IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JAMES C. McKENZIE,

Respondent.

_____/

Case No. 74,292
(TFB Nos. 88-11,260 (6D)
89-10,228 (6D))

COMPLAINANT'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF CROSS APPEAL FOR REVIEW

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In this Brief, the Appellant/Cross-Appellee, James C. McKenzie, will be referred to as "the respondent". The Appellee/Cross-Appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". "TR" will refer to the transcript of the Final Hearing held on February 28, 1990. "RR" will refer to the Report of Referee dated April 12, 1990. "D" will refer to the deposition of Kenneth Sunne, respondent's expert witness. "R" will refer to the record regarding correspondence from respondent's secretary, H. Jo Butterworth, to the Honorable Judge Fleischer.

STATEMENT OF THE FACTS AND OF THE CASE

In 1979, Rose Fisher retained respondent to represent the estate of Jack Fisher, her husband. (TR p. 7, l. 16-18). The respondent quoted a price from the Clearwater Minimum Fee Schedule, plus costs, to the effect that it would take some $13,000.00 for the respondent to probate the Fisher estate. (TR p. 8, l. 24-25, p. 9, l. 1-2). The Minimum Fee Schedule relied on by respondent for determining his fee was outlawed four years before the respondent entered into the fee agreement. The United States Supreme Court held that such minimum fee schedules were unconstitutional as they were a violation of the Sherman Anti-Trust Act. Goldfarb v. The Virginia State Bar, 421 U.S. 773, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975).

As per this agreement, respondent was given a retainer of $1,000.00 to begin work on what Rose Fisher thought was approximately a $400,000.00 estate. (TR p. 48, l. 10-11, 23-25). Respondent failed to determine whether these assets were jointly owned and whether or not they were even probate assets. Using only Mrs. Fisher's opinion of what particular assets were in the estate, the respondent filed an Inventory of Estate Assets on or about February 5, 1980. (TR p. 26, l. 24-25, Bar Composite Exhibit #1). The Inventory of Estate Assets included a large quantity of assets which were owned as tenants by the entirety by Jack Fisher and his wife. According to the Inventory prepared by

respondent, the Fisher Estate listed assets of $458,314.50. (TR p. 27 l. 8-15, Bar Composite Exhibit #1). Respondent took this figure and when coupled with the Minimum Fee Schedule, he arrived at the fee of $13,975.86 that he charged Rose Fisher. On or about June 3, 1980, respondent also prepared Federal Estate Tax Return Form 706 which reflected his fees of $13,975.86. (TR p. 51, l. 15-20). Upon being asked at the Final Hearing about his fee as stated on Schedule J of Form 706, the respondent stated that he intended to receive the $13,975.86 and that he felt he was entitled to it. (TR p. 61, l. 11-18).

In July 1981, A Final Accounting of Personal Representative was filed by the substitute counsel which included only $853.75 as the total assets in probate, because the great majority of the assets placed on the inventory prepared by respondent were in fact, owned as tenants by the entireties and did not pass through probate. (TR p. 28, l. 21-25, p. 29, l. 1-17). As of July 1981, respondent had been paid $4,000.00 in legal fees for his representation of the Fisher Estate. (TR p. 55, l. 4-7, Respondent's Exhibit #10). The $4,000.00 fee received by the respondent represents more than 300% of the probatable assets. Moreover, respondent continued to claim fees of $13,975.86.

Upon filing an objection to discharge, the respondent indicated to the probate court that there was an agreement with the personal representative, which called for attorney's fees of $13,975.86 and at that time only $4,000.00 had been paid. (TR p. 30, l. 11-19).

Following the receipt of Fred Fisher's grievance complaint on April 4, 1988, The Florida Bar began an investigation of the respondent that culminated in a finding of probable cause at a grievance committee hearing held on January 10, 1989. A formal complaint was filed in the Supreme Court of Florida on or about August 31, 1989. On February 28, 1990, continued on March 2, 1990, a Final Hearing was held before the Honorable Judge Barbara Fleischer. At the conclusion of the hearing, Judge Fleischer recommended that the respondent be found guilty as to Count I of the complaint of violating DR 2-106 (A) (a lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee); DR 6-101 (A)(1) (a lawyer shall not handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it); and DR 6-101 (A)(2) (a lawyer shall not handle a legal matter without preparation adequate in the circumstances). Further, the Referee recommended that the respondent be disciplined by a three year suspension. The Referee also recommended that the respondent be responsible for the Bar's costs in this proceeding. The Referee found respondent not guilty as to Count II of the complaint.

The Board of Governors of The Florida Bar considered the Report and Recommendation of the Referee at their meeting which ended May 16, 1990, and voted to file a petition for Review seeking disbarment in the instant case. This brief is filed in

answer to the respondent's Initial Brief and in support of the Bar's Cross-Petition for Review of the Referee's recommendation of discipline.

SUMMARY OF ARGUMENT

The respondent, who has substantial experience as an attorney, charged an outrageously excessive fee to represent the Fisher Estate. The basis upon which the respondent determined his legal fee, The Clearwater Minimum Fee Schedule, had been outlawed four years earlier by the United States Supreme Court as an anti-trust violation. After allegedly discovering that the assets were jointly held with the right of survivorship, the respondent failed to correct same. The respondent insisted there was a fee agreement for $13,975.86 and in support thereof filed a Federal Estate Tax Return Form 706, and an objection to discharge in the Estate proceeding. He further filed a counterclaim and answers to interrogatories in a malpractice suit all to this effect. He now denies the existence of any such agreement in these Bar proceedings.

The Referee found the respondent's testimony less than truthful and recommended a three year suspension in this case. The Referee's rejection of the respondent's testimony was justified in light of the contradictory and evasive statements made by the respondent. However, a suspension is not keeping with the gravity of this conduct. Here, the respondent either offered false documents and testimony by way of prior pleadings and interrogatories under oath, or he perjured himself during the Final Hearing. Either way, such misconduct is worthy of disbarment.

The Referee's findings of fact are presumed to be correct and it is the respondent's burden to demonstrate that the Report of Referee is erroneous, unlawful or unjustified. The respondent has failed to rebut the presumption of correctness and the Referee's findings of fact should be upheld.

The Bar is well within its bounds in prosecuting this case as it was investigated and brought to a final hearing within two years of the original complaint. The respondent was not prejudiced, thus delay is not a factor for the Court to consider upon examination of the Referee's recommended discipline.

However, it is the Bar's position that the Referee's recommended discipline is too lenient. Under Florida's Standards for Imposing Lawyer Sanctions, given the facts of this case, disbarment is the only appropriate discipline for the respondent's course of misconduct.

The Florida Bar asks this Court to approve the Referee's findings of fact and the aggravating factors considered by the Referee. However, the Bar respectfully requests this Court to reject the Referee's recommended discipline, and to disbar the respondent from the practice of law.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT, WHICH ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND ARE NOT CLEARLY ERRONEOUS, SHOULD BE UPHELD.

It is well established that a Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support, since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). Ample evidence exists in the record to support the Referee's findings of fact.

The respondent challenges the Referee's finding that the respondent charged an excessive fee. Disciplinary Rule 2-106 (A) of the Code of Professional Responsibility provides:

> (A) A lawyer shall not enter into an agreement for, charge or collect an illegal or clearly excessive fee.

The Rule goes on to say in subsection (B):

> (B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

At the Final Hearing, expert witness testimony was introduced that the respondent charged a clearly excessive fee. The respondent's own expert testified at a deposition that was admitted into evidence at the Final Hearing, (D. p. 10, l. 7-13), that the respondent charged an excessive fee for the work that was done in this case:

Q. (By Mr. Ristoff) Assuming that Mr. McKenzie did in fact charge approximately $13,000, in other words, if he sent a bill to the PR, one of the beneficiaries, for $13,000, in your opinion would that be an excessive fee for this estate?
A. For that work that was done, yes, absolutely.

In fact, The Bar's expert witness testified that the $13,975.86 fee the respondent charged in this case was far beyond excessive. The Bar's expert witness even testified that the four thousand dollars that the respondent did receive was excessive based upon the work done. (TR p. 32, l. 16-20).

The Referee's finding that respondent's testimony was less than truthful is justified in light of the contradictory and evasive statements made by the respondent. The respondent submitted pleadings and interrogatories in a malpractice suit styled, ROSE FISHER, FRED FISHER, JOYCE YAFFE and ARLENE ANN RAPHAELY, as Co-Personal Representative of the Estate of Jack Fisher, Deceased, Plaintiff, v. JAMES C. McKENZIE, Defendant, Case No. 8304819-16 Circuit Court For Pinellas County, Florida, which stated that there was a fee agreement for $13,975.86. However, in these disciplinary proceedings the respondent denied any such agreement.

The record fully supports the Referee's findings as to both the excessive fee and the respondent's credibility. Rule 3-7.7(c)(5), Rules Regulating the Florida Bar, specifically states that, "upon review, the burden shall be upon the party seeking review to demonstrate that a Report of Referee sought to be reviewed is erroneous, unlawful, or unjustified." The respondent has failed to meet this burden; therefore, the Referee's findings should be upheld.

II. THE REFEREE'S RECOMMENDED DISCIPLINE SHOULD NOT BE REDUCED AS THERE WAS NO DELAY BY THE BAR IN THE PROSECUTION OF THIS CASE.

The respondent contends that the Referee's recommended discipline of a three year suspension should not be accepted by this Court in light of the delay of this matter to come to a close. However, The Florida Bar did not delay it's proceedings against the respondent. Thus, it is the Bar's position, that the Referee's recommended discipline should not be reduced, but rather, should be increased to disbarment, due to the abundance of aggravating factors set forth in the Report of Referee. (RR, p. 3).

The Bar is well within its bounds in prosecuting this case as it was investigated and brought to a final hearing within two years. On April 4, 1988, The Florida Bar received from Fred Fisher, a beneficiary of the Fisher Estate, a grievance against the respondent. Thereafter, The Bar began its investigation that culminated in a finding of probable cause pursuant to a grievance committee hearing on January 10, 1989. The Bar filed its complaint against the respondent on August 31, 1989. Subsequent to the filing of this Complaint, respondent submitted a letter to the Referee indicating that the respondent was disabled because of an aortic aneurysm surgery. Said letter delayed the Bar proceedings. (R. Letter from respondent's secretary to Judge Fleischer dated August 1, 1989)(Appendix A). Final hearings were concluded on March 2, 1990, and on April 12, 1990, Judge Fleischer entered her Report of Referee. As shown above, The Bar

has diligently pursued this case and has brought it to a Final Hearing within two years.

Even if this Court feels that The Bar delayed its proceedings against the respondent, there was no prejudice to the respondent. The overall objective of the doctrine of Laches is to prevent a party from sitting idle and not enforcing his rights at the expense of the aggrieved party. Here, the respondent has suffered no detriment so the doctrine does not apply. Reed v. Fair, 145 So. 2d 858 (Fla. 1962). If anything, the respondent benefited as Rose Fisher died before the Final Hearing and could not refute the respondents allegations regarding the fee agreement.

According to Wagner v. Moseley, 104 So. 2d 86 (Fla. 2d DCA 1958), the burden of proving Laches is on the party asserting it and must be established by clear and positive evidence. The respondent has in no way offered any evidence to the fact he has been injured due to any delay on the part of The Bar.

Based on the foregoing, there was no delay by The Bar in the prosecution of this case, and further the respondent was not prejudiced by the same.

III. THE APPROPRIATE DISCIPLINE FOR THE RESPONDENT'S MISCONDUCT IN THIS CASE IS DISBARMENT GIVEN SEVERAL SERIOUS AGGRAVATING FACTORS, INCLUDING FALSE TESTIMONY GIVEN BY RESPONDENT DURING THE FINAL HEARING.

The Referee found no mitigating factors. However, in Section V of the Report of Referee, the Referee enumerates five (5) aggravating factors that apply in this case. These aggravating factors are as follows:

1. Prior disciplinary offenses;
2. Dishonest or selfish motive;
3. Submission of false testimony or evidence before the Referee during the disciplinary proceeding;
4. Refusal to acknowledge the wrongful nature of his conduct;
5. Substantial experience in the practice of law.

The first aggravating factor of "prior disciplinary offenses" was similarly noted in the Referee's Report in Section (V)(3) entitled Prior Disciplinary Record:

1. The Florida Bar v. McKenzie, 432 So. 2d 566 (1983), Public Reprimand.
2. The Florida Bar v. McKenzie, 442 So. 2d 934 (1983, Rehearing denied 1984), Public Reprimand.
3. The Florida Bar v. McKenzie, S.C. Case No. 72,575, February 22, 1990 - Ninety-one (91) Day Suspension.

In rendering discipline, this Court has recently stated that it considers the respondent's previous disciplinary history and increases the discipline where appropriate, The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1983) (Prior disciplinary history warranted raising probation to a three (3) month suspension), The Florida Bar v. Leopold, 399 So. 2d 978 (Fla. 1981) (Disbarment warranted for misappropriation of funds combined with prior disciplinary offenses), The Florida Bar v. Reese, 421 So. 2d 495 (Fla. 1982) (Referee's recommended discipline would have been

increased from a three year suspension to disbarment due to three prior reprimands except that the respondent was planning on leaving private practice to seek a governmental position).

Disbarment is clearly warranted in this case, considering that the respondent has not only two Public Reprimands, but also a ninety-one (91) day suspension. Thus, disbarment of the respondent is supported by both the record and case law.

As to the aggravating factor of "dishonest or selfish motive", the record shows that had the Complainant not seen another attorney and ultimately lodged a complaint with The Bar, the respondent would have charged an outrageously excessive fee. The record reflects that the respondent failed to amend the Inventory of Assets, even after he allegedly discovered the joint ownership of those assets. Additionally, the respondent continued to demand full payment of $13,975.86 even after being discharged by the co-personal representatives. In fact, the respondent filed a counterclaim in the full amount of $13,975.86 in the above referenced malpractice suit. Furthermore, since the respondent himself, stated that he was aware of the joint ownership of the majority of the assets near the time of the filing Federal Estate Tax Return Form 706, it clearly is the result of a dishonest or selfish motive that he continued to charge such a grossly excessive fee. (TR p. 51, l. 12-15).

The aggravating factor of "submission of false testimony or evidence before the Referee during the disciplinary proceedings" is supported by the record. The Referee stated in her report that she found the respondent's testimony at the Final Hearing

less than truthful. The Referee even went so far as to state that the respondent's testimony was shocking and incredible.

It was the respondent's position during the Final Hearing that an agreement had never existed between himself and Rose Fisher. (TR p. 62, l. 3-6, p. 63, l. 7-16, p. 71, l. 9-11). However, to the contrary, after the co-personal representatives obtained substitute counsel in the Estate proceeding, the respondent filed an objection to discharge, in which he stated to the Court in a pleading that there was in fact an agreement. In the malpractice suit, the respondent filed an amended counterclaim in which he again stated that there was an agreement. (Bar Exhibit #7). Interrogatories in the malpractice suit answered by the respondent under oath, stated that there was an agreement and the respondent supported that agreement with correspondence and documentation. (Bar Exhibit #6). As further evidence of respondent's giving false testimony to avoid impeachment by the interrogatories, it was the respondent's initial testimony at the Final Hearing that the above interrogatories were not under oath, but rather, were merely notarized:

> Q. (By Mr. Ristoff) And you swore under oath that these were your answers?
> A. I do not -- I do not know if I swore under oath that they were my answers.
> Q. It indicates sworn and subscribed to on the 15th of November --
> A. That's just my signature. (TR p. 64, l. 16-22).

The Court later confronted respondent and asked:

> Q. (By the Court). . . [A]re you telling me, sir, that when you signed your name, sir, to what is -- to what has been admitted as Bar Number 6, as an attorney who has practiced almost thirty

years that you did not believe that you were answering these interrogatories under oath?
A. . . .I said as far as it being under oath is concerned, sure. (TR p. 71, l. 22-25, p. 72, l. 1-3)

It is of very serious consequence when the respondent testifies or submits interrogatories under oath in one proceeding to the effect that there was an agreement, and later refutes this by coming into these bar proceedings, and testifies to the Court that he had no agreement. Under The Standards for Imposing Lawyer Sanctions, Rule 6.11 states: Disbarment is appropriate when a lawyer (a) with intent to deceive the court, knowingly makes a false statement or submits a false document; or (b) improperly withholds material, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on a legal proceeding. Further, Rule 6.21 states disbarment is appropriate when a lawyer knowingly violates a court order or rule with intent to obtain a benefit for the lawyer. . . and causes serious or potentially serious interference with a legal proceeding. Here, the respondent either offered false documents and testimony by way of prior pleadings and interrogatories under oath, or he perjured himself during the Final Hearing. Either way, such misconduct should be disciplined by disbarment.

This Court, in The Florida Bar v. Kickliter, (Case No. 74,025 Fla. April 5, 1990), quoted the preamble to chapter 4 of the Rules Regulating The Florida Bar that states: "Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities." The Court

stated further that an attorney taking the oath of admission to the bar must swear to "never seek to mislead the Judge or Jury by any artifice or false statement of fact or law." Kickliter was disbarred as a result of his misconduct.

This Court has held that disbarment should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960). This court further stated:

> "No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial processes. When it is done it deserves the harshest penalty." Id. at 19.

In The Florida Bar v. Agar, 394 So. 2d 405 (Fla. 1981), this Court stated that it had not changed its attitude since Dodd. Since the discipline in Dodd and Agar was disbarment for the use of "false testimony," the same discipline is clearly warranted for the use of "false testimony" by the respondent.

The aggravating factor of "refusal to acknowledge wrongful nature of conduct" is also supported by the record. The respondent has not shown any signs of remorse during these entire proceedings as evidenced by his letter to the Honorable Judge Fleischer after she did not consider a Motion to Rehear. In his letter, the respondent wrongfully and disrespectfully insinuated that the Judge had made a "flippant observation" in her determination that an interrogatory was in the respondent's handwriting and that to do so was an act of judicial arrogance.

(Respondent's Initial Brief). At no time did Judge Fleischer say that the handwriting on the interrogatories was respondents. Rather, the Judge merely pointed out to the respondent that such interrogatories, signed by the respondent, were sworn under oath, and that an attorney of thirty (30) years should be aware of this fact. Similarly, the respondent's responses to the aforementioned interrogatories, being tantamount to perjury, demonstrates that the respondent cannot acknowledge his misconduct.

The aggravating factor of "substantial experience in the practice of law" is supported by the record. At the time the respondent charged Rose Fisher an excessive fee for probating her husband's estate, he had been a practicing attorney for over twenty years. Additionally, Judge Fleischer noted near the conclusion of the Final Hearing that an attorney of thirty years should be aware that interrogatories are under oath. Accordingly, the respondent cannot use inexperience as an excuse for his misconduct and therefore, should be disbarred for his intentional acts to deceive the Court. The Bar contends that the aggravating factors present in this case justify an increase in the degree of discipline which should be imposed against the respondent. The act of charging such an outrageously excessive fee in and of itself may have been worthy of the recommended three (3) year suspension. However, the respondent compounded his misconduct with false testimony deserving of no other course of discipline than disbarment. Further, in light of the respondent's prior disciplinary record, disbarment is fully

warranted. Therefore, The Bar respectfully requests this Court to reject the Referee's recommended discipline of a three year suspension and disbar the respondent from the practice of law.

CONCLUSION

Disbarment is the only appropriate discipline for the respondent's misconduct in this case.

WHEREFORE, The Florida Bar respectfully requests that this Court uphold the Referee's findings of fact and recommendations of guilt; and reject the Referee's recommended discipline and disbar the respondent, James C. McKenzie, from the practice of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Complainant's Answer Brief and Initial Brief in Support of Cross Appeal for Review has been furnished to James C. McKenzie, Respondent at his record Bar address of Post Office Box 4579, Clearwater, Florida 34618 and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 24th day of May, 1990.

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