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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR

v.

JAMES C. McKENZIE

_____/

Case No. 74,292

TFB Nos. 88-11,260(6D)
89-10,228(6D)

REPLY TO RESPONDENT'S
ANSWER TO CROSS APPEAL

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Respondent is correct that The Bar relies upon The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986) to support the presumption that the Referee's findings of fact are correct. However, the Respondent is incorrect in that the Referee's recommendation as to discipline does not receive the same standard of review. This Court is not bound by a Referee's recommendation as to the discipline to be imposed. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978).

Respondent also states, on page one (1) of his Answer to Cross Appeal, that "never did respondent testify that he had no such agreement . . . ."

However, at the Final Hearing, Respondent was asked by Bar Counsel:

> "Q. But you have also indicated that you had no agreement with the beneficiaries in terms of the fee; is that correct?
>
> A. That's correct."

(Tr. Final Hearing, February 28, 1990, p. 62, l. 3-6).

Respondent's Answer to Cross Appeal refers to Respondent's testimony that he "felt he had an agreement" (Answer to Cross Appeal, p. 3, top paragraph, Final Hearing, February 20, 1990, Tr. p. 71, l. 5). However, Respondent never testified that he "felt that he had an agreement" until after he had been directly impeached with Interrogatories and a First Amended Counterclaim from a malpractice action in which Respondent claimed an agreement existed.

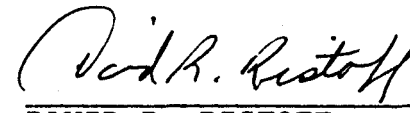
In fact, what makes Respondent's assertion in his Answer to Cross Appeal so outrageous that "never did respondent testify that he had no such agreement" is that, throughout the disciplinary proceedings, Respondent asserted that no agreement existed. Respondent's Answer to the Complaint, dated December 12, 1989, Second Affirmative Defense, p. 3 stated "that there was never any agreement between respondent and the executors based upon anything." (R - Respondent's Answer to the Complaint). Respondent then filed a Motion for Summary Judgment, dated January 12, 1990, where he stated "since there was no agreement, no charge made, or any collection of any fee." (R - Respondent's Motion for Summary Judgment, p. 4). Further, at the hearing on Respondent's Motion for Summary Judgment, Respondent, in an attempt to strike Disciplinary Rule 2-106-(A) (Excessive Fee), stated:

> "There was no agreement that was ever made. The testimony in the malpractice case clearly showed that none of the four (4) ever admitted or stated that there was ever any agreement made with regard to any fees involved. So far as any agreement is concerned, that is totally out the window, and that they cannot prove anything to the contrary."

(R - Tr. of Hearing February 7, 1990, p. 32, l. 10-18). Apparently, Respondent continues to be "less than truthful," just as the Referee found in her Report of Referee.

Based upon Respondent's misconduct and disregard for the truth, disbarment is the only appropriate discipline.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing have been furnished by regular U.S. Mail to James C. McKenzie, Post Office Box 4579, Clearwater, Florida 34618-4579, and John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 15th day of June, 1990.

David R. Ristoff

DAVID R. RISTOFF