SUPREME COURT OF FLORIDA

No. ~~73,214~~ 76395

THE FLORIDA BAR,

Complainant

vs.

T. CARLTON RICHARDSON

Respondent

INITIAL BRIEF AND APPENDIX IN SUPPORT OF PETITION FOR REVIEW OF REPORT OF REFEREE THE HONORABLE THOMAS E. PENICK, JR.

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ISSUES FOR REVIEW

(1) Without violating the Florida State and Federal Constitutional rights to due process, can an attorney be disciplined for filing a complaint for declaratory and injunctive relief under Federal Constitutional and statutory law for the primary purpose of invalidating a Florida State probate court's decision alleged to have been rendered without personal or subject matter jurisdiction? 9, 10, 15, 21

(2) Whether a Circuit Court judge in exercise of *in rem* probate jurisdiction pursuant to Florida Statute 731.105 can adjudicate private contract rights under a legal services agreement to administer and settle an estate between an attorney and an estate's personal representative individually where no estate property is involved? 9, 15, 21

(3) Whether the show cause proceedings under the Grievance Committee panel were conducted in violation of the Florida State and Federal Constitutional due process or equal protection rights of an African-

(11) Whether this Court should refund the $250.00 (Two Hundred Fifty Dollar) filing fee paid and award the respondent his expenses, including a reasonable attorney's fee in defense of this action? 13, 43

STATEMENT OF CASE*

RESPONDENT, T. Carlton Richardson, J.D., LL.M., an attorney of African-American descent who resides and practices in Washington, D.C., seeks review and denial of the recommendations by the referee that he be discipline by suspension for 91-days and pay the Florida Bar's ["Bar"] costs for violating Fla. Bar R. 3.1 that a lawyer shall not bring a frivolous claim. 1/

These proceedings arise out of a grievance submitted by F. Dennis Alvarez, a judge of the 13th Judicial Circuit, Hillsborough County, Florida, [See, Report of Referee ("Report"), Bar Exhibit ("Ex.") #6: Letter, Alvarez to Bar Counsel] who was

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*Citation to the transcript is impossible since the court reporter was unable to provide a copy to respondent because of mechanical difficulty with the computer disc containing the transcript and Bar counsel's refusal to provide the reporter with its copy for reproduction and transmission to the respondent of the requested portions and the respondent would have been required to request copies directly from the Bar at a cost of $1.00 per page plus mailing and disclosure to the Bar of what portions of the transcript were considered relevant by the respondent thus providing the Bar with tactical information that can be advantageous to it in this Review. See, Exhibit "A": Letter, Cook (Court Report) to Richardson (5/1/91), annexed. This action has imposed an undue burden upon the respondent in preparation of this Brief and represent's a serious lack of professionalism on the part of the Bar. Therefore, this Statement is prepared from the notes and recollections of the respondent.]

1--The respondent is currently under suspension since conditions of reinstatement related to payment of a probate court judgment and Bar costs in another proceeding arising out of the same set of circumstances as this complaint. See, The Fla. Bar v. Richardson, No. 73,214 (Fla, Apr. 19, 1990, rev. Feb. 14, 1991), the record of which is incorporated herein by this reference. Those proceedings are currently subject to a writ of certiorari to United States Supreme Court submitted May 14, 1991.

named in his representative capacity as a circuit court judge sitting in probate in a lawsuit filed in the Federal district court of the District of Columbia Circuit by respondent seeking declaratory, injunctive and other relief against the judicial branch of the government of the State of Florida and other private defendants. See, Report, Bar Ex. #1: Complaint. Judge Alvarez's grievance alleges that he was immune from suit and therefore should not have been named a party to the action. The Federal action was disposed of unfavorably to the respondent with a dismissal and imposition of F.R.Civ.P. 11 sanctions. See, Report, Bar Ex. #5.

The grievance was considered by panel "A" of the 6th Judicial Circuit's Grievance Committee ["Committee"], Pinellas County, Florida since Judge Alvarez sits in the 13th Judicial Circuit as chief judge. No lay or attorney member of the entire Committee was African-American and therefore the respondent's panel excluded that racial group. Philip A. McLeod, Esq., was appointed the investigating attorney for the panel and notified the respondent, by letter dated May 4th, 1990 that the panel would conduct probable cause proceedings on May 24th, 1990 and enclosed all the documentary evidence which was to be considered. Among the documents provided were copies of the respondent's initial brief and the Bar's reply brief in Florida Bar v. Richardson, supra, and the initial decision of this Court--which was latter revised twice and became final on February 14, 1991 --in that case imposing discipline upon the

respondent for charging a clearly excessive fee. By notice dated May 25th, 1990, from Bonnie L. Mahon, Esq., Assistant Staff Counsel for the Bar, the respondent was advised that probable cause was found for further disciplinary proceedings. Attorney Mahon, the Bar Counsel who prosecuted the disciplinary complaint against the respondent, was present during the deliberations of the panel when it found probable cause and may have actively participated in the deliberations. Attorney McLeod was also present during the deliberations, actively participated in the deliberations, and may have voted to find probable cause. No record of the Committee panel's deliberations were provided the respondent nor was he advised as to how such a record, if any, could be obtained.

Based upon the probable cause finding by the Committee panel, a complaint was filed in this Court requesting that the respondent be disciplined for violation of various disciplinary rules flowing from his filing of the lawsuit in the Federal court. During the discovery phase of the these proceedings, a Request for Admissions was served upon the Bar by the respondent. In response, the Bar filed a Motion for Protective Order which was opposed by the respondent, but granted after hearing by the referee on November 7, 1990.

A final hearing was held before the referee in January, 1991. The respondent made several preliminary motions to strike and to dismiss which were denied. The Bar's case consisted of one witness, the respondent, and several documentary exhibits

appended to the referee's Report. Respondent objected to the admission of the grievance letter of Judge Alvarez, the Motion to Dismiss filed by Judge Alvarez's counsel in the Federal lawsuit and copies of two cases. These exhibits were admitted over the objections. A motion for directed verdict was similarly denied. The respondent's rebuttal consisted of testimony by the respondent and two attorney witnesses and several exhibits, all except the composite exhibit #7 consisting of selected documents from the probate proceedings underlying the lawsuit, were admitted into evidence by the referee. The referee adjourned the hearing after the closing arguments and took the case under advisement.

On March 1, 1991, the Bar's counsel submitted a cost summary to the referee for inclusion in his Report and provided a copy to the respondent. The referee issued his Report on March 7th, 1991 which contained a statement regarding the "personal history and prior disciplinary record of the (r)espondent" [Report at 22] without according an opportunity to be heard on the penalty imposed, a suspension and payment of costs, or consideration of the any mitigating factors by the respondent. A Petition for Review was timely served in this case.

SUMMARY OF ARGUMENTS

Respondent's arguments in support of his Petition for Review are summarized as follows:

I. **RESISTING AN ILLEGAL JUDGMENT CANNOT BE GROUNDS FOR DISCIPLINE:**

(A) Where a discharged attorney for a personal representative in an estate who had been allowed to withdraw prior to commencement of proceedings to order refund of excess attorney fees under a legal services agreement paid from nonestate funds and involving probate and nonprobate services, was joined in the refund proceedings by motion and copies of pleadings (petition for discharge, final account, opposition to discharge petition) served by certified and ordinary mail in the probate proceedings, a personal money judgment rendered against that attorney is void for lack of subject matter and personal jurisdiction because the subject matter of the proceedings, the fee agreement nor its consideration paid, was not an asset of the estate nor was the attorney joined by personal service of a complaint against him or sought any relief or benefit from the rendering court, save for challenging the court's jurisdiction.

(B) An unsuccessful litigant under the doctrine of preclusion (res judicata or collateral estoppel) cannot relitigate the issue decided in a prior action, including the court's jurisdiction, except that the jurisdictional facts upon which the court's jurisdiction is founded are always open to question. If there does not exist jurisdictional facts giving

rise to a circuit court's in rem and personal jurisdiction, the judgment is void in the rendering State and elsewhere and where suit is brought to setaside the void judgment, the judgment can be collaterally attacked on grounds that the jurisdictional facts upon which it's jurisdiction is founded does not exist and the doctrine of preclusion does not apply.

(C) A void judgment which forms the basis for discipline of an accused attorney can be collaterally attacked in the disciplinary proceedings and if shown that the rendering court lacked subject matter or personal jurisidiction, the judgment must be vacated and the discipline rejected.

(D) Judicial immunity does not bar prosepective injunctive relief against a judicial officer acting in his judicial capacity and does not bar a suit for declaratory and other relief where there is a clear absence of subject matter jurisdiction by the judicial officer. A circuit court judge in exercise of probate jurisdiction acts in clear absence of subject matter jurisdiction if property of an estate under administration is not the basis of the proceedings and, if a money judgment is sought against a respondent, the proceedings are not commenced by filing a complaint and personal service upon a respondent.

II. **DISCIPLINARY PROCEEDINGS LACKED DUE PROCESS.**

(A) Where the procedure employed in the selection of the grievance committee which resulted in substantial underrepresentation or complete lack of an accused African-American attorney's race, the accused attorney's equal protection

rights under the 14th Amendment of the Federal constitution is violated. Prior or current presence of the accused attorney's race on the committee is no defense.

(B) Where the Bar counsel who prosecuted the case against an accused attorney was present during the probable cause deliberations of the grievance committee from which the accused attorney is excluded, the due process rights of the accused attorney under the 14th Amendment of the Federal constitution is violated, even if the committee members might not have been influenced by the association.

(C) Participation by the investigating attorney in the grievance proceedings without an opportunity to be present by the accused attorney, violates the attorney's due process rights even if the accused attorney is provided copies of all materials to be presented to the committee and is given an opportunity to respond in writing since there is a likelihood that the investigating attorney will give oral statements which are not contained in the written materials which are adverse to the accused attorney and the attorney will not be able to rebut those oral statements if erroreous or unclear.

(D) Use by the grievance committee of documentary evidence filed in a prior disciplinary proceedings unrelated to the current charges of misconduct consisting of appellate briefs by the parties and the unrevised opinion of the reviewing appellate court, denies the accused attorney due process since the evidence would clearly be prejudicial since it lacked any probative value

whatsoever.

(E) The respondent was denied due process in the discovery phase of these disciplinary proceedings where the referee improperly granted the Bar's motion for protective order there being insufficient evidence that to answer the requests for admissions would have annoyed, embarrassed, oppressed or caused an undue burden or expense upon the Bar to respond as required by the applicable rule of civil procedure.

(F) Written documents prepared by persons not called as a witness, the aggrieved party and the party's counsel, were admitted over the hearsay objection of the respondent by the referee at the final hearing. It is a violation of State and Federal constitutional guarantees of due process to deny the respondent an opportunity to confront witnesses against him if written evidence prepared by the witness is sought to be admitted into evidence.

(G) The burden of proof is upon the Bar to demonstrate by clear and convincing evidence every element of the charges of misconduct alleged in a complaint. It violates the respondent's due process rights and raises questions regarding the evaluation and sufficiency of evidence if the referee improperly allocates the burden of proof to the respondent.

(H) Where the charges of misconduct are based upon violation of a standard of care (filing a legally or factually insufficient pleading) or lack of good faith (commencing a suit primarily to harass or injure another or filing a legally or

factually insufficient pleading), the respondent's conduct must be weighed against an objective standard of a "reasonably competent lawyer under the circumstances" and the Bar must present clear and convincing evidence by attorney witnesses regarding the violation of this minimum standard of professional conduct. No such testimonial evidence was presented and therefore there was no proof of the misconduct upon which the referee could, consistent with the due process rights of the respondent, find and recommend guilt.

(I) The referee failed to provide the respondent with an opportunity to be heard prior to imposition of the discipline after the referee found misconduct in camera. Due process requires that the respondent have a meaningful opportunity to present evidence or arguments in support of the nature and extent of the discipline imposed. The rule allowing Bar costs, if successful, is unconstitutional on its face and as applied because no meaningful opportunity to be heard was accorded the respondent prior to allowing costs which violates the respondent's due process rights and the rule is not reciprocal thereby denying the respondent's equal protection rights. The discipline imposed of a 91-day suspension is so disproportionate to the misconduct, unconscionable and harsh as to constitute an abuse of discretion by the referee.

(J) Neither the recommendation of misconduct nor the proposed discipline can be accepted by this Court without violating the due process rights of respondent, tossing aside

established precedents regarding the probate jurisdiction of the circuit courts, disregarding expresssed statutory provisions governing probate, and permitting grave injustices to occur by invoking principles underlying the "proper administration of justice", i.e. the doctrines of preclusion (res judicata or collateral estoppel) and judicial immunity which are inapplicable in this case to give validity to an ultra vires probate court personal judgment against the respondent.

ARGUMENTS

I

PREFACE

> "Since the adoption of the Fourteenth Amendment to the Federal Constitution, the validity of [a judgment] may be directly questioned, and [its] enforcement...resisted on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction do[es] not constitute due process of law." Pennoyer v. Neff, 95 U.S. 714, 732-33, 24 L.Ed. 565, 572 (1877)

The referee recommends that the respondent be suspended from the practice of law in Florida for 91-days and ordered to pay the cost of these proceedings for having violated Fla. Bar R. 4-3.1 on meritorious claims and contentions, which states:

> "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. ***"

Under this rule, the referee finds that the Federal lawsuit for declaratory, injunctive and other relief 2/ and brought by the respondent against a Florida circuit court judge sitting in probate and other defendants to invalidate a judgment and related proceedings thereon ordering refund of fees paid under a legal

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2--The federal court dismissed the suit and imposed sanctions under F.R.Civ.P 11 concluding without reasons or a hearing that the suit was "manifestly frivolous and malicious". See, Report, Bar Ex. 5: Order. The referee, however, correctly reasons that this violation of F.R.Civ.P. 11 is not a per se violation of the Bar rule on meritorious claims and contentions which the respondent is alleged to have violated. See, Report at 11.

service agreement which the estate was neither a contracting party nor payor of any consideration under the agreement, was frivolous as a matter of law, the referee states:

> "The standard applicable to the facts of this case is an OBJECTIVE STANDARD; i.e. what would a reasonably competent attorney under similar circumstances have concluded? Research disclosed that a reasonably competent attorney under the circumstances would not have filed the federal complaint and would have known that it was, as the federal court said, manifestly frivolous and malicious. Research by a reasonably competent attorney would have disclosed that the federal lawsuits (sic: lawsuit) filed by the Respondent would have been frivolous and that the principles of (1) judicial immunity, (2) res judicata, and/or (3) lack of federal jurisdiction would have prevented the filing of a lawsuit." Report at 20 (Emphasis in original)

In the commentary to the disciplinary rule on meritorious claims and contentions, it is stated:

> "The filing of an action *** is frivolous.... if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification or reversal of existing law." [Emphasis supplied.]

There is no contention that the factual allegations of the Federal complaint were erroneous. And, there is no contention that the Federal court lacked jurisdiction. The facts alleged in the complaint can be summarized as follows: the respondent was retained by a client, who later became the personal representative of an estate, to administer and settle the estate

of a deceased relative for which the client was a co-beneficiary to a one-third interest. The legal services agreement was signed by the client and invoices issued thereon and paid by the client's wife, who was also an existing client jointly with this client in other matters, by personal checks. No estate funds were used to pay any part of the consideration under the agreement. During administration, the respondent was discharged. Thereafter, the client as personal representative petitioned the probate court for discharge and filed a final accounting requesting the probate court to allow the client to reimburse himself out of estate funds for the compensation paid respondent. The probate court conducted proceedings and concluded that the estate would be allowed to pay only a portion of the fees sought to be reimbursed [See, Exhibit "B": Order on Petition for Discharge etc. (Alvarez, J., Feb. 24, 1986] and later, upon motion by the personal representative, ordered the respondent to refund the estate the difference between the fees allowed to be paid by the estate and those actually paid by the client. See, Exhibit "C": Order Granting Motion for Reimbursement of Excess Attorney Fees etc. (Alvarez, J., March 18, 1986 as amended Apr. 16, 1986) annexed. No process was personally served upon the respondent to these proceedings which were commenced in the probate division of the circuit court by the filing of a motion by the personal representative [See, Exhibit "G" (Composite): Notice and Motion for Reimbursement of Excess Attorney's Fees] and service upon respondent by regular mail. The respondent

defended challenging the jurisdiction of the probate court over his person and property (legal services agreement). When the motion for reimbursement was heard, the probate court considered all compensation received by the respondent from his clients, both probate and nonprobate. 3/ [In the interim, the probate court ordered partial disbursement of virtually all the estate assets, which represented proceeds from the sale of the sole reported asset of the estate a parcel of real estate. See, Exhibit "D": Order Authorizing Partial Distribution (Alvarez, J., May 13, 1986), annexed] On appeal, the intermediate court of appeals affirmed the jurisdiction of the probate court to order refund under the circumstances although the estate paid no part of the consideration under the contract and the proceedings were commenced by motion with service by ordinary mail, but remanded to recalculate the amount owed finding that the probate court erred. See, Exhibit "E": Richardson v. Jones, annexed. On remand, the probate court amended its refund order, this time increasing the amount to be refunded above that originally found, and ordering payment of attorney fees as sanctions for the respon-

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3--In final hearing of The Florida Bar v. Richardson, No. 73,214 Judge Alvarez on direct examination by Bar counsel stated: "... I felt that the $2,500.00, notwithstanding the fact that there was a contract, was sufficient to provide services in this estate and also for any services that (respondent) might have provided for estate planning" (emphasis supplied) *** [and] (t)hat anything else (respondent) charged them, whether (respondent) called it fees of the personal representative and so forth, that all came under the $2,500.00; that I did not feel (respondent) should be paid any other sums." Transcript at p. 65 lines 15-19, p. 67 lines 8-13, Exhibit "G", annexed.

dent's defense of the refund proceedings, the probate court finding that the respondent's defense, notwithstanding partial success on appeal, was without justification in law or fact under the State statute allowing fees to defendants where such suits are brought. See, Exhibit "F": Amended order on refund, annexed. An appeal of the amended order on refund was filed, but held to be untimely by the intermediate court of appeals. The untimeliness was due to the fact that the probate court never actually mailed a copy of its judgment to the respondent, and the respondent only discovered its entry and received a copy of the judgment from the estate's attorney after the running of the appeals limitation period. In separate petitions by the respondent, this Court refused to issue writs of mandamus to the probate court to withdraw jurisdiction and to the intermediate court of appeals to permit appellate review under the circumstances. Upon these facts, the respondent filed a lawsuit in the Federal courts seeking declaratory, injunctive and other relief, and alleged liability as to the probate court under paragraph 32 of the complaint which states:

> "That the defendants, jointly and/or severally, have deprived the plaintiffs [sic: plaintiff] of valuable property, due process and equal protection rights (a) by entering a personal judgment against the plaintiff without summons according to State law, (b) entering a personal judgment against the plaintiff by a probate court whose "in rem" subject matter jurisidiction does not cover the fee contract and compensation received thereunder between the plaintiff and defendants Roosevelt and Perry Jones, and (c) denying plaintiff a right to access the appellate courts of the State on grounds of an untimely appeal where there was an uncontroverted showing of no notice

> of the entry of the judgment appealed being delivered to the plaintiff; (f) [sic: (d)] And, additionally, denying the access to the courts of general civil jurisdiction wherein the plaintiff would have been entitled to a jury trial and counterclaim which is not permissible in probate court." See, Report, Bar Ex. 1: Complaint at 8.

Compensatory and injunctive relief was sought against the parties as their interest may have been declared, specifically as to the judicial defendants, the relief sought was to:

> "direct the appropriate defendants to expunge the court records of any documents pertaining to the underlying litigation leading up to the entry of said $15,670 judgment and otherwise prohibit the use of such records in any manner whatsoever". See, Report, Bar Ex. 1: Complaint at 10.

In the referee's Report, no finding was made that respondent brought the Federal action "primarily for the purpose of harassing or maliciously injuring a person" 4/ However, the referee does conclude, as a matter of law, that there was no good faith arguments on the merits under existing law or to extend, modify or reverse existing law and recommends discipline upon the respondent for filing a frivolous suit against a circuit court judge sitting in probate:

4--There is a statement by the referee which discounts the respondent's defense that he sought independent professional advise on the issue of legal and factual sufficiency of the complaint that on "cross-examination by Bar Counsel [it was] established by clear and convincing evidence that both professors were mislead by the Respondent as to his intentions and/or the specific pleadings to be filed" (Emphasis supplied). The referee cites no portion of the transcript in support of this factual conclusion, nor does the referee find that the primary purpose of respondent's filing the complaint was to harass or injure the judicial defendant. And, in fact, none exists.

> "I recommend that the Respondent be found GUILTY ....of a violation of filing a manifestly frivolous and malicious lawsuit against the Honorable F. Dennis Alvarez." Report at 21

No other misconduct is found.

This recommendation cannot be accepted by this Court without tossing aside established precedents regarding the probate jurisdiction of the circuit courts, disregarding expressed statutory provisions governing the administration and settlement of estates, and permitting grave administration of justice" i.e. of the doctrines of preclusion (res judicata or collateral estoppel) and judicial immunity which are inapplicable in this case to give validity to an ultra vires probate court judgment.

II

RESISTING AN ILLEGAL JUDGMENT CANNOT BE GROUNDS FOR DISCIPLINE

(A) Probate Jurisdiction of Circuit Court Lacking.

The probate jurisdiction of the circuit court is conferred by the Florida Constitution and statutes. In re Neal's Estate 142 So.2d 315 (2nd DCA, Fla., 1962); First National Bank of Ft. Lauderdale v. Moon, 234 So.2d 402 (4th DCA, Fla., 1970). Circuit courts have exclusive original jurisdiction:

> "of proceedings relating to the settlement of the estates of decedents...the granting of letters of testamentary...and other jurisdiction usually pertaining to courts of probate." Art. V., Sec 20(c)(3), Fla. Const.

See also, F.S. 26.012(1)(b) ["Jurisdiction of circuit court."]

Probate jurisdiction of the circuit courts by statute are "in rem". F.S. 731.105 ["Probate proceedings are in rem proceedings."] An in rem proceeding is one directed against property and against anyone claiming an interest in the property. State ex rel So. Brevard Drainage Dis. v. Smith, 170 So. 440 (Fla., 1936). In probate proceedings, the property or res is the assets of the estate, i.e. the property owned by thee decedent at death, being administered. Pitts v. Pitts, 162 So. 708 (Fla., 1935). "(I)f the judgment of the probate court purports to bind the rem over which the court is without jurisdiction, the judgment is not binding on such rem and is a nullity in that regard." Spitzer v. Branning, 184 So. 770, 771 (Fla., 1938) Assets of a decedent's estate consists of those property interests owned by the decedent at death, whether real or personal, tangible or intangible, present or future. Thus, an attorney fee contract created after the death of the decedent to administer and settle the decedent's estate could not conceivably under any strength of the imagination become an asset of the decedent's estate. As relates to attorney fee contracts for services in an estate proceeding, the estate cannot be bound by the contract and it is the personal obligation of the contracting client, whether beneficiary, personal representative or disinterested third-party. F.S. 733.619 [Attorney fee contract not enforceable against estate.] In re Estate of Lieber, 103, So.2d 192, 200 (Fla., 1958) [Attorney fee contract is a personal obligation of personal representative.]

Judge Alvarez ["probate court"] of the 13th Judicial Circuit of Hillsborough County presided in the Probate Division over all proceedings relating the final judgment entered September 15, 1988 in the Estate of Leula King, Deceased ["Estate"] ordering the respondent to pay excessive attorney fees to the Estate. By order dated March, 1986, the probate court made the following findings of fact that (1) "(t)he only asset of the estate was a parcel of real property which the Personal Representative and his wife purchased for $18,000.00...(and)...now consists of $18,000.00 in cash", (2) (w)hen the Personal Representative retained (respondent) for legal services...(t)he Estate thereby became indebted for the total amount of (respondent's) fee and costs" (emphasis supplied), and conclusions of law:

> "1. That the Court has jurisdiction of the subject matter and parties. It is the statutory and inherent obligation of probate courts in the State of Florida to review and determine the reasonableness of compensation paid to attorneys for personal representatives in probate proceedings.
>
> "2. Any person who is determined to have received excessive compensation from an estate for services rendered may be ordered by the Probate Court, to make appropriate refunds in accordance with Florida Statute 733.6175." (Emphasis supplied) See, Exhibit "C", annexed.

It is an undisputed fact that the respondent received no funds from the Estate. The jurisdictional fact invoking the probate jurisdiction of a circuit court judge is the existence of a probate asset and once established, the probate court can determine personal rights arising out of that probate asset, e.g. testatancy or intestacy, beneficiaries, payment from estate

funds of attorney fee contract obligations, etc. By statute and case law, an attorney fee contract is not an obligation of an estate. See, F.S. 733.619 and Lieber, supra. Personal jurisdiction over an attorney who rendered services in an estate is obtained, not by the mere fact that the attorney was involved in probate proceedings as counsel for the personal representative or any interested party, but by the fact that payments were made from estate funds to the attorney. See, F.S. 733.6175 Subject matter jurisdiction, likewise, does not result from determination of an attorney fee claim per se, since the attorney fee obligation is specifically by statute and by case law excluded from an estate's obligation, but by the fact that payments were made from estate funds to the attorney. This is because the proceedings in probate must be "in rem". See, F.S. 733.105 Thus, in this instance as regards the judgment against the respondent, the probate court lacked subject matter and personal jurisdiction, there being no funds of the Estate paid to the respondent and the proceedings having been commenced against the respondent by motion and service by ordinary mail. See, Paylette v. Clark, 559 So.2d 630, 633 (Fla. 2nd DCA, 1990)

On appeal of this March, 1986 refund order, the 2nd District Court of Appeals, affirmed the existence of subject matter and personal jurisdiction not withstanding the fact that the respondent did not receive funds from the Estate or that the proceedings were commenced by motion served by ordinary mail, it stated:

> "Richardson argues that because he had been paid by Jones personally, rather than having been paid from the estate, the court had no authority to order a reimbursement. We find this argument without merit. The court's order simply carries out its obligation to review and determine the reasonableness of compensation to be paid to an attorney for a personal representative. Sheffield v. Dallas 417 So. 2nd 796 (Fla. 5th DCA, 1982)". See Appendix A-12.

This ruling is in direct conflict with the statutory requirements that probate proceedings be "in rem", i.e. involve an asset of an estate [F.S. 731.105], that attorney fee contracts are not obligations of an estate [F.S. 733.619] and that the service provider be found to have received compensation "from the estate" [F.S. 733.6175], this Court's holdings in Spitzer [judgments of probate courts not affecting estate property is void], supra, and Lieber [attorney fee contracts are obligations of personal representative individually if they exceed amount allowed by probate court to be paid from estate funds] supra, and the 5th district court of appeals case relied upon, i.e. Sheffield, supra, which involved a refund order wherein the attorney had received compensation from an estate, which was not the case in Richardson v. Jones. The court of appeals decision was error and cannot be supported in statute or case law.

Furthermore, the referee's statement that, "(i)t would be ludicrous to argue that Judge Alvarez could not hear both a probate matter and a general jurisdiction matter. ** '(T)hat all circuit court judges are entitled to hear and determine anything properly within the court's jurisdiction.' Payette v. Clark,

(supra)..." (emphasis and insert supplied), is not a correct statement of the law.

First, if in the respondent's case the probate judge was hearing a general jurisdictional matter, the respondent would have to be summoned according to the rules of civil procedure upon a complaint personally served, which he was not, and accorded a trial by jury, right to counterclaim and implead others, which he was denied. The 2nd DCA in Richardson v. Jones, rejected respondent's argument that he had a right to a jury trial because the matter should have been tried in the general civil division. See, Estate of Sacks, 300 S.2d 806 (3rd DCA, Fla., 1974) [If an attorney fee contract in estate matters, not involving estate funds, is disputed "the proper course to follow would be a law action in the circuit court, general jurisdiction division"] The Richardson v. Jones appeals court specifically, and rightly held, that in probate court matters, being historically equitable in nature, no right to jury trial was accorded at common law, citing Mid-Continent Cas. Co. v. Giuliano, 166 So.2d 443 (Fla., 1964) 5/ For the referee to hold that the probate court in respondent's case was exercising its general jurisdictional powers, instead of its in rem limited jurisdictional powers, would conflict with the holding of the 2nd DCA in Richardson v. Jones and Payette, supra. [See, discussion re application of Payette, infra.]

5--The facts of this case have nothing whatsoever to do with probate matters, but the principle is a correct statement.

Second, to accept the referee's conclusion that anything so long as it relates to the administration and settlement of an estate is properly within the jurisdiction of the probate court whether the parties are interested or the subject matter pertains to probate issues, is an incorrect statement of the law. As previously stated, unless there is an estate asset involved, a circuit court judge sitting in probate is without subject matter jurisdiction to entertain this matter. This jurisdictional statement is grounded in the clear statutory language that probate proceedings are "in rem proceedings" [F.S. 731.105] and equal protection and due process protections of parties before the circuit court since contract actions are tried in the general civil division which would accord a litigant trial by jury, etc., which is not available to the litigant in the probate division. Otherwise, there would be conflicts with statutes and established case law as previously discussed.

Finally, the Payette case was misapplied and misinterpreted by the referee and provides additional support for the respondent's claim that the probate court lacked subject matter and personal jurisdiction. Payette involved a claim by an intestate beneficiary ["plaintiff"] who was completely excluded from the administration and settlement of an estate, the beneficiary "was not listed as a beneficiary or interested party, received no notice, and was not included in the distribution". A six count complaint was filed by the plaintiff and served by registered mail upon the personal representative, who was also a

beneficiary and a Florida resident, and other beneficiaries of the estate who where nonresidents seeking to reopen probate to obtain plaintiff's intestate share and money damages. Four of the counts "asserted claims for relief within the jurisdiction of the probate division of the circuit court" (emphasis supplied) and two are "claims for damages cognizable [withlin the [jurisdiction of thel civil division of the court" (emphasis and inserts supplied). On appeal from dismissal of the complaint for lack of personal and subject matter jurisidiction, the appeals court held that:

> "(a)ll circuit judges are empowered to hear and determine any case properly within the the court's jurisdiction. For efficiency of administration, however, most circuit courts are divided into divisions, and cases of a particular type are assigned to judges within the division." Payette at 633 (Emphasis supplied)

And, where an action is brought which lies in more than one division, the proper course of action is to "transfer them to the appropriate division of the court". Id. As to personal jurisidiction in the civil division, the appeals court found that "service was effected on the [defendants] by registered mail" and held "[s]uch service is insufficient to confer personal jurisidiction in a civil action for money damages". As to personal jurisdiction in the probate division, the appeals court held that the service was sufficient by registered mail since the defendants, personal representative and other beneficiaries, by obtaining relief, i.e. seeking appointment as personal

representative, or material benefits, receiving distribution of estate assets, had subjected themselves to the circuit court's probate jurisdiction.

This case can clearly be distinguished on the facts from the respondent's case: (1) the respondent was not an interested party in the Estate proceedings, only a discharged attorney who had withdrawn from the Estate proceedings long before a motion was filed in the probate division for refund of any overpayments by his former client, the personal representative; (2) there was no complaint or petition filed against the respondent, only a motion for reimbursement of excess fees paid to respondent under his fee agreement from the personal representative wife's personal funds; (3) there was never service of process with service upon the respondent by ordinary mail 6/ pleadings to close the estate (discharge petition, final account, objection to discharge) and the motion for reimbursement of excess attorney fees; (4) the respondent sought no relief from the probate court claiming that he had been fully paid by his clients, the personal representative and his wife, from nonestate funds and thus had no interest in the petition for discharge wherein the personal representative sought to be reimbursed from Estate funds fees

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6--The personal representative's counsel stated to the court in his "Response to Objection for Discharge and Request for Refund of Attorney's Fee", "(t)he Personal Representative has advised the (respondent) of the pendency of these proceedings by mailing him, by Certified Mail, Return Receipt Requested, a copy of the Objection to Petition for Discharge, Petition for Discharge, and Amended Notice of Hearing on Objection to Petition for Discharge." See, Exhibit "I", annexed.

paid respondent; (5) all the real parties in interest to the respondent's fee agreement were not before the probate court, especially the personal representative's wife who was payor under the fee agreement; and (6) the probate court per Judge Alvarez's own admission adjudicated all claims of respondent's clients for overpayment under the respondent's fee agreement regardless of whether services rendered were for probate or nonprobate (i.e. estate planning and general services). See, Footnote 3, supra. Notwithstanding these facts and respondent's protestations, the probate judge persisted and awarded a personal judgment for $15,670 against the respondent although no complaint was lodged against nor personally served upon the respondent and no Estate asset was involved. In the Paulette case, when the nonresident defendant beneficiaries claimed lack of personal jurisdiction as to the civil division claim because of service by registered mail, the appeals court affirmed that the civil division could not have personal jurisdiction over these defendants because of the manner and insufficiency of service, however, when these same defendants claimed lack of personal jurisdiction as to the probate claims, the appeals court rejected this argument because they had sought relief and/or obtained a material benefit, i.e. distribution from the estate, i.e. the in rem jurisidiction of the probate court was properly invoked and notice by registered or ordinary mail was sufficient. Could the probate court in respondent's case order a refund of excessive compensation by him without first determining if the respondent received any funds

"from [the] estate" as required by F.S. 733.6175? In other words, determining if an asset of the Estate was involved? Clearly, the circuit court's probate jurisdiction could not attach because no Estate asset was involved and personal jurisdiction to enter this money judgment was lacking, not only because the subject matter jurisdiction was not present, but also because the respondent was never properly served with process. Unless the claims are "within the [probate] court's jurisdiction" it cannot hear the matter, pure and simple. In respondent's case, no claim for relief was stated that involved an Estate asset since the compensation received under the legal services agreement was not funds from the Estate.

Because the probate court lacked jurisdiction, the complaint of the respondent was legally sufficient and therefore not frivolous. Discipline cannot be based upon judicial proceedings that lack due process. Due process is denied a party if the court lacks jurisdiction and the judgment is void.

(B) Doctrine of Preclusion Inapplicable.

It is a violation of due process for a court to enter a judgment without subject matter jurisdiction. Pennoyer, supra. A judgment rendered in violation of due process is void in the rendering State. World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291, 100 S.Ct. 559, 564 (1980). However, it is clear that the respondent raised the jurisdictional issues at both the trial court and appellate levels, and thus could be precluded from raising this issue under the doctrine of res judicata (or is

companion collateral estoppel). The U.S. Supreme Court has held:

> "It is one thing to reopen an issue that has been settled after appropriate opportunity to present their contentions has been accorded to all who had an interest in its adjudication. This applies to jurisdictional questions. After a contest these cannot be relitigated as between the parties." Williams v. North Carolina, 325 U.S. 226, 230 (1945).

The exception to this statement of the rule regarding claim perclusion (res judicata or collateral estoppel), has not changed since the Pennoyer case stated it, ie.

> "(T)he record of a judgment ... may be contradicted as to the facts necessary to give the court jurisdiction against its recital of their existence."

and reaffirmed in Williams when it was stated:

> "In short, [the judgment of a State court] is a conclusive adjudication of everything except the jurisdictional facts upon which it is founded *** Otherwise, as was pointed out long ago, a court's record would establish its power and the power would be proved by the record." Williams, supra, at 233 and 234.

The jurisdictional fact giving rise to probate jurisdiction in the circuit court is the existence of a probate asset. There is no probate asset involved in the respondent's case as has been established, therefore, the respondent was not precluded from raising the issue of lack of jurisdiction in his Federal complaint and in these disciplinary proceedings.

(C) Doctrine of Judicial Immunity Inapplicable.

Judicial immunity does not bar prospective injunctive relief against a judicial officer acting in his judicial capability. See,

Pulliam v. Allen, 466 U.S. 522, 104 S.*Ct. 1970 (1984). Dykes v. Hosemann, 776 F.2d 942, 945 n.13 (11th Cir., 1985). "The scope of a judge's jurisdiction must be construed broadly where the issue is immunity of the judge. A judge will not be deprived of immunity because the action he took was error, was done maliciously, or was in excess of his authority: rather, he will be subject to liability only when he has acted in the 'clear absence of [subject matter] jurisdiction'". Stump v. Sparkman, 435 U.S. 349, 356-57, 98 S.Ct. 1099, 1105 (1978); Dykes, supra at 947. As has been demonstrated, the probate court per Judge Alvarez, lacked subject matter jurisdiction there being no estate funds involved in the payment of respondent's legal fee under the attorney fee contract since probate proceedings are "in rem" proceedings and in order to direct a refund by a service provider to an estate, payment must be from estate funds. Its probate jurisdiction does not come about because one of the parties may be interested in the estate as personal representative or beneficiary nor does it come about because the legal services agreement relates to the administration and settlement of an estate, but only if an asset of the estate is involved, which in respondent's case, it was not. The unsuccessful attempt by the respondent to resist the probate court judgment by filing the Federal complaint for declaratory, injunctive and other relief, therefore, cannot be made subject of discipline since the judgment is void, the probate court lacking subject matter jurisdiction and, the jurisdiction of the probate court could be

attacked notwithstanding prior adjudication of the issue of jurisdiction, since the existence of the jurisdictional fact giving rise to in rem probate jurisdiction, i.e. a probate asset, was and is absent; and, the probate judge was not immune from suit since there was a lack of subject matter jurisdiction and there was a request for injunctive relief. The recommendation of the referee regarding guilt for violating the disciplinary rule on meritorious claims and contentions must be disapproved.

III

DISCIPLINARY PROCEEDINGS LACKED DUE PROCESS

A. Before Grievance Committee

1. **Exclusion of African-Americans.** The grievance committee, which consist of lay and attorney members, has been referred to as the Bar's "grand jury" and acts as a vital check against the wrongful exercise of power by the Bar and its counsel. Its finding of probable cause against an accused attorney sets into motion an adversarial proceedings before this Court, with the Bar as complainant and the accused attorney as respondent. The purpose of the grievance committee is to impress upon the accused attorney and the community as a whole that a finding of probable cause which may later result in a finding of guilt or innocence regarding the alleged violation of a disciplinary rule is given in accordance with the law by persons who are fair. If there arises legitimate doubts that the committee has not been chosen by proper means, such as a committee

whose composition lacks African-Americans, the guarantee of the committee's impartiality, neutrality and its obligation to adhere to law is damaged both in fact and by perception. If the representative quality of the committee is compromised by discriminatory selection procedures, the committee becomes a ready weapon for officials to oppress those accused attorneys who by chance are African-American. See, Batson v. Kentucky, 476 U.S. 79, 86-7, 106 S. Ct. 1712 (1986).

Exclusion of African-Americans from the grievance committee as a whole violates the equal protection rights under the 14th Amendment of the Federal Constitution of the respondent, an African-American accused attorney, since there is no likelihood that an African-American would be present either as a lay or attorney member of his panel. Batson, supra. Powers v. Ohio, Case No. 89-5011, ---U.S.--- (1991). In order to show that a equal protection violation has occurred in the context of selection of committee members, the respondent need only show that "the procedure employed resulted in substantial underrepresentation of his race or of the indentificable group to which he belongs". Gastaneda v. Partida, 430 U.S. 482, 494 (1977). Batson. supra at 93 Bar counsel conceded that no African-American was present on the committee nor the respondent's panel, but represented to the referee that previously African-Americans have served on the committee and that at the time of the respondent's final hearing an African-American was on the committee. Such an assertion does not over-

come the respondent's claim for a violation of his equal protection rights. The U.S. Supreme Court in Batson stated:

> "(A) defendant may make a prima facie showing of purposeful racial discrimination in selection of the venire by relying solely on the facts concerning selection in his case. **** '(A) consistent pattern of official racial discrimination' is not 'a necessary predicate to a violation of the Equal Protection Clause. A single invidiously discriminatory governmental act' is not 'immunized by the absence of such discrimination in the making of other comparable decisions.'" at 79.

This Court knows full well that "racial and other forms of discrimination still remain a fact of life in the administration of justice as in our society as a whole." Rose v. Mitchell, 443 U.S. 545, 558-59 (1979) This Court cannot, consistent with Federal constitutional guarantees of equal protection and due process, accept the recommendation of the referee where, as here, African-Americans were excluded from the composition of the grievance committee which determined probable cause in the respondent's case.

2. Ex Parte Participation by Bar Counsel. Our system of law has always endeavored to prevent even the probability of unfairness. Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464 (1975) The mere presence of the Bar counsel who later prosecutes the complaint against an accused attorney before this Court in the deliberations by the grievance committee when probable cause is found violates the due process rights of the respondent under State and Federal constitutions since there is a strong likelihood that Bar counsel would influence the

committee's decision and thus its neutrality or impartiality. In Peters v. Kiff, 407 U.S. 493 (1972), Justice Marshall wrote:

> "[The U.S. Supreme] Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias ... (I)n Turner v. Louisiana [379 U.S. 466 (1955)], the Court held that a jury could not consistent with due process try a case after it had been placed in the protective custody of the principal prosecution witness, notwithstanding the possibility that the jurors might not be influenced by the association. As this Court said in In re Murchison [349 U.S. 113 (1955)], 'fairness of course requires an absence of actual bias in the trial of cases. But our system of law has always endeavored to prevent even the probability of unfairness.'"

The evidence before the referee was uncontroverted that Bar counsel was present during the deliberations, and therefore the referee erred in not granting respondent's motion to dismiss and thus this Court is compelled to disapprove of the referee's recommendation of guilt, less it condones this violation of the respondent's due process rights.

3. Use of Irrelevant Evidence. In finding probable cause, the grievance committee considered evidence of a prior disciplinary action, still under consideration at the time by this Court, of The Fla. Bar v. Richardson, No. 73,214 (Apr., 1990, rev. Feb., 1991), consisting of respondent's brief, the Bar's reply brief, and the original opinion of this Court. See, Fla. Bar R. 3-7.4(f) and (g). Such evidence was totally irrelevant to any charge in the complaint for filing a frivolous lawsuit against the judge and its use could only be prejudicial to the respondent and constituted a denial of a fair and impartial

consideration before the committee at a crucial stage in the disciplinary proceedings without an opportunity to be heard. Such use denied the respondent of his due process rights under the Florida and Federal constitutions and is grounds for disapproval of the referee's recommendation regarding misconduct.

4. Lack of Meaningful Opportunity to be Heard. There is no longer an absolute right of the respondent to be present at the time the grievance committee considers evidence in his case. Under recent amendments [see, The Fla. Bar re Amendments to Rules, etc., 558 so.2d 1000 (Fla., 1990)], respondent is accorded an opportunity to make a written statement after being supplied with all the documentary evidence to be received by the committee. Id. This procedure is violative of the due process rights of respondent which is to guarantee a fair and impartial consideration before the grievance committee. First, the fact that the investigating committee member is present and may have preconceived notions as to the existence of probable cause based upon his investigation and may make inaccurate oral comments regarding his findings which are not contained in the written record. For example, if the investigator interviewed the complainant or other witnesses, the investigator may make hearsay statements regarding what was said and there is no countervailing opportunity of the respondent to correct any incorrect factual statements, whether hearsay or not. Second, the presence of Bar counsel in the room during either the actual discussion or evidentiary phase is per se prejudicial to the respondent because Bar counsel has discre-

tion as to whether a matter is referred to the grievance committee in the first instance. If Bar counsel concludes that the grievance is without merit, counsel can summarily dismiss the grievance or alternatively recommend either to the reviewing attorney for the Board of Governors that the matter not be prosecuted for lack of sufficient evidence since the Board has power to override the probable cause finding of the committee. This clearly places the Bar counsel in a conflict situation with the grievance committee if the counsel disagrees with its findings. Furthermore, if Bar counsel considers that probable cause should have been found, counsel could easily influence the investigating member of the committee or make statements unknown to the respondent during the deliberations regarding the application of a disciplinary rule to the evidence at hand. These circumstances "pose such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." Withrow, supra, 421 U.S. at 47, 95 S.Ct. at 1464. If the procedure is to remain regarding receipt of evidence, participation by the investigating member without a voting right and nonparticipation in and absence from the actual deliberations, and presence of Bar counsel during the representation of evidence and not during the actual deliberations, the respondent should be accorded an opportunity to be heard and not just a written response which would be meaningless under these circumstances since the investigating member and Bar counsel could comment on the submission and the respondent would not be

present to rebut there comments, if adverse, which more than likely they would be. This Court must disapprove of the recommendation of guilt since the show cause proceedings were violative of the due process rights of the respondent.

B. Before the Referee.

1. **Improper Grant of Protective order.** Restricting the right of effective discovery by the respondent violates his due process rights under the State and Federal constitutions. In granting the Bar's motion for a protective order, there was insufficient evidence before the referee and no findings that the request for admissions would have annoyed, embarrassed, oppressed or caused an undue burden or expense upon the Bar to respond as required by Fla. R. Civ. P. 1.280(c). This Court must disapprove of the referee's recommendation because the respondent was denied a fair opportunity to defend in these proceedings thereby denying him his due process rights.

2. **Admission of Hearsay Evidence.** It is a violation of State and Federal constitutional guarantee of due process to deny the respondent an opportunity to confront witnesses against him if written evidence prepared by the witness is sought to be admitted into evidence. The admission of the letter from Judge Alvarez to Mr. Thomas E. Deberg dated October 6, 1989, Bar Ex. 5, is not subject to the business records exception to the hearsay rule and thus respondent's objection should have been sustained by the referee. Furthermore, the Motion to Dismiss filed by the Attorney General of Florida in Case No. 89-2694, U.S. District

Court, District of Columbia, Bar Ex. 4, is not subject to the business records exception to the hearsay rule and thus respondent's objection should have been sustained by the referee. The violation of the constitutional rights to confront the witnesses against respondent constitutes reversible error and this Court should disapprove of the referee's recommendation.

3. **Improper Allocation of Burden of Proof.** The referee stated that, "(t)he Respondent did not meet any burden of proof of any nature or kind to establish any good faith on his part in filing the federal lawsuit." It is upon the Bar to establish by clear and convincing evidence that the primary purpose of filing the law suit by the respondent was to harass or injure Judge Alvarez. The respondent called two attorney witnesses to show that he sought independent advise and counsel prior to filing the complaint. The referee concludes that the respondent "misled" these witnesses because one witness, Professor Barfield, failed to recall that compensatory damages were being sought in the complaint and because the other witness, Professor Jones, stated that the complaint "should have been better drafted". The Bar failed to call one witness of its own to show that filing the complaint was not in good faith according to the standards of practice for an attorney licensed to practice in the State of Florida. Having improperly allocated the burden of proof the evidentiary findings are therefore inconclusive and thus unclear and unconvincing. This Court cannot, consistent with due process, approve the referee's findings under such a circumstance.

4. Insufficiency of Evidence. In his report the referee states that the standard is that of a "reasonably competent attorney under similar circumstances". Report at 20 The referee concludes that "(r)esearch disclosed" and "(r)esearch by a reasonably competent attorney would have disclosed" that the federal lawsuit filed by the respondent would have been frivolous. No where does the referee state that the Bar's attorney witnesses stated anything. The referee cannot base his findings of fact, which a reasonable man standard is, upon "research", it must be based upon testimonial or documentary evidence of record. There is none in the record to support the referee's findings of legal insufficiency of the complaint, and therefore lacking such clear and convincing evidence, this Court cannot approve of the referee's recommendation without violating the due process rights of the respondent.

5. Penalty Phase.

(a) Denial of Hearing. The referee made his recommendations after the close of the formal hearing and requested Bar counsel to submit a cost statement. The Bar counsel served a copy upon the respondent on March 1, 1991 by certified mail, which was received on March 7, 1991 by respondent. See, Exhibit "J": Letter and Cost Statement (Mar. 1, 1991), annexed. The referee served his Report upon the parties on March 7, 1991 by mail. Exactly six (6) days elapsed between the service of the cost statement and the rendering of the Report, not an adequate amount of time to file written objections

or request a hearing. Furthermore, respondent was unaware that the referee had found any misconduct in the first instance and therefore may have been premature in requesting a hearing. Apparently, Bar counsel was informed for in her transmittal letter she writes to the referee: "If the Costs meet with your approval, include same in your Report of Referee." Under the civil rules, one is allowed three (3) days for mailing plus ten (10) days for response, a total of thirteen (13) days. These sequence of events clearly show that no meaningful opportunity to be heard was accorded the respondent prior to the imposition of costs in violation of his State and Federal constitutional rights. Likewise, the respondent was denied a meaningful opportunity to be heard in opposition to the discipline imposed and to present any matters in mitigation to the proposed discipline, professional education, training, and development or ability to pay. This omission also is a denial of the respondent's due process rights. The Court, therefore, must, consistent with its constitutional duty, disapprove of the referee's recommendation.

(b) Rule Allowing Bar Costs Unconstitutional. Bar Rule 3-7.5(k)(1)(5) allowing costs to the Bar if successful but denying it to the accused attorney if successful violates respondent's due process of law or equal protection rights under the Florida and Federal constitutions. See, Atkinson v. Woodmansee, 74 P. 640 (Kan., 1903); United States v. Maryland Casualty Co., 316 F. Supp. 750 (D.C. Cal., 1970) On its face and as applied the

rule is unconstitutional. Furthermore, had the respondent been a State licensee, other than an attorney, there would be no requirement to pay costs of these proceedings and the referee could recommend only a fine of $1,000 (One Thousand Dollars) per rule violation. See, F.S. 455.255. This unequal treatment would result in this case of the respondent paying, should the referee's cost recommendation be accepted of $879.68 (Eight Hundred and Seventy-Nine and 68/100 Dollars), more that than the $1,000 (One Thousand Dollars) fine for violating a rule which other licenses must pay. This Court must reject the recommendation for payment of costs to prevent a violation of the due process and equal protection rights of the respondent.

(c) Recommended Discipline Unjustified and Unfair. A 91-day suspension is imposed for this rule violation. The respondent holds a graduate degree in law, is a former law professor, has participated as faculty member or student in over 250 hours of continuing legal education since coming into private practice in 1975 and in some 19 years of practice since being licensed in 1972 has never been disciplined by a court under which he is licensed until recently under two proceedings arising out of a fee dispute with clients, one for charging an excessive fee which, after two revisions, is currently subject of a petition writ of certioriari to the United States Supreme Court and this recommendation. In the In Re Lauer, Atty. at Law, 324 N.W.2d 432 (Wis., 1982) case which involved a similar rule violation, the accused attorney filed two cases against virtually the same

defendants on the virtually the same cause of action in the same court, the first was dismissed, the second was also dismissed. Apparently Lauer did not aggressively prosecute the matters and submitted only colorable arguments in support of the claims, leading to only one conclusion, that the second suit was brought for an impermissable purpose and was legally insufficient. Lauer was publicly reprimanded and ordered to pay costs. Respondent, on the contrary, was seeking the vindication, albeit without success in retrospect, of federal claims which named, among its defendants, a judge. Having been ordered to repay a third party beneficiary of a legal services agreement that paid no part of the consideration under the agreement an amount, excluding attorney fee sanctions, in excess of the entire amount of compensation received and denied access to appellate courts of Florida because a copy of the judgment was never delivered to the respondent timely by the probate court or at its direction, the respondent unsuccessfully sought redress in the Federal court system. No collateral suit was filed in the Florida courts to vacate the judgment, which arguably could have been done. Instead, a new forum was sought, something that is not unusual in our federal system of government for there are both federal and state rights which each citizen of the United States are accorded. The referee recommends suspension! Such a recommended discipline is so disproportionate to the misconduct as to constitute an abuse of discretion. It is unconscionable, harsh and unjustified and could be considered more a retaliation than punishment and con-

stitutes a "chilling effect" upon the attorney's duty to zealously advocate a cause.

"In imposing a sanction after a finding of lawyer misconduct, a court should consider the following: (a) the duty violated; (b) the lawyer's mental state (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors". ABA, "Standards for Imposing Lawyer Sanctions" [hereafter "ABA Standards"], Sec. 3.0 (1986) The referee's report does not demonstrate that any of these factors listed above were considered, nor does the referee give lip-service to such consideration which would have involved awarding certain due process protections to the respondent, at least, an opportunity to oppose in writing or orally the proposed discipline. No hearing was ever conducted as to mitigating or aggravating factors. The respondent demonstrated no ill will or hostility toward the complaining judge in this case and offered a reasonable explanation for his commencing the lawsuit, there is no pattern of misconduct alleged, but one isolated incident, there has been a cooperative attitude by the respondent, a non-resident to these proceedings, the character or reputation of the respondent was unquestionably good, there was imposition of other sanctions by the federal judge who dismissed the case. The duty owed is that to the "legal system". There was no showing that this isolated instance caused actual or potential injury to Judge Alvarez the complainant. Failing to show that, the minimum consideration for imposition of an admonition or reprimand, let

alone suspension, has not been demonstrated. See, ABA Standards, 6.23 and .24. No attorney testified on the "objective standards" of good faith in respondent's situation, therefore there could be no conclusion of a "knowing" violation of the rule, but more of a negligent violation of the rule, which would result in either a reprimand or admonition. It would be unconscionable under these circumstances wherein the respondent was denied an opportunity to be heard in response to a proposed discipline coupled with a record pitting the referee's legal judgment with that of the respondent's on the legal sufficiency of the alleged frivolous document (complaint) that formed the basis of these disciplinary proceedings for the Court to impose any harsher sanction, if any, than a private reprimand and the Court should amend the recommended discipline accordingly.

IV

CONCLUSION/RELIEF

"Vital changes have been wrought by those members of the bar who have dared to challenge the perceived wisdom, and a rule that penalized such innovation and industry would run counter to our notions of the common law itself." Eastway Const. Corp. v. City of N.Y., 762 F.2d 243, 254 (2nd Cir., 1985) "Bad court decisions must be challenged if they are to be overruled..." Eastway Const. Corp. v. City of N.Y., 637 F.Supp. 558, 575 (S.D.N.Y., 1986). Justice White of the U.S. Supreme Court, stated in Zauderer v. Ofc. of Disciplinary Counsel, 471 U.S. 626, 643 (1985):

> "Over the course of centuries, our society has settled upon civil litigation as a means for... vindicating rights when other means fail. There is no cause for consternation when a person who believes in good faith that on the basis of accurate information regarding his legal rights that he has suffered a legally cognizable injury turns to the courts for a remedy. 'We cannot accept the notion that it is always better for a person to suffer a wrong silently than to redress it by legal action.' ...That our citizens have access to their civil courts is... attribute of our system of justice in which we ought to take pride."

Neither the recommendation of misconduct nor the proposed discipline can be accepted by this Court without violating the due process rights of respondent, tossing aside established precedents regarding the probate jurisdiction of the circuit courts, disregarding expressed statutory provisions governing the probate, and permitting grave injustices to occur by invoking principles underlying the "proper administration of justice", i.e. the doctrines of preclusion (res judicata or collateral estoppel) and judicial immunity which are inapplicable in this case to give validity to an ultra vires probate court judgment. Thus, this Court is urged to disapprove of the referee's recommendation for misconduct and discipline and award the respondent his costs and expenses and for such further relief as the Court deems necessary and proper.

REQUEST FOR ORAL ARGUMENT

Respondent hereby request oral argument because issues relating to the probate jurisdiction of the circuit courts are raised, questions as to conflicts between intermediate courts of

appeals on the issue of probate jurisdiction has been raised, the constitutionality of a Bar rule has been raised, along with the invalidity of a judgment of a probate court, and cited violations of the due process rights of the respondent throughout these proceedings. These reasons compel this Court to grant oral argument.

Certificate of Service

This certifies that a copy of the foregoing Brief was delivered by mail to: Bonnie L. Mahon, Esq., THE FLORIDA BAR, Airport Marriott Hotel, #C-49, Tampa, Florida 33607 on this 6th day of June, 1991.

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