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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. 76,408

vs.

HANS C. FEIGE,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR REVIEW

HANS C. FEIGE
1620 South Federal Highway
Suite 206
Pompano Beach, Florida 33062
(305) 783 6800

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STATEMENT OF THE CASE

This matter arises out of conduct which occured in 1984. The Bar started this matter in 1987 before a committee and filed before this Court in 1990. The Referee heard this matter based on stipulated facts. No testimony was taken. A Report was filed by the Referee on June 3, 1991. This Petition was filed in a timely manner.

STATEMENT OF THE FACTS

The facts of this matter are found in the parties joint pretrial stipulation. Since no testimony was taken, no other facts are of record in this cause.

The parties agree that upon the remarriage of Respondent's client, hereinafter referred to as "Whalen", that she informed Respondent that she had notified her ex-husband of her remarriage which was confirmed by her father.

The parties agree that the ex-husband never paid Fifty Dollars per month in additional alimony to Whalen based upon an order of January 28,1981, and that a claim existed for up to $2,099.00 in back support as of the date of remarriage. The parties agree that the $50.00 per month in additional alimony did not cease upon remarriage and that the ex-husband came to a zero balance in April of 1987.

The parties agree that any conflict of interest was fully disclosed and that Whalen and her father consented to the representation. Whalen was dismissed from the case and neither the representation nor the lawsuit cost her any money! Whalen was fully protected at all times.

The parties agreed that all funds collected were applied as directed by Whalen and that the funds transferred as fees were earned by the Respondent's firm for representation of Whalen in the divorce action or related cases.

The parties agreed that Respondent followed his client's express instructions in this matter and to do otherwise would have been contrary to her wishes.

INTRODUCTION

The facts of record do not support the Referee's Findings that either DR 7-102(B)(1) nor DR 5-101(A) & (B) were violated by Respondent's conduct. Respondent did not receive information clearly establishing that his client had perpetrated a fraud on a person. Respondent accepted employment only after full disclosure and client consent to any possible conflict. The trial Judge (Judge Orlando) ruled on a Motion To Disqualify in favor of Respondent on the question as to his being a witness in the cause.

The findings of the Referee are not only not supported by the facts but are a rubber stamp of the Bar's proposed findings which were submitted over objection. The Report reflects a different position than taken by the Referee at the Hearing on this matter.

The findings and ethical ruling of the Referee on both counts represent a dangerous expansion of the Rules of Conduct which places lawyers at risk even though they are following their own clients commands. It invites lawyers to violate the Oath of Admission, Cannon Seven, Rule 4-1.2, and Rule 4-1.6. The ruling unreasonably expands Rule 4-1.7 and Rule 4-1.16 and the body of law concerning conflict of interest. The basic ruling is premised on the unspoken finding that a lawyer may not believe his client even though he has no facts to the contrary. It imposes a duty to investigate the facts which does not now exist under Florida law even for non-litigation advise which is even further than the Federal Courts have dared to go.

To permit this Report to stand sends a message to all lawyers that must strike fear into their hearts, that is that they have a duty to an adversary to prevent a fraud from happening even at the risk of hurting their own clients case upon the concept that they must not accept their own client's representations as truth.

ARGUMENT

POINT I

THE REFEREE'S FINDING THAT RULES 5-101(A) AND 5-101(B) HAVE BEEN VIOLATED ARE CLEARLY ERRONEOUS AND WHOLLY UNSUPPORTED BY THE FACTS (COUNT II OF THE REPORT).

We start with COUNT II of the Report because it shows how tainted the Referee was by the Bar's use of a prepared Report which was rubber stamped.

The agreed facts are that both Whalen and her father consented to the representation by Respondent after full disclosure. The Record in Gale vs. Feige, et. al. Case Number 85-30638 CM as conceded by the Bar before the Referee reflects that Judge Orlando ruled in favor of Respondent on a Motion to Disqualify. The Bar agrees that any testimony by Respondent would only have duplicated the testimony of two other witnesses, Whalen and her father.

Rule 5-101(A) states that: "Except with client consent, a lawyer shall not accept employment if his professional judgement will be affected by his own financial or personal interest.

The Report finds that the Rule was violated and warrants a 30-day suspension citing The Florida Bar v. Ward, 472 So.2d 1159(Fla. 1985). The Bar's position is that the conflict in this case cannot be waived at all! This Court never said that in Ward, nor in any other case. In Ward this Court ruled that the Repondent had failed to get consent. The Rule is clear on its face that the client may consent and this fact is agreed to by the Bar. The expansion of the Rule found here is dangerous and without support.

In this case both the client and lawyer were sued arising out of Respondent's representation of Whalen in post judgment divorce matters. Respondent had advised Whalen that she could continue to accept funds from Gale after remarriage where she had disclosed the remarriage to Gale and where he owed her money for support that did not end upon remarriage. Funds were received and applied to Whalen's account upon her instructions. No further action was taken upon the express instructions of Whalen and her father. The lawsuit was settled and Whalen was dismissed from the case without any impact on her.

The ruling suggusts that when a lawyer and client are in a common lawsuit he may never represent the client even though the client wants and even insists on such representation. The lawyer may not protect his client himself or risks suspension

from the practice of law. Even if the client cannot afford another lawyer, the proposed rule would apply!

As a matter of public policy such a rule must never be adopted by this Court. A client is entitled to counsel of choice whenever possible. To apply such a rule expansion in this case is unfair. It would be a retroactive rule which this Respondent could not have understood to exist at the time.

Rule 5-101(B) states: A lawyer shall not accept employment when he is a witness to the pending litigation.

It was conceded that any testimony would have duplicated the testimony of Whalen and her father. Also Judge Orlando already ruled in favor of Repondent on this issue.

Rule 5-102(B) provides that a lawyer may represent his client until it is apparent that his testimony is or may be prejudicial to the client. All the cases state that a lawyer need not refuse employment if the testimony relates to an uncontested matter, or if to refuse would work a substantial hardship on the client. Beavers v. Conner, 258 So.2d 330 (Fla. 3rd D.C.A., 1972),later app. 289 So.2d 462, cert den. 300 So.2d 265; Hubbard v. Hubbard, 233 So.2d 150 (Fla., 4th D.C.A., 1970); Draganescu v. First National Bank, 502 F2d 550 (5th Cir. 1974)

Again, it is clear that the Referee rubber stamped the Report which contained no factual basis for this determination. The balance of the violations in Count II fail if the above two fail in that they are boiler plate violations which rest upon some other misconduct.

It is clear that the Bar has gone too far in this case to attempt to build a case for misconduct which does not exist. The fact that a newspaper article of the case initiated the "investigation" may help to explain why!

It is clear that their is no factual support for Count II nor any legal basis for any finding of guilt .

POINT II

THE REFEREE'S FINDING THAT THERE WAS A VIOLATION OF EITHER RULE 7-102(A)(7) or RULE 7-102(B)(1) ARE CLEARLY ERRONEOUS AND WHOLY UNSUPPORTED BY THE FACTS (COUNT I OF THE REPORT).

Rule 7-102(B)(1) in effect in 1984, the time of the alleged misconduct, is mis-stated in the Report. The Rule states: A lawyer who receives information clearly establishing that his client has perpetrated a fraud on a person shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person...
The Rule as amended in 1986 is found in the Report.

It is agreed that both Whalen and her father told Repondent that Gale was informed of the remarriage. While Gale says he never got the notice this was never told to Respondent.

It is agreed that Whalen was entitled up to $50.00 per month in additional support for therapy, and that these sums were never paid by Gale leaving a disputed balance owing of $2,099.00 as of the date of remarriage. It is further agreed that a zero balance would have been reached.

The Referee makes additional findings on disputed facts in favor of the Bar without any testimony or evidence to support the same. He accepts the proposed Report as to these matters without any basis in the record. Nowhere in the record is there any support to the false notion that no showing was made to justify the claim for the additional support. The Bar suggests that only a pleading in the divorce case will do.

In fact Whalen got the therapy paid for by her father as submitted to the Referee by Respondent at the time of the hearing. The Doctor's name was given to the Bar for their investigation!

Cannon Seven, which the Referee finds does not apply, provides that it is the duty of a lawyer -- both to his client and to the legal system -- to represent his client zealously within the bounds of the law.EC 7-1. The bounds of the law in a given case are often difficult to ascertain. The limits of relevant law may be made doubtful by changing... judicial attitudes.EC 7-2.

While serving as an advocate, a lawyer should resolve in favor of his client doubts as to the bounds of the law. E.C. 7-3.

The advocate may urge any permissible construction of the law favorable to his client without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct is within

the bounds of the law, and therefor permissible, if the position taken is supported by the law or is supportable by a good faith argument for an extension, modification, or reversal of the law. E.C. 7-4.

In many cases a lawyer may not be certain as to the state of mind of his client, and in those situations he should resolve reasonable doubts in favor of his client. E.C. 7-6.

The Oath of Admission to The Florida Bar says: "I will maintain the confidence and preserve inviolate the secrets of my clients..." "So help me God." This Oath is the subject of Rule 4-1.6 **Confidentiality of information.** The Rule states:

(a) A lawyer not reveal information relating to representation of a client... unless the client consents after disclosure to the client.

In order to comply with the position of the Bar Respondent would have to violate his Oath and Rule 4-1.6. Whalen did not consent to any communication by Respondent as to the remarriage either directly or indirectly. The Referee found that "The Respondent had an obligation to either inform Gale of Whalen's remarriage or cease accepting Gale's alimony checks" by using the Bar's suggested Report.

The $50.00 per month additional support did not terminate upon remarriage and was subject to modification both up or down. Richter v. Richter, 344 So.2d 889 (Fla. 4th DCA, 1977);Frye v. Frye, 385 So. 2d 1385 (Fla. 2d DCA, 1980). Whalen had at the very least an argument to be made in support of continuation of support after remarriage. Her mental condition which resulted in the award of additional support was caused by Gale's misconduct during the marriage! He had an affair with her best friend and married her after the divorce which triggered Whalen's breakdown.

Respondent had a legal duty to his client to advise her of her claim to the money coming in for her benefit. He had a right to believe her and her father when they both said that Gale was given notice of the remarriage. Respondent was under no legal duty to check with Gale as found by the Referee. Even if the notice had not been given Whalen had a legal claim to $2,099.00 plus interest and had the right to apply the funds to the debt. The Bar (as adopted by the Referee) takes the position that Whalen had to go back to Court to make her claim. No! Whalen had to make a proper showing that the expense had been incurred, in some uncertain way and time. It is the existence of the claim and not its resolution that allows Respondent in his adversarial role to apply the funds to the account of Whalen.

In other words, Respondent may rely upon Whalen's representation that notice was given, and therefor did not have information clearly showing a fraud. And Repondent may assert by silence the legal claim his client had to the money. To do otherwise would be a violation of the most serious kind of both the Oath of Admission and Rule 4-1.6.

As a matter of public policy this Court should not support this Report. To do so requires counsel to doubt their clients and in the face of such a conflict end the employment relationship leaving the client to get new counsel. At the same time the other side, even with the most innocent of Motions To Withdraw, is given more than a clue that something has happened which requires looking into. While Gale if not believed (and I do not) may not be smart enough to know that he can get a hearing to modify, his lawyer is. One may not put his client in this position if it can be avoided. The legal system itself is at stake. Clients must be secure in their dealings with their own counsel and not be afraid of disclosure so as to insure fairness to all. We go too far when this becomes the new standard of conduct, even though it is a growing trend. At Common Law (Queen's Bench) Respondent would not have been permitted to act in any other way than he did. It was ethical then and still is now.

This Court should reject all findings in the Report not contained in the agreed facts. All other facts must be resolved if at all in favor of Respondent in that the Bar must prove its case of alleged misconduct by clear and convincing evidence. The Florida Bar v. Hollands, 520 So.2d 283 (Fla. 1988). It is the duty of this Court to review the determination of guilt based upon the facts of record. The Florida Bar v. Hirsch, 359 So.2d 859 (Fla. 1978). Where the findings are clearly erroneous and/or wholly lacking in evidentiary support the Report must be rejected. The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987); The Florida Bar v. Hooper, 507 So.2d 1078 (Fla. 1987).

The agreed facts can only support a conclusion that no misconduct exists. Only if Respondent knew that Whalen and her father did not tell the truth in December of 1984, and that Whalen had no legal argument to make in support of her position that she was entitled to funds and/or a modification of the Court's Order can misconduct be argued. Even the Referee at the hearing stated that he did not believe that Respondent was guilty of theft. He signed a report saying otherwise.

At the hearing Respondent objected to the submission of a Report prepared by the Bar. The Referee overruled the objection after the Bar said they did it in all cases! A Referee must not prejudge the cause and must use independent judgment in finding the facts based upon the evidence and applying those facts. The Florida Bar comes into the hearing with many advantages. They have investigators, support staff, and the weight of their position. That's enough. This case case shows the evil of permitting the Bar to submit Reports before the Referee rules.

As to discipline this Court has held that the discipline must be fair to society. The discipline should protect society but not deprive the public of the services of a good attorney as a result of undue harshness. The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978);The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

There are no cases like this one to review. None of the cases cited by the Bar in the Report apply. They all involve facts were an attorney stole funds from his client. Nor are there many cases where a lawyer helps his client in a fraud. In The Florida Bar v. McCaghren, 171 So.2d 371 (Fla. 1965) this Court gave a three month suspension to a lawyer who had connived with his client to set up his wife to commit adultery by the hire of a third party. In this case Respondent did not counsel fraud but, based upon the facts given to him by his client, acted in his client's best interest.

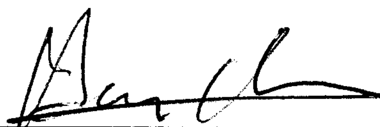
The Bar at the hearing conceded that Repondent is not a bad person nor lawyer. The Referee stated that he was thinking about a suspension of thirty days to one year. Only because Repondent defended his position was this increased! See finding number five on page 10 of the Report. Note that finding number six is unsupported by any evidence (and is also untrue)in the Record. No mention is made in the report of the length of time that has passed and the delay by the Bar in this matter, nor of Respondent's service with Legal Aid as a member of the Board for five years (President the last year), his service on the grievance committee as chairman, his service to the public with civic associations, and his service to both youth and his church. The Referee finds "the absence of mitigation" when he again rubber stamps the Bars proposed findings.

The Report is flawed at best and without any real support either in fact or law and should be rejected.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that this Brief was mailed this 7 day of Oct. 1991 to The Florida Supreme Court, and that a copy was sent U.S. Mail to Kevin P. Tynan, The Florida Bar, 5900 N. Andrews Ave., Suite 835, Fort Lauderdale, Fla. 33309.

RESPECTFULLY SUBMITTED,



HANS C. FEIGE
FL BAR NO. 146666
1620 S. Federal Highway
Suite 206
Pompano Beach, Fla. 33062
(305) 783-6800