047

IN THE SUPREME COURT OF FLORIDA

Case No. 80,764

The Florida Bar Case
No. 91-50,494(15B)

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per Mr. White to not request an amended Brief & just mark through the part of Br. bar wants stricken.

THE FLORIDA BAR,

Complainant

vs.

MALCOLM ANDERSON,

Respondent

_____/

ANSWER BRIEF OF RESPONDENT

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and

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PREFACE

This is a petition for review of a Report of Referee in a disciplinary proceeding brought by the Florida Bar against Malcolm Anderson, an attorney licensed to practice law in the State of Florida.

This case was tried by Senior Judge Gene Fischer serving as the Referee. Following a five day trial, the Referee entered a report recommending that the lawyer be found guilty of a portion of the charges and that he be found not guilty of a portion of the charges. The Referee recommended a public reprimand and probation of six months to a year, with a requirement that the respondent complete a minimum of eight hours of CLE studies, including courses in wills and trust, estate planing and ethics. The Florida Bar seeks review of this recommendation and a ninety-one day suspension of the lawyer.

In this brief the parties will be referred to as "The Florida Bar" and as "Anderson."

The following symbols will be used in this brief:

(T.____) transcript of proceeding

(B.E.____) Bar's Exhibit

(R.E.____) Respondent's Exhibit

(A.____) Appendix attached to this brief

STATEMENT OF THE CASE AND FACTS

The Rules of Appellate Procedure place a square obligation on the appellant or party seeking review to provide the court with a full and fair statement of the facts. Thompson v. State, 588 So.2d 687 (Fla. 1st DCA 1991). In addition, where the record contains conflicting evidence, the factual statement should never be portrayed to the appellate court as unqualifiedly established by the record. Seaboard Air Line Railway Co. v. Hawes, 269 So.2d 392 (Fla. 2nd DCA 1972). The Florida Bar's statement of the facts violates both of these maxims; consequently, its fact statement is not acceptable. The relevant facts, fully stated, are as follows.

The Florida Bar filed a six count complaint which charged Malcolm Anderson with drafting testamentary documents for a client which documents made beneficiaries of the lawyer or his family members, revealing information relating to representation of a client and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation. In response to a request for admissions, Anderson admitted that his action was wrong. He further admitted that he was negligent in drafting the documents as he did. (Response to Request for Admissions; T.5-17; 980 et. seq.) He denied that he intended to defraud his client or anyone else. Id. Despite Anderson's admissions, the Florida Bar proceeded to trial and asked that this sixty-eight year old lawyer be disbarred. (T.976) The Referee rejected that suggestion and recommended a public reprimand, probation and a minimum of eight hours of CLE courses.

Malcolm Anderson was admitted to the Florida Bar in 1966. In the twenty-seven years that he has practiced law, he has never previously had any disciplinary findings against him. (T.285) Throughout his legal career Anderson has been involved extensively in Bar activities and charitable

work. He served as a member of a grievance committee and as a member of the Palm Beach County Bar Association Fee Dispute Committee. In addition he served on the Palm Beach County Bar Association Legal Forum committee. (T.285) The Association received two state wide awards for legal forums chaired by Anderson. (T.285) His extensive charitable work included service as chairman of the Gulftream Council for Boy Scouts, president of United Cerebral Palsy of Palm Beach County, member of the Board of Directors of the Heart Fund, member of the Kiwanis Club and Chairman of the Board of the Palm Beach Festival. (T.286)

Anderson began his legal career doing criminal work. (T.283) Over the years his practice evolved into mortgage foreclosures, bankruptcy, and preparation of some wills and trusts. (T.283-285) He is now a solo practitioner in West Palm Beach, Florida.

In 1988 Malcolm met Mary Sisler through her good friend Frank Wright. (T.286) When they met, Sisler was in her 80's. She was a well regarded art collector who had amassed a very fine art collection which was valued at in excess of twenty million dollars. (T.488; 499-500) In addition, Mary Sisler had a keen interest in the performing arts. (T.306; 510-511)

Mary Sisler had employed a succession of lawyers, all of whom she had fired. (T.287-288) Sisler thought that all of her lawyers were no good, had cheated her, and charged her exorbitant fees. (T.756) When Anderson met Sisler, her property was the subject of a guardianship. The guardian was Heidi Remedio, Sisler's bookkeeper. The guardian kept Mrs. Sisler a virtual prisoner and would not let anyone talk to her or see her. (T.288)

In 1988, Sisler retained Anderson to represent her and to dissolve the guardianship. He obtained a statement from her physician, Dr. William

Adkins, that Sisler was mentally competent, and had the guardianship dissolved. (T.287-290) Thereafter Sisler was able to run her own affairs. (T.290)

Sisler was an extremely demanding client who expected everyone to be at her beck and call, anytime night or day. (T.290; 504-505) She insisted that Anderson be available to her twenty-four hours a day. (T.290) Before Anderson was retained by Sisler, her longtime personal physician and friend, William Adkins, bore the brunt of her demands and attention. (T.500; 505-506) Dr. Adkins knew all of Mrs. Sisler's prior lawyers. (T.502) He could not think of anyone who had "such a bad string of luck with so many lawyers" as did Mary Sisler. (T.503)

The last few years of her life, Mrs. Sisler became preoccupied with her will. (T.506) During the two years that Anderson represented her, Mrs. Sisler executed at least ten different testamentary or trust documents. Her preoccupation with her will stemmed, in part, from the fact that she was from an extremely wealthy family. (T.506) Her sons had been provided for by a trust. (T.506) Her sister was a wealthy woman in her own right and was uninterested in Sisler's wealth. (T.506) Sisler was an extremely benevolent person who gave much money to others. (T.506) She had given untold sums of money to various art museums, including the Metropolitan Museum of Art and the Guggenheim. Over twenty million dollars of her assets were bequeathed to the Metropolitan Museum. (T.506)

Sisler always tried to force things on everyone in her employ. She was intent on giving money to people who had helped her and given her support and reassurance over the years. (T.508) Her determination to give her money away was embarrassing to her friends like Dr. Adkins and Frank Wright. (T.508) These friends tried to and succeeded in steering her

benevolent instincts towards worthwhile causes like the Northwood Institute and Palm Beach Atlantic College. (T.508-510)

Malcolm Anderson was practically "on call" for Mrs. Sisler. She demanded twenty-four hour a day access to him and would call him anytime, day or night, wherever he was. (T.290-293) She even insisted that he get a car phone so that she could reach him if he were between the office and home or out of town. (T.291-292) She called him multiple times a day, wanted to see him a lot and consulted him about everything from firing servants to her art collection to legal matters. She sought his advice on everything.

In December, 1988, Dr. David Prinsky, a member of the board of directors of the Palm Beach Festival, contacted Anderson and asked whether he could discuss with Mrs. Sisler the possibility of making a donation to the Festival. Mrs. Sisler had given substantial gifts to the Festival in the past, but it had been a while since she had made a donation. (T.296-298) Dr. Prinsky wondered if Anderson could pass on a request that Mrs. Sisler renew her support. (T.298) Anderson agreed and communicated the request to her. (T.299)

Mrs. Sisler was receptive and made a $10,000 gift to the Festival. (T.299-300; R.E. 7) That gift enabled the Festival to bring the Louisville Ballet to West Palm Beach for a performance. (T.300) Mrs. Sisler was listed as a sponsor and grantor in the program and received a letter of thanks from the president of the Palm Beach Festival. (T.301-302; R.E.8 and 9) She was proud of her contribution and showed the program to everyone. (T.304) After that, Mrs. Sisler decided to make the Festival a beneficiary of her will and trust.

Subsequently the Palm Beach Festival asked Malcolm Anderson to become a member of its board of directors. (T.305) At first he refused because the board members seemed to think the Sisler gift was his idea. It was not and so he declined. (T.305) However, when again approached, he accepted and became actively involved in the Festival. (T.305)

The Festival was organized in the mid 1970's. (T.733-734;750) Around 1985 the Festival undertook some very ambitious projects, including bringing the New York City Ballet and the St. Paul Chamber Orchestra to West Palm Beach for performances. (T.700) As a result of these presentations the Festival incurred debts of about $600,000. It was unable to raise sufficient funds to satisfy its creditors' demands and litigation was threatened. (T.307) As a result of his service on the board of directors, Anderson became aware of the Festival's creditor and debt problems and the serious threat of bankruptcy. Anderson communicated this information to Sisler. (T.307)

Mrs. Sisler wanted to assure that any money she bequeathed to the Festival would be used for performances and not to pay creditors. (T.307) She wanted to bequeath to the Festival $100,000 plus part of her residuary estate. She doubted that there would be any residuary. (T.307-308) The $100,000 was to be used to buy a $10,000 per year annuity for the Festival. The money was to be used to put on performances. (T.309)

Malcolm Anderson suggested the creation of a charitable remainder trust. (T.156,309) Mrs. Sisler, who was constantly changing her will and trust provisions, did not want to create a charitable remainder trust because it would be irrevocable. (T.552-553) She had a tendency to change her mind a lot. (T.291-292)

Anderson prepared a Third Amendment to Trust which was executed on September 12, 1989 and provided in paragraph 15 for a $100,000 gift to him. (T.311) Mrs. Sisler's intent was that Anderson would use those funds for the benefit of the Festival and not to pay its creditors. (T. 70; 311) The Festival was not mentioned by name in paragraph 15 because Mrs. Sisler did not want the funds to be used to pay the Festival's creditors. Anderson was to set up a self-perpetuating annuity to accomplish this. Unfortunately, Anderson incorrectly neglected to specify that the funds were to be paid to him as "trustee". (T.71-72) Anderson admitted that this was incorrect and a mistake.

Anderson later drafted documents which made AmeriTrust a successor trustee or co-trustee. This was done in order to obtain AmeriTrust's investment expertise and to set up an annuity for the Festival. (T.75-77, 317)

Anderson immediately told the Festival about the gift contained in the Third Amendment to Trust. This occurred a year before Mrs. Sisler's death. Even though he was empowered to reveal Mrs. Sisler's name, Anderson did not. (T.70) The October 30, 1989 minutes of the Palm Beach Festival reflected this gift and reported:

> Jim Tonrey reported that Festival is definitely included in the trust for $190,000 through the efforts of Malcolm Anderson." (R.E. 11)

Although the Festival board members did not definitely know that the gift was from Mrs. Sisler, they correctly surmised that she was their benefactor. A subsequent March 1, 1990 letter from Tony Grogan, the president of the Palm Beach Festival, to fundraiser Jim Tonrey stated:

> The Executive Committee has decided the $190,000 Mary Sisler will deferred gift

> generated through Malcolm Anderson does not count towards your goal because the will is subject to change. (R.E.12)

The Festival's financial condition worsened and bankruptcy seemed inevitable. (T.318-319) A lawsuit had been filed against the Festival by one of its major creditors, First American Bank. (T.319-320) Anderson was asked by the Festival chairman, Attorney Robert Montgomery, to defend the Festival. (T.582-583) The bank's lawyer threatened to get together with all of the other creditors and to throw the Festival into involuntary bankruptcy and to seize all of its assets, including gifts. (T.320)

Mrs. Sisler was apprised of this development. (T.319) She did not want her money to be used to pay creditors. Consequently she changed her will and trust once again. Anderson drafted a Restatement of Trust Agreement of Mary Sisler which was executed by her on July 30, 1990. (T.77; B.E.6) Paragraph 15 of that document left $100,000 to Malcolm Anderson to be used in his discretion to establish a law scholarship fund at the University of Florida. (T.84)

Anderson was successful in his defense of the lawsuit filed against the Festival. He obtained a judgment on the pleadings in favor of the Festival. (T.323) He told Mrs. Sisler about the result. Sisler decided to change plans against and to put the Festival back into her will. (T.325) This resulted in the First Amendment to Restatement executed on August 21, 1990. (T.325; B.E.7) This document deleted the University of Florida as a beneficiary. Paragraph 15 bequeathed $100,000 to Malcolm Anderson or Nancy E. Anderson, his wife. Anderson once again neglected to specify that the bequest to them was as "trustees". He mistakenly neglected to delete the words "per stirpes" from his form. Anderson admitted that this was a mistake. (T.101,103) Anderson admitted that he should have put the

words "as trustees" after their names and that he improperly drafted this document. (T.106)

Mrs. Sisler intended for Anderson to use the money to set up an annuity for the Festival. She did not intend for the money to be used to pay creditors and she left the money to Anderson in order to insure this. Mrs. Sisler was also concerned that Anderson might not survive her and be alive to carry out her wishes with regard to the gift to the Festival. For that reason, she asked that Nancy Anderson's name be included. Mrs. Sisler knew Nancy and was confident that Nancy would carry out her wishes. Nancy Anderson knew about the proviso and absolutely understood that the money was to be given to the Festival to put on performances, and not to pay creditors.(T. 93-94; 629-632)

Mary Sisler died on September 19, 1990.(T.152,158) Anderson immediately reported her death to the Festival's Board of Directors. The September 25th, 1990 Festival minutes reflected that the Sisler Trust would grant a bequest of $100,000 to the Festival to be paid in ten annual installments. (R.E. 14)

Following her death, Neil Chrystal, an attorney hired by AmeriTrust, contacted Anderson and asked to meet with him to discuss the Sisler trust. (T. 160) Anderson met with Attorney Chrystal on September 21st. Chrystal immediately began interrogating Anderson about the $100,000 bequest to him personally. (T160) Anderson explained that the money was not intended for him personally, but that it was for the Palm Beach Festival. (T.161) Chrystal inquired whether members of the Festival could corroborate that. Anderson responded "yes" and arranged a second meeting.

On October 1st, Anderson, Paul Ammann (Sisler's bookkeeper and a successor trustee for the trust), David Prinsky of the Palm Beach Festival, and Dr. William Adkins met with Neil Chrystal. They explained that the $100,000 gift was to be given to the Festival. (T. 369, 512) They also explained that the Festival minutes of a meeting held a year before Sisler's death reflected that Sisler was leaving a bequest to the Festival. (T. 344)

Unbeknownst to Anderson, AmeriTrust had already filed a lawsuit seeking a declaratory decree to determine the trust beneficiaries and an injunction prohibiting distribution of assets until the beneficiaries were determined. (T. 346) AmeriTrust sought removal of Anderson as personal representative.

An evidentiary hearing was conducted before Judge Vaughn Rudnick, the probate judge. (T.379-380) Anderson testified at that hearing and explained that the gift was not intended for him, but for the Festival. He also explained why the gift was set up as it was. (T.893) Judge Rudnick refused to grant an injunction and did not remove Anderson as the personal representative.(T.894)

All of the beneficiaries agreed to mediate their claims and agreed that Anderson should serve as the sole trustee of the Sisler trust. (T.896) The beneficiaries repeatedly told Chrystal that they did not want him to do anymore legal work and that he was needlessly running up legal fees. (T.899) Chrystal ignored their requests and in a seven month period ran up legal fees well in excess of $100,000. Anderson opposed those fees and the probate court substantially reduced Chrystal's fees. (T. 403)

The beneficiaries' claims were all settled at mediation. The Palm Beach Festival received almost $100,00 under the agreement. Part of this

money was used to present a children's musical program called "The Snow Queen" at the Kravis Center. (T.772)

Following the meetings with Anderson, Neil Chrystal wrote The Florida Bar and advised it of Anderson's actions in the Sisler matter. (T.349-350; R.E.18) These proceedings ensued. At trial, Chrystal testified that he had no knowledge that Anderson had ever improperly taken any money from Mrs. Sisler. (T.396) In Chrystal's mind, dishonesty on the part of Anderson was not the issue. (T.397-400) His concern was regarding Anderson's competency to handle the matter. (T.399)

QUESTIONS PRESENTED

I

WHETHER THE EVIDENCE SUPPORTS THE REFEREE'S FACT FINDINGS ON COUNT I.

II

WHETHER THE FINDING THAT NO REAL INJURY OCCURRED IS SUPPORTED BY THE EVIDENCE.

III

WHETHER THE DISCIPLINE RECOMMENDED BY THE REFEREE IS APPROPRIATE.

SUMMARY OF ARGUMENT

A referee's findings of fact and recommendations carry a presumption of correctness which should be upheld unless clearly erroneous or without support in the record. In this case the findings and recommendations are not clearly erroneous. The record supports them.

The recommended discipline is fair to the respondent and society and will sufficiently deter other attorneys from similar misconduct. This court should adopt that recommendation.

ARGUMENT

I

WHETHER THE EVIDENCE SUPPORTS THE REFEREE'S FACT FINDINGS ON COUNT I.

The evidence supports the referee's fact findings on count I, with the exception of the finding that respondent was attempting to shield a gift of money from the reach of creditors of an intended beneficiary. This portion of the findings is incorrect. However, the error is harmless and does not warrant rejection of the referee's recommendation or discipline. As this court explained in The Florida Bar v. Poplack, 599 So.2d 116 (Fla. 1992), a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous and not supported by the record. As shown in the argument on point III, the recommendation is appropriate and should be accepted.

Anderson billed Mrs. Sisler for the legal work pertaining to dissolution of the guardianship. However, he did not charge her for the numerous hours he spent responding to her telephone calls and constant demands. Mrs. Sisler was grateful to him for his help and wanted to make a gift to him of $40,000 because he had not charged her. She asked him to draft an amendment to her trust agreement to provide for a gift of $40,000 to him upon her death. (T.293) Anderson followed her instructions and drafted the document which was subsequently executed by Sisler. (T.294) Upon reflection Anderson realized that he could not accept a testamentary gift from Mrs. Sisler and he so advised her. (T.294) She tore up the original document on the same day that it was executed.

Prior to trial and at trial, Anderson admitted that his conduct was improper. (T.294) The evidence was uncontradicted that the document was immediately destroyed by the client and that Anderson never received any bequest from the client and that he never intended to accept monies as a gift from Sisler.

The gist of the referee's findings on count I is that Anderson did not intend to receive any benefit from his drafting error; that he readily admitted his error; that later documents invalidated the bequest to him; that no benefit was received by him and that no real injury occurred. All of these findings are supported by the record. The record shows that not only did the respondent admit his error to the referee, but the probate judge was also aware of the error. At the hearing on the motion to remove Anderson as trustee, all of the trust documents were shown to Judge Rudnick and discussed. (T.893-896) According to Robert Sorgini, that hearing was "a real mud slinging contest," but Judge Rudnick denied the motion to remove Anderson as a trustee after he saw all of the documents and heard all of the evidence. In addition, all ten of the lawyers representing the parties universally agreed that Anderson should remain as personal representative and trustee. (T.893-896) Jeff Tomberg, the attorney for the Festival, testified that "I was convinced that there was no intent for him to benefit, and I truly believe that the other attorneys who represented the real parties in interest had the same belief . . . ." (T.913)

II

WHETHER THE FINDING THAT NO REAL INJURY OCCURRED IS SUPPORTED BY THE EVIDENCE.

The referee recommended that the respondent be found guilty of counts I, II and IV and that he be found not guilty on counts III, V and VI. The Florida Bar does not contest the findings on counts III, V and VI. It challenges the finding that no real injury occurred as a result of the violations of counts III, V and VI.

As shown in the argument on point I there was no injury as a result of the conduct charged in count I. The respondent immediately advised the client of his error. The respondent did not receive any benefit. There was no injury to the client because the document was immediately destroyed.

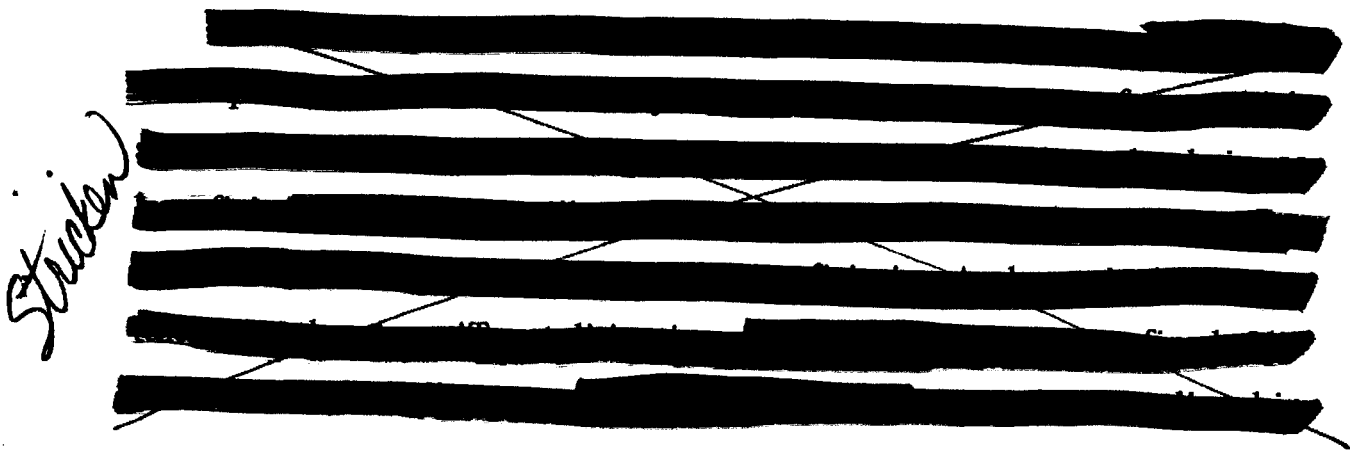
As to counts II and IV, the referee's conclusion that no real injury resulted from the respondent's actions is supported by the record. The thrust of the Bar's argument on this point is that: 1) attorney's fees of $129,753 resulted from Anderson's conduct; 2) Sisler's testamentary scheme was thwarted. Neither of these contentions has merit. This record demonstrates that the attorney's fees resulted because of the actions of AmeriTrust and its attorney, Neil Chrystal. Furthermore, even if Sisler's testamentary scheme were indeed frustrated, that resulted from the actions of Chrystal and AmeriTrust.

Attorney Chrystal was employed by AmeriTrust to determine the beneficiaries under the Sisler trust. (T.427) Chrystal met with Anderson just two days following Sisler's death. (T.160) At that meeting Chrystal interrogated Anderson at length about the $100,000 gift to him and was advised that the money was not intended for him, but for the Palm Beach

Festival. (T.161) Despite that information, not less than a week later Chrystal, on behalf of AmeriTrust, filed a lawsuit. (R.E.18) He named as a defendant everyone who had ever been a beneficiary under any of the trust agreements. In addition, he also named David Sisler Hayes as a defendant. He was never a beneficiary under any of the documents.

Chrystal used the lawsuit as an excuse to run up exorbitant legal fees. His attorney's fees became a "very hot topic." (T.897) The potential beneficiaries' attorneys told him both orally and in writing that AmeriTrust was just a disinterested stakeholder and that they did not want him doing any more work, attending hearings and running up attorney's fees. (T.897-898) Chrystal just ignored them. (T.898) Obviously his actions also increased the beneficiaries' attorney's fees. It was Chrystal's acts and not those of Anderson which caused the attorney's fees.

As for possible frustration of Sisler's testamentary scheme, that also resulted because of the actions of Chrystal and AmeriTrust. There was absolutely no reason for David Sisler Hayes to have been named as a defendant in the declaratory decree action. He was not named as a beneficiary under any of the trust documents or wills. The only reason he got anything is because Chrystal, without cause, brought him into the litigation.



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III

WHETHER THE DISCIPLINE RECOMMENDED BY THE REFEREE IS APPROPRIATE.

Most of the argument and discussion presented by The Florida Bar on this point is irrelevant. The Florida Bar bore the burden of proving its charges by clear and convincing evidence. The Florida Bar v. Wilson, 599 So.2d 100 (Fla. 1992) Initially the Bar sought disbarment. The referee rejected that suggestion and instead recommended a public reprimand, probation and continuing legal education. The proposed discipline is fair to the respondent and acts to protect the public. The punishment is sufficient to punish the breach of ethics. It will encourage reformation and rehabilitation. In addition, the discipline is severe enough to deter others who might be prone or tempted to become involved in like violations.

The referee's recommendation on discipline is afforded a presumption of correctness. The Florida Bar v. Poplack, supra. The Bar has failed to overcome that presumption and has not demonstrated that the recommendation is clearly erroneous or not supported by the evidence. The discipline which the Bar now seeks, a ninety-one day suspension, would be disproportionate to the referee's findings. This case does not involve dishonesty, undue influence, fraud or overreaching on the part of Anderson. This is a case of admitted negligence in drafting documents. The Bar never charged Anderson with incompetence. The discipline recommended by the referee is appropriate and will serve the goals of bar discipline proceedings. The referee's recommendation should be adopted by this Court.

This case differs factually from all of the cases cited by the Bar which deal with attorneys drafting wills whereby they receive bequests from clients. In this case, unlike the cited cases, with the exception of the first amendment to trust agreement, Anderson was never to receive a bequest. All of the bequests were to be given by him to the Palm Beach Festival. Anderson simply drafted the documents improperly and neglected to specify that he was taking "as trustee."

In contrast, in State v. Horan, 123 N.W.2d 488 (Wis.1963), the attorney drafted a will for his client-friend under which he was given a substantial bequest. The conduct there was far more egregious than the conduct in this case. The court there stated that a reprimand and payment of costs was sufficient discipline.

Likewise in State v. Collentine, 159 N.W.2d 50 (Wis. 1968), the attorney drafted a will for a client which bequeathed the potential residue of an estate to him. There, as here, the court found no undue influence, overreaching, coercion or fraud. The court specifically declined to impose discipline and simply admonished the defendant. In the case of In Re Krotenberg, 527 P.2d 510 (Ariz. 1974), unlike this case, the intent was to make a bequest to the lawyer and his family.

Committee on Professional Ethics v. Behnke, 276 N.W.2d 838 (Iowa 1979) is factually distinguishable from this case, too. There, unlike this case, the bequest was to the lawyer himself. In addition, there was evidence which showed that the wills prepared by the lawyer were contrary to the client's wishes.

Committee on Professional Ethics v. Randall, 285 N.W.2d 161 (Iowa 1974) involved much more than drafting a will which made the lawyer a beneficiary. That case also involved a "flagrant and inexcusable" conflict of

interest. The case also involved lies and other dishonest conduct on the part of the lawyer. This case does not.

The Florida cases which the Bar cites do not support imposition of greater discipline in this case. In The Florida Bar v. Novak, 313 So.2d 727 (Fla. 1974), the lawyer named himself as a beneficiary in the client's will. In that case, unlike this one, the gift was intended for the lawyer. This court deemed a public reprimand to be the appropriate discipline. Likewise, in The Florida Bar v. Miller, 555 So.2d 854 (Fla. 1990) the lawyer drafted a will under which he was a contingent beneficiary and whereunder he inherited $200,000. This court held that a public reprimand was the appropriate sanction.

The Florida Bar v. Rule, 601 So.2d 1179 (Fla. 1992) involved far more egregious conduct than this case. That case, unlike this one, involved comingling of trust account funds, using funds for purposes other than those for which the funds were entrusted and violation of trust accounting procedures.

The Bar's reliance on The Florida Bar v. Rhinehardt, Case No. 78,601, is misplaced. There is no reported, written opinion in that case. Thus the case has no precedential value.

Review of the factors to be considered in imposing discipline shows that a public reprimand, probation and continuing legal education are the appropriate sanctions in this case. Anderson did not breach any fiduciary duty to his client. He admitted that he drafted these documents improperly and that it should have been specified that he was taking "as trustee." The referee made a specific fact finding, which is supported by the evidence, that the respondent did not intend to benefit personally from these bequests. The Bar apparently concedes that this fact finding is supported

by the evidence. As shown in the argument on point II, no real injury resulted form Anderson's actions. Any monetary injury was occasioned by the conduct of AmeriTrust and its lawyer. The fact that potential injury was foreseeable does not warrant a ninety-one day suspension under the facts of this case.

In closing, the lawyers argued aggravating and mitigating factors to be considered in imposing sanctions. (T.948-1041) There was evidence of numerous mitigating factors. The respondent has no prior disciplinary record. There was no evidence of a dishonest or selfish motive on the part of Anderson. Indeed, the evidence was to the contrary and showed that he was trying to carry out Sisler's wishes. As a practical matter, if Anderson had intended to benefit personally, he would not have immediately told the Palm Beach Festival about the gift. This was done over a year before Mrs. Sisler died.

There was no pattern of misconduct or multiple offenses. The documents demonstrate that Mrs. Sisler repeatedly changed her trust beneficiaries. The record demonstrates that Anderson cooperated fully with the Bar in these proceedings. He was not deceptive. He fully acknowledged his mistakes and that the documents were improperly drawn. There was no evidence which indicated Mrs. Sisler was vulnerable. Indeed, the record shows she was a demanding woman who expected everyone to be at her beck and call.

The record is replete with evidence which shows that Malcolm Anderson is well regarded as an honest man. (T.514, 727, 745, 749, 806, 847, 936-937) Anderson took a "short-cut" which was described by one witness as "stupid." (T.748-749) But, he did not act dishonestly or to

benefit himself. (T.748-749) He admitted his mistake and was truly remorseful about his drafting mistakes.

This case did not involve dishonesty, fraud, undue influence or overreaching by a lawyer. If anything, it involved a question of competency. Standard 4.5 of the Florida Standards for Imposing Lawyer Sanctions discusses the sanctions to be imposed in cases involving lack of competence. Suspension is appropriate only when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence and causes injury or potential injury to a client. Public reprimand is appropriate when a lawyer demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury. It is also appropriate when a lawyer is negligent in determining whether he is competent to handle a legal matter and causes injury or potential injury.

The Bar did not charge Anderson with lack of competency. Had it done so and put him on notice that was an issue, the respondent could have and would have presented evidence regarding his overall competency in the field of wills and trusts. The record before this court does not demonstrate that Anderson knowingly lacked competence in these areas of practice. Absent such evidence a suspension is not warranted.

CONCLUSION

The Bar has failed to overcome the presumption of correctness of the referee's findings of fact and recommendations. Accordingly, his findings and recommendations should be upheld. The Florida Bar v. Carswell, 18 Fla.L.Weekly S507 (Fla. Sept. 23, 1993).

Respectfully submitted,

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Florida Bar No. 142053

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by mail this **29th** day of **November, 1993**, to: **Louis M. Silber, Esq.**, 400 Australian Ave., South, #855, West Palm Beach, FL 33401; **Luain T. Hensel, Esq.**, The Florida Bar, 5900 N. Andrews Ave., Suite 835, Ft. Lauderdale, FL 33309; **John T. Berry, Esq.**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300.

By: Marjorie Gadarian Graham
Marjorie Gadarian Graham
Florida Bar No. 142053