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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MALCOLM ANDERSON,

Respondent.

_____/

Supreme Court Case
No. 80,764

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

INITIAL BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

In order to ensure a clear record, the following terms of reference will be utilized throughout this brief: The Florida Bar, the appellant, will be referred to as "the bar". Malcolm Anderson, the appellee, will be referred to by his full name, as "respondent", or as "Anderson". References to the final hearing transcript will be made by utilizing the symbol "T" followed by the appropriate transcript page number. Exhibits introduced into evidence by The Florida Bar will be referenced as "Bar Exhibit _____"; exhibits introduced into evidence by the respondent will be referenced as "Respondent Exhibit _____". References to the report of referee will be made by utilizing the symbol "RR".

STATEMENT OF THE CASE AND THE FACTS

STATEMENT OF THE CASE

The Florida Bar filed its Complaint and Request for Admissions on November 12, 1992. Respondent served a response to the Request for Admissions on December 21, 1992. On November 23, 1992, the Honorable Stewart R. Hershey, Circuit Court Judge in and for the Nineteenth Judicial Circuit, Martin County, Florida, was appointed as referee to conduct disciplinary proceedings. On January 6, 1993, this Court entered an Order of Termination of the appointment of the Honorable Stewart R. Hershey as referee predicated upon his determination to recuse himself from hearing the matter. On January 6, 1993, the Honorable Gene Fischer, Senior Judge in Broward County was assigned as referee to conduct the proceedings.

Pursuant to timely notice, Judge Fischer conducted the final hearing in this matter beginning on May 3, 1993 and daily thereafter through May 7, 1993. During the course of the final hearing, the bar presented the testimony of five (5) witnesses and entered sixteen (16) exhibits into evidence; respondent presented the testimony of eight (8) witnesses and entered twenty-three (23) exhibits into evidence. Following closing arguments, the referee refused to accept or consider the bar's tendered memorandum of law regarding appropriate discipline (T 1033-1035) but did request and accept case law from respondent's counsel (T 1019).

On May 28, 1993, the referee served his report of referee in which he found the respondent guilty of three (3) counts of drafting testamentary documents in which he included himself or his family members as beneficiaries

of substantial gifts. (RR 1-2). The referee recommended a public reprimand and probation for six months to one year but specified no terms of probation other than completion of eight hours of continuing legal education, including at least three hours of will and trusts, writing or drafting; three hours of estate planning; and two hours of ethics. Because the transcript of the final hearing was not completed at the time the referee served his report, it was forwarded to the Court by bar counsel on June 3, 1993. Shortly after the receipt of the referee's report, the parties discovered a typographical error which created an ambiguity therein. By letter dated June 7, 1993, Judge Fischer sent the Court a corrected page four and requested that it be substituted for the initial page four.

The report of referee was presented to the Board of Governors of The Florida Bar for consideration at its July, 1993 meeting. Bar counsel was thereafter directed to petition for review and to seek a 91-day suspension and payment of costs as appropriate discipline. The bar's Petition for Review was served on August 2, 1993. The bar's Motion for Enlargement of Time to File Initial Brief was filed August 23, 1993, and the bar was given until October 4, 1993 to serve its initial brief.

STATEMENT OF THE FACTS

Respondent undertook representation of Mary Sisler ("Sisler") in October, 1988. (Respondent's Response to Request for Admissions #2). At the time respondent undertook the representation of Sisler, she was in her mid-eighties. (T 63). On October 10, 1988, Sisler executed a Last Will and Testament which was drafted and notarized by respondent. (Respondent's Response to Request for Admissions 3; Bar Exhibit 8). On July 31, 1990, Sisler executed a First Codicil to her Last Will and Testament which had been drafted and notarized by respondent (Respondent's Response to Request for Admissions 4; Bar Exhibit 9). On October 7, 1988, Sisler created an inter vivos trust known as the "Trust Agreement of Mary Sisler" ("Trust") which was drafted and notarized by respondent and which named Sisler as trustee with successor trustees to distribute assets at her death to certain named beneficiaries. (Respondent's Response to Request for Admissions 5; Bar Exhibit 1). Sisler's will and the codicil thereto provided that the entire contents of Mary Sisler's probate estate were to "pour over" into the Trust. (Respondent's Response to Request for Admissions 6; Bar Exhibits 8 and 9).

On March 31, 1989 Sisler executed a first amendment to the Trust ("First Amendment") which was drafted, witnessed and notarized by respondent. (Respondent's Response to Request for Admissions 7; Bar Exhibit 2). In the first amendment, respondent was appointed as successor trustee and named as a beneficiary to receive the sum of forty thousand dollars ($40,000) "to be his absolutely should he survive the settlor". (Bar Exhibit 2).

On August 8, 1989 Sisler executed a second amendment to the trust ("second amendment") which had been drafted by respondent (Respondent's Response to Request for Admissions 9; Bar Exhibit 3). On September 12, 1989, Sisler executed a third amendment to the trust ("third amendment") which was drafted, witnessed and notarized by respondent (Respondent's Response to Request for Admissions 10; Bar Exhibit 4). In the third amendment, respondent was named as a beneficiary to receive the sum of one hundred thousand dollars ($100,000) "to be his absolutely, should he survive the settlor". (Bar Exhibit 4). The third amendment also added Palm Beach Festival ("Festival") as a residuary beneficiary of the trust. (Bar Exhibit 4). Respondent drafted a proposed fourth amendment to the trust which was never executed. (Respondent's Response to Request for Admissions 12; Bar Exhibit 5).

On July 30, 1990 Sisler executed a Restatement of Trust Agreement ("restatement") which was drafted and notarized by respondent. (Respondent's Response to Request for Admissions 13; Bar Exhibit 6). In the restatement, respondent was named as a successor co-trustee, was named as a beneficiary to receive the sum of one hundred thousand dollars ($100,000) "to be used in his discretion, to establish a Mary Sisler Law Scholarship Fund at the University of Florida", and the Palm Beach Festival was deleted as a named beneficiary. (Bar Exhibit 6). On August 21, 1990 Sisler executed a First Amendment to the Restatement ("final amendment") which respondent drafted, witnessed and notarized (Respondent's Response to Request for Admissions 14; Bar Exhibit 7). In the final amendment, respondent or his wife Nancy, or the survivor of either of them, was named as a beneficiary to receive the sum of one hundred thousand dollars ($100,000) "to be theirs

absolutely, per stirpes" in addition to one-half of the entire residuary "to be theirs absolutely, per stirpes." (Bar Exhibit 7). Neither respondent nor his wife was related to Sisler by blood or marriage. (Respondent's Response to Request for Admissions 17). Mary Sisler died on September 18, 1990. (Respondent's Response to Request for Admissions 16).

On September 28, 1990, Ameritrust, one of the co-trustees, filed a lawsuit (T 163). The suit filed by Ameritrust was a declaratory judgment action to ask for court determination of beneficiaries predicated upon the numerous documents and the ambiguity therein, as well as issues relating to Sisler's capacity, potential undue influence, and the fact that Anderson was a beneficiary. In addition, Ameritrust requested injunctive relief to prevent any trustees and the personal representative from distributing assets prior to a judicial determination of appropriate beneficiaries (T 345-346). Following a hearing on October 4, 1990, of Ameritrust's request for an emergency temporary injunction to enjoin the distribution of assets and the request for attorney's fees and costs associated therewith, the requests were denied by order dated November 13, 1990. (Bar Exhibit 13). On October 4, 1990, the day of the hearing on the request for injunctive relief, respondent and his wife executed and filed both a disclaimer (Respondent Exhibit 22) and an assignment of trust bequests (Respondent Exhibit 23).

On May 3, 1991 the parties to the litigation entered into an amended settlement agreement, (Respondent Exhibit 5) which was approved by the court in an order dated May 6, 1991 (Respondent Exhibit 6).

Throughout the course of the bar proceedings, respondent claimed he never intended to benefit personally from the bequests. With regard to Count I, respondent was the named beneficiary of the sum of $40,000 in the

First Amendment. (Bar Exhibit 2). With respect to that bequest, respondent claimed he did not intend to accept those funds as a gift (Respondent's Response to Request for Admissions 18) but admitted Sisler intended for him to receive those funds (T 59). Respondent further claimed the document was destroyed shortly after execution (Respondent's Response to Request for Admissions 18; T 62) and claimed that reference to that document in three subsequent documents (Bar Exhibits 3, 4 & 5) should not have been made. (T 64-65; T 68; T 75).

With regard to Count II in which respondent was charged with being the named beneficiary of the sum of $100,000 "to be his absolutely, should he survive the settlor" in the Third Amendment (Bar Exhibit 4), respondent claimed the $100,000 was to go to the Palm Beach Festival (T 69-70). He further claimed the bequest named him rather than the Festival because the Festival was deeply in debt and Sisler did not want the funds utilized to pay the Festival's creditors (T 70-72). Respondent's explanation for the fact that the Festival was a named beneficiary in the residuary clause was that Sisler was not concerned about the residuary. (T 72-74).

As to Count IV of the bar's complaint, in which respondent was charged with naming himself and his wife or the survivor of either of them in the final amendment (Bar Exhibit 7) as being the beneficiaries of the sum of $100,000 "to be theirs absolutely, per stirpes" in addition to one-half of the entire residuary "to be theirs absolutely, per stirpes", respondent claimed he never intended to benefit personally and that the monies were to be used for the benefit of the Festival (Respondent's Response to Request for Admissions 24-25). Notwithstanding the pristine language of the document (Bar Exhibit 7), the fact that only respondent, his wife, and one of their four

children was aware of the alleged trust, and the fact that respondent had not executed any document directing his wife and/or children to use the funds for the benefit of the Festival in the event of his death, respondent testified the Festival would have received the funds (T 93-99; T 628-632).

SUMMARY OF ARGUMENT

The referee's finding that the respondent was attempting to shield the $40,000 bequest to him in the first amendment from the reach of any creditors of an intended beneficiary in clearly erroneous. Not only is the finding unsupported by any evidence, it is directly contradicted by respondent's testimony at final hearing.

The referee's finding that no real injury occurred as a result of respondent's "drafting errors" is erroneous for two significant reasons. First, a substantial sum of money was expended from Sisler's assets to litigate the issues and ambiguities created by respondent's "drafting errors", thereby diminishing the distribution to the ultimate beneficiaries.

Second, and more important, Sisler's testamentary scheme was thwarted by respondent's "drafting errors". The record is replete with references to Sisler's disdain for her sons, one of whom had committed suicide, and neither of whom was ever named as a beneficiary in any of the series of documents drafted by respondent over a period of almost two years. The surviving son received $45,746.00 as a direct result of respondent's "drafting errors". In addition, but for the litigation and the resulting settlement, Olive "Olie" Thompson, Sisler's treasured companion, whom Mrs. Sisler wanted to provide for so that Ollie would never have to work again, would have received nothing. Although the first document (Bar Exhibit 1), executed on October 7, 1988, provided a monthly income to Olive and Norris Thompson for their lifetimes, by the time of the first amendment (Bar Exhibit 2) executed on March 31, 1989 (a mere six months later) Olive Thompson was deleted as a

beneficiary and never again named in any subsequent document. Instead, respondent became a named beneficiary.

The issue of appropriate discipline presents an issue of first impression, as there are no reported cases imposing discipline for violation of Rule 4-1.8(c) since the enactment of that rule on January 1, 1987. The lack of cases seems to indicate that few if any lawyers have been so bold. Respondent did not violate Rules 3-4.2, 4-1.2(e) and 4-1.8(c) in only one document; he repeatedly violated it in a series of documents over an extended period of time. Notwithstanding the referee's finding that respondent did not intend to benefit personally, it is significant that respondent did not disclaim or assign his interest to the Festival until after demanding immediate distribution of trust assets and the documents he had drafted were challenged by initiation of litigation. Accordingly, a public reprimand and completion of eight hours of continuing legal education is patently insufficient predicated upon the repetitive nature of respondent's conduct. Should this Court approve the referee's recommended discipline, it will send a message to Florida's lawyers and carve out an exception to the narrowly drafted rule which will lend itself to boundless mischief by unethical lawyers who are able to contrive an opportunity to take advantage of the trust and confidence reposed in them by their clients. This Court must put lawyers on notice that it does not view the violation of Rule 4-1.8(c) as an insignificant infraction. The bar respectfully submits that the minimum discipline which should be imposed is a 91-day suspension and payment of all costs incurred by the bar.

ARGUMENT

I. THE EVIDENCE IS CONTRARY TO THE REFEREE'S FINDINGS WITH REGARD TO COUNT ONE OF THE BAR'S COMPLAINT

As to Count I of the bar's complaint, which charged respondent with being a named beneficiary in the first amendment to the trust to receive forty thousand dollars ($40,000) "to be his absolutely should he survive the settlor", the referee found respondent guilty of violating Rules 3-4.2, 4-1.2(e) and 4-1.8(c) and found that "The evidence supports the respondent's explanation: that being, that he had no intent to receive any personal benefit, but rather, that he was attempting to shield a gift of money from the reach of any creditors of an intended beneficiary." (RR 1).

The record is not only devoid of evidence to support the referee's finding, the finding is contradicted by respondent's testimony. Respondent admitted that Sisler intended for him to receive the $40,000 bequest, that he knew it was wrong, and that the document was destroyed the day it was executed.

> Q. All right. Now, there's also a bequest in here to Malcolm Anderson in the amount of $40,000, also to be his absolutely should he survive the settlor; is that correct?
> A. Yes.
>
> Q. Did she intend for you to have that $40,000 or was there an intent that was not expressed?
> A. No, that was her intention at that time.
>
> Q. That you have the $40,000 ---
> A. That's correct.
>
> Q. ---outright?
> A. Outright.

Q. It was not intended for anybody else?
A. No.

Q. She intended to benefit Malcolm Anderson?
A. Yes.

(T 59-60)

. . .

Q. At the time you drafted this First Amendment to the Trust Agreement, Mr. Anderson, did you discuss with her that it really might be better if she had another lawyer draft this document?
A. What happened - and actually she drafted this - I mean, I drafted this document, took it over to Miss Sisler. She signed it. I brought it back to the office.

I called Miss Sisler and I said, "Miss Sisler, this is an ethical violation. I cannot do this and I'm going to bring it back and we're going to make some other arrangements."

I brought it back still on the 31st of March. She tore this document up, this first amendment, in my presence and - because she realized when I told her that this was unethical and we couldn't do it, and then she put me on a retainer instead.

Because I said if you want to pay me $40,000 or whatever, just put me on a retainer and in three years you would have paid me more than the $40,000. And she agreed to do that and I was on the retainer thereafter and this document was destroyed.

Q. On the same day it was executed?
A. Same day it was drafted. And we thought we had got all the copies but apparently some copies were stolen or somehow got removed from the house. I tore up my file copy, I know that too.

Q. But did you ever suggest to her that if she wanted to give you a gift, she should speak with another attorney and receive independent advice?
A. I didn't really get into that with her at that time.

(T 61 - 63)

Respondent's testimony that the $40,000 bequest to him was not included for any other purpose than to benefit Malcolm Anderson conclusively establishes the miscomprehension by the referee evidenced by his finding that "he [Anderson] was attempting to shield a gift of money from the reach of any creditors of an intended beneficiary."

II. THE REFEREE ERRED IN FINDING THAT NO REAL INJURY OCCURRED AS A RESULT OF RESPONDENT'S "DRAFTING ERRORS"

As to Count One of the bar's complaint,[1] in addition to the finding that respondent violated Rules 3-4.2, 4-1.2(e) and 4-1.8(c), the referee specifically found as follows:

> It is the Referee's finding that the Respondent did not intend to receive any benefit by his drafting error. Further, no real benefit was received by the Respondent and no real injury followed. Potential injury to the legal system or the legal profession was reasonably foreseeable; however, later documents drafted by the Respondent invalidated the bequest to the Respondent, and no real injury occurred.

(RR 1-2)

As to Count Two of the bar's complaint,[2] in addition to the finding that respondent violated Rules 3-4.2, 4-1.2(e) and 4-1.8(c), the referee specifically found as follows:

> It is the referee's finding that the Respondent did not intend to receive any benefit by his drafting error. Further, no real benefit was received by the Respondent and no real injury followed. Potential injury to the legal system or the legal profession was reasonably foreseeable.

(RR 2)

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[1]Count One of the complaint charged respondent with drafting, witnessing, and notarizing a testamentary document, the first amendment, in which he was named as a beneficiary to receive forty thousand dollars ($40,000) "to be his absolutely should he survive the settlor".

[2]Count Two of the complaint charged respondent with drafting, witnessing and notarizing a testamentary document, the third amendment, in which he was named as a beneficiary, to receive one hundred thousand dollars ($100,000) "to be his absolutely, should he survive the settlor".

As to Count Four of the bar's complaint,[3] in addition to finding that respondent violated Rules 3-4.2, 4-1.2(e) and 4-1.8(c), the referee specifically found as follows:

> It is the referee's finding that the Respondent did not intend to receive any benefit by his drafting error. Further, no real benefit was received by the Respondent and no real injury followed. Potential injury to the legal system or the legal profession was reasonably foreseeable.

(RR 2)

Even accepting as correct the referee's finding that respondent did not intend to benefit personally from the bequests to him and/or his family members in the series of documents he drafted, the referee's finding that no real injury resulted from respondent's repeated "drafting errors" is clearly erroneous.

Because of respondent's "drafting errors" in a series of documents, Ameritrust initiated litigation to determine who the appropriate beneficiaries were and to prevent the immediate distribution of trust assets requested by respondent. As a result of that litigation, a written settlement agreement was reached on May 3, 1991. (Respondent Exhibit 5). Pursuant to the terms of the agreement, Ameritrust's attorney's fees, costs and commissions were to be paid from trust assets. The fees ultimately paid to Ameritrust's attorneys totaled $84,250.00, and the attorney representing Malcolm Anderson and his wife was paid $10,569.00 in fees. (T 625). The total attorney's fees paid from trust assets as a result of Anderson's "drafting errors" was $129,753.00,

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[3]Count four of the complaint charged respondent with drafting, witnessing and notarizing a testamentary document, the final amendment, in which respondent, his wife, or the survivor of the two of them, were the named beneficiaries to receive one hundred thousand dollars ($100,000) "to be theirs absolutely, per stirpes" as well as one half of the entire residuary trust "to be theirs absolutely, per stirpes".

including those of the attorneys representing the Festival (Bar Exhibit 16, Schedule J.) But for Anderson's "drafting errors", an additional $129,753.00 would have been available for distribution to the beneficiaries, yet the referee specifically found that no real injury occurred. Whether the attorney's fees paid from the trust assets were authorized or excessive are not issues in this case. The fact is that payment of $129,753 for attorneys' fees from trust assets was made as a direct result of respondent's unethical conduct which was characterized by the referee as "drafting errors". The ultimate irony is that at least a portion of the funds the Festival received from Sisler's assets was used to pay off the Festival's debts (T 819-820), the very thing which respondent claimed Sisler did not want to occur. The three main creditors of the Festival were paid at or about the time the Festival received its initial payment from the Sisler assets (T 820).

The even more compelling harm that was caused by respondent's "drafting errors" was the thwarting of Sisler's testamentary scheme. Numerous witnesses, including Anderson, testified as to Sisler's feelings about her sons who were never once named as beneficiaries in any of the documents drafted by respondent. One son had committed suicide and she had a poor relationship with the other son (T 262-263). Anderson testified that Sisler was estranged from her sons for many, many years and that "she just really almost hated her sons" (T 306). Dr. Adkins, Sisler's physician for the last 16 years of her life (T 498) and a named beneficiary in the documents, testified that Sisler "had no closeness with her sons, to say the least. I've never known a mother who hated her sons more than she." (T 530). Yet, as a result of Anderson's "drafting errors", Sisler's son David Sisler Hayes

received the sum of $45,746.00 (Bar Exhibit 16, page 2) as a result of the settlement agreement (Respondent Exhibit 5).

Additional compelling evidence of the havoc wreaked on Sisler's testamentary scheme by Anderson's "drafting errors" was the unrefuted testimony of Dr. Adkins who described Sisler's relationship with Olive "Olie" Thompson, her companion of many years, and Olie's husband Norris. According to Dr. Adkins, "she [Sisler] stated that she - to me many times that after her death she never wanted Olie to work again; that she wanted Olie to be taken care of." (T 507-509) Although Olive and Norris Thompson were named beneficiaries to receive monthly income for the duration of their lives in the first document drafted by Respondent (Bar Exhibit 1), their bequest was totally and inexplicably eliminated in the next document drafted by respondent, a mere six months later. (Bar Exhibit 2). Furthermore, neither Olive nor Norris Thompson appeared as beneficiaries of any bequest whatsoever in any subsequent document. But for the litigation initiated by Ameritrust, which was ultimately settled, "Olie" would have received nothing. The harm caused by respondent's "drafting errors" is real and measurable, and the referee's finding that no real injury occurred is clearly erroneous. Even the purest of intentions does not vitiate the havoc wrought by respondent.

III. THE DISCIPLINE RECOMMENDED BY THE REFEREE IS INAPPROPRIATE AND SHOULD BE ENHANCED.

A. Case Law

A determination of the appropriate discipline to be imposed necessitates discussion and analysis of the evolution of the law which ultimately resulted in the enactment of Rule 4-1.8(c), Rules of Professional Conduct by this Court on January 1, 1987. In order to assist the referee in making his recommendation concerning appropriate discipline, the bar offered the referee a comprehensive memorandum of law. The referee refused to accept or consider the bar's memorandum and copies of the authority cited therein. However, the referee not only accepted but specifically requested from respondent's counsel copies of the trust account cases mentioned in his closing argument.

In ancient times under Roman law, pursuant to an ordinance enacted by the Emperor Claudius, it was decreed that any legacy to the drafter of an instrument would be deemed invalid. In Re Blake's Will, 120 A.2d 745 (N.J. 1956). Historically, American jurisprudence has viewed the issue less stringently. In many states, such gifts were not and still are not unconditionally void, although they do give rise to either a rebuttable presumption or an inference of undue influence.

In Carpenter v. Hatch, 15 A. 219 (N.H. 1888), an attorney who drafted a codicil in which he was the beneficiary of a residuary legacy was permitted to keep the gift. The court held that the question of the attorney's influence over the testator was a question of fact for the jury. In Farnum v. Boyd, 41 A. 422, (N.J. Eq. 1898), an attorney was permitted to keep a $100 gift which

he had provided for himself, pursuant to the testatrix's instruction, in a will which he had drafted in her behalf. In reaching its determination, the court carefully pointed out that it had searched for but found no affirmative proof of undue influence, despite the respective and disparate positions of the parties. Further, the $100 gift to the attorney, which mirrored a similar gift to the testatrix's physician, was found to be relatively insignificant in view of the size of the estate: $14,000 - $15,000.

This careful judicial inquiry into the motivation and effect of client gifts to attorneys, via instruments drafted by the subject attorneys, continued. In In Re Babcock's Will, 150 A. 219 (N.J. Eq. 1930), the court did not find undue influence where an attorney drafted a client's will which contained a codicil allowing him to choose a gift from the decedent's household furnishings and other chattels as a remembrance of her. In reaching its determination, the court took into consideration the attorney's lifelong friendship with the testatrix, the precise nature and value of the articulated gift, and the size of the estate, reasoning that if the attorney had intended to exert undue influence, he would probably not have elected to acquire household furnishings in lieu of stocks, bonds and a residuary estate of nearly $400,000.

As litigants continued to test the parameters of this area of the law, the courts continued to define and refine their positions regarding inter vivos and testamentary gifts from clients to attorneys, growing ever more vigilant in their efforts to protect client donors from unethical lawyers. Further, the courts began to look more closely at the confidential relationship between counsel and client, acknowledging the circumspection demanded by such a relationship. In Reilly v. McAuliffe, 117 N.E.2d 811 (Mass. 1954), the court disallowed a codicil which named the testatrix's attorney as residuary legatee,

even though the codicil was prepared by a second attorney (because the beneficiary attorney refused to draft it). In refusing to allow the testatrix's attorney (who drafted her will) to take the $20,000 residuary estate, the court noted that it was troubled by the following facts: that the testatrix had been terminally ill and was being treated with sedatives and other drugs at the time the codicil was drafted; that the beneficiary attorney would acquire the bulk of her estate, despite the fact that the testatrix had living relatives; that the beneficiary attorney had been in charge of the execution of the codicil, even though he did not draft it; that the beneficiary attorney had significant influence over the testatrix, visiting her daily; and that the testatrix really had no independent legal advice, as the second attorney seemed to have been procured to perform the transaction in a perfunctory and ceremonious way in order to endow the transaction with the appearance of propriety. From this time forward, the courts began to narrow their focus on gifts from clients to attorneys, and many states began to adhere to the principle that gifts from clients to their lawyers are presumptively the result of undue influence, fraud or overreaching by the lawyer. E.g., In Re Anderson, 287 N.E.2d 682 (Ill. 1972); Committee on Professional Ethics & Conduct v. Behnke, 276 N.W.2d 838 (Iowa 1979); Cline v. Larson, 383 P.2d 74 (Or. 1963); Estate of Younger, 461 A.2d 259 (Pa.Super. 1983); Discipline of Theodosen, 303 N.W.2d 104(S.D. 1981); In Re Swan's Estate, 293 P.2d 682 (Utah 1956); In Re Spenner's Estate, 117 N.W.2d 641 (Wis. 1962). In order to overcome this presumption, the beneficiary attorney must affirmatively demonstrate that the client intended to make the gift and was completely cognizant of the circumstances surrounding the gift. McDonald v. Hewlett, 228 P.2d 83 (Cal. Ct. App. 1951); Radin v. Opperman, 407 N.Y.S.2d 303 (N.Y. App. Div. 1978).

As the case law in this area evolved, the various state bars began to develop their respective positions regarding discipline. One of the most comprehensive discussions of the issues of attorney/beneficiaries is found in State v. Horan, 123 N.W.2d 488 (Wis. 1963). In Horan, an attorney drew a succession of wills for a close friend in which the attorney was named as a beneficiary for a progressively larger amount in each new will as other beneficiaries were eliminated or their shares were reduced. Although the court deemed a reprimand and payment of costs to be sufficient discipline, the decision was predicated upon the court's determination that the law on the subject was not clearly defined or well understood by the members of the legal profession. Such is not the case with respondent's conduct. At the time of respondent's "drafting errors", the conduct in which he engaged was specifically prohibited by Rule 4-1.8(c). Moreover, respondent admitted he knew that including himself as a beneficiary was unethical. In effect, the Horan case has come to stand for the proposition that when an attorney is the draftsman of a will or trust instrument for a client and there are attendant circumstances suggesting preferential treatment of the attorney or a gift which is more than a token or a remembrance, such conduct gives rise to a rebuttable presumption of unethical conduct.

Over recent years, various states and state bar associations have prosecuted attorneys for violation of the generic, but conditional, prohibition against attorneys as beneficiaries of their clients' trusts and estates. The resulting discipline ranges from reprimand to disbarment. In State v. Collentine, 159 N.W.2d 50 (Wis. 1968), a lawyer was admonished for drafting a will bequeathing the residue of the estate to himself. The court did not impose greater discipline because the attorney/beneficiary was able to

demonstrate that he had attempted to persuade the testatrix to get another attorney to draft the will, because the estate was insolvent at the time that the will was drafted (causing the attorney/beneficiary to reasonably believe that he would not actually receive anything from the estate), and because the court found no undue influence, overreaching, coercion or fraud. In Collentine, supra, the sequel to Horan, as the court said: "In Horan, the door was left ajar to permit unnatural wills in certain circumstances. By this opinion that door is closed." Collentine at 54.

In Columbus Bar Association v. Ramey, 290 N.E.2d 831 (Ohio 1972), an attorney was found to have violated the Code of Professional Responsibility by preparing a trust and a will for a client through which he stood to inherit the client's entire estate. Because the Code did not specifically bar attorneys from becoming their clients' beneficiaries, the court imposed a public reprimand. The Arizona state bar association encountered the issue in In Re Krotenberg, 527 P.2d 510 (Ariz. 1974). In that case, the court found that the drafting attorney had breached his fiduciary duty to his client/ward by naming himself and members of his family as beneficiaries in the ward's will. The court ordered a six (6) month suspension from the practice of law as the bare minimum which should be given. In that case, the respondent, much like Anderson in the case at bar, contended that he was "pure in heart" and therefore should not be made to suffer for something which amounts to merely poor judgment. The court said:

> We regret that we have no device for measuring purity of heart and must arrive at our decision on the basis of the facts presented to us. We areconcerned not only with evil but the appearance of evil as well.

Krotenberg at 512.

Even stronger discipline was imposed by the Supreme Court of Iowa in Behnke, 276 N.W.2d 838. In that case, an attorney was suspended for three (3) years for violating the Iowa Code of Professional Responsibility for Lawyers by drafting a will in which he was named as a contingent beneficiary. In reaching its determination, the Court was cognizant of the fact that the Code did not carry a specific prohibition against the conduct engaged in, stating:

> ... it is obvious the canons cannot contain enough "thou shalt nots" to identify every ethical temptation a lawyer will encounter in his or her practice [citations omitted]. Nor is it unfair to require that one who deliberately goes perilously close to an area of proscribed conduct shall take the risk that he may cross the line.

Behnke, at 843.

The Rules of Professional Conduct which were in effect at the time respondent was busily drafting documents for Sisler, contained a specific "thou shall not", and respondent clearly crossed the line.

Another Iowa case resulted in disbarment. In Committee on Professional Ethics v. Randall, 285 N.W. 2d 161 (Iowa 1979), an attorney drafted a will for a client in which he was named as the sole beneficiary. He was also found guilty of a conflict of interest in a related matter. In ordering disbarment, the court said:

> We have passed from the era in which it can be argued it is professionally acceptable for a lawyer to draw a client's will in his own favor unless undue influence can be shown. We made this clear in Behnke, 276 N.W.2d at 844.

Randall at 165.

This same progression of law and corresponding discipline has taken place in Florida. Prior to January 1, 1987, the problem of attorney/beneficiaries was controlled by the Code of Professional Responsibility which did not contain a specific prohibition against an attorney naming himself as a beneficiary. The same problems and concerns experienced in other states were experienced in Florida as well. Under the controlling case law, a gift or testamentary devise to the donor's attorney was so repugnant that a stringent set of prerequisites was established to test the gift's validity. Crane v. Stulz, 136 So. 2d 238 (Fla. 2d DCA 1961); Ritter v. Shamas, 452 So. 2d 1057 (Fla. 3d DCA 1984). In The Florida Bar v. Novak, 313 So. 2d 727 (Fla. 1974), which was prosecuted under the Code of Professional Responsibility (which did not contain a specific prohibition), an attorney received a public reprimand for preparing a client's will in which he was beneficially named and a client's trust which provided that he was to take possession of the client's assets.

On January 1, 1987, the Rules of Professional Conduct, as promulgated by this Court became effective. Rule 4-1.8(c) provides as follows:

> Gifts to Lawyer or Lawyer's Family. A lawyer shall not prepare an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, except where the client is related to the donee.

The rule is fleshed out in the accompanying comment, which provides:

> A lawyer may accept a gift from a client if the transaction meets general standards of fairness. For example, a simple gift such as a present given at a holiday or as a token of appreciation is permitted. If effectuation of a substantial gift requires preparing a legal instrument such as a will or conveyance, however, the client should have the detached advice that another lawyer can provide. Paragraph (c) recognizes an exception where the client is a relative of the donee or the gift is not substantial.

The Florida Bar is unaware of any published opinion decided under Rule 4-1.8(c) which would provide guidance in deciding upon a sanction in this case. In The Florida Bar v. Miller, 555 So. 2d 854 (Fla. 1990), an attorney named himself as a contingent beneficiary in a will; he ultimately received $200,000. However, the court noted that Rule 4-1.8(c) was not in effect at the time that the will was drafted, and imposed a public reprimand. In justifying the sanction, the court also stated:

> We recognize the abundant mitigating circumstances here. Miller apparently did not ever expect to become a beneficiary. He did not originate the idea of naming himself in the will and did not attempt to influence his client to do so. He had developed a close personal and professional relationship with the client.

Miller, at 855. Finally, the court pointed out that, were it not for the significant mitigating factors, "the discipline might be more severe."

In The Florida Bar v. Rule, 601 So. 2d 1179 (Fla. 1992), another case decided based on a will drafted prior to the effective date of Rule 4-1.8(c), an attorney drafted a will in which both he and his sister were named beneficiaries. The attorney also violated various trust account rules. The court approved a ninety-one day suspension, and entered a judgment for costs, notwithstanding the existence of numerous mitigating factors.

While the Bar is unaware of any reported case adjudicated pursuant to Rule 4-1.8(c), a case which arose from a violation of that rule was presented to the court via an uncontested petition for resignation for three (3) years with leave to reapply. The case was styled as The Florida Bar v. Rhinehardt, No. 78,601. The attorney in that case admitted that he "unwittingly violated the rule prohibiting the drafting of an instrument giving him a gift ... ." This Court approved Rhinehardt's petition, effective November 4, 1991. That case is similar to the case at bar predicated upon respondent's position that he never meant to benefit personally, notwithstanding the language utilized in the documents.

At the time that Malcolm Anderson first began drafting Mary Sisler's wills and trust instruments, Rule 4-1.8(c) had been in effect for almost two (2) years. However, over the next two years, Anderson drafted not one but a series of documents utilizing pristine language which indicated progressively larger bequests to himself, his wife, or the survivor, "per stirpes".

Respondent claimed and the referee found, that Anderson did not intend to benefit personally from any of the bequests. Even assuming that fact is true, it is, at best, a mitigating factor and is more than offset by the egregious nature of respondent's ongoing pattern of misconduct over a substantial period of time. The potential for breaching the trust and confidence of elderly or otherwise vulnerable clients is virtually unlimited but for the existence of the specific "thou shall not" set forth in Rule 4-1.8(c). To permit an attorney to violate repeatedly the specific prohibition set forth in the rule and escape with a public reprimand not only leaves the door ajar, it leaves it swinging wide open; and through that swinging door will march a

parade of unethical attorneys who, if challenged or caught in violation of the rule, will merely say they did not intend to benefit personally. The benefits to be reaped from a violation of the rule, if not challenged or detected, may be well worth the risk of a public reprimand. This Court must firmly close and lock the door by imposing a sanction which will deter the temptation to violate the rule and send a message to Florida's lawyers that the consequences of violating the rule are not light.

B. Florida's Standards for Imposing Lawyer Sanctions

Standard 3.0 sets forth the factors to be considered when imposing discipline as follows:

(a) the duty violated;

(b) the lawyer's mental state;

(c) the actual or potential injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors.

The Commentary to Standard 3.0 provides additional guidance:

> ... a lawyer's misconduct may be a violation of a duty owed to a client, the public, the legal system, or the profession. The lawyer's mental state may be one of intent, knowledge, or negligence. The injury resulting from the lawyer's misconduct need not be actually realized; in order to protect the public, the court should also examine the potential injury caused by the lawyer's misconduct ... .

Anderson owed a fiduciary duty to his client, Mary Sisler; he owed her sound legal advice; and he owed her the ability to draft her legal documents in accordance with her wishes and in such a way as to avoid an attack on or challenge of those documents. Respondent fulfilled none of those obligations. Rather, his "drafting errors" invited and in fact precipitated a challenge to the documents he drafted.

As to respondent's mental state, the referee adopted respondent's explanation that he did not intend to benefit personally from any of the bequests. The referee also referenced respondent's "errors", his "negligence", and his "inartful drafting of testamentary documents". (RR 5). While the lawyer's mental state is a factor, it is but one of the four factors to be considered. Therefore, it is respectfully submitted that the referee erred in focusing solely on respondent's intent.

The third factor to be considered is the actual or potential injury caused by the lawyer's misconduct. The actual injury caused by Anderson's misconduct has been previously demonstrated in some detail. In each of the three counts in which respondent was found to have committed rule violations, the referee also found that "potential injury to the legal system or the legal profession was reasonably foreseeable." Conduct such as that engaged in by respondent is repugnant and provides the legal profession's detractors with powerful ammunition. Thus, respondent not only breached the duties owed to his client, he breached the duty he owes the legal profession to abide by the rules governing lawyer's conduct, regardless of his expressed intentions. Even assuming the referee's findings that respondent did not intend to benefit personally when he repeatedly drafted bequests to himself and/or his family members is correct, the end does not justify the means, particularly in light of the injury, both actual and potential, which resulted.

The final factor to be considered is the existence of aggravating or mitigating factors. The existence of aggravating and mitigating factors was not specifically addressed by the referee. From the information included in "Personal History and Past Disciplinary Record" (RR 4-5), it appears that of

the thirteen (13) factors set forth in Standard 9.32 which may be considered in mitigation, three (3) may apply:

(a) absence of a prior disciplinary record;

(b) absence of a dishonest or selfish motive;

(l) remorse

Of the ten (10) factors set forth in Standard 9.22 which may be considered in aggravation, it appears the referee may have acknowledged only (i) substantial experience in the practice of law, predicated upon respondent's admission to the bar in 1966. The bar respectfully submits that additional aggravating factors are applicable and were either overlooked or ignored by the referee. The additional aggravating factors include the following:

(c) a pattern of misconduct;

(d) multiple offenses;

(h) vulnerability of victim.

CONCLUSION

Whether respondent violated certain rules promulgated by this Court is not the issue in this case. Respondent admitted his misconduct, and the referee found specific rule violations. The issue to be determined is whether the discipline recommended by the referee is appropriate. Clearly it is not. Anderson's misconduct not only brought discredit to him but to the entire legal profession and caused substantial harm to his client as well as the intended objects of her bounty.

In The Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1993), an attorney received a public reprimand for his negligent failure to appreciate applicable law which resulted in no real damage to the client other than embarrassment. Respondent's conduct is far more pernicious and warrants nothing less than a suspension for 91 days and payment of all costs incurred by the bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Initial Brief of The Florida Bar have been sent by U.S. mail to Louis M. Silber, Esq., Attorney for Respondent, 400 S. Australian Ave., Suite 855, West Palm Beach, FL 33401-5045; to Marjorie Gadarian Graham, Esq., Appellate Counsel for Respondent, Northbridge Centre, 515 N. Flagler Drive, Suite 1704, West Palm Beach, FL 33401-4329; and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 4th day of October, 1993.

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