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)

REPLY BRIEF OF THE FLORIDA BAR

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REPLY AND COUNTERSTATEMENT OF RESPONDENT'S STATEMENT OF THE CASE AND FACTS

The bar wishes to address and clarify a number of facts and/or issues set forth in Respondent's Statement of the Case and Facts. Therein, the respondent acknowledges "the serious threat of bankruptcy" (Respondent's Brief 5) faced by the Festival and the fact that "bankruptcy seemed inevitable" (Respondent's Brief 7) and uses the Festival's financial woes as the reason for his "drafting errors". Both the record and respondent's brief fail to address what would have happened to the funds if the Festival had in fact gone bankrupt. Only one of two things could have happened: the money would have gone to the Festival's creditors or Anderson would have kept it. Either way, Sisler's alleged intent would have been frustrated.

Respondent claims the $100,000 bequest to him (first mentioned in the Third Amendment, September, 1989, Bar Exhibit 4) was to be used to purchase an annuity for the Festival. Respondent further claims he drafted documents to include Ameritrust as a successor or co-trustee in order to obtain their expertise and to set up an annuity for the Festival. (Respondent's Brief 5 - 6) Once again, the record is devoid of any evidence that respondent even discussed establishing an annuity with Ameritrust prior to Sisler's death. Nor is there any evidence that an annuity was ever purchased between 1989 and Sisler's death a year later.

Respondent's claim that he "mistakenly neglected to delete the words 'per stirpes' from his form" (Respondent's Brief 7) is not supported by the record. Even a cursory review of the distribution clauses of the various documents drafted by respondent reveals that the "per stirpes" language was added rather than deleted. Respondent never utilized the term "per stirpes"

until the final document (Bar Exhibit 7). Of particular significance is the fact that the "per stirpes" language was utilized by respondent in only one document and in connection with gifts to only two of the multiple beneficiaries - Anderson and his wife and Ammann and his wife.

ARGUMENT IN REPLY TO RESPONDENT'S ANSWER (Addressing Respondent's Point I)

The referee's finding as to Count I of the bar's complaint is not only not supported by the evidence, it is in direct conflict with the evidence. The reasons for the bequest are irrelevant. Anderson admitted that the bequest was to benefit him and that there were no other secret or hidden purposes. The referee's finding that Anderson was attempting to shield a gift from the reach of creditors of an intended beneficiary is not supported by any evidence whatsoever.

Notwithstanding respondent's position that the document (Bar Exhibit 2) was destroyed on the same day it was executed, the record is devoid of any explanation of why respondent continued to reference it in numerous subsequent documents he drafted (Bar Exhibits 3, 4 and 5) other than his testimony that it was a mistake.

ARGUMENT IN REPLY TO RESPONDENT'S ANSWER (Addressing Respondent's Point II)

Respondent's argument appears to be that no injury occurred as a result of his ethical violations, but if it did, it was not his fault. Respondent attempts to place the blame on Neil Chrystal, the attorney for one of the co-trustees. What respondent fails to understand or acknowledge is the fact that

but for his own actions, the Ameritrust litigation would not have been necessary.

Respondent's reliance on the actions of Chrystal as the cause of injury is sorely misplaced. The record contains no evidence of wrongdoing by Chrystal or his client, and his fees were approved by the court. There is no evidence that the Ameritrust litigation was frivolous, brought in bad faith or improperly handled in any manner.

The impropriety of the argument set forth in the last paragraph on page fifteen (15) of the respondent's brief has been addressed in the bar's motion to strike filed herewith and merits no further comment beyond stating that the record is devoid of any evidence that Sisler ever directed respondent to omit Olie and Norris Thompson as beneficiaries of the trust.

ARGUMENT IN REPLY TO RESPONDENT'S ANSWER (Addressing Respondent's Point III)

In his attempt to distinguish the cases originally cited by the bar, respondent either overlooks or ignores the most significant fact. None of the cases decided by this court have been predicated upon conduct which occurred after the promulgation and enactment of Rules Regulating The Florida Bar 4-1.8(c). All of the respondent's misconduct occurred long after the rule had been enacted, and he admitted he knew it was wrong to draft a document in which he was a beneficiary; yet he continued to do so. It is the repetitive nature of respondent's misconduct which is so patently offensive.

The record and respondent's brief are replete with admissions of mistakes and negligence. Respondent claims that had he been charged with incompetence, he could and would have produced evidence of his overall

competence in the area of wills and trusts. These arguments are inconsistent. His entire defense of the Sisler debacle was a series of "mistakes" over a substantial period of time, yet he advances the theory that he is or was competent in drafting other wills and trusts. The only reasonable inference to be drawn from respondent's arguments it that he simply made a series of mistakes in Sisler's documents, almost all of which on their faces enured to respondent's benefit, but that he was competent in drafting wills and trusts for other clients. During the time respondent was making his series of mistakes in Sisler's documents, he was receiving a relatively large monthly retainer, he received a personal loan from Sisler, and he obtained a seat on the board of directors of the Palm Beach Festival as a direct result of Sisler's generosity. Whatever the reason for respondent's "drafting errors", his client was ill served while he benefited both financially and in terms of his stature in the community.

The documents respondent drafted for Sisler's signature and the language utilized therein speak for themselves and are the most compelling evidence available. Under the facts and circumstances, a public reprimand is not sufficient to deter similar conduct by other lawyers or to protect the public and the legal profession.

CONCLUSION

The referee's findings on one count of the complaint are contrary to the evidence, real and substantial harm was caused solely by respondent's commission of clearly prohibited conduct, and a public reprimand for his repeated ethical violations is simply inappropriate.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply 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 A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 9th day of December, 1993.

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