

**FILED**

SID J. WHITE

JUN 1 1993

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,

Supreme Court Case  
No. 80764

~~CLERK, SUPREME COURT~~

BY ~~Chief Deputy Clerk~~

Complainant,

v.

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

MALCOLM ANDERSON,

Respondent.

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

May 3, 4, 5, 6, and 7, 1993.

The following attorneys appeared as counsel for the parties:

For the Florida Bar Luain T. Hensel  
For the Respondent Louis M. Silber

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to Count I

The Respondent is charged with violating Rule 3-4.2, Rule 4-1.2(e), and Rule 4-1.8(c), Rules of Professional Conduct, by the act of naming himself as a beneficiary, to receive a substantial gift, in a testamentary document which he drafted for a client.

The evidence clearly supports a finding that the Respondent did violate said Rule 3-4.2, Rule 4-1.2(e), and Rule 4-1.8(c), and he has readily admitted his error in doing so. 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.

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.

#### As to Count II

The Respondent is charged with violating Rule 3-4.2, Rule 4-1.(e), and Rule 4-1.8(c), Rules of Professional Conduct, by the act of naming himself as a beneficiary, to receive a substantial gift, in a testamentary document which he drafted for a client.

The evidence clearly supports a finding that the Respondent did violate said Rule 3-4.2, Rule 4-1.2(e), and Rule 4-1.8(c), and he has readily admitted his error in doing so. 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.

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.

#### As to Count III

The Respondent is charged with violating Rule 3-4.2, Rules of Professional Conduct, by the act of naming himself a beneficiary "to be used in his discretion, to establish a Mary Sisler Law Scholarship Fund at the University of Florida."

The evidence supports a finding that this bequest may have been clarified and more artfully drafted. No real injury resulted and there was no intent to defraud. The Respondent is not guilty of a Rule violation.

#### As to Count IV

The Respondent is charged with violating Rule 3-4.2, Rule 4-1.2(e), and Rule 4-1.8(c), Rules of Professional Conduct, by the act of naming himself and his wife, Nancy Anderson, or the survivors of them, as beneficiaries to receive a substantial gift in a testamentary document which he drafted for a client.

The evidence clearly supports a finding that the Respondent did violate said Rule 3-4.2, Rule 4-1.2(e), and Rule 4-1.8(c), and he has readily admitted his error in doing so. 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.

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.

As to Count V

The Respondent is charged with violating Rule 3-4.2, Rule 4-1.7(b), Rule 4-1.16(a)(1), and Rule 4-8.4(a), Rules of Professional Conduct, by creating for himself a conflict of interest. Respondent served as a member of the Board of Directors for Palm Beach Festival, the ultimate and intended beneficiary of his client's bequest.

The evidence supports a finding that there was no real conflict of interest. No injury resulted.

The Respondent is not guilty of a Rule violation.

As to Count VI

The Respondent is charged with violating Rule 3-4.2, Rule 4-8.4(a), and Rule 4-8.4(c), Rules of Professional Conduct, by attempting to defraud the creditors of Palm Beach Festival.

The evidence clearly supports a finding that the Respondent did not violate Rule 3-4.2, Rule 4-8.4(a), and Rule 4-8.4(c). It is the Referee's finding that the Respondent did not attempt or intend to defraud; rather, he was endeavoring to carry out the intention and desire of his client.

The Respondent is not guilty of a Rule Violation.

III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the complaint I make the following recommendations:

As to Count I

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations of Rule 3-4.2, Rule 4-1.2(e), and Rule 4-1.8(c), to wit: 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.

As to Count II

I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations of Rule 3-4.2 and Rule 4-1.8(c), to wit: 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.

As to Count III

I recommend that the Respondent be found not guilty and specifically that he be found not guilty of violations of Rule 3-4.2, Rule 4-1.2(e), Rule 4-1.8(c), and Rule 4-8.4(a).

As to Count IV

I recommend that the Respondent be found guilty and specifically that he be found guilty of violations of Rule 3-4.2, Rule 4-1.2(e), Rule 4-1.8(c), and Rule 4-8.4(a), to wit: 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.

As to Count V

I recommend that the Respondent be found not guilty and specifically that he be found not guilty of violations of Rule 3-4.2, Rule 4-1.7(b), Rule 4-1.16(a)(1), and Rule 4-8.4(c).

As to Count VI

I recommend that the Respondent be found not guilty and specifically that he be found not guilty of violations of Rule 3-4.2, Rule 4-8.4(a), and Rule 4-8.4(c).

IV. Recommendations as to Disciplinary Measures to be Applied: Upon these findings of guilty, as to Counts I, II, and IV, I recommend that the Respondent receive a public reprimand and be placed on probation for a period of not less than six months nor more than one year, as provided in Rule 3-5.1(c), Rules of Discipline, and Rule 3-5.1(d), Rules of Discipline.

The terms of the probation recommended are as follows: That the Respondent complete a minimum of 8 hours of C.L.E. studies which shall include at least 3 hours of Wills and Trusts, writing or drafting; 3 hours of Estate Planning; and 2 hours of Ethics. Approval of such C.L.E. studies to be made by the Florida Bar.

Having found the Respondent not guilty as to Counts III, V, and VI, no discipline is recommended.

V. Personal History and Past Disciplinary Record: After findings of guilty as to Counts I, II, and IV and prior to recommending discipline pursuant to Rule 3-7.6(k)(1)(4), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 68 years  
Date admitted to Bar: 1966  
No prior disciplinary measures or actions are known.  
Other personal data: Malcolm Anderson presented himself as honest, remorseful, and apologetic for the results of his errors, his negligence, and for any inartful drafting of testamentary documents.

VI. Statement of Costs and Manner in Which Cost Should be Taxed: I find the following costs were reasonable incurred by The Florida Bar.

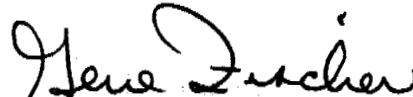
All costs itemized on the INTERIM STATEMENT OF COSTS, filed by The Florida Bar, dated May 27, 1993, totalling \$3,717.10.

The cost for transcripts of the final hearing is not available. However, upon the filing of an affidavit by bar counsel, such transcript cost should be included as a necessary and reasonable cost item.

Further, it is apparent that other costs have been, or may have been incurred, by reason of the appointment of a Senior Judge to serve as Referee, by order of the Chief Justice, Supreme Court of Florida, entered January 6, 1993.

It is recommended that all such costs and expenses should be charged to the Respondent.

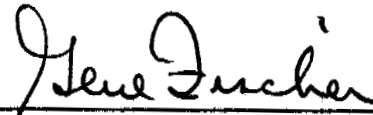
Dated this 28<sup>th</sup> day of May, 1993.



Referee

Certificate of Service

I hereby certify that a copy of the above report of Referee has been served on Luain T. Hensel at 5900 N. Andrews Ave., Ste. 835, Ft. Lauderdale, FL 33309; Louis M. Silber at 400 S. Australian Ave., #855, West Palm Beach, FL 33401; and Staff Counsel, The Florida Bar, 650 <sup>W</sup>Apalachee Parkway, Tallahassee, Florida 32399-2300 this 28 day of May, 1993.



**FILED**

SID J. WHITE

JUN 1 1993

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

SUPREME COURT CASE  
NO. 80,764

FLORIDA BAR CASE  
NO. 91-50,494

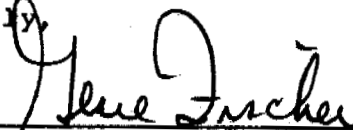
Sid J. White, Clerk Supreme Court  
Supreme Court of Florida  
500 S. Duval Street  
Tallahassee, Fl 32301-8167

Dear Mr. White:

The transcript of the Final Hearing in the above Bar Case will be forwarded to your office for filing within the next several days.

The Fort Lauderdale office of The Florida Bar, Luain T. Hensel, Assistant Staff Counsel, will attend to such filing.

Sincerely,



\_\_\_\_\_  
Gene Fischer, Referee

**FILED**

SID J. WHITE

JUN 10 1993

CLERK, SUPREME COURT.

By \_\_\_\_\_  
Chief Deputy Clerk

June 7 , 1993

Sid J. White, Clerk  
Supreme Court of Florida  
500 S. Duval Street  
Tallahassee, FL 32399-1927

RE: The Florida Bar v. Malcolm Anderson  
Supreme Court Case No. 80,764  
The Florida Bar File No. 91-50,494(15B)

Dear Mr. White:

Enclosed herewith please find a revised page four of the Report of Referee recently sent to the Court in the above referenced matter. Upon receipt of it, counsel for the parties discovered a typographical error which creates an ambiguity. At the suggestion of the parties, I have opted to provide the Court with a corrected page and hereby request that the enclosed page four be substituted for the prior page four.

Should you have any questions or need anything further, please do not hesitate to contact me.

Very truly yours,



H. EUGENE FISCHER  
Referee

HEF/aak

cc: Louis M. Silber, Attorney for Respondent  
Luain T. Hensel, Attorney for The Florida Bar