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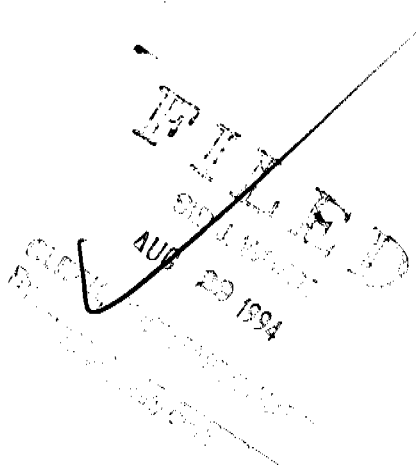

IN THE SUPREME COURT OF FLORIDA

CASE 81,981

TFB 92-11532(12C)

THE FLORIDA BAR,

Complaintant,

vs.

JAMES ALFRED GARLAND,

Respondent.

AMENDED

INITIAL BRIEF OF RESPONDENT

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CITATION OF AUTHORITIES

PRELIMINARY STATEMENT

The Respondent, James A. Garland, will be referred to as Respondent or by name. The Complainant, The Florida Bar, will be referred to by its formal name.

All references to a record on appeal will refer to the transcript of the hearing before the Referee dated January 27, 1994, and January 28, 1994, and will be referred to as (T-) followed by the designated page of the transcript. All references to the Appendix will be referred to as (A-) followed by the designated page.

STATEMENT OF FACTS AND CASE

The Florida Bar filed an Amended Complaint in this cause on October 4, 1993 (A 1). Hearing was held in Collier County before the Honorable Brenda C. Wilson, County Judge, Designated Referee on January 27, 1994, and January 28, 1994. The Report of the Referee initially did not contain any recommendations as to discipline, and subsequent hearing was held on this aspect of the case. The Report of Referee (A 2) was issued, dated May 19, 1994. This appeal is from that report and is timely filed.

Respondent was appointed Personal Representative of the Estate of Lois Locke in July, 1991. He also served as attorney for the Personal Representative.

The initial Inquiry/Complaint form was initiated by one of two residuary beneficiaries in the Estate of Lois Locke. Prior to closing the estate, Respondent prepared an accounting of time for the services rendered by him as personal representative and as attorney for the estate. The estate consisted of assets valued at approximately $592,000.00 (T 19 and 127). Attorneys fees incurred were $22,837.50, and personal representative fees were $4,692.00

(T 284 and 291), according to the testimony of Pedro Pizarro, accountant for The Florida Bar.

The facts reflect that Respondent was attempting to initiate a computerized time record system (T 35-37). The computer print out appeared not to be accurate (T 66, T 229, T 238, T 239, T 240, T 244).

Poppy Hyre was called as a witness by The Florida Bar. She testified she was the Secretary for Respondent in charge of probate (T 206). She found the inaccuracies in the computer time accounting and drew them to Respondent's attention (T 238). She then attempted to reconstruct the time accounting from the records in the file (T 215, 218). Subsequent to her reconstruction, Respondent and Mrs. Hyre went over her hand written notes (Exhibit 3 and 4) (T 218, 242). The final accounting forwarded to the beneficiaries differs greatly from the computer accounting in that it contains many entries not in the computer accounting, but reflected in the Respondent's file (T 222).

It is the position of The Florida Bar that the time reflected in the final accounting was inflated to justify the fees charged. It is the position of the Respondent, substantiated by the testimony of Mrs. Hyre, that the reconstruction was a good faith effort to make an accurate accounting (T 244), and was not done to justify fees (T 232, 245).

The initial computerized accounting reflects entries for secretaries time. These are not reflected on the final accounting, and there was no charge for secretary time on the accounting forwarded to the beneficiaries (T 207).

Mrs. Hyre was no longer working for Respondent at the time of testimony (T 205).

The testimony of Respondent supports this testimony of the secretary as to preparation of the accountings. This secretary and the Respondent were the only parties testifying as to how the final accountings were prepared.

Respondent forwarded the final accountings for attorney time and personal representative time to the residuary beneficiaries and explained to them the procedure available to have the Probate Court review same, if they objected to the fees (A 3). Both beneficiaries executed a waiver and consent to discharge (A 6). These were presented to the probate court and the estate was closed and the personal representative discharged (A 7).

Within two months one beneficiary complained to The Florida Bar about the fees charged.

It has been the procedure of Respondent when closing an estate, to establish a special account into which funds were deposited to cover such items as final tax return expenses, CPA

fees, etc. (T 153). Monies were, however, transferred into Respondent's general account. Respondent did not discover this until subsequent events drew it to his attention (T 170-171).

John Stagg, one of the residuary beneficiaries, subsequently learned that he had received $4,000.00 less than his brother. The reason for the disparity was that the beneficiaries had requested a partial distribution in that amount to Keith Stagg (the Complainant's brother) which had been paid (T 184). The Respondent paid John Stagg an additional $4,000.00 to equalize the beneficiaries (T 185).

John Stagg filed a Complaint with The Florida Bar. The Florida Bar subsequently filed a Complaint alleging various violations by the Respondent in his handling of the Locke Estate. The Respondent, in communicating with the Designated Reviewer for the Local Grievance committee, erroneously indicated that the $4,000.00 paid John Stagg came from the Estate's special account and that the account, after the payment, contained $1,093.30. In fact, the special account was subsequently established in which Respondent deposited the remaining $1,093.30 (T 172 and Exhibit 23).

Expert testimony as to attorneys fees was presented through Mr. Joe B. Cox, who is an attorney in Collier County, where the hearing was held. Mr. Cox admitted to an absence of knowledge

as to probate proceedings in Manatee County, where the estate was filed (T 122). Mr. Cox did testify that a resonable fee would have been in the range of fifteen to eighteen thousand dollars.

The report of the referee includes findings that actions were taken by Respondent to justify fees and that the accounting was false.

Based on the findings of the Referee as reflected in the Report of Referee (A 2), the Referee found Respondent guilty of violation of rules regulating The Florida Bar, and recommended three years suspension, in addition to payment of costs and successful completion of the ethics portion of The Florida Bar examination.

SUMMARY OF ARGUMENT

This disciplinary proceeding evolves from the charge by Respondent of attorney fees and personal representative fees in probate proceedings. The estate was filed in Manatee County and involved assets valued at approximately $592,000.00 (T 19, 20 and Complaint of Mr. Stagg). Total fees charged were $22,837.50 for attorney fees and $4,692.00 for personal representative fees (T 284 and 291). This total amount is well within the present fee guidelines.

Accountings for time of personal representative and attorney fees were provided to the two beneficiaries of the estate. A Consent to Discharge was signed by both beneficiaries (A 5) and the probate estate was discharged (A 6).

No consideration was given by The Florida Bar or the Referee to the Consent or the Order of Discharge in Probate, which Order directly impacted attorney and personal representative fees.

After the order discharging the estate, one of the beneficiaries filed a Complaint claiming that the fees were excessive. The Florida Bar alleged that the accountings misrepresented the time spent in the handling of the estate, and that they were increased to justify the fees. The testimony of the witness for The Florida Bar, Mrs. Hyre reflects that she reconstructed the accountings from the file after finding that a

computerized accounting was in error. Mrs. Hyre was the probate secretary for Respondent. The accountings were not done to try and justify the fee (T 54-56, T 189, 190, 244).

The Referee, after hearing on the issues, found the Respondent guilty of five violation of rules regulating The Florida Bar. This Report of Referee is flawed in that none of the violations are based on clear and convincing evidence, and many are contrary to the facts presented in the transcript of proceedings.

In addition, the Referee recommended three years suspension for these violations, which is very excessive when viewed in the light of an attorney who has served twenty-nine years without any prior disciplinary violations.

ARGUMENT

I

THE REFEREE'S FINDINGS ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND ARE CONTRARY TO THE EVIDENCE

The referee has recommended that the Respondent be found guilty of the following violation of the Rules Regulating The Florida Bar:

Rule 4-1.5(a)(1)(2) (Illegal, Prohibited, or Clearly Excessive Fees); rule 4-8.1(a) (knowingly make a fale statement of material fact in connection with a disciplinary matter); Rule 4-8.4(c) (engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 4-1.15(a) (Clients' and Third Party Funds to Be Held in Trust); and Rule 5-1.1 (Trust Accounts).

The recommendations of the Referee concerning Rule 4-1.5(a)(1)(2), Rule 4-8.1(a) and Rule 4-8.4(c) are not supported by competent substantial evidence, and, in some instances, the specific findings of fact were not only <u>not</u> proven by clear and convincing evidence, they are contrary to the evidence. The recommendation that the Respondent be found guilty of violating those rules should be rejected. The recommendations of the Referee concerning violations, although technical, of Rule 4-1.15(a) and

Rule 5-1.1 are supported by the evidence; however, such violations were not intentional.

A.

Rule 4-1.5(a)(1)

Illegal, Prohibited, or Clearly Excessive Fees

The Florida Bar alleged that the Respondent charged an excessive fee that exceeds a reasonable fee to such a degree that it constituted clear, overreaching. The Florida Bar challenged as excessive, not the amount of the attorney fees and personal representative fees, but the total of the attorney fees and the personal representative fees (T 122 and 123).

The Referee has recommended that the Respondent be found to have violated Rule 4-1.5(a)(1). The Findings of Fact supporting that recommendation, numbers 5,7, 14, 15 and 17, were not proven by clear and convincing evidence, and the recommendation and findings are not supported by competent, substantial evidence. Finding of Fact number 17 and the testimony of Joe B. Cox, Esquire, is critical to the Referee's recommendation to this Court. Mr. Cox is a Board Certified Attorney in wills, trusts, estates, and taxation (T 119). He is a member of the highly esteemed firm of Cummings and Lockwood (T 118). The firm is comprised of seven partners, fifteen associates, six paralegals, and support staff (T 139) with offices in Naples, Collier County. The parties stipulated that the

hourly rates of $120.00 charged by the Respondent as personal representative and $175.00 as attorney fees were reasonable (T 118). Mr. Cox expressed the opinion that a reasonable fee in this matter (probate) would have been between the range of $15,000.00 and $18,000.00, and the fees of either $27,000.00 or $32,000.00, whichever, were excessive (T 126). This opinion was based upon Rule 4-1.5(b) and a review of copies of papers taken from the Respondent's files, including correspondence, and the legal file of the probate documents, some documents on real estate, some tax return documents, some time record documents, broker's statements, and some bookkeeping documents (T 125). Mr. Cox did not segregate or breakdown his opinion of a reasonable fee between those of a personal representative and those of an attorney. The witness did not testify that the Respondent did not do the work and spend the time shown on his time accounting (T 142), nor did he question that the time had been spent (T 149 and 150). Mr. Cox reviewed the time accounting and indicated various items that he would question (T 130-137). One of those specific items was the Respondent's charge for the preparation for the time accounting, although he conceded that he was unsure of any precedent on the issue (T 136) and that he was unfamiliar with the practice, requirements, and procedures followed in Manatee County. Mr. Cox testified that in his "shop" the majority of the estates could have been handled by one of his

paralegals (T 151). He further acknowledged that the amount of time required to do a given task would differ depending upon the skill and knowledge of the practitioner, and would be reflected in the hourly rate (T 148). Mr. Cox's hourly rate is $200.00 an hour (T 139).

The facts reflect that the time placed on the accountings for personal representative and attorney were indeed spent on the estate (T 244).

Mr. Cox said there were times he would have questioned if turned in by an associate (T 130). He admitted he was not testifying that Respondent did not spend the time reflected in the accounting (T 142 and 148).

The Respondent's attorney fee, after refunds, was $22,837.50, and his personal representative fee was $4,692.00 (T 284 and T 291). This was based on an estate of $592,000.00. Comparing the work of the Respondent with that of Mr. Cox is like comparing the provarbial silk purse with a sow's ear. The Respondent believed the time indicated on his accounting was reasonably correct (T 244). It might further be noted that absent from the testimony or consideration by the Referee is any reference to Section 733.617 and Section 733.6171, Florida Statutes (1993), or their predecessors which addressed the manner on which

reasonable fees to personal representatives and attorneys are to be determined. Under those statutes (effective October 1, 1993), a minimum fee, based solely on the value of the estate alone would have been $12,000.00 for the personal representative, and $18,000.00 for the attorney, and would have been presumed to be reasonable compensation.

The Respondent was a sole practitioner during the times material to these proceedings and had no paralegals. There is no question but that Mr. Cox could have performed the probate of the estate with the assistance of his experienced staff more speedily and cost effectively. However, that fact and Mr. Cox's questioning of specific items on the accounting does not constitute a definite and firm conviction that the fee exceeds a reasonable fee to such a degree as to constitute clear overreaching or unconscionable demand which is the standard against which the Respondent's conduct must be measured.

B

Rule 4-1.5(a)(2)

Illegal, Prohibited, or Clearly Excessive Fees.

The Florida Bar alleged that the Respondent prepared an accounting of his time which contained misrepresentations as to the

time in order to justify the $27,529.50 that he had taken as fees during the administration of the estate.

The Referee has recommended that the Respondent be found to have violated Rule 4-1.5(a)(2). The Findings of Fact supporting that recommendation, numbers 4, 8, 9, 10, 11, 12 and 13, were not proven by clear and convincing evidence, and the recommendation and findings are not supported by competent, substantial evidence. The Findings of Fact, numbers 9 and 10, are based on unauthenticated and highly prejudicial hearsay that was erroneously admitted into evidence over the objection of counsel.

The only testimony concerning the manner in which the accounting of the Respondent was prepared is his own and that of his former secretary, Poppy Hyre. The print out from the computer did not distinguish between personal representative and attorney time. The Respondent reviewed the print out and told Ms. Hyre what items were personal representative and what items were attorney time (T 214). Ms. Hyre prepared a breakdown reflecting the division of time (T 215). Prior to typing the breakdown, Ms. Hyre reviewed it again with the Respondent, and that was when they discovered the times were not correct. To prepare the accounting, the Respondent went through the file with Ms. Hyre, and they

reconstructed some of the times (T 216). There were no time sheets used in the reconstruction (T 217 - 218). Ms. Hyre testified, the times just "didn't appear right. So we reconstructed the accounting (T 223)." "I believe that Mr. Garland honestly thought these were wrong, and we increased and decreased the times to what he thought they were. (T 64, T 223 and T 242). We reconstructed it, yes (T 234)." The Respondent testified that he had tried to computerize his time records, but that it had been a disaster (T 28). Some of the time slips were entered and some were entered inaccurately and improperly (29 and 70). The Respondent reviewed the print out in an effort to prepare the accounting (T 35). The time accounting set forth on the print out was so fowled up that he could not rely on it (T 38). Ms Hyre brought to the Respondent's attention that she did not think that the computerized print out reflected the work that was done on the estate (T 330). The Respondent and Ms. Hyre sat down with the files and went through everything to try and make the accounting as accurately as possible (T 54-56 and 71). Most of the items on the computerized printout also appear on the final time accounting (T 63). Some times were increased, some times were decreased, and some were added for work that was not reflected in the print out (T 64). The Respondent testified that he, in good faith, reconstructed the time that had been expended (T 189-190 and 332).

The evidence submitted by The Florida Bar to support its allegations was totally circumstantial, with one exception. Counsel attempted, on a number of occasions, to have Ms. Hyre testify that the Respondent had increased the time accounting to justify the fees which he had received. In an effort to prove that assertion, the Referee allowed The Florida Bar to introduce into evidence, over strenuous objections, Bar Exhibit 25, and, subsequent to the hearing, to submit Exhibit 26 (T 322-325). Exhibit 25 is a letter addressed to Bar Counsel from Joseph F. McFadden, Bar Investigator, relating to a conference between McFadden and the respondent's former secretary, Poppy Hyre. A portion of that letter concerned an interview by Mr. McFadden of Poppy Hyre in which she is related to have stated that she asked Mr. Garland to justify his actions and he stated to her "that he needed to reach the figure of $27,500.00 in the billing" (T 232-233). Ms. Hyre denied having made such a statement (T 232). Exhibit 25 was admitted upon Bar Counsel's representation "..... This is hearsay, no doubt about it, but it's admissible in this proceeding and you can consider it for whatever purpose you want to consider it for." The Exhibit was not offered to impeach the testimony of the witness. As Bar Counsel advised the Referee "It's is being offered solely to show what Ms. Hyre had told my Bar

Investigator. That is the reason it is offered" (T 323). As the Court will note by reference to Findings of Fact Number 10, the Referee has literally used the Exhibit for any purpose she saw fit; namely, to fashion a Finding of Fact based upon hearsay, three times removed from its reputed source, to establish the truth of the matter asserted within the hearsay, i.e., that the Respondent admitted that the times were altered to justify the fees he had taken, even over denial of the statement by Mrs. Hyre (T 232). While it is true that this Court has held that hearsay is admissible, and there is no right to confront witnesses face to face in Bar discipline proceedings, The Florida Bar v. Vannier, 498 So. 2d 896 (Fla. 1986), hearsay in most administrative proceedings, while admissible, is not sufficient in itself to support a finding of act, 120.58(1)(a), Florida Statutes (1993), which is what the referee did. It is not suggested that Bar Counsel should be required to comply with the Florida Evidence Code or that hearsay may not, under the proper circumstances, be admissible in Bar Disciplinary Proceedings. It is, however, suggested that hearsay has never been a basis upon which an administrative finding may be fashioned and that even in disciplinary proceedings, there should be some minimal standard of due process. If determinations may be made based upon evidence of Exhibits 25 and 26, then the existence of witnesses, lawyers,

judges, and the procedures applicable to Bar proceedings are superfluous and should be replaced by a system whereby Bar Investigators simply mail their reports to The Supreme Court, who would then impose sanctions.

The Referee chose to believe the testimony of Mr. Stagg that the Respondent had misrepresented his hourly rate as $120.00 as personal representative and as attorney rather than $175.00 an hour (Findings of Fact No. 8). In light of the Referee's consideration of Exhibit 25, it would have been surprising had she not accepted Mr. Stagg's testimony as accurate. Ordinarily, a finding based on credibility of a witness is presumed to be correct; however, in this cause, Mr. Stagg testified by telephone and the Respondent's credibility was so damaged by the erroneous admission of Exhibit 25, that the recommendation should be rejected. Also, Mr. Stagg knew the monetary amount before executing the waiver.

In addition, it should be noted that the Referee's Findings of Fact in numbers 9d and 9e are erroneous and contrary to the testimony. While secretaries prepared time sheets, the Respondent did not bill for secretary's time (T31-32, 188 and 207).

C

Rule 4-8.1(a)

Knowingly make a false statement of material fact in connection with a disciplinary matter

The Florida Bar alleged that the Respondent, during the course of the disciplinary proceedings, as support for the fees he had charged, presented the accounting that he had prepared of his time and claimed that he had expended 130.5 hours as attorney and 39.1 hours as the personal representative of the Locke Estate. It further alleged that during the proceedings, the Respondent falsely advised that he retained $5,093.30, of the Locke Estate funds in a special account for payment of taxes, CPA fees, and any other unexpected expenses.

The Referee's recommendation that the Respondent be found to have violated Rule 4-1.8(a). The Findings of Fact supporting the recommendation, numbers 21 and 23, were not proven by clear and convincing evidence, and the recommendation and findings are not supported by competent, substantial evidence.

The substance of Findings of Fact number 23 have been previously addressed in the argument relating to Rules 4-1.5(a)(1) and (2). The Referee's Finding of Fact, number 21, should, however, be addressed.

The Respondent, when contacted in January of 1993 by Steve Brannan, a member of the 12 C Grievance Committee, wrote a letter to the attorney advising that he had retained $5,093.30 in a special account and paid CPA fees, taxes, and any last minute expenses. Respondent indicated in the letter that from the $5,093.30, he paid Mr. Stagg $4,000.00 to equalize the distribution of the estate assets. In fact, the $4,000.00 had been paid from the Respondent's general account. It had been the Respondent's practice to retain a small account in the name of the estate after disbursement for paying any Internal Revenue bills that might come in, for paying the CPA, and also to have an account open for any late monies that might come into the estate. After a reasonable period to clear up all the little loose ends, the Respondent would given an accounting to the beneficiaries and disburse any remaining money (T 153). The Respondent believed that a separate account had been established (T 169-170).

There was a special account established by the Respondent in which $1,093.00 was deposited, but that did not occur until August 5, 1992 (T 172 and Exhibit 23). The $4,000.00 was paid to the beneficiary to adjust an unequal distribution that had occurred in closing the estate in which one of the residuary beneficiaries had been paid $4,000.00 more than he was entitled (T 184). The

Respondent was simply embarrassed to say that he had made an error in failing to account for a partial distribution of $4,000.00 to the beneficiary who was overpaid (T 184 and 194-195).

There is no question but that mistakes were made in the estate. The bookkeeping was sloppy, the employees were less than efficient, and mistakes of judgment may have occurred in the Respondent's communication with the Grievance Committee's representative. However, these facts do not prove that the Respondent deliberately made false representations during the disciplinary proceeding.

D

engage in conduct involving dishonesty, fraud, deceit, or misrepresentation

The Florida Bar alleged that the Respondent prepared time slips for his services to the estate which were imputed into a computer; that the beneficiaries were informed that the Respondent had computerized his time sheets and was keeping very strict time; that one of the beneficiaries asked to be advised of the final estate legal expenses and fees; and that the accounting prepared by the Respondent contained intentional misrepresentations and not based on the time reflected by the computer print out.

The Referee has recommended that the Respondent be found to have violated Rule 4-8.4(c). The Findings of Fact supporting the recommendation, numbers 8, 9, 10, 11, 12, and 13 were not proven by clear and convincing evidence, and the recommendation and findings are not supported by competent, substantial evidence. The Respondent has addressed the basic trust and evidence addressed to the issue in the argument presented in relation to Rules 4-1.5(a)(1) and 4-1.5(a)(2) and need not be restated. The one aspect that should perhaps be addressed is that concerning time slips.

The Respondent's time accounting was not based on the time slips. Those were not retained once the information was placed into the Respondent's computer (T 365). The accounting was based on reconstruction from the file. The Referee's findings of fact in paragraph 11 is somewhat misleading as she has confused copies or duplicates of the time slips (T 26) with carbon copy sheets (T 210).

E

Rule 4-1.15(a)

Clients' and Third Party Funds to Be Held in Trust
and

Rule 5-1.1

Trust Accounts

The Florida Bar alleged that the Respondent, during the course of the representation, transferred funds from the Locke Estate account to his trust account in payment of fees he had at times partially earned and transferred funds from the Locke Estate by paying himself fees from the trust account in excess of the fees he was entitled to receive for the hours of services he provided.

The Referee has recommended that the Respondent be found to have violated Rule 4-1.15(a) and Rule 5-1.1. The Findings of Fact supported the recommendation, to the extent that the recommendation is premised upon the Respondent having charged excessive fees. That issue has been previously addressed in the Respondent's argument concerning Rule 4-1.5(a)(1) and (2). The Referee's Finding of Fact number 24, although based on clear and convincing evidence, is erroneous.

There is no question but that the Respondent transferred estate monies representing fees from the estate account into his trust account, and thereafter transferred fees into his general

account as found in Findings of Fact number 22. This practice was one that was advised to him by a Certified Public Accountant so that there would be a paper trail, and then to determine whether the money was earned fees or trust fees (T 104). There is no question but that the practice was not perfectly performed in the Locke Estate. Fees may have been transferred on at least one occasion prior to them being fully earned; however, such was not intentional violation, and the fees were subsequently earned (T 106).

The Referee in Findings of Fact 24 found that the Respondent still owes the Locke Estate $823.32, which are unaccounted funds. A check in that amount was mailed to the beneficiaries February 22, 1993. That check was returned by Mr. Stagg who originally initiated these proceedings (T 328-329). Although not reflected in the initial record, these funds were paid to the beneficiaries. Testimony to this effect should appear in the hearing on discipline; however, a transcript of same is not available at this writing to the undersigned. Copies of checks no. 12126 in the amount of $823.32 dated April 25, 1994, and no. 12125 in the amount of $329.82 dated April 4, 1994, are attached as composite (A 4). These funds were paid to and received by the beneficiaries.

The actions of the Respondent concerning the transfer of funds may, at worse, constitute a technical violation of the Rules.

II

THE REFEREE'S RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED IS EXCESSIVE

The Referee has recommended that the Respondent be found guilty of the following violations of the Rules Regulating The Florida Bar:

Rule 4-1.5(a)(1)(2) (Illegal, Prohibited, or Clearly Excessive Fees); Rule 4-8.1(a) (knowingly make a false statement of material fact in connection with a disciplinary matter); Rule 4-8.4(c) (engage in conduct involving dishonest, fraud, deceit, or misrepresentation); Rule 4-1.15(a) (Clients' and Third Party Funds to Be Held in Trust); and Rule 5-1.1 (Trust Accounts).

The Referee has recommended that the Respondent be suspended for a period of three (3) years, thereafter until Respondent shall prove rehabilitation and for an indefinite period until Respondent shall complete the following:

> A. Until Respondent shall pay the cost of these proceedings and make restitution to the beneficiaries of the Locke Estate, in the amount of $9,529.50; and (costs = $8,148)
>
> B. Until Respondent shall pass the ethics portion of the Florida Bar examination.

This Court has long held that a bar disciplinary action must serve three purposes: The judgment must be fair to society, must be fair to the attorney, and must sufficiently deter other

attorneys from similar misconduct. The Florida Bar v. Carswell, 624 So. 2d 259 (Fla. 1993) and The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970).

There is no question but that the Referee attempted to formulate a recommended discipline based upon the violations of duties found consistent with this Court's standard and the Florida Standards for Imposing Lawyer's Sanctions.

The Respondent has been a member of the Bar since June 11, 1965, and has never been convicted of a disciplinary violation nor subject to disciplinary measures.

The Referee's consideration of Aggravating Factors, to a large extent, depended upon the correctness of her findings of the various violations of the rules. The factors which were erroneously considered were:

1. Multiple Offenses. Technically, this may be true as there was certainly more than one rule determined to have been violated. Actually, these proceedings primarily concern the issue of whether an excessive fee was charged. The other violations were simply pyramided upon the fee issue.

2. Submission of false statements or deceptive practices during the disciplinary process. This consideration appears to relate to the Respondent's testimony concerning appropriateness of

his fees. While it is true that the Respondent's correspondence to Attorney McFadden was misleading, the Respondent testified candidly concerning that violation.

3. Refusal to acknowledge the wrongful nature of his conduct. This consideration assumes that the Respondent has a responsibility to acknowledge the wrongfulness of his fees which he, in good faith, believes were appropriate. The Respondent has not denied that mistakes occurred in handling the estate.

4. Vulnerability of victims. The Respondent has no idea what evidence exists that would justify consideration of this factor.

5. Indifference to making restitution of excessive fees. This consideration, like Aggravating Factor number 3 assumes that the Respondent has an obligation to acknowledge the unreasonableness of his fees which he believes were appropriate.

The Respondent does not have access to a transcript of the record concerning the penalty phase of the proceedings before the Referee. The Respondent would, therefore, request that the Court review the testimony at that hearing which includes that of the testimony of Circuit Judge Paul E. Logan, who was the Probate Judge during the administration of the Locke Estate.

Although each disciplinary case turns upon the specific facts and circumstances presented, the Respondent believes that the

recommended penalty in this case is excessive. For instance, in The Florida Bar v. Johnson, 526 So. 2d 53 (Fla. 1988), this Court imposed a public reprimand and four years probation in an excessive fee case involving violations of the Trust Accounting Procedures. In The Florida Bar v. Hosner, 513 So. 2d 1057 (Fla. 1987), this Court imposed a public reprimand and probation for violation of trust accounting rules and co-mingling of funds. In The Florida Bar v. Suprino, 468 So. 2d 988 (Fla. 1985), this Court imposed a public reprimand for mishandling of trust funds combined with multiple other improper actions.

One of the difficulties of any Respondent in locating similar attorney discipline dispositions is that Reprimands are often issued, but unpublished. The contents and sanctions approved in such cases, while known to the Bar, are not generally known or available. Another difficulty in locating similar cases is the lack of a current cross index of sanctions imposed in disciplinary proceedings as is required by Chapter 120 of other administrative agencies.

It is respectfully submitted to this Court that after almost thirty years of the practice of law with an unblemished record, it is not appropriate to remove the Respondent's privilege to practice law for three years, and indefinitely thereafter, over what is basically a dispute over the reasonableness of an attorney

and personal representative fee. These were matters that should and could have been more correctly addressed in the Probate Court and not by the Bar's discipline procedures.

The Respondent, therefore, respectfully requests this Court to reject the Referee's recommendation as to disciplinary measures and to impose an appropriate discipline that will allow the Respondent to continue to serve the people of the State of Florida as a practicing member of The Florida Bar.

III

THE FINDINGS AND REPORT OF REFEREE REVERSE THE PRIOR DECISION OF THE CIRCUIT COURT, PROBATE DIVISION

At the close of the Estate of Lois Locke, the beneficiaries were provided with an accounting for actions of the personal representative and attorney. Both beneficiaries executed a Consent to Discharge (A 5). These consents were filed in the probate proceedings and the Circuit Court duly discharged the personal representative (A 6).

Pursuant to Sec. 733.901(5), Florida Statutes:

> "(5) The discharge of the personal representative shall release the personal representative of the estate and shall bar any action against the personal representative, as such or individually, and his surety." (Emphasis added)

In accordance with Fla. Statutes 933.903, the estate may be re-opened in the event further administration is necessary. The Florida Bar was aware of the existence of this Consent for Discharge as it was referenced in the initial Complaint. Due to the fact that the determination of fees in a probate proceeding is a matter exclusively within the jurisdiction of the Probate Division of the Circuit Court, it was incumbent upon The Florida Bar prior to initiating disciplinary proceedings, to require that

the complaining party return to that court for a determination of the validity or invalidity of these fees.

By not requiring this, The Florida Bar should be estopped from questioning these fees. This issue will be developed further in a subsequent point.

The major portion of the finding of the Referee revolved around examination and inspection of these fees. The findings include a finding of exceeding a reasonable fee and intentional misrepresentation of entitlement or amount of fee.

We are now faced with the delimma where one court has entered an Order of Discharge which approved all action in the probate proceedings, including the issuance of fees, and another court, acting as Referee, has declared these same fees to be unreasonable. A dicotomy such as this should not exist in a state governed by due process and makes a mockery of law, order and procedure. What message is The Florida Bar and this court sending to attorneys involved in probate proceedings who attempt to get approval of fees and do receive same upon providing an accounting to the beneficiaries?

The Florida Bar should have referred this case back to the Probate Division of the Circuit Court for a hearing on the reasonableness of the fees.

IV

THE COMPLAINT SHOULD BE BARRED BY THE DOCTRINE OF COLLATERAL ESTOPPEL AND PRIOR CONSENT

It is without question that in this proceeding the complaining party is The Florida Bar and not Mr. Stagg as beneficiary of the estate. However, the document initiating these proceedings is flawed. The Florida Bar must take the facts as presented in total, and the proceedings are flawed ab initio.

Mr. Stagg was barred by the doctrine of estoppel and consent from initiating proceedings by The Florida Bar.

As previously stated, the complaining party, Mr. John Stagg, brought to the attention of The Florida Bar, in his Complaint, the fact that he had executed a Consent to Discharge (A 5). This Consent was executed subsequent to the receipt and review by him of the accountings for time of the personal representative and attorney. He acknowledged that he knew the hourly rate being charged. He had received this information from the secretary upon calling her after receipt of the accountings. (See initial Complaint letter).(A 7) He signed the Consent with full knowledge of the legal fees being charged and within two months claimed he had been quoted differently. He had full knowledge of his right to contest the fees (A 3). He was not in any manner coerced as he was residing in another state.

One of the essentials of estoppel is that the conduct must have been done with the intent that another party should act on it. Booth v. Lenox, (1903) 45 Fla. 191, 34 So. 566. Mr. Stagg executed the Waiver and Consent knowing Respondent would act on same, and the Circuit Court would likewise release the personal representative and close the estate.

The elements of equitable estoppel are (1) a representation as to a material fact that is contrary to a later asserted position (2) reliance on that representation, and (3) a change in position detrimental to the party claiming estoppel caused by the representation and reliance thereon. Kuge v. State, Dept. of Admin., Div. of Retirements, (1984 Fla. App. D3) 449 So. 2d 389.

Certainly Mr. Stagg knew from the letter (A 4) what it was he was signing. Without question he represented consent to the accountings and thereby approval of same. The estate was closed and accountings accepted by the Circuit Court, Probate Division based on his consent. He then took a position contrary thereto in his Complaint, which said position is certainly detrimental to Respondent.

This doctrine is termed "Estoppel by Consent".

Mr. Stagg cannot be heard to claim he had no knowledge of his rights (A 4).

The Florida Bar cannot claim they did not know of this Consent prior to instituting disciplinary proceedings (A 3).

The fact that the complaint was accepted and acted upon by The Florida Bar without question of this inconsistent action by the complaining party, and the fact that the complaint was made to this Honorable Court perpetrates a fraud on this Court.

Intent to defraud this Court can be inferred from the action of John Stagg. The Waiver and Consent to Discharge (A 1) was executed on February 11, 1992. The Complaint is dated as drafted on April 13, 1992. The execution of the Consent was obviously a calculated act by Mr. Stagg to mislead the Circuit Court, Probate Division, and Respondent, James A. Garland, as to his intents. However, he is or should be held to the effect of execution of the Consent. The least that should have been done is for The Florida Bar to require additional proceedings before the Circuit Court, prior to disciplinary actions. In fact, The Florida Bar should have refused to allow the complaintant to take two opposite positions. Mr. Stagg should be held to his position of acceptance of the attorneys fees, and the proceedings should have stopped at that point.

If we allow otherwise, no court order or written consent can ever be relied upon by an attorney in Florida. The Florida Bar is held to the same standards in dealing with attorneys as we are

in dealing with clients. In the case at bar, however, The Florida Bar went behind the written consent and behind the Circuit Court Order of Discharge. It, in essence, made a collateral attack on the Probate Order of Discharge and the Consent that was the basis for same.

The Complaint is improper ab initio, and these proceedings, based on same, must fall accordingly.

Florida law is clear that a release that clearly reflects the intent of the executing party to release the other from liability should be honored. Even if there are problems or defects which are not ascertainable at time of execution of the release, parties should be held to the agreement reached as a result of negotiations. Braemer Isle Condo v. Boca Hi Inc., 632 So. 2d 707 (Fla. App. 4 Dist. 1994).

Thus, when Mr. Stagg executed the Consent and the estate was closed in reliance thereon; upon disclosure of this to The Florida Bar, there should have been a requirement that further probate proceedings be instituted by Mr. Stagg. We cannot have a situation where two courts reach different decisions on the same facts and issues.

In review of the law of Res Judicata, the courts frequently refer to the finality of former adjudication. In this case the Probate Court by discharge approved the fees. No appeal

was taken and no motion was made to re-open the estate. That adjudication stands as a valid order of the Courts of Florida.

The Florida Bar and the Referee acted as if that court order never existed. The parties were identical, the issues identical except for The Florida Bar. There is no question but that this Court must face the issue of Estoppel by Judgment or Res Judicata before allowing The Florida Bar to proceed to question "the total fee that he charged for the services rendered" (T 122). That issue was already determined by the Probate Court.

Even if, as found by the Referee, that the total fee has a defect, the execution of the consent waives the defects. Braemer Isle Condo v. Boca Hi, Inc., 632 So. 2d 707 (Fla. App. 4 Dist. 1994).

A waiver, such as that filed by John Stagg (A 1) is an intentional relinquishment of a known right. Fireman's Fund Insurance Company v. Vogel, 195 So. 2d 20 (Fla. App. 2 Dist. 1967). He knew he had a right to contest the fees (A 4) and chose not to exercise that right. He had no grounds to complain to The Florida Bar, and The Florida Bar had no grounds for proceeding in this case.

CONCLUSION

The initiation of disciplinary proceedings by The Florida Bar was improper due to the waiver signed by complainant, and the approval of the fees by the Circuit Court. The finding of the Referee is in direct conflict with the Order of the Circuit Court Probate Division. The complaining beneficiary should be barred by the doctrine of Res Judicata or Estoppel, and this should impact the complaint brought by The Florida Bar. In addition, the findings are not based on clear and convincing evidence, and in fact are contrary to the evidence. The recommended discipline is too strong in light of the facts.

Accordingly, the Report of the Referee should not be accepted, and this case should be returned to The Florida Bar so that they may require the Complainant to seek his proper remedies in Circuit Court, Probate Division, before any further disciplinary action is commenced, or, in the alternative, this cause should be remanded for a new trial on the facts so the Report of Referee may be presented to this Honorable Court based on clear and convincing evidence in the transcript.

CERTIFICATE OF SERVICE

Amended to mail Brief

I hereby certify that a true copy of the foregoing has been sent by U. S. Mail this 31st day of August, 1994, to Bonnie L. Mahon, Bar Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Suite C - 49, Tampa, Fl. 33607, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Appalachee Parkway, Tallahassee, Fl. 32399-2300.

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