047

2/9

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

GENEVA FORRESTER,

Respondent.

Case No. 82,090
TFB No. 93-10,060(6D)
93-11,031 (6D)

ANSWER BRIEF OF RESPONDENT

Henry P. Trawick, Jr.
Trawick, Valentine & Hagan, P.A.
P. O. Box 4019
Sarasota, Florida 34230
813 366-0660
Fla. Bar 0082069

TABLE OF CONTENTS

	Page
Table of Citations	i
Statement of the Case and Facts	1
Summary of Argument	11
Argument	
Issue 1 - WHETHER THE BAR PRESENTED CLEAR AND CONVINCING EVIDENCE OF RESPONDENT'S GUILT	13
Issue 2 - WHETHER THE RECOMMENDATION DISCIPLINE IS APPROPRIATE?	25
Conclusion	27
Certificate of Service	27

TABLE OF CITATIONS

Cases	Page
The Florida Bar v. Simring, 612 So.2d 561 (Fla. 1993)	13
The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978)	13
Lyle v. Lyle, 167 So.2d 256 (2 D.C.A. 1964)	15
In re Estate of Harrell, 426 So.2d 63 (5 D.C.A. 1983)	15
Zelman v. Metropolitan Dade County, 645 So.2d 57 (3 D.C.A. 1994)	15
Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985)	17
In re Estate of Platt, 586 So.2d 328 (Fla. 1991)	17
In re Lieber's Estate, 103 So.2d 192 (Fla. 1958)	18
Vann v. Hobbs, 197 So.2d 43 (2 D.C.A. 1967)	19
Coggan v. Coggan, 239 So.2d 17 (Fla. 1970)	19
Seaboard Airline Railway v. Scarborough, 52 Fla. 425, 42 So. 706 (1906)	22
Goodman v. West Coast Brace & Limb, Inc., 580 So.2d 193 (2 D.C.A. 1991)	22
Del Monte Banana Co. v. Chacon, 466 So.2d 1167 (3 D.C.A. 1985)	23
Baker v. Air-Kaman of Jacksonville, Inc., 510 So.2d 1222 (1 D.C.A. 1987)	23
Triton Oil and Gas Corporation v. E.W. Moran Drilling Company, 509 S.W. 2nd (1994)	23

Statutes	
733.6171(5) Florida Statutes	15
733.617 Florida Statutes	17

STATEMENT OF THE CASE AND FACTS

Respondent will use the same terminology in this brief as that followed by The Florida Bar in its brief with the addition of "R Ex" referring to exhibits presented by Respondent.

This brief is directed to Count I of the complaint since the Bar has not raised any issue about the findings on Count II or the recommendations for discipline under that count. Respondent raises no such issue.

The essential problem with the Bar's statement of the case and facts is the omission of many facts pertinent to the decision of the referee. It would be difficult and tedious to try to correct these omissions on a line by line basis so Respondent will give her account of the facts.

Before moving to the facts, an important point has been omitted by the Bar. The referee asked the parties to research the question of whether he was bound by the judge's decision in the probate proceeding on the facts found in the proceeding. For differing reasons, both parties agreed that the referee was not bound. (Argument 8-11)

Respondent was employed as attorney for Lillie Haynes as guardian for Sarainne L. Andrews in 1988 and continued in that capacity until Mrs. Andrews's death. After Mrs. Andrews's death Mrs. Haynes, the designated personal representative in the decedent's will, retained Respondent to represent her as personal representative.

Shortly after Mrs. Haynes's appointment as personal representative, she told Respondent she wanted to take an advance

on her personal representative's fee. Respondent said that she would like an advance on her fee as attorney. Mrs. Haynes took $50,000.00 and Respondent took $80,000.00 as an advance. Mrs. Haynes signed both checks. Respondent placed hers in her operating account. Respondent and Mrs. Haynes discussed the Supreme Court decision in Platt. Respondent told Mrs. Haynes of the necessity of keeping time records. (DT 32-46) The fee agreement for Respondent's services was (1) a fee that the residuary beneficiaries agreed to; (2) or a fee that was otherwise negotiated; or (3) a fee that the court approved. (DT 44)

The will left the residuary estate to 13 charitable beneficiaries, but the Bar is disingenuous in its discussion of the will. Specific devises were left to 43 beneficiaries in the will. There was a separate list of tangible personal property to be distributed. (DT 21, 22, 81) This was primarily handled before or after the funeral formalities. (PT 1311) Family members were not happy with the residuary devises so there were consultations with family members concerning challenges to the will. (PT 138-140)

Respondent performed the legal services that were necessary and proper in connection with the estate until her retainer was terminated. Whether legal services were necessary or merely proper (See p.7 of the Bar's brief) is not a decision that the personal representative could make. It was at least a joint decision and may have been a purely legal one. Before the termination the personal representative sought an additional advance on fees for her services and Respondent also asked for a

further advance. The personal representative received $80,000.00 and Respondent received $115,000.00. Respondent deposited the check in her operating account. (DT 75, PT 69) Contrary to the Bar's position on page 5 of its brief, Mrs. Haynes set the fees for both herself and Respondent, knew that she was responsible for the checks that she signed, was informed about the Platt decision. (PT 24, 31, 38, 66, 69) Because of her long experience as guardian for the decedent, she was not the ignorant, naive, elderly, incompetent personal representative pictured by the Bar. (DT 64, 330, 331; PT 9, 11, 31, 36-37, 1206, 1207, 1278-1281) Respondent told Mrs. Haynes repeatedly that she was liable for any payments made from the estate. (DT 35, 77) It is interesting to note that Mrs. Haynes was ultimately paid based on a percentage. (PR-Stip) The fact that the personal representative denied knowledge of her liability is unworthy of belief because of her extensive experience as guardian and was properly rejected by the referee. (PT 27)

The Bar asserts that the fees were paid in advance because Respondent was in financial difficulty. Contrary to the assertion on page 3 of the Bar's brief, Respondent was not having financial problems at the time of the initial advance on fees. The contrived attempt by staff counsel is supported only by an exhibit and the testimony of the discredited witness Bailey. Respondent categorically denied any problems. (DR 79, 143) Bailey was in no position to know. During the controversy in the probate court, Respondent was seriously injured in an automobile accident in

December 1991. (DT 300) This caused her financial problems because she could not work for a time and later only on a limited basis. (DT 109, 193, 221) The Bar seized Respondent's practice while she was in the hospital even though she had an associate. (DT 300-303, 366, 367)

The Bar implies that the authorization agreement referred to on page 4 of its brief was Respondent's idea and that she sent it as an independent exercise. Letters for both attorney and personal representative fees were sent. The letter and proposed fee agreement were extensively revised by Mrs. Haynes before being sent to the beneficiaries. (DT 48-56)

Again, the Bar is disingenuous in its statement on page 4 of the brief that Respondent did not disclose the Platt decision to the beneficiaries in the authorization agreement. Each of them had an attorney. (DT 66, 312, 313) Respondent had no obligation to tell the beneficiaries. Respondent discussed the fees with most of the attorneys. The refusal of some of the residuary beneficiaries to approve the requested fee has no bearing on the advance fees although the Bar's brief on pages 4 and 5 is intended to lead a reader to that conclusion.

After her termination as attorney for Mrs. Haynes, Respondent filed a motion for fees. Much is made of the fact that she claimed a fee that had been rejected by some of the residuary beneficiaries and the requested compensation was based on a percentage of the value of the estate rather than the criteria established by this Court in Platt. An inspection of the motion shows that this

statement is only partly true. Respondent did ask for a "reasonable fee" that was based on a percentage. (PT 535-537) She did not ask for one that was based on the criteria in the rejected authorization. (TFB Exh 13) She attached copies of the authorizations that had been approved by residuary beneficiaries so the court could not have been misled about the number who had agreed. (DT 309, 310; PT 537) This petition for fees was dismissed. (TFB Exh 17) The amended petition asked for fees "...in compliance with Florida Statutes and existing case law." (PT 535-537)

The assumption made on page 6 of the Bar's brief that no necessary tax work had been completed or tax clearances received is incorrect because it is based on an expert witness's testimony that he found no such returns in his examination of the file. Respondent testified that she had sent the necessary information to two certified public accountants. (DD 107, PT 454) She was not retained to prepare the estate tax return. The testimony about the percentage of legal work completed is based on testimony of expert witnesses representing the estate who did not review Respondent's files. The time for distribution to residuary beneficiaries had not arrived. The opinion on page 7 of the brief of staff counsel about the legal and nonlegal services performed shows that staff counsel has not practiced probate law and has no knowledge of what the distinction is between legal and administrative work.

Respondent did not have an unbiased judge as demonstrated by the contempt citation as well as other matters discussed subsequently. (DT 143-149) There was not a shred of evidence that Respondent discussed her testimony at the meeting on July 7, 1991 with her expert witnesses. Both witnesses testified that she did not. (DT 281, 283, 307; PT 870, 1196) Respondent testified she did not. (DT 304-306; PT 909-910) Judge Penick's holding that Respondent was guilty of contempt was wrong as discussed in argument. (Note particularly Judge Penick's statement at PT 900, line 2 and PT 914-934)

Much is made on page 9 of the brief about the work performed by the witness Biggs. Ultimately only 54 hours of Biggs's time was presented to the court as compensable and that is what Biggs said she did. (DT 312; PT 1137, 1139) The only evidence that Biggs was an independent contractor came from her and the witness Bailey. Neither is qualified to make that legal judgment. (DT 293-295)

All of the statements, beginning on page 9 of the Bar's brief, concerning review of the records imply that something is wrong with an attorney reviewing time records to determine if they are accurate. (DT 140-142, 310) This will be discussed further in argument. There is no evidence that any impropriety occurred.

At the probate trial on fees Respondent presented three expert witnesses, Seymour Gordon, Gerald Colen and Gardner Beckett. The parties opposing her fee application presented two experts, Sally Foote and William Reischman. At the trial before the referee

Respondent presented four witnesses, although one of the experts' testimony was limited to the contempt proceeding. The experts on fees were Joseph Lang, Seymour Gordon and John Allen. The Bar presented Louie Adcock only. It is clear from the record that the amount of the fee was an issue in this proceeding, as well as in the probate proceeding. Testimony on fees in the probate proceeding ranged from $12,500.00 and $20,125.00 (PT 1224, 1241, 1262) to $190,000.00 to $150,000.00 (PT 239, 802-815, 1178) while at the disciplinary proceeding the low was $20,970.00 (DT 406, 420 after averaging both of Mr. Adcock's amounts in each instance) to $190,000.00 (DT 372) and an hourly rate of $375.00 an hour (DT 384-386). The Bar's witness in this proceeding said the attorney was entitled to be compensated for personal representative services (DT 423) and, like all probate lawyers, that witness disagrees with the Bar's interpretation of the Platt case that the size of the estate is not a factor.(DT 426)

Judge Penick awarded Respondent's successors as attorney for the personal representative $89,355.00 for the litigation over fees only. He awarded $12,100.50 for fees for the "minor" civil action that was one matter holding up distribution from the estate and an interim fee of $64,851.50 for ordinary services, making a total of $166,307.00. (Appendix 40)

Judge Penick has attempted to set standard fees and has a strong and well publicized viewpoint on probate fees. (DT 386; R Exh 1) Apparently Judge Penick investigated certain matters concerning Respondent on his own during the course of the probate

proceeding that indicated (1) a bias toward Respondent and (2) improper conduct in going beyond the scope of the record presented to him. These dealt with an alleged Internal Revenue Service problem of Respondent and foreclosure of mortgages against her. (DT 143, 144, 79)

One of the fascinating things about the lay witnesses presented by The Florida Bar is that two of the three, Suzanne Bailey and Trudy Fuch, were disgruntled former employees. Bailey was discharged because of an alcohol problem that she first denied and later admitted. (DT 208) She deleted a computer program on Respondent's trust account records from the computer without her employer's knowledge or consent and based only on a statement from another disgruntled employee (Biggs) that the program belonged to Biggs. (DT 202-204, 209, 210) After making a number of statements, other than that about alcoholism, the witness had to confess that most were based on something other than fact and she did not know the facts about which she previously testified. (DT 214-219, 222, 223, 229, 232-234) She said Respondent had financial problems after her accident (DT 221); then before as well; (DT 226) and then that she did not know. (DT 234) The next terminated employee was Trudy Fuch who also had to retract testimony on cross examination about the action that Respondent took or did not take after being retained in the Andrews estate. (DT 237-243) This witness even forgot that she spoke to staff counsel. (DT 241-242)

When Judge Penick entered the order assessing Respondent for the fee excess, Respondent owned substantial property. (DT 146-

149) She tried to arrange a settlement with the estate without success. (DT 148-152) This failure resulted in her seeking bankruptcy protection. The reference to Respondent's bankruptcy proceedings is not correct. Respondent applied for bankruptcy protection so she could continue her practice as a professional association. That is the only way in which she can earn money to reimburse the estate. Logic dictates that the estate would respect this and would try to cooperate with Respondent in making money to pay, but this did not happen. Collection proceedings were continued against Respondent's professional association so that she had to convert the Chapter 11 proceeding into a Chapter 7 proceeding. (DT 130-132, 399-401) Respondent had only the assets she had accumulated in her law practice and that she would later accumulate out of which she could pay the debt. (DT 398) Now the debt to the estate has been paid as admitted by the Bar. Only the interest remains unpaid. The question of whether the personal representative owes Respondent for nonlegal services has not been decided.

On page 11 of its brief the Bar attempts to establish a stipulation between the parties that the Bar had to use the record from the probate proceedings instead of live testimony. This is not supported. The offered stipulation was that the referee could take judicial notice of the probate proceeding to avoid introducing parts of the record as exhibits. The failure by the Bar to present live testimony was its own voluntary undertaking. The offered stipulation did not preclude the Bar from calling any

witness that it wanted to call. (DT 120, 120-127 and particularly 125, line 7-10)

The Florida Bar is so anxious to punish that it even found the referee recommended suspension for 60 days, rather than the 30 days he actually recommended. (Bar brief 12)

Finally, the record affirmatively shows there was no misappropriation from Respondent's trust accounts. (DT 178).

SUMMARY OF ARGUMENT

On Issue 1 Respondent's argument is that the Bar failed to prove its case against her by clear and convincing evidence. The Bar has omitted material matters in its presentation in this brief and has stretched others to the point of incredibility. Its contentions concerning fraud, misrepresentation, misappropriation and similar factual matters are not supported by the record.

The Bar's contention that this court can review the probate transcript anew, without deferring to the referee's decision, is an incorrect proposition of law. It is doubly incorrect because the referee heard all of the lay witnesses the probate judge heard with three exceptions, two of those exceptions being either irrelevant or of little consequence. Respondent did not stipulate, as the Bar contends, that the trial judge could consider that record instead of testimony. Respondent only agreed that the referee could take judicial notice of the entire record, largely for the purpose of avoiding the Bar's time consuming and expensive attempts to introduce parts of it as exhibits.

The Bar is bound to be fair to the Respondent by the Rules Regulating The Florida Bar. It has not been fair in its presentation in its brief.

On Issue 2 Respondent does not believe any of the cases cited are relevant because the Bar assumes the guilt of Respondent on all of its allegations in order to justify its position under

Issue 2. Even if Respondent were guilty in a more significant sense than the referee found, the cases do not apply to the facts in the case at bar.

Both parties agreed the referee was not bound by the probate judge's decision. The Bar now seeks to overturn that principle of law because it lost the case before the referee.

ARGUMENT

Issue 1

WHETHER THE BAR PRESENTED CLEAR AND CONVINCING EVIDENCE OF RESPONDENT'S GUILT

The underlying rule for a finding of guilt in a Bar disciplinary proceeding is that The Florida Bar must prove the violation by clear and convincing evidence. See The Florida Bar v. Simring, 612 So.2d 561 (Fla. 1993). The referee's findings of fact bear a presumption of correctness unless clearly erroneous or without evidentiary foundation. See The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). While it is true the referee did not observe the demeanor of some of the witnesses in the probate trial, it is not true that Respondent stipulated that the record would be used instead of live testimony. (See page 9 of this brief) The point is irrelevant in any event because the basic facts are not disputed.

Respondent was retained as attorney for the personal representative of Sarainne L. Andrews in June 1991. She was paid $195,000.00 in two payments on separate occasions by the personal representative before the retainer was terminated by the personal representative on November 25, 1991. The payments were not deposited in Respondent's trust account. Each payment check was made payable to Respondent, not her trust account.

After Respondent's retainer was terminated, the probate court decided that she was entitled to $46,725.00 and that the excess over that amount must be refunded. Respondent was unable

to pay the amount immediately. Collection proceedings were instituted by the personal representative. The only method Respondent had of paying was by continuing to operate her law practice. The collection proceedings threatened to shut down the practice so she asked for and obtained bankruptcy protection. There are some side issues that will be discussed, but this is the gist of the case. From these facts The Florida Bar has complained that Respondent:

1. Collected a clearly excessive fee.
2. Was dishonest, fraudulent, deceitful and misrepresented matters.
3. Misappropriated client funds.

It is undisputed that Respondent's retainer contract with the personal representative ultimately required a judicial decision on the amount of her fee. The judicial decision was rendered. It established the debt from Respondent to the estate. All of the debt has been paid, except interest, by the personal representative.

The Bar devotes most of its argument to taking bits of the record and piecing them together in an effort to show the referee was wrong. The crucial question on these three accusations was the fee. The probate judge tried the fee, but he was biased. His bias shows in the record because:

1. He made an investigation on his own during the probate trial and accused Respondent of having financial problems on income taxes and with having mortgages foreclosed against her, both accusations being false. (DT 143-145)
2. He improperly ordered Respondent not to discuss the case with her expert witnesses and found her in contempt

because of a meeting at which the evidence was clear that she did not discuss her testimony.

3. He told Respondent that she should not be representing herself in the probate trial.

4. He awarded an interim fee for ordinary services to Respondent's successor of nearly $77,000.00, much larger than what he awarded Respondent in what was effectively an interim fee, even assuming the Bar's contention is correct that only about 45% of the work was done by Respondent plus additional fees in 1994 and is being asked to do so again in 1995. (App. 65, 116, 121) The services alleged are the same in both years. The fee in 1994 was awarded based on 496.55 hours--2 1/2 times that allowed Respondent. Another 184 hours is sought in 1995.

5. He had a propensity for trying to set standard fees in his court.

6. He had a well publicized opposition to fair probate fees, including the present statutory fees.

7. Ultimately and belatedly, he recognized his bias. (See App 63)

The principal has been established in Florida that expert witness testimony is required for attorney fees, but is not binding on the court. See Lyle v. Lyle, 167 So.2d 256 (2 D.C.A. 1964); In re Estate of Harrell, 426 So.2d 63 (5 D.C.A. 1983); cf. §733.6171(5) Florida Statutes. So neither the probate judge nor the referee was bound by any of the expert testimony. This being so, the principle advanced by the Bar concerning the deference extended in review is an exercise in semantics. The referee could just as easily ascertain from the cold record, as from live testimony, a reasonable attorney fee. See, for example, Zelman v. Metropolitan Dade County, 645 So.2d 57 (3 D.C.A. 1994).

The referee did not hear the witnesses Foote and Reischman on fees. It does not take much knowledge to know that their

testimony at the probate trial was unconvincing. Even the probate judge disregarded their testimony.

The Bar is wrong when it says the probate judge accepted the testimony of the expert witnesses presented in the probate trial. The witness Foote testified to 100 hours at $175.00 an hour. (PT 1223) The witness Reischman testified to 115 hours at $175.00 an hour. (PT 1241, 1262) The probate judge allowed $200.00 an hour, slightly more than the experts testified to. He allowed 215 hours or almost double what they testified to. (App 21)

So the dispute boils down to how much work was done. The witness whose credibility is in question on this point is Respondent. She alone is the fact witness on the number of hours in both proceedings. Experts can testify about the time they believe should have been taken, but only the Respondent knows the time that was taken. The referee believed Respondent and he had authority to do so. Both the probate judge and the referee observed her demeanor and the Bar had the opportunity to crossexamine her before the referee to destroy her credibility. Staff counsel failed to destroy her credibility before the referee. Respondent hopes that each member of the court will take the time to read the transcript of evidence before the referee because this is the crucial part of the record.

In this connection the question of whether the witness Biggs was an independent contractor or an employee is not relevant. It was initially raised by the Bar in an attempt to destroy the credibility of the time records of Respondent. But the Bar says

Respondent's testimony on the point is false. A lay witness's conclusion about her legal status being correct while a lawyer's contrary conclusion is false is an unusual conclusion for the Bar to reach. Imputing perjury to a legal conclusion is a new doctrine.

On page 19 of the Bar's brief, the Bar asserts that Rule 4-1.5(b) is "substantially consistent" with the loadstar method of computing fees. Yet staff counsel would have this court say that Florida Patients Compensation Fund v. Rowe, 472 So.2d 1145 (Fla. 1985) as applied to probate matters In re Estate of Platt, 586 So.2d 328 (Fla. 1991) permits only a mechanical formula of ascertaining hours and a rate and then by multiplying them. The gist of the Platt decision is:

> "The issue in this cause is whether section 733.617 allows "reasonable compensation" for attorneys and personal representatives to be computed solely on the basis of a fixed percentage of the amount of the probate estate...(emphasis not supplied)
>
> ...Determining a reasonable hourly rate for an attorney for a particular type of legal service and the number of hours that should be expended by the attorney in providing those services is an appropriate starting point for the computation of a reasonable fee in estate proceedings..." (emphasis supplied)

Respondent submits this means what it says. The other factors in the rule, when applicable, have to be accommodated in setting the fee. The size of an estate measures responsibility and is a proper factor to be considered. The purpose of Rowe, given by the Bar on page 35 of its brief, is wrong. In an estate the services are rendered for the beneficiaries, not the personal representative.

The Bar points out that some of the services provided may not have been legal services, but personal representative services. That problem has been resolved by this court in In re Lieber's Estate, 103 So.2d 192 (Fla. 1958). The personal representative may have a claim against Respondent for the reimbursement by the personal representative to the estate of the excess fees as determined in the probate court. Respondent may have a claim against the personal representative for the services performed by Respondent that should have been performed by the personal representative. Some of the contentions of the Bar about the distinction between attorney and personal representative services must be based on ignorance of the reality of probate practice. For example, with the exception of an institutional fiduciary, few personal representatives have the qualifications to properly keep the probate records. An attorney for a fiduciary who permits such a person to maintain the records is asking for trouble. Complaint is made about alleged vagueness of some of the time records. The criticism is after the fact and by persons who do not have to keep meticulous time records themselves. The complaints made in the Appendices C and D of the Bar's brief do not support its contention. For example, on A-16 time sheets showed "Attend funeral, talk with PR, beneficiaries, let in movers." The Bar has emphasized only the attendance at the funeral and that is admittedly not a proper legal charge. Whether the personal representative wanted some of the services provided is not relevant. Competent counsel will decide what services should

be performed by counsel in the absence of an institutional fiduciary.

The Bar makes much of the allegations that Respondent's records were "altered." A lawyer should always review his time records before billing to make sure they are accurate. A lawyer has just as much a right to supply omissions in billing on review as a duty to delete overbilling. A lawyer in a contested fee proceeding who does not review and correct is a fool! The testimony of the witnesses Bailey and Fuch at the disciplinary proceeding was thoroughly discredited. (See pages 7 and 8 of this brief)

The Bar asserts that Respondent was guilty of fraud and misrepresentation by allegations made in her pleadings in connection with the setting of attorney fees. The Bar has now elevated the pleadings to the status of accomplished facts. Even staff counsel should know that the pleadings in a civil action are a "...tentative outline of the position which the pleader takes before the case is fully developed..." See Vann v. Hobbs, 197 So.2d 43 (2 D.C.A. 1967). This court put that question to rest in Coggan v. Coggan, 239 So.2d 17 (Fla. 1970) when the District Court of Appeal tried to elevate a pleading into evidence. Probably the point showing the Bar's attempt to persecute this proceeding, rather than to prosecute it, is best shown by the assertions on page 31 of the Bar's brief about the attachment of the agreements from residuary beneficiaries to her pleading. The will of the decedent was in the probate file. Anyone could count

the number of residuary beneficiaries. Respondent attached all of the agreements that she had received. All this probate judge had to do was count. Since Respondent made no allegation concerning the beneficiaries who had rejected the proposal, she had no duty to say anything about that or to attach the correspondence from those beneficiaries, contrary to the Bar's position.

The Bar contends there was misrepresentation or fraud also because Respondent allegedly did not tell the personal representative of the Platt decision, did not tell her of her liability to reimburse the estate for excess payments and tried to obtain the consent of the residuary beneficiaries to a percentage fee. The allegations are not supported by the record. (See page 3 of this brief)

The Bar contends the payments to Respondent should have been placed in Respondent's trust account and that when she placed the funds in her operating account and used them, she was misappropriating client trust funds. There was no authority on which to support this position until after the probate trial. (See Opinion 76-27, Professional Ethics of The Florida Bar) Respondent was entitled to rely on the opinion. This statement in the Bar's brief at page 36 that Respondent admitted the fees were trust fund is belied by the quotation itself.

The alleged motive for Respondent's obtaining advance fees was her financial problems. The business account records do not show any personal financial problems. The Bar asked the referee

to draw an inference from the records that he declined to do so. No business financial problems occurred until Respondent was injured in an automobile accident. (See page 3 of this brief) The testimony of the witnesses Bailey and Fuch on this was incompetent.

As side issues the Bar has accused Respondent of violating a court order, engaging in conduct prejudicial to the administration of justice and failing to competently represent her client.

The only evidence that Respondent did not provide competent representation or explain the matter to her client properly is the testimony of personal representative and the allegations about violation of Respondent's fiduciary duty to the beneficiaries. Respondent testified that she told the personal representative of her personal liability. While the personal representative made such a claim, it is not credible because she served as personal representative on other estates (PT 1278); was an experienced personal representative and guardian (PT 1278-1282); was told her fees could be challenged and that she should keep time records (PT 1309); and was aware of the Platt decision (PT 23-24).

The Bar says that Respondent failed in her duty to the beneficiaries of the estate by:

1. Attempting to charge Biggs accounting services to the estate at $125.00 an hour. The only basis for that according to the Bar is that Biggs was an independent contractor. The Bar accepts that she could make that determination. The only person the disloyal Biggs convinced was The Florida Bar. She may have stolen money from Respondent; she certainly stole her trust account computer program. Whatever the discussions in

reconstructing time records, only the 54 hours testified to by Biggs went before the probate court.

2. The point on the bond merely shows ignorance of the purpose of the bond. The will waived the bond. It is customary in Pinellas County to require one. The purpose of requiring the bond when it is waived in the will is to cover payments of claims and fees. The aside that Respondent did not advise the personal representative about her personal liability is adequately covered factually on page 3 of this brief.

3. Respondent tried to obtain an agreement from the residuary beneficiaries about a fee without disclosing the Platt decision. The testimony is uncontroverted that the residuary beneficiaries had lawyers. (See page 4 of this brief)

4. Respondent did not require as a prerequisite to distribution the tax identification numbers, tax exemption letters and resolutions authorizing signatures for receipts for the charitable beneficiaries. The testimony of Respondent is uncontroverted that she did require the identification numbers. (DT 81) Those lawyers who charge estates for the other two items are padding their hours. When the estate tax return is examined by IRS, a devise to any beneficiary that is not tax exempt will be promptly shown as a deficiency. When a check is made to a charitable beneficiary and is deposited in that beneficiary's checking account, the receipt is redundant. On many occasions probate lawyers are unable to obtain receipts and must use the cancelled check as a receipt.

Finally, no loss to the estate was caused by any of these side issue items.

The probate judge directed Respondent not to discuss the case with anyone, including her expert witnesses, when court adjourned on May 6, 1992 while Respondent was on the witness stand. This act by the probate judge shows prejudice in the first place because:

1. A party is not subject to the sequestration rule and Respondent was clearly a party to this proceeding. See Seaboard Airline Railway v. Scarborough, 52 Fla. 425, 42 So. 706 (1906); Goodman v. West Coast Brace & Limb, Inc., 580 So.2d 193 (2 D.C.A. 1991).

2. Traditionally, attorneys as officers of the court have been considered exempt from the rule.

3. Prohibiting a party from discussing the case with her expert witnesses was an obvious abuse of power since the witnesses were to appear shortly after Respondent testified or would be taken out of order before she completed her testimony and would have to be notified.

4. Generally, experts are not considered in the same category as lay witnesses because the purpose of the sequestration rule is to avoid coloring a subsequent witness's testimony by what he hears. See Del Monte Banana Co. v. Chacon, 466 So.2d 1167 (3 D.C.A. 1985). It is improbable that this will occur in connection with an expert. See Baker v. Air-Kaman of Jacksonville, Inc., 510 So.2d 1222 (1 D.C.A. 1987); Triton Oil and Gas Corporation v. E.W. Moran Drilling Company, 509 S.W.2d (1974).

5. No testimony supports that fact that Respondent discussed the case or her testimony with the witnesses. The excerpts of testimony quoted by the Bar are deliberately misleading because of omissions. (PT 870-872; DT 279-281)

Respondent testified that she did not discuss her testimony with anyone. One wonders how the probate judge thought Respondent was going to have the witnesses on hand to testify without discussing the case to that limited extent. Another indication of the probate judge's bias is the way he handled the alleged contempt by finding Respondent guilty, fining her and then waiving the fine. The most the probate judge should have done is admonish Respondent.

When Respondent undertook representation of the personal representative in an estate worth nearly $15,000,000.00, she had a reasonable expectation of receiving a fee much in excess of the $195,000.00 that was actually received.

The Florida Bar agreed at final argument that the referee was not bound by the probate judge's judicial determinations. This means that the referee had a clean slate upon which to write.

He found that The Florida Bar had failed to prove most of its case by clear and convincing evidence. He had authority to find the probate judge was wrong. He heard every fact witness that the probate judge heard, except the personal representative, Biggs and Hatton. Hatton's testimony was not relevant to any issue in the disciplinary proceeding. Biggs's testimony at the probate trial related to record keeping. Her credibility was impugned by her disloyalty and theft. The personal representative's testimony at the probate trial was conflicting and indicated her bias. The referee did not hear the two experts on fees presented by the personal representative, Foote and Reischman nor did he hear the witness Beckett presented by the Respondent. Beckett died after the probate trial and before the disciplinary trial.

This case is a typical example of how the grievance machinery of The Florida Bar works. When staff counsel decide to file a complaint, they are not bound by the rules they seek to impose on others and do not have to rely on clear and convincing evidence in order to make their reputation destroying accusations. One wonders if staff attorneys ever heard of Homer Cummings or the principles that flowed from his courageous actions while a prosecuting attorney.

Issue 2

WHETHER THE RECOMMENDED DISCIPLINE IS APPROPRIATE?

The Bar assumes that its contentions concerning Respondent's guilt were proven by clear and convincing evidence. This is not true, but Respondent must answer the decisions cited in argument under this point by the Bar. Before moving to that, Respondent submits that the discipline for the offenses found by the referee is appropriate if this court sustains the finding that Respondent collected an excessive fee. As earlier mentioned, it is Respondent's position that under the facts of this case, she did not collect an excessive fee because the probate court decided what the fee was to be, the excess over what the probate court decided is now a debt and the balance remaining unpaid is a judgment against Respondent. When a party has a judgment, the party's remedy is complete.

The McKenzie case, cited by the Bar on page 43 of its brief, is inapplicable on the facts. In that case the attorney claimed fees based on an inventory that was fictitious because a large part of the inventoried property was held as an estate by the entirety. The case is not anything like the case at bar.

The Baker case, cited by the Bar on page 45 of its brief, is likewise inapplicable on the facts. Trust funds were embezzled by the attorney. The attorney repaid the funds, but that did not change the original theft. The feeble attempt by the Bar at

analogy fails because the checks from the estate in the case at bar were not trust funds. At the time Respondent had a reasonable expectation of a fee award in excess of $195,000.00. No funds were misappropriated as contended by the Bar. The most that can be truthfully said is that Respondent received an advance for work to be performed that was not in fact performed. The future work was not performed through no fault of Respondent.

The Aaron case, cited on page 46 of the Bar's brief, is likewise inapplicable on the facts. The attorney there embezzled $150,000.00 from the estate account and put it into his own account. Ultimately he refunded some of the money. The attempt to equate that conduct with an alleged misappropriation of trust funds by Respondent is not in accordance with the facts.

CONCLUSION

The referee's report should be confirmed.

The undersigned certifies that a copy of the foregoing has been furnished to David R. Ristoff and John T. Berry by mail on January 25, 1995.

TRAWICK, VALENTINE & HAGAN, P.A.

By _____
Henry P. Trawick, Jr.
P.O. Box 4019
Sarasota, Florida 34230
813 366-0660
Fla. Bar 0082069
Attorney for Respondent.