047

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)

INITIAL BRIEF

OF

THE FLORIDA BAR

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TABLE OF AUTHORITIES

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS:

SYMBOLS AND REFERENCES

In this brief, The Florida Bar, Complainant, will be referred to as "The Florida Bar" or "The Bar". The Respondent, Geneva Forrester, will be referred to as "Respondent".

"PT" will refer to the transcript of the evidentiary hearing on attorney's fees in the probate case styled In Re: Estate of Sarainne L. Andrews, Deceased, Sixth Judicial Circuit for Pinellas County, Florida, Probate Division, Case No. 91-2311-ES4, held on May 4-6, 1992 and July 6-10, 1992. "PR" will refer to the probate record in the Sixth Judicial Circuit Case No. 91-2311-ES4.

"DT" will refer to the transcript of the final hearing before the Referee in the disciplinary case styled The Florida Bar v. Geneva Forrester, Supreme Court Case No. 82,090, held on July 5-8, 1994 and August 26, 1994. "DR" will refer to the disciplinary record in Supreme Court Case No. 82,090. "RR" will refer to the Report of Referee dated September 27, 1994 in Supreme Court Case No. 82,090.

"TFB Exh." will refer to exhibits presented by The Florida Bar at the final hearing before the Referee in Supreme Court Case No. 82,090. "Rule" or "Rules" will refer to The Rules Regulating The Florida Bar. "Standard" or "Standards" will refer to The Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE FACTS AND OF THE CASE

The facts hereinafter set forth relate only to Count I (TFB No. 93-10,060(6D)) of Supreme Court Case No. 82,090; Lillie Haynes served as Guardian of the Person and Property of Sarainne L. Andrews from 1982 to the date of Mrs. Andrews' death on June 19, 1991 (PT, pp. 9-10, 1280). During this period, Mrs. Haynes handled all matters involved in the guardianship including investments, accounting, banking, employment of medical assistants to care for the Ward and the like (PT, pp. 11, 1280-1282; DT, p. 11). The only matters not handled by Mrs. Haynes were legal concerns (PT, pp. 11, 1280). Barry Williams was legal counsel for the guardianship until his death in April of 1988, when he was succeeded by Respondent. Respondent's employment as attorney for the guardian continued until Mrs. Andrews' death (PT, pp. 10-11, 1281; DT, pp. 9-11). Respondent was compensated at the rate of $200.00 per hour for the legal services she provided to Lillie Haynes as guardian for Mrs. Andrews (PT, p. 517; DT, pp. 13-14).

Sarainne Andrews died leaving a Last Will and Testament which named Lillie Haynes as personal representative of her Estate (DT, p. 21). The Andrews Estate consisted primarily of liquid, marketable assets which had been managed by Ms. Haynes prior to and during the term of the guardianship. The approximate value of the Estate at the time of Mrs. Andrews' death was $14,800,000.00 (PR, pp. 2564-2594; DT, p. 19). Pursuant to Mrs. Andrews' Will, certain items of tangible personal property were devised to family members and friends, and the entire liquid asset residue of Mrs. Andrews' estate was devised to thirteen charitable beneficiaries (PR, pp. 3533-3542; DT, pp. 21-22).

On June 19, 1991, Lillie Haynes hired the Respondent to render necessary legal services to her as personal representative of the Andrews Estate (PT, p. 12).

On April 4, 1991, (two and one-half months prior to Mrs. Andrews' death), the Supreme Court of Florida issued its first decision in the case of <u>In Re: Estate of Lester Platt</u>, 16 Fla. L. Weekly S237 (April 4, 1991) (<u>Platt I</u>), which held that in the absence of an agreement, attorney's fees for an attorney representing a personal representative in an estate could not be based solely upon a percentage of the value of the estate. [The opinion was amplified and expanded by the Florida Supreme Court in its second published opinion found at 586 So. 2d 328 (Fla. 1991) (<u>Platt II</u>)]. Respondent had knowledge of and understood the ruling of the Supreme Court in regard to <u>Platt I</u> as of the date of Mrs. Andrews' death (PT, pp. 524-534).

On June 24, 1991, Respondent sent a letter to Mrs. Haynes, enclosing an Estate check made payable to Respondent in the amount of $80,000.00, which Respondent indicated would be her initial attorney's fee (DR, TFB Exh. #3; DT, pp. 37-38). At the time Mrs. Haynes received Respondent's letter and the $80,000.00 check, Respondent and Mrs. Haynes had not discussed or entered into an agreement regarding Respondent's fees for legal services to the Estate. In addition, at the time Respondent requested Ms. Haynes to sign the $80,000.00 check, Respondent had not advised Ms. Haynes of the hourly rate she intended to charge for her legal services; she did not provide Mrs. Haynes with a billing statement or time records which indicated the services and time she had spent working on the Estate; she did not advise or disclose to Ms. Haynes that in the event Respondent was not entitled to the $80,000.00, Haynes, as personal representative, would be liable to the Estate for the same (PT, pp. 14-16). Further, when Respondent requested the $80,000.00 initial attorney's fee, she had not reviewed her time records nor had she made a determination as to her entitlement to the funds requested (PT, p. 567). Mrs. Haynes signed the $80,000.00 check and returned the same to Respondent because Respondent, as her attorney, instructed her to do so and indicated she knew what she was doing (PT, p. 1302).

Respondent was experiencing financial problems at the time she sought and received the $80,000.00 from Haynes (DT, pp. 192-195; DR, TFB Composite Exh. #45). On June 26, 1991, Respondent deposited the $80,000.00 check into her law office operating account (DR, TFB Composite Exh. #45; DT, p. 42). On August 22, 1991, Respondent's operating account balance was only $1,503.22 even though, between June 26, 1991 and August 22, 1991, Respondent deposited $17,082.85 of additional funds unrelated to the Andrews case into her operating account (DR, TFB Composite Exh. #45).

In July 1991, Respondent presented to Mrs. Haynes, a document entitled "Authorization Agreement For Compensation of Attorney". Although Mrs. Haynes did not agree to pay Respondent the fees outlined in said Agreement, she did consent to the document being forwarded to the thirteen residuary beneficiaries for their approval (PT, pp. 21-22, 36; DR, TFB Exh. #6).

On July 26, 1991, Respondent mailed the "Authorization Agreement for Compensation of Attorney" to the thirteen residuary beneficiaries (PR, pp. 2981-2989; PT, p. 679; DR, TFB Exh. #6). The "Authorization Agreement for Compensation of Attorney" requested the following: $80,000.00 minimum fee in advance, $500.00 cost deposit in advance. The $80,000.00 minimum fee was to be included in the total fees agreed to. The total attorney's fees to be paid were to be based on a percentage of the total value of the estate as follows:

Five percent (5%) - first $10,000.00;
Four percent (4%) - next $15,000.00;
Three and one-half percent (3 1/2%) of the balance.
(Id.).

The cover letter accompanying the Agreement to the residuary beneficiaries requested that the residuary beneficiaries consent to the requested fees, execute the Authorization Agreement, and return it to Respondent (Id.). In the cover letter, Respondent did not make any disclosure to the residual beneficiaries of the Supreme Court's decision in the case of In Re: Estate of Lester Platt (supra), (Platt I and II). (Id.)

After receiving notification from several residuary beneficiaries of their intent not to consent to the requested fee, and without receiving any authorization to the fee from any of the residuary beneficiaries, Respondent requested from the personal representative of the Andrews Estate, an additional partial payment of fees in the amount of $115,000.00 (PT, pp. 715-716, 1303). On

August 20, 1991, Mrs. Haynes executed and delivered to Respondent, a check in the amount of $115,000.00 (PT, pp. 574-575, 1303; DT, p. 69; DR, TFB Exh. #9). As with the previous payment, Respondent made no review of time records or determination as to her entitlement to the fee prior to depositing the check into her general operating account (PT, pp. 574-575; DR, TFB Exh. #9; DT, p. 75).

In addition, at the time Respondent requested Mrs. Haynes to sign the $115,000.00 check, Respondent had not advised or disclosed to Haynes that in the event Respondent was found not to be entitled to the $115,000.00 or the total fee to date of $195,000.00, Haynes, as personal representative, would be liable to the Estate for the excess funds paid to Respondent (PT, p. 27).

At all times material, the only agreement relating to the payment of attorney's fees to Respondent for her work on the Andrews Estate, was an oral agreement between Respondent and Haynes which provided that Respondent would receive attorney's fees in an amount agreed to by the thirteen residuary beneficiaries, or in the absence of an agreement of all residuary beneficiaries, fees as determined by the Circuit Court for Pinellas County, Probate Division (PT, pp. 21-22; DT, p. 77).

On November 25, 1991, Lillie Haynes discharged Respondent as attorney for the Estate and retained the law firm of Baxter and Strohauer to complete the legal services required for full administration of the Estate (DT, p. 83; DR, TFB Exh. #10).

On December 5, 1991, Respondent filed a Motion to Withdraw and for Reasonable Attorney's Fees. In this Motion, Respondent claimed entitlement to attorney's fees in the approximate amount of $521,000.00 based upon the criteria set forth in the Authorization Agreement for Compensation of Attorney previously supplied to, but rejected by at least eight of the thirteen residuary beneficiaries (PR, pp. 33-43; DR, TFB Exh. #13). The requested compensation was based on a percentage of the value of the Estate and not upon the criteria established by the Supreme Court in In Re: Platt, supra (DT, p. 56).

Respondent claimed in her Motion that the legal work on the Estate was effectively completed, that agreements as to fees had been received from a number of the residuary beneficiaries, but that all thirteen residuary beneficiaries had not yet approved the fees (DR, TFB Exh. #13; PR, pp. 33-43).

At the time Respondent filed the Motion, no necessary tax work had been completed or tax clearances received, no accounting had been prepared or filed, and no arrangements for distribution to residuary beneficiaries had been made; only 45% to 50% of the necessary legal work to administer the Estate had been completed and at least eight residual beneficiaries had rejected the fee agreement (PT, pp. 842-845; DT, p. 407; PR, pp. 1242, 2058-2154).

On April 3, 1992, Ms. Forrester filed an Amended Petition for Attorney's Fees and Costs which alleged in paragraph 5, the existence of an agreement between Ms. Forrester and Lillie Haynes, wherein Ms. Haynes agreed to pay attorney's fees to Ms. Forrester based upon a percentage of the value of the Estate (PR, pp. 668-

671). However, because sworn testimony of Respondent (PR, p. 2498) was in direct contradiction to the allegation in Respondent's Amended Petition for Attorney's Fees and Costs, Judge Penick entered an Order striking paragraph 5 of the Amended Petition.

In her Petition for Fees and Costs, Respondent claimed to have expended 559 hours in rendering services to the Estate. An itemization of the time expended by Respondent, and by her other office personnel and agents, was submitted to the Probate Court (PR, pp. 2821-2854). During the term of her employment, Respondent had prepared and filed necessary pleadings (PR, pp. 1-27, 3533-3553). In addition, Respondent engaged in correspondence with the beneficiaries, meetings with the personal representative, distribution of tangible personal property and the like. Respondent also claimed she maintained the Estate checking account and a running accounting of receipts and disbursements (PT, pp. 121-439). Respondent performed numerous non-legal services, such as attending the funeral and viewing the decedent, reviewing prior Wills of the decedent, inventorying of Estate assets, locating beneficiaries, recording sales of assets, sales commissions and exchange fees, identifying and obtaining refund of insurance policies, accounting for receipts for care of estate's assets, reviewing records of the personal representative, and banking (Id.).

Mrs. Haynes disputed some claims of Respondent and claimed that some services were to be rendered by the personal representative and not the attorney, and that they were done without the authorization or approval of the personal representative (PT, pp. 1282-1289). In many cases, Mrs. Haynes claimed the services provided by Respondent were both unnecessary and unwanted (Id.).

An evidentiary hearing on fees before Judge Penick commenced on May 4, 1992, and continued through May 6, 1992 (PT, Vols. I and II). The hearing was not concluded at that time and the remainder of the hearing on fees was heard the week of July 6th through 10th, 1992 (PT, Vols. III-VII). At the evidentiary hearing, testimony was given by Respondent, Lillie Haynes, and Sally Biggs, Respondent's witness. In addition, Respondent utilized three expert witnesses, Seymour Gordon, Esquire; Gerald Colen, Esquire; and Gardner Beckett, Esquire, to establish the reasonableness of the fee she claimed she was entitled to. Lillie Haynes utilized the testimony of two expert witnesses, Sally Foote, Esquire; and William Reischmann, Esquire (identified as Richman in the probate transcripts) (PT, pp. 7-1317). The Rule was invoked during the proceeding. At the conclusion of the first portion of the hearing on May 6, 1992, Respondent was on the stand as her own witness under direct examination when the hearing was adjourned until July. At that time, Judge Penick informed Respondent that she was on the stand and ordered her to not discuss the case with anyone, including but not limited to her employees and expert witnesses, until her testimony was completed (PT, p. 396). The hearing resumed on July 6, 1992 and Respondent's direct testimony was not concluded until the afternoon of July 8, 1992. On the evening of

July 7, 1991, Respondent met with two of her expert witnesses, Gerald Colen and Gardner Beckett, and discussed the case and their testimony (PT, pp. 868-872).

On July 9, 1992, Judge Penick entered an Order to Show Cause why Respondent should not be held in indirect criminal contempt of court for her violation of his sequestration order (PT, p. 910). After a full hearing on the Order to Show Cause, Judge Penick entered an Order dated October 7, 1992, finding Respondent guilty of indirect criminal contempt.

During the evidentiary hearing in the probate case, Respondent claimed that Sally Biggs performed 124.5 hours of banking and accounting services to the Estate for which Respondent was entitled to be compensated at the rate of $125.00 per hour (PR, pp. 2821-2851). Respondent claimed that Ms. Biggs was an employee of Respondent's law firm (PT, p. 643). Respondent's own witness, Ms. Biggs, testified that she was not an employee of Respondent's, but rather an independent contractor engaged in the accounting business and compensated at the rate of $25.00 per hour for her services (PT, pp. 1018, 1143-1146). The time records which itemized Biggs' services showing an expenditure of 124.5 hours did not reflect the time on Biggs' contemporaneous time records (PT, p. 1150). Biggs, at the request of Respondent, had increased her time, and the increased time was reflected on the time records supplied by Respondent to the Probate Court. During the course of the probate evidentiary hearing on fees, Ms. Biggs reconstructed her time. Biggs had actually expended 54 hours in providing banking and accounting services to the Estate (PT, pp. 1150-1151). Respondent modified her own time records to reflect an increase in time expended on at least one occasion subsequent to Respondent's termination as attorney for the Estate (PT, pp. 1152, 1157; DT, pp. 197, 199-200, 219, 224-225).

On August 3, 1992, Judge Penick entered his Order on Attorney's Fees which awarded Respondent a total fee of $46,725.00 for service rendered to Lillie Haynes as personal representative of the Andrews Estate. Judge Penick specifically found that Respondent had received $195,000.00, and that the Estate was entitled to return of the difference between the amount received and the amount awarded plus prejudgment interest as set forth in the Order (PR, pp. 1662-1672).

Respondent appealed Judge Penick's Order on Attorney's Fees. On March 18, 1994, the Second District Court of Appeal per curiam affirmed Judge Penick's Order on Attorney's Fees. (In Re: Estate of Sarainne L. Andrews; Forrester v. Haynes, 638 So. 2d 944 (Fla. 2d DCA 1994).

On September 7, 1993, Lillie Haynes and the Administrator Ad Litem for the Andrews Estate entered into a Stipulation (which was approved by the Probate Court by Order dated September 28, 1993) wherein it was agreed that Haynes would reimburse the Estate from the personal representative fees awarded to her, the excessive fees paid by her to Respondent, exclusive of any interest thereon, less sums collected on the Final Judgment against Respondent; that she would contribute $20,000.00 towards the fees of Baxter and

Strohauer, P.A., to be fixed by the Court, for services rendered in obtaining and attempting to satisfy the money judgment against Respondent; and that Haynes would not receive an assignment of the Judgment in favor of the Estate against Respondent, leaving the Estate as the sole owner of said Judgment (PR, Stipulation). Respondent has attempted to discharge in bankruptcy the Judgement entered against her as a result of Judge Penick's Order on Attorney's Fees. At the time of the final hearing in this cause, Respondent's debt to the Estate had not been discharged in that the debts' dischargeability was being challenged by the Estate (DR, pp. 130-132).

The final hearing in this cause was held on July 5-8, 1994. During the first day of the final hearing, the Referee made the following inquiry:

> If I'm going to consider this other record, all this stuff is already in there to support it, why are we having this trial here? (DT, pp. 123)

As a result of the Referee's inquiry, The Florida Bar agreed to utilize the entire record from the probate case, including the transcript testimony and documentary evidence from the evidentiary hearing before Judge Penick in lieu of duplicative live testimony and evidence in its case in chief (DT, pp. 124-127). As a result of the foregoing, the only live witnesses called by the Bar were Respondent and an additional expert witness, Louis Adcock, Esquire, the only expert witness in either proceeding who was certified in wills, trusts, and administration of estates. During the final hearing herein, Respondent called as her witnesses, Joseph Lang, Esquire, Gerald Colen, Esquire; Seymour Gordon, Esquire; and John Allen, Esquire.

The Referee issued his Report of Referee on September 27, 1994. In his Report, the Referee found as to Count I that Respondent was entitled to a total fee of $174,000.00; that she received funds from the Estate in the sum of $195,000.00; and that she charged a clearly excessive fee. As to Count I of the Bar's Complaint, the Referee recommended that Respondent be found guilty of violating Rule 4-1.5; that she be found not guilty of all other Rules Regulating The Florida Bar alleged to have been violated by Respondent; and that she be suspended from the practice of law for sixty (60) days.

As to Count II (TFB No. 93-11,031(6D)) of the Bar's Complaint, the Referee recommended that Respondent be found guilty of violating Rule 5-1.1(g) and Rule 5-1.2(c)(1)(A) and (B); that she be found not guilty of violating Rule 4-1.15(a), Rule 5-1.1(a), and Rule 5-1.2(b)(5); and that Respondent be disciplined by a public reprimand.

On November 28, 1994, The Florida Bar filed a Petition for Review challenging the Referee's findings of fact, recommendations of guilt, and recommended discipline in regard to Count I of Supreme Court Case No. 82,090 (TFB No. 93-10,060(6D). The Florida Bar is not challenging the Referee's findings and recommendations in his Report of Referee relating to Count II.

SUMMARY OF THE ARGUMENT

The Referee's findings of fact and his recommendations that Respondent be found not guilty of all rules alleged to have been violated except for Rule 4-1.5(a) are contrary to the competent evidence in the record and are clearly erroneous.

The evidence in the record establishes clearly and convincingly that, Respondent sought a fee of $521,000.00 and collected a fee of $195,000.00 for her representation of the personal representative of the Andrews Estate; Respondent was only entitled to a reasonable fee of $46,725.00 based on testimony of expert witnesses who were familiar with the fee customarily charged in the community for services similar to those performed by Respondent and with the time that Respondent reasonably should have devoted to complete 45-50% of the legal work on the Estate; Respondent misappropriated trust funds from the Andrews Estate in the amount of $148,275.00 and sought to discharge in bankruptcy, the debt she owed to the Andrews Estate; she failed to competently represent Haynes; she knowingly and intentionally violated Judge Penick's sequestration order that she not discuss the Andrews fee case with her expert witnesses until her testimony was completed; and Respondent, in her pleadings filed with the Probate Court and her testimony during the evidentiary hearing before Judge Penick, engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The evidence in the record established that Lillie Haynes was injured by Respondent's representation and by the funds Respondent collected and misappropriated from Haynes and the Estate in that Haynes has been required to personally pay back to the Estate \$148,275.00, less sums collected from Respondent. Haynes has also been required to contribute \$20,000.00 towards the fees of Baxter & Strohauer, P.A., for services rendered in obtaining and attempting to satisfy the money judgement entered by Judge Penick against Respondent.

Based on case law involving misconduct by an attorney similar to the misconduct of Respondent in this case, and based on the Florida Standards for Imposing Lawyer Sanctions, disbarment is the appropriate discipline for Respondent's misconduct.

Based on the competent evidence in the record herein, and on relevant case law and statutes, it was error for the Referee to recommend that Respondent be found not guilty of violating the following Rules Regulating The Florida Bar: Rule 4-1.1; Rule 4-1.4(b); Rule 4-1.15(a), (b), (c); Rule 4-3.4(c); Rule 4-8.4(c) and (d); and Rule 5-1.1.

Respondent should be found guilty of violating all of the foregoing rules in addition to Rule 4-1.5(a) as recommended by the Referee, should be disbarred from the practice of law and required to pay the costs incurred by the Bar in pursuing this case, and be required to return the funds to the Estate as set forth in Judge Penick's order of August 3, 1992 prior to seeking readmission to the Bar.

ARGUMENT

ISSUE I

WHETHER THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS OF GUILT AS TO COUNT I OF THE BAR'S COMPLAINT ARE CONTRARY TO THE EVIDENCE AND CLEARLY ERRONEOUS.

This Court has held that a Referee's findings of fact are presumed to be correct and should be upheld unless they are clearly erroneous or lacking in evidentiary support since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986).

In the instant case, the Referee did not have the opportunity to personally observe the demeanor of a number of the witnesses in this case due to the stipulation of the parties that testimony adduced during the eight-day evidentiary hearing on fees held before Judge Penick would be utilized in lieu of live testimony (DT, pp. 123-129). In The Florida Bar v. Marable, 19 Fla. L. Weekly S624, 626 (Fla. November 23, 1994), the Referee made findings of fact based upon what he heard on tape-recorded conversations. This Court held that,

> deference to the trier of fact's direct observation of a witness's demeanor is less compelling when a tape-recorded voice is being judged rather than live testimony.

The Referee in the instant case should be afforded no greater deference for a review of the transcripts and record to determine credibility.

The Bar alleged in its Complaint that Respondent charged and collected a clearly excessive fee; engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation; engaged in conduct prejudicial to the administration of justice; misappropriated client funds; violated a court order; and failed to competently represent her client (DR, Complaint). The Rules Regulating The Florida Bar which relate to said allegations are contained in Appendix "A" attached hereto.

The Referee recommended that Respondent be found not guilty of violating all the rules alleged to have been violated in Count I of the Bar Complaint except Rule 4-1.5(a). Although the Bar is not challenging the Referee's recommendation that Respondent be found guilty of violating Rule 4-1.5(a), the Bar is challenging the Referee's findings of fact relating to that recommendation. The Bar is also challenging the Referee's finding that there was no evidence, or no clear and convincing evidence, concerning any alleged violation of the Rules Regulating The Florida Bar other than Rule 4-1.5(a).

The only agreement relating to the payment of attorney's fees to Respondent for her work on the Andrews Estate was an oral agreement between Respondent and Haynes which provided that Respondent would receive attorney's fees in an amount agreed to by the thirteen residuary beneficiaries, or in the absence of an agreement of all residuary beneficiaries, fees as determined by the Circuit Court for Pinellas County, Probate Division (PT, pp. 21-22; DT, p. 77). Because the thirteen residual beneficiaries did not agree to pay Respondent the fees she sought, the Probate Court was required to make the determination.

Judge Penick, after an eight-day evidentiary hearing, issued his Order on Attorney's Fees wherein he determined the following reasonable rates and times for Respondent's services to Haynes:

Respondent	-	215 hours	$200.00/hr.
Associate	-	5 hours	$175.00/hr.
Paralegal	-	20 hours	$ 75.00/hr.
Accountant	-	54 hours	$ 25.00/hr
TOTAL:			$46,725.00

Judge Penick specifically found in his order that Respondent had received $195,000.00, and that the Estate was entitled to a refund of the difference between the amount received and the amount awarded plus prejudgment interest as set forth in the Order (PR, pp. 1662-1672).

The Referee herein found that Judge Penick's "finding on fees was against the preponderance of the evidence presented" (RR, p. 4), notwithstanding the oral agreement between Respondent and her client concerning fees, and notwithstanding the fact that on March 18, 1994, the Second District Court of Appeal per curiam affirmed Judge Penick's Order on Attorney's Fees. In Re: Estate of Sarainne L. Andrews, Forrester v. Haynes, 638 So. 2d 944 (Fla. 2d DCA 1994). The Referee's rationale for this finding was that Respondent's time records reflected time in excess of the 215 hours allowed by Judge Penick for Respondent's services; that only two experts for the personal representative testified on fees at the probate hearing, while three experts testified for the Respondent; and that Sally Biggs was not an independent contractor since Respondent furnished her an office, a computer, and computer disks.

The Referee found that Respondent received $195,000.00 in Estate funds for fees, and that from the expert testimony of Respondent's witnesses, Gerald Colen (DT, pp. 286-288), Seymour Gordon (DT, pp. 372-374), and John Allen (DT, pp. 386-389), Respondent should be allowed the following fees:

Geneva Forrester	559	hours @ $300.00/hr	$167,775.00
Richard Sanders	5	hours @ $175.00/hr	$ 875.00
Paralegal	20	hours @ $ 75.00/hr	$ 1,500.00
Staff Accountant	54	hours @ $ 75.00/hr	$ 1,300.00

resulting in a total fee to Respondent of $174,190.00 (RR, p. 2).

The Referee's findings regarding the calculation of the fee that Respondent is entitled to is erroneous and contrary to the oral agreement as to fees, to the law, and to the competent evidence in this case. The findings by Judge Penick, however, are supported by clear and convincing evidence.

Respondent's time records reflect, after two amendments, that Respondent spent 523.25 hours (not 559 hours as found by the Referee) providing services to the Andrews Estate (PR, Geneva Forrester, P.A.'s Second Amended Exhibit on Attorney's Fees and Costs), and Respondent did call three expert witnesses to testify before Judge Penick. However, Haynes called two expert witnesses in that proceeding. Apparently, in the probate proceeding Judge Penick evaluated the testimony of all witnesses and accepted the opinions of Haynes' witnesses after having the opportunity to observe the demeanor of those witnesses. In the disciplinary proceedings, Respondent called two additional expert witnesses, and the Bar called an additional expert witness, who was the only expert witness, in either proceeding, that is certified in wills, trusts, and the administration of estates (DT, p. 404).

Rule 4-1.5(b) of the Rules Regulating The Florida Bar sets forth the factors to be considered in determining a reasonable fee. Judge Penick used the "lodestar" method of computing a reasonable attorney's fee as set forth in Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), and determined the fee Respondent was entitled to in the Andrews Estate case. Rule 4-1.5(b) is substantially consistent with the "lodestar" method of computing a reasonable attorney's fee. Judge Penick's Order on Attorney's Fees (See Appendix "B" of this brief) sets forth his findings of fact relative to the factors set forth in Rowe (supra), and in Rule 4-1.5(b).

A court is not required to accept either the hours stated by an attorney nor the hourly rate asserted by the attorney who performed the services. Florida Patients Compensation Fund v. Rowe (supra); Standard Guaranty Ins. Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990); Platt (supra).

In The Florida Bar v. Richardson, 574 So. 2d 60 (Fla. 1991), this Court held that all of the time spent on a case is not necessarily the amount of time for which the lawyer can properly charge the client. Rather, it is the time that reasonably should be devoted to accomplishing a particular task. See also Quanstrom (supra); and Rowe, (supra).

According to the testimony of three experts, it was not necessary for Respondent to spend 523.25 or 559 hours performing services to Lillie Haynes as personal representative for the

Andrews Estate. The probate administration of the Andrews Estate did not present novel or difficult matters. Both William Reischmann, and Louis Adcock, an attorney board certified in wills, trusts and probate matters, testified that they did not consider the Andrews case to be novel, rather they considered it to be relatively simple due to the fact that the Estate was preceded by a guardianship for a number of years; the guardian became the personal representative of the Estate; there was an on-going continuity of fiduciary investments prior to the incompetency, during the incompetency, and after the death of Ms. Andrews; all of the Estate assets except for the furnishings of the decedent's residence were in two different brokerage accounts; there were no tax problems in that most of the beneficiaries of the Estate were charitable; regular accountings had been done for many years by an accountant; and there was no need to search out prior errors or missing dividends or assets (PT, pp. 1243-1244; DT, pp. 408-409).

The Respondent admitted in her Answer to the Bar's Second Amended Complaint that the administration of the Andrews Estate did not present novel or difficult matters not ordinarily encountered in the probate of a decedent's estate (DR, Second Amended Complaint, and Answer to Second Amended Complaint). Respondent's expert witnesses testified that, but for the value of the Estate, the number of beneficiaries, and the demanding nature of the personal representative, (as described by Respondent) the administration of the Andrews Estate was not novel or difficult (DT, pp. 393, 394; PT, pp. 244-245, 809-810, 820-823, 1178).

Respondent's expert witnesses, Colen and Gordon testified that prior to rendering an opinion regarding the reasonableness of Respondent's fee, they reviewed the Respondent's time records and her file on the Andrews Estate, which included correspondence and pleadings (PT, pp. 237, 819). Respondent's expert witness, Beckett testified that he reviewed Respondent's time records and Ms. Andrews' Will, but did not review any pleadings or correspondence (PT, pp. 1180-1182). Allen testified he did an overall review of Respondent's file, but did not review Respondent's time records (DT, p. 390). All four expert witnesses testified that they had discussions with Respondent as to the services she rendered to the Estate, and the time she spent accomplishing the same.

Respondent's time records and her recollection of services relating to the Andrews case were not detailed and precise, but were vague, indefinite, and general in nature (PR, Order on Attorney's Fees, p. 3). The Respondent's time records (PR, pp. 2597-2818) for the first week of Respondent's employment and her testimony concerning these records is reflected in Appendix "C" of this brief.

It is clear from both Respondent's time records and testimony for the first week of her employment that she did not clearly or accurately account for her "legal time" expended, had only vague recollection of what she claimed to have done, and spent an inordinate amount of time on non-legal matters such as attending decedent's funeral, inventorying personal property, banking, letting in movers, and the like. She could do no better in explaining her legal services than to identify services as "prepare pleadings", "out of office consult", and "case production". Much of her testimony was prefaced with the words, "I presume."

Respondent's testimony concerning the balance of her employment was equally vague and indefinite. (PT, pp. 144-327). Even concerning the week before her employment was terminated, Respondent's testimony was still vague and unintelligible as set forth in Appendix "D" of this brief.

The Court file in regard to the Andrews Estate reflected that between June 20, 1991, and the time of Respondent's discharge on November 25, 1991, Respondent prepared and filed only the standard form pleadings for the probate of an estate, which included a Petition for Administration; Oath of Personal Representative, Designation of Resident Agent and Acceptance; Order Admitting Will to Probate and Appointing Personal Representative; Letters of Administration; Inventory; and Amended Inventory; two Objections to Claims; several Proofs of Service; and receipts of beneficiaries (PR, p. 3431).

Respondent's correspondence file reflected approximately 59 letters to her totalling approximately 100 pages, and approximately 300 pages of correspondence with enclosures from Respondent primarily to the beneficiaries of the Estate. Most of this correspondence was computerized form letters to residual beneficiaries (PR, pp. 2058-2154, 2173-2446).

Respondent's expert witnesses Colen, Gordon, and Beckett testified that Respondent represented to them that she had expended

500 to 559 hours performing services to the personal representative of the Andrews Estate, and that they deemed expenditure of such time by Respondent to be reasonable based on their discussions with Respondent (PT, pp. 238, 797, 1177).

John Allen, an expert witness for Respondent, testified that 500 hours appeared reasonable, but may have been a little excessive for the services rendered by Respondent (DT, p. 391).

It is not credible that the Respondent's expert witnesses could determine the reasonableness of the hours Respondent expended since her time records and her recollection of services rendered were vague, indefinite, and general in nature. In addition, the pleadings and correspondence generated by Respondent and the correspondence sent to Respondent did not justify an expenditure of 500-559 hours of services by Respondent.

Respondent's experts were unaware at the time of their testimony, that Respondent had altered time records made contemporaneous with services rendered. During the evidentiary hearing before Judge Penick, testimony was elicited from Sally Biggs, a witness called by Respondent. Relevant portions of Ms. Biggs' testimony regarding the altering of Respondent's time records are attached as Appendix "E" of this brief.

In this proceeding, testimony that corroborated Sally Biggs' testimony was elicited from Suzanne Bailey, a legal assistant/secretary for Respondent from April 1991, through 1992. Relevant portions of Suzanne Bailey's testimony regarding Respondent's altering of time records is attached as Appendix "F" of this brief.

Louis Adcock, testified that in preparation for rendering his opinion regarding Respondent's fees in this case, he spent twenty-five hours reviewing the Probate Court file, the transcripts and exhibits from the evidentiary hearing before Judge Penick, depositions, Respondent's time records, and correspondence (DT, pp. 405-406). According to Mr. Adcock's testimony, Respondent had completed only about 50% of the work required to administer the Estate, and a reasonable number of hours for the services rendered by Respondent to Lillie Haynes was 110-123 hours (DT, p. 406-407).

Ms. Foote testified that she believed a reasonable expenditure of time for services provided by Respondent would be 100 hours (PT, p. 1223). Reischmann testified that Respondent had completed only about 45.8% of the work required to administer the Estate and that a reasonable number of hours for work performed by Respondent would be 115 hours (PT, pp. 1241-1242).

Unlike Respondent's expert witnesses, the experts utilized by the Bar gave opinions as to the amount of time which <u>reasonably</u> should be devoted to complete 45.8 to 50% of the administration of the Andrews Estate.

It is undisputed that Respondent attended Sarainne Andrews' funeral, assisted with the inventory of the decedent's residence, and did banking and accounting services. However, these services were not requested, wanted, or required by Lillie Haynes, who had been an assistant trust investment officer for the Bank of Clearwater from 1969 until her retirement in 1976, and Ms. Andrews' investment advisor from 1977 to 1982, when she became the guardian for Sarainne Andrews (PT, p. 9). The testimony of Ms. Haynes specifically established that all investment, accounting, and tax matters were handled by her, independent of Respondent (PT, pp. 1282-1289).

The Referee, in ruling contrary to Judge Penick, stated that "Insufficient emphasis has been taken into consideration in considering the results obtained by Respondent in fending off litigation by blood relative(sic) of the decedent that could have consumed considerable time and expense, as blood relative (sic) often engender sympathy, as opposed to charities" (RR, p. 4). There was no evidence, other than Respondent's own testimony, that Ms. Andrews' blood relatives threatened or seriously considered a will contest action. No will contest litigation was filed or pursued in the Andrews case.

Respondent's expert witnesses, Colen and Gordon, testified that they had no personal knowledge of the fees charged in Pinellas County for services similar to those performed by Respondent, but that they had a general knowledge that a fee from $175.00 to $350.00 per hour was considered reasonable (PT, pp. 236-284, 793-892). Both Colen and Gordon testified that they charged $175.00 per hour for probate matters in Pinellas County (PT, pp. 271, 278, 818). Allen testified that $375.00 per hour was a reasonable fee rate for Respondent's services to the Estate. When asked the basis for the opinion, Allen testified as follows in response to questions propounded by Bar Counsel:

A. My basis of that opinion would be, of course, as you know, supposedly the law has changed between the time that Judge Penick ruled on the $50,000 fee. But in my view, I don't think it changed in what was regularly and customarily being observed. So I took a two percent of the estate and I took the number of hours that I felt was reasonable using the eight criteria set forth in the Bar and as I understand it under Rowe.
Q. What did the two percent represent -- how did you arrive at two percent?
A. I took two percent of 14.9 million dollars.
Q. What is your basis for taking a percentage?
A. Well, the basis of the taking of the percentage would be the legislative enactment after the Platt decision.
Q. You are aware, sir, aren't you, in this case the legislative enactments were not in existence at the time Miss Forrester took that fee?
A. Yes, sir, I am. As a matter of course, my firm, which was the standard in this community, Mann, Harrison, Mann and Rowe, since we sounded ninety-nine percent of the trial docket for well over twenty some years and was headed by a former president of the Florida Bar, charged three percent of an estate. But I felt that two percent in light of all of the circumstances, and I think I was swayed by the, you know, the after-the-fact court decision certainly was reasonable. It would not be unreasonable to apply three percent in this particular case (DT, p. 392, L. 12-25; p. 393, L. 1-13).

Respondent's expert witness, Gardner Beckett, testified that the fees customarily charged in the community were based on a percentage of the value of the estate.

Colen testified that he was told by William Belcher, a well-known and prominent probate attorney in Pinellas County, that Mr. Belcher charged for probate matters at the rate of $200.00 or $250.00 per hour (DT, pp. 835-836). The personal representative's and the Bar's expert witnesses, Foote, Reischmann, and Adcock testified that they believed that the fee customarily charged in the locality for probate services by an attorney of Respondent's experience was $175.00 to $185.00 per hour (PT, pp. 1223, 1262; DT,

p. 420). Louis Adcock testified that in 1991, he probably charged $200.00 per hour (DT, p. 420).

The record clearly indicates that Respondent, during her representation of the Andrews Guardianship, charged $200.00 per hour, and that such fees were awarded at that rate by the Probate Court (DT, p. 517).

None of the experts testified that they had ever charged $350.00 per hour or any greater sum for any probate matter and the experts did not know of any other attorney who did so, or who was awarded such a fee rate (DT, p. 425; PT, pp. 275, 835-836, 1184-1185).

Respondent claimed that the Andrews Estate case prohibited her from accepting new employment opportunities and interfered with her ability to represent her existing clients (DT, p. 86). Respondent testified that during her representation in the Andrews Estate, she took on some small cases, but nothing large. However, the Respondent's time records (R, TFB Exh. #25) and her 1991 calendar (R, TFB Exh. #26) reflect that from June to December 1991, Respondent took on eighteen new clients, three flat-fee cases, and had twenty-six initial consultations (DT, p. 100).

Suzanne Bailey, a legal assistant/secretary for Respondent from April 1991 through 1992, testified that Respondent never advised her that the office was not accepting new clients, and that she did not see that the Andrews case had any effect on Respondent's ability to accept new clients. Bailey also testified that she was not aware of any cases that Respondent turned away as a result of the Andrews case. Bailey further testified that she was not aware of any time when Respondent indicated that she was unable to handle existing cases as a result of the Andrews case (DT, pp. 186-187).

Trudy Hall Futch, a paralegal employed by Respondent from April 1991 through November 1991, testified that at about the same time as Ms. Andrews' death, Respondent took on a big divorce case, that Respondent never advised her that the office would not take on any new clients, and that she did, in fact, take on new clients. Futch also testified that subsequent to Ms. Andrews death, Respondent was able to work on her existing cases (DT, pp. 237-238).

As for Respondent's experience, reputation, diligence, and ability or skill, the Respondent owed a fiduciary duty not only to her client, the personal representative of the Andrews Estate, but also a derivative duty to the beneficiaries of the Estate,(Estate of Gory, 570 So. 2d 1381 (Fla. 4th DCA 1990), PT, pp. 1257-1261; DT, p. 414). The evidence in this case clearly and convincingly established the following:

(1) Sally Biggs, referred to by Respondent as her staff accountant, was used by Respondent to assist in the administration of the Andrews Estate, and was paid an hourly rate of $25.00 per hour. Respondent attempted to charge Biggs' services to the Estate at $125.00 per hour, on the grounds that Biggs was her employee. During the hearing before Judge Penick, Biggs, who was Respondent's witness, testified she was not an employee of Respondent. She

testified that Respondent was one of her 12-15 clients that she provided accounting and computer consultation services to. For excerpts of Biggs' testimony, please see in Appendix "E" of this brief.

(2) Respondent procured the payment of attorney's and personal representative's fees of almost $400,000.00, knowing that the personal representative bond was $100,000.00 (PR, pp. 1764-1784, 3549-3550). Respondent failed to advise Lillie Haynes that she (Haynes) was personally liable to the Estate for the amount by which such fees paid exceeded either, the amount agreed upon by the beneficiaries, or, the amount eventually allowed by the Probate Court (PT, pp. 15-16, 24; DT, pp. 64-65).

(3) Respondent attempted to procure an agreement from the residuary beneficiaries of the estate to a fee based on a percentage of the value of the Estate without disclosing the existence of the decision of the Florida Supreme Court in the Estate of Lester Platt, 16 Fla. L. Weekly S237, (April 4, 1991), (Platt I) (PT, pp. 566-567, 679-680; DR, TFB Exh. #6; DT, p. 67).

(4) Respondent did not require, as a prerequisite to distribution, that the charitable beneficiaries furnish the Estate with their tax identification number, a copy of their most recent exemption letter, and a copy of the resolution authorizing an individual to sign receipts on behalf of the charity (PR, pp. 1662-1672). The Bar's experts testified the foregoing was reasonably necessary and required by the attorney representing an estate (PT, pp. 1244, 1246; DT, pp. 409-410).

The foregoing clearly establishes that Respondent failed to competently represent Haynes and that she breached her duty of loyalty to her client and/or the beneficiaries of the Andrews Estate.

Clearly, the Referee's finding that Respondent earned a total fee of $174,190,00 is erroneous and contrary to the competent evidence in this case. There is clear and convincing evidence to support the ruling made by Judge Penick, and per curiam affirmed by the Second District Court of Appeal, that a reasonable fee for the services rendered by Respondent to the Andrews Estate is $46,725.00. Respondent sought a fee of $521,000.00 from Lillie Haynes, the residual beneficiaries of the Estate, and the Probate Court. She collected from Lillie Haynes, fees of $195,000.00. Based on the testimony and evidence from the hearing before Judge Penick and from the final hearing in this case, the fees charged and collected by Respondent constitute a clear overreaching and an unconscionable demand by Respondent.

It is the Bar's position that the Respondent also sought fees from her client and from the Probate Court by means of intentional misrepresentation or fraud as to her entitlement to the fee.

On December 5, 1991, Respondent filed a Motion to Withdraw and for Determination of Attorney's Fees and Costs (DR, TFB Exh. #13, PR, pp. 33-34, 2453-2464). In this Motion, Respondent claimed entitlement to attorney's fees in the approximate amount of $521,000.00 based upon the criteria set forth in the Authorization Agreement for Compensation of Attorney previously supplied to, but rejected by at least eight of the thirteen residuary beneficiaries (PR, pp. 33-43; DR, TFB Exh. #13). The requested compensation was based on a percentage of the value of the Estate and not upon the criteria established by the Supreme Court in In Re: Platt, (supra) (DT, p. 56).

Respondent stated in her Motion that:

> (a) Final distribution to residuary beneficiaries has been delayed due to a pending lawsuit against the Estate;
>
> (b) That it is estimated that it will take approximately three weeks to transfer documents to the new attorney due to the fact that the legal work on the Estate is effectively completed. (DR, TFB Exh. #13)

Contrary to the above, the legal work on the Estate was not "effectively completed" and the case was not in a posture for final distribution to residual beneficiaries but for a pending lawsuit against the Estate. At the time Respondent filed the Motion, no necessary tax work or tax clearances had been received, no accounting had been prepared or filed, no arrangements for distribution to residuary beneficiaries had been made, and no more than 45% to 50% of the necessary legal work to administer the Estate had been completed (PT, pp. 842-845, 1242; DT, pp. 409, 415).

Respondent also stated in her Motion that "agreements as to fees have been received from a number of the residuary beneficiaries. However, all thirteen residuary beneficiaries have not approved fees at this time". (DR, TFB Exh. #13; PR, pp. 33-43). This was a misrepresentation by omission of relevant or material facts or information. Respondent failed to apprise the Court of the fact that at least eight residual beneficiaries specifically refused to enter into the fee agreement wherein Respondent sought a fee based solely upon a percentage of the value of the Estate. Respondent also failed to advise the Court of the residual beneficiaries who had rejected the proposed fee agreement for a fee based solely on a percentage of the value of an estate ($521,000.00) as impermissible pursuant to Platt (supra).

Furthermore, Ms. Forrester attached to her Motion three signed authorization agreements for compensation of attorney signed by three of the residuary beneficiaries (DR, TFB Exh. #13; PR, pp. 2981-2989). Respondent failed to attach to her Motion, correspondence from several beneficiaries who specifically rejected Respondent's proposed fee agreement as being excessive. Respondent obviously made false and/or misleading statements in her Motion in an effort to persuade the Probate Court to award her a fee based solely on a percentage of the value of the Estate.

Ms. Forrester filed an Amended Petition for Attorney's Fees and Costs which alleged in paragraph 5, the existence of an agreement between Ms. Forrester and Lillie Haynes, wherein Ms. Haynes agreed to pay attorney's fees to Ms. Forrester based upon a percentage of the value of the Estate (PR, Amended Petition for Attorney's Fees and Costs). On April 15, 1992, Ms. Forrester gave sworn testimony in her deposition that the only agreement relating to attorney's fees was that Respondent would receive attorney's fees agreed to by all of the residuary beneficiaries, or in the absence of agreement, fees determined by the Court (PR, Estates

Exh. #11, p. 19-20). This testimony was in direct contradiction to the allegation of Respondent contained in paragraph 5 of her Amended Petition for Attorney's Fees and Costs. Pursuant to a Motion of Lillie Haynes to strike paragraph 5 of the Amended Petition for Attorney's Fees and Costs on this basis, Judge Penick entered an Order Granting the Personal Representative's Motion to Strike and did strike paragraph 5 of the Amended Petition.

Respondent made false, fraudulent, and misleading allegations and/or statements in her Motion to Withdraw and For Reasonable Attorney's Fees and Costs in the Andrews case; her Amended Petition For Attorney's Fees and Costs; and her testimony in the evidentiary hearing regarding the employment status of Sally Biggs and the time that she and Biggs spent administering the Andrews Estate.

Contrary to the Referee's recommendation, Respondent should be found guilty of violating Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and Rule 4-8.4(d) for engaging in conduct that is prejudicial to the administration of justice.

The Bar alleged in its Complaint that Respondent violated Rule 5-1.1 by misappropriating client trust funds; however, the Referee found that there was no evidence or no clear and convincing evidence to support the same. It is the Bar's position that the $195,000 received by Respondent were trust funds belonging to the client or the Estate until earned by Respondent based on reasonable time expended for services rendered multiplied by a reasonable hourly rate.

The $195,000.00 which Respondent received from Haynes in June and August 1991 could have been treated by Respondent as her own funds and deposited in her operating account had it represented a non-refundable retainer approved by the beneficiaries, or had Haynes or the thirteen residual beneficiaries agreed to pay Respondent a flat fee based solely on a percentage of the value of the Estate. The Referee found that "although there was no specific fee agreement, Haynes and Respondent treated the $195,000.00 fee as a non-refundable fee" (RR, p. 4). However, this finding is contrary to the testimony of Haynes and Respondent.

The Respondent acknowledged that the $195,000.00 she received from Haynes did not represent a non-refundable retainer (DT, pp. 39-40). She also acknowledged that neither Haynes nor the thirteen residual beneficiaries consented or agreed to pay her a flat fee based solely on a percentage of the value of the Estate.

Rule 5-1.1 provides that "money entrusted to an attorney for a specific purpose must be held in trust and applied only to that purpose". Haynes testified that the two disbursements of Estate funds to Respondent were based on Respondent's representation that she was entitled to the same (PT, p. 23). At the time Respondent had received the $80,000.00 check from Haynes, her time records indicated that she had spent only 65.75 hours on the Andrews Estate (DT, pp. 47-48). Respondent did not earn, and was never entitled to receive $195,000 of Estate funds. Respondent clearly misappropriated the Estate's funds, and her actions in seeking a fee of between $521,000.00 and $200,000.00 based on false time records, false allegations and/or statements in pleadings, and false testimony, along with her efforts to discharge in bankruptcy the debt Judge Penick found she owed to the Estate, support this position. In addition to the foregoing, the residual beneficiaries of the Andrews Estate had an interest in all of the residual assets of the Estate, which included the $195,000.00 disbursed by Haynes to Respondent upon Respondent's instruction. One of the primary reasons for the adoption of the "lodestar" method for computing attorney fees in Rowe (supra) was that someone other than the client who receives services bears the impact of the attorney's fees. This is why Platt (supra) held that, absent an agreement from the beneficiaries of an estate, attorney fees could not be based solely on a percentage of the value of an estate. Platt, (supra) at 333 and 337.

Respondent sent to the residual beneficiaries of the Estate the "Authorization Agreement for Compensation of Attorney" for approval and execution. Many of the residual beneficiaries rejected the Authorization Agreement, which included a request for an $80,000.00 minimum advance on fees. However, when Respondent sent the Authorization Agreement to the residual beneficiaries, Respondent had already received $80,000.00 from Haynes as a retainer and partial fees (DT, p. 41) and used a substantial portion for her own purposes (DR, TFB Exh. #5). Respondent did not, at any time prior to her discharge in November 1991, advise the residual beneficiaries of her receipt of the $195,000.00. She did not deposit the funds in her trust account; rather, she deposited the funds in her business operating account and used the funds for her own purposes.

In her own response to Haynes' Grievance/Complaint, (DR, TFB Exh. #32) Respondent indicates that the $195,000.00 was trust funds. In the last paragraph of page 7 of Bar's Exhibit #32, Respondent stated,

> "This money was not placed in the trust account because the income from the trust account goes to The Florida Bar. I discussed placing the money in a certificate of deposit, but the interest being paid over checking account interest didn't seem to justify moving the money."

It was not until The Florida Bar sought to audit Respondent's trust account that she took the position that these funds were not client funds (DR, TFB Exh. #35).

Further, Respondent stated in her response to Haynes' Grievance/Complaint that,

> "The monies advanced on fees was placed in my business account and utilized only as it was earned. In January 1992, I believe there remained approximately $20,000.00 in the account even though our records indicate more money was due from the Estate." (DR, TFB Exh. #32)

This statement by Respondent indicates that the $195,000.00 that was deposited into her business account (so that the Bar would not get the interest) were trust funds belonging to the client or the Estate that she was entitled to disburse to herself only as she earned it. Respondent testified that the $195,000.00 was used as earned. Respondent also testified the money went out "little by little" (DT, p. 78). Respondent used the trust funds for her own purposes prior to earning them, with the intent to temporarily or permanently deprive the client, Estate, or beneficiaries of these funds. The clear and convincing evidence in this case established that the Respondent was entitled to a fee of $46,725.00, not $195,000.00.

Respondent's bank statements and cancelled checks (DR, TFB Exh. #45) demonstrate when and how the Estate's funds were disbursed from Respondent's business operating account. These records indicate that the Estate's $80,000.00 retainer fee was deposited to Respondent's business account on June 26, 1991, and that the balance in said account at that time was $81,229.49; that between June 26, 1991, and August 22, 1991, additional deposits, unrelated to Andrews, totaling $17,082.85 were made to the account; that between June 26, 1991 and August 22, 1991, Respondent disbursed $50,425.81 from the account to herself, $1,141.00 to the Internal Revenue Service, $865.70 for client costs, and $44,328.11 for other payments. On August 22, 1991, the account balance was only $1,503.22. Further, on August 23, 1991, Respondent deposited additional Estate funds in the amount of $115,000.00 into her business operating account which brought the balance in the account to $117,422.02 on said date. One week later on August 30, 1991, Respondent's account had been depleted by over $30,000.00, leaving a balance of only $87,225.40. On November 25, 1991, the date Haynes discharged Respondent as her attorney, Respondent's business account balance was only $34,341.15, even though Respondent had made additional deposits to the account unrelated to Andrews between August 22, 1991, and November 25, 1991, totaling

$36,570.37. By the time she was discharged, Respondent had spent all of the Estate's funds, even though she had only earned $46,725.00.

The business account records clearly show that Respondent was having personal and business financial problems based on the account balance each time Respondent received funds from Haynes, the nature of the disbursements, and the immediate disbursal of the funds.

Contrary to the Referee's ruling, there is clear and convincing evidence to support a finding that Respondent violated Rule 4-1.15(a), Rule 4-1.15(b), Rule 4-1.15(c), and Rule 5-1.1.

The Bar alleged in its Complaint that Respondent violated Rule 4-1.1 (A lawyer shall provide competent representation to a client); and Rule 4-1.4(b) (A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). The Referee found that there was no evidence or no clear and convincing evidence of the foregoing. This finding is erroneous.

It is the Bar's position that Respondent violated these Rules by advising Haynes that she (Respondent) was entitled to Estate funds totaling $195,000.00 and instructing Haynes to issue checks totaling said sum to her; by failing to advise Haynes of her (Haynes) personal liability for the $195,000.00 should it ultimately be determined that Respondent was not entitled to and failed to repay the same; by failing to advise Haynes that Respondent's professional judgment was impaired by her own personal and financial problems; and by failing to advise and instruct Haynes to obtain an additional bond to cover the disbursements made to Respondent and Haynes during the course of the representation. Respondent should therefore be found guilty of violating Rules 4-1.1 and 4-1.4(b).

The Bar also alleged in its Complaint that Respondent violated Rule 4-3.4(c) (A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists). The Referee found there was no evidence or no clear and convincing evidence of the same. This finding is also erroneous.

The evidentiary hearing before Judge Penick commenced on May 4, 1992, and continued through May 6, 1992 (PT, Vols. I and II). The hearing was concluded July 6th through 10th, 1992. (PT, Vols. III-VII). The Rule was invoked during the proceeding. At the conclusion of the first portion of the hearing on May 6, 1992, Respondent was on the stand as her own witness under direct examination. At that time, the following colloquy between Judge Penick, and all of the counsel for the parties, including Respondent occurred:

THE COURT:

> Ms. Forrester, I'm going to put your (sic) under a heavy burden. You're still on the stand and in the middle of direct testimony. You can't even discuss this case with your employees. I'm going to keep you on the stand. Now, until your testimony is complete, then you can discuss it with your employees or whoever you are going to call; but I'm going to keep you in a vacuum until this is concluded.
>
> All right. We'll stand adjourned at this point in time and we will pick it up at a later date.

MR. BELCHER: Not to discuss with expert witnesses either?

THE COURT:
> Anybody. She's on the stand. Otherwise, we finish tonight (PT, p. 396, L. 12-23; p. 397, L. 20-23).

The hearing resumed on July 6, 1992 and Respondent's direct testimony was not concluded until the afternoon of July 8, 1992 (PT, pp. 402-789). On the evening of July 7, 1991, (a time when Respondent was still on the witness stand) Respondent met with two of her expert witnesses, Gerald Colen and Gardner Beckett.

During the portion of the probate evidentiary fee hearing held on July 8, 1991, Gerald Colen testified as follows in response to questions propounded by attorney Fletcher Belcher:

> Q. What was the purpose of your meeting last night with Mr. Beckett?
> A. To discuss this case.
> Q. Was that done?
> A. Yes. (PT, p. 872, L. 5-9)

Then, during this disciplinary case, Mr. Colen testified as follows in response to questions propounded by Respondent's counsel:

> Q. What happened on the occasion when you met Miss Forrester the night after Judge Penick entered the order? What did you all talk about?
> A. I don't know when Judge Penick entered the order, Mr. Trawick. I know nothing about that order and knew nothing about that order until the issue was raised while I was sitting testifying, at which time I --
> Q. All right?
> A. -- was upset.
> Q. Did you -- let me get at it this way. Did you have a discussion or did you meet with Mrs. Forrester and anyone else before you testified?
> A. I did.
> Q. And who did you meet with?
> A. Well, I believe I testified that I had had conversations with Miss Forrester. I may have had conversations with her a few times after she asked me to be a witness. And then I believe what you're referring

> to specifically is that I met at her house the night before my testimony and --
> Q. That's the occasion,
> A. Yes, and I was there and Mr. Gardner Beckett, rest his soul, was there.
> Q. Would you tell me what the subjects were that were discussed that night at that meeting?
> A. It was -- the subject was my testimony and the testimony of Mr. Beckett at the hearing on attorney's fees. (DT, p. 278, L. 24-25; p. 279, L. 1-25; p. 280, L. 1-13 and 19-25; p. 281, L. 1-6).

Based on Mr. Colen's testimony above and Respondent's testimony before the Referee (DT, p. 351), Respondent never advised Mr. Colen of Judge Penick's order. Respondent testified she never sought to be released from Judge Penick's sequestration order prior to her meeting with Colen and Beckett (DT, p. 352). Respondent clearly violated Judge Penick's direct order not to discuss the case with any of her witnesses, including her expert witnesses, until her testimony was complete. Respondent was found guilty of contempt. With respect to such conduct, Respondent should be found guilty of not only violating Rule 4-3.4(c), but also Rule 4-8.4(d) for engaging in conduct prejudicial to the administration of justice.

ISSUE II

WHETHER DISBARMENT IS THE APPROPRIATE DISCIPLINE FOR RESPONDENT'S MISCONDUCT

The testimony and documentary evidence in this case supports the following findings as established in the Bar's argument in Issue I:

1. The only fee agreement between Respondent and her client, Lillie Haynes as the personal representative of the Andrews Estate, was that Respondent would be paid an amount agreed to by all

residual beneficiaries or, in the absence of an agreement, fees as determined by the Circuit Court for Pinellas County, Probate Division;

2. Respondent sought to be paid an attorney's fee based on a percentage of the value of the Andrews Estate and knew in light of Platt (supra), that since the residual beneficiaries would bear the impact of her fees, she would be required to obtain their unanimous consent or court approval of the fee she desired;

3. That within eight weeks of the commencement of the representation, Respondent obtained $195,000.00 from Haynes for fees that had not been earned, deposited the same in her operating account rather than her trust account, and used the same for her own purpose, even though neither the beneficiaries nor the Probate Court approved of the advance of fees;

4. That Haynes discharged Respondent at a time when only 45 to 50% of the administration of the Estate was completed;

5. That Respondent sought from the Probate Court, a fee of $521,000.00, which was based solely on a percentage of the value of the Estate, even though at least eight of the residual beneficiaries refused to consent to the same, and even though only 45-50% of the work necessary to complete the administration of the Estate had been done;

6. That the Probate Court determined that Respondent was only entitled to a fee of $46,725.00, and entered an order requiring the Respondent to refund to the Estate, $165,424.24, which represented the difference between the attorney's fees

advanced to Respondent and the $46,725.00 awarded by the Court, together with interest from the date of the advance to July 24, 1992;

7. That Respondent sought to discharge in bankruptcy, the debt that the Probate Court found Respondent owed to the Andrews Estate;

8. That Respondent misappropriated trust funds from the Andrews Estate in the amount of $148,275.00;

9. That during the fee hearing before the probate judge, Respondent violated the Court's sequestration order that she not discuss the case with her expert witnesses until her testimony on the stand was completed;

10. That Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in pleadings filed with the Probate Court and her testimony during the evidentiary hearing on fees before Judge Penick;

11. That Respondent failed to competently represent and adequately communicate with her client.

It is the Bar's position that disbarment is appropriate for Respondent's misconduct. This position is supported by case law involving misconduct similar to that of Respondent and by the Florida Standards for Imposing Lawyer Sanctions.

In The Florida Bar v. McKenzie, 581 So. 2d 53 (Fla. 1991), the Referee made express findings of fact that McKenzie represented the Estate of Mack Fisher (Estate); that McKenzie's legal fee of $13,975.86 was based upon the "Minimum Fee Schedule" of the

Clearwater Bar Association, which was no longer in existence at the time McKenzie was retained; that McKenzie filed an Inventory of Estate Assets (which included a large quantity of assets owned as tenants by the entirety by Fisher and his wife) showing total estate assets of $458,314.50; that subsequent to McKenzie's discharge from the case, the Final Accounting established total estate assets of only $853.75 once the tenants by the entirety assets were removed from the inventory; and that McKenzie was paid $4,000.00 in legal fees and continued to claim fees in the amount of $13,975.86.

The Referee concluded that by failing to ascertain that the assets owned as tenants by the entirety were not probate assets, McKenzie did not competently handle the Estate. The Referee further concluded that McKenzie should not have charged a percentage of the jointly held assets as a legal fee and, therefore, charged a clearly excessive fee. The Referee also found that McKenzie's testimony at the final hearing was less than truthful.

As aggravating factors, the Referee noted: prior disciplinary offenses, dishonest or selfish motives, submission of false testimony or evidence before the Referee during the disciplinary proceeding, refusal to acknowledge the wrongful nature of his conduct, and substantial experience in the practice of law.

The Referee recommended that McKenzie be suspended from the practice of law for three years. On review, the Supreme Court of Florida held that the only appropriate discipline was disbarment, given McKenzie's total conduct in the incident.

The Respondent's misconduct is similar to, and yet more serious than that of Mr. McKenzie. Like McKenzie, Respondent charged a clearly excessive fee, and failed to competently represent the personal representative of the Estate.

Unlike McKenzie, the Respondent misappropriated trust funds; engaged in conduct involving dishonesty, fraud, deceit or misrepresentation; violated Judge Penick's sequestration order; and failed to repay the debt she owed to the Estate and has sought to discharge the debt in bankruptcy.

In The Florida Bar v. Baker, 419 So. 2d 1054 (Fla. 1982), the Referee found that Baker, as the attorney for the executor of an estate in New York, sold Estate assets and deposited the funds in his trust account. Subsequently, two checks issued by Baker to one of the beneficiaries of the Estate from his trust account were returned due to insufficient funds. The Referee determined that Baker had issued approximately ten checks totaling $35,000.00 from the Estate account to himself or his law firm without prior court approval and without disclosure to or approval of the beneficiaries.

The Monroe County Surrogate's Court of New York issued a decree disallowing fees and commissions claimed by Baker and directed him to reimburse the Estate in the amount of $22,880.40, which represented the unauthorized transfers of Estate funds for non-estate purposes. Baker repaid the amount so ordered.

The Referee recommended that Baker be disbarred for his misconduct which the Referee stated "amounted to theft". The Supreme Court approved the Referee's findings and recommendations and disbarred Baker.

The Respondent's misconduct herein is similar to, yet more serious than Baker's misconduct. Like Baker, Respondent had the personal representative issue two checks from the Estate account made payable to her totaling $195,000.00, without prior approval of the beneficiaries of the Estate. In fact, Respondent had Haynes issue a check for $115,000.00 made payable to Respondent subsequent to a time when Respondent had received several responses from residual beneficiaries that they would not approve Respondent's proposed fee agreement. Respondent, like Baker, was disallowed fees she claimed she had earned and was ordered by the Probate Court to reimburse the Estate. Unlike Baker, Respondent has failed to repay the Andrews Estate the excessive fees that she charged, collected, and misappropriated from the Estate. In fact, Respondent has attempted to discharge in bankruptcy, the debt she owes to the Estate. Unlike Baker, Respondent also engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation by altering time records, making false or misleading allegations in pleadings, giving false testimony, and violated a Court order.

In The Florida Bar v. Aaron, 606 So. 2d 623 (Fla. 1992), Aaron, as attorney for the co-personal representative and co-trustee of an estate, withdrew $150,000.00 from the Estate account and deposited the funds into his personal savings account. Aaron ultimately transferred some of the $150,000.00 back into the Estate and trust accounts, but failed to account for $47,00.00 in Estate checks that were made payable to him or negotiated by him. Aaron also converted $7,000.00 left in the Estate account, but reimbursed the Estate $54,000.00 for money he owed the Estate for excess attorney fees.

The Referee found that Aaron failed to hold his client's funds in trust separate from his own property; failed to promptly deliver funds to a client or third party; and committed an act contrary to honesty and justice. The Referee recommended that Aaron be suspended for three years. The Supreme Court of Florida found that disbarment was appropriate for Aaron's misconduct.

Like Aaron, Respondent misappropriated Estate trust funds by depositing $195,000.00 of Estate funds into her business operating account and using it for her own purposes prior to earning the same. Respondent has been ordered to refund to the Estate in excess of $145,000.00; however, unlike Aaron, Respondent has failed to make restitution. Instead, Respondent has sought to discharge the debt in bankruptcy, and has caused injury to her client in that Haynes has been held accountable and has been required to repay the debt.

The Florida Standards for Imposing Lawyer Sanctions support the Bar's position that disbarment is the appropriate discipline for the Respondent's misconduct. Based on the facts of this case, absent aggravating or mitigating factors, the following sections of the Standards apply in the instant case:

Standard 4.1 (Failure to Preserve the Client's Property);

4.11 Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury to a client.

Standard 4.5 (Lack of Competence)

4.51 Disbarment is appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client.

Standard 4.6 (Lack of Candor)

4.61 Disbarment is appropriate when a lawyer knowingly or intentionally deceives a client with the intent to benefit the lawyer or another regardless of injury or potential injury.

Standard 6.1 (False Statements, Fraud, and Misrepresentation)

6.11 Disbarment is appropriate when a lawyer:
(a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or
(b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding.

Standard 7.0 (Unreasonable or Improper Fees)

7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

Standard 9.2 (Aggravation)

9.2(b) dishonest or selfish motive;
9.2(c) a pattern of misconduct;
9.2(d) multiple offenses;
9.2(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
9.2(g) refusal to acknowledge wrongful nature of conduct;
9.2(h) vulnerability of victim;
9.2(i) substantial experience in the practice of law; and
9.2(j) indifference to making restitution.

Respondent misappropriated $148,000.00 from the Andrews Estate because she was having financial problems (DT, pp. 191-194); has failed to make restitution to the Andrews Estate; and has sought to discharge in bankruptcy the debt owed to the Estate. Respondent's misconduct has injured her client, Lillie Haynes, in that she has been held personally responsible for, and required to repay the Estate, the excessive funds paid to and misappropriated by Respondent. Haynes has also been required to contribute $20,000.00 toward the fees of her new attorneys, Baxter and Strohauer, for services rendered in obtaining and attempting to satisfy the money judgment entered against Respondent by Judge Penick. Finally, Respondent has failed to acknowledge the wrongful nature of her misconduct and has attempted to blame Haynes and her attorneys for her failure to make restitution and her efforts to discharge the debt in bankruptcy.

None of the mitigating factors set forth in Standard 9.3 (Mitigation) apply to this case.

Both the case law and the Standards set forth above support the Bar's position that disbarment is appropriate for Respondent's misconduct in this case.

CONCLUSION

Wherefore, The Florida Bar respectfully requests that this Court reject the Referee's finding that "Judge Penick's finding on fees was against the preponderance of the evidence presented"; that Respondent earned a fee of $174,190.00 for her representation of Lillie Haynes as personal representative of the Andrews Estate; that there was either no evidence or no clear and convincing evidence of any alleged violations of the Rules Regulating The Florida Bar other than Rule 4-1.5(a); and further the Referee's recommended discipline of a sixty-day suspension. The Bar requests that this Court issue a ruling that Respondent misappropriated Estate funds; that Judge Penick's order on fees is supported, in its entirety, by clear and convincing evidence; find Respondent guilty of violating Rules 4-1.1, 4-1.4(b), 4-1.5(a), 4-1.15(a), (b), and (c), 4-3.4(c), 4-8.4(c) and (d), and 5-1.1 of the Rules Regulating The Florida Bar; disbar Respondent from the practice of law in this state, and prohibit her from seeking readmission until she makes restitution to the Andrews Estate as set forth in Judge Penick's order on fees.

Respectfully submitted,

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