

FILED
SID J. WHITE
SEP 28 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complaint,

v.

GENEVA FORRESTER,

Respondent.

CASE: 82,090

TFB: 93-10,060(6D)

93-11,031(6D)

REPORT OF REFEREE

I. Summary of Proceedings: The undersigned was duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating the Florida Bar. Pursuant to the appointment a final hearing was held on July 5, 6, 7 and 8, 1994 with the argument of counsel for the parties being held on August 26, 1994. The pleadings, notices, motions, orders, transcript and exhibits, including the case file in the Estate of Sarainne Andrews, case 91-2311-ES, now pending in the circuit court for Pinellas County, Florida of which the referee took judicial notice, are forwarded to the Supreme Court of Florida with this report and constitute the record in this proceeding.

During the final hearing The Florida Bar called the following witnesses:

Geneva Forrester
Pedro Pizarro
Trudy Hall
Louie Adcock

The respondent called the following witnesses:

Geneva Forrester
Gerald Colen
Joseph Lang
Seymour Gordon
John Allen

The parties stipulated that the referee could take judicial notice of the probate file in the Estate of Sarainne Andrews, deceased. The referee reviewed the file. The referee asked the parties to research the question of law about the finding effect of the order on fees in the probate proceeding insofar as this grievance proceeding is concerned. At argument both parties agreed that the order on fees in the probate proceeding was not binding on the referee although they differed in their basis for reaching that conclusion. The referee accepted the parties' conclusion

on this point of law.

The Florida Bar filed a second amended complaint in Count I of which the Bar charged respondent with:

1. Failing to provide competent representation to a client;
2. Failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable request for information;
3. Explaining a matter to the extent necessary to permit the client to make informed decisions;
4. Entering into an agreement for, charging and collecting an illegal, prohibited or clearly excessive fee;
5. Representing a client when the lawyer's independent professional judgment may be limited by the lawyer's responsibilities to the lawyer's own interest;
6. Depositing advance fees in the lawyer's operating account instead of in the trust account;
7. Failing to notify the client or a third person when funds are received in which the client or third person has an interest;
8. Possessing property in which the lawyer and another person claim interest and failing to treat it as trust property;
9. Knowingly disobeying an obligation under the rules of a tribunal.
10. Engaging in dishonesty, fraud, deceit or misrepresentation;
11. Engaging in conduct prejudicial to the administration of justice;
12. Applying money entrusted to the lawyer for a specific purpose in a different manner.

In Count II respondent was charged with:

1. Co-mingling personal and client funds in her trust account;
2. Trust account shortages and overages;
3. Showing only totals and ending balances each month without a carry over of

the previous month's balance in her trust account journal;

4. Failing to prepare monthly reconciliations and a comparison between the total of the reconciled balance in the checking account and the total in the trust ledger cards.

II. Findings of Fact.

General Findings: Sarainne L. Andrews died on June 19, 1991 and designated Lillie Haynes as her personal representative in her will. Descendant's estate was valued at approximately \$14,800,000.00. Haynes retained respondent to represent respondent as personal representative in the administration of the estate. About a week after the death of the decedent Haynes and respondent each took an advance fee, respondent's fee being \$80,000.00. On or about August 20, 1991 both of them took another advance on fees with respondent's fee at that time being \$115,000.00. The parties agreed that they would ask the residuary beneficiaries to approve fees for each of them based on a percentage of the decedent's estate. If the residuary beneficiaries did not agree, Haynes and respondent agreed that the court would set a reasonable fee for respondent's services. Respondent asked the residuary beneficiaries to approve the fees based on a percentage. Initially three of them agreed to do so. Subsequently, one of the three withdrew the consent. None of the remaining residuary beneficiaries agreed. (T-21 through 80)

In November 1991 Haynes discharged respondent as her attorney and obtained other counsel. (T-83) In connection with respondent's termination, respondent applied for an award of attorney fees. The circuit Court for Pinellas County, Florida held a series of hearings on the question of the amount of the fee and ultimately allowed respondent her associate, paralegal and staff account a total of 294 hours at varying hourly rates with respondent's rate at \$200.00 an hour and making a total allowed of \$46,725.00. The probate judge setoff this amount against the total of \$195,000.00 taken in advance fees plus interest and ordered respondent to repay to the estate \$165,424.24 . (T-130 through 132, probate file)

Respondent's ability to repay the sum was made difficult, and perhaps impossible, by collection proceedings instituted by Haynes after entry of the order with the result that respondent had to seek bankruptcy court protection in an effort to continue the practice of her profession. Ultimately another attempted levy forced respondent into a chapter 7 proceeding. (T-131 through 133, 146 through 152) Respondent deposited the two checks in her operating account, not her trust account. (T-42, 75)

The Bar performed an audit of respondent's trust account and reported certain improprieties in connection with that that are discussed further under the specific findings under Count II.

Findings on Count I

This proceeding arose because of the fee paid to respondent and has escalated into a charge of embezzlement of trust funds. It actually boils down to whether or not respondent is

guilty of charging an excessive fee and subject to disciplinary proceedings. I find there has been a clear violation of Rule 4-1.5(a) as alleged in Count I for the reason that, although there was no specific fee agreement, Haynes and respondent treated the \$195,000.00 fee as a nonrefundable fee. Respondent was discharged by Haynes before earning the full amount of \$195,000.00 and no part of it has been repaid or placed with a mutually agreed on escrow agent, pending a final determination of the fee.

Sally Biggs was not a true independent contractor as alleged by the Bar because respondent furnished her an office, a computer and computer disk. (T-294 through 297) I have treated her as a paralegal. This is only a minor point, but respondent had daily time records that were kept by Biggs under respondent's supervision during the course of representation that exceeded the 215 hours allowed by the probate judge and there was no evidence to the contrary so I assume the probate court relied upon defense expert as to reasonable hours with the same skills as the experts to have accomplished the work. (probate file and probate transcript Vol. II 1213-1276). I note that only two defense experts testified on fees at the probate hearing while three testified for the respondent. The probate judge was not bound by the testimony of any of the expert witnesses and it is basic law that the number of witnesses is not the determining factor, but his finding on fees was against the preponderance of the evidence presented. I have noted the claims made by the Bar that the billed hours of Sally Biggs were improperly increased, but I do not find that to be improper because she was an employee and I find that the number of hours she actually logged in is the same number of hours presented finally to the probate court.

I make these observations and findings since they go to the recommended punishment as well as to the issue of guilt of the respondent since the \$195,000.00 fee was not earned on August 20, 1991 when the \$115,000.00 payment was made. Insufficient emphasis has been taken into consideration in considering the results obtained by respondent in fending off litigation by blood relative of the decedent that could have consumed considerable time and expense, as blood relative often engender sympathy, as opposed to charities. From the evidence presented in this proceeding (T-286 through 288, 372 through 374, 386 through 389), I find respondent should be allowed the following fees:

| | | |
|-----------------------------------|-------------------------------|--------------|
| Geneva Forrester | 559.25 hrs @ \$300.00 per hr. | \$167,775.00 |
| Richard Sanders | 5 hrs @ \$175.00 per hr. | \$ 875.00 |
| Paralegal | 20 hrs @ \$75.00 per hr. | \$ 1,500.00 |
| Staff Accountant (Sally Biggs) | 54 hrs @ \$75.00 per hr. | \$ 1,300.00 |

resulting in a total fee of \$174,190.00 that respondent earned.

Respondent should be allowed a setoff of \$174,190.00 against the \$195,000.00. This leaves a balance of \$20,810.00 plus interest at 12% a year from August 20, 1991. I recognize that the judgment of the probate judge has become final insofar as the civil liability of respondent is concerned so that my finding on the fee is applicable only to this proceeding and

to the discipline that I subsequently recommend.

I find either no evidence or no clear and convincing evidence concerning any alleged violation of the Rules Regulating the Florida bar, except number 4 listed above, so I find respondent not guilty as to all other charges of violations of rules made by the Florida Bar in Count I.

Findings as to Count II

In connection with the charges brought under Count II respondent cannot be faulted for the Internal Revenue service levying on respondent's trust account rather than her operating account, causing a temporary negative balance in the trust account in January 1991. It was corrected by a deposit by respondent. (T-163) Respondent can be faulted for writing a check to herself from the trust account on June 9, 1987 based on a check deposited from Dennison deposited on the same date that was returned for insufficient funds. That is a violation of Rule 5-1.1(g). The fact that respondent made a new deposit on June 12, 1987 does not obviate the infraction and goes to mitigation only. (T-164, 165)

The Bar's branch auditor found the cash receipts and disbursements journal was prepared on a monthly basis, but showed only the totals and ending balances of the transactions of each month without a carryover of the previous month's balance. This was true even though respondent hired a certified public accountant to bring respondent's trust account records up to date after Sally Biggs removed the computer disks. The computerized records after September 1990 were missing due to Sally Biggs having taken the computer records with her or possibly due to erasure of computer cassettes by another Bar witness, Suzanne Bailey, at the urging of Sally Biggs. (T-202 through 206, 209, 210, 219, 220) In any event the certified public accountant prepared reconciliations from October 1990 through July 1992 prior to an audit by The Florida Bar on November 18, 1992. Monthly comparisons had not been prepared on a timely basis by respondent prior to her certified public accountant being hired and the certified public accountant prepared them for all months from October 1989 through July 1992. Therefore respondent violated Rule 5-1.2(c) (1) (A) and (B) but the evidence showed that respondent was in compliance at the time of the hearing. (T-175 through 179)

III. Recommendation on Guilt or Innocence: As to Count I, I find respondent guilty of violating Rule 4-1.5(a) concerning the charging of an excessive fee.

On Count II, I find respondent guilty of a violation of Rule 5-1.1(g) on the Dennison withdrawal from the trust account and of rule 5-1.2(c) (1) (A) and (B) on the reconciliations and comparisons.

IV. Recommendation as to Discipline: I recommend that respondent be suspended from the practice of law for a period of 30 days and thereafter for an indefinite period of time until respondent shall pay the cost of these proceedings and the estate of Sarainne L. Andrews the sum of \$20,810.00 plus interest from August 20, 1991 at 12% a year, or such other interest rate

is the legal rate prescribed by law for Count I.

As to Count II, I recommend that respondent receive a public reprimand without any further punishment.

V. Statement of Costs: I find the following costs were reasonably incurred by the Florida Bar and assess them as follows:

As to Count I:

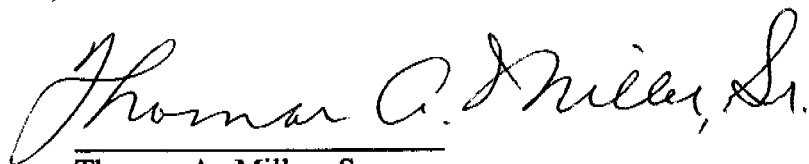
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|---|-------------|
| Administrative costs pursuant to Rule 3-7.6(k)(1) | \$ 500.00 |
| Bar Counsel Travel Expense | \$ 776.15 |
| Investigator's Fee Expense | \$ 2,406.74 |
| Court Reporter Expense | \$ 2,541.00 |
| Miscellaneous Expenses | \$ 190.00 |
| | ----- |
| TOTAL: | \$ 5,996.85 |

As to Count 2:

| | |
|----------------------------|-------------|
| Bar Counsel Travel Expense | \$ 9.90 |
| Auditing Costs | \$ 1,546.37 |
| | ----- |
| | \$ 1,556.27 |

I recommend that all expenses, with interest at the rate prescribed by law, shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of the Florida Bar.

DATED this September 27, 1994.



Thomas A. Miller, Sr.
As Referee

Copies to: Mr. David R. Ristoff, Esquire
Mr. John T. Berry, Esquire
Mr. Henry P. Trawick, Esquire
Ms. Bonnie L. Mahon, Esquire

5996.55
1556.27

7553.12

