

IN THE SUPREME COURT OF FLORIDA
(Before Referee - Circuit Court Judge Philip Bloom)

FILED

SID J. WHITE

OCT 31 1994

CLERK, SUPREME COURT

By _____

Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

vs.

SUPREME COURT

CASE NO. 83,352

DIANE S. SEGAL,

Respondent.

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

The undersigned was duly appointed by the Supreme Court of Florida and by the Chief Judge of the Eleventh Judicial Circuit to preside at disciplinary proceedings on charges brought by Complainant The Florida Bar against Respondent Diane S. Segal, relating to alleged violations of the Rules of Professional Conduct.

A. The following appeared for the parties:

For The Florida Bar, Randi Klayman Lazarus, Esq.

For the Respondent, Diane S. Segal, Esq., Pro Se

B. The Respondent was charged with

1. Violation of Rule 4-3.3(a)(1) in that a lawyer shall not knowingly make a false statement of material fact to a tribunal; and
2. Violation of Rule 4-3.3(d) in that in an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

C. The context of the charges is that Respondent as an attorney, knowingly misrepresented in a written Petition directed to a Probate Judge; and,

thereafter ex-parte, that an estate in which Respondent was a principal beneficiary was ready for closing, when it was not. Respondent denied the charges; denied any knowing misrepresentation in writing or orally; and affirmatively related a number of alleged defenses, circumstances or contentions to show that she was not guilty of any aspect of the charges.

D. In her response to the charges, Ms. Segal has time and again maintained that her conduct was brought about in reaction to a selfish co-personal representative (Kirtley). Ms. Segal's Closing Statement is significant in that regard:

"In conclusion, this Bar matter came about as a result of Mr. Kirtley;'s obsessive, personal vendetta. The Estate of Clifford Segal was not a difficult Estate to administer. Clifford Segal's Last Will & Testament was clear, simple, and straightforward. However, Mr. Kirtley refused to carry out the testator's intent and refused to comply with the explicit provisions of a Will he himself drafted. Specifically, Mr. Kirtley refused to distribute any income to me, the income beneficiary named in the Will, during a 6-year period; he refused to cause the Estate and Trust taxes to be paid; he refused to cooperate regarding all routine administrative matters.

Mr. Kirtley's actions forced me as co-personal representative and co-trustee to seek his removal as co-personal representative and co-trustee in 1988 inasmuch as it was apparent that I would not receive any income distributions as long as he was involved. It was Mr. Kirtley who chose to turn that into a prolonged litigation. he could have immediately commenced income distributions or he could have resigned and the matter would have ended there. But he didn't. Mr. Kirtley engaged Kelley Drye & Warren and the protracted litigation and pleadings began. The only possible explanation for Mr. Kirtley's behavior is obsessive greed on the part of Mr. Kirtley and, subsequently, his

attorneys, Mr. Stokes and Mr. Walton of Kelley Drye & Warren." (at p1)

E. The charges brought by The Florida Bar are serious ones and they have been dealt with accordingly. The Referee held many hours of hearings, heard the testimony of numerous witnesses, reviewed many hundreds of pages of documents and transcripts of previous grievance hearings leading up to the charges, read the documentary evidence, and reviewed many hundreds of pages of transcripts of testimony generated in this proceeding.

II. INTRODUCTION

The Respondent has urged that the matter before the Referee is a "documents" case. She has also contended that others have sought to gain advantage over her due to her naive or receptive personality. To an extent, Ms. Segal is correct on both scores. The Referee had occasion to meet with and observe Ms. Segal on numerous occasions in these hearings when she testified and when she acted as her own attorney over a period of many hours. The Referee has also been immersed in Respondent's work product occasioned in this case. The Referee has been struck with Respondent's personality, her principles and her attitude. Ms. Segal has been respectful in every way during these proceedings. She never practiced law, yet she believes she has a full understanding of probate law. Customary phrases used in court orders have no meaning to her. Her approach or attitude towards others who oppose her (indicated throughout the papers she submitted to the Referee), generates hostility and confrontation and, therefore, litigation. Respondent still urges in these proceedings that the Bar is on a witch-hunt against her.¹

¹ See Closing Statement at p5: "The Bar has also intentionally concealed from this Court the existence of overwhelming documentary evidence that disproved all of the false allegations made by Judge Newbold, Mr. Kirtley, Mr. Stokes and Mr. Walton. Furthermore, the Bar failed to mention in the complaint against me that a grievance committee hearing took place and that a transcript existed. This is a critical omission because the transcript reflects the mistaken and conflicting testimony of Judge Newbold. These actions and omissions constitute concealment of evidence and obstruction of justice."

The history of this case, however, indicates that Ms. Segal accepts no decisions which are against her, appeals almost everything, will not compromise anything and is unyielding. Ms. Segal is a talented, indefatigable, intense and precise person who is driven to do things her way. Indeed, she even insisted on using her court reporter rather than that supplied by the Bar; she forwarded the transcripts to be used by the Referee rather than use those supplied by the Bar; and she chose (perhaps as a result of somewhat unpleasant experiences with numerous attorneys) to represent herself in these serious proceedings. These observations are made because Ms. Segal has referred to her traits as being a causal factor of the Bar's complaints against her; and she has on numerous occasions urged that these proceedings are nothing more than personal attacks on her. (See Segal Narrative Testimony at p1)

Ms. Segal is in error. The motive for the charge(s) against Ms. Segal are not determinative of those charge(s). The only issue before the Referee is the conduct of Ms. Segal. Or, as put less delicately by The Florida Bar: Did she lie to a tribunal? Unfortunately, Respondent's understanding of the law, of procedure, of the role of a lawyer and the role of a judge in the legal system, or even of these proceedings, is somewhat misplaced.² Suffice it to say, Ms. Segal is an unique individual who marches to her own drumbeat. No prejudice is accorded Ms. Segal because of her uniqueness or her unorthodox style.

Even though probable cause exists for the Probate Judge and for The Florida Bar to report or to seek sanctions against Respondent on the second charge, that charge after review of the evidence and due deliberations, is determined against Petitioner and in favor of Respondent. That charge is that Ms. Segal met with the Probate Judge and in the ex-parte remarks which ensued did not fully inform the

² See Closing Statement of Respondent Segal at p19: "In addition, because the Complainant intentionally disregarded and concealed overwhelming and exonerating documentary evidence and testimony, engaged in obstruction of justice, and brought a frivolous and malicious complaint, I respectfully request that this Court impose sanctions on the Complainant. The Bar is guilty of concealing my documentary evidence which includes the court orders of Judge Newman, the successor judge who reversed Judge Newbold, has caused me serious financial injury and has caused potential serious interference with this legal proceeding. The sanctions which should be imposed are reimbursement of my attorney's fees incurred in defending against this frivolous and malicious action and contempt of court for concealing documentary evidence which included court orders of Judge Newman, the successor judge, who reversed Judge Newbold and for relying on Judge Newbold's faulty memory."

judge of all material facts (whether or not adverse) so as to enable him to make an informed decision. Rule 4-3.3(d), Rules of Professional Responsibility. Basically, this charge is a follow through of the first one against Ms. Segal or it may be considered duplicitous of it. More specifically, the Bar contends in its first charge, that the Respondent prepared the written Petition for Discharge and in the second charge, that the Respondent presented the Petition for Discharge to the Probate Judge at an ex parte hearing wherein the Probate Judge ostensibly relied on Respondent's oral representations in closing out the subject estate.

The evidence on the second charge is in strong conflict. For example, the Probate Judge testified as to various details and bolstered his testimony by his usual and customary practice in ex-parte hearings. While that explanation may be logical or plausible, there are understandably some inconsistencies as to details. However, the Respondent was most specific as to every aspect of their meeting. The time frame of eleven days later when the Order of Discharge was signed by the Judge, lends support to the Respondent's version. The Referee finds that the Petitioner has not proven this charge against Respondent by clear and convincing evidence as is required. Therefore, the Referee shall direct his attentions to the first charge.

III. THE EVIDENCE

It is essential to review the evidence in this cause so as to understand the background to the charge(s) and the defenses thereto, as well as any sanctions as may be appropriate.³

Respondent's uncle left a sizeable estate (about \$1.4 million) to his sister and Respondent as co-income beneficiaries. Uncle named Respondent and his lawyer-friend of many years who drafted the will, as co-personal representatives. Respondent was in law school when many of the events occurred. She was admitted to the Florida Bar in 1991 and has not worked as a lawyer on any matters other than her uncle's estate.

³ In analyzing and in reaching a decision in this matter reference may be made to the conduct of others. No determination is made as to the propriety of that conduct except as it may have affected these proceedings or be relevant, and to indicate the environment in which Respondent acted or that her conduct may have been necessitated, instigated, or generated by or as a reaction to the actions of others.

Respondent was unhappy (perhaps properly so) with the administration of her uncle's estate by the co-personal representative who was the attorney upon whom she relied as the professional in estate work. Respondent, as a beneficiary of the estate, requested that he be removed. The co-personal representative resisted, retained counsel and the battle began. It ended with the co-personal representative receiving fees of approximately \$100,000; and his lawyers receiving some \$145,000 in fees, costs and expenses. The Respondent ultimately and reluctantly paid those monies from her uncle's assets, amounting to 17.5% of his estate. These charges against Respondent are as a result of those proceedings.

Respondent contends she was treated quite shabbily by her co-personal representative, his lawyers, and, perhaps, even the Probate Judge, as well as her own lawyers while administering her uncle's estate. (She also feels the same with respect to prior grievance hearings and proceedings leading up to the instant one.) Hence, Respondent personally and as an attorney undertook to handle the closing of her uncle's estate. While Respondent denies it, she "closed" the estate at a time when fees or other monies were actively contested and outstanding to the co-personal representative and to his attorneys as a result of many previous proceedings in the trial and appellate courts. As part of the probate procedure, the assets of the estate were properly being transferred to a trust created by the uncle's will.

Ms. Segal, in order to close out the estate, prepared a written Petition for Discharge (dated February 19, 1992), wherein she advised the Probate Court that the estate was proper for closure; that all claims and debts were paid or disposed of; and that payment or provision was made for the payment of all expenses of administration. Ms. Segal stated that she was the only person having an interest in the proceeding. The attorneys for the former co-personal representative were not mentioned or referenced by Respondent in the Petition for Discharge and no showing was made of any existing claim of the former co-personal representative. Respondent did not send notice of the Petition to the attorneys or the former co-personal representative. (A copy of that Petition for Discharge is attached hereto as part of this decision.) That Petition for Discharge prepared by Respondent as an attorney is the basis for the charge against Respondent for having knowingly made a false statement of a material fact to a tribunal. Rule 4-3.3(a)(1), Rules of Professional Conduct.

IV. RESPONDENT'S RESPONSE

Respondent has interposed a number of defenses to show that she did not in her written Petition for Discharge knowingly misrepresent to the Court. Each and every one of those defenses has been reviewed, analyzed and considered by the Referee. The Respondent's Answer (which pleading weighs over 4½ pounds) contains Ms. Segal's denials, defenses, and contentions. Many of Ms. Segal's contentions are collateral to the issues before the Referee, or may be significant in the event sanctions are appropriate. The more significant of them are enumerated below. Most, if not all, of those matters have been brought to the attention of the Referee over and over again in Respondent's presentation here. For the sake of completeness, the evidence before the Referee and of the Referee's findings follow each of the Respondent's contentions.

1. According to the Respondent, the phrase, "The Court retains jurisdiction to award attorneys' fees" contained in an Order prior to the Petition for Discharge, does not mean that attorneys' fees are owing, and therefore Respondent was not on notice that fees were actually due to the attorneys.

By custom and usage in Dade County, practicing attorneys know that the phrase at most, means that fees are a certainty, but that the amount is still to be determined; and at the least, that there is an alert that the matter of entitlement and amount of fees are still to be determined. Hence the subject of attorneys' fees is not to be disregarded and must be addressed. The accountant's analysis of "contingent" or unlikely or uncertain as to the fees may be accurate for accounting purposes, but the accountant's analysis do not go to the matter of knowledge. Additionally, the feud involving Respondent as to fees was elongated and ongoing and represented a major important, continuous, and unforgettable confrontation between Ms. Segal and Kelley Drye & Warren. As such, Respondent's contention is an afterthought and given little credence by the Referee.

2. According to the Respondent, a successor probate Judge (Newman) reversed Judge Newbold and found that Respondent did nothing wrong with respect to the Petition for Discharge.

Judge Newman never attempted to reverse Judge Newbold's prior Order(s). The subsequent Orders of Judge Newman were most unusual and were prepared by Ms. Segal specifically to try to extricate herself from the problem before us today. Those Orders of Judge Newman are a clear indication that Ms. Segal was obsessed with and understood the gravity of her improper conduct before Judge Newbold via the written Petition for Discharge. When the testimony of Judge Newman compared to the Orders submitted by Respondent to Judge Newman, it may well be that the language and title used in those Orders were inappropriate in view of Judge Newman's clear and unequivocal testimony: He never overruled Judge Newbold and Judge Newman's sole purpose was to close out the estate before him since it was ripe for closure at that time. It is clear that the actions of Judge Newman have no bearing on Ms. Segal's conduct before Judge Newbold.

3. According to the Respondent, the trust made past payments of the estate's bills and the same would be true as to future attorneys' fees, since the assets of the estate were being transferred to the trust.

The testimony of one of the Kelley Drye & Warren attorneys was that he was advised by Ms. Segal that the trust had no assets. Significant attorneys fees were still outstanding from either the estate or the trust. Respondent had constantly refused to pay attorney's fees to Kelly Drye & Warren and indications were that Respondent would continue such resistance. The payment of fees from the estate or from the trust is of no moment since it is the existence of unpaid fees, not the source of payment which was of importance. In any event, since all the assets of the estate were transferred to the trust, a lack of any assets in the trust would be of grave concern to the attorneys. This matter is a red herring and does not warrant all of the attention given it.

4. According to the Respondent, attorneys Kelley Drye & Warren were the personal attorneys for the co-personal representative and not for the estate since they were not employed by the estate, but were solely protecting personal interests in generating a fee of some \$100,000 for the co-personal representative, and attorneys fees for itself of some \$145,000. As such, the attorneys were not "interested persons" under Probate Rule 5.400(c). Additionally, under §731.201(21), Florida Statutes, Kelley, Drye & Warren was not a person who may

reasonably be expected to be affected by the outcome of the particular proceeding involved. See p17(a) of Respondent's Narrative:

"I believed that KDW did not meet the legal definition of "interested person" and, therefore, was not entitled to notice regarding closing the Estate. Fla. Stat. §731.201(21) defines "interested person" as "any person who may reasonably be expected to be affected by the outcome of the particular proceeding involved". Since KDW had always been paid from the Trust, I believed that closing the Estate did not affect their fee claim in any way. There were still paid by the Trust. As I previously testified, I believed that KDW was time-barred from filing any claim against the Estate when it received notice regarding the filing of claims and the statutory time limit expired." (Emphasis added)

The emphasized portion of the above narrative clearly shows a mind set on Respondent's part to avoid the payment of any attorneys' fees to Kelley Drye & Warren. Simply put, Ms. Segal refuses to understand who or which entities are deemed "interested persons," or "affected by the outcome" of proceedings in probate matters.

5. According to the Respondent, §733.710(1), Florida Statutes, barred any claims against the estate made two (2) years after death, and therefore, Kelley, Drye & Warren were barred from any attorneys' fees.

This argument by Ms. Segal shows a complete lack of comprehension of probate practice. Reference to this statute also shows an attempt or an intent by Respondent to avoid the payment of any attorneys' fees to Kelley, Drye & Warren. Or it may also show a lack of ability by an attorney to understand the plain language of a statute thereby questioning the attorney's ability to practice law. Obviously, the statute does not apply to administration of the estate, but rather, only to "a claim or cause of action against the decedent."

With respect to Items 1, 2, 4 and 5 above, the evidence before the Referee is that Respondent knew and understood the meaning of the applicable Probate Statutes and customs, but sought to shield herself from them by her "intentional ignorance" of them. Such a position is so distorted and so inapplicable that it cannot be considered as a defense to the subject charge.

6. Finally, According to the Respondent, personality clashes were intentionally generated so as to harass Respondent, to obtain larger fees and to cause the probate judge to view Ms. Segal as an irritant. Respondent also alleges numerous procedural violations of her due process rights in the Probate Court before Judge Newbold which fomented, taunted and oppressed her in the probate proceedings.

While Respondent may be correct in her analysis of the forces against her, nevertheless that may go to sanctions and not to the violations charged.

In summary, Respondent's contentions clearly show that Ms. Segal was fully aware of the import of her conduct relating to closing out her uncle's estate; that Respondent was intentionally blind to simple probate laws, procedure or practice in the Probate Court.⁴ Respondent refused, until this hearing, to acknowledge that there were interpretations other than hers in probate law and practice.⁵ Respondent rejected any "knowing" deception and adhered to the "subjective" rather than "objective" theory of conduct in that whatever her interpretation of the law was, it was correct. And, when the third probate judge (Newman) was assigned to the case (after Ms. Segal requested recusal of the first two judges) Ms. Segal even sought to purge her recriminatory conduct by having the third judge sign two (2) most unusual Orders whose main purpose was to absolve Respondent from any wrongdoing!

⁴See Segal Narrative Testimony at p 15: "It is certainly possible that different individuals can interpret the same statute differently. I interpreted these statutes as meaning that claims against the decedent and claims against the Estate were time-barred and that the Trust was the only entity against which claims could legally be made."

⁵See Segal Closing Statement at pp 11-12: "It is well established fact that different people can interpret a statute differently. In fact, if statutes were all interpreted identically by the judiciary and attorneys, at least 1/2 of the practicing attorneys would be jobless."

Each and every one of Respondent's defenses or contentions is rejected as being an afterthought or rationalization for her conduct. They are excuses not reasons for improper conduct. Respondent refuses to take responsibility for her own conduct.

V. FINDINGS AND RECOMMENDATIONS

The Referee finds that Respondent Diane S. Segal knowingly and with conscious awareness of the nature of her conduct which was designed to accomplish a particular result, intentionally made a false statement or misrepresentation to the Probate Court when she prepared and submitted to the Probate Judge a written Petition for Discharge on or about February 19, 1992. Accordingly, the Respondent, Diane S. Segal, is deemed guilty of violating Rule 4-3.3(a)(1) of The Florida Bar Rules of Professional Conduct. The Referee retains jurisdiction as to entitlement and amount of attorneys' fees and costs as may be appropriate.

With respect to the charge of violation of Rule 4-3.3(d), the Court finds in behalf of the Respondent, Diane S. Segal, and said charge is hereby dismissed against her.

Based on the foregoing, the Referee recommends appropriate sanctions against Diane S. Segal, the nature and extent of which shall await a further hearing.

VI. HEARING ON SANCTIONS

The Referee finds it appropriate to hold a hearing with respect to recommending or imposing appropriate discipline or sanctions upon Respondent Diane S. Segal. In that regard, the parties are requested that they not duplicate any materials previously brought to the attention of the Referee.

With respect to the hearing on sanctions, the Referee shall receive any information which has bearing on the duty violated; the mental state of the attorney; any potential or actual injury caused by the attorney's misconduct; the existence of aggravating or mitigating circumstances; and any other matter which

justifies or excuses the lawyer's conduct or which may assist the Referee in determining the imposition and extent of any sanctions.

For purposes of the sanctions hearing only the Referee will make the following assumptions based on the extensive record before him; namely, that the co-personal representative was either incapable of, or did not properly or timely administer the estate; that the Kelley, Drye & Warren services as attorneys were unnecessary or exaggerated and that their fees were excessive; that the Probate Judge set matters on unreasonably short notice or otherwise did not respond to Respondent; and that Respondent refused to or did not understand probate laws or practice.

The Referee is concerned that the incidents charged by The Florida Bar and Respondent's response(s) thereto not be indicative of Respondent's future as an attorney. If there is one aspect of the justice system that is paramount and necessary for its well-being, it is that judges be able to rely on the attorneys who appear before them whether that appearance be by way of a written document, or orally. Accordingly, any proposed plan to correct the type of conduct charged against Respondent is welcome.

The Referee believes that not more than an additional two hours are necessary for such a hearing. The Florida Bar is accorded ½ hour, Respondent 1¼ hours, and The Florida Bar ¼ hour in rebuttal at such hearing. In the interim, The Florida Bar is requested to provide Respondent with any fees and/or costs it may seek, in the hope that that aspect of these proceedings may be agreed upon prior to the scheduled hearing.

The parties and their attorneys, etc. are hereby directed to attend the following hearing before the undersigned Referee:

November 9, 1994
5:00 P.M.
Room 1307, Dade County Courthouse

The Florida Bar is to supply an official reporter for such purposes.

Supreme Court Case 83,352
Report of the Referee
October 27, 1994

DONE AND ORDERED by the Referee at Miami, Dade County, Florida, on
October 27, 1994.



PHILIP BLOOM - REFEREE

Copies furnished to:
Randi Klayman Lazarus, The Florida Bar (Complainant)
Diane S. Segal (Respondent)