047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

ROY L. BEACH,

Respondent.
_____/

Case No. 85,005
[TFB Case No. 94-30,540(09A)]

11-24

THE FLORIDA BAR'S ANSWER BRIEF AND INITIAL BRIEF ON CROSS-PETITION FOR REVIEW

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

Rose Ann DiGangi
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, Florida 32801-1085
(407) 425-5424
ATTORNEY NO. 754080

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar."

The transcript of the final hearing held on July 25, 1995, shall be referred to as "TI," followed by the cited page number. The transcript of the disposition hearing held on August 9, 1995, shall be referred to as "TII," followed by the cited page number.

The Report of Referee dated August 23, 1995, will be referred to as "ROR," followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____).

The bar's exhibits will be referred to as B-Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as R-Ex. _____, followed by the exhibit number.

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "A" voted to find probable cause in this matter on September 28, 1994, after taking testimony and evidence. On October 26, 1995, the committee amended its probable cause finding to include additional rule violations. The bar filed its complaint on January 11, 1995. The referee was appointed on or about January 30, 1995. The final evidentiary hearing was held on July 25, 1995, and the disposition hearing, in which the parties presented arguments as to the appropriate level of discipline, was held on August 9, 1995.

In his report issued on August 21, 1995, the referee recommended the respondent be found guilty of violating rules 4-5.4 for sharing legal fees with a nonlawyer, and 4-5.5 for assisting a person who is not a member of the bar to perform activities that constitute the practice of law. The referee recommended he be found not guilty of violating rules 4-1.7 for representing a client when the representation would be directly adverse to the interests of another client or when the lawyer's exercise of independent professional judgment could be materially limited by the lawyer's responsibilities

to another client or to a third person or by the lawyer's own interests; 4-1.8 for using information relating to the representation of a client to the disadvantage of the client; and 4-1.9 for representing another person in the same or substantially related matter in which that person's interests are materially adverse to the interests of a former client or using information relating to the representation to the disadvantage of the former client. Additionally, the referee noted that the bar withdrew its allegation that the respondent violated rule 4-5.3. Finally, the referee recommended the respondent be suspended from the practice of law for three months.

On September 7, 1995, the respondent served his Exception to Report of Referee which this court, on September 19, 1995, treated as a petition for review. On September 12, 1995, this matter was referred to the Executive Committee of the Board of Governors of The Florida Bar for consideration of the referee's report. The matter was considered by the committee because of the bar's time constraints for filing a cross-petition for review created by the respondent's filing of his

petition for review. The committee voted to seek a cross-petition for review of the referee's legal conclusions leading to his recommendation the respondent be found not guilty of representing clients with conflicting interests and his recommendation the respondent be suspended for three months. Even though bar counsel recommended the imposition of a three month suspension as being the appropriate level of discipline, the committee determined that a suspension requiring proof of rehabilitation to be more appropriate given the respondent's disciplinary history and the facts contained in the referee's report concerning the respondent's assistance in the unlicensed practice of law. The bar served its cross-petition for review on September 26, 1995. The respondent executed his certificate of service for his initial brief on October 12, 1995, although the bar would note it was not postmarked until the following day.

STATEMENT OF THE FACTS

Unless otherwise noted, the following facts are taken from the Report of Referee.

During 1993, the respondent provided services as an independent contractor to King and King Paralegals (hereinafter King and King), which was owned and operated by Kenneth and Cathy King. Because the respondent acted as the Kings' supervising attorney, he discussed with the Kings their customers' legal issues and reviewed pleadings and other documents prepared by the Kings. According to King and King's contract, customers, including Margery Rose, were entitled to a thirty minute consultation with the respondent (B-Ex. 4; ROR A1). King and King was located next door to the respondent's office.

On or about June 29, 1993, Margery Rae Rose hired King and King to prepare legal documents regarding her domestic relations problem. Ms. Rose had been divorced in Georgia and her minor child resided there with her former husband, Steven.

Ms. Rose resided in Florida when she hired the Kings concerning her visitation problems. She executed a contract with King and King on June 29, 1993, that provided the paralegal service would prepare the requisite legal documents which would be reviewed by the respondent. Additionally, the contract provided that the respondent would have a thirty minute consultation with Ms. Rose but he would not represent her in court (B-Ex. 4). Pursuant to the contract, Ms. Rose would pay King and King $675.00 as a nonrefundable retainer to prepare the paperwork, conduct research and additional interviews, and for attorney time (B-Ex. 4). Additional services by King and King would be billed at $75.00 per hour (B-Ex. 4). The contract further provided Ms. Rose would not be represented by the respondent unless she entered into a separate agreement with him for legal services (B-Ex. 4). Ms. Rose paid King and King $675.00 (B-Ex. 5).

After hiring King and King, Ms. Rose changed her mind several times concerning what type of action to bring and this resulted in the Kings preparing additional documents. Initially, she had wanted her former husband held in contempt

of court because she believed he had disappeared with their minor child (B-Ex. 2 p. 5). Later, Ms. Rose wanted to modify the final judgment of dissolution of marriage regarding visitation and to domesticate the judgement in Florida (B-Ex. 2 p.p. 6, 21). Thereafter, Ms. Rose changed her mind a number of times about what action she wanted to pursue. Ms. Rose received advice from King and King regarding pursuing her various legal actions and this advice was based upon the respondent's legal advice to Kenneth King. The respondent never had any written, verbal, or personal contact with Ms. Rose.

Approximately two weeks after hiring the Kings, Ms. Rose requested they cease working on the matter (B-Ex. 2 p.p. 14-15). Ms. Rose's former husband had moved to Florida on or around July 3, 1993, and she consequently decided not to pursue any of the actions which she had previously contemplated. She asked the Kings to send her the documents they had prepared up until that point. Additionally, Ms. Rose requested a refund which the Kings refused to provide. Therefore, Ms. Rose filed a pro se action against the Kings

individually and against King and King in the county court seeking a refund and delivery of her file documents to determine whether the services had been performed. The Kings defended that action pro se. The parties entered into a stipulation on September 2, 1993, after mediating the disagreement. The agreement provided the Kings would deliver the documents to Ms. Rose's former husband, in care of a third person, within 72 hours and pay Ms. Rose $47.00 on or before October 21, 1993.

A dispute arose as to whether the Kings had exhibited good faith in attempting delivery of the documents within the required time period. Ms. Rose believed the Kings failed to comply for a period of 10 days. In contrast, the Kings maintained they had tried to deliver the documents but service had been refused until after the 72 hour time period elapsed (TI p. 44). A final judgment was entered in Ms. Rose's favor by the county court on October 22, 1993, awarding her $675.00 because the Kings allegedly breached the terms of the stipulation. Thereafter, Ms. Rose filed a grievance with the bar on October 8, 1993, wherein she complained that the

respondent failed to meet with her or contact her pursuant to the King and King contract. In her grievance form, Ms. Rose stated that the Kings tried twice to deliver the documents to her former husband prior to delivering them to him at his place of business (B-Ex. 5, p. 2 of her letter). After being provided with Ms. Rose's letter to the bar, the respondent believed this statement to be contradictory to her prior position before the county court that the Kings did not attempt to deliver the documents to her former husband prior to the expiration of the 72 hour time limit (TI p. 59). Based upon this apparent discrepancy, the respondent then filed on behalf of the Kings and King and King a motion to vacate the final judgement previously entered in Ms. Rose's favor (TI p.p. 45, 59). The court granted the respondent's motion and set the matter for a new final hearing but, prior to that date, Ms. Rose dismissed her action (B-Ex. 2 p. 23).

As the Kings' supervising attorney, the respondent had received Ms. Rose's domestic relations paperwork which was the subject matter of her civil suit against the Kings and King and King. The central issue in Ms. Rose's suit against the

Kings and King and King was whether they had prepared the requested documents she had paid for.

SUMMARY OF THE ARGUMENT

It is well settled that in bar disciplinary proceedings a referee's findings of fact are presumed to be correct and the burden for proving otherwise rests on the party seeking the review of those facts. Here, the referee found that the respondent assisted King and King in the unlicensed practice of law. Specifically, Mr. King acted as the respondent's conduit for giving legal advice by obtaining and giving information to persons the respondent never directly contacted. The respondent prepared the forms which the paralegal service used. Additionally, the respondent advised Mr. King concerning what questions to ask Margery Rose so that Mr. King could determine what information he, not the respondent, needed to include in her petition. Ms. Rose relied upon the Kings to prepare the documents which would suit her particular circumstances and she believed the work would be properly supervised by the respondent. Although she understood that he would not represent her in court, she reasonably believed, based upon the contract, that the

respondent would ensure that she was provided with the appropriate legal services.

The bar submits, however, that the referee's legal conclusion that an attorney-client relationship did not exist between Ms. Rose and the respondent and therefore, the respondent did not represent clients with conflicting interests, was erroneous. True, Ms. Rose was not a client in the traditional sense but this was not a traditional situation. The respondent, through his supervisory work, gained firsthand knowledge concerning Ms. Rose's later claims in her civil action against King and King. He had knowledge concerning the substance, the quality, and the completeness of that paperwork. Essentially, Ms. Rose was suing King and King regarding the substance, quality and completeness of her legal documents and that was the very suit in which the respondent appeared as attorney of record for King and King, a position directly adverse to Ms. Rose. The respondent acknowledged the information given by Ms. Rose concerning her post-dissolution matter was protected by the attorney-client privilege. Consequently, how can such a privilege exist if there is no

form of attorney-client relationship? Furthermore, the respondent was a potential witness in the civil suit in which he was representing the Kings and he had a personal interest in the outcome of the matter because of Ms. Rose's pending bar grievance against him. Even without triggering an attorney-client relationship, in certain situations, an attorney may owe a duty to a nonclient.

A suspension requiring proof of rehabilitation is warranted because: the respondent has a prior disciplinary history of a short term suspension; the great potential for public harm created by the promotion of an "attorney supervised" paralegal service wherein the "supervision" consists of a lawyer indirectly dispensing legal advice through a layperson; and the importance of sending a message to the membership and laypersons that this court prohibits an attorney from assisting a nonattorney in the unlicensed practice of law.

ARGUMENT

POINT I

THE REFEREE'S FINDING THAT THE RESPONDENT ASSISTED ANOTHER IN THE UNAUTHORIZED PRACTICE OF LAW IS SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

In bar proceedings, a referee's findings of fact are presumed to be correct and this court will not reweigh the evidence and substitute its judgment for that of the referee as long as the findings are not clearly erroneous or lacking in evidentiary support, The Florida Bar v. Bustamante, 20 Fla. L. Weekly S490 (Fla. Sept. 21, 1995). The party seeking to challenge the referee's findings of fact carries a heavy burden of showing those findings are clearly erroneous or without support in the evidence, The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). The bar submits the respondent has failed to prove the referee's finding, that the respondent assisted Mr. King in the unlicensed practice of law, was not supported by clear and convincing evidence. A referee's legal conclusions are subject to broader review by this court than are findings of fact, The Florida Bar in re Inglis, 471 So. 2d 38 (Fla. 1985). The referee's legal conclusion that Mr.

King's activities constituted the practice of law and therefore that the respondent assisted him in the unlicensed practice of law, is sound and well-supported by case law and the evidence.

The bar submits the testimony clearly revealed that Mr. King and his paralegal service were not mere scriveners performing services which nonlawyers, regardless of whether or not they are "paralegals," may legally do. In contrast, King and King engaged in the practice of law. The respondent stated to the referee at the outset of the final hearing that he did not "...want this Court to think that King and King Paralegals were in the business of giving out legal advice on their own," (TI p. 14). Through Mr. King and his service, the respondent dispensed legal advice to legal service consumers whom he never met, based upon Mr. King's knowledge of the consumers' legal problems (TI p.p. 15, 47-49). In Ms. Rose's case, the respondent admitted that when Mr. King discussed her desire to seek a change of custody, the respondent told Mr. King to ask Ms. Rose for more information to "maybe beef up the petition. This is what she has to establish: the change

of circumstances, and so forth" (TI p. 15). Mr. King would then meet with Ms. Rose and tell her what documents she needed (TI p. 15).

According to Mr. King, what he operates is a "pro se assist program" where he and the respondent help persons who cannot or do not hire an attorney's services and, in addition, he runs a "support group for father's (sic) who are going through divorce, child support, visitation, custody problems" (TI p.p. 46-47). The respondent's involvement in such an organization, arguably, could be seen as a "feeder operation" in which the respondent improperly acquired clients through the "support group" and King and King, especially in view of the fact the respondent's office was located next door to King and King in the same building (B-Ex. 2 p. 35). In fact, at the grievance committee hearing, the respondent testified that between 5% to 10% of his business came from "supervising" King and King (B-Ex. 2 p. 56). The respondent drafted the forms which King and King used (B-Ex. 2 p. 63).

Ms. Rose never met with or consulted with the respondent (ROR-A-2). Ms. Rose met with Mr. King who passed on the respondent's advice to her concerning what documents needed to be prepared. The respondent was giving legal advice without ever having communicated with the recipient. The respondent's use of King and King as a conduit could result in the wrong advice being given based upon faulty communication. The respondent had no control over what Mr. King told Ms. Rose and a real danger existed that Mr. King could have misinterpreted or misunderstood things. After all, a layperson speaking with a consumer, unlike an attorney interviewing a client, cannot be expected to understand what type of information is important. Likewise, as a nonlawyer, Mr. King lacked the training to know what questions to ask Ms. Rose in order to elicit the kind of information the respondent needed. The respondent, based upon his legal training, needed certain information to determine the type and substance of the legal documents. The bar submits, the respondent's arrangement with King and King, where prospective customers are told the service is attorney supervised, has the potential to lead the public to believe, as in Ms. Rose's case, that they are

getting the safeguards of a lawyer at a discount price. Moreover, this type of arrangement is even more egregious than a nonlawyer giving legal advice after conducting legal research. In his brief, the respondent argues that their arrangement was beneficial because it enabled Mr. King to enjoy the "benefit of an analysis of the fact specific situation that going to a trained attorney would provide." See page 12 of the respondent's initial brief. In other words, the respondent was giving Mr. King the knowledge he supposedly needed to dispense legal advice in answer to specific questions. This is different than when a husband relates to his wife the advice an attorney has given him after consultation regarding a specific problem. The husband does not get paid for this nor does he market this to the general public. The respondent and the Kings are engaged in a money making venture with the peddling of "customized legal documents" at a discount price as the product. Although the working poor who do not qualify for legal aid need access to the courts and rarely can afford to hire a lawyer, that does not mean they deserve substandard representation by an attorney who hides behind a paralegal service.

The practice of law involves giving advice and performing services that affect an individual's important legal rights and in order to reasonably protect an individual's rights and property, the advisor must have a greater legal skill and knowledge than the average citizen, State v. Sperry, 140 So. 2d 587, 591 (Fla. 1962). The gathering of the information needed to prepare a living trust does not constitute the practice of law, whereas determining whether a trust is appropriate for an individual's needs, and the "assembly, drafting, execution, and funding of a living trust document constitute the practice of law," The Florida Bar re Advisory Opinion, 613 So. 2d 426, 428 (Fla. 1992).

Similar to the case at bar, a Florida corporation, whose stockholders were nonattorneys, offered legal services through its Florida attorney employees. To maintain cost efficiency and profit, the nonlawyers exercised control over the lawyers. The attorneys were encouraged to use standardized forms because the attorneys received higher compensation if they had a high-volume turnover in clients. The nonattorney owners of the business were: prohibited from rendering legal services; not competently trained to evaluate the quality of the

services; not subject to the bar that regulated their product; and ironically, of the opinion that they exercised no ultimate control over the lawyer employees. The corporation advertised it could provide services in connection with dissolutions of marriage, bankruptcies, wills, uncontested adoptions and name changes. The company had established policies limiting the attorney fees charged and an attorney's consultation time with a customer. Several customers were harmed by the corporation's dispensation of legal representation. In fact, the company's manner of operation resulted in a conflict between the company's profit motive and the clientele's legal needs. This court found the corporation was engaged in the unauthorized practice of law. See The Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980). The bar submits the only difference between the respondent's arrangement with King and King and the situation with Consolidated Business and Legal Forms, Inc., is that the respondent was an independent contractor instead of an employee.

Another similar situation was presented in The Florida Bar v. Schultz, 613 So. 2d 11 (Fla. 1993). Because the opinion is not detailed, a copy of it and the referee report are contained in the appendix to this brief. The accused attorney was identified by a telephone solicitor as the intended speaker at an upcoming seminar. The recipient of the telephone call attended the seminar but the attorney did not appear. Instead, a nonlawyer, the vice-president of the sponsoring financial services company, gave the seminar. The recipient of the solicitation telephone call and his wife decided they wanted a living trust and so advised the speaker at the end of the seminar. The couple entered into a contract for the preparation of a living trust and the contract provided the accused attorney would represent them in the drafting of the necessary documents. The attorney, who had an ownership interest in the corporation, never spoke to the couple. After receiving a draft of the trust agreement, the couple were dissatisfied and told the corporation they had decided not to create a living trust. The vice-president of the corporation asked the attorney to represent the company in a breach of contract suit against the couple and he filed the

action against them. The attorney testified in the bar proceedings that he considered both the corporation and the couple to be his clients. The attorney was publicly reprimanded.

In The Florida Bar v. Goodrich, 212 So. 2d 764 (Fla. 1968), the court considered a matter in which an attorney was retained by an insurance company to prepare and furnish the agency with estate analyses of prospective buyers of life insurance. There was no cost to the customer and the attorney was paid by the agency a fixed fee and a retainer. If the customer was interested in the analysis and its recommendations, the underwriter would meet with the customer, the accused attorney and, if one existed, the customer's lawyer. The customer was then told the accused represented the insurance company. The referee found the attorney had engaged in a conflict of interest and this court agreed. In mitigation, the court noticed that he was an inexperienced attorney and that he ceased the concerned activity after the bar began its investigation. The attorney was privately reprimanded.

POINT II

THE REFEREE'S LEGAL CONCLUSION THAT THE RESPONDENT DID NOT REPRESENT CLIENTS WITH CONFLICTING INTERESTS IS ERRONEOUS AND UNJUSTIFIED GIVEN THE EVIDENCE AND TESTIMONY.

Although a referee's findings of fact enjoy a presumption of correctness, the legal conclusions, which are an outgrowth of those findings, and the evidence are subject to closer scrutiny, Inglis, supra. The bar submits the referee's legal conclusion that the respondent triggered no conflict of interest regarding the respondent's indirect delivery of legal advice to Ms. Rose through King and King, and his subsequent representation of King and King in the civil action against Ms. Rose, was erroneous. The referee candidly admitted it was a close call to make (TII p. 8). The main issue involved in Ms. Rose's civil suit against the Kings and their service was whether they had prepared the paperwork she believed she had paid them for (ROR-A-3). The referee found in his report that because the respondent had supervised King and King, the respondent had received Ms. Rose's legal documents which were the subject matter of her civil suit against the Kings (ROR-

A3). Therefore, the respondent had knowledge concerning the material issue in dispute.

Furthermore, because Ms. Rose also disputed whether her paperwork had been done correctly (TI p. 30; B-Ex. 5 p. 4 of her letter), and because the respondent was responsible for ensuring the paralegal service prepared the documents correctly, Ms. Rose may have had a potential claim against the respondent. Therefore, the respondent's interests would have diverged from those of his recognized client, King and King.

The Preamble of the Rules of Professional Conduct states:

> Most of the duties flowing from the client-lawyer relationship attach only after the client has requested the lawyer to render legal services and the lawyer has agreed to do so. But there are some duties, such as that of confidentiality under rule 4-1.6, which may attach when the lawyer agrees to consider whether a client-lawyer relationship shall be established.

The respondent considered the information he learned about Ms. Rose to be covered by the lawyer-client privilege (B-Ex. 2 p.p. 65-66). Consequently, had her former husband sought to have King and King also prepare paperwork in connection with the post-dissolution matter, the respondent would have had a

conflict of interest which would have ethically precluded him from reviewing those documents. The bar submits the attorney-client privilege can only exist where some form of attorney-client relationship has been established, even if that relationship is not the traditional one. Ms. Rose's civil suit against the Kings regarding the existence and substance of her paperwork was related to the post-dissolution matter in which the Kings, and the respondent, were hired to prepare documents. In fact, the respondent was a potential witness in the civil suit. Yet, the respondent appeared as counsel for the Kings after Ms. Rose filed her bar grievance against him. Although Mr. King testified that the county court directed Mr. King to have the respondent represent him despite being made aware of Mr. King's intention to call the respondent as a witness (TI p.p. 44-45), the respondent presented no evidence to support this and the referee made no finding of fact in this respect. The respondent had a personal interest in the civil suit at that point because it was now the subject of a bar inquiry about his conduct. The respondent wore many hats throughout these related matters. Regarding his relationship with King and King, the respondent: was the supervising

attorney; was an independent contractor; was paid for his services; gained knowledge of Ms. Rose's post-dissolution problems that was subject to the attorney-client privilege; gave legal advice to Ms. Rose through Mr. King; gained first-hand knowledge as to the material allegations of Ms. Rose's suit against the Kings; represented the Kings in defending that civil suit against Ms. Rose; and represented himself in defending Ms. Rose's allegations in her bar grievance. It would appear the respondent essentially represented Ms. Rose, King and King, and himself.

Even if Ms. Rose is not considered to have been a client, the respondent still triggered a conflict of interest when his interests became adverse to Ms. Rose's in the civil suit. Attorneys owe duties, under certain circumstances, to third persons who are not clients and, therefore, they can be subject to liability for breaching those duties. See rule 4-1.7(b) of the Rules Regulating The Florida Bar. While normally a privity of contract must exist between a lawyer and an individual before that person may bring an action for malpractice against an attorney, a third party may bring such

a suit where it was the apparent intent of the client to benefit the third person, Angel, Cohen & Rogovin v. Oberon Investment, N.V., 512 So. 2d 192 (Fla. 1987). This third party intended beneficiary exception to the privity rule for legal malpractice actions is not limited to just the drafting of wills, Greenberg v. Mahoney Adams & Criser, P.A., 614 So. 2d 604 (Fla. 1st DCA 1993), petition for review denied 624 So. 2d 267 (Fla. 1993). Likewise in bar proceedings, attorneys have been disciplined for failing to protect the interests of nonclients to whom the attorney owed a duty. For example, in The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982), an attorney was publicly reprimanded and suspended for three months for engaging in misconduct regarding his actions as the attorney for a corporation selling time share unit weeks, for which he was also a director. The attorney failed to provide adequate protection to buyers of the unit weeks because he knew he could not deliver warranty deeds and title insurance to them due to mortgage encumbrances and the fact that the selling corporation did not have title to the property.

The respondent's employment arrangement with King and King is not unlike those employment arrangements between lawyers and living trust marketing organizations which have become more common and increasingly problematic in recent years. In The Florida Bar re Advisory Opinion, supra, this court addressed the potential conflict of interests involved in a lawyer being employed by a corporation in the business of selling living trusts. The lawyer, who is being paid by the corporation, has a duty to evaluate a prospective customer's financial situation to determine if a living trust is appropriate and, if not, the lawyer has a duty to so advise that person. When the lawyer is being paid by a corporation that promotes the use of living trusts, then the attorney's loyalty to the client, the prospective purchaser, is compromised. Likewise, the respondent was paid by the paralegal service for every case he reviewed, regardless of whether or not the customer actually needed to take a legal action. The respondent has not stated that he has ever advised the Kings that no documents were needed for an individual because that person's legal needs did not require the preparation of any documents. There is no indication that

the paralegal service, whose nonlawyer employees conducted all initial interviews, told any customer, after consulting with the respondent, that no legal documents were needed. The Kings were in the business of selling "customized pro se legal documents" and the respondent profited from this commercial endeavor. The more legal forms King and King generated, the greater the profits. It should have been clear to the respondent that Ms. Rose did not understand what type of legal action she should purse because she continually changed her mind. Ms. Rose needed, at the very least, a thirty minute consultation with the respondent, as was allotted to her in the contract. Perhaps Ms. Rose could have then proceeded on a pro se basis but with a better defined legal objective and the appropriate pleadings and motions. Instead, the respondent and King and King kept generating additional documents at Ms. Rose's expense. Furthermore, the respondent determined what legal documents were necessary based upon a layperson's untrained assessment as to what information was important.

POINT III

THE APPROPRIATE LEVEL OF DISCIPLINE IS A 91 DAY SUSPENSION REQUIRING PROOF OF REHABILITATION PRIOR TO REINSTATEMENT.

At the final hearing concerning the appropriate level of discipline, the bar initially planned on recommending a 91 day suspension. However, based upon the referee's announced intention to recommend the respondent be found not guilty of all of the rules charged, the bar changed its recommendation to a 90 day suspension, not requiring proof of rehabilitation. The bar submits the longer period requiring proof of rehabilitation is more appropriate given the conflict of interest the respondent operated under. Even if this court should find there was no conflict of interest, the bar submits the longer period of suspension is appropriate: given the respondent's prior disciplinary history; the great potential for public harm to those seeking King and King's services based upon the assumption that they would be receiving a superior product compared to that offered by other legal technicians and paralegal services that are not "attorney supervised"; and the importance of sending a message to both the public and the legal profession that assisting in the

unlicensed practice of law will not be tolerated in this state. Furthermore, the case law and the Florida Standards for Imposing Lawyer Sanctions support a suspension requiring proof of rehabilitation. It is clear from the respondent's arguments before the referee and his initial brief that he does not understand he has violated the rules. Likewise, there is absolutely no indication the respondent will alter his relationship with King and King in the future after he has been automatically reinstated. This court's review of a referee's recommendations as to disciplinary measures is broader than that afforded the factual findings because the ultimate responsibility to order an appropriate sanction rests with this court, The Florida Bar v. Rue, 643 So. 2d 1080, 1082 (Fla. 1994).

One of the charges the referee recommended the respondent be found guilty of violating was splitting legal fees with a nonlawyer. In Rue, supra, an attorney was suspended for 91 days for engaging in similar misconduct as well as providing financial assistance to clients, engaging in business transactions with clients, and collecting prohibited fees.

There were numerous instances where the accused attorney shared a percentage of the fees he collected with his legal assistants and investigators. In mitigation, the attorney had no prior disciplinary history, he brought his fee contracts into compliance with the rules when the improprieties were brought to his attention by the bar, and he had been active in local charity and civic organizations. In aggravation, there were instances of multiple misconduct and the allegations concerning the conflicts of interest warranted a suspension rather than a public reprimand because the attorney knowingly engaged in the conflicts of interest.

Assisting a nonlawyer to engage in the unlicensed practice of law has, in the past, also brought suspensions. For example, in The Florida Bar v. Chase 492 So. 2d 1321 (Fla. 1986), an attorney was suspended for three years for knowingly allowing his nonlawyer employee to engage in the practice of law, misusing client trust funds and being charged with possession of an illegal drug. With respect to the charge concerning assisting in the unlicensed practice of law, the attorney allowed his nonlawyer employee to display his

business cards in the attorney's office. The cards improperly showed the employee was a lawyer. The accused attorney also allowed the employee to counsel clients about legal matters and allowed him access to the trust account. An audit of the account showed client funds had been misused resulting in overdrafts and there were numerous record keeping violations. In mitigation, the referee considered the attorney's medical problems that led to some of his difficulties.

Another lawyer was disbarred for practicing law in the form of a professional association in which nonlawyers were corporate officers and directors. In The Florida Bar v. Hunt, 429 So. 2d 1201 (Fla. 1983), the attorney was disciplined for: practicing law while suspended for nonpayment of bar dues; failing to properly supervise a disbarred lawyer he employed; failing to advise persons who had an interest in funds of his receipt of said funds; permitting a disbarred attorney to engage in the practice of law; and bringing frivolous actions. Three nonlawyers, including the disbarred attorney, were officers and directors in the accused's professional association. The disbarred attorney had been hired to perform

accounting duties and legal related work. The accused also represented the disbarred attorney in an estate matter. The accused attorney then arranged for another lawyer to represent a beneficiary of a trust established by the decedent. The representation was in connection with a declaratory action against the estate, for which his client, the disbarred lawyer employee, was the personal representative. The accused attorney asked the other attorney to handle the representation due to his own conflict of interest but requested he file the complaint prepared by the accused attorney and then delay further action. The lawyer complied with the accused's request. Thereafter, the disbarred lawyer employee, with the accused's knowledge, used the accused's name and professional association to prepare pleadings and correspondence in the declaratory relief action.

In The Florida Bar v. James, 478 So. 2d 27 (Fla. 1985), the accused attorney was suspended for four months after forming a partnership with a nonlawyer, misbehaving before a county court judge, and causing a client to communicate with a represented party without the consent of the opposing counsel.

The attorney contracted with a debt collection agency to provide legal services. He maintained his office in the same building as the corporation and shared a secretary/receptionist. The manager would review each case and refer to the accused those which he believed merited legal action. The manager had free access to the attorney's client files. The contract provided for the corporation's clients to receive all of the money collected and the corporation was entitled to service charges, punitive damages and attorney's fees. The corporation then compensated the accused based either on an hourly rate or the service performed. Therefore, the attorney's and corporation's compensation depended upon the attorney being able to secure additional payments from the debtors above what was owed. This led to a conflict between the interests of the corporation's customer, the corporation, and the attorney. Communication problems between the attorney and the manager, as well as the aggressive nature of the manner in which business was conducted, led to numerous unwarranted actions being filed. In mitigation, the referee considered that the attorney was not experienced in the practice of law and the bar delayed in prosecuting the matter.

The Florida Standards for Imposing Lawyer Sanctions also support a suspension. Standard 4.22, concerning the failure to preserve a client's confidences, calls for a suspension when a lawyer knowingly reveals information relating to the representation of a client not otherwise permitted to be disclosed and causes injury or potential injury to a client. Standard 4.32, concerning failing to avoid conflicts of interest, calls for a suspension when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict and causes injury or potential injury to a client. Standard 7.2, concerning violations of other duties owed as a professional, calls for a suspension when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

The bar submits a suspension requiring proof of rehabilitation also satisfies the purposes of attorney discipline as cited in Neu, supra. The suspension would be fair to society in terms of protecting the public. The bar

submits the second prong, concerning not denying the public the access to a qualified lawyer, is not persuasive in this instance. The bar's membership has continued to swell in recent years and Orange County, where the respondent practices law, does not suffer form a shortage of lawyers and legal aid services. The respondent's argument that he should be given preferential treatment because he is a sole practitioner is without merit. All attorneys who violate the rules are subject to discipline and to establish a two-tiered system that would not suspend sole practitioners for the same offenses for which an attorney in a law firm or partnership would suffer a suspension would result in an uneven and prejudicial application of the rules. That is tantamount to arguing a convicted criminal should not be given a jail sentence if he has a sole proprietorship to run because his business and customers would suffer.

A second purpose of bar disciplinary proceedings is punishment and encouragement of reform and rehabilitation. As stated previously, it is clear the respondent does not appreciate the nature of his offenses. At the grievance

committee hearing, the respondent stated he believed that he represents a person as that individual's lawyer only if he is expected to go into court and not if that person merely consults with him for legal advice (B-Ex 2 p.67). Similarly, the respondent stated before the referee that giving a person legal advice does not create an attorney-client relationship unless the person hires him (TI p.p. 35, 72). Furthermore, the respondent fails to appreciate why it is improper for a nonlawyer to act as a conduit for legal advice in exchange for remuneration.

Finally, a third purpose of lawyer discipline is deterrence. In recent years, the number of legal technicians and paralegal commercial operations have soared. Persons who wish or who must represent themselves contact these businesses to have legal documents typed. Most of these businesses presumably comply with the law and do not render legal advice. However, when an attorney is available, a temptation exists for the nonlawyer to "pass along information" to the customer that ordinarily the nonlawyer would not know or would not be authorized to relate. The passing back and forth of second-

hand information can lead to miscommunication and misunderstanding, as it did here. The temptation to both nonlawyers and attorneys to enter into these types of business arrangements is great. The nonlawyer has an advertising edge over the competition which does not have a "supervising attorney," and the lawyer receives a steady income and improper referrals from the service with less malpractice exposure although arguably, the attorney provides incompetent representation, as previously discussed, by using the paralegal service as a conduit.

The respondent argues his position as a sole practitioner should be considered a mitigating factor, yet this has never been considered by the court nor is it listed in Standard 9.2. The existence of dependents has sometimes been considered as a mitigating factor, but the respondent has none. In The Florida Bar v. Smiley, 622 So. 2d 465 (Fla. 1993), this court did consider the accused's willing representation of poor clients, but it was not sufficient to save the attorney from being disbarred.

The respondent cites The Florida Bar v. Perlmutter, 582 So. 2d 616 (Fla. 1991), but the facts are not similar to the misconduct alleged here and the discipline was the result of a conditional guilty plea for consent judgment and therefore not dispositive.

In aggravation, the respondent was suspended for 28 days in The Florida Bar v. Beach, 637 So. 2d 237 (Fla. 1994), for triggering trust accounting violations and a conflict of interest. He represented a client in several ventures and, in connection with one, held investor funds in his trust account. He never advised the investors he represented only the corporation of his client and not them. The manner in which business was conducted resulted in the corporation using the investors' funds for purposes other than those for which they were entrusted to the respondent. The respondent had a conflict of interest in representing the corporation and the original client.

Cumulative discipline warrants the imposition of harsher sanctions, The Florida Bar v. Bern, 425 So. 2d 526 (Fla.

1982). This is especially true where the misconduct is similar in nature, as in this case where the respondent represented clients with conflicting interests. The respondent's business arrangement caused harm to Ms. Rose and does not provide a benefit to the public. The simplified forms approved by this court several years ago are readily available to the public at a minimal cost. The purpose of those forms was to enable pro se litigants to complete them without the assistance of a lawyer. There certainly is no need for pro se litigants, most of whom cannot afford to hire an attorney, to hire a paralegal service to do typing at such a high cost. What Ms. Rose needed was legal advice. Instead, Ms. Rose received legal documents prepared by an unlicensed, unqualified person, at the direction of an attorney who never communicated with her to determine what her true needs were and what documents were necessary to satisfy those needs. Ms. Rose paid a discounted price for second-rate legal advice.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact, legal conclusions and recommendation of a 90 day suspension and instead find the respondent engaged in an impermissible conflict of interest and impose a 91 day suspension and payment of costs now totaling $1,745.63, or, in the alternative, approve the referee's recommendation as to guilt but impose a 91 day suspension and payment of costs now totaling $1,745.63.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

ROSE ANN DiGANGI
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, FL 32801-1085
(407) 425-5424
ATTORNEY NO. 745080

By: 

ROSE ANN DiGANGI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by Airborne Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by First Class Mail to the respondent, Mr. Roy L. Beach, 1415 East Robinson Street, Suite D, Orlando, Florida 32801; and a copy of the foregoing has been furnished by First Class Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 30th day of October, 1995.

Respectfully submitted,

ROSE ANN DiGANGI
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 85,005
[TFB Case No. 94-30,540(09A)]

v.

Roy L. Beach,

Respondent.
_____/

APPENDIX TO COMPLAINANT'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

AND

Rose Ann DiGangi
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, FL 32801-1085
(407) 425-5424
ATTORNEY NO.745080

INDEX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

v.

CASE NO: 85,005

ROY L. BEACH,
Respondent.
_____/

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed a referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:

July 25, 1995	evidentiary hearing
August 9, 1995	disposition hearing

The following attorneys appeared as counsel for the parties:

For the Florida Bar	John B. Root, Jr.
For the Respondent	Roy L. Beach, representing himself

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged:

Having considered all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

1. The respondent, Roy L. Beach, a member of the Florida bar, resided and practiced law in Orange County, Florida. In or around 1993, Respondent maintained a professional relationship with King and King Paralegals. The firm of King and King Paralegals was owned an operated by Kenneth and Cathy King. Respondent provided services to King and King Paralegals on an independent contract basis. (Respondent's Answer 1, 34; 2-2, Respondent's Response to Request for Admissions 1-A,C,D.)

2. Respondent acted as King and King Paralegal's supervising attorney, consulted with the Kings concerning their client's legal problems, reviewed pleadings and other documents prepared by them and offered thirty minute consultations to the King's clients. King and King Paralegals paid Respondent a $75.00 flat rate for his services rendered in each case (Respondent's Answer, 1-5,6 TFB Exhibit #4, Respondent's Response to Request for Admissions 1-E,F, TFB Exhibit 2, p. 29, 30,32,34).

ORIGINAL

3. On or about June 29, 1993, Margery Ray Rose hired King and King Paralegals because she was experiencing problems with her visitation rights with her minor child who resided out of state with Ms. Rose's former husband Steven. (Respondent's Answer, 1-7 Respondent's Response to Request for Admissions 1-G).

4. Ms. Rose executed a retainer agreement with King and King Paralegals on June 29, 1993. The contract provided that she was retaining the paralegal service to prepare the legal paperwork. The respondent would review said paperwork and provide her with a thirty minute consultation. The respondent would not represent her in the action which she would handle pro se. (Respondent's Answer 1-8, Respondent's Response to Request for Admission 1-H, TFB Exhibit #4).

5. Ms. Rose never had the thirty minute consultation with Respondent. (TFB Exhibit #5).

6. The contract called for a $675.00 non-refundable retainer fee, which she paid and any additional work done by King and King Paralegals would be billed at a rate of $75.00 per hour. King and King Paralegals paid the respondent $150.00 for his services rendered in Ms. Rose's case. (Respondent's Answer, 1-8, 10, Respondent's Response to Request for Admission. 1-I,J,K.)

7. After retaining King and King Paralegals, Ms. Rose changed her mind several times concerning what type of action she wanted to pursue and this necessitated the preparation of additional pleadings. (Respondent's Answer 1-11, Respondent's Response to Request for Admission 1-L, TFB Exhibit #6).

8. Ms. Rose received advice from King and King Paralegals concerning what she needed to do in order to pursue her various legal actions. This advice was based upon advice given to Kenneth King by the respondent after several consultations. (Respondent's Answer, 3-12 See Respondent's Response to Request for Admissions H-N.)

9. The respondent never met with or spoke to Ms. Rose nor did he have any form of communications with her. (Respondent's Answer 1-13, Respondent's Response to Request for Admissions 1-10, TFB Exhibit #5).

10. On or around July 3, 1993, Steven Rose moved to Florida and Ms. Rose decided not to pursue any action against him at that time. She advised King and King Paralegals to cease work on her case and send her the documents they had prepared. She also asked for a refund, which the service refused. Ms. Rose filed an action, pro se, against King and King Paralegals and Kenneth and Cathy King as individuals in the County Court for Orange County, Florida, seeking a refund and the delivery of her documents as proof these services had been performed. The King's represented themselves pro se. (Respondent's Answer 14-15, Respondent's Response to Requests for Admissions Q-R, TFB Exhibit #5).

11. The parties entered into a stipulation agreement on September 2, 1993, after mediation where the Kings agreed to have the documents served within 72 hours on Steven Rose in care of a third person and pay Ms. Rose $47.00 on or before October 21, 1993. (Respondent's Answer 1-16, Respondent's Response to Request for Admissions 1-T, TFB Exhibit #5).

12. The main issue in Ms. Rose's suit against the Kings was whether or not the documents she had requested and paid for had been prepared. (Respondent's Answer 1-17).

13. A dispute arose as to whether or not the King's had attempted in good faith to serve the documents within the 72 hour time period. Ms. Rose claimed they had failed to comply for approximately 10 days and the Kings maintained service had been attempted but refused. A hearing was held on a Motion to Dismiss and a Final Judgment was entered in favor of Ms. Rose on October 22, 1993, awarding her $675.00 due to the King's alleged failure to comply with the terms of the stipulation. (Respondent's Answer, 1-(18-19) Respondent's Response to Request for Admissions 1 (V-W), TFB Exhibit #5).

14. On or about October 8, 1993, Ms. Rose wrote the Florida Bar and complained about respondent's failure to consult with her or contact her in any way concerning her domestic relations matters. (Respondent's Answer 1-20, Respondent's Request for Admissions 1-X).

15. After receiving Ms. Rose's grievance, the respondent filed a Motion to Vacate the Final Judgment in Ms. Rose's civil action. The respondent entered the matter as counsel for the Kings. As the King's supervising attorney, the respondent had received Ms. Rose's domestic relations paperwork which was the subject matter of her civil suit against the Kings (Respondent's Answer 4-21, 1-22. Respondent's Response to Request for Admissions 1-Y-Z), TFB Exhibit 2, p. 48).

16. King and King Paralegals operated out of an office adjacent to the respondent's office. Respondent's Answer 1-23, Respondent's Response to Requests for Admissions 1-AA).

III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the complaint, I make the following recommendations as to guilt or innocence:

I recommend the Respondent be found guilty, and specifically that he be found guilty of the following violations of the Rules Regulating the Florida Bar:

Rule 4-5.4 (for sharing legal fees with a non lawyer).

There is no question that King and King Paralegals are not lawyers (Transcript p.40, line 10). However, King was acting as a lawyer by giving legal advice that he obtained from

Respondent. (Transcript p. 49). This is no different than King going to the law library, to obtain legal information, using his own knowledge and or opinion to advise a client. See the Florida Bar v. Brumbaugh, 355 So. 2d 1186, 1194 (1978).

Respondent readily admits he received $150.00 for his services from King and King in this case (Respondent's Answer 1-10; Respondent's Response to Request for Admissions 1-K), and that the Kings routinely paid him $75.00 per case, but was subject to change based upon the need for additional work in each particular case (Respondent's Response For Admissions 4). One would normally think of sharing a fee as a lawyer obtaining a fee and then sharing it with a non lawyer; however, the reverse is also true. Respondent was to share a fee with a non lawyer for each case King and King handled. Respondent argues this is only a fee arrangement for legal services he rendered to King, but in reality it's nothing more than a fee sharing agreement. He is Kings "supervising attorney" giving King legal advice concerning King's representations of King's clients, not King's attorney in connection with a lawsuit on behalf of King. (Transcript p. 41, lines 10-15). There is a definite distinction between the two. Here, King, a non lawyer, shared a fee with a lawyer. It's still fee sharing.

Rule 4-5.5 (for assisting a person who was not a member of the bar in the performance of activities that constituted the unlicensed practice of law).

King and King Paralegals are not lawyers (Transcript p. 40 line 10). However, King was acting as a lawyer by giving legal advice that he obtained from respondent. (Transcript p. 49, p. 70 lines 6-21, p. 73 lines 20-22). A paralegal may sell printed material purporting to explain legal practice and procedure to the public in general. They may sell sample legal forms and engage in a secretarial service, typing forms for clients containing information provided to them in writing by the clients. A paralegal may not engage in advising clients as to the various remedies available to them, make inquiries nor answer questions from clients as to particular forms which might be necessary, how to fill out the forms, where to file or how to present evidence in Court. Brumbaugh 1194.

The referee believes King and respondent had a scheme in an attempt to avoid King from being charged with the unlicensed practice of law. King would prepare the paperwork based on information received from his client and his "supervising attorney" the respondent. He would merely be a conduit of legal information from respondent to King's client. (Transcript p. 46, p.49, p.70, lines 14-16).

Respondent argues this is no different than a paralegal in a larger law firm (Transcript p. 69). There is a major distinction. In a large law firm, the paralegal is an employee of the lawyer. The paralegal does not give legal advice directly or as a conduit from a lawyer. In the

instant case, King and King Paralegals are an independent entity from Respondent. Respondent is only a "supervising attorney". (Transcript p. 41, lines 10-15). Although the scheme utilized by King and respondent is to avoid the unauthorized practice of law by King and a violation of Bar Rules by respondent, it nevertheless fails. Obtaining legal information from respondent and passing it on to a client is no different than King going to a law library to obtain legal information or using his own legal knowledge to advise a client. Either way he is practicing law and respondent in assisting him in this practice. (Brumbaugh 1194, TFB Exhibit 4).

The unauthorized practice of law is a serious problem for the Florida Bar and for the public in general. Here, we have a member of the bar assisting a non lawyer in a unauthorized practice and Ms. Rose has suffered as a result.

As to the Bar's allegation that Respondent violated Rules 4-1.7, 4-1.8, and 4-1.9. I recommend a finding of not guilty. The Bar withdrew its allegation that respondent violated Rule 4-5.3 (Transcript p. 63, lines 17-24).

These allegations deal with Ms. Rose being a client of respondent. Although this is a close call, this Referee is of the opinion Ms. Rose was not a client of respondent. Ms. Rose entered a contract with King and King Paralegals not with respondent. Although the contract stated respondent would review the paperwork and give her a 30 minute consultation, it also stated she would not be represented by respondent (TFB Exhibit 4). Her dealings were only with King and she never consulted with respondent. (TFB Exhibit #5). Although Ms. Rose testified she considered respondent to be her atorney because of King telling her respondent was reviewing her case. (Transcript p. 23) she also knew she had never entered into a separate agreement with respondent for representation as called for in the contract with King and King (Transcript p. 31-32; TFB Exhibit 4). The Bar argues that Ms. Rose became a client of respondent when she disclosed confidential information to King who passed it on to respondent while seeking legal aid, whether respondent was employed by her or not. Respondent argues that Ms. Rose was never a client because she did not have a reasonable subjective belief that she was consulting with Respondent for legal advice. Bartholomew v. Bartholomew, 611 So. 2d 85, 86 (Fla. 2d DCA 1992) (TFB Exhibit 1).

This referee believes that Ms. Rose could not have had a reasonable subjective belief that she was a client of respondent. She specifically sought out a paralegal instead of an attorney. Although an attorney was to review the paperwork and give her a consultation, which never materialized, she knew she was a client of King and King. It is this referees belief that respondent's involvement with King was a scheme to avoid an unauthorized practice of law charge. By having an attorney involved, it can be argued the situation is no different than a law firm with a paralegal as an employee. There is a distinction as stated above. If one

accepts this argument then Ms. Rose would be a client of respondent and respondent would not be in violation of Rules 4-5.4 and 4-5.5 as King and King Paralegals would merely be his employees. That is not the case, however, and this referee believes Ms. Rose was solely a client of King and King Paralegals. Respondent provided legal information to King the same as if King researched in a law library. It is this Referees opinion King was practicing law Brumbaugh, 1194. As such, Ms. Rose was a client of King and not of respondent. Under the facts and circumstances of this case she could not have formed a reasonable subjective belief respondent represented her. If she were a client, Respondent would only be guilty of 4-1.7 and not 4-1.8 and 4-1.9 because there is no evidence to support the charge that he used information from his representation of the client to the detriment of the client (Transcript p. 55-62).

This case can be distinguished from the McClendon case (TFB Exhibit 3). In that case the attorney actually filed legal documents and actually did work on behalf of the client. A person could easily form a subjective belief the Attorney represented them in that case. There is not clear and convincing evidence to support the charges in the instant case.

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend that the respondent be suspended from the practice of law for a period of three (3) months with automatic reinstatement at the end of period of suspension as provided in Rule 3-5.1(e), Rules of Discipline.

V. Personal History and Past Disciplinary Record:

After finding of guilty and prior to recommending discipline to be recommended pursuant to Ru.e 3-7.6 (k) (1) (D), I considered the following personal history and prior disciplinary record of the respondent, to-wit:

Age:	42
Date admitted to Bar:	October 31, 1980
Prior disciplinary convictions and discriplinary measures imposed therein:	One, March 31, 1994, respondent pled guilty to violating Rules 4-1.13 (d) and 4-1.15 (d) and was suspended for 28 days.
Other pesonal data:	Gradulate of Walter F. George School of Law at Mercer University, he is a sole practioner and has no dependents.

VI. Statement of Costs and Manner in Which Cost Should be Taxed:

A.	Grievance Committee Level Costs:	
	1. Transcript Costs	$ 270.00
	2. Bar Counsel Travel Costs	$ -0-
B.	Referee Level Costs:	
	1. Transcript Costs	$ 421.15
	2. Bar Counsel Travel Costs	$ 51.48
C.	Administrative Costs:	$ 750.00
D.	Miscellaneous Costs:	
	1. Investigator Costs	$ 171.00
	2. Witness Fees	$ 54.50
	3. Copy Costs (110 copies @ $.25	$ 27.50
	4. Telephone Charges	$ -0-
	5. Translation Services Fees	$ -0-
	TOTAL ITEMIZED COSTS	$1,745.63

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent.

DATED this 21st day of August, 1995.

Ronald A Herring

Referee

CERTIFICATE OF SERVICE

I hereby certify that a copy of the above report of referee has been served on John B. Root, Jr. at 880 North Orange Avenue, Suite 200, Orlando, Fl 32801 and Roy L. Beach, 1415 E. Robinson Street, Suite D, Orlando, Fl 32801 and a copy has been furnished to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, this 23 day of August, 1995.

Supreme Court o

SCHULTZ GREGORY G.

THURSDAY, JANUARY 7, 1993

JAN 11 1993

613 So.2d 11

THE FLORIDA BAR,

Complainant,

v.

GREGORY GLEN SCHULTZ,

Respondent.

CASE NO. 79,923

TFB No. 90-11,727(6E)

We approve the uncontested referee's report and hereby reprimand the Respondent for professional misconduct.

Judgment for costs in the amount of $2,312.66 is entered against respondent for which sum let execution issue.

Not final until time expires to file motion for rehearing and, if filed, determined.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

KBB
cc: Hon. Thomas E. Stringer, Sr., Referee
Kenneth C. Deacon, Esquire
Joseph A. Corsemier, Esquire
John A. Boggs, Esquire
Bryan A. Kutchins, Esquire

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 79,923
TFB No. 90-11,727(6E)

v.

GREGORY GLEN SCHULTZ,

Respondent.
_____/

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, hearings were held on July 17, 1992, August 14, 1992, August 28, 1992, September 29, 1992 and October 12, 1992. Any pleadings, notices, motions, orders, transcripts, and exhibits are forwarded to The Supreme Court of Florida with this report and constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Joseph A. Corsmeier, Esq.

For The Respondent: Bryan A. Kutchins, Esq.

II. Findings of Fact as to Each Item of Misconduct With Which the Respondent Is Charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find that Respondent has admitted the factual allegations in paragraphs 1-25 of the Amended Complaint filed by The Florida Bar as follows:

On or about March 7, 1990, David and Sylvia Goodman attended a seminar luncheon in response to a solicitation telephone call from Mutual Trust Financial Services, Inc. (MTFS).

Respondent was identified as the intended speaker, but did not attend. Charles Olson, identified as Vice President of Securities at MTFS, and a non-lawyer, conducted the seminar.

The Goodmans were advised that the seminar included, inter alia, preparation of living trusts and tips on how to avoid probate.

At the seminar, the Goodmans told Olson that they wanted a living trust.

21-5 Bu

On a form provided at the seminar, which was prepared by Respondent, the Goodmans placed checkmarks indicating that they were interested in living trusts and a mutual fund analysis.

A few days later, Olson telephoned the Goodmans to set up an appointment with him to discuss the living trust.

On or about March 21, 1990, Olson met with the Goodmans at the MTFS office. Respondent was not present at this meeting.

Olson requested and copied down information to draft the living trust and the Goodmans told Olson specific provisions they wanted within the trust. The information requested included, inter alia, whether the Goodmans wanted the trust funds to be distributed per stirpes or per capita.

Olson then requested that the Goodmans execute a contract for a living trust. The Goodmans were given a prepared contract to review, which provided for the Goodmans to pay $500.00 to MTFS for the completion of their living trust documents. The Goodmans then executed the contract and paid a $125.00 deposit by check payable to MTFS, not Respondent.

In the trust contract, Respondent was listed as Vice President and 50 percent shareholder of Mutual Trust Company of America Securities (MTC).

The contract provided that Respondent was to represent the Goodmans in the drafting of the living trust and required the Goodmans to make legal decisions regarding appointment of trustees of the trust, whether the trust distribution should be per capita or per stirpes, and special requests regarding the trust.

Respondent never had any written or oral communication with the Goodmans regarding the drafting of the living trust and never met with them.

Approximately five weeks after the meeting with Olson, on or about April 18, 1990, Mr. Goodman telephoned MTFS to inquire about the status of the trust, and was told by a secretary that the trust draft was being typed.

On or about April 23, 1990, the Goodmans received a draft of the living trust. In a cover letter signed by Olson, the Goodmans were asked to review the draft and then call for an appointment with Olson. Further, the Goodmans were told that if they had any questions, they were to call Olson, not Respondent. This trust draft was the only draft received by the Goodmans.

The Goodmans then decided that the draft was unsatisfactory. They determined that many of the provisions they had requested

21-6 BL

were not incorporated into the document.

Due to their dissatisfaction with the draft, the Goodmans decided not to pursue completion of the living trust and to forfeit the deposit. They sent correspondence to MTFS stating their position.

Several weeks later, Olson telephoned the Goodmans regarding the draft. Olson requested that the Goodmans meet with him. Mr. Goodman explained his dissatisfaction and stated that he did not wish to meet with Olson to correct the draft.

Olson then demanded the remaining amount due and threatened Mr. Goodman with a lawsuit on the trust contract.

On or about June 4, 1990, Olson, on MTFS letterhead, sent correspondence to Respondent requesting Respondent's representation of MTFS in filing a breach of contract lawsuit against the Goodmans.

On or about June 25, 1990, the Goodmans filed a complaint against Respondent with The Florida Bar.

On or about June 26, 1990, the Goodmans were served with a summons and Statement of Claim naming MTFS as the plaintiff and suing the Goodmans for $1,050.00, which included various costs and fees. The lawsuit alleged that the Goodmans breached the contract for failing to pay the $375.00 allegedly owed on the agreement for the living trust. Respondent represented MTFS in the lawsuit.

On or about July 3, 1990, the Goodmans and MTFS entered into a mutual release and settlement. The Goodmans received $62.50, one-half (1/2) of the deposit amount paid to MTFS.

In his sworn testimony at the hearing before the grievance committee on or about October 17, 1991, Respondent stated that both the Goodmans and MTFS were his clients.

III. Recommendations as to Whether or Not the Respondent should Be Found Guilty: As to the Amended Complaint, Respondent should be found guilty of violating the following Rules: 4-1.7(a) (a lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client), 4-1.7(b) (a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person or by the lawyer's own interest), and 4-5.5(b), (a lawyer shall not assist a person who is not a member of the Bar in the performance of activity that constitutes the unlicensed practice of law) Rules of Professional Conduct.

21-7 BU

IV. Recommendation as to Disciplinary Measures to Be Applied: I recommend that Respondent be disciplined by a public reprimand to be published in the Southern Reporter.

V. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Year of Birth: 1948
Date Admitted to Bar: September 19, 1983
Prior Disciplinary convictions and Disciplinary Measures Imposed Therein: None
Aggravating Factors: None
Mitigating Factors:
9.32(a) absence of prior disciplinary record
9.32(b) absence of dishonest or selfish motive

VI. Statement of Costs and Manner in Which Costs Should Be Taxed: I find the following costs were reasonably incurred by The Florida Bar: $2,312.66 (see Amended Statement of Costs).

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses, together with the foregoing itemized costs, be charged to the respondent and that interest at the statutory rate 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 2nd day of November, 1992.

Thomas E. Stringer

THOMAS E. STRINGER, SR.
Referee

Copies:

Joseph A. Corsmeier, Assistant Staff Counsel
Bryan A. Kutchins, Attorney for Respondent
John T. Berry, Staff Counsel

21-8 BL