IN THE SUPREME COURT OF FLORIDA

097

THE FLORIDA BAR,

Complainant,

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

v.

ROY L. BEACH,

Respondent.

FILED
SID J. WHITE
DEC 4 1995
CLERK, SUPREME COURT
By ______
Chief Deputy Clerk

**THE FLORIDA BAR'S CROSS REPLY BRIEF**

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. 745080

# TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES....................................ii

TABLE OF OTHER AUTHORITIES..............................iii

SYMBOLS AND REFERENCES..................................iv

ARGUMENT................................................1

POINT I

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

POINT II

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

POINT III

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

CONCLUSION..............................................13

CERTIFICATE OF SERVICE..................................15

## TABLE OF AUTHORITIES


**PAGE**

The Florida Bar v. Beach ........................................ 12
637 So. 2d 237 (Fla. 1994)

The Florida Bar v. Brumbaugh ........................................ 3
355 So. 2d 1186 (Fla. 1978)

The Florida Bar v. Consolidated Business and Legal
Forms, Inc ........................................ 6
386 So. 2d 797 (Fla. 1980)

The Florida Bar v. Neu ........................................ 1
597 So. 2d 266 (Fla. 1992)

The Florida Bar v. Florida Service Bureau, Inc ........................................ 1
581 So. 2d 900 (Fla. 1991)

The Florida Bar v. Mitchell ........................................ 5
569 So. 2d 424 (Fla. 1990)

The Florida Bar v. Rosenberg ........................................ 8
387 So. 2d 935 (Fla. 1980)

State v. Sperry ........................................ 12
140 So. 2d 587(Fla. 1962)

## TABLE OF OTHER AUTHORITIES


| Rules Regulating The Florida Bar | PAGE |
| --- | --- |
| 1-3.3 | 4 |
| 4-1.7(a) | 7 |
| 4-1.7(b) | 7 |
| 4-3.7(a) | 8 |
| 4-5.3 | 4 |
| 4-5.4(a) | 11 |
| 10-2.1(a) | 3,4 |

## 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 to the bar's Answer Brief and Initial Brief on Cross-Petition for Review (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.

## 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.**

At the outset, the bar would note the respondent's repeated assertions that the bar made improper arguments based upon matters not raised before the referee are without merit. One of the main issues in determining the appropriate level of discipline is the harm or potential harm to the public, The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). The bar's position is that the potential for harm to the public existed because Mr. King was engaging in the unlicensed practice of law with the respondent's assistance. Mr. King did not merely pass on to a legal consumer, Ms. Rose, general information that was no greater than that which anyone could glean from reading a statute, as occurred in The Florida Bar v. Florida Service Bureau, Inc., 581 So. 2d 900 (Fla. 1991), or even from a legal encyclopedia or a continuing legal education publication. Mr. King gave advice requiring greater skill and knowledge than that possessed by a nonlawyer. Otherwise, Mr. King would not have needed to consult with the respondent. Mr. King prepared

documents specific to a consumer's particular needs (TI p.p. 48-49) and communicated to the consumer the respondent's legal advice (TI p.p. 14-15). The bar submits this clearly constitutes the practice of law regardless of where the nonlawyer obtains the information and regardless of whether any individual is actually harmed. The absence of damage is a mitigating factor, not a controlling one. Mr. King's conduct was clearly distinguishable from the cases cited by the respondent. None of the cases cited by the respondent involved a nonlawyer who: (1) met alone with a customer; (2) consulted with a lawyer who was paid by the nonlawyer as an independent contractor for legal advice; (3) prepared legal documents tailored to the specific needs of a customer; and (4) communicated the attorney's legal advice to a customer who never spoke to the attorney.

Furthermore, the respondent's assertions that he has somehow been prejudiced by the bar's arguments in its initial brief are likewise without merit. He has been able to respond in his cross-reply and answer brief. The bar's arguments can be properly decided based upon the record and the case law.

As the referee noted in his report, a paralegal may not advise clients as to the various remedies available to them, make

inquiries nor answer questions from clients beyond those necessary for completion of particular approved forms, how to fill out the forms, or how to present evidence in court and cited, as authority, The Florida Bar v. Brumbaugh, 355 So. 2d 1186 (Fla. 1978) (ROR-A p. 4). Brumbaugh does not authorize a nonlawyer to provide the above proscribed advice if the nonlawyer consults with an attorney first. Laypersons may not give legal advice. There are no exceptions. Rule 10-2.1(a) clearly states that nonlawyers are allowed to engage only in limited oral communications:

> ...to assist a person in the completion of a legal form approved by the Supreme Court of Florida. Oral communications by nonlawyers are restricted to those communications reasonably necessary to elicit factual information to complete the form and inform the person how to file the form.

The rule does not provide that a nonlawyer may complete any type of form other than those approved by this court, even if a lawyer has prepared those forms. Furthermore, Mr. King did much more than merely meet with Ms. Rose and complete the form with information provided to him by her. He obtained information from her and then he conferred with the respondent as to what pleadings to prepare (TI p.p. 48-49, B-Ex. 2 p. 30). The documents Mr. King prepared were not the simplified legal forms

approved by this court referred to in rule 10-2.1 (B-Ex. 6). They were documents prepared especially for Ms. Rose in response to her particular legal needs concerning domesticating a foreign judgment, a motion for contempt, a petition to modify a final judgment from another state, and a motion to have a guardian ad litem appointed (B-Ex. 6). Mr. King funneled the legal advice he obtained from the respondent to Ms. Rose.

An attorney in a law firm has an ethical obligation to adequately supervise nonlawyer assistants so that their conduct will conform to the Rules of Professional Conduct which govern attorneys. See rule 4-5.3, R. Regulating Fla. Bar. Supervised legal assistants in a law firm setting are given more latitude than paralegals who work outside of a law firm because an attorney who supervises a legal assistant within a law firm remains ultimately responsible for the acts of that paralegal. The public is protected because: (1) a harmed client has recourse against the attorney's assets and/or malpractice insurance; (2) an attorney is required under rule 1-3.3, R. Regulating Fla. Bar, to keep a record bar address that is available to the public so harmed clients can locate the attorney; (3) under certain circumstances, a harmed client may receive reimbursement from the

Clients' Security Fund; and (4) an attorney may be properly disciplined for the unethical acts of a nonlawyer employee. See, e.g., The Florida Bar v. Mitchell, 569 So. 2d 424 (Fla. 1990). As the referee noted in his report, the Kings were not, according to the testimony, employees of the respondent and he was a "supervising attorney" only on an independent contract basis (ROR-A p.p. 1,4-5). Therefore, the respondent could not dictate to the Kings the manner in which they should conduct themselves. As an independent contractor, the respondent was more of an employee of the Kings rather than the Kings' employer. Contrary to the traditional situation in which an attorney supervises and pays a paralegal, the respondent/attorney was paid by the Kings/the paralegals (TI p. 47).

The respondent did not have a direct attorney-client relationship with Ms. Rose because he never communicated with her, yet through Mr. King, he dispensed legal advice to her (TI p.p. 14-15). The respondent's only source of knowledge concerning her particular situation was what Mr. King, not Ms. Rose, related to him which was not verified by the respondent. The respondent relied on Mr. King, who was not supervised by the respondent as an attorney in a law firm setting would be

ethically obligated to do, to accurately repeat to the respondent what Ms. Rose told him. In effect, Mr. King controlled what information the respondent received and in this respect, the nonlawyer did exercise control over the attorney as prohibited by The Florida Bar v. Consolidated Business and Legal Forms, Inc., 386 So. 2d 797 (Fla. 1980).

The potential for harm here is clearly evident, regardless of whether or not it actually occurred. Nevertheless, Ms. Rose believed she was harmed in that the documents had not been properly prepared and contained errors (T. p. 30). In her opinion, she did not get what she needed and therefore she hired Central Florida Legal Clinic to prepare new documents which were to her satisfaction (T. p. 31). The quality of the documents which Ms. Rose received from the Kings, after Mr. King consulted with the respondent regarding Ms. Rose's specific legal needs, was an issue in Ms. Rose's civil suit and in her initial grievance to the bar (B-Ex. 5, p. 4 of her grievance form) and furthermore, this issue was addressed at the grievance committee hearing (B-Ex. 2 p.p. 6-7, 18-19). Therefore, the respondent was clearly on notice as to this issue.

## 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.**

The respondent triggered conflicts of interest which ethically precluded him from being able to properly represent the Kings in the civil case. First, the respondent had knowledge of material information because he "coached" the Kings regarding the documents they prepared for Ms. Rose and then, by appearing on the Kings' behalf, he essentially acted adverse to a current client, see rule 4-1.7(a), R. Regulating Fla. Bar. Second, after Ms. Rose filed her bar grievance, the respondent had a conflict of interest because a reasonable attorney would find that his or her independent professional judgement would be materially limited by the attorney's personal interest in defending the grievance and, therefore, the representation of the Kings would be adversely affected by the attorney's own interests, see rule 4-1.7(b), R. Regulating Fla. Bar. Third, presumably, the respondent would be a necessary witness on the Kings' behalf because of his knowledge concerning the preparation of Ms. Rose's documents and as to his knowledge concerning the attempted service of those documents on her former husband which he gained

through his defense of her bar grievance (TI p.p. 44-45), R. Regulating Fla. Bar 4-3.7(a), The Florida Bar v. Rosenberg, 387 So. 2d 935 (Fla. 1980). Additionally, regarding the grievance, the respondent had direct knowledge concerning Ms. Rose's allegations against him and the Kings and, through the grievance process, he was able to obtain information he would not have otherwise obtained which he was then able to use against Ms. Rose in her civil action.

The bar also argued, in its initial brief in support of its cross-petition for review, that there existed a potential conflict of interest in the respondent's business arrangement with King and King Paralegals because the more forms the service generated, the greater the respondent's profits as outlined in the standard employment contract entered into evidence as part of B-Ex. 5. It is disturbing that the potential exists for a client to hire King and King unnecessarily and thereby incur costs. At the grievance committee hearing, Mr. King testified that the consultation charges were for his time spent consulting with the respondent in Ms. Rose's case (B-Ex. 2 p. 31). Mr. King always consulted with the respondent concerning what documents a customer needed and the Kings would pay the respondent for this

time spent. The respondent had no control over whether Mr. King decided to pass this cost of doing business on to the consumer should it be determined by the respondent that no action needed to be taken by the client or no documents needed to be prepared. Ms. Rose testified at the grievance committee hearing that she paid the full contract amount of $675.00 (B-Ex. 6) but incurred an additional $47.00 in charges (B-Ex 2 p. 6). Despite the fact that the Kings did not bill Ms. Rose for all of their additional services, in all likelihood, had she not complained, she would have been billed.

As for Mr. King's testimony at the final hearing that the trial court in Ms. Rose's civil suit required him to retain the respondent to represent him, the respondent produced no court order or transcript to verify this statement. All that was presented was the self-serving testimony of a witness who could face unlicensed practice of law charges.

## POINT III

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

The bar stands on its initial argument that the appropriate level of discipline in this case is a suspension requiring proof of rehabilitation given the facts of the case, the respondent's prior disciplinary history, the case law and the Florida Standards for Imposing Lawyer Sanctions.

Following the respondent's logic that sole practitioners should receive nothing more than admonishments, public reprimands or very short suspensions that would not adversely impact on their practices, then a sole practitioner who steals client funds should not be disbarred or suspended for a long period of time because this might harm the innocent clients who cannot afford to hire another attorney. The error in this logic is obvious. A client with limited funds may experience some difficulty in retaining another attorney if the disciplined lawyer refuses to refund any excessive or unearned fees paid for services he will no longer be able to render (a disciplinable offense in itself). However, if the attorney has committed an ethical breach serious enough to warrant a strong form of discipline, then the client

potentially faces far more harm by continuing to be represented by the errant attorney.

In addition to the legal aid organizations in the area, both the Orange County and Seminole County Bar Associations sponsor lawyer referral services where a person can consult with an attorney for 30 minutes at a modest charge of approximately $25.00-$35.00, far less then the respondent's charge provided for in the Kings' standard contract of employment. Furthermore, the respondent's position that a sole practitioner suffers greater loss of income than a partner or associate of a law firm is erroneous. While a lawyer is suspended, the firm may only properly pay the attorney for fees which were earned while the attorney was a member in good standing. Otherwise, other firms members would be splitting attorney's fees with a "nonattorney" in violation of R. Regulating Fla. Bar 4-5.4(a).

The bar understands that the issue before this court is a difficult one given the current climate which favors access to the courts. However, this court has recognized the need to protect the public by allowing only licensed attorneys to dispense legal advice. Specifically, this court has stated:

> The reason for prohibiting the practice of law by those who have not been examined and found qualified to practice is frequently misunderstood. It is not done to aid or protect the members of the legal profession either in creating or maintaining a monopoly or closed shop. It is done to protect the public from being advised and represented in legal matters by unqualified persons over whom the judicial department can exercise little, if any, control in the matter of infractions of the code of conduct which, in the public interest, lawyers are bound to observe. [*Emphasis added.*] State v. Sperry, 140 So. 2d 587, 595 (Fla. 1962).

The bar submits the respondent should be sanctioned accordingly for eroding the safeguards promulgated by this court to protect the public.

Finally, the bar would note that in the respondent's prior disciplinary case, The Florida Bar v. Beach, 637 So. 2d 237 (Fla. 1994), there was no allegation that he stole client money. Because the money was misapplied, a somewhat lesser offense, the respondent received the lesser discipline of a suspension rather than a disbarment.

## 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.

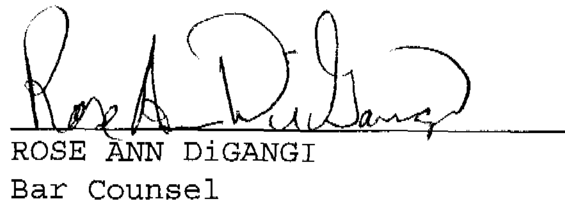
Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, 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. 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 Cross Reply Brief have been sent by Airborne Express 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 regular U.S. 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 regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 1st day of December, 1995.

Respectfully submitted,

By: Jan Wichrowski
Branch Staff Counsel

For: ROSE ANN DiGANGI
Bar Counsel