IN THE SUPREME *COURT* OF FLORIDA

THE FLORIDA BAR,

complainant,

vs.

K. KRIBTINE NOWACRI,

Respondent.

Supreme Court Case No. 86,586

On Petition for Review of
the Report of a Referee

REPLY BRIEF OF RESPONDENT

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Pro Se

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ARGUMENT

COUNT I - WILLIAM LUDECKER

The Bar contends that paragraph ten of its complaint put Respondent on notice that she was charged with failing to take action on settling Mr. Ludecker's case after June of 1994. The allegation that "the respondent failed to timely and diligently pursue the legal matters for which she had been retained by Mr. Ludecker" does nothing more than track the language of Rule 4-1.3. It does not set forth what aspects of the case the Bar may have considered to have been pursued with inadequate diligence. Accordingly, this allegation fails to meet the requirement of Rule 3-7.6(g)(1)(B) that the complaint "set forth the particular act or acts of conduct for which the attorney is sought to be disciplined." (Emphasis supplied).

In its brief the Bar glosses over the rule requirement that the acts supposedly constituting rule violations be alleged with particularity. Nevertheless, apparently recognizing the inadequacy of the pleading alone, the Bar contends that the complaint in *conjunction* with *Mr. Ludecker's* initial *grievance* was sufficient to put Respondent on notice of a claim that this constituted a rule violation. The notion that a purely conclusory allegation can be saved by a claim in a grievance is one for which the Bar cites no support whatsoever. This contention appears to rest on an assumption that all claims made in a grievance are presumptively correct. It fails to take into

consideration the winnowing process which occurs in hearings before grievance committees. Furthermore, Mr. Ludecker's grievance merely stated:

> My complaint is I only went to Nowacki office two times for 45-90 min. and when I was there Nowacki spoke on the phone to other clients or was looking for papers. Every time I would call Nowacki was gone. I would not get any calls back to me.

(Ex. 1 to Bar Ex. 3).

Even if the Bar's complaint were to be construed in conjunction with this, it certainly did not put Respondent on notice that she was charged with failing to diligently pursue a settlement after June of 1994. Furthermore, this position ignores the language of the rule that the *complaint* shall allege the acts in question. Respondent had the right to look to the complaint to determine the charges to which she was required to respond.

The conclusory allegations in paragraph 10 followed a series of factually specific allegations in paragraphs 3 through 9.[1] Fairly read, the allegations of paragraph 10 were merely a summation of the allegations which had been specifically pled in previous paragraphs. Indeed, the allegation in paragraph 10 that Respondent "failed to adequately respond to Mr. Ludecker's numerous written and telephone inquiries" is indisputably a reference back to the specific allegations in paragraphs 6 and 7. This shows that

[1] As was stated in Respondent's initial brief, the referee made no factual findings as to these allegations.

paragraph 10 is a summary of the previous allegations. Rather than being a trap for the unwary, as the Bar would construe them, the pleadings should leave no question as to what the charges are.

None of the cases cited by the Bar support the proposition that a conclusory allegation such as this one is sufficient to put a respondent on notice as to what is charged. In *Lambdin v. State,* 9 So.2d 192 (Fla. 1942), the pleadings were not set forth verbatim in the opinion, but the summary of the charges recited in the opinion indicates that the allegations were much more specific than those in question in the case sub *judice. State* v. *Grant,* 85 So.2d 232 (Fla. 1956), supports Respondent's position. In that case the Court held that "specific acts of alleged misconduct" are required. 85 So.2d at 233. In that case the Court concluded that the respondent had not been put on notice by one count which was not specific, but that other more specific counts were sufficient.

The Bar cites *The Florida* Bar *v. Stillman,* 401 So.2d 1306 (Fla. 1981) and *The Florida* Bar v. *Vaughn, 608* So.2d 18 (Fla. 1992) in support of the alternative theory that the referee may find violations not charged in the complaint. In *Vaughn,* however, the Court recognized that the complaint must provide notice of the acts in question, even if they were not alleged to be independent violations. No such notice was provided in the case sub *judice.*

In its brief the Bar states:

> The respondent's argument that the record fails to support the referee's finding that she failed to diligently prosecute Mr. Ludecker's case are without merit.

(Bar's Brief at 12).[2] This mischaracterizes Respondent's argument. The finding which Respondent contends to be unsupported is that "[t]he client's letters continually request the respondent to take action in his case." It may be debatable whether the June 24 letter "specifically requested that any action be taken" (Respondent's Initial Brief at 9), but even if it is assumed that the letter requested action to be taken there are only two such letters. The undated post-June 27, 1994 letter from Mr. Ludecker to opposing counsel certainly cannot be viewed as a request to Respondent to take action in Mr. Ludecker's case. To the contrary, it constituted a recognition on his part that differences existed between the parties which were precluding a settlement.[3]

Respondent does not dispute the Bar's position that she had an obligation to act diligently regardless of the directions from Mr. Ludecker. These points are raised, however, because they pertain to specific factual findings made by the referee.

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[2] The "finding" that Reepondent "failed to act with reasonable diligence and promptness" was actually a legal conclusion which tracked the language of Rule 4-1.3. The referee did not use the precise language used by the Bar, although Respondent recognizes this is not a direct quotation.

[3] The Bar apparently does not contest Respondent's position that the August 9 letter did not requeet her to take any specific action.

The post-hearing reliance placed on Respondent's bill to Mr. Ludecker by the referee and the Bar merely underscores the lack of notice afforded by the complaint. If Respondent had been put on notice that this was a subject under scrutiny, she could have produced the counsel for Mr. Ludecker's wife as a witness as to settlement attempts made during the June-to-September period.

The Bar closes its argument in regard to Mr. Ludecker by relying on the referee's finding that Respondent did not provide Mr. Ludecker with a copy of his file. The complaint made no mention of this supposed rule violation and accordingly provided no notice. Furthermore, in regard to the absence of testimony that Mr. Ludecker personally asked Respondent for his file, the Bar claims, without any citation of authority, that "[i]t is presumed a lawyer's supervision of the office staff is sufficient to ensure that the staff conveys messages and a failure to do so would subject the lawyer to charges of failing to supervise the nonlawyer employees." (Bar's Brief at 13). Respondent was not charged with any such violation in regard to her representation of Mr. Ludecker. This argument assumes that any failure of office staff to convey a message to the attorney *ipso facto* constitutes a violation of the rule requiring a lawyer to supervise office staff. Rule 4-5.3 does not establish a standard of strict liability on the part of the attorney for the actions of the attorney's staff.

COUNT II - ANN ROGERS

The Bar attempts to cast the issues in respect to Count II as involving the credibility of the witnesses. Yet the pertinent facts are essentially undisputed. In stating that "the respondent may not have known the paycheck she wrote to Ms. Rogers in January, 1995, would be dishonored at the time she wrote the check" (Bar's Brief at 14), the Bar in effect concedes that Respondent lacked the intent required for a finding of dishonest conduct. If Respondent in fact "would have been aware of the overdraft by the time the financial institution presented it for payment the second time"[4] (id.), this has no bearing on the charge of dishonest conduct. The fact that Ms. Rogers' credit union presented the check twice is something beyond Respondent's control and, furthermore, is irrelevant to the charge.

The cases cited by the Bar do not support its position that an event such as this amounts to "dishonest conduct." The opinion in *The Florida* Bar *v. Williams,* 604 So.2d 447 (Fla. 1992), does not address the issue of intent. Nevertheless the check in that case apparently was written in connection with another transaction in which the attorney mortgaged property held as security for a client (Count 11) and then lied to the grievance committee about it. This suggests that the dishonored check was part of a pattern of

[4] The referee made no such finding. The argument presumes Reapondent had knowledge of Ms. Rogers' credit union's policy of presenting checks twice before returning them for insufficient funds.

dishonest conduct. *The Florida Bar v. Brodsky,* 471 So.2d 1273 (Fla. 1985), does not recite the factual circumstances surrounding the checks, so it is of limited value as precedent. In *The Florida Bar v. Davis,* 361 So.2d 159 (Fla. 1978), the attorney had been convicted of uttering a worthless check. Furthermore, the Court specifically stated that the attorney had knowledge that there were insufficient funds to cover the check. 361 So.2d at 161.

The Bar attempts to support the finding as to the pay for Ms. Rogers' last week of work on the basis of Respondent's policy in regard to personal time. The dispute here involves Ms. Rogers' absence for entire afternoons during her last week of employment, a matter clearly different from previous practices in the office. This simply does not rise to the level of "dishonest conduct."

COUNT III - FRANKLIN BURNS

In its brief the Bar ignores the points made by Respondent in her brief, other than to dispute the materiality of the findings regarding Respondent's associate's qualifications.

In its brief the Bar states:

> The bar submits the respondent's failure to advise Mr. Burns that his case would be handled by her associate, Mr. Kwas, because she was taking a leave of absence from the office was a violation of the rules alleged by the bar in its complaint.

(Bar's Brief at 17-18). Yet the Bar fails to offer any explanation as to how this could constitute failure to abide by a client's decision concerning the objectives *of the representation,* failure to act with reasonable diligence and promptness, failure to keep Mr. Burns reasonably informed about the status of a matter or failure to comply with a reasonable request for information. Similarly the Bar fails to point to any aspect of Respondent's supervision of her associate which was inadequate.

COUNT IV - PERRY WHITE

The Bar contends that Respondent "presented no evidence she made any effort to research Mr. White's question [regarding his immigration problem] and obtain an answer for him on this very important issue." (Bar's Brief at 19). It is the Bar's burden to establish rule violations. The Bar's complaint gave Respondent absolutely no notice that she would have to defend against such a claim.

The Bar states that Mr. White "was not able to contact the respondent personally after he retained her and was told that if he wanted another consultation with her, it would cost him additional money." *(Id.).* The referee made no finding in this regard. Furthermore this claim is contradicted by the record. It was in a consultation after retaining Respondent that Mr. White claims to have discussed his immigration problem.

The Bar's contention that Mr. White "was not able to speak with Respondent directly about a refund," (*id.*), ignores the point, made in Respondent's initial brief,[5] that Mr. White never even testified that he asked to speak with Respondent about it.

COUNT V - TERESA ARRINGTON

In regard to the Teresa Arrington grievance, the Bar, to a large degree, again fails to respond to the points made in Respondent's initial brief. The Bar does contend that "respondent did not advise Ms. Arrington that she was taking a leave of absence and her associate attorney would be handling the matter...." (Bar's Brief at 20). The referee made no such finding in respect to this count and gave no indication that his conclusions as to rule violations on this count were based on any such factor.

The Bar argues that "[t]he respondent failed to present any evidence she did anything to advance Ms. Arrington's claim other than filing the initial claim." (Bar's Brief at 22). The referee made absolutely no findings that pertain to such a charge. The Bar makes no suggestion as to actions which should have been taken but were not. The Bar goes on to state, "Ms. Arrington testified she later learned that the respondent failed to have her claim included in the settlement and it was now barred because the plaintiff [sic] had declared bankruptcy." (*Id.*). Again there were no

[5] Respondent's Initial Brief at 25.

findings by the referee in this regard. Furthermore, this mischaracterizes Ms. Arrington's testimony[6] and reflects a misunderstanding of the effect of the Dow Corning bankruptcy. The class action had been brought against numerous defendants which manufactured silicone breast implants. A settlement had been reached regarding the claims against several manufacturers including Dow Corning, but the filing for bankruptcy by Dow Corning took all claims against that company out of the settlement.[7] Dow Corning's bankruptcy did not bar those claims,[8] but merely forced claimants to pursue them in a different forum and subject to the provisions of the Bankruptcy Code. There obviously was nothing that the attorney for an individual claimant in the class action could have done to prevent Dow Corning from filing for bankruptcy.

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[6] She testified:

> Q. And you ultimately learned that a complaint based upon the Dow Corning implant was not included in the settlement, correct?
>
> A. I now know it. I did not know it at the time.

(Tr. 55). She did not assert that her claim was barred.

[7] The procedural background of the breast implant class action and the Dow Corning bankruptcy is set forth *in* considerable detail in *In re Dow Corning Corp., 86* F.3d *482* (6th *Cir. 1996). See also, In* re *Silicone Breast Implant Products Liability Litigation, 837* F. Supp. 1128 (N.D. Ala. 1993).

[8] Claimants against Dow Corning initially had until January 15, 1997 to file claims in the bankruptcy case. *See, In re Dow Corning Corp., No.* 95-20512 (Bankr. E.D. Mich. July 29, 1996)(order establishing bar date for claims), *available at* http://www.implantclaims.com/bardate.htm. On January 17, 1997, Judge Hood of the United States District Court for the Eastern District of Michigan ordered that all registrations of claims against Dow Corning in the initial Global Settlement be treated as proofs of claim in the Dow Corning bankruptcy case. See, Federal Judicial Center, MDL926 Breast Implant Litigation Home Page, available *at* http://www.fjc.gov/BREIMLIT/mdl926.htm.

The Bar next states that "it is common for medical service providers to insist on being provided letters of protection...." (Id.). The referee made no such finding and there is nothing in the record which supports this assertion. The class action settlement made no provision for letters of protection being issued to claimants.

RECOMMENDED DISCIPLINARY MEASURES

The cases cited by the Bar are readily distinguishable from the present case. In *The Florida Bar v. Rolle,* 661 So.2d 301 (Fla. 1995), the attorney previously had been disciplined for "conduct that was almost identical." 661 So.2d at 302. In addition, the attorney there was noncooperative in regard to the Bar's investigation, in that he failed to attend the status conference or the final hearing and failed to respond to the Bar's requests for admission. The neglect with which he was charged has no resemblance to what is charged in Respondent's case. *Rolle* involved no communication with on8 client for a period of 14 months and not taking any action in another case for two years. In *Rolle* the Court cited *to The Florida Bar v. Bern,* 425 So.2d 526, 528 (Fla. 1982), in which it was stated that cumulative conduct of a similar nature should warrant more severe discipline than dissimilar conduct. In the case at bar the alleged misconduct is dissimilar to that with which Respondent was previously disciplined.

In *The Florida Bar v. Lax-kin,* 420 So.2d 1080 (Fla. 1982), the attorney failed to appear for a trial in one case, giving excuses which he failed to support. In two other cases he failed to take any significant action at all on behalf of the clients, despite having previously received payment for his services. No such conduct has been found here.

In *The Florida Bar v. Glick,* 397 So.2d 1140 (Fla. 1981), the attorney was found guilty of misconduct similar to previously disciplined conduct. In addition, he had failed to comply with orders made in the prior disciplinary matter.

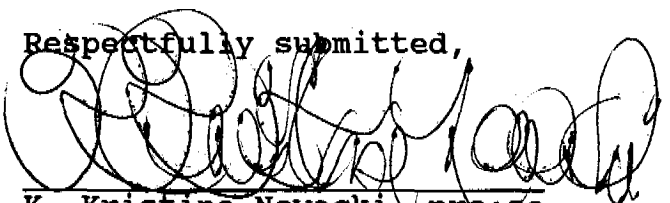
Significantly, the Bar fails to address Respondent's argument in respect to Standard 8.2. The Bar emphasizes the fact of Respondent's prior discipline, but Standard 8.2 expressly takes into consideration the fact that there has been prior discipline.

The Bar contends that Respondent's neglect in the Ludecker, Burns, White and Arrington cases "either caused the clients prejudice or could have caused them prejudice." (Bar's Brief at 25-26). Yet the Bar does not identify any particular act which caused injury or had the potential to do so, nor does it identify the type of injury to which the clients were subjected.

The Bar cites Standard 9.22(j) as a ground for supporting the discipline recommended, stating that Respondent demonstrated an indifference to making

restitution to the clients who paid her fees for services not rendered. The referee made no such finding and did not include this as a basis for the recommended discipline.

Respectfully submitted,



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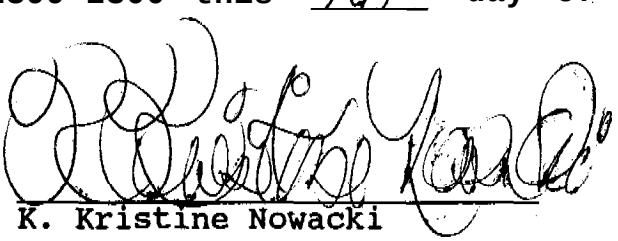
CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Respondent was served by U.S. mail on Jan Wichrowski, Esq., Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801 and John T. Berry, Staff Counsel, The Florida Bar, 650. Apalachee Parkway, Tallahassee, FL 32399-2300 this 7th day of April, 1997.



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