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SID J. WHITE

MAY 12 1997

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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

Case No. 89,066
[TFB Case No. 96-31,129(10B)]

v.
DAVID WILSON, III,
Respondent.

_____ /

RESPONDENT'S INITIAL BRIEF

DAVID WILSON, III, ESQUIRE
FLORIDA BAR NO.: 0244228
927 GOLDWYN AVENUE
POST OFFICE BOX 555253
ORLANDO, FLORIDA 32855-5253
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SYMBOLS & REFERENCES

In this brief, the Respondent, David Wilson, III, shall be referred to as "The Respondent" or "Respondent."

The report of Referee dated April 3, 1997, will be referred to as "ROR" followed by the referenced page number(s) and paragraph number(s) of the Appendix, attached. (ROR-__:__).

SUMMARY OF FACTS

Based on a grievance initiated by Edward Wells, the former husband in a dissolution action, the Florida Bar filed a disciplinary complaint against David Respondent, III, Esquire, the attorney for the former wife, Betty J. Wells.

The Report of Referee recommends that David Respondent, Esquire be found guilty of :

- a) Conflict of interest, Rule 4-1.9, Rules Regulating the Florida Bar.
- b) Conduct prejudicial to administration of justice, Rule 4-8.4(d), Rules Regulating the Florida Bar.

The Report Recommends an unduly harsh sentence of 90 days suspension , plus 2 years probation, and effectively prevents Respondent, a sole practitioner, from supporting his family for three months.

WELLS V. WELLS

In 1990, Betty Wells was sole winner of the Florida Lottery, but wanted the proceeds to be paid to herself and her husband Edward. Respondent thus filed a Declaratory action to accomplish this. (ROR-3:2). In later years, Respondent went on to represent the parties in respective criminal cases, as follows:

- a. In 1993, Respondent represented Edward Wells on criminal charges. (ROR-3:4).
- b. In 1994, Respondent represented Betty Wells on criminal charges. (ROR-3:5).

In 1995, Edward asked Respondent to represent him in the dissolution of marriage action. (ROR-3:6) Edward did not see any conflict in this request. In March 1995, Betty asked Respondent to represent her on the dissolution action already filed by Edward. (ROR-4:7).

From March 1995 to November 1995, neither the trial court, nor Edward Wells, or his counsel, saw any conflict in Respondent's representation of Betty Wells. (ROR-4:7).

In November, 1995, new counsel for Edward, for the first time moved to disqualify Respondent as Betty Wells' counsel. (ROR-4:12)

On November 13, 1995, the trial court took no action on the motion to disqualify. (ROR-4:13).

On December 1, 1995, after a second hearing, the trial court orally granted the Motion to Disqualify Respondent. (ROR-5:16).

On December 8, 1995, Respondent filed three motions that, a Motion for Rehearing, a Motion for a Stay Pending Review, and a Motion for Recusal of the trial judge. (ROR-5:17).

On December 12, 1995, while the Motion to recuse the trial judge was pending, the trial judge entered his written order disqualifying Respondent as Betty Wells' counsel.

[Instead of seeking review, subsequent counselor for Betty Wells resolved all dissolution issues by an agreement providing for equitable distribution].

* * *

SUMMARY OF ARGUMENTS

Review of the Report shows: That the Lottery proceeds became joint marital assets of the parties, due to Respondent's representation of Betty Wells. That Respondent, subsequently represented both Betty and Edward Wells on separate criminal charges. (ROR-3:4-5). That division of the Lottery proceeds was never a significant issue in the divorce proceedings and "no actual harm was done to Mr. Wells." (ROR-4:9). In furtherance, the parties later equitably divided these joint marital assets (subject to child support, etc.). Furthermore, prior to Edward Wells filing the grievance herein, Edward Wells, himself, had asked Respondent to represent in these divorce proceedings. (ROR-3:6). By word and by deed during all the litigation in 1995, Edward Wells thus waived any allegations of conflict. Furthermore, the Referee expressly found that "no actual harm was done to Mr. Wells. (ROR-5:9).

In addition, no actual conflict was apparent to the trial court, to Edward, or to his prior counsel during 1995. Initial the trial Court did not even rule on disqualification of Respondent until after a second hearing. (ROR-4:13). And Respondent's Motion to Recuse the trial judge seems to point to conflicts between Respondent and the judge, although the trial judge did not voluntarily recuse himself on his own initiative. Fla. R. Jud. Admin. 2.160(i).

Pertinent Record Sequence

December 1, 1995	Oral order on disqualification. (ROR-5:16).
December 8, 1995	*Motion for Rehearing (ROR-5:17), *Motion to Stay Pending Review (ROR-5:17), *Motion to Recuse Judge (ROR-5:17).
December 12, 1995	Written order on disqualification (ROR-5:16).

(*actually filed by Respondent within 10 days)

* * *

ARGUMENT

THE REFEREE'S REPORT IS FACTUALLY AND LEGALLY INCORRECT AND THE DISCIPLINARY MEASURES METED OUT ARE UNFAIR AND UNJUST.

Respondent makes the following statements in support of his objections to the factually and legally incorrect Report of Referee and incorporates that report by attaching a copy thereof to these objections.

The Report of Referee states "because he had been [orally] disqualified by the court on December 1, 1995, Respondent had no standing to file the motion to recuse. The filing of the recusal motion constitutes a violation of R. Regulating Fla. Bar 4-8.4(d)." (ea..)

Oral Order. This factually and legally incorrect key finding by the Referee expressly and directly contradicts the Supreme court's definition of "Order" as defined in Fla.R.App.P. 9.020(g). Oral pronouncements by a trial judge have not yet been accorded that status of uncontradicted and incontrovertible edicts in Florida law. Both Respondent and his client had both a constitutional right and a legal obligation, to challenge any rulings of the trial court, especially rulings of a judge they considered to be biased against them, who entered a ruling against them despite his own legal conflicts.

Written Order. The only written disqualification Order Fla.R.App.P. 9.020(e), was rendered on December 12, 1995, Fla.R.App.P. 9.020(g), four days after the Motion to Recuse was filed, and while that Motion to Recuse was still pending. Prior to entry of this written order, the trial judge was free to change his oral ruling. In fact, under McKenzie v Super Kids Bargain Store, 565 So. 2d 1332 (Fla.1990), a trial judge faced with a Motion to Recuse "should first resolve that motion before making any other rulings." Because the trial judge failed to follow this written mandate of the Supreme court, and order disqualifying the trial judge was thus mandatory, especially since he entered this ruling when the judge himself had a legal and ethical conflict.

(Obviously, subsequent counsel felt that it was simpler, quicker, and more practical for Betty to resolve the dissolution case, than to argue this as an issue on appeal).

In terms of constitutional Due Process and the right to a fair trial before an impartial judge, the trial court's Order disqualifying Respondent as counsel, was subject to multiple timely legal challenges, all of which had a significant likelihood of success:

- *by rehearing, Fla.R.Civ.P. 1.530,
 - by clarification, Fla.R.App.P. 9.020(g)
 - by motion to alter or amend, Fla.R.App.P. 9.020(g)
 - *by motion in arrest (stay) of judgment, Fla.R.App.P. 9.020(g),
 - by original certiorari/prohibition under McKenzie v. Super Kids,
 - by appeal, especially under McKenzie v. Super Kids,
 - *by disqualification, Fla. R. Jud. Admin. 2.160(b).
- (*actually filed by Respondent within 10 days)

When the issue was first presented on November 13, 1995, the alleged conflict was not obvious, and the trial judge did not initially order Respondent's disqualification. The trial judge's subsequent Order of December 12, 1995, may well have been entered in good faith, but legally incorrect and misguided attempt to avoid making the conflict issue a feature of the case. It was a facially reversible order entered by an alleged biased judge without jurisdiction, and in direct violation of the Supreme Court decision in McKenzie v. Super Kids, which mandates recusal.

Furthermore, if the client Betty Wells felt that the trial judge was biased against either her or her attorney, Respondent had a constitutional obligation, as well as a legal and ethical duty to file a Motion to Recuse the trial judge within 10 days. Fla.R.Jud.Admin. 2.160(d) and (e). In fact if Respondent had failed to promptly file such a motion: a full, fair, and impartial administration of justice would have been compromised; Betty Wells' "remedy" would have lost; and Respondent could have faced a legal malpractice claim by his client.

* * *

CONCLUSION

The Referee in this case has apparently overlooked the facts and misapplied the law, in an attempt to justify the unwritten and unsigned "orders" of a biased trial judge, whose rulings were in direct conflict with Supreme Court mandate.

a) If there was any conflict in Respondent's representation of Betty Wells, the issue was improperly decided by a judge who himself faced recusal due to conflict. This question resolved itself by the appearance of subsequent counsel. "No actual harm was don to Mr. Wells", or to anyone else, except Respondent, who was deprived of a client simply because he vigorously pursued her constitutional rights.

b) If Respondent's filing of legally authorized and justified motions constitutes conduct prejudicial to the administration of justice, then every Florida attorney who challenges the oral pronouncements of a trial judge, must be summarily disbarred. And Equal Protection requires that every judge who contradicts a mandate of the Supreme Court, including the trial judge herein and the Referee, must be removed from the bench. By definition, the pursuit of constitutional Due Process cannot be "conduct prejudicial to the administration of justice."

WHEREFORE, Respondent, David Respondent, III objects to the flawed and incorrect factual findings and legal conclusions contained in the Report of Referee. No basis has been shown for discipline, and certainly not the harsh discipline recommended by the Referee, who misunderstood and misapplied the law.

Respondent moves for a ward of costs against the Florida Bar pursuant Rule 3-7.6(o)(4), Rules Regulating The Florida Bar. In terms of long-standing Supreme Court precedent, the undisputed facts presented by the Florida bar show no justiciable issue of law.

Respectfully Submitted,


DAVID WILSON, III, ESQUIRE

CERTIFICATION

I HEREBY CERTIFY that the original and seven copies of the foregoing has been filed with Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that a true and accurate copy of same has been furnish by U.S. Mail delivery to Eric Turner, Assistant Staff Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801, this 29th day of April, 1997.



DAVID WILSON, III, ESQUIRE

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THE FLORIDA BAR,
Complainant,

Case No.: 89,066
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DAVID WILSON, III,
Respondent.

_____ /

APPENDIX TO APPELLANT'S BRIEF

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APPENDIX INDEX

Report of Referee dated April 3, 1997

A1

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,
Complainant,

Case No. 96-31, 129 (10B)

v.

David Wilson, III,
Respondent.

Report of Referee

I. Summary of Proceedings:

On October 2, 1996, The Florida Bar (the "Bar") filed a complaint against member David Wilson, III ("Wilson") in the Florida Supreme Court. Subsequent to the filing of the Complaint, the undersigned was duly appointed as Referee to conduct disciplinary proceedings according to the Rules Regulating The Florida Bar. An evidentiary hearing was held on February 28, 1997.

The Complaint filed by the Bar alleges, in material part, that Wilson violated Rule 4-1.9 of the Rules Regulating the Florida Bar by representing Betty Wells in a dissolution of marriage action against Edward H. Wells, Jr., after Wilson had represented both Betty Wells and Edward H. Wells, Jr. in other legal matters, including, but not limited to, a declaratory judgment action against the Florida Department of the Lottery - an action wherein the Wells sought to have a lottery prize of approximately 8 million dollars declared as a joint asset to be shared equally between them. The Complaint further alleges that in representing Betty Wells in the dissolution action against Edward H. Wells, Jr., Wilson used information obtained during his representation of both of the Wells to the advantage of Betty Wells, and to the disadvantage of the former client, Edward H. Wells, Jr., or that Wilson represented Betty Wells in an action where her interests

were materially adverse to the interests of former client Edward H. Wells, Jr. Finally, the Bar complains that Wilson violated Rule 4-8.4(d) of the Rules Regulating the Florida Bar for engaging in unprofessional conduct during the course of the Wells' divorce action. It is alleged that Wilson, among other things, filed pleadings after the trial court entered an oral order of disqualification; failed to communicate with substituted counsel for Edward H. Wells, Jr.; and, conducted himself in an inappropriate manner when dealing with opposing counsel.

In his Answer, Wilson denied having represented Edward H. Wells, Jr., in the declaratory judgment action. He alleged that he represented Betty Wells in that case and that Edward H. Wells, Jr. was a joint beneficiary of that action. With regard to the dissolution of marriage action, Wilson alleges that there was no conflict between the Wells since he represented Betty Wells and that she wanted a 50/50 distribution of assets. Wilson also denied that he engaged in unprofessional conduct during the Wells' divorce.

The pleadings, notices, motions, transcripts and exhibits, all of which are furnished to the Florida Supreme Court with this report, constitute the record in this case.

The following appeared as counsel for the parties:

For the Florida Bar: Eric M. Turner

For the Respondent: David Wilson, III

II. Findings of Fact:

After considering the pleadings and evidence in this case, I make the following findings of fact:

1. Wilson was and is a member of The Florida Bar subject to the jurisdiction of the Supreme Court of Florida and the Rules Regulating The Florida Bar. (Complaint Paragraph 1; Answer Paragraph 1)

2. In June 1990, Betty Wells won approximately 8 million dollars in the Florida lottery. It was the desire of Betty Wells to share the lottery prize equally with her husband, Edward H. Wells, Jr. (Bar Exhibit 1) In order to effectuate this desire, the Wells contacted Wilson who filed a Petition for Declaratory Judgment against the Florida Department of the Lottery. The case number is CI90-10035 and the petitioners in that action are identified on the pleadings as "Edward Wells and Betty Wells, his wife." The final judgment declares that the Wells would share equally in the prize money. (Bar Exhibit 1) According to Edward H. Wells, Jr., Wilson indicated to him that he, Wilson, would represent both of the Wells in the declaratory judgment action. (TR 65-66)

3. At some point subsequent to Betty Wells winning the lottery, the Wells became involved in the purchase of a home. (TR 71) Wilson assisted both of the Wells in the purchase of the home. (TR 68,87) There were problems with the Wells making mortgage payments in a timely fashion and Wilson interceded with the mortgage holder on behalf of the Wells regarding these problems. (TR 69,87) (Bar Exhibit 3) The mortgage issues were active in April of 1995, after the dissolution action had been filed on March 29, 1995. (TR 47)

4. In 1993, Wilson represented Edward H. Wells, Jr. on criminal charges of disorderly conduct and carrying a concealed weapon. (Complaint Paragraph 5; Answer Paragraph 5)

5. In 1994, Wilson represented Betty Wells on a criminal charge of aggravated assault after Edward H. Wells, Jr. had called the police alleging that his wife had battered him. (Complaint Paragraph 6; Answer Paragraph 6)

6. Edward H. Wells, Jr. approached Wilson for the purpose of representing him in a dissolution of marriage action against Betty Wells. Wilson refused due to his past representation. (TR 66) (Bar Exhibit 2)

7. On March 29, 1995, Edward H. Wells, Jr. filed a dissolution action against Betty Wells. Mr. Wells was represented by Attorney Robert J. Nesmith. (Complaint Paragraph 7; Answer Paragraph 7) (Bar Exhibit 1)
8. Wilson filed an answer and counterpetition for dissolution on behalf of Betty Wells. (Complaint Paragraph 9; Answer Paragraph 9) (Bar Exhibit 1)
9. On June 23, 1995, as part of the dissolution action, Wilson, on behalf of Betty Wells filed a motion to set aside the declaratory judgment award which had given a 50% interest in the lottery prize to Edward H. Wells, Jr. (Bar Exhibit 1) The action taken by Wilson in representing Betty Wells against Edward H. Wells, Jr. in the dissolution action was a clear conflict of interest. Wilson had represented Mr. Wells in the declaratory judgment action and had obtained for him an award of 50% of the lottery prize. In the dissolution action, Wilson, on behalf of Betty Wells, sought to have that award taken from Mr. Wells. This motion was denied so no actual harm was done to Mr. Wells.
10. Wilson did not present any retainer agreements or contracts of employment for any services rendered by him for the Wells. (TR 91-93, 95-96) Nor did he produce any "waiver of conflict" documents.(TR 93)
11. Between November 10 and 13, 1995, Paul D. Newnum prepared and filed a number of documents which reflected that he was being substituted as counsel for Edward H. Wells, Jr. (Bar Exhibit 1) The certificate of service on the "Husband's Authorization for Substitution of Counsel" reflects a copy of the notice by mail and fax to Wilson. (Bar Exhibit 1)
12. Newnum also filed a motion to disqualify Wilson which was called up for hearing before Judge Lawrence R. Kirkwood on November 13, 1995. (Bar Exhibit 1)
13. On November 13, 1995, the Court did not take action on the motion to disqualify. The

Court ordered a full evidentiary hearing on the issue. Newnum appeared on November 13 in person. Wilson appeared by phone. (TR 38)

14. Newnum attempted to contact Wilson between November 13, 1995 and December 1, 1995 - the date set for the hearing on the motion to disqualify - without success. (TR 38-40)

15. On November 14, 1995, the day following the November 13 hearing, Wilson set a final hearing in the dissolution matter for December 1, 1995. Wilson did not include Newnum in the certificate of service. (Bar Exhibit 1) (TR 41-42)

16. The hearing on the motion to disqualify was held on December 1, 1995. The motion to disqualify Wilson was granted via oral order from the bench. A written order was entered on December 12, 1995. (Bar Exhibit 1)

17. On December 8, 1995, Wilson filed a motion to stay pending review and a motion for rehearing on the disqualification issue. (Bar Exhibit 1) He also filed on behalf of Betty Wells a motion to recuse the trial judge. (Bar Exhibit 1) Because he had been disqualified by the Court on December 1, 1995, Wilson had no standing to file the motion to recuse. The filing of the recusal motion constitutes a violation of Rule 4-8.4(d).

18. Other than the determinations set forth above, the conduct of Wilson during the course of the dissolution about which the Bar complains reflects poor judgment on Wilson's part, but does not rise to the level of conduct which is prejudicial to the administration of justice. For example, it would have been better practice for Wilson to copy Newnum on notices of hearing after Newnum filed a notice of appearance even if the Court had not formally entered an order allowing Newnum to be substituted as counsel for Mr. Wells. Similarly, it would have been better practice for Wilson to communicate with Newnum prior to the formal order of substitution. The fact that Wilson had contact with Betty Wells after he was disqualified in the

dissolution action was cause for concern for Newnum. However, Wilson had the right to represent Betty Wells on matters other than the dissolution and there has been no showing that he was interfering in the dissolution case at the time he had the discussion with Betty Wells outside of Judge Kirkwood's courtroom. Thus, as to these issues, there is not sufficient evidence to support a finding that Wilson violated Rule 4-8.4(d) - engaging in conduct prejudicial to the administration of justice.

III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty:

As to the Complaint, I make the following recommendations as to guilt or innocence:

I recommend that Wilson be found guilty of violating Rule 4-1.9 of the Rules Regulating the Florida Bar for representing a client - Edward H. Wells, Jr. - in a matter (declaratory judgment action and criminal case) and then representing another person - Betty Wells - in a substantially related matter (dissolution) in which the interests of Betty Wells were mutually adverse to the interests of Mr. Wells. In the dissolution action, Wilson, acting for Betty Wells, tried to overturn the fifty percent lottery award to Mr. Wells which Wilson had obtained for Mr. Wells in the declaratory judgment case.

I also recommend that Wilson be found guilty of violating Rule 4-8.4(d) of the Rules Regulating the Florida Bar for filing a motion on behalf of Betty Wells to recuse Judge Kirkwood in the dissolution action after Wilson had been disqualified from representing Mrs. Wells.

IV. Recommendation as to Disciplinary Measures to be Applied

I recommend that Wilson be suspended from the practice of law for a period of 90 days with automatic reinstatement at the end of the period of suspension as provided in Rule 3-5.1(e), Rules of Discipline.

Upon reinstatement to the practice of law, I recommend that Wilson be placed on probation for a period of 2 years. The terms of probation are as follows:

(1) That Wilson be assigned to a "monitoring attorney" to be approved by the Florida Bar; and

(2) That Wilson submit quarterly case reports to the monitoring attorney for that attorney's review for possible conflicts of interest; and

(3) That Wilson develop and maintain a system for conflict avoidance (including the use of fee/retainer contracts for all clients) that is satisfactory to the Florida Bar; and

(4) That Wilson pay all fees and costs associated with the work of the monitoring attorney.

V. Personal History and Past Disciplinary Record:

After my findings of guilt and prior to recommending discipline pursuant to Rule 3-7.6(h)(1)(D), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 44

Date admitted to Bar: 1977

Prior disciplinary convictions and disciplinary measures imposed therein:

1992 Private Reprimand

I believe that the discipline recommended herewith is sufficient to punish Wilson for his offending conduct and sufficient to deter others from committing similar violations, yet it takes into account his many years of practice and limited disciplinary record. Wilson has been a member of the Bar for twenty years and his only prior discipline was a private reprimand. This history played a significant part in my not recommending a more severe penalty. Wilson may

have rationalized away the conflict which occurred in the dissolution action because of Mrs. Wells' position that the assets of the parties be divided fifty/fifty with Mr. Wells. Aside from the fees to be gained for representing Mrs. Wells, there was no other personal gain to Wilson arising from the conflict. But, an attorney of Wilson's experience should have easily recognized the conflict and taken steps to avoid it. He clearly should not have filed the motion to recuse Judge Kirkwood after he, Wilson, had been disqualified. There was no excuse for such behavior. For Wilson, a sole practioner, a 90 day suspension will have a significant impact on his practice, an impact which I believe to be sufficient punishment, given the facts and circumstances of this case. Due to Wilson's limited disciplinary history, I believe automatic reinstatement is appropriate.

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

I find the following costs were reasonably incurred by The Florida Bar (see attached Affidavit of Costs):

Administrative costs	\$750
Rule 3-7.6(k)(1)(E)	
Bar counsel copy costs	\$191.00
Court reporter costs	\$692.00
Bar counsel travel and out-of pocket costs	\$27.89
Investigator Costs	\$43.66
TOTAL ITEMIZED COSTS	\$1704.55

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 3 day of APRIL, 1997.


Referee

Certificate of Service

I hereby certify that a copy of the above Report of Referee has been served on Eric M. Turner, Esq., 880 N. Orange Avenue, Suite 200, Orlando, Florida, 32801; David Wilson, III, Post Office Box 3154, Winter Haven, Florida, 33885-3154; and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 3 day of APRIL, 1997.



Referee