IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

v.

HARRY JAY KLAUSNER,

Respondent.

Supreme Court Case No. 90,855
TFB No. 97-11,875(20A)

INITIAL BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

'RR" will refer to the Report of the Referee dated January 14, 1998, in which the referee made factual findings and a recommendation as to the discipline to be imposed in Supreme Court Case No. 90,855.

"TR" will refer to the transcript of the final evidentiary hearing held on October 7, 1997 in Supreme Court Case No. 90,855.

"TFB and Resp. Exh. #" will refer to the exhibits submitted by The Florida Bar and Respondent and admitted into evidence at the evidentiary hearing held on October 7, 1997 in Supreme Court Case No. 90,855.

"Rule or Rules" will refer to The Rules Regulating The Florida Bar".

"Standard or Standards" will refer to The Florida Standards for Imposing Lawyer Discipline.

STATEMENT OF THE FACTS AND OF THE CASE

Respondent worked as an attorney for Strategic Recovery, Inc. ("Strategic"), a corporation in which the majority interest holder was his father. (TR at 13). Respondent owned a 12.5 percent interest in the corporation and was an original director. (TR at 13). Strategic had an agreement with Associates in Neurology to bring small claims actions to collect unpaid bills. (TR at 29). Strategic was to receive 50 percent of the money collected. (TR at 13). Court costs in the amount of $43.50 were paid by the client for mailing and filing each action. (TR at 38).

Typically, in the small claims actions Respondent filed a Stipulation of Settlement which was signed by the debtor. (TR at 27). If six months passed without record activity in a file, that file would be set for an abatement hearing by the Court. The abatement would not occur if a new Stipulation of Settlement were submitted by the debtor prior to or at the abatement hearing, If the cases were abated, Respondent would advise the client of the need to pay additional court costs if the client elected to refile. (TR at 29).

On November 27, 1995, abatement hearings were conducted by Judge Edward Voltz. (TR at 30). In nine cases where the debtors

had previously signed Stipulations of Settlement, Respondent presented into evidence nine new Stipulations of Settlement purportedly signed by those debtors. (TR at 30). This was done to prevent the cases from being abated. (TR at 36). Respondent signed the debtors' names to those nine stipulations of settlement without the authorization or knowledge of the debtors, and was fully aware that he was not authorized to sign their names to the documents. (TR at 33).

On March 4, 1996, Respondent appeared before Judge Radford Sturgis in another abatement proceeding, and submitted a Stipulation of Settlement upon which he had signed the client's name without her knowledge or authorization. (TFB Exh. #6). Judge Sturgis swore Respondent in, and expressed concerns about the validity of the signature on the Stipulation of Settlement. (TFB Exh. #6 at 3-5). Judge Sturgis noted that the signature looked totally different from the signature of the same debtor on another document. (TFB Exh. #6 at 3). When Respondent was asked if he recalled the debtor coming into his office to sign the stipulation, Respondent advised that it had been mailed in by the client. (TFB Exh. #6 at 4) . The court pointed out that the stipulation document had no crease in it from being folded and placed in an envelope. (TFB Exh. #6 at 4). Respondent advised

that the stipulation had been mailed to him in a large package. (TFB Exh. #6 at 4).

On April 11, 1996, Respondent's sworn statement was taken by investigator William McQuinn of the State Attorney's office. (TFB Exh. #5). Respondent was advised that debtor Kilpatrick had indicated to the investigator that she never signed the Stipulation. (TFB Exh. #5 at 28). Respondent then stated, under oath, that he had mailed the Stipulation to debtor Kilpatrick, and she had mailed it back to him. (TFB Exh. #5 at 28). When making that statement under oath, Respondent knew that the statement was not true. Respondent specifically denied signing the debtor's name, and indicated that he had no idea how the signature got on the Stipulation. (TFB Exh. #5 at 28). The same questions were asked of Respondent with respect to purported signatures by three debtors on other fraudulent stipulations, and the same false statements were made under oath by Respondent. (TFB Exh. #5 at 32-38).

Toward the end of the sworn statement, Respondent suggested that perhaps his secretary had been responsible for the signature. (TFB Exh. #5 at 37). When the March stipulation was being questioned, the investigator pointed out to Respondent that it was signed after the secretary had left the office.(TFB Exh.

#5 at 40). Respondent then suggested that perhaps his father was responsible for signing that stipulation. (TFB Exh. #5 at 40).

On September 24, 1996, when confronted by an investigator from the State Attorney's Office with evidence that the Florida Department of Law Enforcement had determined that the signatures on the stipulations of settlement were forged, Respondent admitted that he had signed the clients' names to the documents. (TFB Exh. #4 at 2).

Based on Respondent's submission of the fraudulent stipulations to the Court, and to the investigator from the State Attorney's Office, an Information was filed against Respondent on October 11, 1996, for the following counts: Scheme to Defraud; two counts of Forgery; Uttering a Forged Instrument; Perjury When Not in an Official Proceeding; and Making a False Official Statement. A Capias was executed against Respondent on October 11, 1996.

On May 29, 1997, Respondent entered a plea of nolo contendere to the felony charges of Scheme to Defraud, Forgery, and Uttering a Forged Instrument. On June 6, 1997, he pled no contest to the misdemeanor counts of False Statement and False Report to a Public Official. Respondent received a sentence of one day, with credit for time served for the misdemeanors,

adjudication was withheld on the felonies, and Respondent received three years probation with "½ early out". In addition, Respondent paid a fine of $262.50, court costs of $286.00, and State Attorney's office investigation costs of $1,182.85.

Respondent indicated to the Referee in the instant proceedings that he did not understand why the collections cases should have been abated. Respondent indicated that he was concerned about disclosing to the clients that the cases had been abated after they had trusted him to collect the debts owed. Respondent acknowledged "taking a short cut", and indicated that it was "stupid". Respondent also indicated that he was not trying to defraud anyone, that he was trying to protect his clients, and that the debtors were already paying the debt just as they should have been paying.

On June 25, 1997, The Florida Bar filed a complaint against Respondent alleging that Respondent had violated The Rules Regulating the Florida Bar. Respondent served his "Answer and Affirmative Defenses" on or about August 14, 1997.

On September 27, 1997, The Florida Supreme Court issued an order automatically suspending Respondent from the practice of law pursuant to Rule 3-7.2(e), Rules Regulating the Florida Bar.

A final evidentiary hearing was held before Judge Thomas A.

Gallen on October 7, 1997.

On January 14, 1998, Judge Thomas M. Gallen ("Judge Gallen") filed his "Report of Referee" finding Respondent guilty of violating the following Rules Regulating the Florida Bar: Rule 3-4.3 (commission of an act which is unlawful or contrary to honesty and justice); Rule 4-3.3(a)(1)(false statement of a material fact to a tribunal); Rule 4-3.4(b) (fabricating evidence) ; Rule 4-8.4(b) (commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness as a lawyer); Rule 4-8.4(c)(engaging in conduct which involves dishonesty, fraud, deceit, or misrepresentation); Rule 4-8.4(d)(conduct which is prejudicial to the administration of justice). (RR at 3-4). Judge Gallen recommended that Respondent be suspended from the practice of law for three (3) years, and that Respondent be required to again take the ethics portion of The Florida Bar examination prior to applying for readmittance to The Florida Bar. (RR at 4).

The Board of Governor's of the Florida Bar recommended that The Florida Bar seek disbarment in this case. On February 25, 1998, The Florida Bar filed it's "Petition for Review of the Referee's Report" with The Florida Supreme Court.

SUMMARY OF THE ARGUMENT

The Referee erred in concluding that suspension and not disbarment is the appropriate sanction for Respondent's acts of forgery, perjury, and deceit. The serious and cumulative nature of Respondent's conduct warrants disbarment.

Respondent forged signatures on documents and submitted those documents to the Court. Respondent lied to the Court, committed perjury before the Court, and committed perjury in a sworn statement to an investigator with the State Attorney's Office. Respondent did not advise the Court of the false stipulations nor correct his perjured testimony until after he was advised that a handwriting analysis by the Florida Department of Law Enforcement had indicated the debtors had not signed the Stipulations. Respondent even suggested under oath that his father or his secretary might be responsible for the fraud on the court.

Respondent's perjury, his failure to correct his fraud on the Court and the investigators, as well as his attempts to conceal his misconduct, clearly make disbarment the appropriate sanction. Respondent should be disbarred in accordance with the general rule of strict discipline against an attorney who deliberately and knowingly perpetrates a fraud upon the Court.

ARGUMENT

I. WHETHER DISBARMENT, NOT SUSPENSION, IS THE APPROPRIATE SANCTION FOR AN ATTORNEY WHO FORGES SIGNATURES ON SEVERAL STIPULATIONS OF SETTLEMENT, SUBMITS THESE FORGED DOCUMENTS TO THE COURT, MAKES MISREPRESENTATIONS OF MATERIAL FACTS TO THE COURT, COMMITS PERJURY TO THE COURT AND COMMITS PERJURY IN A SWORN STATEMENT GIVEN TO A STATE INVESTIGATOR, CONFESSES ONLY WHEN FACED WITH IRREFUTABLE FACTS, AND IS CONVICTED OF FELONY CHARGES STEMMING FROM HIS ACTIONS.

While a referee's recommendation of discipline is persuasive, this Court has the ultimate responsibility of determining the appropriate sanction. The Florida Bar v. Reed, 644 So. 2d 1355 (Fla. 1994). The Referee in this case has recommended that Respondent receive a three (3) year suspension. (RR at 3). However, disbarment, not suspension, is the appropriate sanction for Respondent's actions.

In the instant case, Respondent forged the names of his client's debtors on several Stipulations of Settlement, and Respondent presented those fraudulent documents to the Court in an effort to prevent the cases from being abated. Respondent then committed perjury before the Court, and to an investigator with the State Attorney's Office regarding the validity of the debtors' signatures. Respondent even suggested that perhaps his father and his own secretary could be responsible for the

forgeries.

Respondent admitted forging the names of debtors only when confronted with evidence by an investigator with the State Attorney's Office advising Respondent that the Florida Department of Law Enforcement had determined that the signatures on the Stipulations of Settlement were forged. (TFB Exh. #4 at 2). Respondent subsequently pled no contest to the felony charges deriving from the forgeries, wherein adjudication was withheld and Respondent three (3) years probation. (TFB Exh. #3).

The Referee opined that Respondent's actions were not nearly as egregious as similar cases where suspension, not disbarment was imposed and therefore found that suspension was appropriate. (RR at 3). This conclusion was clearly in error given the seriousness of Respondent's misconduct.

This Court's analysis of the facts and applicable law in The Florida Bar v. Kickliter, 559 So. 2d 1123 (Fla. 1990), is instructive for the instant case. Kickliter, an attorney, was asked to prepare a new will for a client. The client requested that the new will exclude the client's sons in favor of the client's grandchildren. Kickliter's client died the next day, prior to seeing or signing the new will. After discussing the effect of the unsigned will with the client's granddaughters,

Kickliter, in an effort to effectuate the intent of the decedent, forged the decedent's name on the will. Kickliter had two of his employees witness the will, and then submitted the forged will to the probate court.

Kickliter's forgery was later discovered and he was charged with three (3) third degree felonies. Subsequently, Kickliter pled guilty to the charges, adjudication was withheld and Kickliter received three (3) years probation. Id.

The Referee in Kickliter recommended a maximum three (3) year suspension to run for the duration of Kickliter's probation. Id. at 1124, On appeal, this Court noted that Kickliter's act of forgery constituted serious misconduct, that Kickliter compounded his misconduct by having two of his employees witness the forgery thereby compromising them as well, and that the Kickliter's submission of the forged will to the probate court was egregious Id. This Court has previously indicated that "fraud on the Court strikes at the very heart of a lawyer's ethical responsibility". The Florida Bar v. Roman, 526 So. 2d 60 (Fla. 1988).

As pointed out by this Court in Kickliter, the preamble to Chapter 4 of Rules Regulating The Florida Bar states: "Lawyers are officers of the court and they are responsible to the judiciary for the propriety of their professional activities."

Kickliter, at 1124. Further, this court has stressed that "In taking the oath of admission to the Bar one must swear to never seek to mislead the Judge or Jury by any artifice or false statement of fact or **law."** Id.

This court pointed out the many opportunities Kickliter had to mitigate the magnitude of his misconduct noting:

> "He(Kickliter) could have decided not to forge the signature. Having done so, however, he could have refrained from submitting the will to probate. Having submitted the will, he could have informed the court of the fraud. He took none of these actions, either to refrain from an improper action, or to correct it. Instead, he committed a fraud on the court and allowed it to continue until exposed through criminal proceedings."

Id.

In Kickliter, this court also noted the substantial mitigation indicated by the referee which included absence of a dishonest or selfish motive, a cooperative attitude, good character and reputation, remorse, and the imposition of criminal penalties. Notwithstanding the mitigation, this Court found that there was no basis in Kickliter to warrant not applying the "general rule of strict discipline against attorneys who deliberately and knowingly perpetuate a fraud on the court", and disbarred him for five years. Id.

This Court has previously indicated that:

> "No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done, it deserves the harshest penalty."

Dodd v. The Florida Bar, 118 So. 2d 17, 18 (Fla. 1960).

In the instant case, Respondent engaged in not one, but several acts of dishonesty, including the knowledgeable use of false evidence, and false testimony in the judicial process. Respondent submitted forged documents to the court on two occasions, then lied and committed perjury to the Court, and to an investigator from the State Attorney's Office who inquired into the matter as part of an official investigation. (TFB Exh. #4).

When Respondent was specifically questioned by the Judge in the abatement proceeding concerning the validity of the signatures, he swore under oath that the signatures were valid. (TFB Exh. #6). When pressed to explain evidence that seemed to contradict his statements, in an effort to convince the court that he had no first hand knowledge that the signatures were authentic, Respondent further misrepresented to the Court that one of the forged stipulations had been mailed to him by the debtor. (TFB Exh. #6 at 4). When the Court questioned Respondent

as to why the stipulation was not creased if it had been mailed to him, Respondent elaborated on his misrepresentation, claiming to the Court that the debtor had mailed the stipulation in a large package. (TFB Exh. #6 at 4).

Respondent also knowingly tried to deceive and mislead the the state investigator by falsely indicating that his secretary, or Respondent's own father could have been responsible for the forged signatures. (TFB Exh. #5 at 37, 45). Respondent finally admitted to the forgeries only when confronted with evidence by the investigator for the State Attorney's Office. (TFB Exh. #4 at 2).

Respondent could have decided not to forge the signatures. Having done so, he could have refrained from submitting the fraudulent stipulations to the court. Having submitted the fraudulent documents, he could have informed the court of the fraud. He could have refrained from submitting the forged stipulation on the second occasion. Further, Respondent could have admitted his transgressions when confronted by the court, or when under Oath in the State Attorneys investigation. Respondent also could have asserted his Fifth Amendment privilege. He took no corrective actions, and allowed the fraud on the court and perjured testimony to stand until exposed during criminal

proceedings. Similarly to Kickliter, Respondent should be disbarred.

The Respondent in the instant case has not shown a sufficient justification for not applying the general rule of strict discipline against an attorney who commits a fraud upon the court. Further, Respondent has not overcome the presumption of strict discipline against an attorney who is convicted of a felony.

The Florida Standards for Imposing Lawyer Sanctions provide that disbarment is appropriate when a lawyer is convicted of a felony or when a lawyer engages in serious criminal conduct, a necessary element of which includes the intentional interference with the administration of justice, false swearing, or misrepresentation. Florida Standard for Imposing Lawyer Sanctions, Standard 5.11.

The Standards further state that suspension is appropriate when a lawyer engages in criminal conduct which is not (emphasis added) included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice law. Standard 5 12.

Respondent's foregoing acts of forgery, his perjury and misrepresentations to the Court, and under oath in an official investigation regarding the forgeries, place his misconduct

clearly within the parameters of Standard 5.11.

By reason of the foregoing, Respondent should be disbarred from the practice of law.

CONCLUSION

Respondent has committed acts of forgery and deceit which strike at the heart of a lawyer's moral and ethical obligations. The individual acts of Respondent, as well as the overall pattern of his misconduct, clearly indicate that disbarment, not suspension, is the appropriate discipline.

Thomas E. DeBerg
Assistant Staff Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief have been furnished by Airborne Express No. 6352924826 to **Sid J. White, Clerk,** The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1925; a true **and** correct copy sent by Regular W. S. Mail to **Nicholas Friedman, Counsel for Respondent,** at his record Bar address of 1823 Phillip's Branch Road, Vilas, North Carolina, 28692; and a copy by Regular U. S. Mail to **John Anthony Boggs, Staff Counsel,** The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 26 day of March, 1998.

Thomas E. DeBerg

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