IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC94-768
[TFB Case No. 1998-31,914(05A)]

v.

GARY A. POE,

Respondent.
_____/

THE FLORIDA BAR'S ANSWER BRIEF

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CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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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 October 27, 1999, shall be referred to as "TI" followed by the cited page number. The transcript of the disciplinary hearing held on February 24, 2000, shall be referred to as "TII" followed by the cited page number.

The Report of Referee dated May 17, 2000, 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 Fifth Judicial Circuit Grievance Committee "A" voted to find probable cause on September 25, 1998. The Bar served its Complaint on January 26, 1999. The referee was appointed on February 2, 1999. The parties agreed to a continuance to allow the respondent's counsel adequate time to become familiar with the case and the motion was granted on March 26, 1999. On July 22, 1999, the Bar moved for a second continuance so that Supreme Court case Number SC96-032 could be consolidated for purposes of final hearing. The motion was granted on July 30, 1999.

The final hearing was held on October 27, 1999 and the disciplinary hearing on February 24, 2000. The referee sought an extension of time to file his report, which was granted on February 17, 2000, allowing him until March 17, 2000 to file his report. The referee issued his report on May 17, 2000, recommending the respondent be found guilty of violating Rules Regulating The Florida Bar 4-1.1 for failing to provide competent representation to a client and 4-1.8(c) for preparing an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, or spouse any substantial gift from a client, including a testamentary gift, with respect to SC94-768. The remaining cases, SC96-032, and SC95-692 were dismissed by the Bar at the final hearing and are not at issue here.

On June 16, 2000, the respondent served his Petition for Review as to SC94-768. On July 12, 2000, he moved for an extension of time until August 7, 2000 to file his initial brief, which this Court granted on July 19, 2000. The respondent served his Initial Brief on August 7, 2000.

The Board of Governors of The Florida Bar considered the Report of Referee at its June 2000 meeting and voted not to seek an appeal.

STATEMENT OF THE FACTS

The respondent's statement of the facts in his Initial Brief contains numerous references to testimony the referee did not find to be proven fact. Indeed, the referee, in his report, specifically stated that neither the respondent nor Mr. Sewall established any claim for credibility other than the basic facts the referee went on to set forth in his report. (ROR-A1). Therefore, the Bar shall set forth below the facts as found by the referee and set as forth in his report.

Jack Sewall retained the respondent in September or October, 1996, to prepare his will. (ROR-A2 and TI 127-129). The respondent prepared the will and Mr. Sewall executed it on October 31, 1996. (ROR-A2, TI 16-17, and B-Ex. 2). In Mr. Sewall's will, the respondent named himself as a beneficiary in the amount of $15,000.00 and named himself as personal representative of the estate. (ROR-A2 and TI 15). The respondent was not a relative of Mr. Sewall and there was no mention in the will that the respondent was a trustee. (ROR-A2 and TI 65). Mr. Sewall was suffering from acute mental health problems at the time his will was drafted and he had made the respondent aware of his contemplated suicide before making his will. (ROR-A2 and TI 20). The respondent acknowledged that he believed Mr. Sewall’s threat of suicide to be serious. (TI 20). Despite the respondent's evidence and testimony that he prepared and executed a renunciation,

the referee found the renunciation to have been poorly drafted and of no value. (ROR-A2 and TI 152). The renunciation left Mr. Sewall with a will that did not dispose of his assets as he wished. (ROR-A2 and TI 155-156).

It should also be noted that during the course of the instant case, the respondent related three different versions about the circumstances regarding the renunciation of Mr. Sewall's will. In the respondent's initial response to the Bar dated June 10, 1998, he stated that while he did not wish to name himself as a beneficiary in Mr. Sewall's will, he allowed himself to be named as a beneficiary due to Mr. Sewall's insistence and "due to the distress that [Mr. Sewall] exhibited at that time." (B-Ex. 4). There was no mention of a renunciation in the respondent's initial response to the Bar. (B-Ex. 4).

In his second version, a letter to the Grievance Committee dated September 21, 1998, respondent stated that he told Mr. Sewall that he could not prepare the will as Mr. Sewall requested because it would be unethical (B-Ex. 5). The respondent then stated that Mr. Sewall ordered the respondent's secretary to prepare the will naming respondent as a beneficiary and that he was unaware of the bequest until after the will was executed. (B-Ex. 5). The respondent further stated that he immediately prepared a renunciation after he became aware that he had been named as a beneficiary. (B-Ex. 5).

In the respondent's third version, which appeared during the final hearing on October 27, 1999, the respondent testified that he asked his secretary to prepare Mr. Sewall's will from a worksheet that he had drafted a couple of weeks earlier. (TI 131-132). The respondent also testified that he did not see the will until after it was executed and immediately prepared the renunciation. (TI 135-137).

The respondent's conflicting stories help to illustrate why the referee determined that he lacked credibility.

SUMMARY OF THE ARGUMENT

In his Initial Brief, the respondent stated that he was not appealing the "limited findings" made by the referee. It is undisputed by the parties that the respondent's conduct constituted a violation of Rule Regulating The Florida Bar 4-1.8(c) for preparing an instrument giving the lawyer or a person related to the lawyer as parent, child, sibling, spouse any substantial gift from a client, including a testamentary gift, and that the respondent knew his conduct was prohibited by the Rules Regulating The Florida Bar. The referee also found the respondent guilty of violating Rule Regulating The Florida Bar 4-1.1 for failing to provide competent representation to a client. (ROR-A3).

The respondent argued that the referee's recommendation of disbarment was not supported by the evidence, by the Florida Standards for Imposing Lawyer Sanctions, or by the case law. The referee heard considerable testimony and received evidence in support of aggravating and mitigating circumstances. The evidence included documentation regarding the respondent's extensive prior discipline history. Respondent's prior discipline history involves no less than six different instances since 1984. It is this miserable prior record that aggravates this case to disbarment.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS THE APPROPRIATE LEVEL OF DISCIPLINE GIVEN THE FACTS OF THE CASE AND THE RESPONDENT'S EXTENSIVE PRIOR DISCIPLINARY HISTORY

In his Initial Brief, the respondent argued that there were uncontested facts that were not included in the Report of Referee. The referee, in his report, specifically stated that neither the respondent nor Mr. Sewall established any claim for credibility other than the basic facts which the referee went on to set forth in his report. (ROR-A1). In order to successfully attack a referee's findings, the party seeking review must demonstrate that there is no evidence in the record to support the findings or that the record clearly contradicts the referee's conclusions. The Florida Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999). The respondent has not met this burden here.

It is insufficient to merely argue that there is contradictory evidence when there is also competent, substantial evidence to support the referee's findings. The Florida Bar v. Schultz, 712 So. 2d 386 (Fla. 1988). An appeal is not a trial de novo and this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. The Florida Bar v. Cibula, 725 So. 2d 360 (Fla. 1998). This is because the referee is in the best position to judge credibility and

therefore acts as this Court's fact finder. Carricarte, 733 So. 2d at 978.

The Bar submits that the respondent owed his client, Jack Sewall, the highest duty of care because he knew Mr. Sewall was suicidal at the time the respondent drafted his will. (TI 20). The respondent knew he could not ethically name himself in Mr. Sewall's will. (TI 137). As an attorney, the respondent's duty was to ethically and competently advise his client rather than merely drafting a document which the client may have thought he wanted at a time when his mental capacity may have been questionable. The respondent knew the will was not adequate to meet Mr. Sewall's desire that his children be provided for. (TI 129-130). Given the respondent's argument in his Initial Brief that he drafted the will rather than allowing another attorney to prepare it because he believed "The Florida Bar would still investigate any testamentary gift from a client to his lawyer," it appears the respondent believed he could best avoid a disciplinary proceeding if he handled the matter himself.

In this case the referee's findings as to guilt and his recommendations of disbarment are very well supported by the report and by the record. First, the respondent admitted to his violation of Rule 4-1.8(c). The respondent testified he knew that he committed an ethical violation by naming himself as a beneficiary in Mr. Sewall's will. (TI 136). The respondent also testified that several years ago, the

Bar had investigated him for similar misconduct. (TI 137). The respondent clearly stated in his Initial Brief that "drafting a devise to himself, even at the request of the testator, violated Rule 4-1.8(c)." Regardless, the respondent claimed, as one of his many excuses, that he was forced to draft the will because of Mr. Sewall's unstable mental condition. (TI 137). The referee clearly gave little weight to this claim in light of respondent's inconsistent statements.

Several significant inconsistencies were noted in the respondent's three different versions regarding the drafting and renunciation of Mr. Sewall's will. (B-Ex. 4; B-Ex. 5; and TI 131-137). In the respondent's initial response to the Bar, he stated that he allowed himself to be named as a beneficiary primarily due to Mr. Sewall's unstable mental condition. (B-Ex. 4). There was no mention of a renunciation in the respondent's initial response to the Bar. (Bar-Ex. 4). Three months later, the respondent informed the Grievance Committee that he initially told Mr. Sewall that he could not prepare the will as Mr. Sewall requested because it would be unethical. (B-Ex. 5). The respondent then stated that Mr. Sewall ordered the respondent's secretary to prepare the will naming respondent as a beneficiary and that he was unaware of the bequest until after the will was executed. (B-Ex. 5). The respondent further stated that he immediately prepared a renunciation after he became aware that he had been named as a beneficiary. (B-Ex. 5). The respondent

testified again at the final hearing that he did not see the will until after it was executed and immediately prepared the renunciation. (TI 135 -137). However, this time the respondent testified that he asked his secretary to prepare Mr. Sewall's will from a worksheet that he had drafted a couple of weeks earlier. (TI 131-132). Clearly, there are significant inconsistencies in the three different versions that the respondent presented regarding his preparation of Mr. Sewall's will and renunciation.

Secondly, the respondent's motivation for violating Rule 4-1.8(c) is not an issue in this case. The wording of the rule is clear, and establishing a violation of the rule does not require a showing of intent, dishonesty, fraud, or drafting the bequest without client authorization. Standard 4.31 also does not require intent to mislead or deceive as a requirement for imposing disbarment. As this Court has stated, an attorney must always "honor and never betray the oath that grants [him or her] the privilege to be a Florida lawyer, no matter how much or how little money may entice." The Florida Bar v. Korones, 752 So. 2d 586, 592 (Fla. 2000).

Additionally, the respondent stated that because he attempted to mitigate the violation of Rule 4-1.8(c), a less severe sanction should be imposed. Despite the respondent's evidence that he prepared and executed a renunciation, the referee found the renunciation to have been poorly drafted and of little or no value. (ROR-

A2). The potential for injury to the client is an important factor, and The Florida Standards for Imposing Lawyer Sanctions defines potential injury as "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct." This Court has considered the potential for injury as an important factor in determining the appropriate level of discipline. The Florida Bar v. Witt, 626 So. 2d 1358 (Fla. 1993). Had Mr. Sewall not sought the advice of another attorney regarding his will, the respondent's misconduct might not have been discovered until after Mr. Sewall's death, well beyond the point where the problem could have been rectified.

Also, during the final hearing on February 24, 2000, the respondent testified at great length concerning mitigation. (TII 260-290). While the respondent detailed the circumstances and emotional stressors he believed to have caused his depression and discipline troubles, he failed to specifically clarify what efforts he made to ensure that the behavior would not be repeated. He also failed to present any objective evidence to support his testimony that he was suffering from depression during the time in question and that it in any way contributed to his misconduct. It is proper for a referee to reject as mitigation an accused lawyer's unsupported testimony concerning clinical depression. The Florida Bar v. Greenspan, 708 So. 2d 926, 927 (Fla. 1998). An accused attorney's mental illness may explain misconduct

but it does not excuse it. The Florida Bar v. Horowitz, 697 So. 2d 78, 84 (Fla. 1997).

In Horowitz, the Court held that the attorney's claimed clinical depression did not significantly mitigate his pattern of misconduct to warrant a sanction less than disbarment. Id. at 78. The Horowitz referee considered and rejected the mitigating factor of clinical depression. In Horowitz, the referee found no mitigating factors and the following aggravating factors: prior disciplinary history; a pattern of misconduct; multiple offenses in which the acknowledgment of wrongdoing was late and did not seem sincere; and substantial experience in the practice of law. As in Horowitz, the referee in the instant case considered the respondent's testimony regarding mitigation and found it insufficient to counteract the severity of the misconduct.

The referee's conclusions and recommendations as to discipline in the case at bar are also well supported by the record. The record includes the transcript of the final hearing held on October 27, 1999, the disciplinary hearing held on February 24, 2000, and documents detailing the respondent's prior disciplinary history. At the disciplinary hearing on February 24, 2000, the referee was provided with documentation regarding the respondent's prior discipline cases. The documents clearly established that the respondent has been disciplined six times since 1984.

The respondent was disciplined for the first time in September, 1984, when he received a public reprimand in The Florida Bar v. Poe, 456 So. 2d 892 (Fla. 1984). The respondent was disciplined for trust account record keeping violations, incompetent representation, neglect, and misrepresentation. That case involved five separate Florida Bar files.

In The Florida Bar v. Poe, TFB Case No. 1986-16,167(05A), the respondent was privately reprimanded for neglecting a client's legal matter.

In The Florida Bar v. Poe, TFB Case No. 1990-30,829(05A), the respondent was privately reprimanded pursuant to a report of minor misconduct dated January 14, 1990. In that case, the respondent was disciplined for revealing confidential client information in a **conflict of interest** and engaging in conduct that was prejudicial to the administration of justice.

In The Florida Bar v. Poe, Case No. 82,205 (Fla. Nov. 3, 1994), the respondent was admonished for neglect and inadequate communication.

In April, 1998, the respondent was suspended for six months by order of this Court in The Florida Bar v. Poe, 717 So. 2d 540 (Fla. 1998). In that case, the respondent was disciplined for representing clients with **conflicting interests**. As a condition of reinstatement, the respondent was required to pass the ethics portion of the Florida Bar Examination.

In The Florida Bar v. Poe, Case No. 94,967 (Fla. March 18, 1999), the respondent was again disciplined for representing clients with **conflicting interests**. The respondent was suspended for six months, to run concurrent with his previous six-month suspension in The Florida Bar v. Poe, 717 So. 2d 540 (Fla. 1998).

The respondent is currently suspended from the practice of law for representing clients with conflicting interests, and the instant case involves another serious rule violation involving a **conflict of interest** situation. It is evident that the respondent's past and present violations constitute cumulative misconduct, a relevant factor in considering the appropriate penalty in attorney discipline matters. The Florida Bar v. Adler, 589 So. 2d 899 (Fla. 1991). In most of respondent's discipline cases, as in the instant matter, he was found guilty of charges involving conflicts of interest. An attorney's cumulative misconduct of a similar nature should warrant even more serious discipline than might dissimilar conduct. The Florida Bar v. Rolle, 661 So. 2d 296 (Fla. 1995).

Furthermore, under the Florida Standards for Imposing Lawyers Sanctions, a prior discipline history is considered an aggravating factor [Standard 9.22(a)]. At the final hearing held on February 24, 2000, in addition to documentation regarding the respondent's prior discipline history, the Bar also presented argument regarding other aggravating factors under The Florida Standards for Imposing Lawyer

Sanctions as applicable to the case. The respondent's dishonest or selfish motive, refusal to acknowledge the wrongful nature of his conduct, substantial experience in the practice of law, as well as the vulnerability of the victim, were all presented to the referee as aggravating factors. [Standards 9.22(b); 9.22(g); 9.22(i); and 9.22(h)]. The referee in the case at bar appropriately considered the respondent's prior violations, along with the violations in the present case, in recommending that the proper discipline to be imposed should consist of disbarment. (ROR-A3-4).

The respondent asserted in his Initial Brief that the referee's recommended discipline of disbarment was inconsistent with the Florida Standards for Imposing Lawyer Sanctions. However, the record reflects that the referee was provided with citations to The Florida Standards for Imposing Lawyer Sanctions by the Bar in support of disbarment. It is also relevant to note that Standard 8.1(b) provides that "disbarment is appropriate when a lawyer has been suspended for the same or similar misconduct and intentionally engages in further similar acts of misconduct." It should be noted that the final hearing in The Florida Bar v. Poe, 717 So. 2d 540 (Fla. 1998), was held in November, 1996, and continued through 1997. (TII 301). This time period was the same period during which the present misconduct occurred. The respondent was aware that he was being investigated for conflicts of interest, but he did not take proper precautions to conduct himself ethically in regard

to the clear conflict of interest involved in naming himself as a beneficiary in his client's will. (TII 301).

The respondent also asserted that the referee's recommended discipline was too harsh. However, as mentioned earlier, abundant authority exists for increasing the level of discipline based upon prior similar offenses. In The Florida Bar v. Morrison, 669 So. 2d 1040 (Fla. 1996), this Court recommended increased discipline based on the attorney's prior similar misconduct. That case also noted that the Court has broad latitude in reviewing a referee's recommendations because, ultimately, it was the Court's jurisdiction to order appropriate punishment. Further, the Morrison Court reiterated the three primary purposes of discipline as fairness to society, fairness to the attorney, and deterrence of similar behavior by other members of the Bar. Id. at 1040.

Additionally, in The Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991), this Court approved disbarment in light of the attorney's significant disciplinary history, which included a ninety-day suspension, a public reprimand, a sixty-day suspension, a three-month suspension, and a ninety-one-day suspension. Although the rule violations in Neely involved failure to preserve funds in escrow and misrepresentation, that case illustrates factual agreement with the disciplinary record of the instant respondent. The Neely facts alone would not have resulted in

disbarment, however, when taken into consideration with the attorney's disciplinary history, this Court found that disbarment was "necessary to protect the public interest" and was the "only discipline appropriate under the circumstances, particularly in view of Neely's record." Id. at 468.

In his Initial Brief, the respondent cited several cases which are distinguishable from the instant case due to the respondent's extensive disciplinary history. In The Florida Bar v. Miller, 555 So. 2d 854 (Fla. 1990), the attorney received a public reprimand for drafting a testamentary instrument in which the attorney was a beneficiary. However, in Miller, the attorney had practiced law for nearly forty years with an unblemished record. Another distinguishing factor in Miller is that this Court believed Mr. Miller's explanation that he did not expect to become a beneficiary, whereas the referee in the instant case determined that the respondent did not establish this level of credibility. (ROR-A1).

In The Florida Bar v. Anderson, 638 So. 2d 29 (Fla. 1994), the attorney drafted testamentary instruments, naming himself as a beneficiary, and was suspended for ninety days. This Court noted that potential injury to the legal system or legal profession was reasonably foreseeable from such misconduct, however, the attorney presented significant mitigating factors. He was sixty-eight years old, appeared honest, remorseful, and apologetic concerning the complaint, and had no prior disciplinary record in his twenty-seven years of practice, in contrast to the

respondent's extensive disciplinary history.

CONCLUSION

The respondent's misconduct represents a pattern of escalating, cumulative misconduct demonstrating an attitude and course of behavior that is totally inconsistent with this Court's standards for professional conduct. The referee properly considered as an aggravating factor the respondent's lengthy prior disciplinary history. Furthermore, the referee was provided with evidence and testimony regarding aggravating and mitigating factors. The referee's report reflects that he considered all of the above in making his disciplinary recommendation. Accordingly, the referee's recommendation of disbarment is supported by case law, the facts of the case, the record, and the Florida Standards for Imposing Lawyer Sanctions. Furthermore, disbarment is necessary to protect the public from the respondent's inability to recognize conflict of interest situations. Nothing less than disbarment is appropriate in these circumstances given the respondent's shocking discipline record.

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and recommendation of disbarment and payment of the Bar's costs in prosecuting this case which currently total $2,672.26.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Brief and Appendix have been sent by overnight Federal Express to the Clerk of the Court, 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 Scott K. Tozian, counsel for the respondent, at 109 North Brush Street, Suite 150, Tampa, Florida, 33602-4159; 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 _____ day of _____, 2000.

Respectfully submitted,

_____
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THE FLORIDA BAR,
Complainant,

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[TFB Case No. 1998-31,914(05A)]

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APPENDIX TO COMPLAINANT'S INITIAL BRIEF

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