IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY A. POE,

Respondent.

CASE NO.: SC 94,768

TFB FILE NO.: 98-31,914(05A)

RESPONDENT'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

Resp. Exh.	=	Respondent’s Exhibit from final hearing.
TFB Exh.	=	The Florida Bar’s Exhibit from final hearing.
R.R.	=	Report of Referee.
R.	=	Transcript Page of Final Hearing before Referee on October 27, 1999.

STATEMENT OF FACTS AND STATEMENT OF THE CASE

Respondent and the Complainant, Jack Sewall, met in 1990 or 1991. (R. 59, 110). Shortly after meeting each other, Respondent and Mr. Sewall became very close friends. (R. 67, 110). Mr. Sewall described Respondent as his best friend. (R. 62). Mr. Sewall was the godfather of Respondent's son who was born in 1992. (R. 111). When Mr. Sewall and his wife separated in April 1995, Mr. Sewall hired Respondent to represent him in his dissolution of marriage proceedings. (R. 68, 111).

The divorce proceedings between Mr. and Mrs. Sewall were extremely acrimonious and involved allegations of harassment, domestic violence injunctions and failure to pay temporary child support. (R. 70). During his divorce, a criminal investigation of Mr. Sewall's life insurance business began. (R. 138). As the allegations concerning his life insurance business became public and as the divorce proceedings continued, Mr. Sewall began to suffer from acute depression. (R. 81-82, 137-138). Mr. Sewall testified that he was concerned about the welfare of his children and his elderly mother if anything were to happen to him. (R. 83). Mr. Sewall acknowledged that he spoke to Respondent about leaving him money to look after his children. (R. 84). Mr. Sewall asked Respondent to prepare a will and told him that he was "getting afraid of myself again." (R. 60). Respondent's office prepared the will which named Respondent as the personal

representative and left Respondent a bequest of $15,000. (R. 14; TFB Exh. 2).

Mr. Sewall executed the will on October 31, 1996. (TFB Exh. 2). Respondent was not present when the will was executed. (R. 132). However, Stacey Burns, one of Mr. Poe's administrative assistants, was present to witness the execution of Mr. Sewall's will. (TFB Exh. 8). Ms. Burns testified that concerning every will that she witnessed, she always made sure that the testator had read the will. (R. 47).

Respondent told Mr. Sewall that he could not ethically accept the bequest if he drafted the instrument. (R. 25). While Respondent did not intend to accept any bequest from Mr. Sewall, he did not fully advise Mr. Sewall of his intentions to reject the testamentary gift because Mr. Sewall was emotionally distraught and would interpret the refusal as a betrayal. (R. 131, 136-138). Respondent explained that he did not want another lawyer to prepare the will leaving him a bequest because he was concerned that The Florida Bar would still investigate any testamentary gift from a client to his lawyer.[1] Moreover, Respondent never intended to accept the bequest from Mr. Sewall. (R. 131, 136). Accordingly, after Respondent discovered that Mr.

[1] Respondent explained that The Florida Bar had previously conducted an investigation concerning a former client who had, unbeknownst to him, left him a bequest through a testamentary instrument drafted by another attorney. The investigation did not result in any probable cause determinations. (R. 136-137).

Sewall had executed his will, Respondent drafted a renunciation of his interest in the will on November 4, 1996. (R. 25, 137; TFB Exh. 6). He attached the renunciation to the original copy of Mr. Sewall's will. (R. 139).

Prior to the completion of the dissolution of marriage proceedings, Mr. Sewall terminated Respondent's services. Respondent had repeatedly attempted to convince Mr. Sewall to disclose all of his financial records so that the presiding judge could consider a reduction of his child support obligations. (R. 111-117; Resp. Exh. 8). Respondent was eventually successful in negotiating a reduction of Mr. Sewall's child support payments. (R. 125). Nevertheless, Mr. Sewall believed that it was Respondent's fault that his child support obligations were not immediately reduced and he retained other counsel. (R. 76).

Between October 1996 and September 1998, Mr. Sewall was convicted of four felonies. (Resp. Exh. 3). Two of these convictions, dated September 3, 1998, were first degree felonies of Grand Theft and Organized Fraud which pertained to Mr. Sewall's thefts from his life insurance business investors which occurred between January 1995 through December 1996. (Resp. Exh. 3). Mr. Sewall testified that all of his financial, personal and criminal problems were caused by his excessive child support obligations. (R. 55, 76). He further testified that he blamed Respondent for his criminal convictions. (R. 76-77). Mr. Sewall

even requested reimbursement of the $930,050 he owed to his life insurance company investors from The Florida Bar Client's Security Fund. (R. 80-81).

On April 15, 1998, Mr. Sewall filed a complaint with The Florida Bar accusing Respondent of lack of diligence in his dissolution proceedings. (Resp. Exh. 5). In addition, Mr. Sewall also contended that Respondent, without Mr. Sewall's knowledge or consent, had named himself as a beneficiary in Mr. Sewall's will. (Resp. Exh. 5). On January 11, 1999, The Florida Bar filed a Complaint solely relating to the creation of the will and charging violations of Rules Regulating The Florida Bar 4-1.1 and 4-1.8(c). A final hearing was held on October 27, 1999 and a sanctions hearing was held on February 24, 2000. On May 17, 2000, the Referee issued his report finding Respondent guilty of Rules 4-1.1 and 4-1.8(c) and recommending disbarment. (R.R.). Respondent mailed his Petition for Review on June 16, 2000.

SUMMARY OF THE ARGUMENT

The Referee's factual findings and determination that Respondent violated Rules Regulating The Florida Bar 4-1.8(c) and 4-1.1 do not support a disbarment recommendation. Relevant case law concerning Rule 4-1.8(c) and Rule 4-1.1 violations address more egregious misconduct and the most severe sanction imposed is a ninety-one (91) day suspension.

Respondent attempted to mitigate the 4-1.8(c) violation by drafting a renunciation of his interest in the will. While the Referee appeared to find that the renunciation was the subject of the Rule 4-1.1 violation, the renunciation demonstrates Respondent's attempt to take remedial action to correct the situation. A consideration of the Referee's findings in conjunction with Respondent's disciplinary history supports the imposition of a concurrent one or two year suspension from the practice of law.

I. THE REFEREE'S RECOMMENDATION OF DISBARMENT IS NOT SUPPORTED BY THE EVIDENCE, THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, OR THE CASE LAW.

While Respondent is not appealing the limited findings made by the Referee, this Court should also consider the uncontested facts, admitted to by both Complainant and Respondent, that are not included in the Report of Referee. A complete consideration of all the facts is necessary to determine the appropriate sanction.

First, it is important to recognize the relationship between Mr. Sewall and Respondent. At the time Mr. Sewall asked Respondent to draft a will, the Respondent and Mr. Sewall were very close friends. (R. 67, 110). Accordingly, Mr. Sewall's desire to leave money to a person whom he described as his best friend was not unusual. Moreover, the Referee did not determine that Respondent drafted the bequest to himself without Mr.

Sewall's authorization and did not recommend that Respondent be found guilty of any rule violations concerning dishonest or fraudulent conduct. (R.R.).

Second, the Referee's finding that Mr. Sewall was suffering from acute depression supports Respondent's reluctance to refuse Mr. Sewall's request to leave Respondent a portion of the estate. Mr. Sewall testified that he told Respondent that he was "getting afraid of himself again." (R. 60). Respondent explained that he understood that Mr. Sewall had considered suicide and he was very concerned about doing anything that Mr. Sewall might interpret as a betrayal. (R. 137-138).

Third, Mr. Sewall acknowledged that at the time he requested Respondent to draft the will, his debts greatly exceeded his assets. (R. 88-89). Respondent was aware of Mr. Sewall's debts and had discussed bankruptcy with him. (R. 88-89). Respondent knew that creditors would take priority over beneficiaries named in the will and that there would not have been assets left in the estate. (R. 133). Since Respondent had nothing to gain from a bequest in the will, there was no incentive to include himself as a beneficiary in the will. Respondent's motivation was to avoid upsetting his friend and causing Mr. Sewall to act irrationally.

Fourth, while the Referee found that the renunciation was "not well done" and was a "poor device," the Referee did not make any finding that it was not a valid renunciation. (R.R.). In

fact, the Referee was disturbed that the renunciation "still left Mr. Sewall, the Respondent's former client, with a will that did not dispose of his assets as he wished." (R.R. 2). Respondent does not suggest that drafting a renunciation was the preferred way to avoid violating Rule Regulating The Florida Bar 4-1.8(c). However, Respondent was in the very difficult situation of representing a close friend with emotional problems whom he did not want to further upset. Respondent was attempting to take remedial action.

A. Disbarment is inconsistent with the Florida Standards for Imposing Lawyer Sanctions.

Florida Standard C.3.0 states that "[i]n imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors." Fla. Stds. Imposing Law. Sancs. C.3.0. The Referee did not properly consider these factors in determining that disbarment was appropriate.

The Report of Referee does not include any standard relied upon by the Referee to support the disbarment recommendation.

Standards 4.31 and 4.51, argued by The Florida Bar during the final hearing in this matter, are not applicable to Respondent's conduct. An analysis of the correct standards does not support a disbarment recommendation.

Although no standard specifically applies to a violation of Rule Regulating The Florida Bar 4-1.8(c), Standard 4.3, pertaining to conflicts of interest, may provide guidance in determining the appropriate sanction. The Bar urges this Court to disbar Respondent based upon Standard 4.31. Standard 4.31 states, in pertinent part, that "Disbarment is appropriate when a lawyer, without the informed consent of the client(s): a) engages in representation of a client knowing that the lawyer's interests are adverse to the client's with the intent to benefit the lawyer or another, and causes serious or potentially serious injury to the client." Fla. Stds. Imposing Law. Sancs. 4.31. However, this Standard is not applicable for several reasons. The Referee did not determine that Respondent attempted to mislead or deceive his client, Mr. Sewall, in order to benefit from the will without the client's knowledge or consent. (R.R. 2).

Further, Respondent did not intend to benefit from the creation of the will. Respondent knew that Mr. Sewall's estate did not have any assets due to Mr. Sewall's extraordinary debt. (R. 133). Mr. Sewall had shown Respondent promissory notes exceeding one million dollars and had discussed bankruptcy with

him. (R. 88-89, 133).

Moreover, the drafting of the will did not cause serious or potentially serious injury to the client. First, after Mr. Sewall terminated Respondent's services, Mr. Sewall brought his will to his subsequent attorney who drafted a new will. (R. 106). Second, Respondent promptly drafted the renunciation of interest in the will and would not have received a bequest from Mr. Sewall's estate. (R. 137; TFB Exh. 6).

In contrast, Standard 4.32 more closely corresponds to Respondent's conduct. Standard 4.32 states, "[s]uspension is appropriate when a lawyer knows of a conflict of interest and does not fully disclose to a client the possible effect of that conflict, and causes injury or potential injury to a client." Fla. Stds. Imposing Law. Sancs. 4.32. In this case, Respondent was aware that drafting a devise to himself, even at the request of the testator, violated Rule 4-1.8(c). He advised Mr. Sewall that he could not ethically accept the bequest. (R. 25). However, due to Respondent's fear that his friend and client would interpret his unwillingness to accept the bequest as a betrayal, he did not refuse Mr. Sewall's desire to leave him money to care for his dependents. (R. 131, 136-138).

In addition, Respondent did not cause injury to his client. If Respondent caused potential injury to his client, it was not serious injury. Mr. Sewall executed his will on October 31, 1996

and Respondent executed the renunciation on November 4, 1996. (TFB Exh. 2, 6). Mr. Sewall revoked his will and executed a new will following his termination of Respondent's services. (R. 106). Accordingly, suspension rather than disbarment is more appropriate in this case.

The Florida Bar also relied upon Standard 4.51 in arguing to disbar Respondent. Standard 4.51 states, "[d]isbarment is appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client." Fla. Stds. Imposing Law. Sancs. 4.51. The Report of Referee's findings of facts do not refer to Respondent's competence other than finding that the renunciation was not "well done" and was a "poor device." (R.R. 2). The Referee's findings do not specify the reasons for the deficiency of the renunciation or whether the renunciation was valid. (R.R.). These limited findings do not support the conclusion that Respondent did not "understand the most fundamental legal doctrines or procedures." Disbarment cannot be justified on this standard.

On the other hand, Standard 4.53 is more applicable to the factual findings of the Referee. Standard 4.53 states, in pertinent part, "[p]ublic reprimand is appropriate when a lawyer: (a) demonstrates failure to understand relevant legal doctrines

or procedures and causes injury or potential injury to a client." Fla. Stds. Imposing Law. Sancs. 4.53(a). Any problems with the renunciation, as found by the Referee, comport with a "failure to understand relevant legal doctrines or procedures" rather than a failure to "understand the most fundamental legal doctrines or procedures." Consequently, an analysis of the standards demonstrates that disbarment is not warranted in this matter.

<u>B. The Referee's disbarment recommendation is not supported by applicable case law.</u>

No disciplinary case examining a violation of Rule 4-1.8(c) has determined that disbarment is an appropriate sanction. Rather, the most severe sanction was the imposition of a ninety-

one (91) day suspension. A discussion of the relevant case law follows.

In two disciplinary cases, the responding attorney received a public reprimand for drafting a testamentary instrument in which the attorney was a beneficiary. In The Florida Bar v. Miller, 555 So. 2d 854 (Fla. 1990), the attorney drafted a will in which the client's wife was the beneficiary of the testator's estate and the attorney named himself the contingent beneficiary. Although it was expected that the wife would outlive the testator, she died first and a year later, the testator died leaving $200,000 to the attorney. Id. at 855. Similarly, in The Florida Bar v. Novak, 313 So. 2d 727, 727-28 (Fla. 1974), an attorney drafted a will in which he received the bulk of his client's estate and prepared a trust naming himself as trustee and authorizing the attorney to make personal loans to himself. After the client was declared incompetent, the client executed a new will which excluded the attorney. Id.

In both of these cases, the attorney received some benefit from the testamentary instrument. In Miller, the attorney actually inherited $200,000. In Novak, the attorney received the benefit of personal loans that he granted to himself as the trustee of his client's estate. Moreover, Novak drafted an instrument which devised most of the assets in the estate to himself to the exclusion of any of the testator's relatives.

In contrast, Respondent did not receive any pecuniary gain from Mr. Sewall's will.

This Court has imposed a rehabilitative suspension for a disciplinary case involving trust accounting violations as well as drafting of a testamentary instrument in which he was a beneficiary. In The Florida Bar v. Rule, 601 So. 2d 1179 (Fla. 1992), the attorney drafted a will naming himself and his family as beneficiaries and actually took possession of specific devises. Further, the attorney, without petitioning the court, paid himself fees for the administration of the estate. In addition to the misconduct concerning the estate, the attorney was also found guilty of numerous trust account violations, including a shortage and commingling of funds. Id. at 1180. Although the attorney actually benefitted from the will he drafted and violated serious trust accounting rules, he only received a ninety-one (91) day suspension. Certainly, Respondent's conduct in Mr. Sewall's estate was much less egregious since Respondent did not intend to benefit from the will, did not administer the estate and took remedial action in an attempt to remove himself from an improper situation.

In The Florida Bar v. Anderson, 638 So. 2d 29 (Fla. 1994), this Court determined that a ninety (90) day suspension was an appropriate sanction for an attorney who drafted six (6) testamentary instruments for his client which named him or his

wife as a beneficiary of his client's estate. Although the attorney did not receive a benefit from the testamentary instrument, he was attempting to shield the real beneficiaries from their creditors. Id. This Court noted that suspension was warranted in Anderson, despite the prior public reprimands imposed for similar violations, because the misconduct had occurred after the enactment date of Rule 4-1.8(c). Id. at 30.

Even though Respondent's conduct occurred after the promulgation of 4-1.8(c), Respondent's conduct is distinguishable from Anderson. Rather than Anderson's repeated misconduct of drafting six (6) different testamentary instruments, Respondent's office only created one will. While Anderson drafted the wills to attempt to shield his client's true beneficiaries from its proper creditors, Respondent's reluctance to refuse Mr. Sewall's request was due to his fear that Mr. Sewall would interpret his refusal as a betrayal and act irrationally, potentially harming himself. Further, in contrast to Anderson, Respondent attempted to correct the situation by drafting the renunciation. Because Respondent's conduct was not repeated and because Respondent attempted to mitigate the Rule 4-1.8(c) violation, a less severe sanction should be imposed.

Further, the Referee's determination that Respondent violated Rule 4-1.1 does not justify disbarment. An analysis of Rule 4-1.1 violations in the context of probate proceedings is

helpful in determining an appropriate sanction. Even in cases in which the attorney has committed multiple rule violations besides violating Rule 4-1.1 and the attorney's conduct has caused actual serious injury to the client, this Court has not imposed disbarment. For example, in The Florida Bar v. Roberts, 689 So. 2d 1049 (Fla. 1997), this Court imposed a ninety (90) day suspension due to substantial mismanagement of a probate estate which resulted in serious injury. Due to Roberts' administration of the estate, funds were improperly disbursed causing his client, the personal representative, to lose $9,000. Id. at 1051. In addition to violating Rule 4-1.1, Roberts also violated Rules Regulating The Florida Bar 4-1.3, 4-1.4(a) and (b) and 4-8.4(a). Id. at 1050.

In The Florida Bar v. Shannon, 376 So. 2d 858, 860 (Fla. 1979), the attorney was found to have failed to properly handle the administration of an estate, failed to file an accounting in accordance with the law, failed to file a timely final accounting, failed to comply with the probate court's orders, failed to timely close out the estate, and failed to maintain complete records of the estate. Moreover, the attorney was found to have collected a clearly excessive fee and to have used such inaccurate and misleading figures in his accounting to suggest a misrepresentation to the probate court. Id. This court found that a ninety (90) day suspension was an appropriate sanction.

Id. at 861.

In both of these cases, a non-rehabilitative suspension was imposed for conduct that not only included violations concerning competence but a pattern of failing to act with diligence and promptness in representing a client. Most disturbingly, the attorney in Shannon was also found to have attempted to perpetrate a fraud on the probate court. Shannon at 860. Moreover, both cases resulted in pecuniary damage to the client.

In contrast, the Referee's finding of a Rule 4-1.1 violation in the present case appears to relate to Respondent's drafting of the renunciation instrument. (R.R. 2). Respondent did not cause any actual injury to Mr. Sewall and there was no finding of fraud, deceit or misrepresentation. Respondent's violation of Rule 4-1.1, in comparison to Shannon and Roberts is relatively minor and does not warrant disbarment.

<u>C. Respondent's disciplinary history does not sufficiently aggravate Respondent's misconduct to justify disbarment</u>.

While Respondent concedes that his prior disciplinary history was a proper consideration for the Referee in arriving at a recommended discipline, such consideration does not warrant disbarment here. In <u>The Florida Bar v. Bern</u>, 425 So. 2d 526 (Fla. 1982), this Court considered the appropriate discipline for an attorney with a lengthy disciplinary history who had suffered two prior private reprimands and a prior public reprimand. Based upon the fourth disciplinary prosecution involving conflicts of interest, maintenance of insufficient trust records and failing to adequately account for money and return fees, the referee recommended a public reprimand.

On review, this Court found that cumulative misconduct of a similar nature warranted an even more severe discipline than might dissimilar conduct and imposed a ninety-one (91) day suspension.

In the instant case, the Referee noted Respondent previously received a private reprimand, two admonishments, a public

reprimand and a six (6) month suspension. While Bern stands for the proposition that a more severe discipline is warranted due to Respondent's prior disciplinary record, the rationale of Bern does not mandate disbarment. It must be noted that competence and conflict problems often result in minor misconduct or public reprimand penalties standing alone. In the instant case, Respondent took remedial action within one week and the client suffered no harm.

At present, Respondent has been suspended since May 1998, when this court's order became effective in The Florida Bar v. Poe, 717 So. 2d 540 (Fla. 1998). Respondent suggests that a concurrent suspension of one or two years is the appropriate discipline given the relatively minor misconduct, the remedial action taken by Respondent, and the prior and cumulative misconduct.

CONCLUSION

The Referee’s recommendation of disbarment is not supported by the Referee’s factual findings, the case law, the Florida Standards for Imposing Lawyer Sanctions or Respondent’s disciplinary history. This Court should reject the Referee’s recommendation and impose a one or two year concurrent suspension from the practice of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Respondent's Initial Brief has been furnished by regular U. S. Mail to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and true and correct copies have been furnished by regular U. S. Mail to: Jan K. Wichrowski, Esquire, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314 and Bill Hendrix, Esquire, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; all on this 7th day of August, 2000.

CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 12 point not proportionally spaced Courier font.

____

SCOTT K. TOZIAN, ESQUIRE