IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEFFREY EVAN COSNOW,

Respondent.
_____/

Case No. SC96262

TFB No. 1999-10,250 (6A)

INITIAL BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar will be referred to as "The Florida Bar," or "the Bar." The Respondent, Jeffrey Evan Cosnow, Esq., will be referred to as "Respondent."

"RR" will refer to the Report of Referee in Supreme Court Case No. SC96262, dated January 24, 2000.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar. "Standard" or "Standards" will refer to the Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE AND OF THE FACTS

Pursuant to a court order dated March 7, 1989, Sharon Robinson was granted legal custody of her grandson, Dustin Carroll, who was horn out of wedlock on April 22, 1987. (Hereinafter, Dustin Carroll will be referred to as "the child"). Ms. Robinson's daughter, Stephanie Reed ("Ms. Reed"), is the child's birth mother; Ronald Swango ("Swango") was the putative father. On September 12, 1997, Swango was killed in a vehicular accident involving Rita Frappier ("Ms. Frappier"); thus, Swango's estate accrued a potential cause of action for wrongful death against Ms. Frappier. On September 16, 1997, Ms. Robinson entered into three retainer agreements with Respondent: one covered his legal representation in paternity and guardianship proceedings relating to the child; another related to the administration of Swango's estate; and the third anticipated Respondent's representation in a civil claim for damages for Swango's death.

On December 5, 997, Respondent filed a petition to establish paternity in the Sixth Judicial Circu t, in which he named Ms. Frappier and Ms. Reed as individual defendants; however, the proper defendant to the paternity action would have been Swango's estate or the personal representative of the estate. On March 10, 1998, the trial court dismissed Ms. Frappier from the paternity action as an improper party.

Respondent also filed a guardianship action in the Sixth Judicial Circuit,

within which Respondent prayed that Ms. Robinson be appointed to act as the child's guardian. By virtue of the court order of March, 1987, Ms. Robinson already was the child's legal guardian. On March 26, 1998, Respondent wrote to Ms. Robinson advising that he was withdrawing as attorney in the guardianship proceeding, but that he would remain as counsel in the paternity action, in the anticipated probate and wrongful death cases. The following day, March 27, Ms. Robinson delivered to Respondent a letter in which she demanded that he cease and desist from performing any further legal services in any matter pertaining to herself or the child.

One week later, on April 3, 1998, Respondent filed a "Motion to Substitute Next Friend" in the paternity action, within which Respondent asserted that the child's mother, Ms. Reed, had retained him to represent the legal interests of the child. Respondent knew or should have known that the legal interests of Ms. Robinson and Ms. Reed were materially adverse in any action that involved the care, control, custody, or representation of the child. By virtue of the March, 1989 court order, Ms. Reed was not qualified to supersede Ms. Robinson as representative or guardian of the child, a fact that Respondent knew or should have known. Moreover, Ms. Robinson did not consent to Respondent representing Ms. Reed in the same matter in which he previously had represented her. Ms. Robinson then retained Susan C. Fogarty, Esq. ("Ms. Fogarty") to represent her and the

child's legal interests. Respondent also filed a Petition for Formal Administration (In re: The Estate of Ronald W. Swango, Pinellas County, Florida Case No.98-1802-ES-3), in which he purported to represent Ms. Reed.

On April 3, 1998, Ms. Robinson filed an objection to the appointment of Ms. Reed as personal representative in the probate action. At a hearing conducted April 13, 1998, Respondent agreed to withdraw from the probate action but requested that the court appoint an nttorticy *ad litem* to represent the ititcrest of the child, upon which the court directed him and Ms. Fogarty to submit the names of three (3) attorneys who would be willing to accept such an appointment. One attorney whom Respondent recommended was John Blakely, Esq., and the court chose Mr. Blakely. Respondent recommended Mr. Blakely despite the fact that lie knew or should have known that Mr. Blakely was a member of the same law firm that had represented Ms. Frappier, the (now-dismissed) defendant in the paternity suit. On April 9, 1998, Ms. Fogarty filed a motion to disqualify Respondent as counsel in the paternity case, due to a contlict of interest. On July 22, 1998, the court held that Respondent had created a contlict of interest in the paternity case and issued an order granting the motion to disqualify him as counsel.

Neither Ms. Robinson, nor Ms. Reed, nor the child had legal standing to act as personal representative of Swango's estate, and therefore had no legal standing to initiate a wrongful death action on behalf of Swango's estate. (RR at 1-3.)

Respondent **did** not contest the facts recited herein, but rather moved for summary judgment as a matter of law, arguing that these facts **did** not constitute a cause for discipline. The Bar filed a cross motion for summary judgment, stating the opposite, and the referee granted the Bar's motion, holding that under these facts Respondent had violated Rule 4-1.1 (competence) and Rule 4-1.7(a) (representing adverse interests). (RR at 3.)

As a sanction for these violations, the referee recommended that Respondent be placed on probation for eighteen (18) months, during which he would be subject to supervision by a member of The Florida Bar, and that he would refrain from representing clients in any new area of law unless he first completed a minimum of thirty (30) hours of continuing legal education (CLE) in the new area. In addition, the referee recommended that Respondent successfully complete the Bar's one-day Ethics School refresher course. (RR at 3.)

The Florida Bar Board of Governors voted to file a Petition for Review of the referee's recommended discipline. The board voted to seek a sixty (60) day suspension, followed by a year of probation, during which Respondent must successfully complete the Bar's one-day Ethics School.

SUMMARY OF THE ARGUMENT

The Bar argues that the recommended discipline is too lenient, given Respondent's prior disciplinary record, the nature of the instant misconduct, and the motivation giving rise to the misconduct. Thus, the Bar contends that the referee did not give sufficient weight to the following aggravating factors in determining the recommended sanction:

1) Respondent's disciplinary history
2) Respondent's pattern of misconduct;
3) Respondent's substantial experience in the practice of law; and
4) Respondent's selfish motive.

The recommended sanction fails to achieve the objectives of Bar discipline because it is inconsistent with existing case law, the Florida Standards for Imposing Lawyer Sanctions, and the facts herein. The Bar argues that the objectives of Bar discipline, the Standards, the case authority, and judicial consistency all are better served by imposing on Respondent a 60-day suspension, a one-year probation, and required attendance at Ethics School.

ARGUMENT

I. THE RECOMMENDED SANCTION IS INSUFFICIENT IN VIEW OF RESPONDENT'S MISCONDUCT AND PRIOR DISCIPLINARY RECORD.

A. The Recommended Sanction Fails to Serve the Purposes of Bar Discipline.

While a referee's recommendation regarding discipline is persuasive, this Court has the ultimate responsibility to determine and order the appropriate sanction in any given case. The Florida Bar v. Reed, 044 So. 2d 1355, 1357 (Fla. 1994). A Bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Lawless, 640 So. 2d 1098, 1100 (Fla. 1994).

In imposing attorney discipline, this Court must consider a respondent's previous discipline, and increase the discipline where appropriate. The Florida Bar v. Bern, 425 So. 2d 526, 528 (Fla. 1982). This case reveals that on May 23, 1991, in Supreme Court Case No. 77,341, Respondent received a public reprimand for violating Rule 4-1.4(a) (failure to keep a client reasonably informed regarding the status of a lawsuit). Thereafter, on August 24, 1995, in Supreme Court Case No. 85,519, Respondent received another public reprimand plus one year probation for violating Rule 4-1.3 (diligence) and Rule 4-8.4(d) (engaging in conduct prejudicial

to the administration of justice). Then, on April 15, 1999, in Supreme Court Case No. 93,899, Respondent was suspended for ten (10) days for violating Rule 4-1.3 (diligence) and Rule 4-1.4(b) (failure to explain matters to the extent necessary to permit the client to make informed decisions regarding the representation).

The instant case represents Respondent's fourth instance of adjudicated professional misconduct in this Court. One cannot reasonably argue that placing Respondent on supervised probation for his fourth guilty verdict is by any measure a severe enough sanction to deter others from similar misconduct. Thus, it is in this last regard that the recommended sanction fails to serve the stated purposes of attorney discipline. As for the discipline being fair to society, the societal interest is served when substantially similar sanctions are imposed for substantially similar misconduct. Public confidence in the rule of law suffers when those who misconduct themselves receive widely disparate sanctions from others whose conduct is similar. Given Respondent's instant misconduct, his prior misconduct, and the aggravating factors present, the threefold objectives of Bar discipline cannot be adequately served by approval of the referee's recommended sanction.

The progressive nature of Bar discipline, as enunciated in Bern, requires this Court to consider Respondent's three prior sanctions, and to increase the referee's recommended discipline, should that be appropriate. The very existence of three prior formal sanctions argues for an upward departure from that which otherwise

would constitute an appropriate sanction under the instant facts. It is obvious that the Court has not yet gotten Respondent's full attention, and that it is time to do so. While a sanction no more severe than supervised probation might possibly be appropriate under the instant facts, without more, it is only right and proper to judge the severity of the instant misconduct through the lens of Respondent's prior disciplinary history. When viewed thus, supervised probation is too lenient a sanction, and too insufficient a deterrent to others.

B. Under the Florida Standards for Imposing Lawyer Satictions, Suspension is the Appropriate Sanction for the Misconduct

Standard 4.32 asserts that suspension 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. Here, Respondent represented the child's maternal grandmother, Mrs. Robinson, in a paternity action in which he sued the child's mother, Stephanie Reed, as a defendant. When Ms. Robinson terminated the representation, Respondent approached Ms. Reed (from whom custody of the child had been removed years before) and began advocating her interests in the same matter, by attempting to substitute Ms. Reed as the petitioner (i.e., the child's next friend), despite the fact that she was a named defendant in the case. Later, though Ms. Robinson had hired him to probate the estate of Ronald Swango with her as the personal representative, and then fired

him, Respondent thereafter sought to have Ms. Reed act as personal representative of the estate. It is difficult to imagine conflicts more blatant than these.

The representational conflicts are bound up with Respondent's lack of professional competence. Respondent sued Ms. Reed as a defendant in the paternity action and then sought to represent her as plaintiff in the same case. He sued the mother of the child to establish paternity. In addition, Respondent also sued Ms. Frappier, the alleged vehicular tortfeasor, in the action to establish paternity. Apparently it meant little or nothing to Respondent that Ms. Reed and Ms. Frappier might feel compelled to hire legal counsel at their own expense in order to deal with their improper inclusion as defendants. Indeed, the record shows that Ms. Frappier hired not one but two different law firms just to get herself dismissed as a defendant in the paternity case. As such, Respondent placed his client at risk for being held liable to pay Ms. Frappier's attorney's fees, which risk certainly qualifies as a "potential injury" under the language of the Standards. It is riot known whether Ms. Reed spoke to or paid an attorney pursuant to her inclusion as a named **defendant** in that action; nevertheless, Respondent's improper determination to sue her as a defendant likewise created the risk of potential injury to his client for that inclusion. Similarly, after Ms. Robinson fired Respondent, she had to retain new counsel to file motions against his continued involvement in the various matters. Whether she actually incurred fees and costs attendant to those

motions would merely serve to transform her potential injury to a real one. Regardless, the potential injury is present. For these reasons, Standard 4.32 applies to the conflicts Respondent created, and requires suspension.

Respondent's lack of competence is innately connected to the conflicts he created simply because lie did not -- and continues not to -- appreciate that they were, indeed, conflicts. Standard 4.52 states that "Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client." Here, the lack of professional competence includes: a) Respondent suing improper parties; b) his initiation of a guardianship proceeding before filing any legal claim for damages (i.e., a wrongful death action), presumably to perfect the minor's right to such anticipated damages or settlement monies; c) his attempt to substitute Ms. Reed as next friend in the paternity proceeding when Mrs. Robinson was already the child's legal guardian; d) Respondent's recommendation of John Blakely, Esq. to serve as the child's attorney *ad litem* in the paternity action after Mr. Blakely's law firm had represented Ms. Frappier in the same action; and e) Respondent's attempt to have Ms. Robinson, **and** later Ms. Reed, named personal representative of Ronald Swango's estate when neither had any legal or blood relation with the decedent.

Ultimately, Douglas Buchwalter, an attorney, was named personal representative of Mr. Swango's estate. See Exhibit 1-**A,** Complainant's Cross

Motion for Summary Judgment. As such, Respondent's successive representation of two clients who were unrelated to the decedent and unqualified to administer the estate created unnecessary legal wrangling and potential injury to each client in addition to the estate, whom Respondent presumed to represent through the two women. For all the above reasons, Standard 4.52 applies to these instances of incompetent legal representation, and requires suspension as the appropriate sanction.

C. The Other Aggravating Factors Found by the Referee Further Argue for Suspension as the Appropriate Sanction.

In addition to Respondent's significant disciplinary history, the referee found and considered in aggravation of the rules violations Respondent's substantial experience in the practice of law, Respondent's pattern of misconduct herein, and Respondent's selfish or dishonest motive. (RR at 4.) It is not difficult to discern Respondent's motive in seeking to advocate Ms. Reed's interests in the matters after the child's grandmother, Ms. Robinson, terminated his services in all respects. The reason he would not get off the case is that he could not bring himself to abandon the fees to be gained through the potentially lucrative cause of action predicated on Mr. Swango's demise. The anticipated wrongful death action is what animated the establishment of paternity, the opening of Mr. Swango's estate, and the opening of the guardianship case. All of that was intended to legally process

the damages to be garnered through a wrongful death action, and to direct them to Mr. Swango's only intestate heir, the child. This explains why Respondent tried to substitute Ms. Reed as his law client after Ms. Robinson fired him: he didn't want to lose his chance at the big contingency fee. For this reason alone Respondent should be suspended for his conduct in the case -- because it was driven by the lure of money. Additionally, his 14 years practicing law, and the pattern of offenses found in this case likewise militate for suspension as the appropriate sanction.

D. The Recommended Discipline is Not Consistent with Relevant Case Authority.

Because Respondent's recommended discipline is inconsistent with the Standards and the relevant case law, this Court's approval of the recommended discipline would not reasonably serve society's interest in these proceedings.

In The Florida Bar v. Mastrilli, 614 So. 2d 1081 (Fla. 1993), a suspension of six (6) months was imposed against the attorney for naming his own client as a defendant in the same matter for which the client had hired the attorney. The lawyer undertook to represent two clients for injuries each sustained in a vehicular accident in which one was the driver. He then brought an action against the driver/client on behalf of the passenger/client. In imposing the suspension this Court specifically pointed to Standard 4.32 and its sanction of suspension.

In The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991), a sixty (00) day

suspension was imposed where the attorney accepted employment with a possible conflict of interest involved. The attorney, as Respondent here, failed to disclose the conflict to the client.

In The Florida Bar v. Dunagan, 565 So. 2d 1327 (Fla. 1990), this Court imposed a suspension of sixty (60) days upon an attorney involved in a conflict situation in which he represented clients at a loan closing while intending to deduct his past due legal fees from the proceeds.

None of the foregoing cases included a significant disciplinary history. In The Florida Bar v. Belleville, 591 So. 2d 170 (Fla. 1991), this Court held that a thirty (30) day suspension was appropriate where the attorney had engaged in conduct that merely lent the appearance of impropriety; i.e., representing adverse interests within a single real estate transaction, coupled with the respondent's prior disciplinary history. It is important to note that the conduct at issue in Belleville did not include a pattern of misconduct as shown by Respondent in the instant case.

Finally, in The Florida Bar v. Wilson, 714 So. 2d 381 (Fla. 1998), the attorney was found guilty of engaging in a conflict where he had previously represented a husband and wife, and then later represented the wife against the husband in a divorce action. In deciding upon the appropriate sanction this Court considered the lawyer's prior discipline in the federal bar. This Court specifically pointed to that cumulative misconduct in rejecting the referee's recommendation of

a ninety (90) day suspension and imposing a sanction of a one (1) year suspension. In doing so the Court noted that it will generally impose a greater sanction for cumulative misconduct than for an isolated incident of misconduct.

CONCLUSION

For all the foregoing reasons, the discipline recommended by the referee in this case should be disapproved, and Respondent should receive a sixty (60) day suspension and probation for one (1) year, the terms of which would require Respondent to schedule and complete the Bar's one-day Ethics School.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief has been furnished by Airborne Express to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, at 500 South Duval Street, Tallahassee, Florida 33399-1927; a true and correct copy by regular U.S. Mail to Jeffrey Evan Cosnow, Esq., Respondent, at 3450 East Lake Road, Suite 301, Palm Harbor, Florida 34685-2411; and a copy by regular U.S. Mail to John Anthony Boggs, Staff Counsel, The Florida Bar, at 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, all on this 24 day of March ,2000.

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I HEREBY CERTIFY that this Brief has been generated using 14 point Times New Roman font, in WordPerfect format, and that the accompanying diskette containing the Brief in electronic form has been scanned for computer viruses using Norton Virus Scan.

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