

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

**Supreme Court Case
No. SC04-1918**

Complainant,

v.

**The Florida Bar File
No. 2004-50,040(17E)**

RITA STEIN,

Respondent.

THE FLORIDA BAR'S INITIAL BRIEF

**ERIC MONTEL TURNER, #37567
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, Suite 900
Fort Lauderdale, FL 33309
(954) 772-2245**

**JOHN ANTHONY BOGGS, #253847
Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600**

**JOHN F. HARKNESS, JR., #123390
Executive Director
The Florida Bar
651 East Jefferson Street
Tallahassee, FL 32399-2300
(850) 561-5600**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	iii
PRELIMINARY STATEMENT.....	v
STATEMENT OF THE CASE AND FACTS.....	6
SUMMARY OF THE ARGUMENT	10
ARGUMENT.....	12
RESPONDENT'S CONDUCT IN ASSISTING A NONLAWYER COMMIT THE UNLICENSED PRACTICE OF LAW, FAILING TO ADEQUATELY SUPERVISE THE NONLAWYER, AND FAILING TO COMMUNICATE OR PERFORM ANY WORK ON HER CLIENT'S BEHALF WARRANTS A 90-DAY SUSPENSION	12
CONCLUSION.....	17
CERTIFICATE OF SERVICE	18
CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN	18
CERTIFICATE OF TYPE, SIZE AND STYLE.....	18

TABLE OF AUTHORITIES

Cases

<i>The Florida Bar v. Beach</i> , 675 So.2d 106 (Fla. 1996).....	13, 14, 15, 16
<i>The Florida Bar v. Grief</i> , 701 So.2d 555 (Fla. 1997).....	12
<i>The Florida Bar v. Lawless</i> , 640 So.2d 1098 (Fla. 1994).....	13, 14, 15
<i>The Florida Bar v. Lecznar</i> , 690 So.2d 1284 (Fla. 1997).....	12
<i>The Florida Bar v. Pahules</i> , 233 So.2d 130 (Fla. 1970).....	12
<i>The Florida Bar v. Rue</i> , 643 So.2d 1080 (Fla. 1994).....	12
<i>The Florida Bar v. Sweeney</i> , 730 So.2d 1269 (Fla. 1998).....	12
<i>The Florida Bar v. Vannier</i> , 498 So.2d 896 (Fla. 1986).....	12
<i>The Florida Bar v. Wilson</i> , 643 So.2d 1063 (Fla. 1994).....	12

Rules Regulating The Florida Bar

R. Regulating Fla. Bar 3-4.3	15
R. Regulating Fla. Bar 4-1.1	15
R. Regulating Fla. Bar 4-1.4(a)	15
R. Regulating Fla. Bar 4-1.4(b)	15
R. Regulating Fla. Bar 4-5.3	15
R. Regulating Fla. Bar 4-5.3(b)(2).....	15

R. Regulating Fla. Bar 4-5.4	15
R. Regulating Fla. Bar 4-5.5	15
R. Regulating Fla. Bar 4-5.5(b)	15
R. Regulating Fla. Bar 4-8.4(a)	15

Florida Standards for Imposing Lawyer Sanctions

The Florida Standards for Imposing Lawyer Sanctions Standard 7.0	16
The Florida Standards for Imposing Lawyer Sanctions Standard 7.2	16

PRELIMINARY STATEMENT

Throughout this Initial Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR ____ (indicating the referenced page number). The transcript of the Final Hearing held on December 23, 2004, will be designated as TT ____, (indicating the referenced page number). The Florida Bar will be referred to as “the Bar.” Rita Stein will be referred to as “respondent”.

STATEMENT OF THE CASE AND FACTS

In March 2003, Samuel Fields approached Robin Leitner, her husband, mother-in-law, and father-in-law at a restaurant (RR 2). Mr. Fields knew Mrs. Leitner's mother, Irene Captain, who passed away on February 26, 2003, and offered to probate the estate for Mrs. Leitner and her sister, Michelle List (RR 2). Mr. Fields stated he was an attorney (RR 2). Mr. Leitner inquired various times as to the cost of the probate and Mr. Fields stated it would depend (RR 2). Mrs. Leitner and Ms. List hired Mr. Fields to handle the probate (RR 2). Mr. Fields stated he would give Mrs. Leitner a special fee since he was a friend and neighbor to her mother-in-law and father-in-law (RR 2). When Mr. Fields was asked the amount of the fee, he stated the fee would be \$895 (RR 2).

Mr. Fields drafted a Petition for Administration and on April 18, 2003, filed the petition with the Clerk of Court in Palm Beach County (RR 2). On April 25, 2003, the Letters of Administration were issued and mailed to Mrs. Leitner (RR 2). In May 2003, Mrs. Leitner received a letter regarding the Letters of Administration from Mr. Fields and a bill on Elsen & Fields letterhead charging \$1,208.25, which was more than the agreed upon fee of \$895 (RR 2-3). Mr. Fields' letterhead listed New York and Florida Bars with his addresses in New York, New York, and Boca Raton, Florida (RR 3).

Mrs. Leitner was suspicious because the entire probate process took less than 6 weeks time (RR 3). Mrs. Leitner checked the New York and Florida Bars for a record of Samuel Fields and neither Bar had a record for Mr. Fields (RR 3). In fact, Mr. Fields was disbarred in New York in 1971 and there is no documentation he was ever

readmitted (RR 3). Mrs. Leitner then called the Clerk of Courts for Palm Beach County and they told her Mr. Fields was not the attorney of record, but rather respondent was the attorney of record (RR 3). No one ever informed Mrs. Leitner and Ms. List respondent would be the attorney of record before the petition was filed with the court (RR 3). In fact, when Mrs. Leitner and Ms. List signed the Petition for Administration, the law firm listed was Elsen & Fields and contained Mr. Fields address in Boca Raton, but a signature did not appear on the document (RR 3). Mr. Fields later signed respondent's name and placed her Florida Bar number on the petition (RR 3). Respondent admits that after Mr. Fields drafted the Petition for Administration and obtained the signatures of Mrs. Leitner and Ms. List as petitioners, she gave Mr. Fields permission to sign her name on the petition making her the attorney of record with the court (RR 3).

The clerk also told Mrs. Leitner the probate was not complete and the judge could revoke the Letters of Administration if the case was not completed (RR 3). Mrs. Leitner obtained respondent's telephone number in New York from the clerk (RR 3). When contacted by Mrs. Leitner, respondent stated she did not know Mrs. Leitner (RR 4). After Mrs. Leitner explained she was the attorney of record for her mother's probate matter, she stated it must be Sam (RR 4). Mrs. Leitner explained the incomplete probate and a verbal altercation ensued which resulted in respondent stating she was only hired to obtain the Letters of Administration and, if she was not paid, she would have the Letters of Administration of administration revoked (RR 4). Mrs. Leitner also asked respondent if Mr. Fields was an attorney and she stated he was an attorney (RR 4). Mrs. Leitner

then called Mr. Fields to ask if he was a member of The Florida Bar and he stated his associate was a member (RR 4). Respondent was removed as attorney of record and Mrs. Leitner and Ms. List were forced to hire new counsel to complete the probate of the estate (RR 4).

Prior to the filing of the petition, respondent never met or communicated with either Mrs. Leitner or Ms. List, she never discussed a fee or the parameters of the representation, she never executed a fee or retainer agreement, and she entered a notice of appearance on their behalf without their knowledge or first obtaining their consent (RR 4). As a matter of fact, the first communication respondent had with Mrs. Leitner was by telephone after Mrs. Leitner discovered respondent was the attorney of record, through her own investigation with the courts (RR 4).

Respondent permitted Samuel Fields, a disbarred New York attorney, to draft pleadings, meet with clients, and give legal advice with no supervision from her, thereby assisting him to engage in the unlicensed practice of law (RR 4). As a member of The Florida Bar, respondent knew or should have known if Mr. Fields was indeed a licensed attorney in New York, he could have been admitted to practice law in Florida by filing a *pro hac vice* motion instead of allowing Mr. Fields to sign her name and use her Florida Bar number as a conduit to commit the unlicensed practice of law (RR 4-5). Respondent stated she believed Mr. Fields was a licensed attorney in New York, but she failed to verify if Mr. Fields was indeed licensed to practice law in New York (RR 5). Furthermore, respondent allowed Mr. Fields to sign her name to court documents making

her the attorney of record for clients with which she never had contact (RR 5). Following the issuance of Letters of Administration, respondent failed to take any meaningful or significant action in the case, failed to file a notice of publication, and left the matter pending forcing Mrs. Leitner and Ms. List to hire new counsel (RR 5). Respondent provided no benefit to Mrs. Leitner or Ms. List by allowing Mr. Fields to “represent” them in the Florida probate proceedings (RR 5).

SUMMARY OF THE ARGUMENT

Respondent in this case assisted a nonlawyer in committing the unlicensed practice of law by allowing him to utilize her name along with her Florida Bar number on documents, which he submitted to the Palm Beach County Clerk of Courts. Respondent did not properly supervise the nonlawyer as she was in New York while he was in Florida filing documents with the court. Furthermore, respondent never met or communicated with the clients for which she was the attorney of record. In fact, the clients discovered respondent was the attorney of record only after they investigated the matter on their own. After the clients placed respondent on notice she was the attorney of record on their probate case and the case was not completed, she failed to take any meaningful or significant action on behalf of her clients. Respondent forced her clients to hire new counsel in order to complete the probate.

This Court has held 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 sufficiently deter other attorneys from similar misconduct. Furthermore, the discipline must have a reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The recommendation by the referee in this case does not adhere to the purposes of lawyer discipline because it is not fair to society and it would not deter attorneys from engaging in similar conduct. Moreover, existing case law dictates that an attorney who assists a nonlawyer commit the unlicensed practice of law, and fails to supervise the nonlawyer adequately, receive a 90-day suspension. Given respondent's

conduct, the discipline given in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee in this case should have recommended a 90-day suspension.

ARGUMENT

I. RESPONDENT'S CONDUCT IN ASSISTING A NONLAWYER COMMIT THE UNLICENSED PRACTICE OF LAW, FAILING TO ADEQUATELY SUPERVISE THE NONLAWYER, AND FAILING TO COMMUNICATE OR PERFORM ANY WORK ON HER CLIENT'S BEHALF WARRANTS A 90-DAY SUSPENSION.

While a referee's findings of fact should be upheld unless clearly erroneous, *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986), this Court is not bound by the referee's recommendations in determining the appropriate level of discipline. *The Florida Bar v. Rue*, 643 So.2d 1080 (Fla. 1994). Furthermore, this Court has stated the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997); *The Florida Bar v. Wilson*, 643 So.2d 1063 (Fla. 1994). In *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970), this Court held three purposes must be held in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be serve enough to deter others attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Sweeney*, 730 So.2d 1269 (Fla. 1998); *The Florida Bar v. Lecznar*, 690 So.2d 1284 (Fla. 1997). In the instant case, the referee's recommendation of 1 year of probation with early termination

at 6 months if respondent passes the ethics portion of The Florida Bar Exam is not supported by existing case or the standards for imposing lawyer sanctions and does not conform to the purposes of lawyer discipline. The proper discipline for respondent's misconduct is a 90-day suspension and not the 1-year, or possibly 6 months, of probation recommended by the referee.

This Court has held a 90-day suspension is the appropriate discipline when an attorney assists a nonlawyer with the unlicensed practice of law and fails to supervise the nonlawyer properly. *The Florida Bar v. Beach*, 675 So.2d 106 (Fla. 1996); *The Florida Bar v. Lawless*, 640 So.2d 1098 (Fla. 1994). In *The Florida Bar v. Beach*, 675 So.2d 106 (Fla. 1996), an attorney worked as the supervising attorney for a paralegal firm. The paralegals paid the attorney a flat fee for reviewing pleadings and other documents prepared by the paralegals and offering a 30-minute consultation to the paralegal firm's clients. The referee found the attorney guilty of sharing a fee with a nonlawyer and assisting a person who is not a member of the Bar to perform activities that constitute the practice of law. The referee recommended a 3-month suspension from the practice of law given the attorney's misconduct and his prior instance of discipline, which was a 28-day suspension. This Court held the recommendation of a 90-day suspension adequately fulfilled the 3 purposes of lawyer discipline.

An attorney represented a Canadian couple attempting to obtain permanent residency status in *The Florida Bar v. Lawless*, 640 So.2d 1098 (Fla. 1994). The attorney charged the couple a flat fee of \$5,000. Later, the attorney had a meeting with

the couple and a paralegal who did not work in the attorney's office, but the attorney had worked with in the past. At the meeting, the attorney advised the couple he would supervise the case, but they were to contact the paralegal if they had questions. The couple paid the paralegal a total of \$12,546. However, the paralegal never completed any work on their case. The attorney attempted to rectify the problem by submitting visa applications for the couple, but they eventually hired different counsel. The referee found the attorney failed to supervise the paralegal's handling of the case adequately and recommended a 90-day suspension followed by 3 years probation. The attorney had prior discipline of a private reprimand and 2 public reprimands. This Court held the 90-day suspension followed by 3 years probation served the purposes of lawyer discipline.

The circumstances in *Beach*, *Lawless*, and the case at bar are slightly different. However, the cases are still analogous, thus, the discipline in this case should mirror the discipline in *Beach* and *Lawless*. The respondent in *Lawless* had prior discipline where this respondent does not, but the respondent in *Lawless* attempted to rectify the problem encountered by the clients whereas respondent in the instant case did not attempt to remedy her clients' problems. In fact, respondent in this case exacerbated the problem by engaging in a verbal altercation with her client and attempting to charge them more money in order to complete the probate. This respondent was found guilty of violating 8 of the Rules Regulating The Florida Bar¹ where the respondent in *Lawless* was found guilty of

¹ Respondent was found guilty of violating R. Regulating Fla. Bar 3-4.3, 4-1.1, 4-1.3, 4-1.4(a), 4-1.4(b), 4-5.3(b)(2), 4-5.3(b)(3), and 4-5.5(b).

violating 3 of the rules.² The discipline in this case should be similar to the discipline in *Lawless* even after considering the differences because although the respondent in *Lawless* had prior discipline and respondent in this case does not, respondent's misconduct in the instant case was more egregious than the respondent's misconduct in *Lawless*.

Once more, the referee in this case found respondent guilty of violating 8 of the Rules Regulating The Florida Bar³ unlike the respondent in *Beach* who was found guilty of violating 2 of the Rules Regulating The Florida Bar.⁴ The respondent in *Beach* had a prior disciplinary suspension where this respondent does not have any prior discipline. This Court held in *Beach* the respondent did not have an attorney-client relationship with the client because the client specifically sought assistance from a paralegal instead of an attorney and the contract clearly stated she was not represented by the attorney. However, the clients in this case believed they hired the services of an attorney and respondent assisted in perpetuating that belief by allowing a nonlawyer to utilize her name when filing documents with the court. Furthermore, respondent in this case was the attorney of record with the court so there was no question respondent was the clients'

²The attorney in *Lawless* was found guilty of violating R. Regulating Fla. Bar 4-1.3, 4-5.3, and 4-8.4(a).

³See Footnote 1.

⁴The attorney in *Beach* was found guilty of violating R. Regulating Fla. Bar 4-5.4 and 4-5.5.

attorney even though they were not aware respondent was the attorney of record. The differences in *Beach* and the instant case regarding the number of violations, the existence of an attorney-client relationship, and prior discipline balance, therefore, the discipline in this case should parallel the discipline in *Beach*.

In addition, The Florida Standards for Imposing Lawyer Sanctions 7.0 deals with the proper sanctions for an attorney involved in the unlicensed practice of law. Here, respondent was assisting a nonlawyer commit the unlicensed practice of law by allowing the nonlawyer to utilize her name and Florida Bar number in order to submit documents to the court. Moreover, Standard 7.2 suggests suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

When considering the discipline delineated in The Florida Standards for Imposing Lawyer Sanctions, any applicable mitigating or aggravating factor must be considered. The referee in the instant case found in mitigation the absence of a disciplinary record, character or reputation, and remorse. In aggravation, the referee found the vulnerability of victim and respondent's substantial experience in the practice of law. The mitigating and aggravating factors in this case balance each other. Therefore, consideration of the mitigating and aggravating factors in this case does not warrant a deviation from the recommended discipline in The Florida Standards for Imposing Lawyer Sanctions or existing case law, which is a 90-day suspension.

CONCLUSION

This Court should not approve the referee's report in this case and respondent should be suspended for a period of 90 days because the referee's recommendation as to discipline is inconsistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions.

Respectfully submitted,

ERIC MONTEL TURNER, #37567
Bar Counsel
The Florida Bar
Cypress Financial Center
5900 N. Andrews Avenue, Suite 900
Ft. Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY true and correct copies of The Florida Bar's Initial Brief have been furnished by regular U.S. mail to Charles Wender, Counsel for Respondent, 190 West Palmetto Park Road, Boca Raton, Florida 33432 and to Staff Counsel, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300 on this ____ day of _____, 2005.

ERIC MONTEL TURNER

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

Undersigned counsel hereby certifies The Florida Bar's Initial Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

ERIC MONTEL TURNER