IN THE SUPREME COURT OF FLORIDA
(Before A Referee)

THE FLORIDA BAR,

Complainant,

v.

JUSSI KUSTAA KIVISTO,

Respondent.
_____/

Supreme Court Case No. SC07-2281

The Florida Bar File No. 2006-50,163(15E)

REPORT OF THE REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being appointed as Referee to conduct disciplinary proceedings in this case, according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On December 6, 2007, The Florida Bar filed its complaint against respondent in these proceedings. I (Leroy H. Moe, Circuit Judge, Seventeenth Circuit) was appointed to preside as Referee, by the Chief Judge of the Seventeenth Judicial Circuit. The final hearing was scheduled for November 10, 2008. All pleadings, responses, orders, exhibits received in evidence, transcripts of proceedings and this Report constitute the entire record in this case, and are being forwarded to the Supreme Court of Florida.

During the course of these proceedings, the respondent appeared pro se. An Order for Default Judgment against Respondent was entered on October 30th, 2008, and his pleadings were stricken for the reasons set forth in that order. Michael David Soifer, Esq., represented The Florida Bar.

II. FINDINGS OF FACT

A. Jurisdictional Statement.

Respondent is, and at all times mentioned during this proceeding was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case.

As stated above, a default judgment was entered against respondent and his pleadings were ordered stricken. Respondent's conduct resulting in the default judgment is more fully discussed at length in that ten page Order, which is incorporated herein by and for reference. The Order specifically found that respondent has shown, and continues to show, a willful, deliberate, bad faith and contumacious disregard of and for Orders of the court and Referee. The acts and course of conduct he has perpetrated on the court were solely designed to delay, confuse, and somehow bring to a halt this disciplinary proceeding. They include lying to the Referee in open court, frivolous objections to discovery, incomplete responses to ordered discovery requests, bad faith responses to requests for admissions, repeated willful failures to

appear for his deposition, the filing of numerous obviously frivolous pleadings, including a Federal lawsuit against bar counsel and repeatedly ignoring, disregarding and disobeying routine, yet valid and important Orders of the Court. The evidence is clear and convincing that this somewhat bizarre, but nonetheless defiant and inappropriate behavior and course of conduct were planned well in advance, premeditated and carried out with cunning, stealth and deliberate malice aforethought.

Because of the default being entered, all allegations in the complaint are deemed admitted, and, in pertinent part, are as follows:

AS TO COUNTS I, II AND III

1. Respondent is, and at all times material to this action was, a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. Fifteenth Judicial Circuit Grievance Committee "E," at a duly constituted meeting and by majority vote of the eligible members present, found probable cause for respondent's violation of the Rules Regulating The Florida Bar, as set forth herein. The grievance committee chair at the time that probable cause was found has reviewed and approved the instant Complaint.

3. This matter concerns Kivisto's actions with respect to the Estate of Mirjam Aho and the Estate of Milja Johnson.

4. Mirjam Aho died at the Finnish-American Rest Home in Lake Worth, Florida at the age of 97 on or about June 17, 2001, and respondent was retained to represent Toini Wistbacka, the alternate personal representative named in Aho's will.

5. On or about July 10, 2001, Aho's will was admitted to probate in the Circuit Court for the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. Wistbacka was appointed as the personal representative, and Letters of Administration were issued.

6. The Inventory, executed on or about November 16, 2001, valued the Aho Estate at about $149,926.70.

7. The sole beneficiary of Aho's Estate and the named Personal Representative in Aho's will was Milja Johnson, an incapacitated person residing in the state of New York.

8. On or about March 16, 2000, the Jewish Association for Services for the Aged (hereinafter "JASA") was appointed as the Guardian for the Person and Property of Johnson. JASA is a not-for-profit agency, funded by New York City, to provide guardianship services to elderly and incapacitated persons residing in New York City.

9. JASA retained the services of Susan Robbins, an attorney admitted to practice in the state of New York with the firm of Miller Canfield, for purposes of matters related to Johnson.

10. After learning that Johnson was the beneficiary of the Aho estate, Robbins contacted Kivisto and informed him that she was counsel to JASA as Johnson's guardian, and inquired about the assets in the Aho estate.

11. Kivisto did not inform Robbins as to the assets at that time.

12. In a letter dated May 24, 2002, from Robbins to Kivisto, which was attached to the complaint and incorporated therein as Exhibit A, Robbins confirmed that JASA was the guardian, stated that Kivisto had refused to supply information on the assets, and further stated that no information or court papers had been received on the Aho Estate.

13. Kivisto questioned the authority of JASA to act on behalf of Johnson.

14. Various correspondence and conversations ensued between Kivisto and Robbins.

15. Robbins made repeated demands for respondent to turn over the assets of the Aho estate to JASA as Johnson's guardian.

16. Kivisto sought to intervene in Johnson's New York proceeding on behalf of the Aho Estate, and further sought permission to appear pro hac vice in the New York court.

17. Respondent's motions were denied on or about February 4, 2003. A copy of the final disposition from the Supreme Court of the State of New York – New York County was attached to the complaint and incorporated therein as Exhibit B.

18. On or about May 19, 2003, respondent sent Robbins documents to settle the Aho Estate.

19. At that time, respondent sought fees of about $31,000.00 (approximately 20% of the value of the estate) and Personal Representative fees of $7,500.00.

20. The Aho Estate consisted of marshalling about 5 bank accounts and paying one beneficiary.

21. Florida Statute 733.6171 sets forth compensation for ordinary services of attorneys in formal estate administration and for the size of the Aho Estate, compensation of $4,500.00 would be presumed reasonable under the statute for ordinary services.

22. Robbins regarded the claim of about $31,000.00 in attorney fees as unconscionable for an estate valued at approximately $149,926.70.

23. The Associate Justice in Johnson's New York guardianship proceedings attempted to facilitate a settlement of the fee issue.

24. By letter dated May 30, 2003, to Robbins and Kivisto, the Honorable Phyllis Gangel-Jacob recommended that Kivisto accept $7,500.00 for his fee and that the personal representative accept $5,000.00 for her fee. A copy of said letter was attached to the complaint and incorporated therein as Exhibit C.

25. The Honorable Phyllis Gangel-Jacob further recommended that if Kivisto or the Personal Representative wanted to pursue a judicial determination of the fees,

then the amount of their claims could be held in escrow by Kivisto and the balance of the estate of approximately $115,000.00 could be immediately transferred to JASA.

26. No assets were transferred by Kivisto, and JASA retained Florida counsel, who filed an appearance in the Aho Estate on about August 4, 2003.

27. At some point in 2003, Robbins was informed by Wistbacka that back in November 2001, Kivisto had already been paid $10,000.00 in fees from the Aho Estate, which payment had not been disclosed by Kivisto during settlement negotiations.

28. Thereafter, various pleadings and motions were filed in the Aho estate.

29. In about November 2003, the parties reached a settlement agreement in principle, where respondent would receive $10,000.00 in legal fees. This agreement was set forth in a letter attached to the complaint and incorporated therein as Exhibit D.

30. This settlement would have resulted in about $131,950.43 being transferred to JASA as guardian for Johnson as set forth in Kivisto's letter dated December 8, 2003, to Florida counsel for JASA. A copy of this letter was attached to the complaint and incorporated therein as Exhibit E.

31. Prior to the settlement being consummated and while the Aho estate remained opened and undistributed to the beneficiary, Johnson died on or about January 4, 2004 at the age of 99.

32. Johnson, a resident of New York, died without a will.

33. Respondent, on or about, February 25, 2004, filed a Petition for Administration of Johnson's Estate in the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, which petition listed Johnson's heirs as 2 nephews and 2 nieces in the country of Finland.

34. Johnson's only connection to the state of Florida was the inheritance she was to receive from the Aho Estate and that inheritance was Johnson's sole asset for purposes of probate.

35. On April 6, 2004, respondent was appointed as the personal representative of Johnson's estate.

36. This appointment put respondent in the position of having to account to himself (as the Personal Representative for Johnson) for his fees as the attorney for the personal representative in the Aho Estate, as well as for his fees in the Johnson Estate.

37. On or about April 16, 2004, Florida counsel for JASA filed a motion to compel distribution of the assets in the Aho Estate. A copy of this motion was attached to the complaint and incorporated therein as Exhibit F.

38. The motion to compel distribution was eventually settled, with respondent agreeing to accept $10,500.00 in attorneys fees for his work on the Aho estate.

39. Attached to the complaint and incorporated therein as Exhibit G is a statement of services, showing that respondent claimed he expended $33,255.00 in fees on the Aho Estate, based on 133.3 hours at $250.00 per hour, but that he was agreeing to accept $10,500.00.

40. As part of the Aho Estate settlement, it was agreed that $7,500.00 would be paid to Wistbacka (Aho's Personal Representative), $10,000.00 would be paid to Miller Canfield (Robbins law firm), and that $14,385.00 would be paid to Hodgson Russ (JASA's Florida counsel).

41. However, in addition to the $10,500.00 in attorneys fees for the Aho estate, respondent took $48,715.00 in attorney fees for his work on the Johnson estate plus $3,900.00 for personal representative fees in the Johnson estate.

42. Respondent's statement of services as an attorney for the Johnson estate was attached to the complaint and incorporated therein as Exhibit H, and his statement of services as the Personal Representative for the Johnson estate was attached to the complaint as Exhibit I.

43. A shown by Exhibit H, many of the charges on the Johnson statement did not relate to the Johnson estate but were, in truth and in fact, related to the Aho estate.

44. Moreover, many of the claimed charges for attorneys fees on both estates were unnecessary, overly inflated, and benefited no one except respondent.

45. Out of total assets of approximately $149,926.70, respondent received about $63,115.00 in fees.

46. The Johnson Estate was closed on waivers from the Finish beneficiaries.

AS TO ALL COUNTS

When first appointed, and since appointed, your Referee has read every pleading in this case, with every attachment, nearly every pleading in the Aho Estate and Johnson Estate, the extremely comprehensive letters written by the Respondent, including the ones in his defense, every applicable statute, the Referee Manual, the information in Lawyers Behaving Badly, the orders of the Florida Supreme Court, the transcripts of the hearings and any and all other material thought to be legally relevant.

There is an amazingly comprehensive and complete paper trail in this case. It appears as though very little needs to be added by way of evidence, except perhaps some "expert" opinions.

When I first received and read the material submitted, my first impression was, in effect, well, this is a fee dispute case. I imagine the Respondent will get a lawyer to represent him, cooperate and comply with all pre-trial discovery, make a deal or go to trial, get the matter behind him, and we will all get on with our lives.

In short, it appeared to be a fairly debatable, defensible case. Even if found guilty, my initial impression was to impose sanctions along the lines of some

restitution, maybe some suspension or probation, perhaps some education courses in finance and ethics and maybe a reprimand.

I must admit it is still a mystery to me why the Respondent chose to proceed as he did. (The Florida Supreme Court has the record before it, and doesn't need a recital of the proceedings in this Order).

The problem I am faced with is: THE RESPONDENT IS SEEKING AFFIRMATIVE RELIEF IN OTHER COURTS OF LAW, WHILE HE REFUSES TO COMPLY WITH OR HAVE RESPECT FOR THE BASIC RULES AND LAWS OF THIS COURT IN THIS PROCEEDING.

Considering the respondents education, intelligence, energy and experience, there is no excuse for his actions in this case. In the last analysis, he caused his own problems in this case, and the fact that he thinks he isn't very popular in the legal community, or that other lawyers are out to get him because he is Finnish or New York Judges are unethical and biased doesn't excuse his own actions.

Again, a default having been entered, by operation of law the Respondent is found guilty of the following allegations. It should be noted, that even if a default had not been entered, the evidence on record now shows clearly and convincingly that the Respondent did commit the violations with which he stands accused.

AS TO COUNT I

47. By charging over $30,000.00 in fees in the Aho estate, and by taking $48,715.00 in attorneys fees for the Johnson estate plus $10,500.00 in the Aho estate in the manner set forth above, respondent violated R. Regulating Fla. Bar 4-1.5(a) [An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited or clearly excessive fee…].

AS TO COUNT II

48. Respondent engaged in a dishonest course of conduct that was designed to benefit himself and maximize his fees while at the same time, minimizing the ability of any party, to question the amounts that he claimed.

49. By taking about $63,115.00 in fees out of total assets of approximately $149,926.70 in the manner set forth above, respondent violated R. Regulating Fla. Bar 3-4.3 [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise,…may constitute a cause for discipline] and 4-8.4(c) [A lawyer shall not: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation…].

AS TO COUNT III

50. By delaying any distribution of the Aho estate and claiming and collecting fees in the Aho and Johnson estates in the manner set forth above, respondent violated R. Regulating Fla. Bar 4-8.4(d) [A lawyer shall not: (d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice…].

III. RECOMMENDATION AS TO GUILT

In determining what sanction to recommend, your Referee could not help but think of the standard instruction given in all jury trials, which (paraphrased somewhat), tells the jurors that feelings and emotions such as bias, prejudice or sympathy, for or against either party, should not be considered in reaching your verdict. Your verdict must be determined based on the evidence and the law.

Therefore, even though a default was entered, your Referee has considered only the record evidence and the law, including the appropriate sentencing factors, and omitted from consideration any emotional factors in determining the appropriate sanction.

I say that so those involved know your Referee takes no delight in recommending that a lawyer with otherwise such potential, experience, education and capability, when channeled with the right direction, be banned

from his chosen profession for at least five years. However, the whole episode reminds your Referee of something John F. Kennedy said in his inaugural address:

THOSE WHO FOOLISHLY SEEK POWER AND GLORY, BY RIDING THE BACK OF THE TIGER, FREQUENTLY END UP INSIDE.

That having been said:

As to Count I, and pursuant to the default Judgment, I recommend respondent be found guilty of violating R. Regulating Fla R. Regulating Fla. Bar 4-1.5(a).

As to Count II, and pursuant to the default Judgment, I recommend respondent be found guilty of violating R. Regulating Fla. Bar 3-4.3 and 4-8.4(c).

As to Count III, and pursuant to the default Judgment, I recommend respondent be found guilty of violating R. Regulating Fla. Bar 4-8.4(d).

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend respondent be found guilty of misconduct justifying disciplinary measures and that he be disciplined by:

A. Disbarment

B. Respondent shall pay The Florida Bar's costs in these proceedings.

The Aho Estate was a simple estate consisting of marshalling 5 bank accounts with assets totaling approximately $149,926.70, and paying one beneficiary, Mirjam Johnson, an elderly and incapacitated woman located in New York. The facts of this case demonstrate that respondent plundered the estate. He received approx $63,115.00 of the estate assets. His time sheets for the two estates are replete with excessive, unnecessary and improper charges which were designed to maximize his fee and served no benefit to the beneficiaries or anyone other than himself. Respondent caused delay in the distribution of the Aho Estate solely in an effort to obtain the excessive fee. In the course of pursuing the fees, respondent sought to challenge JASA's legitimacy as Johnson's guardian despite a New York Court order confirming same, sought to intervene in the New York Guardianship without basis, and filed a judicial grievance against New York Justice Phyllis Gangel-Jacob after receiving an unsatisfactory result of his fee claim at a settlement conference. Included in respondent's statements of services for the two estates are excessive time and charges for unnecessary research, and pleadings, duplicative entries, and improper charges for time spent attending a seminar, filing the judicial grievance against Justice Gangel-Jacob and responding to the bar complaint. Many of the charges on his billing statement for the Johnson Estate pertained to the Aho Estate, for which he had agreed to accept $10,500 as payment of his fee. He engaged in a dishonest course of conduct that was designed to benefit himself and maximize his fees while at the same time,

minimizing the ability of any party to question the amounts claimed.

In arriving at the aforementioned recommended sanction of disbarment, both Florida Standards for Imposing Lawyer Sanctions (Florida Standards) and pertinent case law have been examined. Standard 7.0 speaks to the Violations of Other Duties Owed as a Professional, including unreasonable or improper fees. I find Standard 7.1 applicable. It provides that disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another and causes serious or potential serious injury to a client, the public or the legal system.

Case law also supports disbarment. In The Florida Bar v. Della Donna**,** 583 So2d 307 (1991), the lawyer was disbarred for engaging in misconduct where he blocked the release of funds to estate beneficiaries, demanded payment of an exorbitant fee, engaged in conduct for personal and financial self-aggrandizement and charged clearly excessive fees. As in the instant case, the lawyer in Della Donna improperly refused to make distribution of the estate in order to generate more fees for himself. As in Della Donna, I find this respondent's conduct was motivated by personal and financial self gain and aggrandizement and that he acted in complete derogation of his ethical and fiduciary responsibilities to unjustly enrich himself financially. Mr. Kivisto's conduct caused extensive delay, damage and expense to the Estate, and his fee was clearly excessive as well as improper by the unethical manner

in which he extracted the money.

I also find The Florida Bar v. McKenzie, 581 So2d 53 (Fla 1991) applicable. In that case disbarment was ordered based on excessive fee and competency rule violations. In ordering the disbarment, the Court noted the attorney's total conduct in the incident including prior misconduct and the submission of false testimony to the referee. Although Mr. Kivisto has no prior disciplinary history, his misconduct is more egregious than that found in McKenzie because his conduct was not a result of a lack of competence or failure to properly investigate the assets of the estate as occurred in McKenzie. Rather, Mr. Kivisto's conduct was intentional and dishonest and prejudicial to the administration of justice. His actions with the estate were designed to maximize his fees, and were not for the benefit of the beneficiaries, but for his own self interest. Further, Mr. Kivisto's conduct during the disciplinary process was more egregious than McKenzie's submission of false testimony. As more fully discussed in the order for Default Judgment, Mr. Kivisto not only lied to the referee, but he refused to properly participate and cooperate in the disciplinary process. See also The Florida Bar v. Kinner, 469 So2d 131 (Fla. 1985), a case involving an excessive or illegal fee, where the attorney was disbarred for engaging in dishonesty, and conduct adversely reflecting on fitness to practice law.

With respect to aggravation and mitigation as set forth in the Florida Standards, I find the following factors to be applicable:

As to aggravation pursuant to Section 9.2 of the Florida Standards, I find there is dishonest or selfish motive [9.22(b)]; a pattern of misconduct [9.22(c)]; multiple offenses [9.22(d)]; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency [9.22(e)]; submission of false evidence, false statements or other deceptive practices during the disciplinary process [9.22(f)]; refusal to acknowledge wrongful nature of conduct [9.22g]; vulnerability of victim [9.22(h)]; and substantial experience in the practice of law [9.22i].

As to mitigation pursuant to Section to 9.3 of the Florida Standards, I find respondent has an absence of a disciplinary record [9.32(a)]. However, this factor is not sufficient to depart from my recommendation of disbarment.

I find respondent's bad faith obstruction of the disciplinary proceeding a very serious and substantial aggravating factor. The Supreme Court of Florida has held that a lawyer's failure to participate in the disciplinary process calls into serious question a lawyer's fitness to practice law. The Florida Bar v. Bartlett, 509 So.2d 287 (Fla. 1987). This respondent exhibited a course of conduct in the disciplinary proceedings which indicates he has little regard for the disciplinary system. The Florida Bar v. Turner, 457 So2d 474 (Fla 1984). In Turner, a disbarment was ordered after Mr. Turner's pleadings were stricken and a default judgment on the issue of guilt was entered. See also The Florida Bar v. Kaufman, 684 So.2d 806 (Fla. 1996).

The Supreme Court of Florida set forth the purposes of attorney discipline in The Florida Bar v. Pahules, 233 So.2d 130,132 (Fla. 1992); attorney discipline must protect the public from unethical conduct and have a deterrent effect while still being fair to respondents. A disbarment is necessary to serve to protect the public and have a deterrent effect on other attorneys who would engage in a similar type of conduct. It is a fair sanction for respondent's egregious misconduct in the underlying matter and through the disciplinary process.

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS

Prior to recommending discipline pursuant to Rule 3-7.6(m)(l)(D), I considered the following:

A. Personal History of Respondent

Age: 58

Date Admitted to The Florida Bar: May 26, 1983

B. Aggravating Factors:

9.22(b) dishonest or selfish motive;

9.22(c) a pattern of misconduct;

9.22(d) multiple offenses;

9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

9.22(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;

9.22(g) refusal to acknowledge wrongful nature of conduct;

9.22(h) vulnerability of victim;

9.22(i) substantial experience in the practice of law;

C. Mitigating Factors:

9.32(a) absence of prior disciplinary record.

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

Below is an itemized list of the expenses incurred in the above styled case.

A.	Grievance Committee Level Costs:		
	1.	Court Reporter Costs	$ 351.80
	2.	Bar Counsel Travel Costs	$ - 0 -
B.	Referee Level Costs:		
	1.	Court Reporter Costs	$ 1,970.25
	2.	Bar Counsel Travel Costs	$ 313.19
C.	Administrative Fee		$ 1,250.00
D.	Miscellaneous Costs:		
	1.	Investigator Costs	$ 475.92
	2.	Expert Witness	$ 1,700.00

3.	Auditor Cost	$ -0-
	TOTAL ITEMIZED COSTS:	$ 6,061.16

It is apparent that other costs have or may be incurred. It is recommended that such costs be charged to respondent and interest at the statutory rate shall accrue and should such cost judgment not be satisfied within 30 days of said judgment becoming final, respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

Dated this _____day of _____, 2008.

_____
Honorable Leroy H. Moe, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original of the foregoing Report of The Referee has been mailed to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and copies were mailed by regular mail to the following: Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; Michael David Soifer, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 900, Fort Lauderdale, Florida 33309-2366; and Jussi Kustaa Kivisto, respondent, 1010 10th Avenue North, #2, Lake Worth, Florida 33460, on this _____day of _____, 2008.

_____
Honorable Leroy H. Moe, Referee