

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD STUART SHANKMAN

Respondent.

CASE NO.: SC08-1107

TFB No.: 2007-51,241(15G)

THE FLORIDA BAR'S CROSS REPLY BRIEF

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ARGUMENT

I. THE REFEREE ERRED IN FINDING RESPONDENT NOT GUILTY OF VIOLATING RULE 4-8.4(c).

The Referee found that, because there was no evidence that Respondent intended to deceive his client, he was not guilty of violating Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). In order to establish a violation of Rule 4-8.4(c), however, it is not necessary to prove that Respondent intended to deceive his client.

Respondent cites *Fla. Bar v. Neu*, 597 So. 2d 266 (Fla. 1992) to support his assertion that a violation of Rule 4-8.4(c) requires proof of intent. The Bar does not disagree that intent is a required element in order to find a violation of Rule 4-8.4(c). However, this Court has held that, in order to satisfy the element of intent, it must only be shown that the conduct was deliberate or knowing. *Fla. Bar v. Fredericks*, 731 So. 2d 1249, 1252 (Fla. 1999). As this Court stated in *Fla. Bar v. Riggs*, 944 So. 2d 167 (Fla. 2006), "the motive behind the attorney's action was not the determinative factor. Rather, the issue was whether the attorney deliberately or knowingly engaged in the activity in question." *Id.* at 171, citing *Fla. Bar v. Fredericks*. Respondent's misconduct in this case was knowing and deliberate.

Respondent cites the federal Magistrate's Report and Recommendation to

support his argument that he did not act intentionally to deceive Ms. Pippin.

Notwithstanding Respondent's repeated claims that he was "unduly prejudiced" by the Referee's taking judicial notice of the Report and Recommendation, he now attempts to use the Report when he believes it serves his interests. In her Report, the Magistrate found insufficient evidence to support a finding that Respondent fraudulently induced Ms. Pippin to sign the Gary fee agreement. *See* Report, at p. 31. The Magistrate's findings regarding fraudulent inducement are not determinative of whether Respondent violated Rule 4-8.4(c).

Apparently Respondent now wants the Court to consider the Report and Order that he tried so strenuously to keep out of the proceedings before the Referee. Although the Referee indicated in his Report that he did not rely on the Report and Order that were judicially noticed, both the Report and Order support a finding that Respondent violated Rule 4-8.4(c). For example, Magistrate Jenkins found that Respondent made "emphatic and misleading assurances" to his client. Report, p. 49. And Judge Kovachevich found that: "Richard Shankman's conduct in this case, when held up to scrutiny, shows a serious abuse of the trust upon which Plaintiff relied, and a lack of respect for the truth. Counsel was willing to say whatever was convenient to convince the vulnerable Plaintiff to approve his self-serving conduct." Order, p. 4.

Contrary to Respondent's assertion, it is not necessary that Respondent have made an untrue statement of material fact in order to be found guilty of violating Rule 4-8.4(c). The Rule covers any conduct involving dishonesty, fraud, deceit, or misrepresentation. Respondent violated Rule 4-8.4(c) by his intentional course of conduct throughout the representation. He deliberately kept his client in the dark while pursuing his own personal agenda for the case. He knowingly omitted to explain to Ms. Pippin the risks of discharging a series of law firms. Respondent knowingly induced Ms. Pippin to fire these firms by assuring her each time that she would not owe any fees to discharged counsel. Respondent admits he told his client not to worry because he would pay any attorney's fees out of his fees (TR4 446), and she relied on his representations. Despite his prior representations, Respondent intentionally pursued a fee claim against Ms. Pippin that, if successful, would have left her with a 15 percent recovery. These acts and omissions were knowing and deliberate. The Referee erred in finding that Respondent did not have the intent to deceive his client and thus did not violate Rule 4-8.4(c).

II. THE RECORD EVIDENCE SUPPORTS THE FINDING OF ADDITIONAL AGGRAVATING FACTORS.

The Florida Bar has already cited specific record evidence supporting each of the requested aggravating factors in its Answer Brief and Initial Brief on Cross-

Appeal. The evidence supports a finding that Respondent acted with a selfish motive, engaged in a pattern of misconduct, took advantage of a vulnerable client, refused to acknowledge the wrongfulness of his conduct, and caused actual harm. Respondent's response to this evidence is a general claim that he was only acting at the direction of his client and was forced to fire every co-counsel firm that disagreed with him because they refused to pursue his client's goal of stopping distribution of the tapes.

Selfish Motive: Respondent disputes that he put his own interests before those of his client. The Referee found otherwise in concluding that Respondent violated Rule 4-1.7(b). RR, p. 6. Respondent argues he was only attempting to achieve his client's goal of stopping distribution of the tapes and that the defendants never made a settlement offer. The evidence shows that while Ms. Pippin wanted to stop the distribution of the tapes, she also wanted the case to settle. TR1 66-67; TR2 112; TR4 431. Respondent consistently ignores the fact that a settlement agreement could have included the stoppage of distribution, and that this case was ultimately settled after Ms. Pippin fired Respondent.

Respondent disregarded the best interests of his client and insisted on pursuing his own selfish motive of taking the case to trial and making millions of dollars. Respondent actively discouraged co-counsel's efforts to pursue settlement

and fired co-counsel before they could settle the case. TR4 414; TR3 311, 329. Respondent did not even discuss with Ms. Pippin the value of her case. He stated that the only way to find out what the case was worth was to try it. TR7 756-58. Respondent insisted on pursuing an injunction and failed to recognize the disadvantages of this strategy. TR3 305-06; TR4 405-06. After Ms. Pippin finally discharged him, Respondent filed a charging lien against her for 45 percent of her recovery, even though she had already paid 40 percent of her recovery to other attorneys. TR4 441. Ms. Pippin would not have been in this situation (protracted and highly disputed fee litigation against Respondent) if not for Respondent's misconduct in firing a series of law firms.

Pattern of Misconduct: Respondent denies engaging in a pattern of misconduct. He claims he explained *quantum meruit* to the Pippins each time a law firm was fired, and that his promise to pay the fees of discharged counsel out of his fees ended when Ms. Pippin discharged him. The evidence shows otherwise. Each time a law firm was fired, Respondent failed to explain the risks to his client. Ms. Pippin and her step-father were not made to understand that Ms. Pippin's 60 percent recovery could be subject to the fee claims of discharged counsel, including Respondent's fee claim, in the event he was no longer her attorney at the time of settlement. TR1 71-73; TR2 191. Respondent also denies

that his fee percentage increased with each new fee agreement, and states that it decreased when the Solomon Group was retained. The record shows that the Solomon firm never represented Ms. Pippin. TR7 761. Ms. Pippin's case was resolved by Art Tifford after she discharged Respondent. TR1 68.

Respondent's misconduct was not aberrational or a "single, continuing series of closely related events over a short period of time." *See Fla. Bar v. Ticktin*, 14 So. 3d 928, 937 (Fla. 2009). Rather, he engaged in a pattern of misconduct extending over a period of nearly four years.¹

Vulnerability of Client: This Court recently stated that "[v]ulnerability of a victim is established when findings support that a respondent exercised undue advantage over a client who was not reasonably in a position to protect himself or herself." *Ticktin*, at 938. Because of Ms. Pippin's youth and inexperience, she was not in a position to protect herself. Respondent had an obligation to make sure that she fully understood her options and the risks of litigation. Magistrate Jenkins found that Ms. Pippin was "especially vulnerable given the delicate subject matter of the case, the fact that she was a minor for a period of time after retaining

¹ Ms. Pippin hired Respondent in July 2002 (TFB Exh. 8) and discharged him in August 2004. Respondent filed his charging lien against her on August 27, 2004. TFB Exh. 16. The fee litigation was not resolved until 2006. See Report and Recommendation dated January 27, 2006, and Order dated March 31, 2006.

counsel, and the fact that she was suing huge corporate defendants." Report and Recommendation, p. 45.

Respondent argues that he always made himself available to Ms. Pippin's entire family and involved Mr. Keely in every critical meeting. As Respondent acknowledged, however, "My client was Miss Pippin, the daughter. My client was not Mr. Keely." TR7 819. It is clear from the testimony that neither Ms. Pippin nor her step-father understood the risks and options of the litigation, and that they trusted Respondent and relied on his advice. RR 6; TR1 71-73; TR2 188, 191. Respondent took advantage of his young client by walling her off from his more experienced co-counsel while he pursued his own agenda for the litigation.

Refusal to Acknowledge Wrongful Nature of Conduct: Again, Respondent attempts to justify his misconduct by claiming he was only trying to accomplish his client's goal of stopping distribution of the tapes. Respondent continues to insist that his view of the case was the correct one and everyone else was wrong. Throughout the underlying case, the protracted fee litigation with his client, and these disciplinary proceedings, Respondent has continued to demonstrate a refusal to acknowledge his wrongfulness or to recognize any viewpoint but his own.

Actual Harm to Client and Third Parties: Respondent argues that he was not the one who caused a delay in the litigation and increased the costs to his

client. Respondent blames the failure of his co-counsel to follow the client's directives. This is consistent with his pattern of blaming others for his own misconduct. The record evidence supports a finding that Respondent's actions caused actual harm to his client and to multiple third parties involved in the protracted litigation.

III. RESPONDENT'S MISCONDUCT WARRANTS A SUSPENSION OF AT LEAST SIX MONTHS.

The Referee recommended a suspension of 90 days. Respondent argues that he should receive no sanction. Respondent's argument that he should receive no discipline is premised on his request that this Court overturn the Referee's findings of fact and conclusions of guilt. As discussed in The Florida Bar's Answer Brief and Initial Brief on Cross Appeal, the Referee's findings and conclusions as to the Rule violations are well-supported by the competent and substantial evidence in the record and should be upheld.

Respondent argues that *Fla. Bar v. Mastrilli*, 614 So. 2d 1081 (Fla. 1993), is not applicable because he did not engage in a "clear" conflict of interest by representing two clients with adverse interests as did Mastrilli. Mastrilli received a six-month suspension for violating Rules 4-1.7(a) and (b). Respondent claims that his disagreements with co-counsel do not constitute a conflict of interest.

Respondent's argument shows that he does not understand that his conflict of interest was with his own client. Because of his desire to pursue the litigation to trial at any cost and win a huge judgment, Respondent delayed his client's recovery and moved her further away from her goal of settlement. RR 7. Respondent's self-serving conduct warrants a suspension of at least six months.

Despite Respondent's assertion to the contrary, *Fla. Bar v. Herman*, 8 So. 3d 1100 (Fla. 2009), supports the imposition of a longer suspension in this case. Like *Herman*, Respondent engaged in self-serving conduct by putting his own interests before the interests of his client. In rejecting the 90-day suspension recommended by the referee in *Herman* and imposing an 18-month suspension, this Court recognized the seriousness of an attorney engaging in a conflict of interest with his own client and causing harm to the client.

Respondent cites *Fla. Bar v. Riskin*, 594 So. 2d 179 (Fla. 1989), in which an attorney received a public reprimand for one instance of neglecting a legal matter. Respondent's misconduct cannot be compared to the single act of misconduct in *Riskin*. This Court has held that "a public reprimand should be reserved for isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent." *Fla. Bar v. Forrester*, 818 So. 2d 477, 484 (Fla. 2002). Respondent's conduct is not an isolated instance of neglect or a

lapse of judgment. Respondent engaged in a pattern of misconduct extending over nearly four years and involving multiple rule violations. Unlike the attorney in *Riskin* who committed an act of neglect, Respondent engaged in a course of conduct that was intentional and self-serving. Respondent argues that he always acted in the best interest of his client and at her direction. The evidence shows an attorney who disregarded the advice of more experienced co-counsel, took advantage of a young and vulnerable client, convinced her to hire and fire a series of law firms without explaining the potential risks to her recovery from fee claims, failed to communicate her options in the litigation, and insisted on pursuing the case to trial despite his client's desire to settle. After being fired for cause, he sued his client for fees, claiming an amount that could have left her with a 15 percent recovery, after promising her repeatedly that she would not pay more than 40 percent of her recovery in attorney's fees.

Respondent's Answer Brief demonstrates his continued pattern of general denial. He disregards the findings of the Referee, fails to cite or follow the evidence in the record, and instead creates his own self-serving version of events. Respondent continues to insist that he was the only one who knew what was right for his client, and attempts to place the blame on his co-counsel. Respondent's insistence on pursuing his own agenda for the litigation harmed his client and the

legal system. Respondent betrayed the trust of a vulnerable young client. The Referee's recommended sanction of a 90-day suspension is not supported by the case law or the Standards for Imposing Lawyer Sanctions. Respondent's misconduct warrants a suspension of at least six months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Overnight Mail to The Honorable Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy by regular U.S. Mail to John M. Klawikofsky, Counsel for Respondent, at Williams, Ristoff & Proper, PLC, 4532 U.S. Highway 19 N., New Port Richey, Florida 34652; and by regular U.S. Mail to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 16th day of October, 2009.

Karen Boroughs Lopez
Bar Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief complies with the font standards required by the Florida Rules of Appellate Procedure for computer-generated briefs.

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