

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Supreme Court Case
No. SC11-1029

v.

The Florida Bar File
No. 2009-70,304(11G)

PETER M. MACNAMARA,

Respondent.

_____ /

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.6 of the Rules Regulating The Florida Bar, the following proceedings occurred:

On May 23, 2011, The Florida Bar served its Complaint and First Request for Admissions in these proceedings. In its Complaint, the Florida Bar made several specific factual allegations and generally alleged that the Respondent violated several Rules Regulating The Florida Bar: Rule 4-1.4 (Communication), Rule 4-8.1 (Maintaining the Integrity of the Profession; Bar Admission and Disciplinary Matters), and Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). The Complaint did not

identify with particularity how the Respondent violated each of those Florida Bar Rules.

From February 22, 2012, through February 24, 2012, a final hearing was held in this matter. During that hearing, counsel for the Complainant and the Respondent called several witnesses, including expert witnesses, and introduced several documents. After considering the testimony, documentary evidence, and argument of counsel, the undersigned's findings were presented at a hearing held on March 13, 2012. Based on those findings, a sanctions hearing was held on March 27, 2012. All of the aforementioned pleadings, responses thereto, notices, orders, and exhibits, along with this report, constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT:

A. Jurisdictional Statement: Respondent is, and was at all times material herein, a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary of Case and Findings:

On February 3, 2004, Kathleen Earl retained Respondent to represent the estate of Velma Major. Amongst his duties, Respondent was to prepare an estate tax return to be filed with the Internal Revenue Service (IRS). Respondent filed a

request for an extension to file the estate tax return, which request was granted until March 2, 2005. On October 10, 2005, and again on December 5, 2005, the IRS sent letters to Respondent, as the attorney of record, which stated that the estate tax return had not been filed and was overdue. On December 16, 2005, Respondent sent the IRS a cover letter and an unsigned estate tax return, dated March 2, 2005, on behalf of the estate. In the cover letter, the Respondent stated, “[p]ursuant to your request, attached herewith please find **a duplicate copy** of the IRS Form 706, Federal Estate Tax Return for the Estate of Velma I. Major (with all exhibits and attachments)” (emphasis added). The IRS sent no further letters to Respondent stating that the estate tax return had not been filed and was overdue. Nor did the IRS request a signed copy of the estate tax return submitted by the Respondent on December 16, 2005.

The IRS subsequently issued a \$65,643.79 estate tax refund check to the estate, through Respondent, based upon the IRS zero estate tax determination as reflected in the 2005 unsigned estate tax return prepared and submitted by the Respondent. Despite the issuance of the refund, IRS records (admitted into evidence) do not indicate that an estate tax return was filed by the Respondent on behalf of the estate.¹

¹ Pursuant to its investigation, The Florida Bar filed a Freedom of Information Act (FOIA) request with the IRS requesting copies of all IRS files concerning the

On or about October 27, 2006, the Respondent and Ms. Earl received from the Miami-Dade Probate Court an administrative notice that if no response was filed in the related probate matter, the probate court was going to dismiss its case due to inactivity. On October 31, 2006, the Respondent filed a Petition for Extension of Time to Close the Estate Administration in the probate court, and stated therein, "[t]his estate has **filed** a federal estate tax return which is under review and/or audit. That audit and/or review has not been concluded and the federal estate tax closing letter has not been issued" (emphasis added).

After receiving the notice from the probate court, Ms. Earl called an accountant seeking advice. The accountant recommended a tax attorney, Howard Gordon, Esq., who was subsequently hired by Ms. Earl. On November 7, 2006, Gordon sent his first request to the Respondent seeking his files related to the Major estate and Ms. Earl. After several requests, the Respondent sent the files to Gordon on January 9, 2007. In or about May of 2007, Gordon filed a new tax return with the IRS on behalf of the estate which reflected that the estate actually owed federal taxes. After receiving the \$65,643.79 IRS refund check on behalf of the Major estate from the Respondent in October of 2007, Gordon returned the

Estate of Velma Major. The IRS FOIA response did not include a copy of the cover letter nor the unsigned estate tax return sent by Respondent on December 16, 2005. Notably, approximately twenty (20) of fifty-three (53) known documents were missing from the IRS' FOIA file. No witnesses from the IRS were called by either party to explain that discrepancy.

check to the IRS. Based on the estate tax return prepared by Gordon, the Major estate paid to the IRS several thousands of dollars in penalties and interest.²

Ms. Earl subsequently filed a complaint with The Florida Bar regarding the Respondent's representation in the above-mentioned matters. After receiving the complaint, The Florida Bar began its investigation. The instant Bar grievance is based on two basic issues: (1) whether the Respondent actually filed an estate tax return, and (2) whether the Respondent attempted to cover-up his alleged failure to file an estate tax return.

In his written responses to The Florida Bar, the Respondent claimed on multiple occasions to have sent to the IRS an original, no tax, estate tax return prior to receiving the above referenced notices from the IRS and prior to sending the cover letter and unsigned estate tax return on December 16, 2005.³ In those written responses to The Florida Bar, the Respondent referred to the December 16, 2005, unsigned tax return as a "duplicate" copy of the estate tax return.⁴ In his

² Counsel for the parties stipulated, and this referee agreed that it is not the purpose of this proceeding to determine the appropriate estate tax return for the estate's personal representative.

³ At page 7 of The Florida Bar's Exhibit 22, Respondent indicated that he mailed the estate return to the IRS **prior** to receiving the IRS's October 2005 notice of no return. At page 6 of The Florida Bar's Exhibit 32, Respondent also indicated that he sent an "unsigned" return to the IRS prior to the IRS's October 2005 notice of no return and further stated that the return he mailed in December of 2005 was the **third time** he had sent the return to the IRS.

⁴ See The Florida Bar's Exhibit 22 at page 10, paragraph 5, and page 14,

December 16, 2005, cover letter to the IRS, Respondent also identified the attached unsigned estate tax return as the “duplicate” estate tax return.⁵

However, at the final hearing in this matter, Respondent directly contradicted his written responses regarding the filing of the estate tax return. On direct examination, Respondent testified that the unsigned copy of the estate tax return he attached to the December 16, 2005, cover letter was in fact the first time he had sent the estate tax return to the IRS. Therefore, I find that the Respondent’s written responses to the Florida Bar were knowingly false statements, and that the Respondent employed language to deliberately mislead The Florida Bar regarding the filing of the unsigned estate tax return. Further, the Respondent’s reference to the tax return as a “duplicate estate tax return” in his letter to the IRS, was dishonest and misleading, and designed to convey to the IRS that the estate tax return had been sent to the IRS on a prior occasion. Respondent failed to correct the misapprehensions created by his written statements to the IRS and to the Florida Bar. I therefore find clear and convincing evidence to establish that the Respondent is in violation of Rules 4-8.1 and 4-8.4(c).

paragraph 5.

⁵ See The Florida Bar’s Exhibit 2.

Additionally, as set forth above, the Respondent filed a Petition for Extension of Time to Close the Estate Administration in the probate court, which stated incorrectly that a federal estate tax return had been “filed” as of October 31, 2006. However, in his testimony at the final hearing, as well as in his written responses to the Bar, Respondent stated that he never obtained Ms. Earl’s signature on the estate tax return he prepared. Therefore, the unsigned tax return Respondent submitted to the IRS on December 16, 2005, was not properly “filed” and was not a valid return for purposes of the probate proceedings. Respondent cannot feign ignorance as to this misrepresentation to the probate court as he acknowledged in his written response to The Florida Bar that an unsigned tax return is not a valid return.⁶ Respondent’s written pleading to the probate court provides additional clear and convincing evidence of a violation of Rule 4-8.4(c), and is of particular concern to this Referee, in light of the courts’ need to rely upon the statements of the lawyers practicing before it. I have instructed the Respondent to correct the record in the probate proceeding as part of my recommendations in this case.

Finally, Ms. Earl testified that she was unable to adequately communicate with the Respondent, who refused to respond or return calls, and/or refused to provide documentation upon request. According to Ms. Earl, she had to make several requests for the estate tax return before Respondent finally sent her a copy

⁶ See The Florida Bar’s Exhibit 32, page 8.

via fax in April 2006. Ultimately, Ms. Earl terminated the Respondent's representation and hired a new attorney, Howard Gordon. Over approximately two months, Gordon attempted to retrieve the files from the Respondent until he received them on January 9, 2007. I therefore find that there is also clear and convincing evidence to establish that the Respondent is in violation of Rule 4-1.4.

As to the remainder of the allegations contained in The Florida Bar's Complaint, I find that those allegations were not proven by clear and convincing evidence. In particular, I cannot find by clear and convincing evidence that the Respondent fabricated the December 16, 2005, cover letter, based on the competing testimony from the expert witnesses.

III. RECOMMENDATION AS TO GUILT:

Based on the foregoing, I recommend that Respondent be found guilty of violating Rules 4-1.4 (Communication), 4-8.1 (Maintaining the Integrity of the Profession; Bar Admission and Disciplinary Matters), and 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules Regulating The Florida Bar.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE

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

- A. Probation for a period of two (2) years to commence upon entry of the Supreme Court order approving this consent judgment. Special conditions of probation shall include:
1. Respondent shall attend and successfully complete a Professional Responsibility Course to be completed within twelve (12) months of entry of the Florida Supreme Court Order in this cause. Respondent shall submit proof of completion of the course to the bar's headquarters office within thirty (30) days of completion.
 2. Respondent shall complete eight (8) hours of Continuing Legal Education Courses (CLE) approved by The Florida Bar in the area of Ethics to be completed within twelve (12) months of entry of the Florida Supreme Court Order in this cause. Respondent shall submit proof of completion of the course to the bar's headquarters office within thirty (30) days of completion.
 3. Respondent shall correct the record as to his October 31, 2006, request for extension in re: Estate of Velma I. Major; Probate Court case no. 04-1699 CP 02, within sixty (60) days of entry of the Florida Supreme Court Order in this cause. Respondent shall submit proof of his correction of the record to the Bar's headquarters office within thirty (30) days of his filing with the probate court.
- B. Payment of The Florida Bar's costs in these proceedings.

In making this recommendation, I have considered the following Standards for Imposing Lawyer Sanctions:

6.1: False Statements, Fraud, and Misrepresentation

6.14: Admonishment is appropriate when a lawyer is negligent in determining whether submitted statements or documents are false or in failing to

disclose material information upon learning of its falsity, and causes little or no actual or potential injury to a party, or causes little or no adverse or potential adverse effect on the legal proceeding.

Additionally, this referee considered relevant case law, including the following: The Florida Bar v. Robinson, 654 So.2d 554 (Fla. 1995) (an attorney received a public reprimand and two years probation for failing to adequately communicate with a client, for failing to file a notice of appeal on behalf of another client, and for failing to adequately prepare for another client's criminal trial); The Florida Bar v. Whitaker, 596 So.2d 672 (Fla. 1992) (the Court held that a public reprimand and a two year period of probation was appropriate discipline for allowing a statute of limitations to run and for failing to keep a client reasonably informed about the status of a matter); The Florida Bar v. Fisher, SC07-164 (Fla. 2008) (an attorney received a public reprimand for violating Rules 4-3.4(c) knowingly disobeying, 4-8.4(d) conduct prejudicial to administration of justice, 4-8.4(g) failing to respond to Bar. Respondent failed to comply with guardianship court orders and discovery requests); and The Florida Bar v. Peterson, SC10-582 (Fla. 2011) (an attorney received a public reprimand for violating Rules 3.4.3 commission of unlawful act or contrary to honesty and justice, and 4.8.4(d) criminal act reflecting on lawyer's honesty, trustworthiness or fitness).

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

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

A. Personal History of Respondent:

Age: 61

Date admitted to The Florida Bar: November 19, 1976

Prior Discipline: None

B. Factors Considered in Aggravation:

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; and

9.22(i) - substantial experience in the practice of law.

C. Factors Considered in Mitigation:

9.32(a) - absence of a prior disciplinary record;

9.32(b) - absence of dishonest or selfish motive;

9.32(g) - character or reputation. Respondent has a general good reputation in the legal community and has made substantial contribution to his community and legal profession.

In making this recommendation, I also considered that there was no clear and convincing evidence that Respondent's actions prejudiced Ms. Earl.

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS

SHOULD BE TAXED: The Florida Bar shall be awarded their necessary taxable costs of this proceeding and shall submit their statement of costs, as well as a request for payment of same.

Dated this _____ day of _____, 2012.

Honorable Darrin P. Gayles, Referee
Circuit Court Judge
Richard E. Gerstein Justice Building
1351 N.W. 12th Street, Room 625
Miami, Florida 33125

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original Report of Referee was mailed to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-2300; and a true and correct copy was mailed to Robert C. Josefsberg, Attorney for Respondent, 25 West Flagler Street, Suite 800, Miami, Florida 33130; and to Jennifer R. Falcone Moore, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; and to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this _____ day of _____, 2012.

Honorable Darrin P. Gayles, Referee
Circuit Court Judge