

11-4

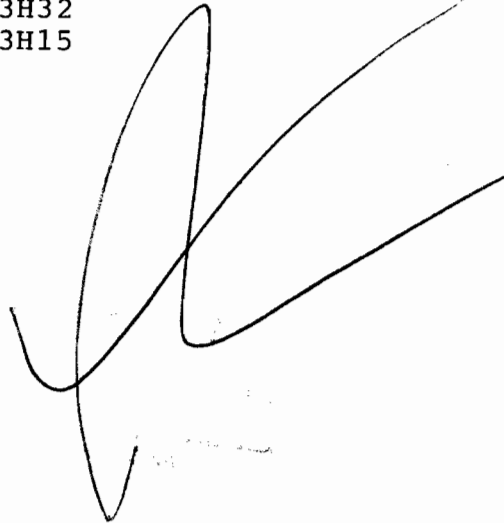
IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

Case No. 65,469
TFB #13C83H32
and #13C83H15

v.

WILLIAM M. HOLLAND, JR.
Respondent.



THE FLORIDA BAR'S ANSWER BRIEF

RICHARD A. GREENBERG
Assistant Staff Counsel
The Florida Bar
Tampa Airport Marriott Hotel
Suite C-49
Tampa, FL 33607
(813) 875-9821

TABLE OF CONTENTS

	<u>Page</u>
Table of Contents.....	i
Citation of Authorities.....	ii
Summary of Argument.....	I
Preliminary Statement.....	1
Argument as to Respondent's First Point Involved...	2
Argument as to Respondent's Second Point Involved..	4
Argument as to Respondent's Third Point Involved...	6
Conclusion.....	9
Certificate of Service.....	10

CITATION OF AUTHORITIES

	<u>Page</u>
<u>St. Joe Paper Co. v. State Dept. of Env. Reg.</u>	2
371 So. 2d 178 (1st D.C.A., 1979)	
<u>Rose v. Grable</u>	2
203 So. 2d 648 (2d D.C.A., 1967), reh. den. Nov. 29, 1967	
<u>Sweeney v. Wiggins</u>	3
350 So. 2d 536 (3d D.C.A., 1977)	
<u>The Florida Bar v. Moriber</u>	8
314 So. 2d 145 (Fla. 1975)	
<u>The Florida Bar v. Zinzell</u>	8
387 So. 2d 346	
Florida's Standards for Imposing Lawyer Sanctions Standard 4.62.....	8
Florida's Standards for Imposing Lawyer Sanctions Standard 7.2.....	8

SUMMARY OF ARGUMENT

I. The Referee's Findings of Fact come before this Court clothed with a presumption of correctness. The Florida Bar submits that there is clear and convincing evidence to support the Referee's findings.

II. The Referee had a substantial amount of evidence upon which to base his Finding of Fact "D". Judge Griffin's Orders provided persuasive evidence as to the reasonableness of Respondent's fee. J. Scott Taylor's testimony informed the Referee of the fee charged by Mr. Maciejewski's attorney. The Referee heard, and rejected, the testimony of Respondent's witness, Seymour Honig.

III. A six month suspension requiring proof of rehabilitation is warranted under the facts of this case.

PRELIMINARY STATEMENT

All references in this Answer Brief to the transcript of the Final Hearing before the Referee shall be by date. For example, (July 25, 1986) - Tr., pg. 1.

ARGUMENT

I. Respondent's first "point involved" may be restated as whether inconsistent, contradictory and confused testimony may constitute clear and convincing evidence upon which a Referee can base valid findings of fact. The Florida Bar (hereinafter the Bar) respectfully disagrees with Respondent's characterization of Mrs. Maciejewski's testimony and submits that the evidence presented to the Referee does, in fact, constitute clear and convincing evidence of Respondent's guilt.

It is well-settled that the judgment of a trial court comes before this Court clothed with a presumption of correctness. St. Joe Paper Co. v. State Dept. of Env. Reg., 371 So. 2d 178, 181, (1st D.C.A., 1979). Therefore, the Bar, as prevailing party below, is entitled to the benefit of all reasonable inferences that can be drawn from the evidence in a light most favorable to the Bar. Rose v. Grable, 203 So. 2d 648 (2d D.C.A., 1967), reh. den. Nov. 29, 1967.

Respondent attempts to cast doubt upon Mrs. Maciejewski's testimony by pointing out that her testimony was somewhat inconsistent as to the date she first saw respondent, the date she signed Bar Exhibits 1 and 2 and the date she gave respondent a check for \$250.00. These minor discrepancies in dates, i. e. whether it was September 22, 23 or 24, 1981, were raised before

the Referee by Respondent on cross-examination of Mrs. Maciejewski and, evidently, were found not to discredit Mrs. Maciejewski's testimony.

Respondent also attempts to characterize Mrs. Maciejewski's testimony as arising from a blind anger toward Respondent that affected her state of mind and her ability to recall. The record is completely void of any indication that Mrs. Maciejewski was vindictive toward Respondent or that her ability to recall events was affected by anything other than her emotional state at the time of her dealings with Respondent and the passage of time. The Referee observed the demeanor of the witness and was in the best position to judge whether or not her testimony was "inconsistent, contradictory and confused". It is not the function of an appeals court to consider the credibility of witnesses nor the weight to be given to particular testimony. Sweeney v. Wiggins, 350 So. 2d 536, 537 (3d D.C.A. 1977).

A brief review of the record reveals some of the testimony of Mrs. Maciejewski the Referee could have relied upon in reaching his Finding of Fact "B", "C" and "E". For instance, when asked why she had signed documents without reading them, Mrs. Maciejewski responded "Because I trusted the man...I did not read these words, I trusted him." (August 1, 1986) - Tr., pg. 55.

In reference to the Promissory Note and Mortgage she

executed, Mrs. Maciejewski stated "No one explained to me that once I signed it, there would be a lien and I would have to make payments". (July 25, 1986) - Tr., pp. 15-16. In addition, Mrs. Maciejewski noted that Respondent told her the Promissory Note "was just a tool for the judge to go by" to set a fee. Id., pg. 16.

Respondent seems to feel there is some significance to the fact that Mrs. Maciejewski noted that the 18% interest on the Promissory Note was too high and that she asked Respondent to lower it. The record reveals, however, that this testimony is consistent with Mrs. Maciejewski's position that any monies referred to in the Note were to be paid by her ex-husband. Id., pg. 16.

The Referee was quite specific as to the basis for his finding Respondent guilty of DR 1-102(A)(6) in Finding of Fact "C". The Referee noted that "no fiduciary relationship...must involve any greater trust and acceptance than that of a battered wife and mother and her counsel". (January 21, 1987) - Tr., pg. 5.

II. Respondent's "second point involved" is that the Referee had before him no competent evidence upon which to base his finding that Respondent had charged a clearly excessive fee. The record shows, however, that the Referee had a substantial

amount of evidence upon which to base his Finding of Fact "D".

Respondent first argues that Judge Griffin had no jurisdiction to determine a reasonable fee payable by Mrs. Maciejewski to Respondent. The Bar submits that this argument is not relevant to the point involved here. It is clear Judge Griffin did not even presume to take jurisdiction over this issue. It is also clear from the record that the Referee only used Judge Griffin's Orders as persuasive evidence, certainly not as being dispositive of the question.

Respondent next argues that Judge Griffin's Orders constitute, at best, only his opinion as to a total reasonable fee payable by both Mr. and Mrs. Maciejewski and since Respondent had no opportunity to cross-examine Judge Griffin the Referee should not have considered these Orders. Again, the Bar submits that the Referee had every right to look to the order of the presiding Judge in the initial fee hearing for guidance as to what would constitute a reasonable fee in the Maciejewski dissolution of marriage proceeding. If Respondent wished to examine Judge Griffin as to the basis for the Judge's Orders, Respondent could have subpoenaed him to testify at the final hearing.

Respondent's final argument as to this point is that J. Scott Taylor's testimony should not be the basis for the Referee's Finding of Fact "D". The main reason set forth by

Respondent is Mr. Taylor's testimony that he did not go through the Court file in the Maciejewski divorce case.

Mr. Taylor's testimony is significant for two reasons. First, he testified that, in his opinion, Respondent did a great deal of work on the Maciejewski case that was not necessary. Mr. Taylor likened it to a laborer digging a ditch with a teaspoon. (August 1, 1986) - Tr., pg. 76. Second, and more importantly, Mr. Taylor made the Referee aware of the fact that Mr. Maciejewski's attorney had only charged his client a total fee of \$3,600.00, as opposed to the \$11,000.00-plus Respondent initially charged.

The manner in which the Referee differentiated between the issue of Respondent's competence to handle Mrs. Maciejewski's divorce and the issue of the reasonableness of the fee charged shows he gave a great deal of thought to his decision. (January 21, 1987) - Tr., pg. 3. The Referee particularly noted that Respondent's fee was so excessive as to be unconscionable as indicated by Respondent's claim of spending 7.5 hours on the case the very first day Mrs. Maciejewski was accepted as a client. Id., pg. 5. In addition, the Referee heard the testimony of Respondent's witness, Seymour Honig, and obviously did not find it to be persuasive.

III. Respondent argues that the facts of this case are in

some way "peculiar" and, therefore, that a six month suspension requiring proof of rehabilitation is unduly harsh. The Bar submits that the recommended sanction is appropriate and should be accepted by this Court.

Respondent suggests he may have committed some "minor" transgressions of the Code of Professional Responsibility and that these "minor" transgressions only call for a minor punishment. The only problem with Respondent's position is his failure to mention the two prior private reprimands he has received for "minor" transgressions of the Code. This third offense calls for a sanction which will protect the public and the administration of justice.

As to the four points raised by Respondent on page 29 of his Brief, the Bar responds as follows:

1. The fact Respondent "voluntarily" reduced his fee by \$4,000.00 shows he knew it was clearly excessive;

2. The ultimate settlement of \$6,400.00 is still \$1,900.00 more than Judge Griffin's Orders and \$2,800.00 more than the total fee charged by Mr. Maciejewski's attorney;

3. The fact the Note and Mortgage were not recorded until four months after they were signed has no relevance to any of the issues involved in this case; and

4. The fact he took no action to collect the note or foreclose on the mortgage likewise has no relevance to the case.

In The Florida Bar v. Moriber, 314 So. 2d 145 (Fla. 1975), this Court imposed a 45 day suspension upon an attorney who was found guilty of charging a clearly excessive fee. In Moriber, as in the present case, there was in excess of \$5,000.00 difference between the fee initially charged by the respondent and the fee ultimately collected or ordered by the Court.

In The Florida Bar v. Zinzell, 387 So. 2d 346 (Fla. 1980), reh. den. Sept. 17, 1980, this Court disbarred an attorney who prepared a document which his client believed to be a will when in fact it was a trust agreement conveying her property. The client never knew of nor authorized her property being mortgaged by the respondent. Id., at 348.

The Bar does not suggest that disbarment is an appropriate sanction here, but a six month suspension is certainly warranted. Suspension is appropriate when a lawyer knowingly deceives a client, and causes injury or potential injury to the client. Florida's Standards for Imposing Lawyer Sanctions, Standard 4.62. Suspension is also 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. Id., Standard 7.2.

CONCLUSION

The Bar submits that the Referee's Findings of Fact are all supported by clear and convincing evidence. The discipline suggested by the Referee is appropriate and should be imposed by this court on Respondent.


Respectfully submitted,



RICHARD A. GREENBERG
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, FL 33607
(813) 875-9821

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U. S. Mail to Richard T. Earle, Jr., counsel for respondent, 150 Second Avenue North, St. Petersburg, FL 33731; and a copy to John T. Berry, Staff Counsel, The Florida Bar, 600 Appalachee Parkway, Tallahassee, FL 32301-8226; this 12th day of October, 1987.


Richard A. Greenberg