IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v. CASE NO. 67,850-18B85C12

EUGENE COLLIER,

Respondent.
______________________________/

REPLY BRIEF OF RESPONDENT ON PETITION FOR REVIEW

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PRELIMINARY STATEMENT

Respondent in the lower court will be referred to herein as Respondent.

The Complainant in the lower court will be referred to as the Complainant or the Bar.

Reference to proceedings before the Brevard County Grievance Committee "B" of the 18th Judicial Circuit, August 12, 1985 and September 3, 1985, will be by citation (GRT-____).

Reference to the first hearing before the Referee, the Honorable Ted P. Coleman, March 20, 1986, will be by citation (TR-____).

Reference to the second and continuing hearing before the Referee, the Honorable Ted P. Coleman, April 20, 1986, will be by citation (TTR-____).

ARGUMENT

THE REFEREE'S FINDINGS OF FACT ARE NOT CLEARLY AND CONVINCINGLY SUPPORTED BY THE EVIDENCE IN BOTH COUNTS I AND II AND THEY SHOULD NOT BE SUSTAINED.

A. COUNT I

The Bar cites the testimony of Mrs. Sweet to support its contention Mr. Crisman, Sr. did not appreciate the significance of the 1983 waiver. The transcript of Mrs. Sweet's testimony actually reflects that Mr. Crisman was aware he had signed some papers and said so, but when he was asked what they were, he said he did not recall what they were. (TR-12-16). This testimony is consistent with the other evidence that Mr. Crisman was a man who did not discuss business matters. The evidence produced by the Bar as well as by the Respondent proves Mr. Crisman was competent when he executed the 1983 waiver.

Regardless of the purported reason for the execution of the affidavits of Mrs. Lollie and Mrs. Dixon, the affidavits as well as their testimony was favorable to the Respondent. They testified (Mrs. Lollie by deposition) Mr. Crisman appeard competent and knew what he was doing on June 29, 1983, the day the 1983 waiver was executed. On page 16, 17 of its brief, the Bar implies evidence of wrongdoing from the fact that after the 1952 waiver of Mr. Crisman's interest (and the failure to terminate the trust), that the Trustee, Mrs. Collier, continued to pay the interest and income from the Trust to Mr. Crisman, Sr. That was a matter between the Trustee and Mr. Crisman, Sr., not evidence that the 1952 assignment was worthless or invalid.

The Bar states there was something peculiar about the fact that after the 1983 execution and the payment of $700.00, there

was a termination of payments for Mr. Crisman's benefit. Why should the payments continue for Mr. Crisman's benefit, since he already had enough income to pay for his care in the nursing home? This in no way alters the testimony of Mrs. Mildred Wages, accountant, who testified and gave her unqualified opinion the trust was not wasted and there were no improper expenditures of monies from the trust. (TTR-65, lines 1-15; TTR-66, lines 1-12).

The Bar's case with respect to the 1983 waiver rests almost exclusively upon the testimony of Crisman, Jr. and his wife. In light of the entire record, does that evidence clearly and convincingly prove the Bar's case? The Bar attempts to use Mrs. Sweet's testimony to show Mr. Crisman did talk business with Mrs. Lollie and cites the transcript on page 18-19. The transcript actually shows Mrs. Sweet admitted that Mr. Crisman, Sr. never discussed business with her, and then she stated she had heard him discuss business with Mrs. Lollie. Is that really persuasive in light of the fact Mrs. Lollie testified Mr. Crisman, Sr. never discussed his business, and others have testified likewise.

The Bar next uses Mr. Crisman, Jr.'s testimony relating to a phone call he received from Mrs. Yvonne Johnson, who was a social service worker. It is hearsay two times removed in an effort to persuade the trier of fact (as well as this Court), that Mrs. Lollie was not truthful with the court in her testimony and affidavits. The questionable reliability of this type testimony is obvious.

The circumstances surrounding the execution of the 1983 waiver certainly looks suspicious, if we except without qualifi-

cation Mr. Crisman, Jr.s testimony about his father's trip to Georgia and his trip home on the airline, etc. But why should the trier of fact accept it without qualification in light of the evidence, which was introduced in the hearing? The Bar recognizes there was conflicting testimony, but contends the Referee was in a position to best resolve the demeanor and credibility of the witnesses. Many of the witnesses, including Mrs. Lollie, appeared by deposition. Is Dr. Margaret Palmer's testimony of Mr. Crisman, Sr. questionable in any substantial way? (TR-37, lines 37-47). Furthermore, Mr. Crisman, Jr. was not there when the 1983 waiver was executed. The notary and witnesses were. The Bar has lamely explained that the notary could not be found. Maybe not. In any event, they were not produced, and the only evidence which was produced supported the Respondent's position.

The Referee in the instant case found it stretched his credibility that a man with no more income than Mr. Crisman, Sr. would knowingly execute a waiver of his rights to the trust income. Why is it incredible? Mr. Crisman Sr. apparently did it in 1952, as well as in 1983, and there is no substantial evidence in this record that in 1952 he was a wealthy man. It is understandable when one considers what parents do for their children. The Referee ignored all the years before 1983, when Mrs. Collier was a Trustee. The trust was kept intact, and Mr. Crisman, Sr. received the benefits from the trust on a regular basis, and the Respondent and his wife made visits and took care of Mr. Crisman and kept close contact with him. The Respondent represented him in a criminal matter and neither Respondent or his wife deserted

Mr. Crisman, Sr., in light of that particular case where the conduct for which Mr. Crisman, Sr. had been charged was truly reprehensible. The past history of good will and fair dealing certainly could have motivated Mr. Crisman, Sr. to relinquish any interest he had in the income from the trust in 1983.

The Court's ruling in 1952 did not nullify the waiver and assignment that Mr. Crisman, Sr. made to his daughter in 1952. The ruling at that time denied the termination of the trust, so that the contingent remainderman's interest would not be cut off. The Trustee continued to disburse funds to Mr. Crisman, Sr., even though she was not legally bound to do so. There is nothing in this record, which indicates the Trustee could not have honored the assignment without obliterating the trust. The Bar's contention that Mr. Crisman Sr. was not disbursed any interest from the trust after the last payment of $7ØØ.ØØ in 1983 was paid, which was after the execution of the 1983 waiver, until March, 1985, when he died, is true. There was no reason to disburse any sums to him during that period of time, since he had an adequate income to pay the nursing home for his care.

The Florida Bar quotes from The Florida Bar v. Stalnaker 485 So.2d 815, 816 (Fla. 1986) to establish its contention the Referee merely listened to conflicting evidence and decided in favor of the Florida Bar in the instant case. Respondent has no argument with the law as quoted from that case on page 2Ø of the Bar's Brief, nor with any of the other cases cited on page 21 of the Bar's Brief. On the other hand, the Referee's findings of fact enjoy the same presumption of correctness as does the trier

of fact in a civil proceeding. Fla. Bar Integration Rule, Article XI, Rule 11.Ø6(9)(a)(1). Since the Rule equates the presumption with the trier of fact in a civil proceeding, this Court can and should reverse the finder of fact, if the facts found are against the manifest weight of the evidence. In the instant case with respect to the 1983 execution of the waiver, we don't have a situation where two parties witnessed an event and one gives one version and one gives another version. The evidence is far more complex, and the manifest weight of the evidence is definitely in favor of Respondent.

With respect to Count I, the Florida Bar has added nothing new to be considered by this Court, and the argument set forth in the Respondent's initial brief clearly demonstrates that the Florida Bar has not carried its burden of proving its case with respect to Count I by evidence which is clear and convincing.

B. COUNT II

The Bar makes a statement that heavy litigation did ensue in December, 1983, and that that ligitation was spawned by Respondent's actions in securing the June 29, 1983 waiver and having the Trustee terminate payments to her incompetent father. The record, Respondent maintains, does not reflect Respondent in any way affected the Trustee's decision to terminate payments to her incompetent father. On the contrary, the Bar has in no way, shape, form or fashion, circumstantially or otherwise, proven there was such a relationship between Respondent and his wife. If the funds had not been properly disbursed, that was an issue for the Trustee to face, not the Respondent. Also, there is nothing inconsistent in the Respondent's position he knew nothing

about the trust from 1980 to 1983, even though the Trustee made loans to him in the amount of $6,500.00.

On page 24, the Bar makes a comment with respect to the Respondent's argument in paragraph 5 of the Referee's report, that if the 1952 assignment was effective, notwithstanding the court's actions, that it made no sense for Mrs. Collier as Trustee to continue paying her father monies for the next twenty five years. This argument by Bar counsel, and this finding by the Referee, recognizes the persuasive power of money in our society today. But it does not in any way affect the validity or the efficacy of the 1952 waiver and assignment of Mr. Crisman, Sr.'s interest in the trust to his daughter, Mrs. Collier. The fact the Trustee didn't acknowledge the 1952 wavier and continued Mr. Crisman Sr. as the beneficiary of the trust does not mean the waiver was invalid. Parents and their children are often generous with one another. The Bar's argument on page 24 and 25 on this issue adds nothing to what has already been discussed.

Respondent disagrees with the findings that certain matters would have given the Respondent a strong interest to prolong litigation, which should have prevented him from acting as counsel for his wife, the Trustee. The Respondent in this case was representing the Trustee, as Trustee, his wife individually and, of course, himself in the lawsuit brought by the guardian of Mr. Crisman, Sr. Nothing in his testimony, nothing in his depositions, was adverse to either himself or to the Trustee or to his wife, individually. The fact Respondent was loaned $6,500.00 by the Trustee from the trust does not in any way belie

his position he had no contact with the trust, until after December, 1983. To borrow money from a trust is not to have an interest in administration of that trust.

The Bar has not successfuly refuted the Respondent's argument with respect to the continuance, which was secured by the Respondent on March 1, 1984, in the case of the guardian (Mr. Crisman, Jr.) suing the Respondent and his wife, individually and as Trustee. The Respondent would rest upon his previous argument in his initial brief. There was no testimony the Respondent knew of the court allowing him to withdraw from the criminal case at the time of the hearing for continuance on March 1, 1984.

In conclusion, the Respondent has not endeavored to rewrite the Referee's findings of fact, but to point out that the record clearly reflects that the findings of fact are erroneous and against the manifest weight of the evidence, and such evidence as was produced in the hearing falls far short of being clear and convincing, and the Referee's findings should be rejected.

C. RECOMMENDED FINDINGS OF GUILT.

The Bar contends Respondent acted unethically, when he undertook representation of all defendants in the lawsuit brought against him, his wife individually and as Trustee by the guardian of Mr. Crisman, Sr., because he was indebted to the trust for at least $6,500.00. To begin with, Disciplinary Rule 5-101(A) clearly states that once there is a full disclosure, it makes no difference whether a lawyer has an interest; that a lawyer can represent the client, if the client so chooses. There is no evidence in this record that the Respondent's wife was not given full disclosure. If anything can be inferred from the evidence,

it would be that she, no doubt, knew exactly the situation. Furthermore, to view this as an ethical obstacle to representation because he owed the trust money, would be the same as saying a lawyer, who owed a bank, would have to decline the offer to represent that bank. Surely, no ethical consideration would be violated if the lawyer represented a bank to which he also owed money.

With respect to his alleged violation of Disciplinary Rule 5-1Ø1(B), the Respondent states that at the time the law suit was filed, he owed the trust some money and nothing else. His testimony on that particular matter would not have been necesary at all to prove the fact that he owes $6,5ØØ.ØØ. The Trustee certainly could testify to that. Neither would his testimony be necessary with respect to the waiver executed in 1983 by Mr. Crisman. It was certainly not obvious the Respondent ought to be called as a witness at the time he undertook the representation of his wife, individually and as Trustee. Furthermore, under the provisions of DR5-1Ø2(B), the Respondent's testimony would have to be prejudicial to his client to disquality him once he undertook representation. It is true that once the lawsuit proceeded past the first motion to dismiss, and the knowledge of the 1983 waiver became a matter of record, that the Respondent became more likely to be a witness and did, in fact, execute an affidavit and did give testimony in at least two depositions. However, the Bar's contention the Respondent violated Disciplinary Rule 5-1Ø2(A), when he failed to withdraw after accepting employment after it became obvious he ought to be called as a witness on

behalf of his client, is not a viable argument in light of the fact there was nothing that this Respondent would have to testify to under any circumstances that would be adverse to his client, and nothing he could testify to that could not be proven with other witnesses. The execution of the waiver in 1983 could have been proven though the Trustee (Mrs. Collier) or through the notary and witnesses, who witnessed the waiver, or perhaps any number of other people.

We must not forget in the instant case, the Respondent was representing himself in a lawsuit, and surely he had a right to represent himself in the lawsuit. Therefore it would appear that since he was already representing himself in the lawsuit, and he was doing nothing that was adverse to the interest of his other clients, that he would certainly fall within the exception of DR-5-101(B)(4), which allows any lawyer to continue and to testify on any matter, if refusal would work a substantial hardship on the client, because of the distinctive value of the lawyer or his firm as counsellor in a particular case.

The Bar further maintains the test is not whether the Respondent's testimony would be prejudicial to his client, but whether it was material and central to the defense of their suit. The matters to which Respondent testified to in his depositions were clearly matters which could have been proven by other witnesses. The Bar has conceded there was never a motion by defense counsel in the lawsuit pending in Brevard County, which had been brought by the guardian, that the Respondent was in any way acting unethically through his representation of himself and the other parties he represented in that lawsuit. On the other hand,

certainly he could testify as he did do on behalf of himself in that lawsuit, and if by testifying on behalf of himself in that lawsuit, it happened to benefit his other clients; so be it.

Finally, the Florida Bar contends the Referee's recommended finding that Respondent violated Disciplinary Rule 5-1Ø5(B) for continuing multiple employment in the defense of that suit, when the exercise of independent judgment on behalf of his client was likely to be adversely affected by his representation of himself, to be clearly supported by the evidence and the plain policy behind the rule, is a statement unsupported by the evidence, the same as the Referee's findings in his report. Where in the record is it enumerated that the Respondent's continued representation of his wife, as Trustee, and his wife, individually, in that particular suit, would in some way affect the exercise of his independent professional judgment in behalf of those clients, or that the exercise of his independent judgment in behalf of his clients would likely be adversely affected by his representation of himself. The fairest inference that can be drawn from the evidence is Respondent made full disclosure of any possible effect of such representation on the exercise of his independent professional judgment and would therefore be allowed to continue his representation in that particular instance, pursuant to DR5-1Ø5(C). Certainly the Bar did not prove he didn't make a full disclosure., etc.

The evidence presented and the evidence not presented by the Bar, together with the evidence which was presented by the Respondent, is not clear and convincing evidence of the quality

and quantity necessary for the Referee to find by clear and convincing evidence that the Respondent is guilty of the Counts for which he has been charged.

D. RECOMMENDED DISCIPLINE

The Florida Bar characterizes the Respondent's conduct as morally reprehensible and outrageous and urges this Court to impose the Referee's recommended disciplinary action. Perhaps it would be, if we accept without any qualifications whatsoever, that he engaged in prolonged dilatory action to delay the lawsuit, did take advantage of an incompetent old man, and did war with other members of the family all for no good reason. But at the worst, it would appear the Respondent took a position in the law suit, which was brought by the guardian, which is supported by the case law as indicated in our original brief; that before an accounting should be allowed or ordered by the court, standing for an accounting must be shown. The Respondent took the appellate route, no doubt feeling he was serving the best interest of his clients, including himself, when the trial court ordered the accounting. The fact he lost does not mean he acted reprehensibly or morally wrong. Is a lawyer immmoral in raising the Statute of Limitations as a defense, when he knows his client owes a debt? It has been said that only a rascal would raise the Statute of Limitations. However, if that defense is available, and the lawyer fails to raise it, he is not only guilty of malpractice, he is acting unethically.

Is the Referee's recommended disciplinary action of Respondent appropriate? Not according to come cases. The Florida Bar v. Gillin, 484 So.2d 1218, (Fla. 1986), is a case

wherein the Respondent was clearly found guilty of stealing from his law firm and suspended for six months. That type of conduct is far more reprehensible and morally outrageous than the conduct upon which the Respondent stands convicted of by the Referee. At worst, the Respondent in the instant case showed bad judgment in representing more than one person, and in having anything at all to do with the execution of the 1983 waiver. The wisdom of Respondent representing himself or anyone else with respect to the law suit that was brought by the guardian is not an issue. But for a lawyer to represent himself and his wife is not necessarily an ethical transgression. When family matters are involved, emotions run high. A lawyer obviously needs to be objective in representing his clients. But it is not yet an ethical transgression to represent one's relatives, although perhaps it should be.

In The Florida Bar v. Terry, 33 So.2d 24 (Fla. 1976), an attorney took advantage of his appointment as guardian of his physically incapacitated aged aunt and discovered $20,000.00 in a cash safety deposit box, which he did not disclose or report to the guardianship until intervention through an heir's counsel. In that case the attorney was only publicly reprimanded. That type of conduct seems more morally reprehensible and more outrageous that what the Referee has found in this particular case, even if all his findings of fact are accepted.

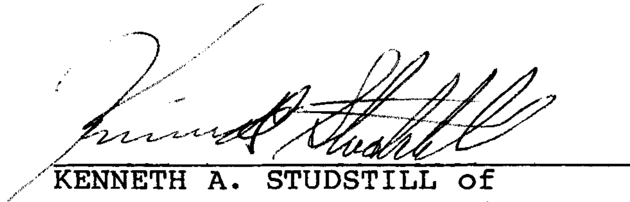
In summary, the Respondent contends the record of this cause does not support the conclusion his conduct was morally reprehensible and outrageous, and the Referee's recommended

discipline should be reduced in severity, if not totally rejected.

CONCLUSION

Since the Respondent has shown in his initial brief that the Referee's findings are erroneous, unjustified and against the manifest weight of the evidence and the Bar's brief does not sucessfully dispute Respondent's original argument, the Referee's report should be disregarded, and the Respondent discharged. On the other hand, if the entire record as reviewed by this court should not justify total exoneration, then the Respondent respectfully requests that the discipline imposed be something less severe than suspension for a period of six months and thereafter until he shall prove his rehabilitation as provided in Rule 11.10(4) as recommended by the Referee.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY to David McGunegle, Esquire, Bar Counsel, 6Ø5 E. Robinson St., Orlando, Florida 328Ø1 and John Berry, Esquire, Staff Counsel, 6ØØ Apalachee Parkway, Tallahassee, Florida 323Ø1, by mail this 11th day of September, 1986.

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