

IN THE SUPREME COURT OF FLORIDA
THE FLORIDA BAR,

Complainant,

Case No. SC95161
[TFB Case Nos. 1998-32,273(10A);
1999-30,041(10A)]

v.

MYGNON CHAMPION EVANS,

Respondent.

-----/

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the Bar."

The Report of Referee dated March 30, 2001, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached. (ROR-A_____).

SUMMARY OF THE CASE

On September 16, 1999, this Court entered an order approving the uncontested referee's report and reprimanding the respondent. This Court also placed the respondent on a one year period of probation conditioned on a review of her trust account by an accountant who would file bi-annual reports with the Bar, a Law Office Advisory Service review, and participation in a binding fee arbitration before Ted Lasseigne with Norma Dillard, and return of Mr. Alfano's original promissory note and mortgage deed. The respondent completed all of her probationary terms successfully, except the binding fee arbitration, which is not at issue here. The Bar is continuing to resolve the binding fee arbitration matter with the respondent to the satisfaction of all parties and has not found at this time that the respondent has violated the terms of her probation. Respondent has filed a Motion to Enforce This Court's Prior Order, to Estop The Florida Bar From Its Ultra Vires Actions, and to Modify Final Judgment which has been assigned to the referee for determination by order of this Court dated July 24, 2001. The Florida Bar has written to the respondent asking her to name another acceptable arbitrator because the one named in the Conditional Guilty Plea for Consent Judgment, Ted Lasseigne, is not available.

On September 14, 2000, the respondent served a Motion for Rehearing and for Relief from Judgment alleging that she had discovered the missing contingency fee contract, statement of client's rights, and settlement statement executed by Ms. Dillard. On December 14, 2000, this Court entered an order assigning the case to the Honorable Frederick J. Lauten for recommendation to this Court as to the respondent's motion. The order did not require that the referee hold an evidentiary hearing in order to make his recommendation.

On February 26, 2000, the referee entered his Order Denying Respondent's Motion for Rehearing and Relief from Judgment and on February 27, 2000, the referee issued his Amended Order Denying Respondent's Motion for Rehearing and Relief from Judgment, stating that the respondent's motion raised a *de minimus* issue that would have no effect on the final judgment in the case that led to her discipline. On March 30, 2001, the referee entered his report recommending that the Motion for Rehearing and Relief from Judgment be denied. The referee now has before him the respondent's newest motion, Motion to Enforce This Court's Prior Order, to Estop The Florida Bar From Its Ultra Vires Actions, and to Modify Final Judgment, for consideration.

On May 2, 2001, the respondent served her Petition for Review and on June

7, 2001, she served her Initial Brief. She re-served her Initial Brief on July 23, 2001, to comply with Fla. R. App. P. 9.210(a) technical requirements.

SUMMARY OF THE FACTS

The Bar objects to the respondent's Statement of the Case and of the Facts as it contains matters not considered by the referee and thus were not contained in his factual findings. Furthermore, because this case originally was resolved by a Conditional Guilty Plea for Consent Judgment, the factual findings were limited to what was set forth in the Conditional Guilty Plea for Consent Judgment. The respondent's statement of the facts goes well beyond this document to facts which are not in evidence and have no relevance as this was a Conditional Guilty Plea for Consent Judgment.

The respondent, as well as her counsel, Joseph A. Corsmeier, each executed the Conditional Guilty Plea for Consent Judgment on August 16, 1999, and August 18, 1999, respectively. The Conditional Guilty Plea for Consent Judgment clearly reflected that it was entered into in a knowing and voluntary manner and it complied with all Bar requirements. On August 25, 1999, the referee entered his Report of Referee Accepting Consent Judgment adopting the facts as set forth in the Conditional Guilty Plea for Consent Judgment which are that the respondent

undertook the representation of Norma Dillard in a personal injury matter in 1991. (Conditional Guilty Plea for consent Judgment p. A1). The respondent was not able to provide The Florida Bar with a copy of the signed client's statement of rights or a written contingency fee contract with Ms. Dillard. (Conditional Guilty Plea for consent Judgment p. A2). The personal injury case was settled on December 20, 1994, and on January 20, 1995, the respondent received the settlement check. (Conditional Guilty Plea for consent Judgment p. A2). The respondent prepared a settlement statement, which Ms. Dillard did not sign, showing Ms. Dillard would received a net of \$43,697.50. (Conditional Guilty Plea for consent Judgment p. A2). The respondent and Ms. Dillard disagreed with respect to how much money Ms. Dillard would receive after the bills and fees were paid, with Ms. Dillard believing she would receive a net of \$50,000.00. (Conditional Guilty Plea for consent Judgment p. A2). The respondent did not pay the medical services providers and kept the funds, including her fee, in her trust account as a result of the dispute with Ms. Dillard. (Conditional Guilty Plea for consent Judgment p. A2). The Bar's audit of the respondent's trust account showed she failed to follow the minimum trust accounting procedures and failed to maintain the minimum required trust accounting records. (Conditional Guilty Plea for consent Judgment p. A2).

This Court entered its order approving the Report of Referee Accepting Consent Judgment on September 16, 1999, and imposed a discipline of a public reprimand followed by a one year term of conditional probation.

SUMMARY OF THE ARGUMENT

The facts set forth in the Conditional Guilty Plea for Consent Judgment were correct at the time the respondent executed it and are still correct. The respondent was not able to provide the Bar with a copy of the contingency fee contract, statement of client's rights or a signed settlement statement in Ms. Dillard's case. Rule 4-1.5(f)(5) provides that the contingency fee contract and closing statement shall be maintained for a period of “6 years after the execution of the *closing statement.*” Emphasis added. Therefore, the respondent’s argument in her brief that the controlling date for computing the expiration of the six year period was the date Ms. Dillard allegedly executed the contingency fee contract in 1991 is misplaced. The time period should be computed from the date the settlement statement allegedly was executed which would have been in 1995. Furthermore, this disciplinary case involved far more than merely one charge of failing to properly maintain a client's contingency fee agreement and signed settlement statement. The respondent also failed to follow the minimum required trust accounting procedures, failed to maintain the minimum required trust accounting records, commingling, and, in a second count, failing to forward trust funds intended for a third party. Thus, the issue raised by the respondent concerning having located the documents

allegedly executed by Ms. Dillard were *de minimus* to the total of the allegations to which the respondent entered a Conditional Guilty Plea for Consent Judgment and, even if the respondent had located the executed documents, it would have had no bearing on the discipline ultimately imposed. Further, the bar served the respondent with its Affidavit of Costs and she did not raise any objection to same before the referee. The respondent has shown no abuse of discretion in awarding the Bar its costs in this matter where the bar has prevailed. This was a question of law, not fact, and the respondent presented her mitigation to the referee through the motions she filed and clearly the referee found the respondent's mitigation was insufficient to warrant the granting of her motion. Further, the respondent's probation has been substantially completed, and the binding fee arbitration is not at issue here.

ARGUMENT

POINT I **THE REFEREE WAS CORRECT IN MAKING A RECOMMENDATION WITHOUT HOLDING A LIVE EVIDENTIARY HEARING**

This Court's order of December 14, 2000, granting the respondent's motion for rehearing stated that the matter was being referred to the referee "for recommendation to this Court as to Respondent's Motion for Relief from Judgment." Nowhere in the order did it require the referee to hold a live evidentiary hearing where the respondent could produce evidence to show she did not obtain a signed contingency fee agreement with Norma Dillard. The Bar submits that the referee did not need to hold an evidentiary hearing to make a recommendation in this matter because the issue the respondent presented was not a factual issue requiring the presentation of evidence and testimony. The issue here is a legal issue, namely, does the respondent's alleged discovery of the executed contingency fee contract, statement of client's rights, and settlement statement warrant a rehearing in a closed disciplinary case where the misconduct involved her failure to maintain said documents for production to the Bar and, if so, whether the newly discovered evidence warranted the imposition of a different discipline. The respondent fully briefed her position and her legal arguments in support thereof in

the motions filed with this Court which were forwarded to the referee for consideration. Rule of Civil Procedure 1.530(a) does not require that the trial court take additional testimony in considering a motion for rehearing. It is within the trial court's discretion as to whether it considers additional evidence. National Enterprises, Inc. v. Martin, 679 So. 2d 331, 333 (Fla. 4th DCA 1996). The issue here was not whether Ms. Dillard executed the contingency fee contract, statement of client's rights and settlement statement but whether the respondent properly maintained these documents so that they could be produced upon request by the Bar. Clearly she did not. No additional evidence was needed on this point.

The respondent's motion for rehearing and for relief from judgment was legally insufficient on its face. The requirements for granting a motion for relief from judgment are that the evidence was discovered after trial, the evidence could not have been discovered before trial by the exercise of due diligence, the evidence must be material to the issues, and it must appear from the evidence that it will probably change the result if a trial was granted. Clearly the respondent has met the first test because she allegedly discovered the documents after the disciplinary case was concluded. Whether she met the second test is debatable, as the evidence was available to her in her office files and, presumably a search of the files would have

produced the documents. Assuming the respondent's staff misfiled the documents so badly that no reasonable search would have located them, the respondent still fails to meet the last two tests. The evidence simply was not material to the issues. The point is that the respondent was unable to provide the contingency fee contract and closing statement to the Bar during the initial investigation of Ms. Dillard's grievance. The respondent will have ample opportunity to present her position based upon the fee contract to the arbitration panel assigned to arbitrate the Dillard fee dispute. The charge concerning failing to have a signed contingency fee contract, statement of client's rights, and settlement statement was only one of several charges, the most serious of which involved an ongoing problem with her trust account record keeping deficiencies. This charge alone would have warranted the public reprimand and probation that was imposed by the court. The Florida Bar v. Miele, 605 So. 2d 866 (Fla. 1992); The Florida Bar v. Borja, 554 So. 2d 514 (Fla. 1990). In addition, the respondent has a prior disciplinary history where she received an admonishment for minor misconduct as a result of failing to properly maintain her trust account records and for failing to adequately explain a fee regarding an initial consultation.

POINT II
**THE REFEREE WAS CORRECT IN ASSESSING
COSTS AGAINST THE RESPONDENT**

Rule 3-7.6(o)(3) provides that when the Bar is successful, in whole or in part, in a disciplinary proceeding, the referee may assess the Bar's costs against the respondent unless it can be shown the costs were unnecessary, excessive, or improperly authenticated. Rule 3-7.6(o)(1)(I) provides that taxable costs shall include an administrative fee of \$750.00 when the costs are assessed in the Bar's favor. The respondent's statement in her brief that the Bar acknowledged it incurred no costs in this matter is incorrect. The affidavit of costs clearly set forth the administrative costs the Bar incurred. The Bar served its Affidavit of Costs on the respondent on March 5, 2001, showing the administrative cost of \$750.00. The respondent could have objected to said cost at that time and requested a hearing as to the reasonability of the cost assessment. She did not do so.

The Bar submits it is entitled to costs in this matter because it has prevailed in whole or in part and the respondent has put forth no evidence that the referee abused his discretion in awarding the Bar its costs. The Florida Bar v. Williams, 734 So. 2d 417, 419 (Fla. 1999). The referee's discretion in awarding costs shall not be reversed absent an abuse of that discretion, and there is no abuse of that

discretion unless the record suggests the costs were unnecessary, excessive, or improperly authenticated. The Florida Bar v. Kassier, 730 So. 2d 1273, 1276 (Fla. 1998). Here the costs were properly authenticated through the filing of an Affidavit of Costs and the costs were specifically provided for by rule 3-7.6(o)(1)(I).

“Where the choice is between imposing costs on a Bar member who has misbehaved and imposing them on the rest of the members who have no misbehaved, it is only fair to tax the costs against the misbehaving member.”

Kassier, at 1276. This proceeding grows directly from the original disciplinary proceeding against the respondent and had she properly maintained her office files and properly supervised her nonlawyer employees, perhaps the contingency fee contract, statement of client’s rights, and settlement statement allegedly executed by Ms. Dillard would never have arisen and this current proceeding would be unnecessary. Costs associated with collateral proceedings arising from a disciplinary matter are taxable the same as costs arising directly in connection with a disciplinary matter. The Florida Bar v. Horvath, 609 So. 2d 1318 (Fla. 1992).

POINT III
**THE RESPONDENT WAS AFFORDED AN
OPPORTUNITY TO PRESENT EXCULPATORY EVIDENCE**

The respondent filed numerous motions in which she presented her arguments in support of her position. This was a question of law, not fact. Even if the referee had held an evidentiary hearing, which was not required by this Court's order, testimony concerning the alleged discovery of the contingency fee contract, statement of client's rights, and settlement statement signed by Ms. Dillard would have had no effect on the referee's conclusions of law. The respondent did not comply with the requirements of rule 4-1.5(f)(5). Regardless of whether she never obtained the written contingency fee contract and closing statement, lost the documents, misfiled the documents, or accidentally threw away the documents, she did not ensure that they were preserved for the required six year time period and that they were "available for inspection at reasonable times." R. Regulating Fla. Bar 4-1.5(f)(5). That time period is computed from the date the settlement statement was executed, which was 1995 if in fact Ms. Dillard executed said statement, and not the date the client entered into the contingency fee agreement. The respondent violated the Rules Regulating The Florida Bar, as she knowingly and voluntarily admitted in her Conditional Guilty Plea for Consent Judgment. The respondent's

motion was facially deficient and did not entitle her to an evidentiary hearing on the matters raised therein. The respondent had the opportunity before the referee in the underlying disciplinary matter to present her defense that she allegedly had obtained a written contingency fee contract and settlement statement in Ms. Dillard's case but the respondent chose not to do so and instead executed a Conditional Guilty Plea for Consent Judgment admitting that she could not produce a written fee agreement with Ms. Dillard. Not being able to produce such an agreement violates the rule as does never having obtained the written fee agreement in the first place. Further, the existence of the fee agreement, statement of client's rights, and settlement statement were never central issues concerning the respondent's representation of Ms. Dillard. In fact, it was only one of six rule violations the respondent admitted having violated in her Conditional Guilty Plea for Consent Judgment. Where a motion for relief from judgment raises *de minimus* issues that have no effect on the final judgment, as is the case here, it is proper to dismiss the motion without an evidentiary hearing. Flemenbaum v. Flemenbaum, 636 So. 2d 579, 580 (Fla. 4th DCA 1994). The Bar submits the referee had the discretion to consider the motion without the need for holding an evidentiary hearing and make a recommendation to this Court based solely upon the written arguments made by the

parties.

With respect to the respondent's probation, she has satisfied substantially all of the terms, with the exception of the fee arbitration. Although the fee arbitration should have been concluded prior to the end of the respondent's probation period, due to the special circumstances involved, the Bar does not at this point consider the respondent to have violated the terms of her probation. The most appropriate venue for the respondent to raise the defense of the executed contingency fee agreement would be at the fee arbitration proceeding. The existence of the contract does not in and of itself resolve the fee dispute with Ms. Dillard. The Bar is not a party to the arbitration and it has no effect on the respondent's disciplinary case. Her probation is not at issue here.

COUNT IV
**THE BAR PROVIDED THE REFEREE
WITH ACCURATE INFORMATION**

The respondent has completed substantially all of the requirements of her probationary period with the sole exception of the fee arbitration. The Bar does not at this point consider the respondent to have violated the terms of her probation and is continuing to work with her in attempting to set the date for the fee arbitration.

The Bar has not improperly influenced the referee in this matter. The letter from Bar Counsel to the referee dated March 5, 2001, merely forwarded the proposed report of referee for Judge Frederick J. Lauten's consideration. Judge Lauten was free to make any changes he felt were appropriate and the language at the conclusion of the letter, "Please do not hesitate to contact me at 407-425-5424, ext 301 regarding this matter" was merely administrative in nature in the event the referee's judicial assistant had questions regarding proper procedure for filing the Report of Referee and the record with this Court. The respondent has presented no credible evidence the referee was in any way prejudiced against her. The respondent was copied on both the proposed Report of Referee and the Bar's letter forwarding same to the referee. The proposed Report of Referee merely set

forth the referee's previous order of February 26, 2001, denying the respondent's Motion for Rehearing and Relief from Judgment in the format required by this Court. The letter forwarding the proposed Report of Referee, on which the respondent was copied, merely gave the referee directions concerning the proper procedures for filing the Report of Referee with this Court and advised the referee that should he have any questions concerning this administrative process, to contact the Bar. This was a strictly administrative matter that did not concern the merits of the case and thus clearly was not an invitation to an improper ex parte communication. Arbelaez v. State, 775 So. 2d 909 (Fla. 2000).

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation that the respondent's Motion for Rehearing and Relief from Judgment be denied and assess costs against the respondent now totaling \$750.00.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Brief and Appendix have been sent by regular U.S. Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Mygnon Champion Evans, 1418 Edgewater Beach Drive, Lakeland, Florida, 33805; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this _____ day of August, 2001.

Respectfully submitted,

Jan K. Wichrowski
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

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APPENDIX TO COMPLAINANT'S INITIAL BRIEF

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