

**IN THE SUPREME COURT OF FLORIDA
(Before a Referee)**

THE FLORIDA BAR,

Complainant,

v.

LINDA C. SWEETING,

Respondent.

_____/

**Supreme Court Case
No. SC09-1117**

**The Florida Bar File
No. 2007-50,471(17D)**

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

Pursuant to R. Regulating Fla. Bar 3-3.2(b) and 3-5.1(b)(3), The Florida Bar filed its Complaint of Minor Misconduct in this cause on June 17, 2009. Thereafter, the Chief Judge of the Fifteenth Judicial Circuit appointed the undersigned to serve as referee. A final hearing was conducted on March 31, 2010, April 1, 2010 and April 5, 2010.

Prior to the commencement of the final hearing on March 31, 2010, respondent filed and argued a series of motions, including a motion for summary judgment. Her motion for summary judgment was denied. At trial, The Florida Bar called five witnesses, in addition to respondent. The Florida Bar's witnesses were Charles Dale, Esq., Stuart House, Esq., Moreene Getz, Peter Portley, Esq., and Alice Reiter-Feld, Esq. Respondent called no witnesses, but testified on her own behalf. She also filed transcripts of The Florida Bar's depositions of both Knyvett Lee (of Eldercare Connection, Inc.) and Wendy Stein, Esq. At the referee's direction, both parties prepared and filed deposition designations. Both parties also introduced a series of exhibits into evidence. These transcripts, designations, and exhibits are numbered and cataloged, and are

included in the record.

Pursuant to The Florida Bar's motion at trial, I have taken judicial notice of R. Regulating Fla. Bar 3-5.1(b), which addresses the process and prosecution of complaints of minor misconduct, proceeding as they do from respondent-rejected grievance committee findings of minor misconduct. I am cognizant of the fact that my factual findings and disciplinary recommendation are not bound by the underlying grievance committee determination. The Florida Bar v. Ray, 797 So. 556 (Fla. 2001).

At the outset of these proceedings, respondent was represented by Kevin P. Tynan, Esq. Mr. Tynan served a motion to withdraw on December 31, 2009. That motion was heard and granted, on January 6, 2010. Thereafter, respondent proceeded *pro se*. Throughout the course of these proceedings, The Florida Bar was represented by Lorraine Christine Hoffmann.

At the commencement of the Final Hearing, Bar counsel conceded that Respondent does in fact have written fee agreements with her client (relating to The Florida Bar's allegations in Count I of its Complaint for Minor Misconduct that Respondent had none.)

At the commencement of and during the Final Hearing, Bar counsel conceded that The Florida Bar has no complaint relative to Respondent's legal services and handling of the two (2) wrongful denial of insurance benefit claims on behalf of Respondent's client.

During trial, The Florida Bar conceded that it did not contest Respondent's entitlement to attorneys' fees and costs for services rendered on behalf of Knyvett Lee as Attorney In Fact for Harriet Kolinsky in two (2) cases against long term care insurance companies.

At the commencement and throughout the Final Hearing, this Referee expressed his intent to review this matter within the confines of the Complaint filed by The Florida Bar against Respondent, i.e. that his interpretation and understanding of the case law would only allow trial

of matters for which Respondent was given notice in the Complaint through either the allegations of misconduct or the rule violations plead in the Complaint, or both. This Referee held that to do otherwise will violate Respondent's due process rights to proper and timely notice of the charges against which she is defending in the Final Hearing.

In its case in chief, The Florida Bar submitted exhibits as well as testimony from (a) the Complainant, Moreene Getz; (b) Charles Dale, Esquire; (c) Stuart House, Esquire; (d) Peter Portley, Esquire; and (e) the Respondent. Bar counsel requested that this referee take "judicial notice" of all of Rule 3-5.1 (b) (3) and Rule 3-.1 (b) (4) relative to Types of Discipline, Minor Misconduct.

In Respondent's defense, Respondent submitted exhibits, (a) designations from the deposition testimony of Knyvett Lee, (b) designations from the deposition testimony of Wendy Stein, Esquire, and (c) Respondent's testimony. For cross, The Florida Bar presented designations from the deposition transcripts of Ms. Stein and Ms. Lee.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

After considering all of the pleadings and evidence, relevant portions of which are commented on below, this referee finds:

1. As alleged in paragraph 1 of The Florida Bar's Complaint, Respondent is a member of The Florida Bar and subject to the jurisdiction of The Florida Supreme Court.

2. The Florida Bar filed its Complaint for Minor Misconduct against the Respondent on June 16, 2009. The Complaint contains two (2) counts alleging misconduct.
3. In Count I, The Florida Bar alleges in paragraph 40 that Respondent had no written or signed contingency fee agreement with Lee or Kolinsky. In paragraph 41, The Florida Bar alleges Respondent's misconduct as follows: "Notwithstanding the lack of a signed contingency fee agreement with her client, respondent accepted and retained a contingency fee for her work on Kolinsky's behalf."
4. In Count I, The Florida Bar alleges that Respondent violated R Regulating Fla. Bar 3-4.2, Rule 3-4.3, and Rule 4-1.5(f)(2), i.e., respectively, that (a) violation of the rules is cause for discipline; (b) commission of an act that is unlawful or contrary to honesty and justice "*may* constitute a cause for discipline"; and (c) a fee agreement that is "contingent in whole or in part upon the successful prosecution or settlement thereof shall do so only where such fee arrangement is reduced to a written contract".
5. In Count II, The Florida Bar alleges in paragraphs 61 and 62 Respondent's misconduct being that: (a) Respondent failed to obey a court's order; and (b) Respondent failed to attend a September 21, 2006, hearing alleging that she had insufficient notice when "respondent knew that her statement was false and misleading".
6. In Count II, The Florida Bar alleges that Respondent violated R. Regulating Fla. Bar 3-4.2, Rule 3-4.3, Rule 4-3.3(a)(1), Rule 4-3.4(c), and Rule 4-8.4(c), i.e., respectively, that (a) violation of the rules is cause for discipline; (b) commission of an act that is unlawful or contrary to honesty and justice "*may* constitute a cause for discipline"; (c) "a lawyer shall not knowingly make a false statement of material fact of law to a tribunal"; (d) "a lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an

assertion that no valid obligation exists”; and (e) “a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation”.

7. The Florida Bar’s burden of proof in this matter is “clear and convincing evidence.”
8. As to Count I, The Florida Bar conceded at the Final Hearing that Respondent did in fact have written retainer agreements with her client. The Florida Bar introduced the retainer agreements as evidence during the presentation of its case in The Final Hearing. The agreements are marked as The Florida Bar’s Composite Exhibits , and they are signed and dated on August 5, 2002.
9. Therefore, this Referee finds that Respondent did not commit the misconduct alleged by The Florida Bar in Count I of its Complaint.
10. Further, this Referee finds that Respondent did not violate any of the Rules alleged by The Florida Bar in Count I of its Complaint.
11. As to Count II, The Florida Bar alleged two (2) acts of misconduct. A. A. Relative to the first, i.e. Respondent’s failure to attend the September 21, 2006, hearing, this Referee finds that: (1) the special set hearing that occurred on September 21, 2006, was not coordinated with Respondent; (2) Respondent received less than 48 hours notice for the special set hearing when the process server effected service of the Formal Notice, Notice of Hearing, and the Petition to Marshall Assets upon Respondent by substitute service at 1:25 p.m. on September 21, 2006; (3) that Peter Portley, Esquire, failed to comply with the Broward County Circuit Court Local Rules with respect to scheduling the special set hearing and neither spoke to Respondent prior to the hearing relative to narrowing or resolving the issues, nor did Portley certify in writing that he had done so prior to serving the Notice of Hearing as required (see

Local Rules 1A and 10A (14) through (20) of the 17th Judicial Circuit in and for Broward County, Florida); (4) Service of process of the Formal Notice, Notice of Hearing, and Petition to Marshall Assets was not effected until September 19, 2006, which made Respondent's written defenses due to be served on October 9, 2006, and which made the special set hearing on September 21, 2006, premature and untimely, and did not afford Respondent due process of law or the 20 days allowed to serve written responses to the Formal Notice and Petition; (5) Respondent was not available to attend the hearing on such short notice and prior to the due date of her written defenses; (6) Respondent contacted Portley's offices on September 19, 2006, and believed that an understanding an agreement had been reached to reschedule and coordinate the hearing date in compliance with the law and Respondent's due process rights as well as in concert with Respondent's and Portley's customary practice in the scheduling of special set hearings; (7) Respondent reasonably relied upon the understanding reached when she contacted Portley's office that the hearing would be rescheduled and coordinated with her to occur at a later time; (8) based upon that telephone communication with Portley's office, Respondent did not intentionally fail to attend the September 21, 2006, hearing; (9) Respondent did not speak to Judge Seidlin on the date and at the time of the hearing on September 21, 2006, by telephone as Portley suggests, otherwise Respondent would have presented her defenses to the Court by telephone at that time; (10) the Court did not issue a rule to show cause against Respondent for her failure to attend the September 21, 2006 hearing; and (11) there is no mention in the Court's Order of September 26, 2006, that the Court had contacted or spoken to Respondent during the hearing, or that Respondent refused to attend the hearing by telephone. Therefore, this Referee finds that Respondent did NOT fail to attend the September 21, 2006. hearing that was unilaterally scheduled by Portley, for which Respondent was given less than 48 hours notice

after process was served on September 19, 2006, for which Respondent was not afforded 20 days to serve written defenses prior to the scheduling of a hearing on the Petition, for which Portley admits that he did not contact Respondent in advance to discuss narrowing or resolving issues, for which Portley admits he did not certify contact with Respondent prior to scheduling the hearing as required by Broward County Local Rules of Court, and for which Respondent had a reasonable belief would been cancelled and rescheduled after contacting Portley's office after service of process on September 19, 2006.

B. Relative to the second act of misconduct alleged by The Florida Bar in Count II against Respondent, i.e. that Respondent failed to comply with a Court Order, this Referee finds that: (1) Portley caused the Formal Notice, Notice of Hearing, and Petition to Marshal Assets to be served on Respondent by process server on September 19, 2006, at 1:25 p.m.; (2) by law, Respondent had 20 days, or until October 9, 2006, to serve written defenses to the Petition; (3) Portley unilaterally scheduled a special set one (1) hour hearing to occur at 10:15 a.m. on September 21, 2006, prior to the due date of Respondent's written defenses to the Petition; (4) Portley proceeded with an exparte hearing on September 21, 2006. (5) on October 9, 2006, Respondent served her written response to the Petition along with her Motion to Vacate the Order of September 26, 2006; (6) neither Respondent nor Portley ever set Respondent's Motion to Vacate for hearing; (7) Portley never moved to compel Respondent's compliance with the order in the probate court, nor did Portley ever move for a rule to show cause against Respondent; (8) the Court never sua sponte issued a rule to show cause against Respondent; (9) after a year of no activity, the probate case was closed; (10) Portley had the original letter of July 26, 2005, from Respondent to Stuart House, Esquire, in his file, which original document was introduced as evidence at the Final Hearing, and which document sets forth the fact that all

alleged assets of the Estate had been fully disbursed to the Estate or to counsel as attorneys' fees and costs for work performed in the Pioneer and National cases more than a year prior to Portley's Petition and the Court's order. Respondent's entitlement to the attorneys' fees and costs paid, and that it would have at all times been impossible for Respondent to comply with the order, not just on this late date, since \$8,190.36 of the amount that Respondent was ordered to deposit in trust with Portley was never paid to Respondent but was rather paid directly to Kolinsky prior to her death. In addition, Portley drafted the Order entered by the Court on September 26, 2006; and Portley specified in the order that Respondent would have ten (10) days from the date of delivery of the Order to comply with the Order. Therefore, this Referee finds that the Respondent did NOT fail to comply with a court order as alleged.

12. With respect to the rule violations alleged by The Florida Bar in Count II of its Complaint, The Florida Bar has failed to prove by clear and convincing evidence that Respondent either: (a) with intent, failed to attend the September 21, 2006, hearing; or (b) with intent, failed to comply with the court's September 26, 2006, order.

III. RECOMMENDATIONS AS TO WHETHER THE RESPONDENT SHOULD BE FOUND GUILTY:

As to Count I of the Complaint of Minor Misconduct against Respondent, this Referee recommends a finding of NOT GUILTY. The Florida Bar has conceded the alleged misconduct in Count I and, therefore, The Florida Bar has failed to meet its burden of proof by clear and convincing evidence.

As to Count II of the Complaint of Minor Misconduct against Respondent, this Referee recommends a finding of NOT GUILTY. The Florida Bar has failed to prove by clear and convincing evidence either act of misconduct it alleged in Count II against Respondent.

IV. RULE VIOLATIONS FOUND:

This Referee has NOT found any Rule violations that Respondent has committed; and therefore, this Referee recommends a finding of NONE, NO RULE VIOLATIONS FOUND AGAINST THIS RESPONDENT.

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

Based upon the above, this Referee makes no recommendations as to any disciplinary measures, and recommends that no disciplinary measures should be applied.

VI. PERSONAL HISTORY, PAST DISCIPLINARY RECORD, AND AGGRAVATING AND MITIGATING FACTORS:

Based upon the above, this Referee finds that personal history is not relevant and has no bearing in these proceedings.

This Referee also finds that Respondent has no past disciplinary record.

Based upon this Referee's findings and recommendations of NOT GUILTY as to both Count I and Count II, this Referee finds that aggravating and mitigating factors are not relevant and have no bearing in these proceedings.

VII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

Evidence of costs incurred was not presented by either party at the time of the Final Hearing.

It is the recommendation of this Referee that costs be assessed against The Florida Bar.

Therefore, Respondent is the prevailing party, in whole, and Respondent should be awarded her taxable costs, in whole. This Referee, therefore, recommends taxation of the following costs against The Florida Bar and in favor of the Respondent:

<u>COURT REPORTER FEES:</u>	Justice Reporting Inc.	\$2,129.90
	Copy of deposition of Lee w/ exhibits	
	Copy of deposition of Stein w/ exhibits	

Dated this 29th day of April, 2010.

_____/s/_____
DAVID E. FRENCH, REFEREE

See Attached Certificate of Service

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927, and that copies were mailed by regular U.S. mail to the following: STAFF COUNSEL, The Florida Bar, 651 East Jefferson Street, Tallahassee, FL 32399-2300; LORRAINE CHRISTINE HOFFMANN, Bar Counsel, The Florida Bar, 1300 Concord Terrace, Suite 130, Sunrise, FL 33321; and to LINDA C. SWEETING, respondent, at her record bar address of 3445 NE 30th Avenue, Lighthouse Point, Florida 33064 on this 29th day of April, 2010.

_____/s/_____
DAVID E. FRENCH, REFEREE

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