Filed
3-8-85
gpl

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JOSE A. GARCIA,

Respondent.

CONFIDENTIAL

CASE NO. 65, 468

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, hearings were held on January 25, 1985, in Lakeland, Florida. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case. The following attorneys appeared as counsel for the parties:

For The Florida Bar: David G. McGunegle, Esquire

For the Respondent: The Respondent appeared pro se.

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is Charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

AS TO COUNT I

1. In April, 1982, the Respondent undertook to represent one Gloria Stanley in prosecuting a claim against Pepsi Cola. The claim arose from a bottle of the soft drink which Ms. Stanley's daughter consumed and which made her sick and caused her to be hospitalized for several days.

2. Although Ms. Stanley suggested that she received a $2,000.00 offer from the insurance adjustor representing Pepsi Cola the only evidence presented at the hearing in this cause suggest that the only firm offer to settle the case was in the amount of $250.00.

3. Upon receiving the $250.00 offer Ms. Stanley then went

to the Respondent who agreed to represent her in the case. At or about the time of the Respondent's initial interview with Ms. Stanley the Respondent caused a release to be signed authorizing the release of medical information by dispensers of medical services. (Respondent Exhibit No. 1)

4. In September, 1982, the Respondent wrote a letter to his client asking for the minimum amount for which she would settle. The Respondent failed to respond to communications from the insurance adjustor about the case.

5. In October, 1982, the Respondent moved his practice from Winter Haven, where he had been retained by his client, to Lakeland, Florida. In June, 1983, he moved his practice from Lakeland to Tampa. He did notify his client of the move to Lakeland but she was only able to discover the move to Tampa after making several telephone calls on her own initiative.

6. The Respondent had no further contact with his client until the hearing before the grievance committee on April 12, 1984.

7. The discovery the Respondent conducted in the case consisted of reviewing hospital records approximately six months after being retained and talking to nurses at the hospital.

8. At a date uncertain to this Referee the Respondent apparently determined that Ms. Stanley did not have a viable case and he determined not to represent her any further in the matter. The Respondent admits that when he advised his client that he did not wish to represent her any further he did not advise her of the applicable statute of limitations in the case. Since the date of the alleged injury was some time during the month of July, 1981, it would appear that a four year statute of limitations in the case would expire on or after July 1, 1985.

9. The Respondent's conduct in this matter persuades this Referee that he undertook to represent a prospective plaintiff

in a matter about which he knew very little. Apparently in an eagerness to get his newly started private practice off the ground he took a case with which he quickly became disenchanted. Although his discovery was far short of what might be expected of a professional in this situation he nonetheless discovered that there was little if any merit to his client's case. For a long period of time he continued to have minimal activity in the matter rather than simply bite the bullet and advise his client that she had no case. While this Referee does not approve of the Respondent's conduct in this case the Referee does understand it.

AS TO COUNT II

1. Each of the findings recited in Count I is hereby adopted and made a part of the findings in Count II.

2. The Respondent had never previously handled an adulterated food case and was not fully aware of the extent and type of damages he could claim in behalf of the mother and the child.

3. The evidence clearly demonstrates that the Respondent was simply not equipped by training or experience to represent his client in this adulterated food case. Of the options available to him he chose the most inappropriate; i.e., rather than refuse the case, refer it to someone else, or to bring in experienced co-counsel, the Respondent chose to make feeble stabs at prosecuting the claim himself.

AS TO COUNT III

1. In May, 1982, the Respondent was retained by Jacqueline Staton to prosecute a claim against an insurance company for property losses suffered during a burglary to her home on December 27, 1981.

2. The Respondent accepted the case and was paid $145.00 as a retainer.

3. On May 6, 1982, the Respondent wrote to the insurance company's claims office in Orlando and submitted a sworn

statement and proof of loss. The insurance company responded on May 25, 1982, June 22, 1982, and July 8, 1982, requesting additional information to permit them to evaluate the claim. In the last communication they indicated to the Respondent that they would close the file unless they received a response by August 6, 1982. On August 5, 1982, the Respondent replied, enclosing an authorization for release of mortgage information and indicating that he had spoken with his client about other requested materials.

4. On August 19,1982, the insurance company's claims representative wrote to the Respondent indicating that there were three remaining discrepancies, all of which had been mentioned in the May 25, 1982, letter which had not been clarified. Although the Respondent did have some problems communicating with Ms. Staton, he did not respond to the August 19, 1982, inquiry from the insurance company.

5. In October, 1982, the Respondent advised his client that he was moving from Winter Haven to Lakeland and gave the appropriate address.

6. On October 28, 1982, the claims representative again contacted the Respondent to try to get response to her August 19, 1982, letter or to several messages left between that date and September 24, 1982, when she finally contacted him and told him what was needed to settle the claim. The representative apparently re-telephoned the Respondent on October 11, 1982, during which conversation the Respondent advised that he would send a letter with all the discrepancies explained. This was not done. At that time the insurance company indicated that they were closing the file but would reopen it for further consideration once the information was received.

7. On December 8, 1983, the Respondent wrote to the claims representative and furnished a copy of an amended police report but furnished no other information.

8. On December 28, 1983, the claims representative wrote to the Respondent stating that they would give no further consideration to the claim unless the information they had been seeking was received before February 1, 1984.

9. On January 30, 1984, the Respondent filed a two count complaint against the insurance company on behalf of his client. (Bar Exhibit No. 4)

10. The Respondent did nothing further after filing the complaint. He withdrew from representation of Ms. Staton when another attorney appeared and prosecuted the case to a successful settlement. Although the Respondent notified Ms. Staton of his move to Lakeland he did not advise her of his subsequent move to Tampa.

11. After agreeing to represent Ms. Staton the Respondent apparently became disenchanted either with Ms. Staton's case or with Ms. Staton personally. As a result he failed to diligently prosecute her case and pursued a course of conduct very similar to that followed in Count I. He continued to make feeble feints at representing his client while at the same time he effectively abandoned her.

AS TO COUNT IV

1. Each of the findings recited in Count III is hereby adopted and made a part of the findings in Court IV.

2. The Respondent apparently filed the lawsuit (Bar Exhibit No. 4) because he thought that the claim representative's December 28, 1983,letter to him might cause the claim to be lost completely.

3. The Respondent apparently filed a lawsuit on behalf of his client only when he felt that he must do so to avoid some legal consequence for the continued inaction in the case. The lawsuit he filed was so meager so as to be of virtually no benefit whatever. The complaint reflected an extremely limited understanding of the cause of action he sought to pursue.

III. Recommendations as to Whether or Not the Respondent Should be Found Guilty: As to each Count of the complaint I make the

following recommendations as to guilt or innocence:

AS TO COUNT I

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating the following Integration Rules of The Florida Bar and/or Disciplinary Rules of the Code of Professional Responsibility, to wit:

(1) 2-106 (E) for entering into a personal injury case on a contingent fee arrangement without a written contract.

(2) 2-110 (A) (2) for abandoning the client.

(3) 6.101 (A) (3) for neglecting a legal matter entrusted to him.

(4) 7-101 (A) (1) for intentionally failing to seek the lawful objectives of his client.

(5) 7-101 (A) (2) for intentionally failing to carry out a contract of employment.

AS TO COUNT II

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating the following Integration Rules of The Florida Bar and/or Disciplinary Rules of the Code of Professional Responsibility, to wit:

(1) 6-101 (A) (1) for undertaking a legal matter which he knows or should know he is not competent to handle without associating himself with another lawyer or doing the appropriate study.

(2) 6-101 (A) (2) for attempting to handle a legal matter without preparation adequate in the circumstances.

AS TO COUNT III

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating the following Integration Rules of The Florida Bar and/or Disciplinary Rules of the Code of Professional Responsibility, to wit:

(1) 6-101 (A) (3) for neglecting a legal matter entrusted to him.

AS TO COUNT IV

I recommend that the Respondent be found guilty and specifically that he be found guilty of violating the following Integration Rules of The Florida Bar and/or Disciplinary Rules of the Code

of Professional Responsibility, to wit:

(1) 6-101 (A) (1) for handling a legal matter which he knows or should know that he is not competent to handle without associating another lawyer.

(2) 6-101 (A) (2) for attempting to handle a legal matter without preparation adequate in the circumstances.

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend that a public reprimand be administered to Respondent in an appropriate manner under Rule 11.10 of the Integration Rule of The Florida Bar, and further, that Respondent be placed upon probation for a period of one year. It is further recommended that the conditions of the probation include supervision of all the Respondent's work by a member of The Florida Bar, and the filing by the Respondent of quarterly reports on his caseload. Said reports are to be filed with the Clerk of The Supreme Court, with a copy furnished to staff counsel of The Florida Bar. Any future adjuciation that the Respondent is in contempt of court, or any finding of probable cause as to conduct of the Respondent committed during the period of probation, or any failure to file a timely report as heretofore ordered, indicating that Respondent is not continuing to make satisfactory progress shall provide grounds to terminate probation and re-open the judgment.

V. Personal History and Past Disciplinary Record: After finding of guilty and prior to recommending discipline pursuant to Rule 11.06 (9) (a) (4) I considered the following personal history and prior disciplinary record of the Respondent, to wit:

1. The Respondent was graduated from the University of Miami College of Law in 1977 and was admitted to practice law in the State of Florida in 1978. Prior to the instant complaints there have been no previous disciplinary matters involving the Respondent.

VI. Statement of Costs and Manner in which Cost Should be Taxed:

I find the following costs were reasonably incurred by The Florida Bar:

A.	Grievance Committee Level Costs	
1.	Case Nos. 1084C35 and 1084C40	
	a. Administrative Costs	150.00
	b. Transcript of grievance committee hearing, 4/12/84	344.00
2.	Case Nos. 1084C71 and 1084C76	
	a. Administrative Costs	150.00
	b. Transcript of grievance committee hearing, 8/9/84	306.65
B.	Referee Level Costs	
1.	Case Nos. 1084C35, 1084C40, 1084C71 and 1084C76	
	a. Administrative Costs	150.00
	b. Transcript of referee hearing held 1/25/85	531.00
	c. Bar counsel's travel expenses	39.00
C.	Miscellaneous Costs	
	a. Staff investigator's expenses	63.80
	CURRENT TOTAL	$1,734.45

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 27th day of February, 1985.

TED P. COLEMAN, Referee

Copies to:

David G. McGunegle, Bar Counsel, The Florida Bar
John T. Berry, Staff Counsel, The Florida Bar
Jose A. Garcia, Esquire