IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs

RICHARD E. GENTRY,

Respondent.

_____/

CASE NO. 66,238
(07B84C22)
(07B84C23)
(07B84C24)

FILED
SID J. WHITE
APR 25 1985
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

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, a hearing was held on April 2, 1985. The Pleadings, Notices, Transcripts and Exhibits all of which are forwarded to the Supreme Court of Florida with this report, constitutes the record in this case.

The following attorneys appeared as counsel for the parties:

For the Florida Bar: David G. McGunegle

For the Respondent: Richard E. Gentry, in pro per.

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

As to paragraphs one, two, three, four, five, six, and seven of the complaint, the parties have stipulated that the allegations are true and could be accepted as a matter of fact. Record at six (Lines 14-20) and at 7 (Lines 1-11). Accordingly, I find:

1. Respondent represented Imogene Schmidt in her personal injury case stemming from an automobile accident beginning in April, 1983. The representation was on a contingency fee basis with one-third to be paid to respondent if no suit was filed and 40% if suit were filed.

2. In late July, 1983, respondent received two checks totaling $10,000.00 representing his client's personal injury protection (PIP) benefits from her carrier. Respondent had his client sign these checks, placed the $4,000.00 check payable to Ms. Schmidt into his trust account and returned the other to the carrier to be reissued since it had been made out to the hospital and Ms. Schmidt jointly. This was done at the client's request so that she would have the immediate benefits available to her for living expenses.

3. When the reissued check was received, respondent gave his client $3,000.00 in six $500.00 cashiers checks and took $3,000.00 as an advance on his fee. During the ensuing months, respondent handled some $4,000.00 of her living expenses through his trust account at her request.

4. The noncontingent PIP benefits were paid over without undue hesitation on the part of the insurance company and only after minimal contracts by respondent.

5. Ultimately, the hospital filed suit for their unpaid bills totaling in excess of $10,000.00 which the respondent later settled for a total of $8,500.00 which included the hospital attorney's fee at time of her accident case settlement in April, 1984.

6. By opinion dated March 8, 1984, in The Florida Bar v. Gentry, 447 So.2d 1342 (Fla. 1984), the respondent was suspended for a period of six months with proof of rehabilitation required effective in 30 days. Respondent previously had filed suit for his client in late 1983 against the driver and State Farm Insurance Company. He reached a settlement of the case which was signed on April 5, 1984. It called for a lump sum payment of $45,000.00 and monthly tax-free payments of $400.00 a month for eight years of Ms. Schmidt. The extended value over the period of the monthly payments was $38,400.00 which cost the insurance company some $26,732.00. The cost was not divulged to respondent despite his request for that information.

7. This was the first structured settlement respondent has handled. In disbursing the proceeds, the respondent paid the hospital bill and himself $33,693.33 which included $33,360.00 as a 40% fee on $83,400.00. The remaining $333.33 was the amount necessary to bring the fee charged on the PIP up to one-third of the $10,000.00. The client received $707.59 in cash plus the monthly payments.

8. Respondent's fee of $3,333.33 for recovery of personal injury protection benefits under Section 627.736 Florida Statutes was based solely on the labor of diverting the payee of the $10,000.00 personal injury protection benefits from the hosptial/ doctor to his client Imogene Schmidt. Record at 35 (Lines 4-7)

9. It was unfair or excessive to charge an attorney's fee for personal injury protection benefits as to this client because the statute itself provides for reasonable attorney's fee if there is a dispute. Record at 19 (Lines 24-25) and at 20 (Lines 1-22)

10. By not reducing the fee on the structured settlement to present value, the Respondent's fee was excessive in the amount of $4,668.20 (Based on subtracting the difference of 40% of $38,400.00 and 40% of $26,732.00) Record at 21 (Lines 2-7)

11. The community standard of lawyers practicing in personal injury is that you charge a percentage of the present value of the settlement of the claim. Record at 16 (Line 2-5)

As to Count II

As paragraph one, two, three, four, five and six of the complaint, the parties stipulated that the allegations are true and could be accepted as a matter of fact. Record at 8 (Lines 12-16)

Accordingly, I find:

1. Review of respondent's trust account reflects he maintained an interest-bearing trust account at the Security

First Federal Savings and Loan Association in Daytona Beach, Florida.

2. The account was opened to earn interest for the benefit of one client in late November or early December, 1982. Said client's funds were expended approximately by the end of March, 1983 and respondent continued to utilize said account until his suspension although he is not a member of the Interest on Trust Accounts Program. The interest generated has remained in the account.

3. Respondent was unable to provide copies of his monthly bank statements for at least three months in 1983 and one month in 1984.

4. Respondent did make some reconciliations although they are not completely identified as to which particular time periods. Respondent did not provide any client ledger cards. He only provided six office deposit slips and six bank deposit slips whereas the bank statements provided list twenty-six deposits. Three checks issued in 1983, two of which were voided, were missing and copies of check stubs 233 through 239 were not furnished.

5. Two checks to respondent on April 5, 1984 do not identify the client matter although they probably relate to the Schmidt case. Further, cancelled checks and corresponding stubs do not always reflect the client matters to which they pertain.

6. Although respondent checked his July 1, 1983 dues statement indicating he had read the trust accounting rules and was familiar with their requirements, he was not maintaining the trust account in accordance with provisions of Fla. Bar Integr. Rule, art. XI, Rule 11.02(4)(c) and the corresponding Bylaw.

As to Count III

As to paragraphs one, two, three and four of the complaint, the parties have stipulated that the allegations are true

and could be accepted as a matter of fact. Record at 8 (Lines 17-21)

Accordingly, I find:

1. Respondent was retained in December, 1983 by John R. Castellana to assist him in securing his driver's license which had been revoked for five years on May 27, 1983.

2. Mr. Castellana returned to the respondent's office in early March, 1984, was quoted a fee of $750.00 and paid $200.00 in cash. He had a short third visit with the respondent suspension. Respondent then turned the file over to another attorney without telling Mr. Castellana. Note, it would appear that no action could be taken on Mr. Castellana's behalf until May 27, 1984 when he would be eligible to petition for relief.

3. Respondent did not send a copy of his suspension order to Mr. Castellana or otherwise notify him. He also failed to provide the affidavit as is required by Fla. Bar Integr. Rule, art. XI, Rule 11.10 (7) to the Florida Bar either personally or through counsel.

4. Respondent accepted a partial retainer and thereafter failed to undertake any effective steps for his clients, to notify him of his suspension or to secure his permission prior to turning his file over to another attorney. Respondent did return the retainer subsequent to the grievance committee hearing on November 2, 1984.

III. Recommendation as to whether or not the Respondent should be found guilty:

As to each count of the complaint I make the following recommendation 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 Disciplinary Rule of the Code of Professional Responsibility to-wit: DR 2-106(A) as well as Integration Rule of the Florida Bar

11.02(4). Charging a fee of $3,333.33 for collecting $10,000.00 in personal injury protection benefits is clearly excessive, because there was no dispute or there was no contingency. Additionally if there is a dispute, reasonable attorney's fees are allowed. Section 627.736(6)(c) Florida Statutes. The sole legal labor for this fee was convincing the insurance company to change the name of the payee on the check. The $3,333.33 fee is clearly excessive, because a lawyer of ordinary prudence would have a definite and firm conviction that the fee was in excess of a reasonable fee for the following reasons:

1. There was minimal time and labor involved.
2. No fee would customarily be charged for collecting undisputed benefits (PIP).
3. There was no contingency involved in collecting the personal injury protection benefits.

However with regard to reducing the fee to present value for the structured settlement resulting in an overpayment of $4,668.20, there is insufficient evidence that such fee is clearly excessive as opposed to being merely excessive. Accordingly as to the structured settlement, I recommend that the Respondent be found not guilty as to violation of any Disciplinary Rule or Integration Rule.

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: Integration Rule 11.02(4)(c) and By-Law for Section 11.02(4)(c) effective until June 30, 1984. Certain monthly bank statements, bank deposit slips and checks were missing . The bylaws require reconciliation, cancelled checks and deposit slips to be kept. These are minimum trust accounting records that were not maintained.

As to Count III

I recommend that the respondent be found not guilty and specifically that he be found not guilty of violating the following Integration Rule of The Florida Bar and/or Disciplinary Rule of the Code of Professional Responsibility, to-wit: Disciplinary Rule 1-102(A)(6) and 6-101(A)(3). There is a fine line between simple negligence by an attorney and violation of canon 6 of the Code of Professional Responsibility. The Florida Bar v. Neale, 384 So.2d 1264 (Fla. 1980). Did the respondent neglect a legal matter entrusted to him? Allowing a statute of limitations to run is not neglect of a legal matter. The Florida Bar v. Neale, supra. Mr. Castellana's driver's license was revoked on May 27, 1983 for five years. He was not able to petition for restoration of his driving privilege until May 27, 1984. No action was taken until November 2, 1984 (when the retainer was returned). Nevertheless unlike a statute of limitations, the petition for restoration can be filed at any time during the remaining four years of his revocation. Clearly then, based on the above cited authority, these stipulated facts do not constitute a neglect of a legal matter.

IV. Recommendation as to Disciplinary measures to be applied:

I recommend that the respondent be placed on probation for a term of eighteen (18) months pursuant to Integration Rule 11.10(1) with the following conditions:

(1) the respondent shall refund to Imogene Schmidt that part of the fee that was excessive or clearly excessive: $8,001.53

(2) the respondent shall be required to attend a complete seminar on trust accounting with a certificate of compliance therewith being filed with the clerk of the Supreme Court of Florida

(3) the respondent shall submit to the Florida Bar a plan for treatment of his alcoholism and continue in his treat-

ment under that plan

(4) the respondent shall be subject to the supervision of a member of the Florida Bar designating personal injury and wrongful death as his specialty when the respondent charges or collects a contingency fee for a structured settlement

The basis for this recommended discipline is set out in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) at 986:

> "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the service of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violation."

Factors that militate against a further suspension are the respondent's alcoholism (The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982)), that contributed to his breach of ethics, the fact that respondent has been suspended from practice from April 6, 1984 to October 6, 1984 and to this date has not sought reinstatement. Given these facts and the fact that respondent will have to prove rehabilitation for reinstatement as to the previous suspension, it appears that probation is a suitable disposition given the purpose of discipline: fairness to society, punishment, encouragement of reformation and rehabilitation and deterrence.

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

Age: 39 years of age

Date admitted to Bar: 1973

Prior disciplinary convictions and disciplinary measures imposed therein:

The Florida Bar v. Gentry, 447 So.2d 1342 (Fla. 1984): suspension for a term of six (6) months.

VI. Statement of costs and manner in which the cost should be taxed:

A. Greviance Committee Costs

Administrative Costs	$150.00

B. Referee Level Costs

1. Administrative Costs	$150.00
2. Transcript Costs	$186.10
TOTAL ITEMIZED COSTS	$486.10

DATED this 23rd day of April, 1985.

JOHN DEAN MOXLEY, JR.
Referee
Circuit Court Judge

Copies furnished to:

Bar Counsel
Respondent

Staff Counsel,
The Florida Bar
Tallahassee, Fla. 32301

JOHN DEAN MOXLEY, JR.
CIRCUIT COURT JUDGE
BREVARD COUNTY COURTHOUSE
TITUSVILLE, FLA. 32780