IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

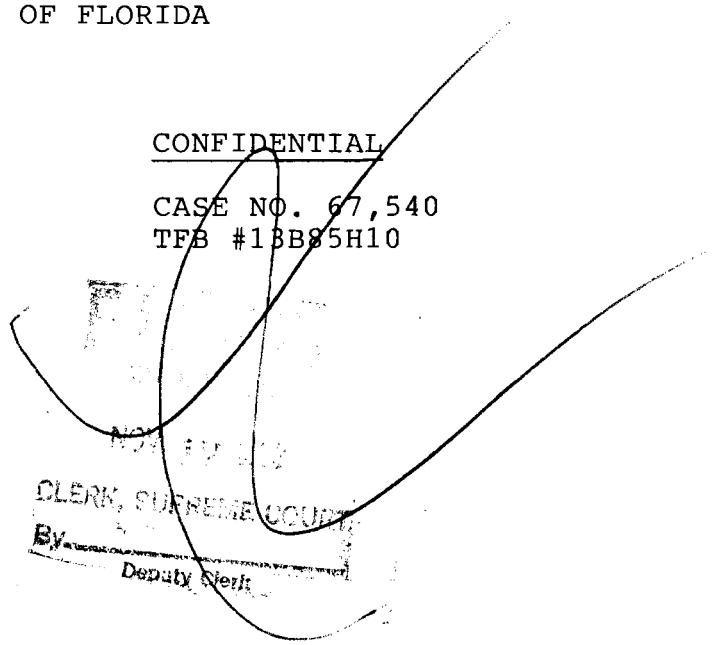
DONALD McLAWHORN,

Respondent.

_____/

CONFIDENTIAL

CASE NO. 67,540
TFB #13B85H10



THE FLORIDA BAR'S ANSWER BRIEF

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STATEMENT OF THE CASE

This disciplinary proceeding is before this Court upon Respondent's Petition for Review of the Report of the Referee finding Respondent Donald McLawhorn in violation of The Florida Bar Code of Professional Responsibility DR 1-102(A)(1) (violation of a disciplinary rule); DR 1-102(A)(4) (conduct involving deceit, dishonesty, fraud or misrepresentation); DR 1-102(A)(5) (conduct prejudicial to the administration of justice); and DR 1-102(A)(6) (conduct that adversely reflects on an attorney's fitness to practice law).

The Petitioner in this appeal is Donald McLawhorn and the Respondent is The Florida Bar. In this Answer Brief, each party will be referred to as they appeared before the referee. Record references in this Answer Brief are to the trial transcript with exhibits (TR), Respondent's Brief (RB), the Report of the Referee (RR) and the pleadings as they appear in the record.

STATEMENT OF THE FACTS

The following are facts taken from the record as distinguished from respondent's statements.

On May 7, 1984, respondent received a settlement check in the amount of $65,000.00, payable to respondent and his client, Diane Vann Cummings (Bar Exhibit 1). The damage award resulted from a personal injury action against a Sebring attorney, Clifford Ables, for alleged drunk driving which resulted in a head-on collision that severly injured Ms. Cummings. (TR 35, 116).

Following his receipt of the check, respondent forwarded Ms. Cummings a disbursement sheet of the proceeds of her damage award. (Bar Exhibit 2). Ms. Cummings did not agree with the figures on the disbursement sheet. (TR 66). As a result, on June 26, 1984, when Ms. Cummings endorsed the $65,000.00 check, it was with the understanding that the funds would be deposited into an account on which both respondent and Ms. Cummings would be signatories. (TR 68).

Ms. Cummings drafted and signed a letter which was notarized by respondent's wife who presented it to respondent. (Bar Exhibit 3, TR 68). In her letter, Ms. Cummings specifically instructed respondent to place the funds in an escrow account bearing both names and not to withdraw said funds without her prior understanding or approval. (Bar Exhibit 3). As Ms. Cummings desired that the funds be placed in a joint account, the letter further provided that no funds be withdrawn without the signatures of both parties (respondent and Ms. Cummings)

appearing on each check or draft (Bar Exhibit 3). When respondent deposited the funds, he failed to inform his client that her name could not appear on his escrow account and that she could not be a signatory on that account. (TR 109).

On June 26, 1984, when Ms. Cummings endorsed the $65,000.00 check, she requested that respondent pay her treating physicians in full, as she had been receiving overdue notices from them. (TR 68, 93, 95). Respondent was aware of Ms. Cummings' overdue medical bills. (TR 74, 145, 159). Ms. Cummings forwarded all past due statements to respondent who assured her that he would handle them for her. (TR 74).

On July 23, 1984, despite his client's express instructions, and without her knowledge or authorization, respondent withdrew the entire $65,000.00 from his escrow account and placed it into a money market account, bearing his name alone. (TR 70, 71, 102; Bar Exhibit 5). Respondent held the $65,000.00 in the money market account from July 1984 through February 1985, when he entered into a settlement agreement with Ms. Cummings immediately prior to the grievance hearing in this matter. (TR 80). Prior to that time, respondent paid no medical bills on behalf of Ms. Cummings from the proceeds. (Bar Exhibit 8, TR 74, 75).

During the period from July 1984 through February 1985, respondent sent letters to Ms. Cummings' treating physicians, asking that they reduce their bills, stating that "the verdict was not sufficient to satisfy all outstanding financial obligations". (Bar Exhibit 9). Respondent later stated that the verdict was sufficient to cover all bills and expenses of

litigation. (Bar Exhibit 2, TR 157).

During the time respondent held Ms. Cummings' proceeds, he had her verbal authorization to pay her treating physicians in full. (TR 68). He stated that he failed to pay her overdue bills because he did not have her written authorization. However, at no time did he attempt to gain written authorization from Ms. Cummings to pay any of her overdue medical bills. (TR 75, 105). Ms. Cummings suffered damage to her credit rating as a result of the unpaid medical bills incurred in her personal injury matter. (TR 75).

SUMMARY OF ARGUMENT

Despite respondent's urgings to this Court that the referee erred in his determinations, the record clearly shows the following:

(1) Respondent held sole control over $65,000.00 in proceeds resulting from a personal injury case he handled on behalf of his client, Diane Cummings. Respondent was to receive $27,000.00 in fees and his client a net of approximately $8,500.00 (Bar Exhibit 2).

(2) At one point, he moved the $65,000.00 to a money market account without his client's knowledge or consent and against her wishes. (TR 70, 71, 102).

(3) Several of his client's creditors were to be paid from the proceeds. (Bar Exhibit 2). At the time he received the proceeds, respondent knew that several creditor's bills were overdue. (TR 68, 157).

(4) Respondent knew that there were ample funds to pay those creditors in full. (TR 15).

(5) Despite this knowledge, respondent wrote to his client's treating physicians and advised them there were not sufficient funds to pay all financial obligations. (Bar Exhibit 9).

(6) Respondent failed to disburse any of the funds for a period of approximately seven (7) months. As a result, his client's credit was damaged. (TR 75).

(7) During that time, respondent was aware that his client

was receiving overdue bills from the creditors that two creditors had sued her for the funds. (TR 74, 145, 159).

Such conduct is violative of the Code of Professional Responsibility, specifically DR 1-102(A)(1), DR 1-102(A)(4), DR 1-102(A)(5), and DR 1-102(A)(6). In the past, this Court has disciplined lawyers for identical conduct. The Florida Bar v. Wagner, 770 So.2d 212 (Fla. 1968).

The referee's findings and recommendations are in accordance with the record and should not be overturned as they are clearly erroneous or lacking in evidentiary support and are supported by case law. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). Therefore, the Bar asks this Court to uphold the referee's findings of fact and conclusions of law in this disciplinary proceeding.

I. THE REFEREE'S RULINGS REGARDING EVIDENCE WERE PROPERLY CONSIDERED IN THIS DISCIPLINARY PROCEEDING AND SHOULD BE UPHELD.

At trial respondent attempted to introduce the deposition testimony of two witnesses, Monte Floyd, respondent's investigator in Ms. Cummings' personal injury case and Mr. Marion Vann, Ms. Cummings' father. (TR 2-7). Respondent failed to subpoena Mr. Floyd and Mr. Vann to insure their presence at the hearing. (TR 5). Respondent also failed to show the unavailability of the two witnesses as required by (Fla. R. Civ. P. 1.330(a)(3). (TR 2-7). Additionally, respondent failed to make proper application and notice to the court to show exceptional circumstances necessary under Rule 1.330(a)(3)(E).

Deposition of the two witnesses were taken at respondent's request, on March 18, 1986, at which respondent was present. (Notice of Deposition dated March 11, 1986). Final hearing was set for July 18, 1986 with notice to respondent on June 11, 1986 (Notice of Hearing dated June 11, 1986). If, at any time, respondent perceived that the testimony of Mr. Floyd and Mr. Vann was somehow valuable to the presentation of his case, it was his duty to ensure the appearance of said witnesses at trial, not the Bar's. Therefore, the referee properly excluded the depositions of the two available witnesses pursuant to the Fla. R. Civ. P. 1.330(a)(3).

The referee admitted Bar Exhibit 8, a letter from Attorney James Kadyk, over respondent's objection. (TR 78). Ms. Cummings acknowledged and identified the exhibit, with which she was

copied, as a letter from Mr. Kadyk to respondent. (TR 78). The referee as trier of fact, assessed the authenticity and the reliability of the letter and admitted it into evidence.

Respondent argues that Bar Exhibit 8 should have been excluded as it contained heresay statements. Any statements pertaining to the merits contained in Bar Exhibit 8 were later independently verified by respondent when he stated that he knew that Ms. Cummings was being pursued by her creditors (TR 145, 159) and that he had not disbursed her funds prior to the settlement in February, 1985.

Respondent was not charged with neglect in his handling of the trial, therefore, statements concerning respondent's alleged inadequate handling of said trial did not relate to the merits of the Bar's charges and were not hearsay. As the relevant parts of Bar Exhibit 8 were independently coorborated by respondent, the letter merely went to the weight of the Bar's evidence and not the merits of the Bar's case and, therefore, Bar Exhibit 8 was properly admitted by the referee.

II. THE REFEREE'S FINDING THAT MS. CUMMINGS' REJECTIONS OF SETTLEMENT OFFERS WERE APPARENTLY AFFECTED BY RESPONDENT'S STATEMENTS REGARDING THE VALUE OF HER CASE ARE CLEARLY SUPPORTED BY THE RECORD.

The referee states that respondent's statements to Ms. Cummings' fiance (now husband) that "it was a million dollar case, no doubt", which he subsequently related to plaintiff, apparently affected her willingness to accept offers substantially less. (RR 1). The record substantiates Ms. Cummings' apparent unwillingness to accept offers from defendant and, as the referee found, it is apparent that her unwillingness was affected by respondent's initial assessment of the value of her case as a "million dollar" case.

Following the accident, while Ms. Cummings was hospitalized, respondent, Monte Floyd (respondent's investigator) and David Robinson (Ms. Cummings' fiance) drove by the house of Sebring attorney, Clifford Ables, the defendant in Ms. Cummings' personal injury case. (TR 38). As Monte Floyd took pictures of Mr. Ables' house, boats and automobile, respondent asked Mr. Robinson if Ms. Cummings would like to own Mr. Ables' house, boats and car. (TR 38). Respondent then stated to Mr. Robinson, "no problem, they're hers". (TR 38). Respondent also said to Mr. Robinson that "it was a million dollar case, no doubt". (TR 38). Mr. Robinson later repeated respondent's statements to Ms. Cummings. (TR 38). From that point on, it was apparent and probable that the possible value of the case was indelibly imprinted in Ms. Cummings' mind.

Respondent points to various excerpts from Ms. Cummings' testimony to support his argument that she did not rely on respondent's statements to her fiance concerning the value of her case. However, Ms. Cummings' testimony is merely directed to the fact that she alone made the decisions to turn down the defendant's offers. (TR 81, 82). Nowhere in the record does Ms. Cummings state that she turned down the offers independently of respondent's initial representations of the value of her case. (TR 81, 82).

During the trial, she stated that she no longer had faith in respondent as her attorney and did not rely on his advice at that time. (TR 84). A careful review of pages 84-85 of the record will show that Ms. Cummings turned down the $100,000.00 offer during trial based on "her instincts and how severe she had been hurt".

The referee properly observed that Ms. Cummings was apparently affected in her unwillingness to accept the various offers of settlement due to her continuing conception of the case as a "million dollar case".

III. THE REFEREE'S FINDING THAT THE RESPONDENT MADE MISREPRESENTATIONS TO DOCTORS IN AN ATTEMPT TO REDUCE THEIR MEDICAL BILLS IS SUPPORTED BY THE RECORD.

Respondent forwarded letters to Ms. Cummings' doctors, asking that they reduce the amount of their bills. (Bar Exhibit 9, TR 147). In the letters respondent stated to the doctors that "the verdict was not sufficient to satisfy all outstanding financial obligations". (Bar 9, TR 147). Despite his representations to the doctors, respondent later admitted that the verdict was sufficient to satisfy all out-of-pocket expenses. (TR 148, 159). Respondent further stated that he never disputed that there was ample money to pay the outstanding creditors their full amount due. (TR 157). It is clear from the record that respondent's letters to Ms. Cummings' doctors were misleading, that her damages awarded were more than sufficient to pay her creditors and that respondent's letter was a misrepresentation of that fact.

As such, the referee findings and conclusion of law are clearly supported by the testimony and exhibits in this proceeding.

IV. THE REFEREE'S FINDING THAT RESPONDENT MADE MISREPRESENTATIONS REGARDING THE DEPOSITS OF THE JUDGMENT PROCEEDS IS CLEARLY SUPPORTED BY THE RECORD.

Respondent argues that Ms. Cummings understood from the beginning, that the proceeds were to be placed in an account on which she could not sign. (RB 13). He argues that the referee's finding that respondent moved the funds without her knowledge or permission are erroneous. The record clearly shows that when she endorsed the settlement check, Ms. Cummings intended and understood that the money would be placed in a joint account. This understanding is obvious in her written request of June 20, 1984 that all disbursements (check or draft) be signed by both parties. (Bar Exhibit 3). It is further substantiated by Ms. Cummings' testimony, as follows:

MS. CUMMINGS: "....I wanted to make sure that Don wouldn't be able to write checks on that money without first consulting me". (TR 67).

BAR COUNSEL: And what was your understanding about the nature of the account into which that check was to be deposited?

MS. CUMMINGS: I was under the assumption that it was going to be put into an account with both our names on it. (TR 68).

. . . . . .

RESPONDENT'S COUNSEL: It's your testimony that you thought this agreement required your signature on each check and/or draft that was disbursed, isn't that correct?

MS. CUMMINGS: Yes. Right. (TR 106, 197).

. . . . . .

BAR COUNSEL: Miss Robinson, when the money was first deposited the very first time, were you under the impression that that money was going into a joint account?

MS. CUMMINGS: Right, right.

BAR COUNSEL: And what happened? When did you first learn that the money was not in a joint account? When did you first learn that you weren't a signator on the account?

MS. CUMMINGS: When I -- when I went to check on the money, the money had been taken out of that account.

BAR COUNSEL: Is that the first time you realized your couldn't sign on that account? Is that the time you found out you weren't a signator on the account?

MS. CUMMINGS: Yes.

BAR COUNSEL: And were you at any time told by Mr. McLawhorn that he was moving the money from the escrow account to the money market account so that you could both sign...

MS. CUMMINGS: No. (TR 109, 110).

In support of his argument, respondent cites to Ms. Cummings' responses that she was aware that she could not be jointly named on respondent's trust account. However, a review of the record will show that her responses pertained to knowledge she acquired well after the fact and not at the time the money was deposited. Nowhere in the record does she state that, at the time the $65,000.00 check was deposited in respondent's trust account, she understood that she could not be a signatory on the account or that she knew he was moving the funds to a money market account in his name.

V. THE REFEREE'S FINDING THAT RESPONDENT'S FAILURE TO PAY MS. CUMMINGS' MEDICAL BILLS WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE IS CLEAR FROM THE RECORD.

From June 1986 through February 1985, when respondent finally relinquished Ms. Cummings' damage award and allowed her medical bills to be paid, he was in sole control of her proceeds. (Bar Exhibit 5, Bar Exhibit 8, TR 164). At one point, Ms. Cummings was forced to seek help from another attorney, James Kadyk, concerning respondent's handling of her proceeds. (TR 93). Despite requests from Mr. Kadyk, respondent failed to disburse the proceeds to satisfy his client's overdue medical bills. (Bar Exhibit 6, 7, 8). As a result, on January 21, 1985, a Motion in Garnishment was filed against Ms. Cummings, with respondent as Garnishee. (Bar Exhibit 6, TR 44).

Other letters were mailed to Ms. Cummings demanding payment of her overdue bills. (Bar Exhibit 7, TR 72). Respondent was aware of the overdue bills and had the overdue statements in his possession. (TR 74, 145, 159). He stated that he had taken a hands-off approach to the matter because, in August 1984, Ms. Cummings had filed a grievance against him. (TR 162).

Respondent tenaciously clung to the proceeds for seven months, stating that the matter was "in negotiation". During that time, respondent made no attempts to protect Ms. Cummings from her creditors or affirmatively resolve the matter in any way.

BAR COUNSEL: Okay. Did Mr. Kadyk ever authorize you or send you any communication authorizing you to pay those bills on her behalf?

RESPONDENT: No. And I wouldn't have taken his signature. It would require hers. I know, she didn't have to bring me the medical bills for me to know what they were. I put them in evidence in trial. I had all the medical bills. (TR 147).

. . . . . .

BAR COUNSEL: At anytime between May and February.... my last question...did you ever ask Mrs. Robinson (Cummings) or Mr. Kadyk for written authority for that disbursement of those funds?

RESPONDENT: No, ma'am....(TR 162).

As a result of respondent's conduct, Ms. Cummings incurred damage to her credit rating. (TR 105). Ms. Cummings stated that respondent assured her that he would take care of her medical bills. (TR 106). She further stated that after the money was moved to the money market account, she no longer considered her agreement requiring written authorization to be valid. (Bar Exhibit 3, TR 106). At no time did respondent contact her concerning the problem with the bills and she stated that had she known that he thought he needed her permission, she certainly would have given it to him. (TR 106).

Respondent's conduct in this matter was certainly prejudicial to the administration of justice on behalf of his client in his wrongful retention of her proceeds in the face of overdue medical bills and subsequent damage to her credit record.

VI. THE REFEREE'S FINDING THAT RESPONDENT'S CONDUCT IN THIS MATTER REFLECTS ON HIS FITNESS TO PRACTICE LAW SHOULD BE UPHELD.

Respondent contends that the referee erred in his determination that respondent violated DR-102(A)(6). To this, the Bar responds that respondent held his client's proceeds for a period of approximately seven (7) months during which time he failed to pay her overdue medical bills. He claimed he needed her authorization to do so. However, during that time, respondent made no efforts to explain the problem to her or to ask her to authorize him to make immediate payment of the bills. Respondent failed in his professional duty to accomplish the disbursement of his client's funds with respect to the rights and legitimate expectations of the creditors involved.

In the course of his handling of Ms. Cummings' case, respondent made misrepresentations to certain creditors who were members of the medical profession. This Court has held, as this referee found in the instant case, that a lawyer is obligated to conduct himself in a manner that would cause laymen and the public generally, to have the highest respect for and confidence in the members of the legal profession. The Florida Bar v. Wagner, 212 So.2d 770, 773 (Fla. 1968). This Court also stated that if an attorney knows that creditors look to him for payment and he has, in fact, retained funds with which to pay their bills, he should make every effort to persuade his client to permit him to make immediate payment of just and undisputed bills. Id. at 773.

Respondent states that he failed to disburse his client's funds for a seven (7) month period because negotiations were pending between her attorney, James Kadyk and his attorney, counsel in these proceedings. Respondent was certainly not holding out in his alleged negotiations for the purpose of paying overdue creditor's claims, as he admitted that there were ample funds to pay all creditors in full. (TR 157). Logically, if he was holding the funds to negotiate more net disbursement to his client, it would have been a simple matter of adjusting his fee of $27,000.00, as was the custom of his own witness, Michael Kinney. (TR 32). It is apparent that respondent's efforts to retain the entire proceeds was simply over the issue of the amount of his fee versus the net amount his client would receive.

In Restivo v. Anderson, 453 So.2d 1167 (Fla. 4th DCA 1984), the court held that an attorney who holds a clients proceeds in a personal injury action, while demanding that the client agree to the attorney's claim as to how the fee was to be computed, stated a cause of action for conversion.

In the instant case, respondent held the entire proceeds, forcing his client to seek help from another attorney to do the very thing respondent should have done in the first place, disburse the proceeds of his client's judgment.

Respondent's flagrant disregard for his client's welfare in this matter, coupled with his misrepresentations to members of the medical profession, clearly reflect on his fitness as a member of our profession. The referee's observations are accurate and his findings should be upheld.

CONCLUSION

Respondent comes to this Court asking that the charges against him be dismissed, contending that he and the Bar have been victimized by an "avaricious" client. However, it is clear from the record that it was respondent who wrongfully retained his client's funds and funds due her creditors for over a period of seven (7) months. It is also clear that there were sufficient funds available to pay those creditors.

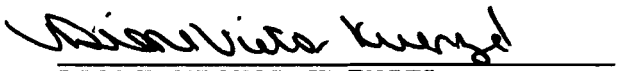
Respondent argues that he held the $65,000.00 for seven (7) months because of on-going negotiations. With sufficient funds to pay the creditors, the only matters to be negotiated were Ms. Cummings' net proceeds in direct proportion to the amount of respondent's fee.

Respondent retained the proceeds and failed to make any attempt to disburse them until, as he contends, negotiations could be completed. As a result of his stand in the matter, he allowed his client to be injured.

The referee heard the testimony of all witnesses and reviewed the exhibits. As the trier of fact, he had first-hand opportunity to assess the credibility and observe the demeanor of all who appeared. Accordingly, his findings of fact and conclusions of law should be upheld unless it can be shown they are clearly erroneous or lacking in evidentiary support.

WHEREFORE, the Bar asks this Court to support the referee's findings and approve the Report of the Referee in this disciplinary proceeding.

Respectfully submitted by,



DIANE VICTOR KUENZEL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing The Florida Bar's Answer Brief has been furnished by regular U. S. Mail to SCOTT K. TOZIAN, Counsel for Respondent, 412 East Madison Street, Suite 909, Tampa, Florida, 33602, this 14th day of November, 1986.

DIANE VICTOR KUENZEL