

12-30
IN THE SUPREME COURT OF THE STATE OF FLORIDA
Clerk

THE FLORIDA BAR,
Complainant,

CONFIDENTIAL

CASE NO: 67,540

v.

DONALD McLAWHORN,
Respondent.

RESPONDENT'S REPLY BRIEF

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FLORIDA CODE OF PROFESSIONAL RESPONSIBILITY

Disciplinary Rules:

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SUMMARY OF ARGUMENT

The Florida Bar in its attempt to defend the unsupported findings of the Referee makes vague statements to buttress the Referee's Report. One such attempt states "the referee properly observed that Miss Cummings was apparently affected ..." [Bar Brief at 10].

The proper defense of the referee's findings would include a direct reference to the record. The Bar did not and cannot make such reference as it does not exist in the record.

The Bar's argument with regard to the Referee's findings concerning misrepresentations is similarly vague. Specific referral to exactly what misrepresentations were made is not attempted by either the Referee or the Bar.

Close scrutiny of the record clearly reveals the referee's report is simply unsupported by the testimony and evidence and cannot be upheld.

THE REFEREE'S FINDING THAT MS. CUMMINGS' REJECTION OF SETTLEMENT OFFERS WERE APPARENTLY AFFECTED BY RESPONDENT'S STATEMENTS REGARDING THE VALUE OF HER CASE IS NOT CLEARLY SUPPORTED BY THE RECORD.

The Bar argues that the record supports the Referee's finding that Ms. Cummings rejected settlement offers based upon Respondent's statements relating to the value of her claim. However, the Bar does not cite a single page of the record below where Miss Cummings states she so relied. Very simply, the record contains no such testimony.

Miss Cummings did not state that she relied upon Respondent's representations as to the value of her case. No testimony of any witness indicated there was any reliance on the alleged representations. The Bar contends that Miss Cummings had a "continuing conception" of the case as a million dollar case [Bar brief at 10]. This contention is palpably incorrect. Regarding the value of her case, Miss Cummings states in her testimony that prior to her trial, "I didn't feel it was worth a million dollars." [R. 59]

Strangely, the Bar feels the burden is on Respondent to prove Miss Cummings did not rely on the representations of the Respondent. This is obvious from the following excerpt from The Florida Bar's Answer Brief.

Nowhere in the record does Miss Cummings state that she turned down the offers independently of Respondent's initial representations of the value of her case.

at 10.

The burden in attorney disciplinary matters is upon the Bar to prove its case by "clear and convincing evidence". It is not Respondent's burden and the Bar's statement to that effect is an attempt to avoid its failure to meet its burden.

Nevertheless, the Bar is obviously incorrect in its contention that "nowhere in the record does Miss Cummings state that she turned down offers independently of Respondent's representations. Clearly, Miss Cummings does state that her assessment of the case was independent of Respondent's representations in the following colloquy.

Q. And isn't it true that the reason why you thought the case was worth more than a hundred thousand dollars was just based on your instincts, and not on anything that Mr. McLawhorn told you? (emphasis added)

A. Based on my instincts and how severe I was hurt.

Miss Cummings, by her own testimony rejects the notion that she relied upon Respondent's representations. The Referee's finding to the contrary is unsupported by the record, incomprehensible and must be overturned.

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

The Bar's position with regard to alleged misrepresentations to the doctors concerning the judgment amount is that because damages exceeded creditor's bills, the Respondent's letter contained a misrepresentation.

This contention ignores the fact that there was no evidence that any of the doctors were misled or felt that the letter was a misrepresentation of the facts. It further ignores the expert testimony of Michael L. Kinney, that compensation of the client is a legitimate financial obligation. The Bar offered no contrary evidence.

Therefore, the proper question to consider, albeit a difficult one, might be: Was the money available to Miss Cummings after payment of all medical expenses, court costs and attorneys fees, sufficient to satisfy that particular outstanding financial obligation; i.e. compensation of the client.

If so, Respondent may have made a misrepresentation. If not there is no misrepresentation.

All available evidence from the record indicates the money available for Miss Cummings was wholly insufficient.

First, counsel for the defendant made settlement offers of \$75,000.00 and \$100,000.00 during the pendency of the case. Obviously, opposing counsel thought the case had potential value in excess of \$100,000.00 to make such offers. Second,

Miss Cummings thought the amount available was insufficient inasmuch as she rejected the referenced settlement offers [R.81, 82] and was unhappy with the amount remaining after payment of costs, etc. Finally, Respondent was unhappy with the amount awarded [R. 133] and felt the remainder available insufficient to compensate his client prompting his letter.

It is clear that all parties involved thought the judgment amount was insufficient given the nature and extent of the client's injuries. Additionally, Respondent and Miss Cummings believed the net available to Miss Cummings fell woefully short of adequately compensating her. Accordingly, there is no evidence available to support the theory that Respondent's letter contained any misrepresentation of any kind. The Referee's finding is without factual support in the record.

THE REFEREE'S FINDING THAT RESPONDENT'S FAILURE TO PAY MS. CUMMINGS' MEDICAL BILLS WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE IS NOT SUPPORTED BY THE RECORD OR THE CASE LAW.

The Bar contends that Respondent's failure to pay Miss Cummings' medical bills was prejudicial to the administration of justice. However, it is interesting that the Bar ignores its own Exhibit 3 in reaching its conclusion.

Miss Cummings' June 20, 1984 letter to the Respondent states "it is further agreed that no checks or drafts, of any kind will be written by anyone (including the two (2) parties mentioned in this agreement) to any institution or persons without the full consent and signatures of both parties concerned (Donald McLawhorn and Diana Cummings) appearing on each and every check or draft. [Bar Exhibit 3].

Obviously, Miss Cummings did not want any bills paid without her written consent or without co-signing each and every draft. Such written authorization was never given to Respondent to pay these medical bills.

In keeping with the spirit of Bar Exhibit 3, Respondent stated he would not pay such bills without her signature. [R. 147].

In any event, such failure to pay these bills is not violative of Disciplinary Rule 1-102(A)(5) which proscribes conduct which is prejudicial to the administration of justice. This Court has previously discussed that type of conduct

prohibited by Disciplinary Rule 1-102(A)(5) in The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982). In Pettie, the Court stated that

One definition of "obstructing the administration of justice" defines the term as "hindering witnesses from appearing, assaulting process server [sic], influencing jurors, obstructing court orders or criminal investigations" at Black's at 972. The term is not so broad as to include all conduct which is illegal but rather those activities, for example, more directly associated with bribery of jurors, subornation of perjury, misrepresentations to a court or any other conduct which undermines the legitimacy of the judicial processes". at 737.

Obviously the failure to pay bills bears not the slightest resemblance to conduct of the nature described in Pettie. Accordingly, the Referee's finding must be reversed.

THE REFEREE'S FINDING THAT RESPONDENT MADE MISREPRESENTATIONS REGARDING THE DEPOSITS OF THE JUDGMENT PROCEEDS IS NOT CLEARLY SUPPORTED BY THE RECORD

The Bar contends that the Referee's finding that Respondent made misrepresentations regarding the deposits of the judgment proceeds is clearly supported by the record. The Bar makes this contention despite the fact that the Referee does not specify what misrepresentations were made. As best can be determined from the Report of Referee, the court below felt that because Respondent placed the funds in a money market account solely in his name, his earlier agreement to place the funds in a joint account constitutes a misrepresentation. The Bar apparently agrees that the earlier promise to place the funds in a joint account was a misrepresentation. The conclusion of the Referee and the Bar is unacceptable upon review of the record below.

As pointed out in Respondent's Initial Brief, Miss Cummings' understanding of the handling of the judgment proceeds was confused at best. [at 13, 14]. However, Respondent confirms that indeed he had indicated to James Kadyk, Miss Cummings' attorney, that the funds would be placed in an interest bearing account giving Miss Cummings the interest earned on the entire sum. [R. 141, 142, 147].

Thereafter when Miss Cummings came to sign the judgment check, she indicated she wanted the funds placed in a joint interest bearing account. Respondent indicated that would be done after placement of the funds in his trust account. [R. 143].

The obvious absence of a misrepresentation is manifested by Respondent's conduct subsequent to this agreement. Respondent attempted to place the funds in a joint money market account, but the bank would not allow such a procedure. [R. 144]. Miss Cummings agrees that the bank explained to her that such a procedure was impermissible. [R. 87,88]

The Bar would now ask this Court to find that Respondent made a misrepresentation, because he did not do as he promised. This position callously ignores the fact that he attempted to carry out his promise. The position further ignores that his promise later proved impossible as confirmed by Miss Cummings.

Black's Law Dictionary defines "misrepresentation" as "any manifestation by words or other conduct by one person to another that under the circumstances, amounts to an assertion not in accordance with the facts."

In the case at bar, Respondent tried to do as he promised and the desired result was rendered impossible by the bank's policy.

The totality of the circumstances indicate an absolute absence of misrepresentation and the finding of the Referee must be reversed.

THE REFEREE'S FINDING THAT RESPONDENT'S CONDUCT IN THIS MATTER REFLECTS ON HIS FITNESS TO PRACTICE LAW IS UNSUPPORTED BY THE EVIDENCE.

The Bar would seek to discipline Respondent because medical bills went unpaid for seven months. The Bar believes that Respondent should have paid medical bills despite, Miss Cummings June 20, 1984 letter mandating her signature and consent to authorize payment. [Bar Exhibit 3]. The Bar also ignores that Respondent attempted to get doctor's bills reduced to enhance his client's recovery, which took time.

Shortly after making request of reduced bills, Miss Cummings filed her complaint with The Florida Bar. [Resp. Ex. 4].

Realistically, Respondent is then in a position of having The Florida Bar look over his shoulder. If he pays the bills without written authorization will he be subject to discipline? If he reduces his fee to mollify an irate client will he be thought to have bought his way out of the complaint?

Our profession is one that by its nature requires a great amount of subjectivity. Instead of citing specific disciplinary rule violations the Bar second guesses Respondent's judgment calls and contends Respondent violated Disciplinary Rule 1-102(A)(6), (conduct which reflects adversely on his fitness to practice law.

The Bar should not be accorded such great and subjective power to question the judgment of its members. Should this Court uphold the Referee's finding in this respect a dangerous precedent will be set. This finding must be reversed.

CONCLUSION

The Florida Bar weakly attempts to defend the Referee's Report in its Answer Brief. Citations to the record are conspicuously absent. Vague references to misrepresentations are made, and recommended rule violations are defended without citation to case law. It is easy to discern that the Bar did not approve of Respondent's over all handling of the case, but cannot show actual disciplinary rule violations.

Certainly, Respondent would do certain things differently under similar circumstances in the future. All good attorneys should second guess themselves and engage in self analysis for the sake of improvement and client happiness. In the perfect setting, these client problems would not exist. Of course neither would, disease, war nor famine exist.

The Respondent's conduct fell well short of violating the Code of Professional Responsibility. The Bar's lack of citation to the record, case law and reliance exclusively on the general provisions of Disciplinary Rule One is overwhelming evidence of this fact.

The legal conclusions of the Referee and his recommendations must be more broadly reviewed than his findings of fact. The Florida Bar v. Inglis, 471 So.2d 34 (Fla. 1985). The Referee's findings of misrepresentations are based on inferences, without specific findings of misrepresentations. That being so there is no basis upon which to find an ethical violation. The Florida Bar v. Ragano, 404 So.2d 401 (Fla. 1981).

The Report of Referee must be overturned.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery to DIANE VICTOR KUENZEL, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33602, this 4 day of December, 1986.



SCOTT K. TOZIAN, ESQUIRE