

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

PUBLIC

Complainant,

Case No. 68,158
(TFB No. 1985C47 (Dr. J. Hunter
Smith and 1985C74 (Indian River
Medtronics))

v.

KENNETH E. PADGETT, JR.,

Respondent.

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 August 11, 1986. The Pleadings, Notices, other materials and 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

For The Respondent: Michael F. Berry

II. Findings of Fact as to Each item of Misconduct of which the Respondent is charged: At the final hearing, the respondent tendered a plea of nolo contendere to the two counts of the Bar's complaint and agreed that there was a factual basis for findings of guilty on both counts as to the rules charged.

1. After considering the complaint and the plea, I find as to the entire complaint, the respondent is, and at all times

hereinafter mentioned was, a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of The Supreme Court of Florida. At the time of this proceeding, the respondent is suspended (See The Florida Bar v. Padgett, 481 So.2d 919 (Fla. 1986)).

As to Count I
(1985C47 - Dr. J. Hunter Smith)

2. Beginning around 1978, respondent referred several personal injury clients to Dr. J. Hunter Smith for orthopedic treatment. In early 1983, Dr. Smith refused to accept further referrals because respondent failed to properly forward payment either upon settlement of the case or as guarantor under a letter of protection.

3. It appears Dr. Smith held a "blanket" letter of protection from respondent dating back to June 1978 and which letter was never repudiated by the respondent through these proceedings. (See Exhibit A of the Bar's Complaint). Respondent wrote to Dr. Smith by letter dated April 16, 1984 and advised him he had settled five cases and had withheld sufficient funds from the proceeds to pay the balances owed on them. (See Exhibit C to the Bar's Complaint.) He thereafter failed to promptly forward full payment on the cases and made partial payments in only one. Moreover, in the Benjamin case, respondent forwarded a partial payment to Dr. Smith in the amount of \$175.00 by way of an attorney account check dated March 23, 1984 which was not honored due to

insufficient funds. Thereafter, respondent forwarded payment by counter check dated April 27, 1984 in the amount of \$455.00 leaving a balance outstanding of \$168.00 which was still outstanding at the time of this hearing. It would appear the funds were not deposited initially into his trust account as required but handled through his attorney account.

4. In at least three other instances, respondent failed to forward payment to Dr. Smith, despite promises and repeated requests. Senalla Holmes finally paid Dr. Smith directly in December, 1984 after respondent had not forwarded payment as promised the previous October. While he guaranteed the Jacqueline Garcia Account in April 1981, respondent failed to forward \$224.64 to Dr. Smith although the case settled in June 1984. The Joseph Fenalon matter was settled in September 1983, and respondent received the funds at or about that time. \$232.00 was to be forwarded to Dr. Smith as the medical provider which respondent failed to do and which remains due.

5. In the Sarah Reed matter, respondent forwarded a check in March 1984 totalling \$475.00. He, or one of his staff, indicated on the envelope that \$300.00 of the check was for his witness fee in the case and that the Judge would only allow \$475.00 on the case thus limiting the \$700 requested as the fee, when in fact the Judge had placed no limitation.

6. Finally, respondent routinely failed to prepare and execute written settlement statements in these cases as required.

As to Count II
(1985C74-Indian River Medtronics)

7. Respondent failed to forward medical payments to Indian River Medtronics from insurance proceeds received on behalf of the clients. In at least four cases, respondent failed to pay the balances owing on accounts although obligated to do so under letters of protection. The balances remaining due ranged from \$100 to \$600 for services rendered in the years 1978, 1981 and 1983. Although he received funds in at least two cases from the insurance carrier, he failed to forward payment on to Indian River Medtronics for their portion.

8. In the McDew and Porter matters, respondent told River Medtronics the insurance company had sent all personal injury protection benefits in one check without designating where payment was to be forwarded. In fact, the insurance company mailed separate checks in October 1983 and later sent letters to respondent in March 1984 detailing the breakdown of payments to the medical providers. Although respondent received settlement funds in the Sheard case, he failed to promptly forward an 80% payments to Indian River Medtronics despite promising to do so in June, 1984. Ultimately, respondent forwarded the 80% payment in October, 1985 totalling \$480.00 but well after a complaint was filed to The Florida Bar.

9. Finally, respondent has refused to forward payment to Indian River Medtronics on behalf of Jean Palladini. She claimed that he retained one-third of the proceeds to pay whatever balances remained due with the medical providers

whereas respondent has instructed Medtronics to bill Ms. Palladini directly.

10. In these cases, respondent has also failed to prepare and have executed written settlement agreements as required.

III. Recommendations as to whether or not the Respondent should

be found guilty: As previously indicated, the respondent has entered a plea of nolo contendere to the two counts in the Bar's complaint. Accordingly, as to each count of the complaint, I make the following recommendations as to guilt or innocence:

As to Count I

I recommend 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 Rules 11.02(3)(a) for conduct contrary to honesty, justice or good morals and 11.02(4) for mishandling trust funds, and Disciplinary Rules 1-102(A)(4) conduct involving dishonesty, fraud, deceit, or misrepresentation, 1-102(A)(6) for other misconduct reflecting adversely on his fitness to practice law, 2-106(E) for failing to prepare and have executed written settlement statements of personal injury cases, 9-102(B)(3) for inadequate trust records and 9-102(B)(4) for failing to promptly to disburse funds after settlements.

As to Count II

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

Integration Rule 11.02(4) for mishandling trust funds, and Disciplinary Rules 2-106(E) for failing to prepare and have executed written settlement statements in personal injury cases, 6-101(A)(3) for neglecting the Sheard case, 9-102(B)(3) for inadequate trust records and 9-102(B)(4) for failing to promptly disburse trust funds upon settlement.

IV. Recommendation as to Disciplinary measures to be applied:

Respondent's plea of nolo contendere to the two counts of the Bar's complaint was conditioned upon the Bar's agreeing to recommend as discipline respondent be suspended from the practice of law for three months and one day thereafter until he shall prove his rehabilitation as provided in Rule 11.10(4). In addition, the respondent is to be placed on probation subsequent to his reinstatement for a period of two years during which period of time his trust account will be subject to review by the Bar on a no notice basis and that any necessary audit of the account will be at his expense. Finally, the respondent has agreed to pay over to the Estate of Dr. J. Hunter Smith and Indian River Medtronics any unpaid amounts due and owing them within 30 days of this hearing. This referee also heard argument as to whether the proposed suspension should relate back to the expiration of his present suspension. After considering the length of the

proposed suspension agreed upon by the respondent and the Bar, this referee recommends that the proposed suspension relate back to the expiration of the fixed term of the present suspension and thus be nunc pro tunc effective August 8, 1986. It is apparent that the present problems are an outgrowth of respondent's prior problems which led to his present suspension, more particularly his total mismanagement of his trust account and his recordkeeping.

V. Personal History and Past Disciplinary Record:

After finding respondent guilty based on his pleas of nolo contendere to both counts, I have agreed to accept the recommended discipline and am aware of respondent's personal and prior professional history to wit:

Age: 39

Date admitted to Bar: 11/10/72

Prior disciplinary convictions and disciplinary measures imposed therein: Six month suspension in The Florida Bar v. Padgett, 481 So.2d 919 (Fla. 1986).

Other personal data: Respondent is divorced and has minor dependents.

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

I find the following costs were reasonable incurred by The Florida Bar.

A. **Grievance Committee Level Costs:**

1. Administrative Costs	\$ 150.00
2. Transcript Costs	\$ 194.18
3. Bar Counsel Travel	\$ 25.40
	<u>\$ 369.58</u>

B. Referee Level Costs:

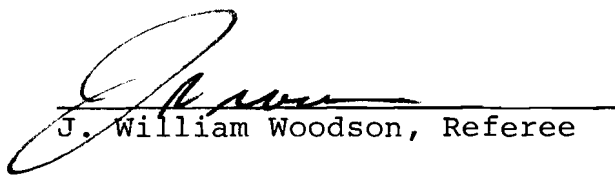
1. Administrative Costs	\$ 150.00
2. Transcript Costs	\$ 63.42
3. Bar Counsel Travel	\$ <u>49.96</u>
	\$ 263.38

C. Miscellaneous Costs

1. Telephone Charges (1985C47)	\$ 16.13
2. Staff Investigator Expenses (1985C47)	\$ 112.50
3. Staff Investigator Expenses (1985C74)	\$ <u>351.80</u>
	\$ 480.43

TOTAL ITEMIZED COSTS: \$1,113.39

DATED this 3rd day of Sept, 1986.


J. William Woodson, Referee

Copies to:

David G. McGunegle
Branch Staff Counsel
The Florida Bar
605 E. Robinson St., Suite 610
Orlando, Florida 32801

Staff Counsel
The Florida Bar
Tallahassee, Florida 32301-8226

Michael F. Berry
Counsel for Respondent
1601 20th St.
Post Office Box 2620
Vero Beach, Florida 32961-2620

David G. McGunegle

David G. McGunegle
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, Florida 32801
(305) 425-5424

Sworn to and subscribed before
me this 20th day of August, 1986.

Sally L. Doyle

Sally L. Doyle, Notary Public
State of Florida at Large

Notary Public, State of Florida at Large
My Commission Expires May 20, 1990
Bonded thru Huckleberry, Sibley &
Harvey Insurance and Bonds, Inc.

My Commission Expires:

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Affidavit of Costs was furnished by ordinary U.S. mail to the Honorable J. William Woodson, Referee, Melbourne Branch Courthouse, 50 S. Nieman Avenue, Melbourne, Florida 32901; a copy has been furnished by certified mail, return receipt requested no. P448559299 to Michael F. Berry, Counsel for respondent, 1601 20th St., Post Office Box 2620, Vero Beach, Florida 32961-2620; and a copy has been furnished by certified mail return receipt requested No. P 448559297 to Kenneth E. Padgett, P. O. Box 3006, Vero Beach, Florida 32960; and a copy has been mailed to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 20th day of August, 1986.

David G. McGunegle

David G. McGunegle
Bar Counsel