

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,
v.
BENNY A. SETIEN,
Respondent.

SUPREME COURT
CASE NO. 70,460

FILED
SID J. WHITE

FEB 18 1988

REPORT OF REFEREE

CLERK, SUPREME COURT
By _____
Deputy Clerk

I. SUMMARY OF PROCEEDINGS: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings as provided for by Rule 3-7.5 of the Rules of Discipline, a final hearing was held on February 3, 1988. All of the pleadings, notices, motions, orders, transcripts and exhibits are forwarded with this report and the foregoing constitutes the record of this case.

The following attorneys appeared as counsel for the parties:

On Behalf of The Florida Bar: Patricia S. Etkin

On Behalf of the Respondent: Henry J. Hunnefeld

II. SPECIFIC FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED: At the final hearing held February 3, 1988, a Factual Stipulation agreed to by both parties was filed. After considering the factual stipulation, together with the pleadings and evidence before me, I find:

COUNT I

1. During or about August 1983 Manuel Antelo ("Antelo") paid Respondent \$500.00 to represent him in a civil action brought by Mt. Sinai Hospital, Dade County Circuit Court Case No. 83-24867 ("civil action").

2. The civil action was based upon Antelo's failure to pay hospital bills incurred by his deceased wife who had been a patient at Mt. Sinai Hospital.

3. On August 19, 1983, Respondent filed an Answer, Affirmative Defense and Third Party Complaint against Antelo's insurance company as a Third Party Defendant for failure to pay his wife's hospital bills. This pleading required a substantial amount of time in research and preparation.

4. Other than filing the aforementioned pleading, Respondent took little or no action to pursue Antelo's legal matters.

5. Respondent failed to answer the requests for production of documents and interrogatories served upon him.

6. As a result of Respondent's failure to respond to the aforementioned discovery requests, motions to compel discovery were filed by both the Plaintiff and Third Party Defendant.

7. Respondent failed to appear at any hearing in connection with the aforementioned motions.

8. In July 1984, the Third Party Defendant's Motion for Sanctions was granted which resulted in the dismissal of the Third Party Complaint filed by Respondent.

9. In September 1984, Plaintiff's Motion to Compel Answers to Interrogatories was granted and Antelo was directed to answer the interrogatories within 10 days.

10. In November 1984, Plaintiff filed a Motion for Default and Final Judgment based upon Antelo's failure to answer the interrogatories as directed by the Court.

11. In January 1985, the Plaintiff's Motion for Default and Final Judgment was granted.

12. The final judgment awarded in favor of Plaintiff and against Antelo was in the sum of \$36,986.68 in addition to \$963.60 in costs.

13. Respondent failed to advise Antelo of the status of his case.

14. Respondent failed to return numerous telephone calls from Antelo inquiring about the status of the case.

15. By reason of the foregoing, Respondent failed to pursue a legal matter on behalf of a client and failed to return his client's telephone calls or keep his client advised as to the status of his legal matters.

COUNT II

1. In early 1985, Teodoro Carrasco ("Carrasco") retained Respondent to pursue personal injury and property damage claims resulting from a "hit and run" automobile accident.

2. Respondent advised Carrasco that he would evaluate the claim and if it satisfied the requirements of the Florida No-Fault Insurance Act that he would file a claim on his behalf with the insurance company.

3. Respondent was personally familiar with the physician treating Mr. Carrasco and recollects that in August or September 1985 he orally requested the treating physician to forward a copy of his medical evaluation.

4. No report was ever received by Respondent from the treating physician and Respondent failed to follow up with further contact with the physician to obtain the report.

5. Carrasco went to Respondent's office on approximately three occasions between the date he was retained and 1986 to inquire about the status of his claim.

6. On each of the aforementioned occasions Respondent personally reassured Carrasco that he was pursuing his claim and that he should not worry because there was "plenty of time".

7. Carrasco telephoned Respondent on numerous occasions after 1986 to ascertain the status of his claim.

8. Respondent failed to return Carrasco's telephone calls.

9. During or about June 1986, Carrasco saw Respondent in a night club and he told Respondent that he was represented by a new attorney in this matter and that Respondent need not send the file to him.

10. The statute of limitations had not lapsed prior to Carrasco's retention of new counsel.

11. No fees were paid to Respondent or due him because of the contingency nature of the case and no costs were requested of Carrasco by Respondent. Respondent expended costs in the amount of TWO DOLLARS (\$2.00) for the police report.

COUNT III

1. July 10, 1984, Anthony Garofolo ("Garofolo") retained Respondent to represent him in a claim involving assault.

2. On several occasions during the next six months, Respondent represented to Garofolo that he had contacted the insurance company for the purposes of negotiating a settlement and was making progress.

3. Between July and November 1984, the following action was taken to pursue Garofolo's legal matter by Respondent's office staff:

- a) A fire rescue report and police report were requested on July 11, 1984. The reports were received on July 19, 1984, and July 17, 1984, respectively.
- b) On August 13, 1984, a letter was sent to: Palm Springs General Hospital and to Clinica Asociacion Cubana enclosing a copy of a medical authorization executed by Garofolo and requesting all medical reports and bills;
- c) On August 13, 1984, a letter was sent to the potential defendant (Eagle Family Discount) informing it of the claim and requesting a response from them or their insurance carrier within ten (10) days.
- d) On August 30, 1984 letters requesting medical bills and reports were sent to Drs. Kaul, Valdes & Eisenberg, Medi-Car Miami Medical Group, Inc.
- e) On October 15, 1984, a letter confirming a telephone call of October 11, 1984 was sent to the insurer for Eagle Stores. This letter also submitted all reports and medical information obtained to that point in time.
- f) On October 23, 1984, Respondent's office staff telephoned the attorney for Medi-Car in response to a letter Garofolo had received regarding collection of a past due bill to advise the attorney of the pending claim.
- g) On November 6, 1984, a letter was sent to Garofolo informing him that on November 15, 1984 his statement would be taken in the office of Respondent.
- h) On November 7, 1984 letters were sent to: the attorney for Medi-Car to confirm that as soon as the claim is settled and proceeds collected, the balance of the bill would be forwarded to his office; the insurer of Eagle Stores confirming that a sworn statement of Garofolo would be given on November 15, 1984.

4. Beginning January 1985 Garofolo had difficulty contacting Respondent to obtain information concerning the status of his legal matters.

5. Garofolo telephoned Respondent on numerous occasions.

6. Respondent failed to return Garofolo's telephone calls.

7. Notwithstanding Respondent's failure to keep Garofolo advised of the status of his legal matters, Respondent's office undertook the following action in 1985 to pursue the claim:

- a) On April 10, 1985, a five-page demand letter was sent to the insurer detailing the employment, facts of the incident, the injuries, out of pocket expenses and overall evaluation of the claim. This letter also confirmed the policy limits of the insurer for this incident and requested that those limits be paid to the insurer.
- b) On June 17, 1985, a letter was sent to the insurer demanding information; including a copy of the insurance policy, pursuant to Florida Statute §627.7264.
- c) On July 22, 1985, a letter detailing all the above actions by Respondent was sent to the insurer putting the insurer on notice that a bad faith claim would be made since a review of the policy requested on June 17, 1985, revealed that there was actually a one million (\$1,000,000.00) dollar limit on such claims and that the insurer had also taken an undue amount of time in responding to the claim. A similar letter was sent to a claims supervisor of the insurer which requested quick action.
- d) On July 23, 1985, a copy of the bad faith letter mailed to the insurer was sent to the office of the insurance commissioner.
- e) During August, 1985, a letter from the insurer was received responding to the letter of July 22, 1985.
- f) Between July 1984 and August 1985, Respondent or his office staff had at least six telephone calls with insurance adjusters or physicians relating to the processing of the insurance claim.
- g) In August 1985 an attorney in Respondent's office prepared a six page complaint alleging numerous causes of action against Eagle Stores and various individuals. This complaint was placed in the file but it was never filed in court.

8. Respondent failed to file a complaint and took no action after August 1985 to pursue the legal matter.

9. Garofolo retained new counsel in May of 1986 who successfully concluded a settlement of the claim.

10. The statute of limitation had not lapsed prior to Garofolo's retention of new counsel.

11. No fees were paid to Respondent or due him because of the contingency nature of the case and no costs were requested of Garafolo by Respondent.

COUNT IV

1. In the spring of 1985, Fernando Figarola ("Figarola") and Respondent spoke about an outstanding debt evidenced by a note which was made in favor of Figarola. Respondent agreed to initiate action to collect the note by sending a letter to the debtor in New Jersey demanding payment.

2. Figarola entrusted Respondent with the original of the promissory note.

3. On June 28, 1985, Respondent wrote a letter to Ramon Garcia of Union City, New Jersey (debtor) demanding payment.

4. No response to that letter was ever received by Respondent.

5. During October 1985, Respondent advised Figarola that he had written a letter to the debtor and was waiting for a response.

6. Respondent took no further action on Figarola's behalf collect debt.

7. Respondent did not furnish Figarola with any further information concerning his efforts to collect the debt.

8. After October 1985, Figarola telephoned Respondent on numerous occasions to ascertain the status of the collection matter but Respondent failed to contact Figarola or return his telephone calls.

9. As of the date the Complaint was filed, Figarola had been unable to locate Respondent to recover the original promissory note.

10. The original promissory note was in Respondent's possession since the spring 1985 until August 1987, when it was returned to Figarola by counsel for Respondent.

11. The statute of limitation has not lapsed prior to the return of the original note to Figarola in August 1987.

COUNT V

1. On August 25, 1983, Roberto and Esther Morejon (Mr. and Mrs. Morejon") retained Respondent to represent their son in a personal injury claim arising from a go cart accident.

2. After a period of review of information provided on November 8, 1983, Respondent's staff sent a notice to Fortune Insurance Company advising the company that a claim was being made for P.I.P. benefits under Mrs. Morejon's insurance policy on behalf of her son.

3. Shortly after November 28, 1983, a letter from Fortune Insurance was received by Respondent relating to the claim and requesting further information.

4. On December 13, 1983, a letter was sent to Fortune Insurance with a completed P.I.P form and requesting additional information.

5. Shortly after February 3, 1984, Respondent received a letter from Mr. Morejon advising Respondent that new counsel had been retained and that the file should be forwarded to the new attorney.

6. On February 20, 1984, a letter was sent forwarding the Morejon file to the new attorney.

7. On March 1, 1984, Mr. Morejon sent a letter to the new attorney advising him that he was retaining Benny Setien again as his attorney.

8. On March 12, 1984, Respondent received a letter from Fortune Insurance requesting additional information.

9. On March 29, 1984, a call was made to the insurer by Respondent's office staff requesting a further detailing of the information needed.

10. In August 1984, Mr. and Mrs. Morejon again went to Respondent's office to discharge him for failure to return phone calls or communicate with them concerning their son's case.

11. During the occasion referenced above, Respondent met with Mr. and Mrs. Morejon and reassured them that he would proceed with the representation.

12. Based upon Respondent's assurances, Mr. and Mrs. Morejon permitted Respondent to continue with the representation.

13. On October 12, 1984, letters were sent advising that Respondent's office was preparing claims to P.I.P. carriers and requesting forbearance of billing for services rendered the Morejon's to the following: Wes F. King, M.D.; Arthur Finnieston, Inc.; Emergency Room Physicians, Miami Childrens Hospital; W. Christian Bauer, M.D.; Metro Dade Fire Department; Child Neurology Associates, P.A.; Drs. Altman, Litt, and Greenberg; Miami Children Pathologist; Miami Childrens Hospital; and Dr. Smith.

14. On October 19, 1984, a letter was sent by Respondent to Universal Casualty Insurance Co., the insurer for Mr. Morejon making a claim for P.I.P. benefits for Mr. Morejon's son.

15. A letter was sent in Spanish on October 24, 1984, to Mrs. Morejon requesting that they contact the office of Respondent immediately to discuss the case and that numerous attempts to contact Mrs. Morejon by phone proved unsuccessful.

16. On October 24, 1984, a letter was sent to a claims adjuster for corporate group services (the group health insurer for Mr. Morejon) requesting payments relating to this case. A copy of this letter was sent to Mrs. Morejon.

17. Shortly after November 9, 1984, Respondent received a letter denying coverage from Fortune Insurance because the go-cart accident in which the Morejon's son was involved in was not eligible for benefits under their policy.

18. A subsequent letter from Fortune was received by Respondent's office on December 20, 1984.

19. Shortly after December 4, 1984, Respondent received a Notice from the Department of Rehabilitation and Liquidation, State of Florida, advising that Universal Casualty had gone into Court ordered liquidation.

20. After receiving the aforementioned letter in December 1984, Respondent took no further action to pursue the legal

matter or advise Mr. and Mrs. Morejon of the status of their case.

21. Respondent failed to return telephone calls of Mr. and Mrs. Morejon or communicate with them regarding their son's case.

22. As a result, during January 1986, Mr. and Mrs. Morejon discharged Respondent and retained other counsel.

23. Respondent failed to return numerous written requests and telephone calls from both Mr. and Mrs. Morejon and/or their new counsel requesting both information concerning the status of their son's case as well as the return of their son's file.

24. The statute of limitation had not lapsed prior to the retention of new counsel by Mr. and Mrs. Morejon to pursue this claim.

25. No fees were paid to Respondent or due him because of the contingency nature of the case and no costs were requested of Mr. and Mrs. Morejon by Respondent.

COUNT VI

1. On or about August 9, 1985, Respondent issued his Check Number 660, drawn on his account at the Ocean Bank of Miami, made payable to the Clerk of the Circuit Court, in the amount of \$306.45 (hereinafter referred to as "check to the Clerk").

2. The check to the clerk was dishonored by the bank due to insufficient funds.

3. Respondent's bank records, including bank statements and checkbook stubs, reflect that he did not have sufficient funds in his account to cover the obligation.

4. After receiving notification of the dishonored check, Respondent redeemed the check to the Clerk in November 1985.

COUNT VII

1. On September 22, 1986, Respondent brought a Porsche to the C.V. European Auto Shop, Inc. located at 7274 NW 70th Street, Miami, Florida for repair.

2. On September 23, 1986, Respondent tendered his Check No. 118, made payable to "C.V. European Auto Shop, Inc.", in the

Cost of Investigation

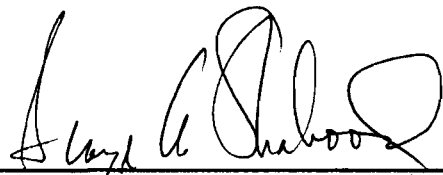
\$2,634.05

Total

\$5,668.81

It is recommended that the costs of these proceedings, in the amount of FIVE THOUSAND SIX HUNDRED SIXTY EIGHT DOLLARS AND EIGHTY ONE CENTS (\$5,668.81) be taxed against Respondent. It is further recommended that execution issue with interest at the rate of twelve percent (12%) to accrue on all costs not paid within thirty (30) days of entry of the Supreme Court's final order in this cause, unless time for payment is extended by the Board of Governors of The Florida Bar.

Dated this 12 day of February, 1988 at Fort Lauderdale,
Broward County, Florida



GEORGE A. SHAHOOD, Referee

Copies furnished to:
Patricia S. Etkin, Esq.
Henry J. Hunnefeld, Esq.