

FILED

SID J. WHITE

DEC 30 1991

CLERK, SUPREME COURT.

By _____
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

FLORIDA BAR

Complainant

Case No. 77,967

VS.

TFB File No. 89-00323-01A
90-01274-01A

JAMES R. MCATEE

Respondent.

_____ /

RESPONDENT'S REPLY BRIEF

JAMES R. MCATEE
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TABLE OF CITATIONS

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RESPONSE TO ARGUMENT I

The whole basis of the Bar's complaint is that there existed a conflict of interest between Page and Clinicare in the case. A conflict of interest can only exist if the attorney is representing two clients at the same time. The threshold requirement is that both Page and Clinicare be clients of McAtee. Page obviously was a contractual client under a limited written agreement. Contrary to the Bar's statement of facts, McAtee never represented Clinicare. The Bar's own exhibits show that from the inception of Clinicare's lien that McAtees' claim from Clinicare was based upon an equitable distribution for attorney's fees. The research notes and the letters to Clinicare clearly show what the intent was at that time. The disbursement letter to Clinicare shows that the funds retained were based upon an equitable distribution in accordance with the agreement reached with Clinicare. The statement by the Bar as to representation of Clinicare are not borne out by the record.

McAtee agrees with the Bar's statement in its brief that the higher the amount collected the more McAtee would receive in fees. That is the purpose of a contingent fee contract. As a direct result of a larger settlement Page also received more money. Certainly, Page received more by not settling with State Farm for \$100,000.00 and forgoing the claim against Aetna Insurance. The Aetna claim grossed an additional \$80,000.00 for which Page received a benefit.

The Bar in its brief made a limited attack upon the holding in Forsyth v. Southern Bell, 162 So. 2d 916 (Fla 1st CA 1964). The Bar took from context a portion of a sentence which bears no relationship to the facts or holding by the Court. The Forsyth case was an action by an attorney to recover attorney's fees from the third party, Columbia Casualty and not for contribution.

The legal obligation to pay attorney's fees by Page is based upon a contract. The right to receive a payment of attorney's fees from Clinicare as part of the costs are based on two entirely different legal principals. Solar Research Corporation v. Parker, 221 So. 2d 138 (Fla 1969).

The Bar's position that only 28% of \$80,000.00 should constitute total attorney's fees totally ignores the rulings of this court.

Irrespective of the contract between Page and McAtee there was an equitable duty on the part of Clinicare to pay for obtaining or protecting its funds. This was acknowledged and agreed to by Clinicare.

The similarities of Forsyth and the case before this court are striking.

Forsyth/Columbia Casualty
Claim for property damage
reimbursement in PI case

Not a party Plaintiff in
the case

Page/Clinicare
Claim for medical care
reimbursement in PI case

Not a party Plaintiff in
the case

Did not take assignment
of its claim from Plaintiff

Did not take assignment
of its claim from
Plaintiff

Did not employ counsel
to protect its claim or
participate in litigation

Did not employ counsel
to protect its claim or
participate in litigation
(was asked to participate
in litigation but
declined)

Claim for attorney's fee
against the carrier on
equitable principles and
not against client
carrier

Claim for attorney's fee
against the carrier on
equitable principles and
not against client
carrier

No contractual obligation
between third party and
Plaintiff's attorney

No contractual obligation
between third party and
Plaintiff's attorney

Court found third party
responsible for equitable
amount of attorney's fees

Third party agreed to pay
equitable amount of
attorney's fees

As pointed out by the court in Forsyth, had Columbia Casualty employed counsel and either brought its own action against Southern Bell or participated in the suit brought by the Plaintiff, then Columbia Casualty would have been obligated to pay its own attorney and would not have been obligated to pay the Plaintiff's attorney a fee.

The Bar has totally missed the point. The attorney's fee collected from Page was based upon contract. The attorney's fee collected from Clinicare is based upon equitable principles of "Common Fund Theory". No contractual obligation exists between the non-party and the attorney. In the case before this court the parties did agree to the same percentage. The obligation to pay

attorney's fees became a legal obligation on the part of Clinicare Forsyth v. Southern Bell, 162 So. 2d 916 (Fla 1st CA 1964).

There is a difference in legal principles for attorney's fees awarded as costs and those earned by an attorney in representing his client Solar Research Corporation v. Parker, 221 So. 2d 138 (Fla 1969).

The Bar has failed to address its position as taken in its brief how McAtee can share or give an attorney fee to a non-attorney.

The finding by the Referee that the fee paid by Clinicare amounted to a discount is pure supposition of the part of the Referee.

The findings of the Referee are solely without support in the record since there is no showing that a conflict of interest existed since Clinicare was not a client of McAtee. The Florida Bar v. Bookman, 502 So. 2d 893 (Fla 1987).

There has been no proof by clear and convincing evidence which is required in these proceedings The Florida Bar v. Rayman, 238 So. 2d 594 (Fla 1970).

Since the findings of the Referee are clearly erroneous and lacking in evidentiary support this Court should find that McAtee is not guilty as alleged.

Upholding of the Referee findings will be in conflict with the established law and practice of attorney's involved

in personal injury cases where there is a claim to the proceeds by non-parties. It is the established practice that the non-parties pay an equitable amount of attorney's fees for the preservation of their claim.

RESPONSE TO ARGUMENT II

McAtee takes very strong disagreement with the claim of the Bar that there was any personal gain misrepresentation or dishonest conduct in the handling of the Page matter.

The file obtained by the Bar from McAtee clearly shows from the inception of the case that McAtee's claim was based upon equitable principles as enumerable in case law. The research notes and letters to Clinicare's attorney clearly spell out the basis of the fees paid by Clinicare. Clinicare even acknowledged the claim. McAtee even ask Clinicare to assist in the case but it refused to aid and thereby reduce its equitable responsibility. Forsyth v. Southern Bell, op cite.

Page could have taken the \$100,000.00 and paid his bills and been a lot worse off financially. The first \$100,000.00 received from the recovery of the suit was to be used to pay all medical expenses and the balance would go to Page. Page came to McAtee because he desired additional compensation for his injuries. Page received an additional amount of \$80,000.00 gross.

The Bar's position that only 28% of the \$80,000.00 should be attorney's fees totally ignores the case law. McAtee's fee was based from Clinicare upon equitable consideration and not upon contract. Once the representation of Page commenced, Clinicare had a legal obligation to McAtee to pay him a fee. This is especially true in light

of the fact that Clinicare had the opportunity to reduce the fee by active participation in the case.

As admitted by the Bar the trust account violations amount to technical violations.

The Bar in its opening statement at the hearing admitted but for the Page matter this trust violation would have already been worked out.

It is McAtee's position that there was absolutely no substantial basis for the bringing of the conflict of interest proceeding, certainly, it has cost McAtee time, effort and money, but most important embarrassment by being accused of charging a client excessive fees.

The Bar has already sustained a finding of costs and fees for what amounts to additional punishment.

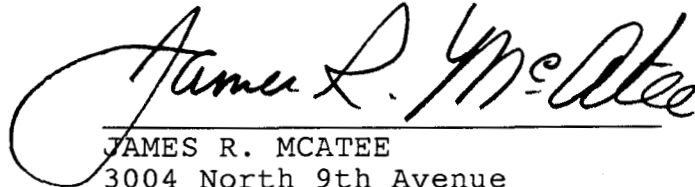
CONCLUSION

Based upon the substantive law of this state there was no conflict of interest shown to exist. The findings of the Referee are clearly erroneous. The decision of the Referee's finding the Respondent guilty of Count One should be reversed and the Respondent found not guilty.

The admitted "technical" violations of the trust accounting rules do not warrant the punishment as recommended by the Referee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Mimi Daigle, Florida Bar Counsel, 650 Apalachee Parkway, Tallahassee, Florida 32399, by U.S. Mail on this the 27 day of December, 1991.



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