

**IN THE SUPREME COURT OF FLORIDA
(Before a Referee)**

THE FLORIDA BAR,

CASE NO: 78,942

Complainant,

(TFB NO: 91-10,108(13D))

vs.

KENNETH W. MASTRILLI,

Respondent.

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REPORT OF REFEREE

I. **Summary of Proceedings:** The undersigned was appointed referee to conduct a disciplinary proceeding according to the Rules Of Discipline. A hearing was held on Tuesday, April 14, 1992. The following attorneys appeared:

For the Florida Bar: **Joseph A. Corsmeier**

For the Respondent: **Michael L. Kinney**

II. **Findings of Fact as to the Misconduct of Which the Respondent is charged:**

Respondent was charged by Amended Complaint dated April 6, 1992, with violations of Rule 4-1.7(a) (a lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client); and Rule 4.1-7(b) (a lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibility to another client).

This case revolves around an automobile accident which occurred on March 3, 1989. Sadie Marie Lapinski ("Driver") made a **u-turn** in front of another car driven by Linda **Parker** Dawkins ("Other Operator"). Eleanore Konopka ("Passenger") was riding in the car with Driver.

On August 30, 1989, Respondent's investigator arranged for Driver and Passenger to be seen by a local physician. At the doctor's office, Driver and Passenger each signed contracts for representation by Respondent. The investigator provided the contracts. Neither Driver, nor Passenger, personally met Respondent.

In the course of Respondent's representation of Passenger, he made written demands for settlement upon the insurance carrier for both Driver and Other Operator. Coincidentally, both

Driver and Other Operator were insured by the same insurance carrier, Allstate.

When settlement was unsuccessful, Respondent initiated upon behalf of his client, Passenger, a lawsuit against his other client, Driver, as well as against the operator of the vehicle which ~~struck~~ Driver and Passenger, Other Operator,

The crux of the Florida Bar's Complaint is that Respondent as counsel for ~~both~~ Driver and Passenger, initiated settlement demands of one client upon his other client, Further, he ~~represented~~ both plaintiff Passenger and defendant Driver in a lawsuit where his respective clients were adversaries.

Respondent adamantly defends his action by asserting that the true party in interest was neither Driver, nor Other Operator, but their common insurance carrier, Allstate. As a result, Respondent ~~asserts~~, the interests of Driver and Passenger were not really adverse, even though Respondent made them opposing parties in a lawsuit.

The Referee finds the facts to be:

1. Driver and Passenger were riding in the same vehicle which was involved in an accident (Record page **14**, lines **8-14**);
2. Respondent undertook the representation of ~~both~~ Driver and Passenger, although he had not met the new clients and did not execute the agreement in ~~their~~ presence (Exhibits 1 and 2; Record page 18, lines 2-18);
3. By letter dated November 3, 1989 addressed to Respondent (Exhibit 4-A), Allstate denied payment;
4. By letter dated November 27, 1989 (Exhibit **4-B**), upon behalf of his client, Passenger, Respondent demanded from the insurance carrier of his other client, Driver, settlement in the amount of the policy limits, \$50,000.00;
5. By letter dated November 27, 1989, (Exhibit **4-C**), upon behalf of his client, Passenger, Respondent demanded from ~~the~~ insurance carrier of Other Operator, settlement in the amount of the policy limits, \$10,000.00;
6. By letter dated December 5, 1989, Allstate declined payment (Exhibit 4-D);
7. ~~On~~ April 28, 1990, Respondent initiated upon behalf of his client, Passenger, a lawsuit in Hillsborough ~~County~~ naming as defendants his other client, Driver, as well as Other Operator (Referee's Exhibit 2; Record page **34**, lines **3-15**);

8. **On** the same day Respondent initiated a second lawsuit upon behalf of his client, Driver, against her insurance carrier, Allstate, for payment of **P.I.P.** medical benefits (Referee Exhibit 1);
9. Respondent neglected to pursue the case where his client Driver was the plaintiff, so that he could pursue the other case for client Passenger where Driver was the defendant (Record, page **41**, lines **2-14**);
10. Upon being served with a copy of the complaint filed by her **own** attorney which named her as a Defendant, Driver terminated the employment of Respondent by letter dated March 27, 1990 (Exhibit **8**; Record, page **41**, lines 14-25 and page **42**, lines 1-17);
11. Respondent's clients never authorized him to initiate a lawsuit of one against the other (Record, page **35**, lines 14-25; Record, page 36, lines 1-25);
12. Driver's insurance policy limits were **\$50,000.00** (Exhibit **4-B**);
13. Respondent wrote in a letter to Allstate that compensation for Passenger's injuries could **far** exceed **\$100,000.00** (Exhibit 4-B);
14. If the policy limits were \$50,000.00, yet the potential damages could be over **\$100,000.00**, Respondent's client, Driver, was exposed to over \$50,000.00, in potential personal liability in Respondent's lawsuit naming Passenger versus Driver. Respondent maintains, however, that he would not have pursued the lawsuit to such a result (Record, page **46**, lines 1-25);
15. Passenger's lawsuit, however, was eventually settled for \$20,000.00, within policy limits **and** without personal exposure to Driver (Record, page **44**, lines 20-25);

The Referee concludes from the facts that neither of Respondent's clients, Driver nor Passenger, consented after consultation with Respondent to become adverse parties in a lawsuit which named Passenger as plaintiff and Driver as defendant.

Respondent makes **an** artful and apparently sincere argument that his demands for settlement, as well as the lawsuit, which pitted one of his clients against the other client, were simply efforts to obtain settlement from **the** insurance carrier. Respondent argues that all he sought was for Allstate to settle Passenger's claim within the limits of Driver's insurance policy, which in fact did occur. Respondent maintains that he never intended to pursue the lawsuit for damages upon behalf of Passenger against Driver in her "personal" capacity.

Further, he ~~makes~~ the convoluted argument that a personal judgment against Driver in an amount in excess of Driver's insurance policy limits, would have resulted in another "bad faith" lawsuit by Driver against Allstate. In effect, all would have worked out well in spite of the conflict.

The Referee, however, finds that Respondent's actions were a clear conflict of interest. The interests of each client were materially limited and adversely affected. Simply stated, Respondent represented opposing parties in litigation. He could not represent the interests of one without adversely affecting the interests of the other.

If Respondent protected Driver's interests by settling Passenger's potential \$100,000.00 claim within the \$50,000.00 insurance policy limits, he adversely affected the interests of Passenger. Conversely, if Respondent protected Passenger's interests by vigorously pursuing an award for damages in excess of Driver's \$50,000.00 insurance policy limits, then he adversely affected the interests of his other client, Driver.

In a word, his "independent" professional judgment in the representation of one client was materially limited by Respondent's responsibility to his other client.

III. **Recommendation as to Whether or Not the Respondence Should Be Found Guilty:**

Guilty of violating Rule 4-1.7(a) and Rule 4-1.7(b).

IV. **Recommendation as to Disciplinary Measures to be Applied:**

The potential injury to Respondent's clients was substantial. Additionally, Respondent has exhibited no remorse, nor even the possibility of wrongdoing. The clients involved are elderly women with little understanding of the legal process. They relied totally upon his "independent" professional judgment.

I recommend that the Respondent be suspended for a period of six (6) months and thereafter until Respondent shall prove rehabilitation by attending a Florida Bar sponsored continuing legal education course on ethics and by successfully completing a re-testing of the professional responsibility examination. Payment of ~~the~~ costs for these proceedings should also be a condition.

V. **Personal History and Past Disciplinary Record:** After finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(4), I considered the following personal history and prior disciplinary record of the Respondent, to wit:

Age: 35

Date Admitted To **Bar:** 1983

Prior disciplinary convictions and disciplinary measures imposed therein: None. (This referee, however, heard a prior complaint of record within the last year against Respondent. Although found not guilty of that violation, Respondent has exhibited in the past an ill-advised and careless method of practice, particularly in the ethical preparation of medical malpractice demand letters.)

VI. **Statement of Costs and Manner In Which Cost Should be Taxed:** I find the following costs were reasonably incurred by the Florida **Bar:**

Costs incurred at the grievance committee level
as reported by **Bar** Counsel: \$ 669.62

Administrative costs at grievance committee level
under Rule 3-7.6(k)(1)(5) 500.00

Witness fees 280.00

Court Reporter costs 1,001.50

Administrative cost at referee level
under Rule 3-7.5(k)(1)(5) 150.00

TOTAL ITEMIZED COSTS \$2,601.12

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to Respondent.

DATED this 8th day of May, 1992.



**WALTER FULLERTON
REFEREE**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above report of referee has been served on ✓ Joseph A. Corsmeier, Esquire, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, to ✓ Michael L. Kinney, Esquire, Attorney for Respondent, Post Office Box 43085, Tampa, Florida 33679-8055 and to John T. Berry, Esquire, Staff Counsel, The Florida Bar, Legal Division, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this 8th day of May, 1992.



WALTER FULLERTON
REFEREE