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IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR

Complainant,

**Supreme Court Case
No. 83,351**

**The Florida Bar File
No. 92-70,732(11F)**

v.

AMY L. BURKICH-BURRELL,

Respondent.

_____ /

ANSWER BRIEF OF THE FLORIDA BAR

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PREFACE

For the purpose of this Brief, Amy L. Burkich-Burrell will be referred to as "Petitioner" and/or "Respondent". The following abbreviations will be utilized:

- T - Transcript of the final hearing conducted September 26, 1994 and September 28, 1994 to be followed by the appropriate page.
- RR - Report of Referee to be followed by the appropriate page.
- PA - Petitioner's Appendix to be followed by the appropriate item letter and page number.

STATEMENT OF THE FACTS

Respondent states in her Statement of Facts that the information concerning prior medical providers was supplied in response to a request for production. However, no citation to the record is provided. That is particularly significant because there is no reference to chronology.

In fact, Burrell's counsel provided the names of doctors who had treated Burrell in answers to interrogatories provided after Respondent was no longer counsel (T. 34) and after opposing counsel had obtained the information from a doctor by service of subpoena. (T. 16).

There are a number of factual omissions which will be addressed in the Argument portion of the brief. Most important, however, is Respondent's omission that she was personally involved in the 1986 accident and accompanied her husband to some of the doctors who treated him. (T. 38, 87, 136).

SUMMARY OF THE ARGUMENT

Respondent first raises the issue of sufficiency of the evidence. However, Respondent fails to overcome the presumption of correctness of the Referee's findings including his first hand evaluation of credibility of the witnesses.

The essential findings of the Referee are undisputed. Respondent had personal knowledge of Burrell's 1986 accident since she and her child were in the car with Burrell. After the accident she went to the doctor's offices with Burrell.

Yonan's alleged participation in preparing answers to interrogatories was in dispute. He was not mentioned at the Grievance Committee meeting. Burrell had testified at the meeting that he prepared the answers himself. In addition, Yonan was not a Florida lawyer and should have been supervised by the Respondent.

Violations of Rule 4-3.4(a) deal with actual knowledge or what one should reasonably know. Based upon the undisputed facts presented above and the Court's negative assessment of Respondent's credibility, the guilty finding in regard to Rule 4-3.4(a) was clearly supported. Respondent concealed material vital to the defense. Likewise, those facts support the conclusion that Respondent concealed and/or failed to disclose in violation of Rule 4-4.1.

As a consequence, the evidence also clearly supports a finding of conduct involving a violation of the Rules of Professional Conduct pursuant to Rule 4-8.4(a). That Rule states that:

"A lawyer shall not (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

The findings of a violation of Rule 4-8.4(c) prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation is also supported by the record.

Second, the recommended discipline is clearly appropriate. An evaluation of the governing cases and their similarities and differences and consideration of several aggravating factors justifies a thirty day suspension. A similar case is **The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989)** which resulted in similar discipline. Additional cases in support of the suspension are cited in the Argument portion of this brief.

POINTS ON APPEAL

I

WHETHER THE REFEREE'S FINDINGS OF VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT WERE ESTABLISHED BY CLEAR AND COMPETENT EVIDENCE AND WERE NOT CLEARLY ERRONEOUS?

II

WHETHER THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS CORRECT AND CONSISTENT WITH ESTABLISHED CASE LAW?

ARGUMENT

I

THE REFEREE'S FINDINGS OF VIOLATIONS OF THE RULES OF PROFESSIONAL CONDUCT WERE ESTABLISHED BY CLEAR AND COMPETENT EVIDENCE AND WERE NOT CLEARLY ERRONEOUS.

It is well settled that in disciplinary proceedings, the findings of the Referee are given a presumption of correctness. The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993). As stated in The Florida Bar v. McClure, 575 So. 2d 176 (Fla. 1991), the party seeking review of the disciplinary proceeding has the burden of showing that the Referee's findings are clearly erroneous or lacking in evidentiary support. This Court must, therefore, uphold the findings of the Referee unless the party seeking review can show that the findings are clearly erroneous. The Florida Bar v. Thomas, 582 So. 2d 1177 (Fla. 1991).

In The Florida Bar v. Simmons, 581 So. 2d 154 (Fla. 1991) this Court stated that it will not reweigh evidence or substitute its judgment for that of the Referee, unless the judgment of the Referee is lacking in evidentiary support. The Referee is in a unique position to assess the credibility of the witnesses and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect. Thomas, supra, The Florida Bar v. Anderson, 594 So. 2d 302 (Fla. 1992).

In the instant case, the Referee's findings of fact are supported by competent and substantial evidence. The Referee found that Respondent's testimony was not credible. The Respondent in her brief, has failed to show that the Referee's determination that her inconsistent, evasive and contradictory testimony lacked credibility was erroneous. The Referee stated in his report that

during Respondent's testimony at trial she displayed selective inability to recall events that were not favorable to her. (RR p.6)

In addition to Respondent's display of selective memory, and disingenuous inability to understand questions, the record reflects numerous inconsistencies in Respondent's testimony as well as Respondent's refusal to accept any responsibility for her conduct. (RR p.6) The Referee found the Respondent had personal knowledge concerning her client/husband's preexisting injuries and prior medical treatment. (RR p.3) Despite Respondent's knowledge of Burrell's prior accident and injuries, Respondent failed to prevent her client from submitting false and misleading answers to the interrogatories, and notarized them. Respondent claimed despite her personal knowledge of Burrell's history, that she had no duty to check the interrogatories. The Referee found that her inaction supported a violation of the Rules. (RR p.4)

At trial the Respondent blamed a non-lawyer who allegedly assisted in the case for the material omissions of fact contained in her clients answers to interrogatories. (RR p.4) On November 30, 1993 at the hearing before the Grievance Committee however, the Respondent and her client/husband Burrell, gave testimony concerning the preparation of the answers to the interrogatories. No reference to a non-lawyer by the name of Cyrus Yonan was made concerning the preparation of interrogatories before the Grievance Committee by either the Respondent or Burrell. In fact, William Burrell, unequivocally stated that he was the one who prepared the answers and mentioned no assistance from any other person. Burrell stated that he had interrogatories from cases that he used as a guideline for his answers and did not mention Mr. Yonan as providing any help. (Testimony of William Burrell before Grievance Committee pages 23, 24, 25, 108 and 129; T. 90-92).

The standard by which the Referee judged Respondent's conduct in finding her guilty of violations of Rule 4-3.4(a) is in accordance with the language of the rule, i.e., whether one knows or "should reasonably know". (Emphasis added) She either knew or should have known that information concerning Respondent's preexisting injuries was material and relevant to the pending proceeding, and that any obstruction or concealment of opposing counsel's access to such information was unlawful. As a lawyer, Respondent knew or should have reasonably known that preexisting injuries and or prior treatment by physicians are relevant factors in the formulation of a defense on behalf of a client. Respondent admitted at trial that she knew what a "preexisting injury" was. (T. p. 126)

Respondent admitted that she was involved in an accident in 1986 with her client/husband, William Burrell. The Referee did not accept her assertion that she did not remember the accident. (RR. p. 6) Respondent further admitted that she accompanied him to Dr. Stephen Ticktin for treatment of his injuries. (T p. 136, 214) The standard for establishing a finding that the Respondent violated Rule 4-3.4(a) was therefore clearly met. The Respondent's failure to provide critical information or at the very least insure that it had been revealed to opposing counsel was found by the Referee to support a violation of the Rules.

The Referee also found that the Respondent violated Rule 4-4.1 of the Rules of Professional Conduct. Rule 4-4.1 states:

"In the course of representing a client a lawyer shall not knowingly, make a false statement of material fact or law to a third person; or fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."

The note to Rule 4-4.1 states, "A misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false". The note further states, "A

misrepresentation can also occur by failure to act". (Emphasis added). Therefore any avoidance of a responsibility to act shall not obviate the duty.

Respondent attempted at trial to excuse the duty she owed to opposing counsel by testifying that she hired a third party by the name of Cyrus Yonan to assist her client/husband in the preparation of his responses to the interrogatories. Respondent further stated that she had no knowledge of the omitted information because she did not review the work of Cyrus Yonan for its completeness and accuracy. (T. p. 109) Yonan was a retired lawyer from Illinois, who was not licensed to practice in the State of Florida.

In defense of her position that she had no duty to review the answers to the interrogatories given by her client, the Respondent cited Florida Bar Staff Opinion, No. 17571. The Opinion suggests that an attorney, under circumstances quite dissimilar to those presented herein, does not have a duty to check his client's sworn answers to interrogatories for accuracy. The factual scenario in the opinion concerned a large law office which handled primarily civil litigation. The opinion evaluated circumstances in which numerous cases were handled by one attorney charged with the responsibility of supervising several paralegals in the office. The paralegals assisted in the preparation of responses to client interrogatories. The staff opinion addressed the problem that a supervising attorney encounters when required to review every answer to each client's interrogatories. The opinion stated that such a requirement would indeed be burdensome for one attorney. The facts in the opinion differ dramatically from those in this case because the lawyer in the opinion did not possess specific personal information that was relevant to the questions being asked in the interrogatories. The opinion further acknowledges that there are circumstances which would require deeper inquiry by counsel, and that the individual facts in each case were controlling.

The distinction between the two fact patterns is obvious. In the instant matter Yonan and

the Respondent were only handling one client and no undue burden would have been imposed upon her in reviewing Yonan's work on her client/husband's answers.

The Respondent's duty to review her client/husband's answers for completeness and truthfulness was not excused by the paralegal's involvement in the instant matter. Subdivision (b) of Rule 4-4.1 recognizes that the law requires a lawyer to disclose information in order to avoid being "deemed to have assisted the client's crime or fraud".

The Referee did not believe the Respondent's contentions that she did not recall the events, nor that she did not know the answers were incomplete. The Referee found that Respondent therefore knowingly violated Rule 4-4.1. The record contains sufficient competent evidence that Respondent was not excused from her duty and that the findings of the Referee that the Respondent violated Rule 4-4.1 of the Rules Regulating Professional Conduct were amply supported by law.

The record contained competent evidence to sustain the Referee's finding that the Respondent violated Rules 4-8.4(a) and 4-8.4(c) of the Rules of Professional Conduct. Rule 4-8.4(a) states, "A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another." Rule 4-8.4(c) states, "A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation."

The Referee concluded based on competent evidence that the Respondent violated the Rules Regulating Professional Conduct by her failure to provide a third party, Cyrus Yonan, with relevant and material information concerning the client's true medical history, despite her first hand knowledge of same. Also, the Referee properly found that Respondent obstructed opposing counsel's access to evidence that was relevant to a pending proceeding. Allowing Yonan to prepare and submit answers to interrogatories which contained the false information that Respondent was

aware was misleading, is the basis for the Referee's finding of a violation of Rule 4-8.4(a) of the Rules Regulating Professional Conduct.

Finally Respondent's act of withholding relevant and material information from a party who rightfully requests and requires such information during the course of litigation is clearly a misrepresentation. The Referee's finding of a violation of Rule 4-8.4(c) of the Rules Regulating Professional Conduct based upon Respondent's actions and inactions in this matter is clearly demonstrated.

Competent evidence was provided in support each and every one of the violations of the Rules Regulating Professional Conduct found by the Referee against the Respondent. The Referee's recommendation of discipline must therefore be affirmed.

ARGUMENT

II

THE REFEREE'S RECOMMENDATION OF DISCIPLINE IS CORRECT AND CONSISTENT WITH ESTABLISHED CASE LAW.

The Referee's recommendation for discipline of the Respondent in this matter is consistent with the relevant and controlling case law.

In **The Florida Bar v. Rood**, 569 So. 2d 750 (Fla. 1990), an attorney who was found guilty of having his client sign false answers under oath was given a one year suspension. The Court determined that the attorney must have known of the false answers based on other facts revealed at trial. This Court upheld the Referee's recommendation and further found that the Referee was entitled to reject the respondent's contention that he had no intent to provide false information.

In the instant case, the Respondent's relationship with her client created circumstances which caused her to be personally involved with him in an auto accident in which he sustained injuries substantially similar to those for which Respondent sought to recover damages in a lawsuit for a subsequent incident. The Referee ruled in favor of the Bar despite the contentions by the Respondent that she did not know or have reason to know the answers given in the interrogatories were false. Like Rood, supra, this Referee concluded the Respondent must have known that the answers were false based on other facts revealed at trial and Respondent's incredible testimony.

In the case of **The Florida Bar v. Feige**, 596 So. 2d 433 (Fla. 1992), an attorney was found to have assisted in perpetrating a fraud on a third party in a dissolution of marriage case, when the attorney failed to notify the former spouse of one of his clients, that the client had remarried. The attorney allowed his client to continue receiving alimony payments, despite the fact that he had personal knowledge that the client had remarried because he performed the ceremony. Feige was

found to have violated the same Rules of Professional Conduct that the Respondent was found guilty of. Feige, however, was suspended from the practice of law for a period of two years.

This Respondent's case is similar to Feige, in that she had specific knowledge of facts which should have been revealed to a third person, the opposing counsel. The Respondent failed to disclose the material facts she was aware of despite reasonable knowledge that the omission of such facts may have assisted in the perpetration of fraud by her client. The Referee found that Respondent was clothed with a clear responsibility based upon the fact that the knowledge she possessed reasonably required her to review the answers given to opposing counsel in order to insure that her client had revealed such information. The Referee found that the Respondent failed to properly fulfill that responsibility, as in Feige and found that her actions or inactions, constituted misrepresentation.

The Referee correctly found that Respondent's conduct warranted a suspension. The Referee weighed the conduct along with the aggravating and mitigating factors which were presented. The Referee determined that a suspension of the Respondent for a period of two years, the discipline in Feige, was not appropriate under these circumstances. However, the Referee did determine that a suspension for a period of thirty (30) days was warranted and was not unduly harsh.

In the case of **The Florida Bar v. Pahules**, 233 So. 2d 130 (Fla. 1970), this Court enumerated the three purposes to be considered when imposing discipline for an ethical infraction.

“First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair

to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter other who might be prone or tempted to become involved in like violations.”

The Referee in weighing the facts and evidence in the instant matter rendered a recommendation for discipline that was consistent with the purposes and guidelines set forth in Pahules.

Finally, **The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989)**, most closely resembles the facts that were established in the instant case. The lead attorney in Anderson, supra, failed to correct a brief which misrepresented the facts of the case to the court. The attorney failed to acknowledge the patent misrepresentation. This Court upheld the finding that the lead attorney was primarily responsible for the work submitted in the case. The lead attorney was suspended for a period of thirty (30) days.

The facts in the instant case are similar to those in Anderson, in that the Respondent herein failed to disclose material facts to opposing counsel even though she had first hand knowledge that contradicted the information which was actually supplied. The Respondent’s interest in the outcome of the litigation as a party as well as a lawyer created a unique relationship to the case that required total candor. Since Respondent was not only the lead attorney, but the only attorney involved in Burrell’s representation at the time the false answers were filed, she was entirely responsible for the misrepresentations made and for her failure in not correcting them.

The discipline recommended by the Referee under the instant circumstances is firm but the type of conduct committed in this case must be discouraged by this Respondent or any other lawyer who might be tempted to become involved in future or like violations. **The Florida Bar v. Rogers, 583 So. 2d 1379 (Fla. 1991)**, Pahules, supra.

The applicable Standard for Imposing Lawyer Sanctions under Section 6.12 states, “Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court that material information is improperly being withheld, and takes no remedial action.”

In this case, the Referee determined that Respondent had specific first hand knowledge of the information requested and did not insure that the information in the answers to interrogatories was correct. Furthermore, the Referee did not believe Respondent’s assertion that she had no knowledge of the incomplete answers or that she forgot about Burrell’s injuries. The Referee considered Respondent’s overall refusal to take responsibility for her actions as an aggravating factor in assessing appropriate discipline. In balance, the Referee considered Respondent’s marital difficulties and claim of inexperience with civil litigation, as mitigating factors in assessing the appropriate discipline.

The Referee was fair in his assessment of Respondent’s case. The recommendation as to discipline by the Referee followed the authority and precedent previously established. The Referee’s recommendation therefore must be upheld as it is supported by existing case law and comports with the Standards for Imposing Attorney Discipline.

CONCLUSION

WHEREFORE, based upon the foregoing the Referee's Report should be approved.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing THE FLORIDA BAR's ANSWER BRIEF was sent Via Federal Express to Sid J. White, Clerk, Supreme Court of Florida, 500 Duval Street, Tallahassee, Florida 32399-1927 and a true and correct copy was mailed to Amy Lee Burkich-Burrell, Respondent at 4475 S.W. 8th Street, Miami, Florida 33134 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this **3rd** of **March, 1995**.

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