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IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: 83,351

FL Bar Case No.: 92-70,732 (11F)

AMY L. BURKICH-BURRELL,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent,

PETITIONER'S REPLY BRIEF

The following is a review of a Report by a Referee in a Florida Bar

Disciplinary proceeding.

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Issue 1

A. There was insufficient evidence presented by the Florida Bar at the trial of this matter for the Referee to recommend a finding of guilt as to a violation of Florida Bar Rules 4-3.4(a), 4-4.1, and 4-8.4.

i. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, had a duty to review the plaintiff's sworn answers to Interrogatories 18 and 20.

ii. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, had any reason whatsoever, whether by suspicion or actual knowledge, to question the veracity of the answer given by the Plaintiff to Interrogatories #18 and #20.

B. There was insufficient evidence presented by the Florida Bar at the trial of this matter to support a finding, by a preponderance of the evidence, that the respondent, Amy L. Burkich, *knowingly* violated Rules 4-4.1 and 4-8.4.

The Florida Bar, in its opening argument at the trial of this matter, stated to the Court that it intended to prove the following:

> Your Honor, the Florida Bar today will show that these rules were in fact violated by the conduct of Amy Lee Burkich-Burrell, to wit, by Ms. Burrell's omission of material information in depositions [interrogatories] that were propounded by opposing counsel in a personal injury action.
>
> The evidence will show that Ms. Burrell knew and had personal knowledge or reasonably should have known that prior similar injuries of her client and husband, William Burrell, and prior treatment by physicians for injuries that were being claimed in the pending action had taken place.
>
> Amy Lee Burkich-Burrell's failure to correct or provide the proper

> information to the Court and to opposing counsel, where she had personal knowledge of such information, not only obstructed opposing counsel's access to that information, but potentially perpetrated a fraud upon the Court and opposing counsel. (T1. Pg 5, Ln 2-23).

Upon a careful review of the trial transcript it is evident that the reasoning of the of the Florida Bar is flawed. Florida Bar Staff Counsel, Ms. Chavies, makes three fatal assumptions, i.e., (1) that the subject answers to interrogatories were made by the undersigned attorney; (2) that the undersigned had a duty to review the subject interrogatories, without having the veracity of the interrogatories being called into question; and (3) that the undersigned's involvement in the 1986 accident automatically compels the petitioner to review the interrogatories for the 1989 accident, in order to prevent omission or misstatement by the person answering them.

In arguendo, the Florida Bar placed the carriage before the horse. Ms. Chavies applies a form of circular reasoning in an attempt to prove that the undersigned had an inalienable duty to review the subject interrogatories given by William Burrell in order to prevent an omission or misstatement in them. This idea is based on the fact that the undersigned had knowledge of the injuries and treatment of Mr. Burrell for the 1986 accident. (T2, Pg. 256, Pg 257, Ln 1-5). Ms. Chavies assumes that the undersigned, by virtue of having been involved in the 1986 accident, should of taken a proactive stance in the filing of a client's answers to interrogatories, in order to avoid a possible error or omission by the client, because she had actual knowledge of the

information sought; notwithstanding the fact that there was never a basis to question their accuracy or veracity.

Throughout the trial of this matter the counsel for the Florida Bar attempts to present a foundation for her argument and improperly assumes that such a proactive duty does exist, even though none exists in law or fact. Counsel for the Bar even goes to the extent of stating at the trial that the Referee should take into consideration, strictly as an aggravating factor, that the undersigned failed to correct or counsel her client at his deposition for the subject case, when he was asked "Did you ever see any doctors before December 24, 1989 for any problems related to your left knee, your neck, your shoulders or your arms?" He responded "Not that I recall." Since when does an attorney have a duty to correct a client's answer when he does not remember the information being asked? Throughout, the Bar attempts to sway the attention of the Referee with half-truths and complete fabrications, specifically like the inalienable duty to review the interrogatories and the above mentioned so called "aggravating factor." What is clear is that the Florida Bar's position in this case is not supported by fact or law.

It is well established that this Honorable Court will not reweigh evidence or substitute its judgment for that of the Referee, but in the instant case, the primary foundation of the Bar's case is that the undersigned breached a duty that does not exist. Therefore, should this Court find that the evidence presented by the Bar was a

misstatement of law and mistakenly accepted by the Referee as fact, this Honorable Court does have the ability to reverse the recommendation of the Referee when the recommendation is contrary to law.

In essence, the petitioner is charged with the violation of two general principles of ethics, (1) Candor Toward The Tribunal; and (2) Fairness to Opposing Party and Counsel.

Ms. Chavies attempted to overcome her proof problem, by saying that counsel *prepared* the interrogatories on behalf of the client/husband, and that the undersigned had personal knowledge of prior injuries and treatment which were not included in the answer, and thereafter, failed to reveal the omissions to the Court and opposing counsel. While this concept is parsimonious, it nevertheless has no legal or factual foundation from which to charge an attorney with an ethical violation.

i. *Attorney does not respond to opposing party's interrogatories.*

The Florida Bar initially contends that the undersigned answered the subject interrogatories on behalf of the client; such an assertion is patently false. (T1, Pg. 83, Ln 8-25, Pg. 84, Ln 1-8). It is well established that "[A]n advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client or by someone on the client's behalf, *and*

not assertions by the lawyer." ABA Ann. Mod. Rules Prof. Cond. Rule 3.3. On the flip side, is Rule 3.1, which involves candor in an assertion purporting to be of the lawyer's own knowledge, as in an affidavit by the lawyer or in a statement in open court.

ii. *Trigger for Florida Rule of Professional Conduct 4-4.1*

The Florida Rule of Professional Conduct 4-4.1 includes the gist of both ABA Rules 3.3(a)(1) and Rule 3.3(a)(2). The ABA and the Courts consider silence tantamount to lying only when it is proven by a preponderance of the evidence that the attorney knows or should know that the information or answers given by a client are false. As stated in "The Law of Lawyering" 584 (2d ed. 1990), when a client answers a proper discovery request with a deliberately incomplete answer, ABA Rule 3.3(a)(2) is applicable not 3.3 (a)(1). ABA Rule 3.3(a)(2) states "fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; as opposed to ABA Rule 3.3(a)(1) which states "make a false statement of material fact to a tribunal." The Florida Bar alleged the misrepresentation of facts by the undersigned to a tribunal. Therefore, an essential element necessary to the charge of omitting pertinent evidence, is the proof that the undersigned had a duty to check the answers of the affiant, William Burrell. A violation of the applicable portion of 4-4.1, can only be triggered by a showing of a willful or negligent breach of duty on the part of the undersigned in failing to check the affiant's answers for accuracy, which in this case was not established. The duty was taken by the Bar and the Referee as a given, when such was not the case.

iii. *Duty To Investigate Client's Truthfulness*

The Florida Bar writes in their Answer Brief, "[D]espite 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." The Bar also states that "[T]he Referee found that her inaction supported a violation of the Rules." (Pg. 6 Answer Brief). This would suggest that attorneys must take a proactive stance toward answers provided by their clients, even when they have no reason to doubt the information provided by their client. Moreover, it was never shown at the trial that the undersigned even knew of the omissions charged herein.

As stated in the Initial Brief, an attorney cannot avoid responsibility by avoiding inquiry. Nevertheless, Rules 4-5.3 and 4-1.2(c), do impose a minimum standard of reasonableness. It is reasonable and proper for an attorney to have a duty to check a client's sworn responses to each and every interrogatory question for accuracy, when the candor of a client is reasonably doubted or suspicious. However, the facts and circumstances as to when the duty arises will depend on the facts of each case. The Bar failed to present any evidence at the trial from which one could even infer that the petitioner, Amy L. Burkich, had any reasonable suspicion of Mr. Burrell's candor prior to his preparation of the answers. The Bar again on Page 9 of the Answer Brief attempts to impose a proactive duty upon the undersigned counsel, which does not exist. Due to the Bar's failure to meet their burden as to whether the undersigned had a reasonable belief or suspicion to doubt her client's candor prior to the filing of the

answers, the undersigned **had no such duty**. Again, the Florida Bar misstates "[T]he 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" and "The record contains sufficient competent evidence that the 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." Such a sweeping assumption is incorrect, as the duty described above never arose as a matter of law or fact.

The undersigned counsel was also charged with a violation of Rule 4-3.4(a). In the Answer Brief, the Florida Bar offers the position that the standard by which the Referee's judgment of the Respondent's conduct in finding her guilty of violation of Rule 4-3.4(a) is in accordance with the language of the rule, i.e., whether one knows or should reasonably know of the omissions. This again would imply that the undersigned had a proactive duty to avoid possible, not probable, injury to the opposing party just by having knowledge of the 1986 accident. The same false assumption surfaces again and again as the underlying presumption upon which the Florida Bar's entire case is set.

As a collateral issue, the Florida Bar has used the term "fraud" throughout the proceeding, to enhance their position. It must be clarified, that for the purpose hereof, the term fraudulent conduct or fraud, as used in Florida Rule of Professional Conduct

Rule 4.4-1, has been addressed by several commentators and ethics committees to have three components: (1) the client's representation or conduct create a false impression; (2) that the impression is material; and (3) the client intends to create a material misrepresentation. (See e.g., Sheriff, Clark County, v. Hecht, 710 P.2d 728 (Nev. 1985). In the instant case the then client, William Burrell, in effect corrected and/or supplemented his answers to Mr. Lippincott's interrogatories, when he responded to the automobile negligence interrogatories propounded upon him by the co-defendant insurance company in the same case. In the second set of interrogatories, Mr. Burrell listed all his medical providers and Mr. Lippincott was provided a copy of the second set of interrogatories by Mr. Burrell's new counsel. These answers to the second set of interrogatories were in addition to the medical records provided to Attorney Lippincott, which already contained the names of all of the medical providers. The Florida Bar must make a showing either by evidence or a reasonable inference that it was the affiant's intent to create a material misrepresentation. Under direct examination, the undersigned stated that she furnished opposing counsel with all of Mr. Burrell's medical records, which contained all the names of the medical providers.

Issue 2.

The sanction imposed by the Referee is disproportionate to the finding of guilt and the established goals of punishment.

As stated previously, the undersigned counsel was charged with violations of Florida Bar Rules 4-3.4(a), 4-4.1, and 4-8.4. The Referee recommended that the petitioner be suspended from the practice of law for thirty (30) days. This sentence is disproportionate to other cases that have come before this Court, specifically The Fla. Bar v. Sax., 530 So.2d 284 (Fla. 1988); where this Court reprimanded Carl S. Sax, an attorney, for notarizing an affidavit in the case of Palm Court, Inc., v. TPC..., which he knew contained statements that were false and filed same with the court.

The trial court improperly penalizes the petitioner for her refusal to admit that she did anything wrong, as is seen in Page 6 of the Report. The undersigned still maintains that she did not do anything which would violate the Florida Rules Regulating Professional Conduct.

For the sentencing portion of the instant case, the Referee examined the cases of The Fla. Bar v. Rood, 620 So.2d 1252 (Fla. 1993); The Fla. Bar v. Feige, 596 So.2d 433 (Fla. 1992); and The Fla. Bar v. Anderson, 538 So.2d 852 (Fla. 1989). In the Rood, Fiege, and Anderson cases, each respondent/counsel was actively engaged

in fraud and deceit and personally executed documents to promote the fraud. The evidence in these cases that each respondent had actual knowledge of the fraud, and nonetheless promoted it, is uncontroverted. However, in the instant case, the Court wrongfully penalized the undersigned for failing to insure that the answers to interrogatories that given by Mr. Burrell were correct. This is specifically what the undersigned contests as being improper as a matter of law. The other charges brought against the undersigned are collateral to this issue.

CONCLUSION

In view of the briefs filed herein and the consideration of the merits, in law and in fact, this Honorable Court must conclude that there was insufficient evidence presented to support a finding of violations of Rules 4-3.4(a), 4-4.1, and 4-8.4, Rules Regulating Professional Conduct, or in the alternative correct the sentence imposed by the Referee to an admonishment or private reprimand.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a true and correct copy of the foregoing was furnished to: Sid White, Clerk of the Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1297, Pamela Pride Chavies, Esquire, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, on this 22nd day of March, 1995.

Respectfully submitted.

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