IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

JAMES O. WALKER, III,

Respondent-Appellant.
_____/

Supreme Court No. 85,698

The Florida Bar File No.
94-51,027 (17C)

047

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ANSWER BRIEF OF THE FLORIDA BAR

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original

TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS

COUNTER STATEMENT OF THE CASE AND OF THE FACTS

The bar files this counter statement in that the respondent has failed to relate to the Court facts sufficient to create a context for this disciplinary proceeding. All page references herein are to the final hearing transcript. All exhibit references herein are to exhibits received into evidence at the final hearing.

Respondent is 49 years of age and was admitted to the bar in 1980. In **Florida Bar v. Walker**, 595 So. 2d 559 (Fla. 1992), respondent received a public reprimand in a case involving respondent' failure to act with reasonable diligence and promptness in representing a client in violation of Rule 4-1.3, Rules of Professional Conduct and his failure to maintain minimum and proper trust account records in violation of Rule 5-1.2, Rules Regulating Trust Accounts.

In the instant case, on September 19, 1991, respondent executed a doctor's lien letter in which he agreed to protect the doctor's fees in any settlement, judgment or verdict for the benefit of one Florence Cunningham, who was the doctor's patient and respondent's client. [See Bar's Exhibit A received in evidence at pages 6,7]. Mrs. Cunningham had indicated to the doctor that she had been injured in an accident and was being represented by respondent [5,6].

Although respondent executed the referenced letter of protection, he did not then, and never had, represent[ed] Mrs. Cunningham in any matter that, in any way, could have or would have generated proceeds with which to pay the doctor's fees [See Bar's Exhibits H and I received in evidence at pages 60 and 61]. Notwithstanding that fact, upon repeated status inquiries by the doctor's office, assurances were given by respondent's office such as "case pending", "waiting for trial date" and "case going to trial" [11]. Subsequent status requests from the doctor's office directed to respondent were not responded to [11,12]. The doctor filed a grievance with the bar [12].

Upon inquiry by the bar, respondent filed a written response in which he represented:

> To dispell the suggestion or implication that we have settled or otherwise received funds or money flowing from a 06/16/87 accident for or on behalf of Florence Cunningham in contravention of the claimed lien which forms part of the complaint materials in this cause, we here unequivocally deny the same, and nothing could be farthest from the truth. Again, we have not received any settlement, judgment or verdict regarding the 06/16/87 accident referred to by Complainant's letters, Bar Complaint or the purported lien. [See Bar's Exhibit C received in evidence at page 14].

On the basis of such response, the bar closed its investigative inquiry explaining to the doctor as follows:

> Given that the case is not yet settled, I have no basis for further disciplinary proceedings against Mr. Walker.
>
> . . .
>
> Common courtesy would dictate that Mr. Walker respond to reasonable inquiry by medical care providers. It is also in Mr. Walker's, as well as his client's best interest to respond to such inquiry to avoid unpleasant consequences from the provider's inability to get such information. [See Bar's Exhibit D received in evidence at page 56].

Bar counsel who processed and closed the doctor's grievance thereafter received notification from the doctor that a search of the public records revealed no case filed on behalf of Mrs. Cunningham [57,58]. In that the statute of limitations would have run, it appeared to bar counsel that there should have been some disposition of Mrs. Cunningham's matter [58]. Bar counsel thereupon reopened the bar's investigative inquiry requesting that respondent offer a further explanation [58]. Respondent filed a written response [See Bar's Exhibit G received in evidence at page 59] which appeared confusing to bar counsel in that it appeared to indicate that respondent had not pursued any claim on behalf of Mrs. Cunningham although representing to the doctor's office in periodic, oral status reports that the case was awaiting trial, etc.

Bar counsel requested further elaboration from respondent [See Bar's Exhibit H received in evidence at page 60]. Respondent filed a written response [See Bar's Exhibit I received in evidence at page 61] in which respondent explained that he had never represented Mrs. Cunningham in connection with any claim; that in fact, the claim had been pursued to conclusion by another lawyer.

Upon further investigation, bar counsel developed that, in fact, Mrs. Cunningham's tort claim had been handled by another lawyer who had settled the case years before Mrs. Cunningham had retained respondent. A sworn statement from Mrs. Cunningham established that she had informed respondent of the prior representation and settlement and had retained respondent for purposes of looking into some aspect of the prior lawyer's representation involving a bill that she thought should have been paid [62, 64].

On the basis of the foregoing, as a result of grievance committee probable cause findings, respondent was charged with acting dishonestly in his dealings with the doctor and with the bar [4-8.4(c)] and with failing to disclose facts to the bar which disclosure was necessary to correct a misapprehension known by respondent to have arisen in the matter [4-8.1(b)].

The referee, recommending that respondent be found guilty of both charges, additionally recommended that respondent receive a 30 day suspension plus a period of probation. Respondent petitioned for review.

SUMMARY OF ARGUMENT

Lawyers must be meticulously forthright in their dealings with medical service providers who are rendering treatment to such lawyers' clients. The execution of letters of protection where there are no underlying claims which potentially will serve to pay the providers' bills constitutes either an act of deception or gross negligence with consequences harmful to the providers. Subsequent assurances to the providers such as "case pending', "waiting for trial date" and "case going to trial" constitute intentional acts of dishonesty.

In responding to bar investigative inquiries, a respondent must take pains to reveal and lay bare all relevant facts and circumstances pertaining to such inquiries. The failure to disclose information which information will necessarily correct a misapprehension known by a respondent to arise as a result of the lack of disclosure is indicative of poor character and an inability to cope with the most basic ethical precepts.

ARGUMENT

I. THE REFEREE'S FINDINGS ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

It is axiomatic that a referee's findings are presumed correct unless they are clearly erroneous or lacking in evidentiary support. As long as those findings are supported by competent, substantial evidence, the Court will not reweigh the evidence and substitute its judgment for that of the referee. **Florida Bar v. Garland**, 651 So. 2d 1182 (Fla. 1995); **Florida Bar v. MacMillan**, 600 So. 2d 457 (Fla. 1992).

In the instant case it stands unchallenged that respondent executed a letter of protection where he was pursuing no underlying claim that in any manner could or would produce funds to pay the physician's bill with his office assuring the physician in subsequent inquiries that the case was pending or that a trial date was in the offing. While the original execution of such letter of protection may have been due to respondent's grossly negligent standard operating procedure to execute all such letters of protection, the subsequent assurances to the physician regarding the pendency of the action, etc. constituted acts of dishonesty with no other purpose than to mislead the doctor into believing that a settlement or verdict was to be expected, thereby inducing

further treatment of the respective patient/client and the forestalling of any collection efforts. It stands equally unchallenged that upon inquiry by the bar, respondent intentionally led the physician/complainant to the bar and the bar itself into believing that the only reason that the physician had not been responded to was due to the fact that "we have not received any settlement, judgment or verdict regarding the 06/16/87 accident referred to by Complainant's letters, Bar Complaint or the purported lien."

The bar would only observe, in response to respondent's initial brief, that it seems the epitome of hubris for respondent to suggest that a physician, in requesting and receiving a letter of protection, cannot infer therefrom that there is an underlying action, but, instead, must launch an intensive investigation to insure that the execution of such letter of protection and subsequent assurances that the case is proceeding apace are trustworthy and reliable. Respondent's argument to the referee and now to the Court that he could not disabuse the doctor or the bar of the notion that there was, in fact, some claim being pursued with a nexus to the letter of protection because of his fear of violating a client confidence is best addressed by the referee who, in colloquy with respondent, stated:

> THE COURT: And I'll tell you why I take it from that. Okay. I'll read you the part that to me, where [sic] I too have been a lawyer for the Florida Bar, would have led me to believe that you were representing Ms. Cunningham in your complaint.
>
> To dispel a suggestion or implication where -- it's actually in your first paragraph, we here unequivocally deny saying that nothing could be further from the truth. We have not received any settlement, judgment or verdict.
>
> You're saying, in words of that nature, that therefore there is a case pending under which a settlement, judgment or verdict could be coming down. Or should be coming down the line. You don't tell them, I do not represent her in this '87 accident for a personal injury claim from which doctor bills could be paid and they're saying to you, I believe, if I understand this correctly, that is not a privileged confidential-type of communication, because you weren't representing her in the personal injury aspect of the lawsuit. You had the duty to tell them you were not. [94,95].

II. THE REFEREE'S RECOMMENDED SANCTION IS, UNDER ALL OF THE CIRCUMSTANCES, LENIENT.

In cases in which attorneys have engaged in dishonesty, fraud, deceit or misrepresentation, the penalties are often severe. The court deals harshly with those who engage in dishonesty, fraud, deceit or misrepresentation because "honesty and candor in dealing with others is part of the foundation upon which respect for the profession is based," **Florida Bar v. Poplack**, 599 So. 2d 116, 118 (Fla. 1992). The penalty most often meted out to those who engage

in this conduct is suspension. See, **Florida Bar v. Poplack**, 599 So. 2d 116 (Fla. 1992); **Florida Bar v. Bazley**, 597 So. 2d 796 (Fla. 1992); **Florida Bar v. Morse**, 587 So. 2d 1120 (Fla. 1991); **Florida Bar v. Wilder**, 543 So. 2d 222 (Fla. 1989); **Florida Bar v. Palmer**, 504 So. 2d 752 (Fla. 1987).

In **Florida Bar v. Palmer**, 504 So. 2d 752 (Fla. 1987), Palmer received an eight month suspension for continually misrepresenting the status of a case. Palmer told his client that the case had settled when in fact he had allowed the statute of limitations to run, thereby barring the client's claim. In the case at bar, respondent misrepresented to both an interested party and to the bar that the case had not been settled when in fact he knew otherwise.

In **Florida Bar v. Morse**, 587 So. 2d 1120 (Fla. 1991), an attorney neglected his client's case and the statute of limitations ran. He then asked Morse to try to effect a settlement. When the insurance company refused, citing the statute of limitations, Morse lied to the client and paid the client $2,500 out of the trust account calling it a "final recovery". Morse was suspended for 90 days and placed on one year probation. See also **Florida Bar v. Bazley**, 597 So. 2d 796 (Fla. 1992) in which respondent received an eight month suspension for knowingly and continually

misrepresenting that a personal injury action had been commenced and settled when, in fact, it had been precluded by workers' compensation; **Florida Bar v. Poplack**, 599 So. 2d 116 (Fla. 1992),in which the Court imposed a 30 day suspension and 18 month probation for lying to a police officer and **Florida Bar v. Wilder**, 543 So. 2d 222(Fla. 1989), in which the Court imposed a 180 day suspension for misrepresenting the status of a case to a client and neglecting a legal matter.

The bar submits that the **Florida Standards for Imposing Lawyer Sanctions** also support suspension as the appropriate discipline. Standard 7.2 provides that: "Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal profession.

It is respectfully submitted that the referee meticulously discussed the mitigating and aggravating factors as specified in the **Florida Standards for Imposing Lawyer Sanctions** and the bar is content to refer the referee's application thereof.

CONCLUSION

Respectfully, the bar submits that the referee's recommendations are supported by overwhelming evidence. His findings should be affirmed and his recommended disciplinary

measures should be adopted by the Court unless the Court regards respondent's patent misapprehension of the issues as evidenced by his brief to require a rehabilitation suspension.

Respectfully submitted,

David M. Barnovitz

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief was furnished to James O. Walker, III, respondent, by U.S. Mail addressed to him at Suite 100, Square One Building, 351 South Cypress Road, Pompano Beach, Florida 33060 on this 15th day of November, 1995.

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