097

IN THE SUPREME COURT OF FLORIDA

JAMES O. WALKER, III

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.

SUPREME COURT NO: 85,698

THE FLA BAR NO: 94-51,027(17C)

12/8

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Chief Deputy Clerk

PETITIONER'S AMENDED MAIN BRIEF

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PREFACE

The Petitioner was the Respondent below and The Florida Bar was the Petitioner. The parties will be referred to as Respondent and the Bar.

The following symbols will be used:

T - Transcript of Testimony before Referee

- Evidence Exhibit, preceded by Proponent and followed by exhibit number

POINT ON APPEAL

THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING RULES 8-4.4(c) AND 4-8.1(b), RULES REGULATING THE FLORIDA BAR.

STATEMENT OF THE CASE AND OF THE FACTS

A Complaint was filed against Respondent alleging violations of Rules 4-8.1(b) and 4-8.4(c) of the disciplinary Rules. Respondent denied the allegations and the cause was tried and heard by referee which found Respondent guilty of said rules and recommended sanctions accordingly. Respondent seeks review of the Referee's Report and recommendations.

On February 17, 1994, Monroe Garfinkel (Garfinkel) a local chiropractor, filed his complaint against Respondent essentially alleging that he (Garfinkel) accepted one Florence Cunningham (a client of Respondent) for treatment of injuries sustained in an automobile accident on June 18, 1987. Further claiming that on July 24, 1991 the patient reached MMI and a final report was submitted to Respondent; That Respondent signed a Doctor's Lien protecting his bill for $2,936; That his office attempted to ascertain the case status and telephoned Respondent's office which advised "case pending", "waiting for trial date", "case going to trial", etc. and as well as he sent a certified letter to which Respondent did not respond. The Doctor's Lien (LOP) was signed by Respondent on September 19, 1991.Respondent's #6.

In response to this Complaint, several pertinent letters were generated, to wit:

1) On March 9, 1994, Respondent made his first required response to the complaint;

2) The Bar's letter dated April 4, 1994;

3) Garfinkel's letter dated April 5, 1994;

4) The Bar's letter dated June 7, 1994;

5) Respondent's letter dated June 13, 1994;

6) The Bar's letter dated June 17, 1994;

7) Respondent's letter dated June 28, 1994.

On May 1, 1995 the matter was heard by the committee and on May 5, 1995 the Bar filed its formal Complaint. Respondent filed his Answer and Affirmative Defenses on June 12, 1995. Thereafter this case was heard by the Referee on August 11, 1995 where Respondent was found guilty of violating the provisions of Rules 4-8.1(b) and 4-8.1(c) and his report, dated August 15, 1995, recommended a thirty (30) day suspension and one (1) year probation during which time Respondent must attend and successfully complete the Bar's Ethics School Program, further providing for early termination of probation upon the successful completion of the ethic's school. Respondent seeks review contending that error was committed in the determination of guilt, the findings of fact, and that the recommended sanction is excessive and unwarranted.

SUMMARY OF THE ARGUMENT

Garfinkel treated Ms. Cunningham for several months, March through July, 1991, and discussed with her an auto accident which occurred in June of 1987. At no point in time did he discuss with this patient the "status" of her personal injury claim arising out of that accident. Garfinkel had no previous dealings with the Respondent's office. No contact during the treatment period, but did send a doctor's lien letter (LOP), and claimed to have first telephonically communicated with Respondent's office in 1992. The patient, Ms. Cunningham, stated that she advised Gardinkel from the outset that she was unemployed and changed from her then HMO to medicaid and medicare so that Garfinkel could be paid for services rendered and she, although having mentioned Respondent as the attorney looking into her accident case, gave Garfinkel no indication that Respondent was seeking money for the case. She was of the understanding that Garfinkel was satsified with the changes she made. Garfinkel had Ms. Cunningham to endorse the LOP approxiately a month after her initial visit to his office and sent the same to Respondent's office in or around September, 1991.

Respondent only learned of the status and circumstances surrounding Ms. Cunningham's 1987 accident by way of the attorney-client realtionship, and defended Ms. Cunningham in a law suit

filed by one of the local hospitals for services rendered arising out of the June, 1987 accident which Ms. Cunningham thought had been resolved during her settlement years previous to her inital visit to Garfinkel's office.

Garfinkel had the patient available for almost five (5) months, on occasion he discussed with the patient her 1987 accident and not once did he inquire of the patient the status of this 1987 accidnet. He was in chiropractic medicine for over twenty (20) years, Garfinkel completely and totally failed to avail himself of those opportunities to discuss the status with the patient, or to have sooner availed of his office's attorney to determine what the court records might show, if anything, relative to a personal injury claim on behalf of Ms. Cunnigham, or otherwise to satify the obligation and duty owed to himself in the matter.

As to the Bar's claim that Respondent had a duty to disclose the status of Ms. Cunningham's personal injury claim violated Rule 4-8.1(b), Respondent, as an attorney, had a continuing duty, even after the attorney-client relationship had terminated, to maintain the confidences of a client. Respondent, likewise, had a duty or obligation, as an attorney, to respond and cooperate with the Bar upon receipt of the Inquiry/Complaint Form. Here, several of the remarks or expressions made by Respondent in his specific responses to each of the several inquiries directed to him for answer or response were taken out of context, but when viewed in context and the light of the specific inquiry to which it pertains, it is clear

that there was no intention on the part of Respondent to misrepresent anything but only to cooperate and respond to the inquiry made and directed to him. Contrary to the Bar's claim, Respondent had no duty to disclose any client confidences or other information learned as a result of the attorney-client relationship even if the attorney-client relationship had terminated.

ARGUMENT

POINT ON APPEAL

THE REFEREE ERRED IN FINDING RESPONDENT GUILTY OF VIOLATING RULES 4-8.4(c) and 4-8.1(b).

As findings of fact to support the claim of misrepresentation of facts relied upon by Garfinkel to this detriment in violation of Disciplinary Rule 4-8.4(c), the Referee relied upon (1) The fact that Respondent signed the Letter of Protection, (2) The alleged verbal telephonic representations claimed to have been received from Respondent's office, (3) The failure of the Respondent to respond to telephonic requests for information from Garfinkel's office, (4) Respondent's March 9, 1994 letter in response to Garfinkel's complaint falsely represented that the claim had not been settled and failed to reveal that there was no case, and (5) That Respondent's response dated June 13, 1994 in response to the Bar's inquiry falsely represented that the statute of limitations had expired.

Fraud or a false misrepresentation of a material fact is defined as follows:

> A false representation of a material fact, made with knowledge of its falsity, to a person ignorant thereof with intention that it shall be relied upon, followed by reliance upon and by action thereon, amounting to substantial change of position;

> Fraud can be established only by clear and convincing evidence and every one of the elements making up fraud must be clearly proven.
>
> Biscayne Boulevard Properties, Inc. v. Graham, 65 So. 2d 858, 859 (Fla. 1953).

It is well settled that where the means of knowledge are at hand and are equally available to both parties and the subject matter is equally open to their inspection, if one of them does not avail himself of those means and opportunities he will not be heard to say that he was deceived by the other's misrepresentation. Scocozzo v. General Development Corp., 191 So. 2d 572, 576 (Fla. 4DCA 1966); Potakar v. Hurtak, 82 So. 2d 502, 503 (Fla. 1955).

Here, it should be noted that all of the alleged false representations relied upon followed the LOP, the first alleged false or misrepresentation, which originated from Garfinkel's office. The pertinent part of the LOP which, if any, imposes any obligation on Respondent's part is as follows:

> The undersigned being attorney of record for the above patient does hereby agrees to withhold such sums from any settlement, judgment or verdict as may be necessary adequately to protect the said doctor named above.

Respondent's endorsement on this LOP, at best, created an obligation to do what was agreed upon, to withhold such sums from any settlement, judgment or verdict to protect payment for

professional services rendered. Court's are not free to apply the rules of construction to an unambiguous contract, but must give force and effect to same as evidenced by the intention os the parties as expressed. Haenal v. U.S. Fidelity & Guaranty Co., 88 So. 2d 888 (Fla. 1956). Any ambiguity should be construed against the party who drafted it. Union Central Life Ins. Co. v. Neuhoff, 24 So. 2d 906 (Fla. 1946).

This LOP was generated out of Garfinkel's office, so if there is any question or ambiguity concerning what it represents then it should be construed against his claim that it led him to believe that there was a pending injury claim. However, Respondent maintains that the LOP was not ambiguous but clear, it simply is an added assurance that if a settlement, judgment or verdict is received an adequate sum should be withheld to pay for services rendered, nothing more and nothing less, unless you stretch the imagination. If you stretch the imagination, it could be argued that since the LOP, which bears no date referencing the date of the accident involved, is a false representation that there is a accident for which patient is being treated and that there may be a claim from which a settlement, judgment or verdict might be achieved. Either of these postulations would be error and can not be, plausibly, said to manifest the intention of the parties.

More importantly, as mentioned above the LOP originated from Garfinkel's office.T.5; He has practiced chiropractic medicine

since 1965.T-4; It was usual and customary for his office to protect his bill by the LoP.T-5; He treated the patient from March 6, 1991 through July 24, 1991.T-27; It was his understanding tht there was a pending case.T-6.; He doesn't know what the statute of limitations is but knows there is one; He doesn't get involved in trying to determine if the statute has run.T-44,45. His office made no telephone calls to Respondent's office in 1991, Respondent's office never initiated any communications to his office.T-45. Other than the LOP, his office had no contact with Respondent office between March, 1991 through September, 1991.T-53. These factors evidence that not only did Garfinkel not avail himself of the one source who could have supplied answers to his every querry respecting whether there was a pending personal injury claim, the patient, but he likewise totally neglected the court's and other sources until long after sending out the LOP. As a matter of fact, Garfinkel, in response to the question whether his office initially inquired of Ms. Cunningham what insurance she might have had to pay for medical expenses in connection with the June 1987 accident, it was disclosed that he was not sure where his office received copies of the insurance information (PIP Carrier), whether from the patient or another doctor; Initially he didn't have anything other than the fact that she was in an accident, **she was represented by Respondent** and he was subsequently, **under the assumption then that there was a settlement in the near future; As long as there is an attorney representing patient** regarding a specific incident; Its

obvious in Florida that she has the right to be compensated for her pain and suffering, **but the patient didn't tell him this**; The LOP confirmed for him the fact some representation going on.T-42,43. But in **his letter to Respondent dated April 5, 1994** which, among other things, **evidence that he knows how to or has the means to search court records** to determine whether an action has been filed or is pending, makes it abundantly clear that the ordinary care and attention required on his part the failure of which resulted from his own negligence. His lack of concern for the status of an injury claim which may or may not have been pending at the initial undertaking of the treatment of the patient is further demonstrated by the patient's unrebutted testimony to the following effect:

> Patient claims when she first met Garfinkel she told him about her accident, explained that she didn't think she had been treated right so she had an attorney looking into it; That she was not working, she was covered under an HMO (Family Health Plan), Garfinkel was not a participant of her then plan so he could not be paid, so she dis-enrolled from the plan so that he could be paid by medicare and that Garfinkel was pleased with the changed arrangements and she did not tell Garfinkel that Respondent represented her regarding the 1987 accident.T-84.
>
> On cross-examination and after being allowed to explain in her own words, in response to the question what she explained to Garfinkel, the patient testified she explained to Garfinkel that she was having problems with her neck, had been in an accident that may have contributed; that she was in an HMO and was not working; Does not believe that at that

> time she had conferred with Respondent but somewhere during the 10 to 12 times speaking with Garfinkel that Respondent was mentioned, but she did not give Garfinkel the impression that Respondent was doing anything for her as far as trying to get money for him.T-85.86.

Lastly, in this respect, well after his initial conference with the patient and **long after sending the LOP** to Respondent, **Garfinkel initiated an investigation** through counsel to determine whether a law suit had been filed on behalf of the patient in Dade, Broward and Palm Beach Counties.T-16; Bar's E. Unquestionably, the means and knowledge were available to be utilized but were not.

As to the claim that Respondent's March 9, 1994 letter falsely stated that the case had settled and/or failed to reveal that there was no case, the claim "not settled" is taken out of context. Respondent, in accordance with the rules and this court's decision in The Florida Bar v. Vaugh, 608 so. 2d 18 (Fla. 1992), as Respondent was reminded upon receipt of the complaint/inquiry filed, was duty bond to cooperate and respond. The gist of the Complaint with its attached LOP was that Garfinkel treated Respondent's client who was involved in an accident in June, 1987, that garfinkel's had a signed LOP by Respondent who had not, despite several alleged phone communications with Respondent's office which had advised that the case was going to trial, pending, etc., provided a status of the case regarding this 1987 accident. Respondent's #6; T-32.

As testified to by the patient, another attorney, Randall Beider, had handled her 1987 personal injury claim to conclusion years previous to presenting herself to Garfinkel's office; She thought there was a problem with the way the case was handled, so she sought Respondent's assistance; That's the means by which Respondent learned of the accident.T-79-84. Rule 4-1.6(a), the Rules Regulating The Florida Bar declares the generally accepted rule in Florida that a lawyer shall not reveal information relating to representation of a client unless the client consents after disclosure to the client. The comment following Rule 4-1.6 styled "Former Client" declares that the duty of confidentiality continues after the client-lawyer relationship has been terminated. Respondent also represented the patient in defense of a suit filed by Universal Medical Center arising out of the 1987 accident for bills patient thought were resolved at settlement years previously.T-84. More importantly, against this back drop, Respondent, duty bond to respond, **made clear in the March 9, 1994** letter, among other things, that **it was his required response**; that its **intent** was to dispel what appeared to be the gist of the complaint, that Respondent had dishonored the LOP. When read together in its proper context, it is clear what the letter intended to convey, Respondent had not dishonored the LOP, **had not settled** or otherwise received funds regarding the 1987 accident, **and lastly** the letter advised that **if provided with the patient's consent** or authority, Respondent would advise regarding the status

of accident case (personal injury claim).

As to the claim that Respondent's June 13, 1994 letter falsely represented that the Statute limitations had expired, again that language is taken out context. This letter was in response to the Bar's letter dated June 7, 1994 wherein, insofar as pertinent here, Respondent was asked:

> 1. Whether you continue to **represent** Florence Cunningham, if not, please indicate the date of termination of your services.
>
> 2. Whether you **instituted a legal proceeding** on behalf of Florence Cunningham, if so, please provide the style of the case, case number and court.
>
> 3. Whether **Ms. Cunningham's claim** has been settled. If so, please provide the date of settlement and the amount.
>
> If I do not receive this information by June 21, 1994 I will have no choice but to require further disciplinary proceedings. **The statute of limitations appears to have expired on this case**. Therefore, **you should either**: (1) Have a court case pending which is a matter of public record or (2) Have settled the case in which event Dr. Garfinkel should have been paid.

Here, the reference to the fact that the limitations period had expired was merely an acknowledgement of what was expressed in the Bar's letter, and, when read in the context in which it was written, it simply conveys, consistent with the three questions asked, that Respondent was not an attorney representing Ms. Cunningham in an injury claim; Respondent did not settle any claim on behalf of Ms. Cunningham, nor distributed any monies arising out of the alleged claim; Respondent did not file suit, there was no

claim. Consistent with Respondent's prior letters and responses, Respondent attempted to make clear there was no breach of the LOP.

As to Count II, the Referee relied upon the claim that Respondent received a copy of the Bar's letter of April 4, 1994 to Garfinkel closing the grievance on the basis that the case had not yet settled; That Respondent knew that the Bar was under a misapprehension that there was, in fact, a case which could be settled; That Respondent failed to disclose the fact that there was no case within a reasonable time after the April 4, 1994 letter; That Respondent was duty bound to disclose the fact after the April 4, 1994 letter to correct the misapprehension; and that Respondent did not disclose that the claim had been settled by mr. Beider until after the Bar re-opened the file and made two further requests, as supporting that Respondent violated Rule 4-8.1(c) of the Rules of Professional Conduct. Rule 4-8.1(b) provides:

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
>
> (b) fail to disclose a fact necessary to correct correct a misapprehension knowing by the person to have arisen in the matter or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority **EXCEPT THAT THIS RULE DOES NOT REQUIRE THE DISCLOSURE OF INFORMATION OTHERWISE PROTECTED BY Rule 4-4.1.**

Mandatory disclosure of information related to representation of a client under the Rules of Professional Conduct is governed by Rule 4-1.6(b) which provide as follows, to wit:

> "A lawyer shall reveal such information to the extent the lawyer reasonably believe necessary:
>
> (1) To prevent a client from committing a crime; or
>
> (2) To prevent a death or substantial bodily harm to another."

The comments under Rule 4-8.1, in the last paragraph, explains that **a lawyer** representing a lawyer who is the **subject of disciplinary inquiry or proceeding, is governed by the rules applicable to the client-lawyer relationship.** The comments under this rule are not as clear as those comments under Rule 4-1.6 which declares that the duty of confidentiality continues after the client-lawyer relationship has terminated.

Here, the focus of the inquiry was what is the Status of Ms. Cunningham's personal injury cliam and has it been settled. As was testified to by Ms. Cunningham, mentioned herein above, Respondent learned of the "status" of her personal injury claim in his capacity as a lawyer, and, as the last comment under Rule 4-1.6 makes clear, the fact that the lawyer no longer represents the client respecting the matter, the lawyer is still duty bound to maintain the client's confidences. Therefore, whether Respondent was duty bound here must be determined under the applicable Rule, 4-1.6(b). Again, this rule requires disclosure (1) To prevent a

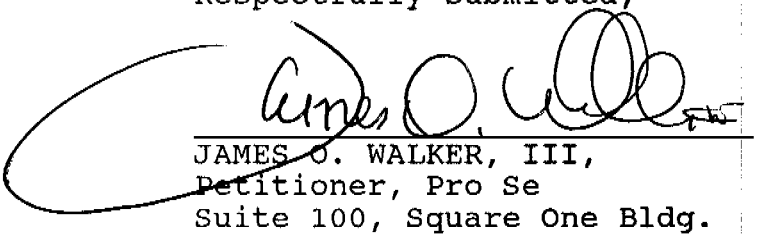
client from committing a crime; or (2) To prevent a death or substantial bodily harm to another. Not only was there no evidence that Ms. Cunningham (client/former client) was about to commit or had committed a crime but also, there was no evidence that disclosure was required to prevent death or substantial bodily harm to another. T-3-105. As a matter of fact, the Bar's Staff Counsel, Ronna Friedman Young, testified that she preferred looking at the rules to answer an inquiry on cross-examination regarding what the rules provide about a lawyer's duty to disclose information or client's confidences.T-60. And afterwards, she testified that her investigation did not disclose that Ms. Cunningham was committing a crime, nor did her investigation support that someone might--was likely to receive substantial bodily harm.T-70,71.

In summary, Respondent's letters dated March 9, 1994 and June 13, 1995 only manifest an intent to cooperate and respond to the complaint which implied a dishonoring of a lien protection letter (LOP), and obey the rules of professional discipline.

CONCLUSION

Based upon the foregoing authorities and arguments, Respondent hereby suggests that this court reverse the Referee's Findings of Facts and Conclusions, and find Respondent not guilty of violating Rules 4-8.1 (b) and 4-8.4 (c) of the Rules of Conduct, or, alternatively, modify the recommended sanction regarding suspension.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of Petitioner's Main Brief has been furnished by mail/hand delivery, this 13 day of November, 1995 to David M. Barnovitz, Esq., Bar Counsel-The Florida Bar, Suite 835, 5900 North Andrews Avenue, Ft. Lauderdale, Fl 33309, Florida Bar Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Fl 32399-2300.

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