IN THE SUPREME COURT OF FLORIDA
(Before a referee)

THE FLORIDA BAR

Complainant,

v.

JAMES O. WALKER,

Respondent.
_____/

Supreme Court Case No: 85,698

The Florida Bar File No: 95-51,027(17C)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The Florida Bar's formal complaint in this cause was filed on May 12, 1995. Thereafter, on May 30, 1995, the undersigned was appointed to preside as referee in this proceeding by order of the Chief Judge of the Fifteenth Judicial Circuit. After hearing all testimony and being otherwise duly informed, I have determined to recommend that respondent be found guilty of the rule violations set forth below. The pleadings, and all other papers filed in this cause, which are forwarded to the Supreme Court of Florida with this report, constitute the entire record.

During the course of these proceedings, respondent appeared pro se and The Florida Bar was represented by David M. Barnovitz, Esq.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT WITH WHICH RESPONDENT IS CHARGED:

Based upon the trial testimony, my findings of fact are as follows:

AS TO ALL COUNTS:

A. Respondent is, and at all times hereinafter mentioned was, a member of The Florida

Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. On or about September 19, 1991, respondent signed a letter of protection in favor of Dr. Monroe Garfinkel in which he agreed to protect Dr. Garfinkel's fees in any settlement, judgment or verdict rendered for the benefit of Florence Cunningham.

C. At the time respondent signed the lien letter, respondent was not representing Florence Cunningham in any personal injury case or in any case in which there could have been a settlement, judgment or verdict that could have resulted in payment to Dr. Garfinkel.

D. From about February, 1992 through January, 1994, Dr. Garfinkel's office staff contacted respondent's office and were given various reports on case status including but not necessarily limited to : "Case pending"; "Waiting for trial date"; and "Case going to trial".

E. On or about January 21, 1994, Dr. Garfinkel wrote a letter to respondent in which Dr. Garfinkel requested information and stated that if respondent had dropped the case, Dr. Garfinkel intended to proceed to collection efforts for his outstanding bill of $2936.

F. Respondent did not reply to this letter.

G. On or about February 17, 1994, Dr. Garfinkel filed a bar grievance against respondent.

H. On or about March 9, 1994, Mr. Walker responded to the bar grievance. The letter stated in part: "Again, we have not received any settlement, judgment or verdict regarding the 6/16/87 accident referred to by Complainant's letters, Bar Complaint or the purported lien".

I. The letter, also, stated in part: "The status, if any, of Florence Cunningham's case(s) handled by this office is privileged and not subject to disclosure without her consent to do so."

J. The letter did not reveal that respondent had no case from which Dr. Garfinkel could

receive a recovery.

K. The grievance was closed by the bar on or about April 4, 1994. The close out letter states in part: " Mr. Walker, in his response, stated that the case was not yet settled. Given that the case is not yet settled, I have no basis for further disciplinary proceedings against Mr. Walker."

L. Mr. Walker received a copy of this letter but took no action to reveal to the bar or to Dr. Garfinkel that there was no case that could be settled.

M. Dr. Garfinkel then requested Attorney Bruce Katzell to represent him in order to obtain information regarding the case being handled by respondent.

N. Attorney Katzell could not obtain any information from respondent.

O. Dr. Garfinkel requested the bar to re-open the grievance file since Dr. Garfinkel could not find any court case filed by respondent on behalf of Florence Cunningham.

P. On or about June 7, 1994, the bar re-opened the file.

Q. Mr. Walker responded by letter dated June 13, 1994. The letter stated in part: "I did not settle Ms. Cunningham's claim; there was no claim, as indicated in your letter, the statute of limitations had already expired."

R. The statute of limitations had not expired on Ms. Cunningham's claim but rather the claim had been settled by Attorney E. Randall Beider in approximately 1988.

S. The bar requested further information from respondent by letter dated June 17, 1994. This letter stated in part that: "If I do not hear from you by June 29, 1994, I will have to assume that (1) there was either a settlement which is being deliberately concealed or (2) that you and Ms. Cunningham elected not to pursue her claim but deliberately concealed the fact from Dr. Garfinkel in order to preclude him from pursuing collection efforts on his fees."

T. By letter dated June 28, 1994, respondent advised the bar and Dr. Garfinkel of the settlement reached previously by Attorney Beider.

COUNT I

U. Respondent made the following false statements of material fact:

1. By signing the lien letter, respondent falsely represented to Dr. Garfinkel that he had a case involving Florence Cunningham from which there could be a recovery to protect Dr. Garfinkel's fees;

2. Through the verbal representations made to Dr. Garfinkel's office staff regarding case status, respondent, individually and/or through his office staff, falsely represented that there was a case;

3. Through his failure to respond to telephonic requests for information and his failure to respond to Dr. Garfinkel's letter of January 21, 1994, respondent continued to perpetuate the falsehood that there was such a case;

4. Respondent's letter of March 9, 1994 to the bar with a copy to Dr. Garfinkel falsely represented that the case had not settled and/or failed to revealed that there was no case; and

5. Respondent's letter of June 13, 1994 falsely represented that the statue of limitations had expired on Ms. Cunningham's claim when, in fact, her claim had been previously settled.

V. Respondent knew or should have known that the above statements were false.

W. The statements were made with an intention to induce Dr. Garfinkel and/or the bar to rely thereon.

X. Dr. Garfinkel relied on the statements to his detriment as evidenced but not necessarily limited to the following:

1. Dr. Garfinkel held off on any collection efforts against Florence Cunningham pending the resolution of the non-existent case handled by respondent;

2. Dr. Garfinkel's office staff was forced to repeatedly spend time to contact respondent's office for the case status information on the non-existent case; and/or

3. Dr. Garfinkel was forced to seek his own counsel and make his own efforts to try to get case status information on the non-existent case.

Y. The bar relied on the statements to its detriment as evidenced but not necessary limited to the fact that the bar initially dismissed Dr. Garfinkel's grievance based on respondent's false representations

COUNT II

Z. Respondent received a copy of the bar's letter of April 4, 1994 to Dr. Garfinkel closing the grievance on the basis that the case had not yet settled.

AA. Respondent knew that the bar was under a misapprehension that there was, in fact, a case which could be settled.

BB. Respondent failed to disclose the fact that there was no case within a reasonable time after the April 4, 1994 letter.

CC. It was necessary for respondent to disclose this fact within a reasonable time after the April 4, 1994 letter in order to correct the misapprehension.

DD. Respondent did not disclose the information that there was no case and that the only claim had been settled by Mr. Beider until on or about June 28, 1994, after the bar had re-opened the

file and made two further requests for information.

III. RECOMMENDATION AS TO WHETHER RESPONDENT SHOULD BE FOUND GUILTY:

After hearing all the trial testimony and being otherwise duly informed, I find that respondent is guilty on both counts of the complaint as follows:

A. As to Count I of the complaint, respondent has violated Rule 4-8.4(c) of the Rules of Professional Conduct which provides that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

B. As to Count II of the complaint, respondent has violated Rule 4-8.1(b) of the Rules of Professional Conduct, which provides that a lawyer in connection with a disciplinary matter shall not fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

In accordance with my findings of fact in this case, I recommend that respondent receive a 30 day suspension. Additionally, I recommend that the respondent be placed on probation for one (1) year during which time he must attend and successfully complete the bar's ethics school program. Should he attend and successfully conclude such ethics school during such year probation period, then his term of probation should be deemed concluded.

In arriving at the foregoing disciplinary recommendation, consideration was given to various factors which are set forth below:

A. There is a precedent for suspension in cases involving misrepresentation. See, The Florida Bar v. Poplack, 599 So. 2d 116 (Fla. 1992); The Florida Bar v. Bazley, 597 So. 2d 796 (Fla.

1992); The Florida Bar v. Morse, 587 So. 2d 1120 (Fla. 1991); The Florida Bar v. Wilder, 543 So. 2d 222 (Fla. 1989); and The Florida Bar v. Palmer, 504 So. 2d 752 (Fla. 1987).

B. Standard 7.2 of the Florida Standards for Imposing Lawyer Sanctions provides for suspension as follows: "Suspension is appropriate when a lawyer engages in conduct that is a violation of a duty owed as a professional and causes injury or knowingly potential injury to a client, the public, or the legal system,"

C. In aggravation under Standard 9.22(a), I have considered that respondent was the subject of a prior disciplinary proceeding which resulted in a public reprimand and probation by order of the Supreme Court dated February 6, 1992. The prior discipline was for neglect and failing to maintain proper trust account records.

D. In aggravation under Standard 9.22(i), I have considered that respondent has had substantial experience in the practice of law.

E. Addressing the existence of mitigating factors, I have found no factors in mitigation.

F. I have, also, considered the fact that Dr. Garfinkel was harmed by respondent's knowing misrepresentations not only because Dr. Garfinkel held off any collection efforts pending the non-existent case but also because Dr. Garfinkel was forced to go through unnecessary time, effort and expense in determining that no case existed.

G. In conclusion, I am satisfied that the recommended disciplinary measure is necessary to meet the Court's criterion for appropriate sanctions: attorney discipline must protect the public from unethical conduct and have a deterrent effect while still being fair to respondent. The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). Any lesser discipline than that recommended would not sufficiently protect the public and have the necessary deterrent effect. It is imperative that a clear

and unmistakable message be sent that it is not acceptable for lawyers to engage in misrepresentation to the members of the public or to the bar.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

After finding respondent guilty but prior to making my disciplinary recommendation, I considered the following personal history and prior disciplinary record of respondent, to wit:

Age: 49

Date Admitted to The Florida Bar: April 7, 1980

Prior Disciplinary convictions and disciplinary measures imposed therein:

Respondent was found guilty of neglect and failure to maintain trust account records and was publicly reprimanded and placed on probation by order of the Supreme Court of Florida on February 6, 1992.

V. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

The Florida Bar has incurred $1,215.84 in costs which should be taxed against respondent

Administrative Costs [Rule 3-7.6(o)]	$750.00
Court Reporter costs	327.34
Photocopying Costs	138.50
TOTAL COSTS DUE THE FLORIDA BAR	$1,215.84

Additionally, I direct that the court reporter charges and transcript for the final hearing be taxed to the respondent upon the filing by The Florida Bar of an affidavit stating the amount of such

charges.

In taxing all costs it is recommended that interest at the statutory rate accrue and be payable beginning thirty (30) days after the disciplinary order in this cause becomes final, unless a waiver is granted by the Board of Governors of The Florida Bar.

Rendered this 15 day of Aug, 1995 at Palm Beach County, FL.

MICHAEL D. MILLER, REFEREE

Original to Supreme Court of Florida with file

copies furnished to:

John A. Boggs, Esq., Director of Lawyer Regulation
David M. Barnovitz, Esq., Trial Counsel
James O. Walker, Esq., Respondent