FILED
SID J. WHITE
JUN 25 1997
CLERK, SUPREME COURT
By
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

TIMOTHY J. HMIELEWSKI,

Respondent-Appellee,

Supreme Court No. 88,

Florida Bar File No. 96-51,422 (171)

THE FLORIDA BAR'S INITIAL BRIEF

ADRIA E. QUINTELA # 897000
Bar Counsel
The Florida Bar
5900 North Andrews Avenue
Fort Lauderdale, Florida 33309
(954) 772-2245

JOHN T. BERRY #217395
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5839

JOHN F. **HARKNESS, JR.** #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5839

TABLE OF CONTENTS

TABLE OF CASES AND CITATIONS

PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the bar" or "The Florida Bar". Timothy J. Hmielewski, Appellee, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

STATEMENT OF THE CASE AND FACTS

Respondent undertook representation of one Scott Schubot and in August, 1994, filed a law suit on Mr. Schubot's behalf entitled Schubot v. Mayo Clinic No. 3-94-942 (3rd Div Minn), alleging claims for wrongful death and medical malpractice (TT23). Sometime between the commencement of respondent's representation and respondent's filing of the referenced law suit, respondent's client, Scott Schubot, confided in respondent that he had purloined medical records from the Mayo Clinic and exhibited such medical records to respondent (TT23-24). The medical records referred to pertained to the incident forming the crux of the wrongful death and medical malpractice claims. Because respondent's client had purloined the subject medical records, when called upon, through pre-trial discovery to produce its records, the Mayo Clinic was unable to find nor produce the critically important records taken by respondent's client.

Respondent committed a fraud and lied throughout the entire course of the litigation as will be more fully outline below. First, respondent responded to the following interrogatory, as follows:

> Please provide copies of any medical records of Richard M. Schubot's in the possession, custody, or control of Scott Schubot, or of

any of the heirs and next of kin of Richard M. Schubot.

RESPONSE: Other than the records provided from your hospital, we have sent and re-sent all of Richard Schubot's medical records in our possession to you. If you would like, we will furnish you with a general medical records authorization so that you may obtain or re-obtain any of Richard Schubot's records.

At the time respondent made such response respondent knew that respondent had never furnished to the defendants a copy of the records respondent's client had taken (TT25).

Subsequently, in a joint report prepared by respondent and defendants' counsel, respondent permitted a representation to be made under the heading of material factual issues in the case submitted by plaintiff, as follows:

Why defendant hospital has failed to maintain and produce critical patient records which would have been customarily kept during the time frame that the decedent was exsanguinating in his hospital bed.

At the time that respondent permitted such joint report to be filed respondent knew that respondent's client had made it impossible for the defendant hospital to produce the referenced "critical patient records" (TT25-26).

Following this, in a Rule 26(a) (1) disclosure, respondent represented:

> Although not in the Plaintiff's possession, the following documents would be used by the Plaintiff to establish his claim (particularly since the Defendant has not produced a complete medical record related to the Defendants' **care** and treatment of Richard Schubot)

At the time respondent made this representation, respondent knew that the defendant could not have produced the referenced records (TT26).

Then, in two sets of interrogatories directed to respondent's client, demands were made for:

> medical records. . . that refer or related to the medical care or treatment Richard M. Schubot has received since 1975.

> All documents referenced in [Mr. Schubot'sl Rule 26(a)(l) prediscovery disclosures . . . including but not limited to . . . [a]ny and all medical records . . . in your possession, control, or custody relating to any and all care or treatment of Richard M. Schubot since 1975 . . .

Respondent responded to such interrogatories, as follows:

> All documents in our possession at this time have been copied and forwarded to defendant.

At the time respondent made such responses to the referenced interrogatories, respondent knew the same to be false in that respondent had not copied and forwarded to the defendant the records taken by respondent's client (TT26-27).

The lies continued. The "expert report" submitted on plaintiff's behalf contained an opinion of an expert that Mayo had "tampered" with the records after the event which opinion was predicated upon the fact that the defendants had not produced the records that respondent's client had purloined. In an affidavit regarding plaintiff's expert witnesses, respondent stated:

> The lack of documentation coupled with [late entries] as well as missing crucial records covering that time frame, leads Nurse Walker to conclude that the records have been tampered with after this event.

Respondent knowingly permitted respondent's expert to opine regarding "tampering" and executed an affidavit regarding her conclusion of "tampering" without revealing the fact that respondent knew such records had not been tampered with but, in fact, had been taken by respondent's client (TT27).

Then, in a settlement letter written by respondent in which a demand for $400,000.00 is made, respondent represented:

> We grant you that the Plaintiff is not able to establish precisely what happened in this case, but the reason for the lack of proof actually enhances liability -- the Mayo Clinic has "lost" the pertinent medical records for the entire day the bleed-out took place.

Respondent, throughout the entire course of the litigation, and in this settlement letter deliberately misrepresented that the

Mayo Clinic had "lost" records when in truth and in fact respondent knew the records were not lost but had been taken by respondent's client. Respondent's deliberate misrepresentation, was for the sole purpose of attempting to secure a settlement based upon such misrepresentation (TT27-28).

As a result of respondent's various representations, all of which respondent knew to be untrue and/or misleading when made, the defendants were put to great trouble and expense in attempting to ascertain the information that was included in the records that were purloined by respondent's client (TT28,41).

Respondent's lies were finally discovered when respondent's client revealed in a deposition that respondent had the crucial missing medical records all along. Respondent was sanctioned by the Minnesota court for his fraudulent conduct and fined along with his client, $105,159 (Respondent has not yet paid this amount). This matter was then referred to The Florida Bar for review.

The bar's complaint was filed on July 22, 1996. It charged respondent with violations of Rules Regulating The Florida Bar 3-4.3 which proscribes commission of an act by a lawyer that is unlawful or contrary to honesty and justice; Rule 4-3.3(a)(1) which prohibits lawyers from knowingly making a false statement of material fact or law to a tribunal; Rule 4-3.3(a)(2) which

prohibits lawyers from failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client; Rule 4-3.4(a) which prohibits lawyers from unlawfully obstructing another party's access to evidence or otherwise unlawfully altering, destroying, or concealing a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counseling or assisting another person to do any such act; Rule 4-3.4(d) which prohibits lawyers in pretrial practice from intentionally failing to comply with a legally proper discovery request by an opposing party; Rule 4-4.1(a) which mandates that lawyers, in representing clients, not knowingly make false statements of material fact or law to third persons; Rule 4-4.1(b) which mandates that lawyers, in representing clients, disclose material facts to third persons when disclosure is necessary to avoid assisting criminal or fraudulent acts by a client; Rule 4-4.4 which prohibits lawyers, in representing clients, from using means that have no substantial purpose other than to embarrass, delay, or burden a third person or knowingly use methods of obtaining evidence that violate the legal rights of such a person; Rule 4-8.4(c) which prohibits lawyers from engaging in conduct involving dishonesty, fraud, deceit or misrepresentation,

and Rule 4-8.4(d) which prohibits lawyers from engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice.

Respondent did not dispute the factual allegations that formed the basis of the bar's complaint (TT32,45-46), but rather argued that his conduct should be excused or mitigated based on the totality of the circumstances surrounding him at the time (TT32-46). After a full hearing, the referee filed a report in which he recommended that respondent be found guilty of violating Rules Regulating The Florida Bar **3-4.3, 4-3.3(a)** (1), 4-3.3(a) (2), 4-3.4(a), 4-3.4(d), 4-4.1(a), 4-4.4 and 4-8.4(c), and not guilty of violating any of the other rules charged as hereinabove recited (RR6-7). The referee has recommended that the respondent be suspended for a period of twelve **(12)** months and thereafter until the respondent proves rehabilitation, and imposed certain conditions on his reinstatement as well as placed him on probation for a period of two (2) years (RR8-9).

At its regular May, 1997 meeting, the Board of Governors of The Florida Bar found the recommended sanction to be too lenient and has authorized this appeal for disbarment.

SUMMARY OF ARGUMENT

Distilled to its basics, this is a case involving conduct which rises well beyond obstinacy to dishonesty and as such deserves the harshest discipline.

Respondent knowingly lied to the court, knowingly lied to his own expert, knowingly lied to the defendants causing them to expend huge sums of money and valuable time attempting to locate medical records that all along respondent had in his possession. As if respondent's misconduct was not severe enough, respondent not only lied about his possession of these medical records, but also attempted to gain a tactical advantage in the litigation by perpetrating this lie.

The referee stated that respondent's conduct made a "mockery of the justice system as a search for the truth and fly in the face of a lawyer's responsibilities as a member of that justice system" (RR9) yet incorrectly found that this serious fraudulent activity warranted only a one year suspension. At issue in this appeal is whether the excuses offered by respondent for his conduct are sufficient to warrant anything but disbarment. In the bar's view they are not. At issue also is whether the character testimony offered by respondent is sufficient to overcome the appropriate sanction in this case. In the Bar's view it is not.. Accordingly,

the bar respectfully requests that this Court enter an order of disbarment.

ARGUMENT

I. RESPONDENT'S MISREPRESENTATIONS WARRANT IMPOSITION OF THE SANCTION OF DISBARMENT.

It is the Bar's position that the Court should exercise its broad latitude in reviewing a referee's recommendations for discipline and find that disbarment is the only appropriate sanction. The Florida Bar v. Morrison, 669 So 2d. 1040,1042 (Fla. 1996). The facts established below present a respondent who made a mockery of the entire judicial system and who would have in all likelihood continued to do so had he not been caught. Respondent does not contest the fact that he lied throughout the course of this litigation (TT38,45-46). From the outset, respondent lied to defendants about Plaintiff's possession of the key records. Throughout discovery, Defendants repeated requests for the key medical records were resisted. Respondent lied in three sets of interrogatories, in a joint report, in a Rule 26A1 disclosure, in an expert report and even attempted to use the fact of the missing records as a weapon with which to extract a substantial sum of money from the Defendant. Respondent even went so far as to premise a settlement request for $400,000 on the difficulty of defending a client which had "lost" records. Were it not for the defendants resolve to try this case, respondent would have likely

been successful in his deception. Such conduct, it is respectfully submitted, warrants disbarment.

The relevant case law also mandates disbarment, In The Florida Bar v. Calvo, 630 So.2d 548 (Fla.1994), the court disbarred an attorney who became aware of fraudulent conduct by his clients and failed to disclose the same, rejecting the attorney's argument that he was required to maintain confidentiality. Likewise, in The Florida Bar v. Miguel A. Orta (Nos. 85,124 and 85,425, March 6, 1997) and in The Florida Bar v. Merwin, 636 So.2d 717 (Fla. 1994), the court determined that disbarment was the appropriate sanction for attorneys who made numerous misrepresentations to the court, and in Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960), the court disbarred an attorney who assisted a client in perpetrating a fraud in a personal injury matter. The court in Dodd stated "No breach of professional ethics . . . is more harmful to the administration of justice.... than the knowledgeable use by an attorney of false testimony in the judicial process." Id at 19. It is the Bar's position that it is conduct of the type respondent **engaged** in which has thrust the legal profession into public disfavor.

The **Florida Standards for Imposing Lawyer Sanctions** also indicate that disbarment is the appropriate sanction. Standard **6.11** recites that disbarment is appropriate when a lawyer with the

intent to deceive the court knowingly makes a false statement or submits a false document; or (b) improperly withholds material information and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding. Here we have both.

II. THE EXCUSES OFFERED BY RESPONDENT DO NOT ALTER THE FACT THAT DISBARMENT IS THE ONLY APPROPRIATE SANCTION.

Respondent argues that he was prevented from revealing his knowledge about the stolen medical records because his duty to his client based upon the attorney/client privilege and the client's Fifth Amendment rights conflicted with his duties to the Court (TT40-41,61-66). His argument is specious, and therefore, should fail. Although respondent paints himself as a sympathetic figure caught in an ethical dilemma, it should be noted that the respondent became aware of the stolen records well before he filed the lawsuit, thus to the extent that any actual dilemma existed, it was entirely self-induced. Respondent did not have to file the lawsuit.

It is also interesting to note that the first time the attorney/client privilege or the Fifth Amendment issue was raised by respondent as a basis for nondisclosure of his possession of the medical records was when respondent got caught in the Minnesota

proceeding, and had to defend himself and not at any time during the course of the litigation in the underlying case.

Respondent also argues that he did not believe that he was committing an ethical violation because some other attorney he knew was faced with what respondent describes as a similar situation, yet the Bar did not prosecute this attorney (TT68-77). The Bar respectfully submits that again this is only an excuse offered by respondent for his malfeasance. As the referee noted, respondent had viable options that he could have exercised had he truly believed that he was on the horns of an ethical dilemma (RR9-10). He could have chosen to not take the case; he could have referred the client to another attorney; he could have called the Bar's ethics hotline which he was familiar with and had called before for guidance (TT51-55); he could have asserted the attorney-client privilege during the litigation; he could have voluntarily dismissed the case; he could have filed a Motion to Withdraw once he felt that he was in an untenable position; he could have anonymously returned the medical records. Respondent chose not to do any of these things, and consciously and knowingly violated the rules of ethics and perpetrated an outright lie. The Bar, therefore, respectfully submits that no credence should be given to

these excuses and that respondent's actions should be examined for what they were.

With regards to specific mitigating facts, the referee in this case found the following mitigation: absence of prior disciplinary record, absence of selfish motive, timely good faith effort to rectify consequences of misconduct, cooperative attitude toward proceedings and full and free disclosure to disciplinary board, remorse and character or reputation (RR12-14). The Bar offers that the only true mitigating factor is character or reputation. Respondent has a prior disciplinary record for an admonishment in 1993, which pursuant to Standard 9.22(a) can still be considered; there is no greater selfish motive than respondent lying and using his lie in an attempt to secure a settlement in order to obtain a fee; with regards to a timely effort to rectify the situation, respondent to date has not: paid the amount for which he and his client were sanctioned, and only disclosed his own conduct after he had no choice given that his client revealed the same in a deposition.

Furthermore, the Bar states that additional aggravating factors are present:

a. A pattern of misconduct [respondent lied time and time again1

b. Multiple offense [respondent lied in three sets of interrogatories, a joint report, a Rule 26A1 disclosure, an expert report, and in a settlement letter]

c. Substantial experience in the practice of law [respondent was admitted in December of 19761.

It is the Bar's position that the aggravation is certainly more significant than the mitigation present in this case. Furthermore the Court has not always accepted the mitigation as a compelling reason not to disbar. In rejecting the mitigation in The Florida Bar v. Nedick, 603 So. 2d 502 (Fla. 1992), (no prior discipline, cooperation with the criminal authorities and the imposition of other penalties) the Court found that the "mitigating factors are outweighed by the seriousness of the offense, its willful and repetitious nature, and the selfish and deceitful motive behind it". Id. The court should similarly find this here.

III. THE CHARACTER AND REPUTATION TESTIMONY OFFERED BY RESPONDENT WAS NOT SUFFICIENT TO OVERCOME DISBARMENT

During the final hearing respondent offered character testimony to support his argument that he should not be disbarred because of the service he provides to clients and the contributions he has made to his profession. The referee found this testimony persuasive and stated that were it not for the extensive character

testimony he may have disbarred respondent (RR13). It should be noted, however, that a number of these witnesses did not even know the nature of the pending allegations against respondent, and all of the witnesses agreed with the impropriety of respondent's conduct (TT109-112,190,199,211-213,230-231,236-237). Furthermore, no amount of character witnesses could undo the egregious nature of respondent's acts.

While respondent's character witnesses commented on the zealousness of respondent and his ability and skill, it is the Bar's position that it is easy to win cases when one ignores the rules that are in place to assure an even playing field. It is those lawyers who play by the rules and win that deserve applause and admiration.

CONCLUSION

This Court has long held that in imposing a disciplinary sanction, the Court 'must reach a judgment that is not only fair to society and to the attorney but also severe enough to deter other attorneys from engaging in similar misconduct." The Florida Bar v. Smith, 650 So 2d 980 (Fla. 1995). Disbarment is the only sanction that fits the facts of this case. In the instant case we have an attorney engaging in a deceptive scheme and attempting to use his lie as a weapon against his adversary. The fact that he is experienced means that he should have known better. Fraud upon the system cannot be permitted under the excuse that it constitutes zealous advocacy. Respondent is guilty of fraud on the entire judicial system and he admits this. Disbarment is the only appropriate sanction.

All of which is respectfully submitted.

Adria E. Quintela #897000
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, #835
Fort Lauderdale, Florida 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** copy of the foregoing has been furnished to by U.S. mail addressed to respondents attorney J. David Bogenschutz, Esq. at 600 South Andrews Avenue, #500, Fort Lauderdale, FL 33301 this 3rd day of June, 1997.

Adria E. Quintela

Adria E. Quintela #897000
Assistant Staff Counsel
The Florida Bar
5900 N. Andrews Avenue, #835
Fort Lauderdale, FL 33309
(954) 772-2245

THE FLORIDA BAR
Ft. Lauderdale Office
Cypress Financial Center
5900 North Andrews Avenue
Suite 835
Ft. Lauderdale, FL 33309
(954) 772-2245

June 23, 1997

Sid J. White
Clerk of the Supreme Court
Supreme Court Building
500 South Duval Street
Tallahassee, Florida 32399-1927

RE: Timothy J. Hmielewski, Esq.
Supreme Court No. 88,526
The Florida Bar File No. 96-5 1,422(171)

Dear Mr. White:

Enclosed please find an original and seven copies of the brief on the above referenced matter.

Sincerely,

ADRIA E. QUINTELA
Assistant Staff Counsel

AEQ/la

enclosures

cc: John A. Boggs, Director of Lawyer Regulation
Timothy J. Hmielewski, Esq.
c/o J. David Bogenschutz, Esq.