

**IN THE SUPREME COURT OF FLORIDA
(Before a Referee)**

**THE FLORIDA BAR,
Complainant,**

**CASE NO: SC09-2057
TFB No. 2008-10,927(13C)**

v

**TIMONTY ALLEN PATRICK,
Respondent.**

REPORT OF REFEREE

I. Summary of Proceedings: On or about November, 2009, a Complaint was filed by the Florida Bar against Respondent, TIMOTHY ALLEN PATRICK, pursuant to Rule 3-3.2(b) Rules Regulating the Florida Bar.

Pursuant to Order from the Supreme Court of Florida, dated November 10, 2009, the Chief Justice of the Supreme Court of Florida designated the Chief Judge of the Sixth Judicial Circuit to appoint a Referee for the Court in the above-styled matter.

On November 18, 2009, Chief Judge J. Thomas McGrady of the Sixth Judicial Circuit, designated and appointed the undersigned as Referee for the Florida Supreme Court in the matter of The Florida Bar v Timothy Allen Patrick, Supreme Court Case number SC09-2057.

Final Hearing as to guilt was held on March 25, 2010.

Any pleadings, notices, motions, orders, transcripts, and exhibits will be forwarded to the Supreme Court of Florida with this Report and constitute the record of this proceeding.

Appearing on March 25, 2010, for The Florida Bar were Troy Matthew Lovell and Lisa Buzzetti Hurley.

The Respondent, Timothy Allen Patrick, appeared with his attorneys, David A. Maney and Lee S. Damsker.

Complainant and the Respondent were afforded an opportunity and fully participated in this proceeding. All attorneys represented their client in an extremely competent and professional manner.

The Respondent was alleged to have violated the following rules regulating to the Florida Bar:

- (a) 3-4.3 (general misconduct);
- (b) 4-1.8(e) (advancing costs of litigation to client); and,
- (c) 4-8.4(c) (conduct involving dishonesty, deceit, fraud, or misrepresentation).

Prior to conducting the hearing herein, the undersigned reviewed the Referee Manual and rules and regulations related to lawyer regulations.

II. Findings of Fact: In making the following findings of fact, the undersigned has considered all of the testimony presented herein, viewed all of the tangible evidence admitted into evidence, heard argument of counsel, reviewed written closing arguments and proposed findings submitted by both sides, and personally observed the witnesses. The undersigned considered and reviewed all of the above, including conflicts in the testimony. The undersigned concludes the facts herein to be as follows:

a. Timothy Allen Patrick is and at all times indicated herein a member of The Florida Bar subject to the jurisdiction of the Supreme Court of Florida.

b. Patrick represented Dr. Craig Newman, Chiropractor, on two PIP claims against Progressive Insurance Company regarding the treatment of Michael Riley and Reem Riley.

c. Patrick represented Newman pursuant to a legal services contingency fee contract. See Respondent's Exhibit #1. Said contract provided that if Newman prevailed, the insurance company would be required to pay Newman's reasonable attorney's fees to Patrick. Newman would not be responsible for payment of attorney's fees to Patrick. If Newman did not prevail, Newman would not owe Patrick any attorney's fees. The contract provided that if the insurance company prevailed, Newman and Newman alone may be responsible for the insurance company's attorney's fees and costs.

d. The claim involved a \$24.00 claim for each of the two Rileys, i.e. a total of \$48.00.

e. The entire benefit Newman could gain in the pursuant of this case was payment of \$48.00 and establishment to the insurance company that he would pursue claims and that these claims were valid.

f. The PIP claim was vigorously prosecuted and defended.

g. By the time the case proceeded to mediation, Patrick had spent approximately sixty hours on this matter. Patrick's normal billing rate was \$225.00 per hour.

h. If an insured is ultimately found liable for contesting a PIP claim, then the statutory penalties of interest and attorney's fees would be applicable. Additionally, Newman ran the risk of being responsible for the insurance company's attorney's fees if the claim was determined to be unfounded.

i. At mediation the insurance company offered \$2500.00 to settle the claim. By this offer, Newman would have been paid in full (\$48.00) and would have established the precedent of prosecuting these types of claims and the insurance company paying these types of claims. Newman could not have gained or benefited any more than the offer made at mediation.

j. If this offer had been accepted and in consideration of the fee agreement between Newman and Patrick, Patrick would have been compensated under \$2500.00 for his sixty hours of work.

k. Newman rejected the claim at mediation and the related offer of settlement. The reason and circumstances related to this rejection is the primary factual dispute in this case.

l. Newman testified that he was inclined to accept the offer. The offer would have given Newman everything he could have received in the case and eliminated any risk of liability for responsibility for the insurance company's fees and costs. Newman indicated that Patrick then raised the issue that Patrick had spent approximately sixty hours on the case and that this would be a low amount for compensation to him. Newman testified that Patrick wanted to proceed with the case and indicated that there was a very high likelihood of the claim being

upheld and by doing so he could be appropriately compensated for his fees and costs. Newman testified that Patrick ensured him that Patrick would be responsible for all fees, including the insurance company's fees and costs in the unlikely event that the insurance company prevailed. Newman testified that he rejected the offer based upon the inducement and representation of Patrick.

m. Patrick testified that he did raise the issue of the time he had invested in the case through mediation, but denied advising Newman to reject the claim and denied offering and agreeing to be responsible for any attorney's fees or costs that might be levied against Newman. Patrick's testimony regarding the mediation and ultimate decision to reject the offer was vague and incomplete.

n. The undersigned is called upon to reconcile this direct conflict in the testimony and the ultimate effect thereof.

o. Pursuant to the rejection at mediation, these two PIP claims proceeded to trial and appeal.

p. The Reem Riley case proceeded to a non-jury trial on July 26, July 27, and August 6, 2004. Newman's claim was upheld at the trial. Newman was awarded \$24.00 in damages. Pursuant to Florida Statute 627.428, Plaintiff was determined to be entitled to attorney's fees and costs to be determined at a later date. Respondent's Exhibit #11.

q. Progressive Insurance Company was awarded a Final Summary Judgment as to the Michael Riley claim and Progressive was awarded attorney's fees. See Respondent's Exhibit #12.

r. Patrick expended a total of 235.5 hours in the prosecution of the Reem Riley \$24.00 PIP claim. Another attorney expended 157.3 hours in the same claim. The Court ultimately awarded attorney's fees on this \$24.00 PIP claim in the amount of \$120,772.50 as well as costs. Additionally, in the Michael Riley case, the Court awarded \$9,000 in fees to Progressive, plus \$1,200 in costs. The Trial Court authorized a set-off for these claims which would have ultimately netted approximately \$110,000.00 to Patrick.

s. Progressive appealed this award and Newman cross appealed. See Respondent's Exhibit #15.

t. Patrick retained attorney V. Rand Saltsgaver to represent Newman in the appeal. The Contingent Fee Agreement was entered into. See Respondent's Exhibit #14. As such, Newman was not responsible for payment of any fees to Saltsgaver. (Contingent Fee Contract).

u. Progressive prevailed on both appeals. Consequently, the award of attorney's fees to Patrick was set aside and Newman was adjudged to be legally responsible for Progressive's fees and costs.

v. Patrick retained the services of attorney David Caldevilla to pursue further appellate remedies on these matters. Patrick signed a fee engagement letter with Caldevilla. Newman never signed the engagement letter. See Respondent's Exhibit #17.

w. Caldevilla sent periodic statements to Patrick and Newman. Patrick paid Caldevilla approximately \$5,800 in fees. Caldevilla contacted Newman regarding fees owed. Newman indicated to Caldevilla that he had never signed the fee engagement letter and was not responsible for any fees to Caldevilla. Caldevilla confirmed in his office accounting that the fees paid to date were paid by Patrick and not by Newman. Caldevilla contacted Patrick regarding these issues. Patrick told Caldevilla that he was surprised that his office had been paying part of Caldevilla's fees. This representation by Patrick to Caldevilla is in direct contravention of the clearly established evidence in this case that Patrick accepted responsibility for payment of at least part of Caldevilla's fees and authorized payment thereof. The representations by Patrick to Caldevilla regarding surprise that he had been paying part of the fees was false and misleading.

x. Ultimately, Progressive Insurance Company prevailed on both appeals.

y. Progressive Insurance Company then sought payment of the fees awarded to it from Newman.

z. The undersigned must reconcile whether Newman rejected the offer to settle and accepted responsibility of the potential liability for Progressive's attorney's fees or whether Patrick induced Newman to reject the offer so that Patrick could pursue full payment of attorney's fees and costs herein and Patrick assume responsibility for Progressive's attorney's fees in the perceived unlikely event that Progressive ultimately prevailed in the case.

aa. The undersigned finds by clear and convincing evidence that Newman rejected the offer of settlement based upon inducement by Patrick to allow Patrick to pursue the full claim for attorney's fees and the representation that in the perceived unlikely event that Progressive prevailed, that Patrick would be responsible for all of Newman's fees and costs to Progressive.

bb. The undersigned rejects the position and the testimony by Patrick that he did not induce and encourage Newman to reject the offer of settlement and that he did not indicate to Newman that Patrick would be responsible for Progressive's fees and costs in the perceived unlikely event that Progressive prevailed.

cc. The actions of Newman after the rejection of the offer to settle herein are consistent with his belief and reliance that he would have no ultimate risk because Patrick assumed all risk of continuing the prosecution of these small PIP claims. Newman had nothing further to gain. Absent the assurances by Patrick, Newman had significant risk in allowing these cases to proceed on after mediation. His non-signature on Caldevilla's fee engagement letter and refusal to pay any fees are consistent with this position.

dd. Patrick's explanation of the events at mediation in which the offer was rejected defy reason, logic, and an attorney's duty to zealously represent a client. Patrick's explanation that he merely let the client decide without providing a recommendation falls below any reasonable level of competency. Patrick's duty at that point should have been to advise Newman to accept the offer because the offer gained Newman everything Newman could have gained in this case. The entire motivation to reject the offer at mediation and proceed with this claim was based upon Patrick's desire to be fully compensated for the time, money, and effort he had placed in this case. In order to be able to do so, he induced and convinced Newman to reject the offer by accepting all of the additional risk. Patrick clearly placed his personal interest of being compensated above the interest of his client. Patrick wrongfully advised and induced his client to reject an offer for full compensation so that Patrick could personally benefit. Patrick wrongfully agreed to and paid approximately \$5,800.00 towards Caldevilla's fees. When confronted with this wrongful activity, Patrick gave a false explanation to Caldevilla.

ee. Patrick denied making this inducement to Newman and refused to pay any of Progressive's fees or costs levied upon Newman.

ff. The actions of Patrick herein, by placing his personal interest above the interests of his client, inducing his client to reject an offer which could subject

his client to significant liability, his ultimate refusal to abide by his representations to Newman, have all caused significant damage to his client.

III. Summary. Patrick handled two PIP claims on behalf of a medical provider, Dr. Craig Newman, for the treatment of Michael Riley and Reem Riley. The nature of the representation placed Patrick in the position of being the primary beneficiary of any successful litigation while imposing substantial risk on Dr. Newman in the event of failure. As a result of the situation herein, Patrick engaged in two incidences in order to induce Newman to continue the litigation. The continued litigation could provide no additional benefit to Newman. Continued litigation could provide significant financial benefit to Patrick. Absent the inducement by Patrick, Newman assumed significant risk by continuing the litigation. Patrick induced Newman to continue the litigation so that Patrick could pursue full compensation for his time, money, and effort and in doing so, induced Newman to proceed by accepting all of the risks. Patrick improperly promised to pay any judgment for attorney's fees imposed against Newman in the event the litigation proved unsuccessful.

This unethical promise induced Newman to continue the litigation. Patrick ultimately failed to abide by his unethical promise. This improper promise to indemnify, violated Rule 3-4.3 (general misconduct) and Rule 4-1.8(e) (improper financial assistance to client). Although Patrick denied making this promise, the clear and convincing evidence at the Final Hearing established that the promise was made. In addition to that promise, the Respondent improperly continued the litigation by agreeing to pay and then paying a portion of the attorney's fee of David Caldevilla who handled part of the appeal of the cases. This conduct, which is uncontroverted, violated Rule 3-4.3(general misconduct), and Rule 4-1.8(e) (improper financial assistance to client).

Patrick is also charged with violation of Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation). The undersigned finds that there is evidence to support this violation, but said evidence does not rise to the level of clear and convincing evidence. Fraud cannot be predicated upon a mere promise not performed. A promise may be actionable as fraud where it is proven that the promissor had a specific intent not to perform the promise at the time the promise was made, as long as the other elements of fraud are established. The Bar argues that the evidence establishing Patrick had a specific intent not to perform the promise at the time the promise was made is established by the fact that Patrick refused to honor the promise approximately two years later when Progressive's fees were placed upon Newman. While this circumstance tends to support this deduction, the undersigned finds this evidence to be insufficient to establish that

Patrick had the intent to not pay Progressive's fees at the time he induced Newman to reject the offer of settlement. Patrick may have had such an intent, but the undersigned finds that the evidence is insufficient to support this by clear and convincing evidence. The undersigned finds that there is insufficient evidence to support Patrick violated Rule 4-8.4(c). This finding should not in any way be construed as doubt upon the finding of the improper inducement by Patrick to Newman at the mediation.

IV. Recommendation as to Guilt. I find that Timothy Allen Patrick's promise to indemnify violated Rules 4-1.8(e) and 3-4.3. I find that Timothy Allen Patrick's payment of part of David Caldevilla's attorney's fees also violated both Rule 4-1.8(e) and Rule 3-4.3. I recommend that Timothy Allen Patrick be found guilty of violating Rule 3-4.3 (general misconduct) and Rule 4-1.8(e) (improper financial assistance to client).

V. Recommendations as to Discipline. A Sanction Hearing is scheduled for May 4, 2010, starting at 1 p.m.

VI. Personal History and Past Disciplinary Record. To be completed after Sanctions Hearing.

VII. Standards for Imposing Lawyer Sanctions and Vase Law Considered. To be considered after Sanctions Hearing.

VIII. Costs. To be considered after Sanctions Hearing.

DATED this ____ day of April, 2010.

JACK HELINGER, Referee

Copies furnished to:

Troy Matthew Lovell, Bar Counsel, The Florida Bar, 4200 George J. Bean Pkwy.,
Suite 2580, Tampa, FL 33607;

David A. Maney, Counsel for Respondent, 606 E. Madison Street, P.O. Box
172009, Tampa, FL 33672-2009;

Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson
Street, Tallahassee, FL 32399-2300