

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. SC06-2232

v.

TFB File No. 2006-00,531(4A)

MICHAEL JOSEPH DAVIE,

Respondent.

INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CONTENTS	ii
TABLE OF CITATIONS.....	iii
PRELIMINARY STATEMENT.....	1
STATEMENT OF THE CASE.....	2
STATEMENT OF THE FACTS.....	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
CONCLUSION	17
CERTIFICATE OF SERVICE	18
CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN	19

TABLE OF CITATIONS

Page No.

Cases

<u>The Florida Bar v. Carlon</u> , 820 So.2d 891 (Fla. 2002)	14
<u>The Florida Bar v. Karten</u> , 829 So.2d 883 (Fla. 2002)	8
<u>The Florida Bar v. Moriber</u> , 314 So.2d 145 (Fla. 1975)	12, 13
<u>The Florida Bar v. Richardson</u> , 574 So.2d 60 (Fla. 1990)	13, 14
<u>The Florida Bar v. Scott</u> , 566 So.2d 756 (Fla. 1990)	16

Rules Regulating The Florida Bar

3-7.16	11
4-1.5	2, 4, 8, 11, 15, 16, 17

Other Authorities

Ethics Opinion 93-2	14, 15
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PRELIMINARY STATEMENT

The Complainant, The Florida Bar, is seeking review of a Report of Referee recommending Respondent be found not guilty of any rule violations. Complainant will be referred to as The Florida Bar, or as the Bar. Michael Joseph Davie, Respondent, will be referred to as Respondent, or as Mr. Davie throughout this brief.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number (e.g., RR 12).

References to specific pleadings will be made by title. Reference to the transcript of the final hearing are by symbol TR, followed by the appropriate page number. (e.g., TR 289).

References to Bar exhibits shall be by the symbol TFB Ex followed by the appropriate exhibit number (e.g., TFB Ex. 10).

STATEMENT OF THE CASE

Robert Alan Lane and his wife filed a Bar complaint against Respondent alleging excessive fees on November 20, 2005. On July 13, 2006, probable cause was found by the Fourth Judicial Circuit Grievance Committee “B” and a formal complaint was filed on November 17, 2006, alleging Respondent violated Rule 4-1.5, Rules Regulating The Florida Bar.

A final hearing was held on February 6, 2009, before the Honorable Murray Goldman, Referee. On February 25, 2009, the Referee entered a Report of Referee wherein he recommended Respondent be found not guilty of violating the provisions of Rule 4-1.5, Rules Regulating The Florida Bar.

Pursuant to the Rules Regulating The Florida Bar, a timely Petition for Review was filed seeking review of the Referee’s recommendation of not guilty.

STATEMENT OF THE FACTS

On July 14, 2000, Respondent was retained by Robert Alan Lane and his wife to handle a medical malpractice claim. (TR 54) The Lanes executed a retainer agreement for \$7,500 and paid Respondent such sum. The Lanes also executed a contingency fee contract.

Pursuant to the retainer agreement (TFB Ex. 1), Respondent was to obtain Mr. Lane's medical records and have them reviewed by a medical expert to determine whether legal grounds existed to substantiate a medical malpractice claim.

After being retained, Respondent sent Mr. Lane's medical provider a one page letter on July 14, 2000, seeking records and x-rays. (TFB Ex. 2) On August 1, 2000, Respondent sent Mr. Lane's medical provider a second letter placing them on notice he intended to sue them. (TFB Ex. 3)

On August 28, 2000, Mr. Lane's medical provider sent Respondent a request for information (TFB Ex. 4) which Respondent's legal assistant, Latrice Williams, forwarded to the Lanes on August 31, 2000. Respondent replied to the request on October 10, 2000. (TFB Ex. 8)

Respondent wrote the Lanes a letter on August 8, 2000, (TFB Ex. 6) regarding their case and then notified them on October 20, 2000, that his expert found no negligence and they had no case. (TFB Ex. 9)

Between July 14, 2000, and October 20, 2000, the Lanes never had contact with Respondent about his representation. (TR 59) The Lanes had not been informed of who was reviewing their case or what the results were before Respondent's letter of October 20, 2000.

Respondent testified he had previously used the reviewing expert, Dr. Heller, and did not have to engage in a search for such expert. (TR 82-83) Respondent was not able to state that he had even organized the medical records for Dr. Heller's review. (TR 91)

The Bar produced an expert witness, Fred Tromberg, whom Respondent stipulated to his qualifications. (TR 9)

Mr. Tromberg testified that a reasonable fee in 2000, for the work done by Respondent in the Lanes' case, would be between \$1,000 and \$1,500. Mr. Tromberg further testified that, under the provisions of Rule 4-1.5, the \$7,500 fee collected by Respondent was unconscionable, overreaching and extremely excessive since it was about 500 percent greater than what it should have been. (TR 24) Mr. Tromberg also

testified that the mere presence of a pre-suit period did not attribute to any more costs or expenses. (TR 40)

After receiving Respondent's letter of October 20, 2000, Mr. Lane contacted Respondent and requested a refund of his \$7,500 retainer. Respondent advised there was no money left and made no refund. (TR 59)

SUMMARY OF ARGUMENT

Respondent charged and collected \$7,500 from Robert Lane and his wife to merely forward Mr. Lane's medical records to an expert to review.

Respondent was shown to have written two standard demand letters by which he obtained the records. Aside from forwarding a request for information from the medical provider's risk manager, Respondent merely forwarded the records for review and sent a letter to the Lanes informing them they had no case.

Through expert testimony, it was shown that the location of the medical provider presented no unique problems having the records reviewed, no exceptional expertise was required to draft the demand letters, the case did not present any novel or complex issues, and the nature of the representation would not have precluded Respondent from accepting other legal work. The expert testified that Respondent's \$7,500 fee was clearly excessive, unconscionable and overreaching in that a reasonable fee would be \$1,000 to \$1,500.

Respondent's fee was five times that of what would be reasonable. The fee was clearly excessive and objectionable to a prudent lawyer.

The Referee's findings contained facts not based on the record and his recommendation of not guilty is contradictory to the competent, substantial evidence showing Respondent was guilty of charging an excessive fee.

ARGUMENT

The Florida Bar is challenging the Referee's findings of fact and conclusion that Respondent was not guilty of violating the provisions of Rule 4-1.5, Rules Regulating The Florida Bar. In the instant case, Respondent was charged with collecting an excessive fee. The Referee recommended Respondent be found not guilty and the Bar is appealing this finding.

To succeed in challenging a Referee's finding of fact in an attorney discipline proceeding, it must be established there is a lack of evidence in the record to support such findings or that the record clearly contradicts the Referee's conclusion. The Florida Bar v. Karten, 829 So.2d 883 (Fla. 2002). In the instant case, the Bar's position is that the record clearly contradicts the Referee's recommendation that Respondent be found not guilty.

Robert Lane and his wife entered into a retainer agreement for a non-refundable advance fee of \$7,500 for which Respondent agreed to obtain all pertinent medical records and have them reviewed by an appropriate consulting medical expert to determine whether legal grounds existed to substantiate any medical malpractice claim. (TFB Ex. 1)

The Referee found that Respondent obtained such records, reviewed and organized them, and forwarded them to the expert for review. (RR 2) The record supports a finding that Respondent obtained such records and forwarded them for review, but when questioned about who organized these records, Respondent testified “Oh, I don’t know.” (TR 91) Respondent further testified that his paralegal, Latrice Williams, could have organized the medical records. (TR 91) Such statements demonstrate the lack of a factual basis for the Referee to make a specific finding that Respondent organized the records.

On August 1, 2000, Respondent filed an Intent to Initiate Litigation for Medical Malpractice (TFB Ex. 3) after he failed to receive Mr. Lane’s x-rays pursuant to his initial request of July 14, 2000. (TFB Ex. 2)

As a result of Respondent’s Notice of Intent, Respondent received a request for information from the risk management group of the medical provider for Mr. Lane. This request was forwarded to the Lanes by Respondent’s paralegal, Latrice Williams, on August 31, 2000. (TFB Ex. 7) Mr. Lane had no contact with Respondent considering this request for information either in person or by telephone. (TR 59) Respondent filed less than a three-page reply in response to the risk manager’s request for information. (TFB Ex. 8)

The Referee, on page 3 of the Report of Referee, finds that as part of the pre-suit period the insurance carrier could have taken Mr. Lane's sworn statement in Tampa and such would have taken at least 10 hours of Respondent's time. The Report of Referee cites to pages 92-93 of the transcript.

A review of pages 92-93 of the trial transcript fails to show any testimony as to how much of Respondent's time would have been taken in attending a sworn statement of Mr. Lane. The only testimony was that Tampa was 200 miles away. For the Referee to make such a finding in attempting to justify Respondent's fee is erroneous and an abuse of discretion.

A review of Respondent's retainer agreement shows that Respondent limited his representation to only obtaining Mr. Lane's medical records and having them reviewed by an expert. Any work beyond this limited area of representation would have to be viewed as covered by Respondent's contingency fee contract. This must be viewed as a natural progression since Respondent had placed the medical providers on notice of their intent to sue. Contrary to Respondent's testimony (TR 93), the retainer agreement did not contain a promise to prosecute the malpractice case. You must look to the contingency contract for such authorization.

The attempt of the Referee to provide Respondent a theory by which to justify the amount of his retainer fee is clearly erroneous and presumes facts which are not within the record.

Respondent notified Mr. Lane of the expert's opinion in his letter of October 20, 2000. (TFB Ex. 9) Mr. Lane filed a Bar complaint on November 20, 2005. This complaint was filed within the period provided under Rule 3-7.16, Rules Regulating The Florida Bar. Contrary to the Report of Referee, Mr. Lane did give a reason for the lateness of his complaint. (TR 60, 67)

The Report of Referee acknowledges the Bar presented testimony of an expert witness, Fred Tromberg, that established a reasonable fee for Respondent's work to have been \$1,500. (RR 3)

The Report of Referee ignores Mr. Tromberg's testimony that the fee charged by Respondent, \$7,500, for the work that was required was clearly excessive, unconscionable and overreaching under the provisions of Rule 4-1.5, Rules Regulating The Florida Bar.

The Report of Referee does not even set forth Mr. Tromberg's opinion but merely notes that it failed to take into consideration the filing of the Notice of Intent and the potential of having to travel to Tampa for Mr. Lane's deposition.

To the contrary, Mr. Tromberg specifically addressed the effect of such pre-suit period in his testimony. (TR 40-41) Mr. Tromberg testified that the mere fact that there was a pre-suit period does not directly relate to a greater amount of work.

The Referee's finding is erroneous and is not supported by the record. For the Referee to ignore this expert's opinion as to Respondent's fee being clearly excessive is an abuse of discretion. Again, the Referee has interjected his own theory of fees in arguing the potential effect of non-existent circumstances on the reasonableness of Respondent's fee.

This Court has not hesitated in the past to suspend lawyers for charging clearly excessive fees where there has been proven a basis for the excess.

In The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975), this Court held that the question of what constitutes an excessive attorney fee depends on multiple factors including the difficulty of the case, any contingencies upon which the fee is based, novelty of legal issues presented, experience of the attorney, quality of work product, and amount of time spent in preparation and litigation.

The Court in Moriber held that, even where a client is fully informed about a fee arrangement, an attorney may still be disciplined for overreaching where the fees charged are grossly disproportionate to the services rendered. In the Lanes' case,

Respondent merely wrote several letters to obtain medical records and forwarded them to a known expert for an opinion.

Subjecting Mr. Lane's case to the factors from Moriber fails to support Respondent's \$7,500 fee. Mr. Tromberg clearly testified that there was not a novel or complex issue, Respondent was experienced and the fee was clearly excessive for the amount of time needed to perform the services. The Court suspended Moriber for 45 days and until such time as he refunded the client's fee less a reasonable fee.

This Court suspended a lawyer for 91 days for charging an excessive fee where the lawyer charged \$10,550.92 for a probate matter where a reasonable fee would have been \$3,100 to \$3,200. The Florida Bar v. Richardson, 574 So.2d 60 (Fla. 1990). In Richardson, the Court agreed with the expert witness that it is particularly important what amount of time should have been devoted to accomplish a particular task. Richardson at p. 62.

The Report of Referee established that the Bar's expert testified that Respondent's work could have been done in a maximum of four hours. As in Richardson, this should be looked at as the time that should be reasonably devoted to accomplish a particular task. The facts considered by the Referee as to what work may

be anticipated do not form a relevant basis for judging the excessiveness of Respondent's fee. The extra work did not materialize and cannot be considered.

Respondent's fee was shown to be 500 percent more than the expert testified would be accepted as reasonable. Such a form of social malpractice, as acknowledged by this Court in Richardson, requires a similar discipline, a rehabilitative suspension.

In The Florida Bar v. Carlon, 820 So.2d 891 (Fla. 2002), this Court again suspended a lawyer for 91 days for charging excessive fees. As in Carlon, Respondent herein had no prior association with his client upon which to justify having charged such an excessive fee. The Court accepted the expert witness' testimony considering the excessiveness of the fee in Carlon. In the instant case, the Referee has not given a valid reason for rejecting such testimony of Mr. Tromberg.

The Report of Referee cites to Ethics Opinion 93-2 and an Ethics School Workbook in finding that the right to charge a "non-refundable fee" has been clearly recognized by The Florida Bar. The Bar has never argued or claimed Respondent's fee agreement was a violation of any rule. The formal complaint makes no such allegation.

The Referee herein has relied upon such an advisory opinion to justify Respondent's excessive fee. He cites to Ethics Opinion 93-2 where it addresses the

prospect of an attorney having to refund all or part of a non-refundable fee when no services are provided. Opinion 93-2, Question 2. The Referee erroneously cites to the fact that Respondent performed the services he was hired to do. This does not address the question of whether the fee itself was excessive. It cannot be rationalized that just because a fee is non-refundable and a lawyer does the work contracted for that the fee itself is beyond review as to its reasonableness.

Within Ethics Opinion 93-2, the committee, under Question 5, addresses this particular problem. The committee stated it did not believe that, by designating a retainer as non-refundable, a lawyer is automatically insulated from a claim that the fee is excessive. Whether or not the fee is excessive under the circumstances is governed by Rule 4-1.5 rather than use of the description “non-refundable.”

The Referee’s finding that Respondent had performed all services under his retainer agreement has no relevance to a determination if the fee was excessive. The record and the testimony of the Bar’s expert witness established that, under the parameters of Rule 4-1.5, the fee Respondent charged was clearly excessive.

The Referee finally points to several letters Respondent presented wherein earlier complaints had been resolved in Respondent’s favor. These letters address the nature of the fee agreement as pointed out by the Report of Referee. The Bar is not

contesting the nature of the fee agreement. The Referee emphasized that one of the letters stated that fee disputes are not generally appropriate areas for attorney discipline.

Each discipline case must be viewed on its own merits. In the instant matter, a grievance committee determined probable cause on a violation of Rule 4-1.5 for excessive fees and not a fee dispute. The burden is upon the party seeking review to demonstrate that the Referee's report is erroneous, unlawful, or unjustified. The Florida Bar v. Scott, 566 So.2d 756 (Fla. 1990).

The Referee's recommendation that Respondent be found not guilty of violating Rule 4-1.5 is contradictory to the evidence and testimony in the record proving Respondent's \$7,500 fee was clearly excessive. The recommendation of not guilty should be reversed. Respondent should be found guilty, suspended for a period of at least 91 days and ordered to pay back to the Lanes that part of his fee proven to be excessive.

CONCLUSION

The Report of Referee contained factual errors and its conclusion that Respondent was not guilty of charging a clearly excessive fee is contradictory to the record.

Respondent should not be allowed to charge \$7,500 for work the Bar's expert showed could be done in four hours time at a reasonable fee of no more than \$1,500. The factors of Rule 4-1.5 fully support the expert's opinion that the fee was clearly excessive.

Florida case law supports a finding of guilty and discipline of a 91-day suspension with a refund of the excessive amount to the Lanes.

Accordingly, the Report of Referee should be reversed and Respondent be found guilty of violating Rule 4-1.5.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding Supreme Court Case No. SC06-2232, TFB File No. 2006-00,531(4A), has been mailed by certified mail #7006 0100 0003 1035 5953, return receipt requested, to Michael Joseph Davie, Respondent, whose record Bar address is 24 North Market Street, Suite 303, Jacksonville, Florida 32202-2810, on this 7th day of April, 2009.

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Initial Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Symantec AntiVirus.

James N. Watson, Jr., Bar Counsel