

No. SC89009

IN THE
SUPREME COURT OF MISSOURI
EN BANC

DUPLICATE
OF FILING ON

MAR 11 2008

IN OFFICE OF
CLERK SUPREME COURT

IN RE:
FREDERICK W. MARTIN III,
RESPONDENT.

RESPONDENT'S BRIEF

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POINTS RELIED ON

I.

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE BECAUSE HE ACTED WITH REASONABLE DILIGENCE IN THAT HE PAID REBEKAH CRONE'S MEDICAL EXPENSES AS SOON AS SUCH EXPENSES WERE ACCURATELY DETERMINED, AND ADEQUATELY COMMUNICATED WITH REBEKAH CRONE BY TELEPHONE, BY DISCUSSIONS WITH HER ATTORNEY, AND BY CONTACT WITH THE INFORMANT.

In Re Disney, 922 S.W.2d 12 (Mo. banc 1996)

In Re Frank, 885 S.W.2d 328 (Mo. banc 1994)

In Re Schaeffer, 824 S.W.2d 1 (Mo. banc 1992)

POINTS RELIED ON

II.

THE SUPREME COURT SHOULD NOT DISBAR RESPONDENT BECAUSE EVEN THOUGH HE FAILED TO ADEQUATELY HANDLE CLIENT AND THIRD-PARTY FUNDS, HE DID NOT CONVERT CLIENT PROPERTY IN THAT HIS FAILURES RESULTED FROM IGNORANCE AND AN ATTEMPT TO SAFEGUARD CLIENT PROPERTY.

In Re Barr, 796 S.W.2d 617 (Mo. banc 1990)

In Re Phillips, 767 S.W.2d 16 (Mo. banc 1989)

In Re Tessler, 783 S.W.2d 909 (Mo. banc 1990)

In Re Waldron, 790 S.W.2d 456 (Mo. banc 1990)

ARGUMENT

I.

THE SUPREME COURT SHOULD NOT DISCIPLINE RESPONDENT'S LICENSE BECAUSE HE ACTED WITH REASONABLE DILIGENCE IN THAT HE PAID REBEKAH CRONE'S MEDICAL EXPENSES AS SOON AS SUCH EXPENSES WERE ACCURATELY DETERMINED, AND ADEQUATELY COMMUNICATED WITH REBEKAH CRONE BY TELEPHONE, BY DISCUSSIONS WITH HER ATTORNEY, AND BY CONTACT WITH THE INFORMANT.

THIS ARGUMENT RESPONDS TO POINTS RELIED ON I. AND II. OF INFORMANT'S BRIEF.

The findings, conclusions and recommendations of the Disciplinary Hearing Panel in a disciplinary proceeding are advisory in nature. In this Court, the evidence is reviewed de novo, and the credibility and value of the evidence is determined independently, with the Court drawing its own conclusions of law. In Re Schaeffer, 824 S.W.2d 1, 2 (Mo. banc 1992).

If the Court determines that sanctions are in order, disbarment is indicated only in extreme cases:

This Court has reserved disbarment for persons clearly unfit to practice law and used reprimands for isolated acts not involving dishonest, fraudulent or deceitful conduct... the intermediate sanction of suspension is appropriate considering the circumstances of this case, where Respondent violated his duty to the public to maintain personal integrity, but the conduct does not rise to a level indicating Respondent is clearly unfit to practice law.

In Re Disney, 922 S.W.2d 12, 15 (Mo. banc 1996).

The Judgment rendered in favor of Kamala Crone and Rebekah Crone was made in three parts: \$8,596.78 to Rebekah (for personal injuries), \$8,384.28 to Kamala (for medical bills) and \$6,018.94

for attorney fees and costs (Exhibit 29), and which was deposited into Respondent's trust account on January 30, 2004 (Ex. 1). In that Rebekah's portion of \$8,596.78 was paid to her on May 17, 2004 (Ex. 1), a matter of days after she turned eighteen years of age (Transcript 230), there is no claim that this portion of the Judgment was paid in a dilatory manner; instead, the focus herein is on the payment of the \$8,384.28 awarded to Kamala for Rebekah's medical bills.

The Crone lawsuit was filed on November 29, 1999, with the Cronos being represented by an attorney other than Respondent (Ex. 29). After the other attorney withdrew from the case, Respondent entered his appearance on behalf of the Cronos in May, 2002 (Ex. 29).

During the time that the case was being handled by the other attorney, discovery was performed and the case set for trial. As part of the discovery process, the Cronos and their attorney had prepared a list of medical bills for Rebekah totaling \$8,384.28, which Kamala verified under oath as being accurate (Ex. 13 and 30).

After Respondent became involved in the case, settlement discussions took place in which the propounded medical bills were part of the negotiations (Tr. 225). Since the medical bills and records had been worked up by his predecessor, Respondent and opposing counsel assumed they were accurate (Tr. 223); however, prior to settlement Kamala had informed Respondent that Rebekah had been examined by other doctors,

with the costs of these examinations having been paid for by their relatives (Tr. 220).

After the award for medical bills was deposited on January 30, 2004, Respondent had frequent contact with Rebekah regarding payment to her of her personal injury award, as a dispute had developed between Rebekah and her mother concerning this award (Rebekah wanted the award paid immediately to her, while Kamala wanted the money paid into a restricted bank account until Rebekah turned twenty-one) (Tr. 228).

Rebekah was paid her award on May 17, 2004, and Respondent continued to discuss the case with her after that time, as some confusion had arisen as to status of the medical bills. In contacting the health care providers, it was learned that the ambulance bill had been double-billed, so there was no liability for this expense; that the hospital bill had been paid by other liability insurance; and that at least one bill listed was not connected with the motor vehicle collision (Tr. 232). In addition, when an itemized bill was obtained from the physical therapist, it revealed that a portion of the bill had been paid by employment-related health insurance; and another health care provider stated that a portion of its bill had been paid by Medicaid (Tr. 233-235).

Another complication at this time concerned Kamala, who had not submitted the medical bills that were to be reimbursed to the relatives. After visiting the St. Clair County Jail

in Osceola and learning that she was no longer incarcerated there, Respondent traveled to the Greene County Jail, to the Federal Marshall's Office and to the Federal District Court Clerk's Office in Springfield, but was unable to learn her whereabouts (Tr. 229-230).

At this point, Respondent contacted Medicaid and the health insurance company to determine if payments had been made on any other medical bills, and whether a claim for subrogation would be made for any bills paid. Rebekah disagreed with this course of action, and sent Respondent a letter (Ex. 18) on January 27, 2005 stating that she would be contacting the Honorable R. Jack Garrett (the Circuit Judge who presided over the personal injury claim) within ten days of the medical bills were not resolved. Respondent responded to this by contacting Judge Garrett's secretary and informing her that he would be willing to discuss the situation should Judge Garrett hear from Rebekah (Tr. 248-249).

Around this same time, Respondent was contacted by attorney Roy Williams (Ex. 18a), who had been hired by Rebekah and her father to help get the medical bills matter resolved. Respondent visited with Mr. Williams on several occasions, gave an accounting of the medical bills and recovery, and discussed the subrogation and Medicaid issues (Tr. 203-205). After these discussions, Mr. Williams advised the Crones in July of 2005 that he was satisfied with the manner in which Respondent was handling the matter (Tr. 206-207).

Rebekah thereafter filed a Complaint with Informant (Ex. 4) on September 30, 2005, which has been pending since that time and resulted in this proceeding. During the course of this process, Respondent has discussed the status of the medical bills with Informant by correspondence and by testimony. After the Medicaid lien was released and the health insurer decided not to pursue subrogation on July 20, 2006 (Ex. 20), Respondent so advised Informant; and after further discussions as to how to pay out the surplus resulting from the medical expenses award, final payment was made in March, 2007 (Tr. 135).

Although there was obviously a long delay between receipt of the proceeds and final payment, there were unusual circumstances and Respondent did keep in regular contact with Rebekah, either directly with her or through her attorney and Informant. Even assuming that he failed to use reasonable diligence or to adequately communicate with the Crones, the facts herein do not rise to the pattern of neglect described in In Re Frank, 885 S.W.2d 328, 334 (Mo. banc 1994), where it was held that a failure to communicate with clients and to diligently pursue their cases called for a suspension, not disbarment.

ARGUMENT

II.

THE SUPREME COURT SHOULD NOT DISBAR RESPONDENT BECAUSE EVEN THOUGH HE FAILED TO ADEQUATELY HANDLE CLIENT AND THIRD-PARTY FUNDS, HE DID NOT CONVERT CLIENT PROPERTY IN THAT HIS FAILURES RESULTED FROM IGNORANCE AND AN ATTEMPT TO SAFEGUARD CLIENT PROPERTY.

THIS ARGUMENT RESPONDS TO POINTS RELIED ON III., IV. AND V. OF INFORMANT'S BRIEF.

Respondent concedes here, as he did before the Disciplinary Hearing Panel (Tr. 273), that he did not use proper accounting practices regarding his trust account, and did not properly deposit client funds. However, Respondent did not attempt to conceal his bookkeeping methods and freely admitted that some client funds (including some of the Crone proceeds) were kept in his office safe rather than his trust account, both in the two depositions he attended and in his testimony before the Panel.

There have been some indications that Respondent has not cooperated with the investigation of this matter by Informant, but he supplied the materials that he had (Tr. 112) and explained that others had been discarded (Tr. 111). Moreover, he offered to obtain the missing documents from his bank, and supplied the necessary information to obtain the bank records when this offer was rejected by Informant (Tr. 113). Furthermore, when asked by the Panel if non-cooperation was an allegation, Informant stated

that it was not (Tr. 109-110).

Regarding the deposit of the Crone proceeds into his office safe, Respondent violated the applicable Rule in that he did not have the permission of his client to do so; however, this was done to protect these funds by avoiding a possible garnishment of them. Respondent had a tax liability, and his bank accounts (including his trust account) had previously been garnished by the taxing authority (Tr. 28).

Informant suggests that by failing to deposit the Crone funds into his trust account, Respondent converted these funds to his own use. However, Respondent has maintained this trust account since 1982, and is not aware of any allegation made (other than herein) that any client funds have ever been misappropriated; in fact, Informant recognizes that Respondent has had his law license since 1977, and has no disciplinary history other than the present charge (Tr. 6). Moreover, Respondent identified several other clients who had client funds deposited into his office safe, including one who had over \$50,000.00 in Respondent's trust account (Herndon, Tr. A137, pg. 69); and apparently the investigation of these clients revealed no improprieties.

Disbarment was considered too harsh a sanction in other cases involving similar circumstances. In In Re Barr, 796 S.W.2d 617, 620 (Mo. banc 1990), the Master had made a recommendation of disbarment due to the attorney's failure to keep the client informed of the status of his case and the deposit

of settlement funds into a non-trust account; but the Court decided that a suspension was warranted under these circumstances. It was also determined that suspension was more appropriate than disbarment where client funds were deposited into the lawyer's account and the recovery was not disclosed for two and one-half years, with no payment at that time despite the demand for same, in In Re Phillips, 767 S.W.2d 16, 19 (Mo. banc 1989); see also In Re Waldron, 790 S.W.2d 456, 460 (Mo. banc 1990).

And in In Re Tessler, 783 S.W.2d 909, 910 (Mo. banc 1990), the attorney did not cooperate with the investigating committee, where it was found that there had been a failure to keep sufficient trust account balances to pay the obligations, and a resulting delay in returning funds to the client. The Court held that under these circumstances, suspension was the indicated sanction.

CONCLUSION

By reason of the foregoing, Respondent submits that disbarment is not the appropriate sanction in this case. Accordingly, Respondent requests that a lesser sanction of reprimand or suspension be imposed.



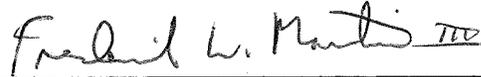
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CERTIFICATE OF SERVICE

I hereby certify that I mailed two (2) copies of
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this 11th day of March, 2008.



Frederick W. Martin III
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