NO. BD-2008-114

IN RE: BURTON A. WAISBREN

S.J.C. Order of Term Suspension entered by Justice Cordy on December 17, 2008.[1]

SUMMARY[2]

The respondent was a medical doctor as well as a lawyer. He was admitted to the bar in 1995 and primarily represented plaintiffs in medical malpractice cases.

Bar counsel filed a three-count petition for discipline alleging that, in three separate medical malpractice cases, the respondent had engaged in similar misconduct. In each case, the respondent had the client execute a contingent fee agreement that provided that the respondent was authorized to file a stipulation of dismissal with prejudice if he found the case was not meritorious. The contingent fee agreement also stated that it could not be modified or terminated unless agreed to by all parties in writing. The respondent charged his clients a flat fee of $3,500 in count one and $5,000 in counts two and three, which was to be deducted from any recovery. In all three cases, the respondent sent letters to attorneys soliciting their association and/or letters to litigation funding companies, disclosing confidential information, without the clients' knowledge or consent.

The special hearing officer concluded that the respondent's contingent fee agreement giving the lawyer the right to dismiss the client's case with prejudice and precluding the client from revoking such permission violated Mass. R. Prof. C. 1.4(b) and 8.4(h); and that, by sending letters disclosing confidential information to attorneys and seeking their participation as co-counsel without his clients' permission, the respondent violated Mass. R. Prof. C. 1.6(a). The special hearing officer, citing Matter of the Discipline of an Attorney, 451 Mass. 131 (2008), concluded that the respondent's failure to advise his clients to consult another lawyer before signing the fee agreements did not violate Mass. R. Prof. C. 1.8(a), reasoning that requiring such advice could create a chain of consultation; he also concluded that the flat fee agreements were not illegal or clearly excessive and therefore did not violate Mass. R. Prof. C. 1.5(a).

In addition to the foregoing misconduct, the respondent also engaged in other misconduct in each case. In Count One, after filing the complaint and discovery, the respondent advised the client that they should obtain an expert report and enclosed, for the client's review, a draft letter to the expert. The client requested changes to the letter describing the medical facts about his case and sent the respondent the requested $1,000 to pay the expert. The respondent sent the letter to the expert without making the requested changes. In July 2000, the expert opined that the doctor had not deviated from the standard of care, and the respondent informed the client, by letter, that the expert had failed to provide a "strongly worded letter supportive of your case." The respondent then requested an additional $1,000 to retain another expert, and enclosed the same draft letter to the new expert, again without the client's requested changes. The client again requested the respondent to revise the letter and agreed to send the $1,000 on receipt of the revised draft; however, the respondent did not send the client a revised letter.

In February 2001, the respondent received notice that the medical malpractice tribunal was scheduled for late March. About a week later, the respondent called defense counsel to say that he was willing to dismiss the case with prejudice. That same day, the respondent sent a

letter to the client asking whether he would pay for another expert review of his case and notifying him of the date of the tribunal. He did not tell the client he had offered to dismiss the case with prejudice, nor did he have the client's consent after disclosure to do so.

About a week later, the respondent advised the client they were running out of time and that the respondent would dismiss the case if he did not obtain an expert letter prior to the tribunal. About four days later, the respondent signed the stipulation of dismissal and returned it to defense counsel for filing. He did not advise the client that he had signed the dismissal, nor did he send a copy to the client at that time. Four days later, the client sent the respondent $1,000 to retain another expert opinion. The respondent replied by letter that it was too late to obtain such a letter and returned the $1,000.

The client, unaware of the dismissal, appeared at the medical malpractice tribunal, but the respondent and defense counsel did not. The client requested a continuance to get a new attorney, which the court granted. An associate of the respondent was present at the tribunal on another matter and when asked why the respondent was not present, she told the court she did not know what was going on with the case. Upon her return to the office, the respondent had her fax a letter to the court stating that the case had been dismissed with prejudice. The respondent did not consult with or advise his client that he was sending this fax.

The client requested a copy of his file and a full refund. The respondent advised the client that he had dismissed the case prior to the tribunal hearing, and he also sent a notice of withdrawal to the court, knowing at the time that the client did not want his case dismissed because he wanted to go forward with new counsel. In the withdrawal notice, the respondent stated that the client had failed to cooperate with him and that the respondent had signed a stipulation of dismissal. About a week later, the respondent essentially refunded the flat fee, but not the expenses. The client filed a complaint with bar counsel. In his response, the respondent falsely stated that he did not speak with defense counsel about dismissing the case until the beginning of March 2001, when, in fact, he had called defense counsel in the middle of February and offered to dismiss his client's case.

The special hearing officer concluded that, by agreeing to dismiss his client's case without obtaining the client's consent, the respondent violated Mass. R. Prof. C. 8.4(h); that, by intentionally concealing from his client that he had agreed to dismiss the case, the respondent violated Mass. R. Prof. C. 1.4(a) and (b), and 8.4(c) and (h); that the respondent's failure to prepare his client's case after July 2000, violated Mass. R. Prof. C. 1.1 and 1.3; that, by failing to keep his client reasonably informed about the status of the case, the respondent violated Mass. R. Prof. C. 1.4(a) and (b); that, by filing a notice of withdrawal representing falsely that the client had failed to cooperate and that the stipulation of dismissal had been authorized, when he knew the client wanted to go forward with the matter with new counsel and did not want it dismissed, the respondent violated Mass. R. Prof. C. 1.16(d), 3.3(a), 5.1(c) and 8.4(a), (c) and (h); and that the respondent's knowingly false representations to bar counsel that he was unable to communicate with the client and the timing of his call to defense counsel to dismiss the case violated Mass. R. Prof. C. 4.1(a), 8.1(a), and 8.4(c), (g) and (h). Because the respondent had filed the stipulation of dismissal, the special hearing officer concluded that his failure to appear at the tribunal did not violate Mass. R. Prof. C. 1.1, 1.2(a), 1.3, 1.16(c) or 8.4(d) or (h) and that his statements informing the court that a stipulation of dismissal had been filed were not false and therefore did not violate Mass. R. Prof. C. 3.3(a)(1), 5.1(c), or 8.4(a), (c) or (h).

In Count Two, in August 1999, the client signed and returned the fee agreements and paid the remainder of the flat fee and the costs. The respondent then filed and served the complaint and discovery. The respondent sent a letter to the client requesting a check for $1,000 to obtain an expert opinion and in April 2000, the client sent the money to the respondent. The medical tribunal was scheduled for hearing in late May 2000. The respondent wrote to the expert and received his opinion in early May that the two physicians had deviated from the

standard of care; the letter did not address the conduct of the hospital. The medical tribunal ruled that the case could proceed against one of the doctors only and to proceed against the other two defendants, the client would have to post a $6,000 bond. The respondent failed to advise the client prior to the expiration of the period for posting the bond that the tribunal had found for two of the defendants and that she would have to post a bond or her claims as to those defendants would be dismissed.

Shortly thereafter, the respondent sent a letter to the client advising her that she would have to pay a $20,000 retainer to proceed to trial and that if she could not afford this, she could sell a percentage of her case to a litigation funding company. He asked her to sign and return a form authorizing him to provide information about her case to such a company. The client did not sign the form. However, that same day, the respondent sent letters to two litigation funding companies and to another attorney asking if he wished to take over the case. The letters disclosed confidential information about the client's case without the client's consent after disclosure.

The respondent received motions to dismiss as to the two defendants in whose favor the tribunal had ruled, but took no action to inform the client or to oppose the dismissals.

In July 2001, the respondent sent a letter to the client advising her not to proceed with her case because it had problems, and stating that he had an ethical obligation to terminate his representation because he believed proceeding to trial would be "fruitless, expensive, and imprudent." He advised her that he would dismiss her case by July 20 unless she advised him that she wished to proceed *pro se* or with new counsel. Shortly thereafter, the client called the respondent and instructed him not to dismiss her case, and that she would not agree to terminate him as her attorney until she found successor counsel. On July 19, without the client's knowledge, the respondent sent to the remaining defendant a motion to dismiss or in the alternative, a motion for plaintiff's counsel to withdraw. In the motion, the respondent claimed that he had discovered important, but privileged, factual issues requiring him not to proceed with the case, that the client had been uncooperative or untruthful, or that he found the case not meritorious. When the client received a copy of the motion, she told the respondent that she was still trying to get another lawyer and not to dismiss her case. Despite these express instructions, the respondent filed the motion, but the court did not act on it. In October 2001, the client advised the respondent that she wished to proceed with her case, and she discharged him, requesting her file, an accounting, and a refund. The respondent did not comply.

In mid-October, the time for pursuing discovery expired. Shortly thereafter, the respondent advised the client that he did not believe the court would allow him to withdraw until the client obtained successor counsel, that he planned to proceed with trial preparation, that the client needed to provide $10,000 to $20,000 for such preparation, and that they might need to replace their expert. In addition, he asked the client for authority to dismiss her case with prejudice. Five days later, the respondent filed a withdrawal of his motion to dismiss or withdraw, stating as grounds that he intended to remain as attorney until the client obtained successor counsel in order to avoid prejudice to the client. The court allowed this motion and the respondent remained attorney of record. Other than noticing the defendant's deposition, which was opposed as beyond the discovery deadline, the respondent took no action to pursue the client's claim. A year and a half later, the court dismissed the client's case with prejudice.

The special hearing officer concluded that, by failing to prepare the client's case, the respondent violated Mass. R. Prof. C. 1.1 and 1.3; that, by failing to keep the client informed about the status of her case and by failing to explain matters to permit the client to made decisions, the respondent violated Mass. R. Prof. C. 1.4(a) and (b); that, by concealing from his client the tribunal's findings for two of the defendants and the need to pay a bond, the respondent violated Mass. R. Prof. C. 1.1, 1.3, 1.4, and 8.4(h); that, by filing a motion to dismiss or withdraw without notice to his client, the respondent violated Mass. R. Prof. C.

8.4(h); that, by filing a motion to dismiss or withdraw in which the respondent revealed confidential information without the client's knowledge or consent, the respondent violated Mass. R. Prof. C. 1.6(a) and 1.16(d); that, by failing to take reasonable steps to protect his client's interests upon the termination of the representation, the respondent violated Mass. R. Prof. C. 1.16(c) and (d); and that, by failing to comply with the client's requests that he return her file, provide an accounting and refund his unearned fee, the respondent violated Mass. R. Prof. C. 1.5(a) and (c), 1.15(b), and 1.16(d) and (e).

In Count Three, in June 2000, a client, who was a law student, retained the respondent to represent her as administratrix of her father's estate in a medical malpractice claim arising out of treatment received by her late father. The respondent advised her that he would charge a flat fee of $5,000 and provided her with fee agreements with the same provisions as those in the previous counts. However, the respondent also told the client that the flat fee would be credited against any recovery, but was non-refundable if there was no recovery. The client told the respondent she wanted the dismissal provisions deleted, but he assured her he would only dismiss the case after consultation with her and her consent. The client also informed him that she did not want him to contact any litigation funding companies and did not want any associate counsel. The respondent advised her to simply disregard these provisions. In reliance on these representations, the client signed the fee agreements and paid the flat fee. Shortly thereafter, the respondent send demand letters to three defendant doctors and a hospital. He also sent letters to litigation funding companies and to attorneys soliciting their association in the case, in which he disclosed confidential information without the client's consent after disclosure.

The respondent then requested $1,000 to retain an expert, which the client promptly paid. The expert opined that two of the doctors and the hospital had deviated from the standard of care causing harm to the client's father. The respondent filed suit against all three defendant doctors and the hospital and served them with the complaint and discovery. For the next eight months, the respondent took no action on the case.

In April 2001, the respondent filed an offer of proof with the court consisting of the expert report, and therefore not including any expert opinion that the other doctor violated the standard of care. The respondent sent an associate to the tribunal. At the tribunal, without the client's consent, the associate agreed to dismiss claims against the third doctor, and the tribunal found in the client's favor with respect to the other two doctors and the hospital, but not the third doctor. As a result, the client would have to post a bond to proceed against the third doctor, but the respondent did not advise her of this fact, and allowed the case to be dismissed as to that doctor, again without informing the client. The client would have posted a bond with respect to that doctor, had she been advised of the need to do so.

In February 2002, after the client passed the bar and opened her own practice, she contacted the respondent to ask about the status of the case. He told her that he was leaving the practice of law and offered to refer his remaining cases to her. During that month he sent client files to her, including her father's case file. The client called the respondent and told him she would not take her father's case and that she was trying to retain successor counsel. She then returned that file to him. In the file she discovered that the respondent had failed to answer interrogatories and to produce documents. When she asked the respondent about this, he told her to send the discovery responses herself. By early March 2002, the client informed the respondent that she would not accept any referrals from him and would return the files. The client had concluded that the cases appeared to have been neglected or mishandled.

That same month, the client contacted bar counsel's office and then sent a letter to the respondent revoking any authority to dismiss her father's case.

In late July 2002, the respondent filed a motion to withdraw, his client filed an opposition to allow her time to retain new counsel, and the court allowed the motion. The client engaged successor counsel, and at the time of the disciplinary hearing, the case was scheduled for

trial.

The special hearing officer concluded that the respondent's conduct in intentionally misrepresenting to the client that he would not seek the assistance of other counsel violated Mass. R. Prof. C. 1.4(a) and (b) and 8.4(c) and (h); that, by concealing from his client the fact that the expert had not supported a claim against one of the doctors, the respondent violated Mass. R. Prof. C. 1.4(a) and (b); that the respondent's failure to prepare the case violated Mass. R. Prof. C. 1.1 and 1.3; that the respondent's failure to keep the client reasonably informed about the case and to explain matters to the extent necessary to permit the client to make decisions violated Mass. R. Prof. C. 1.4(a) and (b); that the respondent's failure to disclose the results of the tribunal and the need to post a bond, and his failure to take action to prevent dismissal as to the one doctor violated Mass. R. Prof. C. 1.1, 1.3, 1.4 and 8.4(c).

The special hearing officer found in aggravation that the respondent had engaged in multiple violations and a pattern of misconduct, and that he had failed to acknowledge the nature and effects of his misconduct.

The special hearing officer recommended that the respondent be suspended for three years and that he be ordered to pay restitution to his client in Count Two, in the amount of $6,308.00, plus 6% annual interest from August 24, 1999, to the date of the order of restitution, with post-judgment interest of 12% per annum thereafter applied to the full amount then owing. The parties did not appeal, the Board of Bar Overseers adopted the special hearing officer's findings of fact, conclusions of law and recommendation, and the single justice entered an order, effective December 17, 2008, suspending the respondent for three years and ordering restitution as recommended by the special hearing officer.

FOOTNOTES:

[1] The complete Order of the Court is available by contacting the Clerk of the Supreme Judicial Court for Suffolk County.

[2] Compiled by the Board of Bar Overseers based on the record filed with the Supreme Judicial Court.