IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 091376

MICHAEL PATRICK WEATHERBEE,
Appellant,

v.

VIRGINIA STATE BAR, ex rel.
FOURTH DISTRICT – SECTION I COMMITTEE,
Appellee.

BRIEF OF APPELLEE

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I. ASSIGNMENTS OF CROSS-ERROR

1. The three judge panel (the "Panel") erred in finding that Appellant Michael Weatherbee was not guilty of violating Rule 1.1 ("Competence") by clear and convincing evidence.

II. STATEMENT OF THE CASE

This is an appeal of right of a Public Reprimand without terms in which Appellant Michael Weatherbee was found guilty of violating Rule of Professional Conduct 3.1 ("Meritorious Claims") for filing a medical malpractice suit against a doctor who was not involved in the operation in question, nor did he have privileges at the hospital where the operation was performed. In brief, Weatherbee filed claims against Dr. Ward Vaughan based upon guesses and circumstantial evidence suggesting that Dr. Vaughan was the "Bob Vaughan" identified as an assistant to the physician responsible for the malpractice, Joel Backer, M.D.

Weatherbee filed this suit against Dr. Backer and Dr. Vaughan without ever requesting records from Dr. Vaughan, and without suing and serving discovery on Dr. Backer to determine the identity of "Bob Vaughan." He testified before the Panel that those records were not "relevant" to his $5 million claims against Dr. Vaughan.

Weatherbee filed the suit four months before the applicable statute of limitation ran, during which time he could have sued Dr. Backer and served such discovery. Instead, Weatherbee sued Dr. Vaughan without factual support for $5 million in the rural area of Winchester, Virginia, where news of this suit made the local news (for the entire day), causing serious injury to Dr. Vaughan's practice and reputation. Dr. Vaughan testified that he lost patients and referrals and has never fully recovered from that.

The Virginia State Bar ("Bar") brought disciplinary charges against attorney Weatherbee under Rules 1.1 ("Competence"), 1.3 ("Diligence") and 3.1 ("Meritorious Claims") based on these facts. The Panel of judges hearing the matter did not find clear and convincing evidence for violations under Rules 1.1 and 1.3, but did find such evidence for a violation of Rule 3.1.

Weatherbee has appealed this finding, arguing that it was inconsistent for the Panel to dismiss charges on competence and diligence while upholding a charge for filing meritless claims. Weatherbee's position is without support under Virginia law and is rebutted by clear evidence that this claim was factually meritless, although Weatherbee made some effort to identify the "Bob Vaughan"

assisting with the surgery. The claims Weatherbee filed against Dr. Vaughan were without any factual support even if the Panel saw some evidence of diligence and competence.

The Bar understands why the Panel could have found that Weatherbee showed some diligence in investigating his claim against Dr. Vaughan. However, that diligence was misdirected and completely ineffective in identifying "Bob Vaughan" due to lack of competence. Instead of (1) having his client request her own records from Dr. Vaughan, which was her absolute statutory right, (2) having her sign a HIPAA release form authorizing Weatherbee to get those records, or (3) suing and serving Dr. Backer with discovery to identify "Bob Vaughan," Weatherbee filed a $5 million suit against Dr. Vaughan based on a "best guess" and circumstantial evidence. Dr. Backer later confirmed that Bob Vaughan was not a doctor. (JA 283).

The failure to take any of these three steps demonstrated a lack of competence under Rule 1.1. The Bar's expert, who has extensive medical malpractice experience, testified that such steps were basic ones that should have been taken by any competent attorney to determine the identity of a potential defendant. That evidence was

also needed to establish liability theories. All of this supports reversing the Panel's decision under Rule 1.1.

III. QUESTIONS PRESENTED

1. Was the Panel's decision to find Weatherbee guilty of violating Rule 3.1 correct as a matter of law?

2. Did the Panel err in dismissing the charges under Rule 1.1, regarding Weatherbee's competence in handling the medical malpractice claims against Dr. Vaughan?

IV. STATEMENT OF FACTS

This appeal concerns Mr. Weatherbee's August 2004 suit against Dr. Backer and Dr. Vaughan for their alleged malpractice on December 16, 2002, when Dr. Backer operated on Weatherbee's client, Dianna Broyles. (JA 120). That operation took place at Warren Memorial Hospital in Warren County, Virginia. A two-page post-operative report identified "Bob Vaughan" as assisting Dr. Backer with that hysterectomy procedure (JA 279), in which Dr. Backer damaged Ms. Broyles' bladder, causing life-threatening complications. That report lacks any information on what Bob Vaughan did in the operation and provides no evidence about any post-operative care.

The Record shows that Mr. Weatherbee and his staff made some efforts to identify Bob Vaughan, but they did not do the three things that would have been most likely, or certain, to identify that person, namely: (1) having Ms. Broyles demand all her records from Dr. Vaughan; (2) have her authorize Mr. Weatherbee under HIPAA to demand those records; or (3) file the suit against Dr. Backer and the hospital and serve discovery to identify the "Bob Vaughan" listed on the surgical report. The suit was filed four months before the statute of limitation ran. (JA 16). Weatherbee was retained in March 2004, a full nine months before that limitation period ran during which those records could have been obtained. (JA 77).

The Bar's expert, attorney Steven Frei, who has extensive medical malpractice experience,[1] testified that Weatherbee's failure to take steps including those listed above fell below the standard of care for a competent Virginia attorney handling a medical malpractice claim. (JA 93-95). Indeed, Mr. Frei testified that sending out HIPAA release forms to "every possible provider" is standard procedure for

[1] Mr. Frei has nearly 25 years of legal experience with 60 percent of his current practice devoted to medical malpractice work. (JA 87-88). Mr. Weatherbee's expert, by contrast, has only litigated three medical malpractice cases in his 41 years of practice. (JA 175). That expert has known Mr. Weatherbee for 20 years. (JA 174).

such cases. (JA 90). As noted, Weatherbee was retained nine months before the statute of limitation ran, giving him plenty of time to take this simple step. (JA 32, 77).

Instead, Mr. Weatherbee and his wife, who reviewed medical records for him, took several more attenuated and ineffective steps to identify Bob Vaughan. This included, for example, searching an internet data base, relying on second hand (and unconfirmed) information from Ms. Broyles, and relying on hearsay information from another attorney, Mr. Ornitz. (*See, e.g.,* JA 287-88). The Panel found that they never obtained records from Dr. Vaughan.[2] (JA 15).

Astoundingly, Weatherbee testified that he did not believe that Dr. Vaughan's records were "relevant" to the $5 million claims filed against him. (JA 214). Instead, he filed numerous allegations against Dr. Vaughan, including that he, along with Dr. Backer, seriously damaged Ms. Broyles' bladder, failed to detect or treat that problem, and failed to provide adequate post-operative care. (JA 265-66). Every one of those allegations was completely false and

[2] This was the finding of the Panel. (JA 15). Weatherbee's wife, Janet Weatherbee, assisted Mr. Weatherbee in reviewing medical records and confirmed that she did not request Dr. Vaughan's records. (JA 137). Weatherbee could not recall whether he obtained those before filing. (JA 78).

based on nothing more than the mention of a "Bob Vaughan" on a two-page operative report.[3] Dr. Vaughan confirmed that his own medical records would have included this surgery if he had assisted Dr. Backer. (JA 110). Weatherbee dropped claims against Dr. Vaughan once his failing was put to light but not until after substantial harm was done to Dr. Vaughan, including losing patients and referrals. (JA 53-57, 229, 304-07).

The Panel heard the Bar's charges against Weatherbee on January 29, 2009. The charges were for violations of Rules 1.1, 1.3 and 3.1 (competence, diligence and meritorious claims, respectively). Weatherbee was represented by counsel. The Panel did not find clear and convincing evidence of violations under Rules 1.1 and 1.3,[4] but did find such evidence supporting a violation of Rule 3.1. The panel imposed a Public Reprimand without terms. (JA 13-18). Weatherbee here appeals the ruling under Rule 3.1.

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[3] Even after filing the suit there is evidence that Weatherbee was uncertain about suing Dr. Vaughan, who was the only defendant never served with the Motion for Judgment (JA 212), and whose address on that pleading differed from the one Weatherbee or his staff obtained on the internet. (JA 145-46).

[4] In questioning Bar counsel, the Panel speculated, incorrectly the Bar believes, that violations of Rules 1.1 and 1.3 had to result in harm to a client as opposed to a third party. (JA 236-41). However, the Panel's Memorandum Order does not indicate whether that reasoning led to the Panel's ruling.

V. LEGAL STANDARD

A Bar Disciplinary Board or a three-judge court has wide discretion when deciding the appropriate discipline in a particular case. *Tucker v. Virginia State Bar*, 233 Va. 526, 534, 357 S.E.2d 525, 529-30 (1987). The Board or court might impose a private or public reprimand, suspend the attorney's license for a period of up to five years, or revoke the attorney's license. *Id*. at 534, 357 S.E.2d at 529 (citing Part 6, § IV, Para. 13(C)(6)). On appeal, this Court should view the penalty imposed below as *prima facie* correct. The Court should not disturb that penalty unless, "upon our independent examination of the whole record, it appears unjustified by a reasonable view of the evidence or is contrary to law." *Tucker*, 233 Va. at 534, 357 S.E.2d at 530; *Myers v. Virginia State Bar,* 226 Va. 630, 632, 312 S.E.2d 286, 287 (1984).

The Court must consider the evidence and all reasonable inferences that may be drawn from the evidence in the light most favorable to the Bar, which prevailed under Rule 3.1 below. *Gunter v. Virginia State Bar*, 238 Va. 617, 619, 385 S.E.2d 597, 598 (1989). Weatherbee likewise benefits from favorable inferences regarding the Panel's rulings under Rules 1.1 and 1.3. *Id.*

VI. ARGUMENT

A. The Panel Correctly Found Clear and Convincing Evidence that Weatherbee Filed a Frivolous Claim Against Dr. Vaughan under Rule 3.1

Rule 3.1 states in relevant part:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous . . . .

Contrary to Weatherbee's contention, the Panel correctly found that Weatherbee violated Rule 3.1 by filing a $5 million medical malpractice claim against a doctor who (1) was not involved in the surgery in question, (2) did not have privileges at the hospital in question at the time of that surgery, and (3) did not have the same name as the person identified on the surgical report. The Panel stated specifically that the suit against Dr. Vaughan "was frivolous given the facts known at the time of the filing of the suit." (JA 254).

The relevant facts related to that claim against Dr. Vaughan are not in dispute. Dr. Vaughan had absolutely nothing to do with Ms. Boyles' injury at the hands of Dr. Backer. The claims against Dr. Vaughan were meritless based on the facts – as opposed to the incorrect guesses, inferences and circumstantial evidence relied upon by Mr. Weatherbee.

1. The Rule 3.1 Violation Did Not Have to Accompany Violations of Rules 1.1 or 1.3

Weatherbee contends that the Rule 3.1 violation conflicts with the dismissal of charges brought under Rules 1.1 ("Competence") and 1.3 ("Diligence"). Opening Br. at 18. But he cites no case law supporting the proposition that a Rule 3.1 violation must be predicated upon or also include (support) violations of the other Rules. Simply because the Panel did not find clear and convincing evidence of a lack of competence or diligence does not mean the claims were not frivolous. They were.

Mr. Weatherbee cites *Byrd v. Byrd*, 232 Va. 115, 120, 348 S.E.2d 262, 265 (1986) for the proposition that the Rule 3.1 violation is unsupported because *Byrd* holds that a claim is only "frivolous" if it has "little weight or importance," or has "no basis in law or fact." But that is precisely the type of claim Weatherbee filed against Dr. Vaughan: it was a claim without any basis in fact whatsoever.

Indeed, not only was Dr. Vaughan improperly named, Weatherbee filed several liability theories that had absolutely no support. This included alleging that Dr. Vaughan, like Dr. Backer, nicked Ms. Broyles' bladder, failed to diagnose those errors, failed to

treat them, and failed to do proper post-operative follow-up. (JA 265-66). Every one of these allegations was completely baseless.

Put another way, a claim can be frivolous under Rule 3.1 even if an attorney makes honest but misplaced efforts to find support for a claim, thus allowing him to escape liability under Rules 1.1 and 1.3. Lack of clear and convincing evidence regarding incompetence or lack of diligence does not change the fact that these claims were frivolous under Rule 3.1.

2. Rule Comments and Case Law Do Not Support Reversing the Rule 3.1 Violation on These Facts

Weatherbee cites Comment [2] to Rule 3.1 for the proposition that a claim is not frivolous "merely because the facts have not been fully substantiated or because the lawyer expects to develop vital evidence only by discovery." Opening Br. at 17. But the claims against Dr. Vaughan were completely and utterly unsubstantiated, not just "not . . . fully substantiated" under Comment 2. There is a huge difference between the two.

For example, accusing a defendant of negligence can be "not fully supported" by showing one or more examples of care the defendant takes in his or her duty to a plaintiff. Here, by contrast, there was absolutely no support of any kind for claims against Dr.

Vaughan. Support for those claims was completely non-existent, not just insufficient. Weatherbee realized this once he had the information he could have easily and quickly obtained through his client, or collected through HIPAA or minimal discovery.

The Bar also finds no support for the proposition that ill-will is required to find a violation of Rule 3.1. Claims that have absolutely no basis in fact whatsoever should be deemed frivolous whether or not malice or harassment motivate the filing of such claims.

There is little case law in Virginia dealing with Rule 3.1 to provide guidance. Weatherbee cites three of the only four reported Rule 3.1 cases in his Opening Brief at 21. One of those decisions, *Barrett v. Virginia State Bar*, 272 Va. 260, 272, 643 S.E.2d 341, 348 (2006), holds that a position that is erroneous is not necessarily frivolous. There, an attorney earlier disciplined for violating Rule 3.1 was found not guilty of another such violation even though he took a sincere but mistaken legal position in a court filing. *Id.*

The Bar believes that this case is distinguishable from *Barrett* because unlike the situation in *Barrett*, much greater care was needed to confirm the allegations here. In *Barrett*, the frivolous position taken was an erroneous legal theory. *Id.* That is different

from making factual allegations about a doctor's operative and post-operative care that are completely devoid of any factual support. Those allegations predictably made the local news, which ran the story every ten minutes for an entire day, causing Dr. Vaughan to lose patients and referrals even to the present. (JA 44, 53-57). If Weatherbee made proper inquiries into, for example, Dr. Vaughan's records, Weatherbee would have easily avoided those factual errors.

And the error here was not just the misidentification of a defendant: Dr. Vaughan's records were needed to establish Ms. Broyles' liability theories. Instead of obtaining <u>all</u> needed records to establish those theories, Weatherbee filed several liability allegations against Dr. Vaughan, all of which were totally unfounded. This included allegations of nicking Ms. Broyles' bladder in several places, failing to diagnose this error, failing to accurately diagnose resulting complications, and failing to provide adequate post-operative care. (JA 265-66).

For these reasons, the Court should affirm the Panel's ruling under Rule 3.1 and uphold the Public Reprimand without terms imposed by the Panel under that Rule.

B. The Panel Erred by Finding That There Was Insufficient Evidence to Find a Violation of Rule 1.1

As noted above, the Bar believes that it is not necessary for the Court to find a violation of Rule 1.1 in order to affirm the Panel's ruling under Rule 3.1. However, the Bar believes there was clear and convincing evidence that Weatherbee violated Rule 1.1 ("Competence") in handling this medical malpractice claim, notwithstanding some misguided efforts to get needed information.

Rule 1.1 states:

> A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.

The Bar believes that the Panel erred in not finding clear and convincing evidence that Weatherbee violated Rule 1.1 for his failure to obtain all the available medical records about Ms. Broyles' procedure and Dr. Vaughan's treatment of her. Likewise, he showed a lack of competence not filing suit against Dr. Backer then using discovery to identify "Bob Vaughan."

As noted, the Bar's expert, Mr. Steven Frei, has nearly 25 years of legal practice experience, 60 percent of which now involves medical malpractice (JA 87-88). His testimony should have carried

greater weight than Mr. Weatherbee's expert who had only three such cases in 41 years (JA 174-75), and who did not even know before testifying before the Panel that Mr. Weatherbee failed to obtain needed records from Dr. Vaughan (JA 177).

The Bar's expert testified that these errors brought Weatherbee below the applicable standard for a competent Virginia attorney handling such a case. (JA 93-95). Weatherbee failed to do things which, according to Mr. Frei, are done as a matter of course in medical malpractice cases, such as securing HIPAA forms to obtain all available records from all medical providers. (JA 90).

Even Weatherbee's own expert conceded that Ms. Broyles had an absolute right to obtain her own records from Dr. Vaughan. (JA 178). Those would have included records about this surgery. (JA 110). This makes Mr. Weatherbee's statement that those records were not "relevant" to $5 million in claims (JA 214) quite incredible and supports finding a Rule 1.1 violation, as does his admission that he could not recall whether he got those records before suing Dr. Vaughan (JA 78).

The Bar believes that this testimony and the other facts in the Record provide clear and convincing evidence that Mr. Weatherbee

showed a lack of competence in his handling of the medical malpractice claims against Dr. Vaughan. For these reasons, the Bar asks the Court to reverse the finding of the Panel and hold that Mr. Weatherbee violated Rule 1.1.

VII. CONCLUSION

For all these reasons, the Bar asks the Court to affirm the ruling of the Panel regarding Rule 3.1, and reverse the Panel's ruling under Rule 1.1.

Respectfully submitted,

VIRGINIA STATE BAR

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CERTIFICATE OF SERVICE

I hereby certify that under Rule 5:26, fifteen (15) copies of the foregoing Brief were filed by hand delivery with the Clerk of the Supreme Court of Virginia, and three (3) copies of the foregoing Brief were mailed by U.S. Mail, postage prepaid, this 22nd day of September, 2009, to Michael L. Rigsby, Esq., 7275 Glen Forest Drive, Suite 310, Richmond, VA 23226. Undersigned counsel also emailed one (1) copy of this brief to the Court. One (1) copy was also served by first-class mail upon Barbara S. Lanier, Clerk of the Disciplinary System, Virginia State Bar, 707 East Main Street, Suite 1500, Richmond, Virginia 23219.

_____
Stephen M. Hall