IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

STEPHEN GUTIERREZ,

Respondent.

_____/

Supreme Court Case No. SC-

The Florida Bar File No. 2018-70,160(11J)

COMPLAINT

The Florida Bar, Complainant, files this Complaint against Stephen Gutierrez, Respondent, pursuant to Chapter 3 of the Rules Regulating The Florida Bar and alleges:

JURISDICTION

1. Respondent is, and at all times mentioned in the Complaint was, a member of The Florida Bar, admitted on September 5, 2015, and is subject to the jurisdiction of the Supreme Court of Florida.

2. Respondent resided and practiced law in Miami-Dade County, Florida, at all times material.

3. The Eleventh Judicial Circuit Grievance Committee "J" found probable cause to file this Complaint pursuant to Rule 3-7.4 of the Rules

Regulating The Florida Bar, and this Complaint has been approved by the presiding member of that committee.

STATEMENT OF FACTS

4. On April 14, 2016, Claudy Charles ("Charles") was arrested on suspicion of setting fire to his own vehicle in an attempt to defraud his insurer.

5. On May 2, 2016, Respondent filed a notice of appearance on Charles's behalf in the criminal case, styled *State of Florida v. Claudy Charles*, Miami-Dade County Circuit Case No. F16-7813.

6. The trial information, filed on May 5, 2016, formally charged Charles with second-degree arson, submitting a fraudulent insurance claim in excess of $100,000, and burning to defraud an insured. It alleged that Charles had set fire to his vehicle on January 9, 2016 with the intent to defraud GEICO and then submitted a false insurance claim representing that the vehicle caught fire after he turned on the ignition.

7. Along with the information, the state provided Respondent with a detailed arrest affidavit as a part of its initial discovery exhibit. It stated, in relevant part, as follows:

- On January 9, 2016 at 12:50 AM, video surveillance captured Charles unsuccessfully attempting to set his 2009 Honda Accord on fire in the parking lot of his apartment complex.

- After leaving to purchase $3.00 worth of gasoline at a nearby Circle K gas station, Charles returned to the complex and parked his vehicle in the same spot.

- At 2:10 A.M., video surveillance showed Charles re-entering his car and sitting in the driver's seat. Approximately twenty seconds later, a large flash was observed at which time the passenger compartment became engulfed in flames.

- Charles quickly exited the vehicle with visible burn marks to his right arm. He later received treatment for his injuries at Homestead Hospital.

- Subsequent investigation revealed that an open flame had been used to ignite a flammable liquid splashed about the passenger compartment of the vehicle.

- On January 13, 2016, Charles filed an insurance claim with GEICO claiming medical expenses in the amount of $226,782 and vehicular losses in the amount of $8,994.54.

8. On June 14, 2016, a little over a month after Respondent had received the information and initial discovery—and presumably had ample time to review it—he filed a civil suit on Charles's behalf against GEICO in the case styled *Claudy Charles v. GEICO Indemnity Ins. Co.,* Miami-Dade County Circuit Case No. 2016-015231-CA-01.

9. In the initial complaint, Respondent represented that the damage to Charles's vehicle on January 9, 2016 was "caused by a vehicle collision in such a fashion as to cause substantial damage to the risk property." *See* ¶10 of Plaintiff's First Complaint, attached as The Florida Bar's Ex. 1.

10. The complaint alleged that Charles suffered losses in excess of $200,000, that GEICO had failed to properly adjust his claim and, in denying it, had breached the terms of the underlying insurance policy. Curiously, however, the complaint omits any details regarding the alleged "collision", the fire which caused the damages, or the active criminal case.

11. On July 17, 2016, the state filed a notice of intent to offer evidence of a business record in the criminal case. Specifically, the state indicated that it intended to introduce as evidence a DVD containing video surveillance recorded by Watchtower Security.

12. Three days later, on July 20, 2016, Respondent filed an amended complaint in the civil case which—despite the evidence to the contrary—again claimed that the damage was caused by a "vehicle collision." *See* ¶10 of Plaintiff's First Amended Complaint, attached as The Florida Bar's Ex. 2.

The Criminal Trial

13. On March 7, 2017, just prior to the start of the criminal trial, the state filed an amended discovery exhibit notifying Respondent that the video surveillance from Watchtower Security was available for review. In the context of last-minute plea negotiations, the assigned felony division chief personally played the video for Respondent, highlighting its inculpatory nature. Despite this evidence, Charles rejected the state's offer and proceeded to a jury trial.

14. During its case in chief, the state introduced the surveillance video depicting Charles igniting his own vehicle; testimony from the responding officer who observed burn marks on Charles's arm consistent with the fire; testimony from a lieutenant with Miami-Dade Fire Rescue who opined that the fire was the result of arson; and testimony from a GEICO claims adjuster who revealed that Charles had taken out his auto insurance policy just weeks before the fire.

15. Conversely, the defense presented no case, choosing instead to attack the sufficiency of the evidence put forward by the state to advance its theory of spontaneous combustion.

16. In his closing argument, the assigned prosecutor relied heavily on the video surveillance, painstakingly walking the jury through Charles's attempts to ignite the vehicle and the fire that eventually resulted. *See* pp. 11-19 of the closing argument transcript, attached as The Florida Bar's Ex. 3.

17. Just as Respondent stood and began giving his closing remarks, smoke began billowing from one of his pockets; he then immediately ran from the courtroom to the men's restroom to extinguish the fire.

18. Assistant State Attorney Nilo Cuervo, Jr. provided an affidavit in which he described Respondent placing his hand in his pocket several times as he began his closing argument. Shortly thereafter, Cuervo observed smoke coming

from the same pocket. *See* Affidavit of Nilo A. Cuervo, Jr., attached as The Florida Bar's Ex. 4.

19. Upon Respondent's return to the courtroom, the following discussion occurred at sidebar:

THE COURT: Mr. Gutierrez –

RESPONDENT: Yes, Judge.

THE COURT: What just happened?

RESPONDENT: A battery just --

THE COURT: Keep your voice down.

RESPONDENT: A battery just broke in my pocket. I was on fire.

THE COURT: A battery burned in your pocket?

RESPONDENT: Yes, Judge.

THE COURT: What kind of battery are you walking around with your in pocket (sic) during a trial?

RESPONDENT: It's just a regular battery for – to charge phones.

THE COURT: That doesn't look like a phone charge battery. What kind of battery is that?

RESPONDENT: It's for phones and for e-cigarettes.

THE COURT: What kind of phone would that battery go in?

RESPONDENT: No, you know, the external chargers.

THE COURT: And why are you carrying around a battery in your pocket?

RESPONDENT: Because I'm an idiot.

See The Florida Bar's Ex. 3 at pp. 21-22

20. At that point, the court excused the jury. However, upon being asked by the bailiff to proceed into the jury room, one of the jurors voiced discomfort, stating "I'm not going to be locking myself in a small room without an exit when someone's playing – with fire." *Id*. at p. 23.

21. Instead, the jury was led out to a hallway, after which the judge proceeded to question Respondent's actions:

THE COURT: -- I'm trying to give you the benefit of the doubt, but it seems to me like that was just a stunt.

RESPONDENT: It was not.

THE COURT: It seems to me very coincidental that in a case involving arson where you're trying to persuade the jury that there was some kind of instantaneous combustion in a vehicle, that you stand up to do your closing argument, and all of a sudden some battery in your pocket becomes flammable.

RESPONDENT: I swear --

THE COURT: Now, you're going to tell me that that was not a stunt, and you're going to tell me that it's just a matter of coincidence --

RESPONDENT: Yes.

THE COURT: -- that in my arson case, you happen to have a battery in your pocket that explodes or starts on fire in front of the jury.

Id. at p. 24.

22. The state moved for an order to show cause why Respondent should not be held in contempt. In reserving on the issue, the court stated:

> I'm considering issuing an order to show cause. I find it to be bazar (sic) and extremely, extremely unlikely that in an arson case where your defense is spontaneous combustion, that you get up to give a closing argument, and all of the sudden without cause on your part, your pocket starts on fire with a battery that's supposedly sitting in your pocket. And all of the sudden, the minute you get up to talk to the jury, it decides to set itself on fire.
>
> I'm going to take that battery, and we're going to take a look at that battery, and I'm going to reserve on an order to show cause.

Id. at p. 27

23. Over the state's objection, the court allowed Respondent to resume his closing argument. Following an uneventful summation, and after brief deliberations, the jury returned a verdict of guilty to the charge of second-degree arson.[1]

24. Returning to the issue of the rule to show cause, the court encouraged the state to investigate Respondent's actions further. To that end, the court made the batteries available to the state for inspection and reset the case for status on March 15, 2016.

[1] The state *nolle prossed* the charges of insurance fraud and burning to defraud an insurer prior to trial.

Subsequent Events

25. At the status conference, the state announced that it was assigning prosecutors to conduct an investigation into the circumstances surrounding the battery fire. To accommodate the expanding investigation, the court granted the state additional time. In addition, the court rescheduled the case so that Charles could consider requesting the appointment of a new attorney.

26. The next day, March 16, 2017, Respondent filed a second amended complaint in the civil matter. Despite actual knowledge that a jury had found Charles guilty of setting fire to his vehicle, the latest complaint—like the previous ones—represented that the damage was the result of a "vehicle collision." *See* ¶ 10 of Plaintiff's Second Amended Complaint, attached as The Florida Bar's Ex. 5.

27. On March 17, 2017, Charles requested new counsel in his criminal case and the court obliged, appointing the public defender's office. After the court granted a motion for a new trial, Charles was given the option of engaging in renewed plea negotiations or potentially facing additional charges at a new trial. He ultimately pleaded guilty to second-degree arson on May 11, 2017 and was sentenced to 364 days in the county jail followed by five years of probation.

28. On May 15, 2017, the state issued a memorandum analyzing whether Respondent's actions in the trial rose to the level of arson under Florida law. While noting that the state could likely establish that Respondent willfully caused the

courtroom fire, the memorandum concludes that it could not prove that Respondent did so unlawfully. Opining that Respondent ignited the battery as an attempt to demonstrate to the jury the feasibility of spontaneous combustion—a legitimate purpose, in theory—the memorandum concludes that Respondent's actions, while ethically problematic, did not rise to the level of arson under the applicable case law.

29. Consequently, that state abandoned any efforts to hold Respondent in contempt or to seek criminal charges.

30. As for the civil case, despite the events in the criminal matter—most notably Charles's formal adjudication of guilt—Respondent did not withdraw or seek to bring it to a prompt conclusion. Although Respondent eventually filed a notice of voluntary dismissal, he did not do so until May 30, 2018—over a year later and well after GEICO's defense counsel had filed multiple motions to dismiss.

31. Significantly, at no point during that year-long period of time is there any indication that Respondent informed the civil court or opposing counsel of Charles's adjudication of guilt.

COUNT I

RESPONDENT'S COMPLAINTS IN THE CIVIL CASE LACKED MERIT AND CONSTITUTE FRIVOLOUS PLEADINGS UNDER RULE 4-3.1

32. Complainant re-alleges and incorporates by reference each allegation contained in the previous paragraphs as if set forth fully herein.

33. R. Regulating Fla. Bar 4-3.1 prohibits a lawyer from bringing "a proceeding…unless there is a basis in law and fact for doing so that is not frivolous." Lawyers are required to "inform themselves about the facts of their clients' cases and the applicable law and determine that they can make good faith arguments in support of their clients' positions." Comment to R. Regulating. Fla. Bar 4-3.1.

34. All three complaints filed by Respondent in the civil action against GEICO claim that Charles suffered damages (medical and property) as a result of a vehicle collision on January 9, 2016. Notably, however, Respondent did not include the insurance claim Charles submitted to GEICO (which represented that the losses resulted from fire) or any of the related police incident reports (which indicated that Charles caused the fire intentionally).

35. Before Respondent filed the first complaint, he had actual knowledge that Charles had been criminally charged with setting fire to the vehicle and fraudulently submitting the losses to GEICO for coverage.

36. More significantly, before Respondent filed the second amended complaint on March 16, 2017, he had actual knowledge that a jury had found Charles guilty of second-degree arson.

37. No view of the facts, nor the development of any additional evidence, could support a good-faith claim that the damage to Charles's vehicle and his bodily injuries resulted from a vehicle collision.

38. Nonetheless, Respondent initiated the civil case and allowed it to linger long after Charles's adjudication of guilt, even as GEICO's defense counsel sought relief in the form of repeated motions to dismiss.

39. As a result of the foregoing, Respondent's actions constitute a violation of R. Regulating Fla. Bar 4-3.1.

COUNT 2

RESPONDENT'S ACTIONS IN THE CRIMINAL TRIAL AND THE CIVIL CASE CAUSED PREJUDICE TO THE ADMINISTRATION JUSTICE UNDER RULE 4-8.4(d)

40. Complainant re-alleges and incorporates by reference each allegation contained in the previous paragraphs as if set forth fully herein.

41. R. Regulating Fla. Bar 4-8.4(d) prohibits a lawyer from "engag[ing] in conduct in connection with the practice of law that is prejudicial to the administration of justice".

42. Such prohibited conduct includes actions which disrupt official proceedings. *See The Florida Bar v. Ratiner*, 46 So. 3d 35, *revised on rehearing* (Fla. 2010) (attorney interrupted deposition by running toward opposing counsel, ripping up an evidence sticker and flicking it); *The Florida Bar v. Burns*, 392 So. 2d 1325 (Fla. 1981) (attorney appeared in courtroom on a stretcher dressed in bedclothes, embarrassing the trial judge and bringing criticism upon the court).

43. It can also include instances where an attorney fails to apprise others of material information. *See, e.g.*, *In Re: Decker*, 212 So. 3d 291 (Fla. 2017) (judge, while an attorney, violated Rule 4-8.4(d) by failing to inform opposing counsel that he and the presiding judge had a former attorney-client relationship).

44. In the criminal case, Respondent's actions directly interrupted the proceedings and caused at least one juror to vocalize concern over his physical safety. Indirectly, Respondent's conduct likely prejudiced his client's ability to receive a fair trial, a concern pressing enough that the court granted a motion for a new trial.

45. The fallout from Respondent's conduct consumed precious judicial and prosecutorial resources as the state was forced to dedicate attorneys to investigate the circumstances surrounding the courtroom fire.

46. In addition, Respondent's conduct triggered intense media interest, subjecting this state's legal profession to nationwide incredulity and mockery. *See,*

e.g., Joe Patrice, Arson Trial Ends with Lawyer's Pants on Fire – Not a Metaphor, His Pants Caught Fire, Above The Law (March 9, 2017), https://abovethelaw.com/2017/03/arson-trial-ends-with-lawyers-pants-on-fire-not-a-metaphor-his-pants-caught-fire/ (last visited March 22, 2019); Jessica Schladebeck, Miami Lawyer Whose Pants Caught Fire During Arson Trial Asked To Leave Case, New York Daily News (March 15, 2017), https://www.nydailynews.com/news/national/lawyer-pants-caught-fire-trial-asked-leave-case-article-1.2999046, (last visited March 22, 2019); Daniel Starkey, Lawyer's Pants Catch Fire, Hilarity Ensues, Geek (March 15, 2017), https://www.geek.com/culture/lawyers-pants-catch-fire-hilarity-ensues-1692471/ (last visited March 22, 2019).

47. Separately, but no less importantly, Respondent prejudiced the administration of justice in the civil proceedings by advancing a cause of action for which there was no good-faith factual basis and failing to disclose the true cause of the subject losses.

48. At all times during the pendency of the civil case, Respondent was on notice that the damages were caused by fire, not a vehicular collision. More importantly, he was on notice (and after the guilty verdict, had actual knowledge) that Charles intentionally caused the fire.

49. Nonetheless, he allowed the civil case to drag on for over a year after Charles was adjudicated guilty of arson before filing a notice of voluntary

dismissal. There is no indication that, at any point during that time, Respondent disclosed to opposing counsel or the court that his client had been found criminally responsible for the fire.

50. As a result of the foregoing, Respondent's actions constitute a violation of R. Regulating Fla. Bar 4-8.4(d).

COUNT III

RESPONDENTS ACTIONS ARE CONTRARY TO HONEST AND JUSTICE UNER RULE 3-4.3

51. Complainant re-alleges and incorporates by reference each allegation contained in the previous paragraphs as if set forth fully herein.

52. R. Regulating Fla. Bar 3-4.3 prohibits a lawyer from engaging in "any act that is unlawful or contrary to honesty and justice."

53. The intent behind this rule is to express that "the enumerated categories of misconduct—specifically the Rules of Professional Conduct contained in Chapter 4 of the Rules Regulating The Florida Bar—are not intended to be an exhaustive list of unethical conduct that may provide grounds for imposing discipline." *The Florida Bar v. Parrish*, 241 So. 3d 66, 73 (Fla. 2018) (quoting *The Florida Bar v. Draughon*, 94 So. 3d 566, 570 (Fla. 2012)).

54. As described more fully above, Respondent's actions in causing a fire during his closing argument, which interrupted the proceedings and potentially

prejudiced his client, and pursuing a cause of action without a good-faith factual basis qualify as acts contrary to honesty and justice.

55. As a result of the foregoing, Respondent's actions constitute a violation of R. Regulating Fla. Bar 3-4.3

WHEREFORE, The Florida Bar prays Respondent will be appropriately disciplined in accordance with the provisions of the Rules Regulating The Florida Bar as amended.

THOMAS ALLEN KROEGER
Bar Counsel
The Florida Bar
Miami Branch Office
444 Brickell Avenue
Rivergate Plaza, Suite M-100
Miami, Florida 33131-2404
(305) 377-4445
Florida Bar No. 19303
tkroeger@floridabar.org

Adria E. Quintela
ADRIA E. QUINTELA
Staff Counsel
The Florida Bar
Lakeshore Plaza II, Suite 130
1300 Concord Terrace
Sunrise, Florida 33323
(954) 835-0233
Florida Bar No. 897000
aquintel@floridabar.org

CERTIFICATE OF SERVICE

I certify that this document has been efiled with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida, with a copy provided via email to Stephen Gutierrez, Respondent, at sg@sglawfirms.com using the Efiling Portal, and that a copy has been furnished by United States Mail via certified mail No. 7017 1070 0000 4774 1800, return receipt requested to Stephen Gutierrez, Respondent, whose record bar address is 454 SW 8th St, Miami, FL 33130 and via email to Thomas Allen Kroeger, Bar Counsel, tkroeger@floribar.org, on this 8th day of April, 2019.

Adria E. Quintela
ADRIA E. QUINTELA
Staff Counsel

NOTICE OF TRIAL COUNSEL AND DESIGNATION OF PRIMARY EMAIL ADDRESS

PLEASE TAKE NOTICE that the trial counsel in this matter is Thomas Allen Kroeger, Bar Counsel, whose address, telephone number and primary email address are The Florida Bar, Miami Branch Office, 444 Brickell Avenue, Rivergate Plaza, Suite M-100, Miami, Florida 33131-2404, (305) 377-4445 and tkroeger@floridabar.org. Respondent need not address pleadings, correspondence, etc. in this matter to anyone other than trial counsel and to Adria E. Quintela, Staff Counsel, The Florida Bar, Lakeshore Plaza II, Suite 130, 1300 Concord Terrace, Sunrise, Florida 33323, aquintel@floridabar.org.

MANDATORY ANSWER NOTICE

RULE 3-7.6(h)(2), RULES OF DISCIPLINE, EFFECTIVE MAY 20, 2004, PROVIDES THAT A RESPONDENT SHALL ANSWER A COMPLAINT.