IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complaint,

v.

Case No. 77,837
[TFB No. 89-30,129 (09E]

HURLEY P. WHITAKER,

Respondent.
_____/

RESPONDENT'S INITIAL BRIEF

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SYMBOL AND REFERENCES

In this Brief, the transcript of the final hearing shall be referred to as "TR"

STATEMENT OF THE CASE

The Respondent will adopt the Statement of Case as submitted by the Complainant, The Florida Bar.

STATEMENT OF THE FACTS

In January, 1986, [redacted], previously known as [redacted], retained the law firm Whitaker, Dorough and Whitaker to investigate and bring a claim on alleged sexual molestation of her three and one-half year old daughter by one [redacted], who was employed by Mother Goose Day Care Center. (TR-6-7) The Respondent was the attorney assigned to investigate the case and to proceed on the claim if viable. (TR-6-7) During the initial pendency of the claim two insurance claim forms were sent to Mrs. [redacted] for her signature, returned to the Respondent and filed with the appropriate agencies. This was done because the insurance company for the day care center and therefore the individual, [redacted], had gone into receivership and FIGA, also known as the Florida Guaranty Association, had taken over the handling of all claims. (TR-9)

The Respondent admits that there were several communication problems with the client. (TR-54,55) These problems were mostly caused by the Respondent, but it should also be noted that [redacted] changed addresses on several occasions during the three to four year time period in question and was many times unavailable upon phone calls being made to her. (TR-31-32-33,36)

The Respondent does not seek to excuse as his conduct for failing to properly communicate with the client and has admitted such in both the Grievance Committee Hearing and the before the Judicial Referee. (TR-55)

The Respondent has outlined several matters that were investigated in this claim, including the discovery of the information that [redacted] herself had been involved in several HRS investigations for child abuse. These matters were of such a nature as to cause great concern about the viability of the cause of action and the proceedings that were being undertaken. (TR-25-30)

The Respondent did file a lawsuit without notifying [redacted] of this. The lawsuit was filed on June 30, 1986 against [redacted] and his employer, Mother Goose. The reason the lawsuit was filed was because of the changes in the tort law, which called in the question whether or not a claim involving joint and several liability would be eliminated. (TR-52)

The suit was not filed because investigation had revealed liability, but rather to protect rights under the law. This was the sole purpose of the lawsuit and no one has refuted the position taken by the Respondent in this matter. (TR-52)

While continuing the investigation of the claim the Respondent, and in order to avoid a dismissal for failure to prosecute,Respondent dismissed the case on June 29, 1987 because the case was not ready to be brought into full litigation. (TR-54)

The failure to inform the client of the filing of the lawsuit was made because the Respondent did not feel that the lawsuit was ready to be pursued and was merely being done to protect legal rights.

The Respondent was working under the assumption that there was a four year statute of limitation on the claim and after dismissal of the lawsuit failed to file the lawsuit by July 17, 1987, the statute of limitations, for FIGA cases actions. (TR-54) [redacted] had requested several meetings with the Respondent and when she failed to get these meetings filed complaints against the Respondent with The Florida Bar in July, 1988 and received a full response from the Respondent in this matter concerning her claim and where it stood, including an explanation of what had happened concerning the FIGA statute of limitations. (TR-36-39) The Florida Bar at that time chose not to pursue the complaint and the matter was dropped. The Respondent also filed a lawsuit against HRS within the required statutory period of time and said lawsuit is still pending. (TR-56-57)

Ms. [redacted] has continued to complain that she has been unable to communicate adequately with the Respondent and has taken the position that she is only able to get information from the Respondent upon filing complaints with The Florida Bar.

It should also be noted that [redacted] has never fired the Respondent in this case and has never asked him to cease pursuing these claims and has never contacted any other attorney about making claims against the Respondent. (TR-34)

SUMMARY OF THE ARGUMENT

The Respondent takes the position that the punishment recommended by the Referee is appropriate under the circumstances due to lack of any prior disciplinary action against the Respondent, being that while there is a claim of prejudice to the client's rights the client was well advised of the statute of limitations running on her claim with FIGA and that she still has viable options against the Respondent, that the punishment recommended by the Referee as to the probationary term and reporting requirements is more than adequate to protect the public, punish the Respondent and to accomplish the purposes of disciplinary proceedings brought by The Florida Bar.

ARGUMENT

THE REFEREE'S RECOMMENDATION FOR DISCIPLINE IS APPROPRIATE UNDER THE RULES OF THIS COURT AND THE FACTS OF THIS CASE.

The Referee in this matter, in his report, made findings of fact as to each item of the misconduct. The only facts that the Respondent would respectfully disagree with Referee are minimal in nature. There is a disagreement as to whether or not the Respondent adequately investigated the case. The Respondent was unable to find the information available to pursue these claims in a manner desired by [redacted]. (TR-34) Additionally, while it is repeated in the Referee's report and in the Bar's Brief in this case, the fact that two grievances had been previously filed against the Respondent, both of which have been found to have no probable cause, should not in some way create the inference that a greater punishment is now due. What the Referee found was that the attorney was guilty of Violating Rule 4.13 and 4.14. Rule 4.13 of The Florida Bar requires a lawyer to use reasonable diligence and promptness in representing his client and Rule 4.14 requires that the lawyer keep his client reasonably informed about the status of the matter and reply to a request for information.

It was the recommendation of the Referee that the Respondent be admonished under Rule 3-5.1a, Rules of Discipline and be placed on a probationary term. The Respondent in this case has always indicated a willingness to accept these punishments and to comply with the request of the Referee, however, The Bar, through the Board of Governors, has seen fit to appeal these recommendations on

what appears to be basically two grounds.

The first ground is that the Referee had no right to make the recommendation of an admonishment, what used to be known as a private reprimand. It is the position of the Bar that under Rule 3-5(1)(b)(4) and Rule 3-7.6(k)(1)(3) the Referee has no jurisdiction to find minor misconduct. The language of Rule 3-5(1)(b)(4) merely states that a rejection by the Board of Governors of the Committee report of minor misconduct without dismissal shall be deemed a finding of probable cause and that when the rejection of that finding is made by the respondent, Referee may still recommend any discipline authorized under these rules. None of this occurred in the present case. The Grievance Committee did not make a finding of minor misconduct and felt that there was probable cause to continue this matter and the Respondent had no ability to accept or reject any such recommendation. The matter was taken specifically to the Judicial Referee after the filing of a formal complaint.

After hearing, under Rule 3-7.6(k), the Referee is to file a report and that report shall contain finding of facts and recommendation as to the guilt or innocence of the Respondent to charges of misconduct justifying disciplinary measures and allows a recommendation as to disciplinary measures to be applied, including one of admonishment.

If the Court interprets the rules as The Florida Bar wishes them to be interpreted then the Referee would be placed in the position of almost being a rubber stamp for The Florida Bar and the

Board of Governors. That is not the purpose of the rules. The rules are obviously intended to provide both sides a forum in which to present the facts, the evidence and the law and allow the Referee to make an appropriate recommendation of punishment based upon all the factors to be considered under the rules.

Under Rule 3-51b(b)(1) minor misconduct can be punished by admonishment as long as it does not involve misappropriation of funds, actual prejudice to a client, the respondent has not been previously publicly disciplined, the misconduct does not involve the same misconduct for which the respondent has been disciplined for in the past five years or the misconduct involves misrepresentation, deceit or fraud or commission of a felony. It is obvious that even in the Bar's interpretation of what occurred in this matter that none of these criteria apply except the possible actual prejudice of the client by the loss of a legal right, that is the lawsuit against [redacted] and Mother Goose Day Care.

As is evident from the record in this case, that right normally would not have been lost in the four year statute of limitations if in fact the insurance company for the Defendant's has not gone bankrupt. The attorney in this case, as admitted by all parties in this case, properly filed the claim forms with the Florida Insurance Guaranty Association and proceeded on the premise, incorrectly, that he had four years in which to file the lawsuit and have it served. If the Court looks at the case of Blizzard vs. W. H. Roof Company, Inc., 573 So2nd 334 (Florida 1991)

it is obvious that this special statute of limitations of one year has caught other attorneys, not only on the Blizzard case but in the cases cited therein and it is a unusual statute of limitations. This is not made as an excuse or a defense to the running of the statute of limitations but rather to appropriately place it in a situation, that while it may be negligent, it is not a deliberate disregard or a deliberate failure to examine or look at a file and properly diary it under the statute of limitations. It is carelessness and an unfortunate circumstance. The client was advised of it in 1988 and has been well aware of it through at least two proceedings before the Bar. The client had more than ample opportunity to bring any action against the attorney and there had never been an denial at this time that the attorney was in fact at fault for this running of the statute of limitations.

Without appearing to be facetious the only prejudice to the client is that she would have in fact had to sue her attorney on what would have been an open and shut case of allowing the statute of limitations to run and still prove the case against [redacted] and Mother Goose Day Care to show her damages.

There has been no deceit or fraud toward the client. The client has been advised of this situation repeatedly and had every opportunity to remedy the situation by the hiring of another attorney and until this date has still not terminated the services of the Respondent.

In looking at cases warranting public reprimands the Court could examine the case of The Florida Bar vs. Stanley L. Rishkin,

549 S02nd, 178 (Florida 1989). This case involved a situation in which the statute of limitations had run, however, there were other matters that came up in this in that there had been absolutely nothing done in the file, that when the case was finally filed there was a Motion for Summary Judgment which the respondent allowed to pass unopposed and he never advised his client of any of these matters. It was also discussed that the attorney had, in the past, received a private reprimand for a neglect of a legal duty.

The problem in researching this issue is obvious in that private reprimands and the matters and problems that led to them are not published and are therefore are impossible to properly research to determine where a case actually fits in prior case law. In the case of The Florida Bar vs. Knowlton, 527 So2nd 1378, (Florida 1988) this Court again discussed the issuance of public reprimand, the Court examined a case concerning attorney neglect. Based upon the finding of facts in that case it appears that no matter what the client did, no response could be received from her attorney, either verbally or written concerning a Worker's Compensation case and eventually the client fired the attorney and it is obvious from the findings of fact that the statute of limitation has run on the Worker's Compensation case because the attorney had never done anything in an attempt to resolve the case and had in fact was attempting to mislead the client at the status of the file. The Court may also examine the case of The Florida Bar vs Budish 422 So2nd 501 (Florida 1982) which dealt with misleading and false advertising.

It is apparent from all of these cases that usually in a case in which public reprimand is issued one of the overriding issues is some misleading or intentional misleading of the client, some falseness on the part of the attorney in an attempt to avoid responsibility for actions. While in the present case there has been a failure to properly communicate there has never been, based upon the evidence presented to any court, an attempt to avoid responsibility for the attorney's actions.

In the case cited by The Florida Bar in support of its position for review, that being The Florida Bar vs Musleh, 453 S02nd 794 (Florida 1984), this Court stated

> "In weighing the proper discipline to be assessed on the facts of this case, we are mindful of the three purposes of the Bar discipline - punishment of the offender, deterrents of those who might be tempted to emulate the wrongdoer, and the protection of the public."

It is respectfully submitted that in this case all of these matters can be handled by the discipline the Judicial Referee has recommended in this case. The probationary term and the terms of that probation will more than adequately protect the public and create in the Respondent not only a requirement of proper notification and communication with his client but a structured way in which that will be handled. Respondent will be punished but in light of his prior record, which is clean of disciplinary actions, the punishment should not be punitive in nature.

Lastly the running of the statute of limitations and the failure to properly communicate with the client is a problem that every attorney is already well aware of and it would not serve any

useful purpose at this time to attempt to embarrass or humiliate the Respondent more than has already occurred.

CONCLUSION

WHEREFORE, the Respondent prays this Court will review the Referee's findings of fact, recommendation of guilt and recommendation of discipline and accept those findings and en-total and tax costs against the Respondent of One Thousand, One Hundred and Ninety-two and 83/100 ($1,192.83)

Respectfully submitted

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that a true copy of the foregoing has been furnished to: JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; KRISTEN M. JACKSON, Bar Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801

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