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IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

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

v.

HURLEY P. WHITAKER,

Respondent.

______________________________/

INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, shall be referred to as the Bar.

The transcript of the grievance committee hearing shall be referred to as "T".

The transcript of the final hearing shall be referred to as "TR".

The Report of Referee shall be referred to as "RR".

STATEMENT OF THE CASE

The Ninth Judicial Circuit Grievance Committee "E" voted to find probable cause in The Florida Bar case number 89-30,129 (09E) on January 4, 1991 for violating Rules 4-1.3 and 4-1.4 of the Rules of Professional Conduct. The Bar filed its Complaint on April 29, 1991 and the final hearing was held on August 9, 1991. The Referee submitted his report on September 17, 1991 and recommended the respondent be found guilty of violating the following Rules of Professional Conduct: 4-1.3 for failing to act with reasonable diligence and promptness in representing a client and 4-1.4 for failing to keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information, and failure to explain a matter to the extent reasonably necessary to permit the client to make informed decisions.

The Referee recommended the respondent be admonished as provided in Rule 3-5.1(a) of the Rules of Discipline before the grievance committee of the Ninth Judicial Circuit and that the respondent be placed on probation for twenty-four months. The Referee recommended as terms of probation that the respondent review his case load with a designated member of the grievance committee at least each ninety days and submit a report of his

open litigation files in writing to the grievance committee with information regarding the diligent prosecution of the cases and communications with clients. The Referee further recommended that the respondent submit within thirty days of the disciplinary order a written plan of procedure and policy to facilitate adequate communication with clients and a tickler system to remind him to use diligence. The Referee considered the personal history and prior discipline record of the respondent: his age at thirty-eight, admission to the Bar in 1983, two prior grievance complaints but no disciplinary convictions.

The Referee's report was considered by the Board of Governors at its November, 1991 meeting. The Board voted to appeal the Referee's recommendation as to discipline.

The Bar filed its Petition For Review on November 18, 1991.

STATEMENT OF THE FACTS

The respondent was hired by [redacted] [redacted], previously [redacted], in January, 1986 to investigate an alleged sexual molestation of her three and one half year old daughter by an employee of a day-care center. The respondent agreed to investigate the case and sent her two insurance claim forms which Ms. Simon signed and returned to the respondent. She did not hear from the respondent for several months and had telephoned him often but only talked with him a few times as he was either in court, busy, or had some other excuse. (RR. pp. 2, 3)

The respondent filed an insurance claim on April 18, 1986. The deadline for filing suit on that claim was July 17, 1987, to which the respondent was assuming a four year statute of limitations applied. (RR. p. 6; TR. pp. 54,65) The respondent filed a lawsuit against the day-care center and its employee on June 30, 1986 only to maintain a claim for joint and several liability which would be eliminated by a new law effective July 1, 1986. The respondent voluntarily dismissed the lawsuit on June 29, 1987, without prejudice, to avoid dismissal for failure to prosecute. The respondent never served the complaint on the defendants. (RR. p. 6; TR. pp. 51-53,55) The respondent failed to inform Ms. Simon that he had filed the lawsuit or that it had

been voluntarily dismissed. The respondent did not refile the complaint prior to the July 17, 1987 deadline thereby resulting in such claim being lost. (RR. p. 5; T. pp. 12,13; TR. p. 65)

Ms. Simon wrote the respondent in June 1988 requesting information on her case. Due to the respondent's failure to respond Ms. Simon filed a complaint with The Florida Bar in July 1988 to which the respondent responded with a letter advising her that the one year statute of limitations for the insurance claim ran against the day-care and its employee. (RR. p. 3; TR. pp. 10,11) He also informed her that a suit had been filed and voluntarily dismissed and explained that no cause of action existed against HRS but that due to a recent Florida Supreme Court opinion, HRS' prior knowledge of sexual abuse by that employee could now support a claim against the agency. (RR. pp. 3,6; T. pp. 39,40)

Ms. Simon, by certified letter, requested a meeting and clarification of the status of her case. She met with the respondent in September 1988 at which time he told her he had been tied up with a big money lawsuit, which he had won, and he could now "do better" on her case. (RR. pp. 3,5; TR. p. 13) Over a month later the respondent sent a letter advising Ms. Simon that he had filed a lawsuit against HRS, which would be set

for trial within nine to twelve months. (RR. p. 3,4; TR. p. 14) The respondent filed the suit without prior discussion with or notification of Ms. Simon and only sent her a copy after she complained to The Florida Bar. (RR. p. 5,6) The respondent admitted that he was prompted to file the second lawsuit by Ms. Simon's grievance to the Bar and he wanted to show good faith and that her case was moving forward. (RR. p. 7; T. p. 64)

Ms. Simon continued to try to contact the respondent but did not hear from him. Finally, Ms. Simon sent a certified letter in January 1990 again asking for copies of the documents and for information on the status of her case. (RR. p. 4; TR. p. 15) In February, 1990 Ms. Simon received a notice of taking deposition scheduled for March 27, 1990, which the respondent later canceled without so informing Ms. Simon. Ms. Simon learned several weeks later from the respondent's secretary that it had been cancelled but was not told why or if and when it would be rescheduled. (TR. p. 16; RR. p. 6)

The only time Ms. Simon would get a response from the respondent was after she contacted The Florida Bar. At one point the respondent called Ms. Simon and told her to "call off the war dogs", because he was working on the case now. (RR. p. 5; T. p. 14,33) The respondent finally wrote to Ms. Simon in August

1990 following her second complaint to The Florida Bar in July 1990 and sent the wrong documents in response to her request made over one year and three months previously. He apologized for the lack of communication saying her request "slipped through the cracks", and blamed it on secretaries. (RR. p. 4; TR. p. 17)

The respondent did not adequately investigate the case and failed to return telephone calls. He failed to adequately communicate with Ms. Simon throughout the case, and, in fact, he admitted his obligation to keep his client informed and admitted his failure to communicate with Ms. Simon and keep her advised of the matters transpiring in her case. Further, the respondent stated that the case did not have much value and in April 1991 he tried to persuade her to dismiss the case. He also tried to refer her case to other attorneys who refused to take it because he had been "grievanced" by the client. The lawsuit against HRS is still active but the statute of limitations has run and if it is dismissed such claim is forever barred. (RR. pp. 6-8; TR. pp. 18,62,64,68; T. pp. 47-50)

SUMMARY OF THE ARGUMENT

The Referee found that the respondent in this case failed to act with reasonable diligence in the handling of his client's case and failed to keep her informed of his progress despite numerous requests for information. The only time he would respond to requests for information or copies of documents was after the client contacted The Florida Bar. The respondent's conduct prejudiced his client's rights by failing to file any pleadings in her initial case resulting in its dismissal and by allowing the statute of limitations to run on her most viable claim before refiling the action. The case has been pending for a period of five years with little or no progress.

The Referee's recommendation of an admonishment of the respondent in these circumstances is clearly inappropriate under the Rules of Discipline, Rule 3-5.1(b) and Rule 3-7.6(k)(1)(3) which state that an admonishment is only appropriate in a case based upon a finding of minor misconduct. The rules do not authorize the Referee to recommend a discipline of minor misconduct where the local grievance committee has found probable cause and he should respect the recommendations of the committee. Further, the recommended discipline is contrary to the standards for imposing discipline sanctions, Rule 4.43, which provides for

a public reprimand when the respondent's negligence causes injury or potential injury to the client.

This Court, however, is the final decision-maker and is the only entity which may authorize an admonishment in a probable cause case as the appropriate level of discipline.

ARGUMENT

THE REFEREE'S RECOMMENDATION FOR DISCIPLINE OF AN ADMONISHMENT, AND A PUBLIC PROBABLE CAUSE CASE, IS ERRONEOUS IN LIGHT OF RULE 3-5.1(b) OF THE RULES OF DISCIPLINE WHICH PROVIDES THAT MINOR MISCONDUCT IS THE ONLY TYPE OF MISCONDUCT FOR WHICH AN ADMONISHMENT IS AN APPROPRIATE DISCIPLINARY SANCTION; AND RULE 3-7.6(k)(1)(3) WHICH PROVIDES THAT A REFEREE MAY ONLY RECOMMEND AN ADMONISHMENT IN CASES OF MINOR MISCONDUCT.

Minor misconduct is a term of art which refers to a specific type of discipline that results in an admonishment (formerly known as a private reprimand). The Rules of Discipline define minor misconduct by exception and set forth criteria in Rule 3-5.1(b) for types of cases that do not qualify for findings of minor misconduct absent unusual circumstances. Minor misconduct may be found in one of two ways. First, at the grievance committee level, the committee may find minor misconduct which finding is subject to approval by the Board of Governors of The Florida Bar. Second, upon a probable cause finding resulting in the filing of a formal complaint with the Florida Supreme Court and an appointment of a referee, the respondent may admit to minor misconduct <u>before</u> the complaint is filed.

A referee must work within certain parameters established by the rules when imposing discipline and is authorized to recommend an admonishment only when a complaint of minor

misconduct has been filed. Rule of Discipline 3-5.1(b)(4) and 3-7.6(k)(1)(3). In the case at hand the grievance committee, after hearing all of the testimony and considering the evidence, voted unanimously for probable cause. Therefore, a recommendation of an admonishment is not available to the referee under the rules. Rule 3-5.1(b)(1)(b) provides that an admonishment is not available when the misconduct results in, or is likely to result in, actual prejudice to a client or other person. In this instance the client has been prejudiced in that her case was neglected and drawn out for over five years with a major portion of the claim being lost due to the running of the statute of limitations.

In addition, an admonishment is inconsistent with the Florida Standards For Imposing Lawyer Sanctions, Rule 4.43 which provides that a public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence and causes injury or potential injury to a client.

The Bar recognizes that this court may choose to exercise its discretion and impose any level of discipline it deems appropriate under the circumstances of the case. The Florida Bar v. Doe, 550 So.2d 1111 (Fla. 1989) However, the judgment should be severe enough to deter not only the respondent but others from

engaging in similar misconduct. In light of the respondent's continued neglect and failure to communicate over a five year period such conduct is not minor and a public reprimand is the appropriate discipline. This Court should correct the Referee's erroneous recommendation in this case as it has done in the past when other Referees have made inappropriate disciplinary recommendations. The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984)

<u>CONCLUSION</u>

WHEREFORE, The Florida Bar prays this Honorable Court will review the Referee's findings of fact, recommendation of guilt, and recommendation as to discipline, and accept the findings of fact and recommendation as to guilt, but reject the recommendation as to discipline and order that the respondent be publicly reprimanded by personal appearance before the Board of Governors and tax costs against the respondent now totalling $1,192.83.

Respectfully submitted,

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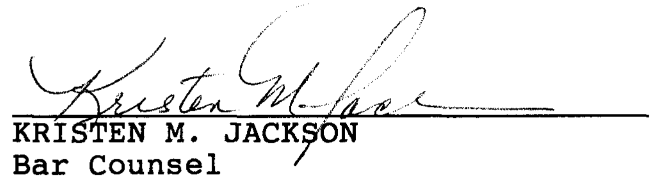
BY: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by certified mail, return receipt requested, no. P 844 906 809, to Counsel for Respondent, R. Lee Dorough, 45 West Washington Street, Post Office Box 1906, Orlando, Florida, 32802-1906; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 18th day of December, 1991.

Respectfully submitted,

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