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IN THE SUPREME COURT OF FLORIDA

AUG 7 1992

CLERK SUPREME COURT

By _____
Chief Deputy Clerk

Case No. 78,823

THE FLORIDA BAR,
Complainant,

v.

MICHAEL L. KINNEY,
Respondent.

_____ /

THE FLORIDA BAR'S ANSWER BRIEF

[Handwritten flourish]

SUSAN V. BLOEMENDAAL
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(813) 875-9821
Attorney No. 347175

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PRELIMINARY STATEMENT

All references to the facts of the case below are taken from the Stipulation of Facts signed by Complainant's counsel and Respondent unless otherwise noted. Additionally, the following abbreviations are used in the brief.

- | | | |
|----------|---|---|
| TFB Exh. | - | The Florida Bas's Exhibit |
| R.R. | - | Report of Referee |
| R. | - | Transcript of Final Hearing
before Referee on March 27, 1992 |

SUMMARY OF ARGUMENTS

The Referee's finding of guilt as to Rule 4-1.3, lack of diligence, is well supported by the record. (A copy of the Report of Referee is attached hereto as Appendix 1). Respondent's own correspondence, submitted to The Florida Bar during the initial investigation of this case, clearly indicates that he was well aware of the insolvency of the insurer and, he was aware that a notice of claim had been mailed to the client with instructions. At the hearing before the Referee, no evidence was presented by Respondent that would support the position Respondent now takes. It is undisputed that Respondent took over responsibility for Ms. Schuchardt's case in May of 1987, and, that no complaint was filed until July 13, 1988. There **is** no evidence that Respondent took any action on behalf of his client other than the filing of the complaint.

Respondent's Argument that his failure to recognize a shorter statute of limitations is insufficient to warrant disciplinary action is without merit, and his reliance on The Florida Bar v. Neale, 384 So. 2nd 1264 (Fla. 1980), is misplaced. Respondent appears to have overlooked this Court's more recent case wherein an attorney was disciplined for his failure to recognize the very same statute of limitations as that overlooked by Respondent.

ARGUMENT

ARGUMENT I. THE RECORD ESTABLISHES BY CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT FAILED IN HIS DUTY OF DILIGENCE TO HIS CLIENT BY FAILING TO TAKE ANY ACTION TO **PRESERVE** HIS CLIENT'S CAUSE OF ACTION.

The Stipulation of Facts entered into between Respondent **and** The Florida Bar clearly indicates that Respondent took over responsibility for Ms. Schuchardt's representation in May or June of 1987. [R.21] Respondent submits that the record is silent as to whether Respondent was aware of the insolvency of the insurance company. The record, however, is not silent. In Respondent's August 15, 1989 letter to The Florida **Bar**, he indicates in pertinent part as follows:

I advised him that my file did not contain a copy of a notice of being sent to the Florida Insurance Guarantee Association **but did contain a copy of the notice and letter being sent to the client, Ms. Schuchardt, with instructions to fill out the notice and return it to our office.** [TFB Exh. #5, page 2.]
(Emphasis supplied)
(A copy of this letter is attached hereto as Appendix 2).

Respondent may have been unaware of the shorter statute of limitations triggered by the filing of the notice of claim, but he clearly should have been aware that the insurance company had been declared insolvent, since his own file contained a copy of the notice. (A copy of the notice is attached hereto **as** Appendix 3- previously submitted to the Referee as part of The Florida Bar's Composite Exhibit #1.)

At the hearing before the Referee, Respondent offered no testimony, no documentary evidence, nor any argument suggesting that he was unaware of the insurer's insolvency.

Respondent's testimony at the Final Hearing indicates that he knew about the insurance company's insolvency **but**, that he simply missed the shorter statute of limitations imposed on FIGA claims:

However, the statute also provided that not only must you send a notice, but you must file your lawsuit within a year after. And even though that period of time was shorter than the statute of limitations, I missed that cut off date and did not file the lawsuit within that statutory time. [R. 17, 2-7.]

The transcript of the Referee hearing reveals that Respondent had his office file on the Schuchardt matter with him at the hearing, and that he referred to the file during his testimony. Yet, Respondent offered no evidence of any action taken by him in furtherance of Ms. Schuchardt's cause of action. Likewise, the court file reflects only one action taken by Respondent in Ms. Schuchardt's case- the filing of the Complaint.

Subsequent to the hearing before the Referee, Respondent filed a "Response to The Florida Bar's Filing the Case of The Florida Bar v. Whithaker." In this response, Respondent offered a chronology of events for the purpose of allowing the Referee to "better follow the actions of Respondent." This chronology offered by Respondent, shows no action by Respondent between his initial contact with Agnes Schuchardt

on June 22, 1987, and the filing of the complaint more than a year later.

ARGUMENT 11. RESPONDENT'S FAILURE TO FILE
SUIT WITHIN THE ONE-YEAR
STATUTE OF LIMITATIONS FOR FIGA
ACTIONS IS SUFFICIENT TO
WARRANT DISCIPLINARY ACTION.

Respondent's reliance on The Florida Bar v. Neale, 384, So. 2d 1264 (Fla. 1980), is misplaced. Respondent has apparently overlooked this Court's more recent decision in The Florida Bar v. Whitaker, 596 So. 2d 672 (Fla. 1992). In Whitaker case, this Court upheld the Referee's finding of guilt as to Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness in representing a client), where the attorney had failed to file a suit within the one-year statute of limitation for FIGA actions because he mistakenly thought the limitations period was four years. Whitaker at 2. Whitaker was also found guilty of violating Rule 4-1.4, (a lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with the reasonable request for information.)

This Court rejected the Referee's recommendation of an admonishment, and ordered a public reprimand, even though Whitaker had no prior disciplinary record. Presumably, this Court was well aware of its previous holding in the Neale case.

The Neale case, upon which Respondent relies, was decided in 1980, prior to the adoption of the Rules of Professional Conduct, which superseded the Code of Professional Responsibility. Under the Code of Professional

Responsibility, the standard by which an attorney was measured was "neglect of a legal matter entrusted to him", DR 6-101(A)(3), Code of Professional Responsibility. The new Rules of Professional Conduct impose a more stringent standard and place upon an attorney an affirmative duty to act with reasonable diligence and promptness in representing a client. Rule 4-1.3, Rules Regulating The Florida Bar. The comment to this Rule recognizes the pernicious affect of delay, even in cases where a client's interests are not affected in substance. This Court's decision in Whitaker reflects this more stringent standard.

Respondent, unlike Whitaker, was found not guilty of failing to keep his client adequately informed, despite evidence in the record of minimal communications by Respondent. However, also unlike Whitaker, Respondent has a prior disciplinary record. On May 5, 1989, the Thirteenth Judicial Circuit Grievance Committee "B" issued a Report of Minor Misconduct citing the following factual basis:

Mr. Kinney was retained by Reginald Britton to pursue a civil action against the Hillsborough County Sheriff's Department for personal injury suffered by Mr. Britton. Mr. Kinney entered into negotiations with the attorney representing the Sheriff's Department, but he was unable to obtain and offer a settlement. Subsequently, Mr. Kinney failed to file any pleadings to preserve Mr. Britton's right to sue and the statute of limitations expired. [TFB Exhibit #8, page 2.]

In determining an appropriate disciplinary sanction, it is important to consider both The Florida Standards for

Imposing Lawyer Sanctions and cases previously decided by The Supreme Court of Florida.

The Florida Standards for Imposing Lawyer Sanctions, Section 4.43 indicates that, absent aggravating or mitigating circumstances, a public reprimand is appropriate when a lawyer is negligent **and does** not act with reasonable diligence in representing a client, and causes injury or potential injury to the client.

There can be no doubt that Respondent's negligence and failure to act with reasonable diligence caused injury to his client. Ms. Schuchardt's cause of action was time-barred as a result of Respondent's lack of diligence.

Section **9.22** of the Florida Standards lists the following aggravating factors which are applicable in this case:

(1) Prior disciplinary offenses.

Section 9.22(a); and,

(2) Substantial experience in the practice of law. Section 9.22(i).

Respondent's prior reprimand was for misconduct almost identical in nature to the misconduct with which he is charged in the instant case, and is therefore a significant aggravating factor. **In** the previous **case**, Respondent failed to file any pleadings to preserve his client's right to sue and the statute of limitations expired. Likewise, in the instant case, Respondent failed to diligently file suit to preserve his client's cause of action until after the time


limitation expired.

At the Final Hearing before the Referee, Respondent testified regarding his substantial experience in the practice of law [R. 71-73]. Respondent has **been** a practicing attorney since 1945, and most recently has concentrated his practice in the area of "personal injury work for plaintiffs and occasional criminal work in federal court." [R.71, 22-23; 73, 3-6]. Respondent therefore cannot be viewed in the same light as a neophyte. At the time he began representing Ms. Schuchardt he had been practicing in excess of 40 years, and confined his practice primarily to the representation of plaintiffs in personal injury matters.

CONCLUSION

As in the Whitaker case, the record in this case clearly reflects an attorney whose failure in his duty of diligence to his client resulted in the client's cause of action being time-barred. Respondent, like Whitaker, failed to file suit within the one (1) year statute of limitations for FIGA actions. Respondent has previously been disciplined for failing to timely file a client's cause of action. **The Florida Bar** respectfully submits that as in Whitaker, the appropriate discipline in the instant case is a public reprimand.

Respectfully submitted,


SUSAN V. BLOEMENDAAL
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Attorney No. 347175

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and copies of the foregoing Answer Brief has been provided SID **J. WHITE**, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida **32399-2927** and a Copy to **SCOTT K. TOZIAN**, Esq., Attorney for Michael Kinney, Respondent at 109 North Brush Street, Suite 150, Tampa, Fl **33602**, and a copy to **JOHN T. BERRY**, **Staff** Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida **32399-2300**, this 5th day of August, 1992.


SUSAN V. BLOEMENDAAL

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

RECEIVED

MAY - 6 1992

The Florida Bar,
Complainant,

v.

Michael Kinney,
Respondent.

CASE NO. 78.823
TFB NO. 89-11,351 (13B)

THE FLORIDA BAR

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates: March 27, 1992

The following attorneys appeared as counsel for the parties:
For The Florida Bar Susan V. Bloemendaal, Esquire
For The Respondent Michael Kinney, Esquire

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, 1 find:

Both parties waived venue in Hillsborough County, Florida and agreed that this hearing could be conducted in Pasco County, Florida.

The facts of this case are as set forth in the Stipulation of Facts filed with this Referee on March 27, 1992 and attached hereto.

III. Recommendation as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

I recommend that the respondent be found guilty and specifically that he be found guilty of the following violation of Rule 4-1.3 (a lawyer shall act with reasonable diligence and promptness).

It has been proven, by clear and convincing evidence, that Attorney Kinney failed to file suit on behalf of his client, Agnes T. Schuchardt, within the legal deadline for the filing of said lawsuits. This failure of Attorney Kinney violates Rule 4-1.3 of The Florida Bar (a lawyer shall act with reasonable diligence and promptness).

Case No. 78,823
TFB No. 89-11,351 (13B)

It **was** not proven, by clear and convincing evidence, that Attorney Kinney violated Rule 4-1.4 of The Florida Bar (a lawyer shall keep a client reasonably informed about the status of the legal matter).

IV. I recommend that the respondent receive a public reprimand and be placed on probation for a period of three years.

The terms of the recommended probation are as follows:

1. Respondent will file a monthly report with the Clerk of the Supreme Court of Florida, and a copy to Bar Counsel, listing:

- a) All new clients who have retained Respondent in each preceding month;
- b) The type of legal matter for which client has retained counsel;
- c) The deadline for the filing of a lawsuit on client's behalf;
- d) In what court the lawsuit should be filed.

V. Personal History and Past Disciplinary Record: After finding of **guilty and prior** to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Date admitted to Bar: Practicing attorney since 1945 and practicing in Florida since 1955.
Prior disciplinary convictions and disciplinary measures imposed therein: TFB No. 88-11,434 (13B), a Minor Misconduct for violation of Rule 4-1.3 for which respondent received a Minor Misconduct.
Other personal data: Respondents Law practice is strictly personal injury work for plaintiffs, and occasional criminal work in federal court.

VI. Statement of Costs and Manner in Which cost Should be Taxed: I find the following costs were reasonable incurred by The Florida Bar at the Grievance Committee and Referee levels:

1. Administrative Costs \$ 500.00

I. GRIEVANCE COMMITTEE LEVEL:

2. Assistant Staff Counsel:
Susan V. Bloemendaal (3/01/92)
Travel Expenses: 8.00

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II. REFEREE LEVEL:


3. Assistant Staff Counsel; (Final Hearing)
Susan V. Bloemendaal (3/27/92)
Travel Expenses: 24.97

4. Court Reporting Service: (Final Hearing)
Gregg R. Stone & Associates (3/27/92)
Appearance Fee: 70.00
Transcript Fee: 365.75

5. Staff Investigator Expenses:
Joseph P. McFadden
Time Expended: (8 Hrs. @ \$19.00) 152.00
Mileage: (126 Miles @ \$.32) 40.32
TOTAL ESTIMATED COSTS TO DATE: \$1,161.04

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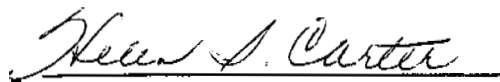
Dated this 4 day of May, 1992.



Referee Bruce Boyer/
Circuit Court Judge
7530 Little Road
New Port Richey, FL 34654

Certificate of Service

I hereby certify that a copy of the above report of referee has been served on **Susan** V. Bloemendaal, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607, Respondent Michael L. Kinney, Esquire, P.O. Box 18055, Tampa, Florida 33679-8055, John T. Berry, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 4th day of May, 1992.



Helen S. Carter
Judicial Assistant