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FILED
SID J. WHITE
AUG 21 1992
CLERK, SUPREME COURT
By Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

complainant,

v.

MICHAEL KINNEY,

Respondent.

CASE NO: 78,823

RESPONDENT'S REPLY BRIEF

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PRELIMINARY STATEMENT

The following abbreviations are used in the brief:

TFB Ex.	=	The Florida Bar's Exhibit
R.R.	=	Report of Referee
R.	=	Transcript of final hearing before Referee on March 27, 1992
Comp. Br.	=	Complainant's Answer Brief

SUMMARY OF ARGUMENT

The Complainant's justification for the Referee's finding below that Respondent did not act with reasonable diligence is the existence of a form in Respondent's file. This form was filled out by Ms. Schuchardt and was related to the insolvency of the insurance company, Iowa National Mutual Insurance Company. However, the information contained on this form does not inform Respondent of a shorter statute of limitations. [Comp. Br. at App. 3]. Complainant's statement that "Respondent offered no testimony, no documentary evidence, nor any argument suggesting that he was unaware of the insurer's insolvency" is an impermissible attempt to shift Complainant's burden of proof to Respondent and, more importantly, a tacit admission that the record is silent on this critical issue. [Comp. Br. at 3].

Complainant's further insistence that Respondent knew about the insolvency of the insurer due to his own testimony is a misreading of the record. In fact, there is no proof in the record that Respondent was aware of the insolvency or the shorter statute of limitations that applied in Ms. Schuchardt's case. Accordingly, based upon the facts below Respondent's conduct does not rise to a level requiring a finding of guilt. Nevertheless, should this Court decide that Respondent's conduct is actionable under the Rules Regulating The Florida Bar, the appropriate discipline is clearly an admonishment given the guidelines set by the Standards For Imposing Lawyer Sanctions.

THE SUPPORT OF THE REFEREE'S FINDINGS OF FACT OFFERED BY COMPLAINANT IS MISPLACED AND DOES NOT JUSTIFY THE FINDING THAT RESPONDENT WAS NOT DILIGENT.

The Complainant argues that the record establishes that Respondent was aware of the insolvency of the insurance company and he should therefore, for unspecified reasons, be found guilty of a lack of diligence. In support of its position that Respondent knew of the insurer's insolvency, Complainant points to an August 15, 1989 letter [TFB Ex. 5], and Respondent's testimony.

In his August 15, 1989 letter to The Florida Bar, Respondent states that his file contained a notice sent to the client to be returned to our office. However, a close review of this notice reveals it was sent to the office of predecessor counsel, Dennis Slater. [Comp. Br. at App. 3]. Further examination reveals it was signed and notarized on June 9, 1986, some eleven or twelve months prior to Respondent being retained. [Comp. Br. at App. 3]. Additionally, the form does not put one on notice of the deadline for filing suit, but only reflects the claim filing deadline. Apparently, this form was handled, completed and sent in to the Florida Insurance Guaranty Receiver Association, (hereinafter FIGA), well before Respondent became involved in Ms. Schuchardt's case. However, there was no indication in Respondent's file that the notice had been sent to the FIGA. [TFB Ex. 5]. Respondent was able to ascertain compliance with notice provisions only after contacting opposing counsel, Al Guemmer. [TFB Ex. 5].

Moreover, Complainant's contention that Respondent'stestimony

indicates that he knew about the insolvency of Iowa National is puzzling. [Comp, Br. at 3]. At the hearing Respondent testified that:

> ... 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 cutoff date and did not file the lawsuit within that statutory time. [R. 17, 18].

Respondent's statement in no way reflects an awareness of the insolvency of the insurer during his handling of Ms. Schuchardt's claim, but merely his later understanding of why the suit was dismissed.

Complainant also relies on Respondent's failure to offer testimony, evidence or argument suggesting that he was unaware of Iowa National's insolvency, Such reliance is an improper attempt by Complainant to shift its burden of proof by clear and convincing evidence to Respondent. The Florida Bar v. McCain, 361 So.2d ***700*** (Fla. 1978). As such, Complainant's argument to this effect is without merit.

Assuming arquendo, that Respondent was aware of the insurer's insolvency, there is absolutely no evidence that Respondent was advised or knew that such insolvency triggered a shorter statute of limitations. Clearly, it is Respondent's failure to be aware of the shorter statute which caused the case to be dismissed. Such failure is conduct similar to that in The Florida Bar v. Neale, **384** So.2d 1264 (Fla. 1980) and insufficient to warrant disciplinary action.

THE FACTS OF THE FLORIDA BAR V. WHITAKER ARE DISSIMILAR TO THE CASE AT BAR AND THEREFORE THE COMPLAINANT'S RELIANCE THEREON IS UNFOUNDED.

The Complainant cites The Florida Bar v. Whitaker, 596 So.2d 672 (Fla. 1992) in support of its claim that Respondent's failure to be aware of a different, shorter statute of limitations warrants discipline. However, Whitaker's conduct was substantially different and more egregious than Respondent's below.

In Whitaker, the attorney was clearly aware of the insolvency of the insurer as he filed the claims with FIGA. [Id. at 673]. Additionally, Whitaker timely filed within the one-year statutory time period, indicating that he was aware of the shorter time frame imposed by the insurer's insolvency. However, Whitaker took a voluntary non-suit to avoid dismissal for lack of prosecution and never refiled suit. [Id. at 673].

Additionally, Whitaker failed to communicate with his client and only responded after the client complained to The Florida Bar, which was on two separate occasions. The referee in Whitaker found him guilty of a lack of diligence as well as failing to keep his client reasonably informed of the status of her matter in violation of Rule 4-1.4. [Id. at 673].

The facts in Whitaker are clearly distinguishable with the facts in the case at bar. First, Whitaker knew of the insurer's insolvency and filed the necessary forms with FIGA. Conversely, the necessary forms below were filed by predecessor counsel with no indication Respondent was advised of the filing or the shorter statute.

Second, Whitaker timely filed within the shorter statute, but took a non-suit when the suit was going to be dismissed due to lack of prosecution by Whitaker. This lack of prosecution ostensibly equates to a lack of diligence by Respondent. In contrast, Respondent **was** retained in June, 1987 and unbeknownst to him was required to file suit by October 10, 1987, due to the shorter statute imposed by the insurer's insolvency.

Accordingly, it is clear that in Whitaker that the Court's finding of a lack of diligence was based upon a totality of the facts including Whitaker's failure to act after timely filing the suit causing the filing of a motion to dismiss based on lack of prosecution. It cannot be said that Whitaker's failure to file a paper or pleading for a period of one year was not the basis of the Court's finding that Whitaker was not diligent. Moreover, Whitaker's failure to communicate with his client was consistent with his failure to prosecute the suit after filing.

These facts in Whitaker cannot be reasonably compared to the facts below. Respondent below unknowingly had a four-month window in which he could have timely filed suit. Due to his unawareness of the shorter statute, he did not file within this time frame. Additionally, unlike Whitaker, Respondent **did** not jeopardize the suit, once filed, by inactivity. Nor did Respondent fail to keep his client reasonably informed, as did Whitaker. [R.R. at 2]. Accordingly, the Complainant's reliance upon Whitaker case is misplaced.

THE REFEREE'S RECOMMENDATION AND THE COMPLAINANT'S INSISTENCE UPON THE IMPOSITION OF A PUBLIC REPRIMAND AND THREE YEARS PROBATION IS NOT SUPPORTED BY THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS.

After finding Respondent guilty the Referee recommended the Respondent receive a public reprimand and three years probation requiring monthly reports to the Clerk of The Supreme Court and Bar Counsel. In its brief, the Complainant endorses this discipline citing The Florida Standards For Imposing Lawyer Sanctions (hereinafter the Standards), and two aggravating factors found thereunder. [Comp. Br. at 7, 8]. However, the complainant's reference to the applicable Standards is palpably incorrect and incomplete.

Assuming this Court ratifies the Referee's **finding** as to guilt, a more thorough analysis of the facts and the Standards is necessary to arrive at the proper discipline. First, the Complainant's reference to Section 4.43 of the Standards is incorrect as Section 4.43 is inapplicable to the instant case. Absent aggravating or mitigating circumstances, Section 4.43 provides:

> 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 a client. (emphasis added).

In truth, Respondent's client **suffered** no injury by reason of the missed statute. Upon discovering the problem, Respondent immediately advised his client of her right to bring a malpractice action against him and encouraged her to bring suit. [R. 25, 47, 48]. Clearly, a malpractice action could and would serve to

compensate the client for the lost cause of action. Accordingly, the client suffered little or no actual loss or injury.

In such a situation as this, Section 4.44 of the Standards controls and states:

> Admonishment is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client. (emphasis added).

Accordingly, the Standards compel the imposition of an admonishment here, absent aggravating or mitigating circumstances. While the Complainant offers two aggravating factors in its brief (prior discipline **and** substantial experience) it fails to acknowledge the more substantial mitigation present here.

Section 9.32 of the Standards sets forth the factors which may be considered in mitigation. Of the listed factors, the following clearly apply in the instant cause.

> (1) absence of a dishonest or selfish motive; (Section 9.32(b)).
>
> (2) timely good faith effort to make restitution or to rectify consequences of misconduct; (Section 9.32(d)).
>
> (3) full and free disclosure to disciplinary board or cooperative attitude toward proceedings; (Section 9.32(e)).
>
> (4) character or reputation: (Section 9.32(g)).
>
> (5) remorse; (Section 9.32(1)).

Given the substantial mitigation and the obvious applicability of Section 4.44 as discussed above, admonishment is clearly the appropriate discipline, if discipline is deemed necessary.

In addition to the guidelines set forth in the Standards, the imposition of a public reprimand and three years probation is

obviously inappropriate for one final reason, i.e., the probation conditions suggested by the Referee would not have avoided the problem which occurred in this case.

The Referee required a monthly report to the Clerk of this Court and to Bar Counsel setting forth:

> (1) All new clients who have retained Respondent in each preceding month;
>
> (2) The type of legal matter for which client has retained counsel;
>
> (3) The deadline for the filing of a lawsuit on client's behalf;
>
> (4) In what court the lawsuit should be filed. (R.R. at 3).

Obviously, the imposition of these conditions would not have revealed the shorter statute applicable in the Schuchardt **case.** Even if Respondent had been on probation at the time of the handling of Schuchardt's matter, the reporting requirements would cause Respondent to give information which would have revealed a four year statute not the shorter statute caused by FIGA's involvement. Put simply, these remedial measures would not remedy the error which occurred below. For all the reasons referenced above, the imposition of an admonishment is the appropriate discipline, if any discipline is deemed necessary.

CONCLUSION

The record reveals only that Respondent was hired in June 1987, and failed to file suit within the filing deadline of October 10, 1987 imposed by FIGA's involvement. There is no record evidence that Respondent was aware of this deadline or that he failed to act diligently. The client's remedy for this honest mistake was, and is, a malpractice action as suggested by Respondent. The disciplinary charges should be dismissed.

Respondent has practiced law for 47 years and has served on the Supreme Court Committee on Jury Instructions for the past 24 years. Nevertheless, the Complainant urges the harsh sanction of a public reprimand and three years probation. By its recommendation, Complainant apparently rejects the law of the jungle whereby lions eat their young, choosing instead to eat its elders. However, should this Court find Respondent's oversight warrants disciplinary action, an admonishment is mandated by the Florida Standards For Imposing Lawyer Sanctions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 26 day of August, 1992, to: Susan V. Bloemendaal, Esquire, Assistant Staff Counsel, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida *33607.*

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