IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant.

v.

DEWEY HOMER VARNER, JR.,

Respondent.
_____/

Supreme Court Case No. SC06-1919

The Florida Bar File No. 2005-51,022(15C)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The Florida Bar filed its formal Complaint in this cause on October 3, 2006. Thereafter, the Chief Judge of the Seventeenth Judicial Circuit in and for Broward County, Florida appointed the undersigned to serve as referee. Pursuant to timely notice, the final hearing was held on June 20-21, 2007, and concluded on August 15, 2007. On September 10, 2007, the referee took testimony on aggravation and mitigation, and heard argument on sanctions. The pleadings, and all other papers filed in this cause (which are forwarded to the Supreme Court of Florida with this report) constitute the entire record.

During the course of these proceedings, respondent was represented by Kevin P. Tynan; The Florida Bar was represented by Lorraine Christine Hoffmann.

II. FINDINGS OF FACT:

A. Jurisdictional Statement: Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary:

1. In or about February 2000, Jerry Lee Lindale hired the law firm of Varner & Thorne, P.A. to represent him in two (2) workers' compensation accidents.

2. Initially, Patricia Thorne, Esq., respondent's law partner, took primary responsibility for Lindale's files, but transferred the files to respondent in November, 2000, due to Thorne's own medical issues.

3. Respondent never informed Lindale that his cases were no longer being handled by Patricia Thorne, Esq.

4. In August, 2003, approximately ten (10) days prior to trial scheduled for August 25, 2003, and only a few days prior to mediation scheduled for August 15, 2003, opposing counsel had scheduled and noticed a physician's deposition in one of the cases.

5. Upon receipt of the notice, respondent telephoned opposing counsel and requested that the deposition be cancelled.

6. Opposing counsel refused to cancel or to reschedule the rest of the discovery. Opposing counsel told respondent she would agree to cancel the physician's deposition if respondent took a voluntary dismissal of the case.

7. Opposing counsel agreed to cancel the physician's deposition if the case were dismissed.

8. Respondent supervised the preparation, signed, and filed a Notice of Voluntary Dismissal of Lindale's case on August 14, 2003. (Florida Bar's Exhibit #1).

9. Respondent caused a copy of the notice of voluntary dismissal to be faxed to opposing counsel, who then agreed to cancel the scheduled physician's deposition.

10. The notice of voluntary dismissal, drafted under respondent's direction, and filed by respondent, expressly stated that Lindale, through his legal counsel, sought the voluntary dismissal of all pending claims in this workers' compensation case.

11. By drafting and filing the notice of voluntary dismissal in this manner, respondent intended to communicate that Lindale was aware of and consented to the dismissal of this case.

12. At the time that respondent supervised the drafting of the notice of voluntary dismissal, and filed it, respondent knew that Lindale did not know of it and had not authorized it.

13. At the time that respondent supervised the drafting of the notice of voluntary dismissal, and filed it, respondent knew that it was false.

14. Despite this knowledge, respondent filed the false notice of voluntary dismissal with the tribunal. Respondent falsely testified under oath that Patricia Thorne, Esq., expressly communicated Lindale's authorization to file the notice of voluntary dismissal. Patricia Thorne, Esq. did not know of the filing of the notice of voluntary dismissal until she received a letter so advising her from Lindale nearly a year later. Patricia Thorne, Esq. had not received permission from Lindale to file a notice of voluntary dismissal and did not communicate Lindale's permission to file same to respondent at any time.

15. Respondent's motion to voluntarily dismiss Lindale's case was granted, and opposing counsel cancelled the scheduled deposition.

16. Respondent never told Lindale that he had filed a motion to dismiss his case. Respondent never told Patricia Thorne, Esq., his alleged partner, that the notice of voluntary dismissal had been filed.

17. Respondent never told Lindale that his case had, in fact, been dismissed.

18. Before filing the motion to dismiss Lindale's case, respondent never considered or reviewed the applicable statute of limitations, and therefore did not know that the voluntary dismissal of the case would deprive Lindale of his cause of action, absent extraordinary remedies.

19. After respondent took a voluntary dismissal of Lindale's case, Lindale made numerous calls to the law firm of Varner & Thorne, P.A., in order to learn the status of his case.

20. Respondent failed to respond to Lindale's many requests for information regarding his case.

21. Respondent failed to tell Lindale that he had filed a voluntary dismissal.

22. Respondent failed to tell Lindale that his case had been dismissed.

23. Lindale did not learn that his case had been dismissed until June, 2004, when a sympathetic member of respondent's law firm support staff revealed the voluntary dismissal to Lindale, surreptitiously. Thereafter, Lindale called the court himself on June 24, 2004, and learned officially of its dismissal.

24. Neither respondent nor anyone else from respondent's law firm had ever informed Lindale that the law firm of Varner & Thorne had stopped representing him.

25. Neither respondent nor anyone else from respondent's law firm ever returned Lindale's file or took any steps to protect Lindale's interests, after his case was dismissed.

26. After finding out that his case had been voluntarily dismissed, Lindale was forced to retain new counsel to attempt to have the case reopened.

27. Lindale had significant difficulty in reopening his case, as the statute of limitations had run on his workers' compensation case.

III. RECOMMENDATION AS TO GUILT:

A. Based on the totality of respondent's intentional misconduct, I find that The Florida Bar has proven, by clear and convincing evidence, that respondent violated R. Regulating Fla. Bar **3-4.2** [Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline.]; **3-4.3** [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor,

may constitute a cause for discipline]; **4-8.4(a)** [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another.]; and **4-8.4(d)** [A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice …].

B. As to Count I of The Florida Bar's Complaint: I find that The Florida Bar has proven, by clear and convincing evidence, that respondent violated R. Regulating Fla. Bar **4-1.1** [A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.]; **4-1.2(a)** [A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to subdivisions (c), (d), and (e) and shall consult with the client as to the means by which they are to be pursued.]; and **4-3.2** [A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.].

C. As to Count II of The Florida Bar's complaint: I find that The Florida Bar has proven, by clear and convincing evidence, that respondent violated R. Regulating The Florida Bar **4-1.4(b**) [A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.]; and **4-1.16(d)** [Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as

giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee that has not been earned. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.].

D. As to Count III of The Florida Bar's complaint: I find that The Florida Bar has proven, by clear and convincing evidence, that respondent violated R. Regulating Fla. Bar **4-8.4(c)** [A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation …].

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that respondent be found guilty of misconduct justifying bar discipline, and that he be suspended for a period of 91-days. Additionally, respondent should be required to pay The Florida Bar costs in this matter. It is recommended that such costs be taxed against respondent and that interest should accrue at the statutory rate. If the cost judgment is not satisfied within 30 days of the judgment in this case becoming final, respondent should be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

In arriving at the foregoing disciplinary recommendation, I have given careful consideration to the factors outlined herein. As a result, I am satisfied that

the imposition of a 91-day suspension (and payment of The Florida Bar's costs) is an appropriate sanction for the misconduct which The Florida Bar has proven by clear and convincing evidence.

Attorney discipline must protect the public from unethical conduct and have a deterrent effect, while still being fair to respondents. The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1972). In applying the relevant case law to this case, I have been guided by a thoughtful consideration of the sanctions the Supreme Court of Florida has imposed, historically, for the most grievous (and therefore, most troubling) misconduct at issue: gross neglect, incompetence and intentional misrepresentations to the client and the court. Further, I have measured respondent's misconduct in the instant case by the yardstick respondent himself created, via his (most recent and most relevant) past misconduct and the bar discipline it precipitated. Starting from this measurement (because Bar discipline is cumulative),[1] I have crafted and recommend a sanction in the instant case that fairly and appropriately punishes the misconduct committed, under the standards established by the Supreme Court of Florida in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), and its progeny.

I am also mindful that respondent's grave misconduct in this case is aggravated and mitigated by the factors set forth in the Florida Standards for

[1] See The Florida Bar v. Bern, 425 So. 2d 526 (Fla. 1982).

Imposing Lawyer Sanctions. The applicable aggravators, as set forth in The Florida Bar's trial memorandum, are: prior disciplinary offenses, dishonest or selfish motive, a pattern of misconduct, multiple offense, and substantial experience in the practice of law. Respondent established the following mitigating factors, through his own testimony and that of his witnesses: personal or emotional problems and character or reputation.

In the instant case, respondent knowingly filed a false pleading, causing the dismissal of his client's case. He deceived the court about the client's agreement with the pleading, and he deceived the client (who knew nothing about the dismissal and assumed that respondent was advancing his cause of action) about the status of his case. In furtherance of this intentional deceit and misrepresentation, respondent also failed to communicate with Lindale and never told him that he had caused the dismissal of Lindale's case, without Lindale's knowledge or approval.

In recommending a sanction in this case, I have carefully examined the case law and the Florida Standards for Imposing Lawyer Sanctions. Standard 4.42 states that suspension is appropriate when a lawyer knowingly fails to perform services for a client and causes injury or potential injury to a client.

Respondent's misconduct, in the instant case, caused *actual* injury to his client, Lindale, whose workers' compensation case was dismissed without his

knowledge or consent, via respondent's willful misrepresentation to him and to the tribunal. After respondent caused the dismissal of Lindales' case, Lindale was forced to hire successor counsel to try to undo the damage respondent had done. Respondent's gross misconduct also caused *actual* injury to the public and to the legal system — which must bear the costs (in time and resources) as well as the scars (in lost trust) of respondent's dishonest and incompetent practice of law.

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS:

Prior to recommending discipline, and pursuant to R. Regulating Fla. Bar 3-7.6(k)(1), I considered the following:

A. Personal History of Respondent:

Age: 65

Date admitted to The Florida Bar: October 25, 1974

B. Aggravating Factors: 9.22

(a) prior disciplinary offenses;

(b) dishonest or selfish motive;

(c) a pattern of misconduct;

(d) multiple offenses

(i) substantial experience in the practice of law.

Prior Discipline: in The Florida Bar File No. 1987-26,200, respondent received a private reprimand for advertising violations. In The

Florida Bar File No. 2000-50,249, Supreme Court Case No. SC96743, respondent received a 90-day suspension for misrepresentation.

C. Mitigating Factors: 9.32

(c) personal or emotional problems

(g) character or reputation

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

I find that The Florida Bar has incurred reasonable costs in the matter and that same should be assessed against the respondent, as follows:

A.	Grievance Committee Level Costs:	
1.	Court Reporter Costs	$ - 0 -
2.	Bar Counsel Travel Costs	$ - 0 -
B.	Referee Level Costs:	
1.	Court Reporter Costs	$6,521.37
2.	Bar Counsel Travel Costs	$ 102.60
C.	Administrative Costs	$1,250.00
D.	Auditor Costs	$ - 0 -
E.	Miscellaneous Costs:	
1.	Investigator Costs	$ 23.00
2.	Witness Fees	$ 25.00
3.	Copy Costs	$ 78.15
4.	Witness Travel Costs	$ 64.02
5.	Computer Search	$ 5.75
6.	Postage	$ 5.05
TOTAL COSTS		**$8,074.94**

It is recommended such costs be charged to respondent and interest at the statutory rate shall accrue. Should such cost judgment not be satisfied within 30 days of said judgment becoming final, I recommend that respondent be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6 (unless otherwise deferred by the Board of Governors of The Florida Bar).

Dated this _____ day of _____, 2007.

_____
HONORABLE PEGGY TRIBBETT GEHL
REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to THE HONORABLE THOMAS D. HALL, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927, and that copies were mailed by regular U.S. mail to the following: STAFF COUNSEL, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; and LORRAINE CHRISTINE HOFFMANN, Bar Counsel, The Florida Bar, 5900 North Andrews Avenue, Suite 900, Fort Lauderdale, Florida 33309-2366; and to KEVIN P. TYNAN, Counsel for Respondent, Richardson & Tynan, P.L.C., 8142 North University Drive, Tamarac, Florida 33321, on this _____ day of _____, 2007.

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PEGGY TRIBBETT GEHL, REFEREE

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