THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC11-2500

v.

TFB File No. 2010-01,113(1A)

EUGENE KEITH POLK,

Respondent.
_____/

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to R. Regulating Fla. Bar 3-7.6, the following proceedings occurred:

The First Judicial Circuit Grievance Committee "A" issued a Report of Minor Misconduct recommending that Respondent receive an Admonishment for Minor Misconduct as an appropriate discipline pursuant to R. Regulating Fla. Bar 3-5.l(b) and 3-7.4(m). The Minor Misconduct was rejected by Respondent on August 1, 2011, and therefore, was deemed a finding of probable cause. See R. Regulating Fla. Bar 3-5.1(b)(4). The Florida Bar filed its Complaint for Minor Misconduct and Request for

Admissions on December 28, 2011. Respondent filed an Answer to The Florida Bar's Complaint on February 17, 2012. On February 21, 2012, The Florida Bar filed a Motion for Summary Judgment because Respondent failed to timely file Answers to The Florida Bar's Request for Admissions. A telephonic case management conference was held on February 27, 2012, at which the Referee set The Florida Bar's Summary Judgment Motion on March 30, 2012, with the agreement of the parties. On March 30, 2012, Respondent made an *ore tenus* motion for a continuance via telephone that was granted in part and denied in part by the Referee, but Respondent, nevertheless, failed to appear at the summary judgment hearing. The Florida Bar's summary judgment motion was granted by the Referee on March 30, 2012. Respondent's counsel filed a Notice of Appearance on April 2, 2012. A final penalty hearing was held on May 31, 2012. The Referee directed that both parties file a proposed Report of Referee, with the Florida Bar's proposed Report due on June 15, 2012, and Respondent's report on June 25, 2012.

On June 28, 2012, Respondent filed a Motion to Supplement the Record, and on June 29, 2012, a Motion to Accept Respondent's Proposed Report Out of Time. On July 2, 2012, The Florida Bar replied to Respondent's two motions and submitted a Motion to Strike Part III and IV

of Respondent's Proposed Report of Referee. Respondent filed his Proposed Report of Referee and Supplemental Motion to Supplement the Record on or about July 5, 2012. The Referee denied Respondent's Motion to Supplement the Record and Supplemental Motion to Supplement the Record on July 16, 2012. On August 7, 2012, a motion hearing was scheduled at which the Referee granted Respondent's Motion to Accept Respondent's Proposed Report of Referee Out of Time, and denied The Florida Bar's Motion to Strike Part III and IV of Respondent's Proposed Report of Referee with the proviso that he would consider Respondent's argument in Part III and IV solely as it related to the issue of mitigation of the disciplinary sanction.

All of the aforementioned pleadings, responses thereto, transcripts, affidavits, exhibits in evidence, and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FACTUAL FINDINGS:

A. Jurisdictional Statement. Respondent is, and at all times was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida and the Rules Regulating the Florida Bar.

B. Narrative Summary Of Case. I would make the following findings of fact:

1. On or about June 20, 2007, Respondent was appointed to represent Dennis Simmons ("Simmons") at an evidentiary hearing relating to Simmons' 3.850 post-conviction relief motion, which Simmons had filed pro se.

2. On November 2, 2007, Respondent met with Simmons for the first time at Century Correctional Institution.

3. During that meeting, Respondent informed Simmons that he was unable to obtain certain essential documents needed for Simmons' post-conviction relief hearing.

4. Simmons provided Respondent with copies of 3 mental health reports, his personal notes and the trial transcripts, with the understanding that Respondent would have them copied and would return Simmons' original documents to him.

5. On November 21, 2008, Respondent represented Simmons at the evidentiary hearing on his post-conviction relief motion. At that hearing, after discovery of a victim's statement that neither Simmons nor Respondent had seen, the judge granted Respondent a continuance so that he could review the State Attorney's file and provide any additional documents that he wished the court to consider.

6. At the evidentiary hearing on July 20, 2009, Respondent presented only 2 of the mental health reports to the court. After the evidentiary hearing, when Simmons complained that the third mental health report should have been presented, Respondent told Simmons to get another copy of the report. Simmons requested the third mental health report but received it too late to submit to the court before the September 16, 2009, deadline.

7. Simmons claimed that the 3 mental health reports were initially provided to Respondent in November 2007, but only 2 were submitted to the court because Respondent lost the third report.

8. On September 16, 2009, Respondent presented a written argument to the court requesting a new trial for Simmons, but presented no additional documents.

9. On November 17, 2009, the court issued an order denying post-conviction relief to Simmons. The Referee notes that the area of post-conviction relief 3.850 practice is often malleable. The decision by the Respondent regarding whether or not to submit the third mental health evaluation to the Court in the 3.850 hearing does not form a basis for discipline in this matter. However, the other actions, or inactions, by the Respondent in representing the client demand discipline in this cause.

10. Beginning shortly after their initial meeting in November 2007, Simmons began writing to Respondent, requesting that the trial transcripts, his notes and the mental health reports be returned as previously agreed. Despite numerous letters to Respondent from Simmons, Respondent did not communicate with his client for almost 2 years, and no documents were returned by Respondent to Simmons during this time period.

11. On November 23, 2009, Simmons advised Respondent that he needed his trial transcripts in order to file an appeal of the denial of the post-conviction relief motion. In a letter dated February 22, 2010, to Simmons, Respondent promised to return his client's documents, but failed to do so.

12. It was not until September 22, 2010, after Simmons had filed a complaint with The Florida Bar and it was referred to the grievance committee, that Respondent provided Simmons with copies of two of his mental health reports, claiming that there was no third report.

13. In December 2010, after the grievance committee found probable cause, Respondent sent Simmons copies of his motion hearing transcripts in December 2010, but did not return the trial transcripts that Simmons had requested.

14. Respondent admitted that he should have returned Simmons' documents earlier but he believed, albeit erroneously, that the trial

transcripts were the property of the public defender's office and that he did not need to provide copies of trial transcripts until Simmons sent him payment for the copies.

15. It was not until approximately April 1, 2011, after Bar counsel had repeatedly contacted Respondent, that he finally provided the trial transcripts to Simmons.

16. Respondent failed to diligently represent Simmons on his post-conviction relief motion.

17. Respondent failed to promptly and adequately communicate with his client despite numerous requests from Simmons for his original documents.

18. Respondent failed to protect his client's interests by failing to return Simmons' original documents to him when requested to do so.

19. Respondent failed to respond in writing to The Florida Bar's inquiry letter dated June 25, 2010, despite the granting of an extension of time to respond until July 23, 2010. Respondent did eventually file a response on September 22, 2010, after being contacted in writing by Bar counsel, and after his case had been referred to the grievance committee on September 2, 2010.

III. RECOMMENDATIONS AS TO GUILT

It is recommended that Respondent be found guilty of violating the following Rules Regulating the Florida Bar, to wit: 4-1.3 (Diligence); 4-1.4(Communication); 4-1.16(d) (Protect Client's Interests) and 4-8.4(g) (Failure to Respond in Writing to The Florida Bar).

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

Based on the foregoing findings, I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined as follows:

A. The imposition of a 10-day suspension pursuant to Rule 3-5.1(e) and three years probation. The terms of the probation are as follows:

(1) Within 30 days of the date of the issuance of the Supreme Court's Final Order in this case, Respondent shall contact Florida Lawyers Assistance, Inc. ("FLA") and shall schedule a substance abuse evaluation. Within 60 days of the date of the issuance of the Supreme Court's Final Order in this case, Respondent will provide The Florida Bar's headquarters office of Lawyer Regulation with proof that Respondent has scheduled an evaluation.

(2) Respondent shall participate in an evaluation for substance abuse conducted by an FLA-approved substance abuse evaluator, and do

whatever FLA recommends. If FLA recommends that Respondent enter into an FLA contract, he will do so for the period of time recommended by FLA.

(3) Respondent will also enter into a contract with FLA that will include supervision and continuation of his psychotherapy treatment plan with Dr. James Larson or any other licensed, certified psychotherapist amenable to FLA and The Florida Bar. Respondent will continue the treatment plan recommended by Dr. Larson or any substitute psychotherapist for the period of time recommended by Dr. Larson or any substitute psychotherapist. Respondent will be responsible to insure that Dr. Larson or any other psychotherapist submits quarterly reports to The Florida Bar's headquarters office of Lawyer Regulation, including the dates of meeting with the doctor during that quarter, and whether Respondent has the continuing ability to practice law.

(4) If a contract for substance abuse issues is needed, then Respondent will enter into a dual diagnosis contract with FLA to cover both the substance abuse and psychological issues for the period of time recommended by FLA or his treating doctor. If Respondent successfully completes all the terms of his FLA contract, he may seek early termination of his probation.

(5) Respondent will be responsible to pay all fees associated with

any FLA contract noted above, including a FLA registration fee of $250 and a probation monitoring fee of $100 a month to The Florida Bar's headquarters office of Lawyer Regulation. All monthly monitoring fees must be remitted no later than the end of each respective month in which the monitoring fee is due. All fees must be paid to The Florida Bar's headquarters office of Lawyer Regulation in Tallahassee. Failure to pay shall be deemed cause to revoke probation.

In making this recommendation of a disciplinary sanction, I have considered the testimony of Respondent and Dr. Larson at the final penalty hearing, Respondent's stipulation to an FLA evaluation by an FLA approved evaluator, the Florida Lawyer Standards for Imposing Lawyer Sanctions (Standards 4.42, 4.52, 7.2), the aggravating and mitigating factors presented by both parties, and the applicable case law. In The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970) and its progeny, I considered the three purposes of imposing a disciplinary sanction. I also noted that for one violation of Rule 4-8.4(g), the Court imposed a 10-day suspension in The Florida Bar v. Grosso, 647 So.2d 840(Fla. 1994). The Court also imposed a 30-day suspension in The Florida Bar v. Jordan, 682 So.2d 547(Fla. 1996), and in The Florida Bar v. Maier, 784 So.2d 411(Fla. 2001), a 60-day suspension for violation of similar rules, namely, Rules 4-1.3, 4-1.4 and

4-8.4(g).

Among the aggravating factors presented by The Florida Bar at the final penalty hearing was Standard 9.22(f), misrepresentation during the disciplinary process, that I considered as grounds for an enhanced discipline. See TFB Exhibit 1. I find that Respondent misrepresented to the Referee and Bar counsel on the date of the summary judgment hearing, March 30, 2012, that he had just learned one week earlier about a molestation incident involving his minor daughter, and had learned of the seriousness of the offense the night of March 29, 2012. He represented that he needed to pick up his daughter at school that afternoon and take her to the doctor. He represented these facts to the Referee and Bar counsel only hours before the scheduled summary judgment hearing as grounds for an *ore tenus* motion for a continuance of the hearing. The Referee agreed to postpone the hearing for an hour and allowed Respondent to appear via telephone. See The Florida Bar v. Oxner, 431 So.2d 983(Fla. 1983)(During a telephone conversation, the attorney lied to the trial judge in order to get a continuance, and then again later in court, warranting a 60-day suspension.).

The Offense Report submitted as TFB Exhibit 1 shows, however, that Respondent met with the school authorities and the police about the

incident on March 2, 2012. It also shows that the defendant was arrested on March 14, 2012, several weeks before the summary judgment hearing for a felony Lewd and Lascivious Act Upon a Child. Therefore, at the time, Respondent represented to the Referee and Bar counsel that he was not aware of the incident until one week before the hearing or the seriousness of the incident until the night before the hearing, he knew, or should have known, about the offense that took place on February 28, 2012, his meeting with the authorities on March 2, 2012, and the arrest of the defendant on March 14, 2012. Contrary to his prior statements to the Referee and Bar counsel, Respondent also testified at the hearing that he was in a parking garage at the time of the hearing but fell asleep in his car. See T-31.

In one case where an attorney gave false testimony during the disciplinary proceedings to the Referee, The Florida Bar v. Fortunato, 788 So.2d 201(Fla. 2001), the attorney was disciplined for failure to reply to 2 appellate orders. More importantly, in that case, the Referee found only one prior offense and despite the numerous mitigating factors, including good character and reputation, remorse and assurances to avoid further disciplinary proceedings, lack of dishonesty or selfish motive, and having personal or emotional problems at time of misconduct, the Court imposed a 90-day suspension.

One of the cases the Court relied on in Fortunato, was The Florida Bar v. Arango, 720 So.2d 248(Fla. 1998) in which the attorney was found guilty of one rule violation, Rule 4-1.3, and of submission of false or fabricated evidence during the disciplinary process by a member of his staff . Although the referee held that there was potential and slight actual harm to the client, the Court held that a 30-day suspension was warranted.

Under the Florida Lawyer Standards for Imposing Lawyer Sanctions, I considered the definitions of "Injury", "Knowledge," "Intent" and "Potential Injury." I find that the Standards only require that Respondent "knowingly", not intentionally engage in a violation of the Rules. The "injury" may be potential or actual harm not only to the client but to the public and the legal system. See Standard 7.2. Here, Respondent was found in violation of four ethical rules relating to client neglect and failure to respond to The Florida Bar. Therefore, whether Respondent's conduct was intentional or not is irrelevant.

There is no element of intent necessary to be in violation of Rules 4-1.4, 4-1.16(d) or 4-8.4(g). Pursuant to Standard 4.42(b) suspension is appropriate for lack of diligence where the lawyer engages in a pattern of neglect which causes injury or potential injury to the client. Otherwise, the Standards require "knowingly" in order to impose a suspension. In cases

where the issue of intent has been raised in disciplinary proceedings relating to Rule 4-8.4(c), the Court has held that ". . . in order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing." The Florida Bar v. Fredericks,731 So.2d 1249(Fla. 1999); see also, The Florida Bar v. Shankman, 41 So.3d 166, 173(Fla. 2010).

B. Respondent shall pay The Florida Bar's taxable costs in the amount of $4,069.68 in these proceedings.

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

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1), I considered the following personal history of Respondent, to wit:

A. Personal History of Respondent
Age: 51
Date admitted to the Bar: April 21, 1994

B. Prior Discipline: None

C. Under Florida Standard 9.22, I considered the following aggravating factors:

(c) pattern of misconduct--Respondent's conduct took place over a period of years. Respondent was appointed as Mr. Simmons' counsel in June 2007 but did not meet with him until November 2007. In that month, Mr. Simmons gave Respondent his original documents with the understanding that Respondent would copy and return them. Despite numerous requests for the return of his documents, Respondent did not return them until April 2011 when he finally provided the trial transcripts to his client. Mr. Simmons wrote 10 letters to Respondent over 2 years asking Respondent to communicate with him and return his documents.

Respondent failed to respond to his client for 2 years. Respondent was first contacted by The Florida Bar to respond to Mr. Simmons' complaint in June 2010. Despite an extension of time in July 2010, Respondent failed to respond to The Florida Bar until after the complaint was referred to the grievance committee and Bar counsel had tried to contact him in September 2010. Bar counsel had to repeatedly contact Respondent from November 2010 through the end of March 2011 to insure that Mr. Simmons received the trial transcripts.

(d) multiple offenses- Respondent has been found in violation of 4 ethical rules.

(f) misrepresentation during the course of the disciplinary proceedings--On the date of the summary judgment hearing, March 30, 2012, Respondent made an *ore tenus* motion for a continuance. The grounds for the motion were that he had to pick up his daughter and take her to the doctor because he had just learned the night before of the seriousness of the molestation. When asked directly by the Referee when he was first aware of this incident, Respondent misrepresented that he learned of the incident the week before the hearing. The offense report presented by The Florida Bar at the final penalty hearing shows that Respondent was aware of the incident as of March 2, 2012, many weeks before the scheduled summary judgment hearing.

(i) substantial experience in practice of law—Respondent was admitted to the Florida Bar on April 21, 1994.

D. Under Standard 9.32, I considered the following mitigating factors:

(a) no prior disciplinary offenses

(b) absence of dishonest or selfish motive

(c) personal or emotional problems-I considered the testimony of Respondent and his psychotherapist, Dr. James Larson, regarding Respondent's personal and emotional problems, that the Respondent had achieved the rank of Colonel while in the United States Marines; that the Respondent had just returned from active duty in the marines 3 months before being assigned to this case, that at the time of the representation of

the client soon after returning from active duty the Respondent was suffering from nightmares, depression, and loss of sleep; that the Respondent did not seek treatment for these symptoms until recently (4 years later) when he began treatment with Dr. James Larson.

(h) physical or mental disability or impairment—I considered the testimony of Respondent and his psychotherapist, Dr. James Larson, regarding Respondent's physical and mental problems. (As noted above).

(j) interim rehabilitation—Dr. James Larson, Respondent's psychotherapist, testified that he had been treating Respondent for approximately 5 months before the penalty hearing.

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

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Costs, pursuant to R. Regulating Fla. Bar 3-7.6(q)(1)(I)	$ 1,250.00
Court Reporter Fees	1,176.29
Investigative Costs and Expenses	597.41
Referee Travel Expenses	154.29
Witness Expenses	375.00
Bar Counsel Travel Expenses	516.69
TOTAL	**$ 4,069.68**

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and that should such cost judgment not be satisfied within thirty days of said judgment becoming final, Respondent shall 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 _____, 2012.

_____
TIMOTHY J. McFARLAND
REFEREE
Gulf County Courthouse
1000 Cecil G. Costin Sr. Blvd.
Port St. Joe, Florida 32456

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 S. Duval Street, Tallahassee, Florida 32399-1927, and that copies were furnished by regular U.S. Mail to KENNETH LAWRENCE MARVIN, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; OLIVIA PAIVA KLEIN, Bar Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and Respondent's Counsel, THOMAS F. McGUIRE, III, at his record Bar address of 3145 Baylen Street, Suite 112, Pensacola, Florida 32502, on this _____ day of _____, 2012.

_____
JUDGE TIMOTHY J. McFARLAND
REFEREE