IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

DEREK VASHON JAMES,

Respondent.

/

Supreme Court Case
No. SC20-128

The Florida Bar File
No. 2019-30,075(9B)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On January 28, 2020, The Florida Bar filed its Complaint against respondent in these proceedings. On September 9, 2020, a final hearing was held in this matter. On September 17, 2020, a sanction hearing was held. The bar introduced 22 exhibits and called two witnesses, attorney Toni Villaverde and respondent. Respondent introduced 16 exhibits, testified on his own behalf and called two additional witnesses, Frank Johnson and Dave Mallen. All items properly filed

including pleadings, recorded testimony (if transcribed), exhibits in evidence and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

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.

Narrative Summary of Case. The facts are not in dispute. Respondent represented an employer/carrier in the underlying worker's compensation case. On July 31, 2018, Ms. Gray (the adjuster), who worked for or with the employer/carrier, was deposed via telephone in the worker's compensation matter (TFB Ex. 15). Ms. Gray, Ms. Villaverde (claimant's counsel), and respondent attended the deposition via telephone from three different locations. Because the deposition was not conducted by video, the court reporter refused to swear Ms. Gray in as a witness and the deposition testimony of Ms. Gray was unsworn. These circumstances also resulted in the absence of an agreement by Ms. Villaverde as to the witness's identity until the final stages of the examination on July 31, 2018.

The Respondent testified at the hearing that because the witness was unsworn, and because Ms. Villaverde did not agree to the witness's identity throughout the large majority of the deposition, the Respondent believed that the

July 31, 2018 proceedings would need to be redone or the witness would need to testify at trial. The transcript of the July 31, 2018 proceedings show that Attorney Villaverde objected to Respondent's characterization of the witness's answers as 'testimony' given the statements were unsworn. As such, Respondent testified at the hearing that under these specific circumstances, and in the absence of any stipulation to admissibility of the witness's answers, he incorrectly believed that communicating with the witness while the deposition was in progress was not improper. The undisputed evidence shows that among the texts sent by Respondent to the witness was a communication at 11:45 AM informing the witness she would need to testify telephonically again at trial.

While the deposition was in progress and Ms. Gray was being questioned by Ms. Villaverde, respondent sent text messages to the witness regarding her testimony. Respondent's texts included coaching and specific directions on how to respond to Ms. Villaverde's questions. That said, no evidence was presented at the instant hearing or in the underlying worker's compensation litigation that any answer given by the witness on July 31, 2018 was untruthful. In fact, Attorney Villaverde was the initial moving party to offer the July 31, 2018 transcript into evidence in the underlying case without objection. The trial record of the proceedings shows the Judge of Compensation Claims also accepted the witness's answers as truthful.

During the deposition, and on the record, Ms. Villaverde said she could hear typing sounds and she asked respondent and the witness if they were engaging in texting during the deposition. Respondent denied this and stated he was only receiving a text from his daughter. Ms. Villaverde asked respondent to stop texting and put his phone away; respondent agreed (TFB Ex. 5, 22).

After a break, Ms. Villaverde resumed questioning Ms. Gray, at which time respondent inadvertently sent a series of text messages to Ms. Villaverde which were intended for Ms. Gray (TFB Ex. 4). Thereafter, Ms. Villaverde filed a motion for production and in-camera inspection of all the texts sent during the deposition.

The Respondent testified at the hearing that following the July 31, 2018 proceedings, he filed motion on August 6, 2019 asking the Judge of Compensation Claims to allow the witness to testify at the upcoming trial telephonically and strike the July 31, 2018 transcript. The Respondent also testified that he offered to agree to a second deposition of the witness. Respondent testified at the hearing that on September 4, 2018, the Judge of Compensation Claims granted that request, striking the July 31, 2018 transcript, with the deposition to be retaken, however this order was vacated on September 17, 2018.

On August 24, 2018, an order was entered by the court granting the motion for in-camera inspection and compelling Respondent to produce the texts sent and

received during Ms. Gray's deposition from 9:15 a.m. (the start of the deposition) to 12:00 p.m. (the conclusion of the deposition) (TFB Ex. 7). Respondent provided two (2) pages of text messages to the court.

In an order filed on September 28, 2018, after a hearing, the court found that text messages sent by respondent to Ms. Gray while the deposition was in progress were not protected by attorney-client privilege because they dealt with "testimonial matters and some of them constitute[d] witness coaching" (TFB Ex. 9; R Ex. 2).

On October 5, 2018, the court entered an order clarifying that respondent was required to produce all text messages sent or received during the deposition. Respondent had not produced any texts involving his daughter even though he had stated during the deposition the typing sounds Ms. Villaverde had heard involved text messages from his daughter (TFB Ex. 10; R Ex. 3).

Despite being ordered to do so by the court, respondent has never produced any texts other than the two pages of texts provided to the court even though respondent informed Ms. Villaverde at the deposition that the typing sounds she heard involved a text received from his daughter. Respondent testified at the instant hearing that he searched for the texts from his daughter, but was unable to retrieve the specific texts due to his own technological limitations. I also note that no evidence was presented that the Judge of Compensation Claims found

Respondent's inability to produce the texts from his daughter constituted a willful or wanton disregard of a judicial order.

I also note that after securing permission from his client to waive the attorney-client privilege, Respondent voluntarily produced text messages between himself and the witness beyond that which was required by the underling order of the Judge of Compensation Claims on October 26, 2018. Respondent testified that this was done in the spirit of full transparency so that the bar and the public would have full access to the subject text communications.

Respondent testified that unlike traditional civil litigation, worker's compensation proceedings are far more informal, with judges given flexibility in applying rules of procedure. Witnesses David Mallen and Frank Johnson, both of whom are career worker's compensation attorneys with nearly 30 years' experience, testified consistent with Respondent regarding the nature of worker's compensation proceedings. Both witnesses also testified to Respondent's long reputation of honesty and fairness within the worker's compensation bar community.

Respondent testified that he felt his client/witness was being mistreated, with Attorney Villaverde constantly talking over the witness's answers, or interrupting with speaking objections. Respondent also testified that this witness was deposed repeatedly in over a hundred cases with Attorney Villaverde. Because of this, he

felt the need to come to the aid of his client. The forgoing notwithstanding, I find that respondent's response that he was just responding to his daughter when in fact texts were being sent to the adjuster was misleading and a matter contrary to honesty.

The court, after considering the transcript and audio of the deposition and viewing the time stamps on the produced text messages, found that the text messages between 10:12 a.m. and 10:25 a.m. and between 11:53 a.m. and 11:56 a.m. on July 31, 2018, occurred during the deposition and not during a break in the questioning. During the questioning at the deposition by respondent, who asked questions of Ms. Gray first, the following text messages were sent/received by Ms. Gray and respondent (TFB Ex. 4):

> 10:12 a.m. (respondent): Your doing great she is just trying to rattle You with objections
>
> 10:12 a.m. (Ms. Gray): (emoji of face with tongue stuck out)
>
> 10:12 a.m. (respondent): So awkward asking you the questions first
>
> 10:13 a.m. (Ms. Gray): I know

After Ms. Villaverde began questioning Ms. Gray, the following text messages were sent/received between respondent and Ms. Gray (TFB Ex. 4):

> 10:19 a.m. (respondent): You don't

10:20 a.m. (respondent): As to settlement checks expiration

10:20 a.m. (respondent): You remember the deposition but not discussing checks

10:20 a.m. (respondent): yes

10:21 a.m. (respondent): Just review notes from 02/20/2018 forward

10:23 a.m. (respondent): Be careful just say

10:23 a.m. (respondent): You may not see today

10:25 a.m. (respondent): Take a break in 15 minutes?

10:25 a.m. (Ms. Gray): Up to you

I find that these specific texts starting at 10:19, where respondent was telling Ms. Gray how to answer, particularly the text in which respondent tells her that she remembers the deposition but not discussing the checks are contrary to honesty.

There was a break in the deposition from approximately 11:39 a.m. to 11:50 a.m. Ms. Villaverde resumed questioning Ms. Gray when the deposition continued at 11:51 a.m. (TFB Ex. 5, 22). While Ms. Villaverde was questioning Ms. Gray, respondent sent the following text messages to Ms. Villaverde, which were intended for Ms. Gray (TFB Ex. 4):

11:53 a.m. (respondent): Just say it anyway

11:53 a.m. (respondent): Just say 03/28

11:54 a.m. (respondent): In addition to the 03/28/2018 email containing the signed release I show . . .

11:55 a.m. (respondent): Don't give an absolute answer

11:55 a.m. (respondent): All I can see at this time but I cannot rule out existence

11:55 a.m. (respondent): It's a trap

11:56 a.m. (respondent): Then say that is my best answer at this time

Ms. Villaverde noticed on her cell phone that she was receiving the text messages from respondent and stopped the deposition. The parties conducted a second deposition of the witness on February 19, 2019, at which time Attorney Villaverde, who was then in possession of the text messages, was allowed to examine the basis of the witness's answers given on July 31, 2018 to determine whether the answers were accurate and whether the information in support of the answers existed independently of the text messages from the Respondent. I note that based on review of the September 11, 2019 trial proceedings transcript and resulting Final Compensation Order of October 17, 2019 the Judge of Compensation Claims did not find that the witness's answers given on July 31, 2018 were untruthful, incomplete, or misleading. I also note that Attorney Villaverde did not appear to challenge the accuracy of the witness's answers, going so far as to offer the July 31, 2018 transcript into evidence without objection at the beginning of the trial proceedings.

RECOMMENDATIONS AS TO GUILT.

I recommend that respondent be found guilty of violating the following Rules Regulating The Florida Bar: 3-4.3 Misconduct and Minor Misconduct. The standards of professional conduct to be observed by members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof. 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; and 4-3.4(a) Fairness to Opposing Party and Counsel. A lawyer must not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor counsel or assist another person to do any such act.

The text messages from respondent to the adjuster, the deponent, while she was being questioned by Ms. Villaverde, telling the deponent what to say, to avoid providing certain information, to remember the deposition but not discussing the checks, and to not to give an absolute answer are dishonest and a violation of both

Rule 3-4.3 and Rule 4-3.4(a) of the Rules Regulating The Florida Bar. Additionally, respondent misrepresented to Ms. Villaverde that he had concluded the text messaging when in fact he had not.

I recommend that respondent be found not guilty of violating the following Rules Regulating The Florida Bar: 4-3.4(b) Fairness to Opposing Party and Counsel. A lawyer must not fabricate evidence, counsel or assist a witness to testify falsely, or offer an inducement to a witness, except a lawyer may pay a witness reasonable expenses incurred by the witness in attending or testifying at proceedings; a reasonable, noncontingent fee for professional services of an expert witness; and reasonable compensation to a witness for time spent preparing for, attending, or testifying at proceedings; 4-3.4(d) Fairness to Opposing Party and Counsel. A lawyer must not, in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party; 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, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

III. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards appropriate prior to recommending discipline:

7.0 Violations of Other Duties Owed as a Professional

7.2 Suspension. Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

While I find no actual injury existed, there was potential injury caused by the texts instructing the witness to remember the prior deposition but not the checks. Furthermore, respondent was texting the deponent and concealed this fact by telling opposing counsel, when she heard texting noises, that he was just texting his daughter. When asked to stop texting during the deposition, respondent stated he would do so but, in actuality, he continued to do so.

3.2(b) Aggravating Factors:

(2) Dishonest or selfish motive (respondent concealed his texting to the deponent by stating he was just texting his daughter and, despite stating he would stop texting during the deposition, he did not);

(7) Refusal to acknowledge wrongful nature of conduct (while respondent, at the final hearing, stated he realized that what he did was wrong, I

did not see any acknowledgement of that wrongful behavior until the sanction hearing); and

(9) substantial experience in the practice of law (respondent has been practicing for 20 years).

3.3(b) Mitigating Factors:

(1) Absence of a prior disciplinary record;

(5) Full and free disclosure to the bar or cooperative attitude toward the proceedings (respondent has been nothing but cooperative and provided all the information to the bar); and

(7) Character or reputation (two witnesses testified as to respondent's competence when advocating for his clients and his truthfulness and honesty and this case may be an isolated instance.).

IV. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Bar v. Carswell, 624 So. 2d 259 (Fla. 1993) – The Supreme Court of Florida held that tampering with witnesses by inducing the witness to lie to law enforcement officers in connection with an investigation regarding voter registration violations warranted a 180-day suspension from practice of law. Carswell, who was running for judicial office, pled nolo contendere to the

misdemeanor charge of tampering with a witness. The court withheld adjudication of guilt and did not order probation or community control.

The Florida Bar v. Wohl, 842 So. 2d 811 (Fla. 2003) – Wohl's participation in formulating and negotiating an agreement offering a financial inducement to a witness warranted a ninety-day suspension from the practice of law, and not merely an admonishment for minor misconduct and probation. The agreement specified that the witness would assist the client in identifying and recovering assets and damages. The witness was to be compensated for what she had witnessed up to $1 million, depending on usefulness of information the witness provided.

The Florida Bar v. Forrester, 818 So. 2d 477 (Fla. 2002) - Forrester was suspended for sixty days, followed by one year of probation, for concealing a document during a deposition and making an intentional misrepresentation to opposing counsel regarding the document's whereabouts. She had a prior discipline history.

The Florida Bar v. Berthiaume, 78 So. 3d 503 (Fla. 2011) - Berthiaume was suspended for ninety-one days for engaging in conduct involving fraud, deceit, or misrepresentation, and conduct prejudicial to the administration of justice by abusing the subpoena power of the court for her personal investigation by serving, without legal authority, a fraudulent subpoena on a bank to produce financial

records of the client. The Court rejected the referee's recommendation of a ten-day suspension and found that Berthiaume abused the subpoena power by using it to conduct her own personal investigation into someone's private finances. Berthiaume sought to deceive the bank so it would provide her with the financial records of her client at a time when Berthiaume had no authority to seek this confidential information.

The Florida Bar v. Miller, 863 So. 2d 231 (Fla. 2003) - Miller was suspended for one year for deliberately concealing that he was aware of the existence of the EEOC's first notice of the client's right to sue. Miller filed affidavits to that effect and permitted witnesses to testify in a way that created an impression that neither Miller nor the client had received the first notice. The referee found that Miller violated Rules 4-3.3(a)(1), 4-3.4(a), and 4-8.4(c). Miller had no prior discipline and had been sanctioned by the federal court based on the same conduct.

The Florida Bar v. Burkich-Burell, 659 So. 2d 1082 (Fla. 1995) – Burkich-Burell was suspended for thirty days for failing to provide opposing counsel with correct information or to disclose material facts. The charges resulted from Burkich-Burell's representation of her husband, William Burrell, in a lawsuit to recover damages for injuries he sustained in a 1989 automobile accident. After submitting answers to interrogatories with inaccurate information, Burrell was

deposed with Burkich-Burell in attendance. Burrell was asked about prior accidents resulting in neck injuries and Burrell answered that he did not recall. Opposing counsel did not learn of the prior neck injuries until he was able to track down the information through Burrell's medical records. Burkich-Burell failed to disclose material facts to opposing counsel despite having first-hand knowledge that contradicted the responses supplied to counsel in the answers to the interrogatories. Burkich-Burell never amended the answers to the interrogatories.

The Florida Bar v. Lopez, 406 So. 2d 1100 (Fla. 1981) – The Supreme Court held that urging parties and/or witnesses to testify under oath to matters which an attorney knows, or should know, that witnesses do not believe, and which are false, warrants a one-year suspension.

The Florida Bar v. Nicnick, 963 So. 2d 219 (Fla. 2007) – The Supreme Court of Florida held that a 91-day suspension from the practice of law was warranted for failing to disclose to the opposing counsel a child support settlement agreement before and after presenting it to opposing counsel's client, especially in light of the fact that Nicnick had been suspended before and had substantial experience in the practice of law.

The Florida Bar v. Cocalis, 959 So. 2d 163 (Fla. 2007) – Public reprimand and participation in bar's practice and professionalism program was the appropriate sanction for Cocalis' misconduct of telephoning an adverse party's treating

physician and failing to advise the opposing counsel that he had inadvertently received an adverse party's medical records prior to trial. Cocalis had no previous disciplinary record, cooperated with the bar throughout the proceedings, and recognized the impropriety of his conduct.

The Florida Bar v. Draughon, 94 So. 3d 566, 571 (Fla. 2012), Draughon was suspended for one year for defrauding the former property owner in a real estate transaction. Draughon transferred without consideration real property to himself, leaving purchaser, an organization in which he was the sole shareholder, without sufficient assets to satisfy its obligations to vendor.

I find that in each of the cases recommending a 90-day or 91-day suspension, the conduct was more egregious than in the instant case. Respondent assisted the witness with dates that were already given. However, I find respondent was dishonest by secretly coaching the witness as to what to say and by lying to opposing counsel about his texting.

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that respondent be found guilty of misconduct justifying disciplinary measures, and that given the aggravation and mitigation, the applicability of standard 7.2, and the potential injury to the legal system, he be disciplined by:

A. A 30-day suspension.

B. Respondent will eliminate all indicia of respondent's status as an attorney on social media, telephone listings, stationery, checks, business cards office signs or any other indicia of respondent's status as an attorney, whatsoever. Respondent will no longer hold himself out as a licensed attorney.

C. Payment of The Florida Bar's costs in these proceedings.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following:

Personal History of Respondent:

Age: 47

Date admitted to the Bar: September 12, 2000

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

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

Investigative Costs	$156.80
Administrative Fee	$1,250.00
Court Reporters' Fees	$1,445.00
TOTAL	$2,851.80

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the

judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 1st day of October, 2020.

GERALD P. HILL II
Referee

Original To:

Clerk of the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399.

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