

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

Supreme Court Case
No. SC21-1211

v.

The Florida Bar File
No. 2020-30,560 (9D)

JAMES F. FEUERSTEIN III,
Respondent.

_____ /

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 August 20, 2021, The Florida Bar filed its Complaint against respondent in these proceedings. Respondent failed to file an Answer to the bar's Complaint, and a default was granted finding respondent guilty of violating the Rules Regulating The Florida Bar as alleged in the Complaint. Respondent also failed to respond to the bar's discovery and Requests for Admission, and those matters set forth in the bar's Requests for Admission were deemed admitted by this referee.

During the course of this proceeding, respondent was not

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represented by counsel. The Florida Bar was represented by Ashley Taylor Morrison, Esq.

On January 13, 2022, a sanction hearing was held in this matter. Although a default was entered, the bar presented supporting evidence to show that respondent violated the rules alleged in its Complaint. The Florida Bar entered Exhibits 1 - 3 into evidence and presented testimony from Mr. Michael Jensen at the sanction hearing. Respondent failed to appear for the sanction hearing and therefore did not call any witnesses or introduce any evidence or exhibits.

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.

1. In or around August 2017, Mr. Jensen hired respondent to represent him in a civil action, Jensen v. Hamid, Case No. 2017-CA-001701, in the Circuit Court of the Fifth Judicial Circuit in and for Lake

County, Florida.

2. Thereafter, respondent failed to inform Mr. Jensen of a case management conference scheduled in the matter for September 18, 2019.

3. Respondent and Mr. Jensen failed to appear for the case management conference.

4. Due to respondent and Mr. Jensen failing to appear at the case management conference, the court entered an order on September 18, 2019 dismissing the case.

5. Respondent notified Mr. Jensen of his failure to appear at the case management conference, however, respondent failed to further communicate with Mr. Jensen regarding his case.

6. Respondent filed a motion to set aside the dismissal on September 27, 2019.

7. Mr. Jensen filed a motion with the court on December 5, 2019 requesting to proceed pro se. Mr. Jensen's motion to the court also alleged that respondent failed to communicate with him since September 19, 2019.

8. The court did not rule on respondent's motion to set aside the dismissal or on Mr. Jensen's request to proceed pro se.

9. Respondent failed to schedule his motion to set aside the dismissal for hearing. Respondent also remained counsel of record on Mr.

Jensen's case contrary to the wishes of Mr. Jensen.

10. Though respondent remained counsel of record, respondent failed to communicate with Mr. Jensen or respond to Mr. Jensen's repeated requests for information regarding his case.

11. On or about February 9, 2020, Mr. Jensen filed a complaint with The Florida Bar alleging respondent's misconduct.

12. In his response to the bar, respondent stated that he joined a new law firm in April 2018. Respondent stated that the computer which contained his former firm's client files was damaged in July 2019, and he was unable to access them.

13. Respondent further stated that during this time period he was unable to access emails associated with his former law firm which were linked to his Florida E-filing portal account. As a result, respondent stated that he missed the Notice of Case Management Conference for the September 18, 2019 hearing.

14. Respondent stated that his failure to appear at the case management conference was unintentional.

III. RECOMMENDATIONS AS TO GUILT.

I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: 4-1.3 Diligence. A lawyer shall

act with reasonable diligence and promptness in representing a client; 4-

1.4(a) Communication: Informing Client of Status of Representation. A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law; 4-1.4(b) Communication: Duty to Explain Matters to Client. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation; and 4-3.2 Expediting Litigation. A lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered Florida's Standards for Imposing Lawyer Sanctions (Florida's Standards) prior to recommending discipline.

Florida's Standards indicate that the following general factors should

be considered in imposing sanctions:

- a) duties violated;
- b) the lawyer's mental state;
- c) the potential or actual injury caused by the lawyer's misconduct;
- d) the existence of aggravating or mitigating factors.

I find that respondent violated the following duties (with appropriate sanctions), which are set forth in Florida's Standards:

4.4 Lack of Diligence

(b) Suspension is appropriate when a lawyer causes injury or potential injury to a client and: (1) knowingly fails to perform services for a client; or (2) engages in a pattern of neglect with respect to client matters.

Considering respondent's mental state as suggested by Florida's Standards, I find no competent evidence demonstrating that respondent's mental faculties were impaired during the course of these proceedings. Respondent was given ample opportunities to participate in these proceedings but failed to do so. Respondent, after being afforded notice, failed to appear for all hearings before this referee. Based on the foregoing, I conclude that respondent's lack of participation in these proceedings was both knowing and willful. With regard to respondent's misconduct, although I find certain mitigating factors to apply which also

concern respondent's mental state, I find that these mitigators do not excuse respondent's misconduct. Despite the presence of these mitigators, I find that at all times respondent acted with the requisite intent in committing the misconduct.

Considering the injury factor as suggested by Florida's Standards, I find that there is significant actual injury in this matter. The evidence presented established that Mr. Jensen hired respondent to represent him in a civil matter and paid him a fee for legal services. As the civil case progressed, respondent's lapses in communication with Mr. Jensen became more pronounced. Respondent failed to advise Mr. Jensen of a case management hearing in the case and failed to appear at the case management hearing resulting in the trial court's dismissal of the case. Although respondent notified Mr. Jensen that respondent missed the case management hearing, respondent failed to further communicate with Mr. Jensen. Respondent also failed to advise Mr. Jensen of the dismissal and its consequences. Respondent filed a motion requesting that the court set aside the dismissal, but thereafter abandoned Mr. Jensen's case. As a result of respondent's conduct, Mr. Jensen suffered a financial loss of the fee paid to respondent, and any potential monetary award in the litigation. Respondent's failure to withdraw from the case as counsel of record also

made it very difficult for Mr. Jensen to move forward on the case and find new representation. Though Mr. Jensen sought out other counsel, he was ultimately unsuccessful in hiring a new attorney. Furthermore, respondent's conduct resulted in actual prejudice to Mr. Jensen due to the ultimate dismissal of the case. Respondent's delays and failure to protect his client's interests, denied Mr. Jensen any meaningful opportunity of reviving his cause of action due to the operation of the Statute of Limitations.

3.2(b) Aggravating Factors:

(9) substantial experience in the practice of law (respondent has been a member of The Florida Bar since October 7, 1987).

3.3(b) Mitigating Factors:

- (1) absence of a prior disciplinary record;
- (2) absence of a dishonest or selfish motive;
- (3) personal or emotional problems;
- (8) physical or mental disability or impairment or substance related disorder.

Respondent was not present at the sanction hearing to provide mitigation on his own behalf; however, the bar presented evidence and made the referee aware of the above mitigating factors. Respondent has no prior discipline history and though respondent engaged in significant

misconduct, he did not display any dishonest or selfish motive for the misconduct. Respondent acknowledged to Mr. Jensen and to the bar that he suffered from depression stemming from the closure of his law practice. The bar also advised this referee that respondent was referred to Florida Lawyers Assistance, Inc. (FLA., Inc.), he has signed a contract with FLA., Inc. and he is actively participating in the program. However, although I find mitigating factors under Standard 3.3(b)(1), 3.3(b)(2), 3.3(b)(3), and 3.3(b)(8) to apply in this matter and have given them consideration, I find that the presence of these mitigating factors is outweighed and diminished by the aggravating factor.

V. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Bar v. McNeeley, 171 So.3d 123 (Fla. May 8, 2015)

(Table Citation), an attorney was suspended for 91 days for failing to diligently represent a client and for failing to comply with the trial court's directives. McNeeley ignored the court's inquiries and then failed to appear at the show cause hearing. He sent an apology letter to the trial judge, who reported the matter to the bar. McNeeley failed to participate in the disciplinary proceedings after his initial response. He had no prior discipline.

The Florida Bar v. Blake, 173 So. 3d 966 (Fla. July 16, 2015) (Table Citation), an attorney was suspended for 91 days and ordered to pay restitution to his client in the amount of \$1,500.00. Blake collected a fee in a criminal matter but failed to perform any work on behalf of the client. He withdrew from the representation citing health issues and then failed to respond to the bar's inquiries, despite informing the bar's investigator that he would contact bar counsel. Blake failed to answer the bar's formal complaint and subsequently failed to appear for the sanction hearing. He was experiencing health problems and had no prior disciplinary history.

The Florida Bar v. Aquafresca, 2016 WL 6138003 (Fla. Oct. 20, 2016) (Unpublished Disposition), an attorney received a 91-day suspension. Aquafresca seriously neglected two separate client matters, failed to respond to the bar's inquiries, and then failed to appear at the sanction hearing following entry of a default. She was already suspended pursuant to a contempt proceeding.

The Florida Bar v. Beck, 2021 WL 4118115 (Fla. Sept. 9, 2021) (Unpublished Disposition), pursuant to a consent judgment, an attorney was suspended for one year. Beck seriously neglected two separate client matters, failed to appear in court, and closed his law practice without proper notice to his clients. Beck also failed to timely respond to the bar's

inquiries. He presented significant mitigation, including personal and health problems. Beck was previously disciplined for failing to timely respond to the bar's inquiries in this matter.

Florida Bar v. Jones, 543 So. 2d 751 (Fla. 1989), an attorney received a rehabilitative suspension of 91 days. Jones neglected a single client matter and failed to participate in the disciplinary process. The referee noted Jones' "total lack of cooperation" with the Bar and his "callous disregard" for the Bar proceedings. Jones failed to appear at the grievance committee hearing or the final hearing before the referee.

I find that The Florida Bar's recommended sanction of a 91-day suspension is the only appropriate sanction which satisfies the purposes of attorney discipline as set forth by the Supreme Court of Florida in The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1972): attorney discipline must protect the public from unethical conduct, it must also be fair to respondents and deter others from engaging in similar misconduct.

Furthermore, I have considered respondent's willful lack of participation in these disciplinary proceedings to be an indicator that he is currently unfit to practice law. The imposition of a 91-day suspension from the practice of law would protect the public as it would require respondent to prove rehabilitation prior to reinstatement.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. A ninety-one-day suspension from the practice of law requiring proof of rehabilitation.

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

During the period of suspension, respondent will eliminate all indicia of respondent's status as an attorney on email, social media, telephone listings, stationery, checks, business cards office signs or any other indicia of respondent's status as an attorney, whatsoever.

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: 61

Date admitted to the bar: October 7, 1987

Prior Discipline: None

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

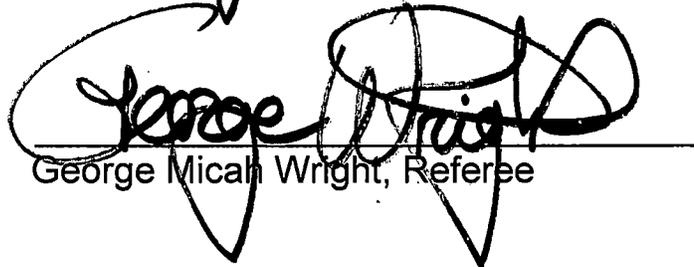
I find the following costs were reasonably incurred by The Florida

Bar:

Investigative Costs	\$313.60
Court Reporters' Costs	\$712.25
Administrative Fee	\$1,250.00
TOTAL	\$2,275.85

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 31st day of January, 2022.



George Micah Wright, Referee

Original To:

Clerk of the Supreme Court of Florida; Supreme Court Building; 500 South Duval Street, Tallahassee, Florida, 32399-1927

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