IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

MARK E. A. BAKAY,

Respondent.

_____/

Supreme Court Case No. SC21-779

The Florida Bar File No. 2020-30,127 (7B)

The Florida Bar File No. 2021-30,562 (7B)

REPORT OF REFEREE ACCEPTING CONSENT JUDGMENT

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 May 25, 2021, The Florida Bar filed its Complaint against Respondent in these proceedings. In Florida Bar File No. 2021-30,562 (7B), respondent waived a probable cause finding by the grievance committee in the Conditional Guilty Plea for Consent Judgment for purposes of resolution of all pending matters. All of the aforementioned pleadings, responses thereto, exhibits received in evidence, and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

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 of Case.

1. In the SC21-779, The Florida Bar File No. 2020-30,127 (7B), while representing Terrell Williams-Bey in a landlord-tenant matter, respondent accompanied Mr. Williams-Bey to an automobile dealership on June 8, 2019, for the purpose of purchasing an automobile for I Care, LLC, a business owned by Mr. Williams-Bey. Respondent accompanied him to the dealership as both an attorney and a friend. Mr. Williams-Bey conveyed to respondent that he had a case with another attorney in which he had received settlement funds and was awaiting receipt of the settlement proceeds. This was also conveyed to the dealership representative. The dealership representative, Mr. Williams-Bey and respondent agreed that a check from respondent's law office operating account in the amount of the purchase price of the vehicle would be held by the dealership for at least one week until Mr. Williams-Bey received the settlement

proceeds and would then provide a personal check as a substitute. If the substitute check was not produced, then respondent's check could be cashed. Respondent did not intend for the check to be cashed and was only to be used as a placeholder. On June 24, 2019, after no funds were received from Mr. Williams-Bey, the dealership presented respondent's operating account check to the bank which was not honored due to insufficient funds. The dealership later learned that the automobile subsequently was sold to CarMax by I Care, LLC. The dealership did not receive any funds from this transaction. Respondent had no knowledge of the sale of the automobile to CarMax. Thereafter, the dealership filed a civil lawsuit against respondent for the unpaid check and sought damages for the worthless check, fraud, fraud in the inducement and negligent misrepresentation. The circuit court required the parties to exchange witness lists and a schedule of all exhibits, meet ten business days prior to the pretrial conference, and provide a joint pretrial statement. Respondent failed to comply with this court order and in response, the dealership filed a motion for sanctions which was granted by the court. The circuit court, with the consent of respondent, granted the dealership's motion for summary judgment

and entered an order for damages. The court found that the dealership was entitled to summary judgment for Count I for a worthless check, Count II for a worthless check that respondent failed to pay after it was returned unpaid, Count III and IV for fraud and fraudulent inducement for untruthfully, implicitly, and expressly representing to the dealership that his law office account check would be paid and based upon that representation the dealership sold the vehicle to Mr. Williams-Bey, and Count V for negligent false representation. Respondent was ordered to pay damages in the amount of $218,102.52.

2. In The Florida Bar File No. 2021-30,562 (7B), The Florida Bar received a notice of insufficient funds from Chase Bank regarding respondent's law office trust account on March 1, 2021. When respondent's credit card servicing company made its regular automatic debit in the amount of $11.14 in February 2021, respondent's trust account contained insufficient funds to honor the obligation. The bar's preliminary audit of respondent's trust account records for July 1, 2020 to March 31, 2021, revealed that respondent placed credit card deposits of earned fees into his trust account and issued checks for bills to Century Link constituting commingled

funds. No client funds existed in the trust account at the time of the overdraft and therefore, no clients were harmed.

III. RECOMMENDATIONS AS TO GUILT

In Case Number SC21-779, The Florida Bar File No. 2020-30,127 (7B), I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

3-4.3 The standards of professional conduct required of members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration of certain categories of misconduct as constituting grounds for discipline are not all-inclusive nor is the failure to specify any particular act of misconduct be construed as tolerance of the act of misconduct. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise, whether committed within Florida or outside the state of Florida, and whether the act is a felony or a misdemeanor.

4-3.4(c) A lawyer must not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

4-3.4(d) 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.

4-4.1(a) In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

4-8.4(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation, except that it shall not be professional misconduct for a lawyer for a criminal law enforcement agency or regulatory agency to advise others about or to supervise another in an undercover investigation, unless prohibited by law or rule, and it shall not be professional misconduct for a lawyer employed in a capacity other than as a lawyer by a criminal law enforcement agency or regulatory agency to participate in an undercover investigation, unless prohibited by law or rule.

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.

In The Florida Bar File No. 2021-30, 562 (7B), I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

5-1.1(a)(1) A lawyer must hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for fees, costs, and expenses, must be kept in a separate federally insured bank, credit union, or savings and loan association account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person and clearly labeled and designated as a trust account except: (A) A lawyer may maintain funds belonging to the lawyer in the lawyer's trust account in an amount no more than is reasonably sufficient to pay bank charges relating to the trust account; and (B) A lawyer may deposit the lawyer's own funds into trust to replenish a shortage in the lawyer's trust account. Any deposits by the lawyer to cover trust account shortages must be no more than the amount of the trust account shortage, but may be less than the amount of the shortage. The lawyer must notify the bar's lawyer regulation department

immediately of the shortage in the lawyer's trust account, the cause of the shortage, and the amount of the replenishment of the trust account by the lawyer.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

5.1 Failure to Maintain Personal Integrity

5.1(b) Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included elsewhere in this subdivision or other conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

6.1 False Statements, Fraud, and Misrepresentation

6.1(b) Suspension is appropriate when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

7.1 Deceptive Conduct or Statements and Unreasonable or Improper Fees

7.1(b) 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.

3.2(b) Aggravating Factors

(4) multiple offenses; and

(9) substantial experience in the practice of law.

3.3(b) Mitigating Factors

(3) personal or emotional problems; and

(11) imposition of other penalties or sanctions.

While respondent has a prior discipline of a grievance committee admonishment, I find that this is neither aggravating nor mitigating as the conduct in this case occurred prior to the discipline imposed by the committee.

V. CASE LAW

I considered the following case law prior to recommending discipline:

In The Florida Bar v. Delgado, 2019 WL 2866704 (Fla. July 3, 2019), (unpublished disposition), Delgado was suspended for three years and required to undergo an evaluation by Florida Lawyers Assistance, Inc. for engaging in fraudulent conduct. Delgado participated in a real estate transaction involving his ex-wife that was knowingly not an arm's length transaction and which could be construed to be mortgage fraud. Delgado previously was suspended for failing to respond to the bar and for failing to comply with Rule 3-5.1(h). In aggravation, Delgado had a dishonest or

selfish motive and was an experienced practitioner. In mitigation, Delgado was diagnosed with a major depressive disorder and a stimulant use disorder and underwent interim rehabilitation by attending individual therapy sessions to address his issues.

In The Florida Bar v. Merkin, 2018 WL 6445595 (Fla. Sept. 21, 2018) (unpublished disposition), Merkin was suspended for eighteen months for repeatedly signing letters stating that his client was not under investigation by the SEC, despite knowing the company was being investigated. Merkin was prosecuted by the SEC for civil infraction of the anti-fraud provisions of the Securities Exchange Act. The U.S. District Court granted summary judgment in favor of the SEC in a scathing opinion finding that Merkin made misrepresentations in violation of the anti-fraud provisions of the Securities Exchange Act. The Eleventh Circuit Court affirmed. Previously in the bar's case, by order dated February 8, 2018, the Supreme Court of Florida sua sponte suspended Merkin after the referee report was filed recommending a thirty-day suspension. The bar appealed, seeking a ninety-one day suspension. The Court determined it would impose no less than a ninety-one day suspension and issued an order to show cause to Merkin directing him to show why the referee's recommended thirty-day suspension should not be disapproved and a more severe sanction, up to and including

disbarment, be imposed. Ultimately, the Court approved the referee's report in part and disapproved it in part. The Court suspended Merkin for eighteen months, effective immediately due to his existing suspension. Justice Canady issued a separate opinion concurring in part and dissenting in part. Justice Canady believed disbarment was the appropriate sanction for Merkin's egregious misconduct that was calculated to mislead the investing public. In mitigation, Merkin had no prior disciplinary history (prior to the Court's sua sponte suspension), cooperated with the bar, had a good reputation, and suffered the imposition of other penalties or sanctions. In aggravation, Merkin had a dishonest or selfish motive and substantial experience in the practice of law.

In The Florida Bar v. Perez, 2018 WL 2731612 (Fla. June 7, 2018) (unpublished disposition), Perez was suspended for eighteen months. Perez served as closing and escrow agent for a commercial real estate transaction. Perez prepared and submitted a HUD-1 settlement statement to the lender which misrepresented that the buyer had brought $3,045,123.83 in cash to the closing when, in fact, only $1,500,000.00 was brought. After the closing, the loan defaulted and at that time the lender discovered the misrepresentation. Perez's defense in these proceedings was that the loan officer knew the truth about the lack of cash to close, but

nonetheless, instructed him to create the HUD-1 settlement statement that way. The loan officer was the complainant in this grievance and testified that he did not instruct Perez on the creation of the HUD-1 nor did he know the cash to close number was untrue. Following trial, the referee concluded that Perez did not knowingly commit a fraudulent or deceitful act, but rather, made "a series of bad decisions" in submitting a false HUD-1 to the lender. After appeal, on October 20, 2017, the Florida Supreme Court issued its opinion finding Perez guilty of violating rule 4-8.4(c) (dishonesty, fraud, deceit, and misrepresentation) and remanded the matter back to the referee for a sanction hearing. On February 20, 2018, the referee filed an Amended Report of Referee recommending that Perez be disciplined by an eighteen-month suspension and payment of the disciplinary costs. In mitigation, Perez had no prior disciplinary record, the complaining witness significantly delayed reporting the matter to the bar, and Perez was remorseful. In aggravation, the referee found Perez's misconduct constituted a serious offense.

In The Florida Bar v. Rathel, 2017 WL 1089567 (Fla. March 23, 2017) (unpublished disposition), Rathel received a one-year suspension for engaging in fraudulent conduct in connection with the purchase of a home. Rathel entered into an agreement to purchase a residence but could not

obtain traditional financing for the full purchase amount. Rathel drafted a document wherein the seller agreed to hold a second mortgage based upon Rathel's assurances that: (1) the loan would be his personal debt that could not be discharged in any way, including through foreclosure, bankruptcy or insolvency; (2) if Rathel could not repay loan under the terms of the agreement, he would sell his existing home and use those proceeds to repay the loan; and (3) if the proceeds from sale of Rathel's existing home were insufficient to repay the loan, his law firm, which allegedly had revenues in excess of $60,000 per month, would repay the debt. The seller relied upon Rathel's assurances because Rathel was an attorney and the seller believed that the document, that Rathel drafted, was sufficient to protect the seller's interests. A few months later, Rathel sold his existing home without advising the seller. Rather than applying the sale's proceeds to the seller's second mortgage, Rathel invested the money which was lost when the investment went bad. Rathel failed to make the required balloon payment, despite seeking, and receiving, two extensions of time to do so. When agreeing to the extensions of time to make the balloon payments, the seller was unaware that Rathel had sold his existing home. Rathel then filed for personal bankruptcy and sought to discharge the seller's second mortgage. At the end of the seller's adversarial proceeding, the court

entered an order finding Rathel fraudulently induced the seller into agreeing to hold the second mortgage. The court refused to permit Rathel to discharge the second mortgage. In addition to his fraudulent course of conduct, Rathel failed to file his personal and corporate Federal income tax returns and failed to pay his Federal income tax obligations for five years. The referee found in aggravation that Rathel still had not filed his corporate and personal tax returns at the time of the sanction hearing. Rathel failed to respond to the bar's investigative inquiries in a second, unrelated, matter. In aggravation, Rathel had a dishonest or selfish motive, engaged in a pattern of misconduct, engaged in multiple offenses and had substantial experience in the practice of law. In mitigation, Rathel had personal or emotional problems, suffered from a physical or mental disability or impairment (migraines), and his prior disciplinary offenses were remote in time.

In The Florida Bar v. Dupee, 160 So. 3d 838 (Fla. 2015), Dupee was suspended for one year for engaging in fraudulent conduct in connection with the representation of the wife in a dissolution of marriage case. The wife closed her credit union account that was in her name solely after meeting with Dupee, who advised the wife to obtain a cashier's check made payable to a fictional trust. When Dupee filed the wife's family law

financial affidavit, the funds from the closed account were not disclosed. Dupee filed the affidavit with the court, knowing it was false. Further, Dupee's tardy responses to discovery likewise were false and misleading because they failed to disclose the funds from the closed account. During her deposition, the wife testified falsely under oath regarding the funds from the closed account. The false testimony occurred in Dupree's presence and Dupee knew it to be false. Dupee took no steps to correct the false information provided during discovery until the evening before the hearing on opposing counsel's motion to compel. Further, when the husband went to the former marital home to retrieve specified personal belonging, he was unable to locate his coin collections because the wife had placed it in Dupee's possession because the wife was disputing the husband's ownership of the asset. Dupee failed to disclose the fact that she was in possession of this asset until the court ordered her to produce the coin collections during a post judgment contempt proceeding. In mitigation, Dupee had no prior disciplinary history.

In The Florida Bar v. Brown, 905 So. 2d 76 (Fla. 2005), Brown was suspended for six months for engaging in fraud and misrepresentation to a surety company in order to obtain a mechanic's lien discharge bond. In addition to practicing law, Brown also operated a real estate development

company. One of Brown's development projects was subject to a mechanic's lien, making it impossible for his company to sell the property without a surety bond in place that was approved by a judge. Brown advised the surety company that he would purchase a certificate of deposit that would serve as collateral for the surety bond. In reliance on Brown's representations, the surety company issued the bond to cover the mechanic's lien and the sale of the property proceeded. One week later, Brown executed a security agreement for the benefit of his law firm, pledging the very same certificate of deposit that he had previously pledged to the surety company as full cash collateral. The security agreement provided that the law firm's interest would have priority over any other claims or interest in the collateral. As litigation ensued, Brown's double pledging of the collateral resulted in a significant loss to the casualty company and profit to Brown's law firm. In mitigation, Brown enjoyed a good reputation, demonstrated evidence of his good character and was involved in numerous charitable activities. In aggravation, however, he had a prior disciplinary history, had selfish motive, refused to accept responsibility for his misconduct, had substantial experience in practice of law, specifically in type of litigation in which he engaged in misconduct, and was indifferent toward making restitution.

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. One-year period of suspension from the practice of law requiring proof of rehabilitation prior to reinstatement.

B. Two-year period of probation upon reinstatement.

C. Terminate the one-year probation that respondent is currently serving in The Florida Bar File No. 2020-30,373(7B).

D. Payment of the bar's disciplinary costs.

E. 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.

F. Respondent acknowledges that, unless waived or modified by the Court on motion of respondent, the court order will contain a provision that prohibits respondent from accepting new business from the date of the order or opinion and shall provide that the suspension is effective 30 days

from the date of the order or opinion so that respondent may close out the practice of law and protect the interest of existing clients.

VII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

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

Age: 44

Date admitted to the Bar: September 17, 2004

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	$474.00
Court Reporters' Fees	$250.00
Audit Costs	$378.20
Administrative Fee	$1,250.00
TOTAL	$2,352.20

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 13h day of September, 2021.

Gerald P. Hill, II, Referee

Original To:

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

Conformed Copies By Email to:

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