

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

KELLY ANNE MCCABE,

Respondent.

Supreme Court Case No.
SC20-620

The Florida Bar File Nos.
2018-10,131 (6A)
2019-10,301 (6A)
2019-10,532 (6A)

_____/

AMENDED
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 April 30, 2020, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. On July 7, 2020, Respondent filed her Answer. On July 8, 2020, a case management conference was held, and the final hearing was scheduled for October 8, 2020, with a sanctions hearing scheduled for October 15, 2020. On September 25, 2020, a Conditional Guilty Plea for Consent Judgment was filed with the referee. The referee accepted the consent judgment and

entered a Report of Referee Accepting Consent Judgment on November 10, 2020.

On February 11, 2021, the Supreme Court of Florida issued an order disapproving the Report of Referee and consent judgment. The matter was referred back to the referee to conduct further hearings and provide an amended report within ninety (90) days.

On February 15, 2021, a case management conference was held, and the final hearing was scheduled for April 9, 2021, and a sanctions hearing for April 28, 2021. On March 25, 2021, a Stipulation of Guilt to Rule Violations and Facts was filed with the referee. The referee entered an Order Adopting Joint Stipulation on April 7, 2021, and cancelled the final hearing. On April 23, 2021, a Consent Judgment as to the Discipline to be Imposed was filed with the referee.

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.

The Florida Bar File No. 2018-10.131 (6A): Danardrick Chance retained Respondent on a contingency fee basis to file suit against the City of Saint Petersburg after being shot in the leg on or about March 8, 2013, by an officer of the St. Petersburg Police Department. After Mr. Chance complained to Respondent that no action had been taken and no suit had been filed, Respondent filed a complaint against The City of Saint Petersburg and the police officer who shot Mr. Chance in Pinellas County, Case Mo. 17-001379-CI, on March 3, 2017, five days before the four-year statute of limitations expired. Respondent never served the complaint on the defendants or took any other action in furtherance of the case. Respondent failed to attach the pre-requisite Notice of Intent to the Complaint or otherwise file a copy of the Notice of Intent to the City of St. Petersburg. The City of St. Petersburg has no record of receiving a Notice of Intent. Respondent failed to keep Mr. Chance informed of the status so that he could make informed decisions concerning his case. Mr. Chance retained new counsel in or around March 2018. Mr. Chance's new counsel has had difficulty obtaining responses from Respondent necessary to protect the interests of Mr. Chance regarding the litigation.

The Florida Bar File No. 2019-10.301 (6A): Carey Gass retained Respondent to handle a personal injury action resulting from an automobile accident which occurred on or about May 22, 2012. Respondent represented to Mr. Gass that she would be filing a complaint in June 2015 on his behalf and the case would be proceeding to mediation and conducting discovery. Respondent relayed that a settlement offer was being negotiated but no proof of such was ever provided to Mr. Gass. Mr. Gass learned that Respondent did not file his complaint and no action was being taken to move his case forward. Respondent finally filed a complaint on behalf of Mr. Gass on or about May 22, 2016, in Manatee County, Case No. 2016-CA-002380, right before the statute of limitations expired. Thereafter, Respondent failed to serve the defendants or take any other action in furtherance of the case. The defendants retained counsel and filed

a Motion to Dismiss Case and Incorporated Memorandum of Law in August 2017, which was set for hearing and re-set several times with the last date for hearing being set for February 7, 2018. Respondent took no action in furtherance of the case and failed to keep Mr. Gass informed of the status so that he could make informed decisions concerning his case. Mr. Gass retained new counsel who entered an appearance in the litigation on or around January 19, 2018. On February 7, 2018, a hearing was held, and the trial court granted Defendants' Motion to Dismiss Case and Incorporated Memorandum of Law finding there was insufficient evidence of excusable neglect by Respondent. Mr. Gass' new counsel filed a Motion to Amend Complaint, and a Motion for Reconsideration and Incorporated Memorandum of Law, and an Affidavit of respondent. Respondent admitted in her affidavit that she failed to perfect service and claimed this was due to excusable neglect and inexperience. On June 18, 2018, the trial court denied Plaintiffs Motion to Amend Complaint and Motion for Reconsideration and found there was no evidence of good cause or excusable neglect and the statute of limitations had expired. The trial court entered an Order on Defendant's Motion for Entry of Final Judgment on June 18, 2018, finding no entitlement to relief for Mr. Gass, and reserving jurisdiction to determine entitlement to costs on behalf of the defendants.

On November 5, 2018, The Florida Bar received the initial complaint of Mr. Gass against Respondent. On November 7, 2018, The Florida Bar sent Respondent correspondence requesting a response to the complaint due by November 26, 2018. Respondent failed to respond to the correspondence dated November 7, 2018. On January 15, 2019, The Florida Bar sent Respondent follow-up correspondence requesting a response to the complaint due by January 25, 2019. On February 6, 2019, Respondent sent an email attaching correspondence dated January 20, 2019, enclosing her response to the complaint dated December 5, 2018, claimed to have been previously sent to The Florida Bar. The Florida Bar had no record of receipt of the December 5, 2018, response prior to February 6, 2019.

The Florida Bar File No. 2019-10.301 (6A): On January 30, 2019, The Florida Bar received a complaint from David Lee Jones against Respondent regarding her representation of him in a criminal and post-conviction matter. On March 6, 2019, The Florida Bar sent respondent

correspondence requesting a response to the complaint due by March 22, 2019. Respondent failed to respond to the correspondence dated March 6, 2019. The matter was referred to a grievance committee, and Investigating Member was assigned, and a Notice of Live Hearing was served to Respondent on October 24, 2019, for her appearance before the committee on November 7, 2019. After service of the Notice of Live hearing, Respondent did respond and communicate with the Investigating Member in response to the complaint of Mr. Jones. On November 6, 2019, Respondent sent an email to the Investigating Member attaching her response to the complaint dated March 10, 2019, claimed to have been previously sent to The Florida Bar. The Florida Bar had no record of receipt of the March 10, 2019, response prior to November 6, 2019, email to the Investigating Member.

III. RECOMMENDATIONS AS TO GUILT

I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

The Florida Bar File No. 2018-10,131 (6A): Rule 4-1.1 (Competence); Rule 4-1.3 (Diligence); and 4-1.4 (Communication).

The Florida Bar File No. 2019-10,301 (6A): Rule 4-1.1 (Competence); Rule 4-1.3 (Diligence); 4-1.4 (Communication); and Rule 4-8.4(g) (Misconduct – failure to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency).

The Florida Bar File No. 2019-10,301 (6A): Rule 4-8.4(g) (Misconduct – failure to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency).

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

4.4 Lack of Diligence

(b) Suspension. 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.

4.5 Lack of Competence

(b) Suspension. Suspension is appropriate when a lawyer engages in an area of practice in which the lawyer knowingly lacks competence and causes injury or potential injury to a client.

8.1 Violation of Court Order or Engaging in Subsequent Same or Similar Misconduct

(b) Suspension. Suspension is appropriate when a lawyer has been publicly reprimanded for the same or similar conduct and engages in a further similar act of misconduct that cause injury or potential injury to a client, the public, the legal system, or the profession.

3 .2(b)Aggravating Factors:

(1) Prior disciplinary offenses:

The Florida Bar v. McCabe, SC16-1416, 2016 WL 4586102 (Fla. September 1, 2016): Respondent received a public reprimand for failure to maintain proper trust account records, failure to comply with appellate procedures and timely respond to appellate court orders in several appellate cases, and failure to timely respond to official bar inquiries.

The Florida Bar v. McCabe, 5C18-1551, 2018 WL 6263207 (Fla. November 29, 2018): Respondent was held in contempt and received a public reprimand for failing to timely respond to official bar inquiries.

(3) a pattern of misconduct; and

(4) multiple offenses.

3.3(b) Mitigating Factors:

(3) personal or emotional problems (respondent was under a significant amount of emotional distress during this time due to ongoing family issues. She voluntarily completed an evaluation through Florida Lawyers Assistance, Inc., and a rehabilitation contract was recommended); and

(12) remorse.

V. CASE LAW

I considered the following case law prior to recommending discipline:

In The Florida Bar v. Shoureas, 892 So. 2d 1002 (Fla. 2004), Shoureas received a three-year suspension for neglecting two (2) client matters, and for failing to provide diligent representation and adequate communication, despite collecting her legal fees. Shoureas further failed to respond to The Florida Bar's investigative inquiries and communications concerning both client matters. The Florida Bar initiated formal proceedings against Shoureas, to which she again failed to respond, resulting in the entry of a default against her, with The Florida Bar's factual allegations deemed admitted. Shoureas also failed to appear at the sanctions hearing. In imposing a three-year suspension, the Court considered Shoureas' failure to contest the disciplinary charges against her, present any mitigation, or explanation for her actions. In aggravation, Shoureas was previously suspended for similar misconduct, and her actions caused injury to her clients. In mitigation, Shoureas was inexperienced in the practice of law (Shoureas committed the violations within two years of her admission to The Florida Bar), Shoureas did not display a dishonest or selfish motive, and Shoureas did not abandon her law practice.

In The Florida Bar v. Feige, 937 So. 2d 605 (Fla. 2006), Feige received a three-year suspension for misconduct amounting to a complete lack of diligence in representing his clients. Feige's misconduct involved violation of 16 different Bar Rules in handling of seven different client matters and a finding that Feige not only grossly neglected his clients and their matters, he also gave unsound advice and misled all parties to cover up his lack of

diligence, and Feige had history of disciplinary cases including a prior two-year suspension.

In The Florida Bar v. Aldo Guillermo Busot, Jr., SC17-1803, Busot received a three-year suspension by court order dated April 19, 2018. Busot engaged in a serious pattern of neglect which negatively impacted his clients. He failed to comply with several court orders, resulting in orders to show cause. He was ultimately found to be in contempt for failing to appear in court as ordered. Following the filing of one client's grievance, Busot attempted to negotiate a settlement of the grievance by requiring the client to contact the Bar within ten days to withdraw her complaint. Busot also failed to timely respond to certain inquiries from the Bar. He previously received a 90-day suspension with probation in 2005.

In The Florida Bar v. Nadine Rhodes Smith, SC16-49, Smith received a two-year suspension by court order dated July 28, 2016. Smith neglected two separate client matters, failed to timely provide a client with an accounting, and failed to respond to the Bar's inquiries. Smith also failed to answer the Bar's formal complaint, which resulted in a default. Smith was already suspended for 91 days for failing to comply with the terms of her FLA, Inc. contract.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

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

- A. A 3-year suspension from the practice of law.
- B. As a condition of reinstatement, Respondent shall complete an evaluation with Florida Lawyers Assistance, Inc. (FLA, Inc.) to establish her fitness to resume the practice of law.
- C. Respondent shall pay the Bar's costs incurred in this matter.

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.

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 herself out as a licensed attorney.

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: 43

Date admitted to the Bar: September 14, 2004

Prior Discipline:

The Florida Bar v. McCabe, SC16-1416, 2016 WL 4586102 (Fla. September 1, 2016): Respondent received a public reprimand for failure to maintain proper trust account records, failure to comply with appellate

procedures and timely respond to appellate court orders in several appellate cases, and failure to timely respond to official bar inquiries.

The Florida Bar v. McCabe, SC18-1551, 2018 WL 6263207 (Fla. November 29, 2018): Respondent was held in contempt and received a public reprimand for failing to timely respond to official bar inquiries.

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

I find the following costs were reasonably incurred by The Florida

Bar:


Administrative Fee	\$1,250.00
Investigative Costs	\$27.00
Court Reporters' Fees	\$1,458.25

TOTAL \$2,735.25

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 7th day of May, 2021.

CONFORMED COPY
ORIGINAL SIGNED
MAY 07 2021
CHRISTINE MARLEWSKI
CIRCUIT JUDGE



Honorable Christine Ann Marlewski,
Referee

Original To:

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

Conformed Copies to:

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