

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Supreme Court Case
No. SC19-1224

v.

The Florida Bar File
No. 2019-00,421 (2B)

DESMOND PATRICK FITZGERALD,

Respondent.

_____/

CONDITIONAL GUILTY PLEA FOR CONSENT JUDGMENT

COMES NOW, the undersigned respondent, Desmond Patrick FitzGerald, and files this Conditional Guilty Plea pursuant to Rule 3-7.9 of the Rules Regulating The Florida Bar.

1. Respondent is, and at all times mentioned herein was, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida. In addition to membership in The Florida Bar, respondent was a member of the Massachusetts Bar, admitted on December 18, 1996, subject to the jurisdiction of the Board of Bar Overseers and the Supreme Judicial Court of Massachusetts.
2. Respondent retired from The Florida Bar on May 14, 2018.
3. Respondent is acting freely and voluntarily in this matter, and tenders this Plea without fear or threat of coercion. Respondent is not represented in this matter.

4. This is a reciprocal discipline action, based on the Order of Term Suspension and the Memorandum of Decision, dated January 30, 2019, which imposed a four-month suspension, with the last two months stayed for one year with conditions.

5. The disciplinary measures to be imposed upon respondent are as follows:

- A. 90 day Suspension, and
- B. Payment of The Florida Bar's costs.

6. Respondent is currently "retired" in Florida and has no clients in the state. Respondent, therefore, does not require, nor does he seek an effective date of 30 days from the date of this Court's order or opinion so that respondent may close out the practice of law and protect the interest of existing clients.

Respondent requests that the suspension take effect immediately from the date of this court's order or opinion.

7. The following allegations and rules provide the basis for respondent's guilty plea and for the discipline to be imposed in this matter:

COUNT I: JOHN VILLEGAS

A. On October 26, 2006, John Villegas (hereinafter "Villegas") was convicted on multiple criminal charges and sentenced to a term of nineteen to twenty-two years in State prison.

B. Respondent filed a notice of appeal on Villegas's behalf on November 22, 2006, as well as a motion to vacate the convictions (first new trial motion).

C. Respondent filed the motion before he reviewed the trial transcript or exhibits, before he reviewed any records concerning Villegas's case (other than the docket), and before he consulted with the client or trial counsel.

D. As the Massachusetts hearing committee aptly described, the motion was "unfocused and vague and failed to allege any claim with particularity." Its legal basis consisted of two sentences claiming that "justice may not have been done," because "important materials were not presented."

E. Neither the motion, nor respondent's accompanying affidavit, identified the "important materials." There was no reason to file the motion so quickly, and the claims raised in the motion could have been raised on direct appeal.

F. Nearly a year later, respondent filed a memorandum in support of the first new trial motion. The memorandum did not specify what "materials" had not been presented at trial or by whom, nor did it articulate why the failure to present those materials warranted a new trial.

G. Instead, the memorandum argued that the protocol for obtaining privileged documents established by *Commonwealth v. Dwyer*, 448 Mass. 122 (2006) ("apply[ing] the new protocol to cases tried after the issuance of the rescript in this opinion"), a case that was decided months after Villegas had been tried, had been violated.

H. In addition, respondent alleged in the memorandum that the judge denied defense counsel's request to review the victim's psychological records prior to trial, and that the records were not made available, although the docket indicated otherwise.

I. It was not until October 15, 2014, almost six months after the Appeals Court had affirmed Villegas's convictions on direct appeal, and eight years after the motion had been filed, that the judge denied the first motion for a new trial.

J. While the first new trial motion was pending, on October 1, 2010, respondent filed a second motion for a new trial, arguing that trial counsel had rendered ineffective assistance by failing to explain to Villegas his testimonial rights and failing to meet with him prior to trial. Respondent represented that, aside from a few brief discussions at the courthouse, trial counsel never met with the client and filed an unsigned affidavit from Villegas to support that argument.

K. The motion was denied without a hearing on April 21, 2011. Several months later, respondent filed a motion for reconsideration, essentially reproducing the argument made in the original motion. That motion also was denied.

L. Despite the client's request, respondent did not file a notice of appeal from the denial of the second motion for a new trial or from the motion for reconsideration.

M. By reason of the foregoing, respondent violated the following Mass. R. Prof. C. 1.1 (competence); 1.2(a) (seeking client's lawful objectives); 1.3 (diligence); and 8.4(d) (prejudice to administration of justice).

COUNT II: APPEALS COURT PROCEEDINGS

N. After Villegas's direct appeal was entered in the Appeals Court, respondent filed a record appendix that omitted copies of Villegas's criminal indictments and included materials that were outside the trial record, some of which were damaging to the client and not linked to legal arguments made in the brief.

O. In addition to a perfunctory argument concerning a jury instruction, the central argument raised in the brief, that trial counsel had failed to meet with the client prior to trial, was supported by the (false)

statement that the defendant had been incarcerated for the entire pretrial period, and the absence of any record of trial counsel having visited Villegas at the correctional facility.

P. Villegas was not, however, incarcerated during the entire pretrial period. Even after the Commonwealth pointed out in its brief that Villegas had been released on bail and been a fugitive for months, respondent filed a reply brief that continued to press the claim that trial counsel did not meet with the client outside the courthouse.

Q. In its decision, the Appeals Court characterized some of respondent's argument as speculative and unsupported, and identified as false the respondent's assertion that the client had been incarcerated at all times prior to trial.

R. The Appeals Court also ruled that the respondent's failure to appeal the denial of the second motion for a new trial effectively waived the issues raised, and that the submission of the unsigned affidavit had no evidentiary weight.

S. With respect to the crux of the appellate argument, trial counsel's supposed failure to meet with the client, respondent falsely stated that the client had been incarcerated from February 2002 to 2006 and used

the absence of any correctional facility record of counsel having visited the client to support the argument.

T. The committee found that the false statement was negligent, not intentional, and that the inclusion of false statements in the brief constituted a lack of diligence, rather than a lack of candor. Nonetheless, inclusion of the statements prejudiced the administration of justice.

U. By reason of the foregoing, respondent violated the following Mass. R. Prof. C. 1.1 (competence); 1.3 (diligence); 3.4(c) (rules of tribunal); and 8.4(d) (prejudice to administration of justice).

COUNT III: EXCESSIVE FEES

V. The respondent represented Villegas for more than seven years and billed approximately 149 hours for his work in the Superior Court and the Appeals Court.

W. A fee agreement signed at the commencement of the representation provided for "a minimum legal fee of \$25,000.00 for representation in connection with [Villegas's Superior Court case] and \$275.00 per hour for any additional time or other legal services thereafter."

X. Respondent collected \$25,000.00 at the outset of the representation, which primarily was for postconviction work in the Superior Court.

Y. Although the respondent billed an additional \$15,953.00, essentially for work in connection with the direct appeal, he did not seek to collect the additional payment.

Z. As described above, in light of the respondent's lack of competence and diligence during the course of the representation, failure to preserve appellate rights, and misrepresentations to the Appeals Court, the fees charged by respondent to the client were clearly excessive in light of the value received by the client, in violation of Mass. R. Prof. C. 1.5(a) (excessive fees).

AA. As previously stated, the committee found that the false statements were negligent, not intentional, and that the inclusion of false statements in the brief constituted a lack of diligence, rather than a lack of candor.

8. By operation of Rule 3-4.6, Rules Regulating The Florida Bar, the Order of Term Suspension and the Memorandum of Decision from Massachusetts shall be considered as conclusive proof of such misconduct in this disciplinary proceeding.

9. Respondent's status with The Florida Bar is "Retired" and he is not practicing law in Florida at this time.

10. The Florida Bar has approved this proposed plea in the manner required by Rule 3-7.9.

11. If this plea is not finally approved by the referee and the Supreme Court of Florida, then it shall be of no effect and may not be used by the parties in any way.

12. Respondent agrees to eliminate all indicia of respondent's status as an attorney in Florida 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.

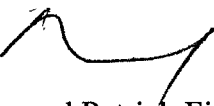
13. If this plea is approved, then respondent agrees to pay all reasonable costs associated with this case pursuant to Rule 3-7.6(q) in the amount of \$1,250.00. These costs are due within 30 days of the court order. Respondent agrees that if the costs are not paid within 30 days of this court's order becoming final, respondent shall pay interest on any unpaid costs at the statutory rate. Respondent further agrees not to attempt to discharge the obligation for payment of the Bar's costs in any future proceedings, including but not limited to, a petition for bankruptcy. Respondent shall be deemed delinquent and ineligible to practice law pursuant to Rule 1-3.6 if the cost judgment is not satisfied within 30 days of the final court order, unless deferred by the Board of Governors of The Florida Bar.

14. Respondent acknowledges the obligation to pay the costs of this proceeding and that payment is evidence of strict compliance with the conditions of any disciplinary order or agreement and is also evidence of good faith and fiscal responsibility. Respondent understands that failure to pay the costs of this proceeding or restitution may reflect adversely on any reinstatement proceedings or any other bar disciplinary matter in which respondent is involved.

15. If this plea is approved, and restitution is owed, if the person to whom restitution is owed cannot be located after a diligent search, respondent shall execute an affidavit of diligent search and provide same to The Florida Bar and shall pay the full amount of the restitution to the Clients' Security Fund of The Florida Bar within 30 days of the date of the affidavit of diligent search.

16. This Conditional Guilty Plea for Consent Judgment fully complies with all requirements of the Rules Regulating The Florida Bar.

Dated this 8th day of November, 2019.


Desmond Patrick FitzGerald
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Dated this 30th day of October, 2019.

A handwritten signature in black ink that reads "James K. Fisher". The signature is written in a cursive style with a large, looped initial "J" and a stylized "F".

James Keith Fisher, Bar Counsel
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