

**IN THE SUPREME COURT OF FLORIDA
(Before A Referee)**

THE FLORIDA BAR,

Complainant,

v.

JACK BARRY PHILLIPS,

Respondent.

**Supreme Court Case
No. SC09-808**

**The Florida Bar File
Nos. 2007-51,071(15D)
2007-51,825(15D)
2008-50,827(15D)
2009-00,091(15D)**

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 May 5, 2009, The Florida Bar filed its Complaint against respondent in these proceedings. The undersigned was appointed to preside as referee by the Chief Judge of the Seventeenth Judicial Circuit. The final hearing was conducted on July 30, 2009. The pleadings, transcripts, orders, exhibits received in evidence, and this report constitute the entire record in this case and are forwarded to the Supreme Court of Florida.

During the course of these proceedings, respondent did not file a responsive pleading to the Complaint as required by Rule 3-7.6(h)(2), R. Regulating The Florida

Bar. A default judgment was entered against respondent on June 15, 2009. Respondent failed to retain counsel and failed to participate in the proceeding. Respondent's failure to appear at the case management conference after being duly noticed resulted in the undersigned issuing an order to show cause why respondent should not be cited for indirect contempt. Respondent failed to respond to the said order. Michael David Soifer, Esq., represented The Florida Bar.

II. FINDINGS OF FACT:

A. Jurisdictional Statement.

Respondent is, and at all times mentioned in this case was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida. Respondent is presently under a three year suspension by Order of The Florida Supreme Court, dated October 23, 2008, in Case No. SC07-816.

Fifteenth Judicial Circuit Grievance Committee "D" at a duly constituted meeting and by majority vote of the eligible members present, found probable cause for respondent's violation of the Rules Regulating The Florida Bar, as set forth in the bar's Complaint and the presiding member of the grievance committee approved the Complaint.

B. Narrative Summary of Case.

A default judgment was entered against respondent for failing to file a responsive pleading to the Complaint as required by R. Regulating Fla. Bar 3-7.11(c).

As provided in the aforesaid order, respondent was adjudged guilty of violating R. Regulating Fla. Bar 4-8.4(g)(1) and 4-8.4(g)(2) as set forth in each of Counts I, II, III, and V of the Complaint; and R. Regulating Fla. Bar 4-1.3 and 4-1.16 as set forth in Count IV of the Complaint.

Findings of Fact as to Count I of the Complaint
The Florida Bar File No. 2007-51,071(15D)

1. On or about January 22, 2007, The Florida Bar (the Bar) received a complaint from Muhammed Kaleem Khan against respondent concerning respondent's representation of Khan in a legal matter.
2. On or about February 15, 2007, bar counsel sent an official inquiry to respondent at respondent's record bar address requesting his written response to the complaint on or before March 2, 2007.
3. Respondent failed to respond.
4. On or about March 12, 2007, bar counsel sent a second letter pursuant to the official inquiry to respondent at his record bar address by regular mail and certified U.S. mail mandating respondent's response on or before March 22, 2007.
5. Respondent again failed to respond.
6. In or about April 2007, respondent wrote to the Bar and requested an extension of time to respond to the inquiry.

7. Respondent wrote a second letter to the Bar dated June 15, 2007, informing the Bar that he thought he found an attorney to represent him, but otherwise respondent provided no response in the letter to the allegations of Khan's complaint.

8. Respondent wrote a third letter to the Bar, dated July 8, 2008, which requested the Bar to fax him another copy of the complaint and indicated that he would cooperate. Otherwise respondent provided no response in the letter to the allegations of Khan's complaint. In response to the letter, the Bar faxed respondent another copy of the Khan complaint on July 8, 2007.

9. Respondent again failed to provide a written response to the Bar's official inquiry concerning the allegations of Khan's complaint to the Bar.

10. By the conduct set forth above, respondent violated 4-8.4(g) [A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made: (1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors; (2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors....].

Findings of Fact as to Count II of the Complaint
The Florida Bar File No. 2007-51,825(15D)

11. On or about June 15, 2007, The Florida Bar (the Bar) received a complaint from Thomas Yarcheski against respondent concerning respondent's representation of Yarcheski in a legal matter.

12. On or about June 22, 2007, bar counsel sent an official inquiry to respondent at respondent's record bar address requesting his written response to the complaint on or before July 6, 2007.

13. Respondent failed to respond to this request.

14. On or about October 15, 2007, bar counsel sent a second letter to respondent at his record bar address by certified U.S. Mail, return receipt requested, mandating respondent's response by October 25, 2007.

15. The certified letter was claimed by respondent and the receipt was returned signed.

16. Respondent again failed to respond.

17. Respondent wrote a letter to the Bar, dated July 8, 2008, which requested the Bar to fax him another copy of the complaint and indicated that he would cooperate. Otherwise respondent provided no response in the letter to the allegations of Yarcheski's complaint. In response to the letter, the Bar faxed respondent another copy of the Yarcheski complaint on July 8, 2008.

18. Respondent again failed to provide a written response to the Bar's official inquiry concerning the allegations of Yarcheski's complaint to the Bar.

19. By the conduct set forth above, respondent violated R. Regulating Fla. 4-8.4(g)(1) [A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee or board of governors.]; 4-8.4(g)(2) [A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made within 10 days of the date of any follow-up written investigative inquires by bar counsel, grievance committee, or board of governors.].

Findings of Fact as to Count III of the Complaint
The Florida Bar File No. 2008-50,827(15D)

20. On or about November 29, 2007, The Florida Bar received a complaint from Michael Cannell against respondent alleging respondent failed to return a screenplay entrusted to him.

21. On or about December 14, 2007, bar counsel sent an official inquiry to respondent at respondent's record bar address requesting his written response to the complaint on or before January 2, 2008.

22. Respondent failed to respond to this request.

23. On or about January 10, 2008, bar counsel sent a second letter to respondent at his record bar address by certified U.S. Mail, return receipt requested, mandating respondent's response by January 21, 2008.

24. The certified letter was returned as "unclaimed and unable to forward" by the U.S. Postal Service.

25. On or about April 10, 2008, bar counsel sent another letter to respondent at another address of respondent that became known to the Bar. The said letter was sent by certified U.S. Mail, return receipt requested, mandating respondent's response by April 21, 2008.

26. Respondent wrote a letter to the Bar, dated July 8, 2008, which requested the Bar to fax him another copy of the complaint and indicated that he would cooperate. Otherwise respondent provided no response in the letter to the allegations of Cannell's complaint. In response to the letter, the Bar faxed respondent another copy of the Cannell complaint on July 8, 2008.

27. Respondent again failed to provide a written response to the Bar's official inquiry concerning the allegations of Cannell's complaint to the Bar.

28. By the conduct set forth above, respondent violated 4-8.4(g) [A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response

shall be made: (1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors; (2) within 10 days of the date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors....].

Findings of Fact as to Count IV of the Complaint
The Florida Bar File No. 2009-00,091(15D)

29. Respondent was retained by Felix E. Santos in 2005 to handle an immigration/asylum matter.

30. Santos alleges in his complaint to The Florida Bar that respondent failed to file documents on his behalf and abandoned the case.

31. Additionally, respondent lost documents critical to the case.

32. By the conduct set forth above, respondent violated 4-1.3 [A lawyer shall act with reasonable diligence and promptness in representing a client.]; and 4-1.16 [(a) Except as stated in subdivision (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct or law; (2) the lawyer's physical or mental condition materially impairs the lawyer's ability to represent the client; (3) the lawyer is discharged; (4) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent, unless the client agrees to disclose and rectify the crime or

fraud; or (5) the client has used the lawyer's services to perpetrate a crime or fraud, unless the client agrees to disclose and rectify the crime or fraud. (b) Except as stated in subdivision (c), a lawyer may withdraw from representing a client if: (1) withdrawal can be accomplished without material adverse effect on the interests of the client; (2) the client insists upon taking action that the lawyer considers repugnant, imprudent, or with which the lawyer has a fundamental disagreement; (3) the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer's services and has been given reasonable warning that the lawyer will withdraw unless the obligation is fulfilled; (4) the representation will result in an unreasonable financial burden on the lawyer or has been rendered unreasonably difficult by the client; or (5) other good cause for withdrawal exists. (c) A lawyer must comply with applicable law requiring notice or permission of a tribunal when terminating a representation. When ordered to do so by a tribunal, a lawyer shall continue representation notwithstanding good cause for terminating the representation. (d) Upon termination of representation, a lawyer shall take steps to the extent reasonably practicable to protect a client's interest, such as giving reasonable notice to the client, allowing time for employment of other counsel, surrendering papers and property to which the client is entitled, and refunding any advance payment of fee or expense that has not been earned or incurred. The lawyer may retain papers and other property relating to or belonging to the client to the extent permitted by law.].

Findings of Fact as to Count V of the Complaint
The Florida Bar File No. 2009-00,091(15D)

33. Paragraphs 31 through 34 of the complaint were incorporated as if fully set forth at length and deemed admitted.

34. On or about July 30, 2008, bar counsel sent an official inquiry to respondent at respondent's record bar address requesting his written response to the complaint on or before August 14, 2008.

35. Respondent failed to respond to this request.

36. On or about December 17, 2008, bar counsel sent a second letter to respondent at his record bar address by certified U.S. Mail, return receipt requested, mandating respondent's response by December 29, 2008.

37. Respondent failed to provide a written response to the Bar's official inquiry concerning the allegations of the Santos complaint.

38. By the conduct set forth above, respondent violated 4-8.4(g) [A lawyer shall not fail to respond, in writing, to any official inquiry by bar counsel or a disciplinary agency, as defined elsewhere in these rules, when bar counsel or the agency is conducting an investigation into the lawyer's conduct. A written response shall be made: (1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors; (2) within 10 days of the

date of any follow-up written investigative inquiries by bar counsel, grievance committee, or board of governors....].

III. RECOMMENDATION AS TO GUILT:

As to Count I, and pursuant to the default Judgment, I recommend respondent be found guilty of violating R. Regulating Fla. Bar 4-8.4(g)(1) and 4-8.4(g)(2);

As to Count II, and pursuant to the default judgment, I recommend respondent be found guilty of violating R. Regulating Fla. Bar 4-8.4(g)(1) and 4-8.4(g)(2);

As to Count III, and pursuant to the default judgment, I recommend respondent be found guilty of violating R. Regulating Fla. Bar 4-8.4(g)(1) and 4-8.4(g)(2);

As to Count IV, and pursuant to the default judgment, I recommend respondent be found guilty of violating R. Regulating Fla. 4-1.3 and 4-1.16;

As to Count V, and pursuant to the default judgment, I recommend respondent be found guilty of violating R. Regulating Fla. Bar 4-8.4(g)(1) and 4-8.4(g)(2).

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

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

- A. Disbarment.
- B. Respondent shall pay The Florida Bar's costs in these proceedings.

In arriving at the aforementioned sanction, both Florida Standards for Imposing Lawyer Sanctions (Florida Standards) and pertinent case law have been examined.

Section 8.1(b) of the Florida Standards For Imposing Lawyer Sanctions specifically speaks to appropriate sanctions involving prior discipline. It provides that disbarment is the appropriate disciplinary sanction when an attorney has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct. Respondent is currently under a three year suspension by Order of the Florida Supreme Court, dated October 23, 2008, in Case No. SC07-816. Among the rules violated in the prior case were Rules 4-1.3, 4-8.4(g)(1) and 4-8.4(g)(2), which were also committed by respondent in this case.

In the instant case, as in the prior disciplinary matter, respondent failed to provide any response to the Bar respecting the four bar complaints filed against him. Respondent was aware of the complaints, as he had written the Bar requesting another copy of the complaints, promising to cooperate. His failure to cooperate and respond to the complaints was willful and his failure to participate in any way in the disciplinary proceedings against him continued through the final hearing. He did not file a responsive pleading to the formal complaint, which resulted in a default judgment against him. He also failed to appear at the duly noticed case management conference conducted on June 11, 2009, which resulted in an Order issued by the undersigned to respondent to show cause why he should not be cited for indirect

contempt. Respondent did not respond to the order to show cause and did not appear at the final hearing.

The case law also supports disbarment in this matter. See The Florida Bar v. Bartlett, 509 So.2d 287 (Fla. 1987), where the attorney was disbarred for committing similar prior misconduct, including neglect, for which he had been disciplined. The Court cited both The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982) and The Florida Bar v. Delves, 397 So.2d 919 (Fla. 1981) to hold the repeated instances of similar misconduct as grounds to impose the disbarment.

Analogous to the instant case, the attorney in Bartlett failed to answer the complaint, respond to request for admissions or appear at the final hearing. In that case, the Supreme Court of Florida cited The Florida Bar v. Montgomery, 412 So.2d 346 (Fla. 1982), to state, “a lawyer’s willful refusal to participate at all in the disciplinary process when he is accused of misconduct calls into serious question a lawyer’s fitness to practice law.”

With respect to aggravation and mitigation as set forth in the Florida Standards, I find the following factors to be applicable:

As to aggravation pursuant to Section 9.2 of the Florida Standards I find there is prior disciplinary offenses [9.22(a)]; a pattern of misconduct [9.22(c)]; multiple offenses [9.22(d)]; bad faith obstruction of the disciplinary proceeding by

intentionally failing to comply with rules or orders of the disciplinary agency [9.22(e)]; and vulnerability of victim.

As to mitigation pursuant to Section 9.3 of the Florida Standards, I find none.

The Supreme Court of Florida set forth the purposes of attorney discipline in The Florida Bar v. Pahules, 233 So.2d 130,132 (Fla. 1992); attorney discipline must protect the public from unethical conduct and have a deterrent effect while still being fair to respondents. After a consideration of all the appropriate factors, I recommend disbarment as the disciplinary sanction in this case.

V. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS:

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

A. Personal History of Respondent

Age: 50

Date Admitted to The Florida Bar: August 27, 1999

Prior Disciplinary Record: Three year suspension by Order dated October 23, 2008, in Case No. SC07-816.

B. Aggravating Factors:

9.22(a) prior disciplinary record

9.22(c) a pattern of misconduct;

9.22(d) multiple offenses;

9.22(e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency;

C. Mitigating Factors: None

VI. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

Below is an itemized list of the expenses incurred in the above styled case.

A. Grievance Committee Level Costs:	
1. Court Reporter Costs	\$ - 0 -
2. Bar Counsel Travel Costs	\$ - 0 -
B. Referee Level Costs:	
1. Court Reporter Costs	\$ - 0 -
2. Bar Counsel Travel Costs	\$ 36.90
C. Administrative Fee	\$ 1,250.00
D. Miscellaneous Costs:	
1. Investigator Costs	\$ 89.80
2. Copy Charges	\$ - 0 -
3. Auditor Cost	\$ - 0 -
TOTAL ITEMIZED COSTS:	<u>\$ 1,376.70</u>

It is apparent that other costs have or may be incurred. It is recommended that such costs be charged to respondent and interest at the statutory rate shall accrue and should such cost judgment not be satisfied within 30 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 _____ day of _____, 2009.

Honorable Lee Jay Seidman, Referee
Broward County Courthouse
201 Southeast Sixth Street
Fort Lauderdale, Florida 33301

CERTIFICATE OF SERVICE

I HEREBY CERTIFY the original of the foregoing Report of Referee has been mailed to Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and copies were mailed by regular U.S. mail to the following: Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; Michael David Soifer, Bar Counsel, The Florida Bar, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323; and Jack Barry Phillips, Respondent, 244 Fifth Avenue, Suite 200, New York, New York 10001-7604 on this ___ day of _____, 2009.

Honorable Lee Jay Seidman, Referee