

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

THE FLORIDA BAR,

Complainant,

v.

KENNETH PAUL SIRKIN,

Respondent.

_____/

**Supreme Court Case
No. SC09-1125**

**The Florida Bar File
No. 2009-51,554(15D)OSC**

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 June 25, 2009, The Florida Bar filed its Petition For Contempt And Order to Show Cause against respondent in these proceedings. An Order to show cause was issued by the Supreme Court and the respondent, through counsel, responded to the petition. The undersigned was appointed to preside as Referee by the Chief Judge of the Seventeenth Judicial Circuit. The final hearing was conducted on March 25, 2010. 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 was initially represented by D. Culver Smith III, Esq. Respondent discharged Mr. Smith as his counsel on or about January 4, 2010, and was *pro se* thereafter. 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 under emergency suspension effective March 26, 2010, entered by Order of the Florida Supreme Court dated February 24, 2010, in Case No. SC10-319.

B. Narrative Summary of Case.

This matter is a Petition For Contempt filed with the Supreme Court of Florida pursuant to R. Regulating Fla. Bar 3-7.11(f), for respondent's failure to comply with a subpoena to produce records and appear for a sworn statement. The Bar's Petition for Contempt and Order to Show Cause states that the subpoena was issued by the grievance committee after respondent failed to respond as required by R. Regulating Fla. Bar 4-8.4(g) to official inquiries in eleven separate Bar complaints that alleged issues involving misuse of trust funds, neglect and failure to communicate. The subpoena required the production of respondent's trust account records and other

records for the period January 1, 2006 through May 31, 2009, and the client files relating to the Bar complaints. The subpoena further required respondent to appear and testify under oath.

Respondent was initially represented by counsel in this proceeding, but respondent discharged the attorney on or about January 4, 2010. During the time period following the filing of the contempt petition up to the discharge of his counsel, respondent had produced some, but not all of the subpoenaed documents, and his sworn statement/deposition had commenced, but had not been completed. After respondent discharged his counsel, he appeared on January 12, 2010, at the scheduled recommencement of his sworn statement/deposition and requested a continuance, so that he could obtain his file from discharged counsel. Respondent agreed on the record to appear for his sworn statement/deposition on January 28, 2010, and further agreed to produce all documents not yet produced that were the subject of the subpoena underlying this contempt case. These yet unproduced documents included all fee agreements, all closing statements from any personal injury cases, and any further documentary evidence that he had to support all trust disbursements, transfers and receipts for his trust account relating to the time frame set forth in the subpoena.

On January 19, 2010, a duly noticed telephonic status hearing took place with the Referee. Respondent failed to appear. The status hearing was rescheduled and duly noticed to take place by telephone on January 28, 2010, coinciding with respondent's

scheduled appearance for the recommencement of the sworn statement/deposition. In the late afternoon of January 27, 2010, after Bar Counsel had left the office for the day, respondent left a message requesting a postponement of the sworn statement/deposition scheduled for the next morning, claiming he was going to retain an attorney. No contact was ever received from an attorney claiming to represent respondent in this matter. On the morning of January 28, 2010, Bar Counsel attempted to contact respondent by telephone concerning the requested postponement. Respondent failed to answer the telephone or return the voice messages that were left for him. Respondent failed to appear at the sworn statement/deposition and also failed to appear at the telephonic status hearing scheduled on that date. At the telephonic status hearing on January 28, 2010, the Referee left a message on respondent's voice mail and subsequently issued an Order commanding respondent to appear on or before February 10, 2010, for his deposition and to bring all requested documents with him to the deposition. Respondent was also ordered to appear at the next telephonic status conference scheduled on February 18, 2010.

On January 29, 2010, Bar Counsel served respondent with a Notice of Taking Sworn Statement/Deposition, scheduling it for February 4, 2010. Respondent failed to appear for his sworn statement/deposition on February 4, 2010, and failed to otherwise take steps to comply with the February 10, 2010, deadline imposed in the Referee's order. Further, respondent failed to appear at the status conference on February 18,

2010. The Bar filed a notice of respondent's noncompliance and a motion to impose sanctions for which a hearing was duly noticed for March 4, 2010. Respondent failed to appear at the hearing and an Order for Default Judgment was entered wherein he was adjudged guilty of Contempt pursuant to R. Regulating Fla. Bar 3-7.11(d)(7) and 3-7.11(f).

Pursuant to the Order for Default Judgment, I find respondent's failure to appear at his deposition/sworn statement and produce all of the subpoenaed documents, are without excuse or explanation. Respondent has intentionally and willfully failed to fully comply with the subpoena. I also find respondent's failure to obey the Referee's Order to appear for his sworn statement and produce the documents was intentional and willful. Further, I find respondent's conduct in this matter was designed to cause delay and frustrate the purpose of these proceedings. Respondent's failures to appear at the status conferences scheduled in this matter are further evidence of respondent's contumacious disregard of this disciplinary proceeding. Respondent also did not appear at the final hearing.

III. RECOMMENDATION AS TO GUILT:

My recommendation as to guilt is as follows:

Pursuant to the Order For Default Judgment Against Respondent, I find respondent guilty of Contempt pursuant to R. Regulating Fla. Bar 3-7.11(d)(7) and 3-7.11(f).

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. Three (3) year suspension.

B. Respondent shall pay The Florida Bar's costs in these proceedings pursuant to R. Regulating Fla. Bar 3-7.6(q).

In recommending this disciplinary sanction, relevant case law and the Standards for Lawyer Discipline were taken into account. Pursuant to the Standards, I find that Standards 6.22 and 7.2 are applicable. Standard 6.22 provides that suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding. Standard 7.2 provides that 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. Respondent's failure to comply with the subpoena obstructed the Bar's investigation into the underlying Bar complaints. Respondent's further failure to properly participate in the instant contempt proceeding caused continued obstruction to the Bar's investigation, and was in derogation of his professional obligations in this disciplinary case. His obstruction and disregard of this matter interfered with the

disciplinary proceeding and also caused injury or potential injury to the public and the legal system.

As to aggravating factors: Pursuant to Standard 9.22(a), I considered respondent's prior disciplinary history where he has already been previously sanctioned with a ten day suspension and is under emergency suspension as of March 26, 2010. I also find a pattern of misconduct [9.22(c)]; bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency [9.22(e)]; and substantial experience in the practice of law [9.22(i)]. I find none of the mitigating factors under Standard 9.32 to be applicable.

There is relevant case law to support my recommendation of a three year suspension as appropriate for the particular circumstances of this case. See The Florida Bar v. Santiago, 521 So.2d 1111(Fla. 1988), where the attorney was disbarred for failing to produce records or appear when subpoenaed and practiced law while suspended. Similar to this case, complaints were filed against the attorney in Santiago, to which the lawyer failed to produce records, respond to queries or appear when subpoenaed. Mr. Sirkin has demonstrated a continuous pattern of neglecting his professional obligations in this disciplinary case. Not only did he fail to comply with the subpoena, he also failed to comply with the order of this Referee. After discharging his lawyer, he failed to further participate in this disciplinary proceeding. His willful refusal to participate in the disciplinary process calls into serious question his fitness to

practice law. The Florida Bar v. Bartlett, 509 So.2d 287 (Fla. 1987).

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 a three (3) year suspension as the appropriate disciplinary sanction in this case.

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

I considered the following personal history and prior disciplinary record of respondent, to wit:

A. Personal History of Respondent:

Age: 36

Date Admitted to the Bar: July 25, 2002

B. Prior Discipline: Respondent is under Emergency Suspension effective March 26, 2010, pursuant to Rule 3-5.2 of the Rules Regulating The Florida Bar. Respondent received a ten (10) day suspension by Order dated August 13, 2009, for violations related to communication with clients, declining or terminating representation with a client, and failure to respond to the Bar's inquiries in Supreme Court Case No. SC08-2292.

C. Aggravation and Mitigation

Florida Standards for Imposing Lawyer Sanctions

Standard 9.22 Aggravating Factors

(a) prior disciplinary offenses;

(c) pattern of misconduct;

(e) bad faith obstruction of the disciplinary proceeding by intentionally

failing to comply with rules or orders of the disciplinary agency;

(i) substantial experience in the practice of law.

Standard 9.32 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 | \$ 1,402.70 |
| 2. Bar Counsel Travel Costs | \$ 35.50 |

C. Administrative Fee \$ 1,250.00

D. Miscellaneous Costs:

- | | |
|-----------------------|----------|
| 1. Investigator Costs | \$ - 0 - |
| 2. Copy Charges | \$ - 0 - |
| 3. Auditor Cost | \$ - 0 - |

TOTAL ITEMIZED COSTS: \$ 2,688.20

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 _____, 2010.

Elijah Harold Williams, 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 Kenneth Paul Sirkin, respondent at 2500 Quantum Lakes Drive, Suite 203, Boynton Beach, Florida 33426 on this ____ day of _____, 2010.

Elijah Harold Williams, Referee