

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC12-93

v.

[TFB File Nos. 2011-30,988(09E);
2011-31,177(09E)]

BRIAN ZACHARY STERN HERZIG,

Respondent.

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 January 18, 2012, The Florida Bar filed its formal Complaint in this matter. Respondent failed to file an answer to the Complaint, and this referee granted the bar's Motion for Default by order dated March 5, 2012. Thereafter, respondent failed to answer the bar's Requests for Admission, and this referee entered an order on May 2, 2012, deeming the bar's requests for admission to be admitted. On May 18, 2012, a final hearing as to discipline was held. Respondent failed to appear at the final hearing and has completely failed to participate in the

referee level of this matter. Before the final hearing as to discipline began, the bar counsel sounded the hall and respondent was not present.

It should be noted that the respondent failed to appear for a telephonic case management conference for which he was duly noticed that was held on March 12, 2012. At the telephonic case management conference, the final hearing was set for May 18, 2012. Respondent was sent notice of the date of the final hearing pursuant to the order on Case Management Conference dated March 16, 2012. The bar provided notices to respondent at his record bar address and at his email address, brian@teamherzig.com.

All items properly filed including pleadings, recorded testimony, exhibits in evidence and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida. This referee considered the bar's Memorandum of Law as to Evidence addressing the introduction of hearsay in disciplinary proceedings which was filed with the referee at the beginning of the final hearing as to sanction. Further, the bar offered and this referee received the bar's Composite Exhibit which was marked as the Bar's Exhibit number 1 which contained five sub-exhibits. The sub-exhibits were comprised of the Inquires/Complaints of Leslie Ludlam and Robert and Marcia Morgan, et al., two pieces of correspondence from respondent and three letters from complainants in

the second count of the bar's complaint. This referee reviewed and considered the bar's composite exhibit.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Kenneth H. P. Bryk

For The Respondent - No Appearance

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 of the Supreme Court of Florida.

B. Narrative Summary of Case. The bar called five witnesses to testify at the final hearing as to discipline. As to Count I, the bar called Leslie Ludlam. As to Count II, the bar called Robert Morgan, Carol Melchoir, Douglas Agan and Donald Migliore, four of the 25 complainants who owned residences in the relevant development addressed in Count II of the bar's complaint. As there was no opposition or impeachment of any of the testimony that the referee heard at the final hearing as to discipline, this referee accepts all of the statements made by the witnesses as facts in the case.

COUNT I **TFB File No. 2011-30,988(09E)**

1. In early 2010, Leslie Ludlam, president of Association Management

Group of Central Florida (AMG) a management company for homeowners associations, who, on behalf of the Wilderness Home Owners Association, hired respondent to pursue collections against delinquent homeowners in the Wilderness Home Owners Association.

2. In May 2010, respondent advised Ms. Ludlam that he had collected funds on behalf of Wilderness Home Owners Association and that he would forward the funds to Ms. Ludlam. In July 2010, respondent's office advised Ms. Ludlam that he had collected \$713.80 on behalf of Wilderness Home Owners Association.

3. Despite repeated requests from Ms. Ludlam, respondent failed to remit the funds until in or about February 2011 when he sent approximately \$1,331.04 to Ms. Ludlam and then only after Ms. Ludlam filed a bar grievance.

4. Respondent failed to respond to letters and emails from or on behalf of Ms. Ludlam.

5. Although respondent ultimately delivered the funds to Ms. Ludlam, he failed to identify the source and amount of the funds collected from individual homeowners so that appropriate credits could be given to the homeowners who had paid their association fees.

6. Despite repeated requests from Ms. Ludlam for an accounting, comprised of files, papers or some method of identifying the source of the collected funds, respondent failed to respond with the requested information.

7. When respondent failed to account for the funds collected and remitted to Ms. Ludlam on behalf of Wilderness Home Owners Association, respondent placed Ms. Ludlam and the Association in the impossible position of attempting to account for the collected and missing funds. Respondent caused irreparable harm to his clients.

8. Respondent also failed to timely respond, in writing, to the bar's investigative inquires into this matter.

COUNT II
TFB File No. 2011-31,177(09E)

9. In 2009, a group of homeowners in the Del Webb La Cresta community hired the Kilgore Pearlman law firm to sue the developer of their community for failing to finish the project in accordance with their contracts. The homeowners paid Kilgore Pearlman a legal fee of \$1,000.00. The case was assigned to respondent, then an associate with Kilgore Pearlman.

10. Shortly thereafter, respondent informed the clients that he was leaving the firm to open his own law practice. Approximately 70 clients terminated Kilgore Pearlman's representation and hired respondent privately. Kilgore Pearlman conveyed a portion of the clients' legal fees to respondent.

11. Despite repeated assurances, respondent failed to file a demand for settlement or file timely and accurate requests for mediation and arbitration as was required in the residents' contracts with the builder.

12. Thereafter, respondent failed to proceed in a timely manner and failed to timely respond to client communications.

13. Despite respondent's assurances to his clients that actions would take place by certain dates, respondent missed repeated deadlines that he had set. The cases dragged on from October 2009 until March 2011 when the bar grievances were filed.

14. Robert and Marcia Morgan ultimately filed the bar grievance against respondent on behalf of themselves as well as these additional homeowners who had hired respondent, listed as follows: Wayne and Carol Melchior; Doug and Teresa Agan; Dennis and Beverly Kendall; Burton and Georgia Aldrich; Donald and Barbara Migliore; David and Denise Conner; Edward and Marie Sullivan; Charles and Cheryl Gray; Jan Urankar; Jerry and Elizabeth Hollan; Patti and Jim Rodgers; Fay Edwards; Ralph and Jessica Blythe; Sally and Lloyd Akiens; Valerie Paskevich; George and Diana Vamos; Richard and Margery Zimmerman; Robert Maas; Jeffrey and Lucille Simon; Richard and Susan Vaiarella; Robert Eldon; Joseph and Lynn Campana; and James and Janet Scott.

15. On or about May 31, 2011, respondent asked all of the remaining clients whether they wished to terminate his representation. Ultimately, all of the clients terminated respondent's representation and asked for a refund of the unearned portion of their legal fees and the return of their files.

16. Despite sending emails to his clients where respondent agreed to refund the unearned portion of the clients' fees and return their files, respondent failed to do so. The four witnesses who testified at the final hearing as to sanction as to Court II, testified of the repeated efforts they undertook to obtain the return of the unearned portion of their legal fees and their files only to be met with responsive emails from respondent agreeing to do so. Despite his repeated assurance via email that he would return the funds and files, respondent failed to do so.

17. Respondent also failed to timely respond, in writing, to the bar's investigative inquiries into this matter.

18. This referee finds by clear and convincing proof that despite respondent's repeated assurances to the residents that he would proceed on their behalf and later return their unearned legal fees and files that respondent never intended to do so.

19. Further, this referee finds that the residents have experienced a potential lack of recourse against the developer of their sub-division.

III. RECOMMENDATIONS AS TO GUILT.

This referee recommends that respondent be found guilty of violating the following Rules Regulating The Florida Bar: 4-1.1 A lawyer shall provide competent representation to a client; 4-1.2(a) Subject to subdivisions (c) and (d), a lawyer shall abide by a client's decisions concerning the objectives of representation, and, as required by rule 4-1.4, shall reasonably consult with the client as to the means by which they are to be pursued. A lawyer may take such action on behalf of the client as is impliedly authorized to carry out the representation. A lawyer shall abide by a client's decision whether to settle a matter; 4-1.3 A lawyer shall act with reasonable diligence and promptness in representing a client; 4-1.4(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows or reasonably should know that the client expects assistance not permitted by the Rules of Professional Conduct or other law; 4-1.4(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed

decisions regarding the representation; 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; and, 5-1.1(b) Money or other property entrusted to an attorney for a specific purpose, including advances for fees, costs, and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or setoff for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

This referee considered the following Standards prior to recommending discipline:

4.4 Lack of Diligence

4.41 Disbarment is appropriate when:

- (a) a lawyer abandons the practice and causes serious or potentially serious injury to a client; or
- (b) a lawyer knowingly fails to perform services for a client and causes serious or potentially serious injury to a client; or
- (c) a lawyer engages in a pattern of neglect with respect to client matters and causes serious or potentially serious injury to a

client.

9.22 Aggravating Factors:

- (b) dishonest or selfish motive;
- (c) a pattern of misconduct;
- (d) multiple offenses; and,
- (e) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency.

9.32 Mitigating Factors:

Although the bar asserted that this referee should consider respondent's lack of a disciplinary history [9.32(a)] and respondent's inexperience in the practice of law [9.32(f)] as mitigation, this referee declines to find either factor as mitigating. The respondent was both admitted in 2009 and hired by the complainants in Count II in 2009. Respondent's misconduct began in 2009 when he took on the employment of these clients when he knew he was not competent to represent them. This referee has found that respondent did not intend to represent the best interests of these clients. In 2009, respondent was aware of his obligations and failed to follow through. The only reason that respondent had no disciplinary history was because it took time to process these complaints and this referee finds that respondent's misconduct began in 2009. Respondent's inexperience and lack of a disciplinary history are not mitigation in light of the facts of these cases.

V. CASE LAW

This referee considered the following case law prior to recommending discipline:

In *The Florida Bar v. Herman*, 8 So.3d 1100, 1108 (Fla. 2009), the Court emphasized that it “has moved towards stronger sanctions for attorney misconduct” in recent years, citing *The Florida Bar v. Rotstein*, 835 So.2d 241, 246 (Fla. 2003).

In *The Florida Bar v. Feige*, 937 So.2d 605 (Fla. 2006), an attorney was suspended for three years for a complete lack of diligence in representing his clients. His misconduct involved the violation of 16 different bar rules in the handling of seven different client matters. 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. He also had a history of disciplinary cases, including a prior two year suspension.

In *The Florida Bar v. Shoureas*, 913 So.2d 554 (Fla. 2005), an attorney was suspended for three years for failing to return client phone calls or reply to client letters, for failing to execute a summons and complaint, for failing to meet discovery deadlines, and for failing to respond to inquiries from the bar. Shoureas had previously been disciplined twice for neglecting clients, but the offenses arose during a single period when she was suffering from chronic

depression.

In *The Florida Bar v. Cimbler*, 840 So.2d 955 (Fla. 2002), an attorney was suspended for one year for failing to record a warranty deed and pay real estate taxes out of funds held in his trust account upon sale of client's real property; for failing to appear at a hearing on the opposing party's motion to dismiss suit for specific performance of real estate sales contract and failing to promptly make restitution to client; for failing to notify clients that they were to appear for a deposition, which resulted in a final judgment in favor of the defendants in a civil lawsuit arising out of a lease dispute; and for failing to maintain his bar address or public phone number, and making deliberate efforts to make himself unavailable and difficult to contact. The Court held that a rehabilitative suspension was necessary despite Cimbler's showing of remorse and significant evidence of mitigation found by referee, in light of the seriousness of the neglect, the cumulative nature of the misconduct, and his previous disciplinary history.

In *The Florida Bar v. Centurion*, 801 So.2d 858 (Fla. 2000), an attorney was suspended for one year for neglecting the matters of five separate clients and for failing to respond to inquiries from the bar. The Court found that Centurion's conduct resulted in prejudice to his clients' rights and was an intolerable breach of trust. He had no prior disciplinary history.

In *The Florida Bar v. Elster*, 770 So.2d 1184 (Fla. 2000), an attorney was

suspended for three years for failing to accomplish any meaningful work on behalf of clients, for making misrepresentations to clients, and for issuing a misleading business card. The attorney's misconduct occurred in four separate cases, and the clients, who were foreign nationals, were very vulnerable.

In *The Florida Bar v. Patterson*, Case No. SC11-911, by order dated December 22, 2011 (no opinion), an attorney was disbarred for neglecting a client's matter, for failing to respond to the bar's investigative inquiries, and for failing to participate in the disciplinary proceedings. The attorney's whereabouts were unknown, and he had a prior disciplinary history.

In *The Florida Bar v. Horowitz*, 697 So.2d 78 (Fla. 1997), an attorney was disbarred for neglecting clients and failing to respond to the bar. In determining the appropriate discipline, the referee considered and rejected the mitigating factor of clinical depression. The referee found the following aggravating factors: prior disciplinary history of a public reprimand, an admonishment, and a suspension; a pattern of misconduct; multiple offenses in which the acknowledgment of wrongdoing was very late and did not seem sincere; and substantial experience in the practice of law. The referee stated in his report: "It is imperative that a clear and unmistakable message be sent that callous disregard for clients, The Florida Bar, and the attorney disciplinary process are serious infractions which may not be committed with impunity."

In *The Florida Bar v. Friedman*, 511 So.2d 986 (Fla. 1987), an attorney was disbarred for neglecting legal matters and abandoning his law practice. In addition, Friedman failed to respond to the bar's complaint and to the bar's request for admissions. The attorney also failed to attend the final hearing. The referee stated in his report: "Respondent's abandonment of his law practice evidenced a total disregard for the most fundamental obligations a lawyer owes to his clients."

In *The Florida Bar v. Bartlett*, 509 So.2d 287 (Fla. 1987), an attorney was disbarred for neglecting a legal matter. Bartlett did not answer the bar's complaint or its request for admissions and did not appear for the final hearing. He had already been suspended twice. In recommending disbarment, the Court found that "a lawyer's willful refusal to participate at all in the disciplinary process when he is accused of misconduct calls into serious question the lawyer's fitness for the practice of law."

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

This referee recommends that respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

- A. Disbarment; and,
- B. Payment of The Florida Bar's costs in these proceedings.

This referee finds no basis to determine that respondent is a candidate for rehabilitation warranting a lesser sanction. Respondent's choice not to participate

in the disciplinary proceeding gave this referee no basis to find he would benefit from rehabilitation if it was afforded to him. This referee only finds the potential for further damage if respondent is permitted to continue practicing law. Although this referee acknowledges and is aware of the difficulties and sacrifice associated with becoming a licensed attorney, this referee finds that this is one of the most egregious cases, if not the most egregious case, that this referee has come across. The only appropriate sanction is disbarment.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), this referee considered the following:

Age: 32

Date admitted to the bar: April 16, 2009

Prior discipline: None

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

This referee finds the following costs were reasonably incurred by The Florida Bar:

Investigative Costs	\$3,187.90
Administrative Fee	\$1,250.00
Court Reporter Fees	\$ 316.60
Copy Costs	<u>\$ 48.00</u>
TOTAL	<u>\$4,802.50</u>

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 14th day of June, 2012.

J. DAVID WALSH
Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

Kenneth H. P. Bryk, Bar Counsel, The Florida Bar, 1000 Legion Place, Suite 1625
Orlando, Florida 32801-1050

Brian Zachary Stern Herzig, Respondent, Herzig & Herzig, P.A., 12935 W.
Highway 42, Prospect, Kentucky 40059-9107

Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida
32399-2300

