STATE OF WISCONSIN IN SUPREME COURT

IN THE MATTER OF DISCIPLINARY PROCEEDINGS AGAINST THOMAS L. FRENN, ATTORNEY AT LAW.

OFFICE OF LAWYER REGULATION, Case No. 2025AP356-D

Complainant;

THOMAS L. FRENN,

Respondent.

REPORT AND RECOMMENDATION OF REFEREE

Procedural History

The Office of Lawyer Regulation commenced this proceeding February 24, 2025 by filing a Complaint. I was appointed as Referee by order of this Court dated March 26, 2025. Attorney John T. Payette appeared for OLR and Attorney Thomas L. Frenn appeared *pro se*.

The Complaint alleges in a single count that Attorney Frenn violated SCR 20:1.14(a) by failing to communicate with his client for approximately four and a half months, while during that period of time he attended a mediation and signed a mediation agreement on her behalf, and then attended an arbitration on her behalf. Attorney Frenn filed an answer April 8, 2025 denying that he violated that rule. He also filed on that date a motion to dismiss with supporting brief, contending that the Complaint failed to state a claim.

I conducted a telephonic scheduling conference on May 5, 2025. In that conference, OLR indicated that it also wished to file a dispositive motion on the issue of whether Attorney Frenn violated SCR 20:1.14(a). On the same date, I issued a scheduling order establishing deadlines for filing that motion and for further briefing of the cross-motions. On May 29, 2025, OLR filed a motion for judgment on the pleadings, along with a brief supporting that motion and opposing the motion to dismiss.

In an Order on Cross-Motions for Dispositive Relief dated June 30, 2025, I concluded as a matter of law that Attorney Frenn's conduct violated the rule and therefore granted OLR's motion and denied Attorney Frenn's. That order, which explains my reasoning, is attached as Exhibit A.

On July 3, 2025 Attorney Frenn served a motion for reconsideration pointing out, among other things, that I had issued my June 30 order without awaiting his reply brief, which according to the scheduling order he could file on or before July 3. Upon conferring with counsel it was

agreed that I should consider Attorney Frenn's motion for reconsideration as his reply brief in support of his motion to dismiss and in opposition to OLR's motion for judgment on the pleadings, and that I should issue a supplemental order upon review of that brief.

On July 4, 2025 I issued a supplemental order acknowledging my procedural error in issuing a decision on the cross-motions before receiving Attorney Frenn's reply brief, and addressing the arguments in what was then considered as that brief.[1] That order is attached hereto as Exhibit B. In that order, I adhered to my denial of Attorney Frenn's motion to dismiss and my grant of OLR's motion for judgment on the pleadings.

On July 29, 2025, I conducted a telephonic status conference with the parties to discuss the remaining issue of the appropriate level of discipline. At that conference, OLR reiterated its request for a private reprimand of Attorney Frenn, and Attorney Frenn took no position on the appropriate sanction. In addition, the parties agreed that Attorney Frenn has no prior discipline, notwithstanding the Complaint's failure to address the existence or absence of prior discipline.

Findings of Fact

In their cross-motions, both parties argued that there is no dispute of material fact. (OLR brief at 1; Frenn initial brief at 1.) Based on the pleadings and the factual statements in Attorney Frenn's initial brief in support of his motion to dismiss, I likewise perceive no such dispute. I therefore adopt and incorporate by reference the factual allegations of the Complaint (paragraphs 1-2 and 4-17 thereof)[2] as my Findings of Fact.[3] For the Court's convenience, following are the undisputed *material* facts:

1. Sue Gaulke, daughter of Patricia Skiera and her agent under powers of attorney for health care and finances, engaged Attorney Frenn to represent Ms. Skiera on May 30, 2019, during the pendency of petitions for guardianship and protective placement of Ms. Skiera. (Complaint, ¶¶ 7-9 at 2-3; Answer, ¶ 1 at 1; Motion to Dismiss, ¶ 7 at 2.)

2. On July 18, 2019, a circuit court in the guardianship proceeding adjudged Ms. Skiera to be incompetent and terminated the health care power of attorney, but Ms. Gaulke continued to serve her mother's agent under the financial power of attorney. (Compl., ¶ 9 at 2-3; Ans., ¶ 1 at 1.)

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[1] That order is entitled "Supplemental Order on Cross-Motions for Reconsideration." It should more properly have been entitled "Supplemental Order on Cross-Motions for Dispositive Relief."

[2] The Complaint does not contain a paragraph numbered "3."

[3] With one exception, Attorney Frenn either expressly admitted or failed to deny the Complaint's factual allegations. *See* Wis. Stat. § 802.02(4) (stating general rule that averments in pleading to which responsive pleading is required are admitted when not denied in responsive pleading). The only factual allegation Attorney Frenn expressly denied is paragraph 8. Based on review of the remainder of the Answer and Attorney Frenn's motion to dismiss, it is apparent that denial pertained only to the allegation in that paragraph concerning the scope of Attorney Frenn's representation of Patricia Skiera. OLR alleged Attorney Frenn was engaged "to represent Patricia regarding the guardianship and protective placement" (Complaint, ¶ 8 at 2), while Attorney Frenn alleged he was engaged "to recover funds that James Skiera stole from his mother, Patricia Skiera" (Answer, ¶ 2 at 1). Attorney Frenn elsewhere effectively admitted the remaining allegations of paragraph 8. Because I consider the difference in alleged scope of representation immaterial to the issue presented by the cross-motions—i.e., whether Attorney Frenn violated SCR 20:1.14(a)—I adopt OLR's allegation of the scope of representation in the interest of simplicity.

3. Attorney Frenn subsequently represented Ms. Skiera at a mediation session involving her four children, signed a mediation agreement on her behalf, and then represented her at an arbitration hearing among the same parties. (Compl., ¶¶ 10-11 at 3; Ans., ¶¶ 3-4 at 1; Mtn to Dismiss, ¶¶ 10 at 2, 12 at 2-3.)

4. After providing that representation, Attorney Frenn met and spoke with Ms. Skiera for the first time on October 21, 2019, ostensibly because Ms. Gaulke was no longer acting as agent under the financial power of attorney and the guardian would not communicate with him. (Compl., ¶ 12 at 4 and Ex. A at 1; Ans., ¶ 5 at 2; *see* Mtn to Dismiss, ¶¶ 13-14, 16 at 3; Frenn initial brief at 3.)

5. Three months later, Attorney Frenn filed his report of that interview in the guardianship proceeding. (Compl., ¶ 12 at 4 and Ex. A.)

6. The report indicated that during the interview Attorney Frenn informed Ms. Skiera of the result of his representation and she expressed her approval as well as her preference regarding who should manage her financial affairs. (*See id.*; Mtn to Dismiss, ¶ 14 at 3.)

Conclusion of Law

For the reasons discussed in my orders on the parties' cross-motions (Exhibits A and B), I reach the following conclusion of law:

By failing to communicate with his client for approximately four and a half months, while during that period of time he attended a mediation and signed a mediation agreement on her behalf, and then attended an arbitration on her behalf, Attorney Frenn violated SCR 20:1.14(a).[4]

Recommendation on Sanction and Costs

Although the *American Bar Association Standards for Imposing Lawyer Sanctions* do not directly address a lawyer's failure to communicate with his client before acting on her behalf, such a failure is analogous to a lack of diligence. The *ABA Standards*, § 4.44, provide that in the absence of aggravating or mitigating circumstances, "[a]dmonition is generally appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes little or no actual or potential injury to a client." *See also id.*, § 2.6 (equating "admonition" with private reprimand).

In this case, Attorney Frenn has emphasized and OLR has not refuted that his work, far from injuring his client, resulted in a substantial financial benefit to her. Of course, there was a potential for injury in that Ms. Skiera may have disapproved of that result, or the manner in which Attorney Frenn was to achieve it, had he consulted her directly before acting on her behalf. That potential was somewhat remote, however, because Attorney Frenn did timely

[4] SCR 20:1.14(a) provides: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client."

consult with Ms. Gaulke, his client's daughter and attorney-in-fact, and apparently nothing came to his attention (nor has anything come to mine) suggesting that Ms. Gaulke's interests diverged from those of her mother, or that those two were not otherwise "on the same page."

Aggravating factors under the *ABA Standards* are present: Attorney Frenn has not acknowledged the wrongful nature of his conduct (*see id.*, § 9.22(g)), the victim was vulnerable (*see id.*, § 9.22(h)), and he has substantial experience in the practice of law (*see id.*, § 9.22(i)).[5] Mitigating factors under the *ABA Standards* are present, as well: absence of a prior disciplinary record (*id.*, § 9.32(a)), absence of a dishonest or selfish motive (*id.*, § 9.32(b)), a cooperative attitude toward this proceeding (*id.*, § 9.32(e)), and a delay of five years before OLR commenced this proceeding (*id.*, § 9.32(j).

The mitigating factors offset the aggravating factors. Therefore, the *ABA Standards* point toward a private reprimand. Because there is no prior discipline, this Court's progressive discipline policy does not point away from a private reprimand.

In short, Attorney Frenn neglected a fundamental component of an attorney-client relationship—direct consultation with his client before acting on her behalf. That omission appears, however, to have been simply a mistake, and not part of a strategy underlying a dishonest or selfish motive. In effect, Attorney Frenn took a short cut, relying entirely on Ms. Gaulke for information and direction that he evidently surmised would be more difficult to obtain reliably from Ms. Skiera. Nonetheless, Attorney Frenn has represented and OLR has not disputed that he achieved a substantial financial recovery for Ms. Skiera. For the foregoing reasons, I recommend that the Court impose a private reprimand.

Finally, I recommend that Attorney Frenn be required to pay the full costs of this proceeding. There are no "extraordinary circumstances here that would justify a departure from the court's standard practice of imposing full costs against the respondent attorney." *Disciplinary Proceedings Against Lister*, 2015 WI 8, ¶ 47, 360 Wis. 2d 330, 858 N.W.2d 687.

Dated this 3rd day of August, 2025.

Charles H. Barr, Referee

[5] Attorney Frenn was admitted to the practice of law in Wisconsin May 17, 1976. (Compl., ¶ 2 at 1; Answer, ¶ 1 at 1.)

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Complainant;

THOMAS L. FRENN,

Respondent.

ORDER ON CROSS-MOTIONS FOR DISPOSITIVE RELIEF

Respondent Thomas L. Frenn moves to dismiss for failure to state a claim the single-count Complaint charging him with a violation of SCR 20:1.14(a). Complainant Office of Lawyer Regulation (OLR) opposes the motion and moves for judgment on the pleadings based on the Complaint's allegations and the Answer's admissions.

Undisputed Material Facts

Both parties argue that there is no dispute of material fact (OLR Brief at 1; Frenn Brief at 1), and I agree. The undisputed material facts are as follows.

Sue Gaulke, daughter of Patricia Skiera and her agent under powers of attorney for health care and finances, engaged Attorney Frenn to represent Patricia on May 30, 2019, during the pendency of petitions for guardianship and protective placement of Patricia.[1] (Complaint, ¶¶ 7-9 at 2-3; Answer, ¶ 1 at 1; Motion to Dismiss, ¶ 7 at 2.) On July 18, 2019, a circuit court in the

[1] The parties differ concerning the scope of the representation. OLR claims Attorney Frenn was engaged "to represent Patricia regarding the guardianship and protective placement" (Complaint, ¶ 8 at 2), while Attorney Frenn claims he was engaged "to recover funds that James Skiera stole from his mother, Patricia Skiera" (Answer, ¶ 2 at 1). This difference is immaterial to the issue presented by the cross-motions.

guardianship proceeding adjudged Patrcia to be incompetent and terminated the health care power of attorney, but Sue continued to serve as Patricia's agent under the financial power of attorney. (Compl., ¶ 9 at 2-3; Ans., ¶ 1 at 1.)

Attorney Frenn subsequently represented Patricia at a mediation session and then at an arbitration hearing, both of which also involved her four children. (Compl., ¶¶ 10-11 at 3; Ans., ¶¶ 3-4 at 1; Mtn to Dismiss, ¶¶ 10 at 2, 12 at 2-3.) *After* providing that representation, Attorney Frenn met with Patricia for the first time, on October 21, 2019, ostensibly because her daughter Sue was no longer acting as agent under the financial power of attorney and the guardian would not communicate with him. (Compl., ¶ 12 at 4 and Ex. A at 1; Ans., ¶ 5 at 2; *see* Mtn to Dismiss, ¶¶ 13-14, 16 at 3; Frenn Br. at 3.) Three months later, Attorney Frenn filed his report of that interview in the guardianship proceeding. (Compl., ¶ 12 at 4 and Ex. A.) The report indicates that during the interview he informed Patricia of the result of his representation and she expressed her approval as well as her preference regarding who should manage her financial affairs. (*See id.*; Mtn to Dismiss, ¶ 14 at 3.)

Analysis

SCR 20:1.14(a) provides: "When a client's capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or for some other reason, the lawyer shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client." OLR charges that Attorney Frenn, by failing to communicate with his client for over four months, during which he represented her in mediation and arbitration, violated that rule.

Inarguably, the polestar of a "normal client-lawyer relationship" is the lawyer's consultation directly with the client. Just as obviously, in the absence of extraordinary

circumstances that consultation must occur *before* the lawyer takes any significant action on the client's behalf. The rule states that a lawyer owes that duty to a client with diminished capacity, to the extent "reasonably possible." The issue the cross-motions present is how, if at all, the rule applies to a lawyer representing an incompetent client.

Attorney Frenn draws a bright line between mere mental impairment and incompetence, noting that incompetence must be adjudicated by a court. (*See* Frenn Br. at 1-2.) He argues, at least implicitly, that with respect to representation of an incompetent client as opposed to a merely impaired one, Rule 20:1.14(a) does *not* impose an obligation on the attorney to consult with that client. Instead, he argues that the attorney for an incompetent client may and should consult exclusively with the client's legal representative as long as that representative is acting in the client's best interest. Attorney Frenn bases his argument on the first sentence of ABA Comment [4] to the rule: "If a legal representative has already been appointed for the client, the lawyer should ordinarily look to the representative for decisions on behalf of the client." Therefore, he concludes, the fact that he did not consult Patricia before representing her in the mediation and arbitration does not amount to a violation of that rule.[2]

OLR counters with ABA Comment [2]: "The fact that a client suffers from a disability does not diminish the lawyer's obligation to treat the client with attention and respect. Even if the person has a legal representative, the lawyer should as far as possible accord the represented person the status of client, particularly in maintaining communication." OLR argues that Comments [2] and [4] are not contradictory: an attorney may have to rely on the client's legal representative for certain decisions or directions, but nonetheless must consult insofar as possible

[2] Attorney Frenn's argument is somewhat inconsistent. If "an incompetent person is someone who has been adjudged incompetent by the court" (Frenn Br. at 1), then for more than six weeks after his engagement Patricia did not yet qualify as incompetent. For the purpose of this analysis, however, I accept Attorney Frenn's assertion that "during the time of [his] representation, Patricia Skiera was always incompetent." (*Id.* at 4.)

directly with the client about the subject of the representation. In support of that argument, OLR points to Comment [1], which observes that "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being."

Attorney Frenn's interpretation of the rule is simplistic. The rule does not draw the bright line that he suggests. In requiring that a lawyer maintain a normal client-lawyer relationship with a client of diminished capacity, the rule does not categorically exempt representation of a client who has been adjudged as incompetent.

OLR's construction of SCR 20:1.14(a) with respect to the duty of a lawyer representing an incompetent client accords more with common sense than does Attorney Frenn's construction. Comment [1] to the rule is undoubtedly correct: a finding of incompetence does not necessarily mean that the client is completely incapable of understanding or communicating about the subject of the representation. Obviously, there are gradations of incompetence, just as there are gradations of impairments generally. One incompetent may be comatose, otherwise unresponsive, or totally cut off from reality, while another may have intermittent lapses in memory or judgment which, while not eliminating her ability to comprehend and communicate, nonetheless renders her unsuitable to make important financial or health care decisions without the aid of a legal representative.

The plain language of the rule requires an attorney to make a reasonable effort to maintain a normal professional relationship with a client of diminished capacity, regardless of whether that diminishment reaches the level of incompetence. For a comatose client, the attorney may perhaps satisfy that duty simply by verifying first-hand the client's comatose condition. But for an incompetent client who is capable of understanding and expressing herself about the

subject of the representation at some level, a lawyer must listen to and advise the client directly to the extent her diminished capacity permits, while listening to and advising the legal representative to the extent the client's diminished capacity renders that necessary.

Although Attorney Frenn eventually consulted directly with his client, OLR premises its charge on the timing of that consultation, which was only after Attorney Frenn represented his client in mediation and arbitration over the course of several months. As OLR points out, the substance of that belated consultation illustrates the purpose of the rule. What if, instead of expressing approval of what Attorney Frenn had done on her behalf, Patricia had expressed disapproval? Surely she was entitled to have her lawyer take into account her wishes, knowledge, and reasoning before he sallied forth on her behalf, even if the effects of her incompetence might ultimately compel her legal representative (her agent under the financial POA) and attorney to follow a different path. That is the entitlement SCR 20:1.14(a) protects.

The arbitrator, who was also the mediator and a retired circuit court judge, issued a decision concluding that Attorney Frenn had "entirely failed to honor the requirements of SCR 20:1.14." (Compl., ¶ 14 at 5.) Attorney Frenn argues that for a variety of reasons this conclusion is entitled to no weight. I agree that my duty is to decide the issues in this proceeding, including the issue presented by the cross-motions, independently and without deference to the arbitrator's analysis, and I have done so.

Accordingly, I deny Attorney Frenn's motion to dismiss for failure to state a claim, and grant OLR's motion for judgment on the pleadings. In my report to the Court, I will recommend that it adopt this order and conclude that Attorney Frenn violated SCR 20:1.14(a) as charged. I request that parties promptly confer and agree on a date and time for a telephone status conference to discuss further proceedings.

Dated June 30, 2025.

Charles H. Barr, Referee

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Respondent.

SUPPLEMENTAL ORDER ON CROSS-MOTIONS FOR RECONSIDERATION

On June 30, 2025, I issued an order denying Attorney Frenn's motion to dismiss the Complaint and granting OLR's motion for judgment on the pleadings. By doing so, I inadvertently "jumped the gun" because according to the Order Following Scheduling Conference, Attorney Frenn was entitled to serve and file a reply brief by July 3. He filed a motion for reconsideration on that date making that point, among others. Upon my inquiry to counsel about how to proceed, Attorney Frenn responded that I may consider his motion for reconsideration and supporting brief as his reply brief. The purpose of this supplemental order, therefore, is to address the remaining arguments in what is now deemed Attorney Frenn's reply brief.

Attorney Frenn makes three substantive arguments in his reply brief. First, he argues that OLR has failed to meet its burden to prove a violation of SCR 20:1.14(a) by clear, satisfactory, and convincing evidence. *See* SCR 22.16(5). The parties, however, agreed that there is no dispute of material fact, and I also perceive none. Therefore, the evidentiary standard applicable to the burden of proof (e.g., preponderance of the evidence; clear, satisfactory, and convincing

evidence; evidence beyond a reasonable doubt) drops out of the analysis. The undisputed material facts either do or do not amount to a violation of SCR 20:1.14(a) as a matter of law, and I have concluded that they do.

Second, Attorney Frenn argues that he "was hired to make a recovery for the estate of [Patricia] Skiera, not to represent her personally." (Frenn Reply Br. at 1.) Again, the parties agreed that there is no disputed issue of material fact, and one of the material facts to which they agreed is that Attorney Frenn was engaged to represent Patricia Skiera, period. Moreover, I fail to perceive how a distinction between a living person and her estate, assuming that distinction to be valid in any context, has any effect on an attorney's duty under SCR 20:1.14(a). For example, adversary counsel engaged or appointed to represent a putative ward with respect to a petition for guardianship of her estate logically has the same duty under that rule to confer with his client as he would if he were instead or in addition representing her with respect to a petition for guardianship of her person.

Finally, Attorney Frenn contends that OLR cites and that there exists no authority for its interpretation of the rule. OLR, however, cites ABA Comment [1] to the rule: "a client with diminished capacity often has the ability to understand, deliberate upon, and reach conclusions about matters affecting the client's own well-being." That is authority; indeed it is compelling authority. While OLR cites no case law on the issue presented by these cross-motions[1]—namely, whether it applies if the client has been adjudged incompetent—the plain language of the rule compels the conclusion that Attorney Frenn contravened it under the undisputed facts.

For the foregoing reasons, I adhere to my June 30, 2025 decision and reiterate my denial of Attorney Frenn's motion to dismiss and grant of OLR's motion on the pleadings. Attorney

[1] None of the case law cited by Attorney Frenn addresses that issue.

Frenn has indicated his unavailability until July 24. I ask that by July 31, 2025, the parties confer and propose a date and time for a telephonic status conference.

Dated July 4, 2025.

Charles H. Barr, Referee