

IN THE SUPREME COURT OF FLORIDA

(Before A Referee)

THE FLORIDA BAR,

Complainant, **FILED**
SID J. WHITE

CASE NO.: 70,804

vs.

HAROLD W. COLEE, JR., **JAN 29 1988**

Respondent. **FLORIDA SUPREME COURT**

Deputy Clerk

REPORT OF REFEREE --
(ORDER ON DISCIPLINARY PROCEEDING)

This matter came on before the below named Referee based on a Complaint by THE FLORIDA BAR against HAROLD W. COLEE, JR.. In its Complaint THE FLORIDA BAR, hereinafter "THE BAR", alleges that HAROLD W. COLEE, JR., hereinafter "COLEE", had access to material evidence of a fraud perpetrated upon a Circuit Court which had received a jury verdict in a personal injury case.

THE BAR alleges that COLEE concealed or knowingly failed to disclose the existence of the fraud on the Court, that COLEE failed to promptly reveal the fraud on the Court and that COLEE acquiesced in payment of compensation to a witness contingent on the outcome of proceedings in the case.

COLEE claims that he did not have personal contact with the witness who could reveal the fraud on the Court, but that COLEE's client knew such witness; that COLEE could not reveal his client's name because the attorney/client privilege prohibited it; and, that there is no evidence that COLEE intended to participate in the payment of money to COLEE's client.

The issues for the Court to resolve are whether COLEE violated the following disciplinary rules:

Complainant, **FILED**
SID J. WHITE

CASE NO.: 70,804

vs.

HAROLD W. COLEE, JR., **JAN 29 1988**

Respondent. **FLORIDA SUPREME COURT**

Deputy Clerk

REPORT OF REFEREE --
(ORDER ON DISCIPLINARY PROCEEDING)

DR 7-102(A)(3):

"(A) In his representation of a client, a lawyer shall not: (3) conceal or knowingly fail to disclose that which he is required by law to reveal."

DR 7-102(B)(2):

"(B) A lawyer who receives information clearly establishing that: (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

DR 7-109(C):

"A lawyer shall not pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the content of his testimony or the outcome of the case."

I. FINDINGS OF FACT:

This case arises out of a "cracker-barrel" discussion between an attorney and his long time client. The discussion centered on a verdict in excess of One Million Dollars (\$1,000,000.00) rendered in a personal injury action in Jacksonville. The size of the verdict obviously titillated both lawyer and client. The level of the discussion was gossipy, opinionated, and banal.

The client advised the attorney that he knew someone who could prove that the Plaintiff in the personal injury action had defrauded the Court, possibly in a criminal way. The lawyer clamped his mental jaws shut on this bare hook, and suggested to the client that such information could be sold to the losing party in the law suit for a sum of Two Hundred Thousand Dollars (\$200,000.00).

The abysmal lack of judgment exercised by COLEE upon receiving this dubious information is, in the opinion of this Referee, the most regrettable act committed by COLEE in the ~~the requirements of the rules of professional conduct, a lawyer shall~~ not: (3) conceal or knowingly fail to disclose that which he is required by law to reveal."

DR 7-102(B)(2):

"(B) A lawyer who receives information clearly establishing that: (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal."

DR 7-109(C):

The client suggests that he is aware of a witness who can expose a fraud perpetrated on the Court; The lawyer responds by saying that such information is valuable; The lawyer suggests that the information be taken to the Defendant's lawyers; The lawyer suggests that the information is worth Two Hundred Thousand Dollars (\$200,000.00).

The Referee believes that it was the lawyer who suggested that the information could be sold, and determined the value of the information, based on the testimony of the client before the Grievance Committee. The client has no interest or bias in this case except perhaps to help his friend the lawyer. If anything, the testimony of the client is extremely damaging to the lawyer. The client denies that he suggested that the lawyer take the information to the Defendant's lawyers and the client denies that he knew for what sum of money the information could be sold. In fact, the client suggests that he would have sold the information for a far greater sum.

COLEE then went to the Defendant's attorneys and revealed that he was aware of evidence which could possibly prove a fraud on the Court. COLEE suggested that the evidence was worth a figure of Two Hundred Thousand Dollars (\$200,000.00). The Defendant's attorneys balked and obtained a delay in making a decision.

Within two days the Defendant's attorneys called back and rejected COLEE's offer. COLEE then terminated the discussions without revealing the name of the client.

The attorneys for the Defendant went to Court, to respond by saying that such information is valuable; The lawyer suggests that the information be taken to the Defendant's lawyers; The lawyer suggests that the information is worth Two Hundred Thousand Dollars (\$200,000.00).

The Referee believes that it was the lawyer who suggested that the information could be sold, and determined

already in possession of the allegedly valuable information. In other words, no fraud had actually been perpetrated on the Court.

↑
II. FINDINGS OF LAW:

Did COLEE willfully conceal or knowingly fail to disclose information which he was required by law to reveal? The Referee finds that COLEE was not actually in possession of information he was required by law to reveal. As previously noted, no fraud had actually been perpetrated on the Court.

However, COLEE was in possession of information which he had reason to believe could prove that a fraud had been perpetrated on the Court, and so, although COLEE was mistaken as to the value of his information, the disciplinary rules compel him to disclose such information. To hold otherwise, would leave the determination of the value of information regarding the perpetration of a fraud on the Court to the attorney who hears such information, and not to the Court itself. COLEE clearly was under a duty to disclose information regarding the fraud on the Court.

COLEE did disclose such information. COLEE immediately went to the Defendant's attorneys and informed them that he believed that he had information of a fraud on the Court which would enable the Defendant's lawyers to set aside the verdict. DR 7-102(A)(3) does not specify that the information must be revealed to the Court. It simply says that such information cannot be concealed, or the attorney may not knowingly fail to disclose such information.

↑
perpetrated on the Court.

II. FINDINGS OF LAW:

Did COLEE willfully conceal or knowingly fail to disclose information which he was required by law to reveal? The Referee finds that COLEE was not actually in possession of information he was required by law to reveal. As previously noted, no fraud had actually been

Did COLEE pay, offer to pay, or acquiesce in the payment of compensation to a witness contingent upon the outcome of the case in violation of DR 7-109(C)? COLEE did not pay the witness to provide the information about the fraud, nor did he offer to pay the witness to provide the information regarding the fraud. THE BAR asserts that COLEE acquiesced in the payment of compensation to a witness contingent on the outcome of the case.

There was no actual payment of compensation to any witness for testimony. In fact, the Defendant's attorneys virtually immediately rejected the idea of paying a witness for such testimony. Had the Defendant's attorneys attempted to pay the witness for the testimony, and had COLEE committed any overt act towards assisting payment, or had COLEE merely stood silent while such payment changed hands, the Referee might find that COLEE acquiesced in the payment of compensation to a witness.

Since no such payment was attempted to be made, nor actually made, COLEE could not have acquiesced in such payment.

It is clear that DR 7-109(C) is intended to prevent attorneys from attempting to bribe a witness for testimony. There is nothing in the DR which prohibits an attorney from attempting to sell the testimony of a witness. Both common sense, morality, and ethics dictate that an attorney should not try to sell the testimony of a witness. However, since the disciplinary rules are quasi-penal in nature, due process requires that the disciplinary rules spell out the prohibited activity. DR 7-109(C) does not explicitly prohibit the selling of testimony. This fraud, nor did he offer to pay the witness to provide the information regarding the fraud. THE BAR asserts that COLEE acquiesced in the payment of compensation to a witness contingent on the outcome of the case.

There was no actual payment of compensation to any witness for testimony. In fact, the Defendant's attorneys virtually immediately rejected the idea of paying a witness

person other than his client, had perpetrated a fraud upon the Court?

When COLEE's client indicated to him that evidence existed of a fraud on the Court, COLEE was under a duty to disclose such information immediately to the Court. DR 7-102(B)(2) delineates the duty of the lawyer to disclose the existence of a fraud upon the Court directly to the Court.

COLEE did not go to the Court in violation of DR 7-102(B)(2) because he desired to sell the information and make money for himself and his client. COLEE violated the ~~spirit~~ and the letter of DR 7-102(B)(2).

III. RECOMMENDED DISCIPLINE.

COLEE has been a member of the Florida Bar since 1948. Nothing has come to the attention of this Referee which reflects adversely upon COLEE's membership in the Bar, nor upon the performance of his duties during the approximately thirty-eight (38) years of his membership in the Bar to the date of this violation of the Code of Ethics.

Fortunately, the violation had no serious consequences. The Plaintiff's attorney has complained about the cost and expense involved in investigating the allegation of the fraud on the Court. This investigation would have been conducted notwithstanding the ethical violation by COLEE. In other words, if COLEE had gone directly to the Court, and immediately revealed his impression that evidence of a fraud on the Court existed, the investigation would have been undertaken anyway.

The disciplinary rules involved in this case are designed to protect the Court system from the appearance or existence of a fraud on the Court, COLEE was under a duty to disclose such information immediately to the Court. DR 7-102(B)(2) delineates the duty of the lawyer to disclose the existence of a fraud upon the Court directly to the Court.

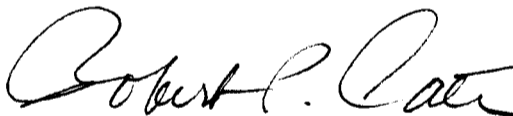
COLEE did not go to the Court in violation of DR 7-102(B)(2) because he desired to sell the information and make money for himself and his client. COLEE violated the

attorneys obtained an Order requiring COLEE to disclose his client's name, and the eventual capitulation of COLEE in revealing the client's name. In other words, the Court system had available its own means for addressing and dealing with aberrant behavior of COLEE.

COLEE must be disciplined however, to afford future protection to the public against similar acts, and as punishment for the poor judgment exercised by COLEE in this case.

Accordingly, the Referee recommends that HAROLD W. COLEE, JR. be administered a private reprimand by THE FLORIDA BAR, that he be placed on probation by THE FLORIDA BAR for a period of one (1) year during which year he will complete ten (10) hours of BAR approved CLE courses involving ethical instruction, and that he pay the costs of this proceeding.

DATED this 26th day of January, 1988.



ROBERT P. CATES
REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Order has been furnished to JAMES N. WATSON, JR., Esquire, 600 Apalachee Parkway, Tallahassee, Florida 32301; and HAROLD W. COLEE, JR., Esquire, 1221 King Street, Jacksonville, Florida 32204; this 26th day of January, 1988.



revealing the client's name. In other words, the Court system had available its own means for addressing and dealing with aberrant behavior of COLEE.

COLEE must be disciplined however, to afford future protection to the public against similar acts, and as punishment for the poor judgment exercised by COLEE in this case.