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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

GEORGE HARROLD CARSWELL, JR.,

Respondent.
_____/

Case No. 78,242

TFB File No. 91-00084-02

INITIAL BRIEF

JAMES N. WATSON, JR.
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PRELIMINARY STATEMENT

Petitioner, The Florida Bar, will be referred to as such, or as the Bar throughout the brief. Respondent, George Harrold Carswell, Jr., will be referred to as the Respondent.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to the hearings before the Referee on July 22, 1992 shall be by the symbol TR, followed by the appropriate page number.

References to the exhibits shall be as follows: EX 1, the tape recorded conversation between Respondent and Mike Matthews.

STATEMENT OF THE CASE

On July 8, 1991, The Florida Bar filed a complaint against George Harrold Carswell, Jr., and on August 5, 1991, the Chief Justice appointed the Honorable John P. Kuder, Circuit Judge, First Judicial Circuit, as Referee in this case. The final hearing was held on July 22, 1992 and the Report of Referee was filed on July 28, 1992.

The Report of Referee recommends that Respondent be suspended from the practice of law for ninety (90) days with automatic reinstatement at the end of the suspension period, and that Respondent shall assume all taxable costs incurred in accordance with the Statement of Costs associated with this case.

On October 8, 1992, The Florida Bar filed its Petition for Review seeking review of the recommended discipline of the Report of Referee.

STATEMENT OF FACTS

The following facts of this case are undisputed pursuant to the Stipulation to Facts, as accepted by the Referee and incorporated in his report as the basis for his recommendation. (RR, p. 1).

At all times relevant to the complaint in this matter, Respondent was a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida.

During 1988, Respondent was a candidate in the election for county judge of Jefferson County, Florida. In October 1988, the Florida Department of Law Enforcement (FDLE) began an investigation into possible voter registration violations involving the aforementioned election.

Prior to the election investigation, Respondent approached Mike Matthews, a resident of Jefferson County, about registering to vote in the election for county judge. The Respondent met Mike Matthews at his place of employment, the Big Bend Truck Stop, with a blank registration form, completed the form for him and had him sign it.

Subsequent to this, Respondent turned in Mike Matthews' completed form to Deputy Supervisor of Elections, Isreal Lawrence, at Lawrence's Grocery Store in Lloyd, Florida. Upon receipt of Mike Matthews' registration form, Deputy Supervisor Lawrence processed the form and swore and subscribed that Matthews had signed the form in his presence at his designated place of registration.

Florida Statutes §98.111(2) provides that the Supervisor of Elections is required to provide certain information required by the law on the registration forms at the time the form is being processed. Florida Statutes, §98.111(3) provides that the applicant of a voter registration form swear to the form's information being true before the supervisor of elections or deputy supervisor and that the elector's signature on the affidavit be attested to by the administering official. In the instance of Mike Matthews' registration, the administering official was shown to be deputy supervisor Isreal Lawrence.

Shortly after learning of the FDLE investigation, Respondent received three messages indicating that Mike Matthews was telephoning him. Respondent or somebody acting on his behalf returned the third telephone call to Matthews and made arrangements for a meeting between Matthews and Respondent at the Matthews' household.

On November 7, 1988, Respondent visited Mike Matthews at his home and instructed Matthews to misrepresent to FDLE the circumstances surrounding the filling out of his voter registration form. Respondent instructed Matthews to lie to anyone from FDLE by telling them that he had registered to vote at the grocery store of Isreal Lawrence when, in fact, he had not. Respondent instructed Matthews to tell FDLE that the Respondent's only part in registering Matthews was to give him a ride to Isreal Lawrence's store.

Additionally, Respondent informed Mike Matthews that they (Respondent and Matthews) were the only two people who knew what had really occurred, and that unless Matthews adhered to Respondent's false account, he would allege to FDLE that Matthews was lying.

During Respondent's conversation with Matthews, Matthews was wearing a police body transmitter, and the conversation was recorded by the police. Exhibit A contains an accurate transcript of the conversation.

Based upon his conversation with Mike Matthews, Respondent was charged with the misdemeanor of tampering with a witness, in violation of Florida Statutes §914.22(2)(a). Respondent pled nolo contendere to the charge. An adjudication of guilt was withheld and Respondent paid a fifty dollar ($50.00) fine.

SUMMARY OF ARGUMENT

The Florida Bar submits that, based upon the undisputed facts and the admission of misconduct by the Respondent, that the recommendation as to discipline by the Referee is inappropriate in view of the nature of the misconduct and similar case law. A more appropriate discipline would be a period of rehabilitative suspension of one (1) year.

ARGUMENT

THE RECOMMENDED DISCIPLINE IS INAPPROPRIATE BASED UPON THE FACTUAL BASIS OF THE ADMITTED MISCONDUCT

The Respondent was charged with the misdemeanor of tampering with a witness as the result of misconduct committed during his campaign for election as county judge of Jefferson County, Florida in 1988.

During the election campaign, Respondent had registered a voter named Mike Matthews, contrary to the statutory requirements for such a procedure. Specifically, Respondent had Mike Matthews sign a registration form outside the presence of a deputy registrar and later had the form notarized by a deputy registrar that stated the form had been executed in his presence.

Prior to the election, Respondent learned of an official Florida Department of Law Enforcement (FDLE) investigation into voter registration irregularities. After receiving a telephone call from Mike Matthews regarding the investigation and possible contact by FDLE, Respondent arranged for a visit with Matthews at Matthews' home.

As shown in the FDLE transcript from the intercepted conversation between Respondent and Mike Matthews (EX 1) on November 7, 1988, Respondent counseled Mike Matthews to lie to FDLE investigators regarding the facts surrounding Matthews' voter registration. On nine separate occasions, Respondent

counseled Mike Matthews to relate facts that were contradictory to the actual events surrounding Matthews' registration. (EX 1, pp. 2, 3, 4, 5, 6, 7).

To enforce the request of Respondent for Matthews to lie to FDLE, Respondent told Matthews that Respondent would tell FDLE that Matthews was lying if he told FDLE anything different than what Respondent was counseling Matthews to say. (EX 1, pp. 4, 7).

A review of the transcript shows not only was Respondent asking Mike Matthews to lie about what really happened regarding this voter registration, but was actively counseling Matthews on just exactly what he needed to say to bring the questioned registration into the permissible parameters that would allow the registration to remain valid and allow Matthews to vote.

At the final hearing before the Referee, Respondent's counsel acknowledged that the cited rules of misconduct in the Bar's complaint were well pled (TR p. 7). Subsequently, the Referee entered a report recommending Respondent be found guilty of the following Rules Regulating The Florida Bar: Rule 3-4.3 (the commission by a lawyer of any act which is unlawful or contrary to honesty and justice), of the Rules of Discipline of The Florida Bar; Rules 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or

misrepresentation), and 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice), of the Rules of Professional Conduct of The Florida Bar.

After finding Respondent guilty of the ethical misconduct on all the violations cited in the complaint, the Referee recommended that Respondent be suspended for ninety (90) days with automatic reinstatement. The Florida Bar takes exception to the recommended discipline and would ask that Respondent receive a more severe sanction of a period of rehabilitative discipline for a period of one (1) year.

In prior cases of similar misconduct, this Court has imposed sanctions that vary according to the attorney's culpability and the presence of mitigating factors.

In Dodd v. The Florida Bar, 118 So. 2d. 17 (Fla. 1960), this Court held that urging and advising several persons to give false testimony warrants disbarment. The attorney in Dodd had counseled several persons, including clients, to give false testimony in personal injury actions.

In affirming the order of disbarment in Dodd, the Court held that no breach of professional ethics, or of the law, is more harmful to the administration of justice or more harmful to the public appraisal of the legal profession than the knowledgeable use by an attorney of false testimony in the judicial process. When it is done, it deserves the harshest penalty. Dodd at p. 19.

The Court disbarred the attorney in Dodd despite the fact that there was no history of prior discipline and that the attorney argued that he had already been punished and discredited through the wide publication of the case.

Although Respondent herein was not counseling a client to lie in an ongoing court case, Respondent was urging a witness in a criminal investigation to lie and misrepresent pertinent facts to FDLE so as to thwart the investigation and prevent his being prosecuted. Such actions by Respondent are clearly analogous to the holding in Dodd and support a penalty more severe than recommended by the Referee.

In The Florida Bar v. Agar, 394 So. 2d. 405 (Fla. 1980), this Court disbarred an attorney who was found guilty of arranging a witness to testify falsely before a court, calling a witness who he had good reason to know would falsely testify and failing to notify the Court of such false testimony.

In Agar, the referee recommended a four month suspension. In rejecting the referee's recommendation, the Court stated it had not changed its position since Dodd, 118 So. 2d. 17 (Fla. 1960) and disbarred the attorney. The Court also stated that the general rule is strict discipline against deliberate, knowing elicitation or concealment of false testimony.

While the Respondent herein counseled the witness to lie to a law enforcement agency, rather than to a court, the Bar would argue that the ultimate act of misconduct is the counseling of anyone to lie to prevent the finding of the

ultimate truth and not where or how the lie is ultimately disseminated.

In the matter of The Florida Bar v. Lancaster, 448 So. 2d. 1019 (1984), this Court addressed the problem of a lawyer trying to influence a potential witness not to testify at the lawyer's trial. The attorney, Lancaster, lied to the State Attorney's office in their investigation into the altered registration number of a boat. Lancaster also conspired with another person to maintain false stories regarding the property and discussed the need to keep the seller of the boat from coming to Florida to testify against Lancaster.

In his defense, Lancaster testified that he was an active member of The Florida Bar and had no prior disciplinary record.

While rejecting the referee's recommendation of disbarment, the Court found that the conduct of Lancaster failed to conform to the ethical standards binding on all attorneys. Citing Lancaster's previous lack of discipline and involvement in community affairs, the Court suspended Lancaster for two (2) years. Lancaster, at p. 1023.

In The Florida Bar v. Lopez, 406 So. 2d. 1100 (Fla. 1981) the Court held that urging parties or witnesses to testify under oath to matters which an attorney knows to be false warrants a one-year suspension.

In Lopez, the attorney offered to release several defendant parties if they were to change their testimony so as to favor Lopez's claim.

Rejecting the referee's recommendation of a three month suspension, the Court held that such a recommendation was insufficient to impress on the Respondent, the Bar, and the public, our dissatisfaction with and distress over the attorney's conduct. Lopez, at p. 1102. The Court ordered Lopez suspended for a period of one (1) year.

The Court, in The Florida Bar v. Meyer, 529 So. 2d. 1098 (Fla. 1988) accepted the resignation of an attorney as the appropriate sanction where the attorney was found guilty of the criminal charges of witness tampering and conspiracy to commit witness tampering.

In The Florida Bar v. Rood, 569 So. 2d. 750 (Fla. 1990), the Court suspended attorney Rood for one (1) year when Rood concealed an expert's memorandum and caused his clients to sign false answers to discovery under oath. In disciplining Rood, the Court found such misconduct "is serious and reprehensible, but it does not merit the extreme sanction of disbarment." Rood, at p. 753.

Reviewing the appropriate provisions of Florida Standards for Imposing Lawyer Sanctions, it appears the following sections are applicable to the matter before the Court:

> **5.11(f)** - Disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.
>
> **5.12** - Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within

Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice.

7.1 - Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to a client, the public, or the legal system.

7.2 - 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.

The Report of Referee herein has cited several mitigating factors that the Court has previously recognized as meriting consideration in determining appropriate discipline. These being a lack of prior discipline; cooperation with the Bar; remorse; and a good reputation in his community.

While the above cited factors are recognized as mitigation as to discipline, they cannot take away from the seriousness of the misconduct committed by Respondent. Respondent had taken an oath upon becoming a member of the Bar that he would maintain the integrity of the Bar and would always handle himself in a truthful manner.

Respondent herein chose voluntarily to seek an elected judicial position and sought to have himself elected by his community. In seeking this personal goal, he freely and willingly chose to violate the statutory laws of his state and disregarded the oath and ethical requirements of the profession that had afforded him the opportunity to run for a judgeship.

This Court has consistently held that the appropriateness of discipline must meet a three prong test. The discipline

must be just to the public, fair to the attorney, and deter other attorneys from misconduct. The Florida Bar v. Pahules, 23 So. 2d. 130 (Fla. 1970).

The Bar feels that a ninety (90) day suspension as recommended by the Referee herein falls short of the test of Pahules.

In Lopez, 406 So. 2d. 1100 (Fla. 1981), this Court found that a three month suspension for similar misconduct was insufficient to impress upon the attorney, the Bar and the public the Court's dissatisfaction with such conduct.

To allow an attorney to be suspended for a period of only ninety (90) days for actively counseling someone to lie for the sole benefit of the attorney would not be just to the public's interest in maintaining their belief in the integrity of the Bar or be sufficient to deter other attorneys from similar misconduct.

In Lancaster, 448 So. 2d. 1019 (Fla. 1984), Justice Ehrlich wrote that our profession can operate properly only if its individual members conform to the highest standards of integrity in all dealings within the legal system. Lancaster, at p. 1024.

In the cited case authority herein, it is clear that the conduct engaged in by Respondent is uniformly held to be reprehensible. Even in light of mitigation and an absence of disciplinary histories, this Court has generally held that the appropriate discipline is a term of rehabilitative suspension. It is the position of the Bar that the recommendation of the

Referee of a ninety (90) day suspension be rejected as inappropriate and that Respondent be suspended for a period of one (1) year.

CONCLUSION

The Referee's recommended discipline of a ninety (90) day suspension is inappropriate. In light of the reprehensible nature of Respondent's misconduct, the appropriate discipline should be a one year suspension.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Initial Brief regarding Supreme Court Case No. 78,242, TFB File No. 91-00084-02, has been hand-delivered to **GEORGE HARROLD CARSWELL, JR.**, Respondent, c/o **JOHN A. WEISS**, Counsel for Respondent, at his record Bar address of Post Office Box 1167, Tallahassee, Florida 32302-1167, this 6th day of November, 1992.

JAMES N. WATSON, JR.
Bar Counsel