IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

KAREN SCHMID COX

Respondent.
_____/

Case No. SC96217
TFB No. 1998-11,854(13A)

INITIAL BRIEF
OF
THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar." The Respondent, Karen Schmid Cox, will be referred to as "Respondent."

"TT" will refer to the transcript of the hearings before the Referee in Supreme Court Case No. SC96217 held December 10, 1999 (Volumes I and II), December 14, 1999 (Volume III) and December 30, 1999 (Volumes IV and V).

The Report of Referee dated January 13, 2000 and the Amended Report of Referee (Amended to Correct TFB No.) dated February 10, 2000 will be jointly referred to as "RR."

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R Exh." will refer to exhibits presented by the Respondent at the hearings before the Referee in Supreme Court Case No. SC96217.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar.

"Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE

The Florida Bar filed a Complaint in this matter on August 10, 1999. By order dated August 20, 1999, The Honorable Wayne L. Cobb, Circuit Court Judge, in and for the Sixth Judicial Circuit, was appointed referee in this case.

Hearings held in this matter on December 10, 1999 and December 14, 1999, were followed on December 16, 1999, by the Referee's issuance of a Preliminary Report of Referee [On Guilt] finding Respondent guilty of violating all rules charged in the Bar's Complaint as follows: Rule 4-3.3(a)(1) (a lawyer shall not knowingly make a false statement of material fact or law to a tribunal); Rule 4-3.3(a)(4) (a lawyer shall not knowingly permit any witness to offer testimony or other evidence that the lawyer knows to be false); Rule 4-3.4(a) (a lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy or conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending or forseeable proceeding; or counsel or assist another person to do such an act) and Rule 4-3.4(b) (a lawyer shall not fabricate evidence, counsel or assist a witness to testify falsely).

A hearing on discipline was held December 30, 1999. On January 13, 2000, the Referee issued a Report of Referee recommending that Respondent receive a

public reprimand. The Referee further recommended that Respondent be placed on probation for a period of one year, during which Respondent would be required to complete 15 hours of approved continuing legal ethics education and to pay the costs of the proceeding to The Florida Bar. On February 10, 2000, the Referee filed an Amended Report of Referee (Amended to Correct TFB No.) solely to correct the TFB number.

The Referee's report was considered by the Board of Governors of The Florida Bar at its meeting which ended February 4, 2000, at which time the Board voted to file a Petition for Review of the Referee's report and request a three (3) year suspension. The Florida Bar filed a Petition for Review of the Referee's report with this Court on or about February 17, 2000. Pursuant to Rule 3-7.7, the jurisdiction of this Court is invoked.

STATEMENT OF THE FACTS

The material facts in this case are undisputed. Respondent became an Assistant United States Attorney in 1997, after a successful career as an Assistant State Attorney in Hillsborough County spanning in excess of twelve years. (TT 29 - 30). In May 1998, while prosecuting a case in her position as an Assistant United States Attorney, Respondent knowingly allowed a government witness to testify under a false name in a federal criminal trial, without court approval and without the

knowledge of the defense. (TFB Exh. 19; p. 11). Respondent also directly aided the concealment of the witness' true identity by identifying her at trial to the judge, jury, and defense using only the false name, and by placing the false name on the Government's Witness List. (RR 5; TFB Exhs. 10 and 18).

On October 15, 1997, the United States of America indicted James R. Sterba for allegedly violating 18 U.S.C. §2422(b), by using the Internet to solicit a minor to engage in sexual activity. (TFB Exh. 9). United States Customs, through its Criminal Investigator Carole Dumestre, developed the case against Mr. Sterba using a confidential informant, Adria Meredith Jackson, to pose as a thirteen-year old girl in alleged online communications with Mr. Sterba. (RR 2). Assistant Federal Public Defender Anthony Martinez represented Mr. Sterba at trial, after his first court appointed attorney, John T. Kingston, withdrew. (TT 208; TFB Exh. 9).

On October 28, 1997, a United States Magistrate Judge issued a pretrial discovery order requiring the government to disclose certain information within the scope of Giglio v. United States, 405 U.S. 150 (1992). (TFB Exh. 1). On February 24, 1998, the Magistrate Judge issued an order denying Mr. Sterba's motion to interview and disclose the identity of the informant, without prejudice, however, the order provided that "[p]rior to the start of the trial, the name of this witness shall be given to defense counsel." (TFB Exh. 4). In the Government's

response in opposition to defendant's motion, Respondent represented: "The name of informant will be revealed, as the informant is expected to testify." (TFB Exh 3). However, Respondent never provided the informant's name or the required Giglio information prior to trial. (TT 212).

Adria Meredith Jackson had come to the attention of Customs as one of the subjects in a criminal investigation regarding Internet international child pornography trafficking. (TT 100). In connection with that investigation, Ms. Jackson tendered a proffer letter in Texas, whereby she agreed to provide any information she had about other subjects of the investigation. (TT 102). After electing not to prosecute Ms. Jackson, Customs took steps to use her as a confidential informant in other criminal investigations. (TT 102 - 103). Although Agent Dumestre performed database searches as to Ms. Jackson's criminal history, the same did not reveal Ms. Jackson's prior arrest in Georgia for filing a false police report, presumably because Ms. Jackson had been sentenced under the Georgia First Offender Act. (R. Exhs. 1-5, 7).

Customs gave Ms. Jackson the option of using her own name or selecting an assumed name to use in her work as an informant. (TT 125). Ms. Jackson chose the fictitious name "Gracie Greggs" and used the same when signing Customs documents, including receipts for cash payments. (TT 125 - 126). Customs paid

Ms. Jackson $2,000.00 in or around September 1997, for her assistance in the Sterba investigation (TT 119) and another $2,000.00 in or around December 1997, for her assistance in an unrelated case for which Respondent was also the prosecuting attorney. (TT 119 - 120).

Shortly before trial, Ms. Jackson, then residing in Oklahoma, expressed concern to Agent Dumestre about having to testify under her real name. (TT 109). Agent Dumestre relayed to Respondent Ms. Jackson's request not to disclose her true identity, to which Respondent replied she would "handle it." (RR. 3; TT 110). Respondent knew Ms. Jackson's true identity before trial (TT 273 - 274). Respondent also knew that Ms. Jackson was an extremely reluctant witness, partly because she was involved in protracted custody litigation in Georgia with her former husband, and feared her involvement in child pornography investigations could jeopardize her custody of their minor daughter. (TT 61). Ms. Jackson had actually been noticed to appear in DeKalb County, Georgia in a contempt action filed against her by her former husband, on the same day she was scheduled to testify against Mr. Sterba. (TT 56 - 64).

Jury selection in the Sterba case began on May 18, 1998, without Respondent having disclosed the informant's name to the defense. During Voir Dire, Respondent read the name "Gracie Greggs" to prospective jurors, instead of Adria

Jackson. (TT 91). The morning of trial, Respondent also presented to the court and to defendant's attorney a witness list naming "Gracie Greggs" instead of Adria Jackson. (TFB Exhs. 10 and 18). After referring to "Gracie Greggs" in her opening statement, Respondent called her first witness, "Gracie Greggs," to the stand. (TFB Exh. 15, p. 22). After the witness was sworn, Respondent asked "Are you Gracie Greggs?" to which Ms. Jackson replied "Yes." (TFB Exh. 15, p.24). Respondent then asked "Are you also Katie16140?" "Katie16140" was the screen name Ms. Jackson had used online. (TFB Exh. 15, p. 24).

Federal Public Defender Investigator, Joseph Palmer heard a portion of Ms. Jackson's testimony and then proceeded repeatedly and unsuccessfully throughout the day of the trial to locate information on "Gracie Greggs." (TT 215 - 216). After both the prosecution and defense had rested, Mr. Martinez approached Respondent and advised her he had been unable to find any information on "Gracie Greggs." (TT 217). Respondent then revealed to Mr. Martinez the true name of the witness, Adria Jackson, and provided at least one other identifier for her. (TT 217 - 218). Later that night, Investigator Palmer telephoned Mr. Martinez and advised that he had found information on Adria Jackson that would require further research. (TT 219).

The next morning, May 20, 1998, the Honorable Steven D. Merryday, United

States District Court Judge for the Middle District of Florida presiding, conducted a brief charge conference during which he specifically inquired about the informant and twice asked the Respondent the informant's name. (TFB Exh. 19; pp. 4, 8 - 9). Respondent steadfastly replied that the informant's name was "Gracie Greggs." (TFB Exh. 19; pp. 4, 8 - 9).

Shortly thereafter, when Respondent had not disclosed the true identity of the informant in response to questioning by the court, defense counsel so advised the court and moved for a mistrial. (TFB Exh. 19, pp. 10 - 13). Judge Merryday granted the mistrial and later dismissed the indictment with prejudice, finding that Respondent had knowingly disguised the identity of a government witness and deceptively used the name "Gracie Greggs." (United States of America v. James Sterba, 22 F. Supp. 2d 1333, 1334 (M.D. Fla. August 13, 1998) attached to Bar's Complaint).

SUMMARY OF ARGUMENT

Notwithstanding the Referee's finding of considerable mitigation, the recommended sanction of a public reprimand and one-year probation is insufficient given the gravity of the misconduct in the instant case. Respondent, a seasoned prosecutor, deliberately concealed the true identity of a government witness by allowing her to testify under a false name in a federal criminal trial, without court approval and without knowledge of the defense. Respondent's misconduct caused serious injury to the integrity of the legal process and also caused significant adverse effects on the legal proceeding, including the dismissal of the case with prejudice. Such blatant disregard for the constitutional rights of a criminal defendant and the requirement of complete candor toward the tribunal is serious misconduct, regardless of motive.

A public reprimand is inappropriate because it does not sufficiently address the seriousness of Respondent's misconduct and the adverse effects thereof. Moreover, a public reprimand is not sufficient to protect the public, encourage reformation, or deter others from engaging in similar misconduct. A three (3) year suspension is the appropriate sanction considering the seriousness of Respondent's conduct, the record herein, the relevant case law, aggravating and mitigating factors, and the Florida Standards for Imposing Lawyer Sanctions.

ARGUMENT

I. The Referee erred in recommending a public reprimand for a prosecutor who intentionally allowed a witness to testify under a false name in a federal criminal trial, without court approval or knowledge of the defense, because such sanction does not adequately address the gravity of the misconduct.

In attorney disciplinary proceedings "a referee's findings of fact are presumed correct and this Court will not reweigh the evidence and substitute its judgment for that of the referee as long as the findings are not clearly erroneous or lacking in evidentiary support." The Florida Bar v. Beach, 675 So.2d 106, 108 (Fla. 1996). A referee's legal conclusions, however, are subject to broader review by this Court than are findings of fact. Id. This Court has broader discretion to review a referee's recommended discipline, because it is this Court's "responsibility to order the appropriate punishment." The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994). The referee erred in recommending a public reprimand in this case, because such sanction is not severe enough to address the seriousness of Respondent's misconduct and the substantial harm that resulted therefrom.

This Court has previously found that the knowing use of false testimony by an attorney in a criminal judicial proceeding is serious misconduct that warrants a severe penalty. As stated by this Court in Dodd v. The Florida Bar, 118 So.2d 17

(Fla. 1960), in affirming an order of disbarment:

> No breach of professional ethics, or of the law, is more harmful to the administration of justice or more hurtful 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.

Id. at 19.

This Court relied on Dodd in The Florida Bar v. Agar, 394 So.2d 405, 406 (Fla. 1980), in finding that disbarment was the appropriate sanction in that case. In Agar, this Court recognized that lighter punishment had been given in similar cases, but noted that those cases represented the exception to the "general rule of strict discipline against deliberate, knowing elicitation or concealment of false testimony." Id.

Agar represented the husband in an uncontested divorce. Agar's secretary advised the wife that the wife could testify as to the husband's residency. Just before entering the courtroom, however, Agar advised the wife that the circuit court judge assigned to the case did not permit such testimony. Although he knew her to be the wife, Agar called her to the witness stand and allowed her to testify under a false name. The wife further concealed her relationship in the marriage, by testifying that she knew the husband because she had done bookkeeping for him. Both the husband and wife later testified that it was at Agar's suggestion that the

wife falsely represented herself and concealed her relationship with the husband.

The referee found that Agar did:

> (1) arrange, either actively or passively, for a witness to falsely testify before a court of competent jurisdiction, and (2) presented or called a witness on behalf of his client who he had good reason to know would falsely testify before a court of competent jurisdiction, and (3) as an officer of such court failed to immediately notify the judge of that court of such false testimony . . . .

Id. at 405.

The facts in Agar are similar to the instant case in that Respondent arranged for a witness to testify under a false name and had good reason to know that Ms. Jackson would so testify. Although an officer of the court, Respondent never notified the judge of the fraud. Further, Respondent failed under repeated questioning by the judge during the charge conference, to reveal the fraud upon the court. Indeed, after defense counsel revealed the fraud, Respondent engaged in prosecutorial gamesmanship by protesting that the witness had not testified falsely, because "Gracie Greggs" was her Customs name and because neither the prosecution nor the defense had ever asked the witness to state her true name.

Although the State Attorney's Office elected not to bring charges of perjury or solicitation to commit perjury against Respondent in the instant case, as were

brought against Agar, Respondent's misconduct was arguably more egregious than Agar's misconduct. Agar represented a party in an uncontested civil divorce, while Respondent was a federal prosecutor seeking a conviction for a serious crime, potentially justifying a lengthy incarceration.

As this Court held in Agar at 406, the question is not whether the testimony is capable of affecting the outcome of the case. Respondent testified that she did not deem Ms. Jackson's identity material, because she was a mere "records custodian" of documented online communications and that "the credibility of a records custodian has really never been an issue in any of [her] trials." (TT 94). As in Agar, the relevant point in the instant case is that Respondent, like Agar, admitted that she allowed her witness to testify under a false name. Respondent also testified that she alone decided and advised Ms. Jackson that she could testify under the name "Gracie Greggs." (TT 77 - 79; 85).

Despite significant mitigation found by the Referee as discussed below, the instant case is not an appropriate exception to the general rule of strict discipline. In fact, as an experienced criminal prosecutor, Respondent had a heightened ethical duty to maintain the integrity of the criminal justice system. As stated in United States v. Lopez, 765 F. Supp. 1433 (N.D. Cal. 1991), vacated, 4 F.3d 1455 (9th Cir. 1993):

> A prosecutor 'has more direct power over the lives, property and reputations of those in [his] jurisdiction than anyone else in this nation . . . .' In light of the prosecutor's tremendous power and the fundamental individual rights at stake in criminal prosecutions, 'the character, quality, efficiency of the whole [criminal justice] system is shaped in great measure by the manner in which the prosecutor exercises his or her broad discretionary powers.'

Id. at 1449 (alterations in original) (footnotes omitted). In the instant case, Respondent was a seasoned prosecutor who had a highly successful career as an Assistant State Attorney in Hillsborough County for more than twelve years before becoming an Assistant United States Attorney in 1997. (TT 30).

This Court has held that "a public reprimand should be reserved for isolated instances of neglect, lapses of judgment, or technical violations of trust accounting rules without willful intent." The Florida Bar v. Schultz, 712 So.2d 386, 388 (Fla. 1998). The Referee in the instant case quite appropriately found that Respondent was "fully aware of the requirements of candid disclosure to the court and defense counsel and the reasons in justice for that candor." (RR 4, at III. A.).

Respondent knew that Adria Jackson was the informant's true name and yet deliberately introduced her to the court, jury and defense counsel as "Gracie Greggs." (RR 4). Respondent further perpetuated the fraud upon the court by allowing the witness to present herself to the court, jury and defense counsel as "Gracie Greggs." (RR 4). Even more troubling, Respondent assisted Ms. Jackson

in concealing her true name by listing her on the witness list as "Gracie Greggs," and by cleverly crafting the question "Are you Gracie Greggs?" instead of a more common question such as "Would you please state your name?" (RR 4). In fact, Respondent further suggested that "Gracie Greggs" was a true name by asking "Are you also Katie16140?" after having asked "Are you Gracie Greggs?" because "Katie16140" was clearly an alias.

Many of the character witnesses testifying on Respondent's behalf said they believed Respondent's conduct was attributable to a mistake and an aberration. (RR 7). However, under the facts of this case, Respondent's conduct was clearly contemplated and deliberate, from the preparation of the witness list and throughout the trial, until the ruse was finally revealed to the court by the defense. Because Respondent's conduct was not the result of a single, momentary lapse in judgment, a public reprimand is clearly inappropriate. Respondent knew her ethical responsibilities and deliberately chose to ignore them.

The discipline imposed on a Respondent must correspond the serious nature of the misconduct and serve to deter others who might be inclined toward similar misconduct. In The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla.1983), this Court defined the objectives of Bar discipline as follows:

Discipline for unethical conduct by a member of The Florida Bar must

> serve three purposes: First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, *the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations*. (Court's emphasis).

As aptly stated by the Referee in the instant case, "candor and honesty by trial lawyers with the court is the glue that holds the American system of justice together." (RR 5). This truth, coupled with the enormous power of the position of a federal prosecutor, mandates that the deliberate ethical misconduct in the instant receive a severe sanction. A harsh discipline is warranted and necessary to protect the public, encourage reformation, and to deter others who might be tempted to commit similar acts of misconduct. A public reprimand is not sufficient to accomplish these goals.

The Florida Standards for Imposing Lawyer Sanctions provide a format for Bar Counsel, referees, and this Court to determine the appropriate sanction in attorney disciplinary matters. The Standards that appear applicable in the instant case are discussed below.

Standard 5.11(f) provides that, absent aggravating and mitigating circumstances, "[d]isbarment 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." In order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the element of intent must be proven by clear and convincing evidence. The Florida Bar v. Lanford, 691 So.2d 480, 481 (Fla. 1997). However, to satisfy the element of intent, the only requirement is that the conduct be deliberate and knowing. The Florida Bar v. Fredericks, 731 So.2d 1249, 1252 (Fla. 1999). In the instant case, Respondent admitted that she deliberately introduced a witness as "Gracie Greggs," knowing her true name was Adria Jackson. Therefore, Standard 5.11(f) would apply.

Standard 5.22 provides that, absent aggravating or mitigating circumstances, suspension is appropriate when "a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process."

Standard 6.11 provides that, absent aggravating and mitigating circumstances, disbarment is appropriate when a lawyer "(a) with the intent to deceive the court, knowingly makes a false statement or submits a false document; or (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant adverse effect on the legal proceeding." The Referee in the instant case found that disbarment, pursuant to

Standard 6.11, was not presumptively appropriate because "the evidence indicates that Respondent did not intend to deceive the United States District Court before which she was practicing on any matter of substantial justice." (RR 6).

The Referee failed to give adequate consideration to subsection (b) of Standard 6.11, however, which suggests that disbarment is appropriate for a Respondent improperly withholding material information that causes serious injury to a party or significant adverse effects on a legal proceeding. Respondent improperly withheld material information in the form of the true name and identity of a key witness. This resulted in potentially serious injury to the defendant and the public. It also resulted in significant adverse effects on the legal proceeding, including the dismissal of the case with prejudice.

The Referee found that under Standard 6.12, a suspension appeared to be the presumptively appropriate sanction. (RR 6). Standard 6.12 provides that, absent aggravating or mitigating circumstances, a suspension is appropriate "when a lawyer knows that false statements or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action."

Standard 7.1 provides that absent aggravating and mitigating circumstances, "[d]isbarment 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." In the instant case, it appears the Respondent may have acted for her own benefit, to insure the availability of a reluctant witness, and for the benefit of Ms. Jackson, to insure her anonymity and conceal her involvement in the case from her former husband. Even though the evidence did not show that Respondent knew of Ms. Jackson's criminal past, Respondent's conduct may fall under Standard 7.1. Clearly, there was serious injury to the public and to the legal system by way of the dismissal of the case with prejudice.

Standard 7.2 provides that, absent aggravating or mitigating circumstances, "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." It is undisputed that Respondent knowingly engaged in conduct that violated her duties of candor toward the tribunal and fairness to the opposing party, and that her misconduct caused injury to the public and the legal system.

Standard 9.22 lists several aggravating factors that may justify an increase in the degree of discipline to be imposed. However, this list is not exclusive. Standard 9.21 defines aggravation or aggravating circumstances as "any considerations or factors that may justify an increase in the degree of discipline to

be imposed." The Referee found Standard 9.22(i), substantial experience in the practice of law, to be the only aggravating factor in the case. However, upon review, this Court might also consider in aggravation, Respondent's special duties as a criminal prosecutor. "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate." Rules Regulating The Florida Bar, Rule 4-3.8 cmt. (1993).

Standard 9.32 lists several mitigating factors which may justify a reduction in the degree of discipline to be imposed. The Referee in the instant case found the following factors in mitigation:

Standards: 9.32(a) absence of prior disciplinary record;
9.32(b) absence of a dishonest or selfish motive;
9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
9.32(g) character or reputation;
9.32(k) imposition of other penalties or sanctions; and
9.32(l) remorse.

The Referee found that the considerable mitigation warranted a reduction from the presumptively appropriate sanction of a suspension, to a public reprimand, citing The Florida Bar v. Hmielewski, 702 So.2d 218 (Fla. 1997). Although mitigation should be considered in arriving at an appropriate discipline, as discussed in Agar and the Standards above, the appropriate threshold in the instant case is disbarment. The Standards do not quantify how much credit Respondent should

receive for mitigation. In the closing argument before the referee, the Bar argued that a two-year suspension from The Florida Bar would satisfy the goals of attorney discipline. However, upon full review by the Board of Governors of The Florida Bar, the Bar now respectfully requests this Court to find that a three (3) year suspension, not a public reprimand, is the appropriate discipline.

II. A three (3) year suspension is the appropriate sanction considering the seriousness of Respondent's misconduct, the record herein, the relevant case law, aggravating and mitigating factors, and the Florida Standards for Imposing Lawyer Sanctions.

Respondent deserves a three (3) year suspension in the instant case, notwithstanding that the Referee found that Respondent "acted (albeit without reflection) in what she thought was the best interest of her witness." (RR 6.). Regardless of Respondent's actual motive for intentionally concealing the identity of the witness, the same does not sufficiently mitigate below a three (3) year suspension.

In The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990), Kickliter was disbarred for five years for forging a client's signature on a will and submitting the same for probate. Id. at 1124. The client had asked Kickliter to prepare a new will. Id. at 1123. Although Kickliter prepared the will the same day he received the required information, the client died before seeing or signing the new will. Id. In

the criminal proceeding that followed, Kickliter pled guilty to charges of forgery, uttering a forged instrument, and taking a false acknowledgment. Id. The court withheld adjudication and placed Kickliter on probation for three years. Id.

In the disciplinary proceeding, the referee found substantial mitigation, including the absence of a dishonest or selfish motive, a cooperative attitude, good character and reputation, remorse, and the imposition of criminal penalties, and therefore, recommended that Kickliter be suspended for two years. However, upon review, this Court held that disbarment was appropriate because of the "magnitude of Kickliter's misconduct and his failure to correct it." Id. at 1124.

As stated above, the Referee in the instant case found substantial mitigation, including the absence of a prior disciplinary record, the absence of a dishonest or selfish motive, a cooperative attitude, good character and reputation, remorse, and the imposition of other penalties. Unlike Kickliter, Respondent in the instant case was not criminally prosecuted for her misconduct. However, Respondent testified that she would receive a two-week suspension without pay from her employment with the United States Government in response to a Department of Justice investigation. (TT 569).

In Kickliter, this Court cited the preamble to Chapter 4 of the Rules Regulating The Florida Bar, which provides "Lawyers are officers of the court and

they are responsible to the judiciary for the propriety of their professional activities." Kickliter at 1124. The Court also quoted a portion of the oath of admission to the bar that requires one to swear "never to seek to mislead the Judge or Jury by any artifice or false statement of fact or law." Id. The Court found that Kickliter's misconduct violated these precepts and was similar to that in other cases where attorneys have been disbarred, citing The Florida Bar v. Agar 394 So.2d 405 (Fla. 1980) and Dodd v. The Florida Bar, 118 So.2d 17 (Fla. 1960). Applying the Court's reasoning in Kickliter, Respondent in the instant case should receive no less than a three (3) year suspension, notwithstanding the absence of a selfish or dishonest motive, and other significant mitigating factors.

In The Florida Bar v. Hmielewski, 702 So.2d 218, 221 (Fla. 1997), the attorney received a three (3) year suspension for making deliberate misrepresentations regarding the location of medical records in a medical malpractice action. Hmielewski represented a client who confided that he had taken the medical records from the Mayo clinic. Id. at 219. Because the client had taken the records, the clinic could not produce them when Hmielewski asked for these same records during pretrial discovery. Id. Hmielewski then made misrepresentations concerning the clinic's inability to produce the records, knowing that his client had taken the records. Id. at 220. Hmielewski's deception came to

light during a pretrial deposition of his client. Id.

Like Hmielewski, Respondent made a series of misrepresentations concerning the same fact to the court and to opposing counsel. Respondent listed a false name on the witness list, read the false name to the venire, used the false name in her opening statement, called her witness to the stand by the false name, elicited false testimony from the witness as to her name, and responded with the false name at least twice when directly questioned by the court during the charge conference. The court never approved Respondent's secret plan to permit the informant to testify under an assumed name.

In Hmielewski, this Court found that "Hmielewski improperly allowed what he perceived as his duty to his client to overshadow his duty to the justice system when he made deliberate misrepresentations of material fact to the Mayo Clinic and the Minnesota trial court. Hmielewski's violations made a mockery of the justice system and flew in the face of Hmielewski's ethical responsibilities as a member of The Florida Bar." Id. This Court in Hmielewski further noted that if not for Hmielewski's lack of a selfish motive, extremely strong character evidence and his relatively unblemished record that "this Court would have no hesitation in imposing disbarment." Id. at 221.

Like Hmielewski, Respondent's actions were unethical and made a mockery

of the justice system. Moreover, as a federal criminal prosecutor, Respondent had a heightened duty to protect the justice system. Respondent allowed her prosecutorial zeal and sympathy for a witness to overshadow her ethical duties and responsibilities as an officer of the court.

In The Florida Bar v. Broida, 574 So.2d 83 (Fla. 1991), Broida received a one-year suspension after continuously misrepresenting facts to the court, failing to properly notify the opposing party of hearings and filing frivolous pleadings in order to delay proceedings. Id. at 86. By circumventing the Rules of Civil Procedure, Broida was able to secure ex parte orders when the opposition failed to appear at hearings. Id. at 84. The referee also found that Broida personally attacked the integrity of lawyers and judges with whom she came in contact. Id. at 86. This Court found that Broida's experience and knowledge made her actions inexcusable, stating that "[h]er tenure in the legal profession [did] not afford her the privilege or right to unilaterally decide when the rules should apply and when they should not; that is within the province of the court." Id. at 87.

Like Broida, Respondent ignored the rules governing her situation and engaged in a secret plan to allow a witness to protect her anonymity by testifying under an assumed name she had used in her work for United States Customs. The right to confront and cross-examine witnesses is fundamental to our system of

justice. Likewise, ethical rules governing strict candor and fairness to opposing party serve the goal of achieving truth and justice in criminal proceedings. As in Broida, Respondent's position did not afford her the privilege to unilaterally decide whether the court and defense counsel should know the true identity of her witness. Moreover, as in Broida, Respondent's experience and knowledge make her actions inexcusable.

In The Florida Bar v. Rood, 569 So.2d 750 (Fla. 1990), Rood received a one-year suspension for concealing the existence of an expert's memorandum from the opposing party. Rood also prepared and caused his clients to file false and incomplete answers to interrogatories. Id. at 752. The existence of the memo came to light as the result of discovery in a related case. Id. at 751.

Like Rood, Respondent engaged in purposeful deception of the court, defense counsel, and the jury by repeatedly identifying Adria Jackson as "Gracie Greggs." Respondent confessed to Judge Merryday that she had permitted a witness to testify under a false name, only after the defendant's attorney revealed the fraud to the court. Like Rood, Respondent should be suspended.

In The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990), Colclough received a six-month suspension for making misrepresentations to the court and to opposing counsel. Id. at 1150. Colclough misrepresented to the court and

substituting counsel that a hearing on costs had been held and that a money judgment had been obtained when in fact no hearing had taken place and no such judgment had been obtained. Id. at 1149. Respondent took advantage of the substituting counsel's lack of knowledge concerning the history of the case. Id. This Court imposed a six-month suspension rather than the one-year suspension recommended by the referee due to an absence of a prior disciplinary record and numerous affidavits and letters attesting to his honesty and credibility. Id. at 1150.

In the instant case, Respondent purposefully left the court and opposing counsel in the dark about important information concerning a crucial government witness who testified at trial. By concealing Ms. Jackson's true identity, Respondent robbed the defendant of his right to confront and cross-examine the witness. A theft of one's constitutional rights related to personal liberty is at least as egregious as the misuse of client funds, for which disbarment is the presumptively correct discipline. The Florida Bar v. Schiller, 537 So.2d 992, 993 (Fla. 1989). Because of the potential and actual harm caused by Respondent's misconduct, she should receive a three (3) year suspension, notwithstanding the character and reputation evidence presented in mitigation.

In The Florida Bar v. Burkich-Burrell, 659 So.2d 1082 (Fla. 1995), Burkich represented her husband Burrell in a personal injury matter. Through her own

inaction, Burkich assisted her husband in withholding information in answers to interrogatories which was relevant to the issue of damages. Id. at 1083. In mitigation, the court considered evidence that Burkich's husband was an alcoholic who mentally and physically abused her, her inexperience, and her lack of a prior disciplinary record. Id. In consideration of the unique facts and mitigation involved, the court suspended Burkich for thirty days. Id. at 84.

Like Burkich, Respondent lacks a prior disciplinary record. Unlike Burkich, Respondent is an experienced prosecutor who has produced no evidence that anyone coerced her into misleading the court and the defense. Therefore, Respondent's actions warrant a much more severe discipline.

In The Florida Bar v. Kravitz, 694 So.2d 725 (Fla. 1997), Kravitz made a series of misrepresentations to the court and opposing counsel. These misrepresentations regarded the identity of the manager of the restaurant he was representing, a misrepresentation to the manager that he could be arrested if he did not pay $4000 to Kravitz, and a misrepresentation to opposing counsel that his trust fund contained sufficient funds to cover settlement. Id. at 726. Kravitz received a thirty-day suspension. Id. at 728. In imposing thirty days rather than the ninety-one days recommended by the Bar, this Court considered the absence of a prior disciplinary record and the fact that the referee had recommended one year

probation. Id.

Respondent's activities are more egregious than those of Kravitz and she should receive a more severe sanction. As a prosecutor, Respondent had a heightened duty to protect the justice system. Instead, she blatantly disregarded the Rules regarding candor toward the tribunal and fairness to opposing party, and abrogated to herself the authority to decide what information she would disclose to the Court and to the defendant's attorney during a federal criminal proceeding.

Therefore, The Florida Bar respectfully requests this Court to impose a three (3) year suspension and the assessment of the Bar's costs in these proceedings as the appropriate discipline in this case.

CONCLUSION

Respondent, an Assistant United States Attorney, knowingly allowed a government witness to testify under a false name in a federal criminal proceeding, without court approval or knowledge of the defense, thereby violating Rules 4.3.3(a)(1); 4-3.3(a)(4); 4-3.4(a) and 4-3.4(b), Rules Regulating The Florida Bar. Respondent knew the true identity of the witness before trial and made a conscious decision to withhold that information from the judge, jury, and the defense. Respondent only revealed the true identity to the defense when the defendant's attorney questioned her after the trial and advised that Investigator Palmer was willing to testify as to the nonexistence of "Gracie Greggs." When Judge Merryday later specifically asked her the informant's name, however, Respondent continued to perpetuate the fraud by replying "Gracie Greggs."

Respondent's misconduct seriously harmed the integrity of the legal process, and caused a federal criminal case to be dismissed with prejudice. An intentional abrogation of authority such as this is egregious, regardless of motive, and warrants no less than a three (3) year suspension from the practice of law and an assessment of the Bar's costs in these proceedings.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Initial Brief have been furnished by Express Mail to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. Mail to David A. Maney, Esq., Counsel for Respondent, at Post Office Box 172009, Tampa, Florida 33672-2009; and a copy by regular U. S. Mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of _____, 2000.

CERTIFICATION OF FONT SIZE AND STYLE AND OF VIRUS SCAN

I HEREBY CERTIFY that this brief has been written in font size Times New Roman 14 pt, and that the enclosed diskette has been scanned using "Norton Antivirus."

_____

Debra Joyce Davis
Assistant Staff Counsel