IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

KAREN SCHMID COX,

Respondent.
_____/

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

REPLY BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, The Florida Bar 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 final hearing before the Referee in Supreme Court Case No. SC96217 held on 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 final hearing 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

Respondent's statement that the Bar "contended before Judge Cobb that an appropriate sanction was a period of suspension of ninety-one days to two years" is misleading. (See Respondent's Answer Brief at page 3). In fact, the Bar argued before Judge Cobb that a rehabilitative suspension was the minimum discipline warranted and that "the case law . . . could possibly dictate a sanction as high as disbarment." (TT, pp. 590 - 591). Further, after discussing several of the Florida Standards for Imposing Lawyer Sanctions, Bar counsel stated "Your Honor, clearly those standards suggest that a disbarment is appropriate in this case." (TT, p. 597).

Respondent also implied that the Board of Governors acted improperly in seeking a higher sanction than recommended by Bar counsel at the Final Hearing, particularly because it had not attended the hearings or read the transcripts thereof, before voting to seek a three-year suspension. (See Respondent's Answer Brief at pages 3 - 4, and footnote 2). This Court has imposed no duty upon The Board of Governors to attend disciplinary hearings or read transcripts thereof, before considering the appropriateness of the recommended sanction in a Bar proceeding. In addition, the Board of Governors is not required under the rules of this Court to request an identical recommended sanction as was offered for the Referee's

consideration during the trial. (See generally, Rule 3-7.7, Rules Regulating The Florida Bar).

STATEMENT OF THE FACTS

As stated in the Bar's Initial Brief, the material facts in this case are undisputed. In footnote 3, page 6 of the Answer Brief, Respondent stated that the Bar "inappropriately impli[ed] that Customs developed evidence against [Adria Jackson], but chose not to file charges." Respondent further stated that there was "no merit" to the position taken by the Bar that Customs had elected not to prosecute Ms. Jackson. Id. Customs Agent, Carole Dumestre testified, however, that she had met Ms. Jackson while Ms. Jackson was being interviewed by another Customs agent in connection with "an Internet international child pornography trafficking investigation." (TT, p. 100). When asked if Ms. Jackson was "a subject of that criminal investigation?" Ms. Dumestre replied "Yes, she was." (TT, p. 100). The Bar's comment accurately reflected that after first considering Ms. Jackson a subject, Customs later made the determination not to prosecute her in connection with its criminal investigation.

At page 9 of Respondent's Answer Brief, Respondent stated that she reasoned that the witness was "merely a records custodian" and "her credibility was not material; accordingly her identity would not be important to the case." (citing

TT, pp. 350-53). Attorney Martinez testified, however, that the witness was a "crucial witness in the case" having "participated in the commission of the offense." (TT, p. 213). Indeed, Judge Cobb accepted as fact that Ms. Jackson was a "crucial witness for the Government's case against Mr. Sterba and not merely a records custodian." (RR, p. 3).

Respondent stated that the Bar "inexplicably states in the Conclusion portion of the brief that 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,'" citing the Bar's Initial Brief at page 29. (See Respondent's Answer Brief, page 11, footnote 5). In response, the Bar acknowledges drawing a reasonable inference from the facts as to Public Defender Martinez informing Respondent that Investigator Palmer was ready to testify about the results of his investigative attempts to locate information on Gracie Greggs. Attorney Martinez testified that he had asked Investigator Palmer, "Are you willing to testify under oath in front of a federal judge that you have exhausted all means possible within your means to locate this individual and you cannot locate this individual?" to which Investigator Palmer responded "Yes." (TT, p. 216). Attorney Martinez then testified that moments after that exchange, he walked into the courtroom, approached Respondent, and said

"Karen, we have a problem." (TT, p. 217). Attorney Martinez also testified that he told Respondent that the "investigator [said] that he's exhausted all his databases in trying to locate Gracie Greggs, and he can't find her. What's the problem?" (TT, p. 217). It would appear reasonable that even if Attorney Martinez did not expressly state to Ms. Cox that Investigator Palmer was willing to testify concerning his investigation efforts, this message was at the very least conveyed implicitly.

Respondent also puts great emphasis on the characterization of the exchange between Respondent and Public Defender Martinez as "calm, matter-of-fact, [and] non-confrontational." (Respondent's Answer Brief at page 11, footnote 5). While it is true that Attorney Martinez displayed no emotion to Respondent when she gave him the name Adria Jackson, Respondent's characterization of the exchange misleadingly suggests that Attorney Martinez was not alarmed when Respondent disclosed what she had done. (TT, p. 218). Specifically, Attorney Martinez said inside, his "jaw dropped," that he "could not believe what [he] had just heard, that an assistant U.S. attorney had put a witness on the stand to testify under a false name in front of twelve jurors, in front of a federal judge." (TT, p. 218). Attorney Martinez said he could not believe what he was hearing, but did not show emotion because he was in "utter shock." (TT, pp. 218 - 219).

ARGUMENT

Respondent argues that this Court should not consider Respondent's special duties as a prosecutor to be an aggravating factor in this case. (Respondent's Answer Brief at page 25). Respondent cites The Florida Bar v. Spann, 682 So.2d 1070, 1073 (Fla. 1996) in support of its position that the Bar had failed to establish a sufficient basis for this Court to substitute its judgment for that of the referee. Although Judge Cobb did not find any aggravating factor other than Respondent's substantial experience in the practice of law, aggravating and mitigating factors and the weight to be afforded them go to the appropriateness of the discipline. As stated in Spann, at 1074, this Court's "review in this area is broad" because it is this Court that bears the "ultimate responsibility to order an appropriate sanction in attorney discipline cases." Citing The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989).

Respondent cited The Florida Bar v. Laing, 695 So.2d 299, 304 (Fla. 1997) for the proposition that this Court should not "second-guess a referee's recommended discipline as long as it has a reasonable basis in existing case law." (Respondent's Answer Brief at page 22). In the instant case, as in Laing, however, the recommended discipline is in conflict with cases imposing a harsher discipline, such as The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981).

Respondent's Brief cites a number of cases involving the imposition of a

public reprimand. For the reasons set forth in the Bar's Initial Brief, the instant case is distinguishable from these cases. Further, as this Court stated in Agar, although lighter punishment may have been given in similar cases, these cases are the exception to the "general rule of strict discipline against deliberate, knowing elicitation or concealment of false testimony." Id at 406.

Respondent stated that the Bar had suggested "by implication" that Respondent could have been criminally charged and "insinuate[d] that consideration had been given to doing so." (See Respondent's Answer Brief at pages 40 and 41). The language cited to support Respondent's statement was found at page 11 of the Bar's Brief, the complete sentence of which reads, "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." For clarification, the Bar acknowledges that the record does not contain evidence to indicate whether the State Attorney's Office has contemplated charging Respondent with any crime.

CONCLUSION

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

Respectfully submitted,

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Debra Joyce Davis
Assistant Staff Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express to The Honorable Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by Airborne Express to David A. Maney, Esq., Counsel for Respondent, at 606 East Madison Street, Post Office Box 172009, Tampa, FL 33672-2009; and a copy by regular U. S. mail to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of May, 2000.

_____

Debra Joyce Davis
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font, and the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Antivirus for Windows.

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Debra Joyce Davis