IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	**Case No. SC96743**
Petitioner-Appellant,	)	
	)	
v.	)	**TFB Case No.**
	)	**2000-50,249(15D)**
DEWEY HOMER VARNER, JR.,	)	
	)	
Respondent-Appellee.	)	
_____	)	

THE FLORIDA BAR'S INITIAL BRIEF

DAVID M. BARNOVITZ, #0335551
Bar Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 835
Fort Lauderdale, Florida 33309
(954) 772-2245

JOHN A. BOGGS, #253847
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

JOHN F. HARKNESS, JR. #123390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

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CERTIFICATION OF TYPE, SIZE, STYLE AND ANTI-VIRUS SCAN

Undersigned counsel hereby certifies that the brief of The Florida Bar is submitted in 14 point, proportionately spaced, Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

STATEMENT OF THE CASE AND FACTS

Case

The bar charged respondent with the commission of several violations of the Rules Regulating The Florida Bar in connection with respondent's knowing submission of a phony notice of voluntary dismissal to conclude a settlement of a civil action that respondent had represented had been filed, but which, in fact, had not.

The bar's complaint was filed on October 14, 1999. The final hearing was held on February 22, 2000, and March 23, 2000. The referee, finding that respondent had violated two of the nine rules charged in the bar's complaint, recommended that respondent receive a thirty-day suspension and that respondent pay the bar's costs.

The referee's report was considered by the bar's board of governors at the meeting which ended June 3, 2000. The board determined to petition for review of the referee's findings of no violation with respect to violations charged by the bar and from the referee's sanction recommendation and to seek a ninety-one day suspension.

Facts

1. Respondent, Dewey Homer Varner, is and at all times hereinafter mentioned was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida [See agreed statement of facts].

2. On December 21, 1998, respondent, at an examination under oath of a client, in referring to a 1997 accident involving such client, Martha Janet Utterback, and

in the presence of Ms. Utterback and State Farm Mutual Automobile Insurance Company representatives, Ed Welch and Evan B. Plotka, represented that he had filed suit on behalf of Ms. Utterback against State Farm, referring to the 1997 accident. When respondent made such statement, he believed it to be true [See agreed statement of facts].

3. At the conclusion of the taking of the examination under oath hereinabove referenced, respondent engaged in conversation with Mr. Welch concerning the settlement of the suit [See agreed statement of facts].

4. During such conversation, respondent informed Mr. Welch that respondent would settle such suit, for attorney's fees in the amount of $200 and a filing fee in the amount of $215 whereupon it was agreed by respondent, on behalf of respondent's client and by Mr. Welch, on behalf of State Farm that the suit be settled by payment from State Farm of the sum of $415 [See agreed statement of facts].

5. On December 30, 1998, State Farm issued and forwarded to respondent's law firm a check in payment of the settlement amount of $415, which check was received and deposited into the law firm's account [See agreed statement of facts].

6. The check was accompanied by a December 30, 1998, letter to respondent requesting that respondent furnish to State Farm a voluntary dismissal with prejudice of the suit that respondent represented had been filed [See agreed statement of facts].

7. On or about January 27, 1999, respondent was notified of a telephone message from Mr. Welch requesting that the voluntary dismissal be sent to him [See agreed statement of facts].

8. Respondent instructed his secretary to prepare a notice of voluntary dismissal [See agreed statement of facts].

9. Respondent's secretary, complying with respondent's instruction, prepared a voluntary dismissal and delivered it to respondent informing him at the time of such delivery that she had not been able to fill in a file number because no action had ever been commenced. Respondent took the voluntary dismissal, filled in a fictitious court file number and thereafter executed the same and mailed a copy to Mr. Welch [See agreed statement of facts].

10. When respondent filled in the fictitious file number after having been told by his secretary that no action had ever been commenced, he did so in his secretary's presence [Final hearing transcript, page 100].

11. Respondent's secretary, referring to the events surrounding respondent's execution and mailing of the phony notice of dismissal, testified:

> Q. When you gave it to Mr. Varner did you have any discussion regarding the pleading?
>
> A. I told him that I couldn't - you know, didn't find that any suit had been filed on this case. It didn't appear that suit had been filed.

Q. And what did Mr. Varner do?

A. He signed the pleading and he mailed it.

Q. Well, did he place a file number on it?

A. Yes.

Q. When did he do that?

A. At the time that I was talking to him about it.

Q. So he did that in your presence?

A. (The witness nods head in the affirmative).

Q. Yes?

A. As best as I remember, yes.

Q. Did you have any discussion with Mr. Varner regarding his ascribing a fictitious number to that document?

A. No.

Q. You knew that it was a fictitious number that he ascribed to it?

A. Yeah [Final hearing transcript, pages 100, 101].

12. At the time respondent forwarded the notice of voluntary dismissal to State Farm, there had been no summons, complaint or other pleadings drafted or prepared in the referenced matter [See agreed statement of facts].

13. The State Farm representative, Ed Welch, relied upon respondent's representation that a suit had been filed in agreeing to settle such suit by payment of the sum of $415 [Final hearing transcript, pages 11 through 13 and page 47].

14. After receiving an investigative inquiry from the bar regarding the foregoing scenario, respondent requested of his secretary that she attempt to create a file in the action he had represented had been commenced and backdate the computer date entries for the documents [Final hearing transcript, pages 104 through 108].

15. Complying with respondent's request, his secretary actually produced a summons, complaint and discovery documents [Bar's composite exhibit 3 in evidence].

16. One of respondent's partners learned about the attempt to create and backdate computer date entries for documents and immediately met with respondent, the secretary in question and the remaining law partner [Final hearing transcript, pages 124 through 126].

15. Respondent abandoned the computer entry backdating project and did not use the documents created for any purpose.

SUMMARY OF ARGUMENT

While blatant and substantial frauds upon institutions absent an accompanying felony conviction have rarely been considered serious enough by the court to warrant

imposition of a rehabilitative suspension, the case at bar offers an element which should push the court beyond the 90-day suspension threshold. The respondent in the case at bar openly, notoriously and flagrantly joined his secretary in his misconduct and when the bar made inquiry, urged that his secretary plunge even deeper into the murky waters of intrigue. Such actions require imposition of a rehabilitative suspension.

ARGUMENT

POINT I THE REFEREE ERRED IN FINDING THAT RESPONDENT DID NOT VIOLATE RULES 4-4.1(a)[1], 4-8.4(b) AND 4-8.4(d), RULES REGULATING THE FLORIDA BAR

The bar is mindful of the axiom that a party contesting a referee's findings of fact and conclusions of guilt "carries the burden of demonstrating that . . . the record evidence clearly contradicts the conclusions." Florida Bar v. Spahn, 682 So.2d 1070, 1073 (Fla. 1996). It is respectfully submitted that the following will demonstrate that the referee's conclusions are contradicted by uncontroverted, clear and convincing record evidence which evidence conclusively establishes that respondent, in addition to violating Rules 3-4.3 [the commission by a lawyer of any act that is unlawful or contrary to justice] and 4-8.4(c) [conduct involving dishonesty, fraud, deceit or misrepresentation], the violations that the referee found respondent to have committed, also violated Rules 4-4.1(a) [a lawyer shall not knowingly make a false statement of material fact or law to a third person], 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] and 4-8.4(d) [a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice].

[1] The referee's report at page 4 makes reference to Rule 4-1.4(a) rather than 4-4.1(a) which is obviously a scrivener's error in that the bar charged respondent with commission of a violation of Rule 4-4.1(a) and the rule provision following the referee's citation is taken from Rule 4-4.1(a).

RULE 4-4.1(a) The proof is uncontroverted that respondent knowingly submitted a phony notice of voluntary dismissal to Mr. Ed Welch, a representative of State Farm Mutual Automobile Insurance Company. Respondent stipulated that he did so. It is respectfully submitted that there can be no other conclusion but that respondent violated the mandate of Rule 4-4.1(a) which expressly prohibits a lawyer who, in representing a client knowingly makes a false statement of material fact to a third person.

RULE 4-8.4(b) In its complaint, the bar charged, inter alia, that respondent had, by his actions, violated Rule 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]. The evidence adduced at the final hearing establishes not only clearly and convincingly, but beyond a reasonable doubt that respondent knowingly presented to State Farm Mutual Insurance Company, through its representative, Mr. Ed Welch, a phony notice of dismissal as a quid pro quo for receiving funds under respondent's client's insurance policy. In urging that the respondent be found guilty of a violation of Rule 4-8.4(b), the referee was presented with section 817.234, Florida Statutes (1999) which provides:

> (1)(a) A person commits insurance fraud punishable as provided in subsection (11) if that person, with the intent to injure, defraud, or deceive any insurer:
>
> 1. Presents or causes to be presented any written or oral statement as part of, or in support of, a claim for payment or other benefit pursuant to an

> insurance policy . . . knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.
>
> 2. Prepares or makes any written or oral statement that is intended to be presented to any insurer in connection with, or in support of, any claim for payment or other benefit pursuant to an insurance policy . . . knowing that such statement contains any false, incomplete, or misleading information concerning any fact or thing material to such claim.

The referee found that the statute had no applicability to the case at bar and thereupon found that respondent did not violate Rule 4-8.4(b). The evidence establishes that State Farm Mutual Insurance Company made a payment to respondent's firm under an insurance policy issued to respondent's client. The evidence establishes that the payment would not have been made save for respondent's representation that an action had been filed. In that regard the testimony elicited from State Farm's representative was:

> Q. Would you have paid Mr. Varner $415 if he hadn't represented the lawsuit was filed?
>
> A. No, sir. [Transcript of final hearing, page 47].

In forwarding what he knew to be a phony notice of dismissal of a law suit that he knew never existed, respondent thereby presented to State Farm, an insurer, with the obvious intent to deceive such insurer, a written statement as part of, or in support of, a claim for payment or other benefit pursuant to his client's insurance policy knowing that such written statement contained false and misleading information concerning the existence of a fictional law suit, an ipso facto violation of section 817.234 (1)(a)(1) and (1)(a)(2),

Florida Statutes (1999). Violation of the statute involving a sum of less than $20,000 constitutes a felony of the third degree [Section 817.234(11)(a), Florida Statutes]. Such violation, in turn, creates a violation of Rule 4-8.4(b) for which respondent should be held accountable.

RULE 4-8.4(d) The referee concluded that respondent's misconduct did not warrant a finding that he thereby violated Rule 4-8.4(d) [a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice. It is the bar's view that an attorney who prepares a document bearing the style and file number of a court action, thereby invokes [and cloaks the instrument with] the dignity, power and prestige of the court. The bar respectfully submits that when such document, such as the notice of dismissal in the case at bar, is fictitious and concocted by an attorney to deceive someone, it constitutes the waving of a court standard and colors for fraud and deception, a practice that is prejudicial to the administration of justice.

POINT II THE REFEREE ERRED IN FINDING THAT RESPONDENT DID NOT VIOLATE RULE 4-5.3(b) AND 4-5.3(c)(1), RULES REGULATING THE FLORIDA BAR

The referee erred in finding that respondent did not violate Rule 4-5.3(b) [with respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer]. It was also error for the referee to have found that respondent did not violate Rule 4-5.3(c)(1) [with respect to a nonlawyer employed or retained by or associated with a lawyer, a lawyer shall be responsible for conduct of such a person that would be a violation of The Rules of Professional Conduct if engaged in by a lawyer if the lawyer orders the conduct involved].

The facts are simple. Victoria Hagar is respondent's personal secretary. She has worked with him for over ten years [Transcript of final hearing, page 96]. When Ms. Hagar was instructed by respondent to prepare the notice of dismissal, she conducted both a computer and file search for a file from which to secure the pertinent information. Finding none, she reported to respondent that no suit had ever been instituted [Transcript of final hearing, pages 97 through 100]. Respondent then, in Ms. Hagar's presence, having been informed that there was no extant lawsuit, concocted a fictitious file number and placed it on the notice that Ms. Hagar had prepared [Transcript of final hearing, pages 100 - 101]. Watching him, Ms. Hagar knew what respondent had done. She knew that the number respondent had inscribed upon the notice in her presence was fictitious

[Transcript of final hearing, page 101]. By his act, respondent had made his secretary complicit to a fraud. In the bar's view, respondent could not have strayed further from Rule 4-5.3(a), viz., the duty of a supervisory attorney to ensure that the his nonlawyer personnel's conduct is compatible with the professional obligations of the lawyer. What respondent did was the absolute antipode to such mandate. Respondent gave his secretary a lesson in how to be deceitful and how to commit a fraud.

To darken the climate, respondent went even further. After receiving the investigative inquiry from the bar regarding the facts underlying this matter [transcript of final hearing, page 108], respondent enjoined Ms. Hagar to explore another avenue of deceit. He asked her to investigate the possibility of creating a file in the nonexistent PIP action with backdated computer entries. Toward that end, Ms. Hagar prepared a summons, complaint, request for admissions, request to produce and interrogatories [bar's consolidated exhibit 3 in evidence]. While respondent abandoned his scheme, he had his secretary actually take concrete steps to move forward with an obvious plan to make it appear to the world that while he may not have commenced a lawsuit, he had all of the pleadings prepared and ready for service and filing. It is respectfully submitted that respondent's consigning of the task of computer entry backdating and pleading preparation to his secretary constituted the antithesis of his duty under Rule 4-5.3(c)(1).

Rather than creating and instilling an aura of professionalism in his secretary, respondent delegated to her an attempt at creating a fraud.

POINT III THE REFEREE ERRED IN FINDING THAT THERE WERE NO AGGRAVATING FACTORS

The referee referred to Florida Standards For Imposing Lawyer Sanctions in addressing mitigating and aggravating factors. In so doing, she concluded that none of the aggravating factors applied. It is respectfully submitted that such conclusion is erroneous. It is so clear as to be self-evident that respondent, in determining to send a phony notice of dismissal to State Farm did so as a result of a dishonest or selfish motive. Having learned that his representation to the State Farm agent that a lawsuit had been filed was untrue, respondent had a number of options available to him. He could have merely sent the funds he received back to the company with a letter of explanation. He could have called the insurance company representative, explained what happened and thereupon determined upon a course of action. His reaction was to keep the money through a deceitful act. The referee should have found that Standard 9.22(b) - dishonest or selfish motive - was an aggravating factor. Certainly, the referee should have found that respondent had substantial experience in the practice of law under that aggravating factor recited in Standard 9.22(i).

POINT IV A 91-DAY SUSPENSION RATHER THAN THE 30-DAY SUSPENSION RECOMMENDED BY THE REFEREE WILL BETTER SERVE THE PURPOSES OF THE LAWYER DISCIPLINE PROCESS

In The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), this court enunciated what it termed the three purposes that must be kept in mind in considering a sanction in bar discipline proceedings. The court stated:

> 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 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 [132].

Respondent's misconduct is not an isolated act of aberrant behavior as postulated by respondent. While it does not constitute an aggravating factor under the Florida Bar Standards For Imposing Lawyer Sanctions due to its age, respondent's 1988 private reprimand nonetheless establishes that respondent then flashed a signal of his penchant for skirting the Rules of Professional Conduct. There, respondent's associate confided in respondent, that prior to and while employed by respondent, the associate had entered into a contract with a police officer whereby the officer, in consideration of receiving a portion of the legal fee, agreed to refer cases to the associate. The associate was severely sanctioned [Florida Bar v. Stafford, 542 So.2d 1321 (Fla. 1989]. Respondent failed to report such egregious breach to the bar [See report of minor misconduct attached as appendix 1]. That lapse by respondent may well have been characterized as an isolated act of aberrant behavior. His present misconduct, however, cannot be so considered. His

falsification of what he represented to be a court document, i.e., the notice of dismissal that he concocted and to which he ascribed a fictitious file number constituted a fraud and felony, with all of the trappings. The hairline crack in his ethics armor created by his 1988 misadventure now, with his blatant act of fraud, expanded exponentially**.** Perhaps it is respondent's position that an ethics breaches separated by a number of years permits each such breach to be considered aberrant. In the bar's view, repetitive instances of misconduct are demonstrative of a character flaw. In the case at bar, it cannot be lost sight of that having committed the fraud, when queried by the bar, respondent's initial reaction was to task his secretary with an attempt to produce computer backdated documentation, a reaction that is a defining measure of respondent's character. The combination of actions on respondent's part simply is not reflective of aberrant behavior. The fact that respondent made his secretary a spectator to the perpetration of his fraud thereby making her complicit therein, expands the misconduct even further. Then, to instruct her to create a superstructure upon the foundation of the fraud through the generation of computer backdated entries, thoroughly distanced respondent's misconduct from the aberrant behavior respondent would urge as a rationalization to his breaches.

The bar respectfully submits that a 91-day suspension would demonstrate to the public and be instructive as a deterrent to the bar membership, establishing that the court will require a lawyer who commits fraud for expediency and joins his secretary in his

misconduct, to establish rehabilitation before it will permit such lawyer to enjoy the privileges bestowed on officers of the court. It will send out a warning that felonious conduct will result in serious consequences. If respondent can establish rehabilitation upon a reinstatement proceeding, then the public will not be denied the services of a qualified lawyer. In Florida Bar v. Forbes, 596 So.2d 1051 (Fla. 1992), the court, finding that the respondent had committed virtually the same rule violations as are present in the case at bar, directed a disbarment. In that case, respondent had been convicted of the felony in which he had participated**.** He had no discipline history. The court entered an order of disbarment in Florida Bar v. Cramer, 678 So.2d 1278 (Fla. 1996). There the respondent perpetrated a fraud upon a financial institution. Based upon the fact that a fraud was involved and that respondent had a substantial disciplinary record, the court disbarred, even though no felony conviction had been secured.

The bar acknowledges that the court has ordered non-rehabilitative suspensions in cases involving fraud upon institutions. See Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985); Florida Bar v. Siegel, 511 So.2d 995 (Fla. 1987); and Florida Bar v. Nuckolls, 521 So. 2d 112 (Fla. 1988). It is respectfully submitted, however, that there is a major distinction between all such cases including the Forbes and Cramer cases, supra, and the case at bar. None of such cases involved a respondent, who, like the respondent in the case at bar, made his secretary complicit in his fraud and further

instructed her to ascertain the possibility of creating a batch of computer backdated documents. From the bar's perspective, steeping a nonlawyer employee in a climate of ethics impropriety should warrant a minimum of a 91-day suspension.

CONCLUSION

While this proceeding presents but one other instance of an attorney's commission of a fraud upon an institution, an additional element has been introduced which should prompt the court to order a rehabilitative suspension. Fraud is hardly the stuff upon which professionalism is grounded. Corrupting ones secretary by joining her in the fraudulent venture should merit the sternest sanction.

All of which is respectfully submitted.

David M. Barnovitz, # 0335551
Bar Counsel
The Florida Bar
5900 North Andrews Avenue, Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished by regular U.S. Mail to Michael J. McNerney, Esq., attorney for respondent at 200 East Las Olas Boulevard, Suite 1800, Post Office Box 522, Fort Lauderdale, Florida 33302-0522, this 6th day of July, 2000.

David M. Barnovitz

APPENDIX