IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	Case No. SC96979
Petitioner-Appellant,	)	
	)	
v.	)	TFB Case Nos.
	)	1999-51,936(17I)
MELODY RIDGLEY FORTUNATO	)	2000-50,097(17I)
	)	
Respondent-Appellee.	)	
_____	)	

THE FLORIDA BAR'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellant, will be referred to as "the bar" or "The Florida Bar." Melody R. Fortunato, Appellee, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

CERTIFICATION OF FONT 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

On November 9, 1999, The Florida Bar filed a two count complaint against respondent charging the respondent with the commission of several violations of the Rules Regulating The Florida Bar in connection with her representation of two clients, an Austin Scott, Jr. and a Francis Gregory Robbins. This matter was tried on March 15, 2000. The Honorable John L. Phillips entered his report of referee on May 15, 2000.

COUNT I

Respondent represented Austin Scott, Jr., in a family court dispute styled Scott v. Scott. As part of the representation, respondent filed a Notice of Appeal in the case, invoking the jurisdiction of the Fourth District Court of Appeal, after the trial court entered an order in the Scott case. Respondent failed to include the $250 appellate filing fee with the Notice of Appeal, or an Order of Indigency.

On or about March 19, 1999 the Fourth District Court of Appeal entered an Order, sua sponte, and ordered the respondent to pay the filing fee or file an Order of Indigency within 10 days of the date of the Order. That Order, the referee found, clearly announced the fee was to be paid regardless of whether the appeal was voluntarily dismissed or adversely dismissed, and stated failure to comply with the Order would result in dismissal of the cause and may result in court sanctions against any party or the parties' attorney. Respondent failed to pay the filing fee, to file an

Order of Indigency, or to make any response whatsoever to this Order. A copy of the Order was admitted into evidence during the bar's proceedings.

On or about April 9, 1999, the Fourth District Court of Appeal entered yet **another** Order dismissing the appeal for failure to pay the filing fee and ordering respondent to show cause why she should not be held in contempt for her failure to abide by the March 19, 1999 Order. Respondent was then given ten (10) days to respond to that Order. The respondent also wilfully disregarded this Order and failed to make any response whatsoever to this Order. A copy of the Court's second Order was admitted into evidence during the bar's proceedings.

On or about May 5, 1999, the Fourth District Court of Appeal entered yet another Order assessing a fine of $250 against the respondent for *her* failure to respond to the Court's Orders of March 19, 1999 and April 9, 1999. The Order required respondent to pay this fine within twenty (20) days. A copy of this Order was admitted into evidence during the course of the bar's proceedings. Respondent, for a third time willingly disregarded the Court's Order, did not pay the $250 in a timely fashion as ordered to do so, and failed to file any response whatsoever to this Order, blatantly disregarding the Court's directives.

From the evidence submitted, it is clear that respondent willfully and intentionally disregarded three separate court Orders from the Fourth District Court of Appeal and never even attempted to file any response to the same.

The referee hearing this matter found that respondent gave no credible reason for her failure to respond to the three Orders of the Fourth District Court of Appeal, or her failure to comply with the requirements of the Orders. He found that the only explanation given by respondent for her willful noncompliance involved a vaguely described medical procedure which was apparently performed on July 21, 1999, well after the three court Orders were entered. The referee also stated that respondent's "testimony was verifiably false, confusing and deliberately misleading." RR at 3.

Based upon his factual findings the referee found the respondent had violated R. Regulating Fla. Bar 3-4.2 [Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline.]; 3-4.3 [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida and whether or not the act is a felony or misdemeanor may constitute a cause for discipline.]; 4-1.3 [A lawyer shall act with reasonable diligence and promptness in representing a client.]; 4-3.4(c)[A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.]; and 4-8.4(a) [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of

another.] Despite his factual findings, however, the referee only recommended that respondent receive a public reprimand in front of the Board of Governors.

COUNT II

On December 18, 1998, Francis Gregory Robbins hired respondent to represent him in a contemplated modification of visitation or custody action. Mr. Robbins' former wife moved to Atlanta, Georgia with his children and Mr. Robbins was interested in reestablishing his visitation rights. Mr. Robbins and his fiancee, Ms. Harry, met with respondent at her office, provided her with a $2,500 retainer, and signed a retainer agreement which stated in pertinent part as follows:

> a. **Retainer for Professional Services.** I agree to pay a minimum non-refundable retainer fee of $2,500.00. This retainer pays for the first $2,500.00 worth of work and effort (emphasis added) performed by your office. I realize that this retainer fee is only a minimum fee and that additional fees may be charged.

Both Mr. Robbins and Ms. Harry testified that they met briefly with respondent and that Mr. Robbins specifically informed the respondent not to take any action until she heard from him. Mr. Robbins was not provided with any documents.

Two weeks later Mr. Robbins contacted respondent's office to advise her he did not want to proceed with the litigation and was informed by a member of respondent's staff that he would be refunded his retainer. He proceeded to call respondent time and time again, but was not able to reach her instead only reaching a member of her staff.

After not receiving a response from the respondent he began to write letters to her dated May 3, 1999, May 14, 1999 and June 4, 1999 (all of which were admitted into evidence at the final hearing) attempting to get his money back. He even had to hire another attorney hoping that the respondent would then call him back, but still he got no response. He never received a refund of his retainer nor did he ever have any work performed by respondent on his behalf.

The referee found that at no time did Mr. Robbins discuss the proposed litigation with respondent or any member of her staff office after the initial meeting on December 18, 1998, and that all discussion after the initial meeting was related to informing the respondent not to go forward with the litigation and seeking a refund of the retainer. RR at 5-6. The referee also found that respondent was "...not a credible witness, her claims of work done on Mr. Robbins' file are not corroborated by any other evidence, and the undersigned has serious doubts about the veracity of this testimony by Respondent." RR at 5.

The referee, nonetheless, found that respondent was not guilty of R. Regulating Fla. Bar 4-1.5 [An attorney shall not enter into an agreement for, charge, or collect and illegal, prohibited, or clearly excessive fee.].

The referee's report was considered by the bar's Board of Governors at the meeting which ended on June 2, 2000. The Board determined to petition for review of the referee's disciplinary sanction and seek a suspension.

SUMMARY OF ARGUMENT

The referee specifically found that respondent was not a credible witness, that her testimony was not trustworthy, and in fact, in certain instances, that it was verifiably false, confusing, and deliberately misleading, yet he only sanctioned her with a public reprimand. This disciplinary sanction given by the referee is totally inconsistent with the case law and the Florida Standards for Imposing Lawyer Sanctions. A respondent who deliberately and continuously lies during disciplinary proceedings and to the court should receive no less than a suspension.

ARGUMENT

I. SUSPENSION IS THE APPROPRIATE SANCTION FOR A RESPONDENT WHO PURPOSELY PROVIDES FALSE, MISLEADING, AND EVASIVE TESTIMONY DURING A DISCIPLINARY PROCEEDING

It is totally inconsistent that the referee found that respondent was not a credible witness, that her testimony in several instances was evasive, deliberately misleading, verifiably false, and confusing, yet he nonetheless only recommended a public reprimand. The case law is overwhelmingly in support of the proposition that a respondent who lies to the court warrants at a minimum a suspension. It is, in fact, respondent's lies to the court that elevate this case to the level of a suspension. What aggravates the situation further is that there are **numerous** instances during the final

hearing in which the respondent's testimony was at a minimum evasive and purposely inaccurate.

A. Respondent lied to the court time and time again about her reasons for not complying with the Orders entered by the Fourth District Court of Appeals.

Respondent, throughout the proceedings, categorically changed her testimony as to why she failed to comply with the Fourth District Court of Appeals Orders. First, she states that the reason she did not comply with the Court's first Order which required that she submit the filing fee or file an Order of Indigency was due to the fact that she could not reach her client. TT at 87. Later in the proceedings, however, she then changes her testimony to state that the filing fee was not paid because the appeal was voluntarily dismissed by her before it was dismissed by the court. TT at 88-89.

THE COURT: You dismissed it voluntarily rather than having it dismissed by the appellate court?
MS. FORTUNATO: Exactly.

Respondent attempted to mislead the court by testifying that her client was not prejudiced by virtue of the fact that she voluntarily dismissed the appeal prior to the court dismissing the same. This was purposefully a lie as the referee later found out that respondent's Voluntary Dismissal was not filed until June 28, 1999, yet the Fourth District Court's dismissal of the appeal was prior to that on April 9, 1999. RR at 3. This lie was only revealed after respondent had no choice but to provide the Court with

a copy of her Notice of Voluntary Dismissal. Had this document not been provided to the Court the referee would have been left with respondent's deceptive testimony.

Respondent continues to lie to the court in other instances of being questioned. For example:

> Q: My question is going to be, that order applies to you in that it states Melody Ridgley Fortunato is to show cause why a fine or other sanctions should not be imposed on said attorney for failure to respond?
> A. Yes.
> Q. It also states that attorney shall respond within ten days of the date of this order?
> A. Yes.
> Q. Did you file a response to this order?
> A. I filed just prior to that (emphasis added) the notice of voluntary dismissal which is reflected in the last paragraph. TT at 111.

In subsequent questioning, the respondent states as follows:

> Q. When was your voluntary dismissal filed?
> A. Prior to that.
> Q. When?
> A. I don't have the document in front of me. I'd have to get it. TT at 112 .

Respondent then lied to the court again by stating, for the first time ever during the entire disciplinary process, that it was a medical condition which prevented her from complying with these orders. TT at 92. When questioned by bar counsel, however, respondent admitted that the only time she raised the issue of some vague medical procedure was when asked by bar counsel why she did not respond in a timely fashion to the bar's investigative inquiry, and the medical procedure did not surface as

an excuse for the noncompliance with the Fourth District Court of Appeals Orders until the date of the disciplinary final hearing. TT at 108.

B. Respondent again lied to the court when she stated that she had performed some work on the Robbins case, and that she had a file.

Respondent once again attempted to intentionally mislead the court during the Robbins portion of the trial. She testified that she had a "file" representing the work done by her on behalf of Mr. Robbins.

The respondent testified:

> The Bar has never requested and never come to my office to even look at my file. Had they requested the file I would have produced it to them....They did not ask for copies of my file. TT at 81.

The evidence, however, revealed that the bar wrote to respondent on several occasions - July 22, 1999, August 11, 1999, and September 8, 1999, TT at 95, 96 (these letters were all admitted into evidence), and that respondent was *specifically* asked to provide her file in the letter dated September 8, 1999, yet did not provide the same as a response to that letter or to any of the bar's prior correspondences.

Respondent's testimony continued to be purposefully confusing, false, and evasive when she was further questioned on this issue:

> Q. Now you stated during your direct testimony that the Bar never asked you to produce the file on the Robbins case, never asked you to produce billing records and that you would have been more than glad to make this available to us.

Do you remember testifying to us?

A. Yes. But I don't remember that so maybe I probably did send you my file then.

Q. Your testimony is that your sent me your file?

A. I don't know. I don't know. My practice is extremely busy. I can't remember what I sent to you. TT at 98.

Obviously, respondent changed her testimony from first testifying that she was never asked to produce her file on the Robbins case, and then when she was caught in her deceit, changed her testimony to now state that she must have somehow produced the file previously. Neither version was true.

It is axiomatic that lying to the court warrants a suspension. See The Florida Bar v. Cibula, 725 So.2d 360 (Fla. 1998) [91 day suspension]; The Florida Bar v. Corbin, 701 So.2d 334 (Fla. 1997) [90 day suspension]; The Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983) [60 day suspension].

In Oxner, the respondent in bar disciplinary proceedings in order to secure a continuance, lied to the trial judge by stating that he had excused a vital witness who now could not be contacted. Judge Fine (the judge hearing the proceedings) was able to contact the witness without any difficulty and found that Oxner had never spoken to the witness about the case. The court ordered a sixty day suspension.

In the instant case, like in Oxner, the respondent misrepresented facts to the referee. She first gave a number of inconsistent and untruthful reasons about her noncompliance with the directives of the Fourth District Court of Appeals, and she then

conjures up a file which she never produced nor could produce even during the final hearing because in truth and in fact, this file never existed and was merely created by the respondent to justify her charging Mr. Robbins a $2,500 fee and not doing any work on his behalf. See also The Florida Bar v. Lund, 410 So.2d 922 (Fla. 1982) [10 day suspension in a case where the respondent was untruthful in his testimony before a grievance committee].

The court has emphatically stated that "Dishonesty and a lack of candor cannot be tolerated in a profession built upon trust and respect for the law." The Florida Bar v. Williams, 604 So.2d 447, 451 (Fla. 1992). It is for this reason lawyers are suspended for lying to grievance committees or for making false statements during the disciplinary process. The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979) [Sixty day suspension for attempting to unethically influence a referee and making a false statement in his initial response to the bar]; The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979) [Ninety day suspension plus probation for lying and self dealing in a real estate matter]; Florida Bar v. Langford, 126 So.2d 538 (Fla. 1961) [Lawyer suspended for eighteen months for testifying falsely before a grievance committee and for attempting to have another lawyer do likewise to corroborate the false testimony].

While the referee found respondent guilty of the rule violations she was charged with in Count I, his findings that her testimony was not credible, verifiably false and evasive is in clear contradiction of his disciplinary sanction and to the case law.

The overwhelming precedent from cases where a lawyer has engaged in acts of misrepresentation or out right perjury during the disciplinary process are suspension cases. The majority of the cases are significant suspensions. See Cibula; The Florida Bar v. Rood, 622 So.2d 974 (Fla. 1993) [1 year suspension]; The Florida Bar v. Colclough, 561 So.2d 1147 (Fla. 1990) [6 month suspension]; Florida Bar v. Segal, 663 So.2d 618 (Fla. 1995), [a three year suspension].

In Florida Bar v. Kleinfeld, 648 So.2d 698 (Fla. 1994), the court stated "Making a knowing misrepresentation to a tribunal is a serious ethical breach." The court's intolerance for a lawyer's deceit is best illustrated in the cases where an attorney has been disbarred for his/her lies. For example, in The Florida Bar v. Rightmyer, 616 So.2d 953 (Fla. 1993), the court ordered disbarment and stated:

> We can conceive of no ethical violation more damaging to the legal profession and process than lying under oath, for perjury strikes at the very heart of our entire system of justice---the search for the truth. An officer of the court who knowingly and deliberately seeks to corrupt the legal process can logically expect to be excluded from that process.

See also The Florida Bar v. Merwin, 636 So.2d 717 (Fla. 1994).

II. THE AGGRAVATING FACTORS REQUIRE AN ENHANCED SANCTION

Independently of respondent's numerous misrepresentations to the court, a number of aggravating factors were present which the referee ignored and which

mandate that this case be elevated to the level of a suspension. (All references are to Florida Standards for Imposing Lawyer Sanctions).

First, under 9.22(c), respondent's pattern of misconduct should have been considered by the referee. In the instant case, there were not one, but three separate appellate Orders which respondent knowingly ignored. To allow a respondent to simply ignore the Court's directives strikes at the very heart of our system, for if the court system is to continue to work we must ensure that lawyers respect the court and abide by its directives.

Other aggravating factors which the referee failed to consider and which should have enhanced the disciplinary sanction ordered include 9.22(e), respondent's bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency. Evidence was submitted which demonstrated that respondent failed to reply to the bar's initial investigative inquiry and correspondence. TT at 96. It was also shown that respondent failed to appear at a status conference scheduled by the court and that she failed to comply with the court's directive that a witness and exhibit list be prepared prior to trial. TT at 3. These instances point to deliberate disregard to the judicial process and to obstruction of the disciplinary proceeding. The referee, however, did not consider this aggravating factor when assessing his disciplinary sanction.

Under 9.22(f), submission of false evidence, false statements, or other deceptive practices during the disciplinary process is an aggravating factor which can be considered. At the risk of sounding repetitive, it has been shown that respondent's testimony during the disciplinary proceedings was found to be false, misleading, evasive, and deliberately confusing by the referee. The referee, nonetheless, dismissed his own findings and while himself recognizing that respondent had lied to him merely ordered a public reprimand. Respondent attempted to make a mockery of the proceedings and to fool everyone, including the referee. She time and time again conjured up facts and when closely questioned on these facts and then caught in her own lies, changed her testimony or became evasive. To allow a respondent to escape unscathed from such reprehensible behavior cannot be allowed for it makes a mockery of the entire disciplinary process. For a referee to make a finding that respondent lied and then for that same referee to find her not guilty of Count II and to merely publicly reprimand her is totally inconsistent.

A further aggravating factor which must to be considered is 9.22(g), refusal to acknowledge the wrongful nature of the conduct. In the instant proceedings, respondent showed no remorse for her actions, provided no apology, and merely conjured a number of false and deceptive reasons as to why she did not comply with the appellate court orders. As to the Robbins case, despite the fact that the referee found it highly doubtful that she ever did any work on the Robbins case, she demonstrated no remorse

for billing this client, for not having done any work on his behalf, and for keeping his retainer.

CONCLUSION

The case law as so The Florida Standards for Imposing Lawyer Sanctions clearly support that suspension is the appropriate discipline in this case. Respondent knowingly violated a court order and then lied to the referee time and time again to cover up her reasons for not obeying the court order. Respondent also lied to the referee about having a "file" in the Robbins case to justify the fee charged. Respondent's conduct was deceitful. Her motives were corrupt and her actions demonstrated total disrespect and disregard for the grievance process. Such conduct cannot be tolerated in a member of The Florida Bar.

Based on the case law and the Standards, the appropriate sanction for violation of the rules set forth herein is a ninety-one (91) day suspension.

WHEREFORE, The Florida Bar respectfully requests this court to enter an order suspending the respondent for ninety-one (91) days.

Respectfully submitted,

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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 Melody R. Fortunato, respondent at 110 Southeast Sixth Street, #1601, Fort Lauderdale, Florida 33301 this ___ day of July, 2000.

_____

Adria E. Quintela