IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: SC20-128
The Florida Bar File No. 2019-30,075(9B)

THE FLORIDA BAR,
Complainant,

v.

DEREK VASHON JAMES,
Respondent.

THE FLORIDA BAR'S REPLY BRIEF

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ARGUMENT

This matter involves some of the most prejudicial ethical violations that a lawyer can commit: multiple affirmative misrepresentations to opposing counsel and multiple affirmative misrepresentations to the court. The undisputed facts demonstrate that Respondent engaged in improper texting to a witness during the course of a telephone deposition and then embarked on a prolonged pattern of misrepresentations and deceit to cover up the impropriety. Respondent's avoidance of and failure to address such misrepresentations in the Answer Brief indicates that he still fails to recognize that such conduct was wrong, and still fails to understand the basic ethical and professional obligation of honesty. As fully set forth in the Initial Brief, this Court has consistently held that dishonesty in connection with the practice of law is prejudicial to the administration of justice and a violation of rule 4-8.4(d) of the Rules Regulating The Florida Bar.

The Referee's findings and the record evidence conclusively show that Respondent engaged in such dishonesty. During the course of a deposition, Respondent sent the witness a series of text messages telling her what to say, what to remember, to avoid providing certain information, and to not give an absolute answer. (TFB Ex. 4; ROR at 10). When confronted by opposing counsel, Ms. Villaverde, Respondent denied texting

with the witness and stated that he was texting with his daughter. (TFB Ex. 5 at 46:10-12; 45:18-24). He agreed to stop texting and to put away his phone. (ROR at 4; Tr. at 48:20 – 49:2). However, Respondent did not stop texting. (ROR at 4). Instead, he continued his texting and inadvertently sent Ms. Villaverde text messages intended for the deponent during Ms. Villaverde's cross examination. (ROR at 4; Tr. at 49:12 – 50:3; TFB Ex. 4). After getting caught in the act, Respondent attempted to justify the texts by falsely stating that they were sent during a break. (TFB Ex. 4: Tr. 51:13-23; 52:2-13).

Following the deposition, Respondent continued to falsely represent to Ms. Villaverde that his text messages in question were sent to the deponent during a break in the deposition, not during her questioning. (TFB Ex. 11; Tr. 53:5-10). He continued to maintain this position when the issue of the texts was brought before the workers' compensation judge. He misrepresented to the judge at the hearing that the texts messages were sent during a break in the deposition. (TFB Ex. 21 at 17:6-16, 28:7-8). He also falsely stated to the judge that the content of the messages only consisted of a "picture of a puppy." (TFB Ex. 21 at 24:18 – 25:2).[1] He

[1] Respondent's assertions in the Answer Brief that the judge "already knew" the texts were more than pictures of puppies (Answer Br. at 26) do not comport with anything in the record, and certainly do not explain his

fought the disclosure of the texts by claiming attorney-client privilege, blamed any misconduct on Ms. Villaverde, and repeatedly accused her of extortion. (TFB Ex. 9 at 5; TFB Ex. 21 at 5:12-16; 12:24 – 13:15; 17:6-21; 23:12-13; 28:4-15; 48:1).

Despite Respondent's attempts to prevent the court from reviewing the inappropriate text messages, the judge ordered the messages sent and received by Respondent during the time period of the deposition to be delivered to her for in-camera inspection. (TFB Ex. 7). Although Respondent had represented to opposing counsel that he was texting with his daughter during the deposition, he produced absolutely no text messages to or from his daughter. (TFB Ex. 10 at 2; Tr. at 58:18 – 59:2). All messages produced were either to or from the deponent. (TFB Ex. 4). And despite his representation otherwise to the judge, only one of the many text messages was a picture of a puppy. (TFB Ex. 4 at 2). The judge found that the majority of the messages were sent to the deponent during the course of the questioning and pertained to "testimonial matters," "constitute witness coaching," and were not attorney-client privileged. (TFB Ex. 9 at 7). As found by the Referee, such conduct was "dishonest" and "contrary to

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emphatic argument to the judge at the August 15, 2018, hearing that the texts consisted only of a picture of a puppy. (TFB Ex. 21 at 24:18 – 25:2).

honesty," as was Respondent's conduct in "lying to opposing counsel." (ROR at 7, 8, 10-11, 12, 17).

As set forth in the Initial Brief, pursuant to the precedent of this Court Respondent's conduct of dishonesty was prejudicial to the administration of justice and is a violation of rule 4-8.4(d). Moreover, as reflected in the record evidence and in the Referee's findings, Respondent's dishonest conduct disrupted and stalled the progress of the proceedings and resulted in multiplied proceedings. (Initial Br. at 18-19). Such additional proceedings included a second deposition, motions, orders, and hearings involving the production of the texts, review of the texts by the court, and litigation involving fraud and misrepresentation under the workers' compensation statute including an appeal in the First DCA. (TFB Exs. 7-13, 16-21). According to this Court's case law, such conduct resulting in multiplication of proceedings is also prejudicial to the administration and a violation of rule 4-8.4(d).

Rather than address the record evidence and the findings by the Referee of misrepresentations and dishonesty and the in-depth discussion of this misconduct in the Initial Brief, Respondent attempts to deflect the issue. He argues that he did not violate rule 4-8.4(d) because the Referee found that there was no challenge to the accuracy of the answers of the

deposition witness. (Answer Br. at 32, 35-37). Such argument misses the point. Whether the deponent answered truthfully is not the issue. The issue is that Respondent was attempting to tell his witness in real time what to say, what to remember, and to not give absolute answers. He then attempted to cover up this dishonest conduct by lying to opposing counsel first denying he had sent the messages at all and then, when he was caught in the act, denying that he had sent them during the course of questioning. He also made multiple misrepresentations to the workers' compensation judge in an effort to justify the texts and to prevent their production.

Respondent tries to further distort the key issues by providing an irrelevant running commentary, without record citation, of the alleged reasoning behind each text sent to the witness. (Answer Br. at 16-20). Additionally, and quite remarkably, Respondent continues to maintain that he believed he had sent the messages during a break in the deposition and that such messages were attorney-client privileged. (Answer Br. at 21-22, 24-26, 28). Of course, both the workers' compensation judge and the Referee made explicit findings to the contrary. (TFB Ex. 9 at 6-7; TFB Ex. 10 at 3; ROR at 5). Respondent also tries to persuade the Court that he should not be held to the professional standards because the July 31,

2018, deposition in question was "nothing more" to him than a "dress rehearsal'" and a "simple conversation" that would lead to some future testimony that he presumably at that point would take seriously. However, the record is clear that Respondent always treated the July 31 proceeding as a deposition and intended for the deposition to be used as evidence at trial, which it was.[2] He also asserts that since workers' compensation proceedings are more "informal" the same ethical rules should not apply.

[2] Respondent formally noticed the deposition, and his notice stated that the deposition was to be taken for "discovery purposes, for use as evidence at the trial or both." (TFB Ex. 15 at 5). The court reporter, provided by Respondent, would not swear in the deponent who was appearing by telephone in a separate location. (Tr. at 45:9-11; 46:2-21; 95:20-23). Nonetheless, the parties proceeded with the deposition that lasted for two hours and forty-five minutes. (Tr. at 46:19-25; TFB Ex. 5). At no point during the deposition was it mentioned or discussed that the deposition was merely a "dress rehearsal" to some future event. (*See* TFB Ex. 5). Towards the end of the deposition, Respondent even indicated that even though the witness was unsworn, he intended for the deposition to serve an evidentiary purpose. (TFB Ex. 5 at 66-67). He also indicated in a motion hearing occurring on August 15, 2018, that he was willing to stipulate the deposition into evidence. (TFB Ex. 21 at 9-10). In fact, the deposition transcript was stipulated to and admitted into evidence at the final hearing. (Tr. 47:1-5; 87:19-22). Although Respondent states in the Answer Brief that he filed a subsequent motion requesting another deposition, such request was not because the testimony in the July 31 deposition was unsworn and not intended to be used or because it was a "dress rehearsal." Rather, the request was made in an attempt to rectify the issues surrounding Respondent's text messaging of the witness during the course of the July 31 deposition. (TFB Ex. 8; TFB Ex. 21 at 5:21 - 6:24).

All in all, Respondent's arguments are without basis and merely serve as a confusing attempt to redirect the Court's attention from the main questions before it. Indeed, to adopt such arguments would set an undesirable precedent for the interpretation of the Rules Regulating The Florida Bar and for future attorney disciplinary proceedings. As fully argued in the Initial Brief, Respondent violated rule 4-8.4(d) and Respondent states nothing of merit to refute such arguments.

Further, as set forth in the Initial Brief, based on the Referee's findings, the record evidence, Florida's Standards for Imposing Lawyer Sanctions, and this Court's precedent, the Referee's recommendation of a thirty-day suspension is not reasonable and is too lenient. Pursuant to this Court's prior case law, an attorney's concealment of information from opposing counsel, or from the court, is dishonest and deceptive conduct warranting a harsher sanction. *See Fla. Bar v. Forrester,* 818 So. 2d 477 (Fla. 2002) (respondent who concealed an exhibit under the table at a deposition during the questioning by opposing counsel in the deposition of respondent's witness, but who eventually disclosed the exhibit before the end of the deposition, was suspended for sixty days);[3] *Fla. Bar v. Nicnick,* 963 So. 2d 219 (Fla. 2007) (respondent who knowingly concealed a signed

[3] As discussed in the Initial Brief, Respondent's conduct was much more egregious than that of the respondent in *Forrester.* (Initial Br. at 24-26).

settlement agreement from opposing counsel until he could investigate its authenticity was suspended for ninety-one days); *Fla. Bar v. Miller,* 863 So. 2d 231 (Fla. 2003) (respondent who concealed his awareness of a document from the opposing counsel and from the judge was suspended for one year). (Initial Br. at 22-27). *See also Fla. Bar v. Lathe,* 774 So. 2d 675, 679 (Fla. 2000) (imposing a suspension of ninety-one days on the respondent for making a misrepresentation to a judge at a hearing and stating that the respondent's "blatant misconduct poses a serious threat to the integrity of the justice system, and cannot be dealt with lightly").

Respondent's reliance on the case of *The Florida Bar v. Cocalis,* 959 So. 2d 163 (Fla. 2007) to argue for a lessor suspension is misplaced. While Cocalis was found to have utilized "sneaky or underhanded trial tactics," he did not engage in multiple affirmative misrepresentations to opposing counsel and to the court as did Respondent in the instant case. Cocalis also did not engage in tactics to conceal his misconduct, nor was there a finding that he refused to acknowledge the wrongful nature of his conduct. Moreover, since the opinion in *Cocalis* was issued, the Court has moved toward imposing stronger sanctions for unethical and unprofessional conduct. *See Fla. Bar v. Parrish,* 241 So. 3d 66, 80 (Fla. 2015); *Fla. Bar v. Rosenberg,* 169 So. 3d 1155, 1162 (Fla. 2015).

Respondent's argument that he should not get a longer suspension rests on his assertion that he "did not coach toward false answers or enhanced answers. He tried to ensure accurate answers." (Answer Br. at 41). He also places significance on the fact that the deposition took place "before Covid-19 and the current prevalence of remote proceedings," and prior to The Florida Bar's issuance of recommended best practices for remote proceedings. (Answer Br. at 40). Neither argument addresses the underlying ethical issue of honesty including the obligation to be truthful with opposing counsel and the court. Respondent's arguments only serve to illustrate his continued refusal to recognize and accept responsibility for his misrepresentations and dishonest conduct.

At bottom, Respondents dishonest conduct and inappropriate behavior followed by a pattern of deception and much needless litigation, along with his continued refusal to accept responsibility for his actions, warrant a ninety-one-day suspension.

CONCLUSION

The Florida Bar respectfully requests that this Court reject the Referee's recommendations that Respondent Derek Vashon James be found not guilty of violating rule 4-8.4(d) and instead find that he is guilty of violating that rule. The Florida Bar also respectfully requests that the Court

reject the Referee's recommended discipline of a thirty-day suspension and instead impose a suspension of at least ninety-one days.

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CERTIFICATE OF SERVICE

I hereby certify that on March 11, 2021, a copy of the foregoing was E-filed with The Honorable John A. Tomasino, Clerk of the Supreme Court of Florida with a copy provided via email to:

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Arial 14-point font and contains 2,158 words in compliance with Rules 9.045 and 9.210(a) of the Florida Rules of Appellate Procedure.

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