IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

GENEVA CAROL FORRESTER,

Respondent.
_____/

Case No. SC00-813
TFB No. 1999-10,125(6C)

ANSWER BRIEF OF THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, Florida Bar, Petitioner, will be referred to as "Florida Bar" or "The Bar." The Respondent, Geneva Carol Forrester, will be referred to as "Respondent."

"TR" will refer to the transcript of the final hearing before the Referee in Supreme Court Case No. SC00-813 held March 26, 2001. The Report of Referee dated April 9, 2001 will be referred to as "RR," and is appended to this Brief, marked "Appendix A."

"TFB Exh." will refer to exhibits presented by 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. SC00-813. "TFB Exh. 1" will refer to the transcript of the Deposition of Donald Hinrichs, dated March 13, 1998, in Pinellas Circuit Court Case No. 95-0021630CI-21. "TFB Exh. 2" will refer to the Subcontract Agreement between Caladesi Construction Company and Palm Marsh Landscape Co., dated November 1, 1993. "TFB Exh. 3" will refer to the Order Denying Defendant's Motion to Strike and Granting in Part and Denying in Part Plaintiff's Motion for Sanctions, dated July 27, 1998, issued by Circuit Court

Judge James R. Case. "R. Exh. 1" will refer to the transcript of the Unsworn Statement in the Deposition of Donald Hinrichs, dated March 13, 1998.

"Rule" or "Rules" will refer to the Rules Regulating Florida Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE

The Florida Bar filed a Complaint in this matter on April 13, 2000. By order dated June 19, 2000, The Honorable Frank A. Gomez, Circuit Court Judge, in and for the Thirteenth Judicial Circuit, was appointed as Referee in the case.

A final hearing was held in the matter on March 26, 2001. On April 9, 2001, the Referee issued a Report of Referee finding Respondent guilty of violating Rule 4-3.4(a) (A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully conceal a document that the lawyer knows or reasonably should know is relevant to a pending or a reasonably foreseeable proceeding; nor assist another person to do any such act), and Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, deceit, or misrepresentation). The Referee recommended that Respondent be suspended from the practice of law for sixty (60) days followed by one (1) year of probation during which Respondent must attend, and successfully complete, The Florida Bar's Ethics School. Respondent filed a Petition for Review of the Referee's Report with this Court on May 8, 2001. Pursuant to Rule 3-7.7, the jurisdiction of this Court is invoked.

STATEMENT OF THE FACTS

The facts of this case are simple and revolve around an incident that took place at a deposition on March 13, 1998. Respondent, a member of the Bar since 1973, represented Caledessi Construction Company in a lawsuit filed by subcontractor Timothy Rice, d/b/a Palm Marsh Landscaping. (TR 80). The dispute between Mr. Rice and Caledessi involved a subcontract agreement between the parties. (TR 19). On March 13, 1998, Mr. Rice's attorney, Michael C. Berry, conducted the deposition of Donald Hinrichs, president of Caledessi Construction Company. (TR 14). During the course of Mr. Hinrichs' deposition, the subcontract became a topic of discussion. Mr. Berry showed Mr. Hinrichs the original subcontract, a two-page document printed on green paper with original signatures. The contract was marked as Deposition Exhibit 5. (TFB Exh. 1, 23; TR 19). Mr. Hinrichs questioned why Mr. Berry had the original agreement stating, "We should have the original of this." (TFB Exh. 1, 24). Later in the deposition, Mr. Berry again showed the contract to Mr. Hinrichs. At this point, the Respondent asked Mr. Berry why he had the original and stated, "I would like to have that." (TFB Exh. 1, 44).

About two and a half hours into the deposition, the Respondent asked Mr. Berry to give her some documents that were on the floor behind him. Respondent

wanted to put the documents away because they smelled of mold and were bothering her sinuses. (TR 61). While Mr. Berry's back was turned, Mr. Hinrichs picked up Exhibit 5 from the table and handed it to the Respondent. The Respondent then bent down and placed the document below the table. (TR 61, RR 2). The court reporter, KayLynn Boyer, observed Mr. Hinrichs hand Exhibit 5 to the Respondent, and she saw Respondent place Exhibit 5 under the table. Ms. Boyer testified that she was shocked by what she had seen and did not know what to do. (TR 61-62). During the next recess, Ms. Boyer informed Mr. Berry's secretary of what she had seen, and the secretary relayed the information to Mr. Berry. (TR 62-63).

After the recess at the deposition, Mr. Berry resumed questioning Mr. Hinrichs, and steered the questioning back to Exhibit 5. Mr. Berry asked, "where is that contract?" and Respondent replied that she thought she had a copy with her. A moment later, Berry asked about the Exhibit again, "Exhibit five. All right. So you don't have it?" Respondent replied, "I'm not seeing it. I had a copy but I know when you filed the complaint didn't you attach it? That would be the easiest way." (Appendix B), (RR 2-3; TFB Exh. 1, 67-68).

At this point, Berry excused himself from the deposition, went into his office, called the presiding judge and requested an emergency hearing regarding a

deposition problem. (TR 28). He was advised to file an appropriate motion and set it for hearing. (TR 30-31). Berry decided to take the statement of Ms. Boyer, the court reporter who had observed Respondent's removal of Exhibit 5. He called another court reporting service in the building and asked them to send a court reporter immediately. (TR 31-32). He also asked Richard Price, an investigator, to serve as a witness. Then Mr. Berry, Mr. Price, and the second court reporter, Beth Ann Erickson, entered the deposition room. (TR 34).

With Ms. Erickson recording the proceedings, Mr. Berry asked Respondent if she had the original Exhibit 5. The Respondent replied in the affirmative. Mr. Berry then asked, "where is it?" and Respondent said, "right here" and reached down under the table, picked up and handed Exhibit 5 to Mr. Berry. (TR 34, 69, 74). Mr. Berry then questioned Ms. Boyer whether she had observed Respondent and Mr. Hinrichs take Exhibit 5. Ms. Boyer stated that she observed Mr. Hinrichs hand Respondent the document while Mr. Berry's back was turned. (R Exh. 1, 3-4). Mr. Berry later testified that the document was returned within approximately 15 minutes from the time he was informed of its removal by Ms. Boyer. (TR 35).

As a result of what happened with Exhibit 5 at the deposition, Mr. Berry filed a Motion for Sanctions against the defendant Caladessi Construction Company. Circuit Court Judge James R. Case held a hearing on the Motion and

took testimony from witnesses, including the two court reporters present at the deposition on March 13, 1998. (TR 36). By Order dated July 27, 1998, Judge Case granted the Motion in part, ruling in favor of sanctions, but denying the remedy of striking the defendant's pleadings. (TFB Exh. 3). In the Order, Judge Case found that, while Mr. Hinrichs initiated the taking of Exhibit 5, "Respondent had the ability to return Exhibit 5, but she elected to conspire with her client to keep the document's location a secret. Ms. Forrester failed to candidly admit what had happened until she was confronted by Counsel for the Plaintiff. Ms. Forrester has not presented a satisfactory explanation to the Court for her conduct; therefore, the Court must refer the matter to the Florida Bar." (TFB Exh. 3, 2).

SUMMARY OF THE ARGUMENT

During a deposition, while opposing counsel's back was turned, the Respondent removed evidence belonging to the opposing party. The evidence was an original subcontract, marked as a deposition exhibit, which Respondent believed belonged to her client. She concealed the document beneath the table, and, when asked if she had it, replied evasively that "she did not see it." The Referee found the Respondent guilty of knowingly and intentionally concealing evidence and making an intentional misrepresentation concerning its location. The Referee's findings and conclusions are supported by the clear and convincing evidence in the record and should be upheld.

The Referee recommended a suspension of 60 days and probation of one year, with the condition that Respondent complete The Florida Bar's Ethics School. Respondent's acts of deception strike at the very heart of an attorney's ethical obligations. The willful and deliberate nature of her misconduct warrants a suspension from the practice of law. The Referee's recommendation is supported by the case law, Florida Standards for Imposing Lawyer Sanctions, and aggravating factors, including Respondent's prior disciplinary record and her dishonest motive. This Court should approve the sanction recommended by the Referee.

ARGUMENT

I. THE SUBCONTRACT WAS EVIDENCE WITHIN THE MEANING OF RULE 4-3.4(a)

Respondent argues that she did not obstruct or conceal evidence within the meaning of Rule 4-3.4(a). Respondent reasons that, even if she is found to have concealed the original subcontract, she did not violate the rule because a copy of the document was still available to opposing counsel. According to Respondent, application of Rule 4-3.4(a) is limited to situations where a lawyer destroys or conceals evidence otherwise unavailable to a party. However, this is not what the Rule states. The Rule reads as follows:

> 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 a reasonably foreseeable proceeding**; nor counsel or assist another person to do any such act.

Rules Regulating The Florida Bar, Rule 4-3.4(a) (emphasis added).

Respondent's conduct falls squarely within the scope of the Rule. The record shows that Respondent removed the original subcontract with original signatures, consisting of two pieces of green letter-size paper, and placed it under the table out of sight. The original subcontract was an issue of dispute between the parties and had been introduced by opposing counsel as Deposition Exhibit 5. Mr.

Berry testified that Exhibit 5 was evidence in the case, and that he needed the original in the event the case went to trial. (TR 42).

Exhibit 5 was indisputedly "a document or other material that the lawyer knows or reasonably should know is relevant to a pending . . . proceeding," and was evidence. As stated by the Referee, "The document in question was, in fact, an exhibit. It was evidence." (TR 93). The availability of one or more copies of the subcontract in no way changes the nature of Exhibit 5 as evidence in a legal proceeding, nor does it justify the Respondent's actions in concealing the original.

It is clear from the comments of Respondent and her client that they believed they were entitled to possession of the original contract. In fact, Respondent even stated, "I would like to have that." (TFB Exh. 1, 44). Respondent's belief that Exhibit 5 belonged to her client does not justify her subterfuge in taking and concealing the document. On the contrary, it provides further evidence of intentional and knowing concealment, as opposed to an inadvertant misplacement of the contract.

II. RESPONDENT CONCEALED EVIDENCE WITHIN THE MEANING OF RULE 4-3.4(a) WHEN SHE REMOVED A DEPOSITION EXHIBIT WHILE OPPOSING COUNSEL'S BACK WAS TURNED, PLACED THE EXHIBIT UNDER THE TABLE, AND REFUSED TO RETURN IT WHEN ASKED.

The Referee found that Respondent knowingly and intentionally removed and concealed evidence, specifically Exhibit 5 to the March 13, 1998 deposition, for a period of time. (RR 4). A Referee's findings of fact are presumed correct and should be upheld unless clearly erroneous or without support in the record. Florida Bar v. Pellegrini, 714 So. 2d 448, 451 (Fla. 1998). This Court has recognized that "[o]ur role is not to reweigh the evidence and substitute our view of the credibility of the witnesses for that of the referee." Id. The clear and convincing evidence in the record supports the Referee's finding that Respondent concealed evidence.

Respondent argues that she did not obstruct or conceal evidence when she placed Exhibit 5 under the table, it is Respondent's position that she returned it to the top of the table where it was inadvertently placed in a plastic bag with other documents, and then returned within 15 minutes on the second request of opposing counsel. Respondent testified that Mr. Hinrichs handed her the contract, and she set it on her briefcase which was leaning up against her chair. She further testified that, when she realized it was out of view, she picked it up and put it back on the

table. (TR 81). Pursuant to Respondent's testimony, she later requested that a stack of moldy papers be put into a plastic bag and that is when Exhibit 5 was moved to the plastic bag, from which it was subsequently retrieved after Mr. Berry came back with a second court reporter and made "a big scene." (TR 83, 90).

Respondent's version of the facts is not however, supported by the weight of the evidence. Contrary to Respondent's claim that the document was retrieved from a plastic bag on top of the table, three witnesses testified that Respondent pulled Exhibit 5 out from under the table near her chair when Mr. Berry asked her if she had it. Mr. Berry testified that he observed the Respondent reach down under the table, pick up Exhibit 5, and hand it to him. (TR 34). The first court reporter, Ms. Boyer, was asked from what source the document was finally produced. She responded, "I saw her reach back down under the table and say 'here' and pull it out." (TR 69). Ms. Boyer did not know if the document was pulled from a plastic bag, however, the bag was not on the table. (TR 69). Finally, Mr. Price, who was called into the deposition room by Mr. Berry as a witness, testified that when Mr. Berry asked Respondent if she had Exhibit 5, she said "yes" and reached down into a briefcase or "something like that," then reached over and handed the document to Mr. Berry. (TR 73-74).

Respondent further contends that her conduct does not constitute concealment within the meaning of Rule 4-3.4(a) because she returned Exhibit 5 on Mr. Berry's second request. The record shows that Respondent did not produce Exhibit 5 until at least the third request, and only after she realized she had been observed. The first opportunity occurred when Mr. Berry returned to the deposition room after having been informed by Ms. Boyer that Respondent had taken the subcontract, and in the course of questioning the witness, asked "Let's see, I had his contract here, where is that contract?" This query failed to produce the document so, a few moments later, he said, "Exhibit 5. All right. So you don't have it?" Again, Respondent equivocated and failed to relinquish the Exhibit. Not until the second court reporter appeared, and Respondent apparently knew she was caught, did she produce the original Exhibit 5 in response to Mr. Berry's request.

The fact that the document was returned in approximately 15 minutes does not excuse Respondent's initial conduct in removing and concealing it. If an observant court reporter had not seen Respondent's actions and reported them to Mr. Berry, the removal of Exhibit 5 may not have been discovered. It was only when Respondent was finally confronted by Mr. Berry and realized that she had been observed that she surrendered the document.

III. RESPONDENT'S EVASIVE ANSWERS AND HALF-TRUTHS IN RESPONSE TO DIRECT REQUESTS TO RETURN THE DEPOSITION EXHIBIT CLEARLY CONSTITUTE MISREPRESENTATION.

Respondent argues that the facts do not support the Referee's finding that she made an intentional misrepresentation in violation of Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, deceit, or misrepresentation). In order to find that an attorney acted with dishonesty, misrepresentation, deceit, or fraud, the Bar must show the necessary element of intent. Florida Bar v. Fredericks, 731 So. 2d 1249, 1252 (Fla. 1999). In order to satisfy the element of intent it must only be shown that the conduct was deliberate or knowing. Id.

The record clearly supports the Referee's finding that Respondent's evasive reply to Mr. Berry's request to return Exhibit 5 was intended to mislead. When Mr. Berry asked Respondent if she had Exhibit 5, she replied, "I'm not seeing it," and a moment later, "Yeah, that's it, isn't it, a copy of it?" (RR 3; TR 68). The Referee found that Respondent's reply was misleading because she knew where Exhibit 5 was, but failed to disclose this information. (RR 5).

The law is well established that an omission of a material fact constitutes misrepresentation. In Florida Bar v. Joy, 679 So. 2d 1165 (Fla. 1996), Joy was found guilty of violating Rule 4-8.4(c) for making false statements by omission of material facts. Joy held insurance proceeds in trust for his client, Morrison Court,

Inc., and G& O Properties, and was not to disburse the funds to the parties until they reached an agreement. After G & O's action was dismissed, Joy wrote a letter to G & O's attorney, Smith, stating that G & O's interest in the insurance proceeds had terminated and that the funds had been disbursed from his trust account. In fact, Joy had transferred the trust funds into an account in the name of his wife. Id. at 1167. This Court found that "Respondent's statement to Smith regarding his disbursement of the funds from his Trust Account therefore amounted to a half-truth. Respondent intended for Smith to misinterpret his statement to mean that he had disbursed the funds directly to his client . . . ." Id. This Court held that Joy intentionally made a false statement or misrepresentation to Smith by omitting a material fact, the disbursement of the escrow funds. Id. at 1168. See also Florida Bar v. Webster, 647 So. 2d 816 (Fla. 1994) (petition for reinstatement denied because of "misrepresentation by omission").

Respondent's reply, "I'm not seeing it," was a half-truth intended to mislead opposing counsel. The court reporter's testimony that she observed Respondent place the document under the table supports the Referee's conclusion that Respondent knew exactly where Exhibit 5 was and did not want to relinquish it. Moreover, Respondent's ultimate production of the Exhibit when confronted by Mr. Berry shows that she knew exactly where the document was all the time. As

Berry stated, "she just reached down and grabbed it, pulled it right out." (TR 35). Respondent's evasive statement, "I'm not seeing it," therefore clearly constituted a misrepresentation by omission.

Again, Respondent claims that, because she returned the document on the second request, she is not guilty of misrepresentation. As discussed infra, Respondent had at least three opportunities to return Exhibit 5. Once again, Respondent misses the point. The fact that she ultimately produced the document does not change the fact that she concealed it and made an intentional misrepresentation as to the document's whereabouts.

Finally, Respondent claims that the Report of Referee does not accurately reflect the Referee's oral findings at the hearing. In his Report, the Referee found that Respondent's "answer was intended to mislead, because she in fact knew where the document was located and failed to disclose that information to Mr. Berry." (RR 5). The Report accurately reflects the Referee's findings. At the hearing, the Referee stated, "Nonetheless with the knowledge that you had of where it was, that is a misrepresentation. You knew where it was and it should have been revealed as to its representation." (TR 96). Moreover, Respondent was given the opportunity to comment on the proposed order drafted by Bar counsel

and, through her counsel, made many of the same objections she raises here, before the Referee signed the Report.

IV. THE DISCIPLINE RECOMMENDED BY THE REFEREE IS SUPPORTED BY THE CASE LAW, THE FLORIDA STANDARDS, AND THE AGGRAVATING FACTORS, AND SHOULD BE APPROVED.

The Referee recommended that the Respondent be suspended from the practice of law for a period of 60 days, followed by a one-year probation during which Respondent must attend, and successfully complete, The Florida Bar's Ethics School. Respondent argues the discipline is too severe and that her conduct warrants at most a public reprimand. While this Court has the ultimate responsibility to order a disciplinary sanction, a referee's recommendation of discipline is to be afforded deference unless the recommendation is clearly erroneous or not supported by the evidence. Florida Bar v. Niles, 644 So. 2d 504, 506-07 (Fla. 1994). "Therefore, the referee's disciplinary recommendation is presumptively correct and will be followed unless clearly off the mark." Florida Bar v. Vining, 707 So. 2d 670, 673 (Fla. 1998).

This Court has repeatedly suspended attorneys for conduct involving deceit and misrepresentation. In Florida Bar v. Varner, 780 So. 2d 1 (Fla. 2001), attorney Varner was suspended for 90 days for engaging in a deception to cover up an error. Varner represented a client in a personal injury matter and, during the client's deposition, represented to the opposing party that he had already filed the lawsuit.

At the time Varner made this statement, he believed it to be true, however, he later learned that no action had been commenced. Rather than notifying the appropriate parties of the error, he prepared a notice of voluntary dismissal, filled in a fictitious file number, and mailed a copy to opposing counsel. The Referee found Varner guilty of violating Rule 3-4.3 (lawyer shall not engage in any act contrary to honesty and justice) and Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation), and recommended a 30-day suspension. The Referee found no aggravating factors and several mitigating factors, including a good faith effort at correcting the consequences of the misconduct, good character and reputation, and remorse. Id. at 2. This Court overruled the Referee's recommendation of not guilty as to several additional rule violations, and imposed a 90-day suspension, finding it most troubling that:

> [A]n error is made in the representation of a client, but instead of the error being admitted, an attorney develops a deception to cover up the error so that it will go undetected. Varner's error in representing that a suit had been filed was pardonable and correctable upon his learning that such a suit had not in fact been filed. However, [he] instead chose to keep this truth to himself and hatched a scheme to conceal the error. **Varner's decision to go forward with a deception rather than honestly admitting to his mistake is so contrary to the most basic requirement of candor that we cannot countenance a short-term suspension in this instance.**

780 So. 2d at 5-6 (emphasis added).

Like Varner, the Respondent had an opportunity to right her wrong, but instead chose to engage in a deliberate deception to conceal Exhibit 5 from opposing counsel. If not for an observant court reporter, Respondent may well have walked out of the deposition room with Exhibit 5 in her possession. Unlike Varner, whose initial misrepresentation was unintentional, Respondent's initial act of concealment was knowing and deliberate. She compounded her deception with an intentional misrepresentation, and only corrected her misconduct when caught. Respondent unlike Varner, has a history of prior discipline. Varner supports the Referee's recommendation that Respondent be suspended for 60 days.

In Florida Bar v. Hmielewski, 702 So. 2d 218 (Fla. 1997), an attorney covered up the fact that his client had taken medical records from a hospital, and did not produce the documents in response to a discovery request. The client told Hmielewski that he took his father's medical records from the Mayo Clinic, believing that they belonged to him and his father. In response to interrogatories from Mayo Clinic, Hmielewski falsely stated that all records in his client's possession had already been provided to the Clinic. Hmielewski also made other misrepresentations regarding the medical records and asserted that Mayo Clinic was negligent for failing to maintain proper records. However, when his client was deposed in the case, Hmielewski counseled him to tell the truth about the

records. The Referee found Hmielewski guilty of a number of rule violations, including Rule 4-3.4(a) (unlawful obstruction of another party's access to evidence) and Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit, or misrepresentation), and recommended a suspension of one year. Id. at 220. This Court considered a prior admonishment for minor misconduct and imposed a three-year suspension, even in light of extremely strong character evidence. Id. at 221.

While Respondent's misconduct is less egregious than that of Hmielewski, she did, like Hmielewski, assist a client in concealing evidence the client thought was rightfully his. Respondent's client, Mr. Hinrichs, believed the original subcontract belonged to him, so he took it from the deposition table and handed it to the Respondent. Instead of putting Exhibit 5 back on the table, she concealed it underneath the table, in an apparent attempt to regain possession of the document. She perpetuated the deception by refusing to turn over Exhibit 5 when specifically asked to do so, and misrepresented her knowledge of its whereabouts.

In arguing that a public reprimand is a more appropriate sanction in her case, Respondent relies on Florida Bar v. Burkich-Burrell, 659 So. 2d 1082, 1083 (Fla. 1995), a case in which the Court suspended Burkich for 30 days for failing "by inaction to correct or disclose the omissions" in interrogatory responses. Respondent argues that Burkich's conduct is much more serious than her own.

The Bar submits that, contrary to Respondent's assertion, her conduct is not dissimilar to that of Burkich, and given Respondent's prior disciplinary record, this case supports a 60-day suspension as recommended by the Referee.

Burkich failed to review interrogatory responses prepared by her client-husband, Burell, with the help of a non-lawyer. As Burrell's wife, Burkich had personal knowledge of his previous injuries and medical treatment, matters not fully disclosed in the interrogatory responses. Id. at 1083. The Referee found Burkich guilty of violating several Bar rules, including those at issue in the instant case: Rule 4-3.4(a) (obstructing another party's access to evidence), and Rule 4-8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation). The Referee considered as mitigating factors, lack of a disciplinary record, spousal abuse, and lack of experience. In aggravation, the Referee considered Burkich's refusal to accept the wrongful nature of her conduct, her evasive answers during the proceedings, and her lack of credibility. The Court approved the Referee's recommendation of a 30-day suspension, stating, "a suspension is warranted here in light of the fact that Burkich failed to disclose material facts to opposing counsel even though she had first-hand knowledge that contradicted the responses supplied to counsel . . . ." Id. at 1084. Like Burkich, Respondent obstructed a party's

access to evidence and then failed to disclose that she had the evidence, even though she had first-hand knowledge of this information.

The other cases cited by Respondent are factually dissimilar to the instant case and, therefore of limited value in determining an appropriate sanction. Florida Bar v. Milin, 502 So. 2d 900 (Fla. 1987), is a case involving conflict of interest and has no relevance to Respondent's misconduct in this case.

In Florida Bar v. Weidenbenner, 630 So. 2d 534 (Fla. 1993), the lawyer, who was co-trustee with a bank, failed to notify the bank that he was no longer the personal representative of the estate. Nevertheless, he signed a letter drafted by the bank to authorize final distribution of trust assets. The Court found that the evidence was insufficient to support a finding of intentional misrepresentation or dishonesty, and approved a public reprimand based on lack of diligence and failure to keep a client informed. The Court noted that, "had we found Weidenbenner's conduct to have been intentional, more than a public reprimand would likely have been warranted." Id. at 537. Weidenbenner had no prior disciplinary record. Respondent's conduct in the instant case is in stark contrast to that of Weidenbenner. Respondent intentionally concealed evidence and intentionally misrepresented its whereabouts when asked if she had the evidence. Moreover, unlike Weidenbenner, Respondent has a record of prior discipline before the Bar.

In Florida Bar v. McLawhorn, 505 So. 2d 1338 (Fla. 1987), a lawyer misrepresented to his client's doctors that settlement funds were insufficient to pay their bills, and failed to obtain his client's permission to transfer settlement funds to an interest-bearing account. The opinion does not mention any aggravating or mitigating factors, or whether the attorney had a record of prior discipline.

The Florida Standards for Imposing Lawyer Sanctions provide additional support for a suspension in this case. Standard 6.1 sets out appropriate sanctions for cases involving conduct that is prejudicial to the administration of justice or that involves dishonesty, fraud, deceit, or misrepresentation to a court. Standard 6.12 states that 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. Respondent's actions in removing and concealing a deposition exhibit, and failing to return it when asked, place her conduct clearly within the parameters of Standard 6.12.

The Standards also require the consideration of aggravating or mitigating factors. The Referee found three aggravating factors in this case: prior disciplinary offenses, dishonest or selfish motive, and substantial experience in the practice of law. Respondent has been disciplined by this Court on three prior

occasions. In 1994, Respondent received an admonishment for minor misconduct. In 1995, Respondent was placed on probation for 24 months upon the condition that she make restitution to two clients for charging excessive fees. In 1995, Respondent received a public reprimand and 90-day suspension for charging excessive fees, writing a check to herself from a trust account, and committing several trust accounting violations. In addition to Respondent's previous disciplinary record, the Referee considered the fact that Respondent was admitted to The Florida Bar in 1973. At the time of the misconduct in this case, Respondent had been practicing law for 25 years. Finally, the Referee considered that the Respondent acted with a dishonest or selfish motive when she removed a deposition exhibit belonging to the opposing party, concealed the exhibit, and misrepresented that she did not have it. Respondent wanted to gain possession of the subcontract, and apparently attempted to do so in an underhanded manner, while opposing counsel's back was turned.

Respondent complains that the Referee did not find any mitigating factors in her favor. At the final hearing, the Referee gave the Respondent the opportunity to present mitigating evidence prior to his ruling on discipline. The Referee even called a recess to allow time for the Respondent to confer with her attorney, and offered to adjourn at 11:15 for lunch to allow Respondent additional time to

counsel with her attorney. Respondent declined the offer of additional time, and when the proceeding resumed, advised the Referee that she had no additional evidence to present in mitigation. (TR 97-99).

This Court has repeatedly recognized that engaging in conduct involving dishonesty, misrepresentation, fraud, or deceit warrants suspension. Florida Bar v. Schultz, 712 So. 2d 386, 388 (Fla. 1998). This Court has also 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." Id. Respondent's misconduct in this case was not simply an "isolated instance of neglect" or "lapse of judgment." Given the serious nature of Respondent's misconduct, a 60-day suspension is an appropriate sanction and is supported by the case law, Florida Standards for Imposing Lawyer Sanctions, and aggravating factors. The Referee's disciplinary recommendation should be approved by this Court.

V. THE REFEREE CONSIDERED ALL OF THE EVIDENCE, AND HIS FINDINGS AND CONCLUSIONS ARE SUPPORTED BY THE CLEAR AND CONVINCING EVIDENCE IN THE RECORD.

Respondent first argues that the Referee could not have considered all of the evidence as stated in the Report because he rendered his ruling immediately upon the conclusion of testimony. The Report states, "After considering all the pleadings and evidence before me . . ." (RR 1). This is the standard language of the sample Report of Referee contained in the Manual promulgated by the Florida Supreme Court as a guide for the conduct of disciplinary proceedings. In fact, the Referee had ample time to consider all of the evidence submitted before signing the Report. The final hearing was held on March 26, 2001, and the Referee did not submit his Report until April 9, 2001. Moreover, while Respondent claims the Referee could not have considered certain documents introduced into evidence at the hearing, the overwhelming weight of the testimony presented at the hearing supports the Referee's oral and written findings. Indeed, the Referee stated at the hearing that "the evidence in this case went beyond the standard that applies to referee disciplinary proceedings. The evidence was almost beyond and to the exclusion of every reasonable doubt." (TR 94).

Next, Respondent argues that several of the Referee's findings are erroneous and not supported by the evidence. A Referee's findings of fact are presumed to be

correct and should be upheld unless clearly erroneous or lacking in evidentiary support since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). In order to successfully challenge the Referee's findings, Respondent must demonstrate "that there is no evidence in the record to support [the referee's] findings or that the record evidence clearly contradicts the conclusions." Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996). Respondent has not met this burden.

Respondent claims the Referee erred in stating that she "knowingly and intentionally removed" the subcontract during the deposition. (RR 4). According to Respondent, her client handed her the subcontract, therefore she could not have removed it. Respondent is mincing words. After she was handed the subcontract, Respondent clearly "removed" it when she placed it under the deposition table in or near her briefcase on the floor. The testimony of court reporter KayLynn Boyer, who observed Respondent's actions, supports the Referee's finding that Respondent removed and concealed Exhibit 5 (TR 61-62).

Respondent makes much of the Referee's finding that she was given more than one opportunity to return Exhibit 5 and did not do so until confronted by opposing counsel. As discussed in Section II, infra, the record shows that

Respondent had at least three opportunities to return Exhibit 5. Not until the second court reporter appeared and Respondent knew she was cornered, did she produce the original Exhibit in response to Mr. Berry's third request. Respondent clearly had "more than one opportunity" to return the Exhibit when specifically asked to do so. She also had the opportunity to avoid the misconduct altogether. When her client handed her the document, she could have refused it and left it on the table. Instead she took it from him and concealed it under the table out of sight of opposing counsel.

Finally, Respondent takes issue with certain costs approved by the Referee. The assessment of costs in a disciplinary proceeding is within the referee's discretion and will not be reversed absent an abuse of that discretion. Florida Bar v. Kassier, 730 So. 2d 1273, 1276 (Fla. 1998). Unless the record suggests that the costs were unnecessary, excessive or improperly authenticated, there is no abuse of discretion. Id. Respondent has not met her burden of proving that the court reporter expenses she refers to were unnecessary or excessive. The Referee was well within his discretion in approving reasonable costs incurred in the proceedings.

VI. THE REFEREE CORRECTLY DENIED RESPONDENT'S MOTION FOR REHEARING.

Respondent contends that the Referee erred in denying the Motion for Rehearing without investigating the allegation of a violation of the rule segregating witnesses. According to Respondent, witness Hinrichs observed witness Berry conversing with other witnesses who had not yet testified outside the courtroom. Respondent refers to an affidavit filed with her Motion for Rehearing in which Mr. Hinrichs stated that he heard Mr. Berry say to witness Price, "[w]e shouldn't be talking about the testimony, so let's go downstairs. . . ."

The Bar submits that the Referee correctly denied Respondent's Motion for Rehearing. Before taking any testimony at the final hearing, the Referee brought in all the witnesses as a group and they were sworn. (TR 10). He then instructed the witnesses that they would not be allowed to talk to the lawyers or anyone else about the case until the case was disposed of. The Referee further instructed the witnesses, "Even after you are finished testifying you are not to discuss the case with anyone particularly witnesses or lawyers unless both parties are present during the course of the conversation." (TR 11). The comment allegedly made by Mr. Berry to Mr. Price that "we shouldn't be talking about the testimony," indicates that Mr. Berry was following the Referee's instructions not to discuss the

case. Assuming, however, for the sake of argument, that Mr. Price's testimony was tainted by an alleged improper conversation with Mr. Berry and stricken from consideration, the remaining evidence presented at the hearing overwhelmingly supports the Referee's factual findings and conclusions of guilt.

VII. THE BAR DID NOT UNREASONABLY DELAY THE DISCIPLINARY PROCEEDINGS, NOR HAS RESPONDENT DEMONSTRATED THAT SHE WAS PREJUDICED BY ANY DELAY.

Finally, Respondent argues that the Referee should have granted her Motion to Dismiss for failure to promptly file the complaint as required by Rule 3-7.4(1). Approximately 16 months elapsed between the Grievance Committee's finding of probable cause and the Bar's filing of a formal complaint. Respondent has not shown that this delay was unreasonable or that she was prejudiced in any way.

The Court has repeatedly held that delay in Bar proceedings does not constitute a basis for dismissal of the case. See Florida Bar v. Lipman, 497 So. 2d 1165, 1167 (Fla. 1986); and Florida Bar v. Guard, 453 So. 2d 392, 394 (Fla. 1984). In Lipman, the Court rejected Lipman's contention that the complaint against him should be dismissed because the Bar's delay in proceeding against him violated the rule requiring a complaint to be filed "promptly" upon the finding of probable cause. The Court acknowledged its prior holding in Florida Bar v. McCain, 361 So. 2d 700, 704 (Fla. 1978) that "'[t]here is no express statute of limitations governing attorney discipline proceedings.'" 497 So. 2d at 11 67. The Court also rejected Lipman's argument that the proceedings were barred by the equitable principle of laches because Lipman failed to show that he was prejudiced by the

delay. Id. In Guard, the Court found that, "Dismissal of the complaints would totally frustrate the primary purpose of discipline, namely, protection of the public from the misconduct of the attorneys." 453 So. 2d at 393-94.

Florida Standard for Imposing Lawyer Sanctions, Standard 9.32(i), lists as a possible mitigating factor, "unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from the delay." (emphasis added). Respondent was given the opportunity to present mitigating evidence at the conclusion of the hearing before the Referee, however, she specifically declined to do so. (TR 98).

Respondent alludes to "conflicts in testimony" which "may be due largely to the length of the delay." Presumably, Respondent is referring to conflicts between the testimony of witnesses at the final hearing in the disciplinary case and at the 1998 sanctions hearing before Judge Case. Respondent does not, however, describe the alleged conflicts, nor explain how she was prejudiced thereby. If Respondent thought there were conflicts in the testimony, she had ample opportunity to cross examine the Bar's witnesses and impeach them with their earlier testimony at the final hearing.

CONCLUSION

By removing a piece of evidence during a deposition when opposing counsel's back was turned, concealing that evidence, and misrepresenting its whereabouts, Respondent has engaged in misconduct which undermine the integrity of the legal profession. Her misconduct in this case demonstrates a fundamental disrespect for the moral and ethical obligations of an attorney.

The evidence in the record overwhelmingly supports the Referee's findings that the Respondent intentionally removed and concealed evidence, and that she intentionally misrepresented its location when asked to return it. The Referee's findings and conclusions are not erroneous and should be upheld by this Court.

The serious nature of Respondent's misconduct warrants the sanction of suspension from the practice of law as recommended by the Referee. The Florida Bar respectfully requests this Court to approve the Referee's recommendation of a 60-day suspension, followed by a one year period of probation, with the condition that Respondent complete The Florida Bar's Ethics School, and the costs of these proceedings as recommended by the Referee.

Dated this _____ day of June, 2001.

Respectfully submitted,

_____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Air bill Number

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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 regular U.S. Mail to Henry P. Trawick, Jr., Attorney for Geneva Carol Forrester, Post Office Box 4009, Sarasota, Florida 34230-4009; 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 June, 2001.

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Susan Varner Bloemendaal
Chief Branch Discipline 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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Susan Varner Bloemendaal