ORIGINAL

IN THE SUPREME COURT OF FLORIDA

GENEVA C. FORRESTER	)	
	)	
Petitioner,	)	
	)	
-vs-	)	CASE NO. SC00-813
	)	
THE FLORIDA BAR,	)	
	)	
Respondent.	)	

APPEAL FROM A REFEREE'S REPORT

AMENDED
BRIEF OF PETITIONER

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STATEMENT OF THE CASE AND FACTS

This is a disciplinary proceeding initiated by The Florida Bar. Petitioner was the respondent in the proceeding before the referee. The Florida Bar was the complainant. Respondent in the lower tribunal will be referred to in this brief as Petitioner and Complainant will be referred to as the Bar. There is no pagination for the record on appeal so references are made to the papers filed and the page number of the paper as (Paper-) with the page number inserted in the blank space.

A complaint was filed by the Bar against Petitioner on April 12, 2000 after a finding of probable cause on December 11, 1998. Petitioner answered the complaint and moved to dismiss it because of the delay of 16 months for filing the complaint after the finding of probable cause. An amended complaint was served on October 20, 2000. It was answered by petitioner.

A motion to dismiss for lack of prompt prosecution was denied.

Some discovery proceedings took place. The proceeding was scheduled for trial before the referee and the trial took place on March 26, 2001. Petitioner was accused by the Bar of violating Rule 4-3.4(a) by obstructing another party's access to evidence or otherwise by unlawfully concealing a document that the lawyer knew or reasonably should know is relevant to a pending proceeding and of violating Rule 4-8.4(c) by engaging in conduct involving dishonesty, deceit or misrepresentation.

The Bar's evidence at the trial showed that a party in a civil action represented by Petitioner handed a document to her

during a deposition. The document was the subcontract agreement between the plaintiff and defendant in that action. Petitioner placed the subcontract somewhere off the table after receiving it.(Transcript-60 through 62) Petitioner testified she later placed the subcontract on the table.

In a break the court reporter told the lawyer for the plaintiff in that action, Michael C. Berry, what had occurred. He returned to the deposition and asked for the subcontract. Petitioner replied that she did not see it and suggested that he use the copy attached to a pleading. Berry then left the deposition room, obtained the services of another court reporter and brought the other court reporter back to the deposition room. Petitioner then handed the subcontract to Berry.(Transcript-27, 34, 63 through 65)

The witness Hinrichs at the deposition testified that the copy of the subcontract he examined at the deposition was his firm's copy. He testified that he showed Petitioner the copy after he was interrogated about it and that it ended up on the table with the rest of the exhibits.(Transcript-77 through 79) Petitioner testified the subcontract was handed to her by Hinrichs, she took it and set it on her briefcase that was leaning against her chair.(Transcript-81) She then put it back on the table because it previously had been out of sight. She testified that there was a lot of mold in the room and some of the papers had mold on them. She asked that the papers be put in a plastic bag. The plastic bag remained on the table.

(Transcript-81 through 84) Immediately after petitioner testified, both parties rested.

The judge immediately dictated his decision to the court reporter. He ruled that the document was evidence, was taken and was concealed. He erroneously said that petitioner was given a couple of opportunities to return it and did not do so. He said the evidence was almost beyond and to the exclusion of every reasonable doubt. He said that petitioner misrepresented the location of the document because she knew where it was.(Transcript-93 through 96)

Thereafter the Bar presented evidence in aggravation although conceding that no harm was done to the judicial process.(Transcript-102) Later staff counsel contended there was injury to the reputation of the legal profession, but offered no evidence to that effect.(Transcript-113)

Staff counsel offered to prepare the report of the referee. He accepted. He required staff counsel to send a copy of the proposed report to petitioner's attorney.(Transcript-118) During the interval petitioner discovered that the witness Berry had apparently violated the rule on segregation of witnesses so a motion for rehearing was filed and denied. The referee changed his decision about having a discussion between staff counsel and petitioner's attorney concerning disagreements about the contents of the report and directed that petitioner's attorney send the objections to him. Petitioner's attorney did so. The objections were ignored.

The referee recommended 60 days suspension and probation for a year during which petitioner had to complete the Bar’s course on ethics.

SUMMARY OF ARGUMENT

The summary of Petitioner's argument is:

1. Meaning of Evidence. When there are several copies of a document that can be used as evidence, a party is not deprived of evidence if one copy is not available.

2. Obstruction or Concealment. Even if one person temporarily has possession of a document that is evidence, it is not an unlawful obstruction or concealment when the time period involved is less than 15 minutes.

3. Misrepresentation. The record does not show any misrepresentation by words or conduct.

4. Inappropriate Punishment. The punishment is too severe for the facts of the case and the lack of injury to either the public or the parties in the trial court if Petitioner is guilty. Whatever loss was suffered by the plaintiff in the trial court was remedied by sanctions in the trial court. A reprimand would be sufficient.

5. Report Contents. Staff counsel for the Bar inserted items in the referee's report that are inaccurate and were not required by the referee's oral statement at the conclusion of evidence. Among these are statements that the referee considered all of the evidence that he did not have the time to consider; assessment of costs that were inappropriate; and that petitioner was given more than one opportunity to correct her alleged misconduct.

6. Rehearing. The violation of the rule segregating witnesses that was one of the subjects of the motion for rehearing was summarily denied without any investigation by the referee although it was not opposed by any verified evidence.

7. Failure to Prosecute. The Bar failed to initiate proceedings for some 16 months after the finding of probable cause. This is a violation of the rule requiring a prompt filing and rule 1.420(e).

ARGUMENT

Issue 1

THE REFEREE ERRONEOUSLY RULED THAT THE SUBCONTRACT WAS EVIDENCE WITHIN THE MEANING OF RULE 4-3.4(a)

Rule 4-3.4(a) says that a lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully conceal a document that the lawyer knows...is relevant to a pending...proceeding. The Bar admitted there were other copies of the subcontract available before the alleged concealment and the other copies were obtainable by Berry.(Answer 16 to Petitioner's first interrogatories; Transcript-46) Petitioner submits the conduct the rule intends to proscribe is the obstruction or concealment of evidence that is otherwise unavailable to a party and not to proscribe any conduct when there are multiple copies available.

Authority on this point is limited. Quinones v. State, 766 So.2d 1165 (3 D.C.A. 2000) is, we submit, helpful. In that case the defense attorney accepted evidence connected with a crime and did not make it available to the State. The attorney revealed it at trial. In that case the concealment or obstruction was complete until the trial. The district court characterized the act of the attorney as unethical. The facts are in sharp contrast to the facts of the case at bar in which the alleged concealment lasted a few minutes. We submit that Petitioner's explanation was adequate and justified more careful consideration than the referee accorded it. Common sense and logic lead to the

conclusion that as long as Berry had access to other copies of the subcontract, there was no obstruction or concealment within the intent of the rule.

Issue 2

A PARTY'S ACCESS TO EVIDENCE IS NOT OBSTRUCTED NOR IS THE EVIDENCE CONCEALED BECAUSE IT IS REMOVED FROM THE TOP OF A TABLE IN A DEPOSITION AND NOT RETURNED UNTIL A SECOND REQUEST FOR IT AT THE DEPOSITION WITHIN 15 MINUTES.

In this proceeding the most that can be said for the Bar's case is that Petitioner took the subcontract from her client and placed it on the floor or some other place that was not the top of the table in the deposition room. Petitioner controverts this by saying that she did so, but placed it back on the table. It was then placed inadvertently in a plastic bag with other documents to be copied for Berry from which it was located and extracted ultimately. This is, we submit, the crucial factual point in the proceeding. It is the only one in which there is a substantial difference in the testimony. The Bar's testimony says that the subcontract was placed at some point other than on top of the table and that it was extracted from some point other than the top of the table on the second request for it. Petitioner says that she placed it below the top of the table and then placed it again on top of the table in clear view and it was placed in the plastic bag. She says she extracted it from that plastic bag when Berry made his second request for it.(Transcript-60 through 62, 77 through 79, 81 through 84)

The testimony produced by the Bar is unequivocal about delivery of the document by Petitioner to Berry. Berry and the court reporter both testified it was immediately handed to Berry. Berry said:

> "...she just reached down and grabbed it, pulled it right out...handed it to me and I passed it to the stenographer..."(Transcript-35)

The first court reporter testified:

> "...I saw her reach back down under the table and say here and pull it out."

Prior to that at the deposition in question Berry asked for the contract. Petitioner responded she had a copy and then Berry asked specifically if she had Exhibit 5. Her response was:

> "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...let me look back there. Yeah, that's it, isn't it, a copy of it?"(Hinrichs deposition transcript-68)

The referee's report says Petitioner was given "...more than one opportunity to return Exhibit 5..."(Report-4)

The deposition transcript, the best evidence of what occurred, unequivocally shows Petitioner delivered the exhibit to Berry on the second request. Berry testified that he was deprived of the document for 10 or 15 minutes from the first time that he inquired about where it was until he received the document.(Transcript-51)

We submit that this is not the type of obstruction or concealment that Rule 4-3.4(a) was intended to prohibit.

Issue 3

THE RECORD DOES NOT DISCLOSE ANY MISREPRESENTATION BY WORDS OR CONDUCT.

The referee says in his report that Petitioner made an intentional misrepresentation about the location of Exhibit 5 when asked if she had it. He then admits that she truthfully replied that she was not seeing it, but he found the answer was intended to mislead because Petitioner knew where the document was located and failed to disclose that information to Berry. Staff counsel added that the conduct involved dishonesty, deceit or misrepresentation. The referee had confined it to misrepresentation.

The quotations from the record given in the preceding argument will not be repeated here, but they clearly show that Petitioner returned the document the second time it was requested. The referee said if the document had been produced upon its first request "...or even the second request..." he might be inclined to reach another conclusion.(Transcript-95, 96) It was the second request. The referee was inattentive to the testimony or made a decision not supported by the facts or was prejudiced by something else that does not appear in the record.

In his report the referee says Petitioner did not make a false statement. He says she was guilty of misrepresentation because her response to the first request for the exhibit by Berry did not tell Berry where the document was and she knew where it was. The language put in the report by staff counsel is not what the referee said.

Issue 4

ASSUMING PETITIONER IS GUILTY OF EITHER OR BOTH CHARGES, THE PUNISHMENT IS TOO SEVERE.

Assuming this Court accepts the referee's findings about the ethical violations, the punishment he recommends is too severe for the offenses.

A document was concealed from a lawyer for 10 or 15 minutes. Most of the time he was out of the deposition room.(Transcript-51) At all times Berry had at least one other copy of the exhibit. Any expense that he was put to was accommodated by the trial judge's sanctions in the action in which the deposition was taken.

We submit that this grievance justifies a public reprimand at most.

The referee notes three aggravating factors. Petitioner has been found guilty of prior disciplinary offenses. There was no dishonest or selfish motive in Petitioner's action. She has substantial experience practicing law.

The referee found no mitigating factors even though it is clear Berry made a mountain out of this molehill in order to extract advantages from the trial of the civil action in which the deposition was taken. In the trial court he admitted referring to the document as being stolen by Petitioner. He made the same statement at the hearing in this matter.(Transcript-52, 53) He asserted the document was stolen from him. The failure to deliver a document for 15 minutes is hardly a theft. Nevertheless, he made it into a mammoth sized offense.

We have been unable to find any decision concerning a grievance matter that is on point with the facts in the case at Bar. That makes it difficult to use other decisions as comparables in assessing an appropriate punishment. The following cases may be of some help:

1. The Florida Bar v Burkich-Burrell, 659 So2d 1082 (Fla. 1995). The lawyer did not review the answers to interrogatories, but knew that the answers were not true. She was suspended for 30 days.

2. The Florida Bar v McLawhorn, 505 So2d 1338 (Fla. 1987). The lawyer made misrepresentations to the client's doctors concerning the sufficiency of a judgment to pay medical bills, transferred the client's funds without his permission and failed to pay the medical bill. The attorney received a public reprimand.

3. The Florida Bar v Milin, 502 So2d 900 (Fla. 1987). The lawyer represented adverse parties in two related suits. He was given a public reprimand.

4. The Florida Bar v Weidenbenner, 630 So2d 534 (Fla. 1993). The attorney failed to notify a co-trustee that his letters of administration had been revoked; he approved a letter authorizing final distribution of trust assets when no longer the personal representative although still a co-trustee. He was given a public reprimand.

All of the acts by the accused lawyer in the foregoing decisions were more serious-much more serious-than Petitioner's acts.

ISSUE 5

THE REFEREE'S REPORT WAS PREPARED BY STAFF COUNSEL AND CONTAINS ERRORS AND STATEMENTS NOT DICTATED BY THE REFEREE AT THE HEARING.

The referee dictated his decision immediately on the conclusion of testimony. The parties were not given an opportunity to argue the case. Staff counsel offered to prepare the referee's report. He accepted.(Transcript-118)

The report contains statements that are not correct and were not made by the referee in his oral statement at the conclusion of giving evidence.

One of these statements is that the referee considered all of the evidence. He could not have done so because he did not have an opportunity to read the deposition and the unsworn statement that were introduced into evidence. Had he done so, he might not have made the error about Petitioner having two opportunities to produce the subcontract before she produced it.

On page 4 in section III, second line, the referee found that petitioner "...knowingly and intentionally removed..." the subcontract. The testimony is clear from all witnesses who testified on the point that Hinrichs handed her the subcontract. She did not remove it.

The finding two lines further down in the same section about Petitioner being given more than one opportunity to return the subcontract and did not do so is also clearly erroneous. There were only two instances when the document was sought by Berry at the deposition.

Finally under this issue, the court recommended costs for court reporter expenses of $17.21, $60.00 and $60.00 for obtaining a copy of a deposition and attendance at two hearings at which no testimony was taken. The deposition was not used in evidence. The rules do not require a reporter unless testimony is taken.

Issue 6

THE REFEREE SHOULD HAVE INVESTIGATED THE ALLEGATIONS ABOUT VIOLATION OF THE RULE IN THE MOTION FOR REHEARING.

The motion for rehearing dealt, among other things, with a violation of the rule segregating witnesses. The rule was invoked.(Transcript-8)

After the witness Berry testified, the witness Hinrichs saw him talking to the other witnesses who had not yet testified. Berry recognized Hinrichs and then said to the witness Price who had not yet testified “...we shouldn’t be talking about the testimony, so let’s go downstairs...” Later Price returned by himself and was called as a witness.

It may be that an investigation would have disclosed no wrongdoing, but the referee denied the motion. The motion was verified on this particular point so the referee should have investigated the matter to determine if an impropriety had occurred.

Issue 7

THE REFEREE SHOULD HAVE GRANTED THE MOTION TO DISMISS FOR LACK OF PROSECUTION.

On December 8, 1998 the Sixth Judicial Circuit Grievance Committee found probable cause in this grievance proceeding. The complaint was filed in the Supreme Court on April 13, 2000. On May 1, 2000 petitioner served a motion to dismiss for failure to promptly file the complaint as required by Rule 3-7.4(l) and in violation of Rule 1.420(e) of the Rules of Civil Procedure. The Rules of Civil Procedure are made applicable to grievance proceedings.

There is decisional authority that the delay must prejudice the respondent in a grievance matter, but that is in direct conflict with Rule 1.420(e).

The Florida Bar offered no excuse, except the press of work, for the failure to proceed promptly. The conflicts in testimony may be due largely to the length of the delay to petitioner’s prejudice.

CONCLUSION

We submit that the report of the referee should be reversed or, in the alternative, the punishment recommended should be reduced to a public reprimand.

The undersigned certifies that a copy of the foregoing has been furnished to Susan V. Bloemendaal, The Florida Bar, Tampa Airport Marriott Hotel, Suite C-49, Tampa, Florida 33607 and John Anthony Boggs, Division Director Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by mail on June 8, 2001.

The foregoing brief complies with the font requirement of Rule 9.210(a).

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