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

REPLY BRIEF OF PETITIONER

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ARGUMENT

Issue 1

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

The Bar refers to petitioner in this proceeding as the respondent as she was in the proceeding before the referee. We will do likewise in this brief.

On page 7 the Bar says that respondent removed the original subcontract. That is an exercise in exuberance that is not found in the record. Her client removed it.

The insistence of the opposing attorney at the deposition that the exhibit was evidence in the case is not law. It is merely his belief in the law. Certainly, the exhibit could have been admitted into evidence in due course. That eventuality did not occur. It was certainly relevant, but it was not the only available copy.

Again, on page 8 Bar counsel says that respondent took the document. This type of misrepresentation is not appropriate. Bar counsel knows that the record does not support this allegation.

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.

The Bar does not contest the fact that the subcontract was unavailable to opposing counsel at the deposition for approximately 15 minutes only. That is one of the factors that makes the referee's recommendation on discipline too harsh.

Issue 3

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

In The Florida Bar v Joy, 679 So2d 1165 (Fla. 1996), cited by the Bar, the lawyer omitted material facts and that constituted misrepresentation. There is nothing material about the answers that were given by respondent in the case at bar at the deposition. In the Joy case the question was about disbursement of escrow funds. The facts in the case at bar are on an entirely different level than the misrepresentation as in the Joy case.

The argument of the Bar that respondent knew where the exhibit was and did not immediately produce it because she did not want to relinquish it is a conclusion of Bar counsel and the referee. Respondent did not say that in her testimony. She is the only one who knew. Bar counsel is second guessing. Bar counsel do not understand the stress of a deposition and never give a lawyer the benefit of the doubt. The lawyer is always unethical. Respondent was distracted. She may not have immediately remembered the document, but Bar counsel will certainly never permit an accused lawyer to be confused. Confusion is tantamount to wrongdoing.

Respondent's attorney was not given a fair and proper opportunity to review the proposed order drafted by Bar counsel. Bar counsel took a week to prepare the order and deliver a copy to respondent's attorney. Within 48 hours thereafter the referee decided that respondent's attorney was delaying the delivery of the order to him because he had not already communicated to Bar counsel. The referee changed the opportunity to arrange the order satisfactorily and directed that the letter to Bar counsel be sent to him. Whether he paid any attention to the objections is not something within the knowledge of Bar counsel nor is it within her knowledge whether he reviewed those objections before signing the report she prepared for him. Respondent submits that it is very poor practice for Bar counsel to prepare an order for the referee.

Issue 4

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

The subcontract, whether evidence or not, was not available to the opposing lawyer at the deposition for approximately 15 minutes. A suspension of two months is too heavy a burden for a 15 minute delay. The Varner, Hmielewski, Weidenbenner and McLawhorn cases, cited by the Bar, all deal with much more serious factual situations than we have in the case at bar. Bar counsel apparently believes that she is entitled to cite factually dissimilar cases while respondent is not.

Another point that needs to be made is Bar counsel's continuing use of "...dishonesty, fraud, deceit or misrepresentation..." The referee found respondent guilty of misrepresentation only.(T-95) Bar counsel generally and continually refer to all four items, regardless of what the record shows. It is an improper practice and should stop.

The statement on page 23 that respondent wrote a check to herself from a trust account implies wrongdoing that did not occur. Respondent did not write a check to herself for her own benefit at any time and there is no record substantiation of that in the Andrews case file that was before this Court in that proceeding.

On the same page Bar counsel puts into the referee's mouth something about dishonest or selfish motives, but that is not in the record either.(T93-118) While Bar counsel has the right to argue the Bar's case from all of the available evidence and draw conclusions from that evidence, she is not permitted to change the words recorded in the transcript.

Perhaps this point is best made on page 24 of the Bar's brief in The Florida Bar v Schultz, 712 So2d 386 (Fla. 1998) when this Court said that public reprimands were reserved for, among other things, lapses of judgment. Respondent may well be guilty of that.

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 report prepared by Bar counsel says that a statement of consideration of all of the evidence is the standard language of a form approved by this Court. That does not excuse using it when it is not true. While the referee would have had time to consider all of the evidence, he did not do so before he dictated his findings. He did not take the time to review the lengthy transcripts admitted in evidence before ruling at the end of the testimony.

The record shows clearly that the costs complained of by the respondent were unnecessary. See The Florida Bar v Kassier, 730 So2d 1273 (Fla. 1998), cited by the Bar.

CONCLUSION

Respondent reiterates the conclusion of her initial brief.

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 by mail on July 6, 2001.

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

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