IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ODIATOR ARUGU,

Respondent.

_____/

Supreme Court Case
No. SC21-933

The Florida Bar File
No. 2020-30,738 (9A)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On June 22, 2021, The Florida Bar filed its Complaint against respondent in these proceedings. On July 6, 2021, respondent filed his Answer. On November 10, 2021, a final hearing was held in this matter. All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence (exhibits 1-9 for the bar and exhibits 1-33 for respondent in the guilt phase; the bar's sanctions exhibit in the sanctions phase), and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

Narrative Summary of Case. The facts of the case are not in dispute. The dispute herein is with the interpretation of the conduct of the respondent and the underlying intent. I adopt the facts as alleged in the Complaint. The Bar has therefore established these facts and they have been sustained by the evidence:

A. Respondent represented the husband, Mr. Rodriguez, in divorce litigation against the wife, Ms. Filippone.

B. The division of the marital home was one of the issues in the divorce.

C. On May 8, 2020, the lawyer for Mr. Filippone, the wife's father, sent a letter to respondent claiming that Mr. Filippone owned a 50% undivided interest in his daughter's and her husband's marital home.

D. On May 13, 2020, respondent prepared and filed a notice of production from non-party for records of Mr. Filippone and his daughter at Freedom Mortgage Corporation.

E. The notice of production from non-party attached a proposed subpoena duces tecum to non-party that listed seven items that respondent wanted produced from Freedom Mortgage Corporation.

F. The notice of production from non-party stated: "Objection to the issuance of the attached subpoena to non-party must be filed with the clerk not later than the time indicated for issuance."

G. The time indicated for issuance of the subpoena was stated in the notice of production from non-party as "ten (10) days (if service is made by facsimile or email) of the service of this Notice of Production from Non-Party[.]"

H. After ten days without objection, respondent served a subpoena duces tecum on Freedom Mortgage Corporation that was different from the subpoena duces tecum he had noticed in his filing of the notice of production from non-party with the court.

I. At his January 4, 2021 sworn statement in the bar disciplinary case, respondent stated, "Well, after the ten days, when there was no objection and I was getting ready to issue the subpoenas, it occurred to me that I did not request for those three documents in 8, 9, and 10, and I decided to include them."

J. The subpoena duces tecum that was served on Freedom Mortgage Corporation sought ten items pertaining to Mr. Filippone and his daughter.

K. The three additional items sought in the subpoena duces tecum actually served included all mortgage loan applications by Mr. Filippone and his daughter, all credit check reports obtained from or with the consent or authorization of Mr. Filippone and his daughter, and any power of attorney executed by Mr. Filippone to his daughter used in connection with the closing on the mortgage loan. The subpoena also sought items from the respondent's client.

L. Because respondent failed to provide notice that he was seeking the additional items in the subpoena duces tecum, he failed to give the opposing parties or interested parties who were served with the subpoena an opportunity to object to the additionally sought documents before the subpoena was served.

M. On May 27, 2020, respondent filed with the court a copy of the subpoena duces tecum served on Freedom Mortgage Corporation.

N. The opposing counsel, Mr. Luther, emailed a letter the same day objecting to the "materially and substantially different" subpoena respondent had served compared to the one he had noticed on May 13,

2020. The respondent asked Mr. Luther for a clarification of the rules with respect to the subpoena.

O. Mr. Luther demanded that respondent either not serve the subpoena on Freedom Mortgage Corporation or, if respondent had already served it, that respondent contact Freedom Mortgage Corporation and inform them the subpoena was withdrawn.

P. Respondent claimed in response to the objection that the subpoena served on Freedom Mortgage Corporation was not materially different from the one he had noticed. The respondent asked Mr. Luther to support his position in respect to the subpoena.

Q. Respondent did not contact Freedom Mortgage Corporation to withdraw the subpoena he had served. Mr. Luther did not clarify the rules with respect to the subpoena for the respondent; and the respondent determined that this provided some support for the respondent's declination to withdraw the subpoena.

R. Freedom Mortgage Corporation produced documents to respondent in response to the subpoena duces tecum.

S. On September 25, 2020, the court, in a written order, found that respondent had improperly sent the subpoena to Freedom Mortgage Corporation after providing notice of a different version of the subpoena:

The Court finds that counsel for Husband improperly sent a Subpoena to Freedom Mortgage requesting financial information from David Filippone by improperly amending such subpoena to include such information after having provided notice to Wife's counsel of a version of the subpoena without such information.

III. RECOMMENDATIONS AS TO GUILT

I recommend that respondent be found guilty of violating the following Rules Regulating The Florida Bar:

3-4.3 Misconduct and Minor Misconduct. The standards of professional conduct required of members of the bar are not limited to the observance of rules and avoidance of prohibited acts, and the enumeration of certain categories of misconduct as constituting grounds for discipline are not all-inclusive nor is the failure to specify any particular act of misconduct be construed as tolerance of the act of misconduct. The commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the course of the lawyer's relations as a lawyer or otherwise, whether committed within Florida or outside the state of Florida, and whether the act is a felony or a misdemeanor.

The respondent served a subpoena to a producing non-party that was different than the subpoena noticed to the opposing party and did not

correct the error after the opposing party objected to the improper procedure.

4-3.4 Fairness to Opposing Party and Counsel. A lawyer must not: (a) 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; . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists; (d) in pretrial procedure, make a frivolous discovery request or intentionally fail to comply with a legally proper discovery request by an opposing party.

There is no question that the respondent abused the discovery process in submitting the substituted subpoena contrary to the rules of court. The improper procedure employed by the respondent interfered with the rules provision permitting an objection. The producing non-party (mortgage company) was unaware of the substitution or objection and produced the documents. The substitution of the subpoena and not correcting the substitution or communicating the objection interfered with

the parties' ability to make a proper objection to be resolved by the court before the production.

As to this violation, I specifically considered The Florida Bar v. Forrester, 818 So. 2d 477 (Fla. 2002), which speaks to fairness in the adversary system. Obstructive tactics in discovery procedure are not permitted. Improperly influencing the non-party mortgage corporation to produce documents in a manner contrary to discovery procedure is unfair to both the producing non-party, the opposing party, and opposing counsel.

4-4.1 Truthfulness in Statements to Others. In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person.

In this case, the respondent failed to inform the producing non-party that there was an objection. This referee considers the failure to inform of the objection or alternatively withdrawing the subpoena to be tantamount to a false statement to the non-party. The presentation of the modified subpoena interfered with the opposing parties' ability to object according to the proper procedure. The respondent had knowledge of the opposing parties' attempt to object and did not communicate the same to the non-party mortgage corporation or otherwise withdraw the improper subpoena. Thus, the respondent caused the non-party to be misinformed.

4-8.4(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

This is a close issue. While the failure to inform the nonparty of the objection is tantamount to a false statement as previously explained, the respondent's argument is persuasive in that if he was trying to be dishonest, he would not have filed the subpoena to which he had added the three additional items. He would have kept that to himself.

The evidence established that the respondent's position was he simply did not know that adding items to a subpoena to be served without providing prior notice was a procedural error. He did not consider the purpose of the rule in providing notice and an opportunity to be heard. The respondent's explanation of being ignorant to third-party discovery procedure is supported by the testimony of Mr. Luther, the opposing counsel, who indicated that several times throughout the representation the respondent demanded that Mr. Luther explain a rule to him or explain why opposing counsel was taking a certain position.

More persuasive is the direction from the Supreme Court in The Florida Bar v. Berthiaume, 78 So. 3d 503 (Fla. 2011), specifically that intent is established by the knowing and deliberate act. Specifically, the Court, in citing The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999), indicates

that the motive behind the respondent's action is not the determinative factor. Rather, the issue is whether the respondent deliberately or knowingly engaged in the activity in question. The respondent's explanation is credible, but I recommend an adjudication of guilt with regard to 4-8.4(c).

4-8.4(d) A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice.

For the aforementioned reasons, I recommend finding respondent guilty. The substituted subpoena was served and not withdrawn after objection by the opposing party. The resolution by the Court was limited because the documents had already been produced when the trial court determined the substituted subpoena was improper. The non-party produced the documents based upon a subpoena that the producing non-party had to no reason to believe was improperly submitted.

I recommend that respondent be found not guilty of violating the following Rule Regulating The Florida Bar:

4-3.3(a)(1) A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.

The evidence establishes that the respondent was honest when the trial judge inquired and admitted to the judge that he had served the

subpoena with additional items that he substituted for the subpoena that had been attached to the notice.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

6.2 Abuse of the Legal Process

(b) Suspension is appropriate when a lawyer knowingly violates a court order or rule and causes injury or potential injury to a client or a party or causes interference or potential interference with a legal proceeding.

7.1 Deceptive Conduct or Statements and Unreasonable or Improper Fees

(b) Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

I found the following aggravating and mitigating factors:

Aggravating Factors:

3.2(b)(1) Prior disciplinary offenses. Respondent has a 2009 case resulting in a public reprimand and two years of probation. The Florida Bar v. Odiator Arugu, SC08-1778 (February 12, 2009).

3.2(b)(2) Dishonest or selfish motive. There was selfish motive associated with altering the noticed subpoena before serving it on the non-party over the objection of the opposing party. An amended notice attaching an amended subpoena would have been appropriate.

3.2(b)(9) Substantial experience in the practice of law. Respondent is an experienced attorney of 26 years.

Mitigating Factors:

3.3(b)(5) Full and free disclosure to the bar or cooperative attitude toward the proceedings. The respondent cooperated with the bar during its investigation.

3.3(b)(7) Character or reputation. I also find, based on the testimony of the character witnesses presented by the parties, that the respondent does have a fine reputation for honesty, trustworthiness, and respectability.

3.3(b)(13) Remoteness of prior offenses. Respondent's prior discipline case occurred approximately twelve years ago.

V. CASE LAW

I considered the following case law prior to recommending discipline:

The Supreme Court of Florida long has considered "...that dishonesty and a lack of candor cannot be tolerated in a profession that relies on the truthfulness of its members." The Florida Bar v. Russell-Love, 135 So. 3d

1034, 1040 (Fla. 2014), citing The Florida Bar v. Rotstein, 835 So. 2d 241, 246 (Fla. 2002); The Florida Bar v. Korones, 752 So. 2d 586, 591 (Fla. 2000). Ordinarily, finding that an attorney has engaged in dishonesty, fraud, deceit, or misrepresentation requires proof of intent as a necessary element. The Florida Bar v. Dupee, 160 So. 3d 838, 844 (Fla. 2015). To prove intent, however, motive is not determinative, and it need "only be shown that the conduct was deliberate or knowing." The Florida Bar v. Berthiaume, 78 So. 3d 503, 510 n.2 (Fla. 2011).

In The Florida Bar v. Berthiaume, 78 So. 3d 503 (Fla. 2011), Berthiaume was found to have engaged in conduct involving misrepresentation and in conduct prejudicial to the administration of justice by abusing the subpoena power of the court for her personal investigation by serving, without legal authority, a fraudulent subpoena on a bank to produce financial records of the client. The Supreme Court of Florida found that Berthiaume was guilty of Rules 4-8.4(c) and 4-8.4(d) because she abused the subpoena power and Berthiaume sought to deceive the bank so it would provide her with the financial records when Berthiaume had no authority to seek this confidential information. Berthiaume was sanctioned with a 91-day suspension.

In The Florida Bar v. Nicnick, 963 So. 2d 219 (Fla. 2007), Nicnick was guilty of Rules 4-3.4(a) and 4-8.4(c) because Nicnick failed to disclose to the opposing counsel a child support settlement agreement Nicnick had presented to the opposing counsel's client and Nicnick concealed the existence of the alleged signed agreement from opposing counsel. Nicnick was sanctioned with a 91-day suspension.

In The Florida Bar v. Forrester, 818 So. 2d 477 (Fla. 2002), Forrester was guilty of Rules 4-3.4(a) and 4-8.4(c) for concealing a contract during a deposition and lying as to its whereabouts. Among other things, Forrester argued that multiple copies of the contract were available, and the concealment lasted only for a short period of time because the contract was uncovered by the end of the deposition. The Supreme Court of Florida rejected these arguments and approved a 60-day suspension. Like Forrester, respondent's misconduct was intentional because he knowingly added additional items to the non-party subpoena before he served it. As an experienced civil and family law practitioner, respondent should have understood that this alteration required him to re-notice the revised subpoena and file it with the court. Further, respondent served the altered subpoena despite being aware of the objection by opposing counsel.

The referee concludes that suspension is appropriate as discussed in The Florida Bar v. Berthiaume, 78 So. 3d 503 (Fla. 2011), citing The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999), and The Florida Bar v. Forrester, 818 So. 2d 477 (Fla. 2002). In reviewing the above cases, the referee further concludes that the respondent's conduct is not as egregious as the misconduct of the attorneys in the above-cited cases approving a 91-day suspension.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. Sixty-day suspension.

B. Payment of The Florida Bar's costs in these proceedings.

Respondent will eliminate all indicia of respondent's status as an attorney on email, social media, telephone listings, stationery, checks, business cards office signs or any other indicia of respondent's status as an attorney, whatsoever.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following:

Personal History of Respondent:

Age: 61

Date admitted to the Bar: November 10, 1995

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Fee	$1,250.00
Court Reporters' Fees	$1,416.80
Investigative Costs	$275.20
Bar Counsel Costs	$156.57
TOTAL	$3,098.57

It is recommended that such costs be charged to respondent and that interest at the statutory rate shall accrue and be deemed delinquent thirty (30) days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 9th day of December, 2021.

ELLEN SLY MASTERS
Referee

Original To:

Clerk of the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399.

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