

Supreme Court of Florida

THURSDAY, JUNE 9, 2005

CASE NO.: SC04-117

Lower Tribunal Nos.: 2003-31,639(05B),
2003-31,801(05B)

JUN 13 2005

THE FLORIDA BAR

vs. RICHARD L. DUCOTE

Complainant

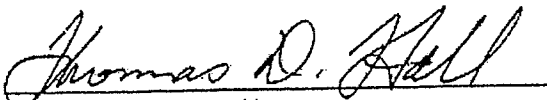
Respondent

The Court approves the uncontested referee's report. Respondent is found not guilty of the alleged misconduct, and the above cause is hereby dismissed.

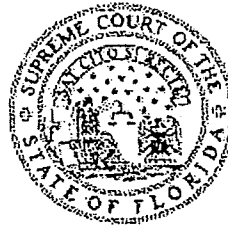
Each party shall bear its own costs.

A True Copy

Test:



Thomas D. Hall
Clerk, Supreme Court



dy

Served:

GARRY D. ADEL

JOHN ANTHONY BOGGS

JOANN MARIE STALCUP

RICHARD L. DUCOTE

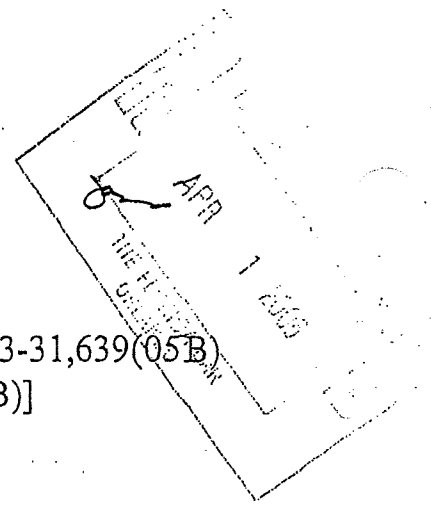
HON. MARTHA ANN LOTT, JUDGE

A

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

Case No. SC04-117
[TFB Case Nos. 2003-31,639(05B)
and 2003-31,801(05B)]



v.

RICHARD L. DUCOTE,
Respondent.

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on March 22 and 23, 2005. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - JoAnn Marie Stalcup and Patti Savitz

For The Respondent - Richard Decote, pro se

II. Findings of Fact Below Pertain to Each Item of Misconduct with Which the Respondent is Charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, this Referee finds the following facts:

1. Respondent was counsel appearing Pro Hoc Vice in a highly contentious custody matter.

2. On March 24th, 2003, the Respondent received a packet of notes and documents approximately one hour before the deposition of an opposing witness, Susan Hawthorne. The packet had been prepared by friends of his client and contained various court records, police reports, receipts, notes, a summary, and

proposed questions. Unknown to him, a pharmacy record titled "Medical Expenses" which falls under the protection of Fla. Statute sec. 465.017 was contained within the packet. The packet was delivered to him by his client. The Respondent reviewed the packet and prepared for the deposition with his client for less than 1 hour. Though he saw it, the nature of the document was not apparent on its face and there was no mention of it in preparation for the deposition.

3. During the deposition of Ms. Hawthorne, Respondent asked 261 questions over a period of less than 45 minutes before the Witness walked out. The questions came from the summary and proposed questions that had been prepared by Ms. Marlow. During the deposition, Respondent asked the witness questions intended to substantiate several basis on which her credibility as a witness could be challenged. The questions pertained to her history of and current substance abuse, her history of false statements, her close association with persons involved with illegal drugs including the fathers of both of her children, and her current involvement in a violent or abusive relationship with someone who did not want her to testify at the trial. The witness walked out before the deposition could be completed. Respondent had the testimony of other witnesses, court records, and police reports as a basis to put Ms. Hawthorne's credibility in issue.

4. Respondent, within a short time after the deposition, listed the document titled "Medical Expenses" as one of many trial exhibits without knowledge of its confidential nature. During this same period, opposing counsel hired a private investigator to track down the source of the medical information that was raised at the deposition. On April 4, 2003, opposing counsel filed a Motion to Revoke Respondent's Pro Hoc Vice. Respondent filed a response within 24 hours, as requested by the trial judge, directly to the judge's chambers on a Saturday. Respondent made a brief inquiry before responding in which Respondent was advised that the document had not been obtained illegally.

5. The Judge continued the trial and scheduled the Motion to be heard Tuesday morning, April 8th, 2003. This was 2 weeks after the deposition when the document in question first surfaced in the packet.

6. At the hearing, the Respondent focused all his efforts on verifying the circumstances under which he had come into possession of the "Medical Expenses" document to prove no unlawful or unethical conduct on his part in order to defend against the Motion to Revoke his Pro Hoc Vice.

7. At no time did either counsel or the Trial Court raise the issue of potential use of the document at trial. At the end of the hearing, the trial judge said that the Respondent should have advised the trial judge that the document would not be

used at trial. As soon as the issue was raised by the trial judge, Respondent immediately indicated he would withdraw the document from his list of exhibits.

The Bar's Complaint is inartfully drafted but appears to allege violation of Rule 3-4.3 in reference to acquisition and use of the pharmacy record, and violation of Rule 4-8.4(d) by forcing "the court to devote nearly an entire day to its inquiry into his conduct". Before this Referee, the Bar appeared to reverse its allegations in its closing argument. This confusion was never explained. Therefore, to insure the Court that this Referee has scrutinized all allegations and all evidence with diligence and care in performing the duties assigned, I offer the following specific references to the allegations and the evidence.

As to the allegation that Respondent violated Rule 3-4.3 - commission of any act that is unlawful or contrary to honesty and justice - referred to in closing argument before this Referee as Count I, there is insufficient evidence to find a violation by clear and convincing evidence. The argument of the Bar as to this allegation went to Respondent's use of the pharmacy record. The Bar did not present any evidence or argument that Respondent had participated in any way in its acquisition and did not argue that he had participated in any way in its acquisition. The Bar did not present any evidence that Respondent had knowledge of the nature of the document at the time he came into possession of it. The Bar did not present any evidence of use of the document, only that Respondent had it in his possession and that he asked questions which were supported by the documents. The Respondent's un rebutted testimony supported by the summary itself was that he asked questions from the summary. Since the packet also contained various court records, police records, receipts, notes, a summary and a list of proposed questions from which all the deposition questions could have been asked, no evidence was presented that he used the pharmacy record in the deposition. Since the Exhibit List had been prepared prior to Respondent being made aware that the confidential nature of the document was in issue, no evidence was presented that he used it thereafter.

The Bar's argument is based solely upon Respondent's actions between Friday afternoon April 4th, 2003, when he first became aware of the claim of privilege, and Tuesday morning April 8th, 2003 in the hearing to Revoke his Pro Hoc Vice. The Bar argues that since he did not take steps to remove the document from his trial exhibit list sufficient to satisfy the trial judge that therefore he *was going to use it at trial* and the future act would support a finding of violation of rule 3-4.3 and/or rule 4-8.4(d). Therefore, this Referee concludes that the

allegation that Respondent violated 3-4.3 by using and not withdrawing the pharmacy record is not supported by clear and convincing evidence.

As to the allegation that Respondent violated Rule 4-8.4(d) for engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice - referred to in the Bar's closing argument before this Referee as Count II, there is insufficient evidence to find a violation by clear and convincing evidence. Paragraph 13 of the complaint and the Bar's argument before this Referee allege that defending against the Motion to Remove Respondent's Pro Hoc Vice was somehow prejudicial to the administration of justice. The full facts presented in this case support just the opposite. The hearing, which the Bar alleges in paragraph 13 of its complaint took "nearly an entire day" and which they argue before this Referee took 3 hours, was in no way prejudicial to the administration of justice. Before this Referee, the Bar argues a "domino effect" stating "he had information that he could use but he didn't use". In their final argument, the Bar reverses its position and argues that the deposition was prejudicial to the administration of justice in violation of 3-4.3 - honesty and justice - because the questions were asked solely to embarrass, harass and/or intimidate Ms. Hawthorne" and the hearing on Respondent's Pro Hoc Vice was where he violated 4-8.4(d) - conduct prejudicial to the administration of justice. As to the deposition of Susan Hawthorne, based upon the background information available to the Respondent at the time of the deposition, all questions asked were reasonable and called for answers that could reasonably lead to admissible evidence for purposes of impeachment. The Florida Bar failed to present any evidence of the allegations in paragraphs 11 and 12 of the Complaint. Therefore, this Referee concludes that the allegation that Respondent violated 3-4.3- acts unlawful or contrary to honesty and justice - by asking questions solely to embarrass, harass and/or intimidate the witness is not supported by clear and convincing evidence. Further, this Referee concludes that the allegation that Respondent violated rule 4-8.4(d) conduct prejudicial to the administration of justice, by defending against the Motion to Remove Respondent's Pro Hoc Vice, is not supported by clear and convincing evidence.

III. Recommendations as to Whether the Respondent Should Be Found Guilty:
As to each allegation of the complaint, I make the following recommendations as to guilt or innocence:

As to the alleged violation of rule 3-4.3- for the commission of an act that is unlawful or contrary to honesty and justice referred to as Count I in The Florida Bar's closing argument, I recommend that the Respondent be found Not Guilty.

As to the alleged violation of rule 4-8.4(d)-for engaging in conduct... that is prejudicial to the administration of justice referred to as Count II in The Florida Bar's closing argument, I recommend that the Respondent be found Not Guilty.

IV. Rule Violations Found: None

V. Recommendation as to Disciplinary Measures to Be Applied: None

VI. Personal History and Past Disciplinary Record: After recommending the finding of not guilty as to all allegations and recommending no discipline pursuant to Rule 3-7.6(m)(1)(D), this Referee did not consider the personal history or prior disciplinary record of the respondent.

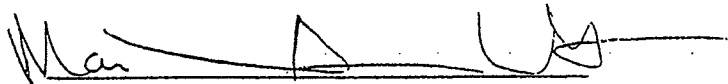
VII. Statement of Costs and Manner in Which Costs Should be Taxed:

While this Referee finds that the Bar failed to meet its burden of proof, this Referee does not find that the Bar's complaint was frivolous or filed for an improper purpose. This Referee is very concerned that this matter was litigated by The Florida Bar without sufficient investigation specifically noting that the Bar never contacted the primary witness for the Respondent, Ms. Marlow, in over a year that this complaint has been pending.

The relevancy of deposition questions could have been discerned by full deposition of the witness, which was interrupted by her walking out; or by full trial, which was interrupted by Mr. Decote being removed from the case. It could have been revealed by full investigation of the complaint by the Florida Bar by deposition of the Respondent's witness which was not done. It was revealed by full evidentiary hearing conducted upon the Florida Bar's Complaint when the Respondent presented the evidence in his own defense. Likewise, the undisputed facts underlying the pharmacy document could have been discerned by full deposition of the witness who accessed them, which was interrupted by her claiming fifth amendment privilege; or by full trial, which was interrupted by Mr. Decote being removed from the case. It could have been revealed by full investigation of the Complaint by the Florida Bar by review of the Respondents' documents. It was revealed by full evidentiary hearing conducted upon the Florida

Bar's Complaint when the Respondent presented the evidence in his own defense. Therefore, this Referee also recommends that each party should bear their own costs in this matter. Because costs cannot be awarded, this Referee respectfully recommends an acknowledgment to Mr. Decote by the Supreme Court that will fully clear his professional reputation in this state.

Dated this 30th day of March, 2005.



Martha Ann Lott
Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

JoAnn Marie Stalcup, Bar Counsel, The Florida Bar, 1200 Edgewater Drive,
Orlando, Florida, 32804-6314

Richard L. Ducote, Respondent, 731 Fern Street, , New Orleans, LA 70118

John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street,
Tallahassee, Florida 32399-2300