

C

Supreme Court of Florida.
THE FLORIDA BAR, Complainant,
v.
Jerry E. OXNER, Respondent.
No. 62454.

April 21, 1983.
Rehearing Denied June 15, 1983.

In disciplinary action, the Supreme Court held that lying to trial judge in order to obtain a continuance warrants 60-day suspension.

Suspension ordered.

Adkins, J., filed opinion concurring in part and dissenting in part.

West Headnotes

Attorney and Client 45 ⚡ 59.13(3)

45 Attorney and Client

45l The Office of Attorney

45l(C) Discipline

45k59.1 Punishment; Disposition

45k59.13 Suspension

45k59.13(2) Definite Suspension

45k59.13(3) k. In General. Most Cited Cases

(Formerly 45k58)

Lying to trial judge in order to obtain a continuance warrants 60-day suspension. West's F.S.A. Code of Prof.Resp. DR1-102(A)(4, 5), DR7-102(A)(5).

*984 John F. Harkness, Jr., Executive Director and Stanley A. Spring, Staff Counsel,

Tallahassee, and Jacquelyn Plasner Needelman, Bar Counsel, Fort Lauderdale, for complainant.

Phillip T. Crenshaw of Crenshaw & Crenshaw, Lake Worth, for respondent.

PER CURIAM.

This is an action initiated by The Florida Bar against the respondent, Jerry E. Oxner, in which the Bar claims, and the referee found, that the respondent was guilty of violating Disciplinary Rule 1-102(A)(4), Disciplinary Rule 7-102(A)(5), and Disciplinary Rule 1-102(A)(5). Although the respondent has sought review, we approve, endorse, and accept the referee's report, findings, and recommendations. Because we find this case significant as it relates to a dereliction of responsibility of an attorney to the court, we publish the referee's full report, with his recommendations and reasons therefor. The report reads as follows:

Findings of Fact

1. Respondent, Jerry E. Oxner, is, and at all times hereinafter was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. A continuation of a trial of a case styled *Robert Shaw v. General Accident Group, et al*, Circuit Court Case No. 79-34 CA(L) 01H and in which the Respondent was counsel of record for the plaintiff, was set for April 16, 1981, before the Honorable Edward H. Fine, Acting Circuit Judge, in the

Circuit Court of the Fifteenth Judicial Circuit of Florida, In and For Palm Beach, County.

3. On April 15, 1982, Judge Fine's Judicial Assistant Beth Burnett, contacted the respective attorneys, Jerry Oxner and Robert G. Merkel, regarding the matter set for April 16, 1981, to advise them that:

a. Due to a lengthy trial in which Judge Fine was involved, the trial set for April 16, 1981 might be re-scheduled to May, 1981;

b. Ms. Burnett would contact the respective attorneys on that same day, April 15, 1981, to tell them definitely whether or not another trial date would be set; and

c. Until such time as the attorneys were instructed, the attorneys should assume that the hearing would be held as scheduled on April 16, 1981.

4. Later in the day on April 15, 1981, Ms. Burnett again contacted the attorneys' offices and advised that the hearing would take place as scheduled on April 16, 1981.

5. Robert G. Merkel, the attorney for the defendant, appeared at the scheduled time on April 16, 1981.

6. The Respondent, attorney for the plaintiff, failed to appear at the scheduled time on April 16, 1981.

7. As a result of the Respondent's failure to appear, Judge Fine called the Respondent on April 16, 1981.

8. During the telephone conversation as stated in paragraph seven (7) above, the Re-

spondent advised Judge Fine that he received a message from his office that morning that the trial was re-scheduled.

9. During the telephone conversation as stated in Paragraph seven (7) above, Judge Fine asked the Respondent if he could proceed to trial on April 16, 1981, in spite of the mix-up concerning the re-scheduling of the hearing set for April 16, 1981.

10. During the telephone conversation as stated in paragraph seven (7) above, the Respondent advised Judge Fine that he would need a continuance as he had personally excused a key witness, a Mr. Henderson, an insurance adjuster for the Hartford Insurance Company, who would testify regarding whether one Curtis Williams*985 was insured by Hartford Insurance Company.

11. Further, the Respondent represented to Judge Fine that he could not contact Mr. Henderson in time to proceed as Mr. Henderson worked out of his home and had no office at which he could be reached.

12. After speaking with the Respondent, on April 16, 1981, Judge Fine contacted Mr. Henderson with no difficulty, merely by dialing the telephone number for the Hartford Insurance Company.

13. Mr. Henderson advised Judge Fine that:

a. He worked at the Hartford Insurance Company;

b. He knew the Respondent personally;

c. He had no knowledge of the case;

d. He was not subpoenaed or otherwise con-

tacted by the Respondent regarding the cause *Robert Shaw v. General Accident Group, et al*;

e. He was never excused by the Respondent from appearing for the trial set for April 16, 1981;

f. He had not spoken with the Respondent on the 15th or 16th of April, 1981, and the Respondent had not left any messages for him during that time.

g. His wife was an employee of the Respondent and knew how to reach him;

h. He had no knowledge of Curtis Williams and he never heard of the case nor spoke with the Respondent regarding checking the files of his office concerning Curtis Williams.

14. The end result of the litigation was that the Respondent appeared and was unable to prove that Curtis Williams was uninsured thereby resulting in a judgment being entered against the Respondent's client.

15. By reason of the foregoing, the Respondent violated Disciplinary Rule 1-102(A)(4) by engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and Disciplinary Rule 7-102(A)(5), by knowingly making a false statement of law or fact and Disciplinary Rule 1-102(A)(5), by engaging in conduct that is prejudicial to the administration of justice.

Recommendations

The Referee recommends that Respondent be found guilty as in paragraph fifteen (15) above and that he be disciplined by suspen-

sion for sixty days. The evidence is uncontroverted that Respondent deliberately lied to Judge Fine, both by telephone and in Court, in order to obtain a continuance. By his own words (Record p. 62, line 22) "... I got myself caught in a crunch and I was careless with what I had to say to the Court to get out of my mistake."

Respondent presented the appearance to the Referee that this was a minor mistake and that the Bar was making too big a matter out of it. He did not get counsel to represent him in these proceedings, he filed no Answer, and he denied the truth of all of the Bar's Requests for Admissions except that he was a member of the Bar subject to discipline by the Supreme Court. The seriousness of his conduct in making bold faced lies to Judge Fine does not appear to be recognized by Respondent. He claims that he has only committed one error that merits no more than a private reprimand and that he has been punished enough by the pendency of these proceedings. Much like he did when he compounded his initial lie over the phone by his statements in Court, Respondent seems to think that by refusing to recognize the significance of his conduct, it will all just go away.

Respondent cited some personal problems in his life that have now been alleviated. However, none of these explains or justifies the deliberate lies Respondent told. The Referee believes that mere reprimand, private or public, will not be sufficient to convince Respondent that his conduct toward a Court of this State was intolerable and cannot be passed over lightly. He has tarnished the honor of all members of the Bar by his conduct and *986 he should be given some time away from his profession to reflect upon

this.

Respondent should also pay the costs of these proceedings.

We would emphasize the importance of a judge's being able to rely on representations made by counsel. A lawyer should never mislead the court. This lawyer's image in the eyes of all judges is tarnished for a long time. All attorneys should take heed to avoid making the mistakes he did.

Commencing thirty days from the filing of this opinion, Jerry E. Oxner shall stand suspended as a member of The Florida Bar for sixty days. During said time he shall not engage in the practice of law in any manner. He is directed to pay costs in the sum of \$1,159.51 within thirty days of the filing of this opinion.

It is so ordered.

BOYD, McDONALD, EHRLICH and SHAW, JJ., concur.

ADKINS, Acting C.J., concurs in part and dissents in part with an opinion. ADKINS, Justice, concurring and dissenting in part.

I concur in the finding that respondent violated the Disciplinary Rules, but I dissent as to the punishment. There is no evil or fraudulent intent on the part of respondent shown in the record.

He acknowledged his wrongful statements to Judge Fine without qualification. Respondent is a family man with children and has been practicing law since 1971. There have been no prior disciplinary proceedings brought against him. A sixty-day punishment exceeds the reasonable necessity to preserve the purity of the Bar.

In my opinion, a public reprimand is appropriate.

Fla., 1983.
The Florida Bar v. Oxner
431 So.2d 983

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Section: TAMPA & STATE

Judge reports lawyer to Bar
GRAHAM BRINK

TAMPA On the day trial was to begin, attorney Ronald Josepher came to court with an urgent request to delay the proceedings.

Josepher's wife had seriously injured her back a few days earlier and would be bedridden for four to six weeks, he told the judge. He would have to care for her and their three children.

Taking Josepher at his word, Circuit Judge Sam Pendino agreed to put off the trial.

The next week, the opposing attorney brought a videotape to court. The tape starred Josepher's wife playing tennis just a few days earlier.

Josepher argued that he had done nothing wrong. He could not have known how quickly his wife would recover, he said.

Pendino was "shocked" at what he saw.

"I can't believe, quite frankly, that somebody could be bedridden and is playing tennis a week later," he said in court.

Judges don't often report lawyers to the Florida Bar, the organization that investigates allegations of wrongdoing by lawyers. More often, clients, inmates or other lawyers lodge complaints.

But once Pendino viewed the videotape, he said he had to report Josepher to the Bar. The outcome of the investigation is pending.

Lawyers are not put under oath each time they appear in court. They are expected as "officers of the court" to accurately represent the facts and not to mislead judges.

In cases where misconduct is substantiated, a lawyer can face punishment ranging from a reprimand to suspension to disbarment. The Florida Supreme Court makes the final decision after receiving a recommendation from the Bar.

Josepher, 49, whose law practice is based in Tampa, did not return repeated phone messages seeking comment about the incident. He has not been disciplined by the Florida Bar since his admission in 1988.

The incident stems from an unusual case in which Josepher was defending a surgeon sued by another surgeon for allegedly botching his knee operation. After several postponements, the trial was scheduled to begin Monday, March 4, the day Josepher asked for the delay.

Josepher explained that his wife, Debra, had injured her back the previous Wednesday in an undisclosed accident. The injury got worse on Thursday and Friday until she was confined to her bed for the weekend, he explained. A doctor, Michael Omori, made a house call on Saturday and prescribed medication and recommended more bed rest. On Sunday, the day before the trial, she had dizzy spells and began sweating, Josepher said.

"With the exception of bathroom privileges, Mrs. Josepher will be confined to bed rest for several weeks," the doctor wrote in a note that Josepher showed the judge.

Michael Trentalange, the plaintiff's attorney, asked why this was the first he was hearing of this problem if the injury had occurred five days earlier. His clients had flown in from Arizona for the trial, he told the judge. Experts were on standby.

Trentalange was skeptical of the doctor's assessment. He pointed out that Dr. Omori was married to an associate in Josepher's office.

Josepher said he hadn't said anything about the injury because he was busy looking after his wife and, as an "optimist," he hoped she would be better in time for the trial. Yes, he said, Omori was married to one of his associates, but "who else are you going to be able to find to come to your house to make a house call," he told the judge.

Trentalange then proposed they delay the trial for just two days to see if she got better. He also offered to pay for around-the-clock nursing care for Mrs. Josepher for the duration of the trial.

Josepher balked.

"I do have a problem with a stranger trying to take care of my wife and kids," he said.

Pendino said in general he was reluctant to delay a trial, especially on the day it was to begin. Defendants often like to have their trials delayed "until 2010," he said.

On the other hand, Pendino had three kids, too, and he said he knew what a handful they could be when a spouse was ill. Pendino decided to postpone the trial. Josephher had his wish.

Trentalange left court feeling suspicious. He later said he had ignored some other "curious" things that had happened during the case. This time he decided to hire an investigator.

The lawyers returned to court nine days after the earlier hearing to decide when to reschedule the trial. Almost immediately, Trentalange told the judge that he had hired an investigator to follow Mrs. Josephher.

Mr. Josephher "misrepresented" his wife's condition and the doctor's note was "not correct," Trentalange told the judge.

Records showed that Mrs. Josephher was at the Harbour Island Athletic Club on March 7, just three days after the initial hearing, and then again on March 9, Trentalange said. The video showed her playing tennis at the club on March 11. She had gone jogging earlier in the morning and used the weight room as well, Trentalange said.

"What the court was told and what actually happened are two completely irreconcilable things," Trentalange told the judge.

Pendino asked Josephher if he knew his wife had played tennis. Josephher said no. Pendino was skeptical.

Josephher defended himself, saying that he was not a medical expert and had relied on the doctor, who "was incorrect with his prognosis." He said he had never offered his own prognosis at the earlier hearing and he could not "predict the future."

Josephher said he knew from the start that Trentalange had planned to have his wife followed. Despite knowing that, they were not going to do anything "disingenuous" to trick the investigator, he told the judge.

Josephher also attacked Trentalange. He said he had felt threatened earlier in the case when Trentalange called him a "piece of s---" and said he would be around after Josephher died and that he'd urinate on his grave.

"This is the type of guy who's filing this kind of motion," Josephher told the judge.

At one point, Pendino noted for the record that Josephher "smirked" while Trentalange was talking. The judge warned Josephher not to make faces and not to make any comments out of turn.

Pendino went on to tell Josephher what he thought of the videotape and the other allegations.

"I just find it shocking," Pendino said. "It's unconscionable. It leads me to be-

lieve that she wasn't as bad off as you represented to this court, sir. It really does."

Josepher: "Well, you're wrong, your honor, with all due respect. . . . You didn't see her over the weekend. You didn't see her on Monday. . . . And you have no medical experience, your honor."

Pendino: "I'll let the Florida Bar sort it out."

Soon after the Bar complaint was made, Josepher's client obtained a new lawyer.

"Some of this really ticked me off," Trentalange said last week. "My client has been waiting too long for this trial."

- Times news researcher John Martin contributed to this report. Graham Brink can be reached at 226-3365 or brink@sptimes.com.

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----- INDEX REFERENCES -----

NEWS SUBJECT: (Legal (1LE33))

REGION: (USA (1US73); Americas (1AM92); Florida (1FL79); North America (1NO39))

Language: EN

OTHER INDEXING: (FLORIDA SUPREME COURT; HARBOUR ISLAND ATHLETIC CLUB) (Debra; Graham Brink; John Martin; Josepher; Michael Omori; Michael Trentalange; Omori; Pendino; Ronald Josepher; Sam Pendino; Times; Trentalange)

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Candor to the Court

Film clips

1. Continuance request in court [he can't lie to judge about needing a continuance]
2. Beating scene
3. Court scene after beating [he can't lie to judge about suspect and being able to continue]

Power Point Slides

Rule of Professional Conduct

- 4-3.3 Candor to the Tribunal
 - (a) **False Evidence; Duty to Disclose.** A lawyer shall not knowingly
 - (1) make a false statement of material fact or law to a tribunal;
 - (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;

Discussion Items

[Suzy]

- The first scene falls under the part of the rule that (a)(1) prohibits a lawyer from knowingly making a false statement of material fact or law to a tribunal.
 - In the scene, Jim Carey is in the courtroom and cannot lie to the judge about needing a continuance, but would a lie as to whether he needed a continuance be a “false statement of material fact or law to a tribunal?”
 - Florida Bar v. Oxner, 431 So.2d 983 (Fla. 1983)—Attorney lies to judge on the phone about why he needs a continuance

[Judge]

- The last scene would fall under the part of the rule that prohibits a lawyer from (a)(2) knowingly failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client
 - In the last scene, Jim Carey couldn't lie to the judge about the suspect or whether he could proceed.
 - Did Jim Carey's failure to disclose that he beat himself up violate the rule?
 - Was it a material fact?
 - Also, did the failure to disclose assist a criminal or fraudulent act by the client?
 - What is the difference in that situation?
 - With technology available these days, it's not a good idea to lie to a judge.
 - “Judge Reports Lawyer to Bar” St. Pete Times (2002)—Attorney tells judge in court that he needs a continuance because his wife hurt her back and he was needed to care for 3 kids. The next week, opposing counsel provided judge with videotape of wife playing tennis. Judge shocked and reports lawyer to bar.