



SUPREME COURT OF GEORGIA

Case No. S94Y1561

Atlanta

FEB 17 1995

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

IN THE MATTER OF: JOSEPHINE HOLMES COOK

Cook was accused of violating Standard 4 (engaging in professional conduct involving dishonesty, fraud, deceit, or wilful misrepresentation) and Standard 45 (b) (knowingly making a false statement of law or fact) of State Bar Rule 4-102 (d) by creating an altered document and using it as an attachment to a motion to compel discovery. The State Bar's formal complaint, as amended, specified three particular acts as violations of Standards 4 and 45: certifying service of a notice of deposition which was not served; creating or ordering the creation of an altered document; and using the altered document in support of a request for attorney fees in the motion to compel. The special master found that the State Bar failed to carry its burden of proving that respondent altered the document, but found that the State Bar "did prove that respondent knowingly made a false statement of fact in the motion to compel and the brief regarding the date of filing the [plaintiff] deposition scheduled for August 25, 1989." The reasoning behind that conclusion is based on OCGA § 9-11-11 (a), which provides in pertinent part that the "signature of an attorney constitutes a certificate by him that he has read the pleading and that it is not interposed for delay." The special master reasoned that since respondent signed the motion and the brief, certifying thereby that she had read them and, by extension, the exhibits, and that since not enough time had passed between the date the notice of deposition was prepared and September 1 for respondent not to be aware that what she alleged in the motion was false, she knowingly made a false statement of fact.

However, it is our considered conclusion that the Special Master's finding cannot stand in view of the State Bar's burden of proving the allegation beyond a reasonable doubt. See State Bar Rule 4-221(e). Under that standard, where the proof, as here, is entirely circumstantial, that proof must exclude every reasonable theory except the one alleged. Here there is a reasonable theory, besides the one charged, that is not excluded and is consistent with the evidence. That theory is that respondent's conduct was the consequence of her negligent representation of the defendants in the underlying action, failing to keep track of her correspondence and pleadings

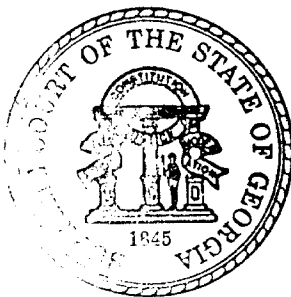
or to review those documents which she retained.¹ To be sure, this theory demonstrates carelessness and shoddy practices and reflects poorly on respondent's professional conduct, but does not establish the intentional wrongdoing of which she stands accused in this matter.

Accordingly, we reject the Review Panel's recommendation that respondent be issued a Review Panel reprimand and hereby order that this disciplinary proceeding against respondent be dismissed.

All the Justices concur, except Thompson, J., who concurs in the judgment only, and Hunstein and Carley, JJ., who dissent.

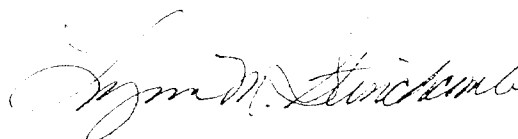
SUPREME COURT OF THE STATE OF GEORGIA,

Clerk's Office, Atlanta



I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

 Chief Deputy Clerk

¹ This theory is reinforced by other circumstances, namely, that this complaint to the State Bar was made, not by a party to the case or even contemporaneously with the case, but almost three years after the fact by an associate of a political opponent in the wake of a vigorous political campaign. Moreover, the trial judge in the underlying case, when presented with the facts of this matter, deemed it unworthy of any action on his part. It is well to note also that while errors and omissions in pleadings are chargeable to the lawyer presenting them, they do not create a presumption of intentional wrongdoing.

S94Y1561. IN THE MATTER OF JOSEPHINE HOLMES COOK

HUNSTEIN, Justice, dissenting.

The special master's findings of fact amply support his conclusion that the State Bar proved that Respondent violated Standard 45 in that she "knowingly made a false statement of fact" in a motion and brief she filed in the trial court. The special master found that during the course of a lawsuit in which Respondent represented the defendants, an "acrimonious" relationship developed between Respondent and Howard, counsel for plaintiff Broderick. The special master detailed the following course of events that occurred in August and September 1989:

On August 17, Respondent served a notice to take the deposition of Fluellen, a third party. The notice was filed August 18; the deposition, set for August 24, was taken.

On August 22, Respondent served a notice to take the deposition of plaintiff Broderick on August 25.

On August 24, Howard objected by letter to the untimeliness of the August 22 notice.

On August 28, Respondent served a notice to take Broderick's deposition on September 1.

On August 29, Howard objected by letter to the untimeliness of the August 29 notice.

On August 31, Respondent wrote Howard and acknowledged receipt of the August 29 letter. The letter further informed Howard that the deposition for "tomorrow" would proceed and a motion to compel would be filed should Broderick fail to appear.

On September 1, Respondent drafted a motion to compel and a brief in support thereof. Attached was a copy of the

Fluellen notice to take deposition, altered to indicate that the notice was to Broderick. Both the motion and the brief contain statements representing that the notice was to Broderick.

On September 8, Howard was mailed the motion and brief.

On September 14, Respondent filed the motion to compel with the brief and the altered attachment in the trial court.

From this sequence of events, it is apparent that the special master's finding is based not only on Respondent's certification of a pleading with an obviously altered attachment, but also on the fact that "Respondent could not have failed to know that the statements in the motion and brief ... were incorrect," given the events that had occurred and the short period of time involved. Accordingly, I must dissent to the majority opinion because the evidence supports the Standard 45 violation.

The special master, although recognizing that disbarment can result from a Standard 45 violation, detailed at length other factors he considered in arriving at his recommended disciplinary action. These factors included that the grievance, although arising out of events in August-September 1989, was not filed until July 22, 1992; that it was filed the day after Respondent was elected to a position on the Fulton Superior Court bench; that the grievance was not filed by one a party to or affected by the altered document; and that the grievance was filed by the campaign manager of Respondent's defeated opponent. Based on these factors, the special master recommended Respondent receive a Review Panel reprimand for her violation of Standard 45. The Review Panel adopted the special master's findings and recommended discipline.

Although the State Bar requests this Court to impose an eighteen month suspension as the appropriate remedy, based on the various mitigating factors found by the special master, I would accept the recommendation that Respondent receive a Review Panel reprimand.

I am authorized to state that Justice Carley joins in this dissent.