

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

v.

LOUIS L. SUPRINA,
Respondent.

CONFIDENTIAL

Case No. 66,785
(TFB No. 1084C103)

FILED

SID J. ROBERTS

DEC 9 1967

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RESPONDENT'S REPLY BRIEF

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POINTS INVOLVED ON APPEAL

POINT I

THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND WAS NOT APPROPRIATE WHEN THE PURPOSE OF THE REFEREE'S HEARING WAS TO REVIEW THE GRIEVANCE COMMITTEE'S RECOMMENDED FINDING OF MINOR MISDUCT AND RECOMMENDATION OF A PRIVATE REPRIMAND, WHICH RECOMMENDATIONS HAD BEEN APPROVED BY THE BOARD OF GOVERNORS AND THEN SUBSEQUENTLY REJECTED BY THE RESPONDENT.

POINT II

THE FURNISHING OF THE NOTICE REQUIRED UNDER FS § 701.05, WHICH NOTICE NECESSARILY IS GIVEN FOR THE SOLE PURPOSE OF OBTAINING A SATISFACTION OF MORTGAGE AND WHICH, WHEN GIVEN BY A MEMBER OF THE FLORIDA BAR WOULD BE IN DIRECT CONFLICT WITH DR 7-105 (A) IS A RECOGNIZED AND APPROVED EXCEPTION TO THE RULE.

STATEMENT OF THE CASE AND OF THE FACTS

I. PRELIMINARY STATEMENT

This is Respondent's Reply Brief. The designations used in Respondent's Initial Brief will also be used herein, with addition of the following: the symbol "IBR" followed by an appropriate page number will refer to the Initial Brief of Respondent - Appellate, and the symbol "CAB" followed by an appropriate page number will refer to Complainant's Answer Brief.

II. STATEMENT OF THE CASE

On December 13, 1984, the Tenth Judicial Circuit Grievance Committee recommended a finding of minor misconduct against the Respondent, together with the discipline of a private reprimand. This recommendation and discipline was approved by the Florida Bar Board of Governors.

The approved finding and discipline was subsequently rejected by Respondent, who sought review of the approved finding and discipline by a Referee. Such review was in accord with Respondent's rights under the Florida Bar Integration Rules.

The Bar's complaint was sent to the Court at the end of March, 1985 and the Honorable W. Rogers Turner, was thereafter appointed referee.

The matter was presented to the Referee on June 21, 1985 without the need for live testimony based on the Complaint; Respondent's Reply and Affirmative Defense together with a Memorandum attached thereto setting forth the chronology and a

stipulation between counsel for both Complainant and Respondent that the sole question before the Referee in this matter was a question of law, that is:

"Does furnishing the written notice to the mortgagees, required under FS § 701.05, including a paraphrase of the penalties and fines for failure to comply and xerox copies of FS § 701.05, 775.082 and 775.03 constitute a violation of disciplinary rule 7-105 (A) (5) for threatening criminal prosecution solely to gain advantage in a civil matter, or is the furnishing of such notice a statutory or judicially recognized exception to said disciplinary rule."

The Referee's report dated August 23, 1985, was thereafter forwarded to the Court. In the report the Referee recommended that Respondent be found guilty of violating DR 7-107 (A) for threatening criminal prosecution solely to gain advantage in a civil matter and further recommended that Respondent be disciplined by a Public Reprimand before the Board of Governors. The Board of Governors approved the Referee's findings, recommendations and discipline.

It is the Referee's Report dated August 23, 1985 which Respondent seeks review of here and which he is appealing.

III. STATEMENT OF THE FACTS

Respondent submits that the relevant facts were properly stated in his Initial Brief. Appellant therefore adopts, for this Reply Brief, the Statement of Facts contained in his Initial Brief by reference.

Respondent would further show the Court that while

the Complainant seeks to show that the Referee's finding of facts are true and accurate, at the same time he points out some of the Referee's errors of fact, directly, in his Statement of the Facts in his Answer Brief. In other cases he apparently recognizes the inaccuracies in the Referee's Report by his seemingly minor changes in his Statement of the Facts in his Reply Brief.

SUMMARY OF ARGUMENT

POINT I The Referee's recommended Public Reprimand was not appropriate where the purpose of the Referee's Hearing was to review the Grievance Committee's recommended finding of minor misconduct together with a recommendation of the discipline of a Private Reprimand, where such recommendation and penalty had been approved by the Board of Governors and then subsequently rejected by Respondent, who sought their review by a Referee. Such action on the Referee's part is entirely unethical and contrary to all sense of justice.

POINT II The furnishing of the notice required under FS § 701.05, which notice necessarily is given for the sole purpose of obtaining a Satisfaction of Mortgage and which, when given by a member of the Florida Bar, would be in direct conflict with DR-7-107 (A) is or should be a recognized and approved exception to the Rule.

Therefore, the Referee's Report should be reversed together with a finding that Respondent is not guilty of any misconduct in this matter and accordingly the Court should enter its order dismissing the case against Respondent.

ARGUMENT

POINT I

THE REFEREE'S RECOMMENDED PUBLIC REPRIMAND WAS NOT APPROPRIATE WHEN THE PURPOSE OF THE REFEREE'S HEARING WAS TO REVIEW THE GRIEVANCE COMMITTEE'S RECOMMENDED FINDING OF MINOR MISCONDUCT AND RECOMMENDATION OF A PRIVATE REPRIMAND, WHICH RECOMMENDATIONS HAD BEEN APPROVED BY THE BOARD OF GOVERNORS AND THEN SUBSEQUENTLY REJECTED BY THE RESPONDENT.

On December 13, 1984 the Tenth Judicial Circuit Grievance Committee recommended a finding of minor misconduct against the Respondent together with a private reprimand. This recommendation and discipline was approved by the Florida Bar Board of Governors. Respondent emphasizes that this finding and discipline had been approved by the Board of Governors, not recommended by them as Complainant contends in its argument on this issue. Respondent rejected the approved finding and discipline and sought review of the finding and discipline by a referee, which was his right under the Integration Rules.

The Referee was, in effect, called upon to act on Respondent's appeal or request for a review of the approved finding of minor misconduct and the approved discipline of a private reprimand. Instead of reviewing this finding and discipline, the Referee, in effect, overruled the previously approved finding and discipline and entered an entirely new finding of major misconduct with an entirely new recommended discipline of a public reprimand.

Such conduct on the Referee's part is the same as a case in which a Defendant, who having been convicted of second degree manslaughter with a two-year jail sentence appeals the case and somehow during the process of the appeal, the Appellate Court throws out the second degree manslaughter conviction with a two-year jail sentence and finds the Defendant guilty of murder in the first degree with a sentence of life imprisonment. Of course, this could never happen under the Constitution. Respondent wonders, are there no such safeguards or similar rights under the Florida Bar Disciplinary proceedings?

Surely, Respondent has at least the same rights of appeal as those rights of appeal in criminal proceedings. That is, the right to have the actual issue before the Court determined and not rejected completely with the Appellate Court (Referee in this case) substituting a new and greater crime than the one being appealed from and then imposing a new and greater punishment than the one being appealed from.

Counsel for the Complainant evidently agrees with this argument as is evidenced by his following statements in his argument before the Referee at the Referee's Hearing.

"...Mr. Suprina sought review (of the Grievance Committee's and Board's approved finding and discipline) by a Referee, which is his right under the Rule,...
Given the Committee's recommendation and the Board's position, I would submit that unless His Honor disagreed, assuming he rules in our favor, I would submit that a private reprimand by a personal appearance before the Board would be sufficient.

I don't believe that one should necessarily be put in a position of jeopardy merely by exercising their right under the rule to seek review."

Therefore, Respondent respectfully prays for the Court to find that the Referee's recommended public reprimand was not appropriate where the purpose of the Referee's hearing was to review the Grievance Committee's recommended finding of minor misconduct together with a private reprimand, which recommendations had been approved by the Board of Governors and then subsequently rejected by the Respondent.

ARGUMENT

POINT II

THE FURNISHING OF THE NOTICE REQUIRED UNDER FLORIDA STATUTE § 701.05, BY A MEMBER OF THE FLORIDA BAR, ALTHOUGH GIVEN FOR THE SOLE PURPOSE OF OBTAINING A SATISFACTION OF MORTGAGE, WHICH PURPOSE WOULD ORDINARILY VIOLATE DR 7-105 (A) IS A RECOGNIZED AND APPROVED EXCEPTION TO THE RULE.

Complainant talks in circles in attempting to support the Referee's recommendations in this case.

On the one hand, Complainant admits that "There is an apparent conflict between the Statute and the Disciplinary Rule" (CAB,18). On the other hand, Complainant suggests that "Putting the mortgagee on notice of the statute does not in itself constitute a violation of Disciplinary Rule 7-105 (A). (CAB,21)

These two concepts are in direct opposition and conflict with each other.

In Complainant's attempt to explain away the apparent conflict between Statute FS § 701.05 and Disciplinary Rule 7-105 (A), Complainant contends that the key or operative word in the Rule is "solely"- - that is, for the singular purpose of "blasting loose" the Satisfaction of Mortgage,

(CAB,21) The Rule reads

" A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter."

Complainant goes on to say that, therefore, since Respondent readily admits that he sent his notice letter for the sole purpose of "blasting loose" the Satisfaction of Mortgage, he violated the rule and is subject to the penalty.

Respondent points out that this sort of reasoning on the Complainant's part is merely a play on words and begs the issue. Respondent submits that anyone who sends the required notice under the Statute does it for the express and sole purpose of obtaining a Satisfaction of Mortgage. If anyone tried to state otherwise, there is no doubt that they would be guilty of perjury.

Complainant uses the same reasoning to try to explain away the apparent conflict between FS § 832.07, regarding the worthless check notice, and DR 7-105 (A), by stating that the operative word in that statute is may whereas the operative word in the Disciplinary Rule is solely.

FS § 832.07, which is the recommended notice in the worthless check statute reads:

...."Unless this amount is paid in full within the time specified above, the holder of such check may turn over the dishonored check and all other available information relating to this incident to the State Attorney for criminal prosecution. "

Once again, Respondent submits that anyone who sends the above notice does so for the sole and exclusive purpose of blasting forth the money in payment for the bad check. Once again, Respondent submits that anyone who tried to state otherwise is clearly guilty of perjury.

Thus, having come to the clear conclusion that:

1) There is direct conflict between the notices required under Florida Statute § 701.05 and FS § 832.07 and DR 7-105 (A) and

2) Such conflict is not explained away by circuitous interpretations of the word "solely" in the Disciplinary Rule, because it is quite evident that anyone who sends the notices required under the Statutes sends them for the sole purpose of obtaining the Satisfaction of Mortgage (under 701.05) and the money (under 832.07), we must then face the real issue before the Court in this case and all other cases having to do with such notices under these particular statutes. That is, the issue which Respondent has been arguing all along; which Counsel for both parties had stipulated to in the beginning and which was presented to the Referee by Counsel for both parties, as being the sole issue before him for his consideration (but which issue he did not even consider in his findings).

That issue, of course, is:

"Does furnishing the written notice to the mortgagees, required under FS § 701.05, including a paraphrase of the penalties and fines for failure to comply and xerox copies of FS § 701.05, 775.082 and 775.03 constitute a violation of disciplinary rule 7-105 (A) (5) for threatening criminal prosecution solely to gain advantage in a civil matter, or is the furnishing of such notice a statutory or judicially recognized exception to said disciplinary rule."

In arguing this issue Complainant argues that the Supreme Court now has jurisdiction over members of the Bar.

Respondent agrees with this argument.

Complainant further argues that the Legislature is without power to create a statutory exception to the code of professional responsibility. Respondent agrees with this argument to the extent that while it may be technically true, in actual practice it may not necessarily be true.

Complainant goes on to argue that a Florida Bar member, who uses the provisions of § 701.05 of the Florida Statutes may constitute a violation of DR 7-105 (A), for threatening criminal prosecution solely to gain advantage in a civil matter. Respondent agrees with this argument and in fact, goes one step further to admit that in each and every case, a Florida Bar member's use of the provisions of § 701.05 and FS § 832.07 does constitute a violation of DR 7-105 (A) for threatening criminal prosecution solely to gain advantage in a civil matter.

Thus, the question narrows down to: Is a Florida Bar member who furnishes such notice, in some way exempt from prosecution under DR 7-105 (A) through some type of recognized exception to the rule, or is the use of such notice statutes limited strictly to non-lawyers.

Complainant contends that the doctrine of Separation of Powers requires a finding that there can be no exceptions to the Rule. However, a review of case law on a great number of legal issues has proved otherwise. Where the cause has been just or the greater good of society is at stake, the

Courts have consistently come up with exceptions to the general rules. The present case before the Bar is just such a case.

The issue is clear - there is a conflict between the statutes and the rules.

The cause is just - Florida Bar members should have the same rights to use and rely on the statutes as non-Florida Bar members.

And the greater good of society is at stake, and would be served better by permitting Florida Bar members to furnish the notices required and contemplated under the statutes, as well as lay persons, since in most cases lay persons would not even be aware of the statutes or their uses.

Whether the Court chooses to call it:

1) Cooperation and coordination of powers between the Legislative and Judicial Branches of the government or

2) Mutual respect and acquiescence between the Legislative and Judicial Branches of the government or

3) Comity between the Legislative and Judicial Branches of the government or

4) Merely support of the Constitutional law which requires that everyone - lawyers and laymen alike - shall be entitled to the equal protection of the law in their reliance on the statutes; the Court needs to recognize and approve these notices as exceptions to the rules.

For whatever reason or reasons the Court chooses to use, Respondent pleads with the Court to find that:

"The furnishing of the notice required under FS § 701.05, which notice necessarily is given for the sole purpose of obtaining a Satisfaction of Mortgage and which, when given by a member of the Florida Bar would be in direct conflict with DR 7-105 (A) is a recognized and approved exception to the Rule."

Having made such finding, Respondent further pleads with the Court to find that the Respondent is not guilty of any misconduct in this matter and accordingly, enter its order dismissing the case against Respondent.

CONCLUSION

The Florida Supreme Court needs to judicially recognize that there is a conflict between the notice contemplated by FS § 701.05 and DR 7-105 (A) when a member of the Florida Bar furnishes such notice.

It further needs to recognize that the greater good of society is served by allowing the members of the Florida Bar (in addition to the lay public) to continue to furnish the notice contemplated under FS § 701.05 without fear of disciplinary proceedings being filed against them under DR 7-105 (A).

Whether the Court chooses to call it : Cooperation and coordination, Mutual respect and acquiescence , or Comity, between the Legislative and Judicial Branches of the government or just Support of the Equal Protection Rights under the Constitution, Respondent pleads with the Court to find that: Furnishing the notice required under FS § 701.05, which notice necessarily is given for the sole purpose of obtaining a Satisfaction of Mortgage and which, when given by a member of the Florida Bar would be in direct conflict with DR 7-105 (A), is a recognized and judicially approved exception to the Rule.

Having made such finding, Respondent further pleads with the Court to reverse the Referee's findings and recommendations and find the Respondent is innocent of any

misconduct under the Florida Disciplinary Rules and
dismiss the case against Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Respondent's Reply Brief have been furnished by ordinary U.S. mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing has been mailed by ordinary U.S. mail to Mr. David G. McGunegle, Esquire, Bar Counsel, The Florida Bar, 605 Robinson Street, Suite 60, Orlando, Florida 32801 and Mr. John T. Berry, Esquire, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, on this 4th day of December, 1985.

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