

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,

v.

Case No. 70,338

JAMES W. AARON,
Respondent

FILED
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TALLAHASSEE, FLORIDA
C
pl

RESPONDENT'S ANSWER AND REPLY BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, will be known as the Bar.

The Respondent James W. Aaron will be known as Respondent.

The Referee's Report will be referred to as R.

The Transcript of the final hearing on September 25, 1987 will be referred to as T.

Exhibits attached to Respondent's Appendix to Brief in Support for Review will be referred to specifically by date and author.

STATEMENT OF THE CASE

The Bar filed its Petition for Review on November 25, 1987, and its initial brief on December 18, 1987. Respondent filed his Petition for Review on November 27, 1987, his Motion for Extension of Time to file his Brief on January 8, 1988 and his Brief in Support of Petition for Review on January 20, 1988. The Bar filed its Answer and Reply Brief on February 1, 1988.

SUMMARY OF ARGUMENT

In Respondent's Initial Brief, several arguments were made that Complainant's conduct in bringing this action resulted in the denial of due process and fundamental fairness to Respondent. He maintains that the lacked jurisdiction to hear this cause because Repondent fail to conduct its investigation of the matters which gave rise to the instant cause in accordance with applicable rules and law. Complainant contends that it has not violated any of Respondent's rights guaranteeing him due process of law in any technical sense.

Respondent further contendend in his initial brief that the Referees recommendation that Respondent receive a private reprimand was consistent with his factual findings herein. Respondent maintanined that Complainant persuaded members of the Tenth Judicial Circuit Grievance Committee "A" that Respondent had willfully and knowingly testified falsely before Judge Richard H. Bailey on December 10, 1985. That allegation by Complainant was the basis for asking the Committee to treat Respondent conduct as serious enough to merit public descipline. The Referee George K. Brown found that the allegations by Complainant relative to Respondent's testimony on December 10, 1985 was unfound and not proved. The Referee did find that Respondent had violated certain technical rules which regulate

trust account record keeping. Clearly the Referee determine as a matter of fact that the conduct which Respondent engaged in constituted minor misconduct only.

Respondent contends that Referee Brown exercised sound judicial descretion in making his recommendation. Complainant argues that Rules of Discipline 3-7.5(c)(1)(3) restricted the Referees discretion on recommending discipline in a fashion which makes his recommendation unlawful.

Finally, Respondent Initial Brief also maintained Complainant's requirement that he execute a certain portion of Complainant's Exhibit Number 5 (Annual "Dues Statement") as presented violated his rights against compulsory incrimination. Complainant asserts in response simply that its Exhibit Number Five does not constitute a technical violation of Respondent's rights.

ARGUMENT

Point I

THE REFEREE ACTED IMPROPERLY IN DENYING RESPONDENT'S MOTION TO DISMISS.

Respondent maintains that the Referee should have granted Respondent's Motion to Dismiss.

Complainant caused two separate matters against Respondent to be brought before the Tenth Judicial Circuit Grievance Committee "A". Complainant's Branch Staff Counsel David G. McGunegle presented both matters before the Committee on January 20, 1987. Respondent suggested that Committee Member Jonathan Hancock recuse himself in the matters. Mr. Hancock recused himself as to one of the matters. The Committee received evidence relative to Complainant's two cases at one sitting. The Committee apparently discussed both matters simultaneously either in "executed session". Afterwards, Complainant's Branch Staff Counsel supposedly announced the results and conclusions of the Committee. The announcements by Mr. McGunegle revealed that no probable cause was found as to violations as alleged in one of the matters presented to it. Complainant's Branch Staff Counsel averred that the Committee was disturbed by Complainant's allegations that Respondent had testified untruthfully before Judge Richard H. Bailey on December 10, 1985. Apparently, the Committee felt that probable cause existed that Complainant's allegations about Respondent's testimony were true and deserved serious

public discipline. T p. 137

Respondent asserted certain facts in his Motion to Dismiss which clearly demonstrated that Respondent a member of a significant identifiable minority group which comprises a substantial percentage of the general population of geographical and boundaries of The Tenth Judicial Circuit. Further Respondent alleged that no members of his minority group was appointed to the Tenth Judicial Circuit Greivance Committee "A" on January 20, 1987. All members of the Committee were white males. Complainant did not deny and basically admitted Respondent's allegations as in its response to Respondent's Motion to Dismiss.

Respondent maintains that Complainant's Board of Governors's method of appointing members to the Committee operated to deny Respondent due process and on the face of it appears improper. Complainant insists that Respondent must legally establish that it's Board of Governor's acted maliciously in appointing only white males to the Committee in order to demonstrate that was denied due process of law.

Respondent's letters to Tenth Judicial Circuit Greivance Committee "A" chairman C. Ray McDaniel copies of which were mailed to Complainant's Branch Staff Counsel David McGunegle of November 26, 1986, December 1, 1986 and December 11, 1986. clearly placed the Chairman and Branch Staff Counsel that at least one of its members was in violation of Rules 3 regulating the confidentiality of Committee procedures and prohibiting bias, prejudice and conflict of interest by

members. Rules of Discipline 3-7.1; 3-3.4(c)(2)(3)(4). Notice of such violations was given to Chairman McDaniel and Staff Counsel McGunegle by Committee member Jonathan Hancock's letter to Respondent of December 9, 1986 and December 22, 1986. Copies of Mr. Hancock's letter to Respondent were mailed to Chairman McDaniel and Mr. McGunegle. The failure of Chairman McDaniel and Branch Staff Counsel McGunegle to act in having Mr. Hancock recuse himself in investigating the matters against Respondent demonstrated bias and prejudice on their part against Respondent in violation of Disciplinary Rules.

The record of the Tenth Judicial Circuit Grievance Committee "A" reveals no finding of probable cause against Respondent by said committee. On January 23, 1987, Chairman C. Ray McDaniel mailed Respondent a notice that the Committee had found no probable cause of violation of any Rules as to one of the matters that it considered on January 20, 1987. No formal notice of finding probable cause by the Committee relative to their deliberations on January 20, 1987 was provided Respondent. Rather, on January 21, 1987, Branch Staff Counsel McGunegle who is not a member of The Tenth Judicial Circuit Grievance Committee "A" mailed Respondent what purports to be a finding of probable cause by the Committee.

A review of the available transcript of the proceeding of the Committee's meeting on January 20, 1987 reveals no affirmative finding of probable cause against Respondent by said Committee or any of its members. Again only the recitations

of Complainant's Branch Staff Counsel McGunegle, who was not a committee member suggests that any probable cause against Respondent was found.

Clearly the instant cause was not legally certified and presented to the Referee herein for disposition because of the numerous violations of Rules of Disciplinary that Complainant had violated at the investigation committee level. Accordingly, the Referee lacked jurisdiction to consider and dispose of the instant cause. Respondent's Motion to Dismiss should have been granted.

ARGUMENT

Point II

THE REFEREE ACTED IMPROPERLY IN ADMITTING COMPLAINANT'S EXHIBIT NUMBER FIVE.

At the hearing before Referee George K. Brown on September 25, 1987 Complainant offered its Exhibit Number Five into evidence. Respondent objected to the receipt of said Exhibit as evidence. The Referee admitted Complainant's Exhibit Number Five over Respondent's objection. T pp. 13-16

Complainant referred to the Exhibit as a dues statement. It was executed by Respondent on July 17, 1986. It is a document which contains certain assertions about whether certain trust account record keeping procedures are being followed by those attorneys who use trust accounts in their practice. The statement is fashioned in such a way that the attorney in paying his annual dues is required to state that he is or is not in compliance with certain rules. No provision for a statement honest of uncertainty or explanation of his response is made there on. Complainant maintains that Respondent was compelled to reply to the printed assertions as they appear on the printed dues statement.

Respondent testified that he felt compelled to answer the printed assertions. He testified that Complainant's Branch Staff Counsel McGunegle had made that clear to him while he was before Referee Richard H. Baily on December 10, 1985. He also testified that Complainant's investigator

Charles Lee had given him similar instructions during a conference at Complainant's Orlando office in January 1986.

Respondent maintains that the either or yes or no, all or nothing scheme in soliciating the information from Respondent is unfair and unlawful. Respondent asserts that under the circumstances which he reported on July 1, 1986, either a "yes" or "no" response by him may have been misleading. He testified that he felt at the time that his response were truth.

Complainant contends that Respondent intentionally mislead it by his execution of Exhibit Number Five on July 17, 1986. Complainant suggests that Respondent knew that he was not in compliance with reules regulating trust account record keeping and attempted to prevent Complainant from learning of same. However, Complainant argument ignores the fact that Respondent was aware that his trust account records were to reviewed quarterly by Complainant beginning August 1986.

Respondent 's right against compulsory self-incrimination was violated by Complainant's requirement that he execute Exhibit Number Five.

ARGUMENT

Point III

THE REFEREE'S RECOMMENDATIONS WERE REASONABLE AND
LAWFUL UNDER THE CIRCUMSTANCES.

Referee George K. Brown found that Respondent had violated certain technical rules regulating trust account record keeping. He found that the allegation that Respondent had intentionally mislead Referee Richard K. Bailey was unfounded.

A referee is allowed to consider all of the evidence presented to him/or her in determining what Disciplinary Rules may have been violated and what is the appropriate discipline should be. In doing so, he the Referee is not restricted by the theories or allegations contained in Complainant's complaint. The referee's discretion in recommended discipline is restricted only by the facts proved before him or her and the rule of equity and reasonableness.

Respondent contends that Referee Brown's recommendation herein was lawful and just. Complainant contends that the Referee's discretion in recommending discipline was restricted by Disciplinary Rule 3-7.5(k)(1)(3). Respondent contends that said rule is advisory only.

The referee's recommendation is supported by the totality of the evidence herein and should be adopted.

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CONCLUSION

WHEREFORE, Respondent James W. Aaron asks this Honorable Court to reverse the referee's ruling relative to Respondent's Motion to Dismiss and his objections to Complainant's Exhibit Number Five and remand this matter to the Referee and or the Tenth Judicial Circuit Grievance Committee "A" for further proceedings.

Additionally, Respondent request that if this Honorable Court affirms the Referee's ruling below, that it accepts his recommendations for discipline of the Respondent herein.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original and seven copies of the foregoing Brief by U.S. Mail to the Clerk of the Supreme Court, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, a copy of the foregoing by U.S. Mail on Co-Counsel David Wilson, III, Post Office Box 3154, FVS, Winter Haven, Florida 33880, a copy to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 and a copy to Branch Staff Counsel David G. McGunegle, The Florida Bar, 605 East Robinson Street, Orlando, Florida on this 7th day of March.

James W. Aaron
Respondent