IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

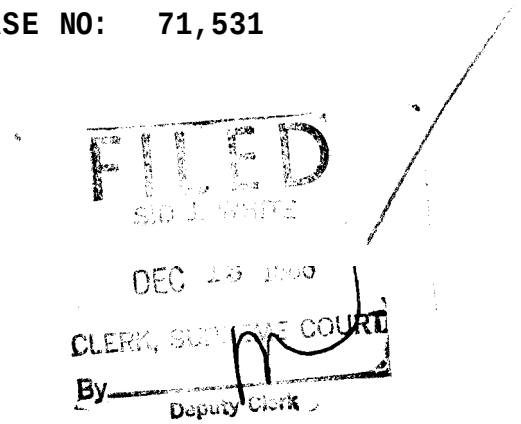
Complainant,

v.

NATHANIEL W. TINDALL, II,

Respondent .

CASE NO: 71,531



RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This disciplinary proceeding is before this Court upon Respondent's Petition for Review of the Report of Referee and is a case of original jurisdiction pursuant to Article V, Section III of the Constitution of the State of Florida.

The case was originally assigned to the Thirteenth Judicial Circuit Grievance Committee "D" and thereafter, the probable cause hearing waived by Respondent and Complainant. Subsequent thereto, Complainant filed a one count complaint against the Respondent which was assigned to the Referee below, the Honorable Robert Boylston, Circuit Judge. Judge Boylston conducted the final hearings in this cause on June 17, 1988, and August 26, 1988, which were followed by his Report of Referee recommending that the Respondent be found guilty of violations of Rule 7-102(A)(1) (asserting a position when it is obvious that such action would serve merely to harass or maliciously injure another) and Rule 8-102(B) (knowingly making false accusations against a judge), of the Code of Professional Responsibility. The Referee further recommended that the Respondent be found not guilty of violations of Rule 7-102(A)(2) and Rule 7-106(C)(6) of the code of Professional Responsibility. Moreover, the Referee recommended the imposition of a public reprimand as discipline for these recommended violations.

On October 14, 1988 Respondent filed his Petition for Review seeking review of the Referee's recommended findings of fact, guilt, and discipline. Thereafter, on November 15, 1988 Respondent filed his Motion for Extension of Time, which was granted and allowed Respondent until December 13, 1988 to file his Initial Brief in this cause.

STATEMENT OF THE FACTS

Abbreviations used in this brief are as follows:

T. = Transcript page of testimony taken at Referee Hearing, June 17, 1988

Resp. EX. = Respondent's Exhibit

Comp. Ex. = Complainant's Exhibit

In 1977, Respondent was approached by a group of people interested in putting together an independent television station in Tampa, Florida under the name of Family Television Corporation. Respondent was told that the group desired his participation in the venture due to Federal Communications Commission (hereinafter FCC) Regulations requiring minority representation. [T. 140]. The stock subscription agreement executed by the corporation provided for no more than ten shareholders, each owning no less than 10,000 shares of common stock. [Resp. Ex. K]. Respondent agreed to participate and initially served on the Board of Directors of the Family Television Corporation and attended at least ten Board meetings. [T. 142, Resp. Ex. O]. However, contrary to the stock subscription agreement, Respondent and Reverend Lowry, another black man participating in the venture, were allowed to purchase only 5,000 shares of stock and never given the opportunity to hold 10,000 as set forth by the agreement. [T. 147, 149, 1501.

At a later date, Respondent encountered further problems with the other shareholders of Family Television Corporation upon attempting to sell a portion of his stock. [T. 145]. In fact, Respondent was required to fill out forms and receive approval of the buyers prior to the sale of his stock. [T. 1451. Additionally, Respondent was required by the group to sell to the law partners of one of the shareholders at a price dictated by the group. In contrast, two other shareholders were allowed to sell their shares without restriction. [T. 1461.

Eventually, Family Television Corporation entered into negotiations with Capital Cities Communications to sell the station and its assets. As a portion of that sale, Capital Cities paid a lump sum of money to the stockholders as noncompete funds. Respondent was told by the principals of Family Television Corporation that he was to receive $31,200.00 in noncompete funds. [T. 1531. However, other participants in the venture received $112,500.00 in noncompete funds. [T. 152]. It was explained to Respondent that membership on the Board of Directors was the criteria for entitlement to the larger portion of the noncompete funds. [T. 152]. However, there were at least four persons who received the larger sum of money who were not members of the Board of Directors of Family Television Corporation, to wit: Beverly Grant, the wife of John Grant; E. Willis Taylor, Skip Hunt, and George Newell. [T. 152, 153].

As a result of what Respondent perceived to be an inequitable distribution of noncompete funds, he filed a declaratory judgment action in the circuit court in Hillsborough County in August of 1984. [T. 20]. During the course of the declaratory judgment litigation, Respondent eventually filed a Motion for Partial Summary Judgment based upon the deposition testimony of Mr. Ian Wheeler, the General Manager and President of Family Television Corporation. [Comp. Ex. 1, T. 25]. On August 21, 1985 a hearing was had on the Motion for Partial Summary Judgment and counsel for Family Television Corporation, Inc. submitted an affidavit of Mr. Wheeler diametrically opposed to the deposition testimony given by Mr. Wheeler and attached to the Motion for Partial Summary Judgment. [Comp. Ex. 2, T. 25 – 28]. Despite the contradictory deposition testimony and affidavit of Ian Wheeler, the trial court denied Respondent's Motion for Partial Summary Judgment. [T. 25].

Thereafter, the litigation between Respondent and Family Television Corporation continued to progress until a hearing on May 15, 1986. At that hearing, Respondent asked the judge to direct attorneys for Family Television Corporation to turn over certain documents. [T. 23, 24]. That request was denied by the trial judge and Respondent was instructed to get the information he requested from the FCC in Washington, D.C. [T. 24]. At the conclusion of that hearing, Respondent accompanied Hugh Smith, Esquire, counsel for Family Television Corporation

back to the building in which both of their offices were located. [T. 29]. During their walk, Hugh Smith informed Respondent that Respondent would never prevail in this litigation because Judge Cheatwood, the presiding Judge and Russell Peaveyhouse, one of the named Defendants, were good friends. [T. 29]. In fact, Respondent later learned that Mr. Peaveyhouse had served as a law clerk in Judge Cheatwood's office, had been to social functions with Judge Cheatwood, and eventually Mr. Peaveyhouse's firm bought Judge Cheatwood's practice when he assumed the bench. [T. 172, 173].

As a result of Mr. Smith's representations, Respondent filed a Motion for Disqualification of Judge Cheatwood in the state court action in June, 1986, setting forth the relationship of Judge Cheatwood and the Defendant, Russell Peaveyhouse. In further support, Respondent offered the contrary testimony and affidavit of Ian Wheeler which resulted in the denial of Respondent's Partial Summary Judgment motion. [T. 32, Comp. Ex. 3]. Although the Motion to Disqualify was scheduled for June 13, 1986 before Judge Cheatwood, Respondent filed a Notice of Voluntary Dismissal immediately preceding the hearing for strategic purposes, due to the pendency of other motions also set for hearing that day. [T. 36, 37].

Subsequently, on December 31, 1986 Respondent refiled his case against Family Television Corporation in the United States District Court and in addition to those matters alleged in the state court action, included allegations that the Family Television Corporation Defendants "had use (SIC) their influence to commit bribery of a public official". [Comp. **Ex.** 5 at p. 21]. Respondent's allegation was predicated upon the perceived close personal relationship between Russell Peaveyhouse and Judge Cheatwood. [Comp. Ex. 3 at p. 21].

Thereafter, Respondent amended his complaint in the United States District Court to include Hugh Smith, Esquire, as a party Defendant. [Comp. **Ex.** 7]. In the Amended Complaint, Respondent again referred to the close personal relationship between Russell Peaveyhouse and Judge Cheatwood, and moreover, again raised the issue of Ian Wheeler's contradictory deposition and affidavit testimony. [Comp. **Ex.** 7 at p. 22].

Meantime, on January 14, 1987 Hugh Smith wrote a letter of complaint to The Florida Bar which spawned these proceedings. [T. 1011.

SUMMARY OF ARGUMENT

The Complainant failed to meet its burden of clear and convencing evidence in the case below due to the fact that it did not call those witnesses who could have testified to the falsity of the allegations brought by Respondent in his various causes of action. Additionally, Respondent's federal case was never decided on its merit and therefore, there has never been a judicial determination that the facts alleged by Respondent were without probable cause, or maliciously brought.

Finally, the Respondent urges that should this Court find that his conduct reaches the level of an ethical violation, the Referee's recommended discipline is entirely too severe in light of past cases decided by this Court.

ARGUMENT

THE REFEREE'S RECOMMENDED FINDING THAT RESPONDENT KNOWINGLY MADE FALSE ACCUSATIONS AGAINST A JUDGE IS NOT SUPPORTED BY THE EVIDENCE PRESENTED BELOW.

The Referee recommended that Respondent be found guilty of violating Disciplinary Rule 8-102(B) by knowingly making false accusations against a judge. The evidence adduced at trial does not support the Referee's findings in this regard.

The reasons the Referee's recommended findings must be overturned with respect to making false accusations against a judge are several. First, neither the Complaint nor the Amended Complaint filed in Federal court by the Respondent accused the judge of any improper behavior. To the contrary, the plain language as set forth in the Complaint and repeated by the Referee in his report is that the Defendants were guilty of "corruptly trying to influence a public official" and "bribery". [Report of Referee at 21. Based on Mr. Smith's constant reference to his clients' position in the community and Mr. Smith's representations as to the relationship between Judge Cheatwood and Mr. Peaveyhouse, the allegations made by Respondent in his Complaint and Amended Complaint were well founded. However, Respondent clearly does not name Judge Cheatwood as a Defendant nor does he accuse him of accepting any bribe attempt. And as Respondent pointed out in his

testimony, the attempt at bribing a public official is violative of the Statute prohibiting bribery. [T. 461. See Craig v. State, 244 So.2d 151 (Fla. 3d DCA 1971). Obviously, Respondent's use of the word "bribery" does not necessarily entail the acceptance of the attempted bribe and therefore does not implicate Judge Cheatwood as the Complainant would have this Court believe.

Assuming arguendo that Respondent did accuse Judge Cheatwood of being a party to the Defendant's corrupt activity, the Referee's recommendation must still be reversed. Clearly, The Florida Bar offered no evidence whatsoever to establish that the accusations made by Respondent were, in fact, false. The Complainant's case consisted of questioning Respondent as to his reasons for filing the Federal law suit, and thereafter, questioning Hugh Smith, Esquire, with regard to his knowledge of the relationship between Judge Cheatwood and Mr. Peaveyhouse. [T. 69, 70]. Although the Complainant could have easily offered testimony from Judge Cheatwood to prove up its case, they did not call him as a witness. Moreover, Complainant did not call Russell Peaveyhouse and question him with respect to his personal relationship with Judge Cheatwood.

It must further be noted that the allegations made by Respondent have never been decided on their merits due to the pendency of the Federal appeal. [T. 791.

Accordingly, it is abundantly clear that Respondent did not accuse Judge Cheatwood of any impropriety in his pleadings against the various Defendants, However, assuming Respondent's allegations could somehow be construed to impugn the integrity of Judge Cheatwood, it has never been shown that those allegations were false in either the Federal Court or the proceeding below.

THE REFEREE'S RECOMMENDED FINDING THAT RESPONDENT ASSERTED A POSITION WHEN IT WAS OBVIOUS THAT SUCH ACTION WOULD SERVE MERELY TO HARASS AND MALICIOUSLY INJURE ANOTHER IS WITHOUT FACTUAL BASIS AND MUST BE OVERTURNED.

The Bar's contention and the Referee's finding that Respondent violated Disciplinary Rule 7-102(A)(1) essentially amounts to a finding that Respondent is guilty of malicious prosecution. The cause of action of malicious prosecution "is one of the most complex of all tort actions, and one of the most difficult to bring successfully". Actions and Remedies, Section 8:01.

The essential elements for malicious prosecution are:

1) Initiation of a prior prosecution.
2) Lack of probable cause.
3) Malice.
4) Favorable termination.
5) Damages.

Id. at Section 8:02.

A quick review of these elements reveals that The Florida Bar can only clearly prove one element, to wit: initiation of a prior prosecution.

The issue of whether or not probable cause existed for Respondent's actions requires a weighing of all of the circumstances which led to the filing of the Federal Court action. Probable cause has been defined in malicious prosecution as "the existence of such facts and circumstances as would excite the belief in a reasonable mind acting on the facts within the knowledge of the prosecutor, that the person

charged was guilty of the crime for which he was prosecuted". Black's Law Dictionary. Given this definition, this court must consider the facts within the knowledge of Respondent to assess whether or not probable cause existed. The facts available to Respondent were that he had been involved in extensive litigation with the Defendants wherein he had met with unfavorable rulings on numerous occasions. Moreover, Hugh Smith constantly referred to the social and professional standing of his clients when addressing the court during motions and other hearings. Moreover, Hugh Smith told Respondent, after one such unfavorable motion hearing, that Respondent would never win because Judge Cheatwood and Mr. Peaveyhouse were goods friends. Also, Respondent thereafter learned that Mr. Peaveyhouse had been a law clerk for Judge Cheatwood, had also socialized with him, and his firm had purchased the Judge's law practice. Thus, it is abundantly clear that the facts within the knowledge of Respondent were sufficient to create the belief in his mind that the Defendants were guilty of the acts of which they were subsequently accused by Respondent.

The next element of malicious prosecution is that the Respondent must have brought the proceeding with malice. Malice has been defined in the law of malicious prosecution as "prosecution . . . instituted primarily because of a purpose

other than that of bringing an offender to justice". Black's Law Dictionary. Moreover, it has been held that malice is inferred when lack of probable cause is proven. Central Fla. Machinery Co., Inc. v. Williams, 400 So.2d 30 (Fla. 2d DCA 1981). As probable cause clearly existed in Respondent's mind based on the various objective circumstances listed above, malice may not be inferred in the incident.

Obviously, the most telling element lacking in this malicious prosecution situation is favorable termination. As outlined previously, Respondent's federal court action is still pending and he may yet prevail on the allegations set forth in his complaint. Even if this court somehow concludes that probable cause was lacking and that malice was present, a malicious prosecution conviction in this cause cannot be upheld due to the pendency of the federal action.

Further evidence that the Respondent's cause of action against the Defendants was not brought maliciously or to harass is that Bar Counsel himself allows that the action could have been brought due to Respondent's misunderstanding of the elements of the charge of bribery. A review of the direct examination by Bar Counsel of Respondent further elucidates this matter.

> Q. What evidence did you have that there was any "other benefits" being provided by the Defendants to Judge Cheatwood?
>
> A. My . . .
>
> Q. Or being offered from Defendants to Judge Cheatwood?
>
> A. As I read the statutes I don't think it has to be anything offered directly.

> What you can do if you try to get someone to not do something that under the law their obligated to do, or perform an official function, whether or not they can actually perform that function, is not the issue. The issue is trying to corruptly get them to do something that they are not supposed to do.
>
> I have never, I have never said anything about Judge Cheatwood. Anything that I said was directed to the conduct of the Defendants only and not to Judge Cheatwood. [T. 451.

Bar Counsel in his final argument, concedes

> "whether it is through inartful drafting or for what . . . or confused in Mr. Tindall's mind as to the elements of bribery, it is still . . . these allegations were filed in a law suit which is a public document in the District Court of the United States District Court up in Tampa, and the only . . . the clear reading of these allegations is that Judge Cheatwood was bribed by these Defendants.

Certainly, if there was a problem with the pleadings filed by Respondent and those problems were a function of inartful drafting then Respondent cannot possibly be guilty of knowingly making false accusations, nor could he be guilty of filing an action which would serve merely to harass and maliciously injure another. If Bar Counsel himself is not convinced that Respondent knowingly and willfully engaged in violations of the two Rules listed, it is inconceivable this Court can find that the Bar proved by clear and convincing evidence that the Bar carried its burden.

THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS TOO SEVERE IN LIGHT OF PAST CASE LAW.

Assuming that the Court finds that Respondent acted improperly, the imposition of a public reprimand is far too severe a punishment to impose. In The Florida Bar v. Clark, 528 So.2d 369 (Fla. 1980), this Court issued a public reprimand on facts tenfold more egrigious. The facts of Clark are that the respondent accused each and every circuit judge of the Eleventh Judicial Circuit of the State of Florida with engaging in a pattern of racketeering activity. The respondent's allegation was apparently predicated upon one judge's rulings against respondent, as well as ex parte communications between the judge and opposing counsel. There is no apparent nexus between the conduct of the one judge and the other several dozen judges of the Eleventh Judicial Circuit so accused. Additionally, in an unrelated matter the respondent appealed a speeding ticket to the Circuit Court of the Fifth Judicial Circuit, the Fifth District Court of Appeals, the Florida Supreme Court, and the Supreme Court of the United States. In fact, the United States Supreme Court denied his appeal as being "so utterly frivolous as not to warrant any further discussion". Id. at 371.

Mr. Clark received a public reprimand for leveling the racketeering charge against each judge in the Eleventh Judicial Circuit and frivolously appealing the speeding ticket. Only one of those judges charged had any involvement with the case of which the respondent felt aggrieved. Additionally, Mr. Clark took a speeding ticket from the county court all the way to the United States Supreme Court, a process which took nearly two years.

Conversely, in the case at bar, Respondent did not accuse Judge Cheatwood of any improper conduct. To the contrary, Respondent accused several Defendants of improperly trying to influence and bribe Judge Cheatwood. Additionally, there were numerous facts and circumstances upon which Respondent relied in making the allegations he made.

For The Florida Bar to be satisfied with a public reprimand in the Clark case and thereafter request the same punishment for Respondent is grossly unfair. Respondent respectfully suggests that should any discipline be deemed necessary that a private reprimand is more than appropriate given the contrast in factual situations from the ~~sub~~ judice and the Clark case.

CONCLUSION

The Complainant has the burden of clear and convincing evidence to prove the allegations in its complaint. The Complainant did not prove that Respondent knowingly made false accusations against the Judge inasmuch as the Bar did not even call the Judge or the party to whom the Judge was allegedly closely aligned. Moreover, the Bar pitifully failed to prove that Respondent filed an action merely to harass or maliciously injure inasmuch as the litigation upon which the Complainant's allegations are predicated is still pending and thus has not been favorably terminated on behalf of the Defendants.

At the hearing, Complainant repeatedly referred to Respondent's paranoia in both its opening statement and final argument, as a cause for Respondent's actions and yet asks this Court to discipline Respondent based on knowing and willful violations of the Code. [T. 4, 199, 200]. The two positions taken by Complainant are, of course, untenable.

Due to the Bar's failure to carry its burden in the cause below the case against Respondent should be dismissed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U. S. Mail delivery this 12 day of December, 1988, to: Mr. Richard Greenberg, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607.

SCOTT K. TOZIAN, ESQUIRE