SUPREME COURT OF FLORIDA

No. 76,395

THE FLORIDA BAR,

Complainant

vs.

T. CARLTON RICHARDSON

Respondent

REPLY BRIEF IN SUPPORT OF
PETITION FOR REVIEW OF REPORT OF REFEREE
THE HONORABLE THOMAS E. PENICK, JR.

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REPLY ARGUMENTS

Upon review of the Florida Bar's ["Bar"] Answer Brief, the respondent replies to the following contentions: (1) that the respondent's challenge to the grievance committee proceedings is untimely since respondent did not oppose the grievance committee panel's finding of probable cause before the panel's designated reviewer, (2) that hearsay is admissible in disciplinary proceedings under any circumstance and (3) that the respondent did not file a motion for rehearing before the referee in order to present mitigation in regard to discipline.

1. Review Proceedings Timely.

Review "proceedings shall be commenced by filing with the Supreme Court of Florida a petition for review, specifying those portions of the report of the referee sought to be reviewed." Fla. Bar R. 3-7.6(c)(1). Does the respondent waive his right to review of the proceedings before the grievance committee panel by failing to raise this issue before the designated reviewer of the Bar's Board of Governors? There is no requirement in the disciplinary rules requiring as a condition precedent to raising the issue on review before this Court that it be first brought before the designated reviewer. Review is "of a report of a referee...or any specified portion thereof". 3-7.6(a)(1) This objection was first raised before the referee, who denied the relief requested and this denial formed the basis for the request for the review.

Furthermore, the designated reviewer is agent of the Board of Governors who is involved in its own internal proceedings preliminary to commencement of disciplinary proceedings against

an accused attorney. 3-7.4(a) and (b) The Board, upon a findings of probable cause by a grievance committee panel or upon its own independent review of the record can find probable cause. Fla. Bar R. 3-7.4(a); .4(c); .4(e) Where the grievance committee panel finds probable cause the record of the investigation and a formal complaint must be prepared. Fla. Bar R. 3-7.3(j) If there is disagreement as to the contents of the complaint, it is to be referred to the designated reviewer. Id.; Fla. Bar R. 3-7.4(b) The designated reviewer, whether there is a disagreement or not, makes an independent assessment of the investigation record and complaint and forward's his/her recommendation to the "disciplinary review committee" if the reviewer disagrees with the committee's findings and draft complaint which then makes a recommendation to the full Board which can accept, reject or modify the grievance committee's findings. Id.

Since the disciplinary rules do not expressly prohibit the respondent from petitioning the designated reviewer to disagree with the findings of the grievance committee panel if adverse, then, the reviewer in his/her discretion could have considered the respondent's objections to the grievance committee's proceedings if submitted. However, the problem here lies in a basic and fundamental principle of due process: notice! The respondent had no prior notice of the transmission of the record and complaint to the reviewer nor copies of the record and the complaint or abstract thereof. Furthermore, a designated reviewer has no power to reverse the decision of the grievance committee panel, neither does the "disciplinary review committee" of the Board, but only

the Board itself. It is assumed that the Bar is suggesting that the respondent, without notice of any proceedings before the reviewer, the Board's disciplinary review committee or the Board itself, that the respondent should have appealed administratively to have the ruling of the grievance committee reversed as opposed to simply applying to the referee for the identical relief. It is not the action of the Board that is reviewed by this Court, but the action of the referee. It was not the Board who failed dismiss the complaint because of the defective proceedings before the grievance committee, it was the referee. Unless the rules specifically require that such issues surrounding the regularity of the proceedings before the grievance committee be first raised within the administrative process leading up to the filing of the formal complaint against the respondent, it stands to reason that the respondent is not required to do so and therefore, has not waived any precondition to having the regularity of the proceedings before the grievance committee questioned upon review as a violation of his due process guarantees under the Federal and State Constitutions.

2. Admission of Hearsay Violates Due Process.

In its reply the Bar contends that "this Court has held that hearsay is admissible and there is no right to confront witnesses face to face" citing The Fla. Bar v. Vannier, 498 So.2d 896 (Fla., 1986). Bar's Answer Brief at 15. This is an incorrect statement of the "Florida Rule" on the right of confrontation in bar disciplinary proceedings. The correct statement of the "Florida Rule" under its case law is that hearsay is admissible if "adequately authenticated and its reliability established."

Id. at 898. In the seminal case State v. McRae, 38 So. 605 (Fla., 1905), this Court held:

> "a disbarment proceedings is not such a criminal prosecution as requires the accused attorney to be confronted face to face with the witnesses against him, but that the deposition of an absent or non-resident witness on behalf of the state, if competent otherwise, when taken upon a commission and written interrogatories, is competent and admissible evidence in such cases." Id, at 607

Where a deposition of a non-resident or absent witness is taken upon written interrogatories, the accused attorney is accorded the opportunity to propound cross-interrogatories. This maintains the adversarial nature of the proceedings and allows the accused attorney to cross-examine out-of-court declarants. The playing field is level, neither the Bar nor the accused attorney has an advantage. In this case, both Judge Alvarez and the Assistant Attorney General who prepared the objected admissions were residents of Florida and available to testify and no hardship was claimed in compelling their testimony.

Following McRae, this Court held in State v. Junkin, 89 So.2d 481 (Fla., 1956) that:

> "'depositions of an absent or nonresident witness, regularly taken under the statute on commission and written direct and cross interrogatories' are admissible in a disbarment action. *** In [McRae], however, it is clear that the issue was confrontation of the accuser, and not the reliability of the evidence." Id. at 482 (Emphasis supplied)

No opportunity was accorded the respondent in this case to direct any cross interrogatories to the declarants of the two documents whose admission was objected to. Having failed to establish the authenticity and reliability of the contents of the documents

sought to be admitted as hearsay, the exception to the "Florida Rule" that there is a qualified admission of documentary hearsay if authentic and reliable does not apply and the receipt by the referee was prejudicial to the respondent and denied due process.

The reasoning in the "Florida Rule" starts from the premise that disciplinary proceedings are not criminal and thus the 6th Amendment right to confrontation under the Federal constitution does not apply. However, the basis of the respondent's objection lies in his 5th Amendment right to due process under the Federal Constitution, which provides that "(n)o person shall *** be deprived of life, liberty, or property, without due process of law". A license to practice law is protected under the Due Process Clause of the 14th Amendment. Leis v. Flynt, 439 U.S. 438 (1979). Hearsay within the context of the Confrontation Clause of the 6th Amendment and the Due Process Clause of the 5th Amendment "overlay...when statements of out-of-court declarants cannot be refuted by cross-examination". United States v. Fatico, 579 F.2d 707 (2d Cir., 1978), inter alia, cert. den. 440 U.S. 910 (1979) Both constitutional guarantees safeguard the fairness of court proceedings "by defining the situations in which confrontation by cross-examination must be afforded the defendant". Id, inter alia Where cross-examination of a declarant of an out-of-court statement is denied, it is difficult to assess the probative force of the information relied upon, i.e. its credibility, and the information is biased and lacks reliability. Id. Whether this Court applies the "Florida Rule" of a qualified exception to the hearsay rule or its outright prohibition under the due process

clause of the 5th Amendment as made applicable to the States under the 14th Amendment, the admission of the hearsay evidence denied respondent due process and this Court, consistent with its duty to preserve fairness in proceedings involving the deprivation of property rights must disapprove the referee's findings as based upon biased and unreliable documentary evidence.

3. Rehearing Before Referee Barred.

While the rules do not expressly provide for rehearing or reconsideration before the referee, it can be assumed by reference that since the Florida Rules of Civil Procedure applies, where not in conflict with the disciplinary procedural rules, that such a relief was available to the respondent. However, "lex non praecipit inutilia" (the law does not require the doing of a useless act)! Such a reconsideration would have been a futility for several reasons: first and foremost, the respondent had no prior notice of the referee's report, a serious due process omission; second, there was insufficient time to file for such reconsideration since the referee was under this Court's order to complete his work within days of the referee's transmission of the record and his report; third, there is no requirement in the disciplinary rules that such must be done or the objection is waived on review; and finally, while a separate hearing regarding imposition of discipline upon a finding a guilt is not required, a hearing is:

> "after a finding of guilt all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent" Fla. Bar R. 3-7.4(k)(1)(3) [Parentheses omitted and emphasis supplied.]

Furthermore, the referee must recommend discipline by applying the A.B.A. Standards for Imposing Lawyer Sanctions, similar to the criminal law sentencing guidelines. It's purpose is to provide consistency in discipline imposed for similar offenses thus according equal treatment under the disciplinary rules for the same or similar offense. Due process and equal protection guarantees require such uniformity of disposition under the disciplinary rules pursuant to guidelines promulgated by this Court such as the A.B.A. Sanctions publication and its decisions, otherwise the penalties imposed in disciplinary proceedings would become arbitrary and capricious and subject to the uncontrolled discretion of the referee. Clearly in this instance, the referee failed to accord the respondent's due process rights, the final hearing consisting of both the receipt of evidence as to misconduct, if found guilty, and as to the nature of the discipline imposed and is adversarial in all aspects and not just as to the misconduct and not penalty phase of the final hearing. Denial the right of respondent to object to the proposed discipline in a timely and meaningful manner, requires that this Court disapprove the referee's recommendation for discipline.

Conclusion

There is no requirement that the respondent exhaust the internal administrative procedures leading up to the filing of the formal complaint before the Board of Governors, including filing a discretionary request before the designated reviewer to disagree with the probable cause findings of the grievance committee panel since the disciplinary rules of procedure do not expressly provide for such an appeal proceeding, the internal administrative

procedures do not envision the involvement of the an accused attorney in the decision-making process of the Board there being no notice requirements or other remedial procedures. Hearsay is inadmissible in disciplinary proceedings if the respondent is denied the opportunity to cross-examine the declarant upon deposition by oral or written questions. For admission of the hearsay, the Bar must justify the failure to produce the declarant of the out-of-court statement. Having failed to accord respondent an opportunity to extra-judicially cross-examine the declarants of the hearsay documents and to justify the inability of the witnesses to be present, the referee's admission of the hearsay documents was error. Likewise, the respondent is not required to affirmatively request ex post facto a reconsideration by the referee of the sanction to be imposed for the disciplinary rule violation since the final hearing is not exclusively for the determination of guilt, but is also designed to accord the respondent an opportunity to present evidence to correct, modify, or change a proposed sanction under this Court's guidelines and/or caselaw.

Consistent with this Court's duty to guarantee fundamental fairness in the disciplinary proceedings whether before the grievance committee panel or the referee as required by the due process and equal protection clauses of the Federal and State Constitutions, disapproval of the referee's report in all aspects is commanded. Respectfully submitted:

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Certificate of Service

This certifies that a copy of the foregoing Reply Brief was delivered by mail to: Bonnie L. Mahon, Esq., The Florida Bar, Airport Marriott Hotel, #C-49, Tampa, Florida 33607 on this 10th day of July, 1991.

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