IN THE SUPREME COURT OF FLORIDA

WILLIAM F. DANIEL,

Petitioner,

vs.

THE FLORIDA BAR,

Respondent.
_____/

Case No. 78,063

TFB File No. 90-00298-02

ANSWER BRIEF

JAMES N. WATSON, JR.
Bar Counsel, The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney Number 0144587

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authorities Cited

TABLE OF CITATIONS

Other Authorities Cited (Continued)

PRELIMINARY STATEMENT

Appellant, **William F. Daniel**, will be referred to as Petitioner or Mr. Daniel throughout this Brief. The Appellee, **The Florida Bar**, will be referred to as Respondent or the Bar.

References to the final hearing before the Referee on January 14, 1992 shall be by the symbol "TR" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Pursuant to Rule 9.210(c), Florida Rules of Appellate Procedure, The Florida Bar is submitting a separate statement of case and facts section with its Answer Brief due to disagreement with certain statements and facts presented by Petitioner, William F. Daniel.

Petitioner failed to reference specific pages within the transcript that would show support for his factual statements and has included legal arguments within this section that are inappropriate and not provided for within Rule 9.210(b)(3), Florida Rules of Appellate Procedure.

Based upon a finding of probable cause, a formal complaint was filed against Petitioner in this matter. As shown by the certificate of service on the formal complaint herein, Petitioner was served with a copy of the complaint by certified mail to his record Bar address of Post Office Box 12, 418 E. Virginia Street, Tallahassee, Florida 32302-0012.

Petitioner acknowledged receiving the Respondent's mailing wherein the copy of its formal complaint and request for admissions were contained. (TR-3)

At the same time as the formal complaint herein was filed and served upon Petitioner, a second formal complaint was likewise filed and served against Petitioner in Supreme Court case no. 78,065.

Both filings of the formal complaints referred to herein were done in accordance with the provisions of Rule 3-7.4(j), Rules of Discipline.

After receiving no response from Petitioner as to neither its Complaint or Request for Admissions in this matter, Respondent filed it's Motion to Deem Matters Admitted and Motion for Summary Judgment with the Referee. As per the certificate of service, the aforementioned pleading was served on Petitioner at his record Bar address of Post Office Box 12, 418 East Virginia Street, Tallahassee, Florida, by certified mail on October 28, 1991. (TR-27)

Petitioner was noticed three times, i.e., October 28, 1991, November 5, 1991, and November 13, 1991, that the mailing containing Respondent's motions were being held by the post office. (TR-27) Petitioner failed to claim the Bar's motions and they were returned unclaimed.

This matter was noticed for hearing on Respondent's Motion To Deem and Motion for Summary Judgment by the Referee for January 14, 1991. The Notice of Hearing signed by the Referee was not dated as to when it was signed or mailed by the Referee. In questioning Petitioner as to his receipt of the Notice of Hearing, Petitioner admitted that he had received the Notice of Hearing more than a week before the hearing and that he "was aware of the Notice of Hearing for some period of time." (TR-28)

On the day of the hearing, Petitioner filed a pleading entitled Special Appearance to Contest Jurisdiction. Petitioner

alleged therein the Referee lacked jurisdiction to hear the cases against Petitioner since he had not been served with a "filed" copy of the complaints, citing Section 48.011, Florida Statutes, (1989).

During the course of the hearing, Petitioner also argued oral motions for continuance and a motion for recusal of the Referee. Both of these arguments were rejected by the Referee and addressed in the Referee's Order of February 27, 1992. (T-23; 31-32)

After finding The Florida Bar had effected proper service of its Complaint and Request for Admissions, as well as its Motion for Summary Judgment, the Referee heard arguments as to the violations cited in the complaint. (T-33)

Based upon the admitted facts, the Referee found Petitioner guilty of the charged offenses and cited rules within the complaint. (T-51)

At the request of Petitioner, the Referee deferred argument on the appropriate discipline and entered an initial Referee's report as to his findings of fact and determination of guilt.

Subsequent to the entry of the order by the Referee on Petitioner's motions and the Initial Report of the Referee, Petitioner filed his Petition for Review of the Referee's findings. Respondent herein filed a Motion to Dismiss the Petition for Review as an impermissible interlocutory appeal of a non-final order. This motion is presently pending before the Court.

In his Statement of Facts, Petitioner makes the statement he is unable to refer to The Florida Bar's Motion to Deem Matters Admitted and for Summary Judgment since he has never seen such motions to date. Such a statement is misleading since the Referee inquired of Petitioner at the hearing if he made any effort to obtain copies of the Bar's motions after receiving the notice of hearing, to which he responded "no." (TR-30) Petitioner was also offered a recess during the hearing by the Referee to be allowed an opportunity to review the Bar's motions, which he refused. (TR-32) Petitioner also chose not to order a transcript of the proceedings from the court reporter and obtained a copy thereof from the Bar on April 21, 1992, subsequent to filing his request for an extension of time. Petitioner could have requested copies of the Bar's Motion at the time he ordered a copy of the transcript or obtained copies from the Referee.

SUMMARY OF ARGUMENT

The Florida Bar served its formal complaint and admissions request upon Petitioner, as provided for within the Rules of Discipline of The Florida Bar.

The Referee had jurisdiction to hear all matters presented within the formal complaint and its Motion for Summary Judgment and Motion to Deem Matters Admitted.

The service of the Bar's Motion to Deem and Motion for Summary Judgment was served pursuant to proper procedure under the appropriate rules, and Petitioner was given reasonable notice.

Petitioner was afforded proper and timely notice of the hearing held on January 14, 1992.

Upon hearing arguments of counsel, the Referee properly denied Petitioner's Motion for Continuance and Motion for Recusal.

ARGUMENT

POINT ONE

PETITIONER WAS EFFECTIVELY SERVED WITH THE FORMAL COMPLAINT AND REQUEST FOR ADMISSIONS

Petitioner herein argued before the Referee and to this Court that he had not been effectively served with the formal complaint and admissions request in this matter. As a result, the Referee lacked jurisdiction to hold the hearing on the Bar's Motion to Deem Matters Admitted and Motion for Summary Judgment.

Respondent mistakenly relies upon the belief that jurisdiction in formal Bar disciplinary proceedings commences only upon a Bar member being served with a filed copy of the complaint. Petitioner argues that since the complaint he received from The Florida Bar did not have a Supreme Court file number affixed to it, he was not under the jurisdiction of this Court to respond to either the Complaint or the Bar's Request for Admissions.

In support of his claim, Petitioner relies upon Rules 3-7.5(g)(i) and 3-7.5(2), Rules of Discipline and Rules 1.050 and 1.070, Florida Rules of Civil Procedure.

The formal complaint in this matter was commenced upon a finding of probable cause by the appropriate grievance committee. The finding was made upon a Notice of Review, pursuant to Rule 3-7.4(g) of the Rules of Discipline, which was

served upon Petitioner with a copy of the record to be reviewed by the grievance committee.

Petitioner is mistaken in his reliance upon Rules 3-7.5(g)(i) and Rule 3-7.5(2). These rules were superseded by the Rules effective June 30, 1991. Also, Petitioner has miscited the rule provision of Rule 3-7.5(2). Apparently Petitioner was meaning to cite to Rule 3-7.5(g)(2).

Under the current rules, Rule 3-7.4(j), Rules of Discipline provide in pertinent part that:

> **"When a formal complaint is not referred to the designated reviewer, or returned to the grievance committee for further action, the formal complaint shall be promptly forwarded to and reviewed by bar headquarters staff counsel who shall file the formal complaint, furnish a copy of the formal complaint to the respondent, and a copy of the record shall be made available to the respondent at his or her expense."**

The rules do not specifically require that a filed or docketed copy of the formal complaint be served upon a respondent. At the time the formal complaint is filed with the Supreme Court, a cover letter is sent to the Clerk with the complaint asking the complaint be filed and a referee be appointed. A copy of this transmittal letter was also mailed to Petitioner.

Petitioner was also sent a copy of the docketing memorandum from the Clerk of the Supreme Court on June 11, 1991 showing the formal complaint was filed June 10, 1991.

Petitioner also argues that no jurisdiction attached in this matter since Respondent was not personally served with a copy of the complaint after it was filed with the Court. In support of this argument, he cites Rules 1.050 and 1.070, Florida Rules of Civil Procedure.

This argument is incorrect for two reasons. First, the Rules of Civil Procedure only attach after the appointment of a referee and apply except as otherwise provided in the rule. Rule 3-7.6(e)(1), Rules of Discipline. Second, Rule 3-7.11(b)(c), Rules of Discipline, provides that effective service of process is obtained by the certified mailing of the complaint upon respondent to his last known record bar address.

Since the procedure for effecting service of process upon Bar members is specifically provided for by Rule, Petitioner's assertion that any statutory rule or rule of civil procedure takes precedent is erroneous and misplaced.

Petitioner also argues that he was denied due process in the instant proceeding and such denial should negate the Referee's finding that he had jurisdiction to hear this matter.

Rule 3-7.11(c), Rules of Discipline provides that:

> **Notice in lieu of process.** Every member of The Florida Bar is within the jurisdiction of the Supreme Court of Florida and its agencies under these rules, and service of process is not required to obtain jurisdiction over respondents in disciplinary proceedings; but due process requires the giving of reasonable notice and such shall be effective by the service of the complaint upon the respondent by mailing a copy thereof by registered or certified mail return receipt requested to the last-known address of the respondent according to the records of The Florida Bar or

such later address as may be known to the person effecting the service.

In order for due process in these proceedings to be met, Petitioner was required to be given reasonable notice. Petitioner received the certified mailing from the Bar with the formal complaint, request for admissions and cover letter to the Clerk of the Court. Petitioner was also mailed the docketing memorandum of the formal complaint by the Clerk's office. Petitioner was also notified of the appointment of the Referee. It is abundantly clear that Petitioner was given reasonable notice that a formal complaint had been filed against him.

Petitioner fails to allege how the fact he did not receive a copy of the complaint after it was filed was harmful to his case. There has been no allegation that there were any discrepancies between the copy served upon him and the original filed in the Court.

Petitioner has argued that under this Court's ruling in Neal v. Bryant, 149 So.2d 529 (Fla. 1962), the finding of the Referee as to jurisdiction is in error and should be reversed. In Neal, this Court held that where there is procedural departure from statutory guidelines then the matter should be remanded for compliance with such statutory guidelines.

The holding in Neal is not persuasive in this matter since The Florida Bar followed the guidelines set forth in the Rules of Discipline, as promulgated by this Court.

Petitioner has made a frivolous and delaying argument as to why he should not be held accountable for his own actions.

Petitioner was under the jurisdiction of this Court at all times and received the required reasonable notice of such pending action on numerous occasions so that there can be no due process argument.

Petitioner was aware of the existence of this complaint since June 17, 1991. The Referee was appointed in this matter June 19, 1991. Petitioner at no time raised his jurisdictional defense until the formal hearing set on the Bar's motions.

The assertions Petitioner makes as to admissions by the Bar that it did not follow procedural requirements of the Rules is a misstatement of the facts and is error. All the record shows is that the Bar made admissions as to Petitioner not receiving a copy of the complaint after its having been filed and that Petitioner was not personally served. Any other characterization of the argument of counsel as an admission of departure from procedure is absurd and should be disallowed. The perception that Petitioner has as to what counsel for the Bar "admitted" to is merely his interpretation as to how he would like the Rules to read so as to relieve himself of his own neglect.

POINT TWO

SUMMARY JUDGMENT IS APPROPRIATE UNDER THE RULES OF DISCIPLINE

Petitioner is attempting to argue that the Referee committed error by granting the Bar's Motion for Summary Judgment. As a basis for this argument Petitioner states that such a procedure is not provided for within the Rules Regulating the Florida Bar and that such procedure does not allow the opportunity to make a full record to review.

Rule 3-7.6(e)(1), Rules of Discipline specifically provides that once a formal complaint has been filed and forwarded to a referee for hearing, that the Florida Rules of Civil Procedure apply except where otherwise provided in this rule. Under the Florida Rules of Civil Procedure, Rule 1.510(c) provides for summary judgment in a matter where it is shown there is no genuine issue as to any material fact and that moving party is entitled to a judgment as a matter of law.

In the instant matter Petitioner failed to respond to the Bar's Request for Admissions wherein the facts and admissions requested from Petitioner were deemed admitted pursuant to Rule 1.370(a), Florida Rules of Civil Procedure.

In the present case, the Bar served a copy of its Requests for Admissions upon Petitioner at the time the formal complaint was served, June 10, 1991. Pursuant to the Florida Rules of Civil Procedure, Petitioner was given forty-five (45) days in which to answer the requests before the Bar moved for summary judgment.

Based upon Petitioner's lack of response, the matters requested admitted by the Bar were deemed admitted. These facts form the findings within the Referee's Initial Report upon which he made his recommendation that Petitioner be found guilty of the cited rule violations. This factual basis and the exhibits admitted into evidence on summary judgment are clearly sufficient to establish a full record for this Court's review in the event the final referee's report should be appealed.

Petitioner's argument as to the Bar's having failed to properly serve the Motion for Summary Judgment was also made under his first point. The Bar would again argue that Petitioner was served under the provisions of Rule 3-7.11(b)(c), Rules of Discipline. At the hearing Petitioner claimed to have been sick during the entire time the postal service had attempted service on Petitioner. (TR-27) Petitioner was given notice of the package on October 28, 1991, November 5, 1991 and November 13, 1991. Petitioner made no claim that there was no one else that could have retrieved this mail for his law offices.

As provided for under Rule 3-7.11(b)(c), Rules of Discipline, all that is required for sufficient service is the mailing of such pleadings by certified mail, which was done by the Bar.

In The Florida Bar v. Bergman, 517 So.2d 11 (Fla. 1987) the question of proper notice was addressed and this Court held that proper notice and service of a complaint and other pleadings was effected where the Bar had sent such pleadings in the prescribed

manner to the attorney's record bar address. Also in Bergman, this court commented on the fact that such argument of improper service would fail when the attorney had actual notice of disciplinary charges.

As in Bergman, the Petitioner herein was served with a copy of the complaint and had actual notice of the charges. The Bar followed the prescribed procedures in mailing its Motion for Summary Judgment by certified mail to Petitioner's record bar address and Petitioner knew of the Motion by his acknowledged receipt of the Notice of Hearing.

It is also the well established practice of this Court to use a record established through matters deemed admitted by a respondent's failure to respond to the Bar's requests. The Florida Bar v. Greene, 515 So.2d 1280 (Fla. 1987); The Florida Bar v. Sparks, 513 So.2d 1051 (Fla. 1987); The Florida Bar v. Hollingsworth, 376 So.2d 394 (Fla. 1979).

The Bar gave Petitioner proper service and notice of the pleadings and hearing; therefore entry of a summary judgment by the referee was proper and not in error.

POINT THREE

PETITIONER RECEIVED PROPER NOTICE OF HEARING ON BAR'S MOTIONS

Petitioner argues that the record in this matter shows that he did not receive proper notice of the hearing on the Bar's motions as required by Rule 3-7.6(h), Rules of Discipline of The Florida Bar.

Rule 3-7.6(h), Rules of Discipline references the notice required for the final hearing in disciplinary cases before a referee. In the instant matter Petitioner was being noticed of a hearing on a Motion to Deem Mattes Admitted and Motion for Summary Judgment and not a final hearing on the Complaint. This is clearly illustrated by the fact that the Referee only entered an initial report and set the matter of discipline to be heard on the Bar's complaint.

Under the general rules of procedure of The Rules of Discipline, Rule 3-7.11(c) provides that due process only requires the giving of reasonable notice. While the rules of civil procedure are not applicable here, the rule cited by Petitioner, Rule 1.090, Florida Rules of Civil Procedure, provides in subsection (d), notices of hearing on motions should be served a reasonable time before the hearing.

In the case of McMurrain v. Fason, 573 So.2d 915 (1st DCA, 1990) it was held that seven days notice was a sufficient and reasonable amount of time on a motion to dissolve a prejudgment writ of replevin.

This Court has held that it is fundamental that due process guarantees to a party notice and an opportunity to be heard before his rights are taken away. Mayflower, Inc. Co. v. Brill, 137 Fla. 287, 188 So.205 (1939).

Petitioner herein admits receiving notice of the hearing and was given an opportunity to be heard. There was no violation of Petitioner's due process rights.

In the instant matter, Petitioner admitted under questioning by the Referee that he had received notice of the hearing on the Bar's motions more than seven (7) days prior to the hearing. (TR-28) The Referee asked Petitioner if he had received the notice more than a week before the hearing and the Petitioner replied:

> Mr. Daniel: Oh, yes. It's been .... it's been.. in terms of the Notice of Hearing, I was aware of the Notice of Hearing for some period of time.

A review of the record shows that this argument is merely an afterthought by Petitioner and was not raised at the hearing on the Bar's motions.

It is clearly evident that Petitioner received reasonable notice of the hearing on the Bar's motion. The mere allegation that Petitioner did not receive at least ten days notice of such hearing is not sufficient to set aside the Referee's Order and Initial Report.

POINT FOUR

REFEREE DID NOT ERR IN DENYING PETITIONER'S ORE TENUS MOTION FOR CONTINUANCE

A review of the transcript of the hearing which is the subject of the appeal clearly shows a succession of events that are in conflict with Petitioner's allegations.

Petitioner's challenge to the Referee hearing the Bar's Motion for Summary Judgment and Motion to Deem Matters Admitted was on the basis of non-service. (TR-28) At no time did Petitioner ever raise the challenge of lack of reasonable notice as to the hearing he attended.

Petitioner argues he had never seen a copy of the Bar's motions so as to properly prepare for such hearing. The Referee found that under the procedures of Rule 3-7.11(b)(c), Rules of Discipline, proper service had been effected upon Petitioner and reasonable notice given. Petitioner admitted receiving the Notice of Hearing on the Bar's Motions (TR-25; 28) but made no effort to obtain copies of the Bar's motions prior to the hearing. (TR-30)

The facts show Petitioner had been aware for at least six months that there were discipline proceedings pending against him. He had received reasonable notice of a hearing against him for summary judgment, the motions of such clearly citing to the cases he was on notice of having been filed. Rather than file a written motion to continue this matter on the arguments made at hearing Petitioner shows up on the day of hearing contesting the

jurisdiction of the referee on written motion. Only after the denial of such jurisdictional argument does Petitioner seek a continuance on lack of service of the motions.

The denial of a stay or continuance by the Referee cannot be seen as an abuse of discretion or a denial of due process. Petitioner chose the method to contest the hearings and cannot now argue that such a method of his own calling was improper.

POINT FIVE

THERE WAS NO ILLEGAL CONSOLIDATION OF DISCIPLINARY CASES

Without referencing a specific rule or case authority, Petitioner has alleged this Court illegally consolidated the two cases filed against Petitioner.

Petitioner again has misrepresented facts to this Court in his argument. Petitioner states on page 22 of his brief that he was prejudiced by the Referee filing one consolidated notice of hearing in both his cases. A review of the files shows that separate notices of hearing were mailed by the Referee.

Petitioner then cites other factors that he argues prove an illegal consolidation. These include a single transcript of the proceedings, both cases were being at a single hearing and a single order citing both case numbers being entered by the Referee.

Petitioner fails to cite any authority as to how these matters are improper or how such prejudices his position.

Petitioner filed two identical motions as to his arguments to the Referee herein and in general failed at hearing to differentiate between the two cases.

The matters before this Court through the formal complaints were the results of probable cause findings at a single grievance committee meeting. Both cases were filed at the same time so there can be no argument that the Bar had been holding either matter so as to "stack" these cases to enhance any

requested discipline. Petitioner's argument that the Bar sought any specific result by filing these cases jointly is baseless.

The assignment of these cases were made to a referee under one order and the handling of both cases is entirely in the economy of justice and is at the savings of costs to the Petitioner as well.

The findings and recommendations of a referee are not final and the ultimate decision as to any discipline rests with the Court. It is clearly within the Court's authority to consider not only past discipline but multiple violations so that it does not matter how the cases are forwarded for consideration.

In making his argument to the Referee for recusal, Petitioner failed to show any basis for alleging bias or any basis for the Referee to recuse himself.

Rule 3-7.6(g)(8), Rules of Discipline, provide the procedure whereby a referee may be disqualified. Under Rule 1.432, Florida Rules of Civil Procedure, such motion must allege facts relied upon for disqualification and must be verified. Petitioner did not do this. Petitioner made a blanket charge of prejudice arguing that the Referee could not humanly hear two cases and not be improperly influenced in making an ultimate decision. The Referee properly rejected Petitioner's motion and his order denying Petitioner's motion to recuse was correct and should be affirmed.

CONCLUSION

The procedures provided for within the Rules of Discipline of The Florida Bar for effecting reasonable notice of pending disciplinary matters were complied with by The Florida Bar and the Referee had jurisdiction over Petitioner to hear all matters noticed for hearing.

Petitioner was given reasonable notice of all matters pending before the referee and the Referee committed not error in denying the challenge of Petitioner as to jurisdiction.

Petitioner's arguments as to lack of proper rule notice fails under his own admissions as to the timeframe in which he received the Notice of Hearing.

The assignment of both the cited cases herein to a single referee was not an illegal consolidation by the Court. There was no showing of an improper motive by The Florida Bar in filing these simultaneously.

The Referee's denial of a continuance was not an abuse of discretion.

The Referee properly denied Petitioner's motion to recuse himself in view of the fact there was no proper grounds presented other than unsubstantiated bias.

The order of the Referee and his initial report should be affirmed and a final hearing held as to the limited matter of appropriate discipline.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. 78,063 has been forwarded by regular U.S. mail to **WILLIAM F. DANIEL**, Respondent, at his record Bar address of 418 East Virginia Street, Post Office Box 0012, Tallahassee, Florida 32302-0012, on this 20th day of May, 1992.

JAMES N. WATSON, JR., Bar Counsel