047

IN THE SUPREME COURT OF FLORIDA

The Florida Bar,
Complainant

v.

Lane W. Vaughn,
Respondent.

Case No. 78, 590
(TFB Case **No.**
91-30,857 (18C)

INITIAL BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF THE CASE

This case arose out of Respondent's representation of a client, Mitchell Eric Miller in a criminal matter in approximately August, 1990. The complaint was initially forwarded to Grievance Committee 18 (C) which found probable cause for further proceedings and a formal complaint was filed by Bar Counsel. After a hearing on November 15, 1991, the Referee found Respondent not guilty on all of the Bar's charges, however found him guilty of a separate offense not alleged in the Bar's complaint; that of failure to cooperate with The Florida Bar in its investigation and subsequent processing of the disciplinary case.

It is this aspect of the referee's report that Respondent seeks to have reviewed by this court, as well as the recommendation that Respondent be suspended from practice for thirty (30) days and be required to pay the costs of the disciplinary proceedings.

ISSUE ON APPEAL

WHETHER A THIRTY (30) DAY **SUSPENSION AND PAYMENT OF** COSTS IS JUSTIFIED FOR ALLEGED FAILURE TO COOPERATE WITH THE FLORIDA BAR IN A CASE WHERE THE RESPONDENT ATTORNEY WAS FOUND NOT GUILTY OF ALL SUBSTANTIVE CHARGES AGAINST HIM.

ARGUMENT

A THIRTY (30) DAY SUSPENSION AND PAYMENT OF COSTS IS NOT JUSTIFIED IN A CASE WHERE A RESPONDENT ATTORNEY IS FOUND NOT GUILTY OF ALL CHARGES BROUGHT BY THE FLORIDA BAR.

In the complaint filed by The Florida Bar against respondent, it was alleged that he had violated Rule of Professional Conduct 3-4.3, engaging in conduct that is contrary to honesty and justice; Rule of Professional Conduct 4-1.3, failing to act with reasonable diligence in representing his client; and Rule of Professional Conduct 4-1.4(a), failing to keep a client reasonably informed about the status of a matter and for failing to comply with reasonable requests for information.

Following the evidentiary hearing which was conducted on November 15, 1991, the Referee made the determination that Respondent was not guilty of any of the above referenced violations of the Rules of Professional Conduct. (Rpt.par.III) He did however, of his own volition, assert against Respondent a violation of Rule of Professional Conduct 4-8.1(b), and in addition, determined that Respondent was guilty of violating

said rule. The Referee cites The Florida Bar v. Stillman, 401 So. 2d. 1306 (Fla. 1981) as authority for this finding.

The Referee cites Respondent's failure to respond to the Bar's request for a reply to the complaining party, his failure to attend the grievance committee hearing and his failure to appear in person for the Referee hearing.

Rule of Professional Conduct 4-8.1(b) states that a lawyer in connection with a disciplinary matter, shall not knowingly fail to respond to a lawful demand for information from a disciplinary authority. This violation, however, was not raised in the complaint filed by the Bar.

Stillman, id., at 1307 clearly does give the referee the authority to include in his report, information not squarely within the scope of the Bar's accusations. It does not appear, however to grant the referee the authority to recommend such a harsh discipline.

In a series of cases involving respondent attorneys, this court has approved the concept of admonishing the attorney for his or her failure to cooperate with some aspect of the Bar's investigation, or disciplinary process. The distinguishing feature in each of those cases, however, is that the attorney was found guilty of some for all of the charges alleged in the Bar's complaint. A more appropriate use of the respondent's failure to cooperate with the Bar is to evaluate the actions as an aggravating factor, if the respondent is found guilty of the substantive charges. The Florida Bar v. Tato, 435 So. 2d. 807 (Fla.1983).

In Tato, the Respondent was guilty of accepting a fee, performing little or no work for clients, willfully ignoring client's requests for accountings or refunds, and as aggravating factors (emphasis supplied) failing to cooperate with The Florida Bar and for being under suspension for nonpayment of Bar dues.

Similarly, in The Florida Bar v. Blaha, 366 So. 2d. 433 (Fla. 1978), the respondent attorney was found to be in violation Of numerous sections of the code of Professional Responsibility and was disbarred for the seriousness of the charges against him. The court, in passing, mentioned Blahas' failure to appear or respond to the Bar's complaint, but considered this not as grounds for discipline in itself, but rather as an aggravating factor.

In The Florida Bar v. Bartlett, 509 So.2d. 287 (Fla. 1987) the court acted upon respondent's current disciplinary charges, for which he was found guilty, as well as his past disciplinary record which included two prior suspensions, in ordering disbarment. The fact that respondent had not answered the Bar's complaint was considered only as an aggravating factor.

In another disbarment case, The Florida Bar v. Montgomery, 412 So. 2d. 346 (Fla. 1982), the respondent was found guilty of violating numerous disciplinary rules, including specific and general neglect of legal matters entrusted to his as well as abandonment of his practice. The court approved the referee's consideration of the respondent's failure to answer the Bar's complaint as an aggravating factor, along with his failure to pay his Bar dues.

In The Florida Bar v. Fath, 368 So.2d. 357 (Fla. 1979) the respondent was admonished in the referee's report for blatant disregard for the disciplinary proceedings. The respondent was, in addition, found guilty of all of the charges alleged in the Bar's complaint. The recommendend discipline which was a three (3) year suspension was justified based upon the seriousness of the charges, the guilty finding as well as the failure to cooperate with the Bar process.

In none of the cited cases did a referee make a determination that a respondent was not guilty of the charges brought against him by the Bar and then recommend a discipline for failure to cooperate with the Bar investigation. In the instant case, the referee has charged the respondent with failure to cooperate, has adjudged him guilty of the offense, and has recommended an egregious discipline. According to the factors to be considered in imposing sanctions, pursuant to the Florida Standards for Imposing Lawyer Sanctions, suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. Assuming arguendo, that respondent's acts constitute a failure to cooperate with the Bar, there was no attending injury or potential injury to a client, to the public or to the legal system. If indeed any discipline is to be imposed, it clearly should be something substantially less severe that requiring an attorney to shut down his practice for a period of thirty (30) days.

The above referenced cases may be distinguished from the instant case in another respect. In each case cited previously the respondent attorney knowingly and willfully failed or refused

to cooperate with the Bar in either its preliminary investigative stages or in the referee level stages of the case. There is ample evidence to indicate that respondent herein had no specific intent to fail or refuse to cooperate with the Bar. Respondent states that he obtained legal advice that it would be in his best interests not to respond in writing to the Bar's initial inquiries. Tr.p90-91. Additionally, although he did not appear in person at the referee hearing, respondent did participate and offer testimony by telephone. Had it been respondent's intent to avoid or stymie the Bar process, he clearly would have consistently been unavailable for any of the proceedings and would not have responded to any matters.

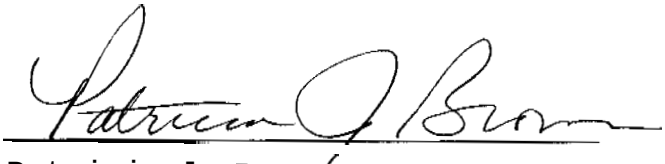
This court, in The Florida Bar v. Lipman, 497 So.2d. 1165 (Fla. 1986) stated that it is improper for a referee in a disciplinary proceeding to base the severity of the recommended punishment on a refusal to admit the alleged misconduct or to show a lack of remourse. Similarly, it is improper for the referee in the case at hand to make a recommended discipline of such a serious and devastating nature to an attorney who is clearly not guilty of any of the original offenses with which he was charged. The referee herein has overstepped the bounds of his discretion and has recommended a punishment which clearly does not match the alleged crime.

CONCLUSION

While the referee in a Bar disciplinary matter has the authority to consider factors outside the allegations raised in the Bar's complaint, it is an abuse of discretion on the part of a referee to raise the issue of failure to cooperate, determine that the attorney is guilty, and then recommend an extreme form of discipline such as a suspension and payment of the costs of the proceeding. There is insufficient evidence to indicate that respondent in the case at hand knowingly or willfully failed to cooperate with the disciplinary process. The referee has gone beyond the discretion granted to him by cited case law.

While the knowing refusal or failure to cooperate with the Bar may be considered as an aggravating factor in the case where an attorney is found guilty of the offenses alleged in the Bar's complaint, it is improper for a referee to assert a new and separate charge. Even assuming that the referee wished to admonish the respondent, a thirty (30) day suspension is a harsh and unreasonable form of admonishment.

The respondent, by and through undersigned counsel respectfully requests this court to reject the referee's recommended finding of guilt and his recommended discipline of a thirty (30) day suspension and payment of costs.

BY: 

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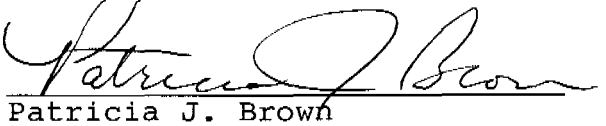
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent by U.S. Mail this 30th day of April, 1992 to JOHN ROOT, ESQUIRE, BAR COUNSEL, THE FLORIDA BAR, 880 N. Orange Avenue, Suite 200, Orlando, Fl. 32801.



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