IN THE SUPREME COURT OF FLORIDA

..TheFlorida Bar,
complainant

v.

Lane W. Vaughn,
Respondent

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

REPLY BRIEF

BY: Patricia J. Brown
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ARGUMENT

THE REFEREE'S FINDING THAT RESPONDENT WAS GUILTY OF VIOLATING RULE OF PROFESSIONAL CONDUCT 4-8.1 b WAS ERROR WHICH CANNOT JUSTIFY A HARSH DISCIPLINE SUCH AS SUSPENSION FROM THE PRACTICE OF LAW.

The commentary following Rule 4-8.1 b specifically allows for the provisions of the Fifth Amendment to the United States Constitution regarding one's right to freedom from making self-incriminating statements in a Bar disciplinary proceeding. Respondent received advice from other practicing attorneys which led him to believe that he had the right to avoid incriminating himself by responding to the Bar's Complaint and succeeding requests for information. While Respondent apparently did not specifically raise the Fifth Amendment as the commentary suggests, it is clear from his actions and comments that that was at least a significant factor in his reluctance to address the Grievance Committee, or respond to the Bar's complaint.

Procedurally, Respondent may have been better advised to affirmatively raise the Fifth Amendment at an early stage in the Bar's investigation, however, he was not then represented by counsel, and took it upon himself to make the best decisions under the circumstances.

Regardless of the methods Respondent used during the course of the Bar disciplinary proceeding, the fact remains that despite the language of Rule 4-8.1 b, Respondent clearly had the right as a citizen of the United States to avoid giving information which he believed may have been incriminating to him.

The Bar argues that there is substantial precedent for disciplining an attorney for failure to cooperate in the disciplinary process, however all of the cited cases are from other jurisdictions, and while they may be persuasive, they are clearly not dispositive of this case. Additionally, even assuming, arguendo, that the holding in Louisiana State Bar Association v. Tucker, 560 So. 2d 435, (La.1989) should be considered, the respondent attorney was disciplined by a public reprimand. The referee in the case at hand, under a similar fact situation has recommended the harsh discipline of a suspension from practicing law.

The Missouri case which the Bar has cited, In Re: Stricker, 808 S.W. 2d 356 (MO. banc 1991) involved a Rule of Attorney Conduct which differs significantly from the Florida Rule. The Missouri lawyer was found guilty of "failing to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter." The Rule violation with which respondent is charged is "knowingly failing to respond to a lawful demand for information from a ...disciplinary authority."

The Bar seems to seek to have respondent disciplined for wasting their time. Counsel alleges that since respondent was ultimately found not guilty of the substantive charges, he may have been vindicated earlier had he supplied information to the Bar or to the Grievance Committee. That argument clearly is only speculative and regardless of what information respondent may have provided early on, there is a significant chance that the proceeding would have still moved through all stages of the process, up to and including this appeal to the Supreme Court. To base the severity of the discipline on a refusal to admit the alleged misconduct or to show a lack of remorse was held to be improper in The Florida Bar v. Lipman, 497 So.2d

1165 (Fla. 1986) and respondent submits that it is equally improper to base the severity of the discipline on any factor other than the egregiousness of the respondent's misconduct. In this case, it has been clearly detetmined that respondent was guilty of none of the alleged misconduct.

Clearly, the cited Florida cases do contain rhetoric about an attorney's failure to cooperate with the disciplinary process. Respondent, in his initial brief pointed out The Florida Bar v. Tato, 435 So.2d 807 (Fla. 1983), as well as The Florida Bar v. Bartlett, 509 So. 2d 287 (Fla. 1987). Again, however, the relevant factor which distinguishes these cases from the instant case is that the respondent was found guilty of the charged misconduct.

It would appear that respondent did not intentionally fail or refuse to cooperate with the Bar disciplinary process, but rather that he was seeking to protect his own rights. Albeit by telephone, rather than in person, respondent obviously did represent himself well enough to the referee so that the referee had enough evidence to find respondent not guilty of the charges against him.

Respondent contends that his lack of participation in every phase of the Bar disciplinary process was not meant in any way to attempt to thwart the procedure which the Bar is obligated to follow. He made a judgment at some point as to how he would represent his own interests. While all attorneys in the state of Florida are on notice as to the functioning of the disciplinary process, each one reacts differently when the accusation of misconduct is leveled at him or her. Respondent should not be harshly punished for something which is in reality only tangential to the issue of attorney misconduct.

In conclusion, the punishment, whether in the area of

criminal law, or in attorney discipline proceedings, must fit the crime. Respondent was found to be not guilty of all charges against him and should have been able to walk away from the proceedings completely vindicated. The referee's recommendation that respondent be penalized for allegedly failing to cooperate with the process, in itself *is* an abuse of discretion. To penalize him in such a harsh manner as to require him to lose his livelihood for a period of time is completely unwarranted under Florida case law.

CONCLUSION

Respondent submits the foregoing to this honorable court and respectfully requests that the report of the referee not be approved as written and submitted, and further, that respondent not be disciplined by either a suspension or the payment of the *costs* of the disciplinary proceedings.

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BY: Patricia J. Brown

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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 8th day of July, 1992 to JOHN ROOT, ESQUIRE, BAR COUNSEL, THE FLORIDA BAR, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801.

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