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FILED
SID J. WHITE
MAY 10 1993
CLERK, SUPREME COURT
By _____ Chief Deputy Clerk

'REME COURT OF FLORIDA

CASE NO. 79,649

TFB FILE NO 92-00753-02

MAY 5, 1993

BRIEF OF RESPONDENT

FACTS:

Respondent has been a member of the Florida Bar since 1981 and operated a limited Florida practice concentrating generally on real property transactions.

Respondent, who had practiced in Connecticut since 1980, was involved in a dispute with another attorney and presented to the Superior Court for discipline. On April 19, 1991, the respondent was suspended from practice in Connecticut for a period of two years. Respondent then notified the Florida Bar and had a discussion with Attorney James Watson relative to reciprocal discipline and travelled the 1500 miles so as to personally deliver a file containing pertinent information to the Florida Bar counsel. [1]

Respondent, in good faith, discontinued any and all legal activity relative to the practice of law in Florida from the date of his suspension in Connecticut. Despite attempts of the respondent to resolve the problem of reciprocal discipline, the Florida Bar counsel failed to cooperate and almost one year after the suspension filed a Complaint seeking discipline of the respondent.

Respondent admitted the facts of the matter, but did not admit the truthfulness or accuracy of the conclusions included in the complaint.

A Telephone hearing was conducted before Referee Judge Philip Padovano on November 3, 1992. On December 3, 1992, Judge Padovano issued his report. Respondent received the report several days later and on December 21, 1992 filed a Motion for Reconsideration and Modification of Recommendation Re: Discipline of Respondent. This motion was improperly considered as a request for rehearing and due to its receipt after the fifteen day procedural deadline and objection by the bar counsel, the motion was not even docketed nor considered, even though obvious errors were contained in the referee's report. For instance; the referee commented on the supposed fact that the respondent had been charged with the serious crime of perjury, when the facts were totally different.[2]

The Connecticut grievance complaint, it must be noted, charged that someone, and not necessarily the respondent, must have been guilty of forging the complainant's name. The Respondent has never been charged with a crime nor was there even a specific claim that the respondent was guilty of any claimed forgery. [3] In addition, the referee's report conveniently omits the fact that the respondent charged that a Connecticut attorney had been guilty of perjury at the hearing in which the respondent was found guilty of violating ethical considerations and suspended for two years. [4]

More importantly, the referee accepted the proposition of the bar counsel that an attorney who is unable to practice in his home state should not be permitted to practice in Florida. The cases cited for the proposition generally deal with disbarred attorneys or those who were guilty of crimes. [5]

Finally, the referee failed to comprehend the degree of culpability of a former associate whom the respondent had accused of embezzlement and the repercussions of that litigation. [6]

Although the referee was technically correct in failing to consider the respondent's motion to correct the record, it seems to be common knowledge that a judge always has the ability to correct errors on his own motion when the errors are so obvious as in the current case.

DISCUSSION:

The Florida Bar counsel seeks to disbar the respondent on the basis that the respondent is not able to practice in his home state, but can cite no Florida Bar Rule or case law to buttress that position. Counsel has conveniently forgotten that the respondent notified the Florida Bar of the suspension and then voluntarily discontinued to practice in Florida or give advice on Florida law and that the respondent personally delivered a complete file to the Florida Bar for review in an attempt to negotiate an acceptable recriprocal disciplinary action. However, that counsel refused to communicate or negotiate with the respondent and a year after the suspension initiated a Complaint. Counsel has consistently taken a "hard line" on this case against an out-of-state attorney and sought discipline far in excess of that which would have been imposed on in-state attorneys. For instance; Walter Dunagan charged his clients interest on interest on unpaid legal fees and misrepresented his position at a real estate closing and was suspended for 60 days (THE FLORIDA BAR V. DUNAGAN, 565 So.2d 1327 (Fla. 1990); Maurice Wagner failed to pay medical bills from settlement proceeds and was reprimanded. (THE FLORIDA BAR V. WAGNER, 212 So.2d 770 (Fla. 1968); Marvin Davis was unable to account for a client's funds and was given a 90 day suspension (THE FLORIDA BAR V. DAVIS, 577 So. 2d 1314

(Fla. 1991); and J. Blayne Jennings, who was found guilty of fraud, deceit and misrepresentation was given a public reprimand THE FLORIDA BAR V. JENNINGS, 482 So. 2d 1365 (Fla. 1986). The referee's report also states that the conduct of the respondent is not sufficient to support a recommendation of disbarment, but felt inclined to accede to the argument of the bar counsel that resignation with a waiver not to reapply is analagous to being disbarred. When asked to produce a rule or case, counsel could provide none to the referee. [7] She had, however, previously alluded to decisions of the Florida Supreme Court which she said stood for the proposition that a lawyer who had been disbarred in his home state should not be allowed to practice law in the State of Florida. [8] The cases are not analagous to the current situation, because the respondent has not been disbarred; he has in fact resigned with the express intention to relocate to the State of Florida, where he had been previously admitted many years ago. For instance, the cited case of THE FLORIDA BAR V. SANDERS, 580 So.2d 594 (Fla. 1991) dealt an attorney who had been convicted of a felony and disbarred in New York and then suspended in Florida. In that case the Court indicated that it should not allow the practice of law in Florida of one disbarred in his home state. In the respondent's case, he resigned with the intention of continuing his law practice in Florida while

abandoning the practice in Connecticut. This is not akin to disbarment. And in FLORIDA BOARD OF BAR EXAMINERS RE R.L.V.H. 587 So.2d 463 (Fla. 1991), the situation was totally different from the respondent's, in that the petitioner in that case had actually been disbarred in his home state and sought to join the Florida Bar for the first time. Even in the Sickmen case, THE FLORIDA BAR IN RE SICKMEN, 523 So.2d 154 (Fla. 1988), the Supreme Court permitted the readmission of an attorney who was disbarred and remained disbarred in his home state.

In reference to the respondent's resignation in Connecticut, it must be noted that there is no procedural rule equivalent to Florida's Integration Rule's reference to resignation with a waiver and the Florida decisions relative to same, despite the attempts of counsel for the Connecticut Statewide Grievance Committee to convince the Court otherwise. [9]

The report of the referee relative to aggravating circumstances is incorrect, unless one is not permitted the regular Constitutional guarantees relative to being innocent until proven guilty after a fair trial. The comments relative a pattern of misconduct and multiple offenses can only be considered as inferences of guilt and are improper in the decision on one's professional status unless a fair forum is provided.

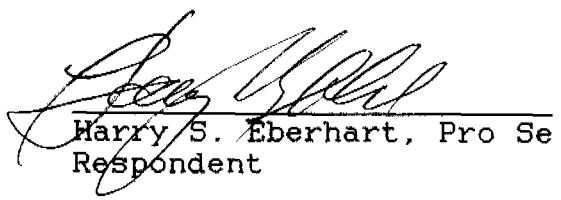
CONCLUSION:

Considering the flaws in the Referee report and the fact that the respondent has in fact served a two-year suspension, albeit an attempt to cooperate with the Florida Bar and the Florida Supreme Court, it should be the decision of the Court that the respondent has suffered enough. The stigma of the two-year suspension has created substantial embarrasment and loss of status by the respondent, in addition to the loss of his law practice.

The Connecticut Superior Court, which is responsible for the Rules of Court in Connecticut saw fit not to preclude the readmission of resigned attorneys and there is no written contract spelling out the conditions of the resignation in Connecticut. In addition, there are no court cases dealing with reinstatement after a resignation in Connecticut, so there can be no determination that a resignation with waiver not to reapply is analagous to a disbarment.

That being the case, the appropriate Florida disciplinary action should be a reciprocal suspension running concurrently with the Connecticut suspension with the condition that a satisfactory resolution to the claim of Attorney John Mezzanotte be resolved prior to reinstatement in Florida.

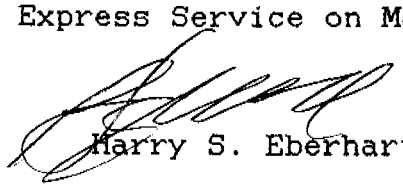
RESPECTFULLY SUBMITTED,



Harry S. Eberhart, Pro Se
Respondent

Certification

I certify that I forwarded the above to the Florida Supreme Court by Federal Express Service on May 6, 1993, with a copy to Attorney Alisa M. Smith by Federal Express Service on May 6, 1993.



Harry S. Eberhart

FOOTNOTES

1. Suspension reported prior to delivery of file in November, 1991, which include an explanation of prior grievances. See Exhibit A.
2. See Transcript Page 27, Line 12 where word "perjury" should read "forgery". All other references to the claim consider it "forgery".
3. See Exhibit B attached. This is the cover sheet to the complainant's grievance complaint.
4. See Exhibit D attached. This complaint was dismissed with out a hearing by the Statewide Grievance Committee.
5. Affidavit of Attorney Daniel Horwitz was never seen by the respondent, but there is no case law or rule to that effect.
6. It is the claim of the respondent that the reprimand of the respondent was due to sloppy work of the associate, who, after being sued for embezzlement, filed the forgery claim.
7. Transcript Pages 40-46.
8. The Florida Bar v. Sanders and the Florida Bar in Re Sickmen.
9. A copy of Rule 36 is attached as Exhibit C.