

097  
**FILED**  
SID. J. WHITE 11-10  
NOV 27 1994  
CLERK, SUPREME COURT  
By \_\_\_\_\_  
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

The Florida Bar,  
Complainant,

Case No.: 83,515  
Fla. Bar Case No.: 93-70,356 (11H)

vs.

Michael A. Catalano,  
Respondent.

---

**RESPONDENT'S ANSWER BRIEF TO A FINAL RULING OF A REFEREE IN A  
FLORIDA BAR DISCIPLINARY PROCEEDING**

---

**BRIEF OF RESPONDENT**

---

SCOTT SAKIN, ESQ.  
Attorney for the Respondent  
1411 N.W. North River Drive  
Miami, FL 33125  
(305) 545-0007  
Fla. Bar No.: 349089

SEAN J. GREENE, ESQ.  
Attorney for the Respondent  
1411 N.W. North River Drive  
Miami, FL 33125  
(305) 325-9818  
Fla. Bar No.: 997269

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	iii
STATEMENT OF THE CASE AND FACTS.....	1-3
SUMMARY OF THE ARGUMENT.....	4-5
ARGUMENT.....	6-12
WHETHER THE GRIEVANCE COMMITTEE HAD A QUORUM WHEN ONLY ONE LAWYER ON THE COMMITTEE WHO WAS AUTHORIZED TO VOTE VOTED AND, THE FLORIDA BAR RULE REQUIRED THAT THE COMMITTEE HAVE A QUORUM OF AT LEAST THREE MEMBERS, TWO OF WHOM MUST HAVE BEEN LAWYERS, BEFORE THE COMMITTEE MAY CONSIDER CASES?	
CONCLUSION.....	13
CERTIFICATE OF SERVICE.....	14

**TABLE OF AUTHORITIES**

<u>Cases</u>	<u>Page</u>
<u>Baker v. State,</u> 636 So. 2d 1342 (Fla. 1994).....	9
<u>The Florida Bar In Re Charles K. Inglis,</u> 471 So.2d 40 (Fla. 1985).....	6
<u>In re Florida Rules Of Judicial Administration,</u> 372 So.2d 449 (1979).....	12
<u>Shelby Mutual Insurance Co. of Shelby, Ohio v. Smith,</u> 556 So.2d 393 (Fla. 1990) .....	8
<u>In re Standard Jury Instructions-Criminal Report No. 90-2.,</u> 575 So.2d 1276 (Fla. 1991).....	11
 <u>Rules</u>	
Florida Bar Rule 3-7.4(f).....	5, 10
Florida Bar Rule 3-7.4(g).....	2, 4, 6, 7, 8, 9, 10 12
Florida Bar Rule 4-8.2(c).....	1
 <u>Other Authorities</u>	
<u>Black's Law Dictionary 1421 (4th ed. 1968).....</u>	4

### INTRODUCTION

The Respondent, Michael A. Catalano is a member of the Florida Bar. The Florida Bar is the Complainant herein. Before the Referee below, the parties were in the same position as they are before this Honorable Court. Therefore, in this brief, the parties will be referred to as they exist in this petition to the Florida Supreme Court.

The Florida Bar has prepared and indexed "record" on appeal which they refer to as "A \_\_\_\_" and the transcript of the final hearing held on January 10, 1994 which they refer to as "T(FH)." In this brief, we will make the same record references however, their "record" is not complete. Therefore, attached to this Answer Brief of the Respondent, is our supplemental record (SR) which will be filed and referred to as "SR \_\_\_\_". Any other documents will be given specific references so that they can be located in the Supreme Court file.

All emphasis has been supplied unless otherwise indicated.

**STATEMENT OF THE CASE AND FACTS**

The Bar has filed a complaint for minor misconduct on the grounds that the Respondent violated Rule 4-8.2(a) of the Florida Bar Rules. (SR 7-10).

The rule states:

"A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge..."

The Respondent, through counsel filed an answer denying the material allegations in the complaint and a motion to dismiss the complaint along with affirmative defenses. (SR 11-22). The Respondent alleged that he repeated a statement told to him by a Miami Herald reporter about a Dade County Court Judge being under investigation. (SR 21-22). There are no allegations that the Respondent said that the judge had done anything improper, only that she was under investigation. In the Respondent's answer and motion to dismiss, the Respondent alleged that he did not make a statement about the judge that was false because he had a good faith reason to believe that the source of the information was reliable. Other grounds for dismissal of the complaint included the instant issue; the grievance committee did not have a quorum when it voted to find the Respondent guilty of minor misconduct. Once the Referee dismissed the case on quorum grounds, there was no reason to address the other grounds for dismissal. (A 1-4).

After having read the argument from counsel for both the Bar and the Respondent, the Referee recommended in writing that the

Bar's complaint be dismissed for the following reason:

The Grievance Committee which heard this matter did not have a proper quorum, pursuant to Florida Bar Rule 3-7.4(g). The rule requires that the Grievance Committee have a quorum of three members of the committee, two of whom must be lawyers, before the committee may "consider" cases. The rule further states that a lawyer grievance committee member may not vote on the disposition of any matter in which that member served as the investigative member of the committee. In this case, the investigating member, a lawyer, was Mr. David White. At the probable cause hearing, Mr. White appeared and acted as a prosecutor/investigating member. (SR 15-20). He did not "consider" any of the facts or circumstances because his role was to present the case as the prosecutor on behalf of the Bar. (SR 19-20). At the time of the probable cause vote, the committee members present<sup>1</sup> consisted of Gui Govaert, a non-lawyer; Julian Newbauer, a non-lawyer; Gilda Geer, a non-lawyer; Julie Feigeles, a lawyer; and investigating member David White. (SR 15-20). At the conclusion of the hearing, the three non-lawyers along with the only lawyer eligible to vote, Julie Feigeles, voted that there had been minor misconduct. (SR 19-20). That vote consisted of one lawyer and three non-lawyer members. Thus, the Respondent was found to have committed minor misconduct based on the votes of one lawyer and three non-lawyers which is less than a quorum. (SR 4-6). This is contrary to Rule 3-7.4(g)

---

<sup>1</sup> There were 10 members of the Grievance Committee at the time and only 3 were non-lawyers. (SR 1-2)

which governs grievance committee procedures.

The Referee recommended in writing that the instant matter be dismissed as the grievance committee procedures were not followed as there was no legal quorum at the grievance committee hearing. (A. 1-4).

The Florida Bar then filed an appeal and brief with this Honorable Court asking that the dismissal be reversed.

### SUMMARY OF THE ARGUMENT

THE GRIEVANCE COMMITTEE DID NOT HAVE A QUORUM WHEN ONLY ONE LAWYER WAS ELIGIBLE TO CONSIDER AND VOTE ON THE CASE AND THE FLORIDA BAR RULE REQUIRED THE GRIEVANCE COMMITTEE HAVE A QUORUM OF THREE MEMBERS OF THE COMMITTEE, TWO OF WHOM MUST HAVE BEEN LAWYERS, BEFORE THE COMMITTEE COULD CONSIDER THE CASE.

Quorum is a majority of the entire body. Black's Law Dictionary 1421 (4th ed. 1968). The purpose of quorum is that when the required number of persons meet, the votes of a majority are sufficient for binding action. Id. Florida Bar Rule 3-7.4(g) clearly defines the quorum required for the Grievance Committee to "consider" and vote on cases. If the committee does not consist of at least two voting lawyers then, pursuant to the express language of the Rule, quorum is not met and any vote of the committee is not valid. In the present case, the Referee correctly dismissed the complaint because the voting members of the grievance committee consisted of one lawyer and three non-lawyers. This is in direct conflict with rule 3-7.4(g) which requires at least two voting lawyer members for a valid quorum. The Grievance Committee should not have considered the case until at least two lawyers were present to consider the case and vote, along with enough other members to make a legal quorum. Rule 3-7.4(g).

In their brief, the Bar argues that requiring there to be at least two lawyers on the committee to consider and vote on the matter would relegate the non-lawyer(s) to a lesser role because the non-lawyer would have to be the investigator and thus could not



vote. (Bar brief at p.6). This is simply not the case. The investigating member can either be a lay person, a lawyer or one of the Bar's own staff lawyers. Rule 3-7.4(f). For instance, in this case, if The Florida Bar Staff lawyer, presented the case then, three members could have constituted a quorum, provided that a quorum consisted of two lawyers and one non-lawyer, or three lawyers. The only requirement is that there be two voting lawyer members. In fact, staff counsel for The Florida Bar, pursuant to rule 3-7.4(f) of the Rules Regulating the Florida Bar, upon request by a grievance committee may appoint bar counsel or an investigator to assist the committee in an investigation. Nowhere in the rule does it state that the investigator must be a lawyer.

The Referee was correct in finding that no quorum existed at the time the Grievance Committee voted on the matter. The Referee's ruling should not be disturbed by this Honorable Court.

## ARGUMENT

THE GRIEVANCE COMMITTEE DID NOT HAVE A QUORUM WHEN ONLY ONE LAWYER WAS ELIGIBLE TO CONSIDER AND VOTE ON THE CASE AND THE FLORIDA BAR RULE REQUIRED THE GRIEVANCE COMMITTEE HAVE A QUORUM OF THREE MEMBERS OF THE COMMITTEE, TWO OF WHOM MUST HAVE BEEN LAWYERS, BEFORE THE COMMITTEE COULD CONSIDER THE CASE.

The Referee entered an order dismissing the complaint. His conclusions should not be reversed unless the moving party on appeal can show that he abused his discretion. "The burden shall be on the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified." The Florida Bar In Re Charles K. Inglis, 471 So.2d 40 (Fla. 1985). In this case, the Referee, after looking squarely at the pleadings, hearing argument from both the Bar and counsel for the Respondent, and examining the plain meaning of what the rule is intended to mean and do, determined that rule 3-7.4(g) required there to be at least two lawyers considering the case in order for there to be a quorum. (SR 11-42). The Referee's dismissal of the complaint against the Respondent was justified as the members of the grievance committee did not satisfy the minimum number of voting lawyers required by The Florida Bar Rules. The Committee had only one voting lawyer member. Therefore, there was no quorum and the complaint was properly dismissed by the Referee. The applicable rule reads as follows:

Rule 3-7.4(g) Quorum, Vote:

Three members of the committee, 2 of whom must be lawyers, shall constitute a quorum. The grievance committee may consider cases in

panels of not fewer than 3 members, 2 of whom must be lawyers...A lawyer grievance committee member may not vote on the disposition of any matter in which that member served as the investigating member of the committee. (emphasis added).

The language in rule 3-7.4(g) is very specific and quite clear. In order for there to be a quorum there must be at least two lawyers on the committee who "consider" the case. At the hearing, the Referee looked up the plain meaning of the word "consider" in Webster's New Collegiate Dictionary. (SR 35). He found the meaning of the word "consider" to be the same as "to judge." The Referee ruled that the plain meaning of rule 3-7.4(g) that reads, "The grievance committee may consider cases in panels of not fewer than 3 members, 2 of whom must be lawyers" to mean the members of the committee need to "judge" or pass on the merits of the matter. (SR 35). (Emphasis added). The Referee found this case to be "judged" by only one lawyer and three non-lawyers. In this case, the investigating member, a lawyer, was Mr. David White. At the probable cause hearing, Mr. White appeared and acted as a prosecutor/investigating member. (SR 18-19). He did not consider any of the facts or circumstances because his role was to present the case as the prosecutor on behalf of the Bar. At the time of the probable cause vote, the committee members consisted of Gui Govaert, a non-lawyer; Julian Newbauer, a non-lawyer; Gilda Geer, a non-lawyer; Julie Feigeles, a lawyer; and investigating member David White. At the conclusion of the hearing, the three non-lawyers along with the only lawyer eligible to vote, Julie Feigeles, voted that there had been minor misconduct. That vote

consisted of one lawyer and three non-lawyer members. Thus, the Respondent was found to have committed minor misconduct based on the votes of one lawyer and three non-lawyers. This is contrary to Rule 3-7.4(g) which governs grievance committee procedures. The Referee found this to be in violation of the Rule and he dismissed the complaint. (A 1-4).

The Bar argues in their brief that both lawyers (David White, the investigator/prosecutor and Julie Feigeles, the Vice Chair) did in fact "consider" the case. (Bar brief at page 6). However, this is simply not supported by the record. (SR 18-19). The record reflects that after the Respondent and his lawyer were excused from the probable cause hearing so the grievance committee could vote, Mr. White was precluded from voting because he was the investigator/prosecutor. (SR 19). In fact, rule 3-7.4(g) specifically precluded Mr. White from considering the case and casting a vote. The rule states, "...A lawyer grievance committee member may not vote on the disposition of any matter in which that member served as the investigating member of the committee. (emphasis added). Thus, Mr. White was not permitted to "judge" the matter the committee voted on. Therefore, there was not a quorum as required by rule 3-7.4(g) as only one lawyer member was able to consider and vote on the complaint.

In their brief, The Bar argues that legislative intent must be construed primarily from the language of the statute, citing Shelby Mutual Insurance Co. of Shelby, Ohio v. Smith, 556 So.2d 393 (Fla. 1990). (Bar brief at p 6-7). Rule 3-7.4(g) was clear and

unambiguous. Even though no rules of construction or interpretation were needed, this is exactly what the Referee did. The Referee read and construed all of Rule 3-7.4(g).

As this court said in Baker v. State, 636 So. 2d 1342 (Fla. 1994), "It is well established that construction and interpretation of a statute are unnecessary when it is unambiguous." 636 So. 2d at 1343. The Rule, which is titled "Quorum, Vote," is very narrow and is written in mandatory language (i.e. "must" have at least two lawyers). The rule specifically delegates and separates the role of the lawyer versus the role of the non-lawyer. For instance, there can be a quorum with three lawyers but, there cannot be a quorum of three lay people. All that is needed to meet the quorum requirement is for there to be at least two lawyer members of the Committee who can "consider" the complaint and vote. Where the statutory language is clear and unambiguous, there is no reason for the court to resort to the statutory process. Shelby and Baker, supra. As stated above, the Rule before this court is very narrowly written and clear. The Referee found it to establish a minimum number of lawyers required to satisfy the quorum.

There is nothing in the Rules Regulating The Florida Bar that prevents either a lay person or even a staff member of the Bar from serving as the investigator. Thus, the Bar's argument that with a grievance committee panel of three members, two of whom must be voting lawyers, the non-lawyer member must be the investigator is without merit. The Bar's position is that the non-lawyer must be

the investigator because Rule 3-7.4(g) requires a minimum of two voting lawyers. However, the Rules allow the Bar's own staff counsel to serve as the investigator. In fact, Rule 3-7.4(f) allows the Bar's staff counsel to appoint either a member of the Bar or a non-lawyer to be the investigator. Therefore, Bar Counsel has several options from which to choose when selecting who can and who shall serve as the committee investigator. The Bar also had the option of continuing the hearing until additional lawyers were available to attend the hearing. Thus, in the present case, the Referee was correct in ruling that the committee did not have quorum as there were not two voting lawyer members.

The Bar is mistaken in believing that the investigator/prosecutor should count towards quorum. Quorum is to be made up of at least three members, two of whom must be lawyers. The members of the committee are to be unbiased and only after hearing the evidence from both the investigator and the Respondent are they to form an opinion as to whether any misconduct occurred. At the hearing, the Respondent testified before the committee. The committee then went into executive session and made a legal and factual determination. Clearly, Mr. White did not pass on the merits of the matter as his relationship to the matter was different than that of the other members. The other members had never before the hearing discussed the merits or met and examined the evidence. Mr. White spoke with the Respondent and investigated the matter before the hearing and knew of facts and issues that were not presented to the fact finders (the other members of the

committee that were present and capable of voting). In the present case, Mr. White, a lawyer, was the investigator and thus did not consider the case. His roll was that of a prosecutor. He presented facts and events for the committee to consider. When the committee voted on whether the Respondent violated any rule, Mr. White did not vote. This left only one lawyer on the committee and three non-lawyers. Therefore, the quorum requirement that there must be at least two voting lawyer members was not met, making the committee's vote a nullity.

In their brief, the Bar tries to draw an analogy between the function of the Grievance Committee and that of the grand jury in that the Committee's function is to determine whether or not probable cause exists to warrant further proceedings. (Bar brief at p 10). However, if less than a quorum exists, the proceedings of a grand jury must be halted until a quorum is present. In re Standard Jury Instructions-Criminal Report No. 90-2., 575 So.2d 1276 (Fla. 1991). The Bar cannot point to any law whatsoever nor can they even suggest that a committee or commission that votes with less than a legal quorum could result in a legal vote. Simply put, a committee that votes without a quorum creates a nullity. Therefore, the Grievance Committee, not having quorum, should not have voted on the Respondent's case.

In addition, the prosecutor can only present evidence to the grand jury and assist the jury. He or she cannot deliberate or vote. They do not become voting members for the same reason Mr. White herein could not vote and therefore "consider" the case. The

same kind of rule applies to the investigating member of the Grievance Committee, pursuant rule 3-7.4(g). His or her role is to present evidence to the other members of the committee. The Referee was correct in dismissing the present complaint.

Quorum rules apply to this Honorable Court. This Court must have a quorum to decide a case. In re Florida Rules Of Judicial Administration, 372 So.2d 449 (1979). As the Court knows, five justices are required to constitute quorum. Once quorum is met, the concurrence of four is needed in a decision. In the instant case, there was only one voting lawyer member on the committee. As would be the case in this Honorable Court, without quorum a legal decision can not be reached.

Since the decision of the Referee was lawful, justified and not erroneous, it should not be disturbed on appeal to this court.



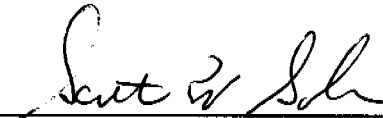
CONCLUSION

The Respondent hereby moves this Honorable Court to affirm the Referee's finding that a quorum was not present when the Grievance Committee voted on the complaint and that the Referee's dismissal was proper.

If this Honorable Court affirms the Referee's finding, then it is respectfully requested that the appellate opinion be published with only the initials of the Respondent in the caption so as not to injure the good reputation of the Respondent.

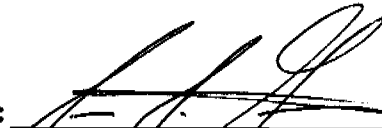
Respectfully Submitted:

SCOTT W. SAKIN, ESQ.  
Attorney for the Respondent  
1411 N.W. North River Drive  
Miami, FL 33125  
(305) 545-0007  
Fla. Bar No.: 349089

By:   
\_\_\_\_\_  
Scott W. Sakin, Esq.

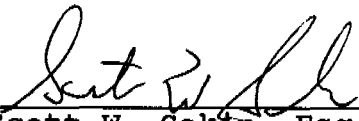
Respectfully Submitted:

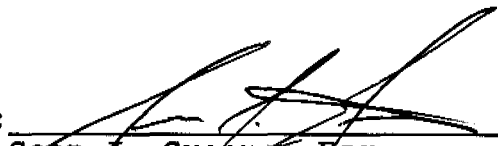
SEAN J. GREENE, ESQ.  
Attorney for the Respondent  
1411 N.W. North River Drive  
Miami, FL 33125  
(305) 325-9818  
Fla. Bar No.: 997269

By:   
\_\_\_\_\_  
Sean J. Greene, Esq.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the instant brief has been furnished to James F. Keeter, Assistant Staff Counsel, 880 North Orange Avenue Suite 200, Orlando, FL 32808-1085 and John A. Boggs, Esq. Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this 26th day of October, 1994.

By.:   
Scott W. Sakin, Esq.  
Attorney for the Respondent

By:   
Sean J. Greene, Esq.  
Attorney for the Respondent

IN THE SUPREME COURT OF FLORIDA

The Florida Bar,  
Complainant,

Case No.: 83,515  
Fla. Bar Case No.: 93-70,356 (11H)

vs.

Michael A. Catalano,  
Respondent.

---

---

SUPPLEMENTAL RECORD TO

RESPONDENT'S ANSWER BRIEF TO A FINAL RULING OF A REFEREE IN A  
FLORIDA BAR DISCIPLINARY PROCEEDING

---

SCOTT SAKIN, ESQ.  
Attorney for the Respondent  
1411 N.W. North River Drive  
Miami, FL 33125  
(305) 545-0007  
Fla. Bar No.: 349089

SEAN J. GREENE, ESQ.  
Attorney for the Respondent  
1411 N.W. North River Drive  
Miami, FL 33125  
(305) 325-9818  
Fla. Bar No.: 997269

INDEX

	<u>SR Page #</u>
Notice setting hearing before Grievance Committee	1-3
Report of Grievance Committee	4-6
Bar's Complaint	7-10
Respondent's Answer and Motion to Dismiss	11-22
Bar's Reply to Answer and Motion to Dismiss	23-26
Transcript of Hearing before Referee 6/6/94	27-42