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SID J. WHITE
JUL 31 1997
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
Complainant,

vs.

ROBERT A. BOLAND
Respondent.

S.C. CASE NO. 85,274

TFB CASE NOS. 94-11,334(13A)
94-11,335(13A)

REPLY BRIEF OF RESPONDENT ROBERT A. BOLAND

Robert A. Boland, Esq.
P.O. Box 172431
Tampa, Florida 33672-043 1
Florida Bar No. 281476
(813) 229-3232

Attorney For Respondent
Robert A. Boland, Esquire

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The record for the Petition In Review was not indexed consecutively by the Clerk of the Circuit Court. Accordingly the record will be referred to by each page of the various hearings and transcripts themselves. The following codes will be utilized by the Respondent:

TT	Trial Transcripts of November 29, 1996 and December 1, 1996.
SH #1	Sanctions Hearing of July 12, 1996
SH #2	Sanctions Hearing of September 1, 1996
PC	Probable Cause Hearing of October 19, 1994
EX #1	Exhibits list of Florida Bar
NC	Since the Trial Court took judicial notice of the entire North Carolina file, reference will be made by "NC Motion or Order" and the date it occurred.
PT	Pre-Trial Transcript

RESPONDENT'S REPLY TO THE COMPLAINANTS STATEMENT OF THE CASE

The Respondent contests one factual statement contained in the Complainant's Statement Of The Case. (Page 1 and 2 of Complainant's Reply Brief.) In the Complainant's Statement Of The Case, the Complainant only listed a specific reference to the record eleven times out of a total of seventeen statements or sentences included therein. (Page 1 and 2 of Complainant's Statement of The Case.)

The Complainant states that his appearance before the grievance committee on October 19, 1994 was a probable cause hearing. (Page 2 lines 2-5 of Complainant's Brief.) This is untrue. (Subpoena to Robert A. Boland issued September 26, 1994.) The subpoena issued on the 26th of September, 1994 by James E. Felman, Chairman of 13a Grievance Committee Hillsborough County, Florida directed Robert A. Boland, Esq. to appear before Michael Masetta and Associates, a court reporting firm in Tampa at 3:00 PM. (Subpoena to Robert A. Boland, Esq. issued September 26, 1994.) Nowhere in the subpoena did it indicate a probable cause hearing. (Subpoena to Robert A. Boland issued September 26, 1994.) The scheduled deposition was at 3:00 and the full committee held a probable cause hearing that evening commencing at 4:30 PM, which notice of was never afforded to the Respondent. (Notice of Probable Cause Hearing of October 19, 1994.)

RESPONDENTS REPLY TO THE COMPLAINANTS **STATEMENT OF FACTS**

The Respondent contests one factual statement contained in the Complainants Statement of The Facts (Page 11 of Complainant's Answer Brief).

The Complainant states that the North Carolina Court refused to accept the affidavit of Jennifer Farinha prepared by the Respondent because it contained two misrepresentations. (Complainant Answer Brief, Page 11 lines 12-13). The North Carolina Court did not accept the affidavit because it was heresy, i.e. Jennifer Farinha was not present to testify (TT 371).

The Respondent does not contest the Complainant's Statement of Facts as to Count II on Page 14 of his Answer Brief, but feels that this Honorable Court is being misled by the manner in which they are being presented. (Complainant's Answer Brief, Page 14, Paragraph 2.) The DUI conviction of April 3, 1980, the suspension for a refusal on May 9, 1980, the completion of a driver's improvement course on July 17, 1980, the five year revocation on February 5, 1983 and a second driving improvement course completion were all or a major part of a single DUI arrest and conviction in 1980. (Respondent's Driving Record Exhibit.) The same is true with the Respondent's second and only other DUI conviction in 1994. (Respondent s Driving Record Exhibit.) The suspensions suggested for failure to appear were D-6 suspensions, i.e. failure to pay a fine timely and were not necessarily suspensions by the Motor Vehicle Department. (Respondent's Driving Record Exhibit.)

ISSUES PRESENTED ON APPEAL

ISSUE I DID THE HEARING REFEREE APPLY THE INCORRECT STANDARD OF PROOF IN DETERMINING GUILT?

ISSUE II WERE THE PROCEDURAL VIOLATIONS AGAINST THE RESPONDENT SUCH THAT THEY SHOULD BE TREATED AS A MITIGATING FACTOR AGAINST THE RESPONDENT.

ISSUE III WAS THERE ENOUGH CLEAR AND CONVINCING EVIDENCE TO WARRANT A FINDING OF GUILT AS TO COUNT I?

ISSUE IV DID THE REFEREE IMPROPERLY ASSUME THE EXISTENCE OF AGGRAVATING FACTORS IN DETERMINING HIS RECOMMENDED SANCTION.

SUMMARY OF ARGUMENT

ISSUE I THE REFEREE APPLIED THE WRONG STANDARD OF PROOF IN DETERMINING GUILT.

ISSUE II THE NONCOMPLIANCE WITH FLORIDA BAR RULE 3–7–6(2)(1) SHOULD COUNT AS A MITIGATING FACTOR FOR THE RESPONDENT.

ISSUE III THERE WAS NOT CLEAR AND CONVINCING EVIDENCE TO JUSTIFY A FINDING OF GUILT AS TO COUNT I.

ISSUE IV THE REFEREE APPLIED INCORRECT AGGRAVATING FACTORS IN DETERMINING THE RESPONDENT'S SANCTION.

RESPONDENT'S REPLY ARGUMENT TO ISSUE I

The Complainant argues that the written Report of the Referee itself indicates that the allegations against the Complainant were proven by "clear and convincing" evidence. Therefore, the referee knew the correct standard of proof because he said so. However, it is quite clear that the referee did not author his own report.

In Section II of the Referee's Report the referee makes written findings of fact as to each item of misconduct that the Respondent was charged. There are 1,278 words contained in this section of the Referee's Report, which section the Respondent feels are the findings of fact. There are 1,278 words contained in the Complainant's Proposed Findings of Fact in this very same section. All 1,278 words are identical in each document. Thus, it is quite clear that the Referee Brandt C. Downey, III did not author the report he signed, He actually had the intent to produce no written findings of fact as evidenced by the ex-parte phone call two days before a scheduled sanction hearing. The mere fact that the words "clear and convincing" appears in the unauthored Referee's Report some 14 months after the trial does not mean that he applied the correct standard at trial. He spoke at the sanctions hearing about "preponderance of the evidence" and how it applied to every element of Count I.

It is without question the Referee applied the wrong standard of proof against the Respondent.

RESPONDENTS REPLY TO ISSUE II

The Complainant's Answer Brief asserts that there was effective service of process upon the Respondent to appear for a probable cause hearing. The record does not support this; neither does the law. The subpoena issued by James Tilman, Chairman of the 13a Grievance Committee, was a subpoena to appear before Michael Musetta and Associates, a court reporting firm in Tampa, Florida. Nowhere on the face of the subpoena is the indication that it was a probable cause hearing. The subpoena was issued on September 26, 1994 and left under the doorstep of the Respondent's residence on September 27, 1994. The Respondent does not receive mail at his home address and has utilized his downtown post office box for his legal mail for the past ten years. He has always in this case accepted certified mail at his legal post office address. The law in Florida concerning substitute service at a residence requires a party over fifteen years of age to accept it he lives there full time and is present when the service is delivered to him. The Respondent was not served personally and lives alone. The service was ineffective. Notwithstanding the ineffective service, the Respondent appeared at 3:00 and waited for two hours and fifteen minutes before he was forced to leave.

No notice of the probable cause hearing was ever given to the Respondent. There is a local rule in Hillsborough County that allows a deponent to leave after waiting twenty minutes for a deposition and that is when service of process is effective. The Respondent indicated he was leaving the deposition and would gladly return without service of process. He was never afforded a fair opportunity to be heard.

The next procedural violation is one that the Complainant refuses to admit. The Complainant states in his Answer Brief that "there were no discussions of the merits of the case" between Florida Bar Counsel and the Referee, Instead he suggests that he was calling "to see if a decision had been made yet." That could and should have been accomplished by a phone call to the Referee's judicial assistant and not a direct, one on one conversation with the Referee. Further, how can you discuss a verdict and the various violations of judicial conduct and not consider it the merits of a case? In point of fact, it is the very heart and soul of the case. The words written by Bar Counsel in his Proposed Findings of Fact were adopted by the Referee word for word in the Referee's report. Did the Florida Bar Counsel anticipate the factual findings of the Referee on each of the multitude of factual questions or were there other ex-parte conversations between the Referee and Florida Bar Counsel? Rule 3.7.6 (K) requires that the Referee make a finding

of fact as to each item of misconduct. The Report of the Referee, authored by Tom DeBerg, Esq. merely stated the factual findings as a whole and then listed the various rules violation with "Guilty" or "Not Guilty" after each. The facts were never applied to the law or the rule in question. In fact, it appears that the Referee intended to produce no written findings of facts whatsoever.

The Respondent repeats his position as to these procedural errors: the Respondent does not claim harmful error as to any of the aforementioned errors or all of them as a totality of procedural errors. However, the Respondent took this grievance quite seriously, having traveled to North Carolina twice to retrieve documents and having spent over a hundred hours for trial and appeal preparation.

The Respondent, having been a sole practitioner and a member in good standing of the Florida Bar for twenty years, expected more from this process. To be told from opposing counsel, via an ex-parte discussion with the Referee on the merit, that "he is guilty of everything" some 3½ years after the process started is distasteful. This Honorable Court should consider these procedural errors in mitigation.

RESPONDENT'S REPLY TO COMPLAINANTS ISSUE III

The Complainant alleges six factual matters that give rise to thirteen different violations of professional conduct. These are repeated over and over to support each rule violation. These six factual matters are as follows:

(1) The alleged false representation by the Respondent of six months residency preceding the filing of the divorce petition.

(2) The delay in filing a restraining order.

(3) The misappropriation of funds to Sally Scherer, Esq.

(4) The advice to misrepresent information to the Sheriffs Department.

(5) The advice to leave the State of Florida after a pickup order was issued by Judge Pendino. They will be addressed in chronological order.

(6) The preparation of an allegedly false affidavit.

(1) The Respondent was told by Kathleen Rains that she came to Florida in the late Fall of 1992 with her children to look for a place to live, Her father was already living in Florida and she desired a job and separate living accommodations. She eventually resided a few blocks from where her father resided. She told the Respondent she took her children back to North Carolina for her husbands Christmas visitation and for an ex-parte hearing with Chief Judge Bullock of the Family Law Division. She testified to the Probable Cause Grievance Committee that she drove back straight through to Florida on December 30, 1992. Thus it was made clear to the Respondent that she had lived in Florida for seven or eight months, enough to satisfy the six month residency requirement. In an effort to embellish the record against the Respondent, both Kathleen Rains and her father Albert Farinha testified before the Referee that the Respondent told them while at the courthouse the residency requirement was ninety days and not one hundred eighty. Yet the petition for dissolution itself acknowledges the one hundred eighty day requirement. The factual dispute lies between the Farinha family and the Respondent. That doesn't even give rise to a preponderance of evidence. When this factual stalemate is added to the lack of credibility of the Farinha family and their past and potentially future desire to use this grievance procedure to regain custody of their children, there is overwhelming evidence to indicate that the Respondent did not intentionally violate the residency requirement.

(2) Kathleen Rains violated all visitation orders of the North Carolina after Christmas of 1992. She was found to be in contempt in March of 1993 and ordered to produce her children for visitation. She refused and drove directly to Florida. She perjured herself by saying she was living in Tiverton, Rhode Island to receive child support payments there. Then her brother would forward the checks to Florida. The filing and receiving of a Restraining Order requires notice to the opposing side. When she retained the Respondent she was working under a false name. She was in fear of her husband. Does it make sense that she would go through all of that and then serve her husband notice of a restraining order in a Florida Court? She told the Respondent to wait to file and serve the restraining order. These motions can be and usually are filed in an emergency manner most of the time. By filing the Petition For Dissolution it enabled Kathleen Rains to learn her division and the corresponding Judge. A motion could be filed and served almost immediately. Once again, the only evidence suggesting there was an unnecessary delay is the word of the Farinha's and such testimony is not corroborated by her actions and previous intentions. If the Respondent was lax in not filing the Restraining Order, such behavior does not coincide with the Responding diligence in learning North Carolina law and filing the petition in Florida in an emergency manner one day before the husband could do so in North Carolina.

(3) The misappropriation of funds never occurred. If monies were to be sent to Susan Scherer, Esq., why didn't the Farinhas make the payee endorsement in her name? If the Respondent was to pay Susan Scherer, why didn't the Farinhas make the payee in both the Respondent's name and Susan Scherer's name? If the bill of Susan Scherer was $325.00, why were two checks written to the Respondent as payee for $350.00?

The answers to these questions are simple; this was money earned by the Respondent. The first payment of fees the Respondent received was $500.00 as a retainer to file the divorce that involved a great deal of conflict of law questions between North Carolina and Florida and resulted in the filing of a Florida petition one day before North Carolina could invoke jurisdiction of the divorce there.

When Kathleen Rains was served on the ninth attempt by Kim Alderman, the Respondent had to scramble and hire a good attorney in North Carolina. This entailed many phone calls and again the results were worthwhile. North Carolina requires service of process on a petition for change of custody forty days prior to hearing. Evidently Kathleen Rains avoiding service was successful in the sense that she thwarted the effective but delayed service of process by Kim

Alderman to change custody in North Carolina.

It should be noted that the Referee's report is in error when it states that the Respondent was served an accepted service of this petition to change custody. The Respondent never was authorized by his client to accept service and never did. Although the tone of the Complainant's brief seems to indicate that the Respondent should have accepted service or encouraged his client to avoid service, there is absolutely nothing in the record to support this. It is the Respondent's position that he is not required to accept service or to assist in that effort. In the short six months of the Respondent's representation, he only met with Kathleen Rains three or four times. Kathleen Rains avoided approximately 15 attempts at service over a five month period.

The Respondent charged Kathleen Rains a total of $1,200.00 and paid a $162.00 filing fee for a total of $1,038.00. Considering the conflict of laws, the filing of a petition for divorce, the solicitation of a North Carolina lawyer and the attendance at the hearing before Judge Pendino in Hillsborough County the legal fee was more than a reasonable one. Sally Scherer agreed to do the North Carolina hearing for $100.00. The Respondent thought that was too low and offered her $200.00 with the additional request of sending the most relevant documents to him. The Respondent told the Farinha's to send Sally Scherer $200.00 via money order. Both of these agreements, the increase of $100.00 to $200.00 and the indication that the Respondent clients would pay this fee were acknowledged by Sally Scherer under oath to be "quite possibly" true. When Sally Scherer sent a $325.00 bill to the Respondent he advised his clients that although the fee might be a little excessive and not agreed to, it would be best to pay her because they would undoubtedly need her again. They told the Respondent they would pay the $325.00 bill. The Respondent never again heard or received a bill from Sally Scherer. The first time the Respondent learned of the outstanding bill was during the grievance procedures. Albert Fatinha called Susan Scherer during the grievance procedures and told her he would do what he could to pay her and never did. He also encouraged her to report the Respondent to the Florida Bar, which she did. It is no coincidence that Kathleen Rains and her father, Albert Farinha did not pay Katherine Baumgartner, Esq. for her services initially in the North Carolina case, which created her separation and the award of custody of the two minor children.

Sometime during the grievance procedures Albert Farinha took one of the $350.00 canceled checks and wrote "N.C." on it before presenting it to the Florida Bar. This was an insidious attempt to influence the Florida Bar. The $1,038.00 fee was reasonable and well earned.

There was no misappropriation of funds.

(4) The Complainant suggests that the Respondent advised Albert Farinha, who wasn't his client, to make misrepresentation to the Sheriffs Department. This came as a result of a secretly taped and recorded phone conversation between the Respondent and Albert Farinha. The Respondent made a Motion In Limine, together with an Affidavit For Support, indicating that during the middle of a phone conversation between the Respondent and Albert Farinha, Albert Farinha secretly tape recorded the remainder of the conversation without the permission, consent or the knowledge of the Respondent. That motion was denied without a hearing prior to trial. A timely objection and exception was made when a transcript of the tape was received into evidence. Notwithstanding the evidentiary error, the Respondent's position is that the secretly taped and recorded conversation produces no evidence of solicitation to misrepresent Sheriffs personnel.

The Respondent called the Farinha household after Judge Pendino's hearing and subsequent Order. Sheriffs deputies were at the Farinha household instantly after the hearing with a pick-up Order for the two minor children. Albert Farinha had a serious heart condition and the transcript reveals he was most upset and beside himself at the point in time. The Respondent testified that he wanted the Sheriffs to visit him because he intended to not answer their inquiries with the attorney-client privilege. The Complainant believes this is unethical. It is Respondent's position that if he knew Kathleen Rains was in flight or if he surmised such flight by the previous months of cunning behavior by his client, he was under an absolute duty not to inform law enforcement. Respondent testified that law enforcement cannot breach an attorney-client privilege. Only a Judge can and only then can do so under certain circumstances. At no time during the taped and recorded phone conversation did the Respondent suggest or encourage flight. The Respondent did not aid or abet flight. In point of fact, the Respondent and Kathleen Rains never met again until her deposition prior to the final grievance hearing. Her children were eventually apprehended some 4½ months later.

(5) The Complainant asserts that the Respondent advised his client to flee the state to avoid the execution of a Court Order. Once again, the sum total of the evidence is the word of Kathleen Rains that he did so, versus the word of the Respondent that he did not, The advice of fleeing Florida, if given, would not have accomplished anything. Judge Pendino's ruling merely gave full faith and credit to a sister state's previous ruling, i.e. the North Carolina Court Order

of March 3 1, 1993 placing Kathleen Rains under arrest for contempt of court violations and the North Carolina Court Order of October 15, 1993 awarding the husband full custody of the minor children together with a pick-up order. In the face of hundreds of visitation violations, contempt of court violations, lies, perjury and avoiding all process servers and court hearings, the sole evidence against the Respondent is the words of Kathleen Rains: "He told me to do it." This is not legally sufficient evidence to find guilt. Inquiry Concerning A Judge, 648 So 2d 318 (Fla 1994).

(6) The last area of alleged misconduct is where the Complainant and the Referee are intellectually straining themselves to find guilt. It is alleged that the Respondent counseled Kathleen Rains and her sister-in-law Jennifer Farinha to sign two false affidavits. As a result, they contend, was that the North Carolina Court didn't receive it in evidence and custody of the children were awarded to the husband. Custody of the children were awarded to the husband because Kathleen Rains didn't show up for the North Carolina hearing on October 11, 1993. Complainant and the Referee seem to believe that Kathleen Rains didn't know about the change of custody hearing. This is absurd. She was aware of the petition months before when she was served by Kim Alderman and when the Farinha family through the Respondent hired Susan Scherer, Esq. In the hearing before Judge Pendino, process server Dana Gilmore was shown a picture of Kathleen Rains and asked if that was the person he served for the October 11, 1993 hearing. He indicated he was absolutely certain it was. Two different Circuit Judges in two different states held that service of process upon Kathleen Rains was legally effectuated. The Report of the Referee is in direct contradiction to both findings.

The mistake as to Jennifer Farinha being a sister-in-law instead of a sister goes to the weight of the evidence and not the admissibility. It is of minor importance anyway. The affidavits were written as the Farinhas told the Respondent and were signed and presented in Court in a last ditch attempt to thwart the effective service of Dana Gilmore.

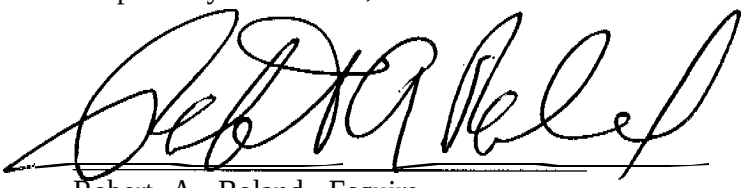
RESPONDENT'S REPLY TO COMPLAINANT'S ISSUE IV

The Respondent will rely on his Initial Brief of Issue IV to reply to the Complainant's Answer Brief of Issue IV.

CONCLUSION

If this Honorable Court finds mitigation in Issue II or unwarranted aggravation in Issue IV the Court should modify or reduce the recommended sentence. If this Court finds in Issue III a lack of clear and convincing evidence sufficient to justify a finding of guilt the Court should remand the case to the Referee to determine an appropriate sentence for Count II.

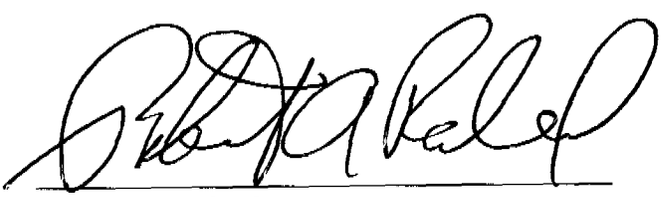
Respectfully submitted,



Robert A. Boland, Esquire
Attorney for Respondent
P.O. Box 172431
Tampa, Florida 33672-043 1
Florida Bar No. 281476
(8 13) 229-3232

Certificate of Service

I HEREBY CERTIFY that a true and correct copy of the Respondent's Reply Brief was sent by U.S. Mail to Thomas DeBerg, Esquire on this 28th day of July, 1997.



Robert A. Boland, Esq.
P.O. Box 172431
Tampa, Florida 33672-043 1
Florida Bar No. 281476
(8 13) 229-3232