

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

097
FILED

SID J. WHITE 7/5

JUN 10 1996

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

SCOTT ROBERT PORTER,

Respondent-Petitioner,

v.

Case No. 87,300

[TFB Case Nos.

96-30,176 (05B)]

THE FLORIDA BAR,

Complainant.

PETITIONER'S INITIAL BRIEF

REVIEW OF REPORT
OF REFEREE

Scott Porter
Respondent-Petitioner

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352-735-0033

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STATEMENT OF THE CASE AND THE FACTS

In April of 1995, three parties, Seller, Buyer, and Secured Party, wanted to transfer an unencumbered title for a mobile home from Seller to Buyer. Respondent had previously drawn a simple will for Seller. Respondent agreed to act as an independent party to hold sales proceeds pending the transfer of an unencumbered title to Buyer.

Secured Party did receive payment from Respondent late. Buyer did receive an unencumbered title to the mobile home, Seller did receive all the sales proceeds due to her, and Secured Party did receive all the proceeds due to them, including stated interest in the promissory note.

The Florida Bar ("the Bar") filed with the Supreme Court of Florida, a complaint against Respondent January 31, 1996. The Bar did not provide a copy of the complaint to Respondent. In a telephone conversation on February 22, 1996, with Kathi Lee Ferguson, the Bar Counsel in this matter, Respondent was told that he would receive a complaint in the mail. A certified mail copy of the complaint was returned to Ms. Ferguson on February 23, 1996. No other attempt was made to serve the complaint or a copy as represented by Ms. Ferguson upon Respondent.

The Respondent did not receive notice of the final hearing with the Referee from the Bar or any other entity. Staff of the Bar had told Respondent's wife that the final hearing would be at 1:15 p.m. April 8, 1996, in Gainesville, Florida. Respondent attended the hearing. Bar Counsel and the Referee started the

hearing early, and it was all but over by 1:15 p.m.

The Referee did not hear any evidence at the hearing. Any evidence received by the Referee was ex parte.

SUMMARY OF THE ARGUMENT

The Referee erroneously continued with the hearing after learning that the Bar had not served the complaint or a copy of the complaint upon Respondent. The Bar's rules and procedures were not followed.

In the alternative, the notice and procedural problems could have been worked out at the hearing if the Referee had taken evidence. The transcript of the April 8, 1996, hearing shows that the Referee received information that was contrary to information that the Bar had under its control.

Finally, in the event the Supreme Court of Florida chooses use the report of the Referee and the record as it currently stands, Respondent will attempt to appeal portions of the report.

ARGUMENT

THE REFEREE SHOULD HAVE PROVIDED FOR NOTICE OF THE ALLEGATIONS IN THE COMPLAINT BEFORE CONDUCTING THE HEARING.

The timeline for a response from the Respondent in the disciplinary procedures before a referee references the service of the complaint, R. Regulating Fla. Bar 3-7.6(g)(2). The Bar did not serve the Complaint upon Respondent. Respondent had met with Bar Staff, Bar staff spoke with Respondent's wife, and the Bar has known where and when to find Respondent to serve a copy of the complaint upon him. A Bar staff investigator once used

the Mount Dora Police Department, to call Respondent's wife when he wanted an interview with Respondent. There were many less drastic measures and easier ways to contact Respondent and effect service upon him.

On February 22, 1996, Respondent attempted to discuss the situation with Bar Counsel, Kathi Lee Ferguson. At that time Bar Counsel declined to discuss the matter, and referred Respondent to a complaint that would be coming in the mail. No such complaint arrived.

Respondent was attempting to obtain a copy of the Complaint and discuss the case with Bar Counsel. Bar Counsel evidently decided that no cooperation with Respondent was better than insuring proper service and/or notice of the complaint.

The hearing before the Referee is defective for lack of the initial service upon the Respondent.

THE REFEREE ERRONEOUSLY USED A REPORT PREPARED BY BAR COUNSEL WITHOUT TAKING EVIDENCE TO PREPARE THE REPORT.

The Referee and Bar Counsel had intended for no participation from the Respondent, Transcript at 2, lines 11 & 12, where Bar Counsel had prepared the report of Referee. The Referee notes that notice was given to Respondent at Mount Dora, Florida, Transcript at 2, lines 7 & 8. The Referee does not state whether such notice was from his office or the Bar, but in either case, it was not received by Respondent.

Bar Counsel said that multiple efforts were made to notify Respondent of the hearing, Transcript at 2, lines 15-17. Whatever they were, they failed. Again, the Bar had many ways to

easily notify Respondent of the hearing, but chose to not use any of them.

At the time of the April 8, 1996, hearing, Bar Counsel and the Referee choose to avoid any problems with lack of service or notice of Respondent and went on without participation of the Respondent. They could have obtained a waiver of service, notice, etc., then, but they elected to go on without it.

The Referee's report erroneously incorporated the Bar's misinformation and was without participation of Respondent.

THE REFEREE'S REPORT IS INACCURATE BECAUSE THE BAR,
THOUGH ITS COUNSEL, MISREPRESENTED INFORMATION AND
FACTS IT HAD TO THE REFEREE.

Two examples of misrepresentation are "He's failed to cooperate with the Florida Bar." Transcript at 3, lines 3 & 4. Failure to accurately represent Respondent's efforts, to communicate with the Orlando office of the Florida Bar concerning this matter, and its failure to return his calls. The Referee suggested that such efforts would factor into his determination, Transcript at 7, lines 17-21. The prepared proposed report is suspect because of the inaccuracies cultivated by the Bar.

The Bar misrepresented information in it's prepared proposed report, making it inappropriate as the final Referee's report.

THE PROPOSED REFEREE'S REPORT, ADOPTED BY THE REFEREE
IS INACCURATE.

While there are many inaccuracies in the report the Bar prepared and proposed the referee, Respondent will try to limit the discussion to those of substance.

An example of an inaccuracy without substance is the

assertion that Respondent had a "client" in this transaction. A party, Seller, had been previously represented by Respondent, but there was no client type interaction, advice, etc. during this transaction. Similarly, there was no event that could be called a "closing" in this matter, despite the Bar's characterization.

Referee's Report at 2, last paragraph of Section II, Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged, the Bar said that the sales proceeds had not been deposited in a Trust Account. It had. Respondent was interviewed, in person, by a staff investigator of the Florida Bar, and provided the information and proof of such deposit.

Referee's Report at 2, third paragraph of Section III, Recommendations as to Whether or Not the Respondent Should Be Found Guilty and Rule Violations Found, the Bar stated "client funds" where not properly delivered. They were. Similarly the other "undisputed" assertions are not supported by evidence submitted by the Bar to the Referee at the hearing.

Referee's Report at 3, Section IV, Recommendation as to Disciplinary Measures to Be Applied, is based upon the representations of the Bar in the preceding items, and carries all of the inaccuracies or distortions introduced in the previous sections.

Further, there is no reference to the Florida Standards for Imposing Lawyer Sanctions in the Referee's report. To recommend disbarment, the referee would have to find that Fla. Stds. Imposing Law. Sancs. 4.11 applied as opposed to Fla. Stds.

Imposing Law. Sancs. 4.12-4.14.

The list of proposed Rule violations contained in Section III of the report does not use any of the other Standards, and relies solely upon the application of Fla. Stds. Imposing Law. Sancs. 4.1.

Referee's report at 3, Section V, Personal History and Past Disciplinary Record, Bar Counsel omitted portions of disciplinary history for Referee's consideration.

The Bar's proposed Referee's report is inaccurate and contains information contrary to what the Bar knows to be the facts.

CONCLUSION

The disciplinary process would have worked better if Bar Counsel had performed as promised. Respondent acknowledges that his initial response to the situation was inappropriate. Contrary to assertions of Bar Counsel, he did work with Bar staff and attempted to work with Bar Counsel.

For the reasons summarized above, Respondent requests an opportunity to have a hearing with a referee, a review of the Report of the Referee, and/or such other relief the Court may deem appropriate.



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CERTIFICATE OF SERVICE

copies to:

John A. Boggs, 650 Apalachee Parkway, Tallahassee, FL 32399-2300
John T. Berry, 650 Apalachee Parkway, Tallahassee, FL 32399-2300
Kathi Lee Ferguson, 880 North Orange Ave., Ste 200, Orlando, FL
32801

I CERTIFY that a true copy of the foregoing has been
furnished to the above-named addressees by U. S. Mail on this
10th day of June, 1996.



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APPENDIX

Transcript of hearing before Referee follows.