IN THE SUPREME COURT OF FLORIDA

CASE NO.SC96915

THE FLORIDA BAR,

Complainant,

vs.

ALBERT P. WALTER, JR.,

Respondent.

CORRECTED ANSWER BRIEF OF RESPONDENT

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CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief are: Courier New Font; 10 characters per inch.

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SYMBOLS AND REFERENCES

The parties will be referred to by name.

The transcript will be referred to by "T.".

STATEMENT OF THE CASE AND OF THE FACTS

The Bar's statement of the facts is merely argument of Bar counsel before the Referee.

Gary Dukes filed a complaint against Mr. Walter on July 9, 1991. Mr. Walter gave a sworn statement to the Bar on May 4, 1992. The Bar spent six years chasing David Chesnoff. It took Mr. Chesnoff's deposition on July 23, 1998.

The Bar made a very telling admission during argument before the Referee. It conceded that Mr. Chesnoff's statements in his deposition were not the first time Bar counsel heard sworn testimony that contradicted Mr. Walter's statements in his sworn statement. The Bar had such testimony from Mr. Dukes (T.12/20/99,pp.9,10). The Bar repeated this admission at p.2 of its initial brief. Thus, there is no doubt that by May 4, 1992, at the latest, the Bar could proceed against Mr. Walter.

POINTS ON REVIEW

I

THE REFEREE CORRECTLY DISMISSED THE COMPLAINT.

II

THE LIMITATION PERIOD OF RULE 3-7.16(a) REFERS TO THE COMPLAINT FILED AGAINST MR. WALTER.

III

THE EXCEPTIONS OF RULE 3-7.16(c) ARE INAPPLICABLE.

IV

THE REFEREE PROPERLY DISMISSED THE COMPLAINT BECAUSE THE COMPLAINT ESTABLISHED AN AFFIRMATIVE DEFENSE ON ITS FACE.

SUMMARY OF THE ARGUMENT

I

The Rule of Lenity applies.

The statute of limitations in effect at the time of the commission of the alleged violation controls. There was no statute of limitations in existence at the time of Mr. Walter's alleged violation. Rather, the Bar had a reasonable time within which to proceed against Mr. Walter.

The Bar waited seven and a half years to proceed. This was most unreasonable.

Rule 3-7.16 was adopted in 1995. The Bar had waited over three years to proceed. Three years is an unreasonable period of time.

Rule 3-7.16 extended the limitations period from a reasonable time to six years. However, the reasonable time requirement had already expired. If Rule 3-7.16 is applicable it must apply to this case. This is not a retroactive application since the Rule was enacted after the expiration of a reasonable time.

II

Rule 3-7.16(a) refers to the complaint filed against Mr. Walter. It does not refer to the complaint filed by a complainant.

Any ambiguity in the Rule must be resolved in favor of Mr. Walter under the Rule of Lenity.

III

Rule 3-7.16(c) contains a tolling provision for fraud, concealment, or intentional misrepresentation of fact. None are present.

IV

A motion to dismiss is the proper method of raising an affirmative defense which appears on the face of the complaint.

INTRODUCTION

Bar disciplinary proceedings "are quasi-criminal in nature. . . ." *The Florida Bar v. Vernell*, 721 So.2d 705, 707 (Fla. 1998), *In re: Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222 (1968).

An attorney in a Bar discipline matter is entitled to due process. *Sheiner v. State*, 82 So.2d 657, 662-663 (Fla. 1955).

These fundamental principles inform the court's analysis and decision.

ARGUMENT

I

THE REFEREE CORRECTLY DISMISSED THE COMPLAINT.

The Rule of Lenity applies. *Reino v. State*, 352 So.2d 853 (Fla. 1977), held that:

> ". . . First, criminal statutes are to be construed strictly in favor of the person against whom a penalty is to be imposed . . . Second, statutes of limitation in criminal cases are to be construed liberally in favor of the accused. . . ."

Mead v. State, 101 So.2d 373, 375 (Fla. 1958), held that:

> "The appellant was not required to raise the question of the statute of limitations as the statute must be construed liberally in favor of defendants and need not be pleaded in bar. . . ."

Bonel v. State, 651 So.2d 774, 776 (Fla. 3d DCA 1995), held that:

> ". . . Statutes of limitation in criminal cases are to be liberally construed in favor of the accused. *Reino v. State.* . . ."

The proper Statute of Limitations is the one in effect at the time of the commission of the alleged violation. *State v. Wadsworth*, 293 So.2d 345, 347 (Fla. 1974); *Reino v. State*, 352 So.2d 853, 856 (Fla. 1977); *State v. Bryson*, 380 So.2d 468, 469 (Fla. 2d DCA 1980).

There was no express limitations period in effect at the time of Mr. Walter's alleged violation. *The Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986). *Lipman* held that the Bar had a reasonable

time to proceed. A reasonable time means a reasonable time, not forever. In *Lipman*, the attorney was convicted of a felony and suspended by this Court. His conviction was reversed. This Court terminated his suspension without prejudice to the Bar proceeding with grievance proceedings. Six months later the Bar filed a two count complaint against the attorney. This Court held:

> ". . . The Bar initiated this disciplinary proceeding within a reasonable time after this Court's December 1984 order, wherein we expressly terminated Lipman's 1981 suspension without prejudice to the Bar to go forward with the instant proceedings. Under the circumstances, we do not find it 'unjust or unfair' to require Lipman to now answer the Bar's charges in this matter." (*Id*., at 1167)

The Statute of Limitations in effect at the time of the alleged violation controls. On May 4, 1992 there was no express limitations period and the Bar had a reasonable time to proceed. Here, the Bar waited *seven and a half years* to proceed. No construction of "reasonable" includes seven and a half years.

The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978), emphasized the Bar's responsibility to proceed with alacrity:

> "'We have pointedly held that the responsibility for exercising diligence in the prosecution rests with Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is so even though the record shows that the conduct of the lawyer merits discipline.'" (*Id*., at 16)

Rule 3-7.16 was adopted on July 20, 1995. *Fla. Bar Amendments to Rules*, 658 So.2d 930 (Fla. 1995). The Bar had had over three

years to bring its complaint by that time. Three years is not a reasonable time within which to proceed. The time had expired.

Rule 3-7.16 granted a favor to the Bar. It *purported to extend* the limitations period. However, even in civil cases, a statute of limitations cannot be extended if it has expired. *Garris v. Weller Construction Company*, 132 So.2d 553, 554 (Fla. 1960); *Neff v. General Development Corp.*, 354 So.2d 1275, 1276, n.1 (Fla. 2d DCA 1978).

Under *Lipman*, the limitations period was a reasonable time. Under Rule 3-7.16 it is six years, assuming that the Rule is applicable to Mr. Walter. Still, the Bar refused to proceed.

Dade County v. Ferro, 384 So.2d 1283 (Fla. 1980), does not support the Bar's argument. First, *Ferro* was a civil case. Here, the limitations period is construed liberally in favor of Mr. Walter. Second, in *Ferro*, an *existing* statute of limitations was extended. Here, under *Lipman*, the Bar's time had expired. Third, Mr. Walter seeks no retroactive application of Rule 3-7.16. This Rule was enacted after the expiration of a reasonable time.

II

THE LIMITATION PERIOD OF RULE 3-7.16(a) REFERS TO THE COMPLAINT FILED AGAINST MR. WALTER.

Mr. Walter repeats:

> "First, criminal statutes are to be construed strictly in favor of the person against whom a penalty is to be imposed . . . Second, statutes of limitation in criminal cases are to be construed liberally in favor of the accused. . . ." (*Reino v. State*, 352 So.2d 853, 860 (Fla. 1977))

Rule 3-7.16(a), *inter alia*, provides that:

> ". . . complaints presented by . . . The Florida Bar under these rules shall be commenced within 6 years from the time the matter giving rise to the inquiry or complaint is discovered, or with due diligence, should have been discovered."

Rule 3-7.16(a) can only refer to the complaint filed against Mr. Walter. The Bar's argument that the: ". . . complaints presented by . . . The Florida Bar. . . ." refers to the complaint mentioned in Rule 3-7.3(b) is specious. The Rule refers to the complainant's complaint. Under the Bar's theory, a complainant could file a complaint against an attorney just prior to the expiration of the six year period. Bar counsel could decide to pursue it, open a disciplinary file, and the Bar would have an additional six years to file the complaint in this Court. This simply cannot be.

When a citizen makes a complaint to the state attorney the statute of limitations is not tested by the date of the citizen complaint. It is tested by the date of the indictment or

information. The same applies here.

Assuming *arguendo* an ambiguity in Rule 3-7.16(a), that ambiguity must be resolved in favor of Mr. Walter and against the Bar. ". . . statutes of limitation in criminal cases are to be construed liberally in favor of the accused. . . ." *Reino v. State*, 352 So.2d 853, 860 (Fla. 1977).

The Bar's reliance upon *Goldstein v. Acme Concrete Co.*, 103 So.2d 202 (Fla. 1958), is misplaced -- and woefully so. *Goldstein* was a civil case. Second, the "complaint" mentioned in Rule 3-7.3 is the *complainant's* complaint, not the complaint the Bar filed against Mr. Walter in this Court. Third, the term in *Goldstein* in two statutes plainly had the same meaning.

The Bar, at p.8, asserts, without support, that there is no basis to believe that the limitation applies to the formal complaint filed in this Court. That is absurd. Why else have the limitation?

The Bar argues that if this were the situation there would be a limitation of actions applicable to very few cases. The limitation period *is* applicable to very few cases.

The Bar further argues that a grievance could be pursued through the staff and grievance committee stages without regard to the time that had passed since the date of the alleged offense. That also is absurd. The Bar has six years. Presumably, the staff and grievance committee are aware of this limitation.

Mr. Walter reasserts that the reasonable time of *The Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986), applies.

III

THE EXCEPTIONS OF RULE 3-7.16(c) ARE INAPPLICABLE.

Rule 3-7.16(c) provides for tolling of the time when it can be *shown* that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the matter. Here, there was no fraud, no concealment, no intentional misrepresentation of fact.

The Bar whines that it was hampered because of David Chesnoff's invocations of the attorney-client privilege and of his right to silence. These invocations were not fraud. These invocations were not concealment. These invocations were not the intentional misrepresentation of fact. They asserted ancient privileges.

The Bar does *not* argue that it required Mr. Chesnoff's testimony to proceed. It cannot. It concedes that it had testimony from Gary Dukes, dated July 9, *1991* (T.12/20/99,pp.4-5; T.1/27/00,pp.6,10).

The Bar, at p.2, states that:

> "Finally, Bar counsel succeeded in deposing him [Mr. Chesnoff] on July 23, 1998 . . . For the first time, Bar counsel heard sworn testimony, *other than that of Dukes*, that contradicted respondent's explanation for the promissory note; mainly that it was drafted to facilitate the return of funds to Dukes. . . ."

Thus, the Bar concedes that Mr. Chesnoff's testimony was merely additional to that of Mr. Dukes. The Bar had enough to file the complaint against Mr. Walter in this Court on May 4, 1992.

That it refused to do so and pursued Mr. Chesnoff simply does not come within an exception of Rule 3-7.16(c).

Mr. Walter reasserts that the reasonable time of *The Florida Bar v. Lipman*, 497 So.2d 1165 (Fla. 1986), applies.

IV

THE REFEREE PROPERLY DISMISSED THE COMPLAINT BECAUSE THE COMPLAINT ESTABLISHED AN AFFIRMATIVE DEFENSE ON ITS FACE.

The Bar argues that an affirmative defense must be raised in a responsive pleading before it may be considered in a motion to dismiss. The Bar is wrong again.

An affirmative defense may be raised by way of motion to dismiss if the affirmative defense appears on the face of the complaint.

Hawkins v. Williams, 200 So.2d 800, 802 (Fla. 1967), expunged the decision of a District Court that the defense of contributory negligence could not be raised by way of motion to dismiss. This Court explained that the then-new Rule 1.110(d)of the Florida Rules of Civil Procedure now:

> ". . . *permits 'affirmative defenses appearing on the face of a prior pleading' to be asserted as grounds for a motion or defense under Rule 1.140(b)*. This opinion therefore holds what the new rules now provide, but the old rules did not." (Emphasis Added)

Adams v. Knabb Turpentine Co., Inc., 435 So.2d 944, 947 (Fla. 1st DCA 1983), held that:

> ". . . The statute of limitations is an affirmative defense which should be raised by answer rather than by motion to dismiss a complaint, *unless the facts constituting the defense appear affirmatively on the face of the complaint*. . . ."(Emphasis Added)

Johnson v. Johnson Chrysler/Plymouth Inc., 389 So.2d 690, 691

(4th DCA 1980), held that:

> ". . . the statute of limitations should be set out as an affirmative defense, *although the defense may be asserted in a motion to dismiss if the facts constituting the defense appear on the face of the complaint*. . . ." (Emphasis Added)

Roehner v. Atlantic Coast Development Corp., 353 So.2d 925, 926 (4th DCA 1978), held that:

> ". . . A defense based on the statute of limitations can be asserted in a motion to dismiss if the facts constituting the defense appear on the face of the complaint. . . ."

Stern v. First National Bank of South Miami, 275 So.2d 58, 60 (Fla. 3d DCA 1973), held that an affirmative defense may be raised by way of motion to dismiss if it is:

> ". . . based on an affirmative defense when the grounds therefore appear 'on the face' of a prior pleading. . . ."

Vaswani v. Ganobsek, 402 So.2d 1350, 1351 (Fla. 4th DCA 1981), held that:

> ". . . If the face of the complaint contains allegations which demonstrate the existence of an affirmative defense, then such defense can be considered on a motion to dismiss. . . ."

Frank v. Campbell Property Management, Inc., 351 So.2d 364, 364-365 (Fla. 4th DCA 1977), held that:

> ". . . If the face of the complaint contains allegations which demonstrate the existence of an affirmative defense then such defense can be considered on motion to dismiss. . . ."

Conte v. R & A Food Services, Inc., 644 So.2d 133 (Fla. 2nd DCA 1994), held that:

> ". . . Florida Rule of Civil Procedure 1.110(d) permits a pleader to raise an affirmative defense appearing on the face of the complaint as a basis of a motion to dismiss for failure to state a cause of action. . . ."

Here, the Complaint (¶12) alleges that Mr. Walter testified falsely on May 4, 1992. The Complaint is dated October 29, 1999 (p.4). The Complaint, on its face, shows that the Complaint was filed almost eighteen months after the expiration of the statute of limitations.

The Bar cites four decisions in support of its erroneous view.

Temples v. Florida Industrial Construction Co., Inc., 310 So.2d 326 (Fla. 2d DCA 1975), supports the Referee's ruling. There, the defendant filed a motion to dismiss which alleged two affirmative defenses not apparent on the face of the complaint. The trial court granted the motion to dismiss. The Second District reversed, holding that:

> "It is well entrenched in our jurisprudence that on a motion to dismiss the movant (appellee) admits as true all the material facts well pleaded. It is axiomatic that in ruling upon a motion to dismiss a complaint the issue before the court is whether the complaint states a valid cause of action. Our examination of the complaint filed in the instant case shows it states a cause of action. Therefore, under the Rules of Civil Procedure, the decision of the trial court in considering matters *not disclosed by the complaint* constitutes reversible error and we reverse, *for unless an affirmative defense appears on the face of a prior pleading*, which we submit does not appear in the instant case, it must be raised by pleading, rather than by motion. . . ." (*Id.*, at 327) (Emphasis Added)

In *Warwick v. Post*, 613 So.2d 563 (Fla. 5th DCA 1993), the

defendant asserted the defense of *res judicata* on a motion to dismiss. Plainly, the defense was not apparent on the face of the complaint. Here, the defense is quite apparent on the face of the Complaint.

Staples v. Battisti, 191 So.2d 583 (Fla. 3d DCA 1966), was denied under the old Rules of Civil Procedure and before *Hawkins v. Williams*, 200 So.2d 800 (1967).

In *Martin v. Eastern Airlines, Inc.*, 630 So.2d 1206 (Fla. 4th DCA 1994), the defendant filed a motion to dismiss *after* it had filed an answer. The affirmative defense did not appear on the face of the complaint.

CONCLUSION

This Court must approve the Referee's Report and Recommendation.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Corrected Answer Brief of Respondent** was mailed to **WILLIAM MULLIGAN**, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131 this 7th day of August, 2000.

By: _____
Louis M. Jepeway, Jr.