IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ALBERT PETER WALTER, JR.

Respondent.

_____/

Supreme Court Case No.: SC96915

The Florida Bar File No. 1992-70,187(11P)

On Petition for Review

INITIAL BRIEF OF COMPLAINANT

WILLIAM MULLIGAN
Bar Counsel
TFB No. 956880
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN F. HARKNESS, JR.
Executive Director
TFB No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

JOHN ANTHONY BOGGS
Staff Counsel
TFB No. 253847
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

CERTIFICATE OF TYPE, SIZE AND STYLE
and ANTI-VIRUS SCAN..... iii

STATEMENT OF THE CASE AND FACTS 1-3

SUMMARY OF ARGUMENT 4

ARGUMENT 5-10

I

THE REFEREE ERRED IN DISMISSING THE BAR'S PLEADING

CONCLUSION 11

CERTIFICATE OF SERVICE 12

TABLE OF AUTHORITIES

PAGE

Dade County v. Ferro,
384 So. 2d 1283, 1287 (Fla. 1980) 6

Goldstein v. Acme Concrete Co.,
103 So. 2d 202 (Fla. 1958) 8

Martin v. Eastern Airlines,
630 So. 2d 1206 (Fla. 4th DCA 1994) 10

Staples v. Battisti,
191 So. 2d 583, 585 (Fla. 3rd DCA 1966) 10

Temples v. Florida Industrial Construction, Co.,
310 So. 2d 326, 327 (Fla. 2nd DCA 1975) 10

The Florida Bar v. Lipman,
497 So. 2d 1165 (Fla. 1986) 4, 8

Warwick v. Post,
613 So. 2d 563 (Fla. 5th DCA 1993) 10

Other authorities:

Rules Regulating The Florida Bar

Rule 3-7.3 3,4,7,8
Rule 3-7.3(a) 7
Rule 3-7.3(b) 7
Rule 3-7.16 3,4,5,6,7,8,9
Rule 3-7.16 (a) 5
Rule 3-7.16 (b) 5
Rule 3-7.16(c) 4,5,9

CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

WILLIAM MULLIGAN
Bar Counsel

STATEMENT OF THE CASE AND FACTS

The Florida Bar opened a complaint file against the Respondent on September 11, 1991. (T. 1/27/00 pg.6). The complaint file emanated from an inquiry/complaint form filed by Gary Dukes dated July 9, 1991 alleging that Respondent received an excessive fee in his representation of Dukes. (T. 12/20/99 pgs. 4-5, T. 1/27/00 pgs.6, 10).

Dukes stated that Respondent was hired as local counsel for trial defense in a criminal case against him. Respondent received approximately $200,000 as an anticipated fee. (T. 12/20/99 pg. 5). Dukes further stated that when the trial did not materialize, Respondent promised to return the aforementioned funds, but failed to do so. Subsequent to the filing of Dukes intial complaint with The Florida Bar, Respondent executed a promissory note payable to the Nevada attorney (David Chesnoff) who hired Respondent as local counsel for Dukes. (T. 12/20/99 pgs. 7-9). It is the Bar's contention that the purpose of the promissory note was to further the return of the funds which belonged to Dukes. During the course of the Bar's investigation, Respondent, while under oath, stated that the promissory note related to an investment and/or gambling debt, and in no way involved a fee dispute with Dukes. (T. 12/20/99 pg. 16). That statement under oath was made on May 4, 1992. (T. 12/20/99 pg. 6).

The grievance file remained open. The Bar had encountered resistance from Chesnoff and had been unsuccessful for quite some time in its efforts to depose him. On November 2, 1993, the Bar attempted to take the deposition of Chesnoff, and he declared the attorney/client privilege for all substantive questions. (T. 12/20/99 pgs. 6-7). Thereafter, court proceedings were held in Nevada wherein the court instructed Chesnoff to answer the questions posed at the deposition. On March 29, 1995, the Bar once again attempted to take the deposition of Chesnoff, and he declared the Fifth amendment privilege on all the questions. (T. 12/20/99 pg. 7). Thereafter, court proceedings were held wherein the Nevada court again instructed Chesnoff to answer the questions posed at the deposition.

Finally, Bar counsel succeeded in deposing him on July 23, 1998. (T. 12/20/99 pg. 7). For the first time, Bar counsel heard sworn testimony, other than that of Dukes, that contradicted respondent's explanation for the promissory note; namely that it was drafted to facilitate the return of funds to Dukes. (T. 12/20/99 pgs. 9, 10).

The Bar filed a formal complaint (pleading complaint filed with the Supreme Court) on November 2, 1999 based upon the information received from Chesnoff. The initial focus of the inquiry/complaint, the excessive fee, was not the subject of the pleading. (T. 12/20/99 pg. 5).

Respondent moved to dismiss, asserting the basis that the formal complaint was filed more than six years after the perpetration of the 1992 alleged false statement, and that such was barred by Rule 3-7.16. The Bar responded that the formal complaint charged only the misrepresentation concerning the promissory note which wasn't confirmed until the 1998 Chesnoff deposition. Therefore, the Bar argued there would not be a violation of Rule 3-7.16.

The Motion to Dismiss was granted. Subsequently, The Referee also rejected the Bar's position on rehearing that the complaint referred to in Rule 3-7.16 is the inquiry/complaint described in Rule 3-7.3, not the formal complaint. The Bar filed a Petition for Review on April 17, 2000.

SUMMARY OF THE ARGUMENT

Rule 3-7.16 was adopted in 1995. This case was pending prior to that date. Authority does not support retroactive application of this rule to the case at hand.

The Referee misinterpreted the meaning of "complaint" as it pertains to Rule 3-7.16. The "complaint" referred to in Rule 3-7.16 is parallel to that of Rule 3-7.3 and does not pertain to a formal complaint filed with this Court.

The Florida Bar v. Lipman, 497 So. 2d 1165 (Fla. 1986), reflects that there is no express statute of limitations governing The Florida Bar cases. This case precedes Rule 3-7.16, but it still has precedential value.

The limitations period should have been tolled in this case, pursuant to Rule 3-7.16(c), due to concealment.

Limitation of actions is an affirmative defense which must be raised in a responsive pleading before it may be considered in a motion to dismiss.

ARGUMENT

THE REFEREE ERRED IN DISMISSING THE BAR'S PLEADING

It was error for the Referee to dismiss the formal complaint in this cause based upon Rule 3-7.16. Rule 3-7.16 in its entirety, follows:

> **RULE 3-7.16 LIMITATION ON TIME TO BRING COMPLAINT**
>
> **(a) Time for Inquiries and Complaints.** Inquiries raised or complaints presented by or to 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.
>
> **(b) Exception for Theft or Conviction of a Felony Criminal Offense**. There shall be no limit on the time in which to present or bring a matter alleging theft or conviction of a felony criminal offense by a member of The Florida Bar.
>
> **(c) Tolling Based on Fraud, Concealment or Misrepresentation**. In matters covered by this rule where it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the matter giving rise to the inquiry or complaint, the limitation of time in which to bring an inquiry or complaint within this rule shall be tolled.

First, assuming arguendo that the Bar's pleading (formal complaint) is the

"complaint" referred to in Rule 3-7.16, the Respondent's argument is fatally flawed. Respondent argues that 1992 was the operative date of the wrongful activity and that the Bar was required to file a formal complaint within six years of that time.

The Bar will discuss in detail the issue of which complaint was contemplated by Rule 3-7.16. However, at the onset Respondent's position is incorrect based upon his view of the law. Respondent addresses an occurrence or incident which took place in 1992. That occurrence or incident was the false statement under oath uttered by the Respondent. Respondent claimed that the promissory note which he executed pertained to an investment and/or gambling debt, and the Bar contends it was designed to facilitate the return of funds to a client.

Rule 3-7.16 was adopted in 1995. There is no legal basis for applying Rule 3-7.16 retrospectively to an incident or occurrence which took place in 1992. As the Court held in Dade County v. Ferro, 384 So. 2d 1283, 1287 (Fla. 1980):

> ... the ... limitation period contained therein may not be applied to a ... claim where the occurrence or incident out of which the claim arose predates the effective date of the statute.

Second, the position that the respondent advanced in his motion to dismiss was incorrect because Rule 3-7.16 does not pertain to the formal complaint filed with this Court. (T. 1/27/00 pgs. 4-8). Rather, it pertains to the inquiry or complaint

which is governed (in part; discussion to follow) by subsection (a) of Rule 3-7.16.

As noted above, it provides:

> Inquiries raised or complaints presented by or to 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. (T. 1/27/00 pgs. 8-9).
>
> (Emphasis added)

Quite clearly the words "inquiry or complaint" are the same words used in the same manner as Rule 3-7.3 of the Rules of Discipline.

> **Rule 3-7.3 Review of Inquiries, Complaint Processing, and Initial Investigatory Procedures**
>
> **(a) Screening of Inquiries.** Prior to opening a disciplinary file, bar counsel shall review the inquiry made and determine whether the alleged conduct, if proven, would constitute a violation of the Rules Regulating The Florida Bar warranting the imposition of discipline ... If bar counsel determines that the facts, if proven, would not constitute a violation of the Rules Regulating The Florida Bar warranting the imposition of discipline, bar counsel may decline to pursue the inquiry. A decision by bar counsel not to pursue an inquiry shall not preclude further action or review under the Rules Regulating The Florida Bar. The complainant and respondent shall be notified of a decision not to pursue an inquiry and shall be given the reasons therefor.
>
> **(b) Complaint Processing and Bar Counsel Investigation.** If bar counsel decides to pursue an inquiry, a disciplinary file shall be opened and the inquiry shall be considered as a complaint, if the form requirement of subdivision (c) is met. Bar counsel shall

investigate the allegations contained in the complaint.

(Emphasis supplied.)

Rule 3-7.3 specifically addresses “inquiries and complaints.” (T. 1/27/00 pgs. 4-5). From an examination of Rule 3-7.3 it is evident that the reference in Rule 3-7.16 (Limitation on Time to Bring Complaints) pertains to “inquiries and complaints” as defined in Rule 3-7.3. (T. 1/27/00 pg. 7). When the words in two related statutes or rules are the same, they should be construed to mean the same thing and should be considered together. Goldstein v. Acme Concrete Co., 103 So. 2d 202 (Fla. 1958). Further, there is no basis to believe that the limitation applies to the formal complaint which is filed with this Court in relatively few cases. If this was the situation to which Rule 3-7.16 applied, there would be a limitation of actions applicable to very few cases, and a grievance could be pursued through the staff and grievance committee stages without regard to the number of years prior thereto that the salient events had occurred.

Third, in The Florida Bar v. Lipman, 497 So. 2d 1165 (Fla. 1986), the Supreme Court of Florida held that "there is no express statute of limitations governing attorney discipline proceedings; rather The Florida Bar has reasonable time after it obtains jurisdiction to proceed". While Lipman precedes Rule 3-7.16, Rules of Discipline, it has not been reversed. (T. 1/27/00 pgs. 3-4, 16-17).

Fourth, assuming Rule 3-7.16 pertains to the formal complaint filed by the bar, subsection (c) would preclude the dismissal of the case since the limitation of time should have been tolled. Rule 3-7.16 (c) states in part:

> "... where it can be shown that fraud, concealment, or intentional misrepresentation of fact prevented the discovery of the matter giving rise to the inquiry or complaint, the limitation of time in which to bring an inquiry or complaint within this rule shall be tolled."

The actions of Chesnoff would constitute concealment as described in Rule 3-7.16(c). Chesnoff refused to answer questions pertinent to this matter causing lengthy delays in these proceedings. The Bar had to hire local counsel in Nevada and expend significant fees litigating the matter simply to obtain the sworn testimony of Chesnoff. Chesnoff had to be ordered by the Nevada court on more than one occasion to respond to the Bar's questions . The Bar's first attempt at taking the deposition of Chesnoff was in 1993. It wasn't until almost 5 years later, in 1998, that the Bar was able to successfully obtain the deposition of Chesnoff. Therefore, Rule 3-7.16(c) would preclude the dismissal of this matter since the time limitation should have been tolled during this period.

Finally, once again assuming arguendo that respondent's motion to dismiss addressed the proper "complaint," by addressing the Bar's formal complaint, a

motion to dismiss is not the proper vehicle for terminating the case under the circumstances. An affirmative defense must be raised in a responsive pleading before it may be considered in a motion to dismiss. Martin v. Eastern Airlines, 630 So. 2d 1206 (Fla. 4th DCA 1994); Temples v. Florida Industrial Construction, Co., 310 So. 2d 326, 327 (Fla. 2nd DCA 1975); Staples v. Battisti, 191 So. 2d 583, 585 (Fla. 3rd DCA 1966), cert. denied 196 So. 2d 916 (1967); Warwick v. Post, 613 So. 2d 563 (Fla. 5th DCA 1993).

Limitation of actions is an affirmative defense, respondent did not raise that affirmative defense in a response pleading. Even if said defense were valid, dismissal is not proper without a responsive pleading. Warwick, supra.

CONCLUSION

WHEREFORE, based upon the foregoing the Bar would submit that the trial court's order granting the Motion to Dismiss should be reversed and remanded for further proceedings.

Respectfully submitted,

WILLIAM MULLIGAN
Bar Counsel
Attorney No. 956880
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
Tel: (305) 377-4445

JOHN F. HARKNESS, JR.
Executive Director
TFB No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

JOHN ANTHONY BOGGS
Staff Counsel
TFB No. 253847
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Initial Brief of Complainant was mailed via Airborne Express to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and a true and correct copy was mailed to Louis M. Jepeway, Jr., Attorney for Respondent, at 19 West Flagler Street, Suite 407, Miami, Florida 33130 via regular mail and to John Anthony Boggs, Staff Counsel, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 via regular mail on this ___ day of May, 2000.

_____

WILLIAM MULLIGAN
Bar Counsel