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)

REPLY 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 AUTHORITIES

PAGE

Other Authorities:

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.

ARGUMENT

THE REFEREE ERRED IN DISMISSING THE BAR'S PLEADING

A. The Bar filed its formal complaint with the Supreme Court within a "reasonable time".

Respondent admits there was no statute of limitations in existence at the time of his alleged violation. Respondent cites to The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986), in support of his contention that the time for filing a formal complaint had expired since the Bar did not file its complaint within a "reasonable time". In Lipman, this Court held that where no express statute of limitations governing attorney discipline proceedings applies, The Florida Bar has a reasonable time after it obtains jurisdiction within which to proceed. Respondent has unilaterally defined "reasonable time". Respondent espouses that the "reasonable time" can in no way be in excess of 3 years. Respondent has provided no support for this premise. It is ludicrous to assign the same time frame for "reasonable" across the board when there are disparate circumstances from case to case. In the case at hand, the Bar conscientiously and diligently pursued its investigation from its inception. David Chesnoff's deposition was an essential part of the investigation. Without Mr. Chesnoff's deposition, the Bar would not have fulfilled its obligation to investigate, Rule 3-7.3, Rules of Discipline, and the grievance committee would not

have been presented with sufficient information. Based on Mr. Chesnoff's actions in avoidance of his deposition, the Bar proceeded within a reasonable time frame as discussed in Lipman.

Additionally, Respondent states that when Rule 3-7.16 was enacted it served to extend the "reasonable time" discussed in Lipman to six years. Once again, this is a flawed argument because respondent attempts to attribute a distinct time frame to "reasonable time" when that should be viewed on a case by case basis.

B. Complaints referenced in Rule 3-7.16(a) of the Rules Regulating The Florida Bar pertain to the initial complaint opened upon commencement of the investigation of a disciplinary matter and not the formal complaint filed with the Supreme Court of Florida.

In the case at hand, reasonable minds cannot differ as to the application of Rule 3-7.16(a). According to Rule 3-7.16(a),

> "***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."
>
> (Emphasis supplied.)

Respondent argues that the complaints referred to in the above rule pertain to formal complaints filed with this Court. Respondent is wrong. Rule 3-7.16(a) equates "inquiries or complaints" for the purpose of defining the time limitation to bring an initial complaint. As the Bar argued in its initial brief, the "inquiries and

complaints" referenced in Rule 3-7.3 are the same as those in Rule 3-7.16(a). The term inquiry specifically refers to the filing of a grievance by a complainant with the Bar. If Bar counsel, upon review of the inquiry, determines that the alleged conduct, if proven, amounts to a rule violation, a disciplinary file would then be opened. According to Rule 3-7.3, at that time "...the inquiry shall be considered as a complaint..." This complaint referenced in Rule 3-7.3 is the initial complaint which is investigated at staff level, not the formal complaint which is at referee level after its filing with this Court and which is referenced in Rule 3-7.4(l), Rules of Discipline.

It is plain to see that the word "complaint" has more than one meaning under the Rules Regulating The Florida Bar. There is the initial complaint at staff level and the formal complaint filed with this court which is referred to a referee. The case of In re Kline D. Strong, 616 P.2d 583 (Utah 1980), provides persuasive authority for the above argument. In Strong, the Supreme Court of Utah examined the triggering event of an attorney disciplinary action with regard to the statute of limitations. That court held "...there is a distinction between the original accusation or complaint and the filing of the prosecutive complaint. The disciplinary action is initiated by the filing of the first accusation of improper conduct." Strong, at 586. Similarly, in the case at hand, the initial complaint commenced within six years of

notice of the alleged misconduct and therefore, no violation of Rule 3-7.16(a) occurred even if the rule did apply. Rule 3-7.16(a) obviously pertains to the initial complaint, not the formal complaint.

Respondent argues that the Rule of Lenity should apply. According to *Black's Law Dictionary* (5th ed. 1988), the Rule of Lenity is defined:

> "Where the intention of Congress is not clear from the act itself and reasonable minds might differ as to its intention, the court will adopt the less harsh meaning."

In the instant case, the rule is clear and unambiguous. Clearly, the Rule of Lenity is not applicable.

C. The Bar's Complaint does not establish an affirmative defense on its face.

The Bar concedes that there is case law which supports Respondent's argument that a motion to dismiss can be filed prior to the answer when an affirmative defense appears on the face of the complaint. The Bar maintains, however, Rule 3-7.16 does not apply in this case and thus, no such affirmative defense exists on the face of the Bar's complaint. Rule 3-7.16 does not apply to the instant case.

CONCLUSION

WHEREFORE, based upon the foregoing the Bar submits that the referee erred in dismissing the Bar's complaint.

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of The Florida Bar's Reply Brief was forwarded 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, Biscayne Building, Suite 407, Miami, Florida 33130 and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this ____ day of _____, 2000.

_____
WILLIAM MULLIGAN
Bar Counsel