

FILED

SID J. WHITE

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

JAN 20 1988

THE FLORIDA BAR,

Complainant,

v.

JAMES W. AARON,

Respondent.

_____ /

CLERK, SUPREME COURT

By _____

Deputy Clerk

Case No. 70,338
[TFB Case No. 87-23,842(10A)]
(formerly 10A87C20)

RESPONDENT'S BRIEF IN SUPPORT
OF PETITION FOR REVIEW

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SYMBOLS AND REFERENCES

In this brief, the Respondent JAMES W. AARON will be referred to as the Respondent.

The Board of Governor of the Florida Bar shall be referred to as the Board of Governors.

The referee report shall be referred to as R.

The transcript for the final hearing on September 25, 1987, will be referred to as T.

Bar exhibits will be referred to as B Ex-.

STATEMENT OF THE CASE
On or about July 17, 1986, Respondent

Following the court's order in The Florida Bar v. Aaron, 490 So.2d 941 (Fla 1986), in which the respondent was publicly reprimanded for commingling and improper trust account record keeping, a review of the respondent's trust records was conducted by a staff investigator from The Florida Bar. This review disclosed the respondent had failed to bring his account into compliance with the rules as required. This gave rise to the filing of the present complaint against the respondent by the Bar.

Respondent filed a Motion To Dismiss The Bar's Complaint on May 11, 1987. A hearing on said motion was held and The Referee denied same by order entered May 26, 1987.

A final hearing was held on September 25, 1987. The referee recommended the respondent be found guilty of violating the following rules of Article XI of the Florida Bar's Integration Rule: 11.02(3) (a) for conduct contrary to honesty, justice or good morals, and 11.02 (4) (c) and the accompanying bylaw for improper trust account record keeping. He also recommended the respondent be found guilty of violating Disciplinary Rule 9-102(B) (3) of the Florida Bar's Code of Professional Responsibility for improper trust account record keeping. He recommended the respon-

dent be found not guilty of Disciplinary Rules 1-102(A) (4) for conduct involving fraud, deceit, dishonesty or misrepresentation, and 1-102 (A) (6) for other misconduct reflecting adversely on his fitness to practice law. He recommended the respondent receive a private reprimand, a one year period of probation during which time the Bar would review his trust account records on a quartely basis, and pay the cost of these proceedings.

The Board of Governores of The Florida Bar reviewed the referee's recommendations at its November, 1987, meeting and approved his findings of fact but took exception to his recommendations of not guilty regarding making a misrepresentation to the previous referee under oath and the overall recommendation of discipline which is considered erroneous and unjustified. The Board voted to file a petition for review of the referee's recommendations and seek a public reprimand, one year period of probation with quarterly reviews of respondent's trust account and payment of costs by respondent. The Board further urges that scheduling of the trust account reviews be the responsibility of the respondent.

The Bar filed it Petition for Review on November 25, 1987. Respondent also filed one dated November 27, 1987, which the Bar is treating as a cross-petition.

STATEMENT OF THE FACTS

In August, 1984, two staff investigators of The Florida Bar reviewed the respondent's Trust account records and determined he was not in substantial minimum compliance with the rules. (B Ex - pp. 11-12). Thereafter, in 1985, he entered an oral plea to misconduct involving commingling and improper trust account record keeping, received a public reprimand, and was placed on a one year period of probation. The Florida Bar v. Aaron, 490 So. 2d 941 (Fla. 1986). After the court's order became final in July 1986, a staff investigator from the Bar reviewed the respondent's trust records for the period July 1985 to July 1986. The review disclosed the respondent had failed to bring his trust account records into compliance as required by the court. (R p. 2)

Respondent did not have a separate receipt disbursement journal nor a cash receipt book. Each client did not have a separate ledger card. Available client ledgers reflected both trust and non-trust activity without distinction. The checks were not identified by number nor were they identified as being trust or non-trust. The respondent had failed to deposit funds belonging in part to himself and in part to trust to the trust account in at least sixty-five instances. This constituted commingling per se. Bank records failed to reflect deposits and

cost expenditures relative to the clients. The respondent reconciled some but not all of his monthly bank statements. His cash receipt book consisted of his regular office receipt book. His records revealed he had bank deposit slips but there were no duplicate office receipts. There was no letter to the bank instructing it to notify the Bar in the event a trust account check was returned for insufficient funds; nor could he tell the referee whether or not he had notified his bank. (R p.2)

Prior to the meeting of the Tenth Judicial Circuit Grievance Committee "A" on January 20, 1987, Respondent raised objections to conduct of the committee and some of its members. On December 11, 1986 Respondent outlined his objections in a letter he wrote to committee-member Jonathan Hancock. Copies of the letter were mailed to chairman C. Ray McDaniel and Branch Staff Counsel David G. McGunegle. Mr. Jonathan Hancock answered Respondent's letter on December 22, 1986. Copies of his letter were also mailed to the Chairman of the Committee and Branch Staff Counsel.

Although the respondent's trust account was not in substantial minimum compliance with the rules, he certified on his 1986 dues statement that he was in compliance. (R p. 3) He admitted at the final hearing on September 25, 1987, that checking paragraph four on his 1986 Bar dues statement regarding monthly bank reconciliations was a misleading statement to the Bar. (R p. 3) The respondent only partially complied with Integration

11.02(4) (c) and Disciplinary Rules 1-102(A) (6) and 9-102(B) (3). He did not maintain all the written trust records required by the rules nor did he follow all the procedures required. He stated he believed the staff investigator would assist him in bringing his account into compliance during this probationary period. (R p. 3; T pp. 11,130) The Bar filed a complaint against the respondent on April 7, 1987, alleging he had failed to bring his trust account into compliance and that he had falsely testified under oath at a hearing before then Circuit Judge Richard H. Baily on December 10, 1985, that he had done so regarding the status of his trust account. At the hearing which focused in part on his record keeping and which he entered a plea to having been not in compliance with the rules, he testified under oath:

Q. Now, Charlie Lee, I think, and Colleen Rook of my office came down and went through your records in August of 1984?

A. I believe so.

Q. And did you then bring those current and in conformance with the rules, subsequent to that visit?

A. Correct.

See the Referee Report at page 2, and B Ex - 2 at pages 11 and 12.

The referee found the respondent guilty of technical trust account violations, but not guilty of misrepresenting the status of his trust account as on December 10, 1985, to Judge Bailey.

SUMMARY OF ARGUMENT

The referee erred in denying Respondent's Motion to Dismiss for lack of jurisdiction. The record of the Tenth Judicial Circuit Grievance Committee "A" clearly shows a lack of any affirmative findings of probable cause by said committee. The record shows the recitation of conclusions by Complainant's Branch Staff Counsel only. Further it is clear from the contents of Respondent's letter of December 11, 1986 and Jonathan Hancock's letter of December 22, 1986 that the Tenth Judicial Circuit Grievance Committee "A" violated its own rules which are designed to insure that its deliberations and decisions reflect fairness to Respondent. The committee was composed of members who demonstrated a biased attitude toward Respondent and disregarded their obligations to recused themselves. It is also clear that the method that the Board of Governor's employed to appoint members to the Grievance Committee operated to deny Respondent's right to due process and equal protection of the laws. Complainant, through the Tenth Judicial Circuit Grievance Committee "A" showed a complete disregard for the the appearance of impropriety that its composition and conduct showed.

ARGUMENT

Point I

WHETHER THE REFEREE ACTED ERRONEOUSLY AND UNJUSTIFI-
ABLY IN DENYING RESPONDENT'S MOTION TO DISMISS.

The referee acted improperly in denying Respondent's Motion To Dismiss for lack of jurisdiction. Respondent's Motion To Dismiss was relied upon three (3) basic points.

First, Respondent contended that the Complaint filed against him was in violation of Disciplinary Rules 3-3.2(a), 3-7.3(i) and (j). Respondent also maintained that Complainant's Tenth Judicial Circuit Grievance Committee "A" violated Disciplinary Rules 3-3.4(c)(2)(3)(4). Finally Respondent contended that Complaint was legally defective in that the Tenth Judicial Circuit Grievance Committee "A" violated Disciplinary Rules 3-7.1 regard confidentiality of disciplinary proceedings.

Respondent contended that the Court herein lacked jurisdiction to act on the Complaint filed herein because the record of the proceedings of the Tenth Judicial Circuit Grievance Committee "A" failed to show that said committee affirmatively found probable cause that Respondent had violated and Disciplinary or Integration Rules as required. Rules Regulating the Florida Bar 3-3.2(a), 3-7.3(i) and (j). The Florida Bar v. GBT 399 So. 2d 357. A review of pages 29 and 30 of the transcript of proceedings of the January 20, 1987 Tenth Judicial Circuit Grievance Committee "A" reveals a complete lack of any affirmative findings of probable cause that Respondent had violated any applicable rules by said committee. The record reveals recitations of findings by Branch Staff Counsel David G. McGunegle only.

Clearly Branch Staff Council David G. McGunegle could not properly act on behalf of the Tenth Judicial Circuit Grievance Committee "A". Rules Regulating The Florida Bar 3-3.3(b).

Respondent's next contention was that the proceedings of the Tenth Judicial Circuit Grievance Committee "A" which gave rise to the Complaint herein was defective. Respondent's position was that Mr. Jonathan Hancock, a member of said committee, participated in the deliberations wherein the finding of probable cause against Respondent was made when he was disqualified from doing so. Respondent maintained that Mr. Jonathan Hancock had a personal interest in the matters under consideration and Respondent which could and did affect the outcome of the proceedings, and that Mr. Jonathan Hancock was biased or prejudiced toward the Respondent. Respondent contended that Mr. Hancock and the Chairman of the Committee were accorded notice of facts prior to January 20, 1987. Rules Regulating the Florida 3-3.4(c)(2)(3) and (4). Respondent outlined his reasons for asking Mr. Jonathan Hancock to recuse himself in his letter to Mr. Jonathan Hancock of December 11, 1986. Copies of the letter were mailed to the Chairman of the Tenth Judicial Circuit Grievance Committee "A" and Complaint's Branch Staff Counsel. Mr. Hancock responded by letter to Respondent on December 22, 1986. In his letter, Mr. Hancock did not deny Respondent's allegations and provided additional evidence of his biased attitude toward Respondent. Copies of Mr. Hancock's letter were also mailed to the Chairman of the Tenth Judicial Circuit Grievance Committee and Branch Staff Counsel for Complainant.

On January 20, 1987 the Tenth Judicial Circuit Grievance Committee "A" considered allegations against Respondent by two different parties. Mr. Jonathan Hancock, and the Chairman C. Ray McDaniel participated in disposing of each of those matters.

Respondent also maintained that the findings of probable cause by The Tenth Judicial Circuit Grievance Committee was improper because said committee was impaneled and operated in a fashion that denied Respondent due process of law. Specifically Respondent maintained that Rules Regulating The Florida Bar 3.3.4(c) was unconstitutionally applied to the proceedings herein in that Complainant's Board of Governors violated Respondent's constitutional rights to due process and equal protection of the laws in the methods and operational effects of appointing members to the Tenth Judicial Circuit Grievance Committee "A". Specifically Respondent maintained that he is an Afro-American man and that all of the members of the Committee which met on January 20, 1987 were male Caucasians. Respondent basically believes that he was a member of a group recognizable as distinct class capable of being singled out for different treatment under The laws (Afro-Americans). That the appointment procedure of Complainant's Board of Governors was susceptible of abuse, and that there had been a substantial degree of underrepresentation of Afro-Americans on The Tenth Judicial Circuit Grievance Committee "A".

Respondent contended that Complainant's disciplinary proceedings were quasi-criminal in nature in that it sought to achieve many of the objectives provided for in criminal laws, i.e. to protect

the public and punish offender. State ex rel Florida Bar v. Dawson
111 So. 2d 427 (1959) Spevak v. Klein 385 U. S. 511, 87 S. Ct. 625
(1967) Malloy v. Hogan 378 U. S. 1, 84 S. Ct. 1489 (1964). In re-
Ruffalo 390 U. S. 544, 88 S. Ct. 1222 (1968). Complainant acknow-
ledge the validity of Respondent's assertions regarding the appli-
cability of due process and equal protection in its Response To
Motion To Dismiss. Respondent's Motion To Dismiss should have
been granted.

ARGUMENT

Point II

WHETHER THE REFEREE ACTED ERRONEOUSLY AND UNLAWFULLY
IN ADMITTING COMPLAINANT'S EXHIBIT NO. 5. AT TRIAL
OVER OBJECTIONS OF RESPONDENT.

The Referee acted improperly in admitting Complainant's Exhibit No. 5 into evidence over Respondent's Objections. Complainant refers to said Exhibit as a "dues statement". Exhibit No. 5 also includes a "Trust Account Certificate" which according to printed instructions "each attorney must complete and sign." Respondent was asked to certify whether he had received/disbursed trust funds in Florida and whether he maintained trust accounts. He was also asked to certify whether he was in compliance with all procedures required by Integration Rule 11.02(4) and by law 11.02(4)(c) and Disciplinary Rules 2-106 and 9-102 of The Code of Professional Responsibility. Further Respondent was called upon to certify whether he had reconciled all statements as required and whether there had been any shortages in client accounts, or whether checks were issued against insufficient funds.

Respondent testified that he felt compelled to certify "yes" on Exhibit No. 5 because Complainant had been chastised by Branch Staff Counsel about not checking the blocks in 1982 or 1983 at the hearing before Judge Richard H. Bailey on December 10, 1985, page 12 transcript of proceedings. Further he testified that he was instructed by Complainant's investigator Charles Lee

on March 11, 1985 that he was required to check the appropriate response, yes or no. Respondent maintained that by being compelled to check "yes" or "no" on Exhibit No. 5, he was in effect being forced to possibly incriminate himself regarding possible violation of Integration and Disciplinary Rules in violation of his constitutional privileges against self incrimination.

The findings of the referee That Respondent violated Rules and Bylaws of Discipline rest solely upon Exhibit No. 5. Requiring Respondent to complete same without room for explanation or comment operated to require him to incriminate himself ~~is~~ improperly and unlawfully.

Spevack v. Klein, *ibid* Malloy v. Hogan *ibid* Gardner v. Broderick 392 U. S. 273, 88 S. Ct. 1913.

ARGUMENT

Point III

WHETHER THE REFEREE'S FINDINGS AND RECOMMENDATIONS HEREIN ARE RESONALBE, LAWFUL AND PROPER.

The Referee recommended that Respondent receive a private reprimand and be placed on a one (1) year's probation and that Respondent's trust account records be reviewed quarterly during probation. The referee made those recommendations while also finding that Respondent violated technical rules regarding trust account record keeping and mislead Complainant by certifying that he was in compliance with all of the applicable rules.

From the evidence submitted at the final hearing the Referee heard uncontroverted evidence that Respondent Co-operated with Complainant during its investigation, that he made his records available for inspection, ^{and} that no client of Respondent was hurt, injured or prejudiced in any way because of Respondents conduct. Further the evidence showed that Respondent's trust account had no overfrafts, that no lying, cheating, defrauding or untrustworthiness by Respondent had been shown, and that he had not violated any trust or confidence reposed in him by his clients.

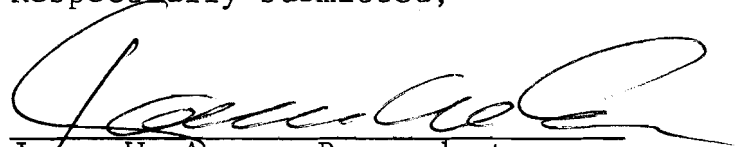
The evidence also showed that Complainant had failed and refused to abide by terms of the order in The Florida Bar v. Aaron 490 So. 2d 941 (1986), which required that it review Respondent's trust account record keeping on a quarterly basis for one year.

The referee had the authority to consider all of the evidence submitted. By finding that Complainant's allegation that Respondent had lied in sworn testimony before Judge Richard H. Bailey on December 10, 1985 was not proved, he clearly found that Respondent's conduct constituted minor misconduct. The evidence clearly convinced the referee that unusual circumstances existed for departing from the normal discipline required by Rule 3-5(b). The complaint herein arose from and is part an parcel of the matters raised in the earlier complaint No. 66,454 The Florida Bar v. Aaron ibid.

CONCLUSION

WHEREFORE, Respondent requests this Honorable Court to reverse the referees decision wherein Respondent's Motion To Dismiss was denied. Further, Respondent requests that the Court declare that the Referee's decision to admit Exhibit No. 5 was in error and reverse his findings regarding Respondent's Conduct. The Court should find that the Referee's recommendation were proper and declare that unusual circumstances existed which supports a finding that Respondent's conduct constituted minor misconduct.

Respectfully submitted,




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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original and seven (7) copies of the foregoing Brief by U. S. Mail to The Clerk of The Supreme Court, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing by U. S. Mail to co-counsel David Wilson, III, Post Office Box 3154 FVS Winter Haven, Florida 33880; a copy to Staff Counsel The Florida Bar, Tallahassee, Florida 32301, and a copy by U. S. Mail to Branch Staff Counsel David G. McGunegle, The Florida Bar 605 East Robinson Street, Suite 610, Orlando, Florida 32087.

11/9/88


James W. Aaron, Respondent