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1992

CLERK, SUPREME COURT

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Chief Deputy Clerk

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IN THE SUPREME COURT OF
FLORIDA, TALLAHASSEE,
FLORIDA

CASE NO. 78,063

TFB FILE NO. 91-00298-02

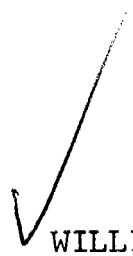
WILLIAM F. DANIEL,
Petitioner,

vs.

THE FLORIDA BAR,
Respondent.

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REPLY BRIEF



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PETITIONER, PRO SE

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STATEMENT OF THE CASE AND FACTS

In PETITIONER'S initial STATEMENT OF THE CASE AND FACTS and RESPONDENT'S separate STATEMENT OF THE CASE AND FACTS, both told this Court that the Referee had entered an order in cases number 78,063 and 78,065. Both were in error.

On page one of the APPENDIX TO PETITIONER'S INITIAL BRIEF, a copy of the Referee's ORDER appears as entered. The original now rests in this Court's original file.

The Referee has entered NO ORDER in case number 78,065 and the motions in that case have not been disposed of by the Referee.

That is fundamental error.

PETITIONER relies on his STATEMENT OF THE CASE AND FACTS in his INITIAL BRIEF, with the correction noted above.

SUMMARY OF ARGUMENT

The Florida Bar failed to serve its formal COMPLAINT and REQUEST FOR ADMISSIONS on PETITIONER as required by the Rules Regulating the Florida Bar and the Rules of Civil Procedure.

The Referee failed to send rule notice or reasonable notice of the final hearing nor did he attach any certificate of service to the notice.

The Florida Bar attempted to serve PETITIONER with a copy of the MOTION to deem matters admitted and the MOTION FOR SUMMARY JUDGMENT, but the post office failed to deliver the letter to PETITIONER. The post office returned the letter with the MOTION to the Florida Bar undelivered.

The Referee entered an ORDER for SUMMARY JUDGMENT and defaulted PETITIONER in case number 78,063 but he failed to make any ruling on any motion in case number 78,065. He also failed to grant PETITIONER'S MOTION FOR A CONTINUANCE.

The Florida Supreme Court improperly and illegally consolidated two unrelated disciplinary cases and denied PETITIONER fundamental fairness.

ARGUMENT
POINT ONE

FAILURE TO FILE THE COMPLAINT AND
THEN SERVE SUIT PAPERS WAS FUNDAMANTAL
ERROR

PETITIONER contends that The Florida Bar never served him with any copy of a COMPLAINT after it filed suit in the Florida Supreme Court. The Bar admits that fact in the transcript of proceedings. It says that it sent PETITIONER a copy of the suit papers it was going to file in the Supreme Court but it admits it never even attempted to serve the attorney after the formal COMPLAINT was filed with this Court.

The Florida Bar misquotes the rules relating to adversary proceedings in the Supreme Court, which are governed by Rule 3-7.6, Procedure Before a Referee and Rule 3-7.7, Procedure Before the Supreme Court of Florida, both of which provisions are in the Rules Regulating The Florida Bar.

The Florida Bar on page eight of its ANSWER BRIEF quotes Rule 3-7.4(j), which deals only with GRIEVANCE COMMITTEE PROCEDURES. That rule has no application to the facts in this case and The Florida Bar knows it. To attempt to mislead this

Court is neither wise nor fair.

Rule 3-7.6(e), Procedure Before a Referee, Nature of Proceedings, clearly provides that "The Florida Rules of Civil Procedure apply except as otherwise provided in THIS RULE."

The orderly procedure in formal, adversary proceedings filed by The Florida Bar in the Florida Supreme Court is clearly outlined in Rule 3-7.6, Rules Regulating The Florida Bar.

Step One-file the formal complaint in court. Rule 3-7.6(g)(1)a.

Step Two-the attorney is not required to file anything-ANSWER or MOTION-until 20 days "AFTER SERVICE OF A COPY OF THE COMPLAINT." Rule 3-7.6(g)(2).

Step Three-after formal suit has been filed and after service of process has been accomplished on the Respondent attorney, then the matter proceeds before the Referee appointed by this Court.

Step Two-formal service of process on the attorney-is further required by Rule 1.070(f), Florida Rules of Civil Procedure.

The Florida Bar has completely omitted Step Two-it admits that it never served PETITIONER after it filed suit in this Court.

The rule of law is Neal vs. Bryant 149 So.2d 529, 97 ALR 2d 529 (Fla 1962) clearly applies.

This case must be reversed.

ARGUMENT
POINT TWO

ENTRY OF SUMMARY JUDGMENT WAS
INAPPROPRIATE AND WAS ERROR

The Florida Bar did not even attempt to serve PETITIONER with a copy of the suit papers after suit was filed in the Supreme Court. Rule 1.070(f) Rules of Civil Procedure requires personal service of process of a copy of the initial pleading.

The Florida Bar also failed to serve a copy of the REQUEST FOR ADMISSIONS on the PETITIONER attorney after it filed suit and omitted service of process.

Then the Florida Bar filed its MOTION TO DEEM MATTERS ADMITTED and MOTION FOR SUMMARY JUDGMENT.

But again, the Florida Bar failed to get service of process. The post office returned the letter with the copy of these motions to the Florida Bar undelivered. Undisputed proof shows NO SERVICE.

The Florida Bar says that since it tried to send the motions to PETITIONER by mail, even if he never got them and even if the letters with the copies of the pleadings came back to the Florida Bar, the attorney is still bound as if he had received them.

Failure to serve the MOTIONS and admitting that the letter came back to the Florida Bar UNDELIVERED is not proper service of papers after the initial process is served. See Rule 1.080, Rules of Civil Procedure.

The Referee proceeded with the MOTION FOR SUMMARY JUDGMENT in spite of the fact that the Florida Bar admitted that its letter with a copy of the motions to the PETITIONER attorney never reached the attorney but came back to the Bar.

No prima facia proof of service of the MOTIONS is involved here. The Bar admitted that its attempt to send the attorney a copy of the MOTIONS failed because they got the letter returned to them by the post office.

Further, SUMMARY JUDGMENT is not an appropriate remedy in formal disciplinary cases filed in this Court. No rule or case says so.

Finally, the Referee's consolidated ORDER dated February 27, 1992 failed to rule on any of the motions in case 78,065 but instead ruled on case number 78,063 and a nonexistent case 78,061.

This case must be reversed.

ARGUMENT
POINT THREE

FAILURE TO FOLLOW THE TEN
DAY NOTICE OF HEARING
REQUIREMENT WAS ERROR

The Referee sent out NOTICE OF HEARING but failed to certify when it was sent (TR 23-32). Nobody knows when it was sent or received.

The matters heard at this hearing were trial or final hearing matters. Everything was set for hearing and determination.

Rule 3-7.6(h) requires 10 days notice of such hearings.

Rule 3-7.6(g)(5)b, Rules of Discipline, provide for a certificate of service on all pleadings, motions, NOTICES, etc.

Neither the Florida Bar nor the Referee attached any certificate to the NOTICE OF HEARING in this case. They ignored the rule. Petitioner suffered.

Procedural due process was not followed.

Rule due process was not followed.

The Florida Bar cites the case of McMurrain v. Fason 573 So.2d 915 (1st DCA 1990) as authority for reasonable notice of hearing on the MOTION TO DISSOLVE a writ of replevin.

In McMurrain, hand delivery of the NOTICE OF

HEARING was certified seven days prior to the hearing, and no MOTION FOR CONTINUANCE was made by the aggrieved party.

In this case, PETITIONER correctly points to no certificate of service of the NOTICE OF HEARING; and PETITIONER did move for a continuance of the hearing to give him more time.

The McMurrain case supports PETITIONER, not the Florida Bar in this case.

The Florida Bar says on page 16 of its ANSWER BRIEF that PETITIONER'S assertion that he did not receive at least ten days notice of hearing is not sufficient to set aside the Referee's ORDER and INITIAL REPORT.

But this is not just PETITIONER'S assertion. The record shows:

1. Failure to attach any certificate of service to the NOTICE OF HEARING, as the rule requires.
2. Failure to follow the clear mandate of at least ten days NOTICE OF HEARING for trial or final hearing. The rule was ignored completely.
3. A duty of law on the Referee and the Florida Bar to follow the procedural rules to insure procedural due process is mandatory.

The rule of law in Neal vs. Bryant, 149 So.2d 529,

97 ALR 2d 529 (Fla 1962), was violated in this case.

The case should be reversed.

ARGUMENT
POINT FOUR

THE REFEREE'S DENIAL OF THE
ORE TENUS MOTION FOR CONTIN-
UANCE WAS ERROR

The fact background shows serous procedural due process violations by the Florida Bar and by the Referee in this case, including failure to serve the initial complaint after sui t was filed by the Bar; failure to serve PETITIOER with a copy of the REQUEST FOR ADMISSIONS; and the MOTIONS; and failure to give RULE NOTICE or reasonable notice of the trial or final hearing.

PETITIONER, in this case did exactly what the First District Court of Appeal told the complaining party to do in McMurrain vs. Fason, 573 So.2d 915 (Fla 1st D.C.A. 1990).

PETITIONER moved for a continuance.

The McMurrain court, at page 919 and again on rehearing in the same volume at page 921, indicated that a MOTION TO CONTINUE would have changed the result.

Taking McMurrain and the rule of law in Neal vs. Bryant, 149 So.2d 529, 97 ALR 2d 529 (Fla 1962), the Referee erred when he denied PETITIONER

a continuance in this case.

PETITIONER was denied fundamental fairness.

The case should be reversed.

ARGUMENT
POINT FIVE

THE FLORIDA SUPREME COURT ILLEGALLY
CONSOLIDATED TWO UNRELATED CASES

The two cases against PETITIONER were totally separate and involved different complaints which were months apart.

The two separate cases were handled as one by the Florida Bar.

The two separate cases were filed by the Florida Bar with separate COMPLAINTS but were filed at the same time in a procedure to lure this Court into treating them as practically consolidated.

This Court issued ONE ORDER appointing the same Referee in both unrelated cases.

The procedure was unfair and it puts the attorney in the position of defending two unrelated cases before the same Referee at the same time with cumulative witnesses.

The Referee sent out notices but set the two unrelated cases on the same date at the same time and for the same place. That smacks of unfairness.

The procedure is unfair on its face.

The Court should stop this procedure.

This case should be reversed.

CONCLUSION

Petitioner DANIEL has shown where the Florida Bar's failure to serve him with the initial COMPLAINT after suit was filed in this Court deprived him of procedural due process of law; equal protection of the law; rule due process of law and fundamental fairness.

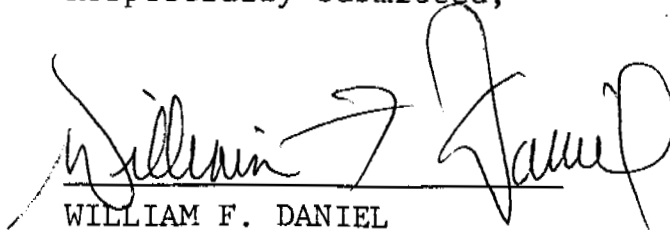
This Court should direct the Florida Bar to follow the rules in each case in which it complains that an attorney does not follow the rules.

This case presents an issue that has not been previously decided by this Court.

Rule 3-7.7(a) RIGHT OF REVIEW, PROCEDURES BEFORE SUPREME COURT OF FLORIDA, RULES REGULATING THE FLORIDA BAR, specifically provides for review by this Court of what the Referee has done and has sent to this Court for either review or it becomes final if not appealed. Review is essential here.

This Court should reverse this case and appoint a new Referee. It should also tell its administrative arm, the Florida Bar to serve copies of COMPLAINTS on Respondents after suit is filed.

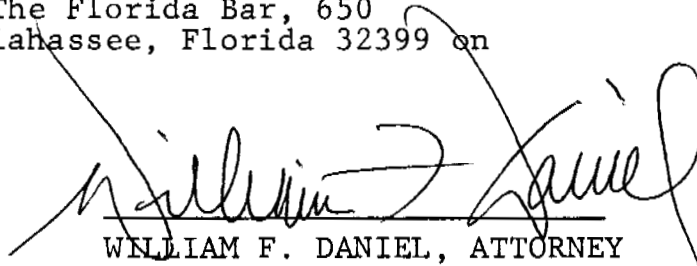
Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the original and seven copies of this REPLY BRIEF were hand delivered to Honorable Sid White, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301 on June 9, 1992; and a copy was furnished by regular U.S. mail to John T. Berry, Esquire, Staff Counsel, and James N. Watson, Jr., Esquire, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399 on June 9, 1992.



WILLIAM F. DANIEL, ATTORNEY
PRO SE