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IN THE SUPREME COURT OF FLORIDA

CHRISTOPHER DEBOCK,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.
_____/

Case No. 67,207

Boggs

AMICUS CURIAE BRIEF OF THE FLORIDA BAR

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INTRODUCTION

In this brief, The Florida Bar will be referred to as either "The Florida Bar" or "the Bar"; Christopher DeBock will be referred to as "DeBock"; and, the State of Florida will be referred to as "the State".

STATEMENT OF THE CASE

DeBock, an assistant state attorney, was subpoenaed by the State to appear at a deposition in regard to a criminal case in which another attorney was accused of offering DeBock unlawful compensation. Despite having use immunity, DeBock asserted his Fifth Amendment right against self-incrimination as he feared said immunity would not extend to Bar disciplinary proceedings.

The State filed a petition for order to show cause, but the trial court refused to find him in contempt, holding that he was entitled to exercise his Fifth Amendment right not to testify without use immunity from Bar proceedings and that the burden was on the State to obtain the immunity from the Supreme Court of Florida before compelling DeBock to testify.

The Fourth District Court of Appeal quashed the trial court's decision and held that DeBock may not invoke his Fifth Amendment right in Bar proceedings, as they are remedial rather than penal in nature, and further held that it was DeBock's responsibility to seek the immunity from the Supreme Court of Florida.

On October 30, 1986, this Court reversed the finding of the district court of appeal and held that Bar proceedings are penal in nature and that this Court may grant use immunity relative to them. This Court further held that the State must make application for immunity to this Court prior to compelling a witness to testify.

The Bar requested leave to appear and to seek rehearing which was granted by this Court, and the Court has directed the Bar to file an amicus brief.

STATEMENT OF THE FACTS

The Bar, as amicus, will rely on the facts as presented by counsel for the State and counsel for DeBock.

SUMMARY OF ARGUMENT

Florida Bar Integration Rule, article XI, Rule 11.02 and Rule 3-3.1, Rules of Discipline, clearly state that a license to practice law is a privilege, revocable for cause. The Court erred in holding that DeBock's right to earn a living and his privilege to practice law are one and the same.

Moreover, the Court erred in its holding that Bar proceedings are penal rather than remedial in nature, contrary to the rules in effect at that time (Florida Bar Integration Rule, article XI, Rule 11.02) and the weight of authority in the United States. Said holding could have the effect of seriously hampering the Bar's ability to protect the public interest through investigation of lawyer misconduct.

ARGUMENT

I.

THE COURT ERRED IN ITS HOLDING THAT A LICENSE TO PRACTICE LAW IS A RIGHT RATHER THAN A PRIVILEGE.

It is important to understand that lawyer regulation is different from other professional regulatory schemes. The first indication of such difference comes from a reading of the Florida Bar Integration Rule which was in effect at the time of the Court's decision. More specifically, Florida Bar Integration Rule, article XI, Rule 11.02 stated in pertinent part:

> . . . a license to practice law confers no vested right to the holder thereof, but is a conditional privilege revocable for cause. The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar.

This Court, in rehearing on the cases in which the Rules Regulating The Florida Bar were adopted and which became effective January 1, 1987 (case nos. 65,197, 65,877, 67,085 and 68,293), has carried forward the same rationale in Rule 3-1.1, Rules of Discipline:

> Privilege to Practice. A license to practice law confers no vested right to a holder thereof, but is a conditional privilege which is revocable for cause.

By contrast, the legislature in enacting the general provisions of the chapter dealing with the regulation of professions and occupations, stated its intent as follows:

> "It is the intent of the Legislature that persons desiring to engage in any lawful profession regulated by the Department of Professional Regulation shall be entitled to do so as a matter of right if otherwise qualified. Section 455.201, Florida Statutes (1985) (emphasis added).

In finding in the instant case that DeBock's right to earn a living and his privilege to practice law are one and the same, the Court is acting in an inconsistent manner in two respects. First, it is inconsistent to equate a right and a privilege as they are quite distinct and opposite concepts. Second, such a statement flies in the face of the Integration Rule and the Rules Regulating The Florida Bar. The Bar would argue that, considering the recent adoption of the Rules Regulating The Florida Bar which carry forward the "right/privilege" language, this Court never intended to confer any more than a privilege to those given a license to practice law in this state.

II.

THE COURT ERRED IN HOLDING THAT BAR PROCEEDINGS ARE PENAL RATHER THAN REMEDIAL IN NATURE IN THAT IT IS CONTRARY TO THE WEIGHT OF AUTHORITY AND COULD SERIOUSLY HAMPER THE PROTECTION OF THE PUBLIC INTEREST THROUGH DISCIPLINARY INVESTIGATIONS AND PROSECUTIONS.

This Court's finding that Bar disciplinary proceedings are penal in nature is inconsistent with the purpose of discipline as stated in the Integration Rule which was in effect at the time of the Court's order. Florida Bar Integration Rule, article XI, rule 11.02, as quoted above stated in pertinent part:

> The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as protection of the legal profession through the discipline of members of the Bar.

Most recently this authority has been restated as American Bar Association policy in the Standards For Imposing Lawyer Sanctions as approved February, 1986. Likewise, in November, 1986, The Florida Bar, through the Board of Governors, gave its endorsement to Section 1.1 of those standards which state as follows:

> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely properly to discharge their professional duties to clients, the public, the legal system, and the legal profession.

It is clear from the language of the Integration Rule, cited above and in effect at the time the Court's order that the primary purpose of discipline is remedial rather than penal, although there is a penal aspect to discipline. See also, Mississippi State Bar v. Attorney/Respondent in Disciplinary Proceedings, 367 So.2d 179 (Miss. 1979). Furthermore, this Court's finding that disciplinary cases are penal in nature is unique and inconsistent with the weight of authority in other jurisdictions as expressed in (The Florida Bar apologizes for the string citation, but wishes to make the Court aware of the number of other states so holding) Matter of Preston, 616 P.2d 1 (Alas. 1980), Matter of Stout, 596 P.2d 29 (Ariz. 1979), In re Petty, 627 P.2d 191 (Cal. 1981), Application of Dimestein, 410 A.2d 491 (Conn. 1979), Matter of Stoner, 272 S.E.2d 313 (Ga. 1980), Disciplinary Board of Supreme Court v. Kim, 583 P.2d 333 (Hawaii 1978), In re March, 376 N.E.2d 213 (Ill. 1978), In re Zahn, 413 N.E.2d 421 (Ill. 1980), Matter of Kesler, 397 N.E.2d 574 (Ind. 1979), cert. den. Kesler v. Indiana Supreme Court Discipline Commission, 449 U.S. 829 (1979), State v. Russell, 610 P.2d 1122 (Kan. 1980), Kentucky Bar Association v. Singer, 558 S.W.2d 582 (Ky. 1977), Louisiana State Bar Association v. Causey, 393 So.2d 88 (La. 1980), Louisiana State Bar Association v. Stinson, 368 So.2d 971 (La. 1979), appeal dismissed, 444 U.S. 803 (1979), reh. den., 444 U.S. 985 (1979), Attorney Grievance Commission v. Bailey, 408 A.2d 1330 (Md. 1979), Matter of Jacques, 258 N.W.2d 443 (Mich. 1977), vacated, Jacques v. State Bar Grievance Administrator, 436 U.S. 952, on remand, 281 N.W.2d 469, Matter of Trombly,

247 N.W.2d 873 (Mich. 1976), Matter of Hanratty, 277 N.W.2d 373 (Minn. 1979), Matter of Bear, 578 S.W.2d 928 (Mo. 1979), Matter of Wilson, 402 A.2d 81 (N.J. 1979), Anonymous Attorney v. Bar Association of Erie County, 362 N.E.2d 592 (N.Y. 1977), Matter of Robinson, 247 S.E.2d 241 (N.C. 1978), reh. 250 So.2d 79 (N.C. 1978), Matter of Maragos, 285 N.W.2d 541 (N.D. 1979), State ex rel. Oklahoma Bar Association v. Peveto, 620 P.2d 392 (Okla. 1980), In re Rook, 556 P.2d 1351 (Or. 1976), Matter of Leopold, 366 A.2d 227 (Pa. 1976), Carter v. Tolcarelli, 402 A.2d 1175 (R.I. 1979), Matter of Barr, 228 S.E.2d 678 (S.C. 1976), Matter of Wallace, 254 N.W.2d 452 (S.D. 1977), Howell v. State, 559 S.W.2d 432 (Tex.Civ.App. 1977), Petition of Harrington, 367 A.2d 161 (Va. 1976), In re Alper, 617 P.2d 982 (Wash. 1980), Committee on Legal Ethics of West Virginia State Bar v. Pence, 290 S.E.2d 668 (W.Va. 1977), Matter of Rabideau, 306 N.W.2d 1 (Wis. 1981), and Matter of Clark, 613 P.2d 1213 (Wyo. 1980). All of the above cases state that disciplinary cases are for the purpose of protection of the public and courts. Further, most of those cases hold that disciplinary proceedings are not penal in nature nor are they criminal.

By stating that the Bar's disciplinary proceedings are penal in nature, the Court has placed severe limitations on the ability of The Florida Bar to protect the public interest and to perform its prosecutorial function. Using the Court's reasoning, if Bar proceedings are penal in nature, then an accused attorney might assert the Fifth Amendment right of silence in any Bar discipline

matter, as testifying or producing records might result in a "penalty." For example, where the Bar might request an attorney to produce his file in a case where there have been allegations of neglect, the attorney might refuse, relying on this Court's holding and invoke his Fifth Amendment right of silence not to incriminate himself. Such an application of this case, and it does not appear to be misplaced from the holding of the Court would seriously impede Bar investigations and the proper and primary function of such disciplinary actions, which is the protection of the public.

The Bar would argue further that, because the Fifth Amendment is a creature of federal law, federal court interpretation of cases dealing with the assertion of the privilege of immunity in disciplinary proceedings should be given great deference. While this Court has cited and relied on Spevack v. Klein, 385 U.S. 511 (1967), the reliance appears to be inappropriate in the context of the issues of the instant case. All Spevack holds is that an attorney may not be disciplined solely for asserting the Fifth Amendment privilege. The case has nothing to do with whether a blanket Fifth Amendment privilege applies in Bar disciplinary proceedings.

The issue of the nature of Bar disciplinary proceedings has also been addressed since Spevack in the federal system in the case In re Daley, 549 F.2d 469 (7th Circuit 1977). In that case, quoting In re Echeles, 430 F.2d 347 (7th Circuit 1970), the court stated that disciplinary proceedings:

> . . . are not for the purpose of punishment but rather seek to determine the fitness of an officer of the court to continue in that capacity and to protect the courts and the public from the official ministrations of persons unfit to practice. Thus the real question at issue in a disbarment proceeding is the public interest and an attorney's right to continue to practice a profession imbued with public trust.

The court in Daley went on to distinguish proceedings which are penal, intended to redress criminal wrongs, and proceedings which are remedial, intended to protect the integrity of the courts and the public and held that the Fifth Amendment right against self-incrimination does not extend to the latter.

Additional post-Spevack cases addressing the issue of the remedial nature of disciplinary proceedings include In re Connaghan, 613 S.W.2d 626 (Mo. 1981), Segretti v. State Bar, 544 P.2d 929 (Cal. 1976), Maryland State Bar Association, Inc. v. Sugarman, 329 A.2d 1 (Md. 1974).

The Court cites Ciravolo v. The Florida Bar, 361 So.2d 121 (Fla. 1978) in support of its holding, but said reliance appears to be misplaced. Ciravolo only holds that a grant of immunity under section 914.04, Florida Statutes does not immunize an attorney from disciplinary proceedings and that such immunity may be obtained only from the Supreme Court of Florida. The case does not hold that "blanket" immunity exists in Bar proceedings nor does it hold that Bar disciplinary proceedings are penal in nature. Granted, immunity may be given where "the greater good to society will be

served," but the holding of the instant case (DeBock) could be construed to apply immunity in all disciplinary cases.

In his brief, the petitioner has misapplied the case as well, stating Ciravolo reaffirms that disciplinary proceedings are penal in nature and that this must be so or why grant immunity. Admittedly, the grant of immunity relieves the immunized attorney from the penal aspect of Bar disciplinary proceedings. However, the grant of immunity is really the result of weighing how best to protect the public, that is, to grant immunity to assist the state in prosecuting one accused of criminal acts or to not grant immunity in order that The Florida might preserve the integrity of the courts and the profession. It should also be stressed that this immunity is not from disciplinary action, as the quote from Ciravolo states in this Court's opinion, but immunity from the use of the lawyer's testimony in a disciplinary proceeding.

The Court also states that it is giving immunity to attorney witnesses since they lack automatic statutory immunity and should be afforded equal protection. There is no question that attorneys may invoke the Fifth Amendment, but only where criminal penalties or forfeitures may result. Again, the Bar would argue that Bar proceedings are remedial in nature and the Fifth Amendment right would only be appropriate where misconduct is of a criminal nature. Also, membership in The Florida Bar is different from membership in any other profession, as it is a conditional privilege, and a grant of immunity due only to the potential loss of this privilege is

totally inappropriate. This also makes the reliance on Lurie v. Florida State Board of Dentistry, 288 So.2d 223 (Fla. 1973) inappropriate since that case concluded that Lurie had a property right in his dental license, something that cannot be said of an attorney's license.

CONCLUSION

In summary then, this Court, in its contention that Bar disciplinary proceedings are penal in nature, has made a finding contrary to its own rules, its previous holdings and the weight of authority in this country. Such a holding could seriously impede the discipline process, thereby preventing protection of the public, as the Fifth Amendment could be invoked in any disciplinary proceeding, whether the misconduct was of a criminal nature or not. This Court's holding in Ciravolo amply covers the issue of whether or not an attorney may invoke the Fifth Amendment when appropriate and also covers the issue of who may grant this immunity. The attempt to make the privilege to practice law a right and the finding that Bar disciplinary proceedings are penal in nature has put the Court in a position where immunity from use in a Bar proceeding of an attorney's testimony in either a civil or criminal matter must arguably be granted. The Court should reverse its decision so that it is reflective of its own rules and so that it comports with the weight of authority.

Respectfully submitted,

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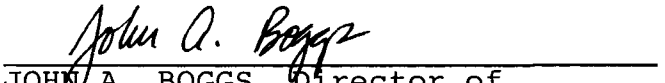

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief were mailed to SID J. WHITE, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and a copy was mailed to MICHAEL W. BAHER, Regional Service Center #204, 111 Georgia Avenue, West Palm Beach, Florida 33401 and DAVID R. DAMORE, Post Office Box 39312, Fort Lauderdale, Florida 33339, this 25th day of February, 1987.

John A. Boggs

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