IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD G. CHOSID,

Respondent.

Case No. 68,157

The Florida Bar Case No. 17A86F54

RESPONDENT'S REPLY BRIEF

RICHARD G. CHOSID
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## PREFACE

For the purposes of this brief, the Respondent, RICHARD G. CHOSID, incorporates the statements contained in the Preface on Page v of Complainant's Brief.

## STATEMENT OF THE CASE

Respondent incorporates the Statement of the Case contained in Complainant's Brief on Pages 1 and 2. Further, Respondent adds that at no time did he receive a copy of the first letter to Mr. Sid J. White, Clerk of the Supreme Court of Florida, dated September 25, 1986, which indicated that the Florida Bar did not intend to file a petition for review in this matter. However, Respondent did receive the letter dated September 30, 1986, some ten to thirteen days after a decision had been reached, indicating that the earlier letter had been sent in error.

Respondent is however confused by the statement of the Counsel for The Florida Bar, indicating that the Board of Governors seeks a review of the Referee's recommendations, in as much as "... the appropriate disciplinary sanction to be sought was disbarment for a period of three (3) years from the effective date of Respondent's felony suspension, that being April 24, 1985." In the context presented it appears that the word "suspension" should be substituted for the word "disbarment", leaving only the issue of the effective date of the suspension from the practice of law, before a petition may be filed with this Honorable Court for reinstatement. Your Respondent will address both the issues of the difference between "disbarment" and "suspension" and the effective date and duration of any legal cessation from the practice of law.

## ISSUE PRESENTED FOR REVIEW

I. WHETHER THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE DISBARMENT FOR A PERIOD OF THREE (3) YEARS FROM APRIL 24, 1985, THE EFFECTIVE DATE OF RESPONDENT'S FELONY SUSPENSION, OR A SUSPENSION FOR A PERIOD TIME OF THREE YEARS OR LESS THAN THREE (3) YEARS FROM THE DATE RESPONDENT'S VOLUNTARY WITHDRAWL FROM THE PRACTICE OF LAW IN FLORIDA.

## STATEMENT OF THE FACTS

The Referee's Findings of Fact are accurately recited in Complainant's brief, except as to the last paragraph on Page 5 thereof, which was not included in the Referee's statement of "pertinent portions" of evidence, as stated at the top of Page 2 of the Referee's Report.

It should be noted that the private reprimand resulted from an unusual and isolated situation where Respondent had represented the Complainant in that matter, since he was the husband of a woman who had been employed as a legal secretary by Respondent for many years. Both parties had requested that Respondent represent the Complainant in their divorce matter, and the issue of a potential, although unrealistic, conflict of interest was raised. The private reprimand came after a hearing. It was determined that all steps should be taken to avoid even "the appearance of an impropriety", even though none had, in fact, been shown in this case.

As a matter of fact, some time later the Complainant in that case came back to your Respondent to apologize for making the complaint, saying that another attorney had put him up to it, in an effort to get back into his good graces and to take over his legal work. He was still dissatisfied with his other attorney and wanted your Respondent to return to being his attorney since the Complainant was comfortable with your Respondent's integrity and honesty.

Consitant therewith, your Referee made further findings of fact beginning on Page 3 of her Report. She found that:

> There has been no finding that the Respondent was in any way involved in any drug trafficking or dealing. There has been no evidence or proofs offered relating to any acts of misconduct other than that related to the false statement contained in the income tax return in question. This Respondent has been engaged in a long and exemplary career as a responsible and caring active trial attorney, primarily in sole practice. Respondent has served his time in a Federal Correctional Institution and paid his committed fine. He is presently on parole in Ft. Lauderdale until March, 1987.

The basic area of conflict between the Complainant and Respondent appears to relate to the recommendation as to disciplinary measures to be applied, as stated by your Referee on Page 4 of her Report. Here the Referee specifically denied The Florida Bar's request for disbarment by stating:

"I recommend that the Respondent be suspended from the practice of law in Florida until such time as he further complies with the Rules and Regulations of the Florida Bar. I have failed to grant the request for disbarment since I find that it is the severest sanction available to us and should not be imposed where less severe punishment would accomplish the desired purpose. (Emphasis added, citation omitted.) I further find that the conduct of Respondent, although not to be condoned, was less grievous than many other reported cases (See The Florida Bar v. George A. Routh, 414 So. 1023.) and should not result in disbarment. Reinstatement will be governed by article XI, Rule 11.11 of the Integration Rule. I further recommend that the duration of the Respondent's suspension be for a period of thirty-six months beginning November 1, 1984 and thereafter until he shall prove his rehabilitation as provided in Rule 11.10(3).

The primary issue herein appears to be whether Respondent will be eligible to apply for reinstatement to the practice of law in the State of Florida on October 31, 1987 or some earlier date set by this Court, or if he must wait until April 24, 1988, a full thirty-six months from the date the State Bar of Florida took any action in this matter, although having notice of the voluntary removal from practice in October, 1984, and the entry of the conviction in December, 1984. Since suspension is automatic and notice was given to the Bar in 1984 by your Respondent, there is no justification for the delay in the official entry of the order of suspension. This delay by the Bar has resulted in the Bar's request for an additional six months being tacked on to Respondent's required suspension time.

## SUMMARY OF ARGUMENT

THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS NOT ERRONEOUS. THERE ARE NO SPECIFIC PROVISIONS FOR DISBARMENT FOR A PERIOD OF THREE (3) YEARS IN THE RULES GOVERNING PRACTICE IN THE STATE OF FLORIDA. FURTHER, THE REFEREE COULD AND DID MAKE A DETERMINATION REGARDING THE EFFECTIVE DATE AND DURATION OF ANY SUSPENSION BASED UPON THE FACTS AS PRESENTED.

Although Respondent's conduct is not to be condoned, it must not be looked upon as one of the major offenses which would subject him to the harsh discipline of disbarment. That statement is consistent with the findings of the Referee. It should be further noted that the conduct which constituted the gravamen of the offense was not done in relation to clients or in breach of the trust of a client or the court, but was something contained on the personal income tax return of Respondent. Further, the proofs indicate that there was not an understatement of income. In fact in one year audited an overstatement was noted and a refund determined to be due. Rather, a deduction for interest and taxes attributable to others was included on Respondent's return, in accordance with his agreement with those others and, more importantly for your consideration herein, consistent with Respondent's understanding of the law in effect at the time. You see, there never was an intent to violate the law.

There can be no comparison of the conduct of Respondent with that of other members of The Florida Bar who have been disbarred, as has been suggested by your Complainant. Who among us is free from attempting to take advantage of every available tax deduction which we believe is rightfully ours? Respondent has suffered greatly for his overzealous application of the tax laws to his advantage. He has been suspended from the practice of law in both Florida and Michigan. The Bar Association in Michigan appealed the suspension order, seeking disbarment, for the same reasons as stated by your Complainant. Respondent has had to answer more than twice for his misdeeds and conduct. He has been put to legal expenses and costs far in excess of any small tax advantage obtained and has depleted all of his funds and much of his extended family's assets and gone into debt as a result of his conduct. The Michigan Supreme Court refused to disbar Respondent upon a similar appeal of the Bar Grievance Administrator. The Florida Bar is now seeking disbarment by way of an appeal of a determination of the Referee of the Supreme Court. Additionally, Respondent has been incarcerated, gone through

proceedings with the Federal Probation Department of the United States Department of Justice, the Bureau of Prisons and the Parole Commission. Since his release he has worked as a mechanic and a salesman. He is presently unable to support his family, living virtually in disgrace.

The suspension recommended by the Referee is more than sufficient to satisfy the needs of The Florida Bar, as suggested, that would be fair to society, be sufficient punishment, and severe enough to deter others. It is urged that a reduction in the suspension recommended by the Referee to a two (2) year suspension would meet those needs just as well.

## ARGUMENT

THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS NOT ERRONEOUS. THERE ARE NO SPECIFIC PROVISIONS FOR DISBARMENT FOR A PERIOD OF THREE (3) YEARS IN THE RULES GOVERNING PRACTICE IN THE STATE OF FLORIDA. FURTHER, THE REFEREE COULD AND DID MAKE A DETERMINATION REGARDING THE EFFECTIVE DATE AND DURATION OF ANY SUSPENSION BASED UPON THE FACTS AS PRESENTED.

The Referee's recommendation of a suspension for a period of three (3) years, beginning November 1, 1984 takes into consideration the fact that your Respondent had terminated his practice in Florida, shortly after his indictment, in 1984. In fact, he had returned to Michigan to be closer to his father who was hospitalized with terminal cancer. First a call, then a letter was sent to the Florida Supreme Court asking for immediate effect for the automatic suspension. It is clear that the Referee understood both the needs of the Bar, as recited in the rules, and the needs of your Respondent, who in reality had not practiced in Florida since July 5, 1984, but to complete one matter which he was handling as a favor for a friend. This matter involved one court appearance in July and the execution of a settlement agreement. This Court in its magnanimity could now determine that the three (3) years should begin August 1, 1984. Reinstatement in the State of Michigan may be requested as early as May, 1987. Since your Respondent took both the Michigan and Florida bar examinations in the same week in 1963, it could be determined to be in the interest of everyone involved, that reinstatement in Florida may be sought at the same time as reinstatement in Michigan. Respondent is now a Florida resident on a full time basis, and he has been since 1979.

Further consideration was given to the fact that, although Respondent had received a private reprimand for a matter involving the appearance of impropriety, the earlier discipline was the only other such blemish on a twenty-three year very active carrier. That matter in no way related to the conduct involved in the criminal action. The criminal conduct amounted to the failure to indicate that there were others associated with a particular business operated by Respondent. No knowledge of such a requirement was known by Respondent at the time of the initial filing. Any deductions taken were done as a part of the agreement between all of the parties

involved. An assignment of all tax benefits were given to Respondent. At the time it was believed to be proper. If fact, it may still be proper, if done properly. However, it was later determined that it was not done properly, subjecting Respondent to criminal liability.

Every case of disbarment cited by The Florida Bar either relates to misconduct relating to clients money matters or trust or the commission of offenses which involved serious or violent felonies. There are no cases cited to support disbarment of an attorney who failed to state that others were involved in a financial capacity with a business which he ran, completely outside and separate from his legal practice.

The dogmatic stance taken by The Florida Bar has resulted in the abuse of the resources available to the public and has in fact been a disservice to the public. Respondent had been willing to stipulate to the three (3) year suspension to avoid the time and cost involved. At this time every penny counts more than ever. It has become very difficult to collect on old accounts, being unable to provide current services. Clients have sought other counsel and see no need to honor prior debts. Further, additional costs have been assessed, for which there was no necessity. Lastly, the Referee and now this Court have been burdened due to the policy requiring an attempt to disbar any member convicted of any felony, regardless of the seriousness of the offense, duration of honorable practice or any other circumstances. This is wrong and should be changed? Why should a Respondent be required to pay the costs of something which turned out the exact way he proposed it prior to the expenditure of any funds? This Court has the opportunity to address that issue in this case.

The inconsistency of the position of your Complainant becomes more clear when we look at its misapplication of the statements articulated in The Florida Bar v. Moore, 194 So. 2d 264, 271 (Fla. 1966). Since disbarment is the extreme measure available to the Bar to impose upon a lawyer, it should be resorted to only in cases where the person charged has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards. More importantly, the Court went on to indicate that to sustain disbarment there must be a showing that the person charged should never be at the bar. This harsh remedy should never be decreed where punishment less severe, such as reprimand, temporary suspension, or fine will accomplish the desired purpose. The Florida Bar seeks "disbarment for three years". Such a request is inconsistent with Moore, Supra in that it suggests that Respondent may be readmitted to practice after the passage of three (3) years. Moore, Supra, mandates a showing that the person charged should never be allowed to practice again. No such showing is offered in the case at bar. The mere recitation of the violation of certain Disciplinary Rules without sufficient relation to specific facts demonstrating a demeanor, attitude and bearing which would call into play the application of this very severe decree should be insufficient to justify a thrust for the jugular, disbarment.

Respondent has admitted his conviction and explained his conduct. An explanation of the reasons for entering a plea of guilty to the charges which constitute a technical offense, at its worse, was offered to the Referee. It was believed that official hostilities

would end and your Respondent would be able to get on with his life. That belief was a mistake. Problems and fallout continue as a result of the conviction. It is however, Respondent's desire to put to rest the issue of his suspension from the practice of law in Florida. Your Respondent gave up his practice in Florida and so notified the Clerk of the Supreme Court, prior to his actual plea of guilty. Respondent requested, and was granted credit for some of that time by the Referee. The Florida Bar has failed to offer any evidence to dispute that fact, yet now seeks to have that finding set aside as erroneous. There has been no showing of an abuse of discretion or misapplication of the facts. In fact, each case cited by The Florida Bar in support of its position can be well differentiated, and in some instances, e.g. Moore, Supra, would better support the position of your Respondent.

A brief review of some of the cases which resulted in disbarment show two distinct patterns. There are those involved in drug trafficking and those involved in other types of offenses involving fraud upon the court or clients, theft from clients or extortion. Two cases in which this Court indicated disbarment was warranted as a result of trafficking in cocaine were The Florida Bar v. Wilson, 425 So. 2d 797 (Fla. 1966), where it was determined that the criteria established in State ex rel. The Florida Bar v. Murrell, 74 So 2d 221 (Fla. 1954), had not been followed by the referee and a recommendation for suspension for three years was changed to disbarment with no time restrictions or limitations. Likewise The Florida Bar v. Hecker, 400 So. 2d 1240 (Fla. 1985), this Court overturned a Referee's decision due to the facts involved in the case, the seriousness of the offense and the gravity of respondent's misconduct, all indicating , in the view of this Court that disbarment was indicated.

This Court ordered disbarment as the remedy in Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1980). This is an example of the second sort of misconduct which justifies such a remedy. Here the attorney counseled clients and witnesses to give false testimony. This is not only a fraud upon the opponent but constitutes a fraud upon the court and the system we are all sworn to support. To condone even the slightest such activity would bring disrepute and disgrace to our profession and ultimately destroy the system itself. The same would hold true if one counseled another in the course of one's practice to file a false income tax return. The false statement of Respondent on his own income tax return was the result of bad advise, poor counseling and mistake. But it was not made with the intent to defraud anyone, regardless of the ultimate disposition of the criminal matter. The issue of civil fraud is still open and under protest at the present time. Further, it certainly was not an act in the course of Respondent's professional conduct or practice. As an intentional act Respondent has been held accountable for the results of his actions. How could you compare his activity with Dodd's or Bland P. Lewis, who fraudulently concealed the assets of a bankrupt estate? State ex rel. The Florida Bar v. Lewis, 145 So. 2d 793 (Fla. 1962). George Kastenbaum was disbarred without objection as a result of his conviction for extortion. The Forida Bar v. Kastenbaum, 263 So. 2d 482 (Fla. 1972). Although we are not assisted in the area of

actual facts involved in this matter, there was no objection filed to the action of the Court. This case involved a crime of violence to the public and of very high severity. We will soon however see that there are crimes of unusual violence which resulted in a suspension rather than disbarment.

In 1981 this Court again supported its earlier decision in Dodd, Supra, by modifying a referee's recommendation of a four (4) month suspension and by entering an order for disbarment as a result of the respondent's allowing a client to perpetrate a fraud upon the court by introducing the testimony of his wife in his divorce action to substantiate residence for jurisdiction purposes, using a false name. The respondent knew that the judge would not knowingly allow the wife to testify accordingly. So he counseled her to use a different name, which she did, perpetuating a fraud on the court. Such conduct involving clients and the court should always be handled much more harshly than individual conduct involving no one but the attorney himself in his own personal business.

Unopposed disbarment was not only ordered, it was well deserved in the case of The Florida Bar v. Cooper, 429 So 2d 1 (Fla. 1983). The actions of Saul J. Cooper constitute a complete lifetime course in bad deeds and dirty doings. To compare your Respondent to Cooper for the purpose of justifying the proposed remedy merely highlights the inappropriateness of the review sought by The Florida Bar in this case.

We can go on to review some cases where this Court determined that a suspension from the practice was the appropriate remedy to see that the conduct of your Respondent does not measure up to many others who were suspended for three years or less. For example Jim Hathaway was found to have appropriated funds of a client and funds on estate for which the attorney was the personal representative to his own use. He had to be forced to make an accounting and further abused clients and the court. However he was suspended for two years. The suspension was upheld over the appeal and objection of The State Bar of Florida. State of Florida ex rel. The Florida Bar v. Hatahway, 145 So. 2d 483 (Fla 1962). Again we see conduct of a much more grievous nature receiving a lesser disciplinary action.

In an action involving the commingling of a client's funds and the conversion of client's funds to the attorney's own use, this Court followed a referee's recommendation for a public reprimand and the payment of costs. Simmons v. State of Florida, 279 So 2d 298 (Fla. 1973). Reading behind the lines we should be able to see that this attorney had problems with the IRS to a much greater extent than your Respondent. Yet he received a public reprimand. Personal problems resulted in a thirty day suspension when an attorney failed to pay a court reporter and the extraction of $20.00 from a client under false pretenses. The Florida Bar v. Thue, 244 So. 2d 424 (Fla. 1971). In this case the conduct of Thue was more destructive to the court system and the administration of justice than your Respondent, although he was convicted of a felony relating to making a false statement on a tax return. Need there be additional punishment to correct the wrong or protect the public? Respondent suggests not.

The failure to file income tax returns is also a violation of federal law. However, of much more consequence is the conduct of an attorney in an effort to circumvent the proper dispensation of

justice through ruse, fraud or trick. The case of The Florida Bar v. Vernell, 374 So. 2d 476 (Fla. 1979), is just such a case. In this case the Court ordered a six month suspension, although finding the attorney had violated serious Rules and the Code of Professional Responsibility as it relates to interaction between clients and the court and the public appearance of impropriety as it relates to the court, had failed to file his income tax returns and therefore had been convicted of a federal offense, and further had previous acts of misconduct. Respondent would suggest that the case at bar does not come close to being as serious an offense as those committed by Vernell. Respondent does suggest however, that the results in Vernell, Supra would be more appropriate in his case. In another case the serious violation of both the Integration Rule of the Florida Bar, Art.XI, Rule 11.09(3)(e) and the Code of Professional Responsibility resulted in a sixty day suspension from the practice of law. The conduct of this attorney was a disgrace to our profession. In the over-all scheme of things your respondent could not come close to committing the dirty deeds described in The Florida Bar v. Baron, 392 So. 2d 1318 (Fla. 1981). This Court might deem it appropriate to consider a reduction in the recommendation of the Referee based upon a review of the cases provided herein. This Court recently supported a referee's decision to suspend an attorney for three years upon the finding that the attorney had filed a false affidavit in a judicial proceeding and had committed felonies by shooting into an occupied vehicle, aggravated battery and aggravated assault. This case represents the degree of severity related to a three year suspension. The Florida Bar v. Routh, 414 So. 2d 1023 (Fla. 1982).

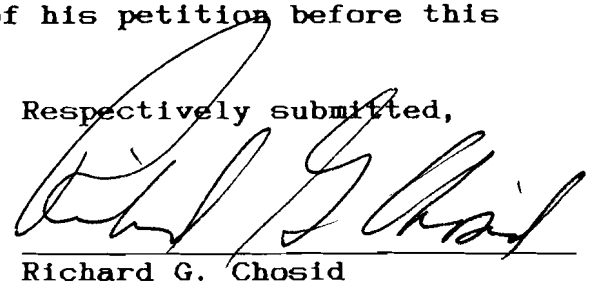
Further support for the request for a reduction from a three year suspension to a two year suspension can be found in the Referee's Finding of Fact and Further Findings. These Findings of Fact are presumed correct and will not be disregarded unless clearly erroneous or lacking support in the evidence. The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978); The Florida Bar v. Hirsch, 359 So. 2d 856 (Fla. 1978). The Complainant does not file any objections to the Referee's Findings of Fact. This appeal is based upon Complainant's improper objections to the Referee's Recommendation as to disciplinary measures to be applied.

## CONCLUSION

In consideration of the foregoing, your Respondent respectfully submits that the request for disbarment by The Florida Bar is misapplied in this case. Further, provisions for automatic appeal and requests for disbarment upon the conviction of any felony should be suspended and the policy reexamined. Further, consideration should be given to a Respondent who is put through the ordeal of these proceedings after offering to settle for a dispositive remedy equal to or of greater severity than that ultimately ordered by this Honorable Court. The least this Court could do is suspend costs in an effort to return to the days of reason and rational disposition.

It is suggested that a rational disposition of this matter would provide for a two year suspension and allow your Respondent to attempt to get back to work in the field which he has spent the last twenty-three years, upon the approval of his petition before this Court according to the Rules.

Respectively submitted,



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Dated: October 14, 1986

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S REPLY BRIEF was mailed, through the United States Postal Service, postage fully paid, to Jacquelyn Plasner Needelman, Attorney for The Florida Bar, Complainant, 915 Middle River Drive, Suite 602, Ft. Lauderdale, FL 33304 on October 14, 1986, with an additional copy being sent the same manner to John T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, FL 32301-8226.

Richard G. Chosid

Dated: October 14, 1986