IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Case No. 70,948

JOHN R. WEED,

Respondent/Petitioner.

_____/

PETITIONER/RESPONDENT'S REBUTTAL BRIEF

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ARGUMENT

THE REFEREE ERRED IN PERMITTING THE COMPLAINANT TO INTRODUCE THE SWORN TESTIMONY OF A WITNESS BEFORE THE THIRD JUDICIAL GRIEVANCE COMMITTEE INTO EVIDENCE WHEN THAT WITNESS COULD NOT RECALL ANSWERS TO QUESTIONS WHICH HE HAD ANSWERED A YEAR BEFORE IN FRONT OF THE GRIEVANCE COMMITTEE.

The witness, John Louie Houck, did continuously state that he could not recall or remember the answers to questions he had been asked in front of the Grievance Committee. He continued to be unable to recall even when his memory was refreshed by the reading of the questions and answers which he had given. The witness was very uncooperative, and hostile and it is understandable that the Complainant felt compelled to avoid trying to continue to question him and took the step of attempting to introduce his previous testimony into evidence. The Respondent objected to this procedure and the Referee at first sustained the objection. It was upon the representations made by the Complainant that the Referee was persuaded to change this ruling and permit the transcript into evidence.

The Complainant called Mr. Houck as a witness and compelled him to appear. The same procedure was followed before the Grievance Committee. No one has the power to require him to remember that which he can not remember. However, this witness was able to remember the things he wanted to remember as even a casual examination of this testimony reveal. The difficulty

which the Complainant had with this witness was that he did not appear to recall the same answers which he gave at the grievance committee hearing. This is a totally different scenario from that which the Complainant attempted to now present. Mr. Houck's standard answer was "I don't remember saying that" in response to the questions of the Complainant.

It is now asserted for the very first time that the testimony of Mr. Houck was admissible due to his age and health. This reasoning was not presented to the Referee and was not the basis upon which the Referee allow the testimony to be admitted. Mr. Houck did not assert that he was unable to testify because of illness or because of age. He appeared at three different hearing before the Referee and did not seem to have any difficult.

The amazing aspect of this assertion by the Complainant is the fact that Mr. Houck appeared to be perfectly capable of saying almost anything he wanted to during the hearings. He recalled many facts going back over many years without any trouble. The things which he wanted to talk about he could remember in great detail and the criticism which he desired to level was done with great skill. On the matters that he did not wish to discuss he had a lapse of memory.

Mr. Houck's insistence on saying just what he desired to say led him on more than one occasion into a verbal conflict with the Referee and required to Referee to give him some rather

stern admonitions. The claim that the testimony of Mr. Houck was admissible because of his age and health is without foundation and is not supported by the record.

Certainly the Complainant position would be more tenable if the witness had died, become incapacitated, been imprisoned and unable to testify, or been unable to be located. Perhaps under one of these circumstances the testimony of the witness could have been used. However, in this case the witness was present and was able and willing to testify. He simply did not want to say what he had previously said under oath. The testimony could certainly be used to refresh the memory of the witness and although this would have been long and tedious it was the procedure which should have been followed.

The Complainant makes the point that the Respondent had an opportunity to be present at the Grievance Committee hearing and could have cross examined the witness at that time. This is certainly true. However, the Respondent was not required to attend the hearing and had no legitimate expectation that testimony taken before that Committee would be introduced into evidence against him. This action by the Complainant appears to be without precedence and has never before been attempted in any disciplinary proceeding.

It must be remembered that the Grievance Committee is an arm of the Complainant and is not an independent body. Counsel for the Bar is present for the meeting and is allowed to be

present when the vote is taken, something the accused party is not allowed. The Complainant assist in the investigation against the accused attorney and provides the Committee with much of its information concerning the accused. If the procedure followed in this case is permitted to stand then it will no longer be necessary for Complainant to present any witnesses before the Referee. It will be sufficient for the Complainant to present a transcript of the proceedings before the Grievance Committee to the Referee and maintain that the evidence is sufficient to convict. The Referee then would be in the position of being an appellate court, simply reviewing for sufficiency the testimony before the Committee. This could be done just as easily by this Court and there would be no need for the Referee. This is a radical departure from the present procedure and should not be adopted.

It is important to remember that the testimony which was introduced here was not a deposition although both parties have used that analogy. The introduction of a deposition is set forth in the Rules of Civil Procedure and none of the grounds found there are present in the instant case.

It is true that a party calling a witness holds him out as worthy of credit and is not allowed to impeach him unless he has made prior inconsistent statement. It was proper for counsel for Complainant to asked Mr. Houck,"did Mr. Weed tell you that he was going to appeal your case?" If Mr. Houck answered with a

"no" or with a "I don't remember" then his prior testimony at the Grievance Committee hearing could be read to him with the question, "do you remember giving that answer on that day at that time and was that answer which was under oath, the truth?" This was the proper procedure to follow even if it meant impeaching the witness.

It is understandable why the Complainant did not wish to impeach Mr. Houck. As stated previously he was a hostile and belligerent witness who wanted to state that every judge, law enforcement person, clerk and lawyer was a liar. He made a point of making this statement a number of times together with the fact that he was the only person that could be believed.

Despite the difficulty with the witness that is not good and sufficient grounds to change a long established procedure and admit the testimony which he gave before the Grievance Committee into evidence.

The Complainant cites **The Florida Bar v.Vannier,**, 498 So.2d 896 (Fla. 1986) and **The Florida Bar v. Dawson,** 111 So.2d 427 (Fla. 1959 for the proposition that the Referee is not bound by the technical rules of evidence. This is the state of the law at present in disciplinary proceedings. However, it is not the law that the rules of evidence are to be totally disregarded. This is not the meaning of the cited cases.

The case law does relax the rules on the admission of hearsay evidence in disciplinary hearing as well as other

technical rules. However, the use of testimony taken at another time under other circumstances when the witness is before the Referee but refuses to give the same answer which he previously gave is not a technical rule of evidence and certainly does not fall into the same category as the evidence discussed in the cited cases. It is not an analogous situation and should not be approved by this Court.

ISSUE II

THE RECOMMENDATION OF THE REFEREE THAT THE RESPONSDENT BE FOUND GUILTY OF COUNTS III AND IV IS NOT SUPPORTED BY COMPETENT AND SUBSTANTIAL EVIDENCE

The findings of the Referee comes to this Court with the presumption of correctness and the burden is upon the Respondent to demonstate that error has been committed.

The burden to prove the guilt of the Respondent by clear and convincing evidence before the Referee is upon the Complainant. The phrase "clear and convincing evidence" means more than a "preponderance of the evidence" as required in civil cases but less than "evidence beyond a reasonable doubt" as required in criminal cases. It requires that the alleging party prove by clear, full evidence, free from suspicion. The allegation cannot be established by inference or implication. **Trickey v. Stone**, 152 So. 2d 748 (1963, 1st DCA); **Sultan v. Jade Winds Construction Corporation**, 277 So. 2d 574 (1973, 3rd. DCA)

The Respondent does not seek to have this Court retry this cause and grant him a hearing de novo which is not permissible. However, this Court should examine the testimony, transcripts and evidence in this cause to determine if there was competent and substantial evidence to support the findings of the Referee. Certainly, if there was not clear and convincing evidence presented as to the guilt of the Respondent then there

is not competent substantial evidence to sustain the findings of the Referee.

The evidence presented as to Count III is dependent upon the testimony and credibility of the witness, John L. Houck. That testimony, especially about the handling of the appeal, was primarily before the Grievance Committee and at the hearing when the witness was required to face the accused there was very little testimony on the subject.

It must be remembered that the Referee rejected most of the accusations against the Respondent that were asserted by Mr. Houck. An examination of the evidence given by Mr. Houck reveals that he was well aware of the fact that Mr. Brinkmeyer was handling the appeal of his criminal conviction.

Mr. Brinkmeyer was appointed by the Court to handle the appeal of Mr. Houck. He testified that he visited with Mr. Houck in 1982 during the time the appeal was in progress. It was his testimony that Mr. Houck told him that the Respondent was representing him in the criminal appeal. Mr. Brinkmeyer knew very well since he was the attorney of record and was handling the appeal that this statement of Mr. Houck was untrue. He was under and obligation if Mr. Houck made such a statement to him to correct Mr. Houck and tell him that he was pursuing the appeal.

The contention by Mr. Brinkmeyer that Mr. Houck would not allow him to file any thing on his behalf has no merit since the

very least that Mr. Brinkmeyer was under the obligation to do was to file a notice to the Court of Appeal setting forth the facts that Mr. Houck would not permit him to file any papers and setting forth the assertion that Mr. Houck maintained he was being represented by someone else. To sit back and do absolutely nothing and to permit the appeal to be dismissed was not proper action on the part of the court appointed attorney.

If Mr. Brinkmeyer believed or thought that Mr. Houck believed that the appeal was to be prosecuted by the Respondent he certainly was under an obligation to notify the Respondent that this contention was being made and to request the Respondent to file a notice of appearance and to continue the prosecution of the appeal. If he believed that his client was being represented by someone else then he had the further obligation of filing a motion to withdraw and then notice would have been given to the attorney that was allegedly representing the client. Mr. Brinkmeyer does not maintain that he ever took any such action. He maintains that Mr. Houck told him to not do anything and that this was what he did.

The testimony of Mr. Hudson, an employee of the Respondent, was that he went to get an affidavit signed by Mr. Houck. He admitted that he did not remember at whose direction he was sent to the jail but he did believe that the Respondent's office was representing Mr. Houck at the time he went to prison. He certainly did not testify that Mr. Houck was being represented

by the Respondent while the matter was on appeal. He testified that Mr. Houck signed the Notice of Appeal which he notarized and Mr. Houck denied that he signed the Notice of Appeal. Mr. Hudson could not remember exactly what after that but he did remember that Mr. Houck did call the office of the Respondent on numerous occasions while he was in jail.

In 1986 a belated appeal was filed by Mr. Houck with the assistance of Mr. Brinkmeyer. It was necessary at that time for certain allegations to be made in order to file a belated appeal. It was at that time that Mr. Houck first made the allegations which are the basis of this complaint. That is an important point to remember since in order to obtain his belated appeal he had to assert ineffective assistance of counsel and had to assert that he had directed his trial counsel to pursue an appeal which had not been done. The record is clear that the original appeal was filed and that Mr. Brinkmeyer was appointed to pursue that appeal. Instead of that appeal he permitted it to be dismissed when it could have proceeded upon the filing of an affidavit.

Mr. Brinkmeyer and Mr. Houck both knew that the Respondent was not pursuing the matter on appeal and the record supports this contention.

An examination of Mr. Houck's refusal to answer the questions put to him by the Complainant before the Referee supports the contention of the Respondent that it is not worthy

of belief. The candor of the witness as well as his ability to remember give credence to the contention that the evidence presented by him is not competent or substantial. If Mr. Houck could face the Respondent and answer his question on August 1, 1988 and August 22, 1988 then he certainly should have been able to answer the questions put to him in January,1988 by the Complainant.

It is interesting to note that although the Complainant goes to great lengths in the Answer Brief to defend the testimony of Mr. Houck it did not do so before the Referee. The argument presented in support of Mr. Houck's contentions to the Referee were very short and without any of the elaboration set forth in the Answer Brief.

It is extremely important to remember that Mr. Brinkmeyer candidly admitted on cross examination that he knew nothing about this matter other than what Mr. Houck had told him. He did not maintain that he had some independent knowledge of the allegation made by Mr. Houck.

The Complainant has totally misunderstood the arguments of the Respondent concerning the testimony of Mr. Hilton with regard to Count IV. Mr. Hilton's minor sons were represented by an assistant public defender in the Juvenile Court. There was no possible conflict on the part of this attorney and none was asserted. The disagreement with the assistant public defender came about at the time judgment was entered against Mrs. Hilton

for the damage done by the children. It was contented that the assistant public defender had told Mr. Hilton that the insurance company would not be able to collect damages from him and his wife for the damage done by his sons. Even a casual glance at the record will reveal that the juvenile case was over for some months prior to civil action.

Mr. Hilton, although he uses the word "appeal", certainly never understood that the juvenile case was being appealed. The juveniles had entered a plea of guilty. They had not received an illegal sentence. The time for appeal had long passed. Mr. Hilton's only object was to avoid the civil judgment from attaching to his wife who was in no way related to the delinquent juveniles.

The Complainant does not address the issue of who was the Respondent representing and to whom was he responsible. Mrs. Hilton was the Respondent's client and he represented her faithfully and obtained for her the results which she desired.

ISSUE III

THE REFEREE ERRED IN DENYING RESPONDENT'S UNTITLED MOTION TO ALLOW HIM TO PRESENT EVIDENCE IN MITIGATION AFTER A FINDING OF GUILT BY THE REFEREE

The Respondent filed his Motion requesting that the Referee permit him to be heard after a determination of guilt or innocence as to the various counts had been made by the Referee. The Complainant opposed the Respondent's Motion stating that it believed the Motion was filed for the purposes of delay. The Motion by the Respondent was filed October 10, 1988.

The record in this cause clearly reflects that the Respondent has not sought at any time to delay the proceedings before the Referee. The Respondent cooperated and appeared, as the record reflects, at all times designated by the Referee. There was nothing to support the contention by the Complainant that the Respondent was seeking to delay a final decision in this cause.

As stated in the Initial Brief the Respondent was placed in the position of having to argue mitigating circumstances when he did not know the decision of the Referee concerning the various counts. As it turned out the Referee found the Respondent not guilty of many of the allegation of the Complaint filed against him. Only after the determination of guilt as to certain matters could factors in mitigation be presented. After all it would appear to be an admission of guilt to claim certain mitigating factor are present. It is inconsistent with a

contention that the accused is not guilty.

It is analogous to a defendant in a trial for murder presenting the jury with mitigating circumstances while maintaining that he not guilty. The two are inconsistent.

The request of the Respondent was reasonable under the circumstances of this case. There would have been no undue delay since the mitigation hearing could have been set immediately upon the Referee making his findings. There was no need for a lengthy period of time to pass. It was not even necessary for the Referee to have a formal hearing. He could simply have directed the Respondent to present his mitigating matters in writing after notifying the Respondent of those counts upon which he had been found guilty. This would have been the fair and equitable way to have handled this matter.

The Respondent was not given an opportunity to be heard on mitigating matters but the aggravating circumstances were presented by the Complainant upon the assumption that the Respondent was guilty of all charges. The position of the Complainant is easy since it assumes all allegations are true.

The Complainant asserts that the Respondent should have called his Motion after filing it on October 10, 1988. However, the Motion clearly was addressed to the Referee concerning a hearing after a finding of guilt. There was absolutely no reason why the matter should be called up for hearing prior to the Referee making a determination and it would not have been

proper to do so.

The Referee on April 24, 1989 entered an Order denying the Motion. It is contented that the Respondent should have done something between April 24, 1989 and May 4, 1989. However, it should be noted that although a period of over six months passed before the Referee denied the Respondent's Motion, a period of only ten days elapsed between the denial and the Report of the Referee. Certainly the short period of time between the two did not give the Respondent an adequate opportunity to seek an alternative.

The allegation that the Respondent was not vigilant is without any merit. Equity dictates that the Respondent be given an opportunity to be heard on matters in mitigation. It has been stated that equity is a court of conscience and is not a place to conceal but rather to make a full disclosure as to the matters in litigation. The Respondent was not negligent in any way in seeking to have matters in mitigation heard by the Referee. In fairness an opportunity to do so should be given to the Respondent.

ISSUE IV

THE REFEREE ERRED IN FINDING THE PETITIONER GUILTY OF VIOLATING DISCIPLINARY RULE 1-102(A)(3)

Perhaps the Petitioner is attempting to make a point that is without merit in his assertions on this issue. It is admitted that the Petitioner was convicted of the misdemeanor charge of failing to file an income tax return for a period of two years. The commission of any felony or misdemeanor certainly reflects adversely upon ones fitness to practice law. However, not all misdemeanors are crimes of moral turpitude and to so classify them would mean that all crimes, great or small, were crimes that involved moral turpitude.

Moral turpitude is defined by Black as:

> "The act of baseness, vileness, or the depravity in private and social duties which man owes to his fellow man, or to society in general, contrary to accepted and customary rule of right and duty between man and man. (Citation omitted)
>
> Act or behavior that gravely violates moral sentiment or accepted moral standards of community and is a morally culpable quality held to be present in some criminal offenses as distinguished from others. (Citations omitted)
>
> The quality of a crime involving grave infringement of the moral sentiment of the community as distinguished from statutory mala prohibita. (Citations omitted)

The argument being made by the Petitioner is that a conviction for failing to file tax returns is not a crime of moral turpitude. Crimes such as rape, murder, molesting children, incest and many others are crimes of moral turpitude.

Reckless driving, speeding, running a stop sign and causing an accident, simple assault and many other similar crimes are not crimes of moral turpitude. It is easy to see that the categories are completely different with the second group not causing the same moral outrage in the community as the first group. If we are going to determine that some crimes involve moral turpitude and that some do not then we must follow some definition such as that set forth in **Black**. The definition must take take into consideration the moral sentiment of the community if it is to have any nexus to morality. Otherwise, we should find some other term to fit the situation.

This argument is not made for the purpose of attempting to justify the conduct of the Petitioner. The offense is illegal and is not to be condoned nor approved. The purpose is to say that conduct which is wrong and illegal is not always violative of moral sentiment. At periods in our history people have refused to pay taxes upon moral beliefs. One of the founding fathers of this country, Thomas Jefferson, found the idea of an tax on income to be offensive. While the Petitioner cannot assert that he feels that it is morally wrong to file an income return, he does states that the failure to file a tax return is a violation of the revenue laws of the United States.

The Complainant quotes from **The Florida Bar v. Lord,** 433 So. 2d 983 (Fla. 1983) that the failure of Lord to file his tax return reflected a flagrant and deliberate disregard for the

very law which Lord took an oath to uphold. This is an absolutely true statement. The breach of any law by a member of the legal profession is in the very same category. The judge who exceeds the speed limit by 20 miles per hour and receives a citation to appear in County Court is having flagrantly and deliberately disregarded the law. The lawyer who receives a citation for reckless driving is guilty of the same thing. It has often been said that we are held to a higher standard than our fellow man because we have taken an oath to uphold the law.

The conduct of the Petitioner is clearly covered by Disciplinary Rule 1-102(A)(6) and that is the one he should have been charged with violating. He is guilty of having violated that rule and whether the Complainant charged him with it or not it would their duty to do so and the Court should so find.

Under the definitions, as commonly understood, the Petitioner is not guilty of having committed a crime involving moral turpitude.

ISSUE V

THE RECOMMENDED DISCIPLINE BY THE REFEREE WITH REGARD TO HIS FINDINGS OF GUILT ON THE PART OF PETITIONER WITH REGARD TO THE COMPLAINANT ARE NOT APPROPRIATE IN THIS CASE

The Complainant maintains that the recommended discipline of a three year suspension in this case is appropriate but does not cite any authority to support this contention. The Petitioner in his initial brief set forth the reasons he believed the recommended punishment was too severe. The Complainant recommended to the Referee that he impose the three year suspension after finding the Petitioner guilty of all of the charges of the Complaint. However, the Referee found the Petitioner not guilty of approximately one half of the charges against him but went along with the recommended punishment. Since the Petitioner was not guilty of some of the allegations then it follows that the discipline imposed should also be lessened.

As set forth in the initial brief there were many mitigating circumstances that should be considered before discipline is imposed in this case. As argued earlier in the initial brief and in this brief the Petitioner sought to present the mitigating factors to the Referee. His motion along these lines was denied by the Referee and therefore the mitigating factors were not considered by the Referee.

Since the Complainant has presented the previous disciplinary record of the Petitioner to the Court there are comments concerning that that should be considered. The time

frame in which most of the complaints were brought against the Petitioner. Most of these complaints were in short time span in the early 1980's. All of the matters in this and the previous complaint were for matters that occurred between 1981 and 1985, with the majority of them being in 1984 and 1985. Before that time the record of the Petitioner had been clean and that should be given some consideration. Also, the fact that the alleged misconduct took place over a relatively short period and for the most part more than 5 years ago should be considered by the Court.

The Petitioner does not believe that the suggestions made concerning the appropriate discipline in his initial brief was without merit and respectfully request the Court to give it full consideration.

CONCLUSION

The Petitioner request that this Court carefully consider the Record and briefs in this cause and after full consideration do that which is equitable and just.

Respectfully submitted,

John R. Weed.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Rebuttal Brief has been forwarded to Mr. John V. McCarthy, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 27th day of September, 1989.

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