IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v. Case No. 70,948

JOHN R. WEED,

Respondent/Petitioner.

_____/

PETITIONER/RESPONDENT'S INITIAL BRIEF

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INTRODUCTION

This is a case of original jurisdiction, pursuant to Article V, Section 15 of the Constitution of the State of Florida.

The petition for review is sought by the Respondent who was the accused attorney before the Referee. The Complainant, the Florida Bar, did not seek review before this Court.

References to the Record are referring to the numbered paragraphs in that letter to Mr. Sid White from the Honorable William L. Gary, Referee in this cause, dated May 5, 1989. Documents will be designated with a capital R in parenthesis followed by the paragraph number. The complaint in this cause is therefore noted as (R. 1).

STATEMENT OF THE CASE

This case was commence by the filing of a four count complaint against the Respondent on August 5, 1987. (R.l) The Complainant filed certain Request for Admissions with the complaint and the Respondent answered the Complaint on September 1, 1987. (R. 2,3) The Request for Admissions was answered on September 22, 1987. (R. 4)

An order scheduling a final hearing was entered by the Referee on October 15, 1987. *(R.5)* The Complainant filed a motion to transport the witness John Louie Houck on December 17, 1987 and an Order for that purpose was entered on the same date. (R. 7,8)

An Order was entered on March 28, 1988 scheduling an additional hearing in this matter. A motion to transport the witness Houck was filed on April 8, 1988 and an order for that purpose was entered on April 11, 1988. (R.9,10, 11) Two additional notices of hearing, one dated July 12, 1988 and the other dated August 3, 1988, was entered by the Referee. (R. 14,15)

At the conclusion of the last hearing it was decided that the parties would submit written memoranda and submit them to the Referee. The written closing argument and memorandum as to appropriate discipline was submitted by the Complainant on September 30,1988. (R.16) The written closing argument of the Respondent was also submitted on the same day but without a memorandum as to the appropriate discipline. (R.17)

On October 10, 1988 the Respondent filed a motion to be allowed to present evidence in mitigation after the Referee had made a determination of guilt or innocence. (R. 18) The Complainant filed a response to this motion on October 14, 1988. (R. 19)

The Referee entered his order denying the Respondent's request for a hearing on mitigating factors on April 24, 1989. (R. 21) On that same date the Complainant filed it statement of cost. (R. 22)

On May 4, 1989 the Referee entered his Report in this matter and forwarded the file to the Supreme Court of Florida. (R. 23) The Respondent filed for review.

STATEMENT OF FACTS

The complaint filed in this caused consisted of four counts with a number of violations alleged in each count. The first count contained an allegation by a Mr. Ervin Whitehead who contended that hired the Respondent to represent him after he was involved in an automobile accident. Mr. Whitehead claimed that he sustained both property and personal injury damages to his neck.

Mr. Whitehead did not have in autombile insurance at the time of the accident,. The Respondent did secure for him a settlement for the damages to his vehicle from the insurance company of the other party and charged him a fee of one hundred dollars. Mr. Whitehead continued to see doctors occasionally but was unable to get any of them to say that he had sustained any permanent damage to his body.

In May, 1983 the Respondent sent Mr. Whitehead a letter informing him that he did not believe that he had a personal injury claim and that he should seek another opinion if he desired. The Respondent explained the present state of the law of Florida concerning filing suit for personal injury. Mr. Whitehead claimed that he never received this letter but did maintain that he wrote to the Respondent in May, 1984 complaining that he was not able to talk to the Respondent.

Based upon all of the evidence presented at the final hearing the Referee recommended in his Report that the Respondent be found not guilty of violating DR1-102(A)(4),

DR1-102(A)(5), DR1-102-(A)(6), DR6-101(A)(1), DR7-101(A)(2) and DR7-101(A)(3)

The second count of the complaint asserted that the Respondent had violated the Code of Professional Conduct by having been charged and convicted of failing to file income tax returns for the years 1978 and 1979. The Respondent admitted the allegations of this count and only disputed that it was a crime involving moral turpitude. He admitted that it did adversely reflect upon his fitness to practice law.

The Report of the Referee recommended that the Respondent be found guilty of violating DR1-102(A)(3) and Article XI, Rule 11.02(3)(a) and (b) of The Integration Rule of the Florida Bar.

Count III of the complaint centered around the allegation of John Louie Houck. The Complainant acknowledged in it'written argument to the Referee that this Count is dependent upon the believability of Mr. Houck. Mr. Houck made many accusations against many people but since the Referee chose not to give these any credence they will not be set forth here.

The Referee's recommendation concerns the allegation by Mr. Houck that the Respondent failed to appeal his criminal conviction.

Mr. Houck was charged with trafficking in marijuana and with possession of more than one hundred pounds of marijuana. The charges were the result of a "sting" operation conducted primarily by the Florida Department of Law Enforcement. Mr.

Houck maintained that he was working in an undercover capacity for the Department. His employment had come about after he was caught with a barn filled with marijuana on his farm in Perry, Florida. The Respondent represented Mr. Houck in that case and the charges were dismissed because law enforcement 'officer failed to obtain a search warrant prior to searching the premises. Mr. Houck's Motion to Suppress was granted by the Court.

During that case Mr. Houck became friends with some of the agents and according to him he began to work with them. The agents maintained that they found him so untrustworthy that he never in fact worked for them.

One of the people caught in the barn at the time of the raid was one Orlando Rodriguez. According to Mr. Houck this man owed him some money and he was trying to get it from him. According to various telephone conversations which were recorded Mr. Houck promised to help Mr. Rodriguez with his troubles but wanted his money. He kept telling Mr. Rodriguez that he was going to have him sent off if he did not get his money together. During the conversations Mr. Houck claimed that he knew everyone in Perry and had great power with the local establishment. He told Mr. Rodriguez that he could pay off judges and that they did what he told them to do. He also tried to intimidate Mr. Rodriguez into hiring the Respondent claiming that they worked together.

Mr. Rodriguez tired of this harassment and notified the

Department of Law Enforcement. They had Mr. Rodriguez Mr. Houck and tell him that he was bring him some money and also some marijuana. Originally this meeting was to take place in Perry, Florida according to the transcripts of the telephone conversations. However, Mr. Rodriguez came to Gainesville and called Mr. Houck from there telling him to come down and meet him at a motel. He told Mr. Houck that he had his money and also had him some "pot".

Mr. Houck picked up a friend and immediately proceeded to Gainesville. When he arrived Mr. Rodriguez had a friend with him that was there for the purpose of translating and assisting his friend Orlando. This friend was in fact an agent of the Department of Law Enforcement and the room was wired with listening and recording devises.

A prolonged discussion and heated argument took place in the room with Mr. Houck making many threats. He was very angry because Mr. Rodriguez had not brought him his money. Mr. Houck repeatedly stated on the taped conversation that he did not want the "pot" and that he did not have any use for it. Mr. Rodriguez and the agent consistently tried to get him to take the marijuana and after about two hours of conversation he agreed upon the condition that Mr. Rodriguez would get his money to him in the following days.

Mr. Houck and his friend had the marijuana placed in Mr. Houck's car and left the motel. A few minutes later they were arrested and charged with possession of marijuana.

Mr. Houck contacted the Respondent shortly after his arrest and requested that he represent him in the Circuit Court of Alachua County on the charges. He also requested that the Respondent represent his friend. A plea of not guilty was entered and the presiding judge held a hearing to determine that there was no conflict with the two defendants having the same lawyer. Both men were present before the Court and it was concluded after they were both questioned that there was no conflict and that the Respondent could represent both of them.

Because of the overwhelming evidence that the State had it was discussed and decided that the only possible defense was that of entrapment. The defendant understood that it would be necessary for them to, in effect, say that they were guilty but that they were led into the crime by the officers. It was understood that the matter would be totally in the hands of the jury and that it would be necessary for them to be convinced.

The matter went to trial and Mr. Houck testified using the defense that he was entrapped. The jury chose not to believe him although they did believe his friend. Mr. Houck was convicted and sentenced to a term of 15 years imprisonment.

Mr. Houck maintains that he wanted the Respondent to prosecute an appeal of his conviction and that the Respondent told him he would do so. A notice of appeal was in fact filed in the Circuit Court bearing Mr. Houck's name on it. Mr. Houck claims that the signature was not his but was a forgery. Mr. Hudson, an employee of the Respondent, maintained that he took

the notice to the Gainesville jail and that he saw Ur. Houck sign it and that he notarized the signature. He also stated that he took the notice to the Clerk of the Circuit Court for filing. The notice was not timely filed and was in fact one day beyond the 30 day period for filing criminal appeals.' Mr. Hudson stated that he though the notice was prepared at the instruction of the Respondent but on cross examination he admitted that Mr. Houck was calling the office during this period of time and that it may have been prepared at his instruction or the instruction of someone else in the office. Mr. Houck testified that he had never seen the notice before and that it did not bear his signature.

The Respondent testified that he told Mr. Houck that there was no basis for an appeal, the trial court having ruled with the defense on almost every objection and having permitted the Defendant to plead not guilty as well as assert the defense of entrapment. Mr. Houck was told that an appeal would be to no avail and that the Respondent could not ethically assert that there were any grounds. He was instructed to obtained the services of the Public Defender if he believed that he must have his case appealed.

Mr. Houck testified that he did not know that the Public Defender was handling his appeal and thought that it was in the hands of the Respondent up until 1985. Vet, the record reveals that he did file an affidavit of insolvency and a request to have the Public Defender appointed. The Public Defender was

appointed and filed a number of documents in the appeal. More importantly the Public Defender visited Mr. Houck in prison to discuss with him his appeal. When the appeal was dismissed because the Public Defender did not show cause why the notice of appeal had not been filed on time a copy of the dismidsal was mailed to Mr. Houck. Mr. Houck even wrote to Mr. Rhodes at the First District Court of Appeal concerning his case and was told that it had been dismissed because the Public Defender had not filed a responds to the Order to Show Cause.

Mr. Houck admitted that the Respondent had told him that he did not have anything to appeal.

Mr. Houck, through Mr. Brinkmeyer, the Public Defender that had handled his appeal and allowed it to be dismissed, filed this complaint against the Respondent. Mr. Brinkmeyer also filed for a belated appeal of the conviction of Mr. Houck with the First District Court of Appeal. This appeal was granted and Mr. Houck was allowed to present his grounds to the Court. The conviction of Mr. Houck was affirmed, the Court finding no merit to the arguments presented on his behalf. This affirmance came down before the hearing in this cause and was the probable reason for Mr. Houck's desire to berate many other people at the time of the hearing.

Mr. Cornelius, an agent with the Florida Department of Law Enforcement who had testified against Mr. Houck in his trial, also testified in this matter. He admitted that he knew nothing of the matters complained of except what Mr. Houck had told

him. Mr. Douglas Brinkmeyer also testified and again stated that he could only repeat what Mr. Houck had told him.

Count IV concerned the complaint of Mr. Boyd Hilton and his accusation that he retained the Respondent to represent him in certin matters and that the Respondent failed to do so. Mr. Hilton claimed that he sought the assistance of the Respondent concerning a juvenile matter in which his children were charged and a subsequent civil action brought against him and his wife for the damages caused by the children.

The Respondent testified that he was retained by Mrs. Hilton in January 1985 because she had a judgment against her for the damages caused by the two sons of Mr. Hilton. These were not her children and she did not understand how she could be held responsible for damages caused by them. She was attempting to buy a car and was unable to do so because the insurance company had obtained a judgment against her.

Mrs. Hilton had been to juvenile court with her husband and the sons when they were charged with having set fire to a house after having broken into it. She was there not as their mother but simply to be with her husband. The two sons were represented by Mr. Isedore Rommes, Assistant Public Defender. Mr. Rommes negotiated a plea and the two sons admitted the allegations of delinquency and were placed on probation. According to Mr. and Mrs. Hilton, Mr. Rommes told them that they would not be liable for the damages to the house because it was covered by insurance. They said that they would never have

agreed to the boys admitting guilt if they had known that they would be liable in any way.

In January, 1985, after being paid a retainer fee by Yrs. Hilton, the Respondent filed a motion in the Juvenile Court to allow the sons to withdraw their plea and vacate the judgment based upon the information that Yr. and Yrs. Hilton had relied upon from Yr. Rommes. A hearing was held on this motion but Mr. Rommes testified that he did not give the Hilton's this advise and the motion was denied. The records do not reveal that the order denying the motion was ever reduced to writting and filed.

In February, 1985, the Respondent filed a motion to vacate the judgment against Mrs. Hilton upon the basis that Yrs. Hilton not being related to the children was in no way responsible for their torts. Upon proper proof to the insurance company of this fact the insurance company cleared Mrs. Hilton and there was no need for the matter to proceed further.

Mr. Hilton testified that he hired the Respondent to appeal the conviction of his children in Juvenile Court and that he also hired him to defend him in small claims court. He did admit that he did not know when he hired the Respondent and that the receipt for the retainer was in the possession of his ex-wife.

Subsequent to the sons being placed on probation they again were having trouble and the Respondent assisted Mrs. Hilton in getting them transferred to their natural mother. The Respondent testified that this cause friction between Yr. and

Mrs. Hilton. This was in response to a question by bar counsel as to why Mr. Hilton would have brought this complaint.

The Respondent asserted that he did everything that he was hired to do by Mrs. Hilton and that he was not guilty of any neglect.

The Referee recommended that the Respondent be found guilty of violating DR6-101(A)(3), DR7-101(A)(1), DR7-101(A)(2) and DR7-101(A)(3).

ARGUEMENT I

"The Referee erred in permitting the Complainant to introduce the testinrmy of a witness before the Grievance Committee into evidence when that witness was present at the hearing"

The Complainant sought to introduce the testimony of the witness, John Louie Houck, before the Grievance Committee into evidence over the objections of the Respondent. The witness was present at the hearing before the Referee but his answers were difficult to elicit and were often contradictory to the testimony which he had previously given. He was attempting to give a long recitation on the injustice of the justice system and to recite to the Referee that he had been sent to prison on a frame-up by the Department of Law Enforcement. He refused to confine his remarks to the matter under consideration and continuously attempted to indict everyone, everywhere, that he had ever had any dealings with and to depict himself as an innocent victim of injustice.

Because of the position taken by the witness during the hearing on the Complaint against the Respondent, the Complainant finally gave up and simply took the position that the testimony which he had given before the Grievance Committee should be introduced into evidence by the Referee and considered by him in reaching his decision. The Respondent objected to this upon the grounds that it denied him the opportunity to have the witnesses appearing against him confront him and be cross examained. The Respondent was not present at the Grievance Committee hearing

when the witness testified although he had been noticed of the hearing and could have been present if he had chosen to do so. The position of the Complainant was that the testimony of Mr. Houck before the Committee was similar to a deposition and that it was admissible even though the Respondent was not present. The Referee at first sustained the objection of the Respondent but upon further argument from the Complainant changed his ruling and admitted the transcript of the Grievance Committee hearing.

It is easy to understand the frustration of the Complainant with a witness who has previously given testimony which is very supportive of its position and who when he appears before the Referee begins to take a different stance and begins to waiver and take a different position. However, that witness is not a party to the proceedings and his attendance has been compelled and the Referee has the duty and the power to compel him to answer the questions propounded by counsel for the Complainant.

If the witness begins to give testimony which is a surprise or is contradictory to what he has said under oath previously than the witness can be declared a hostile witness and the Complainant could have impeached him as on cross examination. These remedies as well as others were available to the Complainant in order for the desired testimony to have been obtained. However, instead of taking any of these or other remedies the Complainant chose to seek admission of the testimony before the Grievance Committee. This was a

fundamental error which deprived the Respondent of various Constitutional guarantees and resulted in the finding of guilt on one of the counts of the Complaint.

It is realized that the proceedings before the Referee are neither criminal nor civil but are quasi-administrative hearings until they reach the Supreme Court. State ex rel. Florida Bar v. Dawson, (1959, Fla) 111 So. 2d 427 However, the proceedings are punitive in nature and the rights of the Respondent must be carefully guarded. Conner v. Alderman, (1964, 2nd DCA) 159 So. 2d 890; Lester v. Department of Professional and Occupational Regulations, (1977, 1st DCA) 348 So. 2d 923; Lee v. Walgreen Drug Stores Co. (Fla 1942) 10 So. 2d 314; Allure Shore Corp. v. Lymberis, (Fla 1965) 173 So. 2d 702 Therefore it cannot be said that the introduction of the transcript was harmless error because without the testimony from it the charges cannot be sustained because there was not clear and convincing evidence presented otherwise as to this particular count.

If a witness changes his story and contradicts what he has previously said then his testimony is certainly not clear and convincing. Such testimony fails even to meet the preponderance test in ordinary civil cases. The witness simply would not say in the hearing what he had previously said and therefore it was necessary for the Complainant to attempt the strategy of introducing the testimony before the Committee as if it were the deposition of a party.

Even if this were a deposition it would be necessary for

certain things to have been shown before it could have been introduced into evidence. The witness was present and therefore he was not dead nor was he more than one hundred miles from the place of the hearing. He was not unable to attend because of age, illness, infirmity or imprisonment. His attendance had been compelled and he was not an expert witness. No application and notice that exceptional circumstances existed as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in a hearing, to allow the ,testimony to be used. The Respondent had not been provided with a copy of the Grievance Committee hearing when it was offered into evidence. He was subsequently provided with a copy by the Complainant. However, no advanced notice of any kind was provided to the Respondent that an attempt to introduce a transcript of these proceedings would be made by the Complainant. Because the procedure provided for in the Florida Rules of Civil Procedure was not followed the transcript should have been excluded even if it were decided that it was in the nature of a deposition.

Yet, it must be remembered that this was not a deposition but a transcript of the proceedings that took place before the Grievance Committee of the Florida Bar. The two are not the same and are distinctly different.

The Grievance Committee of the Bar is more in the nature of a grand jury proceeding. Like the grand jury its functions are investigative, inquisitorial, and accusatorial. The complaint

against an attorney is refer by the Bar to the local grievance committee which must investigate the allegations to determine if probable cause exist for the bring of a formal charge. The committee may hear witnesses and obtain any other information which will assist it in determining whether probable cause should be found. If probable cause is not found to exist then the matter goes no further. This is basically the same procedure followed by the grand jury. The difference being that if the grand jury finds that probable cause exist then it issues an indictment.

Both before the Committee and the grand jury the accused may not be compelled to testify as to any matter which may incriminate him or her. The grievance committee does give the accused attorney a right to be present for the taking of evidence and to cross examine witnesses that testify against him. However, he is not required to be present nor is he required to present witnesses on his own behalf. When this particular matter about which Mr. Houck complained was presented to the grievance committee the Respondent was not present although he was given notice that the matter would be considered by the committee. The absence of the Respondent however is not the issue in this particular situation.

When this situation is carried to its logical conclusion the danger of permitting the Complainant take such action will be aware to the Court. The Respondent has not been able to find any case where the courts have permitted the testimony of a

witness before a grand jury to be presented to the court because the witness did not say the same thing he said before the grand jury. This would certainly be a unique way of having a defendant right of cross examaination eliminated. It would also destroy the system of justice which we have built up in this'country over the past two hundred years and would effectively abrogate most of the provisions of the Constitution. Naturally the testimony of a witness before the grand jury could be used to .impeach that witness if he gives different testimony at some other time. However, that does not mean that a transcript of the entire testimony before the grand jury could be introduced into evidence.

The Respondent has not been able to locate a case that provided for the introduction of testimony before a grievance committee into evidence in a hearing before a Referee. , To adopt such a rule would significant change the disciplinary procedure of this state. The Referee would no longer be needed since it would only be necessary for the Complainant to present all of its evidence to the committee, have a transcript of it made, introduce it into evidence and rest. The probable cause hearing would become the hearing on the merits and the final hearing. The quantum of proof would be significantly diminshed and the Respondent would be placed at a distinct disadvantage in trying to defend himself against any charge.

The witness, John Louie Houck, was present, by compulsion, before the Referee when this matter came on for hearing. The

burden was upon the Complainant to prove its case and that case could only be proven with the testimony of Mr. Houck. Mr. Houck could have been compelled to testify and he could have been impeached by the Complainant if his testimony was different from that which he had previously given. He could also have been cross examined about what he had to say and the Court could then have properly evaluated it.

It was not proper to allow the witness not to testify and to admit his testimony before the Grievance Committee into evidence thus substituting the transcript for live testimony. For this reason the transcript should be disregarded and the Respondent found not guilty as to the allegation of Count III of the Complaint.

ARGUMENT II

"The recommendation of the Referee that the Respondent be found guilty of Counts III and IV is not supported by competent and substantial evidence and by the Record"

The finds of facts and conclusions upon the testimony by the Referee are to be given substantial weight and should not be overturned unless they are clearly erroneous. The presumption is that the findings are correct and the burden is upon the party seeking to have them set aside to show that there is not substantial evidence in the record to support them. The Florida Bar v. Wagner, (1968, Fla) 212 So. 2d 770; The Florida Bar v. Abramson, (1967, Fla) 199 So. 2d 457; The Florida Bar v. Johnson, (1975, Fla) 313 So. 2d 33

Of course, the burden of proof is upon the Complainant and in order to sustain a charge of professional miscondyct there must be clear and convincing evidence of the attorney's guilt. The Florida Bar v. Abney, (1973, Fla) 279 So. 2d 834

It is the contention of the Respondent that the Complainant did not prove the guilt of the Respondent by clear and convincing evidence on Counts III and IV. Even the Complainant concedes that the complaint lodged by Mr. Houck is dependent upon his word. Yet, the documents in evidence clearly indicate that the Respondent was not representing Mr. Houck on appeal. There is no complaint concerning the Respondent's representation at trial. The complaint is that Mr. Houck maintains that he wanted an appeal and that he thought that the Respondent was

proceeding on one. He denies having signed the Notice of Appeal and said that he had never seen it before. Yet he did execute the affidavit of insolvency and the Public Defender of the Eighth Judicial Circuit was appointed to prosecute his appeal. He admitted to having received letters from the Public Defender and also of having the Public Defender visit him in prison. There is no possible way that he could have assumed that the Respondent was handling this appeal. Assuming that the Notice of Appeal was forged and that Mr. Hudson lied about seeing him sign it, he still was too involved in the appeal process to have thought someone other than the Public Defender was handling the matter.

Assuming again that the delay in filing the Notice of Appeal was the fault of the Respondent, which does not appear to be alleged by Mr. Houck, all that was necessary for the Public Defender to do was to allege this fact and to requested a permission to proceed. This is in fact what was subsequently done by the Public Defender and the matter was determined upon its merits. The Public Defender could have done this without allowing the appeal to be dismissed, if he thought in fact there was anything to appeal. There was nothing and this was simply a way around and an attempt to assert inadequate representation so that Mr. Houck could get a new trial. A review of the record supports this assertion and discredits the testimony of Mr. Houck.

Respondent took a great deal of time at the hearing

questioning Mr. Houck about various statements he had made in the past and went over various transcripts with him. He admitted that many of the statements were untrue and contended that everyone lies. He admitted that he had lied to Mr. Rodriguez about the Respondent and about the local circuit judge.

Mr. Houck also accused everyone including various judges of being "crooked". He stated that the prosecutor, Mr. Cornelius, the FDLE agents and all judges were liars. He was totally disgruntled with law enforcement and with the Courts. His continuous refrain was that everyone lies except himself. Yet, he contradicted himself numerous times during the hearing.

Another reason that Mr. Houck's testimony was not worthy of belief and should not be the basis of a finding of guilt was his unwillingness to state his accusation in front of the Respondent. A person who will not face the person he is accusing is not telling the truth and certainly is not believable.

The testimony of John Louie Houck has been discredited and is discredited upon the record when it is carefully examined. Upon such discredited testimony a finding of guilt should not be based. **State ex rel. Florida Bar v. Junkin,** (1956, Fla) 89 **So.** 2d 481; **State ex rel. Florida Bar v. Grant,** (1958, Fla) 100 **So.** 2d 631; **State ex rel. Florida Bar v. Oxford,** (1960, Fla) 127 So. 2d 107; **The Florida Bar v. Farber,** (1968, Fla) 214 **So.** 2d 478

A review of the record will also demonstrate the falsity of the accusation made in Count IV of the Complaint. Mr. Hilton alleges that he hired the Respondent to prosecute an appeal of the conviction of his sons in Juvenile Court. These sons were represented by the Public Defender who entered a plea admitting the allegations of delinquency. The sentence that was imposed by the Court was a term of probationary supervision. Clearly the sentence was legal and the father was fully aware of the implications since he was present as was Mrs. Hilton, the stepmother. There was nothing to appeal at this point and if there had been the Public Defender would have filed it. The juveniles were adjudicated delinquent in May, 1984. Mr. Hilton does not even maintain that he came to the Respondent at this point because he admits that he became disturbed when he found out that the insurance company was going to try to obtain the money which it had to pay out back out of him. This did not occur until some months after the adjudication. The record clearly demonstrates that this accusation is without any foundation in fact.

Mr. Hilton next contends that he was sued by the insurance company and that he brought the complaint to the Respondent who was suppose to take care of it.

The Record reveals that the Respondent filed a Motion in the Juvenile case in January, 1985 asserting that Mr. Hilton and his sons did not understand the ramification of the plea which they had entered and seeking to set it aside. It was asserted

that they had been misinformed by the attorney that represented the juveniles in the adjudicatory hearing. The Respondent claimed that this motion was filed at the instructions of Mrs. Hilton because the juvenile records reflected that she was the mother of these two children when in fact she was not. The situation has caused a judgment to be entered against her and she was unable to purchase a car. The motion in Juvenile Court and in Small Claims Court was for the purpose of clearing Mrs. Hilton. There was never any attempt to set aside the judgment as to Mr. Hilton because clearly he was liable for the torts of his two sons. There was nothing to appeal in the juvenile case.

Mr. Hilton filed his complaint because of the help which the Respondent gave his ex-wife in helping her get the children to their mother. He knew that the only assistance that could be rendered was to his wife and that there was no way ,that any attorney could assist him.

The testimony of Mr. Hilton is evasive and inconclusive when the record is examined. He had reasons for bringing the complaint against the Respondent but they were not the reasons stated at the hearing. His animosity toward the Respondent taints his testimony with the result that the Respondent should be found not guilty as to this Count of the Complaint.

ARGUMENT III

"The Referee erred in not permitting the Respondent to present evidence in mitigation after a finding of guilt by the Referee"

The Referee in his report recommended that the Respondent be suspended from the practice of law for a period of three years, be required to take and pass all portions of the Florida Bar examination, be required to pay the costs of the proceedings and provide proof of rehabilitation. The report goes on to say, "Further, Respondent has failed to file anything in this cause regarding discipline, even though his memorandum was due on September 27, 1988. While Respondent did file on October 10, 1988, an untitled document requesting the undersigned to permit him to present evidence in mitigation after a determination is made of his guilt or innocence, he has not contacted the undersigned's office in any way subsequent to said date."

At the conclusion of the last hearing in this matter which was held on August 22, 1988 both parties agreed and the Referee concurred that written final arguments would be submitted within a specified time. The Complainant submitted its argument with a recommendation that the Respondent be found guilty of all charges on each count and that a three year suspension be imposed. The argument and recommendation was filed with the Referee on September 30, 1988.

On the same day, September 30, 1988, the Respondent filed his argument with the Referee arguing that he should be found

not guilty on all counts except Court II and that on that Count he should be found not guilty of having violated DR1-102(A)(3) of the Code of Professional Responsibility but guilty of violating Article XI, Rule 11.02(3)(b) of the Integration Rule of the Florida Bar. The Respondent's position was that he was not guilty of the other accustions of the Complaint.

Having taken this position the Respondent filed with the Referee a request for an additional hearing after the Referee had made his determination of what charges and counts the Respondent was guilty of having breached. The Respondent took the position that it was impossible for him to make recommendations concerning the discipline that was to be taken against him when he was maintaining that he was not guilty of all counts except Count II. The request for hearing after guilt or innocence had been established was filed with the Referee on October 10, 1988.

The Referee entered his Order denying the Respondent's request to be heard further after a determination of guilt or innocence on April 24, 1989. Nine day later the Referee filed his Report finding the Respondent guilty on some of the charges in Counts 11, 111, and IV. The Respondent was not given an opportunity to be heard as to the punishment to be imposed after the Referee made his findings.

Certainly the discipline to be imposed on an attorney found guilty of professional misconduct must be determined by the facts of the particular case. The Florida Bar v. Pink, (1970,

Fla) 236 So. 2d 97; State ex rel Florida Bar v. Dawson, (1959, Fla) 111 So. 2d 427; Florida Bar v. Scott, (1967, Fla) 197 So. 2d 518 This Court has said that discipline must be fair to society, both by protecting the public from unethical conduct and by not denying the public the services of a quilified lawyer as a result of undue harshness in imposing a penalty. It has also said that the penalty must be fair to the attorney, being sufficient to punish a breach of ethics and at the same time encouraging reformation and rehabilitation. It must also deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Lord, (1983, Fla) 433 So. 2d 983

The procedure which has been established by the Supreme Court of Florida and the Florida Bar appear to contemplate that an accused will be given an opportunity to be heard and present evidence as to the sanctions to be imposed. In November, 1986, The Florida Bar's Board of Governors approved the Florida Standards for Imposing Lawyer Sanctions. The Board stated that these standards would be used as established Board guidelines for discipline and in its recommendations to the Florida Supreme Court for discipline to be imposed.

Rule 9.1, Florida Standards For Imposing Lawyer Sanctions, provides: After misconduct has been established, aggravating and mitigating circumstances maybe considered in deciding what sanction to impose. (Emphasis added) Clearly this language indicates that guilt must be established before

consideration can be given to the punishment to be imposed. The guilt of the Respondent was established on May 4, 1989 and in the same Order the recommended penalty was included. The Respondent had requested to be heard after the finding of the Referee but this request was denied.

Even the Complainant acknowledged some difficulty in recommending sanctions to be imposed against the Respondent in its Memorandum In Support Of Appropriate Discipline when it said: "This memorandum is written on the assumption that Respondent has been found guilty of violating some, if not all, of the disciplinary Rules cited in The Florida Bar's Complaint against him even though Respondent's guilt has not been determined at the time this Memorandum is being submitted." That Memorandum goes on to say: "Both aggravating and mitigating factors should be considered before a decision is made as' to the appropriate sanction to be imposed." (R. 16, P. **12)**

Certainly the Respondent would have difficulty trying to fashion sanctions that would be appropriate against him when he has maintained that most of the charges against him were without any foundation. On many of these charges the Referee agreed with the Respondent on and found that he was in fact not guilty of them.

The Respondent was placed in the same position as a defendant in a criminal case who is required to recommend to the Court that he be imprisoned for only five years although he has pled not guilty and the jury is still out. By its very nature

it appears to be contradictory and to place the Respondent in an untenable position. If he argues that some penalty should be imposed upon him then the Referee could rightfully assume that he is admitting guilt. By the same token if he asserts that there are mitigating circumstates that caused him to do the wrong he is accused of he is again admitting guilt. To require a Respondent to present his recommendations as to sanctions and to require him to put forward his mitigating circumstances before he has been found guilty of violating the Rules is to put him into a "Catch 22" situation and is contrary to all of the rules of fair play and justice under our system.

The Respondent could have presented various mitigating circumstances if he had been allowed an opportunity to do so after the Referee reach his decision as to guilt. The denial, after request to do so, was contrary to spirit and intent of the Florida Standards as well as the procedure established by this Court.

The Respondent should have an opportunity to submit to the Referee the mitigating circumstances he has to offer. This Court should have these mitigating circumstances before it before it imposes sanctions in this case. It is impossible for the Court to make a decision in accordance with the standard established in Lord, supra, with the state of the record before the Court.

It must be noted that the Referee in his Report stated that the Respondent had requested to be permitted to present evidence

in mitigation after a determination of guilt or innocence and that this written request was filed on October 10, 1988. He goes on to state that the Respondent had not contacted his office in any way subsequent to that date. However, it must be pointed out that the Referee denied Respondent's motion on April 24, 1989, more than six months after it was submitted. The Referee then nine days later filed his Report. There was absolutely no reason for the Respondent to have contacted the Referee during the six months that he was considering the Motion since such contact would have been improper. After the Motion was denied there was no opportunity for the Respondent to contact the Referee. The inference in the Report appear to be that the Respondent should have contacted the Referee and submitted to him mitigating factors. As is demonstrated above such conduct on the part of the Respondent would have been inappropriate. The Referee should have granted the Respondent the right to be heard upon the mitigating circumstances and should not imply in his Report that he did not because the Respondent failed to contact him.

This Court should remand this matter to the Referee for the purpose of the Respondent presenting the mitigating circumstances that may exist as to the charges upon which he was found guilty.

ARGUMENT IV

"The Respondent should have been found guilty of violating Article XI, Rule 11.02(3)(a) and (b) of the Integration Rule of the Florida Bar and Disciplinary Rule 1-102(A)(6)."

The Respondent was charged with four misdemeanor counts of failing to file Income Tax Returns in the Federal District Court for the Northern District of Florida, Pensacola Division. On August 15,1985 the Respondent was convicted on two counts of the information and was sentenced on September 20, 1985 to a term of imprisonment of 10 months to be followed by a term of probation of 5 years and a fine of $10,000.00.

The Complainant was immediately notified of this conviction and a probable cause hearing was held before the Grievance Committee in October, 1985. The Respondent admitted his guilt and the Grievance Committee found probable cause although but the Respondent was allowed to present various mitigating circumstances to the Committee. No further action was taken until the Complainant filed the present complaint on August 5, 1987. On December 31, 1985 the Respondent reported to the Federal Correctional Institute at Tallahassee, Florida and remained there until August 4, 1986 at which time he was released.

The complaint filed against the Respondent alleged that he was guilty of having committed a misdemeanor by failing to file his tax return and having committed a crime involving moral turpitude. The Respondent admitted that he had committed a

misdemeanor but denied that the failure to file a tax return was a crime involving moral turpitude.

Over the years the failure to file a tax return has consistently appear before this Court. The decisions going back many years reveal that the Court did not take the violation to be a serious one and therefore little or no discipline was imposed. As the years progressed and as the Federal Government began to press the issue of filing returns more vigorously the Court began to impose private reprimands upon errant attorneys. The Florida Bar v. Rousseau, (1969, Fla) 219 So. 2d 862 The Court after a few years then began to impose public reprimands as punishment for this offense. The Florida Bar v. Slatko, (1973, Fla) 281 So. 2d 17; The Florida Bar v. Turner, (1977, Fla) 344 So. 2d 1280; The Florida Bar v. Ryan, (1977, Fla) 352 So. 2d 1174; The Florida Bar v. Marks, (1979, Fla) 376 ' So. 2d 9

The discipline in these cases was administered for violation of Disciplinary Rules 1-102 (A)(4) and 1-102 (A)(6). These rules provided that a lawyer should not engage in conduct involving dishonesty, fraud, deceit or misrepresentation nor conduct that adversely reflected on his fitness to practice law.

In 1983 in the case of The Florida Bar v. Lord, (1983, Fla) 433 So. 2d 983 the Court found that a public reprimand was no longer an adequate remedy for an attorney who had entered a plea of guilty to four counts of failing to file a tax return and who had in fact failed to file his return for a period of 22

years. The court in that case order the attorney suspended for a period of six months. This case was followed by the case of The Florida Bar v. Blankner, 457 So. 2d 476 in which the Court said that a suspension would be imposed in all cases of this nature in the future.

It is the contention of the Respondent that he should have been convicted of violating Article XI, Rule 11.02(3)(a) and (b) of the Intenration Rule of the Florida Bar and Disciplinary Rule 1-102(A)(6). This is the appropriate violation and carry a penalty as sever as the violation of any other rule. The failure to file a tax return is not a crime involving moral turpitude as used when usually defining criminal offenses. Certainly the failure to file is a criminal offense and the severity of it is not *to* be demeaned by this argument. However not every criminal offense can or should be designate4 as one involving moral turpitude. The actions of the Respondent does adversely reflect upon his fitness to practice law.

The Court relaxed its ruling in Blankner in the case of The Florida Bar v. **Donaldson,** (1985, Fla) 466 So. 2d 216 and imposed a public reprimand upon the offending attorney for having fail to file tax returns. There was a mitigating factor in that case in that the attorney was suffering from acute alcoholism and this disease contributed to his failure to file his returns.

There are numerous mitigating factors that should be considered by the Court in this case but before going to those

it is incumbent upon the Respondent to point out another factor with regard to his case. During the same period that the Respondent was before the Federal District Court and in the same Division one of his fellow attorneys was before the Court upon a charge of possession of cocaine. That attorney was convicted of that offense and was sentenced by the same District Cgurt. That case came before this Honorable Court and the attorney was given a public reprimand. The **Florida Bar v. Levine, (1986,** Fla) **498 So.** 2d **941**

The Respondent does not make this argument for the purpose of offending or taking issue with the Court on the discipline it administers to errant attorneys. However, the Respondent is aware and the decisions of this Court have oftened pointed out, that each case must rest upon its own set of facts. The facts of the instant case warrant consideration.

As the Chief Justice pointed out in **Lord,** supra, he felt that the failure to pay taxes was theft which took the form of failure to pay a legal obligation to the government. As the record will reveal in this case the Respondent did pay his estimated taxes for the years **1978** and **1979** and this was noted at the time of sentencing. These taxes were paid in the years in which they were due and not at some subsequent time. The Respondent did not however file the return with the taxes and , of course, this is the offense. This is not to imply that the Respondent did not owe additional money to the Government since the Internal Revenue exacts severe penalties for failing to file

the return. Certainly, there was no attempt to evade the payment of the lawful taxes which were due. This factor should be taken into consideration by the Court when assessing the penalty that is to be imposed.

There are other mitigating factors which the Respondent could have placed before the Referee if an opportunity to do so had been afforded him. The Complainant has recommended a suspension of 9 months for Count 11. The Respondent feels that this is much too severe when the circumstance of this case are taken into consideration.

ARGUMENT V

"The recommended penalty of the Referee is too severe under the facts and circumstances of this case."

The Respondent would respectfully suggest that the penalty of three years suspension as recommended by the Referee is too severe and should be considerably lessened. The Complainant in its argument and memorandum to the Referee recommended a period of suspension of three years. That was before the Referee had found the Respondent not guilty on one count and on several of the charges in other counts.

The punishment which is imposed must be fair to the public and to the accused attorney. The **Florida Bar v. Beaver**, (1972, Fla) 259 So. 2d 143; **The Florida Bar v. Riccardi**, (1972, Fla) 264 So. 2d 5 Each case must stand upon its own set of facts and the degree of punishment must depend upon the situation and circumstances of the case. **The Florida Bar v. Scott**, (1967, Fla) 197 So. 2d 518

The Respondent would respectfully submit that the facts and circumstances of the case before this Court does not warrant the imposition of so severe a penalty as that recommended by the Referee. To suspend the Respondent from the practice of law for a period of three years would not do justice to the public or to him under the factual situation before the Court. Certainly, it would not be beneficial to anyone since the Court does not have the benefit of mitigating circumstances that could have been

presented to the Referee. It is difficult for the Court to fashion sanctions when the aggravating and mitigating circumstances are not before it.

The Respondent would respectfully submit that if the Court finds him guilty of the charges recommended by the Referee that a fairer disposition would be a suspension of six months. If the Court should disagree with the Referee and find the Respondent not guilty of some of those charges then the Court should fashion a penalty to fit the offenses of which the Respondent is convicted.

SUMMARY OF ARGUMENTS

The Respondent argues that there was not substantial and competent evidence to convict him on Counts III and IV and that he should be convicted of violating Disciplinary Rule 1-102(A)(6) and Article XI, Rule 11.02(3)(a) and (b) of the Integration Rule of The Florida Bar.

The Respondent further argues that he should have had his motion granted to permit him to present evidence in mitigation after a finding of guilt by the Referee. The Motion was made prior to the Referee having issued a Report and was only denied nine days before the Report was filed.

The Respondent takes the position that the Referee should not have permitted the Complainant to introduce into evidence the testimony of John Louie Houck before the Grievance Committee. This witness was present before the Referee, and his testimony should have been compelled.

The Respondent last argues that the penalty recommended by the Referee is too severe under the facts and circumstances of this case.

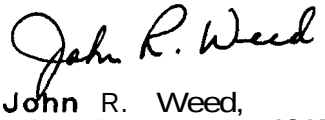
CONCLUSION

The Respondent would request that the Court carefully review the record in this cause and after doing so find that it was not proper for the Complainant to introduce the testimony of the witness John Louie Houck into evidence and that it was not proper for the Referee to consider that testimony which was not given before him. Count III of the information should be dismissed and the Respondent found not guilty on that count for the reason stated above.

The Court after .careful review should order that Count IV also be dismissed since the allegation were not proven by clear and convincing evidence.

The Court should then return this matter to the Referee so that he can take testimony or permit written statements as to matters in mitigation.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have mailed a copy of the foregoing initial brief of Petitioner/Respondent to Mr. John V. McCarthy, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399 on this 14th day of August, 1989.

John R. Weed

John R. Weed
Respondent