

FILED

IN THE SUPREME COURT OF FLORIDA

MAR 27 1980

THE FLORIDA BAR,  
Complainant,

Supreme Court Case  
No. 74,051

CLERK, SUPREME COURT  
By: [Signature]  
Deputy Clerk

v.

JOHN E. KIRKPATRICK,  
Respondent.

CONFIDENTIAL

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On Petition to Review  
\_\_\_\_\_

Initial Brief of Complainant

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### INTRODUCTION

In this Brief, The Florida Bar will be referred to as either "The Florida Bar" or "The Bar". John E. Kirkpatrick will be referred to as "Respondent" or "Mr. Kirkpatrick". Other witnesses will be referred to by their respective surnames for clarity.

Abbreviations utilized in this Brief are as follows: "TR" will refer to the transcript of proceedings of November 9, 1989.

STATEMENT OF THE CASE

Grievance Committee 11"A" after hearing found the existence of minor misconduct and recommended that the Respondent be privately reprimand. The Respondent rejected that private reprimand.

The Florida Bar filed its complaint on April 19, 1989. A final hearing was conducted before the Honorable Joseph A. Nadler, Referee on November 9, 1989.

The Referee issued a report finding Respondent guilty of all allegations and recommended the imposition of a private reprimand. The Florida Bar filed its Petition for Review on February 12, 1990. The Respondent filed a Cross-Petition for Review on the same date. This brief follows.

### STATEMENT OF THE FACTS

The Florida Bar would adopt the Referee's summary of facts contained in the Report of Referee as its statement of facts. Those findings, together with disciplinary rule violation findings have been included below for the Court's convenience.

### FINDING OF FACTS

I find the following facts to be true and correct, as well as admitted by the Respondent.

1. That on or about March 2, 1987, the Respondent was arrested for resisting arrest without violence in violation of Florida Statute 843.02 and no valid tag in violation of Florida Statute 320.07(3)(b).

2. That Respondent was issued a notice to appear in Court on April 6, 1987 for the arraignment.

3. That such notice as heretofore mentioned in paragraph 3, was mailed by regular mail to the address Respondent provided to the arresting officer.

4. That Respondent left the address of 777 Brickell Avenue with the arresting officer.

5. That Respondent failed to appear at the scheduled hearing on April 6, 1987.

6. That a bench warrant was issued by Judge Gerald J. Klein, as a result of Respondent's failure to appear on April 6, 1987.

7. That on May 13, 1987. Respondent appeared in Court, had the April 6, 1987 bench warrant set aside and pled not guilty to the charges.

8. That on June 11, 1987 Respondent pled no contest to the charges and was placed in the Advocate Program.

9. That on June 11, 1987 Respondent's request for a Stay of Execution to pay Court costs was granted until June 18, 1987.

10. That a Notice to Appear before the County Court on July 23, 1987 was mailed to the Respondent as a result of his failure to pay the Court costs in compliance with the Stay of Execution referred to in paragraph 10.

11. That such notice was mailed by regular mail to the address left with the Court.

12. That Respondent left the address of 1869 Brickell Avenue, with the Court as indicated on the Request for a Stay of Execution.

13. That Respondent failed to appear at the scheduled hearing on July 23, 1987 as heretofore mentioned in paragraph 11.

14. That a bench warrant was issued by Judge Gerald J. Klein as a result of Respondent's failure to appear on July 23, 1987.

15. That Respondent failed to comply with the requirements of the Advocate Program by failing to attend all classes.

16. That Respondent failed to comply with the requirements of the Advocate Program by failing to pay the balance of his fee of one hundred and fifty-five dollars (\$155.00).

17. That as a result of Respondent's failure to comply with the requirements of the plea negotiation, Respondent was issued a notice to appear in Court on November 16, 1987.

18. That such notice was mailed by regular mail to the address Respondent left with the Advocate Program.

19. That Respondent left the address of 1865 Brickell Avenue, with the the Advocate Program on June 17, 1987.

20. That Respondent failed to appear at the scheduled hearing on November 16, 1987.

21. That a bench warrant was issued by Judge Gerald J. Klein as a result of Respondent's failure to appear on November 16, 1987.

22. That on November 3, 1988, subsequent to the Grievance Committee hearing Respondent had the July 23, 1987 and November 16, 1987 bench warrants set aside.

23. That on November 3, 1988, Respondent advised the County Court of a change of address to 701 Brickell Avenue.

24. That on November 21, 1988, Respondent was given thirty days to complete probation.

25. That on December 21, 1988 the Court at the request of Respondent extended his time to complete probation for one more month.

26. That as of the date of the last hearing (November 9, 1989) and extension, the terms of probation have been fulfilled by the Respondent.

SUMMARY OF ARGUMENT

John Kirkpatrick was arrested for resisting arrest on March 2, 1987. Thereafter, although he was properly noticed he failed to appear in court causing the issuance of three bench warrants for his arrest. He pled no contest to the charges and was placed in the Advocate Program which obligated him to pay fines and attend classes. Subsequent to the final hearing before the Referee on November 9, 1989 Respondent finally fulfilled all obligations to the Advocate Program.

The Referee imposed a private reprimand, rather than a public reprimand which was sought by The Florida Bar. Respondent's behavior and attitude are a disgrace. The imposition of a private reprimand is too lenient.



POINT ON APPEAL

POINT I

WHETHER THE REFEREE ERREDBY  
IMPOSING A PRIVATE REPRIMAND  
RATHER THAN A PUBLIC REPRIMAND?

**ARGUMENT**

**I**

**THE REFEREE ERRED BY IMPOSING  
A PRIVATE REPRIMAND RATHER  
A PUBLIC REPRIMAND.**

The Florida Bar through this appeal is asking this Court to exercise its ability to review the imposition of discipline in this matter. In re: Inglis, 471 So.2d 38 (Fla. 1985). Consequently, the Florida Supreme Court is not bound by a Referee's recommendation of discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978).

An attorney's conduct, unrelated to his law practice, may be the subject of discipline. The Florida Bar v. Hooper, 507 So.2d 1078 (Fla. 1987).

In a sense, 'an attorney is an attorney is an attorney' much as the military officer remains 'an officer and a gentleman' at all times. We do not mean to say that lawyers are to be deprived of business opportunities; in fact we have expressly said to the contrary on occasion; but we do point out that the requirement of remaining above suspicion, as Ceasar's wife, is a fact of life for attorneys. They must be on guard and act accordingly, to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing.

The Florida Bar v. Bennett,  
276 So.2d 481,482 (Fla. 1973)

This matter did not deal with a business transaction. It dealt with the arrest of an attorney. The Respondent ultimately pled no contest to resisting arrest without violence. It has been

held that an attorney's plea of nolo contendere to a misdemeanor is relevant to his fitness to practice law.<sup>1</sup> The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984); The Florida Bar v. Bunch, 195 So.2d 558 (Fla. 1967).

Respondent subsequently utterly and blatantly disregarded the entire judicial system, including the disciplinary process overseen by this Court. Mr. Kirkpatrick was arrested on March 2, 1987. Between that date and November 16, 1987 as a result of his own actions and/or inactions three bench warrants were issued for his arrest for failing to appear in court. The Referee found that all notices were mailed to the addresses which the Respondent provided. As of the final hearing before the Referee on November 9, 1989 the Respondent had not fulfilled all of his probationary responsibilities flowing from his arrest.

By Bar Counsel:

Q. To date, as far as you are concerned, Mr. Kirkpatrick was revoked out of the program and did not fulfill the conditions of his probation?

By Blas Lugones of the Avocate Program:

A. Yes.

(TR. 41-42)2

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<sup>1</sup>A no contest plea is the equivalent to a plea of "nolo contendere", Latin for "I do not wish to contest, fight or maintain (a defense). Barron's Law Dictionary 313 (2nd ed. 1984).

<sup>2</sup>The Report of Referee dated December of 1989 found that Respondent did "recently" fulfill his responsibilities in reference to his June 11, 1987 obligations.

In fact in an effort to assist the Respondent the Referee suggested that the final hearing be continued so that Mr. Kirkpatrick could clear up all his probationary responsibilities. The Bar objected, and the hearing continued.

THE REFEREE: Ms. Lazarus, I wonder if you folks would consider recessing this for fifteen or thirty days to afford Mr. Kirkpatrick the opportunity -- I am sure Mr. Borgognoni can get an order from Judge Klein and let him pay the money and go to the Advocate Program and then we can reconvene after he finishes the Advocate Program and then make a recommendation.

Do you think you would consider doing that? It seems like a logical thing to do.

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MS. LAZARUS: Your Honor, with all due respect to the Court, it would be our position that this matter has been pending even before Your Honor, since May, and this certainly could have been taken care of a lot sooner than now, the eleventh hour.

THE REFEREE: You are absolutely right.

MS. LAZARUS: As far as the Bar's charges here, it even further aggravates what we have already charged, in that it hasn't been taken care of and--

THE REFEREE: I certainly understand. I was just asking you if you could live with that. If you could, it might be worthwhile and it would serve a lot of ends.

(TR. 17-20)

Clearly, the fact that a complaint was filed by The Florida Bar in April of 1989, subsequent to the grievance committee's findings, did not encourage this Respondent to mitigate his circumstances until subsequent to the November 9, 1989 final hearing. The Referee expressed his sentiments concerning the

above as follows:

Despite the fact that the bar filed its complaint in April of 1989 which was preceeded by Grievance Committee action and this matter has been pending before this Referee since my appointment in May of 1989, the Respondent has just recently fulfilled his responsibilities in reference to his June 11, 1987 Advocate Program obligation. Consequently, Mr. Kirkpatrick's indifference of the legal system began with his encounter with the police officer at the time of his arrest, and continued with his disobedience of Judge Klein.

(Appendix - Report of Referee, page 4)

The Referee further expressed his sentiments through his findings of fact which basically adopted the Bar's allegations in its complaint.<sup>3</sup>

This particular case is a good example of the proposition that the Referee's findings should be given significant weight because he was in the best position to observe the demeanor of the witnesses. The Florida Bar v. Saxon, 379 So.2d 1281 (Fla. 1980). The Referee specifically commented on John Kirkpatrick's attitude.

[A]s in any matter before a court it is important to evaluate the demeanor of the witnesses. The Bar's witness, Blas Lugones, who is a counselor with the Advocate Program was credible and informative. Mr. Kirkpatrick, however, presented a very different impression. His indifference and lack of attentiveness to the matter at hand was apparent.

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<sup>3</sup> Respondent through his belatedly filed answers to the Bar's Request for Admissions likewise admitted to all of the Bar's allegations, except for paragraph 28 which charged that a violation of the Code was committed.

He took no responsibility for actions and occurrences which clearly were his own. In fact, he did not recognize that the privilege of being an attorney should have caused him, more than a lay person, to show respect and deference to the iudicial system.

(Appendix - Report of Referee, page 4, Emphasis Added)

This Court may consider a disciplined attorney's attitude towards the underlying misbehavior as properly bearing on the discipline to be imposed. The Florida Bar v. Thompson, 500 So.2d 1336 (Fla. 1987).

The fact that Mr. Kirkpatrick was arrested for resisting arrest is quite serious. The fact that as a result of his failure to appear in Court three bench warrants for his arrest were issued aggravates the existence of the arrest. The fact that he did not fulfill his probationary responsibilities until after the final hearing exacerbates the foregoing. It is apparent that Mr. Kirkpatrick does not recognize, respect nor value that privilege which has been bestowed upon him by this Court. Despite all of Respondent's admitted transgressions the Referee recognized that his attitude was "indifferent". An attorney more than anyone must and should respect the judicial system.

Simply stated, a private reprimand would not catch Mr. Kirkpatrick's attention and is an insufficient level of discipline. The imposition of a private reprimand in a case like this would send the wrong message to the attorneys in this State. It would tell them that they can violate the laws and show contempt for the Courts by ignoring them.

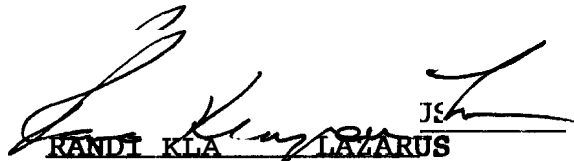
This Court aptly expressed its responsibility in regard to attorney discipline as follows:

In disciplinary proceeding against attorney, ultimate judgment of Supreme Court must be just to the public and fair to accused attorney and should be designed to correct any antisocial tendency of respondent and deter others who might tend to engage in like violations.

The Florida Bar v. Bass,  
106 So.2d 77 (Fla. 1958)

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the Referee erroneously imposed a private reprimand and would urge this Court to publicly reprimand this Respondent.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Initial Brief on Petition for Review was sent Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Gregory Borgognoni, Attorney for Respondent, 701 Brickell Avenue, Miami, Florida 33130 on this 16th day of March, 1990.

  
**RANDI KLAYMAN LAZARUS**  
Bar Counsel

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Report of Referee .....

Exhibit A