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**FILED**

SID J. WHITE

SEP 25 1990

CLERK, SUPREME COURT

By

Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,  
v.

JOSEPH H. WEIL,

Respondent.

Supreme Court  
Case No. 75,547

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On Petition for Review of  
the Referee's Report in a  
Disciplinary Proceeding.

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ANSWER BRIEF OF COMPLAINANT

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## INTRODUCTION

In this brief, The Florida Bar is referred to as either "THE FLORIDA BAR", "THE BAR", or "Complainant"; Joseph H. Weil will be referred to as the "Respondent".

Abbreviations utilized in this brief are as follows:

"TR" refers to the Transcript of Proceedings before the Referee held May 18, 1990

"EX" refers to Complainant's Exhibits introduced into evidence in the proceedings before the Referee.

**STATEMENT OF THE CASE**

On February 15, 1990, The Florida Bar forwarded to the Supreme Court a complaint against Respondent. The filing of the Complaint initiated these disciplinary proceedings. A copy of the Complaint, together with Request for Admissions, was sent to Respondent on that same date.

On March 2, 1985 the Supreme Court referred this matter to a referee for trial.

Respondent failed to respond to the Request for Admissions. Accordingly, The Florida Bar filed with the Referee a Motion for Order Deeming Matters Admitted. The Florida Bar's motion was granted and by order dated May 3, 1990 the matters contained in the Bar's Request for Admissions were deemed admitted.

Final Hearing before the Referee was held on May 18, 1990. Although Notice of the Final Hearing was sent to Respondent at his record Bar address, office address and last known home address by both certified mail and regular delivery, Respondent failed to appear at the final hearing.

On June 5, 1990, the Referee signed a Report of Referee recommending that Respondent be disbarred and that he pay the costs of this proceeding.

The Report of Referee was considered and approved by the Board of Governors at its meeting held July 17 through 21, 1990. Notification was sent to the Court and Respondent that the Bar would not file a petition for review.

On or about July 17, 1990 Respondent's counsel filed a Motion to Remand Cause to Referee. By order of the Supreme Court dated August 10, 1990, Respondent's motion to remand was denied.

Respondent filed a Petition to Review and thereafter an Amended Petition to Review which seeks review of both the referee's finding of guilt and recommendation of discipline.

### STATEMENT OF THE FACTS

The Complaint filed by The Florida Bar against Respondent alleges that Respondent engaged in the practice of law while he was suspended for nonpayment of dues in violation of Rule 1-3.6 of the Rules Regulating The Florida Bar and Rule 4-5.5 of the Rules of Professional Conduct.

Respondent has not paid Bar dues since October 1987. As a result, on September 30, 1988 Respondent became a delinquent member of The Florida Bar pursuant to Rule 1-7.3 of the Rules Regulating The Florida Bar and has retained his delinquent status since that date. As a delinquent member, Respondent is prohibited from practicing law.

The Florida Bar sent Respondent written notification of his delinquency. In addition, in March 1989 a Bar Staff Investigator contacted Respondent to confirm that Respondent was fully aware of his delinquency and that he was prohibited from practicing law.

Notwithstanding his suspended Bar status, Respondent continued to practice of law and was, in fact, employed as a city attorney for the City of Sweetwater, Florida, during his suspension and the course of these proceedings (EX. 3).

### SUMMARY OF THE ARGUMENT

Respondent was suspended from the practice of law for nonpayment of dues. During the period of his suspension Respondent continued to practice law and was, in fact, employed as a City Attorney. Respondent's actions of practicing law while suspended constitutes a violation of the Rules Regulating The Florida Bar and subjects Respondent to disciplinary action.

In determining an appropriate disciplinary sanction, a referee may consider Respondent's total disregard for the disciplinary proceeding as well as prior discipline. Considering the facts of this case, the referee's recommendation for disbarment is warranted.



## ARGUMENT

### I. ALL ATTORNEYS ADMITTED TO PRACTICE OF LAW IN FLORIDA ARE SUBJECT TO THE JURISDICTION AND DISCIPLINARY RULES OF THE SUPREME COURT OF FLORIDA.

Respondent's argument that in-house counsel is not regulated by The Florida Bar is both incorrect and inapplicable to the case sub judice.

First, all members of The Florida Bar are subject to the jurisdiction and disciplinary rules of the Supreme Court. Rule 3-1.2, Rules of Discipline. The nature of an attorney's practice (i.e., city attorney) does not render The Florida Bar, acting as an agency of the Court, without jurisdiction to enforce the Rules Regulating The Florida Bar.

Second, there is no evidence anywhere in the record which reflects that Respondent was either employed as in-house counsel or was not involved in the practice of law. In fact, Respondent's statement of earnings reflects employment as a City Attorney (EX. 3). Respondent has cited no authority to support a presumption that a position of City Attorney involves activities other than practicing law.

Notwithstanding the evidence in the record establishing Respondent's continuous employment as a City Attorney (EX. 3), by his failure to respond to the Requests for Admission Respondent has admitted the specific charge of practicing law while suspended for nonpayment of dues. The Florida Bar v. Hollingsworth, 376 So.2d 394 (Fla. 1979). Moreover, based upon his failure to respond to the Request for Admissions, Respondent

has admitted the specific allegation that he is a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

Based upon the foregoing, the record establishes that Respondent is subject to the jurisdiction and disciplinary rules of this Court and that he engaged in the practice of law while suspended.

## **II. THE REFEREE'S RECOMMENDATION OF DISBARMENT IS WARRANTED**

In evaluating a Report of Referee this Court has held that the referee's findings should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Hooper, 507 So.2d 1078 (Fla. 1987) and 509 So.2d 289 (Fla. 1987).

In the instant case, the matters alleged in the Complaint have been deemed admitted and are, therefore, undisputed: Respondent has not paid his Bar dues since October 1987; Respondent was suspended from the practice of law; Respondent engaged in the practice of law during his suspension, and in fact, was continuously employed as a City Attorney during his suspension. Not only did Respondent practice law while suspended but he continued to practice law as a City Attorney even while he was the subject of these disciplinary proceedings which were based upon his actions of practicing law while suspended.

In arguing discipline, The Florida Bar brought to the attention of the referee The Florida Bar v. Fisher, 554 So.2d 1169 (Fla. 1989) wherein the respondent received a 90-day suspension for practicing law while suspended for nonpayment of

dues. (Tr. 5). The Florida Bar suggested to the referee the difficulty in enforcing an additional suspension as a disciplinary sanction because Respondent engaged in the practice of law while under suspension during the course of disciplinary proceedings. The referee commented, "I don't know why the Supreme Court doesn't just disbar him. He has thumbed his nose at the whole system." (Tr. 11).

In recommending Respondent's disbarment the referee stated,

Even though The Florida Bar is not requesting it at this time, given Mr. Weil's background and his apparent attitude in thumbing his nose completely at the system and refusing to respond to even tell his side I would recommend disbarment. (Tr. 13)

The referee's recommendation of disbarment is justified considering the aggravating factors, including Respondent's total disregard of the disciplinary proceedings. In fact not only did Respondent fail to appear at the final hearing, but he failed to file any pleading or other writing with the Referee which would explain his position with regard to the allegations set forth in the Bar's Complaint as well as any unusual circumstances which prevented him from either responding to the Complaint or appearing at the final hearing. See The Florida Bar v. Bartlett, 509 So.2d 287, 289 (Fla. 1987) wherein this Court recognized that a lawyer's willful refusal to participate in the disciplinary process calls into serious question the lawyer's fitness to practice of law.

In addition, in recommending discipline the referee may consider Respondent's prior discipline. In the case sub judice Respondent received two public reprimands. The Florida Bar v.

Weil, 511 So.2d 988 (Fla. 1987). The Florida Bar v. Weil, 373 So.2d 659 (Fla. 1979). In both instances Respondent was disciplined for dilatory misconduct.

The cases cited by Respondent in support of a lesser disciplinary sanction may be distinguished from the instant case. In The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985), the respondent appeared at the final hearing and sought to explain his actions as the result of alcoholism. In the instant case Respondent neither appeared at the final hearing nor asserted alcoholism as the cause of his misconduct. In The Florida Bar v. Levkoff, 511 So.2d 556 (Fla. 1987), the respondent engaged in the practicing of law while suspended for non-payment of dues during a seven (7) month period in 1984. In the instant case, Respondent practiced law continuously for several years, even during the course of disciplinary proceedings. Moreover, the Respondent in Levkoff made an appearance in the proceedings before the referee and submitted a guilty plea admitting the misconduct and offering to accept a suspension as a sanction. In The Florida Bar v. Fisher 554 So.2d 1169 (Fla. 1989), the decision is silent as to whether the respondent engaged in the practice of law during the course of the disciplinary proceedings.

Further, there is case law which supports the disbarment of an attorney who engages in the practice of law while suspended. See The Florida Bar v. Hartnett, 398 So.2d 1352 (Fla. 1981), wherein the respondent was disbarred pursuant to contempt proceedings which were initiated by The Florida Bar for

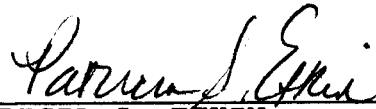
Respondent's actions of practicing law in violation of a suspension order; The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978) wherein the respondent neglected the representation of a client which was undertaken during the three-month period that respondent was suspended from the practice of law; The Florida Bar v. Bauman 558 So.2d (Fla. 1990) wherein the respondent engaged in five (5) distinct acts of practicing law while suspended. In Bauman, the respondent continued to practice law even after he was cited for contempt by a circuit judge for holding himself out as an attorney.

The Florida Bar v. Golden, 563 So.2d 81 (Fla. 1990) is a recent case involving the of attempt of a suspended attorney to assist his client in requesting continuances. Although minimal in nature, Respondent's actions were held to constitute the unauthorized practice of law. The referee recommended a one-year suspension. The Florida Bar petitioned the Supreme Court for review of the referee's recommendation for suspension and sought disbarment. In approving the one-year suspension recommended by the referee, this Court stated, "had Golden's practice been more direct or more substantial, we would agree with the bar." The Florida Bar v Golden 563 So.2d 81, 82 (Fla. 1990). In the instant case, Respondent's continuous employment as a City Attorney is neither minimal nor indirect in nature, thereby justifying disbarment.

CONCLUSION

The Referee's findings and recommendations are fully supported by the record in this case. The Florida Bar recommends that the Supreme Court approve the Report of Referee and enter an order of disbarment.

Respectfully submitted,

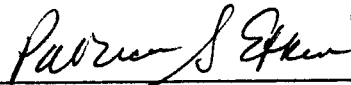


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Answer Brief of Complainant was sent by Federal Express to Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida, 32399-1927, and that a true and correct copy was hand-delivered to Richard Kanner, Attorney for Respondent, 777 Brickell Avenue, Miami, FL 33131 this 27<sup>th</sup> day of September 1990.

  
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PATRICIA S. ETKIN  
Bar Counsel