

FILED
SID J. WHITE

SEP 7 1990

CLERK, SUPREME COURT
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SUPREME COURT OF FLORIDA ✓

THE FLORIDA BAR,
Complainant,

v.

JOSEPH H. WEIL,
Respondent.

_____ /

Case No. 75,547

FILED
SID J. WHITE

SEP 14 1990

CLERK, SUPREME COURT

By _____
Deputy Clerk

Respondent's Brief

Richard Kanner, Esq.
Attorney for Respondent
777 Brickell Avenue
Miami, Florida 33131
305 374-2280

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STATEMENT OF THE CASE

Mr. Weil was a salaried attorney employed by the City of Sweetwater (Bar Ex. 3).

Not a scintilla of evidence is before this court that Mr. Weil held himself out to the public as an attorney during the time in question or that he appeared in any state court for Sweetwater.

The only evidence before the referee that Mr. Weil violated any Cannon of Ethics by his failure to pay dues are his failure to respond to the Bar's Request for Admissions:

I. During 1988 and 1989, you were employed as a city attorney for the City of Sweetwater, Florida.

J. You engaged in the practice of law as city attorney during the period that you were suspended from the practice of law for nonpayment of dues.

K. Your actions of practicing law while you were suspended for nonpayment of dues constitutes a violation of Rule 1-3.6 of the Rules Regulating The Florida Bar and Rule 4-5.5, Rules of Professional Conduct.

Bar counsel advised the referee a 90 day suspension was appropriate (T.5&6); that the Bar was not seeking disbarment(T.9), but the Referee has recommended a five year disbarment.

IN HOUSE COUNSEL NOT REGULATED
BY FLORIDA BAR

The purpose for the prohibition for the unauthorized practice of law is to protect the public. The Florida Bar v. Moses, 380 So.2d 412,417 (Fla. 1980).

The single most important concern in the Court's defining and regulating the practice of law is the protection of the public from incompetent, unethical, or irresponsible representation.

Gay v. Whitehurst, 44 So.2d 430,433 (Fla. 1950) noted the term "practice of law" means:

(H)old himself out to the public for employment as an attorney or counselor at law . . .

Cooperman v. West Coast Title Co., 75 So.2d 818,820 (Fla. 1954) is a case of unauthorized practice of law, with facts analogous to those present here. The court noted :

(T)he corporation cannot be said to be engaging in the practice of law, for to practice law one must have a client and in such instances their clients are themselves.

This unity between the corporation and its employees in an unauthorized practice of law situation was similarly expressed in Harvey Furniture Co. v. Foust, 124 S.W. 2d 694,698 (Tenn 1939):

His act on behalf of the corporation is that of the corporation. The two are not one and another. So merged are their identities, when the agent is acting for the corporation (the only way it can act at all), that the one may not be an accessory of the other. . .

This concept of unity and excluding in-house counsel from regulation is consistent with the authoritative definition of the term "practice of law" stated in State v. Sperry, 140 So.2d 587,591 (Fla. 1962):

(T)he giving of such advice and the performance of such services by one for another as a course of conduct constitutes the practice of law.(e.s.)

The facts in *The Florida Bar v. Jackson*, 398 So.2d 817 (Fla. 1981) are not clear as to the duties of the non-admitted lawyer, charged with unauthorized practice for acts apparently as both city employee and as outside counsel. The stipulation of settlement suggests the Bar recognizes it does not regulate salaried house counsel who do not appear in court. Counsel has noted numerous unlicensed attorneys named in the Florida listings of the "Law and Business Directory of Corporate Counsel" but has found no other instance in Florida in which the Bar has attempted to regulate salaried in-house counsel.

Mr. Weil's failure to deny the Bar's request for admission that the violation of the Bar Rules apply to the stipulated facts does not make it so. *Moore v. State*, 41 So.2d 310, (Fla. 1949) is clear:(headnote supported by the text)

The Supreme Court is not bound by litigant's concession that statute is valid.

See also *Holland v. Gross*, 89 So.2d 255, (Fla. 1956) holding that a presumption of correctness does not apply here to legal conclusions of the trial court drawn from undisputed evidence.

The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970) holds that clear and convincing evidence is the Bar's burden of proof which the Bar concedes (T.4). Here there is no proof. Accordingly, the referee's finding that Mr. Weil was in violation of Rule 1-3.6 that a delinquent member shall not practice law, and Rule 4-5.5(a) that Mr. Weil practiced law while in violation of the regulations of the legal profession are not supported by the record and must be rejected here. *The Florida Bar v Moran*, 462 So.2d 1089 (Fla 1985).

DISBARMENT IS NOT APPROPRIATE

Bar counsel advised the referee that three months suspension was appropriate (T.5&6); that the Bar was not asking for disbarment (T.9).

The Florida Bar v. Hirsch, 342 So.2d 970,971 (Fla. 1977) approved the statement in Drinker's "Legal Ethics" as the standard for disbarment:

Unless it is clear that the lawyer will never be one who should be at the bar, suspension is preferable. For isolated acts, censure, private or public, is more appropriate. Only when a single offense is of so grave a nature as to be impossible to a respectable lawyer, such as deliberate embezzlement, bribery of a juror or court official, or the like, should suspension or disbarment be imposed. Even here the lawyer should be given the benefit of every doubt, particularly where he has a professional record and reputation free from offenses like that charged.

The penalties in other cases for practicing when suspended for failure to pay dues include:

1. The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985): Probation for six to twelve months and supervision by the Alcohol Abuse Committee.
2. The Florida Bar v. Levkoff, 511 So.2d 556 (Fla. 1987): 90 days suspension to commence at time lawyer is reinstated by payment of his delinquent dues.
3. The Florida Bar v. Fisher, 554 So.2d 1169 (Fla. 1989): Court approved stipulated 90 day suspension.

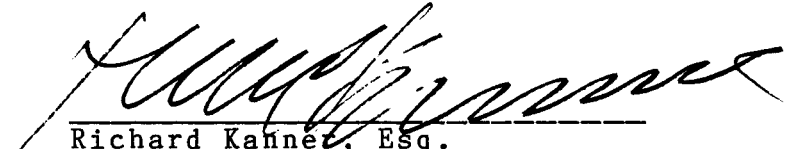
The reasons Mr. Weil did not appear at the Referee's hearing are explained in his motion to remand this matter back to the Referee to present evidence in mitigation of disbarment which is attached hereto.

CONCLUSION

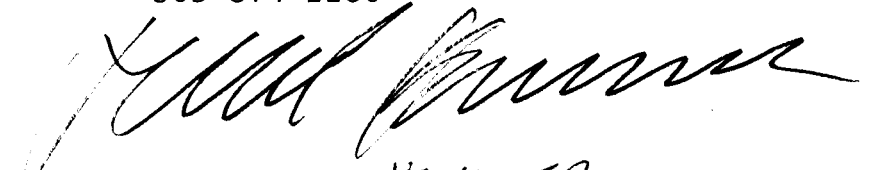
The complaint should be dismissed.

A copy of this brief was served on Patricia Etkin, Esq. and John Boggs, Esq. on September 5 1990.

Respectfully submitted,



Richard Kanner, Esq.
Attorney for Respondent
777 Brickell Avenue
Miami, Florida 33131
305 374-2280



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