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FILED

SID. J. WHITE

OCT 13 1994

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By

Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

Case No. 82,842
(TFB Nos. 93,10,727(6A)
93-10,882(6A)

PHILLIP R. WASSERMAN,

Respondent.

_____ /

CROSS REPLY BRIEF

OF

PHILLIP R. WASSERMAN

PHILLIP R. WASSERMAN, ESQUIRE
4625 EAST BAY DRIVE, STE. 210
CLEARWATER, FL 34624
(813) 535-2288
FL BAR 486388
SPN 488739

ARGUMENT

The position of the Bar throughout this appeal is that it has done nothing wrong and that all fault lies with the Respondent. While the Respondent acknowledges that his 1992 financial problems were his own, the Bar has ignored how its own malfeasance and non-feasance adversely impacted the Respondent. The Bar in so doing has apparently forgotten that it is not merely composed to regulate the conduct of its members but is also supposed to aid, assist, teach, and guide those members. The Bar has also forgotten that in regulating the conduct of its members, it has a duty to act in a reasonable manner.

The Bar admitted below that it had and has an unpublished internal operating rule and procedures concerning the establishment of plans for the payment of disciplinary proceeding costs and restitution. Part of the plan and procedures allows a member to enter into a repayment plan, and pay his or her annual dues thereby retaining membership, despite the fact that all of the costs of discipline and restitution are not **paid**, as required by Rule 1-7.3(a). The part of the payment plan option which is most important to those who may be benefited by it is that payment plan confirmation must occur on or before June 2. However, Rule 1-7.3(a) sets no such limitation. The uncontroverted testimony below was that the Respondent asked the Bar if he could work out a plan for the payment of his disciplinary costs, a sum of approximately \$3,000.00 before the dues delinquency deadline. He was told it was too late.

The maintenance by the Bar of unpublished internal operating rules and procedures violates basic tenants of due process of law. It is doubtful that this Court would tolerate similar conduct from any other regulatory agency. In the case at bar, the Complainants maintenance of unpublished rules and procedures curtailed the Respondent's ability to obtain an extension of time to pay the costs of prior discipline. The Bar simply denied the Respondent the right to seek such an extension. Therefore, contrary to the Bar's proclamations of innocence from any wrongdoing, the Bar did indeed help cause the problem for which it is prosecuting the Respondent.

The Bar's conduct while being violative of constitutional precepts is similarly violative of the spirit of the established relationship between the Bar and its members. The Bar is not simply an agency of regulation. Among other functions the Bar fulfills its purposes by assisting its members and pointing them in the right direction. In the present cause, the Bar was contacted by a member who had financial problems and a \$3,000.00 debt to the Bar, who asked for help in settling the debt. Did the Bar tell Respondent to make a request in writing, stating the reasons (good cause under Rule 1-7.3(a) for the needed additional time? Did the Bar at any previous time advise the Respondent that he could work out a plan to pay off the costs of the prior disciplinary proceedings? No, the Bar adopted its a "your problem, you deal with it" attitude.

The Bar exacerbated the situation by failing to follow

the mandate of Rule 1-7.3(a). The Bar should not have accepted the dues tender until the costs of the prior disciplinary proceeding were paid. It would have been very simple for the Bar to have advised the Respondent that since he had waited until the last day to tender payment for both obligations, he would be considered a delinquent member until the costs check cleared, and would thereafter have to seek reinstatement. After all, sending an uncertified check only constitutes a tender of payment and suspends the obligation as if it were discharged. The suspension of the obligation continues until the check is paid or dishonored. It is only when the check is paid that the obligation is discharged. If the check is dishonored the obligee can either enforce the debt or the instrument, Section 673.3101(2) Florida Statutes.

The Bar, having accepted the dues check and obtaining payment thereof could not thereafter revoke its acceptance. Rule 1-7.3 neither expressly nor by implication permits such a result, because payment of the costs of discipline is a condition precedent to the Bar's acceptance of a dues tender. Having been paid dues, the Bar had two options at law when the costs check bounced, pursue remedies on the check or pursue remedies for the delinquent costs. In either event the Rules required further discipline be sought for failure to pay costs of prior disciplinary proceedings. The Bar itself had no unilateral authority to administratively suspend the Respondent as it did. The Bar's assertions and the Referee's findings to the contrary are incorrect.

Assuming arguendo that the Bar could revoke its acceptance of the dues payment and administratively suspend the Respondent when the costs of discipline check bounded, the issue as to the proper date of suspension remains. The Bar asserts and the Referee found that suspension back dated from November 12, 1992 to October 1, 1992 was proper. This might be correct if it was the dues check which bounced as the dues would then not have been paid. However, it was the costs check which bounded after the dues check had been paid. The suspension should not have been effective October 1, but should have been effective on the date written notice thereof was furnished to the Respondent, November 12. The Respondent simply did not become a delinquent member until the Bar revoked its acceptance of the dues payment. The Bar, like its members, must properly deal with its mistakes.

Again, assuming the administrative suspension was proper, the effective date of the same was November 12. The Respondent cured the payment issues and was reinstated within sixty (60) days from the proper date of the suspension. Under Rule 1-3.7(f), no discipline is proper and the Referee's conclusion to the contrary is incorrect.

The Bar merely asserts without argument that Rule 1-7.3(a) is self executing and therefore by some leap of logic that October 1 suspension date is mandated. While this position would certainly be correct under other facts, it is not sustainable in this cause. Respondent's dues check was tendered, accepted and paid. Events subsequent thereto caused the Bar to revoke its

acceptance and refund the dues to Respondent. Nothing in the Rules provides that Rule 1-7.3(a) is self-executing when the Bar revokes its acceptance of payment of a dues check. There is simply no authority for applying a self-executing, back dating of suspension rule in this cause.

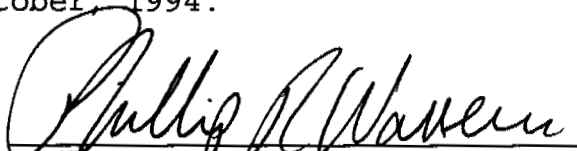
Finally, the Bar asserts that the Respondent should receive greater punishment than that recommended by the Referee. The Respondent asserts that he should not be subject to discipline because none may be imposed or in the alternative that the discipline recommended by the Referee be imposed. If this Court elects to find the Respondent guilty of misconduct, the Referee's recommendation should be adopted. The Bar, like the Respondent helped cause the events leading up to the suspension and the charges in this cause. The Bar's call for a sixty (60) day suspension ignores its complicity and fault. The Respondent should not be subject to greater discipline because of the Complainant's errors.



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above has been furnished by U. S. Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399-1925, and a copy to Stephen C. Whalen, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607 this 12th day of October, 1994.


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