FILED 6/13
SID J. WHITE
MAY 13 1994
CLERK, SUPREME COURT
By ________
Chief Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR
Complainant,
v.
PHILLIP R. WASSERMAN
Respondent

CASE NO. 82-842
TFB NOS. 93-10, 727(6A) and 93-10, 882(6A)

The Supreme Court appointed the undersigned as a referee on December 30, 1993.

The referee conducted a final hearing on April 15, 1994. Present was the Respondent PHILLIP R. WASSERMAN, who represented himself, and STEPHEN C. WHALEN, counsel for the Florida Bar.

Having considered the pleadings, evidence, arguments and case law submitted by the parties, and having reviewed the transcript of the hearing, I respectfully submit the following report to the Florida Supreme Court.

FACTS AND CONCLUSIONS AS TO COUNT ONE:

The Florida Bar has alleged that the Respondent violated DR 4-5.5(a) a lawyer shall not practice law in a jurisdiction where doing so violates the regulation of the legal profession in that jurisdiction.

The Bar has also alleged that the Respondent violated DR4-8.4 (a lawyer shall not a) violate or attempt to violate the Rules of Professional Conduct; b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects; c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; d) engage in conduct that is prejudicial to the administration of justice).

THE FACTS ARE AS FOLLOWS:

The Florida Supreme Court had ordered disciplinary costs of $2,721.57 in an unrelated case involving the Respondent. (TR. pg. 19)

On September 29, 1992, the Respondent tendered a check as payment in full to the Florida Bar in the above amount plus interest. That check "bounced". On that same date the Respondent also sent a check to the Bar for his annual dues. That check cleared.

The Florida Bar, upon learning that the check for disciplinary costs was no good, notified the Respondent on or about October 23, 1992 that his dues check was being returned.

On November 9, 1992 the Bar sent notice to the Respondent that he was suspended as of October 1, 1992 because his outstanding disciplinary costs had not been paid. (TFB Ex. #1)

The Respondent acknowledged receipt of that letter on or about November 12, 1992.

The Bar refunded the Respondent's Bar dues check but the Respondent did not cash that check. As of December 8, 1992 the Respondent had paid his disciplinary costs and reinstatement fees, and the Bar applied the money from the refund check which the Respondent had not cashed toward his dues.

On December 14, 1992 the Bar reinstated the Respondent.

From November 9, 1992 through December 14, 1992, the Respondent continued to represent clients although he had been notified by the Bar that he had been suspended. He did not inform either his clients, including Mr. Halsey, Ms. McCarty or Mr. Summers or the judges before whom he appeared of his suspension. (TR. pgs. 23-28) He did not do so, he testified, because he did not believe that the Bar had legally suspended him. (TR. p. 24)

CONCLUSIONS:

Like it or not, whether he believed the Bar's position to be tenable or not, Mr. Wasserman continued to practice law without making any formal challenge to the Bar's position and without notification to any court or client of his suspension. (TR. p.115) and pgs. 25-26)

I, therefore, find that the Respondent is guilty of violating DR4-5.5(a) and DR4.84(c) and (d). A lawyer who continues to practice after having been told that he has been suspended, who takes no formal steps to challenge a position which he believes to be without legal authority, who continues to hold himself out as a member of the Bar in good standing, has misrepresented himself, if only by silence. The very nature of that behavior prejudices the administration of justice.

FACTS AND CONCLUSIONS AS TO COUNT 2:

The Bar has alleged that the Respondent violated DR4-1.5(a) (an attorney shall not enter into an agreement for, charge or collect an illegal, prohibited, or clearly excessive fee).

The Bar has also alleged that the Respondent is in violation of DR4-1.16(a) (a lawyer shall not represent a client, or where representation has commenced, shall withdraw from the representation of a client if: 1) the representation will result in violation of the Rules of Professional Conduct or law; 2) a lawyer's physical or mental condition materially impairs a lawyer's ability to represent the client; or 3) a lawyer is discharged).

On November 29, 1992, having been notified of his suspension, the Respondent consulted with Michael Eversole regarding a child custody matter. On that date the Respondent accepted a $1,000 retainer and agreed to represent Mr. Eversole.

The Respondent is guilty of violating DR4-1.5(a) and DR4-1.16(a) because he collected a fee that was prohibited because of his suspension.

IN MITIGATION I CONSIDERED THE FOLLOWING:

Most importantly, the Respondent did not cause actual harm to any client, person or court, although there is always potential harm when a lawyer who is suspended continues to act as a member in good standing of the Bar.

The Respondent testified that he was having severe financial difficulties during the time he failed to meet his obligations to the Bar.

The Respondent did in fact meet his obligations to the Bar within sixty-eight (68) days of his suspension.

The Respondent spent many hours providing pro bono services to the community.

The Respondent seems to be remorseful, at least to the extent that he regrets that "it happened", although he maintains that the Bar put him in that position (pgs. 103 and 116).

Prior disciplinary problems, although involving money, are dissimilar in nature.

IN AGGRAVATION I CONSIDERED THE FOLLOWING:

The Respondent has received two prior public reprimands and an admonishment for minor misconduct, all of which I have reviewed.

According to the Respondent, he was caught between a rock and a hard place (the IRS and the Bar). I believe, however, that he should have and could have chosen other options, even including voluntarily suspending his practice until he could meet his financial obligations. He should not have expected the Bar to be sympathetic toward him because of his prior disciplinary history.

The Bar did not place the Respondent in the position in which he found himself; it was the Respondent's actions or inactions that caused him to have financial difficulties and those were not the Bar's responsibilities.

The Respondent has had substantial experience in the practice of law.

REFEREE'S RECOMMENDATION:

I respectfully recommend that:

1) the Respondent receive a public reprimand;

2) forfeit the $1,000 fee he received from Mr. Eversole, a fee to which he was not entitled because he had been told of his suspension when he took it. That money should go to the Florida Bar's Client Security Fund.

3) the Supreme Court place Mr. Wasserman on six months probation so that he can pay costs and his behavior can be monitored.

The Bar has urged the referee to recommend a sixty day suspension. I don't believe a suspension is appropriate because no actual harm came to anyone. But for the Respondent's prior disciplinary problems, I would have recommended an admonishment.

I do wish to say, however, that I would not have hesitated to recommend a suspension or even disbarment, depending on the extent of the harm done, if Mr. Wasserman had caused any actual harm to a client, another person, or the court system.

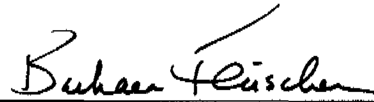
I believe that if the Supreme Court does not impose a suspension for his behavior, that the Court should put him on notice, that no matter how minor, the court will take very seriously any future violations.

If the Supreme Court accepts the referee's recommendation. I respectfully recommend that a public reprimand include the fact that the Respondent has had two prior public reprimands and an admonishment.

COSTS:

I recommend that all administrative costs incurred by the Florida Bar, including but not limited to court reporters' fees, witness fees and investigative fees be taxed against the Respondent. The Bar has submitted an affidavit requesting $3,271.04 in costs. The Respondent should pay that amount.

DONE in chambers in Tampa, Hillsborough County, Florida, on this 12 day of May, 1994



Barbara Fleischer
Referee

Conformed copies furnished by
referee's office to:

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