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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PHILLIP R. WASSERMAN,

Respondent.

_____/

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

9/26

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REPLY BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

In this Brief, the Appellee, Phillip R. Wasserman, will be referred to as "the Respondent". The Appellant, The Florida Bar will be referred to as "The Florida Bar" or "The Bar." "TR" will refer to the transcript of the Final Hearing held on April 15, 1994. "RR" will refer to the Report of Referee dated May 12, 1994. "TFB Ex" will refer to The Florida Bar's Exhibits. "Resp. Ex" will refer to the Respondent's exhibit. "AB" will refer to Respondent's Answer Brief.

SUMMARY OF ARGUMENT

The Referee properly found that Respondent violated the Rules Regulating The Florida Bar by continuing to practice law after having been told that he was suspended and by misrepresenting that he was a member of the Bar in good standing. Rule 1-7.3(d) and Rule 1-3.7(f), Rules Regulating The Florida Bar, are stated in the form of absolute dates. There is no provision for notice to members of the Bar except the notice provided by the rules themselves. Even so, Respondent was found in violation of the Rules Regulating The Florida Bar for practicing law between November 12, 1992, when he received notice of his suspension from the Bar and December 14, 1992, when Respondent was reinstated by the Bar.

In the hearing before the Referee, Respondent tried to lay the blame for his problems on a politician, the Internal Revenue Service, and the Bar. However, the Respondent's own actions or inactions caused his financial difficulties, and those were not the Bar's responsibilities.

ARGUMENT

I. THE REFEREE PROPERLY FOUND THAT RESPONDENT VIOLATED THE RULES REGULATING THE FLORIDA BAR BY CONTINUING TO PRACTICE LAW AFTER HAVING BEEN TOLD THAT HE WAS SUSPENDED AND BY MISREPRESENTING THAT HE WAS A MEMBER OF THE BAR IN GOOD STANDING.

Rule 1-7.3(d), Rules Regulating The Florida Bar, states that, "Upon failure to pay dues and any late charges by September 30, the member shall be a delinquent member." The Rules does not provide for further notice. Respondent cites Rule 1-3.7(f), Rules Regulating The Florida Bar, in his Answer Brief and argues that, "less than sixty (60) days had passed from the time Respondent was notified of his alleged 'delinquency' suspension until his payment of dues was 'accepted' by The Florida Bar." (AB p.2). Rule 1-3.7(f) states that, "Reinstatement from dues delinquency accomplished within sixty (60) days from the date of delinquency shall be deemed to relate back to the date before the delinquency." (Emphasis added). The key word in Rule 1-3.7(f) are "date of delinquency" not when Respondent received notice from the Bar. The key date for determining delinquency is September 30. Rule 1-7.3(d), Rules Regulating The Florida Bar. Respondent's argument is plainly irrelevant.

Respondent waited until September 29 to tender his check for disciplinary costs in an unrelated case, and the check "bounced". (RR. p. 1). At the same time, Respondent sent a check to the Bar for his annual dues, and that check cleared (RR. p. 1). Rule 1-7.3(a), Rules Regulating The Florida Bar, states, "Dues tendered to The Florida Bar shall not be accepted from any member who is

delinquent in the payment of costs or restitution imposed against the member in a disciplinary proceeding." Respondent was delinquent after September 30, 1992, because the check for disciplinary costs was no good; and the Bar was, therefore, prohibited from accepting Respondent's check for Bar dues.

The Florida Bar, upon learning that the check for disciplinary costs was no good, notified Respondent on or about October 23, 1992, that his dues check was being returned (RR p. 1; TR p. 54, L. 14-15, p. 71, L. 17-18; Resp. Ex. 6). On November 5, 1992, the Bar notified Respondent that it could not accept his dues because of unpaid costs and interest (TR p. 55, L. 1-24, p. 71, L. 19-25; Resp. Ex. 7). On November 9, 1992, the Bar sent notice to Respondent that he was suspended as of October 1, 1992, because his outstanding disciplinary costs had not been paid (RR p. 1; TFB Ex. 1; TR p. 20, L. 14-25, p. 21, L. 21-25, p. 55, L. 1-24). Respondent acknowledged that he received the letter dated November 9, 1992, on or about November 12, 1992, (RR p. 1, TR p. 20, L. 14-25).

The Bar refunded the Respondent's Bar dues check, but Respondent did not cash that check (RR p. 2; TR p. 22, L. 11-14, p. 105, L. 18-24). As of December 8, 1992, Respondent had paid his disciplinary costs and reinstatement fees (RR p. 2, TR p. 23, L. 6-7). The Bar applied the money from the refund check which Respondent had not cashed toward Respondent's dues (RR p. 2, TR p. 22, L. 15-17). Respondent sent a replacement check for his costs on December 8, 1992, and a fifty dollar check for reinstatement on

December 11, 1992 (TR p. 98, L. 13-16). On December 14, 1992, the Bar reinstated Respondent (RR p. 2; TR p. 21, L. 11-16).

The Referee found that Respondent met his obligations to the Bar within sixty-eight (68) days of his suspension (RR p.2). The Referee's finding is supported by the fact that Respondent sent a replacement check for his costs on December 8, 1992. Respondent argues persistently that the sixty (60) days should be counted from November 9, 1992, the date upon which Respondent acknowledges he received the notice from the Bar that he was suspended as of October 1, 1992, because his outstanding disciplinary costs had not been paid. (AB p. 2). Rule 1-7.3(d), Rules Regulating The Florida Bar, does not provide for notice subsequent to September 30 before a member becomes delinquent. The Rule is worded to give a definite date for dues delinquency. Rule 1-3.7(f) is also definite. Reinstatement from dues delinquency must be accomplished within sixty (60) days of the "date of delinquency" for a member to avoid disciplinary sanction for practicing law in Florida during the delinquency period. Neither rule contemplates any notice from the Bar.

From November 9, 1992, through December 14, 1992, Respondent continued to represent clients, although he had been notified by the Bar that he had been suspended (RR p. 2; TR p. 23, L. 3-11). Respondent did not inform his clients, including Mr. Halsey, Ms. McCarty, or Mr. Summers of his suspension (RR p. 2; TR p. 23, L. 14-20, p. 24, L. 17-23, p. 23, L. 12-19, p. 24, L. 5-6, p. 26, L. 1-3). Respondent did not inform the judges before whom he appeared

of his suspension (RR p.2; TR p. 25, L. 4-24, p. 27, L. 1-18).

On November 29, 1992, after having been notified of his suspension, Respondent consulted with Michael Eversole regarding a child custody matter (RR p. 2; TR p. 27, L. 19-25, p. 28, L. 1-6). On November 29, 1992, Respondent accepted a $1,000.00 retainer and agreed to represent Mr. Eversole (RR p. 2; TR p. 28, L. 7-14).

The Referee found that Respondent had violated Rule 4-1.5(a) and Rule 4-1.16(a) because he collected a fee that was prohibited because of his suspension (RR p. 3). The Referee's findings of fact are supported by the evidence and should be upheld.

II. THE REFEREE PROPERLY FOUND THAT RESPONDENT VIOLATED THE RULES REGULATING THE FLORIDA BAR DUE TO RESPONDENT'S ACTIONS OR INACTIONS WHICH WERE NOT THE BAR'S RESPONSIBILITIES.

The Referee found that Respondent continued to practice law without making any formal challenge to the Bar's position and without notification to any court or client of Respondent's suspension (RR p.3).

Respondent argues that his suspension was the direct result of improper actions of The Florida Bar (AB p. 3). Respondent states that he tried to enter into a payment plan with the Bar for payment of his outstanding costs. (AB p. 3). Respondent testified before the Referee that he had conversations with Ms. Dixon at The Florida Bar in late September about his needing an extended payment plan, and that he was told, "It's too late." (TR p. 92, L. 9-13). Respondent stated that he learned at the hearing before the Referee for the first time that the Bar has a cutoff date of June 2nd on the hold dues list. (TR p. 92, L. 14-20).

The Referee found that "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." (RR p. 2). Respondent apparently suffers from the "Don't blame me" syndrome. Respondent testified that he had tax problems for a couple of years. Respondent said he was involved in a very high-profile suit with a politician; and, coincidentally, when that ended, his tax problems accelerated (TR p. 88, L. 3-10). Respondent represented to the Referee that the Internal Revenue Service undertook "a form of harassment with me, which I would deem harassment, which I would say made the Bar's actions look almost kind in response." (TR p. 88, L. 11-14). Respondent also testified that the Bar put him in the position where he was practicing law while suspended and was attempting to punish him for being in that position (TR p. 116, L. 16-24).

Respondent testified that the reason the check to the Bar "bounced" was because a check that had been mailed to a mortgage company cleared the bank ahead of the check to the Bar (TR p. 93, L. 9-12). Respondent also testified that he had a problem with other checks bouncing during that time frame, and that is reflected on his bank statement (TR p. 102, L. 11-13, Resp. Ex. 12).

Respondent said that the reason he waited from early October until December 8 to send the Bar replacement funds for the bad check was that he was "undergoing tremendous financial problems at the time, unrelated, by the way, to the practice of law." (TR p.

95, L. 23, p. 96, L. 4).

Respondent argues that he believed that he was entitled to a payment plan and did not know that his attempts to get one were not tolling the suspension notice (AB p. 4). Respondent's testimony was that he did not know that he was suspended until he got the Bar's letter on November 12th, but even then he did not believe that the Bar had the authority to return his dues to him. (TR p. 96, L. 17-21). Respondent testified that he did not tell clients that he was suspended because he did not believe he was suspended even after receiving notice from the Bar on November 12th (TR p. 23, L. 8 - p. 24, L. 23). Respondent said he did not inform Judge Rushing before whom he appeared on December 11, 1992, that he was suspended because he had mailed his check to the Bar on December 8th, and he believed he would be reinstated automatically upon receipt of the check. (TR p. 25, L. 4-24). When asked about an appearance before Judge Rushing on November 16, 1992, Respondent said he could not recall if he was in court or not on that day. Respondent further stated that if he had been before a judge at any time during the month of November and the first week of December, he would not have told the judges that he was suspended because, "I didn't feel I was legally suspended." (TR p. 26, L. 4 - p. 27, L. 17).

Respondent tries to blame the Bar for somehow inflicting this "agonizing ordeal" on him (AB p.4). Yet, Respondent did not ask this court to review the matter of his suspension. Respondent called as an expert witness Mr. Scott Tozian, who has a substantial

practice relating to Bar grievance matters (TR p. 119, L. 9 - p. 124, L. 4). The Referee did not certify Mr. Tozian as an expert, however, Mr. Tozian stated that if he had received the Bar's letter dated November 9, 1992, notifying him that he was suspended, his immediate reaction would have been to file a petition for a Writ of Mandamus with the Supreme Court of Florida so the Court would know he was taking issue with the Bar's action. (TR p. 159, L. 22 - p. 160, L. 16). Mr. Tozian said it had been his experience that the Bar would not then prosecute for the failure to acknowledge their suspension. (TR p. 160, L. 17-19). Respondent has had substantial experience in the practice of law (RR p. 2). Respondent has only himself to blame for his financial problems and for his problems with the Bar.

III. THE REFEREE'S RECOMMENDED DISCIPLINE IS NOT IN ACCORD WITH THE STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The Florida Bar adopts the statements on this issue contained in the Bar's Initial Brief. In addition, the Bar states that the Respondent has misstated that the Referee found "numerous other mitigating factors." (AB p. 9).

The Referee found that Respondent had severe financial difficulties during the time he failed to meet his obligations to the Bar (RR p. 3). The Referee did not mention any personal or emotional problems. The Referee found that Respondent did not cause any actual harm to any client, person or court, but acknowledged that there is always potential harm when a lawyer who is suspended continues to act as a member in good standing of the Bar. (RR p. 3). The Referee also found that Respondent spent many

hours providing pro bono services to the community. (RR p. 2).

The Referee did not find in mitigation Respondent's factor number two, "full and free disclosure to disciplinary board and a cooperative attitude toward the proceedings, in that Respondent admitted all complained of conduct." (AB p. 9). The Referee found that "Respondent seems remorseful, at least to the extent that he regrets that 'it happened', although he maintains that the Bar put him in that position." (RR p. 2, TR p. 103, L. 9-15, p. 116, L. 16-24). However, the above finding was not considered as either a mitigating or aggravating factor by the Referee.

The Referee did not find Respondent's mitigating factor number three, "remorse." (AB p. 9). As stated above, Respondent claimed the disciplinary process was extremely unfair as the Bar was attempting to punish him after the Bar put him in the position of practicing law while suspended. (TR p. 116, L. 16-24).

The Referee did not find Respondent's factor number four, "prompt attempt to rectify the situation giving rise to the discipline." (AB p. 9). Respondent delayed from early October until December 8, 1992, to send replacement funds for his bad check (TR p. 95, L. 23 - p. 96, L. 4). All the while, Respondent continued to practice law as if he were a member in good standing with The Florida Bar. Respondent did not file anything with this Court when he received notice of his suspension from the Bar on November 12, 1992. In summary, Respondent made no attempt to rectify the situation until December 1992.

Respondent cites The Florida Bar v. Batman, 511 So. 2d 558 (Fla. 1987) for the proposition that its facts are similar to the facts in this case; therefore, the discipline should be similar. (AB p. 10). In Batman, the Respondent was disciplined for testifying falsely during a disciplinary proceeding concerning his practice of law in representing clients while under suspension for nonpayment of Bar dues. Batman, 511 So. 2d at 558. Neither party sought review of the Referee's Report. The case does not state any mitigating or aggravating factors.

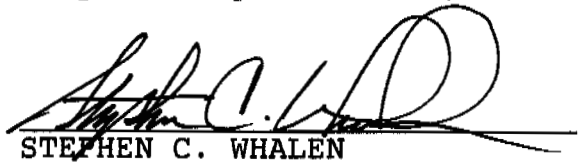
In the present case, the Referee found as aggravating factors the fact that Respondent has two prior public reprimands and an admonishment for minor misconduct. The Referee also found as aggravating factors Respondent's refusal to accept responsibility for being in the position in which he found himself and Respondent's substantial experience in the practice of law. (RR p. 2).

CONCLUSION

The Respondent continued to practice law from November 12, 1992, when he received notice from the Bar that he was suspended from the practice law until December 14, 1992, when Respondent was reinstated by the Bar. During that time, Respondent held himself out as a member in good standing of The Florida Bar to the general public and to the judges before whom he appeared. Respondent should be appropriately disciplined.

Wherefore, it is respectfully requested that Respondent be suspended from practice in the State of Florida for sixty (60) days, be placed on probation for six (6) months, and that Respondent be ordered to forfeit the $1,000.00 fee to The Florida Bar's Client's Security Fund and pay the costs incurred by The Florida Bar in this proceeding.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Reply Brief has been forwarded by U.S. Regular Mail to Sid J. White, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1925; a true and correct copy has been forwarded to Phillip R. Wasserman, Respondent, at 4625 East Bay Drive, Suite 210, Clearwater, Florida 34624 by regular U.S. Mail and Certified Mail Return Receipt Requested No. Z 789 388 130 and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by regular U.S. Mail, this 15th day of September, 1994.

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