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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

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

v.

PHILLIP R. WASSERMAN,

Respondent.
_____/

REPLY BRIEF

OF

PHILLIP R. WASSERMAN

PHILLIP R. WASSERMAN
4625 East Bay Drive, Suite 210
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(813) 535-2288
Florida Bar 486388

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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." "TFB Ex" will refer to The Florida Bar's Exhibits. "Resp. Ex." will refer to the Respondent's Exhibits. The Respondent did not receive a copy of the transcript of the Final Hearing and accordingly, no references to the transcript were capable of being made.

STATEMENT OF FACTS AND OF THE CASE

The Respondent would state that the Statement of Facts and of the Case provided by The Florida Bar is an accurate rendition, however, the Respondent would add that during the hearing a witness for The Florida Bar testified that the "cut-off" date for proposed payment plans of outstanding disciplinary costs was in June. This witness further testified that only staff members of the Bar were aware of such "cut-off" date and that such information was not published to any members of the Bar and, in particular, was not stated to the Respondent.

Resp. Ex. 1 indicates that in September, 1992, the Bar called the Respondent concerning payment plans. At no time was the Respondent notified that a payment plan was not available because it was beyond the "cut-off" date.

SUMMARY OF ARGUMENT

On September 29, 1992, Respondent paid his annual bar dues. On November 9, 1992, The Florida Bar returned the Respondent's annual bar dues and informed him of a suspension retroactively effective October 1, 1992. Until that date the Respondent was unaware of an alleged "delinquency" suspension. On December 8, 1992, Respondent submitted his petition for reinstatement and bar dues and was reinstated on December 14, 1992.

Rule 1-3.7(f) of the Rules Regulating The Florida Bar provides that any member reinstated within a sixty (60) day period from a delinquency suspension shall not be subject to disciplinary sanction for practicing law in Florida during that time.

Beginning in September, 1992, Respondent attempted to work out a payment arrangement with The Florida Bar concerning his outstanding costs. For unknown and unpublished reasons The Florida Bar refused to enter into a payment schedule. The intentional actions of The Florida Bar in contributing, and causing, the Respondent's delinquency suspension should not subject the Respondent to disciplinary actions.

The Standards for Imposing Lawyer Sanctions clearly indicate that the referee's recommendation is supported by the facts. Based upon the facts herein, the charges against the Respondent must be immediately dismissed and he be entitled to recover his costs and attorney's fees. Alternatively, the recommendation of the referee should be upheld.

ARGUMENT

I.

THE REFEREE ERRED IN FINDING THE RESPONDENT GUILTY OF VIOLATING ANY PROVISIONS OF THE RULES OF PROFESSIONAL CONDUCT IN THAT THE RESPONDENT HAD BEEN REINSTATED WITHIN SIXTY (60) DAYS OF THE DATE OF HIS "DELINQUENCY" SUSPENSION.

Rule 1-3.7(f) of the Rules Regulating The Florida Bar provides:

> (f) **Members Delinquent 60 Days or Less**. 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. Any member reinstated within the 60-day period shall not be subject to disciplinary sanction for practicing law in Florida during that time. (emphasis added.)

The record clearly reflects that less than sixty (60) days had passed from the time the Respondent was notified of his alleged "delinquency" suspension until his payment of dues was "accepted" by The Florida Bar.

Both the Respondent and his witness, Scott Tozian, Esquire, former staff counsel for The Florida Bar, testified that this Rule governed these proceedings; the referee chose to decide this matter differently. While the Respondent would like to direct the Court's attention to case law supporting this position, a thorough search has failed to disclose any case. This appears to be a matter of first impression.

Clearly a person cannot be suspended until such time as he has been put on notice of the suspension. The record clearly establishes the Respondent's first notice was November 12, 1992. (TFB Exhibit 1). On December 8, 1992, the Respondent filed his petition for reinstatement and submitted his dues again. An attorney who is suspended from The Florida Bar for failure to pay dues is automatically entitled to reinstatement upon the filing of his petition and the payment of the dues. **The Florida Bar (In re: Steinbach)**, 427 So2d 733 (Fla. 1983); **Thomson v. The Florida Bar**, 260 So.2d 492 (Fla. 1972).

In that only twenty-six (26) days passed from the notification of his suspension to his filing of the petition for reinstatement, the Respondent clearly falls under the ambit of Rule 1-3.7(f) and therefore is not subject to discipline. In that all findings of disciplinary violations are directly related to the Respondent's practicing law while "suspended," all findings must be reversed in accordance with Rule 1-3.7(f).

II.

THE REFEREE ERRED IN FINDING THE RESPONDENT GUILTY OF VIOLATING THE RULES OF PROFESSIONAL CONDUCT IN THAT ANY SUSPENSION WAS THE DIRECT RESULT OF IMPROPER ACTIONS OF THE FLORIDA BAR ITSELF.

As early as September, 1992, the Respondent began seeking a way of entering into a payment plan with The Florida Bar for payment of his outstanding costs. (Resp. Ex. 1). The Florida Bar

refused to do so. During the course of the trial, a witness for The Florida Bar explained the reasoning behind the Bar's decision: the "cut-off" date for entering into a payment plan was June. Upon further inquiry, the witness stated that no one who had outstanding costs was aware of this fact. The only persons with knowledge of such "cut-off" date were staff members of The Florida Bar, and they never published this internal rule.

The Respondent testified that no such "cut-off" date was provided him, and further, that reason was never given when the Respondent asked why he was denied a payment plan.

Believing he was entitled to a payment plan as evidenced in Resp. Ex. 4, the Respondent continued attempts to negotiate a payment plan during the pendency of the dues dispute. Only after being rejected by all persons with authority to allow a payment plan, and then being notified of the beginning of an investigation into his continuing practice of law did the Respondent learn that the negotiations were not tolling the suspension notice. At that time, Respondent pursued avenues to accumulate all monies for payment at one time, at great personal hardship, to satisfy the Bar.

The Bar's infliction of this "agonizing ordeal" of having to live under a cloud of uncertainty for a period is directly antithetical to the spirit and intent of the Rules Governing The Florida Bar. **The Florida Bar v. Rubin**, 362 So.2d 12 (Fla. 1978); citing **The Florida Bar v Randolph**, 238 So.2d 635, 638 (Fla. 1970).

The Rubin case illustrates that The Florida Bar has an obligation to negotiate and deal with attorneys in good faith in accordance with The Rules. Ellis Rubin was subjected to multiple disciplinary actions and personal repercussions as a result of The Bar holding referee's reports and disclosing certain findings in violation of its Rules. In reversing the discipline imposed on Rubin, the Supreme Court stated:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so. Rubin at 16.

The record clearly shows that The Florida Bar's failure to follow its own rules caused the Respondent's predicament. The interest of justice and equity demand that this Court correct that wrongdoing. "After all, The Florida Bar acts for and is an agency of this Court. When the child falters, the parent shall correct." **The Florida Bar v. Mc Cain**, 361 So.2d 700 at 705 (Fla. 1978).

III.

THE REFEREE'S RECOMMENDED DISCIPLINE IS IN ACCORD WITH THE STANDARDS FOR IMPOSING LAWYER SANCTIONS AND SHOULD BE AFFIRMED BY THIS COURT.

There are three purposes in imposing discipline to an accused attorney:

1. The judgment must be fair to society, both in terms

of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty;

2. The judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation; and

3. The judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. **The Florida Bar v. Pahules**, 233 So.2d 130, (Fla. 1970).

In applying the above rationale to the recommended discipline of the referee, all three goals are adequately met.

The referee's findings of fact and recommendations in attorney discipline proceedings come to the Supreme Court with the presumption of correctness, and should be upheld unless clearly erroneous or without support in the record. **The Florida Bar v. Vannier**, 498 So.2d 896 (Fla. 1986). The report of the referee clearly set forth the aggravating factors and mitigating factors established during the hearing and applied them to the circumstances of this particular case in fashioning an appropriate penalty. There is no basis for disturbing this recommended discipline.

The Florida Standards for Imposing Lawyer Sanctions requires an examination of four questions before deciding punishment:

1) duties violated;

2) the lawyer's mental state;

3) the potential or actual injury caused by the lawyers misconduct;

4) the existence of aggravating or mitigating circumstances.

While not conceding that the Respondent is guilty of any violations pursuant to Rule 1-3.7(f), should this Court decide to discipline the Respondent, an analysis of the above four questions will support the referee's recommendation.

(1) Duties violated. The Respondent will concede that an intentional and knowing perpetration of fraud on the Court is an extremely serious departure from the Rules of Professional Conduct. It is apparent from the referee's findings that a lawyer "who continues to practice after having been told that he has been suspended...., 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." (Referee's Report, pg. 2)

2) The lawyer's mental state: The record clearly evidences that the Respondent was acting under the belief that the Bar's conduct was improper and that ultimately the Bar would correct its untenable position. It was this obvious belief that led the Respondent to continue his attempts at negotiating a payment plan. Immediately upon learning of the investigation of alleged improprieties on the part of the Respondent, i.e.

practicing law while suspended, the Respondent took action to secure necessary funds to pay the imposed disciplinary costs.

3) The potential or actual injury caused: The referee was very clear: "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." (Referee's Report, pg. 3).

In **Dolan v. State**, 469 So.2d 142 (Fla. 3rd DCA 1985), a criminal defendant attempted to have his attorney declared ineffective because the attorney was suspended for non-payment of dues during the defendant's representation. In declining to so find, the District Court stated:

> "Where, as here, the suspension is unrelated to any disciplinary proceeding and the act of reinstatement is purely ministerial, the suspended status of the attorney simply has no bearing on his ability to effectively represent a criminal defendant."

Further support for the referee's recommendation is evidenced by the fact that no client or judge complained of the Respondent's conduct; the Bar instituted this action and continued with its prosecution.

The Respondent would suggest to this Court that had a client or judge complained of his conduct, the Bar would have certainly brought such fact to the referee's attention.

4) The existence of aggravating or mitigating circumstances: The Florida Bar seeks a suspension for one reason: the Respondent's prior disciplinary history. This suggestion begs

the necessary evaluation of the need to create a "comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct" (Standard 1.3).

The Florida Bar, while citing the Standards, fails to acknowledge that, based on the Respondent's good faith belief that the Bar's conduct caused the problems resulting in discipline, that an admonishment is appropriate when a lawyer is negligent in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public, or the legal system. Standard 7.4.

The referee examined the prior disciplinary proceedings against the Respondent and concluded they were dissimilar in nature. This is a valid consideration.

Numerous other mitigating factors were found, including, (1) personal or emotional problems of the Respondent; to wit: serious financial problems; (2) full and free disclosure to disciplinary board and a cooperative attitude toward proceedings, in that the Respondent admitted all complained of conduct; (3) remorse; (4) prompt attempt to rectify the situation giving rise to the discipline; (5) the numerous hours of pro bono service provided by the Respondent.

The last factor in mitigation must be addressed. Imposing a sanction on the Respondent more severe than a reprimand will defeat the purpose of the Rules altogether. Due to the volume

of pro bono cases handled by the Respondent, his suspension in this case, will undoubtedly work a substantial hardship on those pro bono clients. While a fellow attorney may be willing to assume the Respondent's fee generating cases, that willingness may be diminished by the lack of such fees. The clients would suffer. This is not the purpose of sanctions.

One final consideration is similar type cases and similar discipline (Standard 1.3). In **The Florida Bar v. Batman**, 511 So.2d 558, (Fla. 1987), the Respondent was accused of practicing law while being suspended for nonpayment of dues. Although a per curiam decision, this Court upheld a disciplinary sanction of public reprimand. The Respondent in this case deserves no greater sanction.

CONCLUSION

The Respondent was reinstated within sixty (60) days from the receipt of his notice of suspension. Rule 1.3-7(f) prohibits a lawyer from being disciplined for practicing law if the reinstatement occurs within sixty (60) days.

The Florida Bar's actions in inviting the Respondent to arrange a payment plan and then refusing to do so, while allowing the Respondent to continue in negotiations for a payment plan lulled the Respondent into the belief that the Bar would continue to act in good faith; a now obviously erroneous belief. To allow

discipline in such a circumstance is contrary to justice and equity.

Should discipline be warranted, the recommendation of the referee is appropriate under the Rules of Discipline and the Standards for Imposing Lawyer Sanctions.

WHEREFORE, it is respectfully requested that this Honorable Court determine that no disciplinary sanctions are warranted, and if they are, that the recommendation of the referee is appropriate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies by hand delivery 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, FL 33607 this 1st day of September, 1994.

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