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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

v

JAMES R. MCATEE,

Respondent/Appellee.

_____/

CASE NUMBER 83,174
TFB File No. 94-00481-01A

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Respondent in proceedings below, James R. McAtee, is the Appellee in these proceedings. He will be referred to as either Mr. McAtee or as the Respondent. The Appellant, The Florida Bar, will be referred to as the Bar throughout these proceedings.

References to the referee's report, the transcript of final hearing, and the exhibits will be by the same nomenclature used by The Florida Bar in its initial brief. As is also true in the Bar's brief, SSA will refer to the Social Security Administration and ALJ will refer to Administrative Law Judges in SSA proceedings.

STATEMENT OF THE CASE AND OF THE FACTS

Respondent accepts the statement of the case and of the facts as set forth by The Florida Bar in pages two through nine of its brief.

SUMMARY OF ARGUMENT

Mr. McAtee argues that the referee's recommendation that he be suspended for two years nunc pro tunc June 19, 1993, is the appropriate discipline to impose for his conduct. Disbarment, as argued by the Bar, is far too harsh considering the circumstances of this case. The referee found, and the evidence was unrebutted, that Mr. McAtee appeared in no Florida courts during his suspension. No clients were prejudiced by his actions. He accepted no fees for his actions. Most significant, however, was the referee's finding that Mr. McAtee labored under the impression

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that a suspended lawyer could practice before the SSA. That belief was predicated upon Mr. McAtee's service as chairman of the Bar's unlicensed practice of law committee for his circuit. During his term as chair, the UPL committee investigated the representation of clients by non-Florida lawyers before the SSA and determined that it was proper.

In determining the discipline to be imposed, the referee considered the relevant case law. All of the cases cited by the Bar involved facts far more egregious than those appearing in the instant case or they involved instances where lawyers refused to appear before the Supreme Court during the contempt proceedings. The cases cited by Mr. McAtee all point towards the appropriateness of the referee's recommendation.

In determining the discipline to be imposed in the instant case, the referee considered Mr. McAtee's testimony in his reinstatement proceedings. In fact, the referee in the instant proceedings was the same referee before whom Mr. McAtee testified before. The referee's findings and conclusions regarding the significance of the past testimony, the reasons for it, and Mr. McAtee's testimony in the contempt proceedings, all factored into his decision. Because the referee was the person before whom the improper testimony was given, his decision regarding the sanction should be given great weight.

The referee had competent, substantial evidence before him supporting his finding that Mr. McAtee did not appear before any Florida judges during his suspension and that his practice before

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the SSA was predicated upon a mistaken belief that he could appear before that agency.

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ARGUMENT

ISSUE I

THE REFEREE DID NOT FAIL TO CONSIDER RESPONDENT'S TESTIMONY DURING THE REINSTATEMENT PROCEEDINGS REGARDING HIS PRACTICE WHILE SUSPENDED.

The referee presiding over the instant contempt proceedings was the same referee who heard Mr. McAtee's testimony in his unsuccessful bid for reinstatement. The referee clearly considered that testimony when he recommended a discipline. If anyone was to be offended by Mr. McAtee's testimony in the reinstatement case, it was the referee that presided over these contempt proceedings. That same referee recommended that Mr. McAtee be suspended for two years nunc pro tunc to June 19, 1993.

The referee was obviously aware of and considered Respondent's testimony in the reinstatement proceedings when he made his recommendation in the instant case. The Bar argued at final hearing that the prior testimony should be considered in determining a discipline for the contempt. In paragraph 22 of his report, the referee refers to Mr. McAtee's prior testimony. In that paragraph, the referee first rejected the Bar's invitation that Mr. McAtee be held in contempt for his testimony in the reinstatement proceedings. (On page 11 of its initial brief in the instant appeal, the Bar notes that it is not asking this Court to hold Mr. McAtee in contempt for his testimony during the reinstatement case.)

In paragraph 22, the referee noted

> That Respondent's candor before the court was a factor in the denial of the petition for

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> reinstatement and thereby extending his suspension to at least two and one-half years duration rather than the original 91 days.

That the referee was more than aware of Mr. McAtee's testimony in the reinstatement proceedings was made apparent when he stated that

> I would further note that the bulk of the Bar's perceived perjury [in the reinstatement case] comes from Respondent's belief that practicing before the SSA was not the practice of law. ROR, par. 12.

The referee had the opportunity to personally observe Mr. McAtee's testimony at both the reinstatement proceedings and in the contempt proceedings. In the latter, an explanation was given for Mr. McAtee's refusal to acknowledge practicing law while testifying in the reinstatement case. In essence, Mr. McAtee believed that his conduct did not constitute the practice of law because it was in SSA administrative proceedings. That the referee did not specifically declare the testimony in the reinstatement proceedings to be an "aggravating" factor does not mean that it was not considered during the proceedings. His specific reference to Mr. McAtee's prior testimony makes it apparent that he considered it when he recommended a two year suspension.

The Florida Standards for Imposing Lawyer Sanctions, effective January 1, 1987, give a referee wide latitude in determining the discipline to be imposed. Standard 9.1, in discussing aggravation and mitigation in general, states:

> After misconduct has been established, aggravating and mitigating circumstances <u>may be considered</u> in deciding what sanction to impose. (Emphasis supplied).

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It is apparent that the referee considered Mr. McAtee's testimony in the reinstatement proceedings when he determined the sanction in these contempt proceedings. He has wide latitude in recommending the discipline and that recommendation will be upheld absent a showing that it is erroneous, unlawful or unjustified.

ISSUE II

THE REFEREE PROPERLY CONSIDERED AS MITIGATION THAT (1) RESPONDENT'S PRACTICE OF LAW WHILE SUSPENDED WAS NOT BEFORE ANY FLORIDA STATE COURTS AND (2) RESPONDENT'S PRACTICE BEFORE THE SOCIAL SECURITY ADMINISTRATION WAS UNDER A MISTAKEN BELIEF THAT HE COULD APPEAR AS A LAY REPRESENTATIVE.

In paragraph 18 of his report, the referee found that

> Mr. McAtee appeared in no Florida courts during the period of his suspension. TR 20.

The Bar presented no evidence to rebut Mr. McAtee's testimony to that effect and, accordingly, that factual finding by the referee must be upheld. The Florida Bar v McKenzie, 442 So.2d 934 (Fla. 1983).

While the referee's finding that Mr. McAtee appeared in no Florida courts, standing alone, would be a major factor to consider in determining if Respondent acted in contempt of the Florida Supreme Court for practicing while suspended, the main thrust of this finding is how it is applied to Mr. McAtee's belief that practice before the SSA was appropriate. Immediately after the above quoted language in paragraph 18 of his report, the referee went on to find that

> During the time that [Mr. McAtee] had been chairman of the local unlicensed practice of law (UPL) committee in the First Judicial

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> Circuit, the issue of non-lawyer representation before the SSA arose. It was determined that, in fact, it was entirely proper for non-lawyers to appear before that agency. TR 17-19. Accordingly, Respondent assumed that appearing before the SSA during his suspension, since a license to practice law was not required, was not contempt of court.

The referee made the above quoted factual finding after listening to testimony from Mr. McAtee. He was in a position to observe the candor of the witness and he determined that Mr. McAtee's actions were governed by his knowledge gleaned during his chair of a UPL committee. That factual finding is supported by competent evidence and, accordingly, must be upheld. The Florida Bar v McKenzie, 442 So.2d 934 (Fla. 1983).

Mr. McAtee properly stayed out of Florida courtrooms. Had he known it was improper, he would also have stayed out of SSA hearing rooms.

It is clear that Mr. McAtee was laboring under the impression that practice before the SSA was akin to practice before the Bar of another state. Mr. McAtee would not have been in contempt of the Florida Supreme Court if he practiced in the courts of Alabama during his suspension. While the analogy is not precise, in Mr. McAtee's mind practicing before the federal SSA bar was not contempt of the Florida Supreme Court.

It is significant to note that, as found by the referee, Mr. McAtee received no fees for any work done during his suspension. ROR 19.

It is apparent that much of Mr. McAtee's contemptuous conduct was predicated upon his belief that a 91 day suspension was one that would only last three months or so. Had he been experienced in disciplinary proceedings, he never would have made that assumption. But, as a novice in the grievance process, he mistakenly believed that he would be reinstated within a short time after his suspension ended. When viewed in that light, his failure to withdraw from his state court cases (although he made provisions to care for the clients' matters during the suspension) becomes more understandable. T 28, 29.

The Bar also tends to ignore the fact that Mr. McAtee notified his clients (or at least 44 of the 45 clients he had) of the suspension by sending them a copy of the Court's order imposing that sanction.

The Bar seems to argue to this Court that the referee found Mr. McAtee not guilty of contempt for his SSA practice. This is not true. The referee, however, observed that Mr. McAtee was under the belief that SSA practice was preempted by federal law, see Sperry v Florida, 373 U.S. 379, 83 S.Ct. 1322, 10 L.Ed. 2nd 428 (1963). Mr. McAtee believed that his SSA practice did not constitute contempt of the Supreme Court of Florida because it was not within the Florida judicial system. The referee properly considered that belief in his determination of the sanction to be imposed.

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The referee's factual finding regarding Mr. McAtee's belief is further buttressed by the Bar's own witness. The referee specifically found in paragraph 16 of his report as follows:

> While counsel for the SSA opined that a suspended lawyer could not practice before that agency, he was unable to cite any controlling authority for his opinion. TFB Comp. 5, p. 22.

The lack of controlling authority to buttress SSA's opinion is one more factor that could contribute to Mr. McAtee's mistaken belief that his practice before the SSA while suspended was appropriate.

In paragraph 17 of his report, the referee outlines Mr. McAtee's SSA practice. Of the sixteen cases in evidence, ten were pending at the onset of Mr. McAtee's order of suspension. He actually appeared before an ALJ on only two occasions. Although Mr. McAtee signed up six new cases after he was suspended, clearly improper, the referee found that Mr. McAtee "appeared before an ALJ in none of them" and received no fees in any of those cases. "Substitute counsel was obtained in most cases." Most importantly, the referee also found in paragraph 17 that:

> There is no evidence of any client's position being prejudiced as a result of Respondent's conduct.

Referees in disciplinary proceedings must be given wide latitude in what they consider in determining discipline. After listening to Mr. McAtee's testimony before him, the referee found that Mr. McAtee:

> Labored under the good faith, albeit mistaken, belief, that a suspended lawyer stood in the

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same shoes as a non-lawyer as to eligibility to practice before the SSA. ROR, Par. 23.

That is a proper factor for a referee to consider in determining the sanction to be imposed for contemptuous conduct.

ISSUE III

THE REFEREE'S RECOMMENDATION THAT MR. MCATEE BE SUSPENDED FOR TWO YEARS NUNC PRO TUNC JUNE 19, 1993, IS AN APPROPRIATE DISCIPLINE CONSIDERING ALL THE FACTORS PRESENT.

As the Appellant in these proceedings, The Florida Bar has the burden of proving to this Court that the referee's recommendation is "erroneous, unlawful or unjustified." Rule 3-7.7(c)(5). While the Bar properly points out that the scope of this Court's review of discipline is broader than its review of a referee's findings of fact, The Florida Bar v Anderson, 538 So.2d 852 (Fla. 1989), the referee's recommended discipline before this Court cloaked with "a presumption of correctness...." The Florida Bar v Niles, 644 So.2d 504, 506 (Fla. 1994).

In recommending disbarment, The Florida Bar ignores the bulk of this Court's decisions in disciplinary cases involving lawyers' contemptuous conduct. As elaborated on below, in paragraphs 25 through 35 of his report, the referee thoroughly considered this Court's past decisions on contempt matters and reached the conclusion that disbarment was not warranted. In so concluding, he was clearly influenced by this Court's pronouncements in The Florida Bar v Hirsch, 342 So.2d 970, 971 (Fla. 1977). There this Court stated:

[I] cannot say that the record here

> establishes that this Respondent is one that has been demonstrated to fall within the class of lawyers "unworthy to practice law in this state".... Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved, as the rules provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the society of which they are a part.

Mr. McAtee does not appear before this Court arguing that he should not be disciplined. However, disbarment, the "extreme and ultimate penalty" is not the appropriate sanction to be visited for the misconduct found by the referee.

By demanding disbarment, The Florida Bar is ignoring the three purposes of discipline, as set forth by this Court in The Florida Bar v Pahules, 233 So.2d 130, 132 (Fla. 1970). The Bar skips over the first element of Pahules, protection of the public (the referee specifically found that Mr. McAtee received no fees for his work and no clients' positions were prejudiced) and they completely ignore the second purpose, that the sanction

> Must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation.

Although the Bar alludes to 25 distinct acts which constitute the practice of law, the non-SSA matters are de minimis and one offset by Mr. McAtee's notifying his clients (or at least 44 of the 45 of them) of his suspension. The bulk of his "practice" was

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before the SSA. Mr. McAtee believed it was appropriate for him to appear before that administration during his suspension. He was also operating under the mistaken belief that a 91 day suspension was just that. These two factors explain his conduct.

The main fallacy in the Bar's argument is that it has ignored the extent of Mr. McAtee's "practice" while he was suspended. The Bar would have this Court consider a motion for continuance the equivalent to conducting a five day trial. In only two instances did Mr. McAtee actually appear before an administrative judge, and those were before the SSA. Virtually every instance the Bar complains about was an SSA matter and, as the referee properly found, Mr. McAtee was acting under the belief that he could appear before the SSA during his suspension.

The Bar completely ignores the fact that there is no evidence indicating Mr. McAtee appeared before any Florida court during his suspension.

The Bar's reference on page 19 of its initial brief to Standard 8.1 of the Florida Standards for Imposing Lawyer Sanctions proves up Mr. McAtee's argument that disbarment is inappropriate. As quoted by the Bar, Standard 8.1 states that disbarment is appropriate when a lawyer

> Intentionally violates the terms of a prior disciplinary order and such violation causes injury to a client, the public, the legal system, or the profession:

The referee, after observing Mr. McAtee's testimony, found that he acted under the mistaken belief that he could appear before the SSA while suspended. Accordingly, there is no "intentional"

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violation of this Court's order. Furthermore, Mr. McAtee's actions did not cause injury to any client or to the public. ROR, par. 17. Nobody paid fees and nobody was prejudiced by his actions. The Bar may argue a nebulous injury to the legal system or the profession, but if this Court finds such injury it is more than appropriately remedied by suspension.

Standard 8.3 states that public reprimand is appropriate when a lawyer "negligently" violates the terms of a prior disciplinary order. The referee could clearly have concluded that a public reprimand was appropriate in the case at Bar. He chose not to do so.

All of the cases cited by The Florida Bar as support for its argument that Mr. McAtee should be disbarred were considered by the referee with the exception of The Florida Bar v Brown, 635 So.2d 13 (Fla. 1994) and The Florida Bar v Greene, 589 So.2d 281 (Fla. 1991). The Brown decision presents no facts upon which this Court can compare the facts of that case to the instant proceedings. Most significantly, there is no finding in Brown of mitigation. In fact, he ignored the contempt proceedings and the Court was forced to accept all of the allegations made by the Bar as being true. In the case at Bar, there was significant testimony and mitigation found.

The Florida Bar insists on relying on The Florida Bar v Jones, 571 So.2d 426 (Fla. 1990) as support for their position that disbarment is appropriate. The referee specifically dealt with the Jones case in paragraphs 29 and 30 of his opinion. He emphatically

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rejected Jones as controlling precedent because the accused lawyer in that proceeding filed no response to the Bar's appeal of a referee's recommendation for a two year suspension. As the referee specifically noted:

> In essence, by ignoring appellate proceedings, Mr. Jones agreed with the Bar's position.

The underlying facts in Jones distinguishes it from the case at Bar in any event.

During his suspension, Mr. Jones appeared in at least three cases in Florida courts and there were no less than five instances of failure to notify clients of his suspension. More significantly, he falsely advised the Supreme Court in contempt proceedings that all clients had been advised of his suspension and, to add insult to injury, he lied to the Florida Supreme Court by stating that he had asked The Florida Bar for assistance in winding down his practice and that they had refused to help him. In fact, Mr. Jones ignored the Bar's advice. He was on notice that his conduct was improper. There was no finding in Mr. Jones' case, as there was in Mr. McAtee's, that he only appeared before the SSA and that his practice before that administration was predicated upon the good faith belief that suspended lawyers could appear before that agency.

The Bar's reliance on The Florida v Greene, 589 So.2d 281 (Fla. 1991) is also misplaced. Mr. Greene had one of the longest histories of disciplinary sanctions that this Court has ever seen. Although the Court agreed with the Bar that further suspension of Mr. Greene would have been fruitless, they came to that conclusion

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only after noting that he had "completely disregarded lesser forms of discipline...." The Court then noted that he had been disciplined at least six times previously spanning a 20 year period.

Even with the long litany of disciplinary violations, two justices dissented and noted that they would have

> Approve[d] the referee's recommendation of extending the suspension rather than imposing the ultimate penalty of disbarment.

In The Florida Bar v Bauman, 558 So.2d 994 (Fla. 1990), this Court did, in fact, disbar a lawyer for practicing while suspended. The ultimate penalty in that case was warranted, however, because Mr. Bauman continued to practice law in Florida courts even after he was held in contempt by a Florida circuit judge for holding himself out as a lawyer. He ignored that contempt citation and continued to practice. Mr. Bauman was given one bite by a local judge. The second bite warranted the ultimate sanction by this Court.

While The Florida Bar argues that Mr. McAtee's case is similar to Jones and Greene and Bauman, and it hammers away at their characterization of his conduct as being 25 separate acts, they cannot point to a single instance wherein Mr. McAtee appeared before a Florida judge in his capacity as counsel. They disregard that two of the lawyers in the cases cited above were specifically advised that their actions were improper; Mr. Jones by letter from the Bar and Mr. Bauman by contempt citations. They completely gloss over the referee's findings that Mr. McAtee believed that he

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could properly appear before the SSA. It is these factors that removes his case from those cited by the Bar.

As stated above, the referee thoroughly considered all cases in considering the discipline to be imposed. Rather than rearguing those cases, Mr. McAtee would set forth in this brief paragraphs 25 through 28 of the referee's report.

> 25. In determining the discipline to be imposed, I have considered numerous cases. Among them are The Florida Bar v Starke, 616 So.2d 41 (Fla. 1993). There, Mr. Starke was suspended for three years, nunc pro tunc the date of his original temporary suspension for theft of over $15,000.00 of trust funds and for practicing law after his temporary suspension was ordered by the Court. I find that Mr. Starke's conduct was far more egregious than that before me in the instant case. Yet, Mr. Starke received but a three year suspension. I find it inappropriate to disbar Respondent for conduct far less serious than that engaged in by Mr. Starke.
>
> 26. In the case of The Florida Bar v Weil, 575 So.2d 202 (Fla. 1991), the accused lawyer was suspended for six months for practicing law while suspended for failure to pay dues. This Referee notes that Mr. Weil was counsel for the city of Sweetwater, a public position of great responsibility, and that counsel's improper conduct on behalf of a public entity could have far-reaching implications. I further note that Mr. Weil had been previously disciplined by the Supreme Court on two prior occasions before his suspension.
>
> 27. In The Florida Bar v Golden, 563 So.2d 81 (Fla. 1990), the accused lawyer was suspended for one year for representing clients in court, for a fee, on two different occasions. Mr. Golden's participation was in Florida court and there was absolutely no ambiguity about his lack of authority to appear. In light of Mr. Golden's lengthy history of past disciplinary orders (he had three prior disciplinary orders) the Court ordered his one year suspension. The suspension I am

recommending in the instant case is twice as long as Mr. Golden's.

> 28. Finally, this Court notes that in The Florida Bar v Neckman, 616 So.2d 31 (Fla. 1993) the accused lawyer was given but a public reprimand for representing himself to be a lawyer in connection with a debt-collection matter after the effective date of his resignation from The Florida Bar. In imposing discipline, the Court noted several mitigating factors, among which was the fact that no injury was caused to any client. Similarly, in The Florida Bar v Brigman, 322 So.2d 556 (Fla. 1975) the accused lawyer, after being found in contempt, only received a six month suspension for failing to notify clients of the suspension and for failing to take the proper steps to discontinue his use of attorney at law on shingles and letterhead.

Starke, Weil, Golden, Neckman, and Brigman are all case standing for the proposition that Mr. McAtee should not be disbarred, should not receive the "ultimate" discipline, for his conduct. Mr. Starke was suspended for three years for conduct far more serious than that at Bar. Mr. Weil received but a six month suspension for his contempt. Mr. Golden, while representing clients for a fee in Florida courts, and despite a lengthy disciplinary history, received but a one year suspension for his misconduct. And, as noted by The Florida Bar, Mr. Brigman received but a six month suspension.

Mr. McAtee submits to this Court that, while improper, his conduct certainly does not warrant the extreme sanction of disbarment. Continuing his suspension for two years from the date of his last improper act is sufficient sanction. Disbarring him would violate this Court's stricture that disciplinary proceedings

are remedial and not punitive. DeBock v State, 512 So.2d 164, 166 (Fla. 1987).

The cases cited by the Bar all involve far more serious misconduct and contain no similar mitigation. To disbar Mr. McAtee would be, pure and simple, a punitive rather than a remedial measure.

CONCLUSION

The referee considered Mr. McAtee's testimony in reinstatement proceedings when he recommended a two year suspension. The referee, before the past testimony had been made, was in the proper position to determine the weight that that past testimony should be given in determining a sanction. The referee was within his rights, and quite properly found that Respondent did not practice in any Florida courts while suspended and that his practice before the SSA was under the mistaken belief that he could appear before that agency.

Most importantly, disbarment is too Draconian a discipline to impose for the misconduct at Bar. There was no showing of any prejudice to clients. There was no showing that Mr. McAtee appeared in any Florida courts. There was no showing that Mr. McAtee accepted any fees for his conduct. It is clear that the combination of Mr. McAtee's belief that a 91 day suspension would be one of short duration and that practice by a suspended lawyer before the SSA was appropriate, contributed to his belief that he was not in violation of his suspension by doing so. The cases

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cited by the Bar all include far more serious misconduct, or include instances where lawyers ignored the appellate process, and do not govern the sanction to be imposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief were mailed to Lois B. Lepp, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to John A. Boggs, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 this 31st day of March, 1995.

JOHN A. WEISS