IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

vs.

JAMES R. MCATEE,

Respondent/Appellee.
_____/

Case No. 83,174

TFB File No. 94-00481-01A

INITIAL BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

References to The Florida Bar may include The Bar, The Complainant, or the Appellant. References to James R. McAtee may include the Respondent, Mr. McAtee, or the Appellee. References to the transcript of the final hearing on September 19, 1994 will be referred to as "T-___". References to the Report of Referee entered on November 3, 1994 will be referred to as "ROR, p. ___". The exhibits introduced by The Florida Bar consist of the entire record before this Court in Mr. McAtee's reinstatement case, Case No. 80,765 (TFB File No. 93-00419-01A-NRE). The Florida Bar's Composite Exhibit 1 consists of the pleadings from the reinstatement proceedings; The Florida Bar's Composite Exhibit 2 is the transcript of the June 19, 1993 reinstatement hearing; The Florida Bar's Composite Exhibit 3 consists of The Florida Bar's Exhibits 1 through 20 from the reinstatement proceedings; The Florida Bar's Composite Exhibit 4 is the transcript of the July 20, 1993 telephonic hearing in the reinstatement matter; and The Florida Bar's Composite Exhibit 5 is the transcript of the July 26, 1993 telephonic supplemental hearing in the reinstatement proceedings. References to the exhibits entered into evidence will be made by the composite exhibit number followed by further identification within the exhibit. For example, "TFB Comp. 1, ROR, p. 13" refers to the report of referee at page 13 which is a part of The Florida Bar's Composite Exhibit 1. "SSA", as used by the Referee, refers to The Social Security Administration, Office of Hearings and Appeals. "ALJ" refers to the administrative law judges in the Social Security Administration, Office of Hearings of Appeals.

STATEMENT OF THE CASE

On July 9, 1992, this Court issued an order suspending Respondent from the practice of law for 91 days to be followed by three years probation upon his reinstatement. The Florida Bar v. McAtee, 601 So. 2d 1199 (Fla. 1992). At all times since August 10, 1992, the effective date of the suspension, Respondent has remained suspended.

In November 1992, Respondent petitioned for reinstatement to The Florida Bar, which petition was denied in November 1993. During the course of Respondent's reinstatement proceedings, The Florida Bar discovered that Respondent had practiced law while he was suspended.

This contempt action stems from the Respondent' s practice of law while suspended which was discovered during the reinstatement matter. On February 10, 1994, The Florida Bar filed a Petition for an Order to Show Cause asking this Court to hold Respondent in contempt and alleging the Respondent had engaged in the practice of law while suspended. On February 15, 1994, this Court issued an Order to Show Cause to Respondent requiring that the Respondent respond on or before March 7, 1994. On or about March 16, 1994, Respondent moved for an extension of time to file his response. On or about April 6, 1994, Respondent filed a response to the Order to Show Cause.

This matter was referred by this Court to the Referee on or about June 28, 1994. A final hearing was held before the Referee on September 19, 1994. The Report of the Referee was entered on November 3, 1994. The Referee's report recommended that Respondent be found guilty of willful contempt of court for his continued practice of law while suspended and recommended that he be suspended for two (2) years nunc pro tunc to June 19, 1993. The Florida Bar filed its Petition for Review on February 3, 1995.

STATEMENT OF THE FACTS

The Referee found the following facts:

Respondent is, and at all times pertinent to these proceedings was, a member of The Florida Bar and subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

On July 9, 1992, Respondent was suspended for 91 days effective August 10, 1992. The Florida Bar v. McAtee, 601 So. 2d 1199 (Fla. 1992). Respondent was ordered not to accept any new clients after July 9, 1992. His suspension requires proof of rehabilitation before reinstatement.

A lawyer suspended from practice is required to comply with Rules 3-5.1(g) (requiring that a copy of the order of suspension be sent to all clients with matters pending and that the Bar be given an affidavit listing all clients so notified) and 3-6.1(c) (a suspended lawyer shall not have direct contact with any clients or receive, disburse, or otherwise handle trust funds or property).

On November 12, 1992, Respondent petitioned for reinstatement to The Florida Bar. Two months later the Bar moved to dismiss the petition. Final hearing on the petition was not held until June 19, 1993. Thereafter, two supplemental hearings were held. This Referee presided over those proceedings and recommended that Respondent be denied reinstatement. That recommendation was approved by the Supreme Court of Florida on November 18, 1993. Respondent is not eligible to petition for reinstatement to The Florida Bar until November 18, 1994.

In the aforementioned reinstatement proceedings, this Referee found that Mr. McAtee engaged in the practice of law during his suspension (TFB Comp. 1, ROR, page 8). That finding was a major factor in the recommendation that Respondent be denied reinstatement.

These proceedings were brought by The Florida Bar on February 10, 1994 pursuant to Rule 3-7.7(g). The Florida Bar seeks Respondent's disbarment for his allegedly contemptuous conduct.

Respondent argues that, while deserving of discipline, his conduct does not warrant disbarment. He points out that save the possible exception of a limited filing in a bankruptcy case, all of his misconduct pertained to his mistaken belief that he could practice before the Social Security Administration (SSA) as a lay practitioner. Respondent argues that he should be disciplined for his misconduct by no more than a two year suspension, nunc pro tunc June 19, 1993, the last date that he participated in a SSA case.

The Florida Bar argues that Respondent be held in contempt for failing to comply with Rule 3-5.1(g). Yet, it is undisputed that Respondent notified 44 clients of his suspension. TR 13. The Bar has only been able to present one witness, Mr. Adkins, that was not notified of the suspension. I find that failing to notify only one of forty-five clients of the suspension is not contemptuous conduct.

The Florida Bar also argues that Respondent should be held in contempt for disbursing funds from his trust account in violation of Rule 3-6.1(c). I find, however, that Respondent's only trust activity pertained to funds to which Respondent had ownership, e.g., earned fees. There is no evidence that Respondent received any funds in trust during his suspension. The only disbursements alluded to by the Bar were funds belonging to Respondent's mother in which he had a beneficial interest and payment to himself of earned fees and costs. This Referee notes that a strict interpretation of Rule 3-6.1(c) would prevent Respondent from returning unearned fees held in trust -- a situation clearly not contemplated by the rule.

I find that Respondent's failure to pay costs prior to the date on which they were paid, i.e. March 25, 1993, was not contemptuous conduct. The Bar cites no cases in which a seven month failure to pay costs resulted in a finding of contempt.

Obviously, the bulk of the Bar's allegations concern Respondent's practice before the Social Security Administration. At the outset, this Referee notes that Federal legal proceedings are preempted from state regulation. Sperry v. Florida, 373 U.S. 379, 83 S. Ct. 1322, 10 L.Ed. 2nd 428 (1963). 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 Bar presented sixteen instances wherein Respondent was counsel before the SSA on behalf of claimants. Of those sixteen cases, ten of them were pending at the time of Respondent's order of suspension (TFB Comp. 3, Exhibit 18, numbers 1, 2, 3, 4, 5, 7, 9, 11, 12, and 16). In only two cases (numbers 2 and 16) did Respondent actually appear before an ALJ. Those appearances were on March 4, 1993 and April 22, 1993 respectively. On one of the cases, (number 3), the only issue remaining had to do with Respondent's earned fees. Although Respondent signed up six new cases after his order of suspension came down, he appeared before an ALJ in none of them and testified that he anticipated his 91 day suspension ending prior to an actual appearance being required in the case. In none of those cases did Respondent receive fees. Substitute counsel was obtained in most cases. There is no evidence of any client's position being prejudiced as a result of Respondent's conduct.

Respondent testified, and the Bar did not rebut, that he appeared in no Florida courts during the period of his suspension. TR 20. He also testified that during the time that he had been chairman of the local unlicensed practice of law (UPL) committee in the he First Judicial 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.

There is no evidence that Respondent received any fees for any work done during his suspension.

I find that Respondent's last act as SSA counsel was a request for a continuance on June 19, 1993.

(ROR, pp. 3-7).

The Referee found that,

> Respondent has engaged in willful contempt of court through his actions before the Social Security Administration. In mitigation, however, I find that Respondent has appeared before no Florida courts and that he labored under the good faith, albeit mistaken, belief that a suspended lawyer stood in the same shoes as a non-lawyer as to eligibility to practice before the SSA.

(ROR, p. 8).

The Referee considered that Respondent has been suspended for over two years for an offense which originally warranted a 91 day suspension (ROR, p. 8).

The Referee declined to hold Respondent in contempt for any other matters raised by The Florida Bar (ROR, p. 7). The Referee declined to hold the Respondent in contempt for his false testimony to the Referee during the reinstatement proceedings (ROR, p. 7).

The Florida Bar suggests the following additional facts should be considered:

In the course of closing down his law practice in order to serve the suspension, Respondent sent a letter to his clients which indicated "During the period of suspension I will be doing some office work on your file so that the case will be ready for hearing. I have an attorney on stand-by who will proceed with your case in the event there is any activity during the suspension period." (TFB Comp. 3, Exh. 9).

Respondent's activity in the sixteen cases cited by the Referee which were pending before Social Security Administration (ROR, pp. 5-6) are set out more fully below.

The Respondent submitted five "Authority to Represent" forms in separate clients' matters to the Social Security Administration (form SSA-1696-U4). The forms, submitted on November 12, 1992; January 25, 1993; February 5, 1993; and two on March 9, 1993, were signed by the Respondent, who, in his own handwriting, wrote the title "attorney" under his name (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Cases 6, 8, 13, 14, and 15; TFB Comp. 3, Exh. 12).

Respondent does not dispute that he held himself out as an attorney when he submitted these forms (T-29, 32, 38). Respondent admits that he knew that his petition for reinstatement was pending when he submitted the forms which indicated he was an attorney but that he was hoping to be reinstated before the clients' matters were heard (T-26, 28-29).

While suspended, Respondent requested four separate continuance in three separate matters (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Cases 4, and 5; TFB Comp. 5, p. 20). Respondent requested the continuances by contacting the administrative law judges. According to one administrative law judge, Respondent requested a continuance because he was "not prepared" (TFB Comp. 3, Exh. 18, Case 5). In one instance, Respondent requested a continuance on July 21, 1993 - after the June 19, 1993 hearing on his reinstatement petition and just prior to the supplemental hearing on July 26, 1993 regarding his reinstatement petition (TFB Comp. 1, ROR, p. 10; TFB Comp. 5, p. 20).

While suspended, Respondent had telephone contact with several administrative law judges regarding substantive issues in claimants' matters. In one case, Respondent indicated to the administrative law judge's clerk that he was trying to obtain necessary medical records. In another case, Respondent advised an administrative law judge's clerk that he would contact his client to have his client follow through in obtaining necessary medical records (TFB Comp. 3, Exh. 18, Cases 4 and 10).

Respondent filed several requests for Social Security Administration hearings on behalf of his clients while he was suspended (TFB Comp. 3, Exh. 18, Cases 11, 13, & 15). While suspended, Respondent had telephone conversations about the clients' legal matters with at least two clients, Frank Adkins and Roswell Howell (TFB Comp. 1, ROR, p. 13). Additionally, Respondent met with Frank Adkins and prepared him for a hearing on April 22, 1993 (TFB Comp. 1, ROR, p. 8).

While suspended, Respondent appeared at an evidentiary hearing as counsel for Mr. Adkins on April 22, 1993 (ROR, p. 6). During the April 22, 1993 hearing, Respondent advised

the administrative law judge that he was "the attorney for Mr. Adkins' interests" (TFB Comp. 1, ROR, p. 8). The administrative law judge believed Respondent to be an attorney (TFB Comp. 1, ROR, p. 8; TFB Comp. 3, Exh. 18, Case 16). Mr. Adkins hired an attorney to protect his legal rights and "felt betrayed" when he discovered that Respondent was not a member in good standing with The Florida Bar (TFB Comp. 1, ROR, p. 9).

Respondent appeared at an evidentiary hearing as counsel to another client on March 4, 1993 (ROR, p. 6; TFB Comp. 3, Exh. 18, Case 2).

Respondent accepted at least six new clients after this Court directed him not to do so on July 9, 1992 (ROR, p. 6), including entering into two fee agreements on March 6, 1993 with clients in Social Security matters wherein he referred to himself as an "attorney" and where he was to be compensated at the attorney rate (TFB Comp. 1, ROR, p. 11; TFB Comp. 3, Exh. 18, Cases 14 and 15).

In the reinstatement proceedings, this Referee found "it is clear that Respondent practiced regularly before the Social Security Administration. It is also clear that Respondent had direct contact with many clients about legal matters during his suspension. Respondent accepted representation of at least four new clients during the period of his suspension" (TFB Comp. 1, ROR, p. 16). Respondent admits that at all times material hereto he was aware of Rule 3-6.1, Rules of Discipline, which prohibits direct client contact by a suspended lawyer (T-44).

This Referee previously found "Respondent held himself out as an attorney" when on August 31, 1992, Respondent sent a letter to various clients and tribunals on "attorney at law" letterhead which indicated a change of his address, despite being advised by The Florida Bar to refrain from using attorney letterhead (TFB Comp. 1, ROR, p. 14).

Every action of Respondent before Social Security Administration indicated he was an attorney (T-54-55). Respondent admits that he never advised the administrative law judges that he was suspended (T-23). Respondent admits that the administrative law judges knew him in his capacity as an attorney and in no other capacity (T-49). Respondent admits that he did not advise

Social Security Administration that he was appearing as a lay representative (T-54-55). Respondent admits that his clients had hired him as an attorney (T-40). Respondent admits he never inquired of any administrative law judge whether he could appear as a lay representative (T-47-48). Social Security regulations do not permit a suspended attorney to appear as a lay representative (TFB Comp. 1, ROR, pp. 11-13).

This Referee previously found that Respondent's practice of law while suspended was not limited to practice before Social Security Administration. Respondent also practiced some bankruptcy law (TFB Comp. 1, ROR, p. 13). Respondent advised the Referee that he had not withdrawn from any of his pending cases in any court; he just asked another attorney to cover for him if any court appearances were required (TFB Comp. 1, ROR, pp. 9, 14). Respondent admitted that he had not withdrawn from any cases which were pending in the state circuit courts (TFB Comp. 5, p. 33).

Respondent's last act as an attorney before the Social Security Administration was a request for a continuance filed on July 21, 1993 (T-51; TFB Comp. 1, ROR, p. 10).

The Referee previously found that Respondent made knowing misrepresentations to this Referee regarding his continued practice of law while suspended (TFB Comp. 1, ROR, p. 21).

> Mr. McAtee was unable to be honest and forthcoming in these proceedings. During [Respondent's] deposition, Bar Counsel specifically asked [Respondent] whether he had any direct contact with any clients during the period of his suspension to which Mr. McAtee responded no. Bar Counsel asked Mr. McAtee whether he had represented any clients before the Social Security Administration during the period of his suspension to which [Respondent] responded "no, I'm not doing that". Even at trial, before being presented with irrefutable evidence, [Respondent] denied contact with any clients regarding any legal matters he was handling (citations omitted).

(TFB Comp. 1, ROR, pp. 15-16).

At the reinstatement trial, Respondent answered Bar Counsel's question, "And have you practiced law at all since August, 1992 in the State of Florida?" by saying, "As an attorney, no". (TFB Comp. 1, ROR p. 8) After evidence of Respondent's appearance before an administrative law judge was introduced, the Referee asked Respondent whether his appearance before an

administrative law judge on April 22, 1993 was his only appearance before an administrative law judge. Respondent again lied, as this Referee previously found, by telling this Referee that he had not otherwise appeared before an administrative law judge (TFB Comp. 1, ROR, p. 16).

When confronted at the reinstatement supplemental hearing on July 26, 1993 with the overwhelming evidence of his continued practice of law, Respondent stated, "I have got my back against the wall, because my expenses have gone on and on and on" (TFB Comp. 5, p. 30).

This Referee said in his report in the reinstatement, "Mr. McAtee has not been truthful with The Florida Bar or this Referee.... These were knowing misrepresentation to the tribunals and to the clients and to this Referee" (TFB Comp. 1, ROR, p. 21). The Referee continued, "Mr. McAtee's actions throughout this proceeding were designed to elude, evade and mislead The Florida Bar and this Referee from discovering the truth. It is unknown whether this Referee knows, to date, the truth of all of Mr. McAtee's actions during his suspension. It is unlikely that the actions discovered herein include all of his misconduct" (TFB Comp. 1, ROR, p. 23-24).

Respondent misled Mr. Howell, Respondent's bankruptcy client, as to Mr. Howell's need to obtain another attorney (TFB Comp. 1, ROR, p. 14). Mr. Howell testified that it would have been in his best interests to get another attorney (TFB Comp. 1, ROR, p. 14).

By Respondent's actions before Social Security Administration, at least one client's matter stands to be dismissed (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Case 4).

SUMMARY OF ARGUMENT

The Respondent was suspended for 91 days effective August 10, 1992. At all times since then, Respondent has remained suspended from the practice of law in this state. During the course of the proceedings regarding Respondent's petition for reinstatement, Respondent was found to have practiced law during the term of his suspension and to have lied to the Referee and The Florida Bar about his unauthorized practice, which resulted in his petition for reinstatement being denied. The Florida Bar, having become aware of Respondent's extensive practice of law

while suspended by this Court and the fact that Respondent deliberately lied to the Referee and The Florida Bar in the reinstatement matter, believes that Respondent should no longer be entitled to be a member of The Florida Bar. No breaches of a lawyer's duty to the Court are more serious than violating this Court's order and then lying about it.

The Referee erred in failing to consider Respondent's false testimony and knowing misrepresentations regarding his continued practice of law while suspended as an aggravating factor in this contempt proceeding.

The Referee erred in finding 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. The record does not support a finding that Respondent's practice of law while suspended was performed under the mistaken belief that Respondent could appear as a non-attorney or lay representative before the Social Security Administration since, at all times, Respondent held himself out as an attorney.

The Referee erred in recommending a two year suspension, nunc pro tunc to June 19, 1993, as appropriate discipline for Respondent's willful contempt of court by the continued practice of law while suspended; the appropriate discipline to be imposed is disbarment without leave to reapply for five years and the payment of the Bar's costs in bringing these proceedings.

ARGUMENT

ISSUE I

THE REFEREE ERRED BY FAILING TO CONSIDER RESPONDENT'S FALSE TESTIMONY DURING THE REINSTATEMENT PROCEEDINGS REGARDING HIS PRACTICE OF LAW WHILE SUSPENDED AS AN AGGRAVATING FACTOR IN THIS CONTEMPT ACTION.

The record in this contempt matter, which stems from Respondent's actions discovered in his reinstatement proceedings, makes it clear that Respondent made material misrepresentations to the Referee and to The Florida Bar during the course of his reinstatement proceedings regarding his continued practice of law while suspended. This Referee so found in his report entered in the reinstatement matter (TFB Comp. 1, ROR, pp. 15-16, 21, 23-24). Only when Respondent was confronted with overwhelming evidence of his continued practice of law did he finally admit his practice of law continued while he was suspended because 'his back was against the wall' (TFB Comp. 5, p. 30; TFB Comp. 1, ROR, p. 21).

That Respondent made such misrepresentations during the course of bar proceedings is properly considered as an aggravating factor in determining appropriate discipline in this contempt proceeding.

Under the Florida Standards for Imposing Lawyer Sanctions, Section 9.22(f), the "submission of false evidence, false statements or other deceptive practices during the disciplinary process" is an aggravating factor which may justify an increase in the degree of discipline to be imposed.

In this case, The Florida Bar is not asking this Court to hold Respondent in contempt of Court for his false statements to the Referee during the reinstatement proceedings. The Florida Bar acknowledges that it could have and still can bring contempt charges against the Respondent for his perjurious testimony before the Referee during the reinstatement proceedings. However,

Respondent's false testimony to the Referee during the reinstatement proceedings should be considered as an aggravating factor in this contempt proceeding regarding the discipline to be imposed. Respondent's false testimony is especially aggravating in light of the Respondent's stated position that he honestly believed he could practice as a lay representative before Social Security Administration. Respondent had no reason to lie to the Referee and The Florida Bar regarding his actions before the Social Security Administration if he truly believed he could practice as a lay representative. But as this Referee previously found, Respondent's actions were designed to elude, evade and mislead the Referee from hearing the truth of his actions (TFB Comp. 1, ROR, p. 23-24). The misrepresentations in the reinstatement proceedings have to be taken together with Respondent's later testimony during this contempt proceeding that he mistakenly believed he could practice before Social Security Administration as a non-lawyer (T-19).

This Court has noted,

> 'No breach of professional ethics, or the law, is more harmful to the administration of justice or more hurtful to the public appraisal of the legal profession that the knowledgeable use by an attorney of false testimony in the judicial process. When it is done, it deserves the harshest penalty.' (citing The Florida Bar v. Dodd, 118 So. 2d 17, 19 (Fla 1960)) We can conceive of no ethical violation more damaging to the legal profession and process than lying under oath, for perjury strikes at the very heart of our entire system of justice- the search for the truth. An officer of the court who knowingly and deliberately seeks to corrupt the legal process can logically expect to be excluded from that process.

The Florida Bar v. Rightmyer, 616 So. 2d 953, 955 (Fla. 1993). Rightmyer involved an attorney who had been convicted of perjury as a result of his trial and deposition testimony which was false. Disciplinary proceedings followed the perjury conviction. The referee noted many mitigating factors, including marital, business and financial difficulties, an alcohol problem, the respondent's remorse, and that but for a public reprimand in 1986, the respondent enjoyed a good reputation as a member of the bar for twenty-seven years.

The Florida Bar recognizes that in Rightmyer the perjury was the basis for the disciplinary action. But the Court's rationale in Rightmyer is no less applicable when considered

as an aggravating factor in this contempt proceeding. Lying to a court, under oath, by an officer of that court is reprehensible and must be considered as an aggravating factor in this contempt proceeding.

This Court should consider Respondent's flagrant disregard for this Court's order of suspension aggravated by his failure to be truthful in disciplinary proceedings as sufficient grounds for his disbarment from the practice of law.

ISSUE II

THE REFEREE ERRED IN CONSIDERING 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.

Respondent presents as his defense to this contempt proceeding, and the Referee has so found, that Respondent's extensive practice of law while suspended was due to his mistaken belief that he could practice before Social Security Administration as a lay representative and that he did not appear before any Florida state courts while suspended (ROR, p. 7).

The record does not support by competent and substantial evidence the Referee's finding that Respondent mistakenly believed he could practice as a lay representative before Social Security Administration. The Referee's findings of fact should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. McKenzie, 442 So. 2d 934 (Fla. 1983).

All attorneys are charged with the knowledge of the law. Under Rule 3-4.1, Rules of Discipline,

> Every member of The Florida Bar ... is within the jurisdiction of this court and its agencies under this rule and is charged with notice and held to know the provisions of this rule and the standards of ethical and professional conduct prescribed by this court.

The definition of the practice of law includes "the giving of such advice and performing of such services [which] affect important rights of a person under the law, and [for which] the

reasonable protection of the rights and property of those advised and served requires that the persons giving such advice possess legal skill and knowledge of the law greater than that possessed by the average citizen...." The Florida Bar v. Brambaugh, 355 So. 2d 1186, 1191 (Fla. 1978)(quoting from State v. Sperry ,140 So. 2d 587, 591 (Fla. 1962). Under the Rules Regulating The Florida Bar, references to the practice of law are made as "practice of law in this state". See Rules 1-3.1, 1-3.2(a), 1-3.2(c)(4), 1-3.3(a) and (b), 1-3.5 and 1-3.6, Rules Regulating The Florida Bar. Rule 3-5.1(e), Rules of Discipline, says a "respondent may be suspended from the practice of law...". Nowhere in The Rules Regulating The Florida Bar does it refer to the practice of law in the State of Florida being limited to the practice of law before the state courts of Florida.

The practice of law includes many acts which do not pass through the court system. The practice of law "is not limited to litigation in the courts, but includes the giving of legal advice and counsel, and the preparation of legal instruments and contracts by which legal rights are defined or secured, regardless of whether such matters are or may be the subject of litigation." In re The Florida Bar, 267 So. 2d 824, 826-27 (Fla. 1972) (quoting from 3 Fla. Jur., Attorneys 7). A lawyer's work performed in his office is certainly considered the practice of law, even if those matters will never present themselves to a tribunal.

Respondent admits that he was aware of the rules governing his suspension, including Rule 3-6.1(c), Rules of Discipline, which prohibits direct client contact by a suspended attorney (T-44). Respondent's testimony that the reference to client contact in Rule 3-6.1(c), Rules of Discipline, did not apply to him because the clients he assisted were Social Security clients (T-44) is without merit. Rule 3-6.1(c), Rules of Discipline, refers to "clients" and does not in any way qualify the reference to clients as being those persons who have matters pending in Florida state courts.

Respondent admits that he did not withdraw from any cases which were pending before the state circuit courts (TFB Comp 5, p. 33). Therefore, he still owed a duty to the circuit courts

and clients in those cases.

The Referee in this matter found that the Respondent had, in fact, willfully practiced law during his suspension and in no way qualified the Respondent's practice of law. The Referee merely asserts that the Respondent's lack of practice of law before a state court is a mitigating factor to which The Florida Bar takes great exception. That there is no evidence that Respondent actually appeared before a state court during the period of his suspension does not mitigate the seriousness of his offenses.

The record does not support, with competent and substantial evidence, the Referee's finding that Respondent was operating under a mistaken belief that he could practice before the Social Security Administration as a lay representative. The record indicates that in every instance of Respondent's practice before Social Security Administration, he presented himself as an attorney. In the five notices of appearances, Respondent listed himself as an "attorney" (TFB Comp. 3, Exh. 12; TFB Comp. 3, Exh. 18, Cases 6, 8, 13, 14, and 15; TFB Comp. 1, ROR, p. 10). Respondent had the opportunity to write "representative" on the form (TFB Comp. 3, Exhibit 19) but chose to hold himself out as an attorney. Respondent admits that all of the administrative law judges knew him only as an attorney and in no other capacity (T- 49). Respondent admits that he did not disclose that he was acting as a lay representative (T-54-55). Respondent admits that he took no steps to ascertain whether the law then prohibited a suspended attorney from appearing as a lay representative before the Social Security Administration (T-47). In the fee contracts, Respondent referred to himself as an attorney; Respondent did not hold himself out as a lay representative (TFB Comp. 3, Exh. 18, Cases 14 and 15). Respondent admitted that he tried to get another lawyer to cover hearings for him because his clients believed that he was a lawyer (T-40). In the two evidentiary hearings before administrative law judges, Respondent held himself out as an attorney, not as a lay representative, as the Referee previously found in the reinstatement proceedings (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Cases 2 and 16). As the attorney of record, Respondent requested continuances from the

administrative law judges (TFB Comp. 3, Exh 18, Cases 4 and 5). As attorney of record, Respondent responded to substantive matters regarding the claimants (TFB Comp. 3, Exh. 18, Cases 4 and 10). Respondent's testimony at the contempt hearing on September 19, 1994 is the first time that Respondent testified that he was acting under a mistaken belief that he could act as a lay representative. The Bar is not suggesting that the issue of lay representatives was not discussed before the Referee during the reinstatement proceedings in June and July 1993, but simply that when Respondent testified during those proceedings he never stated that he was operating under that theory. What Respondent did say on July 26, 1993 was that he had his back against the wall because his expenses were continuing to rise (TFB Comp. 5, p. 30). Respondent admits that when he filed the authorizations to represent and the requests for hearings, wherein he listed himself as an attorney, that he thought he would be readmitted to The Florida Bar by the time the clients' matters went to final hearing (T-28-29). Respondent's statements further magnify that he intended to deceive Social Security Administration when he submitted the forms indicating that he was an attorney. The Respondent's self-serving testimony that he was under a mistaken belief he could practice as a lay representative, in the face of the documentary evidence to the contrary, is not supported by competent and substantial evidence.

Respondent statement that he was operating under a mistaken belief that he could be a lay representative when he engaged in the practice of law while suspended by practice before the Social Security Administration should not be considered a mitigating factor in recommending the appropriate discipline to be imposed.

The Referee erred in finding as mitigation that Respondent's practice of law while suspended was not before any Florida state courts as there is no case law or standards to support this finding. The Referee's finding that Respondent's practice before the Social Security Administration was under a mistaken belief that he could appear as a lay representative is not supported by competent and substantial evidence in the record and should not be relied upon by this Court as a basis for determining the appropriate discipline to be imposed in this matter.

ISSUE III

CONSIDERING THE AGGRAVATING FACTORS PRESENT AND THE NATURE OF THE CONTEMPT OF COURT, DISBARMENT IS THE APPROPRIATE DISCIPLINE TO BE IMPOSED.

The Referee has found Respondent in willful contempt of this Court for his continued practice of law in this state while he was suspended by this Court (ROR, p. 8). The Referee recommends as an appropriate discipline that Respondent be suspended for two years nunc pro tunc to June 19, 1993, the date of Respondent's last unauthorized act (a request for continuance) (ROR, p. 7, 12). The Bar would point out that the record reflects that Respondent's last unauthorized practice of law was a request for continuance filed on July 21, 1993 (T-51; TFB Comp. 1, ROR, p. 10; TFB Comp. 5, p. 20). Respondent's counsel concedes this date in his opening statement to the Referee (T-9). June 19, 1993 was the date of the final hearing in the reinstatement matter.

The discretion to impose discipline is vested in this Court. The Referee's recommendation as to the appropriate discipline to be imposed is subject to a broader scope on review by this Court than a referee's findings of fact. The Florida Bar v. Anderson, 538 So. 2d 852 (Fla. 1989).

The Respondent's practice of law while suspended includes over twenty-five (25) distinct acts which constitute the practice of law:

Respondent appeared as counsel at two evidentiary hearings; requested at least four continuances, met with at least one client, counselled at least two clients over the phone, sent a letter to clients on attorney letterhead indicating that he would be continuing to work on their legal matters during the time of his suspension; sent a change of address on attorney letterhead to the Social Security Administration and his clients on August 31, 1992 indicating his change of address; filed five authority to represent forms wherein he indicated in his own handwriting that he

was an "attorney"; discussed with at least two administrative law judges or their law clerks substantive matters pertaining to his clients' matters; requested administrative hearings on behalf of three clients, and accepted six new clients, including entering into two fee agreements which indicated he was an attorney (TFB Comp. 3, Exh. 18; TFB Comp. 1, ROR, pp. 8-14). And, as the Referee pointed out, it is doubtful that these acts above constitute the entire misconduct committed by the Respondent, in light of his misrepresentations regarding his conduct (TFB Comp. 1, ROR, pp. 23-24).

In determining appropriate discipline, this Court considers the purposes of discipline as outlined in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), which says, in pertinent part,

> First, 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. Second, 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. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Id at 132.

Next the Court looks to the Florida Standards for Imposing Lawyer Sanctions.

> 3.0 Generally- In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:
>
> (a) the duty violated;
> (b) the lawyer's mental state;
> (c) the potential or actual injury caused by the lawyer's misconduct; and
> (d) the existence of aggravating or mitigating factors.

The duty violated:

> 8.0 - Prior Discipline Orders
>
> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving prior discipline.

8.1 - Disbarment is appropriate when a lawyer:

(a) 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; or

(b) has been suspended for the same or similar misconduct, and intentionally engages in further similar acts of misconduct.

Florida Standards for Imposing Lawyer Sanctions

The Respondent has violated a direct order of this Court not to practice law in this state. If the Respondent can not abide by this Court's orders, then what orders will he abide by?

The Respondent's mental state:

While the Referee has cited Respondent's good faith mistake regarding appearances before the Social Security Administration as a mitigating factor in Respondent's practice of law while suspended, the record clearly reflects that Respondent intended to engage in the practice of law while suspended. First, when Respondent notified his clients of his suspension, he advised them in the letter that he would be continuing to work on their cases- in other words practice law- while he was suspended (TFB Comp. 3, Exh. 9). While this Court has held that a suspended attorney can work in a law office while he is suspended, it must be under the direct supervision of another lawyer and the suspended attorney must not have direct client contact. The Florida Bar v. Thomson, 310 So. 2d 300 (Fla. 1975).

Respondent filed a notice of appearance in a new case approximately 10 days before his suspension was to go into effect (TFB Comp. 3, Exh. 18, Case 10). By November, 1992, Respondent was accepting new clients, signing authority to represent forms, requesting continuances, all while his petition for reinstatement to The Florida Bar was pending. In the following few months, by March and April 1993, Respondent was appearing at evidentiary

hearings and clearly holding himself out to the Social Security Administration and his clients as an attorney. Yet when asked about whether he was practicing before Social Security Administration, Respondent denied same (TFB Comp. 1, ROR, p. 15). Even at the final hearing on his petition for reinstatement on June 19, 1993, Respondent denied that he had practiced law. Respondent lied to the Referee when the Referee asked him if he had appeared before more than one administrative law judge (TFB Comp. 1, ROR, pp. 15-16). Respondent continued to practice law by filing a request for continuance on July 21, 1993, one month after the date of the final hearing in the reinstatement matter wherein his practice while suspended was raised (TFB Comp. 5, p. 20; T-51). Only when presented with irrefutable evidence of his substantial practice did Respondent finally admit at the July 26, 1993 supplemental final hearing that 'he had his back against a wall' because his expenses had been continuing to rise (TFB Comp. 5, p. 30); Mr. McAtee was trying to justify his practice of law while suspended. If one wants to avail himself to the benefits of bar membership, then he must strictly comply with the requirements and orders of this Court.

If the Respondent honestly believed that as a suspended attorney he could practice before the Social Security Administration, then he would have held himself out as a lay representative. Respondent admits that all the forms filed with Social Security Administration included references to him as an attorney (T-54-55). Respondent did not file one document indicating he was appearing as a lay representative. The administrative law judges knew Respondent only in his capacity as an attorney and Respondent allowed them to think he was an attorney because he never stated anything to the contrary. In fact, the record indicates that this Referee found during the reinstatement proceedings that Respondent had held himself out as an attorney to the administrative law judge before whom he appeared on April 22, 1993 (TFB Comp. 1, ROR, p. 10).

The Injury or Potential Injury Caused by the Respondent's Misconduct:

Injury is defined as "harm to a client, the public, the legal system, or the profession which

results from a lawyer's misconduct." "Potential injury" is defined as "the harm to a client, the public, the legal system or the profession that is reasonably foreseeable at the time of the lawyer's misconduct, and which, but for some intervening factor or event, would probably have resulted from the lawyer's misconduct." Florida Standards for Imposing Lawyer Sanctions.

The injury to the legal system includes representations to the administrative law judges that he was an attorney capable of asserting or defending the rights of the claimants who stood before Social Security. The clients believed they were being represented by an attorney when, in fact, they were not. Client matters were continued by the Respondent in hopes that Respondent would later be reinstated and then eligible to represent the clients' interests. It is not in the clients' best interests for Respondent to put his interests ahead of theirs. One client's case stands to be dismissed because of Respondent's actions. The Respondent's actions hurt the profession by his willful disregard for the Court's order of suspension and his knowing misrepresentations to the Referee in Respondent's reinstatement proceeding. The legal profession can not afford to have members of the bar allowed to engage in activities which discredit the profession as much as Respondent's actions have discredited this profession. See Rightmyer, supra.

That Respondent received no fees from his unauthorized practice of law is irrelevant to the Court's determination in these matters. The Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991). But for The Florida Bar's intervention in determining that Respondent was practicing law, the Respondent would have received compensation for his services, as indicated by the fee agreements into which he entered (TFB Comp. 3, Exh 18, Cases 14 and 15). The record indicates that Respondent is to automatically receive fees for the matter at which he appeared for final hearing on March 4, 1993 (TFB Comp. 3, Exh. 18, Case 2).

Aggravating or Mitigating factors:

Aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. Section 9.21, Florida Standards for Imposing Lawyer Sanctions.

The Florida Bar submits that the following aggravating factors are present in this case and should be considered by this Court in meting out the appropriate discipline.

9.22 (a) prior disciplinary offenses;
(b) dishonest or selfish motive;
(c) a pattern of misconduct;
(d) multiple offenses;
(f) submission of false evidence, false statements, or other deceptive practices during the disciplinary process;
(i) substantial experience in the practice of law.

Florida Standards for Imposing Lawyer Sanctions.

Respondent, admitted to The Florida Bar in 1964, has been previously publicly reprimanded and placed on one year's probation for lack of communication, lack of diligence, and failing to return property and cost deposit. The Florida Bar v. McAtee, Case No. 74,745 (August 30, 1990). In The Florida Bar v. McAtee, Case No. 80,261 (December 16, 1993), Respondent received three years probation which is to be served concurrent with the three years probation ordered in The Florida Bar v. McAtee, 601 So. 2d at 1199, supra, upon his reinstatement, for lack of diligence and lack of communication (ROR, pp. 12-13).

Respondent's motive in practicing law while suspended was selfish; he needed to earn a living (TFB Comp. 5, p. 30).

The multiplicity of Respondent's acts which constitute the unauthorized practice of law indicate both a pattern of misconduct and multiple offenses.

The Respondent's knowing misrepresentations regarding his practice of law while suspended are well documented in the Referee's report entered into evidence in this contempt proceeding as part of The Florida Bar Composite Exhibit 1 and discussed at Issues I and II of this brief. As this Referee previously noted, the Respondent's actions were intended to elude, evade

and mislead the Referee and The Florida Bar from knowing his misconduct (TFB Comp. 1, ROR, pp. 23-24).

Lastly, this Court should look to the cases which it has previously decided in determining appropriate discipline.

This Court recently said that "a clear violation of any order of disciplinary status that denies an attorney the license to practice law generally is punishable by disbarment, absent strong extenuating factors." The Florida Bar v. Brown, 635 So. 2d 13 (Fla. 1994). In Brown, the attorney had submitted a disciplinary resignation and then failed to comply with the terms of his disciplinary resignation. The Florida Bar brought a contempt action and the attorney did not accept service and did not respond to the Bar's allegations. This Court disbarred the respondent.

The respondent in The Florida Bar v. Eric Jones, 571 So. 2d 426 (Fla. 1990), was originally suspended for 91 days, as was Mr. McAtee. Prior to Mr. Jones' 91 day suspension, he had never before been disciplined. See The Florida Bar v. Eric Jones, 543 So. 2d 751, 752 (Fla. 1989) (attorney who did not participate in proceedings suspended for 91 days for neglect of a legal matter, failing to carry out contract of employment, conduct which reflects adversely on his fitness to practice law and failing to keep his client reasonably informed). The Florida Bar discovered that respondent was continuing to practice law while suspended and filed a petition for an order to show cause. The referee recommended a two year suspension. However, this Court disbarred Mr. Jones because he practiced law in seven distinct acts, failed to comply with the rules regarding notice to clients and he made knowing misrepresentations to this Court regarding his compliance with the suspension. Mr. Jones' acts while suspended included, on one occasion, attending a hearing where he conferred with a new attorney, handing notes to the new attorney during the hearing, and attempting to make arguments to the judge. On the day following the hearing, the respondent wrote the judge a letter regarding appropriate case law. In a second case, the respondent filed documents in court as the attorney for the clients. In a third case, the

respondent prepared documents for the client's signature and gave legal advice to the client. Mr. Jones continued to use letterhead indicating he was an attorney at law and continued to maintain his office sign until the Bar brought it to his attention. The referee in Jones found that the respondent "violated both the letter and the spirit of the law by engaging in conduct that constituted the practice of law after his suspension became effective". Jones, 571 So. 2d at 427-28.

In Greene, supra, in a contempt proceeding brought by The Florida Bar, this Court disbarred an attorney who engaged in the practice of law on four occasions while he was suspended. The fact that Mr. Greene collected no fees and was acting on behalf of a personal friend did not sway this Court not to disbar Mr. Greene. Id at 282. This Court concluded that further suspension of Mr. Greene would be fruitless due to his history of disciplinary violations. Id.

In The Florida Bar v. Bauman, 558 So. 2d 994 (Fla. 1990), this Court disbarred an attorney who engaged in five distinct acts of practicing law while suspended for a period of six months. The respondent was held in contempt by the circuit judge for holding himself out as an attorney for one such act. Subsequent to the circuit court contempt citation, the respondent continued to represent clients. The Court said,

> Respondent argues that 'disbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable. 'The Florida Bar v. Davis, 361 So. 2d, 159, 161 (Fla. 1978). We can think of no person less likely to be rehabilitated than someone like Respondent who willfully, deliberately and continuously refuses to abide by an Order of this Court.

Id.

The Florida Bar submits that James R. McAtee's case is very similar to Jones and Greene and Bauman. Mr. McAtee committed at least 25 different acts which constitute the practice of law, used attorney letterhead, and made numerous misrepresentations to the Referee appointed by

this Court regarding his continued practice of law while suspended. Mr. McAtee appeared in court, sans another attorney, and represented his clients' legal matters at evidentiary hearings on at least two separate occasions. Respondent filed requests for continuances and assisted clients in doing so. Respondent communicated with administrative law judges. Respondent did not withdraw from any court case, including circuit court cases; he just got another attorney to cover for him if a court appearance was required. Respondent's actions show he intended from the outset of his suspension to violate the letter and spirit of the law as evidenced by his letter to his clients saying he would continue working on their cases during the period of his suspension (TFB Comp. 3, Exh 9). Mr. McAtee, like the attorney in Greene and unlike the attorney in Jones, has a prior disciplinary history. Mr. McAtee has also said he had his back against the wall financially, which is no excuse for his unauthorized practice. As this Referee found, Respondent's actions were intended to mislead, elude and evade the Referee and The Florida Bar from knowing about his continued practice of law and this Referee still may not know the extent of Respondent's practice while suspended. (TFB Comp. 1, ROR, pp. 23-24). Respondent's misrepresentations to the Referee appointed by this Court and to The Florida Bar aggravate the offenses committed. See Jones, supra. The Bar submits that further suspension of Respondent would be useless since the Respondent has clearly shown his lack of respect for this Court's orders and his obligation, as an officer of this Court, to be truthful, especially under oath.

See also, The Florida Bar v. Hartnett, 398 So. 2d 1352 (Fla. 1981) (Attorney held in contempt and disbarred for willfully engaging in the practice of law while serving a two year suspension. Attorney's clear disrespect for the Court will not be tolerated); The Florida Bar v. Santiago, 521 So. 2d 1111 (Fla. 1988) (Attorney stipulated to disbarment for contempt of court by practicing law while temporarily suspended. The referee rejected the stipulated disbarment and recommended an additional two year suspension citing to the respondent's personal difficulties, however this Court disbarred the attorney); The Florida Bar v. Dykes, 513 So. 2d 994 (Fla. 1987) (Respondent had been suspended for a period of six months and failed to notify clients that

he had been suspended; he acted as a personal representative of an estate without also having an attorney for the personal representative; he communicated with a client regarding legal matters and he misappropriated estate funds. This Court disbarred him).

The Florida Bar acknowledges that this Court has, in some cases where respondents have been found in contempt of this Court for continuing to practice law while suspended, lengthened the period of suspension rather than disbarred the respondents. See The Florida Bar v. Brigman, 322 So. 2d 556 (Fla. 1975) (the Court, in a contempt proceeding, added a six month suspension to the respondent's prior suspension because the respondent failed to notify his clients of his suspension; failed to remove his sign; and continued the use of "attorney at law" letterhead. The respondent claimed ignorance because he did not read the order or the rules which defense the Court found to be irrelevant); The Florida Bar v. Golden, 563 So. 2d 81 (Fla. 1990) (Court held that counseling and attempting to assist a client in requesting two continuances constituted the unauthorized practice of law. The Court ordered a one year suspension in this matter. The Court declared in Golden that the practice was minimal in that he only counselled and attempted to assist one client in requesting two continuances (emphasis added)).

Certainly Mr. McAtee's practice of law while suspended far exceeds the minimal practice found in either Brigman or Golden.

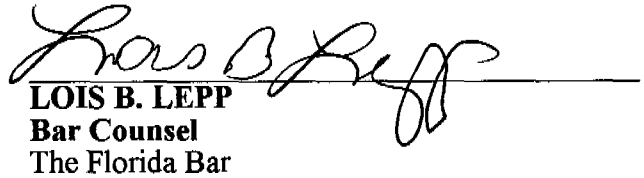
CONCLUSION

The extent of Mr. McAtee's practice of law while suspended far exceeds the number of acts in Jones, Greene, and Bauman combined. Mr. McAtee's case is aggravated by the knowing misrepresentations under oath. Although Mr. McAtee's disciplinary history is not as long as the attorney in Greene, it is certainly greater than Jones' lack of disciplinary history prior to his 91 day suspension, the Bar suggests that further suspension of the Respondent would, like Greene, be fruitless. Mr. McAtee's flagrant disregard for this Court's order dictates so. The Court's rationale in Rightmyer warrants that Mr. McAtee's misrepresentations under oath to this Referee regarding

his continued practice of law be considered as an aggravating factor in this case. Since Mr. McAtee cannot tell the truth, he should not be permitted to be a member of the bar. Respondent's actions have damaged the public's assessment of the legal profession and have impacted on the lives of those who sought his assistance. Like the Court said in Bauman, disbarment is reserved for those who willfully, deliberately and continuously violate court orders. Unfortunately, Mr. McAtee, by his actions has shown himself to be deserving of disbarment. Mr. McAtee's extensive misconduct during the period of his suspension- while he is supposed to be rehabilitating himself from the conduct which led to his suspension- indicates that he cannot be rehabilitated and, therefore, should be disbarred from the practice of law without leave to reapply for five years and required to pay the costs of The Florida Bar in bringing this action.

The Florida Bar suggests that this Court hold Respondent in willful contempt of Court for his regular and continuous practice of law while suspended and that this Court disbar Respondent from the practice of law in the State of Florida without leave to reapply for five (5) years and order him to pay the costs of The Florida Bar in bringing these proceedings.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of The Florida Bar regarding Supreme Court Case No. 83,174; TFB File No. 94-00481-01A was served on John A. Weiss, Counsel for Respondent, at his record bar address of Post Office Box 1167, Tallahassee, FL 32302-1067 on this 10th day of March, 1995.

LOIS B. LEPP, Bar Counsel

Copies to: John T. Berry, Staff Counsel c/o John A. Boggs, Director of Lawyer Regulation
Steven M. Masterson, Designated Reviewer