097

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

REPLY BRIEF OF THE FLORIDA BAR

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SUMMARY OF ARGUMENT

The Referee declined to consider the Respondent's false testimony in the reinstatement proceedings as an aggravating factor in this contempt proceeding. That the Referee considered the Respondent's candor as a factor in the denial of the reinstatement petition does not vitiate the necessity to consider the Respondent's lack of candor as a factor in the discipline to be imposed in this contempt proceeding.

The Respondent's practice of law while suspended was not a mistake. Respondent clearly held himself out as an attorney eligible to practice law in this state as evidenced by the many documents he submitted to the SSA wherein he indicated he was an "attorney." The Referee's finding that the Respondent mistakenly believed he could practice as a lay person before the SSA is not supported by competent and substantial evidence and should not be considered as a mitigating factor in this contempt proceeding. The Respondent is trying to hide behind alleged ignorance to avoid being disbarred.

That Respondent did not appear for any hearings in state court cases does not mitigate the sanction to be imposed herein. Suspension from the practice of law requires more than the attorney refraining from appearing before a state court. It requires that he not hold himself out in any capacity in any forum as an attorney. Suspension from the practice of law requires that the attorney refrain from giving any legal advice to his clients, even if the clients' matters are never to appear before a tribunal.

Disbarment is the only appropriate sanction to be imposed in a case where the Respondent engages in a pattern of flagrant disregard for this Court's order suspending him. A two year suspension nunc pro tunc to June 1993 is insufficient to meet the goals of bar disciplinary proceedings. This Court, which monitors attorney misconduct and appropriate sanctions therefor, is in a position to compare Respondent's misconduct with that of other attorneys in this state. As such, this Court has a broader view of Respondent's misconduct and should order that disbarment

is the only appropriate sanction.

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 Respondent argues that because the Referee considered the Respondent's candor in denying the petition for reinstatement, then the Referee considered the Respondent's candor in determining the appropriate discipline in this contempt action. However, the Referee clearly states in his Report that he declines to find the Respondent in contempt for his misrepresentations during the reinstatement proceedings and that he has declined to consider the Respondent's false testimony in these contempt proceedings. The Referee's report says, "I further do not find Respondent in contempt for false testimony before this Court in the reinstatement proceedings despite the Bar's invitation to do so.... Should the Bar bring proceedings for perjury, Respondent's testimony before this Referee in the previously filed reinstatement proceedings can be considered at that time.... (ROR, p. 7 (emphasis added)). Based upon the Referee's statement, it is clear the Referee did not consider the Respondent's false statements during the reinstatement proceedings when he made a recommendation in this contempt action. This contempt case stems entirely from the evidence presented in the reinstatement proceedings. Therefore, all of the factors of the previous case must be considered herein and the Referee erred in not considering the false testimony as an aggravating factor in this contempt case.

The Respondent relies on the Referee's statement that Respondent's lack of candor was a factor in the denial of the reinstatement and that Respondent has now been suspended for two and one-half years as a result of a 91 day suspension. The Referee stated that the major factor in the

denial of the petition for reinstatement was Respondent's continued practice of law (ROR, p. 4), but that the Respondent's lack of candor was also a factor (ROR, p. 7). Denial of a petition for reinstatement is not a disciplinary sanction; it is evidence that an attorney has not rehabilitated himself to the point that he is capable of returning to the practice of law. A 91 day suspension is never just 91 days because the attorney is required to prove rehabilitation. Respondent's disciplinary record discloses that Respondent has received a 91 day suspension, not a two and one-half year suspension.

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 argues that because he appeared in no Florida courts, his practice of law in violation of this Court's order should be substantially mitigated. Respondent fails to acknowledge that the practice of law encompasses many acts which take place outside of the courtroom. Under Respondent's theory, a suspended lawyer could carry on his practice of law by meeting with clients and giving legal advice and holding himself out as an attorney, so long as he did not file a pleading or make an appearance before a tribunal. In effect, this is what Respondent actually did with his clients. Clearly, this was not intended by this Court in its regulation of the practice of law in this state. Many lawyers- who hold themselves out as practicing law- never set foot inside a courtroom or other tribunal, yet they are subject to this Court's regulation nonetheless. One does not have to appear before a tribunal to be considered an attorney and to engage in the practice of law in this state. See, The Florida Bar v. Brambaugh, 355 So. 2d 1186 (Fla. 1978); In re The Florida Bar, 267 So. 2d 824 (Fla. 1972)(practice of law not limited to those matters which may

ultimately appear before a tribunal). However, the facts of this case, which were accepted by the Respondent (R's answer brief, p. 1), are that the Respondent had legal matters pending before the Florida circuits courts from which he did not withdraw (TFB Comp. 1, ROR, pp. 9, 14; TFB Comp. 5, p. 33) and to whom he owed a duty as an officer of the court. As such, Respondent was holding himself out as a lawyer to those state circuit courts. It was Respondent's hope that he could put off any action in the pending circuit court cases until his suspension concluded. Moreover, the Respondent sent all of his clients a letter which indicated that he would be doing work on their files in his office while he was suspended (TFB Comp. 3, Exh. 9). Therefore, the evidence shows that Respondent was working or intending to work on pending circuit court cases while he was suspended. That the Bar has not presented evidence that the Respondent actually appeared at a hearing before the circuit courts should be taken together with the Referee's statement that it is doubtful that we know to date the extent of Respondent's misconduct (TFB Comp. 1, ROR, pp. 23-24).

Respondent argues that his mistaken belief that he could practice before SSA as a lay representative is supported by competent and substantial evidence since the Respondent so testified. Yet, Respondent agreed with the facts of this case as presented by The Florida Bar, which include that <u>every</u> document Respondent submitted to the SSA during the period of his suspension listed himself as an "attorney." Respondent submitted five separate "authority to represent" forms, between November 12, 1992 and March 9, 1993, wherein he, in his own handwriting, said he was an "attorney" (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Cases 6, 8, 13, 14, 15; TFB Comp. 3, Exh. 12). Respondent admittedly never advised anyone at the SSA that he was acting as a lay representative (T-23). Respondent's fee agreements with his new clients referred to him as a lawyer and called for him to be paid at the attorney's rate (TFB Comp. 1, ROR, p. 11; TFB Comp. 3, Exh. 18, Cases 14 and 15), not at the rate that a lay representative would be paid. All the evidence, including Respondent's admission, points to the fact that Respondent, at all times, held himself out as a <u>lawyer</u> eligible to practice law before the SSA (T-

29, 32, 38 54-55). How can Respondent now assert in these proceedings that he was acting under the mistaken belief that he could appear as a lay representative when he never even attempted to appear as a lay representative? Further, Respondent does not answer why he lied to this Referee and to The Florida Bar about his practice of law before SSA if he truly believed he could act as a lay representative. If Respondent had actually believed he could practice as a lay person, he would have been honest when confronted with the situation.

Respondent, in arguing his mistake in appearing before the SSA, relies upon his tenure on the UPL committee wherein non-lawyer representation before the SSA was discussed and determined to be permissible. Respondent, at all times, has been a lawyer, albeit a suspended lawyer, subject to and held to know the rules and regulations governing his professional conduct. See Rule 3-4.1, Rules of Discipline. Respondent must be charged to know the difference between being a lawyer and being a non-lawyer.

Respondent argues that counsel for SSA was unable to cite controlling authority for his opinion that a suspended lawyer could not practice before the SSA and that this could have contributed to Respondent's mistaken belief regarding practice before SSA (R's answer brief, p. 9). The fact is that Respondent took no steps to ascertain whether he could practice before the SSA. He did not look at the regulations governing the SSA and he contacted no one at the SSA regarding his practice (T-47-48). For had he contacted the SSA, he would not have been able to engage in the acts and sign up the new clients, for which he was to be paid, in violation of this Court's order. The SSA regulations clearly prohibit practice before them by any attorney or lay person who is prohibited by law from acting as a representative (TFB Comp. 1, ROR, p. 12). In the reinstatement proceedings, the Referee recognized 20 C.F.R. Section 404.1705(a), which provides the framework for the practice of attorneys before the SSA. 20 C.F.R. Section 404.1705(a) states:

> (a) Attorney. You may appoint as your representative in dealings with us, any attorney, in good standing, who
> (1) Has the right to practice law before a court of a State,

Territory, District or island possession of the United States, or before the Supreme Court or a lower federal court of the United States;

(2) Is not disqualified or suspended from acting as a representative in dealings with us; and

(3) Is not prohibited by a law from acting as a representative.

(TFB Comp. 1, ROR, p. 12 (Emphasis in original)). Respondent just ignored the SSA regulations, which clearly would have applied to him, and now tries to use his ignorance as justification and mitigation for his substantial misconduct. Respondent takes no responsibility for his actions.

Respondent relies on the Referee's finding that there was no evidence of any client's position being prejudiced as a result of the Respondent's conduct (R's answer brief, p. 9). In the statement of facts set forth by the Florida Bar in its initial brief and accepted by the Respondent, there is evidence of prejudice to the clients as a result of the Respondent's actions. One client was misled regarding the need to obtain a new attorney when it would have been in his best interests to get another lawyer (TFB Comp. 1, ROR, p. 14). One client's matter stood to be dismissed because of Respondent's actions (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Case 4). One client believed he was represented by an attorney at a final hearing and "felt betrayed" to find out that Mr. McAtee was not a member in good standing (TFB Comp. 1, ROR, p. 9). Respondent's clients matters (potential disability benefits) were delayed because Respondent was suspended and not prepared (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Cases 4 and 5; TFB Comp. 5, p. 20). Respondent had no regard for his clients' best interests.

The Referee erred in finding that the Respondent mistakenly believed he could practice before the SSA as a lay representative because in every instance of his practice, Respondent held himself out as an attorney. Respondent's self-serving statements made only in this contempt proceeding, and not when the misconduct was originally discovered before the Referee in the reinstatement proceedings, is the only indication in the record that Respondent thought he could act as a lay representative. The Referee's finding that Respondent's practice before the SSA was under a mistaken belief he could appear as a non-lawyer is not supported by competent and substantial evidence in the record and should not be considered as a mitigating

factor in this contempt proceeding.

ISSUE III

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

Respondent suggests as mitigating factors that support a 2 year suspension as the appropriate discipline the following: a) Respondent's practice before SSA was under a mistaken belief that he could appear as a lay representative; b) Respondent mistakenly thought his 91 day suspension would be served in approximately 91 days; c) Respondent appeared in no Florida state courts; d) Respondent was not paid for his services, and e) none of Respondent's clients were prejudiced by Respondent's actions.

Respondent argues that there was no intentional violation of this Court's order because of Respondent's mistaken belief he could practice before the SSA while suspended (R's answer brief, pp. 12-13). Respondent seems to disregard the Referee's finding that Respondent was in "willful contempt of court." (ROR, p. 8 (emphasis added)). A willful violation is indeed an intentional violation.

Respondent argues that "much of his contemptuous conduct was predicated upon his belief that a 91 day suspension was one that would only last three months or so" (R's answer brief, p. 8). How is it, then, that most of Respondent's continued practice of law occurred after Respondent filed his petition for reinstatement in November 1992 and while Respondent's petition for reinstatement was pending. Most of the conduct which is the subject of this contempt action occurred in January through July, 1993. By January 1993, Respondent knew that The Florida Bar had moved to dismiss his petition for reinstatement. Respondent was well aware of the pending reinstatement proceedings and the fact that a final hearing was to be held in June 1993. Without a shadow of a doubt, Respondent knew he was not eligible to practice law in this state because he

was suspended, yet he did so anyway. Now that Respondent has been caught violating this Court's order, he is trying to mitigate his misconduct by claiming that he did not know that he would not be immediately reinstated upon expiration of the 91 day suspension.

Respondent is charged with knowledge of the Rules Regulating The Florida Bar. Rule 3-4.1. He can not claim as a valid defense that he did not know the rules which govern his right to practice law in this state. In a greater sense, as an attorney, Respondent is charged with knowing the law. If a lawyer is not sure of the law, he has a duty to determine what the law is before he acts in derogation thereof. Respondent's willing ignorance should not be permitted as a defense to his willful contempt of court. Respondent cannot turn a blind eye and then seek protection when he is caught. His willingness to turn a blind eye to the status of the law, especially when it concerns his license to practice law, is, in and of itself, telling of Respondent's lack of sound judgment.

That there is no proof that Respondent appeared at a hearing before any Florida state court should not be considered a mitigating factor in this court. Respondent was practicing before a tribunal which, like a state court, required him to be admitted to the practice of law in this state (because he is not admitted in any other state). The SSA has regulations in place which prevent a suspended lawyer from practicing before it (TFB Comp. 1, ROR, p. 12). Respondent hid his status from the SSA so that he could practice before it.

Respondent also failed to withdraw from any of his pending state circuit court cases which left him responsible to those courts and clients (TFB Comp. 1, ROR, pp. 9, 13-14). The Respondent advised his clients that he would be working on their cases in his office and if a court appearance was necessary, he would have an attorney on stand-by to appear in court (TFB Comp. 3, Exh. 9). Respondent's letter to his clients at the beginning of the suspension shows that he intended from the beginning to violate the very spirit of this Court's order. And as the Referee noted in the reinstatement, it is doubtful that the misconduct proven herein is all of the misconduct in which Mr. McAtee has engaged (TFB Comp. 1, ROR, pp. 23-24).

Respondent cites as a mitigating factor that he was not paid for his representation of these clients. But for the Bar's intervention and detection of the Respondent's contemptuous activity, the Respondent would have received substantial sums of money as a result of his misconduct. Respondent was to be paid automatically up to $4000 for his representation of the client (who thought he had an attorney) that the Respondent represented at the final hearing on March 4, 1993 (TFB Comp. 3, Exh. 18, Case 2). Respondent signed fee agreements with his new clients so that he could be paid (ROR, p. 6; TFB Comp. 1, ROR, p. 11; TFB Comp. 3, Exh. 18, Cases 14 and 15). Further, this Court said in The Florida Bar v. Greene , 589 So. 2d 281 (Fla. 1991) that the lack of receipt of fees was irrelevant to the Court's consideration of these matters. The Respondent can not use as a shield that fact that he was not paid when it was his intent to be paid for his work. After all, Respondent says he engaged in this practice while suspended because he had his back up against the wall since his expenses were continuing to rise (TFB Comp. 5, p. 30). Respondent's motive in accepting new clients was not altruistic; he was trying to make money. The Bar would point out that many lawyers do pro bono work for which they are still expected to maintain the highest of ethical standards and for which they are expected to provide competent legal counsel. So the lack of payment of fees to Respondent for legal work performed while suspended should be irrelevant to the Court's consideration of appropriate discipline.

Respondent argues that there is no evidence that any clients were injured as a result of Respondent's inaction. Yet Respondent overlooks the injury outlined in the statement of facts in The Florida Bar's initial brief which he accepted as true. One client's case stood to be dismissed and benefits denied because of the Respondent's actions (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Case 4); one client was misled into thinking he did not need another lawyer when it would have been in the client's best interests to get another lawyer (TFB Comp. 1, ROR, p. 14); clients' cases were delayed because Mr. McAtee was suspended and not prepared (TFB Comp. 1, ROR, p. 10; TFB Comp. 3, Exh. 18, Cases 4 and 5; TFB Comp. 5, p. 20); and at least one client felt betrayed by Mr. McAtee's actions (TFB Comp. 1, ROR, p. 9). These people believed they had

hired an attorney who could assist them.

Respondent has asserted that any injury to the legal system is nebulous (R's answer brief, p. 13). Respondent's conduct has brought disrepute to the profession for the client's effected by his conduct. He has flagrantly and repeatedly violated an order of this Court, yet his responsibility as an attorney is to uphold and promote compliance with orders of the judiciary. Respondent, an officer of the court, has made misrepresentations, under oath, to this Court.

The Florida Bar has not ignored the case law wherein attorneys have been subjected to additional suspensions because of their misconduct while suspended. The Florida Bar firmly believes that Respondent's egregious misconduct far outweighs the misconduct noted in any of those cases; therefore, the only conceivable discipline in Mr. McAtee's case is disbarment.
The Respondent, citing the Report of the Referee, relies on several cases in arguing that disbarment is inappropriate. In The Florida Bar v. Stark, 616 So. 2d 41 (Fla. 1993), the attorney was suspended for three years nunc pro tunc to the date of his temporary suspension, for theft of trust funds and trust accounting violations and for practicing law past the date of his temporary suspension (for trust fund violations). Mr. Stark had improperly used $7000 of a client's funds for his own purposes for which he was temporarily suspended. Subsequent to his suspension, the respondent continued to practice law by continuing to maintain his office signs, continuing to display his business cards, practiced law on two occasions in one case by filing motions and arguing on behalf of a client, failed to advise the circuit court that he was suspended; failed to timely notify his clients of his suspension in writing and failed to provide the requisite affidavit to The Florida Bar. It is apparent from the Court's opinion in this case that the respondent was suspended for three years primarily based upon his theft of trust funds; not upon his practice of law while suspended. The respondent's practice of law past the date of his temporary suspension was de minimis when compared with James McAtee's practice while suspended for 91 days. Further, there were substantial mitigating factors in Stark that are not present here. The respondent was found to be suffering from personal and emotional problems related to caring for

his mother, made full disclosure to the disciplinary board, made full restitution to the clients, was remorseful, had no prior disciplinary history (in an almost 40 year career), and had good character or reputation as testified to by 11 attorneys, 6 circuit court judges, 3 district court of appeal judges, one federal judge, and two other judges. With that, this Court found evidence that Mr. Stark could be rehabilitated. There is no evidence in this record that the Respondent can be rehabilitated. In fact, Mr. McAtee's misrepresentations to the Referee when confronted indicate an inability for rehabilitation. Respondent's willing ignorance of the law in a matter as important as his license to practice is evidence that he can not be rehabilitated. There was no full disclosure by Mr. McAtee; in fact, as the Referee noted, it is doubtful that we know the full extent of Mr. McAtee's misconduct.

In The Florida Bar v. Neckman, 616 So. 2d 31 (Fla. 1993), the resigned attorney was found to have represented himself to be an attorney in one matter. This Court publicly reprimanded him and placed him on probation for the duration of his mandatory resignation. In mitigation, there was no injury caused by the respondent; the respondent was not motivated by financial gain, but a desire to help friends; the violations were unrelated to the respondent's past misconduct; and the respondent's rehabilitation and treatment (under the direction of F.L.A.) were progressing rapidly.

Mr. McAtee's case is far more egregious than that in Neckman. Respondent engaged in his misconduct solely for the purposes of his financial gain. There is evidence of injury contained in this case- clients were misled and betrayed, one client's case stood to be dismissed, clients cases were continued solely because the Respondent was suspended (TFB Comp. 1, ROR, p. 9, 10, 14). Respondent's conduct continued over an extended period of time while he was suspended and trying to gain reinstatement.

The attorney in The Florida Bar v. Weil, 575 So. 2d 202 (Fla. 1991) was suspended for six months for practicing law while suspended for non-payment of dues. The suspension was to begin following the attorney's reinstatement to active membership. A suspension for non-payment

of dues is not a disciplinary suspension, as was Mr. McAtee's suspension. Mr. Weil's unauthorized practice of law was minimal when compared with Mr. McAtee's.

Finally, the Respondent argues that The Florida Bar v. Golden, 563 So. 2d 81 (Fla. 1990) should be considered in deciding that disbarment is an inappropriate sanction in this case. Mr. Golden was found to have counselled and assisted one client in requesting two continuances. The respondent prepared the documents which the client signed pro se. The respondent then appeared in the courtroom with his client and was ordered by the presiding judge to leave the room. This Court said, "Had Golden's practice been more direct or more substantial, we would agree with the bar [that disbarment is the appropriate discipline]. Id at 82 (emphasis added). This Court said that Mr. Golden's practice of law was minimal. The respondent also failed to provide a copy of the order of suspension to his clients. The respondent's past disciplinary history included a public reprimand, a 10 day suspension and a 90 day suspension. This Referee noted that the two year suspension he recommended is twice as long as the suspension imposed in Golden (ROR, p. 9). Mr. McAtee's conduct is more than twice as egregious as Mr. Golden's misconduct. Respondent had contact with at least 9 clients, six of whom were new clients. Respondent himself prepared and filed documents, including requests for continuance, all the while holding himself out as an attorney. None of the cases cited by the Respondent or relied upon by the Referee indicate a practice of law while suspended as pervasive as the Respondent's actions.

In The Florida Bar v. Jones, 571 So. 2d 426 (Fla. 1990), the attorney did not participate in the proceedings and therefore agreed with The Florida Bar's position, however, this Court relied on the facts of the case in makings its decision as to appropriate discipline. The Respondent herein has agreed with the facts of this case as cited by The Florida Bar in its Initial Brief, pp. 2-9. (R's answer brief, p. 1).The facts in Jones showed only seven instances of the practice of law, three of which were appearances in a tribunal and the others included continuing to use letterhead and continuing to have his office sign posted, inter alia. Respondent tries to distinguish the misrepresentations to this Court in Jones from the misrepresentations to this Court, through its Referee, in this case. In neither case are misrepresentations, under any circumstances, acceptable for a member of this profession. But, comparing the Respondent's misrepresentations with those

of Mr. Jones, indicates that Mr. Jones lied to this Court about notifying his clients of the suspension and that The Florida Bar had refused to help him wind down his practice, while the Respondent herein lies, under oath, about his continuing active practice of law in violation of this Court's orders. Mr. Jones, prior to his 91 day suspension, had never before been disciplined by this Court, yet he was disbarred for his activity. Mr. McAtee has three times before been disciplined by this Court; his conduct demands disbarment.

Respondent's contempt for this Court's order of suspension is so profound that his conduct while suspended exceeds the conduct complained of in Jones , The Florida Bar v. Bauman, 558 So. 2d 994 (Fla. 1990), and Greene , supra, all of whom were disbarred.

Contrary to Respondent's argument, The Florida Bar has considered the second purpose of discipline as outlined in The Florida Bar v. Pahules, 233 So. 2d 130, 132 (Fla. 1970). According to Pahules, the discipline must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. The sanction of disbarment fairly treats the Respondent for his misconduct herein. Respondent was serving a 91 day suspension wherein he was supposed to be rehabilitating himself when he continued to engage in the practice of law and then he lied about it. The Florida Bar suggests that reformation and rehabilitation is not possible for the Respondent who cannot appropriately conduct himself at a time when he is subject to strict scrutiny.

The Referee cited The Florida Bar v. Hirsch, 342 So. 2d 970 (Fla. 1977) in concluding that the record before him did not establish that the Respondent was unworthy of practicing law in this state (ROR, p. 12). The record in Hirsch indicates that the attorney had used client's funds which were later replaced. In the course of the bar proceedings, Mr. Hirsch "candidly admitted" his wrongdoing and admitted the request for admissions made by the Bar. Id at 971. He then offered mitigating circumstances which included marital difficulties which led to divorce, good reputation in the community, and a lack of a prior disciplinary history in approximately 25 years of practice. This Court, in declining to disbar Mr. Hirsch, relied upon Henry Drinker's "Legal Ethics" which said,

'Ordinarily, the occasion for disbarment should be the demonstration, by a

> continued course of conduct, of an attitude wholly inconsistent with the recognition of proper professional standards.....Similarly, such extreme measures should be invoked only in case of fairly recent offenses, proof in refutation of which would be reasonably available to respondent, except, of course, in cases where he was shown to have actively concealed them. Just as a lawyer who has been habitually dishonest will almost certainly revert to his low professional standards when necessity, temptation and occasion recur, so one who has been consistently straight and upright can properly be trusted not to repeat an isolated offense unless of such a nature as of itself to demonstrate a basically depraved character.'

Id at 972 (quoting from Henry S. Drinker, Legal Ethics, pp. 46-47 (1953)(emphasis added)).

The elements in Hirsch that made the attorney a candidate for rehabilitation have been shown to be directly inapplicable in Mr. McAtee's case. Mr. Hirsch was candid with the referee about his conduct and had never before been disciplined for misconduct. Mr. McAtee was anything but candid with this Referee regarding his misconduct. Unlike the record in Hirsch, there is no evidence in this record that the Respondent enjoys a good reputation among his peers. Further, the Respondent's actions of practicing law while suspended and then covering it up when he is caught compounded by Respondent's three prior disciplinary sanctions since 1990 show a course of misconduct wholly inconsistent with one capable of rehabilitation.

CONCLUSION

Respondent's misconduct requires that he be disbarred from the practice of law. The record in this case clearly establishes that Respondent should not be permitted to remain a member of this profession since he has demonstrated his inability to abide by this Court's orders which is aggravated by his inability to be honest and forthcoming when he is finally caught. This Respondent's misconduct is far worse than that of any other lawyer whose case has been cited herein. Respondent clearly and openly and repeatedly held himself out to be a lawyer, then when The Florida Bar found out about it, he tried to cover up his wrongdoing by claiming his ignorance of the law. The Respondent can not hide behind his flagrant disregard for the law now that he has been caught. The record is clear that Respondent can not be rehabilitated; he can not even take responsibility for his actions herein. To allow Mr. McAtee to continue as a member of the bar

would serve an injustice on the public whom he is supposed to serve.

The Florida Bar suggests that this Court enter an order disbarring James R. McAtee from the practice of law without leave to reapply for five 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 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, FL 32308-6825 on this 17th day of April, 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