IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLES BEHM,

Respondent.
_____/

Case No. SC07-661
[TFB Nos. 2005-30,980(07B); 2006-30,684(07B)]

THE FLORIDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, The Florida Bar shall be referred to as "The Florida Bar" or "the Bar."

The transcript of the hearing concerning held on February 24, 2009, shall be referred to as "TI" followed by the cited page number(s). (TI-__)

The transcript of the hearing held on March 4, 2009, shall be referred to as "TII" followed by the cited page number(s). (TII-__)

The Report of Referee dated March 9, 2009, shall be referred to as "ROR" followed by the referenced Appendix page number(s). (ROR-A_)

The Bar's exhibits will be referred to as "B-Ex." followed by the exhibit number. (B-Ex.__)

The Respondent's Initial Brief shall be referred to as "I.B." followed by the cited page number. (I.B. p.__)

STATEMENT OF THE CASE AND FACTS

On April 11, 2007, The Florida Bar filed a two-count complaint against respondent, which was subsequently assigned Supreme Court Case No. SC07-661. The Honorable Tyrie William Boyer was appointed as referee on April 23, 2007. On September 18, 2007, the referee held a hearing as to Count I [TFB Case No. 2005-30,980(07B)] of The Florida Bar's Complaint. The referee found respondent guilty but withheld recommending a sanction until the conclusion of the hearing on Count II. On October 15, 2007, the parties appeared for the scheduled hearing as to Count II [TFB Case No. 2006-30,684(07B)] of The Florida Bar's Complaint. In lieu of a hearing, the parties stipulated to findings of fact and agreed to a consent judgment for a 90-day suspension as to both counts.

The referee entered his report of referee on November 26, 2007, accepting the parties' consent judgment for a 90-day suspension. On Count I, the referee found respondent guilty of violating 8 separate Rules related to the maintenance of his trust account. On Count II, pursuant to the consent judgment, the referee found respondent guilty of violating the following Rules Regulating The Florida Bar: 3-4.3 for committing any act that is unlawful or contrary to honesty and justice; and, 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

On or about January 25, 2008, respondent filed his initial Petition for Review, specifically challenging the Bar's audit costs. Respondent filed his Amended Initial Brief on or about May 5, 2008. Respondent's Initial Brief challenged the appropriateness of the Bar's audit costs as well as the validity of the consent judgment related to Count II of the Bar's Complaint. On or about May 23, 2008, the Bar filed its Answer Brief.

On October 30, 2008, this Court remanded the case back to the referee. The Court rejected respondent's argument that the referee lacked jurisdiction to adjudicate the allegations in Count II and further rejected the argument that the referee abused his discretion in awarding costs. This Court further disapproved the Report of the Referee Accepting Consent Judgment for a 90-Day Suspension on the grounds that the recommended sanction of 90 days was too lenient for the admitted conduct and ordered the referee make factual findings and recommendations of guilt as to Count II and a recommendation of sanction based on both Counts I and II.

On February 24, 2009, pursuant to the Order of the Supreme Court of Florida dated October 30, 2008, the parties appeared for a scheduled hearing/trial as to Count II for the referee to make factual findings and recommendations of guilt as to Count II and a recommendation of sanctions based on both Counts I and

II. The referee entered his report on March 9, 2009, finding respondent guilty of the misconduct alleged in Count II and recommending a 90-day suspension for Count I and a consecutive 91-day suspension for Count II.

On or about May 7, 2009, respondent filed his Petition for Review, challenging the referee's finding of guilt in Count II. After receiving an extension of time, respondent filed his Initial Brief on or about June 23, 2009.

As to Count II, the Bar adopts the referee's findings of fact as set forth in his report dated March 9, 2009. The following factual summary of Count II is taken from the report of referee contained in the appendix herein and as otherwise noted:

In an Order dated November 9, 2005, in Behm v. The Estates of Calvin E. Hutson and Connie M. Hutson, Kelli Norwood and Diann Elizabeth Norwood, Case No. 05-CVS-721, the Honorable Wm. Erwin Spainhour found that respondent stated "that he had been gainfully employed and earned taxable income during the period from 1998 through 2004 and that he had (1) not filed any tax returns with any state or federal agency and (2) not paid any income taxes to any state or federal agency during that period" (B-Ex.22; TI-7).

From 1999 through 2006, respondent received compensation of $400 or more per year in legal tender or in kind for his legal services (TI-6). Respondent did not file either personal or business 1040 federal income tax returns from 1999

through 2006 (TI-7). Respondent believes the federal tax system is mandatory for some people but not for others, and respondent argues that he has a good faith belief that he is not obligated to file federal tax returns or pay taxes (TI-79, 88-89).

SUMMARY OF THE ARGUMENT

The record in this matter contains substantial, competent evidence that clearly and convincingly supports the referee's findings of facts and recommendations of guilt. Respondent freely admits that he does not agree with the federal laws of taxation, or the expert testimony of Clark Pearson, CPA that confirmed respondent's obligation to file and pay taxes. The referee was in the best position to review the evidence and assess the credibility of the witnesses. Therefore, consistent with its prior holdings, this Court should not reweigh the evidence or substitute its judgment for that of the referee, but should approve the referee's findings of fact and recommendations of guilt. Furthermore, this Court should not condone respondent's blatant violation of the law.

In addition, the referee's conclusions and recommendations as to discipline are supported by the facts, the record, and existing case law. Consecutive suspensions of 90 days and 91 days, as recommended by the referee, would sufficiently address respondent's serious misconduct. A suspension of at least 91 days would also ensure that respondent cannot obtain reinstatement to The Florida Bar without proof of rehabilitation.

ARGUMENT

POINT I

THE REFEREE'S RECOMMENDATIONS AS TO FACTS AND FINDINGS OF GUILT IN COUNT II ARE WELL SUPPORTED BY RESPONDENT'S ADMISSIONS AND THE COMPETENT RECORD EVIDENCE.

Respondent's burden on review is to demonstrate that there is no evidence in the record to support the referee's findings or that the record evidence clearly contradicts the conclusions. The Florida Bar v. Vining, 721 So.2d 1164, 1167 (Fla. 1998). The findings of fact are not in dispute here, since respondent stipulated to facts regarding his failure to pay federal income taxes from 1999 through 2006, either personal or business (ROR-A5). Respondent's main argument is that he is not required to file or pay federal income taxes; however, this argument was entirely rejected by the referee (TII-9).

Based wholly on his admissions, it does not appear that respondent can succeed with this appeal. After previously considering the same facts regarding respondent's failure to file income tax returns, in its order dated October 30, 2008, this Court rejected respondent's consent judgment for a 90-day suspension, stating as follows:

> [T]he Court disapproves the Report of the Referee Accepting Consent Judgment for a 90-Day Suspension, on the grounds that **the recommended sanction of ninety days is too lenient for the**

> **admitted conduct** and remands this cause to the referee for further proceedings. (Emphasis added).

This Court has already acknowledged that respondent's admissions regarding his failure to file and pay income taxes constitute ethical misconduct warranting greater than a 90-day suspension.

Furthermore, the standard of proof in a Bar disciplinary proceeding is clear and convincing evidence. The Florida Bar v. Niles, 644 So.2d 504, 506 (Fla. 1994), citing The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). The Bar has met its burden of proof by clear and convincing evidence, while the respondent has failed to meet his burden of establishing that the record is wholly lacking in evidentiary support for the referee's findings. The Court has consistently held that where a referee's findings are supported by competent substantial evidence, it is precluded from reweighing the evidence and substituting its judgment for that of the referee. Vining 721 So.2d at 1167, quoting The Florida Bar v. MacMillan, 600 So.2d 457, 459 (Fla. 1992). The referee was in the best position to assess credibility and to determine guilt, and his findings and recommendations are clearly supported by the record.

In his Initial Brief, respondent argues that the referee erred in giving probative weight to the ruling of North Carolina Circuit Judge, Wm. Erwin Spainhour. Judge Spainhour's ruling stated "that [respondent] had been gainfully

employed and earned taxable income during the period from 1998 through 2004 and that he had (1) not filed any tax returns with any state or federal agency and (2) not paid any income taxes to any state or federal agency during that period" (B-Ex. 22). Contrary to respondent's assertion, in The Florida Bar v. Tobkin, 944 So.2d 219 (Fla. 2006), the Court held that the referee properly considered and relied on another court's decision, stating as follows:

> Because Bar disciplinary proceedings are quasi-judicial rather than civil or criminal, the referee is not bound by the technical rules of evidence. Consequently, a referee has wide latitude to admit or exclude evidence, and may consider any relevant evidence, including hearsay and the trial transcript or judgment in a civil proceeding. Id. at 224.

Like the referee in Tobkin, the referee in this matter properly considered another court's ruling as an element of the evidence against respondent.

To reinforce his guilty finding, the referee also had the benefit of the expert testimony of Clark Pearson, a Certified Public Accountant with over 35 years of experience (ROR-A5; TI-27-32). In concluding that respondent was required to file tax returns for the years 1999 through 2006, Mr. Pearson reviewed many documents, including respondent's bank statements, two letters respondent sent to the IRS, the Bar's exhibits, relevant case law, transcripts from respondent's civil trial in North Carolina, documentation from the IRS, and the U.S. Master Tax Guide (TI-33). Mr. Pearson testified that respondent was required to file tax

returns because respondent had income from his law practice greater than the minimum filing requirement for each of the relevant years, 1999 through 2006 (TI-40). Mr. Pearson further testified that the total deposits into respondent's office account totaled $426,926.28 during the time period of July 14, 2004 through July 31, 2007 (TI-43). In response to Mr. Pearson's conclusions, respondent merely misconstrued and distorted case law to support his argument that he is not required to file income tax returns (TI-110, 114-118). The referee was not convinced by respondent's arguments and ultimately informed respondent that it was unlawful for him not to file income tax returns and that it was unlawful for him not to pay income taxes (TII-9).

In his Initial Brief, respondent again presents extensive excuses and arguments for his failure to file tax returns and pay taxes. Respondent has stated that he does not believe that the federal tax system is mandatory for all persons (TI-79, 88-89; ROR-A5). As a practicing attorney, respondent should know that his arguments are baseless and contrary to established law. In United States v. Gerards, 999 F.2d 1255, 1256 (8th Cir. 1993), the court held that "[a]ny assertion that the payment of income taxes is voluntary is without merit." In United States v. Bressler, 772 F.2d 287, 291 (7th Cir. 1985), the court upheld Bressler's conviction for tax evasion, noting "[h]e has refused to file income tax returns and

pay the amounts due not because he misunderstands the law, but because he disagrees with it…[O]ne who refuses to file income tax returns and pay the tax owing is subject to prosecution, even though the tax protestor believes the laws requiring the filing of income tax returns and the payment of income tax are unconstitutional."

In his Initial Brief, respondent also argues that "the federal government has no authority to tax the income from a state issued license to practice law" (I.B. p. 13). Respondent implies that attorneys licensed by the State of Florida are not obligated to pay taxes. This belief is flawed and perilous. Although respondent has not been criminally charged with tax evasion, he is clearly violating the law. Furthermore, this Court has already rejected respondent's tax protestor arguments by way of its October 30, 2008 order.

This is respondent's second appeal of the same matter, and he has twice failed to acknowledge any wrongdoing. Although respondent refuses to acknowledge that his conduct is unlawful and dishonest, the referee properly found respondent guilty of violating the following Rules Regulating The Florida Bar: 3-4.3 for committing any act that is unlawful or contrary to honesty and justice; and, 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation.

As set forth above and in detail in the report of referee, the record contains substantial, competent evidence that clearly and convincingly supports the referee's findings of facts and recommendations of guilt. The referee was in the best position to review the evidence and assess the credibility of the witnesses who testified. Therefore, consistent with its prior holdings, this Court should not reweigh the evidence or substitute its judgment for that of the referee, but should approve the referee's findings of fact and recommendations of guilt.

POINT II

THE REFEREE'S RECOMMENDED DISCIPLINES OF A 90-DAY SUSPENSION FOR COUNT I, AND A 91-DAY SUSPENSION FOR COUNT II, ARE APPROPRIATE GIVEN THE REFEREE'S FINDINGS OF FACT, CASE LAW, AND STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The Bar submits that based on the available case law and the Florida Standards for Imposing Lawyer Sanctions, the referee's recommended disciplines of a 90-day suspension for Count I, and a consecutive 91-day suspension for Count II, are appropriate. The referee made his disciplinary recommendations after considering the evidence, relevant case law, and aggravating and mitigating factors. As a general rule, the Court will not second-guess a referee's recommendation of discipline as long as the discipline is authorized under the Florida Standards for Imposing Lawyer Sanctions and has a reasonable basis in

existing case law. The Florida Bar v. Spear, 887 So.2d 1242, 1246 (Fla. 2004).

In Count I, the referee found respondent guilty of several trust account violations. The trust account violations were technical in nature, and there was no evidence that respondent misappropriated client funds (ROR-A3). For this misconduct, the referee recommended that respondent receive a 90-day suspension from the practice of law with automatic reinstatement.

In The Florida Bar v. Davis, 577 So.2d 1314 (Fla. 1991), an attorney received a 90-day suspension and a two year period of probation for failing to have a trust account ledger, or other records other than receipts, while receiving and handling trust funds. In recommending a 90-day suspension for respondent's similar misconduct, the referee here also considered The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986). In Neely, an attorney was suspended for 60 days and placed on a two year period of probation for accounting errors in his trust account and for failing to properly supervise the account, when the misconduct was not intentional but the result of gross negligence. The referee in Neely also found no proof of dishonesty and determined that there was no client harm.

In Count II, the referee recommended the sanction of a 91-day suspension followed by a two year period of probation for respondent's unethical conduct related to his failure to file and pay federal income taxes. Pursuant to this Court's

order dated October 30, 2008, the referee considered The Florida Bar v. Cimbler, Case Nos. SC04-2050 and SC05-948 (Fla. 2008), prior to making his disciplinary recommendation. In Cimbler, the attorney was suspended for two years followed by three years probation for failure to timely file income tax returns and failure to timely pay income taxes. However, it appears that unlike respondent, Mr. Cimbler was involved in a deliberate criminal enterprise with one or more of his clients. Accordingly, the referee found that respondent's misconduct, for sanctioning purposes, was more similar to the misconduct detailed in The Florida Bar v. Pearce, 631 So.2d 1092 (Fla. 1994) and The Florida Bar v. Blankner, 457 So.2d 476 (Fla. 1984).

In Pearce, 631 So.2d 1092 (Fla. 1994), an attorney was suspended for 45 days for failing to file federal tax returns for two years. Pearce pled guilty in federal court to misdemeanor charges of failure to file income tax returns. In recommending a suspension, the Court noted that "[k]nowledge of the law is part and parcel of an attorney's job" and that "[f]iling an annual tax return is an ingrained part of American life." The Court does not take this type of misconduct lightly, and it has imposed both public reprimands and suspensions on attorneys who have failed to file federal income tax returns. Id. at 1093.

In Blankner, 457 So.2d 476 (Fla. 1984), an attorney was suspended for six

months for failing to timely file his personal tax returns. Blankner pled guilty in federal court to misdemeanor charges, and he was sentenced to probation and fined. During the bar disciplinary proceeding, the referee found that Blankner failed to timely file his personal income tax returns for the years 1970 through 1979. The Court held that a public reprimand would no longer be viewed as sufficient discipline for failure to file a tax return and that the cumulative nature of Blankner's conduct warranted a rehabilitative suspension.

The referee's disciplinary recommendations are also supported by the Florida Standards for Imposing Lawyer Sanctions, as outlined in the referee's report. As to Count I, suspension is appropriate pursuant to Standard 4.13 when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client. As to Count II, suspension is appropriate pursuant to Standard 7.2 when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

In mitigation, the referee considered absence of a dishonest motive (the referee believes that respondent is an honest person who has made some bad choices); personal or emotional problems (multiple members of respondent's family died in a traffic accident in which respondent was also involved); and,

physical or mental disability or impairment (respondent sustained multiple injuries from his traffic accident that occurred at the end of 2001). See Fla. Stds. Imposing Law. Sancs. 9.32(b), 9.32(c), and 9.32(h), respectively.

In aggravation, the referee considered respondent's prior disciplinary offense (public reprimand by court order dated July 17, 2007, for engaging in conduct in connection with the practice of law that was prejudicial to the administration of justice); respondent's refusal to acknowledge wrongful nature of conduct (respondent maintains that the current form of federal taxation in the United States is unconstitutional despite established law to the contrary); and, substantial experience in the practice of law (respondent was admitted to The Florida Bar in 1999). See Fla. Stds. Imposing Law. Sancs. 9.22(a), 9.22(g), and 9.22(i), respectively.

A judgment must be fair to society, fair to the respondent, and severe enough to deter others who may be tempted to become involved in like violations. Spear 887 So.2d at 1246, citing The Florida Bar v. Lord, 433 So.2d. 983, 986 (Fla. 1983). Respondent's misconduct in this matter should not be taken lightly, especially the egregious conduct detailed in Count II. A suspension of at least 91 days would sufficiently address respondent's misconduct and act as an effective deterrent.

CONCLUSION

In this matter, respondent explicitly and voluntarily stipulated to facts concerning his personal belief that the tax system is not mandatory for him and acknowledged his failure to file federal tax returns and to pay federal income taxes. Respondent should not be allowed to maintain his right to practice law when he is deliberately violating the law. A 91-day suspension will ensure that respondent cannot obtain reinstatement to the Bar without a willingness to comply with the law and to demonstrate rehabilitation.

WHEREFORE, The Florida Bar prays this Honorable Court will affirm the referee's recommendations and tax costs now totaling $20,758.48 against respondent with interest accruing at the legal rate 30 days after this Court's order becomes final.

Respectfully submitted,

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Frances R. Brown-Lewis
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief have been sent by First Class Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by electronic filing to the Clerk of the Court; a copy of the foregoing has been furnished by First Class Mail to Charles Behm, Respondent, Post Office Box 10, Pomona Park, Florida 32181; and a copy of the foregoing has been furnished by First Class Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _____ day of July, 2009.

Respectfully submitted,

_____
Frances R. Brown-Lewis
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Answer Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

_____

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APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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