

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC07-661

[TFB Nos. 2005-30,980(07B);

v.

2006-30,684(07B)]

CHARLES BEHM,

Respondent.

**REVISED REPORT OF REFEREE PURSUANT TO ORDER OF
SUPREME COURT DATED OCTOBER 30, 2008**

- I. Summary of Proceedings: The undersigned was appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits, all of which were forwarded to The Supreme Court of Florida with a Report of Referee dated November 26, 2007, constitute the record in this case.

On September 18, 2007, a hearing was held as to Count I [TFB Case No. 2005-30,980(07B)] of The Florida Bar's Complaint. This referee found respondent guilty but withheld recommending a sanction until the conclusion of the hearing in 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 discipline.

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 following attorneys appeared as counsel for the parties:

For The Florida Bar - Frances R. Brown Lewis
Patricia Ann Toro Savitz

For The Respondent - *Pro se* (Count I)
Tommy K. Cryer (Count II)

II. Findings of Fact as to Each Item of Misconduct of which the Respondent Is Charged:

COUNT I
[TFB Case No. 2005-30,980(07B)]

After considering all the pleadings and evidence, pertinent portions of which are commented on below, this referee finds:

1. On August 24, 2004, the Seventh Judicial Circuit Grievance Committee "B" grievance committee issued a properly served Production Subpoena Duces Tecum on respondent.
2. The subpoena required respondent to produce any and all trust account records, including but not limited to: deposit slips, check books, canceled checks, check stubs, ledger cards, journals, closing statements, bank statements and reconciliations, monthly comparisons, fee agreements and documentary evidence supporting all trust disbursements from October 1, 2001 to April 30, 2003.
3. The Bar's Chief Auditor, Clark Pearson reviewed respondent's records for the audit period October 1, 2001 through April 30, 2003, to determine whether respondent's trust account was in substantial compliance with the Rules Regulating The Florida Bar. The Bar's Chief Auditor testified that respondent's trust records were not in substantial compliance with the trust rules.
4. There was a hurricane and a series of storms through the area where respondent's law office is located. In addition, the storms destroyed some of respondent's trust records. Respondent, however, had access to substantially the same records through his bank or banks. The

respondent failed to avail himself of those trust records available as he did not go to the bank or banks that kept records so that either he or The Florida Bar could recreate the required trust records.

5. Respondent failed to provide or recreate separate cash receipts and disbursements journals, bank reconciliations and monthly comparisons for the audit period.
6. A number of the client ledger cards provided by respondent failed to detail each deposit and disbursement, as well as the payee and check number for the checks and the reason for which all trust funds were received, disbursed, or transferred.
7. Respondent failed to provide duplicate bank deposit slips for his trust account for the audit period.
8. Respondent failed to properly identify the trust account as “trust account.” Respondent’s checks were labeled “Charles Behm, Attorney at Law, I.O.T.A.” The I.O.T.A. designation is insufficient to satisfy the requirement.
9. Respondent’s trust account was not in substantial compliance with the Rules Regulating The Florida Bar.
10. The trust account violations were technical in nature, and there was no evidence that respondent misappropriated client funds.
11. The hurricane and series of storms that went through the area where respondent’s law office was located created aggravating conditions for the respondent that made it difficult for respondent to keep or maintain the records required by the trust accounting rules.

COUNT II
[TFB Case No. 2006-30,684(07B)]

After considering all the pleadings and evidence, pertinent portions of which are commented on below, this referee finds:

12. Respondent was admitted to The Florida Bar in 1999. During 1999, respondent worked for the State Attorney's Office and received monetary compensation.
13. In or around 2000, respondent opened his law office. From that time to the present, respondent has run his law office as a sole proprietorship.
14. Respondent has never run his practice as a professional corporation nor a limited liability company. He has an occupational license.
15. From 2000 to present, respondent received compensation of \$400 or more per year in legal tender or in kind for his legal services.
16. On August 23, 2003, in a deposition in his personal injury case, respondent stated that the records prepared by his legal assistant indicated net earnings in his law practice of \$22,400 in 2000; \$37,000 in 2001; and \$9,700 in 2002.
17. In respondent's child support case, respondent, on October 17, 2005, admitted to having income since 1998, for the purposes of determining child support since 1998.
18. 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."
19. Respondent received \$15,000 in settlement funds in his personal injury case.
20. In these disciplinary proceedings, respondent testified that he divorced in 1992 and that he did not believe he had ever claimed his daughter on his "federal" tax returns.

21. In these disciplinary proceedings, respondent testified that he had not filed federal income tax returns for the past six years.
22. Respondent did not file either personal or business 1040 federal income tax returns from 1999 through 2006.
23. Respondent did not pay federal income taxes from 1999 through 2006, either personal or business.
24. In mitigation, respondent argued that he has a good faith belief that he is not obligated to file federal tax returns or pay taxes.
25. Although respondent has been personally compensated for his legal services, he believes that he has not received income as defined by the United States Supreme Court current definition for income.
26. Respondent believes the federal tax system is mandatory for some people but not for others.
27. Respondent maintains that the Bar expects him to testify against himself in a quasi-administrative arena (these disciplinary proceedings) about issues that can reasonably result in criminal prosecution.
28. This referee had the benefit of the testimony of Clark Pearson, an expert, whose testimony this referee finds credible and whose opinions this referee accepts.
29. Respondent has not been convicted nor charged with a crime, notwithstanding, his failure to pay federal income taxes or file federal income tax returns.

III. Recommendations as to Whether the Respondent Should Be Found Guilty: As to each count of the complaint this referee makes the following recommendations as to guilt or innocence:

COUNT I
[TFB Case No. 2005-30,980(07B)]

This referee finds respondent guilty of violating the following Rules Regulating The Florida Bar: 4-1.15 for failing to comply with The Florida Bar Rules Regulating Trust Accounts; 5-1.2(b)(1) for failing to maintain the minimum trust accounting records including a separate bank or savings and loan association account or accounts in the name of the lawyer or law firm and clearly labeled and designated as a “trust account;” 5-1.2(b)(2) for failing to maintain original or duplicate deposit slips; 5-1.2(b)(5) for failing to maintain a separate cash receipts and disbursements journal, including columns for receipts, disbursements, transfers, and the account balance; 5-1.2(b)(6) for failing to maintain a separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance; 5-1.2(c)(1)(a) for failing to follow the minimum trust accounting procedures including making monthly reconciliations of all trust bank or savings and loan association accounts, disclosing the balance per bank, deposits in transit, outstanding checks identified by date and check number, and any other items necessary to reconcile the balance per bank with the balance per the checkbook and the cash receipts and disbursements journal; 5-1.2(c)(1)(b) for failing to make monthly a comparison between the total of the reconciled balances of all trust accounts and the total of the trust ledger cards or pages, together with specific descriptions of any differences between the 2 totals and reasons therefore; and, 5-1.2(f) for failing to produce all records and papers concerning property and funds held in trust and to provide such explanations as may be required for the audit.

COUNT II
[TFB Case No. 2006-30,684(07B)]

This referee finds that the respondent’s failure to file either personal or business federal income tax returns from 1999 through 2006 is unlawful. Furthermore, this referee finds that the respondent’s failure to pay federal income taxes from 1999 through 2006, either personal or business, is unlawful. Although this referee finds that the respondent has not been charged with any crime relating to his failure to pay income taxes or to file income tax returns, the failure to do

so is nevertheless unlawful. Accordingly, this referee finds the respondent guilty of violating the following Rules Regulating The Florida Bar: 3-4.3 for the commission by a lawyer of 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.

This referee finds the respondent not guilty of violating rule 4-8.4(b) of the Rules Regulating The Florida Bar – committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects.

IV. Recommendation as to Disciplinary Measures to Be Applied:

This referee makes the following recommendations as to the disciplinary measures to be applied:

- A. As to Count I, a 90-day suspension from the practice of law with automatic reinstatement.
- B. As to Count II, a 91-day suspension from the practice of law requiring proof rehabilitation pursuant to Rules Regulating the Florida Bar to be followed by a two year period of probation. (This referee finds this case more similar to The Florida Bar v. Pearce, infra, and The Florida Bar v. Blanker, infra, than The Florida Bar v. Cimbler, infra.)
- C. The suspensions set forth in Counts I and II should run consecutively. Further said suspensions should not be concurrent, but rather consecutive, to the recommended suspension in The Florida Bar v. Behm, SC08-85.
- D. Payment of costs which currently total \$20,758.48.

V. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to R. Regulating Fla. Bar 3-7.6(m)(1)(D), this referee considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 48

Date admitted to bar: August 3, 1999

Prior disciplinary convictions and disciplinary measures imposed therein:

Respondent received a 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.

With regard to the Florida Standards for Imposing Lawyer Sanctions, this referee has considered the following:

4.1 Failure to Preserve the Client's Property

4.12 Suspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.

4.13 Public reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client.

7.0 Violations of Other Duties Owed as a Professional

7.2 Suspension is appropriate 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.

9.22 Aggravating Factors

(a) prior disciplinary offense;

(g) 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,

(i) substantial experience in the practice of law (respondent was admitted to The Florida Bar in 1999).

9.32 Mitigating Factors

(b) absence of a dishonest motive (this referee believes respondent is an honest person who has made some bad choices);

(c) personal or emotional problems (multiple members of respondent's family were killed in a traffic accident in which respondent was also involved); and,

(h) physical or mental disability or impairment (respondent sustained

multiple injuries from his traffic accident that occurred at the end of 2001).

This referee has also considered the case law, including:

1. In The Florida Bar v. Cimble, Case Nos. SC04-2050 and SC05-948 (Fla. 2008), 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 the respondent, sub judice, Mr. Cimble was involved in a deliberate criminal enterprise with one or more of his clients. (Accordingly, this referee finds that the case, sub judice, is for sanctioning purposes, more similar to The Florida Bar v. Pearce, 631 So. 2d 1092 (Fla. 1994) and The Florida Bar v. Blankner, 457 So. 2d 476 (Fla. 1984)).
2. In The Florida Bar v. 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.”
3. In The Florida Bar v. 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.
4. 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.
5. In The Florida Bar v. Neely, 488 So.2d 535 (Fla. 1986), 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 found no proof of dishonesty and determined that there was no client harm. The attorney had a prior disciplinary history, which included a 90-day suspension for self-dealing and misrepresentation and a public reprimand for neglect.

VI. Statement of costs and manner in which costs should be taxed: This referee finds the following costs were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
	1. Bar Counsel Travel Costs	\$ 219.58
B.	Referee Level Costs	
	1. Court Reporter Costs	\$ 976.75
	2. Transcript Costs	\$ 1,263.28
	3. Bar Counsel Travel Costs	\$ 1,115.35
C.	Administrative Costs	\$ 1,250.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	\$ 684.57
	2. Witness Fees	\$ 5.00
	3. Copy Costs	\$ 280.95
	4. Audit Costs	<u>\$ 9,294.15</u>
	SUB-TOTAL ITEMIZED COSTS:	\$15,089.63
E.	Referee Level Costs:	
	1. Court Reporter Costs	\$ 185.00
	2. Transcript Costs	\$ 228.50
	3. Bar Counsel Travel Costs	\$ 464.73
	4. Expert Witness Fees	\$ 4,440.00
	5. Expert Witness Travel Costs	\$ 175.12
	6. Copy Costs	\$ 175.50
	SUB-TOTAL ITEMIZED COSTS	\$ 5,668.85

AFTER REMAND:
TOTAL ITEMIZED COSTS:

\$20,758.48

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar. It is further recommended that respondent shall be deemed delinquent and ineligible to practice law pursuant to R. Regulating Fla. Bar 1-3.6 for failure to timely pay the costs assessed in this proceeding.

Dated this _____ day of _____, 2009.

TYRIE WILLIAM BOYER
Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

Frances R. Brown-Lewis, Bar Counsel, 1200 Edgewater Drive, Orlando, Florida
32804-6314;

Charles Behm, Respondent, Post Office Box 10, Pomona Park, Florida 32181;

Tommy K. Cryer, Counsel for Respondent, 4348 Youree Drive, Shreveport, Louisiana
71105; and

Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street,
Tallahassee, Florida 32399-2300

this _____ day of _____, 2009.

Judicial Assistant/Deputy Clerk