IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

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

v.

CHARLES BEHM,

Respondent.
_____________________________/

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 Count I, held on September 18, 2007, shall be referred to as "TI" followed by the cited page number(s). (TI-__)

The transcript of the hearing concerning Count II and the consent judgment, held on October 15, 2007, shall be referred to as "TII" followed by the cited page number(s). (TII-__)

The Report of Referee Accepting Consent Judgment for a 90-Day Suspension dated November 26, 2007, shall be referred to as "ROR" followed by the referenced Appendix page number(s). (ROR-A_)

The referee's letter dated November 29, 2007, with attachments, shall be referred to as "RL" followed by the referenced Appendix page number(s). (RL-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 (ROR-A5-A6). 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 (ROR-A6). In his report, the referee approved

the Bar's costs totaling $15,089.63 which included audit costs in the amount of $9,294.15.

On or about January 25, 2008, Respondent filed his 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 challenges the appropriateness of the Bar's audit costs as well as the appropriateness of the consent judgment related to Count II of the Bar's Complaint.

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

On August 24, 2004, the Seventh Judicial Circuit Grievance Committee "B" issued a properly served Production Subpoena Duces Tecum on Respondent (B-Ex. 1 - Count I). 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 (B-Ex. 1 - Count I).

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 (TI-85; B-Ex. 11 - Count I). The Bar's auditor testified that Respondent's trust records were not in substantial compliance with the trust rules (TI-96).

Respondent failed to provide or recreate separate cash receipts and disbursements journals, bank reconciliations and monthly comparisons for the audit period (TI-89, 91-92; B-Ex. 11 - Count I). 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 (TI-89-90; B-Ex. 11 - Count I). Respondent failed to provide duplicate bank deposit slips for his trust account for the audit period (TI-93-94; B-Ex. 11 - Count I). 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 (TI-94-95; B-Ex. 11 - Count I).

The trust account violations were technical in nature, and there was no evidence that Respondent misappropriated client funds (T-121). There was a hurricane and a series of storms through the area where Respondent's law office is

located which destroyed some of Respondent's trust records (T-143-145). Respondent, however, had access to substantially the same records through his bank or banks (TI-91-92). Respondent failed to avail himself of those available records. 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 (TI-70-71).

As to Count II, the Bar adopts the facts as set forth in the parties' oral consent judgment. The following factual summary 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" (TII-40).

From 1999 to present, Respondent received compensation of $400 or more per year in legal tender or in kind for his legal services (TII-38). Respondent did not file either personal or business 1040 federal income tax returns from 1999 through 2006 (TII-38). 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 (TII-38-39).

SUMMARY OF THE ARGUMENT

As to Count I, The Florida Bar disputes Respondent's arguments that the Bar's audit costs are improper. The Bar's subpoena for trust records was valid and properly authorized; the auditor conducted a through audit, not an "inventory of records" as alleged by Respondent; there is no evidence in the record that the costs are excessive, unnecessary, or improperly authenticated; and Respondent has not shown that the referee abused his discretion in awarding the Bar audit costs. Respondent has failed to demonstrate why he should not be responsible for payment of the full amount of costs pertaining to this disciplinary proceeding.

As to Count II, Respondent stipulated to facts concerning his failure to file and pay income taxes since 1998. Respondent freely admits that he does not agree with the federal laws of taxation, however, the Bar cannot condone Respondent's blatant violation of the law. Respondent's argument that the Bar does not have jurisdiction without a criminal proceeding is without merit, because criminal prosecution is not a condition precedent to The Florida Bar bringing its disciplinary proceeding. The referee properly denied Respondent's motion to dismiss Count II and appropriately disciplined Respondent for engaging in conduct that is unlawful and contrary to honesty and justice.

ARGUMENT

POINT I

THE REFEREE'S ASSESSMENT OF AUDIT COSTS IS APPROPRIATE, AND THE REFEREE DID NOT EXCEED HIS DISCRETION BY AWARDING SUCH COSTS.

In regard to his objections to costs, Respondent first argues that The Florida Bar did not have authority to conduct an audit of his trust account pursuant to R. Regulating Fla. Bar 5-1.2(e). In fact, the audit was properly ordered by the grievance committee investigating Respondent's disciplinary matters and was authorized by R. Regulating Fla. Bar 5-1.2(e)(7) (ROR-A2). Despite asserting in his Initial Brief that the Bar's subpoena for trust account records was improper (I.B. p. 10), Respondent failed to timely allege that the Bar had no authority to serve its subpoena. In a letter to the Bar dated April 18, 2005, Respondent maintained that he was interested in complying with the subpoena (B-Ex. 8 - Count I). During the final hearing on Count I, Respondent testified freely regarding the maintenance of his trust account. Since Respondent provided his trust records to the Bar without objection to the validity of the subpoena, his current argument is neither timely nor convincing.

Next, Respondent argues that the Bar's audit was merely an inventory of records and not a compliance audit (I.B. p. 13). Respondent's assertion in this

regard is incorrect and is not supported by the record. At the final hearing, the Bar's auditor testified that he "reviewed" Respondent's existing trust records for the relevant audit period (TI-85). The auditor subsequently testified at length concerning his conclusions regarding Respondent's compliance with the trust rules (TI-80-141; 218-223). The Bar also presented the auditor's report, dated April 20, 2005, which provided an explanation of Respondent's trust account violations along with 15 attached pages to support the auditor's analysis and conclusions (B-Ex. 11- Count I).

At the final hearing, the Bar's auditor further testified that he had spoken with Respondent on the telephone and had sent him e-mails concerning the investigation of his trust account compliance (TI-85-86; B-Ex. 9-10 - Count I). The auditor's correspondence with Respondent reveals that the auditor studied Respondent's trust records, constituting time and expense (B-Ex. 9-10 - Count I).

The referee's findings further support that the Bar's auditor conducted more than simply an inventory of records. Based on the auditor's testimony and report, the referee found that a number of the ledger cards provided by Respondent failed to detail each deposit and disbursement, as well as the payee and the check number for the checks and the reason for which all trust funds were received, disbursed or transferred (ROR-A3). The referee further found that Respondent failed to

properly identify his trust account as a "trust account" and that his checks were insufficiently labeled, "Charles Behm, Attorney at Law, I.O.T.A" (ROR-A3). The foregoing conclusions could not have been made without the auditor's scrutiny of Respondent's provided trust records.

On November 28, 2007, the referee held a telephonic hearing to address Respondent's concerns about the report of referee, including Respondent's belief that the Bar's audit costs were unreasonable. (Respondent did not arrange to have a court reporter present, so there is no transcript of this proceeding). Thereafter, on November 29, 2007, the referee sent an e-mail to Respondent's counsel stating that, after considering argument and memorandum, he had determined not to amend his report of referee (RL-A20). The referee further stated, "[o]bviously, I believe that the report is in keeping with my directions and your agreements as found in the extensive record of this case" (RL-A20).

The referee has discretion in awarding costs in Bar disciplinary proceedings. The Florida Bar v. Williams, 734 So.2d 417, 419 (Fla. 1999). All of the costs listed by the Bar in its Affidavit of Costs are permitted under Rules 3-7.6(q) and 5-1.2(f), and there is no evidence in the record that the costs were excessive, unnecessary, or improperly authenticated. The Florida Bar v. Kassier, 730 So.2d 1273, 1276 (Fla. 1998). Respondent has not shown that the referee abused his

discretion in awarding the Bar the costs as set forth in its Affidavit of Costs, therefore, the Bar is entitled to its costs. The Florida Bar v. Carson, 737 So.2d 1069, 1073 (Fla. 1999). "Where the choice is between imposing costs on a bar member who has misbehaved and imposing them on the rest of the members who have not misbehaved, it is only fair to tax the costs against the misbehaving member." Kassier at 1276.

POINT II

THE CONSENT JUDGMENT REGARDING COUNT II IS APPROPRIATE AND SHOULD BE ENFORCED.

The primary issue to consider is whether Respondent voluntarily entered into an oral consent judgment during the hearing held on October 15, 2007. In the consent judgment, Respondent stipulated to findings of fact regarding his failure to pay federal income taxes from 1999 through 2006, either personal or business and agreed to a 90-day suspension from the practice of law (TII-5; ROR-A5). In his Initial Brief, Respondent contends that he only entered into the consent judgment as an alternative to compromising his rights under the Fourth and Fifth Amendments of the United States Constitution (I.B. pp. 4, 21, 22, 24). Respondent, through counsel, also raised the issue of having to compromise his constitutional rights before the referee (TII-4-5). He decided however to forgo an evidentiary hearing and agreed to a consent judgment to resolve the matters before

the referee.

In The Florida Bar v. Palmer, 588 So.2d 234 (Fla. 1991), this Court held that a consent judgment for disbarment would be enforced even though it was not signed by the attorney. After the referee denied Palmer's motion to continue the final hearing, the parties, in a telephone conversation in which the referee and Palmer's attorney were present, stipulated to a consent judgment. When bar counsel formalized the agreement in writing, Palmer refused to sign it. The referee enforced the agreement, and this Court upheld the agreement despite Palmer's contentions that the consent judgment was made under duress when the referee wrongfully denied a continuance. Palmer did not suggest error in the findings of fact.

Similar to the attorney in Palmer, Respondent does not imply that the findings in the report of referee are false. Respondent has repeatedly admitted that he has not filed income taxes since 1998. The referee permitted the Bar to present its Exhibits 1-20 to show that Respondent had received taxable income and was legally obligated to file income tax returns and pay federal incomes taxes, and, thus to support the factual basis for the consent judgment in Count II (TII-3-4; B-Ex. 1-20 - Count II). Respondent has merely offered excuses and arguments for his failure to file tax returns and pay taxes despite declaring his right to make a living

as an attorney and own the fruits of his labor (TI-25-26; TII-27).

Respondent has stated that he does not believe that the federal tax system is mandatory for all persons (TII-7; 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."

Respondent further maintains that the referee improperly denied his motion to dismiss Count II for lack of jurisdiction as well as his motion to stay the proceedings. This Court has held that absent clear abuse, the referee has the sound discretion to decide whether to grant or to deny pretrial motions in attorney discipline cases. Accord The Florida Bar v. Kandekore, 766 So.2d 1004, 1006 (Fla. 2000) (addressing a motion to continue); The Florida Bar v. Roth, 693 So.2d

969, 972 (Fla. 1997) (addressing a motion to dismiss); and The Florida Bar v. Lusskin, 661 So.2d 1211, 1212 (Fla. 1995) (addressing a motion to abate disciplinary proceedings).

In denying Respondent's motion to dismiss, the referee properly determined that criminal prosecution for failure to file tax returns is not a condition precedent to The Florida Bar bringing its disciplinary proceeding. This Court has held that "[d]isciplinary proceedings are not concerned with the issues addressed in criminal or civil proceedings. Rather disciplinary proceedings are concerned with violations of ethical responsibilities imposed on an attorney as a member of The Florida Bar." The Florida Bar v. Garland, 651 So.2d 1182, 1183 (Fla. 1995), citing The Florida Bar v. Swickle, 589 So.2d 901, 905 (Fla. 1991). While bar disciplinary proceedings may share some of the same goals as criminal proceedings (punishment, deterrence, protection of society), they do so in the context of enforcing the higher standard of duty and conduct required of those who exercise the privilege of practicing law. The Florida Bar v. Musleh, 453 So.2d 794, 796 (Fla. 1984).

The Bar further submits that Rule Regulating The Florida Bar 3-4.4 allows an attorney to be disciplined for criminal conduct regardless of whether the attorney has been tried, acquitted, or convicted in a court for the alleged criminal

offense. Rule 3-4.4 further provides that "[t]he acquittal of the respondent in a criminal proceeding shall not necessarily be a bar to disciplinary proceedings."

Relevant case law also reveals that this Court has disciplined attorneys for engaging in illegal conduct without relying on a criminal conviction. In Swickle, an attorney was disbarred for making misrepresentations to a judge and suggesting that he had the ability to bribe a judge. Swickle was disciplined by the Bar even though he was tried and acquitted on the criminal charges of bribery and conspiracy. Id. at 903. Similarly, in The Florida Bar v. Wheeler, 653 So.2d 391 (Fla. 1995), this Court disbarred an attorney for entering into payment schemes with judges, despite the fact that Wheeler received immunity from federal prosecutors.

This Court has also disciplined attorneys for engaging in illegal conduct without the element of any criminal prosecution. In The Florida Bar v. Levin, 570 So.2d 917 (Fla. 1990), an attorney was disciplined for routinely engaging in illegal gambling activities over a period of at least five years, when he knew that his betting constituted a misdemeanor offense. In Levin, the Court strongly emphasized that attorneys, as officers of the court, are required to live within the law. Id. at 918.

As Respondent emphasized in his Initial Brief, this Court has disciplined

attorneys for failing to file and/or pay income taxes (I.B. p. 23). *See* The Florida Bar v. Blankner, 457 So.2d 476 (Fla. 1984) and The Florida Bar v. Pearce, 631 So.2d 1092 (Fla. 1994). In Pearce, this 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." Id. at 1093. 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.

Respondent claims that since the Internal Revenue Service has not caught up with him, the Bar should not be concerned with his conduct. Although Respondent has not been criminally prosecuted, this Court should not simply ignore Respondent's admitted violation of the law. The practice of law is a privilege, not a right, and is revocable for cause. Petition of Wolf, 257 So.2d 547, 548 (Fla. 1972). As the late Justice Ehrlich stated in his dissenting opinion in The Florida Bar v. Levine, 498 So.2d 941, 942 (Fla. 1986), "[l]awyers are officers of the Court and members of the third branch of government. That unique and enviable position carries with it commensurate responsibilities. If the public cannot look to lawyers to support the law and not break it, then, pray tell, to whom may they look."

In her dissenting opinion In The Florida Bar v. Wishart, 543 So.2d 1250,

(Fla. 1989), Justice Barkett also expressed her concern for this type of misconduct:

> Our entire system of jurisprudence is built on the principle that disagreements with the application of law can be corrected by appeals, by collateral attacks, or by petition to the legislature for a change in the law. No attorney is ever privileged to arrogate to himself or herself the right to say with finality what the law is. That prerogative inheres in the courts. Without this principle, our legal system would fall into shambles. Id. at 1253.

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 tax returns and to pay income taxes. The Respondent agreed that a 90-day suspension was the appropriate sanction for the Rule violations in Count I and Count II. This Court possesses the jurisdiction to discipline an attorney who has blatantly chosen to ignore the law, and the consent judgment concerning Count II should be enforced.

CONCLUSION

Respondent has failed to demonstrate that the referee abused his discretion by awarding audit costs in the amount of $9,294.15 and by approving the consent judgment involving Respondent's admitted violation of the law.

WHEREFORE, The Florida Bar prays this Honorable Court will affirm the referee's recommendations as to audit costs, enforce the consent judgment in Count II, and tax costs now totaling $15,089.63 against Respondent with interest accruing at the legal rate 30 days after this Court's order becomes final.

Respectfully submitted,

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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 21st day of May, 2008.

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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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant, Case No. SC07-661
[TFB Nos. 2005-30,980(07B);
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Respondent.
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APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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