IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC 07- 661

LOWER TRIBUNAL NUMBERS

TFB 2005-30,980 (07B) and TFB 2006-30,684(07B)

THE FLORIDA BAR

COMPLAINANT

V.

CHARLES BEHM

RESPONDENT

RESPONDENT'S AMENDED INITIAL BRIEF

FILED BY CHARLES BEHM, ESQUIRE, RESPONDENT

POB 10 POMONA PARK, FLORIDA 32181

ORIGINAL

TABLE OF CONTENTS

INTRODUCTION, REQUEST FOR ORAL ARGUMENT, AND

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 5

ARGUMENT COUNT I 8

ARGUMENT COUNT II 15

The Bar's Pursuit Of This Case Appears In Effect to Be A Slapp Suit 20

CONCLUSION 26

CERTIFICATE OF SERVICE 27

CERTIFICATE OF COMPLIANCE 27

CASE LAW iii

OTHER CITATIONS iv

POINTS ON REVIEW v

TABLE OF CASE LAW

U.S. SUPREME COURT

Case	Page
Cheek v. United States, 498 U.S. 192	20

STATE OF FLORIDA

Case	Page
Florida Bar v. Barley, 831 So.2d 163 (Fla., 2002)	8
Florida Bar v. Blankner, 457 So. 2d. 476	23
Florida Bar v. Pearce, 631 So. 2d. 1092	23
Florida Bar v. Hosner, 536 So. 2d. 188	23
Florida Bar v. Smith, 650 So. 2d. 980	24

OTHER CITATIONS

	Page(s)
Fourth Amendment, U.S. Constitution	4,
Fifth Amendment, U.S. Constitution	4,18,24
Florida Constitution	4,19,21
Fla. R. Jud. Admin - Rule 2.120(c)	19,21
Black's Law Dict. 7th ed.	15
Florida Statute § 768.295	21

Rules Regulating the Florida Bar; (2007)

Rules of Professional Discipline Rule 3.3-2(b)	9,10
Rules of Professional Discipline 3-4.3	16
Rules of Professional Discipline 3-4.4	2,3,17
Rules of Professional Discipline 3-7.6 (I)(3)	1,8
Rules of Professional Discipline 3-7.6(f)	15
Rules of Professional Discipline Rule 3-7.1(g)	22
Rules of Professional Discipline Rule 3-7.1(i)	22
Rules of Professional Discipline Rule 3-7.2	16
Rules of Professional Discipline Rule 3-7.7	1
Rules of Professional Conduct 4-8.4	20
Rules of Professional Conduct 4-8.4(b)	16
Rules of Professional Conduct 4-8.4(c)	16
Rules Regulating Trust Accounts Rule 5.1-2(e)	8,9,10

POINTS ON REVIEW

COUNT I

Whether a compliance audit was authorized under the rules governing attorney discipline or the rules regulating trust accounts and, if so, whether the costs associated with Count I of the underlying case were unnecessary, excessive, or not properly authenticated, and whether the Referee exceeded his discretion by allowing such costs to be awarded against the Respondent when the costs were claimed in relation to a compliance audit with limited records covering a relatively small period of time.

COUNT II

Whether the Bar had subject matter jurisdiction to bring Count II absent a charge, indictment or admission of a criminal act by the Respondent and whether the Referee erred by not dismissing Count II of the underlying complaint for lack of jurisdiction, and in the event that they did have any proper jurisdiction was their case fatally flawed for lack of ripeness ?

INTRODUCTION, REQUEST FOR ORAL ARGUMENT, AND STATEMENT OF THE CASE AND FACTS

This is an original proceeding in the Supreme Court of Florida (before a Referee), pursuant to Rules 3-7.6 and 3-7.7, Rules Regulating The Florida Bar. The parties are referred to throughout as follows:

The Respondent is Charles Behm, a member of the Florida Bar. The Complainant is the Florida Bar. The symbol “RR" will be used to designate the Final Report and Recommendation of Referee, and the symbol "T' followed by the date of the hearing and appropriate line(s) and page(s), will be used to designate the transcripts of the disciplinary hearings. All emphasis is supplied, unless otherwise indicated. Oral argument is requested in the instant case by Respondent. Respondent accepts the Referee's version of the facts as presented in pages 1 through 9 of the Final Report and Recommendation of Referee (RR. p. l-9), with those exceptions or additions noted in the Argument.

The Referee held the first of two disciplinary hearings on 18 September 2007, regarding TFB Case Number 2005-30,980(07B) during which the Referee found the Respondent not guilty of several of the counts pursued by the Florida Bar. The Referee did find the Respondent guilty of other violations with regard to the trust account records (IOTA) but all of those violations were found to be

"technical in nature, with no evidence that respondent misappropriated client funds" (RR. p.3-par 10.). The Respondent's transgressions were based upon the Respondent's failure to recreate the records after they were destroyed by flooding and water damage occurring to the office building housed the Respondent's law office during the 2004 hurricanes (T- Sept 18 2007 at p. 262, line 21 through p.264, line 25).

The Referee made his rulings, but withheld sentencing until the hearing of Count II, (alleging criminal action by the Respondent) under TFB Case Number 2006- 30,684 (07B) on 15 October 2007 (T- Sept 18 2007 at p. 225, line 9-14).

To Count II and its allegations of criminal activity, the Respondent objected in a timely and proper fashion, through his MOTION TO DISMISS COUNT II FOR LACK OF JURISDICTION (Index to Record-Tab # 52; also see Appendix D).

The Motion was heard at the beginning of the September 18th 2007 hearing conducted before the Referee (T- Sept 18 2007 at p.5, line 21 through p.18, line 7). Through argument before the Referee, the Respondent pursued the issues related to the Motion as well as to the Bar's lack of standing, and lack of ripeness, and contested the Bar's Complaint on grounds of the Respondent's Constitutional rights. Ibid. A proper reading of Rules of Discipline Rule 3-4.4, which governs

the Florida Bar and the professional conduct of its members regarding criminal acts, was also addressed. (T- Sept 18 2007 at p.9, line 9 - 13). The Respondent extolled Rule 3-4.4 in detail and noted upon a reading of the rule before the Court, that the Bar's actions were without any justification in the form of an indictment, charges, arrest, admission, or other indications of a crime filed against the Respondent, by any agency, whatsoever. (T- Sept 18 2007 at p.12, line 9 – p.13, line 6). The Court denied the MOTION TO DISMISS COUNT II FOR LACK OF JURISDICTION (T- Sept 18 2007 at p.26, lines 22, 23).

Count II was ultimately set to be heard on October 15th 2007 (T- Sept 18 2007 at p.269, line 13). At that hearing the Respondent was represented by Attorney Tommy Cryer, who sought a stay of the proceedings based upon the fact that the Respondent's rights were at risk and that he was being put in a position of "having to make statements that could be used against him or used in preparing a criminal prosecution against him" (T- Oct. 15th 2007 at p.21, line 7 through p. 27, line 17). The Referee denied the Respondent's Motion to Stay Proceedings (T- Oct. 15th 2007 at p.28, line 16). Mr. Cryer placed in the record the appropriate objection (T- Oct. 15th 2007 at p.28, line 20).

The merits of that count were never heard as the actions of the Florida Bar in continuing to pursue the tax count prompted the Respondent to stipulate to the Referee "finding to the effect, but not to the fact", in other words, not stipulating to

the findings themselves, but rather, stipulating to the referee making that finding based upon the allegations. (T- Oct. 15th 2007 at p.42, line 23 – p.43, line 10). A consent judgment was entered by the Respondent as an alternative to being forced to compromise his rights under the Fourth and Fifth Amendments of the US Constitution and the Florida Constitution while defending against Count II. Ibid.

The Bar declined at the time to present an amount for costs and deferred to comment on costs stating that an affidavit of costs would have to be presented. (T- Oct. 15th 2007 at p.45, line 9). No subsequent mention of the amount of costs was made by the Bar.

The Referee issued his report on 26 November 2007 recommending ninety days suspension and automatic reinstatement thereafter plus costs of $15,089.63, but this was based upon the Parties' stipulation to the Referee having an ability to make his finding, but not to the finding itself. (T- Oct. 15th 2007 at p.43, line 8). A First Affidavit of Costs was later submitted by the Bar containing only the total amounts claimed by the Bar, without any further documentation or justification. (Index to Record, Tab # 64). Subsequent to that a Second Affidavit of Costs, again containing only the total amounts claimed by the Bar and lacking any further documentation, was filed. (Index to Record Tab # 66). The Respondent timely and appropriately objected and the Respondent's objection to the costs was heard in a telephonic hearing where the matter of the Bar's claim of a $9,294.15 charge for a

compliance audit was specifically questioned verbally and through emailed objections. (See Appendix B). The Respondents objection to costs for what was merely a compliance audit was denied. Respondent sought review.

Summary of Argument

Regarding Count I - TFB 2005-30,980(07B) - The costs as proffered by the Florida Bar are unnecessary, excessive, or not properly authenticated and unjustified , reasonable, oppressive, and punitive, in light of the fact that the audit was a compliance audit not an account audit The Certified Public Accountant (C.P.A.) involved, claimed costs of over $9,294.15 to this audit. The same C.P.A. stated that in trial that there were less than a hundred transactions falling within the time period that he was auditing. The C.P.A. repeatedly lamented the lack of records and his inability to conduct a complete compliance review because so many records were missing. At a post trial hearing challenging a $9,294.15 claim of costs, conducted by phone, the Bar's C.P.A. testified to having 118 hours in this case. That equates to approximately 3 full 40 hour work weeks for a compliance audit. No further documentation was proffered by the Bar to authenticate, or justify the claimed expenses. This is unreasonable and unjustified in light of the C.P.A.'s own admission that he was unable to reconstruct the records from what

the Respondent was able to submit. It is respectfully submitted that the Referee erred in not dismissing the cost as unnecessary, excessive, or not properly authenticated.

Regarding Count II - TFB Case No. 2006-30,684(07B) The Florida Bar lacked subject matter jurisdiction to file a formal complaint and pursue disciplinary proceedings against the Respondent. It is respectfully submitted that the Referee erred in not dismissing the count for lack of jurisdiction, or at the very least, ripeness. The Respondent was accused and a formal complaint entered against him by the Bar alleging violations of 3-4.3 – the commission by a lawyer of any act that is unlawful or contrary to honesty and justice, 4-8.4(b)- for committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, and fitness as a lawyer in other respects; and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; Jurisdiction was timely challenged in the Respondent's MOTION TO DISMISS COUNT II FOR LACK OF JURISDICTION. The motion was argued before the Referee and improperly denied.

The Respondent has never been charged, indicted, tried or convicted – nor has he admitted to any crime. The Respondent has not found any case involving a tax issues and resulting in the Florida Bar's discipline of a bar member, where that bar member has not first been convicted in a criminal court, or has entered a plea to

a criminal act. The Bar has overreached its authority and assumed the authority of a criminal court or law enforcement agency to create a conviction where there is no charge or accusation by a law enforcement agency, nor by any court of competent jurisdiction.

ARGUMENT

COUNT I

Regarding Count I - TFB 2005-30,980(07B) - "When the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated." Rule Regulating Fla. Bar 3-7.6 (I)(3). However, the costs as proffered by the Florida Bar are unnecessary, excessive, and improperly authenticated , Florida Bar v. Barley, 831 So.2d 163 (Fla., 2002), given the fact that the audit was a compliance audit not an account audit.

Rule 5.1-2(e) Audits – Any of the following shall be cause for the Florida Bar to order an audit of a trust account:

1. Failure to file the trust account certificate required by rule 5-1.2(c)(5).
2. Return of a trust account check for in insufficient funds or for uncollected funds, absent bank error;
3. Filing of a petition for creditor relief on behalf of an attorney;
4. Filing of felony charges against the attorney;

5. Adjudication of insanity or incompetence or hospitalization of the attorney under the Florida Mental Health Act;
6. Filing of a claim against the attorney with the Clients' Security Fund;
7. When requested by a Grievance Committee or the Board of Governors,
8. Upon Court Order.

None of the enumerated prerequisites set out in Rule 5.1-2(e) to warrant an audit are present in this case unless the record on review shows that the board of governors or a grievance committee ordered an audit (Rule 5.1-2(e)(7). Since there is no such order known to have been issued Board of Governors, and there is no complaint by client, the question of where the Bar found probable cause begins to surface. Looking at the overall case, there was no complaint by any person or agency, and therefore no basis for the necessity of an accounting. It is apparent by looking at what is not in the record, that the Grievance Committee, without any known probable cause, chose to subpoena and audit the trust records of the Respondent.

Rule 3-3.2(b) states that no formal complaint shall be filed by the Florida Bar unless there is first a finding that probable cause exists to believe that the

Respondent is guilty of misconduct justifying disciplinary action. Count I of the Bar's Complaint states that the Grievance Committee found probable cause on April 28th 2006, to file the Complaint, but the probable cause is based upon the Respondent's failure to provide all the required trust account records pursuant to the Subpoena issued on August 24th, 2004. (Index to Record, Tab.#1) However there is no indication in the record as to the probable cause or justification behind the issuance of the subpoena in the first place. If there is no probable cause to justify the subpoena that initiated the complaint, then how is there any justification whatsoever for the costs of a compliance audit under Rule 5.1-2(e) ?

Nevertheless, under Rule 3.3-2(b), such an order should issue only on probable cause to believe that a violation has occurred. Probable Cause for such an audit was never shown by the Bar, and was not present in this instance to justify the audit.

According to Bar counsel, the subpoena introduced as Bar's Exhibit #1 was the subject of the Bar's complaint (T- Sept 18 2007 at p 54, lines 21-25). The compliance audit was limited to the parameters of that subpoena as inferred by Bar Counsel. (T- Sept 18 2007 at p 88, lines 4-6). Bar counsel stated that "Mr. Behm was charged with his trust account records during the audit period not being in substantial compliance with the rules regulating the Florida Bar". (T- Sept 18 2007 at p 42, lines 1-5).

In the Affidavit of Costs, the Bar claimed Audit Costs of $9,294.15 . (see Index of Record tab 64 FIRST AFFIDAVIT OF COSTS). However, the Bar's C.P.A. stated that in trial that there less than a hundred transactions in the time period that he was auditing. (T- 18 Sept 2007 at p 89, lines 6-8). The C.P.A. repeatedly lamented the lack of records and his inability to conduct a complete compliance review because so many records were missing and concluding with a statement that regarding the available records overall: "Basically I couldn't do much of anything with those" (T- 18 Sept 2007 at p 89, lines 9-25 to p. 90, lines 1-9).

The obvious questions are :

1. If the records were inadequate, then what was audited for $9,294.15 in costs for the audit alone ?

2. What amount of time is actually required to do a compliance audit upon determining that the available records are insufficient for an audit"?

At a post trial hearing challenging a $9,294.15 claim of costs, conducted by phone, the Bar's C.P.A. testified to having 118 hours in this case. That equates to approximately three entire 40 hour work weeks for the sole declared purpose of doing a compliance audit (?). This is unreasonable and excessive because the C.P.A.'s own admission was that he was unable to reconstruct the records from what the Respondent was able to submit.(T- 18 Sept 2008 at P.89, lines 6-8).

At the end of the hearing on 15 October 2007, while the Parties contemplated the issues relevant to the Consent Judgment proposed to the Court, the Bar Counsel gave no hint as to the projected costs and stated that as to costs the Florida Bar would have to file an affidavit with respect to the costs…"(T- 15 Oct 2007 at p 45, lines 9-11. That affidavit was subsequently sent to the Referee denoting a total of $15,089.63 and of that $9,294.15 for the costs of an audit without any supporting documentation or justification. (First Affidavit of Costs, Index to record Tab 64, and Second Affidavit of Costs, Index to record Tab 66.). The documentation presented by the Bar consists solely of the affidavits of cost, which in no way justify or properly authenticate claiming $9,294.15 for what was billed by the Bar as a compliance audit, nor documents the balance of the claimed costs ($5,795.48). Ibid.

Both the First Affidavit of Costs and the Second Affidavit of Costs were signed solely by the Bar Counsel, and <u>not</u> by the C.P.A. that allegedly conducted the audit. Ibid. No affidavit by the C.P.A. his time sheets, invoices, other supporting documentation, authentication, or record of any kind was offered by the Bar, or has ever been made a part of the record on review. Nor was any such supporting documentation offered during the post-trial hearing on the Respondent's objections to support the Bar's claim for costs.

Attorney Tommy Cryer (of Shreveport, La.) represented the Respondent on Count II pro hac vice. Because of geographic distances, the post trial hearing on costs and the objections to the Referees Report was conducted by phone following emails between the Parties and Referee. (see Appendix B – email of Tommy Cryer, Esq. dated 28 Nov 2007). Through Mr. Cryer, the Respondent filed a timely objection to the proposed costs and emailed the same to the Court and opposing Counsel. Ibid. The Respondent pointed out, and reargues here that costs were not specified or stipulated to and there would have been a major difference of opinion and position had they been. Ibid.

As to any justifiable amount for the cost of conducting a compliance audit, the trust account records were not being examined in order to conduct an audit of every transaction to verify that all monies arrived safe and sound, but rather whether the condition and composition of the records substantially complied with the Bar requirements. (T- Sept 18 2007 at p 42, lines 1-5). Such an audit would consist only of an inventory of records to ensure that all aspects of record-keeping were being complied with. Ibid. This was not an audit to account for monies received, but merely a check to see if the accounting and record keeping practices were in compliance with the Bar's requirements. Id. The findings of the "audit", were set out on pages 5 and 6, of the Report of Referee (RR p. 5-6) . It is

inconceivable that to obtain such results could have required nearly three, entire forty hour work weeks based upon the Bar C.P.A.'s testimony.

By virtue of improper authentication, excessiveness, and unnecessary expenditure, as well as its oppressive, unreasonable and punitive nature, the imposition of the audit costs should be denied. The Referee erred in not dismissing the cost as unnecessary, excessive, or not properly authenticated and he exceeded his discretion in allowing the amount to stand. In awarding such a unnecessary, unjustified, and improperly authenticated cost for a compliance audit, the Referee exceeded his discretion and allowed the Bar to impose what was effectively a punitive fine in the guise of costs.

Finally, assessment for costs of audit is governed by Rule 5.1-2(f), and apply only to "Audits conducted in any of the circumstances enumerated in this rule . . ." No probable cause was ever indicated to justify the issuance of a subpoena for the Respondent's records in the first place, therefore, the audit was not conducted due to any of the circumstances enumerated in Rule 5.1-2(e), and associated costs should not be assessed in this case.

ARGUMENT

COUNT II

Regarding Count II - TFB Case No. 2006-30,684(07B) SUBJECT MATTER JURISDICTION is defined as Jurisdiction over the nature of the case and the type of relief sought, the extent to which the Court can rule on the conduct of persons, or the status of things. (See Black's Law Dictionary 7th ed.). It is respectfully submitted that the Referee erred in not dismissing Count II for lack of jurisdiction.

This has been a case of defending the Respondent, by attempting to prove a negative – to wit, that where attorneys have been subjected to discipline by the Bar in cases involving the federal income tax, the Bar has never previously presumed subject matter jurisdiction absent a plea, conviction, or admission; None of which apply to the Respondent . The rules limit jurisdiction:

Rules of Discipline - 3-7.6 (f) – Nature of Proceedings – Administrative in Character – A disciplinary Proceeding is neither civil nor criminal but is a quasi-judicial administrative proceeding. The Florida Rules of Civil Procedure apply except as otherwise provided in this rule.

In the Instant Case, the Florida Bar clearly lacked subject matter jurisdiction to file a formal complaint and pursue disciplinary proceedings against the Respondent because the Bar acts in a quasi-judicial role that is neither civil nor criminal in nature and it therefore does not constitute a court of competent jurisdiction to pass judgment on alleged criminal actions by the Respondent. Ibid.

Nonetheless, the Respondent remains accused solely by the Bar, and a formal complaint was entered against him by the Bar alleging violations of 3-4.3 – the commission by a lawyer of any act that is unlawful or contrary to honesty and justice, 4-8.4(b)- for committing a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, and fitness as a lawyer in other respects; and 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; (T- 18 Sept 2007 at p. 18, line 9-18) (Index to Record – Tab 1).

The Respondent has never been charged, indicted, tried, or convicted – nor has he admitted to any crime. The Bar overreached its authority and assumed the authority of a criminal court or law enforcement agency to create a conviction where there is not even a charge or accusation by a court of competent jurisdiction or law enforcement agency.

Rules of Discipline 3-7.2 Definitions state:

Judgment of Guilt : For the purposes of these rules, judgment of guilt shall include only those cases in which the trial court in the criminal proceeding enters an order adjudicating the respondent guilty of the offense(s) **charged**.

Determination of Guilt: Determination of Guilt: For the purposes of these rules "determination of guilt" shall include only those cases in which the trial court in the criminal proceeding enters an order withholding adjudication of the respondent's guilt of the offense(s) charged.

Convicted Attorney: For the purposes of these rules , "convicted attorney" shall mean an attorney who has had either a determination or judgment of guilt entered by the trial court in the criminal proceeding.

There has been no" judgment of guilt" or "determination of guilt" nor is the Respondent a "convicted attorney."

During the discovery phase of the proceedings, at the hearing on the Bar's motion to compel discovery , the Bar was seeking evidence as to whether the Respondent had "taxable income." (T- 14 Aug 2007 at P.4, line 24). This would be an indispensable element of the crimes of either tax evasion or willful failure to file a tax return, and would have to be established and proven, or at least charged, in a court of competent jurisdiction before the Bar could have probable cause to seek to discipline the Respondent. (Rules of Professional Discipline 3-4.4). In

other words without already establishing at least the charges through a proper court that the Respondent had taxable income, and an obligation to file a tax return, and had intentionally (willfully) failed to do so, the Bar was prosecuting a legal impossibility, or possibly a legal nullity. Ibid.

At that same hearing the Respondent raised his rights to Fifth Amendment protection of his personal records, and also questioned the grounds on which the Bar was seeking the disciplinary action. (T- 14 Aug 2007 at P.17, lines 3-25 and P.18 lines 1-5). The Respondent directly questioned the validity of the charges and the basis on which they were being brought. This was recognized by the Referee as going to the issue of whether the Bar had a valid charge against the Respondent but it was not addressed further (T- 14 Aug 2007 at P.18, lines 8-13).

[A]ny ground showing that the court lacks jurisdiction of the subject matter may be made at any time. Fla. R. Civ. P. 1.140(b). Jurisdiction was timely challenged in the Respondent's MOTION TO DISMISS COUNT II FOR LACK OF JURISDICTION, which was addressed at the beginning of the trial. (T- 18 Sept 2007 at P.18, lines 8-13; also see Index to Record Tab # 52; and Appendix D). The Motion raised issues regarding:

a) the Bar lacking jurisdiction, (Ibid at par. 9).

b) that the Bar’s actions were by its own admission, a “quasi-judicial administrative proceeding, (Ibid at par. 6).

c) that through such a proceeding, the Bar sought an administrative ruling outside a Court of competent jurisdiction, which was inconsistent with the Florida Constitution. (Ibid at par. 8).

d) That the Respondent was entitled to due process. (Ibid par. 4).

e) Further the Motion pointed out that this the Bar’s action violated the Florida Rules of Judicial Administration 2.120(c) because the Bar’s action in a quasi-judicial proceeding denied the Respondent due process in a criminal court, per the Florida and U.S. Constitutions prior to the Bar getting involved. (Ibid at par. 2, 3 ,4) .

The motion was argued before the Referee and improperly denied. (T- 18 Sept 2007 at p. 26, line 23).

The issue of the Respondent being compelled to testify against himself was again addressed before the Court at the trial hearing for Count II . The possibility of criminal prosecution against the Respondent was addressed before the Court through the Respondents motion to stay. (T- 15 Oct 2007 at p. 4, line 22 - 25). The

Respondent was forced to choose between defending against the Bar and waiving his Fifth Amendment rights or sitting silent and offering no defense. (T- 15 Oct 2007 at p. 5, line 1-23). The Court was advised that the Respondent was being forced to forgo either his rights against self incrimination or his rights to due process. (T- 15 Oct 2007 at p. 5, line 6-11).

The Bar's Pursuit Of This Case Appears In Effect to Be A Slapp Suit

In the comments section of the Bar's own Rules of Professional Conduct under Rules of Professional Conduct - Misconduct Rule 4-8.4 :

> Many kinds of illegal conduct reflect adversely on the fitness to practice law such as offenses involving fraud and the offense of willful failure to file an income tax return….
>
> Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to the law practice. …
>
> A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists. Rules Regulating the Florida Bar; Rules of Professional Conduct 4-8.4 (2007) Comment section.

Bolstering that rule is the decision in a 1991 U.S. Supreme Court case: Cheek v. United States, 498 U.S. 192. The High Court Held that if the defendant has a subjective good faith belief no matter how unreasonable, that he or she was

not required to file a tax return, the government cannot establish that the defendant acted willfully in not filing an income tax return. Ibid.

The Bar readily acknowledged that the Respondent believes he has a good faith belief that he is not obligated to file a return. (T- 15 Oct 2007 at p. 38, line23-25 to p. 39 at lines 1-9). The Bar also acknowledged that the Respondent believes in redress of grievances through the Court system. (T- 15 Oct 2007 at p. 38, line23-25 to p. 39 at lines 1-9). On these two concessions alone, the Bar effectively disproved the necessary elements of its own case.

The actions of the Bar are therefore tantamount to a Strategic Lawsuits Against Public Participation (SLAPP) suit which is directly prohibited by Florida Statute section § 768.295. Such suits by governmental entities like the Florida Bar are forbidden . (see APPENDIX C for statute). The law prohibits such lawsuits by governmental entities in order to preserve this fundamental state policy, preserve the constitutional rights of Florida citizens. Ibid.

Such rights would doubtless include the Right to due process under Florida Constitution Art. I sect. 9, and administrative orders which are not consistent with the Constitution (as prohibited by Fla. R. Jud. Admin Rule 2.120(c)).

Ultimately, however, the Respondent was forced to accept a consent judgment to preserve his Constitutional rights or face being effectively deposed by the Bar, the

results of which would be available to any agency subsequently seeking to build a prosecution effort against the Respondent.

Rule 3-7.1(g) – Production of Disciplinary Records Pursuant to Subpoena. The Florida Bar pursuant to a valid subpoena issued by a regulatory agency, may provide any documents that are a portion of the public record, even if the disciplinary proceeding is confidential under these rules…

Rule 3-7.1(i) – Evidence of a Crime – The confidential nature of these proceedings shall not preclude the giving of any information or testimony to authorities authorized to investigate alleged criminal activity.

It is critical to note that this rule does not require evidence of a crime, only that a "regulatory agency" subpoenas it and the Bar can give up any and everything regardless of its confidential nature. Ibid. In this way, the Respondent was compelled to either sit silently and offer no defense, or testify as to his beliefs and actions, under oath, with the almost absolute certainty that the Bar would offer what was essentially a deposition of the Respondent, to the Dept. of Justice, Dept. of the Treasury, the I.R.S., or any other agency that might use the Respondent's own testimony, to prosecute the Respondent. It is respectfully suggested that this is why the Respondent found no cases of Bar discipline involving lawyers and, allegations of their criminal activity related to income tax crimes, prior to their conviction, plea or admission. (See Appendix A).

It is unknown whether Legal Counsel for the Florida Bar has previously sought to expand the Florida Bar's jurisdiction into areas of alleging tax related crimes without arrest or indictment or admission by the attorney at question. Using Fastcase, the Respondent queried for Bar disciplinary cases involving income tax. Twenty-two appropriate cases were obtained and **in every case, the attorney facing the disciplines of this Court had been convicted or had pled out to some criminal act.** (See APPENDIX A for a list of the cases submitted to the Referee and (T- 15 Oct 08 P. 48 at lines 19-24)). The Respondent has not found any case involving a tax issues and discipline of a bar member where there has not first been a conviction or a plea to a criminal act.

Even in the tax related cases submitted by the Bar as aggravating, **each and every case involved a plea or conviction** :

Florida Bar v. Pearce, 631 So. 2d. 1092 – **pled guilty** to misdemeanor charges of willful failure to file tax returns (T- 15 Oct 08 P. 48 at lines 19-24).

Florida Bar v. Blankner, 457 So. 2d. 476 – **Pled guilty** – willfully failing to file tax returns (T- 15 Oct 08 P. 49 at lines 5-15).

Florida Bar v. Hosner, 536 So. 2d. 188 – **Convicted** of mail fraud; **14 felonies**, assisted in prep of false returns – Disbarred (T- 15 Oct 08 P. 49 at lines 16-21).

Florida Bar v. Smith, 650 So. 2d. 980 – **Convicted of Tax evasion**, False Statements to Fed. Elections Commission (T- 15 Oct 08 P, 49 at Line 22-25 and P. 50 at lines 1-6).

Apparently, the Florida Bar was unable to find a case involving a Florida Bar member, income tax, and a criminal act that has not at least been charged prior to being disciplined, because if it had, such a case would certainly have been used in the proceedings.

In his opening statement, Attorney Tommy Cryer revealed the limitations facing the Respondent in the coming trial:

"…Mr. Behm, in response to the [Bar's] charges… has stipulated that he has had earnings but not income, as contended by the Bar, properly contended that he has had earnings, but earnings are not income, and its not earnings tax that we're talking about.

Mr. Behm will not be able to address these issues personally in this hearing. He will be forced to invoke his Fifth Amendment right to remain silent with respect to questions and issues and facts and disclosures, but we will endeavor to demonstrate to the referee that these issues concerning what is and is not income, who is and is not liable, are matters of federal law that are genuine, not frivolous issues, that are not tax protesters issues, and that I could be called a lot worse things than being a Constitutionalist, but that's what I am. I would like to think all of us were. But that's basically all that we'll be able to do today for you." (T- Oct. 15th 2007 at p.34, lines 8-22).

As reiterated in opening statement in the Instant Case, The Respondent was forced to choose between his Constitutional right against testifying against himself,

or sitting silent and proffering no defense against what the Bar had already concluded was some form of criminal act, despite their lack of any charges , indictments, convictions, or admissions. Therefore, the consent judgment against the Respondent should be set aside, and costs assessed as to Count II should therefore be charged against the Bar, and the case referred back to the Referee for further consideration consistent with that ruling.

Conclusion

Count I : The Referee erred in allowing the costs of the audit to be assigned to the Respondent. The costs were not discussed nor disclosed prior to, or during the trial. They are unnecessary, excessive, or not properly authenticated as well as unjustifiable, unreasonable, oppressive and punitive in nature, in that they were for a compliance audit with minimal records and a period of time having less than 100 transactions associated with the Respondent's law office being reviewed. The Respondent should be relieved of all costs, or at least those associated with the compliance audit as pled above, and because no probable cause exists in the record justifying the initial subpoena by the grievance committee.

Count II: The Referee erred in not dismissing Count II for lack of Jurisdiction, standing, and ripeness. It is improper to put an attorney in the position of choosing between his Constitutional rights and mounting a defense in a quasi-judicial administrative hearing. The historical lack of prosecution by the Bar against lawyers in tax filing cases without a criminal charge, indictment, conviction, or admission of criminal wrongdoing goes directly to the defense of the Respondent. If the Bar had a case, its case was not ripe, and is prima facia evidence of a lack of subject matter jurisdiction that would trigger disciplinary action. This constitutes overreaching by the Bar. This Court should set aside the consent judgment, associated costs, and dismiss the count with prejudice.

CERTIFICATION OF SERVICE

The undersigned hereby certifies that a true copy of this RESPONDENT'S AMENDED INITIAL BRIEF, with all appendix has been conveyed by U.S. mail this 5th day of May, 2008 to Frances R. Brown-Lewis, at the Florida Bar, 1200 Edgewater Drive, Orlando , Florida 32804.

Charles Behm Esquire
POB 10 Pomona Park , FL. 32181
Bar # 0171972
Ofc: (386) 328-9950 Fax (386) 325-8486

CERTIFICATION OF COMPLIANCE

The undersigned hereby certifies that the RESPONDENT'S AMENDED INITIAL BRIEF complies with the font requirements of Rule 9.210(a) of the Fla. R. App. P., in that the document has been submitted in 14 point type of the Times New Roman font.

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