

**IN THE SUPREME COURT OF FLORIDA
(Before a Referee)**

THE FLORIDA BAR,

Complainant,

v.

**CASE NO. SC 10-1793
[TFB Case No. 2009-30,994 (18B)]**

SUSAN K.W. ERLNBACH,

Respondent.

_____ /

REPORT OF REFEREE WITH FINDINGS OF FACT

I. Summary Of Proceeding: Pursuant to the undersigned being duly appointed to conduct disciplinary proceedings herein according to the rules regulating The Florida Bar, a hearing was held on August 11th and 12th, 2011. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar:	Frances Brown-Lewis
For the Respondent:	Mark S. Peters

II. Finding Of Fact As To Each Item Of Misconduct Of Which Respondent Is Charged: The Respondent, SUSAN K.W. ERLNBACH, was initially charged with (1) violation of Florida Bar Rule 3-4.3 to wit: misconduct by the commission of an act that is unlawful or contrary to honesty and justice; (2) violation of Florida Bar Rule 4-8.4(c) conduct involving dishonesty, fraud, deceit or misrepresentation; (3) violation of Florida Bar Rule 5-1.1(e) failing to promptly deliver to a third party funds or property that a third party is entitled to receive.

The parties filed prior to the hearing of this matter a detailed stipulation as to the facts and application of law to those facts. The parties' stipulation is accepted by this Referee and incorporated into this proposed report. The stipulation is attached to this Report of Referee with Findings of Fact as Exhibit "A". This Referee adopts the findings of fact and agreement between the parties.

The Florida Bar as part of the stipulation agreed to dismiss that portion of its complaint that alleges a violation of Florida Bar Rule 5-1.1(e). The Respondent, SUSAN K.W. ERLNBACH, having stipulated that there is a factual basis to support the Florida Bar's allegations that the Respondent violated Florida Bar Rule 3-4.3 and 4-8.4(c), the Respondent is found guilty of violation of Rule 3-4.3 misconduct by the commission of an act that is unlawful or contrary to honesty and justice and guilty of violation of Rule 4-8.4(c) conduct involving dishonesty, fraud, deceit or misrepresentation.

After considering all of the pleadings and evidence, pertinent portions of which are commented on below and supported by record evidence, this Referee finds the following by the standard of clear and convincing evidence:

The Respondent, SUSAN K.W. ERLNBACH, was admitted to practice law in 1982. Her Florida Bar Number is 356891.

The Respondent and her husband failed to file timely joint tax returns for the tax years 1997, 1998, 1999, 2000, 2001, 2002 and 2004, 2005 and 2006, even after the extensions permitted by the Internal Revenue Service. The Respondent and her husband sought and received a discharge of liability for the taxes, interest and penalty due for the tax years 1998, 1999, 2000, 2001, 2002, 2003, 2004 and 2005. The Respondent presently owes taxes, interest and penalties for the 2006, 2007, 2008 and 2009 tax years to the Department of Treasury. These findings are supported by The Florida Bar's exhibits and the parties' stipulation.

Over the years in question, the Respondent and her husband have made payments in excess of \$500,000.00 toward past due taxes, interest and penalties as reflected in Respondent's Exhibit No. 7. There was no evidence that Respondent and her husband attempted to evade responsibility for personal income taxes. Delays in filing personal tax returns occurred during time periods when respondent was preoccupied not only with her law practice but, with caring for several members of her extended family who had cancer and other serious medical conditions from the middle 1990's through 2006. The Internal Revenue Service imposed significant financial penalties and interest for the late tax returns.

The Respondent withheld federal income tax, social security tax and Medicare tax from employees of her professional association, Susan K.W. Erlenbach, P.A., and failed to pay the sums withheld over to the Department of Treasury as required by the Internal Revenue Code. The Respondent engaged in

this activity intermittently from 2006 until 2008. As a result, the Internal Revenue Service determined that the Respondent's P.A. and herself individually owed \$13,634.05. The Respondent and the I.R.S. undertook a payment plan agreement, which the Respondent is following by making monthly payments as required by the agreement. More than one half of this debt had been paid by the time of the hearing. Failure to remit employment taxes does not appear to be based upon greed or selfish motivation. Ms. Erlenbach's lifestyle was not, and is not lavish. The Respondent's failure to pay 941 withholdings and the employer's matching share appears to be related to poor business management of her practice's finances. The Respondent has four employees and she is a caring and generous employer. The Respondent filed her quarterly tax returns in a timely manner even when she was unable to remit the entire amount of taxes owed.

The intentional and willful failure to pay the Department of Treasury funds that were withheld from employees of the Respondent's professional association constitutes a violation of 26 U.S.C. §7202 and 26 U.S.C. §7203. Respondent has not been prosecuted by the Government for violation of either statute. The Respondent has neither been charged with nor convicted of any misdemeanor or felony. The Respondent has a repayment agreement with the Internal Revenue Service and she is performing her obligations under the agreement. The Respondent has admitted her failure to file timely joint personal tax returns, pay her joint income tax obligations and failure to pay 941 withholdings is a violation of Florida Bar Rules 3-4.3 and 4-8.4(c). She has accepted responsibility for those violations. The Respondent is remorseful for her actions and regrets her failure to adhere to federal tax laws and the Florida Bar Rules.

III. Recommendation As To Whether The Respondent Should Be Found Guilty: The Respondent is guilty of violating Rule 4-8.4(c) and Rule 3-4.3. The failure to file tax returns as required by the Internal Revenue Code is a violation of Florida Bar Rules. The Florida Bar v. Marks, 376 So.2d 9 (Fla. 1979); The Florida Bar v. Behm, 41 So.2d 136 (Fla. 2010). Further, the failure to pay funds withheld from employees to pay taxes, social security and Medicare to the Internal Revenue Service is a violation of the Federal Tax Code and Rules 4-8.4(c) and 3-4.3.

IV. Aggravation Factors Under Lawyer Sanctions Standards 8.0: The Respondent has been the subject of prior disciplinary proceedings. The first in January of 2001 resulted in a finding of minor misconduct, admonishment and one year probation.

The second and third disciplinary proceedings are related. The Respondent entered a Conditional Guilty Plea and a Consent Judgment was entered thereon. The sanctions applied to the Respondent were a public reprimand and two years of probation (September 2006). In July 2007, the Respondent was the subject of an Order to Show Cause for failure to comply with the terms of her probation. She was suspended in July 2007 subject to her suspension being lifted upon compliance with the terms of her probation. The Respondent's suspension was terminated on October 18, 2007 and her probationary period thereafter extended until October 18, 2009. The Respondent completed her probationary period without further incident.

The Respondent's prior disciplinary actions do not involve the non-payment of federal income tax, late filing of tax returns or employees' withholding taxes as charged here. The Respondent's prior disciplinary actions in 2005 and 2007 are aggravating factors under Standard 8.0.

The Respondent's repeated late filing of tax returns and failure to pay taxes demonstrates a pattern of misconduct. The Respondent failed to pay over withheld 941 taxes to the Department of Revenue in 2006, 2007 and 2008. This also evidences a pattern of misconduct. These are aggravating factors under Rule 9.22

The Respondent has been practicing law since 1982. She is experienced as an attorney and with the rules regulating the profession. This is an aggravating factor under Rule 9.22.

V. Mitigating Factors Under Lawyer Sanction Standard 9.3: The Respondent has admitted that her failure to pay federal income tax, failure to timely file federal income tax returns and failure to pay money withheld from her law firm's employees are actions that constitute a violation of Rule 3-4.3 and Rule 4-8.4(c). She has accepted responsibility for those acts and expressed remorse. These are mitigating factors.

The Respondent has also presented testimony from the following witnesses in mitigation:

- a.) Jennifer Opel Taylor (18th Judicial Circuit General Magistrate);
- b.) The Honorable Bruce W. Jacobus (District Court Judge, Florida Fifth District Court of Appeal);
- c.) The Honorable Michelle Vitt Baker (Brevard County Court Judge);
- d.) The Honorable J. Dean Moxley, Jr. (18th Judicial Circuit Court Judge);

- e.) The Honorable J. Preston Silvernail (18th Judicial Circuit Court Judge);
- f.) The Honorable Vincent Torpy (District Court Judge, Florida Fifth District Court of Appeal);
- g.) Peter Pancoast, Esquire;
- h.) Timothy Bradley, Esquire;
- i.) Pamela Harden;
- j.) Betty Secosh;
- k.) Angela Sampson;
- l.) Jennifer Simpson;
- m.) Linda Moore;
- n.) Sylvia Segura;
- o.) JoAnn Nitti;
- p.) Mary Ohwovoriole;
- q.) James O. Hoffman;
- r.) E. Len Adcock;
- s.) Cindy MacPhee.

Each of these witnesses testified that the Respondent was an able advocate who vigorously represented her clients in a capable and professional manner. The witness testimony, taken as a whole, indicates the Respondent enjoys a very good professional and ethical reputation among her clients, other attorneys and the judiciary. Respondent provides valuable legal services to her clients, many of whom could not afford an attorney but for the Respondent. The Respondent's generosity of time and money is not necessarily good business practice and may have contributed to her tax problems; however, she is held in high regard by her peers and the judges who testified about those very practices.

The Respondent has put in place practices and procedures to avoid any continued violation of the regulations regarding 941 tax withholdings. She has established a payment schedule to repay the 941 taxes due and has paid more than fifty percent (50%) of the sums due.

The following mitigating factors have been proven by the Respondent:

9.32(c) Personal and emotional problems the Respondent was experiencing were a substantial contributing factor in the Respondent's misconduct. The Respondent suffers from depression, attention deficit disorder and severe anxiety. Respondent's cash flow problems occurred in the same time period that (1) her husband (with whom she shared a building, housing their

separate law practices) had been diagnosed and was being treated for cancer and (2) there was a general economic downturn in the economy as a whole, particularly in Northern Brevard County, due to the termination of the Space Shuttle program.

9.32(d) The Respondent has established a system within her office to ensure payment of withheld funds to the Government along with the law firm's obligation to match social security payments. Further, the Respondent has set up a payment plan to repay the past tax obligations owed for non-withheld withholdings.

9.32(e) The Respondent has cooperated with these proceedings and recognizes and acknowledges her misconduct.

9.32(g) Respondent is of good character and enjoys a good professional reputation. She provides services as an advocate to many clients at the lower end of the social-economic scale whose rights would otherwise not be protected by a skilled advocate. Respondent has been an active participant in providing legal services for the poor and has accepted one or more legal aid cases each year for the last twenty years. Respondent currently has four active pending legal aid cases.

9.32(l) The Respondent has expressed and exhibited by her actions, remorse for her acts and omissions in dealing with her tax obligations. Respondent's remorse is real and not an artifice.

9.32(m) The Respondent's prior disciplinary proceedings in 2001 with findings of minor misconduct is not so remote in time and the finding sufficiently minor as to not be a consideration for determination of sanctions.

VI. Burden Of Proof: The Florida Bar's burden of proof is by clear and convincing evidence on any disputed issues of fact. The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973). The Florida Bar v. Bass, 106 So.2d 77 (Fla. 1958). The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970).

VII. The Purpose Of Disciplinary Proceedings: It is well recognized that the purpose of attorney disciplinary proceedings and actions are: (1) to protect the public; (2) sufficiently punish an offending attorney; and (3) deter other attorneys from the behavior that subjected the offending attorney to discipline. The Florida Bar v. Barrett, 897 So.2d 1269 (Fla. 2005).

The Respondent's work for her clients, who are primarily underprivileged, serves a public interest that will not be met during her suspension. Further, the Respondent's law firm's employees will be unemployed and unpaid during any lengthy suspension. A lengthy suspension will further impede the Respondent's employment tax repayment plan and resolution of her other joint income tax debt.

VIII. Recommendation As To Disciplinary Measures To Be Applied: This Referee recommends an eighty-nine (89) day suspension from the practice of law followed by a two (2) year probationary period and payment of disciplinary costs. It is noted that the Respondent previously received sanctions in Case No. SC04-2188. The conditions of probation shall include quarterly reports to The Florida Bar reflecting payment of all taxes due for the Respondent's law firm's employees and the payment of any personal income tax due on the Respondent's individual income. As a term of probation, the Respondent shall also submit to the I.R.S. an offer and compromise concerning her personal tax debt and any documents the I.R.S. requires to consider an offer and compromise.

In recommending the above disciplinary measures, this Referee considered the following case law:

- a.) The Florida Bar v. Greene, 235 So.2d 7 (Fla. 1970);
- b.) The Florida Bar v. Pearce, 631 So.2d 1092 (Fla. 1994);
- c.) The Florida Bar v. Ryan, 352 So.2d 1174 (Fla. 1977);
- d.) The Florida Bar v. Marks, 376 So.2d 9 (Fla. 1979);
- e.) The Florida Bar v. Rousseau, 219 So.2d 682 (Fla. 1969);
- f.) The Florida Bar v. Donaldson, 466 So.2d 216 (Fla. 1985).

IX. 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.) Court Reporter Costs	\$	135.00
	2.) Bar Counsel Travel Costs	\$	58.81
B.	Referee Level Costs		
	1.) Court Reporter Costs	\$	844.75
	2.) Bar Counsel Travel Costs	\$	515.70
C.	Administrative Costs	\$	1,250.00

D. Miscellaneous Costs		
1.) Investigator Costs	\$	237.34
2.) Witness Fees	\$	NA
3.) Copy Costs	\$	145.20
4.) Auto Track Costs	\$	NA
5.) Audit Costs	\$	1,087.40
TOTAL ITEMIZED COSTS	\$	4,274.20

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 a final unless a waiver is granted by the Board of Governors of The Florida Bar. The Respondent should be required to pay The Florida Bar's costs during the period of her probation. It is further recommended that Respondent shall be deemed delinquent and ineligible to practice law pursuant to R. Regulation Fla. Bar 1-3.6 for failure to timely pay the costs assessed in this proceeding.

Dated this 23rd day of September, 2011.

DWIGHT L. GEIGER
Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

Frances Brown-Lewis, Bar Counsel, The Florida Bar, 1000 Legion Place, Suite 1625, Orlando, Florida 32801

Mark S. Peters, Counsel for Respondent, Eisenmenger, Berry & Peters, P.A., 5450 Village Drive, Viera, Florida 32955

Susan K.W. Erlenbach, Respondent, 2532 Garden Street, Titusville, FL 32796

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