

**In The
SUPREME COURT OF FLORIDA**

THE FLORIDA BAR,

CASE NO. SC09-1040
SC09-1218

Complainant-Appellee,

v.

KEVIN J. HUBBART,

Respondent-Appellant.

APPELLANT’S INITIAL BRIEF

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ORAL ARGUMENT REQUESTED

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STATEMENT OF THE CASE AND FACTS

Before this Honorable Court comes two matters, SC09-1040 (TFB No. 2009-11,443 (6A)) and SC09-1218 (TFB No. 2009-11,146 (6A)), heard together by the reporting referee and consolidated by this Court, pursuant to the motion of Appellant.

SC09-1040 (TFB No. 2009-11,443 (6A))

On June 22, 2009 The Florida Bar filed a Notice of Determination of Guilt in three felony matters. Respondent had pled and obtained orders withholding adjudication in three worthless check charges, one in 2003 and two in 2006. The amount of the outstanding checks was; \$245.92, \$330.00 and \$220.68 respectively. Report of Referee in SC09-1040, p2. The Supreme Court entered an order suspending Respondent on June 23, 2009, effective July 23, 2009. A sanctions hearing was held on August 21, 2009 and then continued until September 25, 2009 for further evidence and to be heard at the same time as SC09-1218.

Appellant did not dispute that such orders in the alleged criminal matter were entered, but did testify, without rebuttal, that both the 2003 and 2008 cases were unrelated to the practice of law, (T-34, T38-39). Pursuant to Rules Regulating the Florida Bar 3-7.2(h), a respondent may only “challenge the imposition of a sanction only on the grounds of mistaken identity or whether the

conduct involved constitutes a felony under applicable law.” As such, Appellant was irrebuttably presumed guilty of misconduct and only allowed to address the level of sanctions to be imposed. (T-32, *see also*, T-36-37, wherein the referee admonishes the judgments may not be attacked. The Referee determined that Appellant violated the Rules Regulating the Florida Bar 3-7.2, based on a Determination of Guilt, and recommended a sanction of a suspension for three years. Report of Referee in SC09-1040, p4.

SC09-1218 (TFB No. 2008-11,146 (6A))

On July 6, 2009 The Florida Bar filed a complaint alleging Appellant practiced law while inactive due to a delinquency in an ordered payment. Specifically, the Bar alleged that by letter dated March 4, 2008, Appellant was sent notification from The Florida Bar that he had become delinquent for failure to pay assessed costs, effective March 4, 2008. Report of Referee in SC09-1218, p3.

The Bar further alleged that Petitioner represented Daniel LaSalla in a multi-party civil litigation matter scheduled for trial on March 10, 2008 and appeared for trial; that Appellant asked for, and was granted, a 24-hour continuance for trial that Appellant did not advise the Court or opposing counsel that he had become a delinquent member of The Florida Bar and was not authorized to practice law; that after the trial was continued, Appellant continued to practice law by representing Daniel LaSalla in possible settlement negotiations and by disseminating pleadings

relative to the case. *id.* The Bar did also allege that when trial was reconvened on the morning of March 11, 2008, Respondent informed the Court and opposing counsel that he was unable to proceed because he was ineligible to practice. *id.* The Referee did not note in his determination of fact nor his mitigating factors the un rebutted testimony of Appellant that upon learning he was delinquent, Appellant contacted the Florida Bar Ethics hotline prior to appearing in Court on March 10th, and was specifically informed that he should inform the Court he was delinquent, ineligible to practice and thus it would be proper for him to request a continuance on behalf of the client. Florida Bar Exhibit #9. It was further not noted that Appellant did testify that he informed the Court of his delinquent status, which was referenced in the transcript of the March 11 hearing in that matter. Florida Bar Exhibit #7. The Referee did not consider any of these as mitigating factors and recommended a discipline of disbarment.

SUMMARY OF THE ARGUMENT

Appellant comes before this Court on three issues. First, Appellant challenges the Constitutionality of The Rules Regulating the Florida Bar 3-7.2(a)(2) and 3-7.2(h). This rule, when applied to an attorney who has not had an adjudication entered against him or her, denies them the opportunity to challenge whether the underlying actions are true and whether they constitute a disciplinary breach. The result is a taking of the attorney's property interest in the license to

practice law without due process.

The second issue is that there is insufficient factual evidence to support a determination of guilt in either matter. As to SC09-1040, there was an irrebuttable presumption of guilt, so no facts were even considered, thus there is a complete lack of facts to support the finding. As to SC09-1218, there is substantial testimony by the Appellant, much if it undisputed, that all of his actions were based on the advice of the Florida Bar Ethics Hotline, that he fully disclosed his situation and that he did not attempt to practice any substantive law.

Third and finally, the discipline imposed herein, a three year suspension and a disbarment are substantially excessive considering the minimal relationship to the ability to practice law, the lack of any breach of client confidence, the lack of any breach of trust, the lack of bad intent, the lack of any misappropriation of funds and the minimal injury to any party.

ARGUMENT

I. THE RULES REGULATING THE FLORIDA BAR 3-7.2 (a) and 3-7.2(h) ARE UNCONSTITUTIONAL UNDER THE 14TH AMENDMENT TO THE U.S. CONSTITUTION AND ARTICLE I, SECTION 9 OF THE FLORIDA CONSTITUTION IN THAT IT DENIES APPELLANT DUE PROCESS OF LAW.

The Rules Regulating the Florida Bar 3.7(h) currently state that “The respondent may not contest the findings of guilt in the criminal proceedings,” and further expand that guilt is determined whether there is a conviction or even an

order withholding an adjudication of guilt. Rules Regulating the Florida Bar 3.7(a)(2). Under the current rule 3.7, if an attorney is accused of a felony, pleas *nolo contendere* (with or without an Alford plea scenario) and has the adjudication withheld, that attorney is subject to discipline without any opportunity to challenge whether the underlying actions constitute an action that should be subject to discipline. Such a total denial of any opportunity for a hearing on the merits of the actions leading to the discipline is a complete lack of due process, and as such violates the U.S. and Florida Constitutions.

It is undisputed that a license to practice law in the State of Florida is privilege, not a right. However, once that privilege is granted, a professional has a property interest in that license, which may not be suspended or revoked without due process of law. Delk v. Department of Professional Regulation, 595 So. 2d 966 (5th DCA, 1992). *See also* Florida Bar v. Prior, 330 So. 2d 697 (Fla. 1976). The procedure for suspending or revoking such a privilege is through a quasi-judicial administrative hearing process before a referee appointed by the Florida Supreme Court. Even in such proceedings, an attorney is entitled to due process. Florida Bar v. Carricarte, 733 So. 2d 975 (Fla. 1999).

Rule 3-7.2(a)(2), defines Determination of Guilt to include both fully adjudicated matters and those without enter of any adjudication. Rule 3-7.2(h) prohibits an attorney who has been determined guilty from disputing whether the

underlying facts constitute a disciplinary breach. At the time of the criminal charge, it is unlikely that the attorney has been actually noticed of the potential for professional discipline in the matter (which was true in the current case). Therefore, an attorney has no notice of a potential for discipline at the time of a potential plea, and has no opportunity to challenge whether such actions are a disciplinary breach once notice is given, after such a plea.

This Court has previously found that when disbarment proceeding are based on conviction of a crime, the proof of conviction and an adjudication of guilt are sufficient to establish a “*prima facie*” case for disciplinary action. Florida Bar v. Cohen, 908 So. 2d. 405 (Fla. 2005). *Prima facie* itself only implies that there is sufficient evidence to infer guilt, and potentially shifts the burden of proof to the other party, but it does not imply an irrebuttable conclusion. However, under the current Rule 3-7.2, it is an irrebuttable conclusion which is mandated, even without a conviction. Thus, in the scenario where no final adjudication is entered, or adjudication is withheld, and then the attorney is subsequently subject to discipline, the result is an rebuttable conclusion of guilt even though the attorney has never been given the opportunity to challenge whether the alleged actions constitute a disciplinary breach. Such is a denial of any arguable concept of due process and therefore Rule 3-7.2(a) and Rule 3-7.2(h) are unconstitutional when applied to attorneys who have not been adjudicated of any crime.

II. THE DETERMINATION OF GUILT RECOMMENDED BY THE REFEREE IS NOT SUPPORTED BY THE FACTS IN EVIDENCE AND APPLICATION OF LAW THEREIN.

SC09-1040 (TFB No. 2009-11,443 (6A))

This Court has been asked to approve a recommended finding of Guilty for violation of Rules Regulating the Florida Bar 3-7.2, based on withheld adjudications in two criminal matters. In determining whether Appellant was guilty of any disciplinary breach, the only facts considered by the Court in determining guilt were the facts that Appellant had been charged with three felonies and adjudication had been withheld. Pursuant to Rules Regulating the Florida Bar 3-7.2, no further facts could be considered, although Appellant did testify, and it was undisputed, that none of the checks in question were related to Appellant's practice of law. As no facts specific to the actions of Appellant were even considered, it is logically impossible for the Referee to have found that Appellant took any action which constituted a breach of discipline.

SC09-1218 (TFB No. 2008-11,146 (6A))

This Court has been asked to approve a recommended finding of Guilty for violation of Rules Regulating the Florida Bar 3-4.3, 4-4.5, 4-8.4(a), 4-8.4(c), and 4-8.4(d). All of these alleged breaches revolve around the actions taken by Appellant on March 10 and March 11 of 2008. At that time Appellant was

delinquent in the payment of assessments to the Florida Bar and therefore ineligible to practice law. It is undisputed that Appellant, upon learning of his status, requested guidance from the Florida Bar Ethics Hotline. It is further undisputed that the advice solicited was to appear before the court and request that the matter be continued because Appellant was not eligible to practice at that time. It is still further uncontested that the advice of the Ethics Hotline was to continue to relay communications between the opposing counsel and Appellant's client.

The only factual dispute in this matter is whether Appellant was sufficiently clear as to his status regarding eligibility to practice law at that time. Of the three opposing counsel and judge present on both days, only one of the opposing counsels has alleged that Appellant was less than clear as to his status. That attorney, in his report to the Florida Bar, provided a transcript of the March 11, 2008 hearing. On page five of that transcript, Appellant states he found out the previous morning, 'mentioned' it to the court on March 10 and was seeking to be 'reinstated.'

Based on all of the facts before the Referee, the Appellant, upon learning of his delinquent status and prior to appearing in court on March 10, 2008, sought advice from the obvious source and, in good faith followed that advice. As such, there are not facts sufficient to find that Appellant intentionally sought to practice law while ineligible nor that Appellant sought to misrepresent his status to opposing

counsel and/or the court and thus there was no breach of any disciplinary rules.

III. THE DISCIPLINE RECOMMENDED BY THE REFEREE IS EXCESSIVE, CONTRARY TO THE AGGREGATING AND MITIGATING FACTORS PRESENTED AND THE STANDARDS OF DISCIPLINE TO BE APPLIED.

SC09-1040 (TFB No. 2009-11,443 (6A))

This Court has been asked to approve a recommended discipline of a three year suspension for violation of Rules Regulating the Florida Bar 3-7.2, based on withheld adjudications in two criminal matters. The specific criminal matters where three dishonored checks unrelated to the practice of law. The Referee also considered as aggravating factors the Appellants single prior discipline of a public reprimand and a pattern of misconduct from 2004, which appears to be based on the same prior discipline. As mitigating circumstances, the Referee noted that Respondent testified to ‘personal problems’ with corroborations, and did not comment on the weight, if any, given to these mitigating factors.

The underlying allegations for this matter are three (3) dishonored checks totaling less than \$800.00. It is undisputed that each check was made good and that all were made good prior to any notice of potential discipline.

This Court has considered worthless check issues involving attorney before, and found that in considering the seriousness of the offense, the must look beyond the mere uttering of a worthless check and determine if there was illegal conduct involving moral turpitude. Florida Bar v. Davis, 361 So.2d 159 (Fla. 1978). In

Davis, the Court found that previous opinions had found that the mere uttering of a worthless check did not rise to that level and, when examining the additional factors, found while uttering a worthless check was inexcusable, it was not a crime of moral turpitude. Florida Bar counsel acknowledged that this was not a crime of moral turpitude during the hearing. (T-37).

In the worthless check cases before this Court, it has often been the case that there were additional allegations beyond the worthless check. For example, in Davis it is similar to the present situation in that there was no intent to defraud and the checks did not involve any attorney-client relationship. *id.* It differs, however, Different from the present matter, there were also allegations of improper trust fund activities and the underlying debt related to the worthless checks had not been satisfied. *id.* In Davis, the referee did not find inappropriate actions regarding the trust account and recommended a sanction of a 12 month suspension. The Supreme Court found that there was a violation regarding the trust account, but that there was not any act of moral turpitude, but kept the discipline at 12 months. Thus, Davis suggests at that an appropriate discipline for a worthless check uttered without intent to defraud is less than a 12 month suspension.

The Davis case has been followed by a number of decisions. A case with some similarities to the current matter, as it involves multiple complaints and a history of prior discipline, is The Florida Bar v. Williams, 753 So.2d 1258 (Fla.

2000), a case noted in the Referee's decision. In Williams, Williams was found to have failed to act with reasonable diligence, failing to keep a client informed of status, failing to respond to the client's request for information, collecting an excessive fee, trust accounting discrepancies and Williams uttered a worthless check to a client. Williams at 1259-1260. Williams had been subject to three prior disciplines, including a 20 day suspension. Williams at 1261. The Supreme Court confirmed the referee's recommendation of a one year suspension followed by a period of probation and accounting oversight. Williams. When considering appropriate discipline, trust accounting and duties to a client are considered more serious violations than violations not directly related to the practice of law. In the Williams matter, even considering trust accounting irregularities, failures to communicate with the client, and three previous disciplines, including a suspension, the Court found that a 12 month suspension was reasonable. *id.* This again suggests that the appropriate sanction for uttering a worthless check is substantially less than a 12 month suspension.

Finally, examining Standards for Imposing Lawyer Sanctions regarding uttering a worthless check and the associated determination of guilt, the appropriate section is Section 5, failure to maintain personal integrity. In examining the specifics to determine the recommended sanction, the facts are that there was not a conviction of a felony, the checks did not involve clients and there

is was no evidence presented of an actual intent to defraud. Section 5.11 indicates that conviction of a felony, or several other specifically enumerated acts suggest disbarment. The rules use the specific term ‘conviction’ not “determination of guilt’ as defined by the Rules of Conduct, thus this section does not apply. Section 5.12 suggests a suspension is appropriate when there is knowing criminal conduct that seriously reflects adversely on the lawyer’s fitness to practice. There was no evidence presented to the Referee that the acts were done knowingly and intending criminal conduct and even if such knowledge is implied, these are isolated incidents which do not seriously reflect on the ability to practice law. In fact, Appellant has not been able to find any reported Florida caselaw indicating that the mere utterance of a worthless check seriously reflects on the ability to practice law. Thus, the standard should not apply or, at worst, should apply at the lowest level of suspension if there is substantial evidence of intent to commit criminal conduct and those acts reflect on the ability to practice law. Therefore, while acknowledging that Court’s finding in Davis that the utterance of a worthless check is inexcusable, the mere utterance of a worthless check combined with only a determination of guilt would most likely merit a public reprimand.

Appellant’s prior Public Reprimand and the mitigating circumstances presented by Appellant are effectively offsetting, thus the appropriate discipline for uttering a worthless check for which there was no conviction is substantially less

than a 12 month suspension and most likely a public reprimand.

SC09-1218 (TFB No. 2008-11,146 (6A))

The Referee has recommended a discipline of disbarment for this matter. The Referee begins his justification for the recommendation by noting this was the third case he has heard involving Respondent in the last three years. The referee does not cite the prior two cases, but presumably they are the prior matter resulting in the public reprimand and the case consolidated herein. If that is the case to which the Referee refers, it would be inappropriate to consider it as an aggravating factor as it was not yet approved by this Court.

After diligent searching, Appellant has not located a published Florida opinion directly finding a violation of ethics rules for practicing law while ineligible due to a delinquency. There are numerous matters brought by the Bar regarding the unlicensed practice of law, they are not relevant to this matter as the forum and penalties are different and this was not an unlicensed practice, but an alleged practice of law while ineligible due to fees being due.

Under the Standards for Imposing Lawyer Sanctions, the allegations under this matter fall under Section 7, Violation of Other Duties Owed as a Professional. This section seems most appropriate as it specifically includes the unlicensed practice of law (which is, arguably the more severe version of ineligible practice) and miscommunications about the lawyer. In the present matter, the alleged

ineligible practice was the appearance at a trial call requesting a continuance and relaying communications between the client and opposing parties. The foregoing was done after consulting with the Florida Bar ethics hotline, and disclosing to the Court and opposing counsel the ineligibility. The client engaged additional counsel and the litigants settled the matter the same week.

Under Section 7.1, disbarment is appropriate when the intentional misconduct causing serious injury. There is no suggestion in this matter of any serious injury. Further, the representations to Court and opposing counsel was done at the direction of the ethics hotline, thus it is not appropriate to suggest that any misconduct we done intentionally. Section 7.2 suggests suspension is appropriate when the conduct is knowing and causes or can potentially injury the client, the public or the legal system. As mentioned above, the conduct was at the direction of the ethics hotline, so it is fair to infer it was not done knowing it to be improper. Further, there was no harm to any party nor was there the potential for harm. Section 7.3 suggests a public reprimand is appropriate when the conduct is negligent, but harm is still present or possible, so it also does not apply. Thus, applying the Standards for Imposing Lawyer Sanctions to this situation, the default position is an admonishment, as suggested under Section 7.4.

Based on the above analysis, absent mitigating or aggravating circumstances, any of the individually complained of acts would likely not merit a

suspension of any length.

General Considerations in the Appropriate Level of Discipline

An attorney disciplinary proceeding must serve three purposes. First, the discipline must be fair to society. Second, it must be fair to the attorney. Third, the discipline must be severe enough to deter other attorneys from similar misconduct. Florida Bar v. Rue, 643 So.2d 1080 (Fla. 1994); Florida Bar v. Stark, 616 So.2d 41 (Fla. 1993). Further, the Standards for Imposing Lawyer Sanctions provide that this Court should consider several factors before imposing sanctions, which are the duties violated; the lawyer's mental state; the potential or actual injury caused by the lawyer's misconduct; and the existence of aggravating or mitigating circumstances. Ultimately, the actual or potential injury reflects the seriousness of the actions and thus should carry great weight in determining the severity of any discipline.

The Standards for Imposing Lawyer Sanctions indicate that in considering the proper discipline, the consideration injury reasonably foreseeable at the time of the conduct be considered. In the SC09-1040 matter, the only tangible harm foreseeable would be the value of the worthless checks, less than \$800.00. There was minimal, if any, tangible or foreseeable harm in the SC09-1218 as Appellant did not try to proceed with the scheduled trial and did relay communications between the parties.

When compared to the harm normally contemplated in ethics violations, the standards indicated that injury to the client, public, legal system or profession by the alleged misconduct be considered. It further suggests that the injury can range from ‘serious’ to ‘little or no injury’. As related to the check issues, there was no client in the matter nor any ‘public’ act, so there is no harm, actual or potential, to them. Regarding the ineligible practice issues, these do involve dealings with the legal system, but the actual or potential injury is minimal or non-existent in that neither caused or threatened any change in any outcome of any matter, nor caused any significant additional costs in any matter, so any injury would be theoretical. Thus, in considering the discipline, it must be considered that there was minimal actual harm, which was resolved prior to these actions, and minimal potential harm.

CONCLUSION

Appellant comes before this Court requesting three types of relief. First, a determination that the Rules Regulating the Florida Bar 3-7.2(a)(2) and 3-7.2(h) be found unconstitutional based on a lack of due process. These rules, as applied to an attorney who has not had any adjudication of a felony conviction deprive the attorney of any reasonable due process. The second relief sought is a determination that the recommendation of the Referee as to guilt be reversed in

both matters. As to the SC09-1040 matter, there was absolutely no evidence presented regarding the actions of Appellant and thus absolutely no basis for any finding of a disciplinary breach. As to the SC09-1218 matter, there is minimal evidence that Appellant less than fully disclosed his delinquent status and substantial evidence that he did so, and only proceeded upon the advice of the Florida Bar. Finally, the third relief sought is that this Court reduce the discipline herein, should it determine that the Appellant is guilty of one or both violations. Appellant has not breached any client confidences, has not violated any client trust, has not misappropriated any client funds and has caused almost no actual harm. As such, a reprimand to a non-rehabilitative suspension would be the most appropriate discipline.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by hand delivery on the 4th day of June 2010, to:

Karen B. Lopez
Bar Counsel
The Florida Bar
4200 George J. Bean Parkway
Tampa, Florida 33607-1496

CERTIFICATE OF COMPLIANCE

I, Kevin Hubbart, hereby certify that this document is exclusively Times New Roman 14 point font, pursuant to Florida Rules of Appellate Procedure 9.210(a).

Kevin Hubbart