IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 74,443
[TFB No. 87-27,927 (01A)]

v.

FREDRIC G. LEVIN,

Respondent.
_____/

ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be known as the Bar.

The transcript of the final hearing will be referred to as T.

The Bar's exhibits will be referred to as B–Ex.

STATEMENT OF THE CASE

The First Judicial Circuit Grievance Committee "A" voted to find probable cause on September 20, 1988. The Bar filed its Complaint on July 21, 1989. The respondent filed his Answer on March 23, 1989. The undersigned Bar Counsel filed a Notice of Substitution of Counsel on August 24, 1989. The final hearing was held on January 16 and 17, 1990. The Referee filed his report on February 9, 1990, recommending that the respondent be found guilty of violating Integration Rules 11.02(3)(a), 11.02(3)(b) and Disciplinary Rule 1-102(A)(6). The Referee also filed a memorandum outlining the reasoning behind his recommendations. The Board of Governors considered the report at its meeting which ended on March 17, 1990, and voted not to seek review of the Referee's recommendations. The respondent filed a petition for review on March 27, 1990. His initial brief was originally due on April 25, 1990, but the respondent moved for an extention of time to file which this Court granted. The respondent filed his brief on May 1, 1990, and petitioned for oral argument.

STATEMENT OF THE FACTS

Except as otherwise noted, the following facts are taken from the Report of Referee.

The respondent routinely engaged in illegal gambling activities involving placing bets on the outcome of football games. This occurred over a five year period of time through late 1986. The respondent placed his wagers through a bookmaker in the Pensacola, Florida, area. His bets ranged between $500.00 and $2,000.00 nearly every weekend during the 1986 football season with some weekend totals reaching upwards of $6,000.00. The respondent was aware that betting on football games was and is a second degree misdemeanor in the state of Florida pursuant to Section 849.14 of the Florida Statutes. The respondent viewed betting on football games as his form of recreation; that it was an activity engaged in by many residents of the state; and that the law was not routinely enforced.

Capt. Gerald Gigon and his wife Patricia were friends of the respondent. During a social conversation, the respondent casually mentioned that he bet on football games. The respondent, however, did not entice either Capt. Gigon or his wife to engage in this activity. Capt. Gigon apparently had been interested in learning how to place bets on football games for

quite some time and requested the respondent's help. Initially, he placed bets for them through his bookmaker. Thereafter, he provided the Gigons with the bookmaker's telephone number and they began placing their own bets. He also allowed wagers and payoffs to be delivered to his law office on behalf of the Gigons. Later when Capt. Gigon began losing a substantial amount of money, the respondent urged him to stop gambling.

The respondent's own illegal betting activities did not cease until late in the fall of 1986 when his bookmaker was arrested. On February 10, 1987, the respondent freely gave an incriminating statement to the Assistant State Attorney investigating the criminal case against the bookmaker. (B-Ex 3).

On March 5, 1987, and again on August 19, 1987, the respondent appeared on his own television show, "LawLine" as televised on "BLAB TV", a local television station in Pensacola, Florida. During both shows the respondent stated that he had engaged in illegal gambling activities by placing football bets with a bookmaker. During the August 19, 1987, show, he asserted his belief, on camera, that placing bets on football games with a bookmaker was an acceptable recreational activity. He further admitted he knew he was committing a misdemeanor offense by placing such bets.

The respondent testified before the First Judicial Circuit Grievance Committee "A" on September 20, 1988, that if he had the opportunity to place bets on football games he would continue to do *so.* The respondent testified at the final hearing that the main reason that he no longer gambled was that he would now rather spend the weekends playing with his grandchildren. (T. pp. 199, 213).

Some six other attorneys in the Pensacola area were also involved in placing similar illegal bets in varying degrees. Of these, two received private reprimands and the remaining were not disciplined by the Bar.

SUMMARY OF THE ARGUMENT

In his initial brief, the respondent does not attack the Referee's findings of fact. He freely admits that he knowingly committed a misdemeanor offense by placing bets with a bookmaker over a period of years. He apparently believes, however, that his good deeds, reputation and belief that the statute is "a bad law" somehow excuse the fact that he, an officer of the court, broke one of the very laws he is sworn to uphold. He further argues that the imposition of any discipline in his case is unfair given the fact that some of the offenders who were also members of the Bar either were not disciplined or received private reprimands. What the respondent fails to recognize is that many factors influence the level of discipline in a given case. For example, disciplines imposed for trust account record keeping violations range from private reprimands to suspensions depending upon the circumstances in each case. In fact, it would be unfair for a specific level of discipline to be imposed upon a certain transgression without considering the unique facts of each case.

In this instance, the respondent's admission to the grievance committee that he would gamble again given the opportunity and his public statements on his television program set him apart from the other attorneys who apparently evinced

different attitudes toward their illegal conduct and did not publicly boast of it in the mass media. The main issue is not the respondent's gambling activities but rather his willful and knowing violation of the law. The Bar submits that if he believed it to be a "bad law" then he should have worked toward repealing it.

Furthermore, much of the publicity in this case has been generated by the respondent himself. He apparently contacted the local newspaper and had his television station videotape the final hearing. (T. pp. 212-213). His petition for review and request for oral argument suggest that additional publicity is being self generated. Had he not petitioned for review, this Court most likely would have issued an order that did not specify the details of the case. It merely would have appeared in the Southern Reporter in a table of cases issued without written opinions. Therefore, the respondent's argument that a public argument will damage his career is a hollow one. The Bar submits that a public reprimand is the appropriate disposition of this case due to the respondent's willful repeated conduct of engaging in gambling activities that constitute a second degree misdemeanor offense.

ARGUMENT

THE REFEREE'S RECOMMENDED DISCIPLINE OF A PUBLIC REPRIMAND IS THE APPROPRIATE DISPOSITION GIVEN HIS FINDINGS OF FACT.

The respondent spends much of his brief discussing in great detail his professional accomplishments and good deeds. The Bar has never taken issue with the respondent's ability as an attorney and his contributions to both his community and profession are most certainly to be commended. All of this was considered by the Referee in making his recommendation as is indicated by his report and memorandum. The issue is that the respondent, who has considerable experience in the practice of law, voluntarily chose to violate one of the laws of this state simply because he felt it was a "bad law" and gambling on football games was his form of recreation. He excuses his actions by arguing that most everybody gambles, the law is rarely enforced, and therefore it is all right regardless of what the law says. The Bar suggests that if the respondent believed it was an archaic, unenforced law and that gambling should be legalized then he should have used his skills to work toward repealing the statute rather than choosing the ignore its existence. An officer of the court must live within the bounds of the law and not willfully flaunt it. As the Referee noted in his memorandum,

> The respondent like all other members of society is not free to pick and choose which laws he will obey and which laws he will not obey. A violation of law puts that person 'at risk' and if discovered, he cannot urge that there are other persons, like offending, that have not been caught and prosecuted. Appendix p. 8 - See also paragraphs 12-14 of the findings in the report (Appendix p. 4).

What if another member of the Bar believed that a statute against sexual relations with a minor was a "bad law"? What if an attorney believed that possession of less than twenty grams of marijuana was a "bad law"? According to the respondent's philosophy if a person believes a statute to be a "bad law", then he should not be required to abide by it, especially if it is rarely enforced.

An attorney has a responsibility to conduct himself in a manner that is consistent with the standards of the professional. The Florida v. Bennett, 276 So.2d 481 (Fla. 1973). Although Bennett, supra, concerned an attorney's conflict of interest in dealing with his business partners, this Court clearly indicated that an attorney may be disciplined for improper conduct in his personal life.

> 'An attorney is an attorney is an attorney', much as the military officer remains 'an officer and a gentleman'. We do not mean to say that lawyers are to be deprived of business opportunities; in fact we have expressly said to the contrary on occasion; but we do point out that the requirement of remaining above suspicion, as Caesar's wife, is a fact of life for attorneys. They must be on guard and act accordingly to avoid tarnishing the professional image or damaging

the public which may rely upon their professional standing. At p. 482.

In the past this Court has disciplined attorneys for engaging in personal conduct that reflected adversely on their fitness and which may or may not have had a direct link to their abilities or fitness to practice law. In The Florida Bar v. Hefty, 213 So.2d 422 (Fla. 1968), an attorney was disbarred for engaging in sexual relations with his stepdaughter at a time when she was a minor. Although the child complained to the authorities and an investigation was made, it appears from the court opinion that no criminal charges may have been brought against the accused attorney. He was found guilty of violating Integration Rule 11.02(3)(a).

In The Florida Bar v. Kay, 232 So.2d 378 (Fla. 1970), an attorney was disbarred for his conviction of indecent exposure in violation of the city ordinance and for his lack candor in his testimony at the criminal and disciplinary hearings. The attorney was found guilty of violating Integration Rule 11.02(3).

The respondent's gambling activities, like the conduct in Hefty and Kay, supra, were unrelated to the practice of law. The respondent was found guilty by the Referee of violating Integration Rule 11.02(3)(a) which states in part that the commission of any act that is contrary to honesty, justice, or

good morals constitutes a cause for discipline. Unlike Hefty and Kay, supra, the issue here is not so much the morality of the respondent's conduct, although some persons may consider gambling to be immoral and this argument most probably figured in the legislative intent in passing the law many years ago. The real issue is the effect of the respondent's conduct on justice in that he knowingly and willfully engaged in an illegal activity and publicly flaunted the law. Such public statements by a member of the Bar, especially one with the prestige and influence of the respondent, serve only to encourage the average person to adopt a similar attitude and begin ignoring laws with which he or she may simply disagree. The Bar submits that this is the wrong message for an attorney to convey to the general public. Instead, if he believes a law should be changed he should encourage people to work toward either amending or repealing it rather than violating it. In Bar disciplinary cases not only is it important to examine an offense and the circumstances surrounding it but also to consider the effect of the attorney's action on others as well as his character and the likelihood of further disciplinary violations. See The Florida Bar v. Moxley, 462 So.2d 814 (Fla. 1985). Note the Referee also found the respondent guilty of violating Rule 11.02(3)(b) for engaging in criminal misconduct contituting a misdemeanor.

In The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988), an attorney was suspended for ninety days and placed on a two

year period of probation for his illegal possession and delivery of cocaine. The attorney pled no contest to the criminal charges, ajudication of guilt was withheld and he was placed on probation. The attorney argued that his actions did not reflect adversely on his fitness to practice law. The referee disagreed and stated that "[a]ttorneys are officers of the court and as such are expected by the Bar, bench and public to conduct themselves in accordance with the law". This Court agreed and adopted the Referee's findings and language.

The two cases most similar to the respondent's are In Re: Inquiry Concerning a Judge, 460 So.2d 377 (Fla. 1984) and In Re: Block, 496 So.2d 133 (Fla. 1986). Both concerned disciplinary proceedings instituted by the Judicial Qualifications Committee against judges. In the first case a Circuit Judge received a public reprimand for his participation on a golf tournament committee which promoted, advertised and conducted gambling with respect to a golf tournament. The golf tournament committee was investigated by the grand jury or Orange County, Florida. At their direction a report was delivered to the Judicial Qualifications Commission and proceedings against the judge, James S. Byrd, ensued. He was charged with impairing the confidence of the citizens of this state and the integrity of the judicial system. The judge entered into a stipulation that the factual matters alleged were true.

In the second case, the Judicial Qualifications Commission found that a judge had violated various Disciplinary Rules of the Code of Professional Responsibility at a point in time when he was a practicing attorney. He was charged with sharing legal fees with both a suspended attorney and his legal secretary. He was also charged with placing wagers and bets with bookmakers in violation of the Florida criminal statutes. Although he testified that he placed bets with friends whose family members went to the track every day, the Commission found his testimony to be without credibility and he was found guilty of violating Disciplinary Rules 1-102(A)(1), 1-102(A)(3), 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6). It is this second case that more closely mirrors the misconduct committed by the respondent. The main difference is that the respondent openly admits that he placed his bets through a bookmaker and did not attempt to mislead the grievance committee to believe otherwise. The Bar submits that if it is improper for members of the judiciary to engage in gambling activities then it most certainly should be considered improper for attorneys as officers of the court to do likewise.

No attorneys have received public discipline for gambling. However, there have been public reprimands issued for other misconduct that constituted criminal misdemeanor offenses. For instance, in The Florida Bar v. Levine, 498 So.2d 941 (Fla. 1986), an attorney was convicted of a misdemeanor for the

personal use of cocaine. The attorney pled guilty was adjudicated and was sentenced to two years probation, fined $5,000 and ordered to perform 100 hours of legal services for the poor. In the Bar proceeding he entered into a consent judgment for a public reprimand. He was found guilty of violating Disciplinary Rule 1-102(A)(6), one of the same Rules for which the respondent is charged with violating. Justice Ehrlich, in a dissenting opinion, queried whether the Court should similarly discipline all attorneys who have been convicted of a misdemeanor. He declined to answer that rhetorical question in the affirmative but went on to express concern that an attorney's recreational use of a controlled substance should be treated so lightly.

Although the respondent's misconduct did not involve drug use, in many ways gambling is analogous. Both may be viewed as recreational activities engaged in by an attorney which do not necessarily affect his ability to practice law. In many instances drug laws are not enforced against the users but rather against the distributors. Justice Ehrlich's comments in his dissenting opinion in Levine, supra, are enlightening. He stated the following:

> Lawyers 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. Is this proper perception that makes this seemingly innocuous (in the superficial sense that the only one adversely affected is the one indulges in the use of the drug) breach of the law, so very pernicious, in the eyes of the public and understandably gives rise to a full measure of cynicism. The bar needs the support of the public but it must merit that support and when this Court gently slaps the wrist of the member of the bar who uses cocaine in contravention of the statute, the public may arguably have reason to believe that we are treating the bar as a privileged class above the law and other citizens. At p. 942.

In The Florida Bar v. Pascoe, 526 So.2d 912 (Fla. 1988), an attorney received a public reprimand and three year period of probation €or placing an ethically improper advertisement, pleading no contest to a misdemeanor possession of marijuana charge, making comments concerning a federal court action that were interpreted as improper criticism and failing to timely handle a criminal appeal. The attorney was also required to take and pass the ethics portion of the Bar exam prior to his satisfactory completion of his probation.

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attorney received a forty-five day suspension for his conviction of engaging in a lewd and lascivious act. The conviction was later reversed on appeal but the referee determined that the accused attorney's conduct reflected poorly on his conduct as a citizen and an officer of the court. He was found guilty of

violating Disciplinary Rule 1-102(A)(3) and Integration Rule 11.02(3)(a)(b). The attorney entered into what amounted to a conditional guilty plea subject to an agreed upon discipline.

In The Florida Bar v. Thompson, 429 So.2d 3 (Fla. 1983), an attorney was publicly reprimanded for failing to maintain a trust account and for issuing numerous checks that were returned due to insufficient funds. In less than one year's time he issued forthy-three checks that were dishonored. It does not appear from the opinion that any criminal charges were brought but it is clear that when an attorney issues a check connected with his law practice and there are insufficient funds to cover it, it is a disciplinable offense.

The respondent also argues that his discipline is a matter of selective enforcement. The Bar submits that this is not the case. This action against the respondent is no more an instance of selective enforcement than a state trooper choosing to ticket one person driving at seventy-five miles per hour on the interstate while other motorists pass by at speeds in excess of the posted limit. Anyone who has faced such a situation well knows how unpersuasive it is to argue that the other motorists were going either the same speed or faster. The fact that others seem to break a particular law or rule does not excuse one's own personal conduct nor does it make it right. Moreover, the other attorneys who placed wagers and received lesser or no discipline

apparently demonstrated attitudes quite different from that of the respondent's. This Court has held that an accused attorney's attitude towards his underlying misconduct has a bearing on the level of discipline to be imposed. See The Florida Bar v. Thompson, 500 So.2d 1335 (Fla. 1986). The respondent's attitude is that he has done nothing wrong despite having violated a criminal law. He testified at the final hearing that he did not believe he should be held to a different standard than a lay person simply because he is an officer of the court. (T. p. 29). He admits he testified before the grievance committee that the only reason he stopped gambling was because his bookmaker was arrested and if given the opportunity would, at that time, resume gambling. Since that time that his grandchildren have moved back to the Pensacola, Florida, area, and the respondent apparently no longer desires to engage in gambling activities. He still does not believe, however, that his conduct was unethical in any way. (T. p. 199). The Bar submits that the respondent's attitude is what sets him apart from the other attorneys who received either private reprimands or against whom disciplinary proceedings were not initiated.

The respondent also argues that he is being penalized for exercising his right to free speech with respect to the airing of his opinions on his two television programs, the video tapes of which were admitted into evidence as Bar Exhibits 6 and 7. The respondent widely broadcast his views as set forth above although

he knew gambling was a crime, and which to him was an acceptable recreational activity. The Bar urges this Court to carefully review Bar Exhibits 6 and 7 in order to get the flavor of his attitude and comments in context. A man of the respondent's prominence in the community may be subject to even more scrutiny than the average citizen because his opinions carry considerable weight. It is unseemly for an officer of the court to so openly flaunt his violation of a criminal law. The respondent is not above the law.

The respondent indicates in his brief that a public reprimand would adversely affect his professional image. It seems, however, that much of the publicity already surrounding this case has been generated by the respondent himself. The respondent apparently contacted a local newspaper and had his televison station, "BLAB TV", videotape the final hearing. (T. pp. 212-213). If there is a wound, the Bar suggests it has been self-inflicted. The respondent has widely publicized every aspect of this case including airing his views on "LawLine", video taping the final hearing, appealing the Referee's recommended discipline and requesting oral argument. Had he not sought an appeal, it is doubtful that the facts of this case would be set out in the Court's opinion and published in the Southern Reporter. Instead, it would have been listed in the table of cases published without written opinions. If oral argument is granted, the Bar suggests that media coverage will be

ample. If he was truly concerned about any adverse effects this matter could have on his professional image, then it is only reasonable to assume he would have chosen a different course of conduct.

Finally in his initial brief, the respondent mixes the commentaries to the Rules of Professional Conduct with the former Code of Professional Responsibility. The respondent was charged under the old code because his misconduct occurred prior to January 1, 1987. Therefore, the Rules of Professional Conduct do not apply here. His analysis and comparison between the two sets of rules is meaningless and confusing at best. In addition, it is immaterial that the respondent's bookmaker was charged with a crime while the respondent was not also charged. There is no reason why a bettor could not be charged just as a "John" may be charged for soliciting a prostitute. The fact that it is rarely done is hardly an excuse for engaging in criminal activity.

In determining the appropriate level of discipline three considerations must be made as laid out in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). First, the judgment must be fair to both society and the respondent, protecting the former from unethical conduct without unduly denying them with the services of a qualified lawyer. Second, the discipline must be fair to the respondent with it being sufficient to punish the breach and at the same time encourage reform and rehabilitation.

Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misconduct. The Bar submits that a public reprimand would best serve these three purposes and to reinforce this Court's view that even in personal transactions an attorney must "avoid tarnishing the professional image or damaging the public which may rely upon their professional standing". The Florida Bar v. Hooper, 507 So.2d 1078, 1079, (Fla. 1987), quoting The Florida Bar v. Bennett, 276 So.2d 481, 482 (Fla. 1973).

In conclusion, it is worth quoting the Referee's findings and commentary set forth in paragraphs twelve through fourteen in section two of his report.

> Respondent argued that the greivance committee conspired to embarrass him publicly. I find little evidence of this in the record. It appears the respondent's attitude at the time may have differed considerably from that of the other attorneys who received lesser or no discipline. He saw nothing wrong with breaking the law because he felt it was a bad law to begin with. Furthermore, he aired his views publicly through his television program. Further, although the respondent denied he was advocating breaking the law, he must have been aware his stature in the community could foster that impression as opposed to merely airing his opinion.
>
> I find that the respondent repeatedly engaged in illegal gambling over a lengthy period of time involving a substantial amount of money. Respondent is an officer of the Court and as such is sworn to uphold the laws of the State of Florida. It is not acceptable for a member of the Bar to simply ignore a law with which he does not agree. Rather, he should work to have the law repealed by the State Legislature which, by his own admission he has not done.

> I recognize that the respondent has a long and distinquished career in the practice of law. He has made many contributions to the community. Good deeds, however, do not excuse his routinely engaging in conduct he admittedly knew to be illegal.

Such conduct clearly warrants a public reprimand regardless of its impact on the respondent's ability to practice law for the obvious reasons.

CONCLUSION

WHEREFORE, The Florida Bar respectfully prays this Honorable Court will review and approve the Referee's findings of fact, recommendation of guilt and recommendation of a public reprimand and further order the respondent to pay costs in these proceedings currently totalling $1,814.00.

Respectfully submitted,

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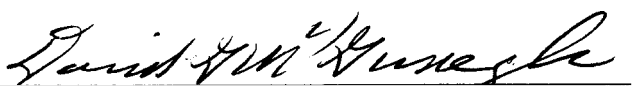
BY: 
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Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by certified mail, return receipt requested no. P 034 463 943, to Alan H. Rosenbloum, counsel for respondent, at 417 Canterbury Lane, Gulf Breeze, Florida 32561-4416; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 21st day of May, 1990.

Respectfully submitted,

David G. McGunegle
Bar Counsel