IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Case No. 74,443
TFB No. 87-27,937 (01A)

FREDRIC GERSON LEVIN,

Respondent.

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

PAGE

CITATION OF AUTHORITIES .... ii-iii

PROCEDURAL HISTORY 1

STATEMENT OF THE CASE AND FACTS 1-10

Respondent's Background 1-8

Referee's Findings of Fact 8-9

Referee's Conclusions of Law 9-10

Grounds for Appeal 10

SUMMARY OF ARGUMENTS 11

ARGUMENTS ON APPEAL 12

I.

WHETHER RESPONDENT VIOLATED § 849.14, FLA. STAT. (1989) 12

II.

WHETHER COMMISSION OF A MISDEMEANOR IS A VIOLATION OF A RULE OF PROFESSIONAL RESPONSIBILITY 12-16

III.

WHETHER A LAWYER IS NECESSARILY SUBJECT TO DISCIPLINE JUST BECAUSE HE VIOLATES A RULE OF PROFESSIONAL RESPONSIBILITY 16-20

IV.

WHETHER RESPONDENT SHOULD BE CONTESTING A PUBLIC REPRIMAND IN A CASE OF THIS NATURE 20-23

CONCLUSION 24

CERTIFICATE OF SERVICE 25

CITATIONS OF AUTHORITIES

PAGE

CASES

In Re Block. 496 So.2d 133 (**Fla.** 1986) 15

In Re Inquiry Concerning a Judge. 460 So.2d 377 (**Fla.** 1984) 15

The Fla. Bar Re Rules Regulating the Fla.Bar, 494 So.2d 977 (**Fla.**); *modified,* 507 So.2d 1366 (**Fla.** 1987) 1

The Florida Bar v. Kay. 232 So.2d 378 (**Fla.**); *cert. denied.* 400 U.S. 956. 91 **S.Ct.** 352 (1970) 15

The Florida Bur v. Routh. 414 So.2d 1023 (**Fla.** 1982) 15

The Florida Bar v. Stone. 538 So.2d 460 (**Fla.** 1989) 15

The Florida Bar v. Turner. 369 So.2d 581 (**Fla.** 1979) 15

Wayte v. *U.S.,* 105 S. **Ct.** 1524 (1985) 22

STATUTES

Ch. 24. **Fla. Stat.** (1989) 14

Ch. 550. **Fla. Stat.** (1989) 18

§ 550.16, **Fla. Stat.** (1989) 14

Ch. 551. **Fla. Stat.** (1989) 18

§ 551.09, **Fla. Stat.** (1989) 14

§ 798.01, **Fla. Stat.** (1989) 17

§ 798.02, **Fla. Stat.** (1989) 17

§ 849.08, **Fla. Stat.** (1989) 14

§ 849.085, **Fla. Stat.** (1989) 14

§ 849.093, **Fla. Stat.** (1989) 14. 19

§ 849.0935, **Fla. Stat.** (1989) 14

§ 849.14, **Fla. Stat.** (1989) 9. 12. 17. 18

§ 849.141, **Fla. Stat.** (1989) 14. 18

OTHER AUTHORITIES

Fla. Bar Integr. Rule. art. XI. Rule 11.02 24

Fla. Bar Integr. Rule. art. XI. Rule 11.02(3) 12. 13. 14. 16

Fla. Bar Integr. Rule. art. XI. Rule 11.02(3)(a) 1. 10

Fla. Bar Integr. Rule. art. XI. Rule 11.02(3)(b) 1. 10

Fla. Bar Code Prof. Resp., Preliminary Statement 13. 22. 24

Fla. Bar Code Prof. Resp., EC 1-5 13

Fla. Bar Code Prof. Resp., D.R. Rule 1-102(A)(1) 1. 10. 12-14, 16. 18

Fla. Bar Code Prof. Resp., D.R. Rule 1-102(A)(6) 1. 10. 12-14, 16. 18

Fla. Bar Code Jud. Conduct. Canon 2B 15

Fla. Bar Code Jud. Conduct. Canon 5B(2) 15

Fla. Bar Code Jud. Conduct. Canon 5C(1) 15

Fla. R. Regulat. Fla. Bar. Ch. 4. Preamble 16

Fla. R. Regulat. Fla. Bar 3-4.1 1

Fla. R. Regulat. Fla. Bar 3-4.2 1

Fla. R. Regulat. Fla. Bar 3-4.3 .... 1. 13

Fla. R. Regulat. Fla. Bar 3-7.6(a)(5) 10

Fla. R. Regulat. Fla. Bar 4-8.4 .... 13. 14

Fla. R. Regulat. Fla. Bar 4-8.4(a) 1

Fla. R. Regulat. Fla. Bar 4-8.4(b) 1

PROCEDURAL HISTORY

On September 20,1988, the First Judicial Circuit Grievance Committee "A" found probable cause to believe that Respondent violated Fla. Bar Integr. Rule; art. **XI,** Rule 11.02(3)(a),(b), Fla. Bar Code Prof. Resp., D.R. Rule 1-102(A)(1),[1] and Fla. Bar Code Prof. Resp. D.R. 1-102(A)(6).[2] On July 20, 1989, The Florida Bar **filed** a formal complaint alleging violations of the above rules. The Honorable W. Fred Turner **was** appointed the Referee in the case, and a final hearing on the matter was set and heard on January 16 and 17,1990.

On February 6,1990, the Referee issued his Report in which he found Respondent guilty of all charges, and recommended Respondent receive a public reprimand by personal appearance before the Board of Governors. Ten days later, Respondent filed a supplement to the record in which the sequence of events occurring after the hearing and prior to the filing of the Report of the Referee were discussed in detail. On March 29, 1990, Respondent filed the instant Petition for Review of the Referee's Report, challenging the Referee's findings of fact and conclusions of guilt as erroneous and unjustified.

STATEMENT OF THE CASE AND FACTS

RESPONDENT'S BACKGROUND

Respondent, Fredric G. Levin, age 53, was admitted to practice law in Florida on October 20,1961. (R-5).[3] Since that time, as detailed below, his contributions to the legal profession, to

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[1]As the substantive violation alleged is a violation of former Fla. Bar Code Prof. Resp. D.R. 1-102(A)(6), further reference to former Fla. Bar Code Prof. Resp. D.R. 1-102(A)(1) shall be omitted. References to D.R. 1-102(A)(6) shall hereafter include implicitly reference to D.R. 1-102(A)(1).

[2]In this Court's opinion, ***The Florida Bar Re Rules Regulating the Florida Bar,*** 494 So.2d 977 (Fla.), ***modified,*** 507 So.2d 1366 (Fla. 1987), the former Integration Rule and Disciplinary Rules were re-codified into the present Rules Regulating the Florida Bar. Fla. Bar Integ. Rule, art. **XI,** Rule 11.02(3)(a),(b) **is** now contained in Fla. R. Regulat. Fla. Bar 3-4.1, 3-4.2 and 3-4.3. Fla. Bar Code Prof. Resp. D.R. 1-102(A)(1) and 1-102(A),(6) are now contained in Fla. R. Regulat. Fla. Bar 4-8.4(a) and 4-8.4(b). As all conduct alleged in the Complaint occurred prior to January 1, 1987, the Integration Rule and the Disciplinary Rules apply. ***Rules Regulating the Florida Bar,*** 494 So.2d at 978.

[3]References to the findings of the Referee shall be designated "R", followed by page

politics, to education, to business, to charities and his ethics in each of these areas have been surpassed by few.

COMBATTING RACISM

Respondent entered the University of Florida College of Law in 1958. (T-176).[4] This was the same year that the first black student **was** permitted to attend a Florida public institution. (T-176). From the first day the student entered the law school, he was subjected to ridicule from the other students in the form of the "Law School Shuffle" (the rubbing of feet on old wood floors). The students would do this every time the black student walked into the library or the classroom, and he was never given an opportunity to speak. (T-177). Although Respondent did not participate in these activities, he initially did not take any action to prevent these actions even though it bothered him tremendously. (T-178).

After the first semester, Respondent was ranked at the top of his class. (T-179). This provided him enough confidence that he walked up to the law student, in view of all the other students, and offered to become study mates, which they did. (T-179). The Respondent and the student immediately became study mates and friends. In fact, they dined together in Respondent's home on numerous occasions, during a time when it was a violation of Florida law for a black person to eat in the same restaurant as a white person. (T-179). As a result of this act, many other law students began befriending the black law student. (T-180).

A few years after this incident, Respondent graduated first in his entering class. (T-180). He immediately began working with the law firm of Levin and Askew in Pensacola, Florida. (T-180). It was not long thereafter that Respondent once again openly displayed his commitment to combatting racism when he submitted the name of a black lawyer for membership in the local bar association. Unfortunately, this time Respondent's efforts proved unsuccessful. The local bar overwhelmingly defeated Respondent's recommendation because of the attorney's race. (T-181).

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number.

[4]References to the transcript of the hearing held on January 16-17,1990 shall be designated "T" followed by the page number.

This only strengthened Respondent's commitment. Since that time, Respondent's law firm was the first and only major Pensacola law firm to hire black attorneys, and has constantly provided free legal advice to the poor in various legal areas. (T--85 & T-217).

LEGAL CONTRIBUTIONS

With regard to his contributions to the legal profession, the testimony overwhelmingly showed that the Respondent's commitment to his clients was surpassed by few, if any. Witnesses spoke about how the Respondent would return each and every phone call he received each day before he would leave his office, (T-91). They spoke about how the Respondent would talk with every walk-in who came to the office, whether they were poor, dirty, or even drunk. (T-89). Respondent's former secretary testified that Respondent never turned anyone away without trying to advise them. (T-89). The Vice-chairman of the Escambia County Commission talked about how Respondent would daily help the poor without any fee. (T-103). He further stated that Respondent had a reputation in the community that he would fight the establishment for the minority and oppressed. (T-104).

Finally, as an example of his commitment to providing free legal service to the poor, the Respondent, at his own expense and ingenuity, started a television program in Pensacola, Florida known as "Lawline," which he aired on BLAB (Basic Local Audience Broadcasting) Television network. (T-57). One of the purposes of this program was to provide free legal advice to the community. Today, "Lawline" airs live on BLAB television four hours every week in Pensacola, and many hours in five other communities. (T-57).

One client, whose case was the only one the Respondent had lost in Escambia County in the last twenty years testified:

> Words can't describe what I feel about the man. . . . [A]nybody can say good things about a lawyer who won your case. I would like to direct my comments to the attorneys, the image of attorneys. This man is honest. He's a good man. He did the best he could. He was hurt very badly by losing the case. When my wife died, he took time out of his busy schedule. He's a very busy man. He spent the day with me at my home, and he attended the service. He was with me -- I love the guy. He was with me when I needed him

as a lawyer and as a friend. (T-99).

Another former client, George Lane, president of an American Stock Exchange Company, testified how he had spent tens of millions of dollars on lawyers in his various businesses around the country, but that he had hired the Respondent to represent him on a criminal matter involving twenty-four charges because of, among other things, the following episode he witnessed. (T-136-37,139). Mr. Lane testified that he was meeting with Respondent in Respondent's office to discuss whether Respondent was qualified to handle this magnitude of a criminal case where the attorneys' fee would certainly be in the hundreds of thousands of dollars, and when the Respondent had not handled a criminal case in over twenty years. During the conversation, Respondent took ten minutes away from Mr. Lane's conference to help some poor man who was about to get his pick-up truck repossessed. Mr. Lane testified that he felt that the respondent genuinely cared for the problems of people, whether they were a client with no money or one worth millions. (T-138,139). Mr. Lane went on to testify about the Respondent's dedication to his cases. He testified that it was as if the Respondent, who was chief trial counsel, was actually sitting in his client's shoes. (T-142). He gave the following example:

> [I]n the span of one minute I reached probably the low point in my life as well as the high point in my life, because the low point was when that jury was out and my entire future is in their hands, and I'm praying that they will have heard the facts and do the right thing. . . . And then in the matter of a minute, that foreman comes in and hands that verdict --and the foreman stands up and says, "Acquitted of all charges." And that was probably the happiest moment of my life. And that emotional swing in that brief period -- at that point I looked and the other members of the defense team were joyous and thrilled, as you might expect. I was overwhelmed with emotion. I began to cry. I looked, and my parents were crying, my wife was crying, and Fred Levin was crying. (T-142,143)

With regard to developments in the practice of law, the Respondent helped to develop the structured settlement as a means of protection of the funds of seriously injured persons. (T-95). Ironically, it was the Respondent's willingness to risk all his assets in order to protect those of his clients which led to this development in law. Specifically, in the early 1980's, Respondent won an $18,000,000.00 jury verdict for two young injured children who lost their parents when a train derailed near their home and released a deadly gas which engulfed the house and killed the parents.

Respondent was concerned that the remaining relatives would squander the money if it were simply handed to the guardians, so he wanted the money paid in installments over many years. The problem was that no individual or company was willing to take the gamble of the intricate tax consequences which could result from such a decision. For this reason, Respondent decided to risk the chance of a multi-million dollar malpractice action, which he had the assets to cover, and came up with a concept known as novation. (T-192, 193). This concept was not only eventually accepted by the I.R.S., but also led to structured settlements being the multi-billion dollar business that it is today. (T-95 & T-192). This fact is so well known among those in the field of structured settlements that the chairman of the structured settlements' seminars testified: "[t]here are many plaintiffs that have greatly benefited from structured settlements. There will be many, many more in the future that will owe Fredric *G.* Levin a debt of gratitude for the chance he took for the benefit of his clients with tremendous risk to himself from both a financial and reputation standpoint." (T-96). Likewise, the former principal economic advisor to President Ford stated that Fred Levin is known as the "Father of Economic Testimony" in the courtroom. (T-145).

Among his peers, it has been stated that Respondent is "the most unselfish person I know as far as willing to help somebody," and probably at the same time the best trial lawyer in Florida, said former Federal District Judge David L. Middlebrooks. (T-120, 122). A fellow law student and former law partner testified that the Respondent was the finest trial lawyer he had ever known. (T-78). Judge M.C. Blanchard, the late and beloved Chief Judge of the First Judicial Circuit, wrote The Florida Bar on behalf of the Respondent stating that Respondent was the best lawyer in the First Judicial Circuit and probably in the State of Florida. (T-129) He later sent an additional comment to The Florida Bar which said that the Respondent may be the best trial lawyer in the nation. (T-221).

The above facts regarding Respondent's contribution to the legal profession have earned him a national reputation as an outstanding trial lawyer. (T-94,145, 171, 221). He has personally secured eleven jury verdicts in personal injury cases in excess of one million dollars in the conservative Northwest Florida area, several of which were record verdicts. (T-78). He was in the

first group of lawyers in this country to be board certified in trial advocacy. (T-45 & T-187). He has written one of the best selling trial books in the country (T-183), and has lectured all over the country. (T-190). He is a member of the Inner Circle of Advocates, which is the most exclusive trial organization in the world (being limited to no more than one hundred of the top trial lawyers), and Respondent himself was selected to lecture to that group on three occasions. (T-182).

POLITICS

With regard to politics, the former Chairman of the State Democratic party testified that the Respondent had a reputation not only in local and state elections, but in national elections, as one of the premier fund raisers for politics in the State of Florida. (T-71). The Chairman further stated that he believed Respondent was the number one person in Escambia County to head a political campaign, and not just in regards to fund raising. (T-71). He finally stated how disturbed Respondent became when Respondent heard that Senator Dempsey Barron had characterized The Florida Bar as "the biggest bunch of blood suckers he had ever met," and how he heard Respondent pledge that he would fiid somebody to defeat Senator Barron. (T-72).

Respondent proved successful in his commitment. He became one of the primary advisors and fund raisers in the endeavor which eventually led to the defeat of Senator Barron in 1988. (T-72). The Chairman closed his affidavit with the following: "[a]lthough Mr. Levin obviously has done tremendous things for his clients over the years, I'd like to think that there are many more people who live in Florida that owe him for having brought better government to us." (T-72).

EDUCATION

With regard to the support of public education, Dr. Bernard Sliger, President of Florida State University, submitted an affidavit that the Respondent was not only a fine family man and a pillar of the state but that the Respondent was also a very substantial supporter of Florida State University, The University of West Florida and the Respondent's alma mater, the University of Florida. (T-65). Dr. Sliger further stated that the Respondent was: "a kind, considerate, and warm person. One does not have many friends like Fred. If I needed help of any kind, one of the

first persons I would turn to would be Fred Levin." (T-64, 65).

BUSINESS

Respondent's degree of ethics can also be found in his business dealings. In the mid-1970's, Respondent became Chairman of the Board (T-206) of a chain of ladies apparel stores throughout the Southeast. At its high point, there were fifty-he retail stores doing approximately twenty-five million dollars in business per year. (T-57). Unfortunately, the tremendous interest rates that occurred in 1980 caused the bankruptcy of these stores and it became necessary for that business to file Chapter 11 under the bankruptcy code. (T-60). At the Respondent's insistence, and contrary to the advice of other lawyers, Respondent went to the local banks in the community and put up two million dollars of his own assets to protect the banks which were lending money to the business. (T-60). As a result, every lending institution eventually received one hundred cents on the dollar and all unsecured creditors were paid more than they had agreed to in the Chapter 11 reorganization plan. (T-60, 61). The President of this business testified at trial that: "I have never, never known any human being who had a stronger feeling of integrity than Fred Levin.." (T-61).

CHARITABLE CONTRIBUTIONS

The testimony at trial showed that in **1989,** the Respondent was the single largest contributor to the United Jewish Appeal in Northwest Florida (T-58), the largest single contributor to United Way in Escambia County, Florida (T-67), and the largest single contributor to United Cerebral Palsy in Northwest Florida (T-68). The testimony also showed that it is well known within the community that Respondent was contributing to numerous worthy causes. For example, the former chairman of the Escambia County Commission testified that when a black church group had been abandoned on the west coast and needed a thousand dollars in order to get a bus back to Pensacola, he knew all he had to do was call Fred Levin. The money was sent immediately. (T-103, 104).

ETHICS

Among the many examples of Respondent's legal ethics described above, no one example is more telling than the following. In the mid 1980's, the Respondent was chosen to represent Gulf Power Company, the electric company in Northwest Florida, as their general litigation counsel, a position unheard of for a plaintiff's attorney. (T-80). As part of this arrangement, Respondent was paid approximately $500,000 per year, and on a couple of occasions had received bonuses from the client in the amount of a hundred thousand dollars. (T-197-199). In additional to the financial benefits, the Respondent stated how the power company treated him as royalty. How he would be picked up by chauffeurs when he would visit other communities, and how the power company had parties in his honor. The Respondent testified to the privilege he felt to have the private number of the president of the largest publicly owned utility company in the world. (T-197-199).

The Respondent testified that this was clearly the most prestigious client he has ever had, and one that was benefitting his career. (T- 196,197). However, at the end of the 1980's, the power company began having some difficulties and decided to blame the cause of their problems on a former executive who had recently died in a mysterious plane crash. (T-154, 155). The Respondent became so disgusted with his client's willingness and eagerness to blame their troubles on an individual who could not defend himself, that the Respondent notified the power company that he would no longer represent them and that the reason for this was that the power company's conduct had fallen below the Respondent's ethical standards. (T-81).

REFEREE'S FINDINGS OF FACT

After a two day hearing, the Referee reached several fiidings of fact, which are summarized below:

(1) For at least five years, through late 1986, the Respondent routinely engaged in illegal gambling activities involving placing bets on the outcome of football games. The Respondent placed his wagers through a bookmaker in the Pensacola, Florida area. The wagers ranged between $500.00 and $2,000 nearly every weekend during the 1986 football season with some weekend

totals reaching upwards of $6,000. **(R-1-2).**[5]

(2) The Respondent was aware that betting on football games was and is illegal in the State of Florida. Section 849.14, Fla. Stat. (1989) makes it a second degree misdemeanor. (R-2).

(3) The Respondent informed two of his friends, Capt. Gerald Gigon and his wife Patricia, in a casual conversation that he bet on football games. Mr. and Mrs. Gigon had apparently been interested in learning how to place bets on football games and requested help. The Respondent informed the Gigons that he was willing to place the bets for them, and would allow them to pick up their payoffs and drop off their losses at his office.[6] He eventually provided the bookmaker's number directly to the Gigons. (R-2, 3).

(4) The Respondent never enticed the Gigons to gamble, and in fact, he urged them to stop when he realized the degree they were gambling. (R-2).

(5) On or about March 5,1987, and again on August 19,1987, the Respondent appeared on his own television show "Lawline," which is televised on BLAB television. During these television appearances, the Respondent stated that he engaged in football gambling, and placed these bets through a bookmaker. He stated that he saw this as an acceptable recreational activity, even though it was listed as a misdemeanor offense under the laws of Florida. (R-3).

(6) On September 20, 1988, the Respondent testified before the First Judicial Circuit Grievance Committee "A" that if he had the opportunity to place bets on football games, he would continue to do so. (R-3).

(7) At least 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 others were not disciplined by the Bar at all. (R-3, 4).

REFEREE'S CONCLUSION OF LAW

Based on the above factual findings, the Referee reached the following conclusions:

(1) The Respondent repeatedly engaged in illegal gambling over a lengthy period of time involving substantial amounts of money. Respondent is an officer of the Court and as such is sworn to uphold the laws of the State of Florida. (R-4).

(2) The Respondent's attitude towards the disciplinary proceedings apparently differed from that of the other six lawyers which received a lighter punishment or no punishment at all. The Respondent saw nothing wrong with breaking the law, because he viewed it as a bad law. He also aired his

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[5] References to the findings of the Referee shall be designated "R", followed by page number.

[6] There was never even a suggestion by anyone that Respondent ever charged the Gigons a fee for this service.

views publicly on television. (R-4).

(3) The Respondent has a long and distinguished 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. (R-4)

As a result of the foregoing, the Referee recommended that that the Respondent be found guilty of violating Fla. Bar Integr. Rule, art. XI, Rule 11.02(3)(a),(b) for engaging in conduct that is contrary to honesty, justice, or good morals, and for engaging in conduct which constitutes a misdemeanor. The Referee also found the Respondent guilty of violating Fla. Bar Code Prof. Resp., D.R. Rule 1-102(A)(1) for violating a disciplinary rule, and Fla. Bar Code Prof. Resp., D.R. 1-102(A)(6) for engaging in conduct that adversely reflects on his fitness to practice law. His recommendation was that the Respondent be subject to a public reprimand by personal appearance before the Board of Governors. (R-5).

GROUNDS FOR REVIEW

Pursuant to Fla. R. Regulat. Fla. Bar 3-7.6(a)(5), the Respondent challenges the Referee's findings of fact as incomplete and conclusions of law as erroneous and unjustified. As to the findings of fact, the Respondent listed those facts which were undisputed, but not included in the Referee's findings, in the previous section entitled "Statement of the Case and Facts." As to the Referee's conclusions of law, the Respondent submits that the findings of guilt were erroneous and unjustified because the Referee was under the impression that a violation of any misdemeanor statute constitutes an ethical violation, whether or not the violation is related to the attorneys' fitness to practice law. Moreover, the Referee believed that every violation of an ethical code subjects the lawyer to discipline, regardless of the lawyer's intent and extenuating circumstances. Finally, the Referee did not properly consider the ramifications of selective enforcement under the Constitution nor under the Code of Professional Responsibility.

SUMMARY OF THE ARGUMENTS

(1) Under the Rules of Professional Responsibility a lawyer cannot be guilty of an ethical violation unless his conduct is found to be immoral and such immorality indicates a lack of those characteristics relevant to the practice of law.

(2) Thus, it is not true that every violation of a misdemeanor statute constitutes a violation of the rules of professional conduct.

(3) For example, it is not a violation of professional conduct for a lawyer to cohabitate with an unmarried woman even though this is a violation of a misdemeanor statute.

(4) Similarly, not every violation of a rule of professional conduct subjects a lawyer to discipline. The Court must consider: (1) whether the violation was willful; (2) the seriousness of the violation; (3) extenuating factors; and (4) previous violations.

(5) In the instant case, Respondent's violation of the misdemeanor gambling statute does not constitute a violation of a rule of professional conduct.

(6) Moreover, Respondent's conduct is not subject to discipline when the Court considers that Respondent did not willfully violate a rule of professional conduct, the gambling statute is not enforced against mere gamblers, and the extenuating factors in this case.

(7) Finally, it is unconstitutional for The Florida Bar to selectively enforce its rules of ethics against an attorney because he exercises his first amendment right to speech. Similarly, the Code of Professionally Responsibility itself demands that the rules be uniformly applied to all lawyers.

ARGUMENTS ON APPEAL

ISSUE I

WHETHER RESPONDENT VIOLATED § 849.14, FLA. STAT. (1989)

Section **849.14,** Fla. Stat. **(1989)** provides:

> Whoever stakes, bets or wagers any money or other thing of value upon the result of any trial or contest of skill, speed or power or endurance of man or beast, or whoever receives in any manner whatsoever any money or other thing of value staked, bet or wagered, by or for any other person upon any such result, or whoever knowingly becomes the custodian or depositary of any money or other thing of value so staked, bet, or wagered upon any result, or whoever aids, or assists, or abets in any manner any of such acts all of which are hereby forbidden, shall be guilty of a misdemeanor of the second degree, punishable as provided in § **775.082** or **§ 775.083.**

Respondent admits, and has always admitted from the time allegations were first brought against him, that during a period of twenty-eight **(28)** years in the practice of law, he placed bets on football games in at least five (5) football seasons prior to the **1987** football season, and that the bets ranged from five hundred (500) dollars to two **(2)** thousand dollars. **(T-34).** Thus, it is without question that Respondent violated the above Florida misdemeanor statute.

ISSUE 11

WHETHER A COMMISSION OF A MISDEMEANOR IS A VIOLATION OF A RULE OF PROFESSIONAL RESPONSIBILITY

Were the issue before the Court simply whether the Respondent committed a misdemeanor, the matter would have long ago been put to rest. However, Respondent is charged with violating Fla. Bar Integr. Rule, art. XI, Rule 11.02(3) and Fla. Bar Code Prof. Resp., D.R. 1-102(A)(1),(6). The gravamen of these rules is that Respondent cannot be guilty of an ethical violation unless his conduct is found to be immoral and only if such immorality indicates a lack of those characteristics relevant to the practice of law.

The analysis begins with the language of the rules themselves. Fla. Bar Integr. Rule, art.

XI, Rule **11.02(3)** provides:

> The standards of professional conduct to be observed by members of the Bar are not limited to the observance of rules and avoidance of prohibitive acts. **. . .** The commission by a lawyer of any act contrary to honesty, justice, or good morals, whether the act is committed in the course of his relations as an attorney or otherwise **.....** whether or not the act is a felony or misdemeanor, constitutes a cause for discipline.

Thus, the Court must first find not only that the Respondent committed a misdemeanor, but also that his actions are "contrary to honesty, justice, or good morals."

To put this question of morality into perspective, it is instructive to note that the new Rules Regulating the Florida Bar which incorporate the provisions of former Florida Bar Code Prof. Resp. Rule **11.02(3)** omit reference to "good morals." ***See*** **Fla.** R. Regulat. Fla. Bar **3-4.3.** Florida Bar Code Prof. Resp. D.R. Rule **1-102 (A)(6)** also makes no reference to the morality of the lawyer's acts. Specifically, D.R. Rule **1-102 (A)(6)** only proscribes "conduct that adversely reflects on (an attorney's) fitness to practice law."

The old disciplinary rules do make oblique reference to morality in Fla. Bar Code Prof. Resp. EC **1-5 - - " . . .** [a lawyer] should refrain from all illegal and morally reprehensible conduct. Because of his position in society, even minor violations of law by a lawyer may tend to lessen public confidence in the legal profession...." **- -** but these directions are merely "aspirational" and do not form the basis for discipline. ***See*** Fla. Bar Code Prof. Resp. Preliminary Statement.

Again, reference to the present Rules Regulating the Florida Bar is instructive in understanding what must be established in order to subject a lawyer to discipline. The equivalent of former Fla. Bar Code Prof. Resp. D.R. Rule 1-102(A)(6) is Fla. R. Regulat. Fla. Bar **4-8.4** which provides, in pertinent part:

> **A** lawyer shall not:
>
> (b) Commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness **as** a lawyer in other respects;
>
> (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation...."

Perhaps the most telling, and succinct statement of the analysis to be applied by the Court is

contained in the Comment to Rule 4-8.4:

> Many kinds of illegal conduct reflect adversely on fitness to practice law, such as offenses involving fraud. . . . However, some kinds of offenses carry no such implication. Traditionally, the distinction was drawn in terms of offenses involving 'moral turpitude'. That concept can be construed to include offenses concerning some matters of personal morality, such as adultery and comparable offenses that have no specific connection to fitness for the practice of law. . . .***A lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.*** Offenses involving violence, dishonesty, or breach of trust or serious interference with the administration of justice are in that category. A pattern of repeated offenses, even ones of minor significance when considered separately, can indicate indifference to legal obligation. (emphasis added).

With reference, then, to the rules, the Court cannot find respondent violated Rule 11.02(3) and D.R. 1-102(A)(1) and (6) unless: (1) respondent's conduct was immoral and (2) the immorality is such as reflects on the Respondent's ability to practice law.

Respondent readily admits that the conduct found by the referee - - misdemeanor betting on football games - - does not merit approbation. Neither, however, is it immoral. (T-123). Chapter 24 of the Florida Statutes legalizes a lottery which, absent such legislation, would violate § 849.08, Fla. Stat. (1989). Likewise, gambling on dog racing, horse racing (§ 550.16, Fla. Stat. (1989)), Jai-Alai (§ 551.09, Fla. Stat. (1989)), charity bingo (§ 849.093, Fla. Stat. (1989)), charity drawings (§ 849.0935, Fla. Stat. (1989)), and bowling tournaments ($ 849.141, Fla. Stat. (1989)) is neither illegal nor immoral. Finally, poker games among a group of friends are legal in Florida, and moral, § 849.085, Fla. Stat. (1989). Even the Chief Justice of the United States publicly admits enjoying a friendly game of poker. (T-125-26, 243).

Moreover, other forms of gambling which are not legal are highly regarded in our society. When the Governor of Florida bets a crate of oranges against another state governor's football team, this is looked upon as a show of state pride and sportsmanship. This Court can also take judicial notice that many offices and social organizations have betting pools on everything from the date and time of an expected birth (where the lucky guesser splits the fund with the new mother) to even football games. Thus, gambling, per se, is not immoral. The question, then, is whether

Respondent's gambling reflects on his fitness to practice law.

The record before the Court is replete with evidence of respondent's legal skills. See ***supra.*** So, too, is the Respondent's social, ethical, moral, and charitable contributions to the legal, local, and political community amply supported. See ***supra.*** Respondent cannot simply be compared to other individuals who have received a public reprimand for gambling activities, because the facts of their cases are clearly distinguishable. For example, in the case of ***In*** Re ***Inquiry Concerning a Judge,*** 460 So.2d 377 (Fla. 1984), the court applied a wholly different standard than what is applicable to Respondent. In that case, Judge Byrd was found to have violated, among other rules, Fla. Bar Code Jud. Conduct, Canon 2B (avoiding the appearance of impropriety by lending the prestige of his office to private interests of others), Fla. Bar Code Jud. Conduct, Canon 5B(2) (soliciting funds for a charitable organization), and Fla. Bar Code Jud. Conduct, Canon 5C(1) (exploiting his judicial position). No such explicit prohibitions apply to Respondent.

Similarly, Judge Block, ***In Re Block,*** 496 So.2d 133 (Fla. 1986), was found guilty of acts much more heinous than the Respondent's. Judge Block, among other violations, split fees with a non-lawyer and suspended lawyers, and gave "incredible" testimony about his gambling. There was also evidence that Judge Block willfully and fraudulently mis-reported campaign contributions and falsified the purchase price of real property. ***Id.*** at 134-35.

In this case, the Respondent's gambling did not directly violate rules going to the heart of a lawyer's obligations, like representing clients with conflicting interests and putting his own interests into conflict. ***The Florida Bar v. Stone,*** 538 So.2d 460 (Fla. 1989). Respondent did not engage in conduct as reprehensible as shooting a firearm into an occupied vehicle and submitting a false affidavit. ***The Florida Bur v. Routh,*** 414 So.2d 1023 (Fla.1982). Respondent did not commit a lewd and lascivious act "in an isolated area at 3:00 in the morning." ***The Florida Bur v. Turner,*** 369 So.2d 581, 582 (Fla. 1979) (Adkins, J., dissenting). Nor did respondent commit indecent exposure and exhibit a lack of candor before a tribunal. ***The Florida Bar v. Kay,*** 232 So.2d 378 (Fla.), ***cert. denied,*** 400 U.S. 956, 91 S.Ct. 352 (1970).

Even the disciplinary committee which brought the charges in this matter could not find that

gambling, per se, indicates unfitness to practice law because, as indicated in the stipulation read into the record **(T-7-8),** several other attorneys who admitted gambling received absolutely no discipline. What, then, makes Respondent's acts, in the context of all the evidence, something which indicates his unfitness to practice law?

Respondent engaged in recreational gambling in a form constituting a misdemeanor in this state. He never jeopardized his clients, his partners, or his family. **(T-204).** No trust funds were touched. No deceit was ever practiced before any tribunal. In fact, it is Respondent's candor in honestly answering a question put to him during a television show which may have started this whole proceeding in the first place. **(T-234).**

While the selective prosecution of the Respondent is discussed below, the fact remains that Respondent openly and candidly admits that he violated a rarely enforced misdemeanor statute prohibiting conduct which, in many forms, is perfectly appropriate behavior. **As** former Federal Judge D.L. Middlebrooks testified, the legislature passes numerous laws that prohibit conduct but most of those laws have nothing whatsoever to do with morality, fitness, integrity or honesty, and that in his opinion the law in regard to gambling had nothing to do with ethics. (T-125).

Respondent was wrong to commit a misdemeanor. Not all violations of misdemeanor statutes, however, are violations of a rule of professional responsibility. Respondent's conduct does not, in theory, nor in practice, indicate his inability or unfitness to practice his profession. Therefore, Respondent should not be found to have violated Fla. Bar Integ. Rule, art. XI, Rule **11.02(3)** nor Fla. Bar Code Prof. Resp. D.R. **1-102** (A)(1) or **(6).**

ISSUE III

WHETHER A LAWYER IS NECESSARILY SUBJECT TO DISCIPLINE JUST BECAUSE HE VIOLATES A RULE OF PROFESSIONAL RESPONSIBILITY

If we assume for purposes of argument that Respondent did violate a rule of professional conduct, the question still remains whether every violation of a rule of professional conduct subjects the attorney to discipline. The preamble to the Florida Rules of Professional Conduct pro-

vides:

> [W]hether or not discipline should be imposed for a violation, and the severity of a sanction, depends on all the circumstances, such as the willfulness and seriousness of the violation, extenuating factors, and whether there have been previous violations.

Fla. R. Regulat. Fla. **Bar** Chapter 4, Preamble. Therefore, even though an attorney violates a rule of professional conduct, that does not mean the attorney has necessarily committed an act subject to discipline. The Court must consider: (1) whether the violation was willful; (2) the seriousness of the violation; (3) extenuating factors; and (4) previous violations.

WILLFULNESS OF VIOLATION

Respondent admitted that he knowingly violated § 849.14, Fla. Stat. (1989). (T-32). This is not the issue, however. The issue is whether Respondent willfully violated a rule of professional conduct regarding a lawyer's honesty, integrity, or fitness to practice law. The answer to this question is no.

During the time Respondent violated § 849.14, he viewed his actions only as a technical violation **of** the law, not as an actual violation. (T-31, 32). The reason for this is because the statute was not being enforced against those simply wagering personal bets, whether with or without a bookmaker. The only time the statute was enforced was against the bookmaker himself. To Respondent, his actions were no different than if he had been committing adultery, which is a violation § 798.01, Fla. Stat. (1989), or cohabiting with an unmarried woman, which is a violation of § 798.02, Fla. Stat. (1989). Although an individual realizes he is violating the strict language of a Florida Statute, he also knows that he will not face criminal responsibility for such actions. (T-32).

This is even more true regarding Respondent's intent to violate a rule of professional conduct subject to discipline. **As** noted above, the Rules themselves provide that a violation of the adultery statute or cohabitation statute is not an ethical violation which subjects a lawyer to discipline. It is only when the criminal statute being violated involves violence, dishonesty, breach of trust or serious interference with the administration of justice that an ethical violation occurs. Respondent

knew he did not fit within this category. He was not performing any acts of violence under any scenario, he never knowingly wagered bets against any individual he had a fiduciary duty with, he never allowed **his** gambling to interfere with the administration of justice, and he never lied to any individual, agency, or entity about his gambling. Even the Florida Bar must agree with this, because they chose only to charge Respondent with violating Fla. Bar Code Prof. Resp. DR 1-102(A)(1),(6), and not **1-102(A)(2)-(5),** which disciplines a lawyer for engaging in conduct involving moral turpitude, dishonesty, fraud, deceit, and misrepresentation. In conclusion, Respondent never willfully violated a code of professional responsibility he thought could subject him to discipline. This becomes even more clear when the Court considers the type of lawyer Respondent was, and is, as discussed under the subheading "Extenuating Circumstances" below.

SERIOUSNESS OF THE VIOLATION

The second issue the Court must consider when deciding whether a lawyer has committed an act which is subject to professional discipline is the seriousness of the violation. This is one issue in which there will likely be little dispute. The statute Respondent violated is considered far from serious in the realm of criminal law. In fact, this Court can take judicial notice that this statute is rarely, if ever, enforced against the individual gamblers themselves. This is true whether the individuals are betting five (5) dollars or five thousand (5,000) dollars, and whether the individual is betting against his bowling partner, or through a bookmaker. The statute is only being enforced against the bookmaker himself. In fact, the Florida Bar itself does not consider a violation of the statute a serious offense. In the instant case, the Florida Bar stipulated that it knew of six other lawyers that did essentially the same exact acts Respondent did. Yet, of these six lawyers, four received no discipline and the other two received only private reprimands. (T-168).

The reason § 849.14 is not enforced is because gambling has become an accepted means of recreation in the state of Florida. For example, Florida now recognizes the following, among others, as legal forms of gambling: (a) the payment of a purse in a bowling tournament (§ 849.141, Fla. Stat. (1989); (b) horse and dog racing (Ch. 550, Fla. Stat. (1989); (c) Jai Alai (Ch.

551, Fla. Stat. **(1989);** (d) certain bingo games **(§ 849.093,** Fla. Stat. **(1989);** and (e) the State Lottery (Ch. **24,** Fla. Stat. **(1989).** Clearly, if gambling has become so well recognized that the State of Florida has become by far the largest beneficiary of such activity through the state lottery, then the commission of such an act cannot be considered a serious violation of criminal law.

EXTENUATING FACTORS

The third issue the Court must consider when deciding whether a lawyer has performed an act which is subject to discipline is the extenuating factors associated with those acts. When the Court considers the extenuating circumstances involved in this case, it becomes clear that Respondent did not willfully commit any act intended to deceive anyone, to harm anyone, or to embarrass the legal profession. He certainly did not believe he was committing an act which the Florida Bar would consider immoral.

What do we know about Fredric G. Levin, the Respondent. As detailed throughout the statement of facts, Respondent's commitment and contribution to the legal profession, to politics, to education, to charities, to business, and his ethics in each of these areas has been surpassed by few. He was the first student in his law school class in **1958** to openly attempt to help minority students. He was the first lawyer in the Pensacola area to recommend minorities be admitted as members in the local bar association. He was praised by lawyers, judges, politicians, and clients for his devotion to his clients and his willingness to speak with each and every individual who ever called his office, or walked into his office. He even started his own television program which now provides six hours of free legal advice to the community each week.

With regard to his contributions to the legal profession, the evidence showed that he risked all his personal assets to ensure two clients would retain their jury award, and the money would not be squandered away by the guardians. With regard to politics, he is now well known as one of the premier fund raisers for politics in the State of Florida. In fact, his efforts were instrumental in getting Senator Dempsey Barron ousted from office. This is the Senator who characterized The Florida Bar as "the biggest bunch of blood suckers he had ever met." With regard to the support

of public education and charitable organizations, he is known as one of the largest single contributors. Finally, With regard to integrity, his character is certainly commendable. This is the individual who guaranteed millions of dollars in his personal assets just to protect the lending institutions and unsecured creditors when one of his companies filed Chapter 11. This is also the individual who fired a client paying him close to $500,000 a year, plus fringe benefits, just because he personally believed the client **was** acting immorally.

As noted above, the Court must consider extenuating circumstances when deciding whether to discipline an attorney at all. In the instant case, counsel for Respondent can think **of** few, if any, situations in which the extenuating circumstances could be stronger. For this reason alone, the Respondent should not be subjected to discipline even if he committed a technical violation of the Rules.

PREVIOUS VIOLATIONS

The final issue the Court must consider when deciding whether to discipline a lawyer is his previous violations of the code of professional responsibility. Prior to the instant matter, the Respondent had never had a client nor judge every question his integrity, honesty, morality or fitness. During the Respondent's twenty-eight **(28)** years of the active practice of law, he never had a client even complain to him about anything he ever did. **(T-236).**

ISSUE IV

WHETHER RESPONDENT SHOULD BE CONTESTING A PUBLIC REPRIMAND IN A CASE OF THIS NATURE

The foremost pragmatic question is why is Respondent contesting a public reprimand? Why is he using up valuable judicial resources? The answer is threefold. First, a public reprimand will affect Respondent's image in the legal profession. Second, Respondent is extremely disturbed by The Florida Bar's willingness to selectively enforce the Supreme Court's rules. Third, the Referee's decision is setting bad precedent.

RESPONDENT'S IMAGE

As discussed extensively in this brief and at the hearing, the Respondent has worked extremely hard in his lifetime in order to develop an image as one of the best advocates of the legal profession and the oppressed. He has also worked equally as hard in developing an image as an ethical businessman, political advisor, and charitable contributor. The publicity already generated by this legal action and the Referee's Report has caused a severe tarnishing of Respondent's image. He has recently been informed that his board certification in trial advocacy will not be renewed because of the Referee's finding of guilt. It was not important to the board certification committee that Respondent was in the first group of lawyers in the country to be board certified, or all the contribution the Respondent has made to the legal profession. He also has been recently informed that Martindale Hubbell will be reconsidering Respondent's "AV" rating. Finally, he has recently been informed by other members of the law firm that some of Respondent's clients have expressed deep concern with Respondent trying their case, because of the negative publicity he has received. This is something that in all his career as a lawyer has never occurred.

If the Florida Supreme Court adopts the Referee's Report, the fears of the board certification committee, Martindale Hubbell, and the public will only be reinforced. More important, the name of Fredric *G.* Levin will be forever tarnished in the Southern Reporter.

SELECTIVE ENFORCEMENT

At the beginning of the Respondent's hearing, The Florida Bar stipulated to the fact that charges were brought against at least six other lawyers in the First Judicial Circuit because of the same conduct of placing illegal bets through bookmakers on football games and collecting and paying money from the office. In these other six cases, the local Grievance Committee either found no probable cause to believe that any ethics violations occurred, or that only a minor violation occurred resulting in a private reprimand. (T-8-9). In the Referee's Report, as in the transcript of this case, the only aspect of the Respondent's case that can be distinguished from those of the other attorneys is that the Respondent admitted on a television show that he had gambled on

football through a bookmaker, whereas the other attorneys were unwilling to admit their guilt publicly. (R-4).

The Florida Bar's decision to selectively enforce the Supreme Court's rules against the Respondent because he exercised his First Amendment right is without question a violation of the highest law in the country. As stated by the Supreme Court in ***Wayte v. United States,*** 105 S. Ct. 1524, 1531 (1985):

> [A]lthough prosecutorial discretion is broad, it is not 'unfettered.' In particular, the decision to prosecute may not be 'deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification,' including the exercise of ***protected statutory and constitutional rights.*** (citations omitted and emphasis added).

However, it is not even necessary for this Court to find for the Respondent on constitutional grounds, because the Code of Professional Responsibility itself provides that "[w]ithin the framework of fair trial, the Disciplinary Rules should be ***uniformly applied to all lawyers,*** regardless of the nature of their professional activities." ***See*** Fla. Bar Code Prof. Resp. Preliminary Statement. This has clearly not been done in the instant case, because the other lawyers were either not disciplined at all, or received a private reprimand, whereas the Respondent's agreement to accept a private reprimand as opposed to going to a hearing was rejected by the Bar. (T-7-9).

PRECEDENT

If the Supreme Court adopts the Referee's Report, virtually every attorney in Florida will be subject to a public reprimand. How many Florida attorneys can say that they have never placed a bet on the Florida-Florida State football game, the Miami-Florida State football game, or other football games? If an attorney during a public forum answers truthfully that he or she has committed such an act, they would have to be reprimanded under the Referee's logic.

What the Court would be saying is that lawyers must be able to live a life which is totally and absolutely free of any scrutiny. Any violation of any Florida statute, administrative code, ordinance or other law might prove the attorney unethical and possibly unfit to practice law. This is true whether or not the attorney has provided substantial contributions to the legal profession and

society. Although this is not true of other professions, and certainly not true of private citizens, we will hold all lawyers to an almost unattainable flawless life. As Judge Jacob Fuchsberg,[7] a lawyer who spent almost a decade as a judge for New York's highest court, stated in an affidavit submitted on behalf of the Respondent:

> [While serving on the bench to New York's highest Court] the most sensitive responsibilities I share[d] with my six associates and the court was the ultimate review of disciplinary decisions against judges and lawyers in which I am proud to say . . . it was rare for any of us . . . to forget that [the attorney] was an ordinary person living a private life. In weighing the conduct of which we must try to avoid the unconscious temptation to expect more of others than we do ourselves. **(T-172-73).**

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[7]Judge Fuchsberg was also the former President of the American Trial Lawyers Association, former eight term President of the Roscoe Pound Foundation, former Chairman of the Inner Professional Committee of Doctors and Lawyers of New York, former Chairman of the United Way of New York, former founder and editor of *Trial* Magazine, the President of the Law Center Foundation for New York University Law School, and Chairman of the Board of the Touro College Law Center which was named for him.

CONCLUSION

The Florida rules of professional responsibility are designed to punish those attorneys which have failed to maintain the minimum ethical standards. **See Fla.** Code of Prof. Resp. Preliminary Statement. In other words, the Florida Bar is not saying that the Respondent, Fredric G. Levin, failed to meet the maximum degree of ethics, but that his conduct (including the extenuating circumstances) fell below the absolute minimum standard that the public has the right to expect from lawyers.

How can The Florida Bar in good faith argue that the public has the right to expect more of a lawyer than Fred Levin gives? Can the public expect a lawyer to take and give advice to every person who decides to call his office or just walk in, whether they are poor, dirty, or drunk, when other attorneys could not find the time or desire? Probably not, but Fred Levin does this anyway. Can the public expect a lawyer to develop and implement a concept of providing free legal advice to the community by use of television? Probably not, but Fred Levin did it anyway. Can the public expect a lawyer to risk all his assets to protect a client's jury award when no other person in the country was willing to take this gamble because of the uncertain tax consequences? Probably not, but Fred Levin did it. Can the public expect a lawyer to be the single largest conmbutor to most of the major charities in the community? Probably not, but Fred Levin is. Can the public expect a lawyer to fire his most prestigious client, which was paying him approximately $500,000 a year, just because he does not agree with the client's morals. Probably not, but Fred Levin did. Can the public expect a lawyer to dedicate his life to becoming what one federal judge and one state judge called the best trial lawyer in Florida, if not the country? Probably not, but Fred Levin does.

Fla. Bar Integr. Rule, art. XI, Rule 11.02, provides that the "primary purpose of discipline of attorneys is the protection of the public . . . ." Does the public need to be protected from Fredric G. Levin? The answer is no. For this reason, Respondent requests this Court to deny the Referee's Recommendation and issue an order finding that the Respondent did not violate any Rule of Professional Conduct subjecting him to discipline.

Respectfully Submitted:

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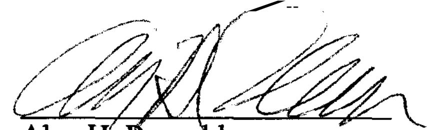
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief in Support of Denying the Referee's Recommendation has been furnished to DAVID G. MCGUNEGLE, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite **200,** Orlando, FL **32801-1085,** by U.S. Mail on this 1st of May, **1990.**



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