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.

FILED
JUN [illegible]
CLERK, SUPREME COURT
By ___ Deputy Clerk

RESPONDENT'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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SYMBOLS AND REFERENCES

In this brief, the transcript of the final hearing will be referred to as T.

References to The Florida Bar's Answer Brief will be referred to as AB.

SUMMARY OF ARGUMENTS

(1) The Bar has attempted to change the issue in the case from one of an analytical and legal analysis on ethical violations to that of a personal attack on the Respondent, stating that the Respondent thinks he is above the law.

(2) The real issues in this case are whether every violation of a misdemeanor statute constitutes a violation of the rules of professional conduct, and whether every violation of the rules of ethics subjects an attorney to discipline.

(3) The answer to both of these questions is no. A misdemeanor violation only constitutes an ethical violation when the misdemeanor involves dishonesty, breach of trust, or serious interference with the administration of justice. In this case, the gambling statute does not fall within this category, and the fact that the Respondent spoke publicly about his gambling is irrelevant, as the Respondent is guaranteed the right of freedom of speech.

(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) Without even addressing the above issues, it is clear that 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.

(6) If the Respondent receives a public reprimand, he will permanently lose his board certification, and will likely lose his "AV" rating with Martindale Hubbell.

ARGUMENTS IN REPLY

I.

WHAT THE BAR PERCEIVES AS THE ISSUE

The Bar, in its Answer Brief, attempts to change the issue in this case from one of an analytical and legal analysis on ethical violations to that of a personal attack on the Respondent. What The Bar would like this Court to believe is that the issue in this case is whether the Respondent conceives himself as so powerful and almighty that he can pick and choose the laws he wishes to obey. (AB 8). This is not the issue in this case. The real issues are discussed below.

11.

THEREALISSUES INTHECASE

A. WHETHER EVERY MISDEMEANOR VIOLATES A RULE OF ETHICS

There is no issue in this case as to whether the Respondent committed an act which violated a misdemeanor statute. The Respondent violated § **849.14, Fla.** Stat. **(1989)** when he placed bets on football games. The Respondent has never denied this, and in fact, it is because the Respondent openly admitted his gambling to a television viewing audience, to the state attorneys' office, to the Local Bar Grievance Committee, and to The Florida Bar, that The Bar now argues the Respondent should be subject to a public reprimand. (AB 5-6).

There is also no issue as to whether a violation of every misdemeanor statute constitutes a violation of the The Florida Bar's rules of ethics. The Court needs to look no further than the Comment to Fla. R. Regulat. Fla. Bar **4-8.4**[1] which provides that only those misdemeanors which

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[1]The Bar argues that "the Rules of Professional Conduct do not apply here," and that the "analysis and comparison between" the Rules of Professional Conduct and the old Code **of** Professional Responsibility "is meaningless and confusing." (AB **18).** While the grounds for The Bar's confusion are not specified, the relevance of the Rules of Professional Conduct, the successor rules to the old Code, should be clear. The Rules of Professional Conduct, in pertinent part, adopt the old Code and comment upon the meaning of particular sections. While not controlling, the new Rules and their commentary are persuasive in elucidating the meaning and intent of the disciplinary guidelines. Surely The Bar is not arguing that new Rules are totally

(Footnote Continued on Next Page)

involve violence, dishonesty, breach of trust, or **serious** interference with the administration of justice constitute unethical conduct.

Stated differently, the rules of ethics are designed to punish actions which indicate a lack of those characteristics relevant to the practice of law; e.g., acts involving dishonesty and breach of trust. This is made clear by the very provision the Respondent is charged with violating, Fla. Bar Integr. Rule, art. XI, Rule 11.02(3):

> 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, with reference to the provisions of the rules of ethics, the Court must fiid more to punish an attorney than the fact he committed a misdemeanor. The commission of the misdemeanor must also be an act contrary to honesty, justice or good morals.

The Bar does not even attempt to argue that the Respondent's violation of the gambling statute was dishonest or immoral. (AB **9-10).** The Bar obviously realizes such an argument would carry little weight in light of the fact that the State of Florida has legalized more forms of gambling than possibly any other state with the exception of Nevada and New Jersey. *See, e.g,* § **849.141,** Fla. Stat. **(1989)** (the payment of a purse in a bowling tournament); Ch. **550, Fla.** Stat. **(1989)** (horse and dog racing); Ch. **551,** Fla. Stat. **(1989)** (Jai Alai); **(§ 849.093,** Fla. Stat. **(1989)** (certain bingo games); and Ch. **24,** Fla. Stat. **(1989)** (the State Lottery).

Based on the foregoing, it is clear that a violation of the gambling statute, per se, does not constitute an act in violation of morality or honesty, as those terms are used in the rules of ethics. Therefore, the question becomes whether the Respondent acted in a manner contrary to justice.

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divorced from the old Code, as to do so would eliminate any precedential value to the pre-Rule decisions. Moreover, The Bar certainly would not be arguing that the prior rules of professional conduct take a tougher stance on ethics violations than the new rules. Thus, the Respondent submits that the new Rules of Professional Conduct have great value in the interpretation of violations under the old rules.

The Bar states that the Respondent's actions were contrary to justice because "he knowingly and willfully engaged in illegal activity and publicly flaunted the law." (AB **10).** This is not, however, what the term "justice" means in the ethics code. If it were, then anytime an attorney knowingly violated a misdemeanor statute and then publicly admitted his guilt, he would be subject to discipline. For example, if an unmarried, male attorney **was** cohabitating with an unmarried woman, and the attorney was asked publicly about this, under The Bar's argument the attorney would be subject to discipline if he told the truth. This is contrary to the rules of ethics. **As** stated previously, the rules of ethics themselves specifically provide that certain crimes such as cohabitation or adultery do not constitute a violation of the rules of ethics. **See** Comment to Fla. R. Regulat. Fla. Bar **4-8.4**

Certainly, the law could not apply differently simply because an attorney openly admits that he has committed such a violation, for this would be a violation of the attorneys' constitutional rights to freedom of expression. In fact, it is when the attorney remains silent about his actions, refuses to cooperate with officials about his actions, misleads officials about his actions, or attempts to cover-up his actions that he is acting contrary to justice. This is far from what the Respondent did.

Despite the foregoing, The Bar argues that a violation of the gambling statute is a violation of the ethics code. To prove this point, The Bar chooses not to argue the merits of the case, but rather The Bar cites to *In Re Inquiry Concerning a Judge,* **460 So.2d 377** (Fla. **1984)** and ***In Re Block,*** **496** So.2d **133** (Fla. **1986).** The problem with The Bar's reliance on these cases is The Bar fails to reveal all the relevant facts of these cases which clearly distinguish them from the instant case.

In the case of *In Re Inquiry Concerning a Judge,* **460** So.2d **377** (Fla. **1984),** the court applied a wholly different set of rules and standards to the respondent, who was a judge, than those applicable here. 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, nor were the the Respondent's actions similar. The Respondent in no way used his position as an attorney to solicit funds for his gambling, nor did he exploit his position as an attorney to gain an advantage in his gambling activity.

Similarly, Judge Block, in the case *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 misreported campaign contributions and falsified the purchase price of real property. Id. at **134-35.** Nowhere in the record is it even suggested that the Respondent acted fraudulently or dishonestly in his gambling activities. In fact, he openly admitted all his actions, and cooperated fully with all concerned individuals, including law enforcement personnel.

The behavior of the judges in the two cases cited above (dishonesty, fraud, and using one's position in the profession to gain advantage) are the exact types of actions that the code of ethics are designed to prevent, and the Respondent takes no issue with the rulings in those cases. However, the cases are inapplicable to the facts of this case.

The Bar also argues that a violation of the gambling statute is a violation of the code of ethics because such a violation is analogous to the cases in which the Court has sanctioned attorneys for drug use and drug distribution. (AB **13).** This analogy is misguided. The drug problem in America is one of epidemic proportion, and is probably the number one public concern in the country today. This is because drug use is known to result in violence, serious crime, fatal auto accidents, and other types of activities in which innocent individuals suffer. Furthermore, it is without question that the judgment of an attorney using drugs is altered to the extent that the client is likely to suffer, even though The Bar argues otherwise. (AB **13).** The type of harm associated with drug use in no way compares to the recreational gambling the Respondent was doing. If it did, the State of Florida would not have legalized so many forms of gambling to date.

The remaining cases cited by The Bar are inapposite and distinguishable. Without going

case-by-case, it can be demonstrated why The Bar's argument fails of its own accord. The Bar distinguishes the Respondent from the **six** other attorneys investigated by the Local Grievance Committee by saying the other attorneys "evinced different attitudes toward their illegal conduct and did not publicly boast of it in the mass media." (AB 5-6). Thus, to The Bar, the ethical wrong committed by the Respondent was not gambling, but having what it considered an attitude. The Bar harps on quotes from several cases that an attorney has higher obligations for the public portrayal of his or her personal life than the average person. While this statement might be true, it is also inapplicable to this action. The facts of each case The Bar cited in its brief (drug use, sexual crimes, fraudulent business activities, trust account violations) all involve private activities with clear underlying immoral misconduct. The Respondent's gambling **is** not immoral, The Bar admitted this (AB **10),** the only "improper" conduct of the Respondent was exercising his free speech.

As The Bar concedes, "[t]he 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." (AB **10).** Scraping away the crust from The Bar's argument, the reason why the Respondent is before the Court **is** his attitude offended some members of the Local Grievance Committee and The Bar. Attorney discipline must be based upon serving the ends of justice, not satisfying the personal tastes or distastes of a few. Whether an attorney "flaunts" his beliefs or not, discipline should not be imposed unless there has been misconduct and the misconduct reflects poorly on justice. The question is not focused on what the attorney advocates concerning the misconduct, but whether the misconduct is subject to discipline.

The question of whether a violation of **§ 849.14,** Fla. Stat. **(1989)** is unethical behavior can best be explained by recognizing that Fla. R. Regulat. Fla. Bar 4-8.3(a) provides:

> A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.

Based upon this mandatory provision, if a violation of the gambling statute was unethical, then every lawyer in this state who bet on a golf game, tennis game, the Florida/Florida State football

game, played poker, or bet on any other game of skill would be acting unethically. Therefore, based upon the above mandatory provision, a lawyer who knows another attorney gambled on such an event would himself be unethical if he did not inform his local grievance committee.

The Bar could not possibly intend this result. If it does, then who should report Former Governor Reubin Askew and Former Governor Bob Graham who made public that they bet boxes of oranges against governors of other states during bowl games involving the respective state colleges? Moreover, who should report the Chief Justice of the United States Supreme Court, if he decided to become a member of the Florida Bar, since he announced publicly that he enjoyed playing poker? (T-125, 126,243).

B. WHETHER EVERY VIOLATION OF A RULE OF ETHICS SUBJECTS THE ATTORNEY TO DISCIPLINE

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 provides:

> [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.

The Bar does not even attempt to address these four criteria. This is probably because The Bar recognizes that the Respondent has no previous violations against him, that the gambling statute is not taken seriously by the state (as the law applies to bettors), and that few people have made more contributions to law, business and social programs than the Respondent. Thus, the

only remaining question is whether the Respondent's actions were willful?

If by the term "willful," the Court means did the Respondent know he was committing a misdemeanor in Florida, then the answer is yes, the Respondent acted willfully. However, if the term "willful" means the Respondent knew, or should have known, that he was violating an ethics' rule, the Respondent did not act willfully.

The Bar claims that that the Respondent's statements to the local grievance committee prove that the Respondent felt he was so powerful that he could pick and choose whatever laws he wished to obey. (AB 7-8, 16). The actual statements made by the Respondent, however, were that if his conduct was not unethical, he would see nothing wrong with continuing to gamble. (T-28,200). He did not say, nor did he ever imply, that he felt he had the right to violate any law he considered to be a "bad law," as The Bar continuously characterized in its brief. (AB 6-8).

When a law no longer represents the conscience of the state, the law is no longer enforced. In fact, that is what has occurred with the misdemeanor gambling statute in regards to bettors. It is the same thing that has occurred with the adultery and cohabitation statutes. The Respondent certainly would not have violated a law for which he thought he would be arrested. Likewise, the Respondent would not have violated a rule if he thought it would result in unethical conduct. As the Respondent testified, if he ever thought his conduct was unethical, or that even the charge would be made, he would have never done it. (T-200). Thus, the Respondent clearly did not willfully violate a rule of ethics.

C. SELECTIVE ENFORCEMENT

The next issue that must be addressed by the Court is whether The Bar has the right to selectively enforce which attorneys it will prosecute for the same violations. 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 in their offices. 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 repri-mand. **(T-8-9).** This stipulation of The Bar in and of itself, requires that the Respondent be found not guilty.

The Code of Professional Responsibility 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. In other words, the Code of Professional Responsibility does not allow for selective enforcement. The Bar has failed to address this code provision in its brief.

The Bar does state that its "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." (AB **15).** This analogy misses the point. The Bar Association in this case "pulled-over" seven individ-uals. Yet, The Bar only elected to "ticket" one of the seven individuals, even though they agreed all were doing the same thing. As with the highway patrol officer, The Bar doesn't have the power to allow all the violators to go free, and then ticket only one individual because that individual has a bumper sticker that states "I disagree with the 55 mile per hour speed limit."

The Bar finally argues in regards to selective enforcement that the Respondent was actually different from the other six attorneys because the Respondent made public statements on television that he thought gambling was a recreational activity and that he didn't think there was anything wrong in doing it. (AB **16-17).** In other words, the Respondent is being charged because he pub-licly expressed his opinion.

The Bar's admission that it prosecuted the Respondent because he exercised his first amend-ment 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).

This Court must take a stand against The Bar's selective enforcement, because if The Bar can use its powers selectively to get rid of what it deems "bad lawyers," it could use the same power to get rid of "good lawyers." If The Bar can selectively enforce a misdemeanor statute such as this, what keeps it from enforcing it because of the attorneys' race, religion, sex, or simply because the lawyer is "too good" competitively.

There is no question but that gambling by an attorney could lead to The Bar bringing charges. For example, if an attorney was gambling to the extent that he jeopardized his clients by using trust funds, or not competently handling their matters, then The Bar should prosecute. Likewise, if an attorney spent enormous amounts of money on material things so that he jeopardized his clients, The Bar should prosecute. This isn't selective enforcement, but is the way the ethics' rules are supposed to be enforced.

III. WHETHER THE RESPONDENT HAS THE RIGHT TO CONTEST A PUBLIC REPRIMAND

The Bar argues that the Respondent does not have the right to contest a public reprimand because:

> [M]uch 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.

(AB **6).**

The Bar, however, fails to understand why the Respondent went public about the disciplinary proceedings. The Respondent at first attempted to keep the matter confidential. He appeared before the local grievance committee, like the other six attorneys, but was selected for greater punishment than any of the others. The Bar agreed with the Respondent's attorney that if the Respondent would accept a private reprimand, The Bar would recommend this to the local grievance committee. Reluctantly, the Respondent agreed to abide by the advice of his attorney, family, and friends and he gave his approval to accept the offer, even though he did not believe he

had committed an ethical violation. (T-207-208). This agreement was sent to the local grievance committee who refused to accept it. The local grievance committee stated that it would not settle for less than a public reprimand of the Respondent, even though the other six attorneys who appeared before the local grievance committee received either a private reprimand, or else no probable cause was found at all. (T-207-208). It was at this time that the Respondent realized that confidentiality (even among his fellow attorneys) might prove detrimental to his career. He, therefore, decided that his future would be better served if the entire proceedings were made public, and the public was permitted to know the entire facts. (T 212-213). This is especially true in the instant case, where The Bar did not limit the punishment it was seeking to a public reprimand until the day **of** trial. Until that time, the Respondent did not know whether The Bar was going to seek a public reprimand, a suspension, or a disbarment. Therefore, The Bar totally failed to recognize in its brief the significance of the Respondent going public. The Respondent was willing to accept a private reprimand for conduct he did not believe was unethical in order to avoid this matter going public. It was the fear of a private hearing, and what might happen, that caused the Respondent to make sure the public knew the entire facts.

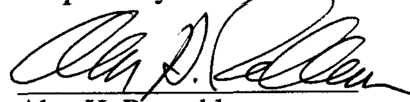
The Bar now takes the position that a public reprimand would do no harm to the Respondent's image because the Respondent has already received negative publicity in his community. However, The Bar again fails to recognize the seriousness **of** a public reprimand. Because The Bar has sought a public reprimand against the Respondent, and because the Referee approved a public reprimand, the Respondent has recently been informed that his board certification in trial advocacy will not be renewed. 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, nor was it important to the committee that the Respondent has made numerous contributions to the legal profession. The Respondent also has been recently informed that Martindale Hubbell will be reconsidering Respondent's "AV" rating. If the Supreme Court adopts the Referee's Report, the Respondent will certainly not reacquire his board certification or **"AV"** rating.

CONCLUSION

When the Respondent bet on football games in the early **1980's,** he never dreamed that one day he would be facing a disciplinary action by The Bar. When the Respondent openly discussed his gambling on television, he never dreamed The Bar would take the action it has. And when the Respondent told the absolute truth to all concerned individuals, he certainly never dreamed The Bar would use that against him. Yet, something happened so that the Respondent was selectively chosen to be prosecuted. The Bar states it is because the Respondent spoke openly about his actions. But if this is the true reason, then the Respondent's constitutional rights have been violated.

The Florida Bar has never asked for, nor received, a public reprimand for an attorney's gambling. (AB **12).** It is submitted that The Bar has never prosecuted an attorney who has done more for law, business, and social programs than the Respondent. This matter even becomes more incredible when we realize that The Bar and the Respondent's attorney agreed to a private reprimand (even though the Respondent did not believe he was guilty of unethical conduct), but the local grievance committee refused and demanded public humiliation. What has happened to the Respondent is wrong, and should be corrected.

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;** JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, **650** Apalachee Parkway, Tallahassee, FL **32399-2300;** JOHN T. BERRY, Staff Counsel, The Florida Bar, **650** Apalachee Parkway, Tallahassee, FL **32399-2300;** MIMI DAIGLE, Assistant Bar Counsel, The Florida Bar, **650** Apalachee Parkway, Tallahassee, FL **32399-2300; ,**by **U.S. Mail** on this 31st **of** May, **1990.**

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