W00A

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

MICHAEL J. NEDICK,
Respondent.
_____/

Case No. 76,908
TFB File No. 91-00353-02

ANSWER BRIEF

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PRELIMINARY STATEMENT

The Appellant in these proceedings, The Florida Bar, will be referred to as The Florida Bar in this Brief. The Appellee, Michael J. Nedick, will be referred to as Respondent.

All references to the Referee's Report will be designated by (RR-____).

STATEMENT OF THE CASE AND FACTS

Respondent concedes the facts as stated in the Florida Bar's brief as they are the findings of the Referee.

SUMMARY OF ARGUMENT

It is Respondent's position that the Report of the Referee be accepted and confirmed in all aspects and that the penalties recommended by the Referee be imposed by this Court.

ARGUMENT

As Counsel for the Florida Bar stated, the only issue to be decided is whether or not the discipline recommended by the Referee is appropriate.

Respondent does not try to argue that his misconduct was a mistake. Respondent conceded his guilt before the Referee and has never made such a claim of mistake. The Court should, however, take note, that the total amount of personal income not reported by Respondent during the years 1982 to 1986 was $22,500. The total amount of taxes not paid during this five year period was $8,067.

Disbarment is not automatic whenever an attorney is convicted of a felony. As the Supreme Court stated in The Florida Bar v. Pavlick, 504 So.2d 1231, 1235 (Fla. 1987), "We further note that neither the Integration Rule nor case law mandates disbarment." See, The Florida Bar v. Chosid, 500 So. 2d 150 (Fla. 1987); The Florida Bar v. Carbanaro, 464 So.2d 549 (Fla. 1985). See also, The Florida Bar v. Clark, 582 So.2d 620 (Fla. 1991).

In his report the Referee found the following aggrevating followingaggrevatingfactors: Dishonest or selfish motive and

repetition of misconduct. (RR-4) The Referee found the following mitigating factors: absence of prior disciplinary record, the imposition of other penalties or sanctions and Respondent's cooperation with the authorities (RR-3).

Respondent is also admitted to the Bars of New York and New Jersey. As recognized by the Referee there is an absence of a prior disciplinary record in all the states in which Respondent was admitted. The Referee also considered the penalties imposed by the two other states in which Respondent is admitted. In January of 1991 the New Jersey Supreme Court imposed a two year suspension retroactive to April 19, 1990. In New York, where Respondent conducted 97 per cent of his law practice, the recommendation of the Hearing Panel of the Departmental Disciplinary Committee for the First Judicial Department of the Supreme Court, at the suggestion of of the Staff Counsel of the Committee, was a six month suspension retroactive to December 27, 1990. This report awaits confirmation by the Appellate Division of the Supreme Court.

Respondent's cooperation with the Federal Authorities is an appropriate factor to be considered by the Referee. See, The Florida Bar v. Clark, id. Respondent provided the government with extensive information and documentary evidence that the government could not have obtained from any other source. As a result of Respondent's cooperation the Government was able to obtain guilty pleas from both of his ex-partners, one, a Justice

of the Supreme Court of the State of New York.

Counsel for The Florida Bar talks in terms of the sentencing Court "excusing" Respondent's behavior. Respondent did not ask the sentencing Court nor would he ask any Court to excuse his behavior. Respondent fully admitted his guilt before that Court and before this Referee. The information presented to the sentencing Court provided a compelling case for leniency. The main reason given by the sentencing Judge for the imposition of any period of incarceration was general deterrence which the Sentencing Court indicated was a necessary ingredient in a tax case.

Counsel for the Bar also cites several cases in his argument for disbarment. In citing The Florida Bar v. Hosner, 536 So.2d 188 (Fla. 1988), Counsel states, "This Court agrees that an attorney should be disbarred for engaging in conduct virtually identical to Respondents." (Appellant's Brief, Page 9). Counsel failed to state that the Respondent in the Hosner case was convicted of fifteen felonies, fourteen of prepartion of false tax returns and one of using the mail to commit fraud. A reading of the case also fails to show any mention of any mitigating facts such as the Respondent has shown herein,and fails to show conduct virtually identical to Respondent's.

Counsel further points to other cases that call for disbarment for fraudulent conduct. It should be pointed out that

none of these case involved tax matters. In The Florida Bar v. Lowe, 530 So.2d 58 (Fla. 1988), the Respondent was convicted of two counts of Grand Theft. In The Florida Bar v. Cooper, 429 So.2d 1 (Fla. 1983) the Respondent was disbarred after being involved in several fraud schemes including an attempt to mislead a Court while under oath. In The Florida Bar v. Simons, 521 So.2d 1089 (Fla. 1988), the Respondent was disbarred for his involvement in schemes to defraud an insurance company coupled with several acts that constituted theft.

As Counsel stated this Court has imposed lesser sanctions for filing false tax returns. See, The Florida Bar v. Chosid, id. Respondent has presented substantial mitigation to the Referee; his lack of prior disciplinary record, other penalties imposed, his cooperation with federal authorities. He has shown that he was a hard working dedicated worker in his community and continues to devote his time to the community. He indicated his remorse for the trouble his acts have caused everyone involved. Respondent is not asking the Court to excuse his behavior, rather to fashion a penalty which is appropriate under all the circumstances. See, The Florida Bar v. Clark, id. The Court in The Florida Bar v. Pahules, 233 So.2d 130, 131-32 (Fla. 1970) set out standards which Respondent asks this Court to follow:

"Disbarment is only one penalty which may be imposed on a lawyer for ethics violations. Suspension, probation or public or private censure or reprimand also may be appropriate in individual cases. Rule 11.-07 Integration Rule. As this Court said in State_ex rel. The Florida Bar v. Murrell, 74 So.2d 221, 223 (Fla. 1954).

> '[D]isbarment is the extreme measure of discipline and should be resorted to only in cases which the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particulary where he has a professional reputation and record free from offenses like that charged against him.'"

Based on the foregoing reasons, Respondent asks this Court to impose the sanctions recommended by the Referee.

CONCLUSION

Respondent respectfully requests that this Court affirm the Referee's report in all aspects and that the penalties recommended by the Referee be imposed.

CERTIFICATE OF SERVICE

I, HEREBY CERTIFY that a true and correct of the foregoing ~~Reply~~ Answer Brief of Respondent regarding Supreme Court Case No. 76,908, TFB File No. 91-00353-02 has been forwarded by regular mail to James N. Watson, Jr. Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 21 st day of November, 1991.

MICHAEL J. NEDICK