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

INITIAL BRIEF

JAMES N. WATSON, JR.
Bar Counsel, The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
Attorney Number 0144587

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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 was admitted to the Bar of the State of New Jersey in 1975. In 1982, a partnership was formed between Respondent, William T. Martin, and Mark T. Weinstein. (RR-2) From 1982 through 1984, Respondent and his partners received cash fees between $40,000 to $55,000; they agreed not to report these fees on their partnership and individual income tax returns. (RR-2). In 1983, Respondent also filed a false income tax return in which he failed to report $7,500 that he had received. (RR-2).

In March of 1985, Respondent's partnership with Mr. Martin and Mr. Weinstein dissolved. Thereafter, Respondent and Mr. Martin formed a two-person partnership doing business in the Bronx. During 1985 and 1986, Respondent and his partner again failed to report approximately $50,000 they had received in cash fees. (RR-2).

In 1987, Mr. Martin, Respondent's partner, was elected as a Justice of the New York Supreme Court for Bronx. Following Mr. Martin's election, the United States Department of Justice investigated Mr. Martin. This investigation included reviewing Respondent's individual tax returns because the income reported on the partnership's income tax returns was suspiciously low. This investigation revealed that Respondent had filed false income tax returns. (RR-2). Based upon this investigation, Respondent cooperated with the Federal Government and eventually pleaded guilty to one count of tax evasion.

(RR-2). On April 4, 1990, Respondent was found guilty of attempting to evade or defeat tax in violation of 26 U.S.C. §7201. (RR-2). On April 7, 1990, Respondent was sentenced to two years imprisonment with all but three months suspended, to be followed by nine months of probation. (RR-2).

On November 7, 1990, The Florida Bar initiated disciplinary proceedings against Respondent. A final hearing was held on April 23, 1991, and Respondent admitted his guilt. Accordingly, Respondent was found guilty of violating Rule 3-4.4 (a determination or judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction of any crime or offense that is a felony under the laws of such jurisdiction is cause for automatic suspension from the practice of law in Florida. In addition, whether the alleged misconduct constitutes a felony or misdemeanor The Florida Bar may initiate disciplinary action regardless of whether the respondent has been tried, acquitted, or convicted in a court for the alleged criminal offense) of the Rules of Discipline of The Florida Bar; and Rules 4-8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects), and 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct of The Florida Bar. (RR-3). Following these findings, the Referee recommended that Respondent be suspended three years, nunc pro tunc, April 4, 1990, and that he successfully complete a law school ethics course as well as

the ethics portion of The Florida Bar examination as conditions of his reinstatement. (RR-3). The Florida Bar filed a Petition for Review on September 23, 1991.

SUMMARY OF ARGUMENT

Respondent and his partners knowingly tried to hide over $100,000 in income from the federal government. (RR-2). Respondent's fraudulent conduct was not a one-time occurrence, but, instead, was a series of acts which occurred over a five-year period. (RR-2). Based on his actions, Respondent was convicted of violating Title 26, U.S.C. §7201, and sentenced accordingly. (RR-2). It is The Florida Bar's position that, based on analogous caselaw and the Standards for Imposing Lawyer Sanctions, Respondent should be disbarred. Although disbarment is a very severe sanction, it is necessary in this case to show the legal profession and the public that this Court will not tolerate officers of the court engaging in theft by whatever name.

ARGUMENT

The facts surrounding Respondent's conviction are undisputed. Respondent's federal felony conviction was a direct result of his fraudulent conduct--he knowingly conspired and agreed to submit false tax returns to the federal government. (RR-2). Respondent's unethical and illegal conduct was not a single, solitary act; Respondent and his partners submitted false income tax returns for 1982, 1983, 1984, 1985, and 1986. (RR-2). Respondent also submitted a false personal income tax return in 1983. (RR-2). These were six, separate egregious acts committed by Respondent. This Court should not be expected to treat such conduct lightly.

Respondent cannot argue that his misconduct was a mere mistake. In total, Respondent and his partners tried to hide over $100,000 in income from the federal government. (RR-2). Anyone with a high school education knows such conduct is a serious crime. Respondent, who has been a practicing attorney since 1975, consciously acted to violate the law on six different occasions. Upon discovery of his misconduct, Respondent pleaded guilty and was convicted of violating Title 26, U.S.C. §7201. (RR-2).

Since Respondent's guilt is undisputed, the only issue left to be resolved is the appropriate discipline. It is The Florida Bar's position that Respondent should be disbarred. Although the Referee recommended that Respondent only receive a three year suspension; The Florida Bar believes, and the Board

of Governor's concurs, that Respondent's serious misconduct warrants a more severe sanction. A review of analogous caselaw and the Florida Standards for Imposing Lawyer Sanctions will demonstrate that disbarment is appropriate.

Before reviewing analogous caselaw, a review of the Florida Standards for Imposing Lawyer Sanctions is essential to assist this Court in determining an appropriate sanction. E.g. The Florida Bar v. Clark, 582 So. 2d 620 (Fla. 1991); The Florida Bar v. Diaz-Silveira, 557 So. 2d 570 (Fla. 1990). The following sanctions are applicable (RR-4):

Failure to Maintain Personal Integrity

5.11(a) - Disbarment is appropriate when a lawyer is convicted of a felony under applicable law.

5.11(f) - Disbarment is appropriate when a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice law.

It is also recommended that both mitigating and aggravating factors be considered before imposing a sanction. The following aggravating factors were found applicable (RR-4):

9.22(b) - Dishonest or selfish motive.

9.22(i) - Substantial experience in the practice of law.

Likewise, the following mitigating factors were found applicable (RR-3):

9.32(a) - Absence of a prior disciplinary record.

9.32(k) - Imposition of other penalties or sanctions.

The Referee also recognized Respondent's cooperation with the governmental authorities as a mitigating factor. (RR-3). It is The Florida Bar's position, however, that Respondent's cooperation with the authorities is not proper grounds for mitigation. Respondent never contacted the authorities on his own initiative. Instead, Respondent only cooperated after getting caught. From beginning to end, Respondent acted in an effort to further his own interests. It is obvious from Respondent's sentence that the court never excused Respondent's misconduct merely because he cooperated with the authorities. Despite the fact that Respondent cooperated with the authorities, the court found it proper to sentence Respondent to two-years imprisonment with all but three months suspended to be followed by nine months probation. (RR-2). It would be a fallacy to excuse criminal behavior, once the behavior is exposed, simply because the attorney cooperated with the authorities in an effort to further his own interests. The

Florida Bar, therefore, does not believe Respondent's cooperation with the governmental authorities should be considered a mitigating factor in determining the appropriate sanction to be imposed on Respondent.

Next, the following cases will illustrate how the Court has dealt with other, similar misconduct; the sanctions imposed in these cases also coincide with the sanctions recommended by the Florida Standards for Imposing Lawyer Sanctions.

In The Florida Bar v. Hosner, 536 So. 2d 188 (Fla. 1988), this Court disbarred an attorney who was convicted for preparing false income tax returns and using the U.S. mail to commit fraud. This Court agrees that an attorney should be disbarred for engaging in conduct virtually identical to Respondents.

However, it should be noted that this Court has imposed lesser sanctions on attorneys for filing false tax returns. E.g. The Florida Bar v. Chosid, 500 So. 2d 150 (Fla. 1987). The Florida Bar, however, agrees with the reasoning of former Chief Justice Ehrlich in his dissenting opinion in Chosid, in which he stated:

> I view respondent's offense as a very serious one. In making and subscribing a false income tax return, he has committed an act of perjury and he is guilty of conduct involving moral turpitude. His motivation for the crime was pecuniary gain by understating his taxable income. In short, this was stealing from the government. I do not believe that the identify of the victim of the theft

> should make a difference in the gravity of the offense and the bar discipline that should be imposed. If this theft had involved a client or a business associate or a member of the public, anyone except the government, I do not think there would be any question but that disbarment would be viewed as the appropriate discipline. But since the victim of the theft is the government and the medium of the theft is a false income tax return, the Court apparently does not view the facts with the same gravity as if it were some other kind of theft from some more animate victim. I cannot draw this distinction. A crime for pecuniary gain, theft by whatever name, by a member of The Florida Bar, an office of the Court, is to be roundly condemned and disbarment is the appropriate response from this Court.
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> ....
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> ... Anything less than disbarment can be looked upon as an abdication by this Court of its responsibilities in the supervision of an arm of this Court, The Florida Bar.

Id. at 150-51.

This Court, moreover has implicitly stated that fraudulent conduct warrants disbarment. In The Florida Bar v. Lowe, 530 So. 2d 58 (Fla. 1988), an attorney was disbarred for fifteen years based on his fraudulent conduct and criminal conviction. In The Florida Bar v. Simons, 521 So. 2d 1089 (Fla. 1988), an attorney was disbarred for attempting to defraud an insurance company coupled with several acts that constituted theft. Finally, in The Florida Bar v. Cooper, 429 So. 1 (Fla. 1983), an attorney who was involved in several fraud schemes was

disbarred for twenty years. All of these cases corroborate than an attorney should be disbarred when he engages in fraudulent conduct similar to the Respondent's--he knowingly and willfully engaged in fraudulent conduct which resulted in a criminal conviction.

Additionally, The Florida Bar believes disbarring the Respondent will fit squarely within the three-prong test enunciated by this court in The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970).

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

In disbarring the Respondent, a clear message will be sent to the public, the legal professional, and the Respondent. When a member of The Florida Bar is convicted of theft by whatever name, such behavior will not be condoned or treated lightly and he or she will be disbarred.

Based on the foregoing reasons, The Florida Bar respectfully asks this court to disbar Respondent.

CONCLUSION

The Florida Bar respectfully requests that this court affirm the Referee's findings of facts but set aside his recommended discipline and disbar Respondent.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of Complainant regarding Supreme Court Case No. 76,908; TFB File No. 91-00353-02 has been forwarded by regular U.S. mail to MICHAEL J. NEDICK, Respondent, at his record bar address of 930 Grand Concourse, Bronx, New York 10451-2705, on this 23rd day of October, 1991.

JAMES N. WATSON, JR.
Bar Counsel