IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellant,

v.

LAWRENCE J. SMITH,

Respondent-Appellee.

Supreme Court Case No. 82,255

The Florida Bar File No. 94-50,126 (17E)

INITIAL BRIEF OF THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, appellant, will be referred to as "the bar" or "The Florida Bar." Lawrence J. Smith, appellee, will be referred to as "Respondent" or "Smith". The symbol "RR" will be used to designate the Report of Referee. The symbol "TT" will be used to designate the transcript of the final hearing held on April 11, 1994 and the symbol "CT" will be used to designate the transcript from the closing argument held on May 23, 1994. The bar's trial exhibits will be referred to as TFB ___ and respondent's trial exhibits will be referred to as Resp. ___.

STATEMENT OF THE CASE AND FACTS

The referee's findings of fact are short and to the point. The referee, in his report, found that:

> On August 2, 1993, Respondent Lawrence J. Smith was convicted, following his plea of guilty, on a two count Information which charged him with tax evasion for the calendar year 1988 and with causing a false statement to be made to the Federal Election Commission in 1990. RR1 (footnote omitted).

One felony to which respondent pled guilty, viz., Title 26, United States Code, Section 7201, involves respondent's filing of a false and fraudulent federal income tax return for 1988 by under reporting the income earned in that year. See TFB 1 (respondent's written plea agreement) and TFB 2 (the information). Paragraph four of respondent's plea agreement recites that respondent "failed to report $110,389.00 of the income received during tax years 1987 through 1990". The referenced under reported income falls into the following four categories:

> 1. a "loan" of $10,000.00 from respondent's congressional campaign account (described below) (TT159);
>
> 2. two unreported law practice referral fees in the approximate amount of $35,000.00 (TT159);
>
> 3. under reported honoraria for 1989 and 1990 totaling $21,000.00 (TT159-160);
>
> 4. various monies paid to respondent (i.e. 42 monthly payments of $1,000.00 towards respondent's rent and a monthly stipend for the use of respondent's name in a law firm) by one Brian Berman[1] (TT160-161).

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[1] At the time of the events in question, Berman was a member of the Florida Bar. Berman was placed under emergency suspension on May 7, 1991 [The Florida Bar v. Berman, 581 So. 2d 1310 (Fla. 1991)] and disbarred on October 17, 1991 [The Florida Bar v. Berman, 591 So. 2d 184 (Fla. 1991)].

The other felony to which respondent pled guilty, viz., Title 18, United States Code, Section 2, stems from respondent's position as a member of the United States House of Representatives and involves respondent's knowing and wilful complicity in causing another to file a false and fraudulent Federal Election Commission (FEC) Report of Receipts and Disbursements. See TFB 2. The subject report recited that respondent's congressional campaign account had disbursed $10,000.00 to Brian Berman for consulting fees although, according to the criminal information, respondent "then and there well knew he had not paid $10,000.00 to Brian Berman for consulting" services.

The salient facts of this $10,000.00 transaction are simple. First, in September of 1990, respondent caused a $10,000.00 check from his congressional campaign account to be issued to Brian Berman. TT146. Berman deposited the check into his trust account and issued a trust account check to respondent in the sum of $10,000.00. TT146. Respondent then converted this $10,000.00 trust account check into two cashier's checks. TT147. The first cashier's check in the amount of $4,000.00 was used to discharge a preexisting gambling debt. TT147-148. The other cashier's check, in the amount of $6,000.00, was deposited into the now infamous congressional "House Bank" and spent by respondent to satisfy personal expenses. TT147. It is interesting to note that the exchange of checks by respondent and Berman coincides with the September 10, 1990 deadline set by the casino for payment of respondent's outstanding $4,000.00 gambling debt. TT151-152. In April of 1992, a full year after Berman was placed on emergency suspension and after the transaction was widely reported in the

media, respondent made restitution to his campaign account by returning the $10,000.00 he had misused. TT156.

On August 5, 1993, respondent, pursuant to his plea, was sentenced to three months incarceration, was fined $5,000.00, ordered to pay all delinquent taxes, ordered to pay a special assessment and placed on two years of supervised release. See TFB 3.

The referee has found respondent guilty of having violated R. Reg. Fla. Bar 4-8.4(b) [A lawyer shall not commit a criminal act.]. RR2. As a sanction, the referee has recommended a two year suspension from the practice of law, nunc pro tunc the date of respondent's automatic felony suspension. RR14. The bar now appeals this recommended sanction, as a proper weighing of the aggravation and mitigation and a due consideration of the serious nature of these two felonies leads to the inescapable conclusion that respondent must be disbarred.

SUMMARY OF ARGUMENT

It is axiomatic that attorneys are disbarred for the commission of a serious felony, such as the filing of fraudulent income tax returns. In the case at bar, respondent pled guilty to and was thereby convicted of two (2) serious felonies, both of which involved fraudulent conduct. It is respectfully submitted, that either of these felonies should warrant disbarment.

Respondent's mitigation evidence simply can not militate the seriousness of the felonies committed by him and the aggravation factors associated therewith.

ARGUMENT

I. Disbarment is the appropriate sanction for a lawyer convicted of filing fraudulent tax returns and campaign account reports.

In July of 1992 this court disbarred Michael J. Nedick for submitting false tax returns to the federal government. The Florida Bar v. Nedick, 603 So. 2d 502 (Fla. 1992). At that time the court pronounced that the knowing submission of fraudulent tax returns was "fraudulent conduct of a serious order". Id. at 503. Now two years later, the respondent comes before this court having not only been convicted of submitting a fraudulent tax return, but having committed a second fraudulent felony by filing a fraudulent Federal Elections Commission Report of Receipt and Disbursements wherein he failed to disclose that he had "loaned" himself $10,000.00 from his congressional campaign account to satisfy personal obligations, inclusive of a $4,000.00 gambling debt. A careful analysis of these two felonies, the aggravation and mitigation present in this case and the relevant case law results in the conclusive determination that respondent should be disbarred for his violations of the law and the public trust.

A. The tax offense.

Respondent has under reported his income on his federal income tax returns for the tax years 1987 through 1990.[2] TFB 1. The first class of unreported income concerns respondent's financial dealings with Brian Berman, his ex-partner[3] and now disbarred lawyer. He failed to report approximately $35,000.00 in referral fees paid by Berman. TT159. He also

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[2] Pursuant to his plea agreement, however, he has only been convicted of filing a false tax return for 1988. RR1.

[3] Respondent was publicly reprimanded for Berman's use of respondent's name in Smith & Berman, P.A., when it was disclosed that there was no real partnership. See TFB 6 (the disciplinary record affidavit).

failed to report various monies that were paid to him by Berman. This included monthly rent payments by Berman (42 months @ $1,000.00) and a monthly stipend for the use of respondent's name in Smith & Berman, P.A. TT160-161. The second type of unreported income was generated by respondent's service as a congressman. In the calendar years 1899 and 1990, he failed to report income of $21,000.00 that he had earned in honoraria for various speaking engagements. TT 159-160. In addition, he failed to report $10,000.00 of income[4] related to his taking of a check from his campaign account, laundering it through Berman's trust account and satisfying personal expenses with the same.

The facts of Nedick are strikingly similar to respondent's violations. In Nedick, the lawyer conspired with his business partners to under report the partnership's earned income on six total occasions for two different partnerships. Id. at 503. Nedick was found guilty of attempting to evade the income tax due and was sentenced to two years of imprisonment with all but three months suspended, followed by nine months probation. The Nedick referee recommended a three year suspension because of three mitigating factors that he found. The mitigating factors were: (1) no prior disciplinary record; (2) cooperation with the federal government; and (3) other penalties imposed. On the other hand the referee found that: "(1) Nedick had a dishonest or selfish motive; and (2) there was a repetition of the misconduct." Id.

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[4] Respondent contends that this was not income because it was a loan that he eventually paid back and that it was related to some consulting work that was to be performed by Berman. The criminal information, however, states that respondent "then and there well knew he had not paid $10,000.00 to Brian Berman for consulting". Respondent is bound by the statement in the plea agreement. See. R. Reg. Fla. Bar 3-7.2(b); The Florida Bar v. MacGuire, 529 So. 2d 669 (Fla. 1988) [A felony conviction is conclusive proof of that felonious act.].

The bar appealed the Nedick referee's recommended sanction requesting that Nedick be disbarred. This court agreed with the bar and found that "severe sanctions are necessary to show the legal profession and the public that 'theft' by any name will not be tolerated by the court and The Florida Bar."[5] Id. The court further found that the submission of false tax returns was "fraudulent conduct of a serious order." Id.

In Nedick this court, while accepting three of the mitigating factors found by the referee (lack of a disciplinary record, cooperation, and the imposition of other penalties), found that this mitigation was far "outweighed by the seriousness of the offense, its willful and repetitious nature, and the selfish and deceitful motive behind it." Id. In reaching its decision to disbar Nedick, the court disagreed with the referee that cooperation with the government after Nedick had already been caught, was substantially mitigating and said that:

> To excuse repeated, long term criminal behavior once the behavior is exposed simply because a person cooperated with the authorities is contrary to the purpose underlying our system of Bar discipline. While cooperation with authorities is a matter to be considered in mitigation, here it is clearly outweighed by the wilful and repetitious nature of Nedick's offenses. In repeatedly joining with others in making and subscribing to false income tax returns, Nedick has committed acts of perjury and conspiracy and is guilty of conduct involving moral turpitude. His only motive was pecuniary gain. Id.

Respondent's conduct is squarely on point with Nedick as the respondent's only motive was pecuniary gain. He testified at trial that he needed the money and that this drove him to cheat on his taxes. TT131-133.

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[5] If respondent's actions are theft by another name, then there is a presumption of disbarment in this case. The Florida Bar v. Schiller, 537 So. 2d 992 (Fla. 1989) [There is a presumption of disbarment in theft cases.].

Likewise, respondent and Nedick both pled guilty to one count of income tax evasion and served three months in jail therefore. Id. Both lawyers filed fraudulent tax returns on more than one occasion. Id. While Nedick under reported his income by a little over $57,500.00, respondent under reported his income over a five year period by almost twice that sum. TFB 1. There are some differences in the mitigation that is found in this case and not in Nedick, but there are also substantially more serious aggravating factors that are not found in Nedick.[6] On balance then there is no real difference between respondent's and Nedick's filing of fraudulent tax returns. Thus, even without the second serious felony committed by respondent, there is no reason to depart from this court's pronouncement that tax fraud warrants disbarment.

B. The fraudulent FEC report.

Although Florida has no automatic felony-disbarment rule, this court has declared that serious felonies involving moral turpitude warrant disbarment. See The Florida Bar v. Winn, 593 So. 2d 1047 (Fla. 1992); The Florida Bar v. Cohen, 583 So. 2d 313 (Fla. 1991). Respondent's second felony conviction is such a crime. Respondent, a U.S. congressman, at the time of the events in question, filed a knowingly false FEC report, which fraudulent report failed to disclose that he had misused $10,000.00 of the monies donated to his reelection campaign fund. TFB 2.

The facts of this second felony are important: In September of 1990, respondent provided Berman with a $10,000.00 check, drawn against respondent's campaign account. TT146. Berman deposited this check into

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[6] Aggravation and mitigation is discussed below.

his trust account and issued a trust account check in the same amount to respondent. TT146. Respondent then went to the bank and converted Berman's trust account check into two cashier's checks. TT147. The first cashier's check was used by respondent to satisfy a preexisting gambling debt in the amount of $4,000.00. TT147-148. The remaining $6,000.00 was drawn in respondent's favor and this cashier's check was deposited into the now infamous congressional "House Bank" and spent by respondent to satisfy personal expenses. TT147. The actual check swap between Berman and respondent coincided with the September 10, 1990 deadline set by the casino for payment of respondent's gambling debt. TT151-152. In April of 1992, a full year after Berman was placed on emergency suspension and after the check swap was reported on by the media, respondent made restitution to his campaign account, by restituting the $10,000.00 that he had misused. TT156.

Respondent testified that this was a loan, but upon making restitution, he paid no interest thereon. TT156. Respondent further claims that this was a legitimate transaction because Berman was to perform consulting services for the campaign. TT133-134. Yet the criminal information that respondent admitted to reads that at the time respondent exchanged checks with Berman he "then and there knew he had not paid $10,000.00 to Brian Berman for consulting". TFB 2. While respondent attempts to legitimize this financial transaction, his conviction upon his guilty plea and the facts belie such contention. It appears that the exchange of a campaign account check for a lawyer's trust account check and later conversion into cashier's checks was nothing more than an attempt to hide the source of the money being used by respondent to satisfy personal expenses. If this was not the case, why didn't

respondent just deposit Berman's check into his own bank account and satisfy his gambling debt with his own check?

This court in a particularly egregious case of the misuse of public funds explained that:

> Anyone entrusted with public monies is directly responsible to society as a whole. This obligation is all the more compelling when an attorney is the one stealing from the public. Attorneys, by their special training in the law, must be presumed to be acutely aware of their legal obligations in handling public funds. With this knowledge comes an increased responsibility both for honoring the letter of the law and setting an example of propriety for others.
>
> When a nonlawyer steals from the public, it is a serious evil. When a lawyer commits the same crime, it is doubly evil. Those who have received intensive education in the requirements of the law cast disrepute on the entire profession when they willfully cast aside their training and knowingly break the very law about which they have been so thoroughly trained and tested. The Florida Bar v. Anderson, 594 So. 2d 302, 303 (Fla. 1992).

Respondent testified at trial. Of interest is his following statement:

> I pled guilty to filing a false statement with the F.E.C. because I did - because at the time the statement was prepared for my campaign, I knew that I had taken the money back. TT134, 1.21-24.

Respondent had full knowledge at the time of the filing of the FEC report that he was making a false statement and that he was willfully casting aside his training by knowingly breaking the law. The court in Anderson commented:

> When others see an attorney breaking the law, they may well assume that such conduct is acceptable. Attorneys who imitate the crimes of nonlawyers effectively place the imprimatur of their legal training on the misconduct, implying that the law itself either condones such misconduct or at least will ignore it. Id. at 303-304.

Respondent attempts to belittle the serious nature of his misrepresentation. He avers that the FEC reporting cases are usually

resolved civilly or at most by a misdemeanor conviction. Obviously the U.S. government disagreed with this position for respondent now stands convicted of a felony and not the lesser charges suggested by respondent. The bar does not believe that this is anything less than a felony. Not only did respondent misuse his campaign account for his own benefit, he also lied about it to hide his defalcation from the public.

In Anderson, supra., the lawyer was disbarred for misusing public funds. The court reasoned: "that a lawyer who wilfully misappropriates public funds commits a disciplinary offense as serious as misuse of client funds, whether or not the misappropriation is accomplished while acting as an attorney." Id. at 303. In The Florida Bar v. Keane, 536 So. 2d 990 (Fla. 1989) the lawyer, the public defender for the Sixteenth Judicial Circuit, misused public funds and was also disbarred. Both Anderson and Keane included elements of fraud or forgery to hide the misuse. In the case at bar the respondent has misused public funds and stands convicted of feloniously and fraudulently hiding this fact by making a misrepresentation on his FEC report. It follows, that respondent should be disbarred for his violation of federal law.

C. Aggravation and Mitigation.

Respondent has committed two serious felonies and the case law indicates that disbarment is warranted for these types of crimes. There is no genuine dispute on this point. The real issue in this case is whether or not a balancing of the aggravating and mitigating factors, as defined in the Florida Standards for Imposing Lawyer Sanctions, outweighs the seriousness of respondent's felonious misconduct.

There are numerous aggravating factors present in this case. Standard 9.22 lists each and every item that may be considered in aggravation and the following are applicable here:

9.22(a): Prior disciplinary offenses. In The Florida Bar v. Smith, No. 80,811 (Fla. 1992), respondent received a public reprimand for improperly allowing another attorney (Berman) to hold himself out as respondent's partner when no such partnership existed.

9.22(b): Dishonest or selfish motive. Filing fraudulent federal income tax returns and fraudulent reporting to hide an illegal campaign expenditure constitute both dishonest and selfish motive. Nedick, supra.

9.22(c): A pattern of misconduct. In his plea, respondent admitted to a five year period of income tax evasion.

9.22(d): Multiple offenses. Two distinct felonies are involved.

9.22(e): Vulnerability of victim.[7] By his tax evasion and misuse of campaign funds, respondent victimized the public at large and his campaign contributors.

9.22(i): Substantial experience in the practice of law. Respondent was admitted in Florida in 1972 and in New York prior to that time.

Respondent has claimed that several mitigating factors are present and that they outweigh the need for disbarment in this case. The Bar does not contest the following factors found in Standard 9.32:

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[7] The referee did not find this aggravating factor. Although he did find all the other aggravating factors discussed herein. RR4-7. It is the Bar's position that the referee did not attribute the proper weight to the substantial aggravation present in this case.

9.32(e): Full and free disclosure to the disciplinary board or cooperative attitude toward proceedings. Respondent has cooperated fully with the bar.

9.32(g): Character or reputation. Numerous witnesses have expressed confidence in respondent's character and reputation notwithstanding his dual felony convictions.

9.32(k): Imposition of other penalties or sanctions. Respondent has been convicted and sentenced in the federal criminal prosecution.

9.32(l): Remorse. Respondent has expressed remorse.

Prior to discussing respondent's mitigation argument in detail, it is important to note that in Nedick, supra., the court found that the lack of a disciplinary record, the imposition of other penalties and cooperation with the government was far outweighed by the seriousness of income tax evasion. Nedick at 503.

Respondent points to a career of public service as a congressman and state representative suggesting that his good works mitigate against disbarment consequences. Such argument must fail for two reasons. Firstly, it is difficult to imagine a more sacred fiduciary relationship to the public than that undertaken by an attorney who seeks and is elected to public office. The trust established by such office exponentially magnifies the seriousness of unlawful acts committed by such attorney-public servant. See Anderson, supra. ("doubly evil" for a lawyer to steal from the public). Secondly, the court has considered and rejected such an argument. The Florida Bar v. Golub, 550 So. 2d 455 (Fla. 1989); The Florida Bar v. Aaron, 606 So. 2d 623 (Fla. 1992). In Aaron the court discussed that it balances the mitigation against the seriousness of the misconduct and in applying that

test, the court found that Aaron's valuable public service through his extraordinary pro bono services did not outweigh the serious nature of his misconduct.

Respondent also asserts that his poor financial situation drove him to commit the felonies at issue. A good discussion of such an argument can be found in The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991). The Shanzer court in their disbarment order state that:

> Respondent argues that his depression, primarily over his marital and economic problems, led him to use his trust account for personal purposes. These problems, unfortunately, are visited upon a great number of lawyers. Clearly, we cannot excuse an attorney for dipping into his trust funds as a means of solving personal problems. We recognize that mental problems as well as alcohol and drug problems may impair judgement so as to diminish culpability. However, we do not find that the referee abused his discretion in not finding this to be one of those cases.
>
> We are not unmindful of respondent's cooperation with the Bar and restitutions efforts, and these efforts should be considered upon any reapplication for membership in The Florida Bar. Id. at 1383-1384 (footnote omitted).

In the Bar's view this court should not excuse respondent "for dipping into his" campaign account and cheating on his taxes as a means of solving personal financial problems.

Next, respondent argues that no client has been injured by his action and that this should somehow mitigate his sanction. The court, however, has repeatedly found that the mere fact that unethical conduct does not injure a client is not mitigating where a fraud is being perpetrated upon the government. The Florida Bar v. Adler, 505 So. 2d 1334, 1335 (Fla. 1987). Also see The Florida Bar v. Cohen, 583 So. 2d 313 (Fla. 1991) [insurance

fraud]; The Florida v. Breed, 378 So. 2d 783 (Fla. 1979) [theft of client funds]. In Pearce, 631 So. 2d 1092 (Fla. 1994), the court discussed:

> The fact that clients were not harmed by Pearce's behavior does not merit the lesser sanction of a public reprimand. Under the definitions in the Florida Standards for Imposing Lawyer Sanction, injury encompasses not only harm to a client, but also harm to "the public, the legal system, or the profession which results from a lawyer's misconduct." Pearce's misconduct was a serious offense that adversely reflects on the practice of law and reflects poorly on the profession. Id. at 1094.

Lastly, respondent contends that as a public figure, he has suffered great public exposure and humiliation due to extensive press coverage of his difficulties. This is not the first time a lawyer has raised adverse press coverage as mitigation. The Florida Bar v. Dubbeld, 594 So. 2d 735, 736 (Fla. 1992). In Dubbeld the referee recommended that the sanction be mitigated because of prior adverse publicity suffered by the respondent. The court disagreed:

> As we stated when amending the rules on confidentiality, "public respect and confidence in the primarily self-operated lawyer disciplinary system can best be gained by allowing the public to determine for itself that the grievance system works efficiently, fairly, and accurately." Id. at 736.

It is respectfully submitted that an analysis of the mitigation present in this case, balanced against the two (2) serious felonies at issue, permits no conclusion but that respondent should be disbarred. This conclusion is magnified when the element of aggravation is addressed.

D. Conclusion.

There simply appears no basis for treating this respondent differently from the respondent in Nedick, supra. Mr. Nedick failed to report almost $60,000.00 on four tax returns. Respondent filed to report $110,389.00 on

five returns. Nedick pled and was convicted of only one felony, viz., tax evasion. Respondent was convicted of two totally separate felonies, one being the same as Nedick's conviction. In Nedick the court found cooperation with the government, no prior discipline history, plus the imposition of other penalties, but observed that "these mitigating factors are outweighed by the seriousness of the offense, its wilful and repetitious nature, and the selfish motive behind it." Id. at 503. Standard 5.11(b) states that:

> Disbarment is appropriate when a lawyer engages in serious conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.

Respondent has engaged in such crimes. The Florida Bar therefore urges this court to disbar the respondent.

WHEREFORE, The Florida Bar, complainant, respectfully requests this court to disbar Lawrence J. Smith, respondent, nunc pro tunc September 24, 1993 and to award the bar costs in the amount set forth in the report of referee.

Respectfully submitted,

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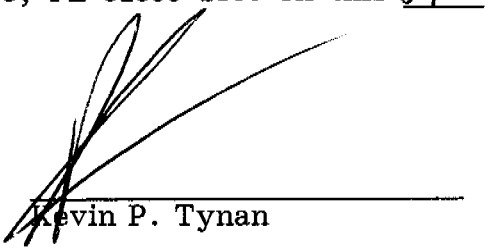
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Initial Brief have been furnished to Neal R. Sonnett, Attorney for Respondent, at One Biscayne Tower, Suite 2699, 2 South Biscayne Blvd., Miami, FL 33131-1802 and to John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 29th day of August, 1994.



Kevin P. Tynan

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