SUPREME COURT OF FLORIDA
(Before a Referee)

FILED
SID J. WHITE
JUN 23 1994
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

THE FLORIDA BAR,	:	
Complainant,	:	**CASE NO. 82,255**
v.	:	**TFB NO. 94-50,126 (17E)**
LAWRENCE J. SMITH,	:	
Respondent.	:	
	:	

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS.

The undersigned was duly appointed Referee on September 21, 1993 by Order of the Honorable Jack H. Cook, Chief Judge of the Fifteenth Judicial Circuit. The pleadings, transcript of final hearing and all other papers filed in this proceeding are forwarded to the Court herewith and constitute the record.

The respondent appeared in person and by Neal R. Sonnett, Esquire. The bar was represented by Kevin P. Tynan and David M. Barnovitz, bar counsel.

II. FINDINGS OF FACT REGARDING GUILT.

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.[1/]

[1/] The Florida Bar introduced five exhibits from the federal criminal proceedings, including the Plea Agreement, the Information, the Judgment, an Order Modifying Conditions of Supervised Release, and an Order Granting Request for Correction of Sentence.

The Florida Bar's Complaint is based upon the felony convictions[2/] and the Respondent's Answer admitted the essential allegations of the Complaint. Moreover, under Rule 3-7.2(b) of the Rules Regulating The Florida Bar, the determination or judgment of guilt by a court of competent jurisdiction "shall be conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules." For those reasons, there is no disputed issue of guilt, but only an issue of the appropriate level of discipline under all the facts and circumstances of this case.

I therefore find the Respondent guilty of having violated Rule 4-8.4(b), Florida Rules of Professional Conduct [A lawyer shall not commit a criminal act].

III. ISSUES REGARDING DISCIPLINE.

A. Introduction.

The Florida Bar seeks disbarment, but the Respondent -- and witnesses who testified on his behalf-- have argued that disbarment is not warranted in this case and that a suspension is sufficient to "protect the public and the administration of justice."[3/]

In attempting to determine the appropriate level of discipline, the undersigned Referee has considered the testimony of the Respondent and witnesses who appeared on his behalf, the Sentencing Memorandum which was submitted to the United States District Judge,[4/] argument of counsel, and the respective Hearing Memoranda.

[2/] See Rule 4-8.4(b), Florida Rules of Professional Conduct.

[3/] See Standard 1.1, Florida Standards For Imposing Lawyer Sanctions.

[4/] The Florida Bar stipulated and agreed that the arguments made in the Sentencing Memorandum, and more particularly almost 100 letters appended thereto, could be substantively considered in these proceedings.

The Florida Standards for Imposing Lawyer Sanctions do not mandate that the respondent be disbarred. On the contrary, while the language of Standard 5.11 provides that disbarment is "appropriate" when a lawyer is convicted of a felony, the Florida Supreme Court has made it clear that disbarment is far from automatic, and that the appropriate discipline must be based upon a fair consideration of all of the facts and circumstances of the individual case. In The Florida Bar v. Jahn, 509 So. 2d 285, 286-87 (Fla. 1987), the Supreme Court rejected "automatic disbarment rule" for felony convictions, stating that it would "continue to view each case solely on the merits presented therein."[5/] The Supreme Court of Florida affirmed those principles most recently in The Florida Bar v. McNamara, ____ So.2d ____, 1994 WL 102644 (Fla. March 31, 1994):

> As we said in The Florida Bar v. McShirley, 573 So.2d 807, 808-09 (Fla.1991): To disbar McShirley without considering the mitigating factors involved, however, would be tantamount to adopting a rule of automatic disbarment when an attorney misappropriates client funds. Such a rule would ignore the threefold purpose of attorney discipline set forth in Pahules [233 So. 2d 130 (Fla.1970)], fail to take into account any mitigating factors, and do little to further an attorney's incentive to make restitution.

The solemn responsibility of the undersigned referee, then, is to weigh all of the facts and circumstances of the case and the relevant aggravating and mitigating factors, and make a recommendation regarding an appropriate sanction -- one that is fair to society and sufficient to protect it from unethical conduct while not denying the public the services of a qualified lawyer by an unduly harsh discipline, fair to the Respondent by

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[5/] See also The Florida Bar v. Rosen, 495 So.2d 180,182 (Fla. 1986) (extreme sanction of disbarment should be imposed only where rehabilitation highly improbable); The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla.1978)(same); The Florida Bar v. Pavlick, 504 So. 2d 1231 (Fla. 1987),(neither Integration Rule nor case law mandates disbarment for all attorneys convicted of felony); The Florida Bar v. Chosid, 500 So.2d 150 (Fla.1987); The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla.1985).

punishing him for his misconduct while at the same time encouraging rehabilitation, and severe enough to deter others from similar misconduct. See The Florida Bar v. Pearce, 631 So.2d 1092 (Fla. 1994); The Florida Bar v. Dubbeld, 594 So. 2d 735, 736 (Fla. 1992); The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979); The Florida Bar v. Pahules, 233 So.2d 130 (Fla.1970).

B. Aggravating Factors Urged By The Florida Bar.

The Florida Bar asserts the applicability of the following aggravating factors under Standard 9.22, Florida Standards For Imposing Lawyer Sanctions:

1. 9. 22(a): prior disciplinary offenses.

On December 10, 1992, the Respondent received a public reprimand for improperly allowing another attorney to hold himself out as Respondent's partner when no such partnership existed. While the judgment regarding the public reprimand may have pre-dated these proceedings, the subject matter of the reprimand is part and parcel of the conduct underlying the convictions in this case, since both arose out of the Respondent's relationship with Brian Berman.[6/]

Thus, the reprimand represents a separate Rule violation from that upon which the instant proceedings are based, but it is not really "prior" in the sense that it represents unrelated acts of misconduct committed before the acts underlying the conviction.[7/] For

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[6/] As Bar Counsel acknowledged, The Florida Bar's inquiry initially covered **both** areas under the same Florida Bar file number, but was later bifurcated by agreement of the parties for reasons of convenience. Moreover, the facts underlying the reprimand were addressed in the Sentencing Memorandum submitted to the United States District Court, which further demonstrates the interrelationship between the two areas.

[7/] On the other hand, it could be argued that, if the matters had not been bifurcated, they would represent multiple offenses in the same case. See, e.g., The Florida Bar v. Rood, 633 So.2d 7, 9 (Fla. 1994).

that reason, I find that it merits only slight weight, if any.[8/]

2. 9.22(b): dishonest or selfish motive.

The Florida Bar argues that the offenses of conviction constitute dishonest or selfish motive, citing The Florida Bar v. Nedick, 603 So.2d 502 (Fla. 1992). Because the Respondent acted consciously to violate the law, there is no doubt that he committed dishonest acts. I am far less convinced, however, that he committed those acts solely because of dishonest or selfish motives.

Indeed, because The Florida Bar relies so heavily on Nedick, however, it must be noted that the conduct in this case differs significantly from Nedick. Nedick conspired with his partners to hide cash fees, and his "only motive was pecuniary gain." Id. at p. 503. In contrast, the great bulk of the income at issue in the instant case represented properly deposited checks, not hidden cash receipts, and the failure to report the income resulted from financial pressures and inability to pay, not from a purely selfish desire for pecuniary gain.[9/] On balance, any such aggravating factor here is far less egregious than that in Nedick, and the mitigating factors, as discussed below, are far more substantial and meaningful than those present in Nedick.

3. 9.22(c): a pattern of misconduct.

While the Respondent pled guilty to income tax evasion for the 1988 tax year, the

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[8/] In his Hearing Memorandum, Respondent's counsel suggested that this factor is most appropriately a neutral one, and therefore did not urge the absence of a prior disciplinary record in mitigation. Counsel did note, however, that with the exception of the matters underlying this case, which encompass both the reprimand and the current proceedings, Mr. Smith had never had a complaint lodged against him with any Bar in almost thirty years as an attorney.

[9/] While the lack of a selfish motive does not excuse the Respondent's actions, the circumstances are relevant to the weight to be accorded this factor.

Plea Agreement provided that, for purposes of determining the correct offense level under the Federal Sentencing Guidelines,[10] the "relevant conduct" included a total of $110,398 for the tax years 1987 through 1990. The Florida Bar asserts that the additional years and amounts demonstrate a pattern of misconduct, but the Respondent argues that the stipulation regarding application of the sentencing guidelines was not an admission that he intentionally sought to evade those amounts of taxable income for those years.[11] Under these circumstances, while I find that this aggravating factor is relevant, I do not assign it great weight.

4. 9.22(d): multiple offenses.

In addition to the tax evasion charge, The Respondent pled guilty to a separate count involving a false Federal Election Commission report, and this aggravating factor is therefore relevant and applicable. Nevertheless, I find that the weight of this factor is somewhat diminished by the unrefuted representations of Respondent's counsel that similar violations of the federal election laws have almost always been handled administratively by the Federal Election Commission through conciliation agreements, and that Congress has determined to treat such conduct, when prosecutable, as a misdemeanor.[12]

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[10] Under §2T4.1 of the United States Sentencing Guidelines, the correct offense level is determined by the amount of the tax loss.

[11] Respondent's counsel maintained that potential legal defenses regarding rent payments made by Berman were waived in order to effectuate the plea, and that the I.R.S. later determined that the $10,000 campaign fund check did not represent income to the Respondent. Both amounts were included in the government's calculations.

[12] See Title 2, U.S.C. §437g(d)(1)(A).

5. 9.22(h): vulnerability of victim.

I find the aggravating factor of "vulnerability of victim" to be inapplicable to the facts and circumstances of the case at bar. The Florida Bar urges that "public at large" is the vulnerable victim in this case, but this is not a case in which a large segment of the public is vulnerable to being victimized,[13] or in which clients or other individuals were particularly vulnerable.[14]

6. 9.22(i): substantial experience in the practice of law.

I find this factor to be applicable to the Respondent, who graduated from law school in 1964, was admitted to practice in New York thereafter, and was admitted to The Florida Bar in 1972.

C. Mitigating Factors Urged By The Respondent.

The Respondent argues the applicability of the following mitigating factors under Standard 9.32, Florida Standards For Imposing Lawyer Sanctions:

1. 9.32(g): character or reputation.

The Florida Bar agrees, and the record is clear, that the Respondent had an outstanding reputation for character, honesty, and integrity as a Lawyer, as a community activist, and as an elected public servant. Attached to the Respondent's Sentencing Memorandum were almost 100 letters which gave impressive and high praise to the Respondent's character, his basic integrity, and the substantial contributions he has made

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[13] See, e.g., The Florida Bar v. Calvo, 630 So.2d 548, 551 (Fla. 1993), where the Court discussed the "harm to the public at large that Calvo helped create through his reckless misconduct or omissions."

[14] See, e.g., The Florida Bar v. Mims, 532 So.2d 671, 673 (Fla. 1988), in which the Court observed that "Mims' victims were extremely vulnerable, one being a poor, unhealthy woman and another being both unemployed and uneducated."

during his long legal and public service career.[15/] I find this mitigating factor to be both relevant and applicable.

2. 9.32(l): remorse.

Again, The Florida Bar agrees, the record reflects, and I am satisfied after hearing from the Respondent, that he has manifested a profound sense of remorse and contrition, and I find this to be a relevant and applicable factor that mitigates the degree of discipline to be imposed.

3. 9.32(d): timely good faith effort to make restitution or rectify the consequences of his actions.

The Respondent clearly qualifies for consideration with respect to this mitigating factor. He voluntarily repaid the $10,000 to his campaign fund in April 1992, more than a year before he was charged with the offenses at issue. He voluntarily informed the U.S. Attorney of unreported speech honoraria payments discovered after a further review of his accounts, although federal investigators had not been aware of their existence. He agreed to pay all tax liabilities as determined by the Internal Revenue Service. Finally, he entered into a conciliation agreement with the Federal Election Commission and paid a personal civil fine in the amount of $5,000.

Unlike the facts in The Florida Bar v. Nedick, supra, the Respondent's course of cooperation and his attempts to rectify the consequences of his misconduct began before

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[15/] While I place greater weight on the testimony of witnesses who appeared on the Respondent's behalf, letters have been favorably considered in other proceedings before a Referee. See, e.g., The Florida Bar v. Meldon, 459 So.2d 314, 315 (Fla. 1984)("Meldon has submitted numerous letters commending him for his community service..."); The Florida Bar In re: Efronson, 403 So.2d 1305 (Fla. 1980)(In reinstatement proceeding before a Referee, the "record includes well over two hundred letters of recommendation from attorneys, former clients, community leaders, and friends."); The Florida Bar v. Scott, 238 So.2d 634, (Fla. 1970);

he was caught. While that cooperation, standing alone, still might not outweigh the seriousness of the offenses, it is certainly a relevant factor which should be considered together with the other factors present.

4. 9.32(e): full and free disclosure to disciplinary board or cooperative attitude toward proceedings.

There is no dispute that the Respondent has been fully cooperative during the pendency of these proceedings, and this mitigating factor is relevant and applicable.

5. 9.32(a): absence of a dishonest or selfish motive; and

6. 9.32(c): personal or emotional problems.

Respondent's counsel argues the above two factors in tandem, contending that, while the offenses to which the Respondent pled guilty constitute dishonest **acts**, they were not caused by dishonest or selfish **motives**. Because the acts resulted from serious personal financial problems, these factors should be considered in mitigation.

To buttress his point, counsel notes that the incident involving the campaign check was the only time, in 14 years of elective public office, that Mr. Smith ever utilized campaign funds as a loan for personal purposes or filed a false report, despite the fact that his campaigns had raised contributions totalling millions of dollars.

As Respondent's counsel pointed out in his Sentencing Memorandum and at the hearing in these proceedings, the F.E.C. and the Department of Justice conducted a thorough investigation of the Respondent's campaign reports, receipts and expenses. The fact that only one isolated example of either misuse of funds or false reporting was uncovered lends credence to the argument that the Respondent lacked a dishonest or selfish motive.

However, just as I was not convinced by the argument of Bar Counsel that "dishonest or selfish motive" should be viewed as an aggravating factor,[16] I am unconvinced that the absence of such motive is present to a degree that would justify a reduction in the degree of discipline to be imposed. At best, the issue of motive represents a neutral factor that is neither aggravating nor mitigating.

7. 9.32(k): imposition of other penalties or sanctions.

The Respondent has suffered substantial other penalties and sanctions. The federal criminal case resulted in felony convictions, incarceration in a federal prison, and the imposition of a criminal fine. Additionally, an administrative fine of $5,000.00 was imposed by the Federal Election Commission, and there will likely be substantial monetary penalties in connection with the payment of his outstanding civil tax liability.

Moreover, because the Respondent previously served as a Member of Congress, both the federal criminal case and these proceedings have received an enormous amount of media attention,[17] and the Respondent and his family have been subjected to substantial public chastisement and embarrassment. While prior publicity should not normally mitigate the level of discipline,[18] the inordinate and overwhelming media coverage has caused the Respondent acute personal embarrassment which warrants

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[16] See discussion at Section III(B)(2), supra.

[17] As the record reflects, both the main hearing and the subsequent final argument hearing in these proceedings were heavily attended and covered by representatives of the television, radio and print media.

[18] See The Florida Bar v. Dubbeld, 594 So. 2d 735, 736 (Fla. 1992). On the other hand, in The Florida Bar v. Diamond, 548 So. 2d 1107 (Fla. 1989), the Court approved, as mitigating factors, "other personal hardships" which included "loss of professional esteem and acute personal embarrassment, including his understandable reluctance to accept public service positions offered to him. . ."

some consideration.[19/]

D. Other Factors Which Justify a Reduction In The Degree Of Discipline.

There were a variety of other factors urged by the Respondent which, although not specifically listed in Standard 9.32, are, in my view, "consideration[s] . . . that may justify a reduction in the degree of discipline to be imposed."[20/] Those factors include the following:

1. No Violation of Duty Owed To Clients.

The Respondent's offenses did not involve the practice of law or any duty owed to clients. In The Florida Bar v. Helinger, 620 So.2d 993, 995-996 (Fla. 1993), the Supreme Court noted that "Bar discipline exists primarily to protect the public from misconduct that occurs in the course of an attorney's representation of a client" and stated:

> This Court likewise has recognized that misconduct occurring outside the practice of law or in which the attorney violates no duty to a client may be subject to lesser discipline. In a case resulting from a criminal conviction, discipline is imposed in addition to the criminal penalty already exacted in the criminal case.

See also The Florida Bar v. Moody, 577 So. 2d 1317 (Fla. 1991),(violations did not involve the practice of law and did not affect a client); The Florida Bar v. Corbin, 540 So. 2d 105 (Fla. 1989)(misconduct did not involve the practice of law nor actual breach of a

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[19/] Indeed, if the Respondent had been Mr. Smith, private citizen, instead of Mr. Smith, former Member of Congress, one wonders if the positions of both federal prosecutors and bar counsel might have been different.

[20/] See Standard 9.31. Moreover, Standard 3.0 states that in imposing a sanction, "a court shall consider the following factors: (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors."

professional responsibility to litigants or clients).[21]

2. Factors Raised By The Testimony of Witnesses for the Respondent.

The high caliber of the eight individuals who appeared at the Hearing in support of the Respondent[22] was exceptionally impressive, and the substance of their testimony was extraordinarily genuine and striking. The witnesses included: three distinguished Past Presidents of The Florida Bar;[23] one distinguished Past President of both The Florida Bar and the American Bar Association;[24] a Member of Congress who served with the Respondent;[25] two Florida State Senators, close friends and colleagues for many years;[26] and an attorney who worked for and with him in his private practice of law.[27]

All attested to his basic sense of honesty, integrity, and forthrightness. They expressed their admiration for his outstanding service to his profession, his community, state and nation. They spoke of his sincere remorse over what he did, his lack of a vile or corrupt motive,[28] and the substantial punishment that he has already received,

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[21] The Florida Bar urges rejection of this mitigating factor on the authority of The Florida Bar v. Adler, 505 So. 2d 1334, 1335 (Fla. 1987), The Florida Bar v. Anderson, 594 So. 2d 302, 303 (Fla. 1992), and The Florida Bar v. Keane, 536 So. 2d 990 (Fla. 1989). Those cases, however, involved the misuse of public funds, circumstances not involved in the instant case.

[22] One witness, Stephen Zack, testified via telephone hookup.

[23] James Fox Miller, Ray Ferrero, Jr., and Stephen Zack.

[24] Chesterfield Smith.

[25] Rep. Harry Johnston of West Palm Beach also served as President of the Palm Beach County Bar Association and Chaired a Grievance Committee in that Circuit.

[26] Senators Kenneth Jenne & Howard Forman of Broward County, Florida.

[27] Patricia Rahl.

[28] See The Florida Bar v. Diamond, 548 So. 2d 1107, 1108 (Fla. 1989),

including being forced out of public life and the emotional trauma for him and family because of the extensive publicity surrounding him.

Perhaps most important, they all strongly stated their belief that he is rehabilitatable if not already rehabilitated, in the sense that such acts will never occur again, that he can continue to be a substantial asset to the profession, and that disbarment is not warranted and represents far too serious a punishment in this case.[29/]

Just as The Florida Supreme Court, in Diamond, supra at 1108 (Fla. 1989), could not "ignore the abundant character testimony from prominent, sober, and reliable witnesses," I find such strong testimonials by persons who have made such major contributions to the profession, the state and the nation, to be convincing and compelling. [30/] I also find other factors set forth in Diamond to be present in this case, including "[t]he age of Respondent, his years of service to his clients, his community, his Bar and his country." Id.

IV. RECOMMENDATION AS TO THE DISCIPLINARY MEASURES TO BE APPLIED.

In this case, there are substantial and strong mitigating factors which, on balance, outweigh the aggravating factors and, notwithstanding the seriousness of the offenses, tip the scales in favor of a degree of discipline less than disbarment. Having carefully considered all of the facts and the law, I am satisfied that the stigma of disbarment is not necessary to encourage reformation or rehabilitation of the Respondent and would not

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[29/] See Diamond, supra, and cases cited therein.

[30/] Even United States District Judge Donald Graham, after imposing sentence on Mr. Smith, expressed his "great respect" for the Respondent and his belief that the Respondent would "continue to be a positive member of this community." See Transcript of Sentencing, Vol I-91.

result in any greater protection of the public, than would a term of suspension.[31/]

I therefore recommend that the Respondent be suspended for a period of Two Years, nunc pro tunc to September 24, 1993, the effective date of the felony suspension.

IV. STATEMENT AS TO PAST DISCIPLINE.

The Respondent received a public reprimand in 1993 for allowing his name to be used in a firm even though he was neither a partner or associate of that firm.

V. STATEMENT OF THE COSTS OF THE PROCEEDING.

I find that the following reasonable costs have been incurred by The Florida Bar and that the same should be assessed against the respondent:

Administrative Costs [Rule 3-7.6(k)(1)(E)]	$500.00
Court Reporter Costs	
Deposition of Smith on 2/28/94 - appearance fee	50.00
Final Hearing on 4/11/94	621.75
Closing Argument on 5/23/94 (to be determined)	210.00 ~~0.00~~
Miscellaneous Costs	
Investigative Costs	223.92
Family Bank of Hallandale - production of records	70.00
TOTAL (to date)	~~$1,405.67~~ $ 1,675.67

[31/] See The Florida Bar v. Diamond,supra; The Florida Bar v. Blessing, 440 So.2d 1275, 1277 (Fla.1983).

Rendered this 22 day of June, 1994 at West Palm Beach, Palm Beach County, Florida.

GARY L. VONHOF, REFEREE

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