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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)

REPLY BRIEF OF THE FLORIDA BAR

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ARGUMENT

I. Respondent's argument is unsupported by fact, precedent, or the Florida Standards for Imposing Lawyer Sanctions.

What respondent has attempted to accomplish in his brief is to force analogies to cases with fact patterns substantially different from that in the case at bar and to trivialize the felonies of which he stands convicted.

As an example of the forced analogy, respondent cites The Florida Bar v. Diamond, 548 So. 2d 1107 (Fla. 1989), the foundation case of his argument, but glosses over two aspects of that case which render the case inapposite to the matter now before the Court. Firstly, unlike respondent, Mr. Diamond was convicted of but one type of felony, viz., mail and wire fraud. Had he been convicted of a second, separate and distinct felony as has respondent, it is unlikely that Mr. Diamond would have escaped with a three year suspension rather than disbarment. Secondly, this Court placed heavy emphasis on a factor not present in the case at bar, viz., that the trial judge who presided at Mr. Diamond's criminal trial, testified in the bar action on Mr. Diamond's behalf stating "that notwithstanding the verdict, he never saw Mr. Diamond as an active participant in an act of fraud." Id. at 1108. Even with such testimony, the 4-3 Diamond decision produced a three (3) year suspension, not the two (2) year suspension recommended in this case. It cannot be argued that respondent in this case was not an active participant in an act of fraud. Diverting money from funds entrusted to him for his campaign account to the payment of a gambling debt, as well as other personal expenses, and submitting a knowingly fraudulent campaign account report and the knowing submission of false tax returns permit no such argument. Under the circumstances, it is respectfully submitted that faced with the

separate, serious felonies involved in this case, the Diamond, dissent would have been transmogrified to a unanimous disbarment order.

The attempted trivialization of the two distinct felonies of which respondent stands convicted must similarly fall. At page 11 of his brief respondent states that the $110,389.00 of unreported income was "not properly included on Mr. Smith's tax returns for the years in question only because the strain of financial pressures left Mr. Smith unable to pay the required taxes." This Court, in The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991), considered another lawyer's plea for leniency based upon that lawyer's dire financial situation, which the lawyer claimed was his reason for stealing client monies. In Shanzer, the Court noted that:

> 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.

Id. at 1383. Respondent's lack of remorse and state of denial evidenced by his rationalization that his felony conviction for submitting a knowingly fraudulent campaign account report constituted nothing more than a misdemeanor, in the bar's view is singularly unpersuasive. This Court should not countenance respondent's knowing misuse of $10,000.000 of campaign account funds to satisfy a gambling debt, other personal obligation and his intentional cheating of the United States government by under reporting his income by more than $100,000.00.

In October of this year, this Court decided the case of The Florida Bar v. Wilson, 19 Fla. L. Weekly S507 (Fla. 1994) which is strikingly similar to the case at bar. In Wilson the lawyer was convicted of grand larceny and conspiracy based upon his "reporting of fictitious and inflated costs to the State of New York so that a nursing home and its owners could illegally obtain

funds from the New York Medicaid program." Id. at S507. Wilson was not sentenced to any jail time,[1] but he was ordered to pay restitution and was placed on five years probation. At trial, before the referee, Wilson presented an extensive mitigation case and the bar raised several aggravating factors. The Court commented as follows on these factors:

> The referee found the following mitigating factors in this case: absence of a prior disciplinary record; Wilson's good character and reputation in the community; Wilson had already been sentenced to probation and restitution by the New York court; and Wilson exhibited remorse for his mistakes. The referee also found the following aggravating circumstances to be established: Wilson had a dishonest or selfish motive; there was a pattern of misconduct; multiple offenses were involved; Wilson's refusal to acknowledge the wrongful nature of his conduct; the vulnerability of the victim; and Wilson's substantial experience in the practice of law. Id. at S507.

After balancing both the mitigation and the aggravation with the serious nature of the felony convictions, the referee and the Court concluded that "the substantial character evidence is not sufficient to overcome clear and convincing evidence that Grafton B. Wilson committed two serious felonies involving theft of public medicaid money." Id. at S508. Thus, Wilson was disbarred.

The Wilson decision is consistent with an earlier disbarment order of this Court. The Florida Bar v. Bunch, 195 So. 2d 558 (Fla. 1967). In Bunch, the lawyer was convicted of converting almost $60,000.00 of public

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[1] The respondent in this case was sentenced to three months of incarceration and placed on two years of supervised release. Thus it appears that the criminal court system found respondent's criminal misdeeds worse than Wilson's.

funds and for knowingly filing a false report to the Comptroller of the State of Florida which hid this conversion.[2] Bunch was disbarred. Id. at 559

Standard 5.11 of the Florida Standards for Imposing Lawyer Sanctions states that the sanction of disbarment is appropriate when:

> (a) a lawyer is convicted of a felony under applicable law; or
> (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft.

Respondent's criminal conduct is clearly within the parameters of Standard 5.11.

CONCLUSION

Recent precedent and the Florida Standards for Imposing Lawyer Sanctions dictate that respondent be disbarred. The Florida Bar v. Nedick, 603 So. 2d 502 (Fla. 1992); Wilson; Standard 5.11(b).

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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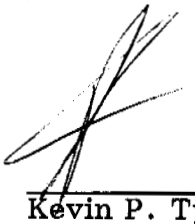
[2] Just as respondent submitted a false FEC report which hid the fact that he had converted $10,000.00 from his campaign account to his own use.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Reply 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 2nd day of December, 1994.



Kevin P. Tynan