IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

V.

FRANCIS W. BLANKNER,

Respondent.

_____/

CASE NO. 63,230
(09A83C09)

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

ADDITIONAL AUTHORITIES

Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar

ISSUE ON APPEAL

WHETHER THE REFEREE'S RECOMMENDATION THAT RESPONDENT, FRANCIS W. BLANKNER, BE SUSPENDED FROM THE PRACTICE OF LAW FOR A PERIOD OF TWO (2) MONTHS WITH AUTOMATIC REINSTATEMENT IS APPROPRIATE AND JUSTIFIED IN LIGHT OF THE PARTICULAR FACTS AND CIRCUMSTANCES OF THE RESPONDENT'S CASE.

STATEMENT OF FACTS

The respondent, Francis W. Blankner, is fifty-nine (59) years of age. He was admitted to the practice of law in 1949 and has been engaged in active practice in Orlando, Florida since that date. (Transcript (T.), Pages (pp) 15, 17, 37 and Referee's Report (R.) Page (p.) 3). Mr. Blankner served in the Armed Forces in the Pacific during World War II as a radar operator and aerial gunner aboard a B-29 Bomber. During his military career he was the recipient of the Purple Heart. After the close of the war he was honorably discharged whereupon he returned to Orlando, Florida. (T., pp. 52, 53 and R., p. 3; also letters attached to respondent's exhibit 2).

Mr. Blankner is a family man. His wife, Jean Sims Blankner, suffered a debilitating stroke in the late 1960's. Mrs. Blankner is not employed outside the home. The Blankners have three (3) children, Francis W. Blankner, Jr., Evelyn Blankner Ciupak and Matthew J. Blankner. The older son is a prosecuting attorney in the Ninth Judicial Circuit of Florida. Evelyn Ciupak is employed as a mechanical engineer for Ford Motor Company in Michigan. The younger son, Matthew, is employed as a mechanical engineer for the Orlando Utilities Commission. (T., pp. 17, 18, 60, 61 and R., p. 3). Mr. Blankner is presently residing with his wife, Jean, and his eighty-nine (89) year old mother-in-law, Marguerite Sims.

Mr. Blankner provides a home and support for Mrs. Sims. (T., p. 61 and R. p. 3).

On May 5, 1982 the respondent was charged with three misdemeanor counts of wilful failure to file personal income tax returns (1977, 1978, 1979), in violation of 26 U.S.C. 7203. On July 12, 1982 Mr. Blankner pleaded guilty to failure to timely file his 1978 income tax return. On August 20, 1982 the respondent was sentenced before the Honorable Elizabeth A. Kovachevich, United States District Judge. Judge Kovachevich sentenced Mr. Blankner to a probationary period of five (5) years and a ten thousand dollar ($10,000.00) fine to be paid two thousand dollars ($2,000.00) annually until paid. In arriving at the aforesaid sentence, it is important to note that Judge Kovachevich based her decision upon a pre-sentence investigation report which contained all the necessary facts including Mr. Blankner's failure to file his income tax returns for the years 1970-1975. (See complainant's exhibits 2 and 3 attached to T. and T., pp. 41, 63, 76).

Thereafter, the Board of Governors of The Florida Bar filed the instant complaint. (See complainant's exhibit (1) attach to T.). At the hearing on this matter, Florida Bar Counsel, Mr. McGunegle, recommended a suspension of ninety-one (91) days with proof of

rehabilitation prior to reinstatement. (T., pp. 78, 79, 80). After a comprehensive hearing, the referee, the Honorable Edward M. Jackson, recommended a sixty (60) day suspension with automatic reinstatement and a public reprimand. The referee based this decision on a careful balance of the aggravating as well as the mitigating factors. He deemed suspension appropriate due to the cumulative nature of respondent's misconduct. On the other hand, Judge Jackson found that Mr. Blankner had an impeccable professional, social and military record. He further found that the respondent attorney had no disciplinary history. (R. p. 3).

Testimony at the hearing revealed that the respondent's financial difficulty arose while he was the sole support for his wife, his aged mother-in-law and his three children. During this time period, Mr. Blankner was providing financial support for the college education of his three children as well. Additional funds were borrowed from friends and relatives to defray living and college expenses. (T., pp. 19, 27, 28, 29, 30, 31, 32, 33, 34, 35, 38, 52, 58, 59, 60, 61, 62).

Mr. Blankner's failure to timely file his income tax returns was the result of his financial inability to pay the taxes owed. (T., pp. 67, 68). The evidence further showed Mr. Blankner had only one source of income: his law practice; and that the partnership

tax returns were timely filed each year indicating Mr. Blankner's taxable income. (T., pp. 37, 38, 55, 56).

The only significant assets he and his wife owned were their home in Orlando and a house at New Smyrna Beach, which he purchased for between five thousand dollars ($5,000.00)and ten thousand dollars ($10,000.00) in the mid-1960's. Nor did he belong to any country clubs or other clubs which would require an annual payment of substantial dues. (T., pp. 32-36, 40, 59, 64, 65, 68, 69, 70).

In 1980, prior to any investigation by the Internal Revenue Service, Mr. Blankner prepared his 1976 income tax return. The 1976 tax return was filed in 1980 and the taxes paid with loan proceeds. Subsequent to preparing his 1976 return, Mr. Blankner, while in the process of preparing his 1977 tax return, was contacted by the Criminal Investigative Division of the Internal Revenue Service. Thereafter, on advice of counsel, Harrison T. Slaughter, no return was filed. During 1980 and 1981, Mr. Blankner, with the assistance of a Certified Public Accountant, prepared and filed his 1977. 1978 and 1979 personal income tax returns and paid the taxes owed. (T., pp. 22, 23, 24, 56, 57. 66, 88). His taxable income was determined as follows: $29,022.00 in 1977, $35,971.00 in 1978 and $31,498.00 in 1979. (T. Respondent's Exhibit #1, 3 and 4).

With the full support and cooperation of his wife, the respondent sold the family home in order to pay the taxes owed for the years 1977-1979. Further, Mr. and Mrs. Blankner sold their remaining asset, their beach cottage, in order to pay the penalties and interest accrued for the years 1976-1979 to Francis Blankner, Jr. (T., pp. 58, 59, 64, 65, 66, 69, 70).

Since the sale of his family home, Mr. Blankner has resided with his wife and mother-in-law in a modest two-bedroom rental apartment. (T., pp. 34, 61). Since his indictment and conviction, Mr. Blankner has suffered not only public embarrassment, emotional pain and family stress, but also his law practice has suffered financially. He has, in fact, been forced to borrow money from his son and his brother to continue the support of his wife and mother-in-law. (T., pp. 61, 62, 63, 69).

Succinctly put, the respondent attorney, Francis Blankner, has destituted himself and his wife.

In closing, the respondent has made the necessary arrangements to prevent the recurrence of this situation. In January, 1982, he formed a Professional Association. Mr. Blankner now draws a salary of approximately one thousand dollars ($1,000.00) per month from which federal taxes are withheld. (T., pp. 16, 58, 62). Additionally, Mr. Blankner has timely filed and paid federal income taxes for the years 1980, 1981 and 1982. (T., pp. 58, 60, 61, 62).

ARGUMENT

THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FOR A PERIOD OF TWO (2) MONTHS WITH AUTOMATIC REINSTATEMENT IS AN APPROPRIATE DISCIPLINARY MEASURE. FURTHER, THE RESPONDENT ASSERTS THAT THE REFEREE'S CHOICE OF SANCTION IS FULLY JUSTIFIED BASED UPON HIS CAREFUL EXAMINATION OF THE PARTICULAR CIRCUMSTANCES IN THE RESPONDENT'S CASE.

The determination of appropriate discipline imposed upon a Florida Bar member for misconduct under Florida Bar Integration Rule 11.02(3)(a) and Florida Bar Disciplinary Rules 1-102(A)(4) and 1-102(A)(6) is not one of exact decision or absolute rule. Both historically and as a stated policy matter, discipline of a member of The Florida Bar depends on the unique circumstances and particularities of each individual case. The choice of sanction is a careful balance of both the aggravating and mitigating factors.

The issue in Mr. Blankner's case is whether the decision reached by the referee, the Honorable Edward M. Jackson, is appropriate and justified. As the record shows, Judge Jackson recommended a two (2) month suspension from the practice of law with accompanying automatic reinstatement. The respondent asserts that the above-described decision is fair and well-reasoned. As the record reflects, Judge Jackson spent a considerable portion of time exploring the unique facts and circumstances surrounding this action.

The respondent contends, further, that the recommendation of The Florida Bar (one-year suspension with necessary proof of

rehabilitation) is not justified or appropriate. We base this contention on the very basic premise that the Board of Governors recommended discipline simply does not comport with what the record reflects regarding respondent's particular mitigating factors and the prior decisions of this Court.

In The Florida Bar v. Rousseau, 219 So.2d 682 (Fla. 1969), where an attorney had been convicted of three (3) counts of failure to file income tax returns, this Court accepted the recommendation of the referee that Respondent Rousseau receive a private reprimand and a probationary term of two (2) years. In reaching this decision the Court rejected the Bar's request for a six (6) month suspension. Rousseau, supra, is particularly relevant to the instant case not merely because this Court rejected the recommendation of the Board of Governors, but because of this Court's stated reasoning for rejecting the Bar's request. In Rousseau, supra, the Court based its decision not to suspend solely upon the "mitigating factors" enunciated in the record.

Similarly, in The Florida Bar v. Greene, 235 So.2d 7 (Fla. 1970), this Court rejected the recommendation of the Board of Governors (six month suspension). In Greene, supra, the respondent failed to pay $85,000.00 in income taxes and failed to file tax returns for at least a two (2) year period. In rejecting the recommendation of the Board of Governors, the Court approved the referee's recommendation of probation for a period of one (1) year and further ordered a public

reprimand. As in Rousseau, supra, this Court placed emphasis on respondent's prior record of service to the community and his favorable reputation.

Further, in The Florida Bar v. Slatko, 281 So.2d 17 (Fla. 1973), this Court accepted the referee's recommendation of a public reprimand. In Slatko, supra, the respondent was indicted on charges of income tax evasion (a felony charge) and three (3) misdemeanor counts of failure to file income tax returns. Mr. Slatko entered a plea of Guilty to two (2) counts of failure to file a plea of nolo contendere to the remaining count of failure to file.

It is important to note at this point that this Court has approved numerous conditional guilty pleas in cases arising from charges of successive years of failure to file income tax returns. In these matters this Court deemed public reprimand the appropriate sanction for the cumulative or successive misconduct.
The Florida Bar v. Beamish, 327 So.2d 11 (Fla. 1976);
The Florida Bar v. Ryan, 352 So.2d 1174 (Fla. 1977);
The Florida Bar v. Schonfeld, 336 So.2d 77 (Fla. 1976);
The Florida Bar v. Greenspahn, 366 So.2d 396 (Fla. 1978);
The Florida Bar v. Shepherd, 366 So.2d 438 (Fla. 1978);
The Florida Bar v. Turner, 344 So.2d 1280 (Fla. 1977).

For comparison purposes it is essential to examine the cases

which have come before this Court; and the Court ruled suspension as the appropriate disciplinary measure.

In The Florida Bar v. Miller, 322 So.2d 502 (Fla. 1975), the respondent entered a plea of nolo contendere to one (1) count of filing a false tax return (a felony charge). In Miller, supra, this Court held that the offense pleaded to warrants a ninety (90) day suspension with a provision for automatic reinstatement.

Further, in The Florida Bar v. Solomon, 338 So.2d 818 (Fla. 1976), the respondent was convicted of wilful failure to file income tax return for 1973. He admitted to three (3) additional years of failure to file income tax returns (1966-1968) (see footnote at pg. 819). Additionally, Mr. Solomon had been previously disciplined by way of private reprimand on two (2) prior occasions (1970 and 1974). Further, the respondent had been suspended from practice before the U. S. District Court for the Southern District of Florida in 1967 for "willful interference with the administration of justice." The Court, in taking into account the above-mentioned professional record suspended Mr. Solomon for a six (6) month period.

To the same effect, The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), where an attorney was charged with three (3) separate counts of misconduct

1. Mr. Vernell was charged and convicted of five

successive counts of wilful failure to file income tax returns.

2. Neglecting a matter entrusted to him in that Mr. Vernell reinstated a criminal appeal having no intention of taking further action in behalf of the defendant. His representations were solely for the purpose of collecting reimbursement for his services in the first appellate proceedings.

3. Conflict of interest in that Mr. Vernell was a close friend and business partner of a Confidential Informant in the government's case against the defendants represented by Vernell. Vernell advised the defendants of this on the scheduled date of plea. He further advised them that if the sentence imposed was too "heavy" they could set their plea aside due to his conflict.

This Court in Vernell, supra, agreed with the referee, in part, and ruled that Mr. Vernell be found guilty of Counts I and III. In determining the appropriate discipline in Mr. Vernell's case this Court considered the following:

1. The Respondent Vernell was found guilty of five (5)

charges of wilful failure to file income tax returns (1967-1971).

2. The combined charges of failure to file for five (5) years coupled with a finding of professional misconduct in dealing with a client.

3. The two (2) prior reprimands on Mr. Vernell's professional record

   A. A private reprimand in November, 1964.

   B. A public reprimand in June, 1974. The Florida Bar v. Vernell, 296 So.2d 8 (Fla. 1974).

After considering the cumulative nature of the above-described factors, this Court held that Mr. Vernell's conduct warranted a suspension from the practice of law for a period of six (6) months.

More recently, this Court suspended for a six (6) month period (to include requisite proof of rehabilitation) an attorney who had wilfully failed to file income tax returns for twenty-two (22) years (1954-1976). The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983). Attorney Lord was charged by indictment with four (4) counts of wilful failure to file income tax returns in violation of 26 USC 7203. He pleaded guilty as charged. The Court found that Respondent Lord

failed to pay taxes on approximately $545,000.00 income earned in the four (4) year period (1973-1976).

Prior to the Lord, supra, decision, the respondent did not find any case wherein a member of The Florida Bar had been suspended for wilful failure to file income tax returns absent additional misconduct. Nor did counsel for the complainant cite any such case in his brief. Prior to Lord, supra, reprimand was the appropriate sanction for wilful failure to file income tax returns. A careful examination of the cases reveals reprimand was deemed appropriate in cases where the misconduct involved a single year of failure to file income tax returns as well as cases involving multiple or successive years of wilful failure to file, i.e. cumulative misconduct.

The Florida Bar rests its position on the Lord, supra, decision. Clearly there are similarities between Lord, supra, and the instant case. Respondent, Mr. Blankner, failed to timely file personal income tax returns for multiple years without legal justification or excuse. Mr. Blankner, like Mr. Lord, has given years of service to his clients, community and country. Mr. Blankner, like Mr. Lord, has an impeccable professional reputation and has no prior record of discipline. Mr. Blankner, like Mr. Lord, has earned the respect of leading members of the legal and business communities. (See

attachments to Respondent's Exhibit 2, Transcript of Hearing.) Mr. Blankner, like Mr. Lord, has suffered public embarrassment as well as significant financial setbacks in his law practice as a result of such public disclosure.

Equally clear, however, are the differences between Mr. Lord and Mr. Blankner. As Florida Bar counsel aptly notes in his brief, Mr. Blankner's conduct does not equal that of Mr. Lord. (Complainant's Brief p. 10). Mr. Lord's misconduct transpired over a substantially greater number of years and involved a significantly larger amount of taxable income earned.

Another critical difference between Mr. Lord and Mr. Blankner is that The Florida Bar charged Mr. Lord with violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(a)(3) for engaging in illegal conduct involving moral turpitude; 1-102(a)(4) for engaging in dishonest conduct; and 1-102(a)(6) for engaging in conduct that adversely reflects on his fitness to practice law. Lord, supra. Mr. Blankner, on the other hand, was charged with violating only Disciplinary Rule 1-102(a)(4) for engaging in dishonest conduct and Disciplinary Rule 1-102(a)(6) for engaging in conduct that adversely reflects on his fitness to practice law. In other words, The Florida Bar did not charge Mr. Blankner with engaging in conduct involving moral turpitude.

This Court in arriving at its decision to suspend Mr. Lord, relied on the finding that Mr. Lord's conduct involved moral turpitude. In the Respondent Blankner's case, this avenue is not open to the Court.

In Lord, supra, as noted above, this Court made the finding that Respondent Lord's misconduct was not an isolated event; but rather, it constituted serious cumulative misconduct involving moral turpitude. Prior to Lord, supra, the discussion of cumulative misconduct generally arose in cases where the respondent attorneys had been previously disciplined by the Supreme Court, i.e. multiple disciplinary proceedings. The Florida Bar v. Bern, 425 So.2d 526, 528 (Fla. 1982); The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981); The Florida Bar v. Ryan, 396 So.2d 181 (Fla. 1981); The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979); The Florida Bar v. Greenspahn, 386 So.2d 523 (Fla. 1980); The Florida Bar v. Solomon, 338 So.2d 818 (Fla. 1976).

Further, this Court in Lord, supra, reaffirmed the right of the appointed referee to consider mitigating factors in determining the appropriate sanction, i.e. consider personal hardships and demonstrated rehabilitation. Respondent Blankner has taken several steps to prevent the recurrence of similar misconduct. Mr. Blankner has timely filed his 1980, 1981 and 1982 personal tax returns and paid the taxes thereon. He also formed a Professional Association

in January, 1982 which pays the respondent a monthly salary from which income taxes are withheld. As to reparation for previous years, Mr. Blankner has filed tax returns for the years 1976, 1977, 1978 and 1979; and paid the taxes, accrued interest and penalties thereon. To pay the amounts due, he and his wife, Jean, sold their home and their small beach house. Respondent, his wife and his mother-in-law reside in a two (2) bedroom rental apartment. He presently owns no real property or assets. Additionally, Mr. Blankner has been borrowing funds from his older son and his brother in order to meet his monthly financial obligations.

These steps do not excuse Mr. Blankner's misconduct but they do serve to mitigate it. The respondent attorney has destituted himself and his wife in order to make amends and pay the taxes, accrued interest, penalties, costs and accompanying fine.

CONCLUSION

WHEREFORE, Francis W. Blankner respectfully requests that this Court review the referee's report and recommendations and approve his findings and his recommended discipline of a two (2) months' suspension with automatic reinstatement and payment of costs. The Respondent Blankner firmly contends that the above-described recommendation strikes a proper balance between a disciplinary measure which serves a just purpose for society and the citizens of Florida and equally serves the Respondent. The Respondent further contends that the above-described recommendation not only meets this test of fairness to society and fairness to the Respondent attorney but also serves as an effective deterrent to others.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Respondent's Answer Brief have been furnished by Federal Express Currier Service to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Respondent's Answer Brief has been furnished by mail to David G. McGunegle, Bar Counsel, 880 North Orange Avenue, Suite 102, Orlando, Florida, 32801; a copy of the foregoing Respondent's Answer Brief has been furnished by mail to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 on this 24th day of October, 1983.

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