

FILED

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

CASE NO. 63,230

v.

(09A83C09)

FRANCIS W. BLANKNER,
Respondent.

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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OTHER AUTHORITIES

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

1-102(A)(4)	1
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Florida Bar Integration Rule, Article XI, Rules

11.02(3)(a)	1
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STATEMENT OF THE CASE

On May 5, 1982, respondent was indicted in United States of America v. Francis W. Blankner, United States District Court, Middle District of Florida, Orlando Division, Case No. 82-42-Orl-CR-EK charging him with three counts of violating 26 United States Code Section 7203; a misdemeanor. Respondent allegedly had willfully and knowingly failed to file income tax returns for the calendar years of 1977, 1978 and 1979. He pled guilty to one count (1978) in exchange for the dismissal of the other two, was found guilty, sentenced to five years' probation and fined \$10,000.00. Respondent had also failed to file income tax returns for the years 1970-1975 but was not charged with violations for these years.

The Florida Bar subsequently filed a formal complaint against respondent on February 10, 1983. It charged him with violations of Fla. Bar Integr. Rule, Article XI, Rule 11.02(3)(a) and (b) and Disciplinary Rules 1-102(A)(4) and 1-102(A)(6) of the Code of Professional Responsibility of The Florida Bar.

The Honorable Edward M. Jackson was appointed referee on February 24, 1983 and the hearing was held before him

in Melbourne, Florida, on April 19, 1983. The referee filed his report on May 23, 1983, recommending the respondent be found guilty, receive a public reprimand and due to the cumulative nature of the misconduct be suspended for two months with automatic reinstatement and pay costs now totaling \$698.13.

The Board of Governors received the report at their July, 1983 meeting. They approved all but the recommended discipline which they believe is erroneous and unjustified given the entire circumstances and seek this review urging a one year suspension with proof of rehabilitation required prior to reinstatement and payment of costs.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FOR ONLY TWO MONTHS WITH AUTOMATIC REINSTATEMENT FOLLOWING COMPLETION OF THE SUSPENSION IS ERRONEOUS AND UNJUSTIFIED IN LIGHT OF THE SERIOUSNESS AND CUMULATIVE NATURE OF RESPONDENT'S MISCONDUCT AND WHETHER A SUSPENSION FOR ONE YEAR WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS APPROPRIATE.

STATEMENT OF FACTS

Respondent failed to timely file with the Internal Revenue Service his personal income tax returns for the years 1970 through 1979 (Transcript (T.), Pages (pp) 22, 23, 24; Bar Exhibit 1, 2; Complaint and Answer). Income tax returns for the years 1976, 1977, 1978 and 1979 only were filed with the Internal Revenue Service. The 1976 return was filed in 1980 (T., pp. 22, 23); the 1977 through 1979 returns were filed and taxes due paid in 1981 (T., pp. 56, 57).

In May, 1982, respondent was indicted by a Federal Grand Jury on three counts for willfully and knowingly failing to file his income tax returns for 1977 through 1979, each count being a Federal misdemeanor under 26 United States Code Section 7203. (Bar Exhibit 1). Respondent pled guilty to Count II (1978) in exchange for Counts I (1977) and III (1979) being dropped under a Plea Agreement (Bar Exhibit 2). He was found guilty of Count II, sentenced to five years probation and fined \$10,000.00 (Bar Exhibit 3).

Testimony at the hearing held before the referee on April 19, 1983 showed that respondent had been gainfully employed in Orange County, Florida from 1949 to the present as an attorney. (T., pp. 16, 17, 37). The referee found he had earned enough income in the years 1970-1972 and 1977-1979 to warrant a duty to file income tax returns for those years. (Report Findings, para. 3 and 5). Evidence and testimony elicited from respondent showed that for the years 1970 through 1972, respondent earned enough money to pay the mortgage payments due on his home, support himself, his wife and his elderly mother-in-law in that home, as well as provide substantial assistance for the college educations of his two sons and a daughter (T., pp. 18, 19, 27, 19-33, 60, 61). Respondent states the only reason he failed to file or file in a timely fashion during those years was because he could not pay the taxes owed. (T., pp. 67, 68).

The referee found respondent had made a conscious decision over a period of at least six years not to file or timely file his income tax returns without justifiable reason or excuse (Referee's Report, p. 2).

The referee found respondent guilty as charged and recommended a public reprimand with two months' suspension and automatic reinstatement at the conclusion of the suspension. The Board of Governors of The Florida Bar then sought this review of the referee's recommendation of discipline seeking a one year suspension with proof of rehabilitation required prior to reinstatement and payment of costs.

ARGUMENT

THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FOR ONLY TWO MONTHS WITH AUTOMATIC REINSTATEMENT FOLLOWING COMPLETION OF THE SUSPENSION IS ERRONEOUS AND UNJUSTIFIED IN LIGHT OF THE SERIOUSNESS AND CUMULATIVE NATURE OF RESPONDENT'S MISCONDUCT AND A SUSPENSION FOR ONE YEAR WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS APPROPRIATE.

The issue is the appropriate measure of discipline for respondent's failure to timely file Federal income tax returns from 1970 through 1979 and his failure to file any returns for the years 1970 through 1972 and 1977 through 1979 as found by the referee. He pled guilty to failure to file a personal income tax return for the year 1978 and charges involving the years 1977 and 1979 were dropped. The referee recommends a suspension for two months with automatic reinstatement. The Board of Governors of The Florida Bar believes this is erroneous and unjustified considering the number of years involved in this deliberate and repeated misconduct. Instead, the Board believes the respondent should be suspended for a period of one year with proof of rehabilitation required prior to reinstatement.

In 1969, this Court approved a referee's recommendation for a private reprimand and two years' probation in

The Florida Bar v. Rousseau, 219 So.2d 682 (Fla. 1969). That attorney had been convicted of failing to file income tax returns for over a three year period. The Court then published the reprimand making it a public private reprimand. The similar disposition occurred in The Florida Bar v. Greene, 235 So.2d 7 (Fla. 1970). He failed to file certain income tax returns, to pay some \$85,000.00 in income taxes and was convicted on a plea of guilty to the charge of failing to file tax returns. The misconduct occurred over at least a two year period.

In The Florida Bar v. Lemlich, 248 So.2d 161 (Fla. 1971), the Court approved a referee's recommended public reprimand for respondent's being found guilty of willfully and knowingly failing to file Employer's Quarterly Federal Tax Returns. In 1973, the Court approved a referee's recommendation for a public reprimand in The Florida Bar v. Slatko, 281 So.2d 17 (Fla. 1973) where the attorney was indicted for failing to file income tax returns for three years, pleaded guilty to two years and pleaded nolo contendere to the other. In 1977, the Court approved the referee's recommended public reprimand in

The Florida Bar v. Turner, 344 So.2d 1280 (Fla. 1977). That attorney pleaded and was adjudicated guilty for failing to file an income tax return for one year. No petition for review was filed. All of the foregoing individuals were sentenced to varying terms in Federal penitentiaries following their adjudications of guilt. Of course, this respondent was placed on probation.

Subsequent to Turner, public reprimands were approved for income tax problems by conditional pleas in several cases. See e.g. The Florida Bar v. Ryan, 352 So.2d 1174 (Fla. 1977); The Florida Bar v. Wasman, 366 So.2d 409 (Fla. 1978); The Florida Bar v. Thomson, 372 So.2d 1124 (Fla. 1979); and The Florida Bar v. Marks, 376 So.2d 9 (Fla. 1979).

However, the Court just issued a much more stringent discipline for income tax problems in The Florida Bar v. Lord, Case No. 61,649, June 9, 1983. In this case, the attorney was found to have knowingly and willfully failed to file income tax returns between the years of 1954 to 1976. In Federal Court, he had been charged with the

last four years and pleaded guilty to all counts. He was found to have failed to account for and pay taxes on approximately \$545,000.00 during the twenty-two year period. He was sentenced to one year in prison, suspended except for ninety days and three years of community service. The referee recommended a three months' suspension citing several factors including the respondent's apparent rehabilitation, the fact the offenses were misdemeanors, his prior unblemished record and testimony from other members of the local Bar as to his good character. The Bar appealed the referee's recommended discipline. This Court, noting the cumulative nature of the misconduct and the purposes of discipline, suspended the respondent for a period of six months with proof of rehabilitation required underscoring the need for deterrence of others. Chief Justice Alderman concurred and dissented and would have ordered a three year suspension. Justices McDonald and Ehrlich also concurred and dissented indicating they would have approved a disbarment order.

Although this respondent's transgressions do not equal those of Mr. Lord, they do involve multiple

years of failing to timely file any income tax returns as required. At least three he never filed and four were only belatedly filed after he became a target of an I.R.S. investigation. As noted in Lord:

The misconduct charged is not an isolated event, rather, it constitutes serious cumulative misconduct involving moral turpitude. [Citations omitted]. Moreover, the misconduct present here respects a flagrant and deliberate disregard for the very laws respondent took an oath to uphold. (Lord Slip Opinion, p. 5).

This Court has several times enunciated the principle that cumulative misconduct is treated more seriously than isolated misconduct. See e.g. The Florida Bar v. Bern, 425 So.2d 526, 528 (Fla. 1983) and the citations therein. This referee found the misconduct to be willful, without any justifiable excuse or reason and cumulative in nature. The Board disagrees only with his recommended discipline.

It was noted most recently in Lord, supra, that discipline of attorneys for unethical conduct must serve three purposes. The judgment must be fair to society in protecting the public from unethical conduct and not denying it the services of a qualified attorney due to an

unduly harsh penalty. Second, it must be fair to the respondent both to punish the breach and to encourage rehabilitation. Finally, the judgment must be severe enough to provide a viable deterrent to others who might become tempted to become involved in similar misconduct. The Florida Bar v. Thue, 244 So.2d 424, 425 (Fla. 1971) citing The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). See also State ex rel. The Florida Bar v. Murrell, 74 So.2d 221, 227 (Fla. 1954).

This respondent has engaged in cumulative misconduct involving both a deliberate choice and moral turpitude. Accordingly, the discipline meted out by this Court should be more stringent. It should not be a token sanction because it involves income tax offenses against the Federal Government or because the total amount deceitfully not paid and withheld from the Federal Government is much less than involved in the Lord case. The misconduct was willful and ongoing for several years. The Board of Governors of the Florida Bar urges this Court to impose the discipline of a suspension for one year with proof of rehabilitation required prior to reinstatement and payment of costs currently in the amount of \$698.13.

CONCLUSION

WHEREFORE, the Board of Governors of The Florida Bar respectfully requests that this Court review the referee's report and recommendations and approve his findings but reject his recommended discipline of a two months' suspension with automatic reinstatement and payment of costs and; instead, impose a suspension of one year with proof of rehabilitation required prior to reinstatement and payment of costs for this serious and cumulative misconduct.

Respectfully submitted,

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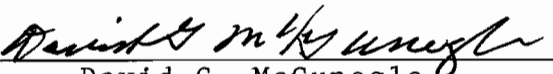
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Brief in Support of Petition for Review have been furnished by Purolator Courier Service to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Complainant's Brief in Support of Petition for Review has been furnished by mail to Harrison T. Slaughter, Counsel for Respondent, at Post Office Box 1980, Orlando, Florida 32802; a copy of the foregoing Complainant's Brief in Support of Petition for Review has been furnished by mail to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 on this 6th day of September, 1983.



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