IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

FRANCIS W. BLANKNER,

Respondent.
_____/

CASE NO. 63,230

(09A83C09)

COMPLAINANT'S REPLY BRIEF

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OTHER AUTHORITIES

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

Florida Bar Integration Rule, Article XI, Rule

PRELIMINARY STATEMENT

This brief will be restricted to items raised by respondent.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FOR 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.

ARGUMENT

THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE SUSPENDED FOR 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.

It is readily apparent from the published cases beginning with The Florida Bar v. Rousseau, 219 So.2d 682 (Fla. 1969) to The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), that this Court has viewed federal misdemeanor tax offenses in an increasingly serious manner with respect to disciplines imposed. Rousseau, supra, and The Florida Bar v. Green, 235 So.2d 7 (Fla. 1970) involved more than one year of offenses and were private reprimands which were in fact published becoming public private reprimands. In 1973 in The Florida Bar v. Slatko, 281 So.2d 17 (Fla. 1973), public reprimand as recommended by the referee was ordered in a case involving multiple years of failure to file. Four years later, in The Florida Bar v. Turner, 344 So.2 1280 (Fla. 1977) a public reprimand as recommended by the referee was ordered for one year's failure to file

an income tax return and one year's failure to file an employer's income tax return. During this same period several cases were resolved by conditional pleas for public reprimands covering failure to file for one or more years.

Respondent rightfully points out that prior to Lord, supra, suspensions had been reserved in income tax cases for those matters involving felony charges, where other discipline was involved or where it previously had been imposed. Respondent cites The Florida Bar v. Miller, 322 So.2d 502 (Fla. 1975) with respect to the first proposition. It should be pointed out that the Court accepted essentially a conditional plea agreed to by the Bar and the respondent for a 90 day suspension at oral argument on what had been the Bar's recommendation for an indefinite suspension. The Court noted:

> The record reflects that respondent is primarily a real estate broker and, although a member of The Florida Bar, he practices only on rare occasions. Respondent was involved with

> his partner, a former agent for the Internal Revenue Service, in various business enterprises; Respondent asserts that he signed income tax returns prepared by his partner without knowledge of the violations alleged by the government. Respondent entered a plea of nolo contendere to one violation of filing a false income tax return, which constitutes a felony.

After noting the agreement between counsel for the parties, the Court further wrote, "In view of the total circumstances and the unique nature of this case and in light of the above agreement of the parties, the Court considers the discipline to be adequate and approves the parties stipulation."

Clearly, Miller, supra, is unique and since it involves a felony does not particularly apply in this case. Neither do cases cited by the respondent which involve prior discipline or other concurrent discipline. In this case we are concerned with the respondent's conduct for at least six years where he knowingly failed to file his federal income tax returns as required by law.

Respondent cites Lord, supra, as a case with both similarities and differences to those at issue here.

The main difference is the number of years in which that respondent failed to file his income tax returns. The Bar notes it was in error on Page 10 of its brief in support of its petition for review when it indicated that Lord was found to have failed to account for and pay taxes on approximately $545,000 during the twenty-two year period. It should have been during the four year period for which he was indicted. Moreover, the record indicates that he had deprived the federal government of approximately $412,220.82 in tax revenues over the entire twenty-two year period.

Respondent notes that The Florida Bar did not charge him with violating Disciplinary Rule 1-102(A)(3) for engaging in illegal conduct involving moral turpitude as was done in Lord, supra. He argues this is an important distinction since there is no precise charge or finding involving moral turpitude. In addition to charges of violating Disciplinary Rules 1-102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation and 1-102(A)(6) for engaging in other conduct that adversely reflects on

his fitness to practice law, the Bar charged a violation of Article XI, Rule 11.02(3)(a) of the Integration Rule for conduct contrary to honesty, justice or good morals. That rule also applies to such misconduct. Given the facts of this case there is little practical distinction in charging this respondent with violating Rule 11.02(3)(a) and not charging him with violating Rule 1-102(A)(3) as was done in Lord, supra. Moreover, the discipline to be imposed flows from the facts underlying the offense(s) and not on whether a precise rule was omitted from the charging instrument.

Respondent further notes that prior to Lord, supra, the cumulative discipline principle had been applied in those cases where the attorneys involved had received prior discipline. See e.g. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1982). Under the circumstances present in Lord, this Court has expanded that principle to apply to a series of cumulative acts over time as well. Obviously, an aggregation of misconduct acts can be the cause for more severe discipline being imposed by this Court. This applies to both serious and non-serious acts and the Bar does not believe that

misdemeanor income tax offenses are in the latter category. See The Florida Bar v. Abrams, 402 So.2d 1150 (Fla. 1981) at Page 1153 and The Florida Bar v. Brigman, 307 So.2d 161 (Fla. 1975).

The main question remains as to the appropriateness of the referee's recommended discipline. For the reasons set forth in the Bar's main brief, it again urges this Court to impose a suspension for a period of one year with proof of rehabilitation required prior to reinstatement and payment of costs 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 multiple acts of misconduct.

Respectfully submitted,

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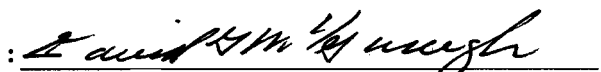
By: 
David G. McGunegle,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of Complainant's Reply Brief have been furnished by mail to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Complainant's Reply Brief has been furnished by mail to F. Wesley Blankner, Jr., Counsel for Respondent, at Post Office Box 53, Orlando, Florida 32802; a copy of the foregoing Complainant's Reply Brief has been furnished by mail to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 on this 3rd day of November, 1983.

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