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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SYDNEY ADLER,

Respondent.

_____/

CONFIDENTIAL

CASE NO. 68,449
(TFB #12A85H02)

**THE FLORIDA BAR'S OPENING ANSWER BRIEF**

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## STATEMENT OF THE CASE

This disciplinary proceeding is before this Court upon The Florida Bar's Petition for Review of the referee's recommendation of discipline.

The Petitioner in this appeal is The Florida Bar and the respondent is Sydney Adler. In this Opening Brief, each party will be referred to as they appeared before the referee. Record references in this Opening Brief are to the trial transcript and the referee's report.

## STATEMENT OF THE FACTS

In the fall of 1976, respondent entered into a joint venture involving a coal mining tax shelter in West Virginia known as the LALS Group.

Respondent invested four thousand four hundred ($4,400.00) dollars in cash in the joint venture and prepared the Joint Venture Agreement and other related documents including the five hundred thousand dollar ($500,000.00) non-recourse note.

In the latter part of December, 1976, the investors in the LALS Joint Venture, including respondent, executed the Joint Venture Agreement and the $500,000.00 non-recourse note and backdated said documents to reflect the date of October 27, 1976.

The Joint Venture Agreement and the non-recourse note were backdated to October 27, 1976 due to the fact that after October, 1976 non-recourse obligations no longer provided investors with a basis for taking a tax deduction, per the revised Internal Revenue Service regulation.

At the time that respondent prepared and executed the Joint Venture Agreement and the non-recourse note, he knew said documents were backdated fraudulently and was familiar with the effective date of the pertinent change in the Internal Revenue Service regulation regarding non-recourse obligations.

Subsequently, the respondent claimed a tax deduction of one hundred twenty-five thousand dollars ($125,000.00) on his 1976 tax return. Said deduction was ultimately disallowed by the Internal Revenue Service upon discovery of the fraudulent backdating of the Joint Venture Agreement and the non-recourse note. As a result, respondent was assessed a tax of $380.00 by the Internal Revenue Service.

In 1979, the Internal Revenue Service audited the LALS Group tax returns. Pursuant to the audit, the Internal Revenue Service requested the original Joint Venture Agreement and other related documents for review. Respondent was in possession of said documents and had the same delivered to the Secretary of Treasury.

On April 14, 1983, a one-count misdemeanor information was filed against respondent in the United States District Court for the Southern District of West Virginia, charging respondent with the violation of Title 26, United States Code, Section 7207 and Title 18, United States Code Section 2, for willfully delivering and disclosing to the Secretary of Treasury and his delegate, the LALS Group Joint Venture Agreement, dated October 27, 1976, which was known by respondent to be fraudulent and false as to a material matter, that is, the date of the document.

The respondent pled guilty to the charge and was sentenced to three years probation and fined ten thousand ($10,000.00) dollars.

The Florida Bar filed a Complaint against the respondent charging him with violating The Florida Bar Code of Professional Responsibility Disciplinary Rule 1-102 (A)(4) (Conduct involving deceit, dishonesty, fraud or misrepresentation) and The Florida Bar Integration Rule 11.02 (3)(a) (conduct contrary to honesty, justice or good morals).

The referee found respondent guilty of violating Disciplinary Rule 1-102 (A)(4) and The Florida Bar Integration Rule 11.02 (3)(a) and recommended that the respondent be disciplined by a public reprimand and payment of costs.

## SUMMARY OF ARGUMENT

In 1976, respondent knowingly claimed a $125,000.00 tax deduction on a fraudulently backdated document. Respondent was later convicted of a federal misdemeanor for delivering to U. S. Secretary of the Treasury the same documents which respondent knew to be fraudulent. As a result of his conviction respondent was sentenced to three years probation and a $10,000.00 fine.

The referee's recommendation of a public reprimand is not a sufficient disciplinary measure for such conduct. It is not consistent with recent case law, nor does it achieve the purposes for which disciplinary sanctions are ordered by this Court. Therefore, The Florida Bar asks this Court that the referee's recommendation of a public reprimand be increased to a suspension of ninety-one (91) days and payment of costs.

## ARGUMENT

A PUBLIC REPRIMAND IS INSUFFICIENT DISCIPLINE FOR CONDUCT WHICH RESULTED IN A CONVICTION FOR DELIVERY OF A FRAUDULENT DOCUMENT TO THE SECRETARY OF TREASURY WHICH WAS KNOWN TO BE FRAUDULENT AS TO A MATERIAL FACT.

A public reprimand is an insufficient disciplinary sanction for the fraudulent conduct committed by respondent. The mitigating factors which were considered by the Referee, are insufficient to warrant less than a suspension for the following reasons:

1. The first and primary mitigating factor upon which the referee based his decision was that the respondent's motive for backdating the documents was not to seek monetary advantage.

It is clear that one does not make an investment without some expectation of gain, whether it be by way of a tax write-off, tax credit or pure capital gain. The fact that respondent was only taxed three hundred and eighty ($380.00) dollars, after the documents were found to be fraudulent, certainly does not obliterate the fact that he was seeking a monetary advantage at the time he filed the tax return.

During the trial, the respondent testified that his primary reason for investing in the Joint Venture was that an energy crisis existed in 1976 and coal, an inexpensive energy source, would be a good investment if coal prices reached the previous 1972 record levels. (T 16). Such

testimony shows that respondent sought a monetary advantage in investing in the joint venture.

Although respondent further testified that he did not backdate the documents in order to receive a tax deduction, he did take a $125,000 tax deduction on his 1976 tax return and stated that he participated in such illegal activity so that he would not be excluded from the joint venture, which he felt would be very profitable. ( T 11, 18,19).

2. A second mitigating factor upon which the referee based his recommendation was that respondent's conduct was not cumulative and would not be repeated.

In determining non-cumulative conduct to be a mitigating factor for the disciplinary sanction, the referee referred to The Florida Bar v. Blankner, 457 So. 2d 476 (Fla. 1984) (RR 2). In Blankner, the respondent was found guilty of failing to file income tax returns for a period of nine years. The referee recommended that Blankner receive a public reprimand and, due to the cumulative nature of his misconduct, that Blankner be suspended for two months with automatic reinstatement thereafter. The Florida Bar petitioned the Supreme Court to review the referee's recommended discipline. The Supreme Court, in determining whether the referee's recommended discipline was appropriate, reviewed its decision in The Florida Bar v. Lord, 433 So.2d 983 (Fla.1983). In Lord, the respondent knowingly and willfully failed to file any income tax returns from 1954 to 1976. The referee recommended a

three-month suspension with automatic reinstatement thereafter. Upon review, the Supreme Court held that the recommended three-month suspension was insufficient to deter others from committing similar acts of misconduct. As a result, and due to the fact that Lord's conduct was cumulative and a flagrant and deliberate disregard for the law, the Court found the appropriate discipline to be a six-month suspension.

Based upon its holding in Lord, the Supreme Court found in Blankner that the appropriate discipline was a six-month suspension, subject to the requirement that the respondent prove rehabilitation prior to reinstatement. The Court's holding is not based solely upon the fact that Blankner's conduct was cumulative in nature. Rather, the Court's decision was primarily based upon the fact that a public reprimand was not sufficient discipline to deter others from committing similar acts of misconduct.

3. The third mitigating factor upon which the referee based his recommendation was that there have been several cases wherein a public reprimand has been found to be appropriate discipline for failure to file tax returns.

In The Florida Bar v. Silver, 313 So.2d 688 (Fla. 1975) and several subsequent cases, the Supreme Court did approve a public reprimand for misconduct involving failure to file income tax returns. In Blankner, however, the Court found that its decision in Lord represented a return to the higher

standard set out in The Florida Bar v. Childs, 95 So.2d 872 (Fla.1967). In Childs, the Supreme Court of Florida held that a suspension from the practice of law to be the appropriate penalty for an attorney's failure to file an income tax return. Most importantly, the Court in Blankner stated that a public reprimand will no longer be viewed as sufficient for such conduct. Blankner at 478.

4. The fourth and final mitigating factor upon which the referee based his recommendation for discipline was that respondent's misconduct did not affect a client.

Lack of injury to a client should not be considered mitigating in a case involving fraud upon the government.

In Blankner, the Court states that " Lord serves notice that in the future an attorney's failure to file a tax return, even though such failure is a misdemeanor under federal law and no client is injured, will warrant a suspension and subsequent inquiry into the attorney's fitness to practice law before reinstatement will be granted". Blankner at 478.

## CONCLUSION

The fundamental issue before this Court is whether a public reprimand is sufficient discipline for conduct which resulted in a conviction for willful delivery of a document to the Secretary of Treasury which was known by respondent to be fraudulent as to a material fact.

It is The Florida Bar's position that a public reprimand is not sufficient discipline for respondent's misconduct and is inconsistent with the Supreme Court's ruling in Lord and Blankner.

The respondent willfully and knowingly violated the very laws which he took an oath to uphold. The Bar requests that the Court reject the referee's recommended discipline and impose upon respondent a ninety-one (91) day suspension from the practice of law and the payment of the costs of this proceeding.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished to WARREN M. GOODRICH, Counsel for Respondent, 1401 Manatee Avenue West, Suite 1010, Bradenton, Florida, 32301 and JOHN T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, by regular U. S. Mail on this 19th day of December, 1986.

DIANE VICTOR KUENZEL