IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

SYDNEY ADLER,

Respondent.
_____/

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

ANSWERING BRIEF OF RESPONDENT SYDNEY ADLER

Warren M. Goodrich
of
HOLLAND & KNIGHT
Post Office Box 241
Bradenton, Florida 33506

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF FACTS

Respondent disagrees with the statement of facts in the opening brief of The Florida Bar at pages 2 through 4. The specific areas of disagreement are as follows:

1. The Florida Bar states as a fact that respondent knew the joint venture documents were backdated "fraudulently." This characterization of the backdating of the documents is erroneous and misleading. The Florida Bar's complaint did not allege, nor did the referee find, that respondent's conduct was fraudulent.

2. The Florida Bar states as a fact that respondent claimed a $125,000 tax deduction based on the joint venture documents, which deduction "was ultimately disallowed by the Internal Revenue Service upon discovery of the fraudulent backdating" of the documents. Again, this characterization of the backdating of the documents belongs to The Florida Bar and was not found as a fact by the referee. Furthermore, respondent's $125,000 "tax deduction" was included on his personal tax return as a matter of form as a result of the K-1 issued to respondent in connection with the filing of the partnership return on the joint venture. (Transcript at page 19.) The referee found that respondent did not backdate the documents to seek a monetary advantage, i.e., to evade taxes. Report of Referee, para-

graph V(3) at page 2. The referee found that the $380 in taxes, interest and penalties respondent paid when the deduction was disallowed was inconsequential to respondent's motive. Id.

3. The Florida Bar states as a fact that respondent was in possession of the backdated joint venture documents and, at the request of the Internal Revenue Service, had the documents delivered to the Secretary of Treasury. For the sake of clarification, it should be noted that the referee found that the IRS contacted the certified public accountant who had prepared the joint venture's tax returns, requesting the original joint venture documents. Because the documents happened to be in respondent's possession, the accountant contacted respondent and asked that the latter send the documents over. Respondent accommodated the accountant and had the documents delivered to him; the accountant, in turn, delivered the document to the government agent. Report of Referee, paragraph II at page 2.

4. The Florida Bar fails to state the record facts which support the mitigating factors found by the referee. Respondent's uncontradicted testimony was that he did not need, nor was he seeking, a tax deduction from the joint venture investment (Transcript at page 19) and that his motivation in entering the transaction was that he felt it was a good investment. John C. Manson, an attorney in

good standing with The Florida Bar, testified on behalf of respondent. Mr. Manson stated that he had worked with respondent on several hundred real estate transactions over the course of many years and that respondent's integrity and ethical principles "were the very highest." (Transcript at page 23.) Respondent expressed regret and contrition for his conduct (Transcript at page 17), upon all of which the referee concluded: "I like to think I'm a good judge of character and based on his background, his testimony and the testimony I have heard from the witness, I don't think this conduct will be repeated." (Transcript at page 58.)

SUMMARY OF ARGUMENT

The Florida Bar bears the burden of demonstrating that the referee's recommended discipline is erroneous, unlawful or unjustified; it has not met this burden.

The referee's recommended discipline is commensurate with the discipline imposed by this court in cases of comparable attorney misconduct. The cases relied upon by The Florida Bar in support of a suspension of respondent involved cumulative misconduct and are thus distinguishable. The referee's recommended discipline is justified, considering the nature of respondent's conduct alone; but when the mitigating factors found by the referee are considered as well, the justice of the referee's recommendation is manifest. The referee's unchallenged finding that respondent's misconduct will not be repeated supports the conclusion that no rehabilitory period of suspension is required to render respondent fit to practice law.

The referee's recommended discipline will accomplish the desired purpose of imposing appropriate discipline for the unethical conduct involved because it is fair to society, fair to respondent and of sufficient severity to deter other attorneys from similar misconduct.

This court should approve the report of referee in all respects and impose the discipline recommended by the referee.

ARGUMENT

THE FLORIDA BAR HAS FAILED TO MEET ITS BURDEN OF DEMONSTRATING THAT THE RECOMMENDATION OF THE REFEREE -- THAT RESPONDENT BE DISCIPLINED BY A PUBLIC REPRIMAND BEFORE THE BOARD OF GOVERNORS OF THE FLORIDA BAR AND THAT HE PAY THE COSTS OF THESE DISCIPLINARY PROCEEDINGS -- IS ERRONEOUS, UNLAWFUL OR UNJUSTIFIED.

Upon review of a referee's report in attorney disciplinary proceedings, the burden is upon the party seeking review--in this case, The Florida Bar--to demonstrate that the referee's report is erroneous, unlawful or unjustified. Rules Regulating The Florida Bar, Rule 3-7.6(c)(5)(1987). The Florida Bar has failed to meet its burden with respect to the referee's recommendation that respondent be disciplined by a public reprimand before the Board of Governors of The Florida Bar and by the assessment against him of the costs of these disciplinary proceedings* ("the referee's recommended discipline"). The referee's recommended discipline is not erroneous, unlawful or unjustified because: (1) the recommended discipline is in accordance with precedent of this court, and the case law

---

*Neither The Florida Bar nor respondent seeks review of that portion of the report of referee recommending payment of costs be assessed against respondent. Therefore, reference to that portion of the referee's recommended discipline will be omitted hereafter.

relied upon by The Florida Bar in its opening brief is factually distinguishable from this case; (2) the recommended discipline is supported by the mitigating factors found by the referee; and (3) the recommended discipline will accomplish the purposes of discipline for unethical conduct by a member of The Florida Bar in that the recommended discipline is fair to society, fair to respondent and severe enough to deter other attorneys from becoming involved in like violations, see The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983).

1. **The Referee's Recommended Discipline is in Accordance With Precedent of The Florida Supreme Court Involving Comparable Ethical Violations.** The referee's recommended discipline of respondent is not erroneous, unlawful or unjustified because it is in accordance with the discipline imposed by this court against attorneys who committed comparable ethical violations.

Respondent is charged with ethical violations arising from his actions in signing a backdated joint venture agreement and non-recourse note and (indirectly) delivering the joint venture agreement to the Secretary of Treasury, knowing the agreement to bear a false date. Respondent pled guilty to a federal misdemeanor charge based on this conduct. The Florida Bar filed a complaint against respondent charging him with violations of former Florida Bar

Integration Rule 11.02(3)(a) (conduct contrary to honesty, justice or good morals) and former Florida Bar Disciplinary Rule 1-102(A)(4) (conduct involving deceit, dishonesty, fraud or misrepresentation). The referee recommended respondent be found guilty of these violations and that he be publicly reprimanded.

In The Florida Bar v. Murrell, 411 So.2d 178 (Fla. 1982), the respondent-attorney was found to have backdated a quitclaim deed from his client to himself, with the effect of giving the respondent-attorney a claim to the property superior to that of a third party claiming title under a separate deed from the client. This court accepted the referee's recommendation that the respondent-attorney be found guilty of violations of former Disciplinary Rules 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation), 1-102(A)(5) (conduct prejudicial to administration of justice) and 1-102(A)(6) (conduct adversely reflecting on fitness to practice law). The court also accepted the referee's recommended discipline of a public reprimand of the respondent-attorney. Id. at 180. The conduct of respondent in the present case is less culpable than that in Murrell because respondent did not acquiesce in the backdating for personal gain; he needed no tax shelter and the unintended tax benefit he did receive was de minimis: $380, including interest and penalties. In Murrell

on the other hand, the attorney intended and attempted to cheat a third party out of title to real property and overtly attempted to do so for personal gain. The referee's recommended discipline in the present case is consonant with precedent of this court.

An entire line of disciplinary decisions by this court involving ethical violations comparable to respondent's and demonstrating the correctness of the referee's recommended discipline is based on the failure of attorneys to file income tax returns with the Internal Revenue Service for one or more years. The Florida Bar relies on one branch of this line of cases in support of its contention that the referee's recommended discipline is erroneous, unlawful or unjustified as not being severe enough. See The Florida Bar v. Blankner, 457 S.2d 476 (Fla. 1984); The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983); The Florida Bar v. Childs, 195 So.2d 862 (Fla. 1967). As the referee's report correctly noted, however, these cases are distinguishable in that each involved repeated failures to file tax returns. See Blankner, 457 So.2d at 477 (failure to file returns for six years); Lord, 433 So.2d at 984 (failure to file returns for years thirteen years); Childs, 195 So.2d at 862 (opinion not specific, but stating that respondent-attorney failed to file "Income and Social Security tax returns," indicating at least two, and possibly

many more, required tax returns were not filed). The court's statement in the Blankner opinion--that "a public reprimand will no longer be viewed as sufficient" discipline for "an attorney's failure to file a tax return," 457 So.2d at 478 (emphasis supplied)--would appear to be dictum since Blankner failed to file tax returns for six years. The court clearly relied on the cumulative nature of Blankner's conduct in deciding a six-month suspension was appropriate discipline. See 457 So.2d at 478. Such reliance is consistent with the following principle set forth by the Florida Supreme Court on an earlier occasion: "This court deals more severely with cumulative misconduct than with isolated misconduct." The Florida Bar v. Vernell, 374 So.2d 473, 476 (Fla. 1979).

Respondent's misconduct in this case was isolated--he has no prior disciplinary record. See Report of Referee, paragraph V(4) at 2. His misconduct consisted of a single culpable act. There do not appear to be any reported cases in which an attorney was found to have engaged in a single, isolated failure to file an income tax return in which the resulting discipline was more severe than a public reprimand. See, e.g., The Florida Bar v. Thomson, 372 So.2d 1124 (Fla. 1979); The Florida Bar v. Freed, 366 So.2d 430 (1978); The Florida Bar v. Grusmark, 366 So.2d 439 (Fla. 1978); The Florida Bar v. Wasman, 366 So.2d 409 (Fla. 1978);

The Florida Bar v. Ryan, 352 So.2d 1174 (Fla. 1977). In fact, there appear to be a great many cases in which the attorney's misconduct was cumulative yet the resulting discipline was not nearly as severe as the ninety-one day suspension requested by The Florida Bar in this case. See, e.g., The Florida Bar v. Donaldson, 466 So.2d 216 (Fla. 1985) (public reprimand plus three year's probation for failure to file income tax returns in four years; alcoholism found as mitigating factor); The Florida Bar v. Shepherd, 366 So.2d 438 (Fla. 1978) (public reprimand for failure to file personal income tax return in three years and employer's income tax return in one year); The Florida Bar v. Greenspahn, 366 So.2d 396 (Fla. 1978) (public reprimand for failure to file income tax return in four years); The Florida Bar v. Beamish, 327 So.2d 11 (Fla. 1976) (public reprimand for failure to file income tax returns for three years); The Florida Bar v. Slatko, 281 So.2d 17 (Fla. 1973) (public reprimand for failure to file income tax returns in three years); The Florida Bar v. Rousseau, 219 So.2d 682 (Fla. 1969) (public reprimand plus two year's probation for failure to file income tax returns for three years).

Failure to file even a single income tax return is more culpable than respondent's misconduct, because an attorney who fails to file an income tax return is knowingly and intentionally cheating the government out of tax

payments for that year. As the referee's report found, monetary advantage was not part of respondent's motive in backdating the joint venture documents, and the $380 he paid when the resulting tax deduction was disallowed was inconsequential. See Report of Referee, paragraph V(3) at 2. Unlike the attorneys in the "failure-to-file" cases above, respondent had no intent to cheat the government out of tax money by his misconduct.

Thus, respondent's conduct was less culpable than those attorneys who failed to file tax returns for even one year; those attorneys were disciplined by public reprimand. Even some attorneys whose failure to file tax returns was cumulative, i.e., repeated over several years, were punished less severely than The Florida Bar would have respondent punished. Therefore, it is clear that the referee's recommended discipline is not erroneous, unlawful or unjustified and that The Florida Bar's requested punishment of a ninety-one day suspension is excessive in light of precedent of this court. The referee's recommendation should be accepted.

2. **The Referee's Recommended Discipline is Supported by The Mitigating Factors Found by the Referee**. "In disciplinary cases it is important to look at the offense and the circumstances surrounding it. But it is also important to consider the effect of the dereliction of duty on others as

well as the character of the wrongdoer and the likelihood of further disciplinary violations." The Florida Bar v. Moxley, 462 So.2d 814, 816 (Fla. 1985). As shown above, the nature of respondent's misconduct, standing alone, is such as to warrant no more than the public reprimand recommended in the referee's report. But the justice of the recommended discipline is even more manifest when considered in light of the mitigating factors found by the referee.

The most important mitigating factor found by the referee is the following: "Respondent's misconduct will not be repeated." Report of Referee, paragraph V(3) at 2. This factor is of singular importance because it demonstrates the justice of the referee's recommended discipline as opposed to the undue severity of The Florida Bar's requested discipline of a ninety-one day suspension from the practice of law.

A disciplinary suspension of more than ninety days requires the suspended attorney to prove his rehabilitation before regaining the privilege of practicing law. Rule 3-5.1(e), Rules Regulating The Florida Bar. The ninety-one day suspension of respondent requested by The Florida Bar would include such proof or rehabilitation, yet the referee found as a mitigating factor that respondent's misconduct will not be repeated, a finding that The Florida Bar's opening brief does not challenge. The referee's finding is an

appropriate mitigating factor for consideration in determining the proper discipline of respondent. Moxley, 462 So.2d at 816. If respondent will not repeat his misconduct, it is logical that he needs no rehabilitation to prevent further misconduct. It follows that the referee's recommended discipline is not erroneous, unlawful or unjustified and that The Florida Bar's requested discipline of a ninety-one day suspension, including the inherent requirement of proof of rehabilitation, is excessive and contrary to the relevant mitigating factor found by the referee. The discipline assessed against an attorney found guilty of unethical conduct should not be imposed for the purpose of punishment; the discipline should be corrective and designed to protect the public interest and to give fair treatment to the attorney. The Florida Bar v. Thomson, 271 So.2d 758, 761 (Fla. 1972), clarified as to other issues, 310 So.2d 300 (Fla. 1975).

The other mitigating factors found by the referee also support the recommended discipline. The referee found that respondent's misconduct in backdating the joint venture documents resulted in a negligible monetary benefit, and that it was not respondent's intent to obtain such a benefit in engaging in the misconduct. The Florida Bar's opening brief, at pages 6 to 7, wrongly focuses on respondent's motive for profit in investing in the joint venture. Since that investment itself was not unethical, and is not alleged

as misconduct by The Florida Bar's complaint, respondent's motive in making the investment is not relevant to the present inquiry. That respondent had no motive for profit in backdating the joint venture documents, however, is an appropriate mitigating factor for consideration, since the absence of such motive reflects on both "the nature of the conduct as well as the character of the individual." Blankner, 457 So.2d at 479 (Adkins, J., dissenting).

The fact that respondent's misconduct did not affect a client is also an appropriate mitigating factor in support of the referee's recommended discipline. See Moxley, 462 So.2d at 816. This factor is in mitigation of respondent's misconduct because it indicates respondent, though he acted unethically, was not as much a danger to the public as an attorney who, for example, embezzles funds from his clients' trust account or neglects a legal matter entrusted to him. See Lord, 433 So.2d at 986 (one purpose in discipline of unethical conduct is to protect public from such conduct). Thus, the referee's recommended discipline is appropriate for respondent, whose misconduct did not adversely affect any client.

Finally, as discussed in part 1 of this section of this brief, the fact that respondent's misconduct was an isolated, single instance of unethical conduct (which, by the referee's finding, will not be repeated) is a mitigating

factor that supports the referee's recommended discipline. This factor also serves to distinguish this case from the Blankner-Lord-Childs branch of cases, in which cumulative misconduct justified discipline more severe than a public reprimand.

Therefore, it is clear that, in light of the nature of respondent's misconduct and the mitigating factors found by the referee, the referee's recommended discipline of a public reprimand is not erroneous, unlawful or unjustified.

3. **The Recommended Discipline Will Accomplish the Purposes of Discipline for Unethical Conduct by a Member of the Florida Bar Set Forth in The Florida Bar v. Lord**. In The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983), the Florida Supreme Court stated:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The referee's recommended discipline of a public reprimand of respondent will accomplish these purposes.

First, the referee's recommended discipline is fair to society. As noted, respondent's misconduct did not affect a client; therefore, a form of discipline that will isolate respondent in his professional capacity from members of the public is not necessary in this case. Moreover, the referee's recommended discipline will not unfairly deny the public the services of a lawyer who has shown no tendency whatsoever to act in a way harmful to his clients. The ninety-one day suspension of respondent requested by The Florida Bar would deprive the public of the services of a qualified attorney who has not been shown to be a danger to his clients.

Second, the referee's recommended discipline is fair to respondent. A public reprimand is a sufficient corrective measure for respondent's unethical misconduct. Already he has suffered the ignominy of a federal criminal conviction and The Florida Bar's disciplinary proceedings arising from his misconduct. To one whose personal reputation and professional record of over thirty years had been unblemished, such matters no doubt are the source of a great deal of shame and dishonor. The referee's finding that respondent will not repeat this misconduct supports the conclusion that a suspension is unnecessary to deter respondent from further misconduct. While the discipline imposed upon an errant attorney should encourage reformation and rehabil-

itation, the foregoing indicates that a ninety-one day suspension is unnecessary to encourage that process in respondent. As noted, the discipline assessed against an attorney found guilty of unethical conduct should not be imposed for the purpose of punishment, but rather to correct the misconduct. Thomson, 271 So.2d at 761.

Finally, the referee's recommended discipline of respondent is severe enough to deter other attorneys who might be tempted to engage in similar misconduct. This general deterrence purpose of attorney discipline should not be considered in a vacuum. One must consider the existence of criminal penalties which have a strong deterrent effect on an attorney contemplating misconduct that is both unethical and criminal. The particular offense to which Repsondent pled guilty carries a potential punishment of a fine of $10,000 and imprisonment for one year. 26 U.S.C.A. § 7207 (Supp. 1986). In addition, the need for general deterrence should not be permitted to overwhelm the other purposes of discipline for unethical conduct by attorneys, else disbarment will become the standard discipline for even the most minor misconduct. The need for strong general deterrence must be balanced against the needs of society and fairness to the offending attorney. In this case, such a balance favors a public reprimand of respondent.

For the foregoing reasons, the referee's recommended discipline is appropriate and accomplishes of the purposes of discipline of attorneys' unethical conduct enunciated in The Florida Bar v. Lord, supra. The referee's recommendation of a public reprimand of respondent should be accepted by the court.

CONCLUSION

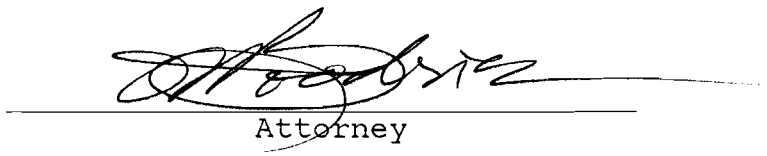
The public reprimand of respondent recommended by the referee is commensurate with the punishment imposed by this court in the cases most factually similar to the present one. The discipline is supported by the mitigating factors found by the referee. The recommended discipline accomplishes the purposes this court has set for discipline of unethical conduct by attorneys. Therefore, the report of referee should be approved by this court and the recommended discipline should be imposed.

Respectfully submitted,

Warren M. Goodrich
of
HOLLAND & KNIGHT
Post Office Box 241
Bradenton, Florida 33506

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, by U.S. Mail, to Ms. Diane Victor Kuenzel, Bar Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607; and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, this 28th day of January, 1987.



Attorney

256390001ab:233