IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 68,449
(TFB #12A85H02)

v.

SYDNEY ADLER,

Respondent.

_____/

THE FLORIDA BAR'S REPLY BRIEF

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STATEMENT OF FACTS

Respondent takes issue with the Bar's statement that respondent knew that the joint venture documents were back-dated fraudulently. In reply , the Bar refers to the following statements made by respondent:

> Respondent's Counsel: When you learned that the people that you were going into it with were going to back-date the agreement, did it occur to you that this was not the thing that should be done?
>
> Respondent: We -- I knew that the law -- not the law, the rules, the IRS rules had changed in the latter part of October, this all occurred sometime -- we probably began talking about it sometime in November and didn't consummate it until sometime in early December.
>
> And I knew that they were going to go ahead and do the deal with or without me. I had been involved with these type of people as a furor that developes [sic] in the year-end to get the situations out and you get sometimes caught up in that furor and I did think that I could make some money out of it. [TR 16]

SUMMARY OF ARGUMENT

Respondent was adjudged guilty of a federal misdemeanor involving fraudulent documents filed with the government. He was fined $10,000.00 and sentenced to three years probation. The referee recommended that he be publicly reprimanded for his criminal offense.

The Bar asks that the Court disapprove a public reprimand as an insufficient disciplinary sanction. The referee's recommendation neither complies with the Court's stringent sanction concerning similar cases as reflected by recent case law, nor is the recommendation consistent with current standards for imposing lawyer discipline.

Therefore, the Bar asks that the referee's recommendation of a public reprimand be disapproved and a ninety-one day suspension be imposed.

ARGUMENT

1. The referee's recommendation is inconsistent with current case law.

Respondent argues that the referee's recommendation is consistent with prior case law. In support of this argument, respondent cites The Florida Bar v. Murrell, 411 So. 2d 178 (Fla. 1982) involving an attorney who received a public reprimand for back-dating a quit claim deed. Respondent argues that, unlike Murrell, personal profit was not part of his motive. In support of his position, respondent points out that the referee observed that respondent received only a $380.00 tax advantage for the year 1976, which the referee found was inconsequential to any motive of seeking a monetary advantage.

The Bar responds that, in Murrell, the referee did not find that the respondent back-dated the quit claim deed for personal profit. Furthermore, in the instant case, the referee did not address the future profits that respondent was afraid to lose if he failed to participate in the back-dating of the documents, despite the small tax advantage he received in the year 1976. Respondent stated that he expected the venture to be profitable and he knew that the other parties to the deal would go ahead with or without him if he did not participate in the back-dating in 1976. [TR 16].

Respondent's knowledge that he participated in a misrepresentation of a material fact in Internal Revenue Service documents to be filed with the government is clear. As an attorney, respondent's knowledge that the documents were back-dated fraudulently is unmistakable.

In Murrell, it is not clear from the facts whether or not Murrell knowingly back-dated and filed the quit claim deed. Therefore, respondent's conduct is measurably more egregious than Murrell's in that it is undisputed that respondent had knowledge of the back-dating, and further, unlike Murrell, knew that the back-dated document was filed with the Internal Revenue Service. Additionally, Murrell's conduct was not considered criminal misconduct. However, respondent was later charged and adjudicated guilty of a federal misdemeanor, fined $10,000.00 and sentenced to three years probation for his misconduct.

Throughout these proceedings, both the Bar and respondent have cited to income tax evasion cases as a precedent to the instant case, as both involve a type of fraud upon the government. In its Opening Brief, the Bar cited The Florida Bar v. Childs, 95 So. 2d 872 (Fla. 1967), where this Court held that the appropriate sanction for failure to file an income tax return was suspension from the practice of law.

In the following years, the Court departed from its

position in Childs and, in certain cases, held that a public reprimand was sufficient for failure to file an Internal Revenue Service tax return. However, in The Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983) and in The Florida Bar v. Blankner, 457 So. 2d 476 (Fla. 1984), the Court clearly expressed its intention to return to the higher standards of Childs and stated that a public reprimand would no longer suffice for failure to file an income tax return.

It is important to note that each of the cases cited by respondent in support of his argument were heard by the Court (with the exception of Donaldson, an alcoholism case), during the above period after the Childs case and prior to Lord and Blankner.

Respondent further argues that his conduct in this matter was less serious then failure to file an income tax return. To this, the Bar responds that respondent's conduct, committed with others while he held himself out as an attorney, was flagrant and clearly more egregious. In contrast to a failure to file case, respondent and three other individuals participated in the fraudulent back-dating of Internal Revenue Service documents in a joint venture to gain a tax advantage. Unlike the individuals who, for whatever reason, fail to file or who prepare an inaccurate tax return, respondent conspired with three other

individuals to participate in the back-dating scheme as a fraud upon the government. Therefore, approval of the referee's recommendation of a public reprimand in the instant case, would be a clear retreat from the strict standards announced by this Court in Blankner and a retraction of the Court's strong policy concerning an attorney who commits a fraud upon the government.

2. Mitigation.

Respondent states that the most important mitigating factor found by the referee is his observation that respondent's misconduct will not be repeated. The Bar sincerely hopes that the referee's assumption is correct. However, the Bar and this Court are well aware of attorneys who appear again and again before the Court as respondents in disciplinary proceedings. Following each episode, it is always hoped by all concerned that the specific misconduct or other misconduct will not be repeated by the same respondent. However, there can be no guarantees. The Bar submits that regardless of whether the respondent's misconduct will be repeated or not, the referee's recommendation of a public reprimand is not sufficient under current case law.

Respondent further argues that his misconduct did not

adversely effect a client and that this should be considered as a mitigating factor. In Blankner, this Court said:

> 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. For such conduct a public reprimand will no longer be viewed as sufficient. [Blankner, 457 So. 2d at 478](emphasis added).

Additionally, respondent further argues that the Blankner - Lord - Childs cases represent instances of cumulative misconduct and, for that reason alone, discipline of more than a public reprimand was warranted.

The Bar agrees that, respondent's conduct is not cumulative. However, as this Court stated in Blankner, a single instance of failure to file income tax will warrant a suspension. And as respondent's conduct is ethically more egregious than a failure to file an income tax return, the Bar asserts that a ninety-one day suspension the appropriate penalty.

3. A ninety-one day suspension is consistent with current standards of discipline imposed by this Court.

First, respondent argues that a suspension will deny the public his service as an attorney. The Bar replies that respondent, by his own admission, has not

been an active practitioner for some time. [TR 18]. And, thus, a suspension will comply with this standard.

Second, respondent states that suspension will be unfair to respondent as he has already suffered the ignominy of the criminal proceeding and The Bar disciplinary proceeding. While the criminal case is public, as are all criminal cases, the Bar's proceeding remained confidential until the final hearing. Therefore, respondent has suffered no public disrepute other than what ordinarily results from an adjudication of guilt in a criminal case. Certainly, this disrepute cannot serve as mitigating factor in a disciplinary proceeding. It should be argued that the public's awareness of a crime committed by a member of our Bar should be an aggravating factor, rather than mitigating when considering appropriate penalty.

Third, respondent argues that the referee's recommended discipline is sufficient to deter others of similar misconduct. In support of that argument, respondent further states that the existence of criminal penalties alone are sufficient deterrent to others contemplating similar misconduct. The Bar responds that respondent's argument that the criminal sanction is sufficient deterrent would negate the need for disciplinary proceedings in any case where a respondent has been found to commit a crime.

It could also then be argued that the more severe the crime and penalty, the more effective the deterrent and, thus, the less need for any disciplinary proceedings.

Finally, the Bar points out that in Blankner this Court addressed especially considered the deterrent factor of the discipline in its directive that the sterner sanction of Childs would henceforth be applied.

CONCLUSION

A public reprimand is an insufficient disciplinary sanction for the commission of a federal crime. An attorney who commits a crime not only violates a law, but also violates the oath of admission to the Bar to uphold that law.

A public reprimand is an inadequate sanction for this misconduct as it is not consistent with the recent pronouncements of this Court and cannot serve to uphold the integrity of our profession and our disciplinary system.

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 11th day of February, 1987.

DIANE V. KUENZEL