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JUN 8 1994

IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

Case No: 80,377

[TFB Case No. 92-30-743 (18C)]

v.

LEWIS R. PEARCE,

Respondent.

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Answer Brief, the Respondent, Lewis R. Pearce, shall be referred to as "the Respondent".

The transcript of the final hearing dated February 5, 1993, shall be referred to as "T", followed by the cited page number.

The Report of the Referee dated March 4, 1993, shall be referred to as "RR", followed by the cited page number.

The Plea Agreement which is attached to the Report of Referee dated February 23, 1993, shall be referred to as "PA", followed by the cited page number.

STATEMENT OF THE CASE

The Respondent is in agreement with the Statement of the Case as set forth in Petitioner's Initial Brief.

STATEMENT OF THE FACTS

The Respondent is in agreement with the Statement of Facts set forth in Petitioner's Initial Brief. Respondent would add to that Statement of Facts that Respondent has fully cooperated with the Florida Bar throughout this disciplinary proceeding (T, 11), that Respondent has no prior disciplinary history (T, 11), and that Respondent fully cooperated with the Federal Government in its investigation of Respondent's failure to timely file federal income tax returns for 1986 and 1987 (PA, 2).

SUMMARY OF THE ARGUMENT

The only issue to be decided in this case is the discipline to be imposed upon the Respondent for Respondent's violation of the rules of discipline. Respondent did not file federal income tax returns for 1986 and 1987 in a timely manner. Respondent has admitted this both in proceedings in Federal Court and in this disciplinary proceeding. This is the only violation with which Respondent has been charged. Respondent has no previous disciplinary history.

Respondent believes that the case law clearly states that where a lawyer is found guilty of a misdemeanor for failure to file federal income tax returns for a short period of time and where this failure does not constitute cumulative behavior over a long period of time and where the lawyer has no previous disciplinary history the appropriate discipline should be a public reprimand, with or without probation. Respondent accepts the recommendations of the referee including all conditions set forth therein as being appropriate discipline in this case.

ARGUMENT

A PUBLIC REPRIMAND WITH PROBATION AND A REQUIREMENT FOR PRO BONO SERVICE TO THE PUBLIC IS THE APPROPRIATE DISCIPLINE IN THIS CASE FOR RESPONDENT'S VIOLATION OF THE RULES OF DISCIPLINE.

There is no real argument concerning the facts of this case. Respondent has admitted that he did not file his personal income tax returns for 1986 and 1987 in the manner required by law. Respondent further admitted that he was convicted of two misdemeanor counts of failure to timely file his Federal Income Tax Returns for the years in question. Based on these convictions, the Florida Bar instituted disciplinary proceedings against Respondent. With the Respondent admitting to the violations, the only issue to be considered by this court is the appropriate discipline to be imposed based on the facts of this case.

The Florida Bar argues that the recommended discipline of the Referee is not adequate and that the appropriate discipline should be a six (6) month suspension, in addition, they seek a thirty (30) month probationary period and that Respondent be required to perform two hundred (200) hours of pro bono work in the area of guardianship. The penalty sought by the Florida Bar is greater than any penalty imposed by this court in any case cited in Petitioner's brief, including the most flagrant cases.

Respondent believes that based upon the facts of this case and the decisions of this court that the recommended discipline

of the Referee should be approved and the Florida Bar's request for significantly harsher discipline should be denied.

The history of lawyer discipline in cases where a lawyer fails to timely file his personal income tax returns appears to begin with the case of The Florida Bar v. Childs, 195 So. 2d 862 (Fla. 1967). This case involved a municipal judge who failed to file his personal income tax returns and certain social security tax returns. The text of the case does not disclose how many years were involved nor does the case indicated whether the judge involved had been involved in any other disciplinary matters. The Florida Bar in that case requested that the judge be suspended for a period of one (1) year. This court in its ruling imposed a six (6) month suspension.

The Childs case was followed by a series of cases decided during the period 1970 through 1979, all of which involved the failure of a lawyer to file his or her personal income tax returns. In each of these cases, the lawyer was convicted of a misdemeanor and in each of these cases this court stated that the appropriate discipline should be a public reprimand. In some of these cases, probation was also ordered.

The first of these cases was The Florida Bar v. Greene, 235 So. 2d 7 (Fla. 1970). In this case, the lawyer was convicted of failing to file his tax returns for the years 1964 and 1965 and failing to pay \$85,000 in federal income tax. It appears from the text of the case that the lawyer had no prior disciplinary history. The referee recommended that the lawyer receive a private reprimand and that he be placed on probation for a period

of one (1) year. In addition, the referee recommended that the lawyer be required to report to the Florida Bar when his 1979 tax return was filed and that he had complied with his agreement with the Federal Government which provided for the payment of the taxes for the years in question. The Florida Bar petitioned for review asking that the lawyer be suspended for a period of six (6) months, apparently basing this request on the decision in The Florida Bar v. Childs, supra. This court in rendering its opinion noted that the complaint and record show that no other crime or unethical conduct was involved in this case other than the failure to file the tax returns for two years. Based on the facts in this case, the court publicly reprimanded the lawyer and imposed the probationary conditions recommended by the referee.

Next came the case of The Florida Bar v. Silver, 313 So. 2d 688 (Fla. 1975). In this case, the Respondent was found guilty of failure to file his tax returns for one (1) year. The case does not recite how many other years might have been involved. Here the court approved a conditional guilty plea and the discipline imposed was a public reprimand. This case was followed by the The Florida Bar v. Beamish, 327 So. 2d 11 (Fla. 1976). This case involved the failure to file tax returns for a three (3) year period. The Respondent was only charged with and convicted of one misdemeanor count. Again, the court approved a conditional guilty plea and the discipline imposed was a public reprimand.

These cases were followed by a string of cases including The Florida Bar v. Schonfeld, 336 So. 2d 77 (Fla 1976), involving the

failure to file tax returns for a six (6) year period, The Florida Bar v. Turner, 334 So. 2d 1280 (Fla 1977), The Florida Bar v. Ryan, 352 So. 2d 1174 (Fla 1977), involving the failure to file tax returns for a three (3) year period, The Florida Bar v. Wasman, 366 So. 2d 409 (Fla 1978), involving the failure to file tax returns for a one (1) year period, The Florida Bar v. Thomson, 372 So. 2d 1124 (Fla 1979), involving the failure to file tax returns for a one (1) year period and The Florida Bar v. Marks, 376 So. 2d 9 (Fla 1979), involving the failure to file tax returns for a one (1) year period. Each of these cases involved the failure to file personal income tax returns for anywhere from one (1) to six (6) years and resulted in one or more misdemeanor convictions. In each of these cases it would appear, from a lack of discussion of each lawyer's prior disciplinary history, that each lawyer involved in these cases had no prior disciplinary history. In each case, the discipline imposed by this court was a public reprimand.

During this same period of 1970 through 1979, this court decided three other cases involving the failure of a lawyer to file his personal federal income tax returns. In these cases, the discipline imposed was a suspension.

The first of these cases was The Florida Bar v. Solomon, 338 So. 2d 818 (Fla. 1976). In this case, the Respondent had been convicted of failing to file his 1969 federal income tax return. The referee recommended that the lawyer be suspended for a period of one (1) year. This recommendation was at least partly based on the fact that Solomon had a prior disciplinary history. Mr.

Solomon had received a private reprimand in 1970 and again in 1974. He also had been suspended from practice before the U.S. District Court for the Southern District of Florida in 1967 for willful interference with the administration of justice. Mr. Solomon asked this court to reduce the recommended discipline to a public reprimand. This court in its decision stated

"We have consistently held that prior disciplinary action is relevant to the imposition of discipline for breach of the Code of Professional Responsibility. E.g., The Florida Bar v. Poller, 203 So. 2d 323 (Fla. 1967). And see Fla. Bar Integr. Rule, Article XI, Rule 11.06(9)(A)(4). None of the "failure to file" cases cited by Solomon involved prior offenders."

Based on the facts of this case and Solomon's prior disciplinary history, this court imposed a six (6) month suspension as the appropriate discipline.

The next case in which more than a public reprimand was imposed as the measure of discipline in failure to file cases was The Florida Bar v. Starr, 357 So. 2d 730 (Fla. 1978). In this case, the Respondent was charged with failure to file his personal income tax return for 1973. In addition, in the same proceeding, the Respondent was charged with neglecting a legal matter entrusted to him. The Respondent admitted the charges and entered into a conditional guilty plea with the Florida Bar whereby the Respondent would be suspended for a period of six (6) months. The case contains no discussion of the Respondent's disciplinary history presumably because of the guilty plea and agreement on the discipline to be imposed. This court approved the conditional guilty plea and imposed a six (6) month suspension as the appropriate discipline.

The final case decided by this Court during this time period was The Florida Bar v. Vernell, 374 So. 2d 473 (Fla. 1979). In this case, the Respondent was found guilty of violating the rules of discipline by failing to file his federal income tax returns for the years 1967 through 1971. The Respondent was also found guilty of violating the Code of Professional Responsibility for suggesting that one of his clients plead guilty in a criminal case and if the client received a heavy punishment they could have the plea set aside because of the lawyer's conflict of interest. The referee recommended a private reprimand for failure to file his income tax returns and a public reprimand for the later item. It should be noted that in addition to these violations Vernell had a prior disciplinary history. In 1964, he had received a private reprimand and in 1974 he receive a public reprimand from this court.

The Florida Bar in this case urged the court to impose a one (1) year suspension on Vernell, insisting that the recommended discipline of the referee was too lenient. This court agreed with the Florida Bar that the referee recommended discipline was too lenient and imposed a six (6) month suspension. It did not impose the one (1) year suspension requested by the Florida Bar. This court in the case stated

"This court deals more severely with cumulative misconduct than with isolated misconduct. The Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978). In view of Vernell's prior breaches of professional discipline and his cumulative misconduct in this case, we hold that a suspension is appropriate. See the Florida Bar v. Solomon, 338 So. 2d 818 (Fla. 1976)."

A review of the aforementioned cases clearly indicates that where a lawyer fails to file federal income tax returns, at least for a limited period of time, and no other violations are involved and where the lawyer has no prior disciplinary history, the appropriate disciplinary action is a public reprimand, with or without probation. It is only where a lawyer has a prior disciplinary history or there is cumulative misconduct on the part of the lawyer that the court will impose more severe sanctions such as suspension. This concept that a lawyer who is involved in cumulative misconduct or who has a prior disciplinary history will be treated more severely than a lawyer who has no prior disciplinary history and who is only involved in isolated incidents of misconduct is further supported by the cases of The Florida Bar v. Adler, 589 So. 2d 899, (Fla. 1991) and The Florida Bar v. Dubbeld, 594 So. 2d 735, (Fla. 1992). The decision of this court in The Florida Bar v. Adler indicated that the lawyer involved was found guilty of numerous trust account violations and in addition had a disciplinary history having been disciplined by this court previously Adler had received a ninety (90) day suspension from the practice of law for his previous violation. In that case this court said

"When considering the appropriate penalty in a disciplinary matter, this court also considers prior misconduct and cumulative misconduct as relevant factors and deals more severely with cumulative misconduct than with isolated misconduct. The Fla. Bar v. Greenspahn, 386 So. 2d 523, 525 (Fla. 1980). In the instant case the referee found multiple trust account violations as well as prior disciplinary action."

Based upon the multiple trust account violations and the prior disciplinary history, this court imposed an eighteen (18) months suspension on Adler for his violations of the Code of Professional Responsibility.

In the case of The Florida Bar v. Dubbeld, supra, the lawyer involved was charged with two violations of the rules regulating the Florida Bar. The first was for a conviction that he received in state court for driving while under the influence of alcohol. The second charge against the lawyer was for allegedly leaving an obscene or at least a patently offensive message on the answering machine of a woman who he thought had told his wife that he was having an extramarital affair. The lawyer was found guilty of both violations. The referee recommended an admonishment for those violations. The Florida Bar during the proceedings urged that at least a public reprimand be given to the lawyer. It should be noted that the lawyer involved in this case received an admonishment in February of 1989 as well as a second admonishment in February of 1990. This court in rendering its decision in that case stated as follows:

"The incidents giving rise to the instant complaint occurred in January and March 1990 and demonstrate a continuing pattern of misconduct upon which Dubbeld's prior admonishments appear to have no affect. Cumulative misconduct will be dealt with more harshly than isolated incidents of misconduct. The Fla. Bar v. Coutant, 569 So. 2d 442 (Fla. 1990). Dubbeld's continuing misconduct warrants a public reprimand."

Again, it is clear from all of these cases that the court will deal differently with those lawyers who are involved in

cumulative misconduct and/or who have a prior disciplinary history then it does with lawyers who have no disciplinary history and are involved only with isolated misconduct.

Following the series of cases involving failure to file federal income tax returns cited during 1970 through 1979, this court decided the case of The Florida Bar v. Lord 433 So. 2d 983 (Fla. 1983). At first glance, the Lord case would appear to be a significant departure from the discipline to be imposed in these cases. However, on review of the facts in the Lord case one can distinguish Lord from the previous line of cases. The Lord case involved a Respondent who had failed to file any tax return for a twenty-two (22) year period. This violation of the rules of discipline was substantially more flagrant than existed in any of the other cases cited herein. The referee in this case recommended a three (3) month suspension. The court said that in light of the fact that the misconduct charged is not an isolated event, but rather constitutes cumulative misconduct that the discipline to be imposed should be a six (6) months suspension.

This case was then followed by The Florida Bar v. Blankner, 457 So. 2d 476 (Fla 1984). In this case, the Respondent had failed to timely file his tax for a ten (10) year period. The referee recommended a public reprimand with a two (2) month suspension and automatic reinstatement. The Bar sought a one (1) year suspension. Upon review, the court stated again that due to the cumulative nature of the violations the discipline to be imposed would be a six (6) month suspension.

A review of The Florida Bar v. Lord, supra, and The Florida Bar v. Blankner, supra, clearly indicates that these cases were not attempting to change the long standing policy of this court in disciplinary matters. Each of these cases involved cumulative violations over a substantial number of years, they did not involve isolated misconduct. This court has repeatedly held that cumulative misconduct will be treated more severely than isolated misconduct. Each of these cases follows the line of cases which have consistently held that where the violations are cumulative or the lawyer has a prior disciplinary history the discipline will be more severe.

Since the publication of the Lord and Blankner decisions, the Respondent could only find one case in which a lawyer had been disciplined for failure to file his or her federal income tax return. That case being The Florida Bar v. Donaldson, 466 So. 2d 216 (Fla. 1985). This case involved a lawyer who failed to file federal income tax returns for 1975 through 1978. The referee found that the tax returns were not filed because of the uncontrolled alcoholism of the lawyer. No other charges were filed against the lawyer and no prior disciplinary history was discussed. The referee recommended a public reprimand and probation with certain conditions of probation to be complied with by the lawyer. This court approved the recommendations of the referee.

Despite the lack of cases involving the discipline of lawyers who have failed to file federal income tax returns in recent years, Respondent still believes his analysis of the cases

is correct and is supported by several decisions involving attorneys who have been disciplined for misdemeanor convictions, all of which were decided after the Blankner decision.

The first of these cases is The Florida Bar v. Levine, 498 So. 2d 941 (Fla. 1986). In this case, Mr. Levine pleaded guilty to one count of the misdemeanor of personal use of cocaine. In the disciplinary proceeding, Mr. Levine entered a conditional plea of guilty and there was a joint recommendation of discipline. The referee recommended a public reprimand in accordance with the joint recommendation. The court approved the public reprimand.

In The Florida Bar v. Dubbeld, supra, the attorney was convicted of driving under the influence. The case also noted that the attorney had been disciplined on two prior occasions receiving an admonishment in each case. The referee recommended that the attorney receive an admonishment and be placed on unsupervised probation for two years. The court in that case stated that an admonishment was not sufficient and the discipline imposed was a public reprimand. The court went on to state:

"Cumulative misconduct will be dealt with more harshly than isolated incidents of misconduct."

Finally, Respondent would cite to the court the case of The Florida Bar v. Levin, 570 So. 2d 917 (Fla. 1990). In this case the court stated

"The referee found that respondent routinely engaged in illegal gambling activities (bets of \$500 to \$2,000) over a period of at least five years; placed bets for others through his bookmaker; permitted bets and payoffs to be delivered to his law office; advocated,

on his own television show, betting with a bookmaker as an acceptable recreational activity, despite knowing that betting is a misdemeanor; and testified before a grievance committee that, if he had the opportunity, he would continue to bet."

The referee then recommended a public reprimand which the Respondent challenged. This Court in that case went on to state:

"Respondent argues that mere misdemeanor-betting violations should warrant different discipline than misdemeanor-drug violations. If this were a criminal prosecution, the respondent's point might be well taken, but for the purpose of bar discipline, the distinction is irrelevant. The lawyer was knowingly engaged in conduct constituting a misdemeanor. In this regard, the purpose of the discipline is the same."

The court imposed the discipline of a public reprimand.

The Levine case is interesting in that it seems to indicate that for disciplinary purposes there is not a distinction between misdemeanors and all misdemeanors will be disciplined the same, particularly where there is no cumulative misconduct and no prior disciplinary history.

In this case, the court is faced with the situation where the Respondent did not file federal income tax returns for a two year period. Respondent has admitted his guilt at all stages of the proceeding and has cooperated fully during the entire disciplinary process. Prior to the disciplinary process, the Respondent cooperated fully with representative of the Federal Government in their investigation of the matter including entering into a voluntary plea of guilty to the charges filed. Respondent has done everything that can be done to mitigate the mistake that Respondent made.

Respondent would also point out to the court that Respondent has no prior disciplinary record and that no other charges are involved in this case except those pertaining to the failure to file the federal income tax returns for the years in question.

If the prior cases decided by this court are any indication of the appropriate discipline to be imposed under the facts of this case, then this court should approve the recommendations of the referee and impose a public reprimand with probation to run concurrently with the probation established by the Federal District Court for the Middle District of Florida, under the terms and conditions recommended by the referee.

The primary purpose of all discipline is to cause the lawyer to think about what he had done and to insure, to the extent possible, that the lawyer rehabilitates himself and does not violate the rules of discipline in the future. If this is really the major purpose of lawyer discipline, then the discipline imposed cannot be so harsh as to prohibit the lawyer from rehabilitating himself. If this court imposes a six (6) month suspension as requested by the Florida Bar, Respondent will effectively be excluded from practicing law for a minimum period of almost one (1) year. This includes the period of Respondent's suspension plus the anticipated period necessary to petition for reinstatement. This length of time away from the practice will leave me no client base when Respondent returns and no effective source of revenue from Respondent's practice for two or three years. Under these circumstances, it will make it virtually

impossible for Respondent to comply with the terms of Respondent's probation with the Federal Court and to pay the taxes for the years in question

What Respondent did in this case was wrong. Respondent concedes that there needs to be some discipline imposed upon Respondent for this violation of the rules of discipline. The question is, how severe should the discipline be and how best can the public and the Bar be served by the discipline, while at the same time being fair to the Respondent. Respondent believes this can best be accomplished by this court approving the recommendations of the referee. Respondent believes that under the facts of this case that such discipline would be fair to all concerned and the appropriate discipline in this case.

CONCLUSION

In conclusion, Respondent believes that under the facts of this case, primarily that the violation of the rules of discipline in this case is an isolated situation, and the fact that prior to this proceeding Respondent did not have any disciplinary history, that the recommendation of the referee for a public reprimand and probation should be approved.

Respectfully submitted,


A handwritten signature in cursive script, appearing to read "Lewis R. Pearce", written over a horizontal line.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of Lewis R. Pearce's Answer Brief and Appendix have been sent by Federal Express to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail, to the following: John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, and John B. Root, Jr., Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801 this 7th day of June, 1993.

Respectfully submitted,


Lewis R. Pearce
Respondent