IN THE SUPREME COURT OF FLORIDA

CASE NO. 69,280

THE FLORIDA BAR,

Complainant,

The Florida Bar Case No. 17C86F47

vs.

IRVIN R. SHUPACK,

Respondent.
_____/

ANSWER BRIEF OF IRVIN R. SHUPACK

CLAUDETTE A. PELLETIER
Attorney For Respondent
P.O. Box 383
Fort Lauderdale, Florida 33302
(305) 772-5959
(305) 463-4040

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PREFACE

For the purposes of this brief, , the Complainant, The Florida Bar, will be referred to as The Florida Bar and Irvin R. Shupack will be referred to as the Respondent.

Abbreviations utilized in this brief are as follows:

RR Refers to the Report of Referree, to be followed by page number and paragraph of report.

T Refers to the transcript of the final hearing held before the Honorable Thomas E. Sholts on November 21, 1986, to be followed by page numbers.

T2 Refers to the transcript of the hearing held on December 23, 1986, to be followed by page numbers.

EX Refers to exhibits introduced at the November 21, 1986, hearing, to be followed by the exhibit number.

STATEMENT OF THE CASE

A formal complaint was filed in this cause on September 4, 1986 relating to conduct which took place in June of 1981. The Florida Bar's First Request for Admissions was filed on or about September 10, 1986. The Honorable Thomas E. Sholts was appointed as Referee on September 12, 1986.

On October 22, 1986, the Respondent forwarded his Answer to The Florida Bar's First Request for Admissions.

The final hearing before the Referee was scheduled for and held on November 21, 1986. The hearing as to discipline to be imposed was scheduled for and held on December 23, 1986.

The Referee submitted his Report of Referee on January 13, 1987. The Referee has recommended that Respondent be found guilty of violating Florida Bar Code of Professional Responsibility, Disciplinary Rules 1-102(A)(4) and 7-102(A)(7) and Florida Bar Integration Rule, Article XI, Rule 11.02(3)(a) and not guilty of violating Florida Bar Integration Rule, Article XI, Rule 11.02(4) property entrusted to an attorney for a specific purpose is held in trust and must be applied only to that purpose. The Referee recommended, as a disciplinary sanction, that Respondent be suspended for a period of thirty (30) days with automatic reinstatement at the end of the period of suspension as provided in Rule 11.10(4).

The Florida Bar seeks to appeal the Referee's recommendations as to discipline and states that a six (6) months suspension should be sought. Respondent did not cross-appeal.

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE BAR SUSTAINED ITS BURDEN OF PROOF OF DEMONSTRATING THAT THE REFEREE'S RECOMMENDATION WAS CLEARLY ERRONEOUS, UNLAWFUL OR UNJUSTIFIED AND WHOLLY WITHOUT SUPPORT IN THE RECORD

STATEMENT OF THE FACTS

In that the Referee's Findings of Fact are not being appealed by either the Florida Bar or the Respondent, Respondent adopts the Referee's Finding of Facts as presented but would note the following:

1. The Respondent in this case did not prepare any of the documents relating to the Deed and Mortgages. Respondent also did not prepare the Contract in question which contained the language indicating the DiBlasio's might be getting a second mortgage. Page 11 of The Bar's Brief states that "the mortgage deed was false because it stated that the property was free and clear of all encumbrances, when in fact there existed the Lieberman mortgage." The Bar's statement infers that Respondent prepared this Mortgage Deed, which he did not.

2. The Respondent has one other instance or discipline which was imposed for conduct which occurred within a month of the conduct in the instant case. Both events occurred in 1981. No other discipline was imposed nor are any pending.

SUMMARY OF ARGUMENT

Article II, Rule 11.09(3)(e) of the Integration Rule states that upon review, the burden shall be upon the party seeking review to demonstrate that a Report of a Referee sought to be reviewed is erroneous, unlawful, or unjustified.

The discipline ordered by the Referee in this case is well within the realm of discipline ordered in cases of a similar nature. Respondent can cite cases where less discipline was imposed and the Bar can cite instances where more discipline was imposed. However, The Bar has completely failed to demonstrate that the Referee's findings are erroneous, unlawful or unjustified. The Bar merely cites a series of cases with dissimilar factual situations in which more discipline was applied. This does not meet their burden of proof as required by the Integration Rule and applicable case law.

Referee's well documented reasoning for his Recommendation of Discipline to be imposed should be upheld.

ARGUMENT

A. Burden of Proof

The Standard for Review of a Referee's Recommendation of Discipline is set forth in Article II, Rule 11.09(3)(e) of the Florida Bar Integration Rule as follows:

> Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee sought to be reviewed is erroneous, unlawful, or unjustified.

This Court has held that the well established principle found in civil cases regarding the presumption of correctness of trier of fact, is to be equally applied in cases of disciplinary members of The Bar.

> Findings of Fact of a referee appointed to hear disciplinary cases are entitled to the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. The Florida Bar v. Hawkins, 444 So.2d 961 (1984)

A Referree's findings of fact in disciplinary proceedings are presumed correct and will not be disregarded unless clearly erroneous or lacking support in evidence. The Florida Bar v. Baron, 1981, 392 So.2d 1318.

Initial fact-finding responsibility in attorney disciplinary matters is imposed on referee and his findings should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. McCain, 361 So.2d 700, (1978).

The Supreme Court will not reverse a finding of a referee in attorney discipline proceedings unless findings are clearly erroneous or fully lacking in evidentiary support. The Florida Bar v. Golden, 502 So.2d 891, (1987).

The fact-finding responsibility in disciplinary procedings is imposed

on referee and his findings should be upheld by The Supreme Court unless clearly erroneous or without support in evidence. The Florida Bar v. Hirsch, 359 So.2d 856, (1978).

A Referee's findings in disciplinary proceedings come to the Supreme Court with a presumption of correctness, and it is the petitioner's burden to establish that the referee's findings of fact are wholly without support in the record. The Florida Bar v. Hirsch, Id.

Fact finding in disciplinary matters should not be overturned unless wholly lacking in evidentiary support. The Florida Bar, Reinstatement of Rubin, 323 So.2d 257, 1975.

In disciplinary proceedings, the referee's findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. McKensie, 442 So.2d 934, (1983).

B. Mitigating Circumstances

While personal difficulties should not be relied upon to excuse attorney's misconduct, referee should not be restrained from considering hardships in recommending discipline which would be fair to society and to the attorney, in addition to being effective deterrent to others. The Florida Bar v. Lord, 433 So.2d 983, (1983).

The referee in the instant case questioned Respondent extensively as to the nature of his practice, then and now, and as to what changes he had made to show change and rehabilitation. (T2 p. 13, 15, 16, 17, 24, 25, 26, 27, 28, 30 and 31).

What is contemplated by term "cumulative misconduct" is not two violations within a month, which occurred five and one-half years before. Referee noted this in arriving at his recommendation. (T2, p. 15, 16 and 30) particularly,

> ...the fact that this happened at or about the same time as the prior and I don't think it was strictly as cumulative as it would be if there had been another event involving very similar things a year and a half or two years later on something like that. (T2 p. 30)

There is no set "time" for suspension, each case stands on its own and trier of fact (referee) is in the best position to observe all subjective factors, including, but not limited to demeanor of Respondent and other witnesses:

Where the state bar recommended that an attorney be suspended, at minimum for three months and one day for misconduct, so as to preclude automatic reinstatement, referee did not err in considering attorney's rehabilitation as one of ten factors in recommending appropriate discipline. The Florida Bar v. Lord, 433 So.2d 983, (1983).

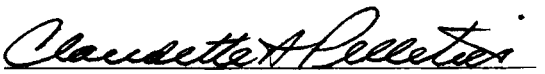
Where individual has recognized his mistake, rehabilitated himself and will be able to resume practice of law commensurate with high standards of the profession, public reprimand is sufficient under the circumstances. The Florida Bar v. Craig, 261 So.2d 138, (1972).

Accordingly, a 30 day suspension is well within the realm of discipline contemplated in cases of a similar nature where mitigating factors are well documented in the record.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this Honorable Court to enter an order upholding the Referee's recommendation as to Discipline.

Respectfully submitted,



Claudette A. Pelletier

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was mailed this 8th day of June, 1987, to JACQUELYN P. NEEDELMAN, The Florida Bar, 915 Middle River Drive, Suite 602, Galleria Professional Building, Fort Lauderdale, Florida 33304, JOHN F. HARKNESS, JR., Executive Director, Florida Bar, Tallahassee, Florida 32301-8226 and JOHN T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226.

CLAUDETTE A. PELLETIER
Attorney for Respondent
P.O. Box 383
Fort Lauderdale, Florida 33302
(305) 772-5959
(305) 463-4040

By: Claudette A. Pelletier