IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

IRVIN R. SHUPACK,

Respondent.

_____/

Supreme Court Case No. 69,280

The Florida Bar Case No. 17C86F47

REPLY BRIEF OF THE FLORIDA BAR

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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 Referee, 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

The Complainant, The Florida Bar, hereby adopts and realleges the Statement of the Case as presented in its Initial Brief filed in this cause.

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE A SUSPENSION FOR A PERIOD OF SIX (6) MONTHS DUE TO THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT AND RESPONDENT'S PRIOR DISCIPLINARY RECORD.

STATEMENT OF THE FACTS

The Complainant, The Florida Bar hereby adopts and realleges The Statement of the Facts presented in its Initial Brief filed in this cause and reaffirms the following:

The Referee specifically found that Respondent prepared most of the DiBlasio closing papers and that Respondent fraudulently failed to disclose to Mr. Haywood, either orally or in any of the closing papers, that the Lieberman note and mortgage existed. (RR, p. 2, Par. 6).

The Florida Bar requests that the Court's attention be directed to Exhibit 9, the mortgage deed between Kucan Investment Corporation and the DiBlasios. The mortgage deed was sworn to by the Respondent's client, Mr. Abraham. The Respondent not only witnessed said deed but also notarized it. 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. Respondent knew about the Lieberman mortgage, because Respondent had the Lieberman mortgage in his possession and had not yet recorded it. (See TFB's Ex. 9 and Report of Referee, P. 2, Par. 6).

SUMMARY OF ARGUMENT

THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE A SUSPENSION FOR A PERIOD OF SIX (6) MONTHS DUE TO THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT AND RESPONDENT'S PRIOR DISCIPLINARY RECORD.

The Florida Bar, when seeking review of the Referee's recommended discipline, does not need to sustain the same burden of proof as when seeking review of a finding of fact.

The Florida Bar is not seeking to review the Referee's findings of fact as neither party as petitioned for review of same.

The Florida Bar is seeking review of the Referee's recommendations as to discipline. This Court has previously stated, in The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978) that it is not bound by the Referee's recommendations for discipline.

Respondent's misconduct was wholly inconsistent with the high professional standards of the legal profession. A six (6) months suspension is therefore more appropriate than the suspension recommended by the Referee.

ARGUMENT

THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE A SUSPENSION FOR A PERIOD OF SIX (6) MONTHS DUE TO THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT AND RESPONDENT'S PRIOR DISCIPLINARY RECORD.

The Florida Bar is not seeking review of the Referee's findings of fact. The Florida Bar is seeking review of the Referee's recommendations as to discipline.

This Court has stated that it is not bound by the Referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797, 799 (Fla. 1978).

In The Florida Bar In Re Inglis, 471 So.2d 38 (Fla. 1985), this Court distinguished the burden required to overturn a finding of fact with that of seeking review of a recommendation of discipline.

> "Thus, we must accept the Referee's findings of fact unless they are not supported by competent, substantial evidence in the record. With regard to legal conclusions and recommendations of a referee, this Court's scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment." Id at 40-41

Accordingly, this Court has imposed greater discipline than recommended by Referees when deemed appropriate. The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983); The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982); The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981); and The Florida Bar v. Mueller, 351 So.2d 960 (Fla. 1977).

As support for his argument Respondent cites The Florida Bar v. Golden, 502 So.2d 891 (Fla. 1987) for the proposition that findings of a referee in attorney discipline proceedings will not be reversed unless clearly erroneous or fully lacking in evidentiary support. This Court in Golden stated that:

> After carefully reviewing the evidence, we accept the findings of fact of the referee. This Court will not reverse the findings of a referee unless the findings are clearly erroneous or wholly lacking in evidentiary support. Id, at 892.

It is clear that the Court was referring to the findings of fact of the referee and not the recommendations of discipline because the Court modified the Referee's recommended discipline. Id.

Respondent cites cases in his answer brief that deal with the standard of review for a referee's findings of fact. Complainant does not seek review of any findings of fact made by the referee, only the recommendations as to discipline, which this Court is not bound by. The Florida Bar v. Weaver, 356 So.2d 797, 799 (Fla. 1978).

In this cause, Respondent has been found guilty of two (2) separate acts of misconduct. The first act is the misconduct concerning the failure to disclose the Lieberman mortgage to the DiBlasios or their attorney. The second act of misconduct was the placing by Respondent of a false amount of stamps on the mortgage deed. The Referee's findings on the misconduct is as follows:

> The DiBlasios were represented at closing by Attorney Ben V. Haywood. Mr. Shupack did not affirmatively disclose to the DiBlasios or to Mr. Haywood that Kucan Investment Corporation (five days prior to its closing with the DiBlasios) had executed and delivered a mortgage and note to the Liebermans. Mr. Shupack knew of the existence of the Lieberman mortgage, having it in his possession. Although he prepared most of the DiBlasio closing papers, Mr. Shupack fraudulently failed to disclose to Mr. Haywood, either orally or in any of the closing papers, that the Lieberman note and mortgage existed. Mr. Shupack knew that neither Mr. Haywood or his clients could learn of the existence of the Lieberman mortgage because it had not bee recorded. At closing, Mr. Shupack asked Mr. Haywood to give him the DiBlasio mortgage in order to record it. He did so for the specific secret purpose of insuring that the DiBlasio mortgage would be recorded after the Kucan mortgage. Mr. Shupack then fraudulently recorded the Lieberman mortgage before recording the DiBlasio mortgage, thereby rendering the DiBlasio's mortgage to second status. At all times referenced above, the DiBlasios believed they were receiving a purchase money first mortgage. In furtherance of this fraudulent scheme. Mr. Shupack placed documentary stamps in the amount of $416.25 on the warranty deed from DiBlasio to Kucan which established a false purchase price of $92,500, instead of the correct purchase price of $67,500. (RR, p.2, Par. 6).

In the cases cited previously in The Florida Bar's initial brief, The Florida Bar v. Wall, 491 So.2d 549 (Fla. 1986), The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986), and The Florida Bar v. Ward, 472 So.2d 1159 (Fla. 1985), the respective respondents received suspensions for a period of three (3) months and a day, three (3) months and thirty (30) days for fraudulent misconduct without even having a prior disciplinary record.

Respondent has been previously disciplined for deceitful misconduct. In The Florida Bar v. Shupack, 453 So.2d 404 (Fla. 1984), Respondent was found guilty of violating Disciplinary Rule 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and was suspended for thirty (30) days.

The Court considers the prior disciplinary history of a respondent when determining the appropriate punishment for the present misconduct. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983), The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981) and The Florida Bar v. Solomon, 338 So.2d 818 (Fla. 1976).

Respondent's prior and present conduct both involve dishonesty and deceit. Respondent received a thirty (30) day suspension in 1984 for his prior misconduct, and although the prior and present misconduct occurred within a close time period, a thirty (30) day suspension is not sufficient for the cumulative acts of fraudulent misconduct that occurred.

Although the instant acts of misconduct occurred close in time to the previous acts of misconduct, The Florida Bar did not receive the matter until August 20, 1985 from The Honorable Reasbeck, the presiding Judge in the civil action. (T. 21, 23).

The Florida Bar submits that a six (6) month suspension would require Respondent to accept the seriousness of his misconduct.

In The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983), the Respondent's prior discipline consisted of a private reprimand. The Referee considered Respondent Bern's prior discipline and only recommended a public reprimand. This Court stated:

> "[T]he Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature should warrant an even more severe discipline than might dissimilar conduct ....considering respondent's previous history and the fact that this involves another instance of business matters with clients, the respondent should be suspended." Id, at 528

The Florida Bar maintains that Respondent's misconduct was wholly inconsistent with the high professional standards of the legal profession. A six (6) month suspension is, therefore, more appropriate than the suspension recommended by the Referee.

CONCLUSION

For the above-stated reasons and the reasons stated in The Florida Bar's Initial Brief, The Florida Bar respectfully requests this Honorable Court to enter an order suspending the Respondent for a period of six (6) months, and tax the costs of the proceedings in the amount of $1,690.46 against the Respondent.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of The Florida Bar was sent by United States Mail to Claudette A. Pelletier, Attorney for Respondent, Post Office Box 383, Fort Lauderdale, Florida 33302, and a copy to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226, on this 19th day of June, 1987.

JACQUELYN P. NEEDELMAN