

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JEFFREY M. MART,

Respondent.

CASE NO. 70,413
[TFB NO. 87-23,650(19)]

FILED

SID J. WHITE

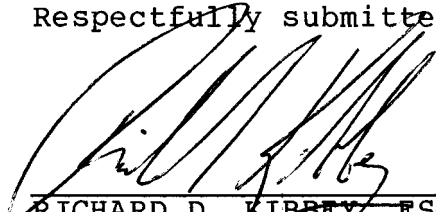
AUG 10 1988

CLERK, SUPREME COURT

By _____
Deputy Clerk

RESPONDENT'S ANSWER BRIEF

Respectfully submitted,



RICHARD D. KIBBEY, ESQUIRE
Attorney for Respondent
416 Camden Avenue
Stuart, FL 34994
(407) 286-2684

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SUMMARY OF ARGUMENT

The Referee's recommended disciplinary period is legally proper and is also supported by the circumstances of this case. Although historically it has been stated that this Court has the final decision regarding the proper discipline, more recently it has been held by this Court that the factual findings and recommendation by the Referee should be upheld unless clearly erroneous or without support in the record. (Emphasis supplied) The Referee's factual findings and recommendations come to this Court clothed with a presumption of correctness.

The actions and omissions determined by the Referee to have existed occurred prior to the date of the new Rules Regulating the Florida Bar. Therefore, the type of discipline levied upon the Respondent should be governed by the earlier Florida Bar Intergration Rules. Only the procedures of the new Rules Regulating the Florida Bar can be applied to cases pending as of the effective date of the Rule change. Substantive disciplinary measures are not procedural and application of the new disciplinary time periods under the Rules Regulating the Florida Bar in this case would be an improper ex-post-facto application of the new Rules. Further, the Respondent should be given credit for the amount of time which he voluntarily suspended himself.

ARGUMENT

THE REFEREE'S RECOMMENDATION OF A THREE (3)
YEAR PERIOD OF DISBARMENT IS LEGALLY PROPER
AND SUFFICIENT AND SHOULD BE UPHELD BY THIS
COURT.

The factual basis stated for the Referee's findings of fact have gone undisputed by the Respondent throughout the course of the disciplinary proceedings. As noted by the Referee the Respondent made substantial admissions of wrong doing including those violations outlined in the Referee's report. (R. 3). AS noted by the Referee the admissions by the Respondent greatly shortened the final hearing of what was otherwise a voluminous and complex case thereby narrowing the focus of the investigation to the appropriate discipline. (R. 5). Inasmuch as the Complainant's appeal relates only to the severity of the discipline recommended by the Referee and the factual basis for the findings of guilt are largely undisputed it is to the appropriateness of the discipline that the Respondent's Answer Brief will be directed.

The final determination as to the appropriate discipline for an attorney is reserved to the discretion of this Court and the Court is not bound by the recommendation of the Referee. Florida Bar vs. Weaver, 356 So. 2d. 797 (Fla. 1978). However, more recently this Court has ruled that the factual findings and recommendations by the Referee come to the Court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. Florida Bar vs. Vannier, 498 So. 2d. 896 (Fla. 1986), the Florida Bar vs.

Lippman, 497 So. 2d. 1165 (Fla. 1986) and the Florida Bar vs. Fields, 482 So. 2d. 1354 (Fla. 1986).

The Referee was permitted to consider and did, in fact, consider certain mitigating circumstances in this case. The Referee noted that the Respondent had no prior disciplinary convictions nor had disciplinary measures been imposed upon him. (R. 9). The Referee also noted as a mitigating circumstance the fact that the Respondent made frank admissions concerning his conduct and recognized that the conduct fell below the standard required by the Florida Bar. (R. 6). Further, the Referee noted that the Respondent had voluntarily suspended himself from the practice of law over one (1) year prior to the date of the Referee's report. The Respondent's willingness to admit his faults greatly abbreviated the grievance hearing. (R. 3).

In determining the recommended discipline the Referee also noted the dramatic and substantial effect that the collapse of the Beacon 21 project had upon the Respondent's own life. The Referee noted, in pertinent part, as follows:

1. The Respondent lost in excess of One Million Dollars (\$1,000,000.00) of his own monies. The Respondent and his wife have been forced into bankruptcy with no assets other than their marital residence which had a lis pendens filed against it resulting from a consent

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judgment of over Two Million Dollars
(\$2,000,000.00) awarded to Chicago Title.

2. The Respondent faces possible foreclosure upon his marital residence due to the inability of the Respondent to satisfy the monthly mortgage payments.
3. The Respondent's name and picture had appeared numerous times in the local newspaper in Martin County, Florida and the Respondent had served a significant amount of time in jail as a direct result of the criminal prosecution in this case.

(R. 6).

The factual basis supports the Referee's recommendation regarding the period of disbarment and the recommended discipline is not clearly erroneous under the circumstances. The Respondent respectfully submits to this Court, that the Court should consider the various types of punishment which have befallen the Respondent as a direct result of this incident. These would include not only the significant jail time that he has already served but the stigma that has attached to him and will continue to attach, perhaps indefinitely, within the legal and business community in which he lives. Further, the complete collapse and demise of his financial status is another factor that this Court should consider.

The recommended discipline by the Referee is not only supported by the facts and circumstances of this case but by

prior decisions of this Court as well. The Referee noted that the appropriate discipline should be pursuant to the Code of Professional Responsibility and the Florida Bar Intergration Rule rather than the newly enacted Rules Regulating the Florida Bar in that the new Rules became effective January 1, 1987 but the conduct complained of and admitted to occurred prior to the effective date of the new Rules. As stated in the Complainant's Initial Brief this Court has upheld disbarment pursuant to the former Intergration Rule when the misconduct occurred prior to the effective date of the new rules regulating the Florida Bar and the Court issued its order after the effective date of the new Rules. Florida Bar vs. Newman, 513 So. 2d. 656 (Fla. 1987).

More recently, this Court has upheld the recommendation of a Referee made after the effective date of the new Rules Regulating the Florida Bar based upon a violation of the former Florida Bar Intergration Rules. Florida Bar vs. Robbins, 13 F.L.W. 444, Case No. 70,585. July 14, 1988. It runs contrary to the notions of justice and fair discipline to suggest that the minimum disbarment period of five years under the current Rules Regulating the Florida Bar should apply in this case when the conduct complained of was prosecuted and disposed of under the former Rules. Further, because disbarment is quasi-penal in its nature application of the new disciplinary time periods would be an improper ex-post-facto of the new Rules.

As the Complainant points out in page 16 of its Initial Brief, Chapter 1 of the Rules of the Florida Bar provides that "all disciplinary cases pending as of 12:01 a.m. January 1, 1987,

shall thereafter be processed in accordance with the procedures set forth in the rules regulating the Florida Bar." (Emphasis supplied). The Complainant correctly points out that one factor for this Court to determine is whether the expanded time period is substantive or procedural. It is difficult, if not impossible, to accept the Complainant's proposal that the length of time or "sentence" of disbarment is procedural rather than substantive. Using the area of criminal law as an example, the courts of this state have uniformly held that the length of a criminal sentence is substantive in nature. Statutory changes and amendments which are substantive in their nature have never been permitted to be applied retroactively because such an application would most certainly offend the ex-post-facto doctrine. The same logic applies here. The preamble of Chapter 1 as quoted above clearly states that only the "procedures" in the new Rules Regulating the Florida Bar would be applied to cases which were being processed. An ex-post-facto application of the new Rules cannot and should not be permitted simply to "avoid administrative chaos" as the Complainant suggests. When the conduct complained of clearly occurred in its entirety before the effective date of the new Rules no "administrative chaos" is required to apply to the old rules of discipline.

The disbarment period recommended by the Referee has been upheld by this Court under similar circumstances. For instance, in the case of the Florida Bar vs. Sharman, 504 So. 2d. 1236 (Fla. 1987), this Court upheld a Referee's recommendation of three (3) years disbarment for the use of trust funds for

purposes other than the specific purpose entrusted and also the commingling of a lawyer's funds in the trust account.

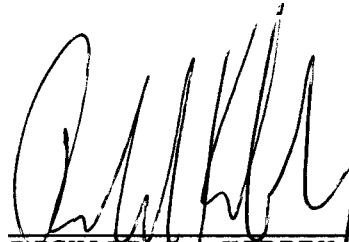
The Respondent submits that the period of Respondent's voluntary suspension should be deducted from the period of disbarment imposed. Because the referee did not address this issue the Respondent seeks clarification from this Court on that matter.

CONCLUSION

The Respondent respectfully submits that the Referee's recommendation of the three years (3) disbarment should be upheld. As noted, the findings of fact and the recommendations of the Referee come to this Court clothed with a presumption of correctness unless clearly erroneous and not supported by the record. The substantive changes in the new Rules concerning minimum periods of disbarment should not be applied retroactively to conduct which occurred prior to the effective date of the new Rules Regulating the Florida Bar. The preamble to the Rules Regulated to the Florida Bar note that only the "procedures" of the new Rules should be applied to cases being processed during the substitution of the new Rules for the old Rules. Any other conclusion would be an improper ex-post-facto application of the substantive disciplinary time period. The Respondent should also be given credit for the period of time during which he had voluntarily consented to a temporary suspension.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Respondent's Answer Brief have been furnished by ordinary U.S. mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; a copy of the foregoing has been furnished by mail to David G. McGunegle, Bar Counsel, The Florida Bar, 605 E. Robinson Street, Suite 610, Orlando, Florida 32801, on this 8th day of August, 1988.



RICHARD D. KIBBEY, ESQUIRE
Attorney for Respondent
416 Camden Avenue
Stuart, FL 34994
(407) 286-2684