043

FILED
SID J. WHITE
SEP 18 1991
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

IN THE SUPREME COURT

THE FLORIDA BAR,

Complainant,

vs.

Case No. 76,250
TFB Case No. 89-30,750(07C)

ROBERT E. KRAMER,

Respondent,
_____/

ANSWER BRIEF

RESPECTFULLY SUBMITTED BY:

Robert E. Kramer

ROBERT E. KRAMER, ESQUIRE
Post Office Box 2356
Daytona Beach, Florida 32115
(904) 672-4313
Attorney/Respondent/Appellee
Florida Bar No. 293539

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE

The Respondent accepts the Statement of the Case contained in the Complainant's Initial Brief, with the following exceptions:

1. The fifth sentence in discussing the Referee's Report (C1) and recommendation of a private reprimand, contains the clause, "although such a recommendation was not authorized by the Rules." Said clause is not a proper part of the Statement of the Case but rather a self serving conclusion of the Complainant's position.

2. On page two of Complainant's Statement of the Case, the Complainant alleges that the Referee made no findings as to some rules violations alleged by the Complainant. The report is very clear as to which Rules the Referee deems the Respondent to have violated. Therefore, the Referee found the Respondent not guilty of any other rules violations.

3. The last sentence of the Complainant's Statement of the Case is merely self serving hearsay and is not supported by any reference to the record on appeal and should therefore be stricken.

STATEMENT OF THE FACTS

The Referee's findings of fact are presumed to be correct for the purposes of this appeal. See Rule of Discipline 3-7.7(a)(5). The Respondent takes exception to the following items in the Statement of the Facts contained in the Complainant's Initial Brief.

1. At the bottom of page four, the Complainant states that the Kentucky foreclosure sale could not be finalized until Mr. Flanary paid the $756.20 commissioner's fee. In fact, the letter from the Kentucky attorney states that unless this fee was paid immediately, the foreclosure sale and deed would be set aside and the entire foreclosure would be dismissed. See Respondent's Exhibit 5, T-P. 52.

2. At page six of the Complainants's Statement of Facts they discuss how because the loan was by deed and option to repurchase instead of by mortgage, Mr. Flanary lost his right of redemption. They neglect to point out that Mr. Flanary was offered the right to redeem the property throughout the grievance process but declined to do so. See Complainant's Exhibit 12, T-3.

SUMMARY OF THE ARGUMENT

The Referee's recommendation of a private reprimand is appropriate in this case. Rule 3-5.1(b)(1) defines the criteria for when a private reprimand is the appropriate penalty. The Bar, in their argument, did not even discuss this rule. It should be undisputed that in this case, none of the exceptions contained in Rule 3-5.1(b)(1) apply and therefore, the Referee's Report providing for admonishment should not be overturned.

The findings contained in the Referee's Report are entirely compatible with the definition of minor misconduct contained in Rule 3-5.1(b)(1). In their argument of the section, the Complainant does not even allege that this case does not fit within such criteria.

The Bar's argument appears to be that if the Board of Governors recommends probable cause, then the Referee may never recommend a private reprimand. Under their theory, the Referee could recommend a lesser punishment and find the attorney not guilty of any wrongdoing. Also, the Referee could find the attorney guilty of major misconduct and award a severe penalty. However, for some unexplained reason, the Bar's theory is that the Referee should be prevented from recommending the penalty of admonishment which is in the middle.

ARGUMENT

POINT ONE

A PRIVATE REPRIMAND AND PAYMENT OF COSTS IS AN APPROPRIATE DISCIPLINE GIVEN THE NATURE OF THE MISCONDUCT.

The Complainant's argument is that a public reprimand is a more appropriate discipline in the instant case, give the nature of the misconduct. Rule 3-7.7(c)(5) provides that the Bar has the burden to show that the Referee's Report is "erroneous, unlawful or unjustified". Therefore, the proper question is not whether one penalty is more appropriate than another, but rather was the penalty provided by the Referee unjustified or erroneous.

Rule 3-5.1(b)(1) defines the criteria for when a private reprimand is the appropriate penalty. The Bar, in their argument, did not even discuss this rule. It should be undisputed that in this case, none of the exceptions contained in Rule 3-5.1(b)(1) apply and therefore, the Referee's Report providing for admonishment should not be overturned. At page eleven of Complainant's Initial Brief, the Bar states that this was a "rush deal" to get Mr. Flanary to sign the paperwork as soon as possible. The Bar does not go on to state that the undisputed testimony of both Mr. Flanary and Respondent was that Mr. Flanary received a letter from his attorney in Kentucky. The basis of the letter was that Mr. Flanary would immediately lose the property in Kentucky unless he paid certain costs associated with the foreclosure. Complainant's Exhibit 12, T-3. Mr. Flanary could not afford to pay those costs and therefore approached Respondent to borrow money. If Respondent did not loan him the money, he would have definitely lost the Kentucky property. This loan gave him a chance to keep it. The transaction was structured in such a way that I was capable of doing it on such short notice. Also, given the small amount of money involved, i.e., $2,500.00, Respondent did not want to have to foreclose on out-of-state property in the event of a default

of payment. The use of a Deed with an option to repurchase is perfectly acceptable in Kentucky.

Respondent now realizes that he should have either refused Mr. Flanary's loan request completely or required that he seek independent counsel. That because of the small amount of the loan involved, Respondent did fail to adhere to the requirement of Rule 4-1.8(a). However, even by Mr. Flanary's own testimony, Respondent never misled him in any way. All of his allegations of improper advice as to the type of transaction involved concerned conversations that he had with the mortgage broker involved, Davis Hamilton. It is Respondent's recollection that Mr. Flanary testified that he never even discussed the loan with Respondent, (T-P.33), however, in no way was the transaction unfair to Mr. Flanary. Rather, it allowed him to repurchase the Kentucky property by merely repaying the amount borrowed together with interest thereon at the rate of eighteen percent (18%) per annum.

All of the cases cited by the Bar are irrelevant to the instant case. In each case cited, the awarding of a private reprimand was improper because the conditions of Rule 3-5.1(b)(1) were not met. Therefore, all of these cases are clearly distinguishable from the case at Bar. Also, none of these cases discuss the real issue of whether the instant case meets the Rule 3-5.1(b)(1) test and that the Referee's ruling shall remain undisturbed.

POINT TWO

THE REFEREE'S RECOMMENDATION FOR DISCIPLINE OF A PRIVATE REPRIMAND, IS APPROPRIATE IN LIGHT OF RULE 3-5.1(b) OF THE RULES OF DISCIPLINE WHICH PROVIDED THAT MINOR MISCONDUCT IS THE ONLY TYPE OF MISCONDUCT FOR WHICH A PRIVATE REPRIMAND IS APPROPRIATE; AND RULE 3-7.5(k)(1)(3) WHICH PROVIDED THAT A REFEREE MAY RECOMMEND A PRIVATE REPRIMAND IN CASES OF MINOR MISCONDUCT.

The Complainant's argument in this section appears to be based on the personal beliefs of the author since there are no citations to support statements which attempt to be presented as fact or law. Rule 3-7.5(k)(1)(3) provides that a Referee may only recommend admonishment in cases based on a complaint of minor misconduct. The definition of minor misconduct is contained in Rule 3-5.1(b)(1).

The findings contained in the Referee's Report are entirely compatible with the definition of minor misconduct contained in Rule 3-5(b)(1). In their argument of the section, the Complainant does not even allege that this case does not fit within such criteria.

The Bar's argument appears to be that if the Board of Governors recommends probable cause, then the Referee may never recommend a private reprimand. Under their theory, the Referee could find the attorney not guilty of any wrongdoing or the Referee could find the attorney guilty of major misconduct and award a severe penalty. However, for some unexplained reason, the Bar's theory is that the Referee should be prevented from recommending the penalty of admonishment which is in the middle.

In the Bar's closing argument before the Referee, their position that admonishment is not a proper recommendation is discussed (T-P. 187). The Bar informed the Referee that

> "So the Rules say that recommendation is not available in disposing of this particular case. Although, with all candor, referees have utilized it and the Court has

not been uniform in its application of whether to accept it or reject it. (T-P. 187-188)."

The Complainant has presented no cases where this Court even discusses the issue of whether or not admonishment is a proper recommendation after the Grievance Committee finds probable cause. In the cases presented by the Complainant, the recommendation of admonishment is sometimes accepted and sometimes rejected by this Court. However, in every case where a recommendation of admonishment was overruled, the Courts reasoning was based upon the misconduct not being within the definition of minor misconduct as set forth in Rule 3-5.1(b)(1).

The Bar's argument is even more illogical when it is considered that the Referee's Report is only a recommendation to this Court. The safeguard against Referee's adjudging private reprimands is that this Court may review and decline to accept the report and the Bar may appeal if the case does not fit the requirements of Rule 3-5.1(b)(1), as they have done in Argument One of their Initial Brief.

CONCLUSION

WHEREFORE, the Respondent respectfully requests this Honorable Court to uphold the recommended discipline set forth in the Report of Referee, namely, admonishment, and payment of costs.

ROBERT E. KRAMER, ESQUIRE
Post Office Box 2356
Daytona Beach, Florida 32115
(904) 672-4313
Attorney/Respondent/Appellee
Florida Bar No. 293539

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and five (5) copies of the foregoing Reply Brief have been furnished by U.S. Mail to the SUPREME COURT OF FLORIDA, Supreme Court Building, Tallahassee, Florida 32399-1925; and copies thereof have been furnished to: JOHN F. HARKNESS, JR., ESQUIRE, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; JOHN T. BERRY, ESQUIRE, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; DAVID G. McGUNEGLE, ESQUIRE, 880 North Orange Avenue, Suite 200, Orlando, Florida 328-1; JANICE K. WICHROWSKI, ESQUIRE, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801, this 16th day of September, 1991.

Robert E. Kramer

ROBERT E. KRAMER, ESQUIRE
Post Office Box 2356
Daytona Beach, Florida 32115
(904) 672-4313
Attorney/Respondent/Appellee
Florida Bar No. 293539