Case disp. 3-12-92
Suspended

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant

vs.

MARTIN L. BLACK,

Respondent

CASE NO. 76,86[illegible]

BRIEF OF RESPONDENT, MARTIN L. BLACK

Petition for Review of a Report of Referee rendered in this case on September 12, 1991, and the Referee's Order on Motion for Clarification, rendered on October 25, 1991. Said Referee was appointed to conduct disciplinary proceeding, pursuant to the Rules of Discipline of The Florida Bar.

MARTIN L. BLACK
FLORIDA BAR NO. 0178990
505 EAST DUVAL STREET
LAKE CITY, FLORIDA 32055
904/752-0614

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AUTHORITIES CITED

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I. STATEMENT OF CASE AND FACTS

Respondent, MARTIN L. BLACK, has been an attorney in good standing with The Florida Bar since 1974 (T-157). Respondent has been a sole practitioner in Lake City, Florida, since 1977 (T-45, T-100). Since 1974, up to the time of the Complaint filed herein, Respondent has never had any prior disciplinary action against him (RR-8).

In November, 1986, Respondent began to represent Joe Frazier, the Complainant, in a workers' compensation case (RE-1). Respondent, after representing Mr. Frazier for approximately 3 years, settled the case (T-8). The case was settled for $76,000.00 in May of 1989 (T-136), and the Order approving the settlement was signed by the Compensation Judge on June 19, 1989 (T-57).

Subsequent to the settlement of the case and the Order being signed by the Judge approving the settlement on June 19, 1989, but prior to the settlement funds being received on July 17, 1989, Respondent requested a loan from Mr. Frazier in the amount of $24,000.00, to be used to pay-off a loan owed to Barnett Bank for foreclosure on Respondent's house (T-65)(T-101).

Respondent agreed to repay the loan in 30 days and agreed to pay to Mr. Frazier an additional $2,000.00 for loaning him the money (T-104). Respondent advised Mr. Frazier

to seek independent legal advise regarding the terms of the loan, but Mr. Frazier declined to do so (T-106). Mr. Frazier states initially that he does not recall being advised to seek independent counsel, and subsequently denied that he was advised to do so (T-70)(T-71).

Respondent, in an effort to protect Mr. Frazier and provide security for the loan, executed a note and mortgage to the home in favor of Mr. Frazier the day the parties went to the Bank to pay-off the loan to Barnett Bank and to retrieve the property from foreclosure (T-69, 87,106).

The Agreement between Respondent and Mr. Frazier was that the mortgage given to Mr. Frazier would not be recorded, that Respondent would use the property, which was appraised by the Bank at $45,000.00, as collateral for a new loan from a lending institution in the amount of $24,000.00, and repay Mr. Frazier (T-110, 111).

Although the mortgage was not to be recorded, both Respondent and Mr. Frazier agreed that any prospective lender would be advised that Respondent owed Mr. Frazier $24,000.00, that Mr. Frazier had a lien on the home for $24,000.00, and that the purpose of the loan was to pay-off the loan to Mr. Frazier (T-83,87). Additionally, every lender that Respondent applied to for a loan on the property was advised of the $24,000.00 lien on the property held by Mr. Frazier (T-83, 84)(T-118).

Mr. Frazier did not request or expect a mortgage on the property from the Respondent. Respondent insisted on giving the mortgage to Mr. Frazier to secure the loan note and provide additional security to Mr. Frazier for the loan (T-69).

Respondent was unable to secure a $24,000.00 loan on the $45,000.00 home within the 30 days agreed, and consequently was unable to repay Mr. Frazier within 30 days (T-111). Respondent then requested in writing and Mr. Frazier agreed, to extend the time for repayment of the loan (T-25). In consideration of Mr. Frazier extending the loan period, Respondent agreed to pay Mr. Frazier an additional $600.00 per month until the loan of $24,000.00 was fully repaid. (T-80)(T-110).

Respondent anticipated getting a loan for $24,000.00 on the $45,000.00 house within a short time, however, Respondent was unable to secure a loan on the property, and consequently paid Mr. Frazier $600.00 per month from August 27, 1989 to June, 1990, approximately 11 months (T-112)(T-79).

After August 27, 1989, Respondent advised Mr. Frazier of the problem he was having borrowing the money to repay the loan. Mr. Frazier then attempted to use the home as collateral to borrow $24,000.00, but was not approved. Respondent then deeded the property to Mr. Frazier and to Respondent's mother in November, 1989, 4 months after the

loan to Respondent from Mr. Frazier. This was done in an effort for them to borrow the $24,000.00 on the home, and pay-off the loan Respondent owed to Mr. Frazier. The parties agreed that Mr. Frazier would get the $24,000.00 proceeds from the lender, and that Respondent would repay the loan installment payments owed to the lender (T-33).

With the property as security, a loan of $24,000.00 to Mr. Frazier and Respondent's mother was approved in February, 1990, approximately 45 days from application for the loan. However, Mr. Frazier refused the loan, and instead filed a complaint with The Florida Bar against the Respondent for failing to repay the loan within 30 days per the initial Agreement (A-KK)(A-LL)(T-136).

In June of 1990, Mr. Frazier's complaint was heard by a Grievance Committee in Columbia County, Florida. The Committee determined probable cause and advised The Florida Bar of its determination.

On August 1, 1990, Respondent repaid Mr. Frazier $24,000.00, the full amount of the loan. From August 27, 1989 to August 1, 1990, Respondent paid to Mr. Frazier a total of approximately $34,000.00 (T-112)(T-79).

The Florida Bar filed a complaint against Respondent in December, 1990, alleging Respondent violated 3-4.3 of the Rules of Discipline, and Rules 4-1.7(b), 4-1.8(a), and 4-8.4(d) of the Rules of Professional Conduct of The

Florida Bar.

Circuit Judge Frederick D. Smith, Eighth Judicial Circuit, was appointed as Special Referee to hear the Complaint. A final hearing was held on April 18, 1991, in Alachua County, Florida.

On September 12, 1991, the Referee issued his report recommending that Respondent be found guilty of violating Rule 3-4.3 of the Rules of Discipline, and Rules 4-1.7(b), 4-1.8(a), and 4-8.4(d) of the Rules of Professional Conduct of The Florida Bar (RR-8).

The Referee's report of September 12, 1991, recommended that "Respondent be suspended from the practice of law for a period of three months and thereafter until Respondent prove rehabilitation as provided in Rule 3-5.1(e) Rules of Discipline. I recommend that passage of the ethics portion of The Florida Bar examination shall constitute rehabilitation" (RR-8).

The Florida Bar thereafter filed a Motion for Clarification of the Referee's report, alleging that since the Referee ordered rehabilitation, Respondent has to be suspended for at least 91 days and under Rule 3-7.10 of the Rules of Discipline of The Florida Bar.

Over the Respondent's objections, the Referee granted The Florida Bar's Motion for Clarification on October 25, 1991, and changed his recommendation in his initial report

as to disciplinary measures to be applied to Respondent, and recommended that "Respondent be suspended from the practice of law for a period of ninety-one (91) days, and thereafter until Respondent shall prove rehabilitation as provided in Rule 3-7.10 of the Rules of Discipline of The Florida Bar. I recommend that passage of the ethics portion of The Florida Bar examination shall be a condition of reinstatement" (RO-1).

Respondent thereafter filed a Petition for Review.

II. SUMMARY OF ARGUMENT

WHETHER THE REFEREE ERRED BY FAILING TO MAKE "FINDINGS OF FACT IN HIS REPORT AS TO EACH ITEM OF MISCONDUCT OF WHICH RESPONDENT IS CHARGED", AS MANDATED BY THE FLORIDA BAR RULES OF DISCIPLINE, RULE 3-7.6(K)(1).

The Referee's report in this case does not comply with the requirement specified in The Florida Bar Rules of Discipline, Rule 3-7.6(K)(1). The Rule state:

> "The Referee's report shall include (1) Finding of fact as to each item of misconduct of which the Respondent is charged..."

The Referee's report in the case sub judice makes a total of forty (40) findings. Some of the findings in the report are relevant to the charges of misconduct against the Respondent, some of them are obviously not. However, there are no specific findings of fact as to each item of misconduct charged against the Respondent as mandated by the above referenced Rule 3-7.6(K)(1).

By making forty (40) general findings in his report, then proceeding to summarily recommend that Respondent be found guilty of four (4) violations of rules of discipline and professional conduct, the Referee has effectively prevented Respondent from challenging the report on appeal. There is no way for Respondent to know, by reading the report, which finding is relevant to which rule violation, and thereby challenging the finding and recommendation of

guilt on appeal.

Some of the Findings of Fact contained in the Referee's report are not supported by unrefuted evidence as required by case law in The Florida Bar v. James C. Burke, 578 So.2d 1099 (Fla. 1991). The unrefuted findings are numbers seven (7), eight (8), twelve (12), and twenty-nine (29).

WHETHER THE REFEREE'S "RECOMMENDED DISCIPLINARY SANCTIONS TO BE APPLIED AGAINST RESPONDENT" WERE INAPPROPRIATELY HARSH AND INEQUITABLE, CONSIDERING THE FACTS AND CIRCUMSTANCES OF THE CASE, OTHER SANCTIONS IMPOSED BY THE COURT IN RECENT CASES, AND THE MITIGATION FACTORS PRESENT BEFORE THE REFEREE.

Respondent had been a member of The Florida Bar for over fifteen (15) years when the Complaint herein was filed against him. He is a sole practitioner and a minority attorney, practicing out of Lake City, Columbia County, Florida, for twelve (12) years before the Complaint. Respondent has never had any disciplinary action taken against him previous to this case.

Respondent was recommended by the Referee to be found guilty on several rule violations involving honesty and conduct prejudicial to the administration of justice, yet the record reveals that Respondent made every reasonable effort to be honest and above-board in his conduct of this case.

Disciplinary actions were initiated against Respondent

because of a loan from a Complainant. However, in less than a year's time, Respondent repaid the Complainant the full amount of the loan, in addition to over $10,000.00 during the year, in an effort to avoid any financial hardship to Complainant because of the loan to Respondent.

There are only three (3) findings of aggravating factors by the Referee in his report, and six (6) mitigating factors findings, yet the Respondent recommended suspended for 91 days and rehabilitation pursuant to Rule 3-7.10 of the Rules of Discipline of The Florida Bar.

In recent cases before this Court involving factually similar matters, such as The Florida Bar v. John A. Barley, 541 So.2d 606 (Fla. 1989), where the Court held that the Judgment be fair to society and to Respondent, and deter others who might be prone to become in like violations.

In the Barley case as in the one before the Court, there was the determination that Respondent's conduct was based on a lack of judgment, not bad motives. The Court considered the Respondent's good attitude and genuine desire to right the wrongs he committed, which is identical to the factual situation in the case sub judice.

Therefore, the Referee's recommended disciplinary sanctions to be applied against Respondent in this case are inappropriately harsh and unfair in this case.

WHETHER THE REFEREE ERRED IN CHANGING HIS INITIAL RECOMMENDED DISCIPLINARY SANCTION TO BE IMPOSED ON RESPONDENT FROM 90 DAYS SUSPENSION, TO 91 DAYS SUSPENSION AND PROOF OF REHABILITATION WITHOUT ADDITIONAL FINDINGS OF FACT, BUT BASED SOLELY ON THE FLORIDA BAR ATTORNEY'S MOTION FOR CLARIFICATION.

The Referee in this cause initially recommended that:

> "Respondent be suspended for three months and thereafter until Respondent shall prove rehabilitation as provided in Rule 3-5.1(e) Rules of Discipline. I recommend that passage of the ethics portion of The Florida Bar Examination shall constitute Rehabilitation."

However, after The Florida Bar's attorney filed a Motion for Clarification, the Court amended its report to read:

> "Respondent be suspended from practice of law for period of 91 days and thereafter until Respondent shall prove rehabilitation as provided in Rule 3-7.10 of the Rules of Discipline of The Florida Bar. I recommend that passage of the ethics portion of The Florida Bar Examination shall be a condition of reinstatement."

It is obvious by reading the Referee's recommendation in his initial report that he was of the opinion that Respondent needed to show "rehabilitation" only by passage of the ethics portion of The Florida Bar Examination, his report stated as much: "I recommend that passage of the ethics portion of The Florida Bar Examination shall constitute Rehabilitation."

The Referee's "amended recommendation of Disciplinary measures to be applied against the Respondent" is much more severe than the initial recommendation. The Referee changed

his initial recommendation and imposed the more stringent requirement for reinstatement under Rule 3-7.10 on Respondent without any additional factual findings or evidence other than those in the original report.

The summary imposition of the more severe discipline against Respondent, without additional findings of facts or any determination of necessity, by the Referee was unfair and unjust and constituted error by the Referee.

III. ISSUE(S) AND ARGUMENT

WHETHER THE REFEREE ERRED BY FAILING TO MAKE "FINDINGS OF FACT IN HIS REPORT AS TO EACH ITEM OF MISCONDUCT OF WHICH RESPONDENT IS CHARGED", AS MANDATED BY THE FLORIDA BAR RULES OF DISCIPLINE, RULE 3-7.6(K)(1).

The Referee's report filed with the Court in this cause does not comply with the requirements specified in The Florida Bar Rules of Discipline 3-7.6(K)(1). The Rule states:

> "The Referee's report shall include (1) a finding of fact as to each item of misconduct of which the Respondent is charged..."

In the case sub judice, the Referee's report cite a general list of forty (40) findings of fact. Some of the findings are relevant to the items of misconduct against the Respondent, and some of them are obviously not relevant to the misconduct charged.

It is impossible to determine from the Referee's report, specifically, which of his findings relate to which item of misconduct that is charged against Respondent.

The Respondent was recommended to be found guilty on four different items of misconduct, or violations of the Rules of Discipline and Rules of Professional Conduct of The Florida Bar. However, the Findings of fact by the Referee in his report, make no distinction between the findings used

to recommend Respondent's guilt of an item of misconduct under the Rules of Discipline, from the findings he is using to recommend Respondent's guilt for an item of misconduct under the Rules of Professional Conduct.

To allow the Referee to merely make general findings of fact in his report, and then to use all those general findings of fact to summarily recommend a determination of guilt as to four (4) separate and distinct items of misconduct charged against Respondent, is in error, unfair, and in violation of Rule 3-7.6(K)(1), The Florida Bar Rules of Discipline.

Respondent is unfairly handicapped in challenging on appeal the Referee's recommendation of guilt as to a specific item of misconduct in a situation where the Referee does not make specific findings of fact as to each item of misconduct charged against Respondent, but instead, make numerous findings of fact and then conclude Respondent's guilt as to four (4) items of misconduct. The Referee must make specific findings of fact as to each item of misconduct charged against Respondent before the Court can adopt the recommendation of guilt. The Florida Bar v. Lancaster, 448 So.2d 1019 (1984).

Wherefore, the Referee's report of findings is invalid, and therefore should not be adopted by the Court.

WHETHER THE REFEREE'S "RECOMMENDED DISCIPLINARY SANCTIONS TO BE APPLIED AGAINST RESPONDENT" WERE INAPPROPRIATELY HARSH AND INEQUITABLE, CONSIDERING THE FACTS AND CIRCUMSTANCES OF THE CASE, OTHER SANCTIONS IMPOSED BY THE COURT IN SIMILAR FACT CASES, AND MITIGATION FACTORS PRESENT BEFORE THE REFEREE.

It is clear from the decisions rendered out of the Supreme Court, that the Court, in determining appropriate discipline, gives consideration to whether the misconduct is isolated misconduct, and to the absence of any past disciplinary problems of the Respondent. The Florida Bar v. Childers, No. 76,126 (Fla. July 11, 1991)[16 FLW S488], The Florida Bar v. Vernell, 374 So.2d 473, 476 (Fla. 1979).

The Respondent is a minority attorney and sole practitioner, whose office has been located in Lake City, Florida, for the past twelve (12) years. Respondent was a former County Judge, and has been a member of The Florida Bar for 17 years. Respondent has never previously been disciplined by The Florida Bar for any reason. The complaint against Respondent is clearly an isolated instance of misconduct.

Respondent was the attorney for Complainant, Joe Frazier, Sr., in a workers' compensation case. Respondent represented Mr. Frazier for three (3) years before settling the case for $76,000.00 in May, 1989. The Workers'

Compensation Judge signed the Order approving the settlement of the case on June 19, 1989.

On a day subsequent to June 19, 1989, the date the Order was signed approving the settlement of the case, but before the settlement proceeds were received on July 17, 1989, Respondent requested a loan from Mr. Frazier of $24,000.00 to pay-off Barnett Bank. The purpose of the loan was to pay-off Barnett Bank and for Respondent to get Respondent's home out of foreclosure. The loan amount, plus the money added by Respondent was to be used to pay-off Barnett Bank completely, which would leave the home free and clear of any liens.

Respondent agreed to repay the loan, and an additional $2,000.00, to Mr. Frazier within 30 days. Mr. Frazier agreed to the loan and terms.

The facts are unrefutable that Respondent insisted on giving Mr. Frazier a written loan note evidencing the transaction, along with a written mortgage on the property.

Mr. Frazier testified before the Referee that he "does not remember" Respondent advising him to seek independent legal advise regarding the loan; Respondent testified that he did advise Mr. Frazier to seek independent legal advise, but that Mr. Frazier declined.

Respondent and Mr. Frazier testified that Respondent's

plan was to use the home, which was appraised at $45,000.00, as collateral to borrow $24,000, and repay Mr. Frazier with the money borrowed on the property.

Mr. Frazier testified before the Referee that he did not remember Respondent advising him that the mortgage was not to be recorded, but Mr. Frazier did remember that Respondent advised every potential lender on the property that Mr. Frazier had a $24,000.00 lien on the property, and that the sole purpose of the loan was to use the proceeds to repay Mr. Frazier.

The facts show that when Respondent was unable to repay Mr. Frazier the loan in 30 days, as promised, Respondent agreed on August 27, 1989, to pay Mr. Frazier $600.00 per month, until he was able to reimburse Mr. Frazier the entire amount of the loan.

In October of 1989, three months from the time of the original loan, Respondent was still unable to secure a loan on the property to repay Mr. Frazier, Mr. Frazier was insistent on receiving his money, thereby, Respondent agreed to allow Mr. Frazier to attempt to borrow the money from a lender, use the property as collateral for the loan, and Respondent agreed to be responsible for paying all cost surrounding the loan and the installment payments to repay the loan.

Mr. Frazier was unable to secure a loan using the

property as collateral. Respondent then deeded the property to Mr. Frazier and Respondent's mother in November of 1989. The two of them applied for a loan using the property for collateral, the loan was approved but Mr. Frazier declined the loan and filed a Complaint with the Bar against the Respondent in January, 1990, six (6) months from the date of the loan by the Respondent.

Even after Mr. Frazier filed a Complaint with The Florida Bar against the Respondent, the Respondent continued to pay Mr. Frazier $600.00 per month to help outset any hardships caused by the failure to repay the loan.

Respondent paid Mr. Frazier $600.00 until July, 1990. Respondent paid Mr. Frazier the entire sum of $24,000.00 on August 1, 1990, approximately one (1) year from the date of the loan.

The above facts admittedly demonstrate that the Respondent showed a lack of judgment, but it is also obvious that Respondent's entire conduct was motivated by his desire to pay Mr. Frazier's money back to him in the quickest time possible.

In previous cases coming before the Court involving the question of disciplinary sanction to be applied, the Court has subscribed to the language contained in the Florida Supreme Court case of The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), which stated that "for isolated acts,

censure, public or private, is more appropriate. Only for single offenses as embezzlement, bribery of a juror or Court official and the like should suspension or disbarment be imposed."

Surely, an attorney who has been practicing for twelve (12) years as a sole practitioner, five (5) years as a Public Defender, and having been a member of The Florida Bar for seventeen (17) years, yet having only this one disciplinary action against him in all that time, falls into the "isolated acts" category referred to in the Pahules case.

The Court's position of avoiding imposing unduly harsh punishment on an attorney when the charges, facts and circumstances is demonstrated in the recent case of The Florida Bar v. Gary H. Neely, 502 So.2d 1237 (Fla. 1987).

The attorney in the Neely case was found guilty of violating disciplinary rules 1-102(A)(6), 3-104(C), 3-104(D), 9-102(B)(3), and 9-102(B)(4), as well as rules 11.02(3)(a) and 11.02(4). The Referee recommended a six (6) months suspension and proof of rehabilitation.

However, this Court on review of the case changed the disciplinary action against the attorney to three months suspension and probation for two years. The Court stated that:

> "...based upon the charges, facts and circumstances of this case, a six month suspension is unduly severe..." The Florida Bar v. Neely, Supra.

The attorney in the Neely case was charged with more violations than the Respondent herein. Also, the violations were more serious in that he was found guilty of a violation of justice and good morals. The Court was silent as to any mitigation factors or previous disciplinary action that might have been considered. Whereas, in the case now before the Court, the Respondent has no previous disciplinary actions and has shown substantial factors of mitigation.

Another case that is even more on point to the case herein where the Court avoided imposition of unduly harsh disciplinary action is The Florida Bar v. Barley, 541 So.2d 606 (Fla. 1989).

The Barley case involved a loan from a client, as does the case sub judice. However, the loan in the Barley case was of trust funds, no written evidence of the loan was given, no security was given, repayment of the loan was in excess of two (2) years.

Barley was found guilty of violating rules 1-102(A)(6), 2-106(A), 2-106(C), 5-101(A), 5-104(A) and 9-102(B)(4). The Referee in the case recommended punishment of sixty day suspension and payment of costs. This Court upheld the recommendation. The Court stated that:

> "...his conduct shows a lack of judgment, which cannot be encouraged among members of our profession. On the other hand, the Referee considered Barley's good attitude and genuine desire to right the wrongs he committed. We

> agree with the Referee that Barley's misconduct occurred mainly through ignorance, nor through bad motives." The Florida Bar v. Barley, Supra.

In the present case, the Respondent provided a written note, gave a mortgage on the property, eventually deeded a one-half interest in the property to Complainant, repaid the loan completely, and also paid the Complainant an additional $10,000.00 over the period of the loan in an effort to avoid hardship to the Complainant.

Again, the Barley case is silent as to any previous disciplinary action against Barley, or any factors of mitigation. Whereas, in the Respondent's case, the Referee's report contains both, lack of previous discipline and numerous factors of mitigation.

Wherefore, based upon the facts, circumstances and charges, the lack of any previous disciplinary action, the six (6) mitigation factors contained in the Referee's report and the Court's imposition of disciplinary sanctions in other cases involving similar facts, Respondent contends that the punishment recommended by the Referee in this cause is unduly and inappropriately harsh.

WHETHER THE REFEREE ERRED IN CHANGING HIS "INITIAL RECOMMENDED DISCIPLINARY SANCTION TO BE IMPOSED ON RESPONDENT"

FROM THREE MONTHS (90 DAYS) SUSPENSION, TO 91 DAYS SUSPENSION AND PROOF OF REHABILITATION, WITHOUT ADDITIONAL FINDINGS OF FACT, BUT BASED SOLELY ON THE BAR'S ATTORNEY'S MOTION FOR CLARIFICATION.

The Referee's initial recommended discipline against Respondent was:

> "...Respondent be suspended from the practice of law for a period of three months (90 days) and thereafter until Respondent shall prove rehabilitation as provided in Rule 3-5.1(e) Rules of Discipline. I recommend that passage of the ethics portion of The Florida Bar Examination shall constitute rehabilitation."

However, after The Florida Bar's attorney filed a Motion for Clarification, alleging that the Referee's imposition of rehabilitation (in this case, passage of the ethics portion of The Florida Bar) could only be accomplished if the Referee recommended a 91 day suspension and rehabilitation, pursuant to Rule 3-7.10 of the Rules of Discipline of The Florida Bar. The Referee, without any additional finding of facts and based solely on the Bar's attorney's Motion, changed the recommended punishment to:

> "...Respondent be suspended from practice of law for a period of 91 days and thereafter until Respondent shall prove rehabilitation as provided in Rule 3-7.10 of the Rules of Discipline of The Florida Bar. I recommend that passage of the ethics portion of The Florida Bar shall be a condition of reinstatement."

It appears clear by the facts of this case, the lack of previous disciplinary actions against Respondent, factors of mitigation in the Referee's report, such as the absence of intent to deceive victim, lack of intent to deprive victim of property, and the Referee's own recommendation in the initial report that "passage of the ethics portion of The Florida Bar Examination shall constitute rehabilitation", that the imposition of suspension and the stringent and extensive requirements of rehabilitation called for under Rule 3-7.10 of the Rules of Discipline was inappropriately harsh punishment on Respondent.

It was only after the Bar's Motion for Clarification, alleging that the Referee's requirement for rehabilitation, the passage of the ethics portion of the Bar's examination, could not be imposed on Respondent unless Respondent was suspended for 91 days and rehabilitation ordered pursuant to Rule 3-7.10, Rules of Discipline of The Florida Bar.

However, that is not the case as demonstrated by the Court's ruling in The Florida Bar In Re: Roth, 500 So.2d 117 (Fla. 1986). This case involved an attorney who was suspended by the Court for a period of 60 days and also required to complete a course in professional responsibility at an accredited law school, or achieve success on the multistate Professional Responsibility examination within one year.

The facts clearly show that the Referee's primary concern regarding "rehabilitation" of the Respondent was that Respondent successfully complete the ethics portion of The Florida Bar Examination.

To recommend that Respondent show rehabilitation pursuant to Rule 3-7.10 of the Rules of Discipline, would require Respondent to show:

(1) full compliance with conditions imposed in the previous disciplinary judgment;

(2) unimpeachable character;

(3) reputation for professional ability;

(4) lack of malice towards those responsible for previous disciplinary action;

(5) a repentant attitude concerning the earlier wrongdoing and a strong resolution to adhere to principles of correct conduct;

(6) restitution to persons harmed by earlier misconduct.

The Florida Bar In Re: Sickmen, 523 So.2d 154 (Fla. 1988).

In addition, Respondent would be required to petition for reinstatement and comply with the extensive requirement of Rule 3-7.10(n) of the Rules of Discipline of The Florida Bar, which according to this Court's own ruling indicates that:

> "Experience has taught us that the average time for a final determination on such a petition is from six to nine months." The Florida Bar v. Casety, 499 So.2d 831 (Fla. 1987).

Clearly, the summary imposition of a 91 days suspension

and rehabilitation under Rule 3-7.10 against Respondent is inappropriately harsh in this case and appear to conflict with his report as to the factors he considered in making his recommendation of punishment, specifically when consideration is given to the fact that the Referee's report indicates that Respondent has either fulfilled the above requirements, such as remorse, repentance, restitution, lack of prior disciplinary action, and lack of malice, or makes no findings of fact indicating a necessity to require Respondent to show proof of other requirements under the Rule.

Wherefore, Respondent submits to this Court that based upon the above, the Referee acted incorrectly in summarily changing his report and recommendation that a harsher punishment be imposed on Respondent than recommended in his initial report.

IV. CONCLUSION

This Court has previously consistently adhered to the principles stated in the case of The Florida Bar v. Pahules, Supra, when dealing with the discipline of attorney, to wit:

> "... For isolated acts, censure, public or private is more appropriate...[1] First, the judgment must be fair to society both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time

> encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." The Florida Bar v. Pahules, Supra.

Respondent, a minority attorney and sole practitioner in an area which has no minority attorneys within a seven County area, has no previous disciplinary action against him. The Respondent has been a member of The Florida Bar since 1974, almost 18 years, has worked as a Public Defender for five (5) years and also a County Judge.

Respondent has made restitution to the victim, and according to the Referee's report, "has shown remorse, made full and free disclosure to the disciplinary board and cooperative attitude toward proceeding, proved an absence of intent to deprive victim of property and absence of intent to deceive the victim."

WHEREFORE, based upon the above facts of this case, the Referee's report, the charge against Respondent, the issues involved, the case authorities cited, the factors of mitigation in the Referee's report and lack of previous disciplinary action, the Respondent respectfully requests that this honorable Court enter its Order determining that:

(1) The Referee's report of findings of fact is invalid.

(2) The recommended disciplinary sanctions are too harsh and a public reprimand against Respondent is appropriate.

(3) The Referee erred in changing his initial recommendation of disciplinary sanction to be applied against Respondent.

Respectfully Submitted,

MARTIN L. BLACK
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Lake City, Florida 32055
904/752-0614

V. CERTIFICATION

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to JOHN V. MCCARTHY, Esquire, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by U. S. Mail, on this 16th day of March, 1992.

MARTIN L. BLACK