IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
JUN 2 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

vs.

MARTIN L. BLACK,

Respondent

CASE NO. 76,866

REPLY BRIEF

MARTIN L. BLACK
Florida Bar No. 0178990
505 East Duval Street
Lake City, Florida 32055
904/752-0614

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DESIGNATIONS

The following designations shall be used throughout this Reply Brief, followed by page number when appropriate:

Appellant/Respondent - Martin L. Black

Appellee - The Florida Bar

AAB - Appellee's Answer Brief

RR - Referee's Report

T - Transcript of Hearing before Referee held April 18, 1991

BE - Bar Exhibits

RE - Respondent's Exhibits

RO - Referee's Order on Motion for Clarification

FBC - Florida Bar's Complaint

A - Respondent's Answers to Request for Admissions

RESPONDENT'S ARGUMENT IN RESPONSE AND REBUTTAL

I. 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 Florida Bar, in its Answer Brief, misstated the law in its contention that "an item of misconduct is a set of related facts and/or parties which, given a particular case, can lead to several violations of the Rules of Professional Conduct of The Florida Bar..." The Bar also inappropriately cited the case of The Florida Bar v. Barley, 541 So.2d 606 (Fla. 1989), as the source of authority for such contention. (AAB-12). The above cited Barley case does not contain any of the language cited by The Florida Bar to this Court in support of its position as to what constitutes an "item of misconduct."

The Florida Bar also argues that the Complaint filed against Respondent herein should be considered as a "one-Count disciplinary Complaint, relating to Respondent's conduct to his client..." (AAB-12). Consequently, it is the Bar's position that the forty (40) allegations made in the disciplinary Complaint filed against Respondent are a set of related facts, and there is only one allegation of misconduct.

The Florida Bar's position is not a valid one, as is demonstrated by the facts and language in the case of The Florida Bar v. Lancaster, 448 So.2d 1019 (Fla. 1984). The Lancaster case involved a single set of related facts and/or parties, as does the case herein. The case presently before the Court involved a loan to Respondent from a client and Respondent's attempt to repay the loan. The Lancaster case involved the possession of a boat with an altered identification number. The Bar

merely divided the case into Counts. Counts one (1) and two (2) related to altering the identification number on the boat. Count three (3) related to scheming to influence a witness not to appear at the trial regarding the boat. Count four (4) related to attempting to induce a witness to testify falsely about the boat. Count five (5) related to counseling a witness [regarding the boat], knowing the witness had other counsel. Count six (6) related to lying under oath about the alteration of the boat's I.D. number.

The Lancaster case demonstrates that even though a disciplinary complaint may contain a set of facts and/or parties that are related and involves one common single theme, to wit: the boat; however, it is the specific allegations by The Bar in the complaint against a lawyer that determines the "items of misconduct", not merely whether The Bar decides to divide the complaint into a one count or six counts complaint.

The case herein involves various and distinguishable different items of misconduct against the Respondent, and Respondent should be given the opportunity to specifically respond on appeal to each "item of misconduct" found by the Referee.

It is important, not only from the standpoint of notice to the lawyer for future avoidance of such conduct that a lawyer be provided with "findings of fact as to each item of misconduct, but such findings are crucial and particularly important when a Referee, as in this case, determines that there has been a violation of Rule 3-4.3 of the Rules of Discipline of The Florida Bar (the commission by a lawyer of any act which is unlawful or contrary to honesty and justice), and Rule 4-8.4(d) of the Rules of Professional Conduct of The Florida Bar (conduct that is

prejudicial to the administration of justice). The finding of fact as to each item of misconduct is especially important when the same Referee also makes a determination that the lawyer had an "absence of intent to deprive the victim of property; and an absence of intent to deceive the victim."

Clearly, in allegation forty (40) of its Complaint against Respondent, The Florida Bar specifically charged the Respondent with "violation of Rule 3-4.3 (misconduct and minor misconduct, of the Rules of Discipline of The Florida Bar); and Rules 4-1.7(b) (Conflict of Interest; general Rule); 4-1.8(a) (conflict of interest; prohibited transactions); and 4-8.4(d) (a lawyer should not engage in conduct that is prejudicial to the administration of justice), of the Rules of Professional Conduct of The Florida Bar. (FBC-7).

The above are individual specific items of misconduct charged against the Respondent, and specific items of misconduct that the Referee found to have been violated by the Respondent. Simply because The Florida Bar did not charge each item in a different "Count" in the Complaint, does not alter the fact that they are specific individual items of misconduct, charged against the Respondent, thereby requiring specific individual findings of fact by the Referee, pursuant to Rule 3-7.6(K)(1), of the Rules of Discipline of The Florida Bar.

Respondent respectfully contends that the Referee failed to comply with Rule 3-7.6(K)(1) of the Rules of Discipline of The Florida Bar in that the Referee's Report fails to make a "finding of fact" as to each item of misconduct of which Respondent is charged, particularly with respect to the finding by the Referee that Respondent violated Rule 3.4.3

of the Rules of Discipline of The Florida Bar and Rule 4-8.4(d) of the Rules of Professional Conduct of The Florida Bar, and yet, found an absence of intent to deceive and an absence of intent to deprive by Respondent.

The Referee's findings of fact and The Florida Bar's argument that the loan was usurious (RR-3), and that the loan agreement based upon its terms, was unenforceable (RR-3), is clearly in error, and is lacking in evidential support as is required by The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986):

> The purpose of the usury law is to protect the needy borrowers by penalizing unconscionable money lenders, Stubblefield v. Dunlap, 4 So.2d 519 (1941).

In this case herein, it is the Respondent/attorney/borrower who agreed to pay the client/lender an amount in excess of the usury rate. In order for the Referee to establish that the transaction was usurious, there must be a determination of the following elements; to wit: 1) a loan; 2) money to be repaid; 3) payment or agreement to pay a greater rate of interest than allowed by law; and 4) a corrupt intent [on the part of the lender-client] to take more than the legal rate, Lord v. Hodge, 209 So.2d 692 (2nd DCA 1968).

It is clear from the record in this case that there was no corrupt intent found on the part of the lender/client, because the lender did not prepare the loan documents, nor did he dictate the terms of the agreement, both of which were done by the borrower/Respondent. (BE-5)(T-107)(BE-4).

> Usury is largely a matter of intent and is not fully determined by fact that lender actually receives more than the law permits, but is determined by existence of a corrupt

> purpose in lender's mind to get more than the legal interest for money lent. I.R.E. Financial Corp. v. Cassel, 335 So.2d 598 (3rd DCA 1976).

Based upon the prevailing case law of this State, the summary determination by the Referee that the loan agreement was usurious and unenforceable was clearly erroneous and lacking evidential support.

> "Usury is ordinarily an issue of fact to be determined at trial." Keller v. Siegal, 319 So.2d 581, (Fla. 3rd DCA 1975).

> Usury is purely a personal defense created by statute for protection of borrowers, and therefore, any borrower may waive his right to claim the benefit of the defense. Gunn Plumbing Inc. v. Dania Bank, 252 So.2d 1 (1971).

There was never a trial or lawsuit alleging the issue of usury. The Referee's determination that the agreement was unenforceable was in error, and premature. The Referee obviously made a presumption that the defense of usury would have been utilized by the borrower/Respondent if a lawsuit by the lender had been filed. This presumption is completely without merit and contrary to the facts of the case because the Respondent totally complied with the agreement.

Clearly, the fact that there was never a determination or evidence of a "corrupt intent to take more than the legal rate of interest" by the lender/client; no trial determining the fact of usury; and clear factual evidence from the record that the borrower waived, or would have waived, the defense of usury, show that the Referee's finding of fact that the loan was usurious and the loan agreement was unenforceable was not supported by case law, evidence and facts, and was therefore erroneous.

II. 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 IN CASE BEFORE THE REFEREE.

The Florida Bar, in support of its argument involving the first issue of this appeal, states that this is a "one-Count disciplinary complaint...", and further proceeds to intimate that it involves only one Count of misconduct against Respondent. (AAB-12).

However, in the first line of its argument as to the second issue on appeal, The Florida Bar characterize the case as a "pattern of misconduct on Respondent's part." (AAB-14). Respondent respectfully submit to the Court that the Bar cannot have it both ways.

Respondent herein agrees with The Florida Bar that the starting point in determining proper discipline in this case should be The Florida Standards for Imposing Lawyer Sanctions. Respondent submits that the applicable standards to be imposed in this case are contained in Section 3.0 of the Florida Standards, to wit:

> 4.33 Public reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely affect another client, and causes injury or potential injury to a client.
>
> 7.3 Public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or legal system.

Florida Standards for Imposing Lawyer Sanctions, Section C, 3.0, states:

> "In imposing a sanction after a finding of lawyer misconduct, a court should consider the following":
>
> (a) duty violated

(b) the lawyer's mental state

(c) the potential or actual injury caused by the lawyer's misconduct

(d) the existence of aggravating or mitigating factors

In this case, the Referee determined that Respondent violated Rule 3-4.3, of the Rules of Discipline of The Florida Bar 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. Contrary to The Florida Bar's argument in its Answer Brief that Respondent's mental state was not specifically addressed, (AAB-16), the Referee in this case determined that the Respondent's state of mind was one of "remorse" regarding the duties violated as an attorney. (RR-9).

There was no actual injury to the client because the client was repaid the loan of $24,000.00, plus an additional $10,000.00, both within a one (1) year period from the time of the loan.

Respondent admits that it was initially his position that there was no potential injury to the client because the client was given a mortgage on real property worth almost twice the value of the loan. In addition, the Respondent gave the client a note of indebtedness for the amount of the loan. However, since the matter has been brought before the Bar, Respondent now agrees that there was a potential injury to the client, although unintended, and sought vigorously to be avoided by Respondent, and was in fact avoided by Respondent's repayment.

The aggravating factors in this case were selfish motive; vulnerability of victim; and substantial experience in the practice of law. However, the mitigating factors far outweigh the aggravating

factors. They were: 1) Absence of prior disciplinary record (over 17 years of practice); 2) Timely good faith effort to make restitution or to rectify consequences of misconduct (Respondent paid the client $600.00 per month, an additional lump sum amount of $3,900.00, and additionally repaid to the client the original amount of the $24,000.00 loan within 1 year); 3) Remorse (The Respondent evidenced remorse not only by actions towards client, but sincerely expressed remorse before Referee at hearing); 4) Full and free disclosure to disciplinary board and cooperative attitude towards proceedings (Respondent made every effort to assist The Bar in resolving the grievance filed against him); 5) Absence of intent to deprive victim of property (Respondent made every conceivable effort to insure that client did not suffer any property loss, even to the extent of taking actions that eventually resulted in Respondent being charged with misconduct by The Bar); 6) Absence of intent to deceive the victim (Respondent wrote the victim in excess of 10 letters in less than 1 year regarding the loan, and also provided information and copies of every document relevant to the loan).

Respondent herein respectfully contends that by the Referee specifically finding "an absence of intent" to deprive the client of property, and the "absence of intent" to deceive the client, clearly takes the Respondent's misconduct out of the realm of "knowingly" violating any duty or responsibility to a client, to one involving "negligently" violating a duty or responsibility to a client. Thereby, making the aforementioned Florida Standards for Imposing Lawyer Sanctions, 4.33 and 7.3, the applicable objective standards to be applied to Respondent in the case sub judice.

The Florida Bar, in examining supposedly "applicable case law" to determine appropriate discipline, cites the cases of The Florida Bar v. Pitts, 219 So.2d 427 (Fla. 1969); The Florida Bar v. Delves, 160 So.2d 114 (Fla. 1964); The Florida Bar v. Barley, 541 So.2d 606 (Fla. 1989); The Florida Bar v. Kramer, 17 F.L.W. S 81 (1992); and The Florida Bar v. Crabtree, 17 F.L.W. S 77 (1992). Clearly, none of these cases are similar to the case now before the Court. They can easily be distinguished from the present case by very important and relevant facts, to wit: The Pitts case and Delves case, both involve a situation where attorneys borrowed money from laymen; both cases involve attorneys who failed to reimburse or repay the loan to the laymen; and in each case, when lawsuits were filed to collect the money or judgment, both attorneys pled usury as a defense to the notes that each had prepared. Further, in the Delves case, the attorney intentionally furnished a defective instrument; violated an agreement not to encumber the security real property; failed to pay the indebtedness; and when a suit was filed against him for payment of a loan from a layman, the attorney pled usury as a defense to the note he prepared for the layman; additionally, the Delves case involved two different incidents of the attorney borrowing money from laymen.

Clearly, those two cases are not even close to the facts in the case herein. In the case now before the Court, the client was not only reimbursed, but was paid an additional $10,000.00 in less than a year by the attorney; there was a continuing good faith effort to repay the loan by the attorney; no lawsuit to enforce the note was ever brought against the attorney by the client; and the attorney never alleged usury as a defense or challenged the validity of the note given to the client in any

proceeding.

In the Barley case, the attorney provided no written evidence or security for the loan; charged the client excessive fees for legal services; withdrew fees from client's trust without permission; drafted three notes evidencing the debt and back-dated them. The back-dated notes prepared by the attorney did not contain the agreed upon terms of the loan.

The Kramer case involved an attorney who loaned a client money, intentionally required the client to sign a deed when the client thought he was signing a mortgage. The attorney subsequently transferred the deed to another party who forclosed on the client's property.

The Crabtree case was one wherein the attorney was employed to get $1.5 million from Europe; the attorney received a personal interest in the assets; represented two clients in the same transaction without informing either of them; took fees in the transaction without explanation; wrote phony letters designed to mislead anyone regarding the transaction; and the attorney had received a prior reprimand for similar conduct.

It is obvious that the Barley case, Kramer case, and Crabtree case involve facts that are immediately and obviously distinguishable from the ones in the case before the Court. The most notable distinctions are that the attorneys in the three cases attempted to deceive their clients and the Court by preparing false and fraudulent documents regarding the transaction, and in addition, it is clear that each case involved "an intent" by the attorney to deprive the client of property.

Respondent, in his initial brief, cited certain cases that

reflected appropriate discipline for Respondent's behavior. Respondent cites further the case of The Florida Bar v. Dunagan, 509 So.2d 291 (Fla. 1987), wherein the attorney entered into a business transaction with his client without advising the client to obtain independent legal counsel. The Court imposed a public reprimand and six (6) months probation. In the case of The Florida Bar v. Dougherty, 541 So.2d 610 (Fla. 1989), the attorney violated Rules Regulating the Florida Bar, Count I, Rules 1-102(A)(6) and Rule 4-13, failing to act with reasonable diligence; Count II, Rules 1-102(A)(6) and Rule 4-1.8, entering into a business transaction with client, without full disclosure; and Count III, Article XI, Rule 11.02(4), failing to maintain minimum trust records.

In the Dougherty case, supra, the Court determined that there was no evidence that Respondent had any intention of misappropriating any money belonging to the client; that he was candid during the hearing, and realized his error, and took steps to correct them; and that he had never been disciplined previously. Dougherty was publicly reprimanded and placed on probation for two years with certain conditions.

The Court, in addressing the issue of public reprimand, stated in the case of The Florida Bar v. Wetly, 382 So.2d (Fla. 1980), that:

> "Public reprimand should be reserved for such isolated instances of neglect; or technical violations of trust accounting rules without willful intent; or lapses of Judgment."

Respondent submits to this honorable Court, that the case herein is such a case as described in Wetly; the facts demonstrate that this is an isolated instance of negligence, and lapse of Judgment by Respondent.

Further, the facts of this case; the findings of the Referee; the

mitigation factors; Florida Bar Standards; and similar case law out of this Court involving lack of prior discipline, all support the conclusion that an imposition on the Respondent of 91 days suspension and rehabilitation, pursuant to Rule 3-7.10, Rules of Discipline, would be unduly harsh.

This honorable Court has determined by case law that after serving a suspension where the Respondent has to then apply for reinstatement via Petition under Rule 3-7.10, that a minimum time of six (6) to nine (9) months additional time of suspension is required prior to the determination of such Petition. The Florida Bar v. Casety, 499 So.2d 831 (Fla. 1987).

Therefore, clearly, the sanctions imposed by the Referee on Respondent herein is unappropriately harsh because it is tantamount to, at a minimum, of nearly a year's suspension from the practice of law.

The recommended 91 days suspension and rehabilitation disciplinary sanction is especially harsh when the Court considers that the requirements that Respondent must subsequently meet to demonstrate rehabilitation under Rule 3-7.10, such as remorse, repentance, restitution, lack of prior disciplinary action, and lack of malice, according to the record and the Referee's findings of fact, already exist and were proven by Respondent at the hearing of April 18, 1991.

Additionally, if this Court applies the often-cited test outlined in the case of The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970), as was done in the Respondent's initial brief, it is clear that suspension and rehabilitation recommended by the Referee in this case is unduly harsh, and that a public reprimand is the more appropriate sanction to be

imposed on the Respondent.

Wherefore, based upon the aforegoing, the Referee's recommended disciplinary sanction of 91 days suspension and rehabilitation is unduly and inappropriately harsh.

III. WHETHER THE REFEREE ERRED IN CHANGING HIS INITIAL RECOMMENDED DISCIPLINARY SANCTION TO BE IMPOSED ON RESPONDENT FROM "THREE MONTHS SUSPENSION AND PASSING THE ETHICS PORTION OF THE FLORIDA BAR EXAMINATION" 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 states clearly in his initial report that he recommended "suspension from the practice of law for a period of 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."

The Florida Bar argues in its Answer Brief that it is not clear exactly what the Referee meant in regards to whether the suspension should be less or more than 90 days. However, Respondent respectfully submits to this Court that it is obvious that "three months", constitute a period of time less or equal to 90 days, certainly, "three months" has never been judicially interpreted as being the same or equal to 91 days.

The Referee referred to a specific Rule in his initial report, Rule 3-5.1(e), Rules of Discipline, and not the more harsh Rule of 3-7.10, Rules of Discipline, as in his subsequent report. Also, the Referee stated that "passage of the ethics portion of the Florida Bar examination shall constitute proof of rehabilitation."

Surely, the subsequent recommended disciplinary sanction of 91 days suspension and rehabilitation pursuant to Rule 3-7.10, constitutes an enhancement of his initial recommended discipline, and was erroneous because of no additional findings of fact or error in the previous findings, but was based solely on the Bar's Motion for Clarification.

CONCLUSION

Respondent, a minority attorney and a sole practitioner in a seven county area which has no other minority attorneys; who has no previous record of disciplinary action against him; a member of The Florida Bar for 18 years; a former Assistant Public Defender for 5 years; a County Judge for one year; a former Board member of Three Rivers Legal Services; a former Secretary and Vice President of the Florida Chapter of the National Bar Association, is before this Court on an isolated instance of neglect and laspe of Judgment.

Respondent has made restitution, plus an additional $10,000.00 payment to the victim in less than a 1 year period of time. According to the Referee's report, Respondent has shown remorse; made full and free disclosure to the disciplinary board; shown cooperative attitude towards disciplinary proceedings; proved an absence of intent to deprive victim of property; and proved an absence of intent to deceive the victim."

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

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

(2) The recommended disciplinary sanctions are unduly harsh, and that a public reprimand is appropriate in this cause;

(3) The Referee erred in changing his initial recommendation of disciplinary sanction and enhancing recommended punishment without additional findings of fact.

Respectfully Submitted,

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CERTIFICATION

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to JOHN V. MCCARTHY, ESQUIRE, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, by Hand Delivery~~/U. S. Mail~~, this 2nd day of June, 1992.

Martin L. Black