IN THE SUPREME COURT OF FLORIDA

WILLIAM T. CHARNOCK,
Appellant,

v.

THE FLORIDA BAR,
Appellee.
_____/

INITIAL BRIEF OF APPELLANT WILLIAM T. CHARNOCK

ON APPEAL FROM THE REPORT OF THE REFEREE
CASE NO: 81,857
TFB CASE NO. 93-30,100 (05B)

LAW OFFICES OF JAMES MARTIN BROWN
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I. TABLE OF CONTENTS

Page

1. TABLE OF CITATIONS.....3
2. STATEMENT OF THE CASE.....4
3. FACTS OF THE CASE.....8
4. SUMMARY OF ARGUMENT.....17
5. ARGUMENT.....19
6. ARGUMENT.....24
7. ARGUMENT.....26
8. ARGUMENT.....32
9. CONCLUSION.....34

II. TABLE OF CITATIONS

1. The Florida Bar v. Anderson, 538 So.2d 852.
2. The Florida Bar v. Brigman, 307 So.2d 1092 (1975).
3. The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991).
4. The Florida Bar v. Fischer.
5. The Florida Bar v. Pearce, 631 So.2d 1092.
6. The Florida Bar v. Scott, 566 So.2d 765 (Fla 1990).
7. The Florida Bar v. Temmer, 632 So.2d 1359.
8. Florida Rule of Civil Procedure 1.580
9. In Re Bithoney, 486 F.2d 319 (1973).
10. Florida Standards for Imposing Lawyer Sanctions 9.32

REFERENCES MADE TO SPECIFIC PARTS OF THE RECORD

RR = Report of Referee

R = Record

III. STATEMENT OF THE CASE

A complaint alleging ethical misconduct against Respondent was submitted to The Florida Bar Disciplinary Office in Orlando under the signature of Attorney Jeffrey P. Cario as attorney for both the party foreclosing a lien on the subject property and the putative buyer of such property at foreclosure sale, the same having been executed by Attorney Cario on 21 July, 1992. At roughly the same time Attorney Cario filed a complaint with the Office of the State Attorney in Brooksville against Respondent repeating those same allegations contained within his letter to The Bar Disciplinary Office, seeking criminal prosecution and bypassing the filing of a complaint with the Hernando County Sheriff's Department.

Attorney Cario's letter to the Disciplinary Office in Orlando was processed, forwarded to Respondent and a written reply was submitted by Respondent directly to Attorney Cario with a copy to Bar Staff Counsel on 15 August, 1992, denying any violation of the Rules Regulating The Florida Bar.

Attorney Cario's complaint and the Respondent's reply were forwarded to Fifth Circuit Grievance Committee "B" and a probable cause hearing was scheduled for 11 February, 1993. Pursuant to discussions between Counsel for Respondent and Bar Staff Counsel, probable cause finding was waived by stipulation and consent

agreement for the matter to proceed to hearing before a Referee for resolution.

Following Respondent's waiver of probable cause hearing a complaint was propounded by Bar Staff Counsel and filed in this Court on 28 May, 1993. Respondent has maintained his denial of the allegations of rule violations specified in the complaint and the parties exchanged requests for admission narrowing the issues to be determined by the Referee and to simplify the evidentiary hearing in this cause.

Evidentiary hearing upon the complaint was commenced before the Referee on 11 February, 1994, continuing throughout that day and resuming for an additional full day of testimony and production of evidence on 30 March, 1994. Testimony was presented from the Respondent on each day of the hearing and additional testimony was presented by three witnesses for The Florida Bar and six witnesses for Respondent. Testimony by Affidavit was presented on behalf of The Bar from Elizabeth Best, Esquire, and her former partner, Charlotte Anderson, Esquire, and on behalf of Respondent from Richard S. Fitzpatrick, Esquire, as an accepted expert witness in real property law and practice. Five exhibits were received into evidence upon motion of The Bar and ten exhibits were presented by Respondent. By consent of the parties the Court reviewed the entire contents of Hernando County Circuit Court Case #91-1551-CA-01

styled Ruthenberg v. Pelycado Onroerend Goed, B.V., that case being the underlying action within which each of the events relative to the complaint and Respondent's defense occurred. Upon conclusion of the presentation of all testimony and other evidence it was agreed between parties that Summation and Final Argument would be presented to the Referee in written form.

The summation and final argument addressed four distinct issues. With regard to the first issue of whether there was any unethical conduct on behalf of the Respondent in the execution of the affidavit the referee found that there was no unethical conduct. RR-4. The second issue was whether the affidavit of Todd Shoen was a false affidavit or contained perjured statements. The referee found that it was not a false affidavit nor did it contain perjured statements by Todd Shoen. RR-5. In addressing the third issue the referee founds that Rule 1.580 would allow a bona fide lessee under a valid contract who does not have actual possession to enforce his rights to possession. RR-6.

However, the referee did find that the procurement of a tenant, entering into the lease and directing and securing the affidavit of said tenant, all for the purpose of utilizing Rule 1.580 thereby delaying the transfer of actual possession pursuant to the writ of possession was unethical conduct with no substantial purpose other than to embarrass, delay or burden a third person,

deceitful, and prejudicial to the administration of justice. In addition, the referee found that the attempt by respondent to shift blame for his actions in procuring and putting Todd Shoen in possession by testifying that another attorney told him to put someone in possession was also unethical in that his testimony was not truthful.

Based on those findings the referee recommended that the Respondent be suspended for a period of ninety days. The Respondent requests a review of the finding of unethical behavior and the referee's recommended discipline.

IV. STATEMENT OF THE FACTS

Respondent received his law degree from the University of Florida in 1987 and was admitted to practice in the State of Florida in 1988. He maintained a practice in Hernando County, Florida, continuously from the time of admission concentrating his practice in the area of real estate transactions and real property law. At all times material to the present complaint, Respondent operated a high volume, solo law practice supported by a secretarial staff, a retired non-lawyer County Court Judge as an independent contractor Law Clerk and an independent contractor paralegal. Commencing in 1991 Respondent had occasion to represent a Dutch consortium incorporated under the laws of Holland under the name Pelycado Onroerend Goed, B.V. in a number of matters concerning acquisition, maintenance and disposition of parcels of real property located within Hernando County, Florida. At all times material to the complaint Respondent maintained a valid Power of Attorney to act on behalf of the Dutch corporation and specifically with the right to negotiate and enter into lease agreements for the Dutch properties located in Hernando County. Respondent routinely entered into short-term lease agreements with third parties on behalf of the Dutch corporation. The real property involved in the civil case underlying the present complaint was purchased by the Dutch corporation, such sale proceeding through closing without the

recording or filing of any liens or other encumbrances. At the time material to this action the property had a fair market value of approximately One Hundred Fifteen Thousand Dollars ($115,000.00) to One Hundred Twenty Thousand Dollars ($120,000.00) excluding the contents of the dwelling. A title insurance policy issued for the property showing no liens or other encumbrances. There is no question that the putative lien ultimately foreclosed in the underlying civil case was not filed, recorded or perfected prior to the closing on Pelycado's purchase of the property.

Subsequent to the closing a putative lien was filed by Douglas Ruthenberg d/b/a Castle Pools through the complainant, Jeffrey P. Cario, alleging a construction debt owed to Castle Pools in the approximate amount of Four Thousand Dollars ($4,000.00). In December, 1990 at the request of the Dutch corporation Respondent searched the county records on seven parcels of property including that parcel involved in the present action and located the putative Four Thousand Dollar ($4,000.00) lien filed after closing by Ruthenberg/Castle Pools. Respondent then sent certified mail notification to Attorney Cario advising of the legal invalidity of the lien and advising of Respondent's representation of the Dutch corporation concerning the subject property. No reply or further correspondence was sent to Respondent by Attorney Cario's law firm in reply to Respondent's certified notice of representation and

claim of the lien's invalidity. On or about 15 August, 1991, Attorney Cario's law firm filed a complaint to foreclose the said lien in the Circuit Court of Hernando County under that Court's Case #91-1551-CA-01. Notwithstanding the certified mail notice of representation forwarded to the Cario firm by Respondent in December, 1990, no copy of the complaint and summons were provided to the Respondent. No attempt was made to personally serve the Dutch corporation and the provisions of Florida Statutes Chapter 48 for foreign service admittedly were not properly followed by Ruthenberg/Castle Pools. The Cario firm did not file a Notice of Action or Affidavit of Diligent Search nor was Notice by publication in the local press effected. At the request of Ruthenberg/Castle Pools a local attorney was appointed as Guardian Ad Litem but mistakenly believed through misunderstanding of his staff that proper service could not be effected internationally through mail delivery. Throughout the time period in question Respondent represented the Dutch corporation on other matters concerning parcels of real property within Hernando County, Florida, including litigation involving a lien foreclosure action by the Cario law firm on behalf of Ruthenberg/Castle Pools against Pelycado on a nearby parcel of property which was voluntarily dismissed by the Cario law firm with prejudice.

The lien foreclosure action by Attorney Cario's firm on the subject property was prosecuted by Attorney Cario's firm without actual notice to either the Dutch corporation or the Respondent. Motion for Summary Final Judgment was filed on or about 12/17/91 and granted in hearing without notice to Respondent on 2/12/92 providing for sale to occur on 3/19/92. On 3/19/92 Mr. Gary Schraut-also represented by Attorney Cario's firm-purchased the property foreclosed upon by the Cario firm on behalf of Ruthenberg/Castle Pools for the amount of Eighteen Thousand Two Hundred Dollars ($18,200.00), the same being roughly One Hundred Thousand Dollars ($100,000.00) below fair market value.

On or about 31 March, 1992, while using a telephone in Judge's Chambers with the consent of the Judicial Assistant, Respondent observed pleadings in plain view on the Judicial Assistant's desk bearing the name of the Dutch corporation. Upon arrival back in his law office later that afternoon Respondent accessed the computer system and learned for the first time that the Cario firm filed and prosecuted a lien foreclosure action involving the subject property resulting in the purchase of such property by another Cario firm client for approximately 10% of fair market value. Respondent immediately notified the Dutch corporation by international facsimile transmission of what he had learned that afternoon and requested instructions from his client.

In accordance with the instructions received from the client Respondent then prepared and filed the following day a Motion to Quash Service of Process, Motion to Set Aside Foreclosure Sale and Motion to Deny Purchase or Possession and an Order to Stay was entered sua sponte by the Court on 4/2/92 nunc pro tunc 4/1/92. After the submission of various pleadings a Certificate of Title was issued on 4/7/92 bearing the date 3/30/92 and a motion for the issuance of a Writ of Possession was filed by Ruthenberg/Castle Pools on 4/9/92. A number of pleadings and submissions were submitted by the Cario firm on behalf of Ruthenberg and by Respondent on behalf of Pelycado and an Order was ultimately entered by the Court on 5/28/92 appointing a mediator and referring the matter for mediation.

At mediation Pelycado was represented by Respondent and purchaser Schraut and the foreclosing party Ruthenberg were represented by Attorney Cario. Schraut offered to return the property to Pelycado upon condition that Pelycado would pay Schraut the sum of Fifty Five Thousand Dollars ($55,000.00) plus the approximate Four Thousand Dollar ($4,000.00) amount of the lien and further conditioned upon the agreement of Pelycado to provide Schraut with a long-term no interest loan in the amount of an additional Fifty Thousand Dollars ($50,000.00) which offer was refused as extortionate by Respondent on behalf of Pelycado. Notice

of mediation impasse was submitted on 6/22/92 and the following day Ruthenberg moved entry of a Writ of Possession and Order of disbursement.

An Order was entered by the Court on 7/14/92 directing the Cario firm to prepare an Order denying Pelycado's Motion to Quash Service of Process, Motion to Set Aside Foreclosure Sale, Motion to Deny Purchase or Possession and granting Ruthenberg's motion for the Writ of Possession which Writ was signed by the Court on 7/15/92. The Writ of Possession in favor of Schraut was served on 7/16/92.

A copy of the Writ of Possession was forwarded to Respondent bearing U.S. Mail postmark dated 7/16/92.

On 7/15/92 in anticipation of the actual issuance of the Writ of Possession, Respondent sought advice from Attorneys Best and Anderson in Tampa, and in accord with his understanding of their representations entered into a verbal lease agreement with Todd Shoen allowing Shoen's occupancy of the subject property for a period of two weeks for a rental of Three Hundred Dollars ($300.00), the payment of which in currency is not disputed in the complaint. Respondent transmitted his file in toto through hand delivery to the Best and Anderson firm in Tampa, collected from the client and transmitted to the trust account of Best and Anderson a retainer fee of Fifteen Thousand Dollars ($15,000.00) on 7/16/92

and a Notice of Appearance on behalf of Pelycado was filed in the Circuit Court of Hernando County in the underlying cause by Attorney Charlotte Anderson on 7/17/92. Respondent's firm prepared an Affidavit for execution by Todd Shoen reciting the provisions of Rule 1.580, Florida Rules of Civil Procedure alleging possession by Shoen of the subject property which Affidavit was executed by Shoen, notarized by Respondent's secretary on 7/15/92 and was then served upon the Hernando County Sheriff's Department by Respondent's staff on 7/16/92. The Writ of Possession in favor of Schraut was served upon the subject property by the Sheriff's Department on 7/16/92.

The complaint admits the existence of the verbal contract between Respondent and Todd Shoen and the uncontradicted testimony adduced at hearing reflects that the agreed upon sum of Three Hundred Dollars ($300.00) for two week lease was a commercially reasonable amount and time frame for the subject property and its sister properties. An Appeal was filed and perfected on behalf of Pelycado to the Fifth District Court of Appeal which Court issued its opinion under its Case #92-1821 and #92-1822 on April 22, 1994, in favor of Pelycado and reversing the actions of the Trial Court.

On or about 7/21/92 Attorney Cario filed a complaint with The Bar Discipline Office in Orlando alleging that Respondent had falsified the Rule 1.580 Affidavit by Todd Shoen, had suborn

perjury by securing the signature of Mr. Shoen upon such Affidavit, had committed fraud by securing the notarization of such Affidavit by his secretary, Ms. Potts, and had attempted to subvert the administration of justice in the underlying case through the use of such Affidavit. Roughly coincident with the filing of his complaint to The Bar, Attorney Cario bypassed the Hernando County Sheriff's Department and filed a criminal complaint directly with the local State Attorney's Office through Investigator Jane Phifer, also a client of Attorney Cario.

On the basis of interviews conducted by Ms. Phifer an Information was filed by the State Attorney against Respondent under Hernando County Circuit Court Case #92-728-CF charging Respondent with several violations of the criminal law including perjury, false written statement, solicitation of perjury and principal to false acknowledgment by a notary.

A Pre-Trial Intervention Contract was entered into by the State, the Respondent and his Counsel on 15 March, 1993, expressly reciting the agreement of the parties that such contract was a "best-interest" agreement and did not contain any admission of factual or legal guilt to the charges. The Pre-Trial Intervention Agreement called for Respondent to attend and complete a Bar approved law office management course and to complete 3.0 hours of ethics continuing legal education. Respondent completed his

contractual obligations and an Order was then entered in August, 1993 dismissing each of the charges brought against Respondent by the State. With the consent of the State Attorney Respondent maintained his right to petition for the sealing and expunction of all records within the criminal case.

SUMMARY OF ARGUMENTS

1. The finding that the Respondent's conduct in procuring a tenant for a piece of property thereby delaying an attempt to take possession of said property was unethical is erroneous and unsupported by substantial and competent evidence in the record. The actions by the Respondent did not delay the change in possession of the property, and the attempt to delay such a change in possession was to be accomplished through the valid use of a Rule of Civil Procedure. The purpose of such use was to protect the Respondent's client and was done in the course of zealous representation. The Respondent was engaged in zealous representation of his client through the utilization of Rule 1.580 and nothing unethical, deceitful, or prejudicial to the administration of justice was done. The Respondent's actions were not unethical.

2. The Record shows that the Respondent never tried to shift blame from himself for his actions and did not state that the attorney Vetter or attorney Anderson told him to put someone in possession. The Respondent clearly stated that he accepted full responsibility for his actions and that attorneys Vetter and Anderson introduced him to Rule 1.580. As supported by the affidavit of attorney Anderson she told the respondent to read Rule 1.580 and see if it applied. The finding that the Respondent tried

to shift blame from himself or was untruthful is clearly erroneous and unsupported by the record.

3. The recommended discipline is clearly excessive in light of the facts of the case and that it fails to meet the goals of discipline. The findings of unethical conduct are clearly erroneous and even if the findings were supported in the record a suspension of ninety days does not meet the goals of discipline. A ninety day suspension unnecessarily deprives society of a competent and zealous attorney. Further, because of the facts of the case such a punishment would inhibit zealous advocacy.

4. The referee should have considered those mitigating factors that applied in this case. The referee erred in not considering those factors and those factors should be considered in reviewing the recommendation of the referee.

I. THE FINDING THAT THE RESPONDENT'S CONDUCT IN PROCURING A TENANT FOR A PIECE OF PROPERTY THEREBY DELAYING AN ATTEMPT TO TAKE POSSESSION OF SAID PROPERTY WAS UNETHICAL, DECEITFUL, PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE, AND HAD NO SUBSTANTIAL PURPOSE OTHER THAN TO EMBARRASS, DELAY OR BURDEN A THIRD PERSON ARE CLEARLY ERRONEOUS AND UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE WITHIN THE RECORD.

The Florida Bar must prove by clear and convincing evidence that an ethical violation has occurred. The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991). Once the referee has made a determination that the Bar has met their burden that finding will not overturned unless the Court finds that it is clearly erroneous or lacking in evidentiary support. The Florida Bar v. Scott, 566 So.2d 765 (Fla. 1990).

The referee make the following findings in his report:

1. I find no unethical conduct on behalf of the Respondent in the execution of the affidavit of Todd Shoen. (Page 4)

2. The affidavit was not a false affidavit nor did it contain perjured statements by Todd Shoen. (Page 5)

3. Rule 1.580 would allow a bona fide lessee under a valid contract who does not have actual possession to enforce his rights to possession. (Page 6).

This leaves the narrow finding that the procurement of a tenant, entering into the lease and directing and securing the affidavit of said tenant, all for the purpose of utilizing Rule 1.580 thereby delaying the transfer of actual possession pursuant

to the writ of possession was unethical conduct with no substantial purpose other than to embarrass, delay or burden a third person, deceitful, and prejudicial to the administration of justice.

It should first be pointed out that no actual delay was effected. The trial judge did not consider the affidavit and possession was transferred. By not actually delaying the proceedings the actions of the Respondent were not prejudicial to the administration of justice. In fact the possession that the Respondent was trying to delay was unjust and eventually reversed by the Fifth District Court of Appeal.

It is the contention of The Florida Bar that Respondent engaged in a course of conduct through entering into the lease agreement with Todd Shoen, securing Mr. Shoen's Rule 1.580 Affidavit and submitting the same to the Sheriff of Hernando County for the purpose of delaying the execution of the Writ of Possession pending hearing was a deliberate attempt on Respondent's part to subvert the due administration of justice.

In accordance wit the other findings made by the referee the Respondent now respectfully submits that his actions were wholly appropriate, well within the requirements of the law and within the purview of the rule requiring zealous representation of a client's interests while avoiding false statements to or fraud upon the tribunal.

Respondent acted diligently and in accordance with the requirements of the law, the Rules of Civil Procedure and the Rules Regulating The Florida Bar in protecting the lawful rights and interests of his client and in attempting to prevent the perpetration of a grave injustice by those opposing his client. Notwithstanding his notification by certified mail in December, 1990 to the Cario law firm, Respondent was not notified and did not receive any pleadings or other documentation some eight months thereafter when the Cario firm sought to foreclose an invalid construction lien recorded against the said property after the issuance of a title insurance policy showing no liens or encumbrances and after the purchase of the property by Respondent's client had been closed. The contents of Hernando County Circuit Court File #91-1551-CA-01 clearly reflects that from his initial accidental and fortuitous discovery of the lien foreclosure action, Respondent fully protected his client's rights and took every step reasonably available to him to prevent a manifold injustice. The ultimate ruling by the District Court of Appeal in favor of Respondent's client bears witness to the injustice which would have been perpetrated but for the opposition set in motion on an emergency basis by Respondent. In the absence of the net result of Respondent's representation of his client, Pelycado would have been forever deprived of the use and benefit of real property which it

owned in fee simple absolute free of valid liens or encumbrances with a fair market value of approximately One Hundred Fifteen Thousand Dollars ($115,000.00) to One Hundred Twenty Thousand Dollars ($120,000.00). The uncontradicted testimony from the hearing in this cause and supported by the contents of the underlying civil case file reflect that the construction lien by Ruthenberg/Castle Pools in the amount of approximately Four Thousand Dollars ($4,000.00) was invalid. It is further clear that without notice to Respondent and without effecting Service of Process on Pelycado, Ruthenberg/Castle Pools through Attorney Cario's firm obtained a foreclosure of such lien and secured a foreclosure sale during which the Pelycado property was purchased by another Cario firm client, Gary Schraut, for approximately 10% of its fair market value.

When Respondent accidentally discovered what had transpired he immediately took steps to protect his client's interests carrying the matter as far as he was able through the Trial Court and then securing Appellate Counsel to carry the matter to its conclusion through the DCA's reversal of the Trial Court. As a result of his zealous representation of his client's interests and his attempts to prevent the apparent misuse of the legal process and the subversion of the due administration of justice by others, Respondent found himself criminally prosecuted and subject to

formal Bar disciplinary proceedings upon the complaint of his opposing counsel in the underlying civil action.

As the facts of the case show the acts of the Respondent were not unethical, but zealous acts to protect the interests of his client. The referee's finding that the acts were unethical or deceitful are erroneous and without evidentiary support. Clearly, the Respondent's actions were for the purpose of protecting his client and not to delay or interfere with the administration of justice, and by not delaying the exchange of possession did not interfere with the administration of justice.

II. THE FINDING THAT RESPONDENT WAS BEING UNTRUTHFUL IN ATTEMPTING TO SHIFT BLAME FOR HIS ACTIONS BY TESTIFYING THAT ANOTHER ATTORNEY TOLD HIM TO PUT SOMEONE IN POSSESSION OF THE PROPERTY IS CLEARLY ERRONEOUS AND UNSUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE WITHIN THE RECORD.

The Referee's finding that the Respondent was being untruthful by testifying that a another attorney told him to put someone in possession of the property is based on the testimony of the Respondent and the affidavit of Attorney Anderson. The Respondent does not claim that another attorney told him to put someone in possession of the property only that they introduced him to Rule 1.580.

The Referee finds that "In discussions with both Vetter and Anderson, respondent became aware of the provisions of Rule 1.580." (RR-4). The Respondent does not claim that Vetter or Anderson told him to put someone in possession of the property. As Attorney Anderson agrees she introduced the Respondent to Rule 1.580 and that is all she did.

Most importantly, the Respondent's testimony was not offered to shift the blame from the Respondent. The Respondent clearly states "I'm not saying it's their fault. I did the affidavit and decided to put Mr. Shoen in there on my own." R-173. The testimony was offered to show how the Respondent became aware of Rule 1.580 and the Referee found that the Respondent first became aware of Rule 1.580 through those conversions. The Respondent knows that he

is liable for his actions and even if it was found that one of the attorneys did advise him to put someone in possession of the property he would remain responsible for taking that action.

Secondly, the evidence that Respondent was being untruthful is far from competent and substantial. The Respondent does not indicate that either Vetter or Anderson advised him to place someone in possession. They told him about the Rule. Attorney Anderson testifies that she advised the Respondent that if there was a tenant on the premises that it would appear "that subsection "b" of rule 1.580, third party claims, would appear to apply to the situation". See the Affidavit of Attorney Anderson. The Respondent's testimony does not conflict with that of Anderson. The Respondent claims that "they're the ones who first introduced me to the Rule. What I did after that was on my own." not that the attorneys told him to put someone in possession. R-173. The finding that the Respondent was not being truthful is unsupported by the evidence, and the Respondent's testimony is not in conflict with any other testimony or evidence and the finding should be vacated.

III. THE RECOMMENDATION THAT THE RESPONDENT BE SUSPENDED FROM THE PRACTICE OF LAW FOR A PERIOD OF NINETY DAYS IS EXCESSIVE WHERE THE RESPONDENT WAS FOUND TO HAVE PROCURED A TENANT FOR A PIECE OF PROPERTY THEREBY DELAYING AN ATTEMPT TO TAKE POSSESSION OF SAID PROPERTY

The Referee, in defining the issue on Page 6 of the Referee's report, states that the issue is whether the Respondent, with knowledge that his relief requested had been denied and the stay for issuance of the writ of possession had been lifted, was entitled as an attorney to procure a tenant and put that tenant in possession of the subject property in order to invoke Rule 1.580 thereby frustrating the actual possession of the subject property passing to Mr. Schraut.

Addressing this issue in the Referee's report the Referee makes the following findings:

1. I find no unethical conduct on behalf of respondent in the execution of the affidavit of Todd Shoen. (Page 4)

2. The affidavit was not a false affidavit nor did it contain perjured statements by Todd Shoen. (Page 5)

3. Rule 1.580 would allow a bona fide lessee under a valid contract who does not have actual possession to enforce his rights to possession. (Page 6)

In summation, Mr. Shoen had a valid lease as shown by the affidavit, however it is the manner in which the respondent obtained the lease to which the Referee takes exception. Because the respondent enters the lease agreement with the knowledge that he has no other legal recourse at that time to prevent a transfer

of possession, his conduct is found to be deceitful, prejudicial to the administration of justice, and having no substantial purpose other than to embarrass, delay or burden a third party. The respondent chose to utilize a legal remedy to protect the rights of his client, but the fact that the remedy was utilized at the "last minute" under the particular circumstances of this case it is held unethical.

This Court has much wider discretion when reviewing the recommended discipline than when reviewing the findings of the referee. The Florida Bar v. Pearce, 631 So.2d 1092, The Florida Bar v. Anderson, 538 So.2d 852. In determining the appropriate discipline the Court is guided by three purposes. The first purpose is to have a judgment that is 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 attorney. Second, the harshness of the punishment 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 first goal of discipline is not met by the referee's recommendation. The attorney in this case is charged with unethical conduct in an attempt to protect his client's interest by

delaying the opposition by utilizing a valid law in an inappropriate manner. The harm here is a delay and the prospective harm is that this lawyer would continue to be overzealous in his representation of his clients to the detriment of others.

Clearly there are two dangers of which we must be aware. The first is the danger of over-zealousness at the expense of others and the second is any punishment that might inhibit this lawyer from zealously representing his clients in the future. From the referee's recommendation it is clear that he does not feel this attorney needs extensive rehabilitation, otherwise the recommendation would be a ninety-one day suspension.

Other courts have warned that this situation places the attorney in an intolerable dilemma where the threat of discipline becomes a disincentive to advocacy and a bar to access to legal remedies. In Re Bithoney, 486 F.2d 319 (1973). The entire discipline process cannot help but make this attorney more aware of how important meaningful access to the Court is and to be cautious with one's degree of zeal. A public reprimand will protect society in the future and not deny society the services, both in terms of availability and advocacy, of a zealous and qualified lawyer.

The second goal of discipline is also met by a public reprimand. Due to the unique circumstances of this case the rehabilitation needed is not to be more aware of the law, diligent,

or truthful but to be more cautious and aware of the manner in which one represents one's client. This rehabilitation is learned through experience, not books. This process has been the experience that is the rehabilitation and a ninety day suspension can only be seen as excessively punitive. This is true particularly in light of the fact that the Respondent has attended a Bar approved course in law office management and taken three hours of continuing legal education in the ethics field through the agreement that was entered with the State on the related criminal charges resulting in the dismissal of the case against the Respondent.

It is excessively punitive when looking at the aspect of rehabilitation and when looking a the degree of fairness to the Respondent. Commonly, ninety day suspension are used in cases of substance abuse. The Florida Bar v. Temmer, 632 So.2d 1359. Forty five day suspensions have been recommended where lawyers have obviously violated commonly known laws such as repeated failure to file tax returns. The Florida Bar v. Pearce, 631 So.2d 1092. In The Florida Bar v. Fischer, the was a ninety-one day suspension where the lawyer specifically instructed an employee to lie about a court proceeding to further his interests by having a case against the lawyer dismissed. Here there is no law violation, drugs, trust account violations, or violence. In the end the

attempted delay did not delay possession of the property by the opposing party.

Had this case represented a series of acts of misconduct which in the aggregate constitute a serious breach of ethics then such a stern sanction would be necessary. The Florida Bar v. Brigman, 307 So.2d 161 (1975). But, this case is one incident of misconduct due to the lawyer's attempt to protect his client's interest, and the harm done was a delay in possession of a piece of property by the opposing party. A ninety day suspension is entirely disproportionate to the nature of the violation. The Bar had previously argued that because the Respondent had been previously disciplined that this did show a pattern of misconduct, but the Respondent's previous admonishment was based on a conflict of interest where the actual violation occurred over four years ago which the Respondent has learned from and that type of behavior has been cured. This matter is entirely different both in character and in time.

The third goal of discipline is to prevent others from repeating this conduct. Again, the fear in punishing too harshly is that the fear of stern punishment will prevent the zealous attorney from representing his client to the fullest. A public reprimand will put other attorneys on notice that such behavior is

inappropriate and by doing so make them think before acting over-zealously without inhibiting advocacy.

In conclusion, the referee makes a separate determination based on the testimony given during the disciplinary proceedings that the attempt by Respondent to shift blame for his actions in procuring and putting Todd Shoen in possession by testifying that another attorney told him to put someone in possession was also unethical in that his testimony was not truthful. (RR-6). As shown in Section IV of this brief the Respondent's testimony was not offered to shift the blame, only to show that either Vetter or Anderson introduced him to Rule 1.580 as shown by his statements at R-173 that "They're the ones who first introduced me to the Rule. What I did after that was on my own."

In conclusion the recommendation of the referee is excessive, does not serve the goals of discipline, inhibits zealous advocacy, and is not supported by competent and substantial evidence. The proper form of discipline would be a public reprimand as such would properly meet the goals of discipline and not deprive society of a competent and zealous advocate.

IV. THE REFEREE FAILED TO CONSIDER RESPONDENT'S MITIGATING FACTORS BEFORE RECOMMENDING THE NINETY DAY SUSPENSION.

The Respondent raised the following factors to be considered in mitigation at the hearing on September 8, 1994 at page 30:

1. 9.32 (b). Absence of a dishonest or selfish motive.

2. 9.32 (e). Full and free disclosure to the disciplinary board or cooperative attitude toward proceedings.

3. 9.32 (f). Inexperience.

4. 9.32 (g). Character or reputation.

5. 9.32 (j). Interim rehabilitation.

6. 9.32 (l). Remorse.

7. 9.32 (m). Remoteness of prior offenses.

The Respondent acted to protect his client's interest and lacked a dishonest or selfish motive. His goal was protect his client by using a valid Rule of Civil Procedure and thus 9.32 (b) should have been considered. During the entire disciplinary process the Respondent took full responsibility for his actions and cooperated fully with the Florida Bar and the referee and expressed his remorse for his actions and thus 9.32 (l) and 9.32 (e) should have been considered.

Although the Respondent was an reputable member of the Bar these charges resulted from his use of a Rule that he was not familiar with and since that time he has taken remedial measures to insure that this time of conduct will not occur again including

attendance at a Bar approved law office management course and three hours of continuing legal education in ethics. As found by the referee attorney's Vetter and Anderson introduced the Respondent to Rule 1.580 and thus he was inexperienced with the particular Rule in question and 9.32 (f) should have been considered and with the remedial measures he has taken to prevent this or other misconduct from occurring in the future 9.32 (j) should be considered.

Several witness testified as to the Respondent's character and fitness to practice law and the prior admonishment received by the Respondent was based on allegations that were four years old. The Respondent's character and the remoteness of any prior discipline should be considered in this case under 9.32 (g) and 9.32 (m).

CONCLUSION

The finding that the Respondent had tried to shift blame for his actions is clearly erroneous and unsupported by the record. The finding that the Respondent's actions were unethical is clearly erroneous and unsupported by the record. His actions were part and parcel of zealous advocacy and his use of Rule 1.580 was a valid use of that Rule.

Even if the timing and manner of the Respondent's use of Rule 1.580 was beyond the scope of zealous advocacy, the discipline recommended by the referee is excessive. What he was trying to do was to protect his client's interest and prevent the injustice that the Fifth District Court of Appeals eventually had to correct. A ninety day suspension is clearly excessive for such behavior and would only serve to deny society access to a competent lawyer and inhibit zealous representation by other lawyers in the future. The proper form of discipline would be a public reprimand.

RESPECTFULLY SUBMITTED on behalf of the Respondent, William T. Charnock, III, Esquire, on this the 3 day of January, 1995.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished to Carlos E. Torres, Esquire, Assistant Staff Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801-1084, by U.S. Mail delivery, on this 30 day of January, 1995.

JAMES MARTIN BROWN, ESQUIRE