IN THE SUPREME COURT OF FLORIDA

14

THE FLORIDA BAR,

Complainant,

v.

ALEC J. ROSS,

Respondent.

_____/

Supreme Court Case
No. 89,012

Respondent's Initial Brief

On Petition for Review

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SYMBOLS

T.T._____, shall refer to the Trial Transcript of July 15, 1997, and page number.
D.T._____, shall refer to the Transcript of Hearing on Discipline of September 26, 1996, and page number.
R.R._____, shall refer to the Referee Report, and page number.

STATEMENT REGARDING ORAL ARGUMENT

Respondent respectfully suggests that the facts and legal arguments presented in the briefs and record before this Court and the decisional process, will be significantly aided by oral argument.

STATEMENT OF THE CASE

Respondent received a ninety-one (91) suspension and remains suspended from the practice of law by order of the Florida Supreme Court dated November 15, 1990. (See Supreme Court Case No. 75,358).

Although this action arose as a result of a complaint filed by Roger Quisenberry (hereinafter referred to as "Quisenberry"), pertaining to Respondent's actions in the case of County Collection Services, Inc. vs. Roger Quisenberry, Case No. **L93-1433 AH,** in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida. (hereinafter referred to as the "underlying case"). None of the violations with which Respondent was charged by the Bar in its complaint are those specifically raised in his complaint. Quisenberry was the owner of real estate property at Hypoluxo Village, in Palm Beach County, Florida. On or about August 2, 1994, County Collection Services, Inc., obtained a Summary Judgment in Foreclosure against Quisenberry's property for failure to pay a code enforcement lien. On or about August 25, 1994, Quisenberry's property was purchased at a foreclosure sale by Robert Lazar (hereinafter referred to as "Lazar"). Quisenberry retained attorney Kim St.James (hereinafter referred to as "St. James") to represent him in setting aside the foreclosure sale. St. James filed a Motion to Set Aside the Foreclosure Sale together with an affidavit of Quisenberry in support of the motion. The Quisenberry affidavit stated that he was out of town during the time of the finalization of the foreclosure sale and that he had not received notice of the foreclosure sale date. (R.R. 2).

Respondent had had a prior dispute with Quisenberry in an unrelated matter involving a landlord/tenant dispute. Respondent has continuously maintained that he is owed money from Quisenberry as a result of the prior dispute. Respondent, is a real estate investor and a foreclosure buyer and became aware of the Motion to Set Aside and the Quisenberry affidavit, by reviewing the Court file and knew personally that the information contained in the affidavit was false.

In early November 1994, Respondent contacted Lazar and advised him that he had information regarding the falsity of the Quisenberry affidavit and offered to buy an interest in Lazar's purchase and to provide his services as a real estate investor and foreclosure expert in a an effort to defeat Quisenberry's Motion to Vacate Foreclosure Sale. Respondent then contacted Lazar's attorney, Steven Newburgh, and made the same representations to him. As a result of Respondent's telephone call to Newburgh, a witness subpoena issued for the deposition of Respondent. The deposition was scheduled for December 8, 1994.

Upon receiving the Notice of Taking Deposition of Ross, St. James contacted the Respondent to find out what Respondent knew about this matter. Respondent advised St.James of his dispute with Quisenberry and that in exchange for the monies owed to him by Quisenberry, he could make himself unavailable for deposition and/or for service of the subpoena for deposition and would be unavailable for trial. Respondent also stated to St. James that he was going on vacation and if Quisenberry paid him the money owed him, he could leave town sooner or remain on vacation longer. In December 1994,

Respondent contacted St. James again to inquire as to an answer to his proposition to settle his other matter with Quisenberry. Respondent's proposition was rejected. In the interim, Respondent continued to send numerous faxes to Newburgh, outlining his expertise in foreclosure matters, continued to provide him with additional documents to help defeat the Quisenberry motion, and continued to offer to buy an interest in the property purchased by Lazar. These overtures were also rejected.

The process server for Newburgh was unable to serve Respondent, and Newburgh requested a continuance. Subsequently, Respondent did testify and Quisenberry's Motion to Set Aside the Foreclosure Sale was defeated.

On December 13, 1994, Quisenberry filed a complaint with The Florida Bar against Respondent, which is the subject matter of these proceedings. This matter was heard by Grievance Committee (11E) on February 21, 1996. The Grievance Committee found no probable cause under Rule 4-8.4(b) of the Rules Regulating The Florida Bar (criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness...), probable cause under Rule 4-8.4(c) (engage in conduct involving dishonesty, fraud., deceit, or misrepresentation), and deferred their vote on Rule 4-8.4(d) (engaged in conduct in connection with the practice of law that is prejudicial...). This charge was latter dismissed by the grievance committee. However, it did find probable cause from the St. James' testimony relating to Respondent's request for money in exchange for his not being available to be served. Subsequently, The Florida Bar filed the instant action. The complaint is based solely on a violation of Rule 4-8.4(c) and accuses Respondent

exclusively of being "dishonest" per se. Respondent's actions which are alleged to be dishonest are his failure to directly (and promptly) notify the trial judge in the underlying action of his belief that Quisenberry had filed a fraudulent affidavit and his alleged offer to St. James to make himself unavailable to be served for deposition, and out of town for deposition, if he was paid money, and to his offer to allegedly sell his testimony to Newburgh's client.

The Honorable Terri Ann Miller was duly appointed as a Referee in this matter and a final hearing took place on July 15, 1997. The referee found Respondent guilty of violating Rule 4-8.4(c). A hearing on the penalty phase took place on September 26, 1997, and on September 30, 1997 the Referee entered her final report. This report was drafted by counsel for the Bar and Counsel for Respondent was not given the opportunity to provide any input in the drafting of the report, or the findings of fact.

The Referee recommended that Respondent be disbarred pursuant to Standard 5.11(b) and (f) of the Florida Standards for Imposing Lawyer Sanctions. Further, she found aggravating circumstances pursuant to Standard 9.22(a) prior disciplinary offenses, (b) dishonest or selfish motive, and (g) refusal to acknowledge the wrongful nature of conduct. The Referee found no mitigating factors. Respondent take issue with the Referee's findings of fact and recommended discipline of disbarment and asks this Court not to approve her recommendation. Respondent filed a timely Petition for Review and this Court has jurisdiction pursuant to Art. V, Section 15, Fla. Const.

SUMMARY OF ARGUMENT

The Bar accuses the Respondent of violating Rule 4-8.4© as it relates solely to the term "dishonesty". The rule does not define the term "Dishonesty". The lack of definition in the rule is fatal to its continued validity. A statute or rule which does not give people of ordinary intelligence fair notice of what constitutes forbidden conduct is unconstitutionally "vague".

The referee's findings of fact were clearly erroneous and lacking in evidentiary support. The referee made no specific findings of fact as to what acts on the part of the Respondent were "dishonest". Not a single findings of fact in the report is corroborated by a citation to the testimony offered during the trial or disciplinary hearing. The referee's findings of fact are contrary to the testimony of Newburgh and St. James.

The referee did not make independent findings of fact. The report of the referee was ghost written by Bar counsel, and Respondent was not given the opportunity to challenge the findings of fact. When an interested party is allowed is to draft a judicial opinion without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming. The presumption of correctness with which the referee's report comes, has been overcome by a showing that said findings are clearly erroneous and lacking in evidentiary support.

The recommended penalty of disbarment is excessive and contrary to law. The

Bar and the referee relied on cases for disbarment without distinguishing them and applying their facts to the case at bar. To approve the referee's report would create great disparity in discipline and be contrary to the stated goals of the Standards for Imposing Lawyer Sanction.

ARGUMENT I

THE REFEREE COMMITTED ERROR BY DENYING RESPONDENT'S MOTION TO DISMISS, BASED ON RULE 4-8.4© BEING UNCONSTITUTIONALLY VOID FOR VAGUENESS

The Bar accuses the respondent of a rule violation relating solely to the word "Dishonesty". (See the Bar's Notice of Service of Answers to interrogatories 4 and 6). This charge was brought under Rule 4-8.4(c) which states that a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation. The Bar maintains that Respondent committed a dishonest act per se. The rule does not define the terms "dishonesty" or "dishonest". Additionally, there is no legal definition contained in the Florida Statutes, of any substance, that would lead to the elements that would show a reasonable individual what it means. The word "dishonest" does not convey sufficiently definite warnings as to the proscribed conduct that people of common understanding would positively know the actual prohibited conduct.

The vagueness of the word dishonest, or its misapplication by the Bar, is readily apparent. Dishonesty has commonly been associated with not telling the truth. None of the testimony given by Respondent's accusers (St. James and Newburgh) is cited by the referee, as Respondent having told either one of them something that was false.

The lack of definition in this Rule is fatal to its continued validity. Warren vs. State, 572 So.2d 1376 (Fla. 1991). In the Warren case, this Court struck down a statute which used the term "ill fame", as unconstitutionally vague. The Court reasoned that a

statute which does not give people of ordinary intelligence fair notice of what constitutes forbidden conduct is "vague" for purposes of determining whether the statute is constitutional.

The fundamental concern of the vagueness doctrine is that people be placed on notice of what conduct is forbidden or illegal. The standard for a constitutionally impermissible rule or law is whether it contains such vague language that a person of common intelligence must speculate about its meaning and then be subject to punishment if his guess is wrong. State vs. Wershow, 343 So.2d 605 (Fla. 1977). See also F.S.A. Const. Art 1 S 9; U.S.C.A. Const. Amends. 5, 14. Thus, a vague law is one which fails to give adequate notice of what conduct is prohibited and which, because of its imprecision, may invite arbitrary and discriminatory enforcement. State vs. Rawlins, 623 So.2d 600 (Fla. 1993).

In the Wershow case, this Court declared a statute unconstitutionally vague. It stated that the test for vagueness is much less severe where the maximum penalty is loss of office or position. In the case at bar, Respondent is being disbarred based on this rule.

The vagueness and ambiguity of this rule is apparent in the Referee's Report. The Report fails to state exactly what in the Respondent's conduct was "dishonest". The referee never found that Respondent was obligated to report this information to the trial judge in the underlying case. It appears, from the record, that the findings of facts of the Referee may be couched in allegations of attempted extortion and bribery. (See D.T.8).

On June 17, 1997 Respondent brought this issue before the referee by way of a

Motion to Dismiss, founded on the constitutionally of Rule 4-8.4©. The referee denied said motion and therefore committed error in doing so.

ARGUMENT II

THE REFEREE'S FINDINGS OF FACT WERE CLEARLY ERRONEOUS AND LACKING IN EVIDENTIARY SUPPORT

The referee's findings of fact are not supported by competent and substantial evidence due to the fact that they are in significant part, clearly erroneous. Although the referee's findings of fact enjoy a presumption of correctness, they can be overturned if they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Niles , 644 So.2d 504,506 (Fla. 1994).

The referee made no specific findings of fact as to what acts on the part of the Respondent were "dishonest". The report merely states the conclusion that Respondent should be found guilty of violating Rule 4-8.4© (R.R. 3). Not a single finding of fact in the report is corroborated by a citation to testimony offered during the trial or the disciplinary hearing. In the case of The Florida Bar v. Vining, 23 Fla. L. Weekly, S82, S83 (Fla. Feb. 12, 1998), the respondent attacked the referee's findings of fact. This court, in rejecting respondent's arguments and approving the referee's findings of fact, specifically stated that, "each finding of fact in the referee's report was corroborated by a citation to the testimony offered". Therefore, it can be inferred that there should be specific references to the record when findings of fact are made.

Based upon the Bar's sworn response to interrogatories, the Bar narrowed the scope of its complaint to only "conduct involving dishonesty" within the meaning of Rule 4-8.4© (T.T. 13, 19). Therefore, the case did not involve fraud, or misrepresentation.

However, in the report, the referee finds Respondent guilty of violating Rule 4-8.4© without making any distinctions. (R.R.4).

The referee states that St. James "believed Respondent was soliciting a bribe" (R.R. 3-4), but does not make a specific finding that Respondent actually solicited a bribe. The referee then goes on to state that, "St. James rejected Respondent's attempt at extortion", (R.R.4), without making a finding that there was an extortion committed or any type of analysis as to the elements of extortion. Again, there is no reference to the testimony confirming these findings of fact, nor the exact acts of the Respondent which constitute "dishonesty" within the meaning of Rule 4-8.4©.

Respondent's conversation with St. James did not meet the common law definition of extortion (See Black's Law Dictionary, 6th Ed.,p.584 (1990)), nor the statutory definition of extortion. (See F.S. 836.05). Respondent did not tell St. James anything about the case, according to her own testimony. (See T.T. 57-83). However, it appears that the referee, without making a specific findings of fact, considered Respondent guilty of bribery and extortion, and extrapolated that feeling into a conclusion that he violated Rule 4-8.4©, and thus those actions had to be dishonest. (D.T.8). The referee, however, does not make this part of the record. In fact, virtually all the cases relied upon by the Bar and the referee in support of the punishment of disbarment deal with conduct involving either bribery or extortion. (D.T. 14).

In the report, the referee characterized Newburgh's testimony as the Respondent demanding participation in the Lazar foreclosure purchase, in exchange for information.

(R.R.3). This is a mischaracterization of the record. The testimony at trial was clear that Respondent wanted to "buy" an interest in the property (T.T.36), and was not selling information. In fact, one of the letters that Respondent faxed to Newburgh clearly stated, "If your client is willing to **sell** me an interest as a co-owner in the case and with my assistance, there will be a much better chance of success in defeating Mr. Quisenberry's motion to vacate the foreclosure sale." (T.T.36) (Emphasis added). Respondent was trying to purchase an interest in the property and offered his services as an expert in the area of foreclosures. The referee failed to consider this letter (even though it was admitted into evidence), otherwise, the findings of fact would have been different.

ARGUMENT III

THE REFEREE DID NOT MAKE INDEPENDENT FINDINGS OF FACT

The referee did not make independent findings of fact, but rather, relied on the findings of fact prepared by Bar counsel and denied Respondent the opportunity to challenge them.

At the hearing on discipline, the first thing Respondent's counsel did was to challenge the findings of fact (D.T. 17-18). The referee responded by saying, "We are not going to do that today". (D.T. 17). Respondent countered that, "the penalty is dependent on the findings of fact. If they[facts] are erroneous, then the penalty that will be provided will be based on an erroneous set of facts". (D.T. 18). The referee's response was simply, "You can argue that to the Supreme Court". (D.T. 18). Respondent has obviously accepted the invitation.

Although the referee provided Respondent's counsel with a proposed copy of the report prepared by Bar counsel, to allow him, "an opportunity to review that as well" (D.T.6), it was a meaningless act because he was precluded from challenging it.

In the Vining case, respondent challenged the referee's findings of fact based upon the ground that the referee considered a circuit court judgment and the referee incorporated some of the language contained therein. Id. At S83. In approving the referee's report, this court placed special emphasis on the fact that "each findings of fact in the referee's report is corroborated by a citation to the testimony offered during the disciplinary hearing, thus, rebutting respondent's argument that the referee merely adopted another's findings of fact. Accordingly, we approve the referee's findings of fact".

Such is not the case here. In the instant case, the referee merely adopted the proposed report prepared by Bar counsel and refused to entertain any challenges to it by Respondent. (D.T. 18). Allowing litigants to ghost write opinions creates a very apparent danger. The United States Supreme Court has held that when an interested party is permitted to draft a judicial order without response by or notice to the opposing side, the temptation to overreach and exaggerate is overwhelming. Anderson v. City of Bessener City N.C., 105 S.Ct. 1504,1510(1985). The U.S. Supreme Court has often criticized courts for their verbatim adoption of findings of fact prepared by the prevailing party, particularly when those findings have taken the form of conclusory statements, unsupported by citation to the record. Id.

It is clear from the record that the referee's report prepared by Bar counsel was conclusory in nature, without making any specific findings of fact as to what actions on the part of the Respondent were "dishonest". This flaw is further compounded by the fact that each findings of fact failed to make any citation to the testimony, and Respondent was prohibited from challenging it. The presumption of correctness with which the referee's findings of fact comes has been overcome by a showing that said findings, with respect to the Newburgh and St. James testimony, and the failure to give citations to the testimony are clearly erroneous and lack evidentiary support. *See* Niles *supra.* Accordingly, this Court should reject the referee's findings of fact.

ARGUMENT IV

THE RECOMMENDED DISBARMENT IS EXCESSIVE AND CONTRARY TO LAW

The sanction resulting from a Bar disciplinary action must serve three purposes: The sanction must be fair to society; the sanction must be fair to the attorney; and the sanction must be severe enough to deter other attorneys from similar misconduct. The Florida Bar v. Neu, 597 So.2d 266, 269 (Fla. 1992). This Court's review of a referee's recommendations as to disciplinary measures is broader than that afforded to factual findings because the ultimate responsibility to order an appropriate sanction rests with this Court. The Florida Bar v. Rue, 643 So.2d 1080, 1082 (Fla. 1994).

The stated purpose of the Standards for Imposing Lawyer Sanctions are threefold: (1) the consideration of all relevant factors appropriate to imposing a certain level of sanction, (2) the consideration of the appropriate weight of such factors, in light of the stated goals of lawyer discipline, and (3) consistency in imposing those Standards. Prior to considering the imposition of the Standards, Standard 3.0 asks the referee to consider the following questions: (1) What duty was violated? (2) What was the lawyer's mental state? (3) What was the potential or actual injury caused by the lawyer's misconduct?

(4) Did there exist any aggravating or mitigating factors?

The only factors, pursuant to Standard 3.0, that the referee appears to have considered in the report are aggravating factors (prior disciplinary offenses, dishonest or

selfish motive and refusal to acknowledge the wrongful nature of conduct). The referee fails to make a specific finding as to what duty was violated by Respondent.

In Support of disbarment, the report mentions Rules 5.11(b) and (1) of the Rules Regulating The Florida Bar. The referee states, I recommend that the Respondent be disbarred, pursuant to 5.11(b) and (f) of the Rules Regulating The Florida Bar". (See R.R.4). Rule 5.11(b) deals with **Trust Accounts Required,** and Rule 5.11 (f) deals with **Unidentifiable Trust fund Accumulations and Trust Funds Held for Missing Owner** These rules have nothing to do with the issues involved in the case at bar. It is clear that this was a mistake on the part of the drafter of the report, and the referee apparently signed the report without making an independent judgment as to what was placed before her. This is further evidence of the dangers that the U.S. Supreme Court alluded to when party litigants are allowed to ghost write judicial decrees. *See* Anderson *Supra.*

The authority which the referee was probably referring to here, were Standards 5. 11(b) and (f) of the Florida Standard for Imposing Lawyer Sanctions. Subsection (b) states that "a lawyer engages in serious criminal conduct Respondent was not charged with having committed any criminal conduct here. In fact the referee stated that "So I don't see where B would come into anything anyway. I think it applies when it is a party to a Suit. So I don't think that really comes into it". (D.T. 35). Further, the referee acknowledged that, "I would definitely agree that you were not prosecuted for anything here. That goes without saying. That would be distinguishing as to the cases that the Bar did give me as far as criminal prosecution... As to the acts themselves, I would have to

look at them and see, in essence, were they the same act. However, you weren't prosecuted. But I will review the case law." (D.T. 53). Based upon the report, it appears that the referee did not consider the case law. Thus, the report is inconsistent with the record. Even though the referee admitted that [Standard] 5.11(b) did not apply, it was in the report prepared by Bar counsel. This is further evidence of the danger of using ghostwriters for crafting judicial decrees. *See* Anderson. *supra.*

Subsection (f) states "a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice" This standard is inapplicable to the case at bar because the Bar never charges Respondent with fraud, deceit or misrepresentation. Respondent was not a practicing lawyer at any time material hereto. His was merely functioning as a private businessman.

Respondent's conduct, although foolish and ill advised, cannot be characterized as intentional, as you would characterize the culpable state of mind of a criminal defendant. Even though the Bar never charged Respondent with bribery or extortion, nor were any criminal charges brought against him, it still proceeds to rely on a litany of cases for the proposition that disbarment was appropriate here, which involve either criminal bribery or extortion.

The Bar relied on a number of cases for the proposition that bribery and extortion require disbarment, without any type of analysis of the facts and circumstances of those cases and applying those sets of facts to the case at bar. (D.T. 15-18). Those case are

distinguishable and inapplicable to the instant case. The Bar relies on these cases merely for their desired result of disbarment, without regard to the facts. When Respondent's conduct is juxtaposed to other cases such as Vining, which involved far more egregious conduct (multiple offenses involving taking disputed funds from the registry of the court without noticing other interested parties), and he receives a three year suspension, while Respondent gets disbarred, it shows a tremendous disparity in discipline. In The Florida Bar v. Kleinfeld, 648 So.2d 700 (Fla. 1994), the respondent lied under oath and this court imposed a three year suspension.

It is interesting to note that while the Grievance Committee found no probable cause that the Respondent committed any criminal act involving dishonesty, the referee's report in couched in terms of her belief, solely from St. James's "belief", that Ross had committed a criminal act, namely extortion and/or bribery.

For this court to approve the referee's recommendation of disbarment would create a tremendous disparity in the imposition of disciplinary sanctions. This disparity is contrary to stated purpose of the Florida Standards for Imposing Lawyer Sanctions, which are designed to promote consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions. See Standard 1.3.

The referee also failed to make any findings of fact that Respondent's conduct constituted bribery and extortion. This type of rationale, without distinguishing the misconduct involved, will inevitably lead to illogical and inflexible results, and that is what has happened in the case at bar. The Bar and the referee have failed to evaluate all

of the relevant factors of Respondent's misconduct in crafting a punishment which will be fair to society, fair to the attorney and sever enough to deter other attorneys from similar misconduct. *See* Neu. *supra.*

The referee also relied on Standard 9.22 (a) (prior disciplinary offenses), and the Bar relies on the cases of The Florida Bar v. Berns, 425 So.2d 526 (Fla. 1983) and The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) for the proposition that cumulative misconduct is an aggravating factor and requires disbarment in the case at bar. (D.T. 17).

Respondent's prior misconduct was an advertising violation in 1988, where he receive a reprimand, (See Supreme Court Case No. 71,350). Since this reprimand is more that seven (7) years old, it should not even have been considered by the referee. (See Standard 9.22).

The second prior misconduct was a ninety-one (91) day suspension in 1990 which was based, in part, on dilatory practices in defending some clients in mortgage foreclosures. (See Supreme Court Case No. 75,358). In this matter, the referee stated, a good part of Mr. Ross' motivation was to help his clients... If the respondent shows during the 91 day suspension that he has behaved well, I would favor his reinstatement. Moreover, I would not object to being the referee in any further reinstatement proceeding." Accordingly, Respondent's prior misconduct did not involve moral turpitude, and the aggravating of these prior offenses to attempt to bootstrap it into disbarment is inappropriate and contrary to law. Although it is true that this court deals more severely with cumulative misconduct than with isolated instances, the type of prior

misconduct must be analyzed as well. In the Niles case, this court rejected prior misconduct because it did not involve moral turpitude. Id. At 507.

The referee cites 9.22(b) (dishonest or selfish motive). However, the referee has failed to defined exactly what acts on the part of Respondent are dishonest or where his motives are selfish. The referee also cites 9.22 (g) (refusal to acknowledge the wrongful nature of conduct). During the disciplinary hearing, the referee inquired directly on this point from Respondent, and the Respondent admitted that his conduct was not appropriate. (D.T.39). However, the referee refuses to acknowledge that.

The cases that most closely parallel the actions of the Respondent and that should be used as authority in the case at bar, are the cases of The Florida Bar v. Colee, 533 So.2d 767 (Fla. 1989), and The Florida Bar v. Jackson, 490 So.2d 935 (Fla. 1985). The issue in Colee involved the question of whether Colee should have gone to the tribunal with information he had. This was a case of selling testimony where the lawyer said, "We should be able to recover $200,000.00, because we are going to save the company a million dollars by bringing this to their attention." Colee tried to sell testimony in an on going litigation, and this court stated that, "We find that a ninety-day suspension is warranted." Jackson, also involved the issue of the selling of testimony, and the Respondent received a three month suspension.

The facts of the instant case are similar to what happened in Colee and Jackson. Yet, those attorneys were not prosecuted for being dishonest, much less for having engaged in "bribery" or "extortion" in their solicitation of money to provide information.

In fact, the rule under which this Court found them guilty does not even exist today. The unfairness and disproportionate penalty of disbarring Respondent is readily apparent. Those attorneys violated a specific rule that existed at that time and received, at most, a ninety (90) day suspension. Today there is no such rule. In the instant case, Respondent does the same thing (but no rule exists that prescribes an obligation, as a non-party or non-practicing attorney, to report a fraud to the trial judge, much less how he should go about contacting the trial judge), but the Bar wants him disbarred.

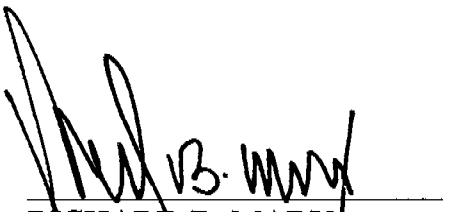
Additionally, and contrary to the Colee and Jackson cases, Respondent testified at the trial in the underlying case, without being under subpoena, and his testimony helped defeat the Quisenberry Motion to Vacate Foreclosure Sale.

In conclusion, Respondent draws this Court's attention to the fact that prior to instant case, the Respondent was and still remains suspended from The Florida Bar. Irrespective of this case, in order for the Respondent to ever practice law again in the State of Florida he must go through the reinstatement process and prove rehabilitation and suitability to practice law. Based upon the Referee's decision in this case, even if he had recommended a public reprimand, it will be a very difficult road to travel for the Respondent to be reinstated. Therefore, disbarment is too severe a punishment and contrary to the law.

CONCLUSION

In view of the Florida Standards for Imposing Lawyer Sanctions, together with the authority cited herein, the referee's disciplinary recommendation of disbarment should be rejected by this Court, and in its place, this Court should order a public reprimand or a suspension, based upon the unique set of circumstances involved in this case.

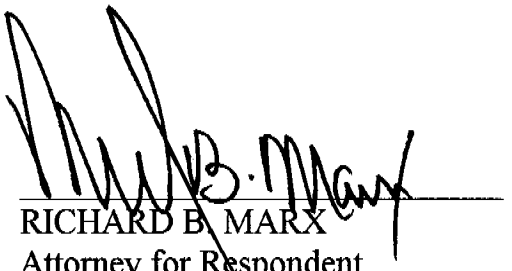
Respectfully submitted,



RICHARD B. MARX,
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the original and seven copies of Respondent's Initial Brief were sent via U.S. Mail to Sid White, Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32399; and a copy was sent to Billy J. Hendrix, Esq., Branch Counsel, The Florida Bar, 444 Brickell Avenue, Suite M100, Miami, Florida 33131; John T. Berry, Esq. Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 9 of March, 1998.



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