

IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE

THE FLORIDA BAR,
Complainant,
v.
FRED J. WARD,
Respondent.

TFB CASE NO.: 17F80F11
SUP. CT. CASE NO.: 64,278

FILED
SID J. WHITE
DEC 12 1984
CLERK, SUPREME COURT
By [Signature]
Chief Deputy Clerk

REFEREE'S REPORT

1. SUMMARY OF PROCEEDINGS:

The above styled disciplinary proceeding duly came on to be heard before the undersigned on May 25, 1984 and August 30, 1984. The Florida Bar was represented by David M. Barnovitz, bar counsel. Respondent appeared in person and by Richard R. Kirsch, Esquire, his attorney.

2. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT FOR WHICH RESPONDENT IS CHARGED:

Having considered all of the pleadings and evidence, I find:

A. Respondent is, and at all times hereinafter mentioned was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. During April 1978, respondent filed an action on behalf of Max Wolkowitz against Saul J. Cooper and Barbara Cooper, his wife, to foreclose a second mortgage on certain real property in Dade County, to wit:

Lot 3, Block 2, Kendall Lane Estates, Section A,
according to the Plat thereof, as recorded in
Plat Book 86, Page 89, of the Public Records
of Dade County, Florida

such action being styled Wolkowitz v. Cooper, Case Number 78-7251, Circuit Court for the Eleventh Judicial Circuit.

C. On December 27, 1978, a Final Judgment of Foreclosure was entered by the court in the case Wolkowitz v. Cooper.

D. On February 12, 1979, the clerk of the court issued to Mr. Wolkowitz a certificate of title for the property in the case Wolkowitz v. Cooper.

E. On January 19, 1979, the Coopers filed a notice of appeal in the case Wolkowitz v. Cooper.

F. On May 18, 1979, Mr. Wolkowitz entered into a written agreement with Augusta Gold, whereby Mr. Wolkowitz agreed to sell to Mrs. Gold or assigns, and Mrs. Gold agreed to purchase from Mr. Wolkowitz, the property described in paragraph B hereinabove.

G. At the time that Mr. Wolkowitz signed such agreement, such signing being accomplished at respondent's law offices, respondent generally advised Mrs. Gold to seek legal counsel on the matter as there existed a "nuisance suit" which involved the property.

H. Between May 18, 1979 and July 24, 1979, Mrs. Gold assigned the agreement to herself and Leonard Gold, her husband.

I. Between May 18, 1979 and July 5, 1979, respondent caused an abstract of title covering the subject property to be delivered to Marshall Fischer, Mrs. Gold's attorney. Such abstract did not include a copy of the notice of appeal filed by the Coopers in the case Wolkowitz v. Cooper.

J. On or about July 5, 1979, Stuart G. Elliot replaced Marshall Fischer as the attorney for Mrs. Gold with respect to the agreement.

K. On or about July 10, 1979, Mr. Elliot wrote to Lawyers Title Guaranty Fund concerning questions he had as to the status of Mr. Wolkowitz's title to the subject property but making no reference, direct or indirect, to the pending appeal.

L. On or about July 11, 1979, in response to Mr. Elliot's letter of July 10, 1979, respondent wrote to Lawyers Title Guaranty Fund, wherein he expressed the view that Mr. Wolkowitz's title to the property vis-a-vis the Coopers was "res judicata". Respondent made no reference to the pending appeal.

M. On or about July 10, 1979, respondent forwarded to Mr. Elliot copies of pleadings filed by the Coopers, and others, in foreclosure proceedings involving the property. The notice of appeal filed in Wolkowitz v. Cooper was not included and no reference was made thereto.

N. At the closing, despite respondent's and Mr. Wolkowitz's knowledge of the pendency of the appeal in the case Wolkowitz v. Cooper, Mr. Wolkowitz delivered to Mr. and Mrs. Gold a warranty deed and an affidavit

of ownership concerning the property, both such documents being prepared by respondent. The affidavit of ownership recited, inter alia, as follows:

"2. That his possession has been peaceful and undisturbed; and that his title thereto has never been disputed, questioned, or rejected.

3. That he has not known of any facts by reason of which his possession of, or title to, the said premises might be disturbed or questioned, or by reason of which any claim to said premises (or any part thereof) or interest therein, adverse to him, might arise or be set up.

4. That no person has any lease, option, deed or contract of any nature whatsoever for the purpose of, or claim to or against such premises, or any part thereof, except as hereinafter stated; that the said premises are now free and clear of all taxes (except taxes for the current year that are a lien against said property but not payable) encumbrances, or liens, by mortgage, decree, judgment, statute, or any other liens of any nature and description, except the following: Subject to an existing first mortgage in favor of Coral Gables Federal Savings and Loan Association with an unpaid balance of \$55,462.14."

O. Neither Mr. Elliot nor his clients were aware of the existence of the notice of appeal at the time of the title closing.

P. Upon discovery of the notice of appeal subsequent to title closing the Golds made demand for return of the funds and promissory note delivered at the closing which demand was refused.

Q. On or about August 23, 1979, Mr. and Mrs. Gold filed an action against Mr. Wolkowitz, respondent, and others seeking return of the funds and promissory note they delivered to Mr. Wolkowitz at the closing, plus other damages, such action being styled Gold v. Wolkowitz, et al., case number 79-14582, Circuit Court for the Eleventh Judicial Circuit.

R. Respondent appeared as attorney for Mr. Wolkowitz, himself, and respondent's professional association in Gold v. Wolkowitz, et al. and conducted all proceedings in such case on behalf of such parties up until the time of trial.

3. RECOMMENDATION AS TO WHETHER OR NOT RESPONDENT SHOULD BE FOUND GUILTY:

Respondent was charged with violation of Disciplinary Rules 1-102(A)(4), 7-102(A)(7), 5-101(A) and 5-101(B) of the Code of Professional Responsibility. I shall treat each, in turn.

A. I cannot find that respondent, himself, engaged in conduct involving fraud or misrepresentation by failing to provide Attorney Elliot with a copy

of the notice of appeal along with the other pleadings in the case of Cooper v. Wolkowitz. While the tenor of such conduct is abhorrent to the spirit and purpose of the disciplinary and integration rules, respondent has not been specifically charged with any such conduct by the bar's complaint and therefore I must find him not guilty of any violation of Disciplinary Rule 1-102(A) (4).

B. Respondent prepared the affidavit of ownership and warranty deed for his client, Mr. Wolkowitz. He thereafter assisted and counseled Mr. Wolkowitz in delivering the affidavit and deed at the closing. Contrary to the plain language on the affidavit no reference was made to any pending appeal. While the appeal was a matter of record, it is abundantly clear from the totality of the circumstances that neither Mr. Elliot nor his clients were aware of the existence of such an appeal. Therefore, I find respondent guilty of violating Disciplinary Rule 7-102(A) (7) in that his assistance of his client in the preparation and delivery of the affidavit of ownership was conduct which respondent knew to be fraudulent.

C. I find that Mr. Ward's appearance as the attorney for himself, his client, Mr. Wolkowitz, and Mr. Ward's professional association constitutes so fundamental a conflict of interest that the conduct could not be condoned even with disclosure to Mr. Wolkowitz. The conflict existed from the inception of the Gold v. Wolkowitz litigation and it is irrelevant that Mr. Ward intended only to represent Mr. Wolkowitz until such time as it became apparent through the course of litigation that the matter could not be settled and must proceed to trial. The conflict existed whether the case was settled or proceeded to trial. Therefore, I find that Mr. Ward violated Disciplinary Rule 5-101(A) by failing to refuse employment on behalf of Mr. Wolkowitz when Mr. Ward's interests, both financial and professional, must assuredly have impaired or vicissiated his independent professional judgment.

D. Since Mr. Ward and his professional association and Mr. Wolkowitz were all co-defendants and charged with fraud and misrepresentation, it is obvious that a very real potential existed for Mr. Ward to be called as a witness in his own behalf, on behalf of his professional association, and certainly on behalf of his client, Mr. Wolkowitz, against whom the Golds were seeking both compensatory and punitive damages. Under such circumstances, Mr. Ward by not refusing such employment when he knew that he would have to at one point in the proceedings become a witness, violated Disciplinary Rule 5-101(B).

4. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend as discipline in this matter that the respondent be suspended for a period of 30 days.

5. PERSONAL HISTORY:

Respondent was admitted to The Florida Bar in 1956 and is 54 years old.

6. STATEMENT AS TO PAST DISCIPLINE:

In 1970 respondent was administered a private reprimand for violating the Disciplinary Rules of the Florida Bar.

Respondent has no other disciplinary history.

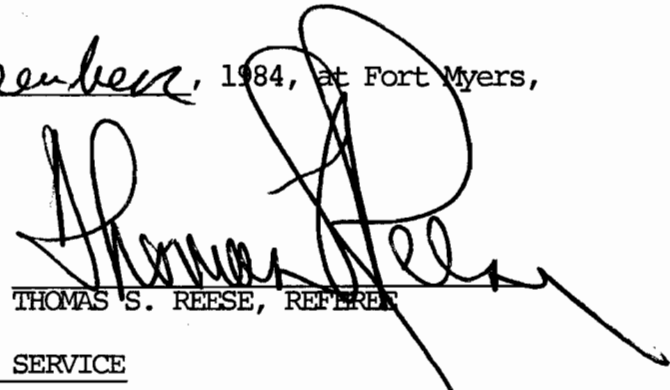
7. STATEMENT OF COSTS OF THE PROCEEDINGS AND RECOMMENDATIONS:

The costs of these proceedings are as follows:

Administrative Costs:	
Grievance Committee Level -----	\$ 150.00
Referee Level -----	150.00
Court Reporter Costs:	
Grievance Committee Level -----	490.70
Referee Level -----	1,432.75
Photocopies -----	134.00
Subpoenas -----	162.50
Witness Fees -----	48.80
<u>TOTAL</u> -----	<u>\$ 2,568.75</u>

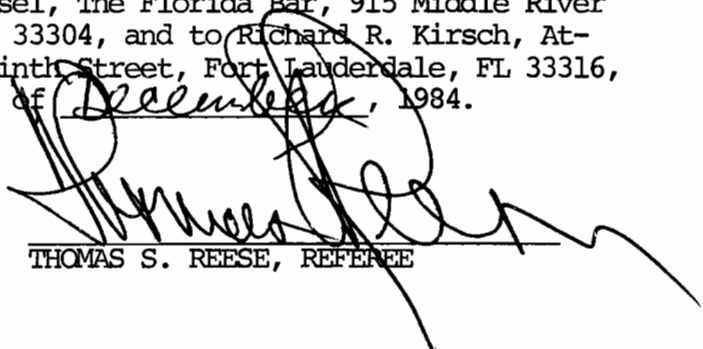
I recommend that such costs be taxed against the respondent.

RENDERED this 6th day of December, 1984, at Fort Myers, Lee County, Florida.


THOMAS S. REESE, REFEREE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Referee's Report was mailed to David M. Barnovitz, Bar Counsel, The Florida Bar, 915 Middle River Drive, Suite 602, Fort Lauderdale, FL 33304, and to Richard R. Kirsch, Attorney for Respondent, 224 Southeast Ninth Street, Fort Lauderdale, FL 33316, by regular mail, on this 6th day of December, 1984.


THOMAS S. REESE, REFEREE