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INTRODUCTION

THE FLORIDA BAR, Complainant in the lower proceedings, will be referred to as "The Florida Bar".

JAMES L. WALL, JR., Respondent in the lower proceedings, will be referred to as "Respondent".

THE BOARD OF GOVERNORS OF THE FLORIDA BAR will be referred to as the "Board of Governors".

The following symbols will be used in this Brief:

"T" - Transcript of Final Hearing held June 21, 1985.

"RR" - Report of Referee

POINTS OF APPEAL

I.

WHETHER THE REFEREE'S RECOMMENDATION OF A SIXTY DAY SUSPENSION WITHOUT PROOF OF REHABILITATION IS TOO LENIENT IN LIGHT OF THE SERIOUS MISREPRESENTATION BY RESPONDENT

II.

WHETHER RESPONDENT SHOULD BE REQUIRED TO MAKE RESTITUTION TO THE PARTY HARMED BY HIS MISREPRESENTATION.

STATEMENT OF CASE

On April 9, 1985, The Florida Bar filed a formal Complaint against Respondent based upon a finding of Probable Cause by Eleventh Judicial Circuit Grievance Committee "G" entered December 4, 1984. Circuit Court Judge Louis Weissing was appointed Referee to hear this case on April 25, 1985. Pursuant to a Waiver of Venue submitted by Respondent, the case was set for final hearing and heard in Referee Weissing's chambers in Fort Lauderdale, Florida on June 21, 1985.

Based upon a stipulation between the parties, the facts contained in The Florida Bar's Complaint were agreed to as true as amended or clarified by Respondent's Response to the Complaint. Further, by stipulation, the transcript of the grievance committee proceedings taken December 4, 1984 was introduced to the Referee.

Prior to the final hearing, bar counsel consulted with Stephen Zack, the Board of Governors' Designated Reviewer of this case, to determine a position as to appropriate discipline in the event the Referee found Respondent guilty. After review of the matter, Mr. Zack advised that his position was that Respondent should receive a public reprimand or a short-term suspension of less than 91 days. This position was relayed to Referee Weissing at the final hearing.

At the final hearing, Respondent appeared without counsel and presented no witnesses. Bar Counsel presented one witness, R. James Knox, Vice-President of the Attorney Title Insurance Fund. Respondent was given an opportunity to cross-examine Mr. Knox.

On August 23, 1985, Referee Weissing issued a Report of Referee which contained findings of fact, a recommendation that Respondent be found guilty of violating Disciplinary Rule 1-102(A)(4) and 1-102(A)(6) of the Code of Professional Responsibility, a recommendation that Respondent be suspended from the practice of law for a period of sixty (60) days and a recommendation that costs in the amount of \$1,090.91 be assessed against Respondent. The Report of Referee specifically found that restitution to the Attorney Title Insurance Fund was a civil matter between Respondent and the Attorney Title Insurance Fund and did not make restitution a condition of the discipline.

On September 20, 1985, pursuant to article XI, Rule 11.09 of the Integration Rule of The Florida Bar, the Report of Referee was presented to the full Board of Governors at its meeting in Pensacola, Florida. The Board of Governors of The Florida Bar voted to petition for review of the Report of Referee and specifically, to appeal that portion of the Report of Referee recommending discipline. The Board of Governors' position is that Respondent should receive a one-year suspension with proof of rehabilitation.

Further, the Board of Governors believe that restitution to the Attorney Title Insurance Fund should be a condition to Respondent's reinstatement.

STATEMENT OF FACTS

Pursuant to a stipulation between the parties, the facts contained in The Florida Bar's complaint were agreed to as true as amended or clarified by Respondent's Response to the Complaint.

During or about April 1983, Respondent undertook the representation of Kramer Homes Inc. and its President, Larry Griggs in a bankruptcy matter in the United States Bankruptcy Court. Respondent filed a bankruptcy petition on behalf of Kramer Homes on April 1, 1983. Respondent was also aware of an existing and outstanding 1980 Capital Bank mortgage on one of the properties owned by Kramer Homes, the Woods Landing Condominium located in Dade County, Florida.

During or about May 1983, Respondent represented Kramer Homes as the seller of two Woods Landing Condominium units to two separate buyers. During or about the period of May 18 to May 19, 1985, Respondent prepared the closing statements, mechanic lien affidavits and warranty deeds to accomplish the sales of the two units between Kramer Homes and the two buyers. Respondent failed to indicate, in any of those documents, that Kramer Homes was in bankruptcy or that there was an existing and outstanding 1980 Capital Bank mortgage on the Woods Landing Condominium blanketing all units.

Further, on May 19, 1984, Respondent, an unrestricted member of the Attorney Title Insurance Fund, issued Attorney Title Insurance Fund policies on the two Woods Landing Condominium units sold to the two buyers. Respondent failed to indicate as exceptions to the policy or in any other manner, that Kramer Homes was in bankruptcy proceedings and that there was an existing and outstanding 1980 Capital Bank mortgage on the Woods Landing Condominium blanketing all units.

Ultimately, since Respondent had actual knowledge of bankruptcy and the existing and outstanding 1980 Capital Bank mortgage, the Attorney Title Insurance Fund had to pay off claims that were eventually made against the policies in the total amount of \$161,200. That amount represents the combined purchase prices (\$80,000 and \$81,200) of the two Woods Landing Condominium units sold by Kramer Homes, to the two buyers.

I.

THE REFEREE'S RECOMMENDATION OF A SIXTY DAY SUSPENSION WITHOUT PROOF OF REHABILITATION IS TOO LENIENT IN LIGHT OF THE SERIOUS MISREPRESENTATION BY RESPONDENT.

It is the responsibility of this Court to review the Referee's report and, if his recommendation of guilt is supported by the record, to impose the appropriate penalty. The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980).

In the instant case, the Board of Governors of The Florida Bar contests that portion of the Report of Referee which recommends that Respondent receive a 60 day suspension and requires no proof of rehabilitation. It is the Board of Governors' position that, based on these facts, the appropriate penalty is a one-year suspension with the requirement that proof of rehabilitation be made before Respondent is reinstated.

This Court recognized in The Florida Bar v. Scott, 197 So.2d 518, 520 (Fla. 1967) that:

... the degree of punishment in each case where violations of Canons of Professional Ethics are involved depends entirely upon the factual situation presented by the record in that particular case. Over the years this Court has not found any areas of black and white as to the degree of punishment to be imposed in all cases. Rehabilitation as well as punishment is involved in every case. Such factors call upon the total experience of the Justices of this Court in determining the appropriate judgment in each instance. (emphasis supplied).

The Referee recommended that Respondent be found guilty of violating Disciplinary Rule 1-102(A)(4) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 1-102(A)(6) (conduct that adversely reflects on fitness to practice law) of the Code of Professional Responsibility. (R.R. 9). In recommending guilt, the Referee found the violations to be serious because they involved a knowing misrepresentation on the part of Respondent. (R.R. 9).

Since there was a knowing misrepresentation by Respondent, the Board of Governors believes a greater sanction should be imposed. While the Court considers each case on its own merits in fashioning the appropriate disciplinary sanction, it does consider, as one factor, the punishment imposed on other attorneys for similar misconduct. The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980). The discipline imposed for similar misconduct, in this case misconduct involving misrepresentation, has often been severe.

In The Florida Bar v. Steele, 197 So.2d 305 (Fla. 1967), the accused attorney was disbarred for knowingly preparing promissory notes for the purpose of creating a fictitious indebtedness of a decedent owing to Respondent's clients and business associates. Although the Steele case is factually distinguishable from the instant case because the accused attorney in Steele received some of the funds

when the fictitious promissory notes were paid, the Board of Governors would have sought disbarment but for the total lack of evidence that Respondent received any improper compensation for preparing the Attorney Title Insurance Fund policies in the manner in which he did.

In The Florida Bar v. Beaver, 248 So.2d 477 (Fla. 1971), the accused attorney was suspended for one year for counseling a client in misrepresenting the client's financial condition for the purpose of secreting assets from the client's wife in a pending divorce action. In Beaver, just as in the instant case, the accused attorney misrepresented a matter to third parties in order to facilitate suspect objectives on the part of a client. In Beaver, the accused attorney counseled and aided his client in misrepresenting the client's financial condition in order to secret assets from the client's wife. In the instant case, Respondent misrepresented the status of a property's financial condition (by purposely not listing a bankruptcy proceeding and an outstanding mortgage as exceptions to a title insurance policy on the property) in order to facilitate his client's sale of units within the property.

In The Florida Bar v. Snow, 436 So.2d 48 (Fla. 1983), the accused attorney was suspended for six months for using false representations to obtain evidence in a case. In Snow, the Referee had found the accused attorney guilty of

violating Disciplinary Rules 1-102(A)(4) and 1-102(A)(6), the identical violations in the instant case. As in the Snow case, Respondent knowingly misrepresented a matter to gain an advantage for a client. The resulting harm in this case, however, was a \$161,200 loss incurred by the Attorney Title Insurance Fund.

In The Florida Bar v. Thomson, 271 So.2d 758 (Fla. 1972), this Court has stated that in determining discipline "the discipline should be corrective and the controlling considerations should be the gravity of the charges, the injury suffered, and the character of the accused. (emphasis supplied)".

Since this Court has adopted a case by case determination of appropriate discipline, Scott, supra at 520, the Board of Governors suggests that Respondent's discipline should be more severe due to the gravity of the misrepresentation and the injury the misrepresentation caused. The seriousness of the matter is further magnified because Respondent owed a fiduciary duty, based upon a position of trust, to the Attorney Title Insurance Fund.

This Court observed in The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970) and recently in The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla. 1985), that three purposes must be kept in mind in reaching conclusions in attorney disciplinary matters:

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing the penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Board of Governors of The Florida Bar believes that these three purposes of discipline can only be met if Respondent is subjected to a one-year suspension and required to prove his rehabilitation before resuming the practice of law.

II

RESPONDENT SHOULD BE REQUIRED TO MAKE RESTITUTION TO THE PARTY HARMED BY HIS MISREPRESENTATION.

In the instant case, Respondent misrepresentation has caused a substantial loss in the amount of \$161,200 to the Attorney Title Insurance Fund.

The Board of Governors of The Florida Bar argue strongly that something should be done to restore the Attorney Title Insurance Fund. The Referee found that restitution in this case was a civil matter between Respondent and the Attorney Title Insurance Fund (R.R. 9). However, the Board of Governors suggest that this Court does have the authority to order restitution in this case.

In The Florida Bar v. Moriber, 314 So.2d 145 (Fla. 1975), this Court ordered the accused attorney to make restitution to an aggrieved client where the attorney charged a "clearly excessive" fee. The matter of fees between attorney and client are normally decided in civil court or arbitration.

In The Florida Bar v. Litman, 417 So.2d 948 (Fla. 1982), this Court ordered the accused attorney to make restitution in the amount of \$33,333.34 to clients caused a loss by the accused attorney's fraud, deceit, misrepresentation and dishonesty. In Litman, the accused attorney misrepresented the purchase price of certain

property causing the purchasers, the accused attorney's clients, to pay \$100,000 more than the actual price. The \$100,000 was split three-ways and the accused attorney received \$33,333.34. Despite the fact that the matter was in civil litigation, the accused attorney was ordered to make restitution as a condition of the discipline imposed.

In The Florida Bar v. Atwood, 409 So.2d 1022 (Fla. 1982), the accused attorney notarized a signature on a quitclaim deed outside the presence of the alleged signatory. The signature was a forgery and the Court ordered the accused attorney to make restitution as a condition of discipline. In Atwood, however, Respondent agreed to make restitution.

The responsibility and power to ultimately fix the penalty to be imposed on an attorney found guilty of professional misconduct rests in this Court. State ex rel. Florida Bar v. Glover, 60 So.2d 17 (Fla. 1952); The Florida Bar v. McCain, 330 So.2d 712 (Fla. 1976); The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

In a case where damage is obviously caused by the professional misconduct of an attorney, the Board of Governors of The Florida Bar suggests that restitution can be ordered to restore the damaged individual or entity. In this instant case, Respondent misrepresentation obviously

caused a loss of \$161,200 by the Attorney Title Insurance Fund and Respondent should be required to restore the Attorney Title Insurance Fund in that amount.

CONCLUSION

Because of the knowingly serious misrepresentation by Respondent, the Board of Governors of The Florida Bar suggests that a (sixty) 60 day suspension without proof of rehabilitation is too lenient. Accordingly, Respondent should receive a one-year suspension and be required to prove his rehabilitation to resume the practice of law.

Further, because Respondent's misrepresentation obviously caused a substantial loss in the amount of \$161,200 to the Attorney Title Insurance Fund, Respondent should be required to make restitution to the Attorney Title Insurance Fund in that amount.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Initial Brief were sent to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and a true and correct copy was sent to James L. Wall, Jr., at 1275 Bluebird Avenue, Miami Springs, Florida 33166, on this 5th day of October, 1985.



LOUIS THALER
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