

FILED

IN THE SUPREME COURT OF FLORIDA

MAY 1 1987

THE FLORIDA BAR,
Complainant,
v.
IRVIN R. SHUPACK,
Respondent.

CLERK, SUPREME COURT
CASE NO. 69,280
Deputy Clerk

The Florida Bar Case
No. 17C86F47

INITIAL BRIEF OF THE FLORIDA BAR

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PREFACE

For the purposes of this brief, the Complainant, The Florida Bar, will be referred to as The Florida Bar and Irvin R. Shupack will be referred to as the Respondent.

Abbreviations utilized in this brief are as follows:

- RR Refers to the Report of Referee, to be followed by page number and paragraph of report.
- T Refers to the transcript of the final hearing held before the Honorable Thomas E. Sholts on November 21, 1986, to be followed by page numbers.
- T2 Refers to the transcript of the hearing held on December 23, 1986, to be followed by page numbers.
- EX Refers to exhibits introduced at the November 21, 1986, hearing, to be followed by the exhibit number.

STATEMENT OF THE CASE

A formal complaint was filed in this cause on September 4, 1986. The Florida Bar's First Request for Admissions was filed on or about September 10, 1986. The Honorable Thomas E. Sholts was appointed as Referee on September 12, 1986.

On October 22, 1986, the Respondent forwarded his Answer to The Florida Bar's First Request for Admissions.

The final hearing before the Referee was scheduled for and held on November 21, 1986. The hearing as to discipline to be imposed was scheduled for and held on December 23, 1986.

The Referee submitted his Report of Referee on January 13, 1987. The Referee has recommended that Respondent be found guilty of violating Florida Bar Code of Professional Responsibility, Disciplinary Rules 1-102(A)(4) and 7-102(A)(7) and Florida Bar Integration Rule, article XI, Rule 11.02(3)(a). The Referee recommended, as a disciplinary sanction, that Respondent be suspended for a period of thirty (30) days with automatic reinstatement at the end of the period of suspension as provided in Rule 11.10(4).

The Board of Governors of The Florida Bar considered the Referee's Report at its meeting held March 18-21, 1987 and determined that review of the Referee's recommendations as to discipline should be initiated and that a six (6) months suspension should be sought.

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE A SUSPENSION FOR A PERIOD OF SIX (6) MONTHS DUE TO THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT AND RESPONDENT'S PRIOR DISCIPLINARY RECORD.

STATEMENT OF THE FACTS

The Referee's Findings of Fact are as follows:

1. The Respondent, Irvin R. Shupack, 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.

2. On or about May 15, 1981, Joseph DiBlasio and Nicholas DiBlasio owned the following real property and entered into a Deposit Receipt Contract with Landmark Florida Title Corporation to sell the following described real property located in Broward County, Florida:

Lot Seventeen (17) of Garden Villas, according to the Plat thereof, recorded in Plat Book 38, page 50, of the Public Records of Broward County, a/k/a 1422 Arthur Street, Hollywood, Florida.

3. Before the closing, Landmark Florida Title Corporation assigned the contract to Kucan Investment Corporation. Mr. Shupack represented Kucan Investment Corporation in its dealings with the DiBlasios and the Liebermans.

4. The closing on the DiBlasio Deposit Receipt Contract took place on June 29, 1981. The property was transferred by Warranty Deed to Kucan Investment Corporation for \$67,500. At closing, the DiBlasios took back from Kucan Investment Corporation a note and purported purchase money first mortgage dated June 29, 1981, in the amount of \$49,500.

5. Regardless of the DiBlasios' ownership of the

property, Richard Abraham (who was, in effect, "Kucan") and Kucan Investment Corporation on June 25, 1981, fraudulently executed and delivered a note and mortgage to third parties, Fred Lieberman and Eleanor F. Lieberman, in the amount of \$49,500. The Lieberman note and mortgage were executed and delivered by Kucan Investment Corporation and Richard Abraham five days prior to the date that Kucan Investment Corporation took title to the property on June 29, 1981.

6. The DiBlasios were represented at closing by Attorney Ben V. Haywood. Mr. Shupack did not affirmatively disclose to the DiBlasios or to Mr. Haywood that Kucan Investment Corporation (five days prior to its closing with the DiBlasios) had executed and delivered a mortgage and note to the Liebermans. Mr. Shupack knew of the existence of the Lieberman mortgage, having it in his possession. Although he prepared most of the DiBlasio closing papers, Mr. Shupack fraudulently failed to disclose to Mr. Haywood, either orally or in any of the closing papers, that the Lieberman note and mortgage existed. Mr. Shupack knew that neither Mr. Haywood nor his clients could learn of the existence of the Lieberman mortgage because it had not been recorded. At closing, Mr. Shupack asked Mr. Haywood to give him the DiBlasio mortgage in order to record it. He did so for the specific secret purpose of insuring that the DiBlasio mortgage would be recorded after the Kucan mortgage. Mr. Shupack then fraudulently recorded the Lieberman mortgage before recording the DiBlasio mortgage,

thereby rendering the DiBlasios' mortgage to second status. At all times referenced above, the DeBlasios believed they were receiving a purchase money first mortgage. In furtherance of this fraudulent scheme, Mr. Shupack placed documentary stamps in the amount of \$416.25 on the warranty deed from DiBlasio to Kucan which established a false purchase price of \$92,500, instead of the correct purchase price of \$67,500.

7. Kucan Investment Corporation immediately defaulted on the DiBlasio mortgage, and litigation ensued. Fortunately, the DiBlasios recovered their loss, partly from Mr. Shupack's insurance carrier and partly from Mr. Haywood's insurance carrier. The Referee notes that Mr. Haywood was guilty of negligence by not fully examining the DiBlasio mortgage. If he had carefully examined the mortgage, he would have noted language (in extremely fine print) on the back indicating the DiBlasios might be getting a second mortgage. Mr. Haywood's negligence should, to some extent, mitigate the discipline against Mr. Shupack because Kucan's scheme would have been discovered had Mr. Haywood properly represented the DiBlasios.

(RR, pp 1-2).

The Respondent possesses a history of prior discipline from The Florida Bar. The Respondent received a thirty (30) day suspension in Case No. 64,667, The Florida Bar Case No. 17B82F26, for violation of Disciplinary Rule 1-102(A)(4) (an attorney shall not engage in conduct involving dishonesty,

fraud, deceit or misrepresentation). The Florida Bar v. Shupack, 453 So.2d 404 (Fla. 1984).

SUMMARY OF ARGUMENT

THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE A SUSPENSION FOR A PERIOD OF SIX (6) MONTHS DUE TO THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT AND RESPONDENT'S PRIOR DISCIPLINARY RECORD.

The Respondent's misconduct was wholly inconsistent with the professional standards of the legal profession.

The Referee found the Respondent to have engaged in two (2) instances of fraudulent conduct. This misconduct, coupled with Respondent's similar prior misconduct, calls for harsher discipline.

The Court considers the prior disciplinary history of a Respondent when determining the appropriate punishment for the present misconduct. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983), The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981), and The Florida Bar v. Solomon, 338 So.2d 818 (Fla. 1976).

In light of Respondent's cumulative misconduct, a six (6) month suspension is in order.

ARGUMENT

THE REFEREE'S DISCIPLINARY RECOMMENDATION WAS ERRONEOUS AND THE DISCIPLINARY SANCTION IMPOSED SHOULD BE A SUSPENSION FOR A PERIOD OF SIX (6) MONTHS DUE TO THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT AND RESPONDENT'S PRIOR DISCIPLINARY HISTORY.

The Referee recommended that Respondent be suspended for a period of thirty (30) days. ("RR 3").

The Florida Bar believes that the Referee's disciplinary recommendation was erroneous. This Court has stated that it is not bound by the Referee's recommendations for discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). Accordingly, this Court has imposed greater discipline than recommended by Referees when deemed appropriate. The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983); The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982); The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981); and The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981).

The Florida Bar submits that Respondent's misconduct was wholly inconsistent with the high professional standards of the legal profession. A six (6) month suspension is, therefore, more appropriate than the suspension recommended by the Referee.

This court has established three (3) criteria for determining the proper disciplinary sanction to be imposed against attorneys in actions brought pursuant to Florida Bar Integration Rule, article XI. This Court has mandated that:

(F)irst, 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 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 Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

The Referee found Respondent's actions to be violative of Disciplinary Rules 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) and 7-102(A)(7) (in his representation of a client, a lawyer shall not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent), and Florida Bar Integration Rule, article XI, Rule 11.02(3)(a) (conduct contrary to honesty, justice and good morals).

Respondent has been found guilty of two (2) separate acts of misconduct. The first act is the misconduct concerning the failure to disclose the Lieberman mortgage to the DiBlasios or their attorney. The second act of misconduct was the placing by Respondent of a false amount of stamps on the mortgage deed. The Referee's findings on the misconduct is as follows:

The DiBlasios were represented at closing by Attorney Ben V. Haywood. Mr. Shupack did not affirmatively disclose to the DiBlasios or to

Mr. Haywood that Kucan Investment Corporation (five days prior to its closing with the DiBlasio) had executed and delivered a mortgage and note to the Liebermans. Mr. Shupack knew of the existence of the Lieberman mortgage, having it in his possession. Although he prepared most of the DiBlasio closing papers, Mr. Shupack fraudulently failed to disclose to Mr. Haywood, either orally or in any of the closing papers, that the Lieberman note and mortgage existed. Mr. Shupack knew that neither Mr. Haywood or his clients could learn of the existence of the Lieberman mortgage because it had not been recorded. At closing, Mr. Shupack asked Mr. Haywood to give him the DiBlasio mortgage in order to record it. He did so for the specific secret purpose of insuring that the DiBlasio mortgage would be recorded after the Kucan mortgage. Mr. Shupack then fraudulently recorded the Lieberman mortgage before recording the DiBlasio mortgage, thereby rendering the DiBlasio's mortgage to second status. At all times referenced above, the DiBlasios believed they were receiving a purchase money first mortgage. In furtherance of this fraudulent scheme, Mr. Shupack placed documentary stamps in the amount of \$416.25 on the warranty deed from DiBlasio to Kucan which established a false purchase price of \$92,500, instead of the correct purchase price of \$67,500. (RR, p. 2, Par. 6).

In The Florida Bar v. Wall, 491 So.2d 549 (Fla. 1986), the Respondent failed to indicate defects in title as exceptions on two title insurance policies. The Wall Respondent also issued policies certifying that purchasers had obtained good title, and prepared closing statements, mechanic's liens, affidavits and warranty deeds without indicating that the property was in bankruptcy or that a mortgage encumbered the property.

Respondent Wall was suspended for three (3) months and

one (1) day, with proof of rehabilitation required. The Wall Opinion did not reference any prior disciplinary record of Respondent Wall.

This Court suspended the Respondent for three (3) months and required him to complete a course in professional responsibility in The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986). In the Lehrman case, the Respondent misled his client as to a mortgage forfeiture. The Lehrman Opinion did not reference any prior disciplinary record of Respondent Wall.

In The Florida Bar v. Ward, 472 So.2d 1159 (Fla. 1985), the Respondent was suspended for a period of thirty (30) days for engaging in conduct constituting a conflict of interest and preparing and delivering a false affidavit or ownership and warranty deed for a client. The Ward Opinion did not reference any prior disciplinary record of Respondent Ward.

The evidence is clear that the instant Respondent's conduct constituted fraud. The mortgage deed between Kucan Investment Corporation and the DiBlasios, Exhibit 9, was sworn to by the Respondent's client, Mr. Abraham. The Respondent not only witnessed said deed but also notarized it. The mortgage deed was false because it stated that the property was free and clear of all encumbrances, when in fact there existed the Lieberman mortgage. Respondent knew about the Lieberman mortgage, because Respondent had the Lieberman mortgage in his possession and had not yet recorded it.

The Referee found "At closing, Mr. Shupack asked Mr. Haywood to give him the DiBlasio mortgage in order to record it. He did so for the specific secret purpose of insuring that the DiBlasio mortgage would be recorded after the Kucan mortgage." (RR, p.2, Par. 6). The Referee also found ..."Respondent fraudulently failed to disclose to Mr. Haywood... that the Lieberman note and mortgage existed." (RR, p. 2, Par. 6).

Respondent's second instance of misconduct was when he placed stamps on the warranty deed that reflected a higher purchase price than what his client paid for the property. Respondent admits that he did this at his client's request. (T, p. 22). The Referee found that this act was done to establish a false purchase price. (RR, p. 2, Par. 6).

Respondent has been previously disciplined for deceitful misconduct. In The Florida Bar v. Shupack, 453 So.2d 404 (Fla. 1984), Respondent was found guilty of violating Disciplinary Rule 1-102(A)(4) (conduct involving dishonesty, fraud, deceit, or misrepresentation) and was suspended for thirty (30) days.

The Court considers the prior disciplinary history of a Respondent when determining the appropriate punishment for the present misconduct. The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983), The Florida Bar v. Greenspahn, 396 So.2d 182 (Fla. 1981) and The Florida Bar v. Solomon, 338 So.2d 818 (Fla. 1976).

Respondent's prior and present conduct both involve

dishonesty and deceit. Respondent received a thirty (30) day suspension in 1984 for his prior misconduct, and although the prior and present misconduct occurred within a close time period, a thirty (30) day suspension is not sufficient for the cumulative acts of fraudulent misconduct that occurred.

Although the instant acts of misconduct occurred close in time to the previous acts of misconduct, The Florida Bar did not receive the matter until August 20, 1985 from The Honorable Reasbeck, the presiding Judge in the civil action. (T, 21, 23).

The Florida Bar submits that a six (6) month suspension would require Respondent to accept the seriousness of his misconduct.

In the cases stated previously, The Florida Bar v. Wall, supra, The Florida Bar v. Lehrman, supra, and The Florida Bar v. Ward, the respective Respondents received suspensions for a period of three (3) months and a day, three (3) months and thirty (30) days for fraudulent misconduct without even having a prior disciplinary record.

In The Florida Bar v. Bern, 425 So.2d 526 (Fla. 1983), the Respondent's prior discipline consisted of a private reprimand. The Referee considered Respondent Bern's prior discipline and only recommended a public reprimand. This Court stated,

"[T]he Court deals more harshly with cumulative misconduct than it does with isolated misconduct. Additionally, cumulative misconduct of a similar nature

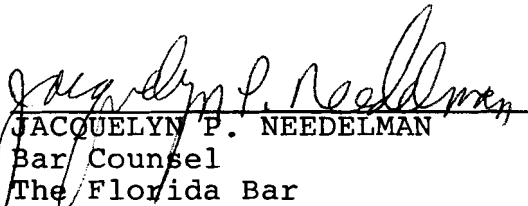
should warrant an even more severe discipline than might dissimilar conduct.... considering respondent's previous history and the fact that this involves another instance of business matters with clients, the respondent should be suspended." Id at 528

Accordingly, the instant Respondent, Shupack, should receive the more severe suspension of six (6) months.

CONCLUSION

For the foregoing reasons, The Florida Bar respectfully requests this Honorable Court to enter an order suspending the Respondent for a period of six (6) months, and tax the costs of the proceedings in the amount of \$1,690.46 against the Respondent.

Respectfully submitted,

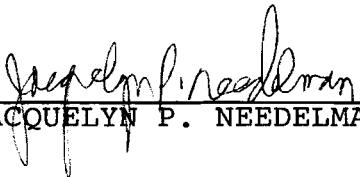

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief of The Florida Bar was sent by United States Mail to Claudette A. Pelletier, Attorney for Respondent, Post Office Box 383, Fort Lauderdale, Florida 33302, and to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226, on this 30th day of April, 1987.



JACQUELYN P. NEEDELMAN