IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

STEPHEN G. BENEKE,

Respondent.

_____/

File No. 06A83H79

Supreme Court No. 64,090

RESPONDENT'S INITIAL BRIEF

RICHARD T. EARLE, JR.
EARLE AND EARLE
447 Third Avenue North
St. Petersburg, FL 33701
(813) 898-4474
Attorney for Respondent

TABLE OF CONTENTS

TABLE OF CASES AND AUTHORITIES

POINTS INVOLVED

Is there clear and convincing evidence that Respondent was guilty of engaging in conduct involving misrepresentations or committing an act contrary to honesty and good morals?

SECOND POINT INVOLVED

Assuming that Respondent is guilty as recommended by the referee, does his conduct warrant a public reprimand?

STATEMENT OF CASE

This matter is before the Court on Respondent's Petition For Review of a Referee's Report in a disciplinary proceeding.

The Florida Bar filed its Complaint against Respondent charging him with violating Disciplinary Rules 1-102 (A) (1) (violation of a Disciplinary Rule); Dr 1-102 (A) (4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and Integration Rule, Article XI, Rule 1102 (3) (a) (committing an act contrary to honesty, justice or good morals).

Respondent filed his Answer in effect denying said violations.

The matter was heard before the duly appointed referee who, after considering the evidence, filed his report recommending that the Respondent be found guilty of violating Disciplinary Rule 1-102 (A) (4) (engaging in conduct involving misrepresentation); and Integration Rule, Article 11 XI, Rule 11.02 (3) (a) (committing an act contrary to honesty and good morals) and recommending that Respondent receive a public reprimand.

Respondent timely filed his Petition For Review of said Referee's Report.

STATEMENT OF THE FACTS

Most of the referee's findings of fact are supported by the evidence. For the purpose of brevity, Respondent will quote the referee's findings and will comment on the evidence only as to those findings which Respondent contends are not supported by substantial evidence.

"2. In late January, 1978, Respondent was contacted by David Cotton, a Real Estate Broker with offices close to Respondent's law office, about a Clearwater office building on the market for sale. Respondent was interested and, through the Broker, came into possession of a Sales Contract executed by the seller showing a sales price of $245,000.00. There are two of the so-called original contracts for that price, essentially identical in form except for an unexplained but obvious change in the day in January, 1978, above the seller's signature signifying acceptance. One is dated January 26, 1978 (Bar Exhibit 1) the other, (Bar Exhibit 1-A) possibly one of several duplicates, could well have been executed by the seller on January 27th and someone by pencil attempted to change it to correspond with Exhibit 1. Respondent testified that he did not sign Exhibits 1 and 1-A until he went to Ellis National Bank of Clearwater to obtain financing." Respondent adopts these findings of fact.

The referee further found that "at or about the time he submitted his loan application dated January 25, 1978, to the

bank, he left with the bank's representative a copy of the $245,000.00 contract." The only evidence in this regard is the testimony of Mr. Beneke who testified that when he received the contract which was signed by only the seller, he went to Ellis National Bank and discussed the matter with Mr. Schotzberger, the President, to ascertain if he could secure a mortgage loan on the property. (Tr.-85) At that time Mr. Schotzberger asked Respondent to sign the contract which he did and gave it to Mr. Schotzberger. (Tr.-86) At the same time Mr. Schotzberger gave Respondent a mortgage loan application and asked Respondent to fill it out and send it to him. Subsequently, and apparently on January 25, 1978, Respondent filled out the loan application. (Tr.-86) The loan application made no mention of the purchase price of the property being acquired. (Bar's Exhibit 4) Thus, the evidence does not sustain the finding of the referee to the effect that the $245,000.00 contract was submitted with Respondent's loan application but, in fact, refutes it.

The referee further found: "3. Respondent testified that he thereafter decided to negotiate for a lower price, again through the Broker, because the square footage of the rentable space in the subject building was substantially less than represented. Ultimately a contract dated January 20, 1978, the seller and Respondent agreed upon a price of $159,000.00." (Bar Exhibit 2-A) The only testimony in this regard is that of Respondent and, of necessity, the referee intended to find that

as a result of negotiations subsequent to the preparation and execution of the $245,000.00 contract, the $159,000.00 contract became effective. Further, if the $245,000.00 contract was correctly dated January 26th or 27th, the subsequent contract for $159,000.00 was incorrectly dated January 20th.

The referee further found: "4. It is significant that although Respondent had to have provided a copy of the $245,000.00 contract to the Ellis Bank, he, at no time, saw fit to inform the bank or any of its representatives about the final contract, ostensibly made after negotiations had brought about a reduction in the sales price. While the loan application makes no reference to the purchase price of the property, all of the bank's in-house, operational records reflect that the Respondent was paying $245,000.00 for the property and was seeking a loan in the amount of $175,000.00 (Bar's Exhibits 4 and 6)."

Respondent does not take issue with these findings of fact.

Referees further found: "5. Although Respondent contends that the bank did not rely on the original $245,000.00 contract provided by him and insists he had an understanding with the lender that he could receive a first mortgage loan equal to 70% of the appraised value of the property to-wit: $227,000.00, the referee is of the opinion that the actions of the Respondent were subtly intended to support his application for a loan in excess of the purchase price of the property." The

contention of the Respondent, as above set out, is the only evidence in the record relative thereto. In this regard, Respondent testified that Mr. Schotzberger told him the bank would lend him 70% of the appraised value of the property. (Tr.-86, 91) The opinion of the referee that "actions of the Respondent were subtly intended to support his application for a loan in excess of the purchase price of the property is without any foundation in the evidence and constitutes mere suspicion. The evidence reflects that in December, 1976, Respondent filed with Ellis Bank an application for a mortgage loan to finance the acquisition of real estate. (Tr.39) The bank did not require a copy of the contract for the purchase of the said land as none was in the bank's file and the only information that the bank had relative to the value of the land was the bank's appraisal. (Tr.41) In February, 1979, Respondent filed an application with Ellis Bank for a loan for the purpose of acquiring real estate. (Tr.41) Again, the bank's file did not contain a copy of the contract for this purchase. (Tr.42) Respondent borrowed $53,000.00 from the bank and the bank well knew that the purchase price was only $51,601.32 as reflected in the closing statement. All of this is reflected in the bank's file. (Tr.44)

The referee further found: "6. Based on the $245,000.00 sales contract, on February 23, 1978, Ellis National Bank of Clearwater issued a mortgage of $160,000.00 at 9% interest to Respondent on the property, which was a thousand dollars more than the actual negotiated purchase price of the property.

'7. On February 23, 1978, Respondent purchased the property from Duvall Financing Corporation for $159,000.00. At the closing, Respondent furnished a note in the amount of $5,000.00 and a down payment of $500.00.

"8. On December 28, 1978, Respondent sold said property to Bruce Taylor, Inc. for $230,000.00."

9. 'The testimony of Mary Beth Legrow, Respondent's former secretary for nearly two years commencing in January, 1978, as to Respondent's smug exaltation after concluding the transaction and his furtive attempts to cancel the original contract, all tend to bolster the referee's opinion that the transaction with the Ellis Bank was tainted.' This finding is made notwithstanding the absence of any complaint by the Ellis Bank as to Respondent's satisfactory performance of the obligation to it."

FIRST POINT INVOLVED

Is there clear and convincing evidence that Respondent was guilty of engaging in conduct involving misrepresentations or committing an act contrary to honesty and good morals?

ARGUMENT

At the outset, several things should be recognized. The conduct occurred in January, 1978, while the Hearing before the referee occurred on April 18, 1984; a time span of slightly over six years. The only witnesses as to what actually occurred between the bank and the Respondent were Mr. Schotzberger, the President of the bank, and the Respondent himself. Mr. Schotzberger had been discharged from the bank or had resigned and his whereabouts were unknown so that he was not available. The identity of the person bringing this matter to the attention of the Bar was and is unknown to the Respondent. However, it appears in the record that the bank was never dissatisfied with the loan, either as to the amount or the performance by the Respondent.

The basic issue in this case is whether the Respondent delivered the $245,000.00 contract to the bank and failed to deliver the $159,000.00 contract to the bank for the purpose of inducing the bank to make a larger loan than it would have made if it had known all of the facts. The Respondent testified

that Schotzberger told him the bank would lend 70% of the appraised value of the land. If this is true, the purchase price of the land was immaterial and from Schotzberger's statement, Respondent was aware of that. Respondent dealt only with Schotzberger relative to the loan.

In securing the approval of the loan which Schotzberger had agreed to make, Schotzberger informed the officers and directors of the bank that the purchase price was $245,000.00. Bar's Exhibit 4 indicates this. However, Respondent did not see Bar's Exhibit 4 as it relates to the internal operation of the bank.

The testimony of Respondent is clear to the effect that Schotzberger committed the bank to lend 70% of the appraised value of the property and therefore the purchase price was immaterial.

The referee was "of the opinion" that the actions of the Respondent were subtly intended to support his application for a loan in excess of the purchase price of the property.

The "opinion" of the referee is contrary to the testimony of Respondent and is based solely upon suspicion, which suspicion arises from two assumptions: That the bank would not make the loan unless it knew the purchase price of the property and, the loan could not exceed some unspecified percentage of the purchase price and certainly not in the full amount thereof. Not only is there no evidence to support these two assumptions but they are refuted by the record. Thus, in 1976,

Respondent applied to Ellis Bank for a mortgage loan to finance the acquisition of real estate and it is certain that the bank did not require a copy of the Contract to Purchase because the contract was not in the bank's file and the bank relied solely on its appraisal which was in its file. In February, 1979, the Respondent sought another loan from Ellis Bank for the purpose of acquiring real estate. Again, the bank did not obtain a copy of the contract for this purchase because there was none in the bank's file. In this loan, there was a closing statement in the bank's file reflecting that the purchase price of the property was only $51,601.32, notwithstanding, which the bank loaned Respondent $53,000.00 to acquire the property. Thus, the assumptions giving rise to the referee's suspicions are refuted by the record. Further, these two loans support the testimony of Respondent.

Respondent has not overlooked the findings of the referee to the effect that Respondent was exultant after concluding the transaction. Any normal person would have been exultant. Respondent had acquired a piece of property for $159,000.00 which he knew was worth far more - in ten months he sold it for $230,000.00. He was exultant because he had accomplished the purchase of the property without investing any of his money. This is not dishonesty.

The referee found the Respondent guilty of furtive attempts to conceal "the original contract." This is based upon the testimony of Mary Beth Lagrow and is ridiculous on its

face. "The original contract" referred to is the contract for $245,000.00. There is no conceivable, logical reason for Respondent attempting to conceal this contract - which was in the possession of the bank. If, in fact, the Respondent desired to conceal any contract, it would have been the $159,000.00.

The law is so clear as to not require citation of authority that a lawyer's guilt of violating the code of professional responsibility must be based upon clear and convincing evidence. Here there is no evidence, much less clear and convincing evidence that the Respondent intended to misrepresent anything material to the bank. There is no evidence that Schotzberger, in making the loan to Respondent, relied upon any representations other than the appliction furnished by the Respondent to the bank which made no representations relative to the purchase price or value of the property.

Determining that a lawyer is guilty of misrepresentations or of committing an act contrary to honesty and good morals is a serious matter because a lawyer's reputation for honesty is his stock in trade. Such a determination should be carefully made based upon clear and convincing evidence and not upon surmise, suspicion or conjecture.

SECOND POINT INVOLVED

Assuming that Respondent is guilty as recommended by the referee, does his conduct warrant a public reprimand?

The purpose of disciplining lawyers is to protect the bench, the Bar and the public and to deter other lawyers from engaging in similar misconduct. The penalty assessed in disciplinary proceedings should not be made for purposes of punishment and prejudice nor passion should not enter into its determination. Florida Bar v. Thomson 271 So.2d 758, Supreme Court 1972. In Thomson, supra, the Court stated, "the purpose of assessing penalty is to protect the public's interest and to give fair treatment to the accused attorney. The discipline should be corrective and the controlling considerations should be the gravity of the charges, the injuries suffered and the character of the accused."

In this case, no one complained to the Florida Bar or any other authority relative to REspondent's conduct. For an unknown reason, the Florida Bar undertook an investigation of the transaction, which investigation resulted in the filing of the formal Complaint. The only party involved, other than Respondent, was Ellis Bank. This party was not dissatisfied with the loan it made Respondent and, in fact, in 1979 made another loan to the Respondent in an amount greater than the

purchase price of the property being acquired, which fact was well known to the bank.

The offense did not arise out of or was it connected with Respondent's practice of law. It was an arms length business transaction between the Respondent and the bank, which transaction apparently was satisfactory to both of them. The transaction was fair because, in fact, the bank loaned approximately 70% of the value of the property as demonstrated by the bank's independent appraisal and the subsequent sale of the property some ten months later for $230,000.00.

The bank suffered no monetary loss whatsoever as a result of the transaction.

The record reflects that the Respondent has never been disciplined for any offense before, although he has practiced law for eleven years.

A public reprimand, to be published in the Southern Reporter and released by the Florida Bar to the news media, will result in advising the public that the Respondent has been guilty of misrepresentation and committing an act contrary to honesty and good morals. This will, in no way, be beneficial to the bench, Bar and the public. The sole result will be the public branding of the Respondent as a dishonest person.

Respondent submits that a public reprimand is too harsh a penalty for his conduct. Private reprimand would be more appropriate.

CONCLUSION

Respondent suggests that, not only shouldn't this case be before this Court, but it should not have been before the referee and, as a matter of fact, the Complaint should never have been filed.

The matter does not involve an attorney-client relationship; it involves an arms length business transaction unrelated to the practice of law. There is no complainant - both Ellis Bank and Respondent are well satisfied with the transaction.

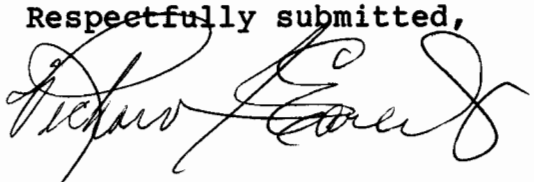
There is no evidence that Respondent is guilty of any misrepresentations of conduct contrary to honesty and good morals.

The Bar's case is based upon conjecture, surmise and suspicion. A review of the Complaint filed by the Florida Bar, in the light of the findings of fact by the referee, reflect that the Bar did not offer evidence in support of many of the allegations of the Complaint.

In brief, Respondent submits that this Court should dispose of this matter by reversing the report and recommendations of the referee and dismissing the Complaint.

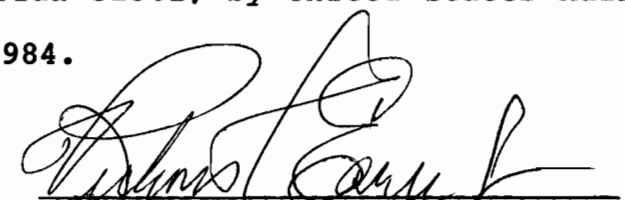
If counsel has overstated Respondent's case and if the Court determines that Respondent should be disciplined, it would be unduly harsh and would serve no worthwhile purpose to subject him to a public reprimand.

Respectfully submitted,



CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to Steve Rushing, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607 and John F. Harkness, Jr., Executive Director, The Florida Bar, Tallahassee, Florida 32301, by United States Mail this 14th day of September, 1984.



RICHARD T. EARLE, JR.
EARLE AND EARLE
447 Third Avenue North
St. Petersburg, FL 33701
(813) 898-4474
Attorney for Respondent