

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

File No. 06A83H79

v.

Supreme
Court No. 64,090

STEPHEN G. BENEKE,

Respondent.

FILED

SID J. WHITE

JUN 4 1984

REPORT OF REFEREE

CLERK, SUPREME COURT

By _____
Chief Deputy Clerk *jal*

- I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Article 11 of the Integration Rule of The Florida Bar, final hearing was held on April 18, 1984.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Steven Rushing, Esq.
For the Respondent: Richard T. Earle, Jr., Esq.

II. Findings of Fact:

After considering all of the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

1. Respondent is and at all times material herein was a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

2. In late January, 1978 respondent was contacted by David Catton, 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 27 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. 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.

3. Respondent testified that he thereafter decided to negotiate for a lower price, again through the broker, because the square footage of rentable space in the subject building was substantially less than represented. Ultimately, by contract dated January 20 the seller and respondent agreed upon a price of \$159,000.00. (Bar's Exhibit 2-A). Curiously, seller's acceptance of the last contract is dated January 23, 1978 (several days prior to Exhibits 1 and 1-A).

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 (Bar's Exhibits 4 & 6).

5. Although respondent contends that the Bank did not rely on the original \$245,000.00 contract provided by him and insists that 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.

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 \$1,000.00 more than the actual negotiated purchase price of the property.

7. On February 23, 1978, respondent purchased the property from Duval 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, Incorporated 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 exultation after concluding the transaction and his furtive attempts to conceal 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.

III. Recommendation as to Whether or Not the Respondent Sould Be Found Guilty:

I recommend that the Respondent be found Guilty of the following violations of his oath as an attorney, the Integration Rules of The Florida Bar and Disciplinary Rules of the Code of Professional Responsibility, to-wit: DR 1-102(A)(4) (Engaging in conduct involving misrepresentation); and Integration Rule Article XI, Rule 11.02(3)(a) (Committing an act contrary to honesty and good morals).

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend that the Respondent receive a public reprimand by means of publication of the Order in West's Southern Reporter, but without probation added.

It is true as Respondent's counsel ably argues that this case does not involve a breath of trust with a client or violation of an attorneys duty to his client, and further that no one has suffered a financial loss. Certainly, there has been no criminal charge brought in this case and to that extent the circumstances are less agregious than in the case of The Florida Bar v. Fussell, 179 So.2d 852 where the same arguments were advanced in behalf of the offender.

It is fitting to remember the wisdom and good sense of Justice Glenn Terrell when he remarked:

"Every lawyer is sensitive to his loyalty and fidelity to client but with it there is an equal and sometimes greater loyalty to the public that is often lost sight of. To say that every lawyer should be schooled in the element of public response or trusteeship means that he should be as sensitive to his fidelity to the public as he is that to client.".....Ex Parte Florida Bar, 5 So.2d 1 (1941).

V. Personal History and Past Disciplinary Record:

After finding of guilty and prior to recommending discipline pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record of the respondent based upon evidence adduced at trial before me, to-wit:

Age:	36
Year Admitted to Bar:	1973
Prior disciplinary convictions:	None, according to respondent.

VI. Statement of Costs and Manner in Which Costs Should be taxed: I find the following costs were reasonably incurred by The Florida Bar.

1. Grievance Committee Level	
a. Administrative Costs at the Grievance Committee Level, The Florida Bar Integration Rule, Article XI, Rule 11.06(9)(a)	\$ 150.00
b. Court Reporter appearance and transcript costs of Grievance Committee hearing held on February 22, 1983.	91.20
c. Deposition of Mark Campbell of October 5, 1983, transcript costs (10 pg. at \$1.00)	10.00
d. Copy of Grievance Committee Proceedings on February 22, 1983 (39 pg. at \$1.00)	39.00
2. Referee Level	
a. Administrative Costs at the Referee Level, The Florida Bar Integration Rule, Article XI, Rule 11.06(9)(a)	\$ 150.00
b. Court Reporter appearance of hearing on April 18, 1984.	105.00
c. Estimated transcript costs for hearing on April 18, 1984 (250 pgs. at \$2.40)	600.00
d. Bar Counsel travel and meals	13.25
e. Bar Investigator expenses (Ernest J. Kirstein)	315.80
f. Investigator charges of Joe Aloï Investigations	47.00

g. Witness Fees and Mileage:		
David Catton (from Madison, Florida)		
\$5.00 and (440 miles at .06)		\$ 31.40
William G. Kranich (from Oldsmar, FL)		
\$5.00 and (30 miles at .06)		6.80
Mary Beth LeGrow (from Clearwater, FL)		
\$5.00 and (15 miles at .06)		5.90
Frank D. Roberts (from St.Petersburg, FL)		
\$5.00 and (20 miles at .06)		6.20
Bernard Speaker (from St.Petersburg, FL)		
\$5.00 and (20 miles at .06)		<u>6.20</u>
	TOTAL:	<u>\$1,577.75</u>

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent.

Dated this 14th day of June, 1984.

Marion Buck
Referee

Certificate of Service

I hereby certify that copy of the foregoing Report of Referee was provided by regular mail to: Steve Rushing, Bar Counsel; Respondent, Stephen G. Beneke; Richard T. Earle, Jr., Respondent's attorney; and John Berry, Staff Counsel, The Florida Bar, this 15th day of June, 1984.

Marion Buck