047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

Case No. 75,116
(TFB Case No. 89-30,753 (18A)

WALTER J. BELLEVILLE,

Respondent.
_____/

ANSWER BRIEF

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TABLE OF AUTHORITIES

CASES	PAGES
The Florda Bar v. Teitelman 261 So.2d 140 (Fla 1972)	5,6,8,9, 10,12
Rules of Professional Conduct	
4-1.7(a)	1,8
4-1.7(b)	1,8

SYMBOLS AND REFERENCES

In this Brief, the complainant, The Florida Bar, shall be referred to as "the Bar".

The Report of Referee, dated February 8, 1991, shall be referred to "RR", followed by the cited page number.

The transcript of the final hearing held on April 20, 1990, shall be referred to as "T", followed by the cited page number.

The transcript of the excerpt of stipulated facts from the final hearing on April 20, 1990, shall be referred to as "TS", followed by the cited page number.

STATEMENT OF THE CASE

On October 5, 1989, the Eighteenth Judicial Circuit Grievance Committee "A" voted to find probable cause against the respondent. The Bar filed its formal Complaint on December 7, 1989. The respondent filed an Answer to the Bar's Complaint on January 5, 1990. On January 8, 1990, the respondent filed a Motion to Strike Portions of Complaint claiming particular paragraphs of the Complaint were irrelevant and inflammatory in nature. The Bar filed it's Response to Respondent's Motion to Strike Portions of Complaint on January 17, 1990, asserting that pleadings in Bar proceedings may be informal by rule and that the paragraphs in question contained factual background material necessary to the Bar's charges against the respondent. At the final hearing on April 20, 1990, the respondent submitted a Motion to Dismiss for Failure to State a Cause of Action or Alternative Motion for Judgment on the Pleadings. The Referee denied the motion as well as the previous Motion to Strike. In lieu of testimony the parties offered a set of stipulated facts to the Referee. The Referee filed his Report on February 8, 1991, finding the respondent not guilty of the Rules of Professional Conduct charged, to-wit: Rule 4-1.7(a) for representing a client when the representation will be directly adverse to the interests of another client without client consent; and Rule 4-1.7(b) for representing a client when the lawyer's exercise of independent professional judgment may be materially limited by the lawyer's responsibilities to a client or to a third person or by the lawyer's own interests without client consent.

A Petition for Review was filed by the Bar on or about March 26, 1991. It is on that on that Petition for Review that this case comes before the Court.

STATEMENT OF THE FACTS

During the time of 1988, the respondent, WALTER J. BELLEVILLE, was practicing law and as part of his practice represented a Mr. Bradley M. Bloch, the President of Galloway & Bloch, Inc. (TS p.3 and 5) Mr. Bloch, as President of Galloway & Bloch, Inc., entered into a Contract for Sale and Purchase of real property with Mr. James F. Cowan. (TS p.3) An Addendum to the Agreement provided that Mr. Cowan would pay closing costs.(TS p.6)

Additionally, Mr. Cowan agreed with Mr. Bloch that Mr. Bloch's attorney would prepare the closing documents. Mr. Bloch's attorney was the respondent, WALTER J. BELLEVILLE.

It is fairly obvious that Mr. Cowan did not have a particularly good deal as a result of his negotiations with Mr. Bloch. (TS p.3 through 6) Nor did Mr. Cowan retain an attorney to represent him. (TS p.5)

The respondent prepared all the documents necessary for a closing. (T p.6) The closing occurred at Mr. Cowan's residence. The respondent did not attend the closing. No explanation of the documents was made to Mr. Cowan by any representative from the respondent's office. However, respondent was paid a fee which was deducted from the sale proceeds pursuant to the agreement between Bloch and Cowan that Cowan would pay all closing costs. The closing statement prepared by the respondent indicates the fee on Mr. Cowan's side of the closing statement as "attorney fee (closing agent)". (PS p.6-p.7)

Mr. Belleville did not disclose to Mr. Cowan that he represented an adverse interest, did not obtain Mr. Cowan's consent

to any representation, and no fee was agreed upon between them prior to his undertaking of the preparation of the closing documents. (TS p.8 and p.9)

Mr. Belleville's position was that he did not represent Mr. Cowan and therefore the disclosures were not necessary. (TS p.9)

In fact, Mr. Belleville and Mr. Cowan never met one another or had any communications. (RR Recommendations)

Lastly, Mr. Bloch testified that in the event that the transaction had not closed, he would have been responsible for the payment of the respondent's attorney's fees (TS p.10)

SUMMARY OF THE ARGUMENT

The Referee properly recommended that the respondent be found not guilty of the rules violations charged. Specifically, the Referee found that The Florida Bar v. Teitelman, 261 So.2d 140 (Fla.1972) was not applicable to this case. Further, the Referee found that the respondent had no duty or obligation to Mr. Cowan as an attorney since there was no evidence that the respondent had any contact or dealing with Mr. Cowan.

The Referee's conclusions are consistent with the evidence presented and with the law.

ARGUMENT

ISSUE I

THE REFERREE'S FINDINGS OF FACT AND CONCLUSIONS ARE CONSISTENT WITH THE CLEAR AND CONVINCING EVIDENCE PRESENTED ON THE RECORD

The Bar argues that the Referee made inconsistent findings and conclusions with respect to the evidence presented. Initially, the problem with the claimed inconsistencies is the confusion that the Bar has with the stages of the proceedings at which the inconsistencies allegedly occur. The Bar cites at Paragraph 8 of its Initial Brief that the Court found Teitelman to be controlling. Unfortunately, what the Bar does not point out is that the comment made by the Referee was made in its ruling on a Motion to Dismiss the Complaint for Failure to State a Cause of Action. (T p.25-26).

Further, the Bar cites a statement made by the Referee during a Motion to Strike filed by the respondent. The Court went on to state during those same comments that "If the Bar's pleadings, which I have to accept as being the allegations, as being true at this time, are proven... I think the terms of the contract or agreement between Mr. Bloch and Mr. Cowan are material to this question of the disclosure obligations on the part of Mr. Belleville." (T p.30-31). It is important to note that one of the allegations found in the complaint was specifically that Mr. Belleville was representing Mr. Cowan.

The Bar's conclusion that "it is apparent that at the final hearing the Referee found that the Bar had proved its case by clear and convincing evidence and yet when he issued his Report almost a year later, he inexplicably found the opposite and recommended the

respondent be found not guilty." is simply not accurate. The Bar's logic and argument are based upon a faulty premise. That is, that the Referee had made any determination on the evidence at the time of the hearing. Instead, it is clear that the matters cited by the Bar in its Brief as findings by clear and convincing evidence were solely rulings on a Motion to Dismiss and a Motion to Strike filed by the respondent. Those Motions were heard prior to the submittal of any evidence to the Referee and therefore have no bearing on the Referee's ultimate determination based upon the evidence presented.

As a result of the foregoing, it is clear that the Referee's Report is not inconsistent with findings made at the time of the hearing. In fact, the findings are consistent with both the evidence presented and the law.

ARGUMENT

ISSUE II

THE RESPONDENT WAS NOT REQUIRED TO DISCLOSE TO THE SELLER THE FACT THAT HE WAS REPRESENTING THE BUYER WHERE THE RESPONDENT DID NOT REPRESENT THE SELLER

The Bar has urged in the latter portion of its argument as to this issue that, essentially, even where there is no express prohibition of the conduct of the respondent, the Court should discipline the respondent. However, there was no pleading addressed to conduct adversely reflecting upon the respondent nor any allegation of misconduct, whether specifically proscribed by the rules or generally proscribed, except those of 4-1.7(a) and 4-1.7(b) of the Rules of Professional Conduct. Therefore, it seems inappropriate for the Bar to now argue that the Referee's Report should be overturned based on matters that were not pled.

The real issue is whether the holding in The Florida Bar v. Teitelman, 261 So.2d 140 (Fla 1972) applies. It is the position of the respondent and the holding of the Referee that Teitelman does not apply here. In the Teitelman case, there was no discussion of an existing contract allocating the responsibility for the payment of closing costs or fees. Teitelman discussed at Page 143 the circumstances under which an attorney could charge a fee to the Seller for preparation of documents on behalf of the Seller. Teitelman further went on to cite opinions 64-56 and 65-34 of the Professional Ethics Committee of the Florida Bar which both pointed out that "It is not improper for the attorney to collect a reasonable fee for his services provided Seller has agreed with Buyer to pay all closing costs and provided the fee is part of the

closing costs." Opinion 64-56 (September 29, 1964) and "Who pays the attorney is a matter of contract. If the Seller employs the attorney he is primarily liable for the fees. Unless the Buyer in someway contracts to pay these fees he is under no obligation to do so." Opinion 65-34 (June 15, 1965). It is clear that the Court recognized circumstances under which a Buyer and Seller could contract for the sale and purchase of real property whereby one party's attorney would prepare all of the documents and as a matter of contract would receive payment from the other party. Those are the facts that are present before this Court. The contract provided that Mr. Cowan would pay all closing costs. The parties agreed that Mr. Belleville, Mr. Bloch's attorney, would prepare the closing documents. Mr. Cowan has testified that Mr. Belleville was Mr. Bloch's attorney. Mr. Bloch testified that he would have been responsible to Mr. Belleville for the attorney fees if the closing did not occur. Finally, there was clearly no confusion as to who Mr. Belleville represented. In fact, as the Referee found, there was no indication that Mr. Belleville ever met or dealt with Mr. Cowan.

Mr. Bloch hired and agreed to pay Mr. Belleville. The professional relationship of Mr. Belleville to Mr. Cowan is no different under this set of facts than if Mr. Belleville had charged and received payment from Mr. Bloch. And thereafter, a debit was entered against the Seller's proceeds and credited to the Buyer. Had that arrangement been done, then Teitelman would clearly be inapplicable even though the result would have been the same. The Seller would have still paid for the attorney's fees

pursuant to the contract. The difference is merely a bookkeeping entry.

In most Promissory Notes the maker is responsible for the payment of the holder's attorney's fees in the event of a default in the Note. In the event that the respondent had been hired by the holder of such a Note and had settled the claim of his client by payment of the Note directly to the holder and payment of the holder's attorney's fees directly to the attorney by the maker then the Bar's position would create an attorney client relationship between the maker and the respondent. It is an illogical conclusion of a logical extension of the Bar's insistence that payment of fees by a party not in privity with the attorney, but in fact, in an adversarial relationship with the attorney's client, creates a new relationship of attorney/client between the adversary and the attorney.

The Teitelman case does not stand for such a proposition. It does indicate a need to disclose potential conflicts where an attorney is not clearly representing only one party and where assignment of responsibility for payment is by contract between the client of the attorney and a third party. The only language in Teitelman which even hints of such a requirement is dicta, which, while persuasive authority, should be examined carefully in light of the factual distinctions of the case at bar.

In conclusion, facts and circumstances of this case do not fall within the requirements of Teitelman, since, the only person liable to the respondent for attorney's fees was Mr. Bloch and that liability was satisfied by assignment of that responsibility from

Mr. Bloch to the Seller by contract to which the respondent was not a party.

ARGUMENT

ISSUE III

A PRIVATE REPRIMAND IS THE APPROPRIATE DISCIPLINE IN THE EVENT THE REFEREE'S REPORT IS OVERTURNED

The Bar has cited several cases which have little similarity to the case before the Court in support of its request for a suspension of the respondent. All of the cases cited have clear lines drawn with regard to the attorney's "conflict of interest" or "dual representation."

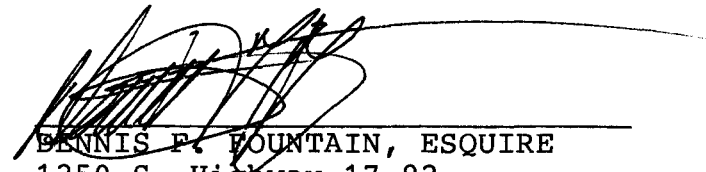
While the respondent might have been better served by providing clear written disclosures in this cause, it is clear that neither of the parties to the transaction felt that Mr. Belleville represented Mr. Cowan. Further, it is clear that Mr. Belleville, if he erred, at all, was mistaken as to his duties and did not act intentionally.

The only case cited by the Bar or the respondent which intimates the creation of an attorney/client relationship between Mr. Cowan and the respondent is Teitelman. It is certainly fair argument that Teitelman does not apply to the facts in this case. Mr. Belleville did not believe that he was subject to its requirements nor did the Referee, below. Therefore, a maximum penalty to the respondent should be a private reprimand.

CONCLUSION

WHEREFORE, the Respondent respectfully requests this Honorable Court to affirm the Report of Referee.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Answer Brief and Appendix have been furnished by regular U.S> Mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1925; a copy of the foregoing has been furnished by regular U.S. mail to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, an a copy of the foregoing has been furnished by regular U.S. Mail to Jan Wichrowski, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801, this 10th day of June, 1991.

DENNIS F. ROUNTAIN, ESQUIRE
Counsel for Respondent

APPENDIX

REFEREE'S REPORT.....RR

TRANSCRIPT OF STIPULATED FACTS.....TS

TRANSCRIPT OF FINAL HEARING.....T

TEITELMAN v. FLORIDA BAR.....A