IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

W. FURMAN BETTS,

Respondent.
_____/

Case No. 64,979
[TFB Case No. 82-03,087 (06A)]

THE FLORIDA BAR'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar"; the appellee, Mr. Betts, will be referred to as the respondent; "R" will denote the record and "RR" the Report of Referee.

STATEMENT OF FACTS AND CASE

In October of 1983, the respondent waived a formal grievance committee hearing and requested that the matter at hand be forwarded for trial before a referee. In March, 1984, The Florida Bar filed a formal Complaint. On March 13, 1984, the Supreme Court of Florida assigned the case to the referee.

Thereafter settlement negotiations between the Bar and counsel for respondent took place. Although a Consent Judgment had been anticipated, it did not take place and therefore the Bar filed an Amended Complaint, pursuant to both parties' stipulation, on October 16, 1985.

No Motion to Maintain Confidentiality was filed. Pursuant to the applicable rules at the time, the Integration Rules of The Florida Bar, Article XI, Rule 11.06(5)(d) required that unless a Motion to Maintain Confidentiality was filed the case became public. Although pleadings were labeled confidential by both parties, this was apparently through clerical error since no Order of confidentiality was ever made.

Final Hearing was held January 13, 1986. Although the referee indicated at Final Hearing that his report would be forthcoming, it was not filed until March 13, 1988, despite a Motion to Expedite the Referee's Report filed by the Bar.

Meanwhile, the Rules Regulating The Florida Bar replaced the previous Bar disciplinary rules and became effective January 1, 1987 at 12:01 A.M., The Florida Bar Re: Rules Regulating The Florida Bar, 494 So.2d 977, at 978 (Fla. 1986).

The Report of Referee recommends that respondent receive a private reprimand for the conduct alleged in Count One of the Bar's Amended Complaint. Respondent prepared a will for Claude W. Fairfield dated January 7, 1981. The beneficiaries were Mr. Fairfield's daughter, Thelma Jean Bayer, and her husband Winifield Scott Bayer. Shortly thereafter, Mr. Fairfield decided to change his will and remove his daughter and son-in-law as beneficiaries. The respondent prepared the first codicil to the will and it was executed on January 23, 1981, RR-2.

The respondent was concerned about his client's decision to change his will. He spoke with his client on four or five occasions and finally convinced him to reestablish Mrs. Bayer's interest in the estate. The respondent prepared a second codicil to this effect. He brought the codicil to Mr. Fairfield in the nursing home on February 27, 1981. However, it was not properly executed. The respondent admitted he did not know if his client was competent at the time or not. Mr. Fairfield's condition had been deteriorating since he signed his earlier will in January. The referee noted Mr. Fairfield's signature had deteriorated

considerably between January 7, 1981, and January 23, 1981 when he signed the first codicil, RR-2.

The respondent failed to read the entire contents of the second codicil to his client. He made no verbal response and the respondent had to place the pen in Mr. Fairfield's hand and hold his own hand over it to make an "X" on the paper. The referee noted that the client apparently lacked testamentary capacity at the time, RR-3.

The referee found there was insufficient evidence to find the respondent improperly assured Mrs. Bayer that there had been no changes in her father's will or first codicil that would harm her interest in her father's estate, RR-2.

The referee did find the respondent had placed himself in a conflicting position by accepting a Power of Attorney from his client, however, he did not ever take control of Mr. Fairfield's assets. Nor was there evidence to connect the respondent with the preparation or execution of a check for $10,000 made payable to "Miss Hodge", RR-4.

The referee found the respondent not guilty of Disciplinary Rules 1-102(A)(3) for engaging in illegal conduct involving moral turpitude; 1-102(A)(4) for conduct involving dishonesty, fraud,

deceit, or misrepresentation; 7-101(A)(3) for prejudicing or damaging his client; 7-102(A)(6) for participating in the creation or preservation of evidence he knows to be false; and 7-102(B)(2) for failing to promptly reveal a fraud to a tribunal. He also found him not guilty of violating Integration Rule 11.02(3)(a) for conduct contrary to honesty, justice or good morals. Respondent was found to have violated Disciplinary Rule 1-102(A)(5) for engaging in conduct prejudicial to the administration of justice and 1-102(A)(6) for conduct reflecting adversely on his fitness to practice law, RR-4.

The referee found the respondent not guilty of all charges in Count Two of the Bar's Complaint. These charges involved alleged fraud since the respondent denied receiving a fee in a sworn statement although the evidence indicated he had received the check. The referee found that this was an unintentional misrepresentation of facts and found respondent not guilty, RR-5-6.

The Bar does not challenge the referee's findings of fact and seeks review of the referee's recommended discipline only since the referee's recommended private reprimand is improper under the applicable rules.

SUMMARY OF ARGUMENT

The referee has made detailed findings of fact with which The Florida Bar has no dispute. However, the referee has recommended a private reprimand as discipline for the respondent's actions in guiding his client's hand to make his signature in the will where the client clearly lacked the mental capacity to accomplish this.

A private reprimand is inappropriate for both procedural and substantive reasons.

Procedurally, the Rules Regulating The Florida Bar came into effect on January 1, 1987, some five months prior to the Report of Referee. Rule 3-7.5(k)(1)(3) states that minor misconduct is the only category of attorney misconduct for which a private reprimand is an appropriate discipline. Since the case at hand is a formal complaint rather than a complaint of minor misconduct, a private reprimand is procedurally inappropriate.

Further, the seriousness of respondent's conduct in placing an improper signature on such an important document as a will mandates stronger sanctions in order to effectuate the goals of the Supreme Court of Florida in disciplining attorneys.

ARGUMENT

POINT I

A PRIVATE REPRIMAND IS IMPROPER WHERE RULE 3-7.5(k)(1)(3) PROHIBITS PRIVATE DISCIPLINE IN A PUBLIC PROBABLE CAUSE CASE.

It is established that the Rules Regulating The Florida Bar became effective on January 1, 1987 at 12:01 A.M. regarding the procedures for attorney discipline, see The Florida Bar Re: Rules Regulating The Florida Bar, supra.

The new rules divide misconduct into two separate categories: minor misconduct handled in a confidential manner and probable cause findings handled by a public formal complaint.

Private reprimands are limited by Rule 3-5.1(b) of the Rules of Discipline to minor misconduct cases. Further, Rule 3-7.5(k)(1)(3) states that a referee may only recommend private reprimands in cases of minor misconduct:

> Minor misconduct is the only type of misconduct for which a private reprimand is an appropriate disciplinary sanction.

Minor misconduct cases are the only cases handled in a confidential manner since all pending formal complaints not previously ordered to be confidential became public as of January 1, 1987, Rule pursuant to the new rules at 3-7.1(a)(2).

The case at hand was never and is not now a minor misconduct case. Rather, it is a formal complaint case which is therefore public. Given the apparent limitation of private reprimands to cases of minor misconduct, nothing less than public discipline is appropriate in this case.

The referee's apparent wish to recommend the most lenient available discipline can still be imposed by public discipline. Since public discipline is mandatory under the current rules, the discipline is not unduly harsh and is proper under the procedural rules. The goals of the Supreme Court of Florida in imposing lawyer sanctions, outlined in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) to include protection of the public from unethical conduct, encouraging reformation of the respondent, and deterrence of others are best served by public discipline. The seriousness of the actions of respondent demand public discipline.

Florida's Standards for Imposing Lawyer Sanctions, approved by The Florida Bar's Board of Governors in November, 1986, in an effort to promulgate the American Bar Association's efforts towards uniformity in discipline, support nothing less than public discipline. Section 6.1 addresses violations of duties owed to the legal system by false statements, fraud, and misrepresentation. Section 6.12 most closely describes the

conduct of the respondent in placing his client's false signature on a will by guiding the client's hand where the client was not mentally capable of signing the will:

> Suspension is appropriate when a lawyer knows that false statement or documents are being submitted to the court or that material information is improperly being withheld and takes no remedial action.

The Supreme Court of Florida has shown on apparent adoption of the Florida Standards guidelines by forwarding a copy of the Standards to all referees upon assigning them cases. Section 9.3 of the Standards states that factors justifying mitigation in the degree of discipline to be imposed include: a) the absence of a prior disciplinary record, and b) the absence of a dishonest or selfish motive. Nevertheless, public discipline is called for. A suspension of less than 90 days and certainly nothing less than a public reprimand is therefore appropriate.

It should be noted that although approximately six years have passed since the misconduct of the respondent, the initial delay was due to the ongoing negotiations between The Florida Bar and respondent which did not come to take place and the later delay was caused by the failure of the referee to submit a report in a timely manner after Final Hearing. However, (i) of Section 9.3 of the Standards states that the respondent must demonstrate

specific prejudice resulting from that delay. No prejudice appears to have been caused respondent by this delay and therefore this should not be considered a mitigating factor.

Therefore, nothing less than public discipline for the respondent is appropriate in this case and the private reprimand recommended by the referee must be rejected due to both procedural restraints and discipline goals.

CONCLUSION

WHEREFORE, The Florida Bar respectfully requests this Court accept the Referee's basic findings of fact but reject the recommended discipline of private reprimand and impose nothing less than a public reprimand and assess the payment of costs of this proceedings, currently totalling $828.50.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief have been furnished by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida. 32399-1927; a copy of the foregoing has been furnished by regular U.S. mail to Counsel for respondent, Richard T. Earle, Jr., at 150 Second Avenue North, Suite 1200, St. Petersburg, Florida 33704; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 22nd day of June, 1988.

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