

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant

vs.

H. EUGENE JOHNSON,
Respondent

CASE NO. 67,638

(TFB #13A85H40)

FILED
SID J. WHITE
MAY 21 1987
CLERK, SUPREME COURT
By _____
Deputy Clerk

REPLY BRIEF OF RESPONDENT

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SUMMARY OF ARGUMENT

AS TO THE FILING OF THE LIMITED PARTNERSHIP AGREEMENT: Prior to the employment of the Respondent, a Limited Partnership Income Tax Return was filed on behalf of a purported limited partnership known as Salvage Enterprises Limited when, in fact, said limited partnership did not exist. Upon Respondent's employment, in order to legalize what had been done before (the filing of the Income Tax Return), Respondent prepared a Limited Partnership Agreement showing himself as a Limited Partner contributing \$5,000 and Hines as a General Partner contributing \$100, which Agreement was filed in the office of the Secretary of State. Neither Respondent nor Hines, his client, intended that Respondent contribute the \$5,000. It was not the intent to mislead or defraud anyone and no one was misled or defrauded.

If the filing of the Limited Partnership Agreement under these conditions constituted a breach of the Code of Professional Responsibility, certainly, under these circumstances, a private reprimand is adequate discipline.

AS TO THE LETTERS: Respondent was an ordained Minister of the Church of Christ as well as a lawyer. The Complainant, Hines, had been active in the Church. After Hines had defrauded Respondent of \$20,000, Respondent wrote the various letters between August 6 and November 26, 1984. These letters did not constitute threats by the Respondent of any action that he

would take under the circumstances. They did not seek restitution of the \$20,000. Instead, they expressed Respondent's views as an ordained Minister of a Fundamentalist Church of the punishment that The Lord would mete out to Hines as an unrepentent sinner who had not sought forgiveness.

The nature of these letters might well be foreign and even abhorrent to people of other faiths. However, there is no evidence and the Referee did not find that the letters were written for any other purpose or that the Respondent did not believe them to be true.

RESTATEMENT OF THE FACTS
AND THE CASE

For reasons that will be set out hereafter, it is necessary for the Respondent to restate the facts and the case.

This case is before the Court on the Complainant's Petition to Review a Referee's Report, as amended.

The Bar filed its Complaint. The Respondent filed his Answer which, in effect, denied all of the material allegations in the Complaint. Hearing was held before the Referee during which testimony was taken.

The Referee filed his Report. The Report found the Respondent guilty of two separate and distinct violations of the Code of Professional Responsibility and recommended that Respondent receive a private reprimand therefor.

The Complainant timely filed its Petition for Review of the Referee's Report on the basis that "the Referee's recommendation of a private reprimand is inappropriate discipline when it is applied to the facts of this case." The Complainant does not question any of the Findings of Fact by the Referee.

The Complaint charges many alleged violations of the Code of Professional Responsibility beginning in May 1984, and culminating in a series of letters written by the Respondent between August 6, 1984 and November 26, 1984.

In his Report, the Referee made the following Findings:

"On or about March 1, 1983, the Complainant, Hines, employed the Respondent as his attorney to represent him. Prior to and at that time, Hines was engaged in a venture to locate and

recover sunken treasure and artifacts in the Bahama Islands. Prior to March 1, 1983, he had formed an association with a Mr. Anderson and a Mr. Glantz whereunder Anderson and Glantz furnished the necessary capital and Hines furnished the boat and crew to engage in the venture. Although Anderson and Glantz had put up substantial capital and the venture had engaged in recovering treasure, the legal form of the venture had never been agreed upon and there were no formal partnership agreements or limited partnership agreements entered into, nor had the corporation been formed. Notwithstanding the foregoing, United States of America Income Tax Returns were prepared and filed in the name of a purported limited partnership known as Salvage Enterprises Limited. At the time of Respondent's employment, he concluded that a limited partnership should be formally formed and filed, as required by law, and he prepared a Limited Partnership Agreement wherein Hines was a General Partner and Respondent was a Limited Partner which Limited Partnership Agreement provided that Respondent would contribute \$5,000.00 to the Partnership. Said Limited Partnership Agreement was duly filed in the Office of the Secretary of State of the State of Florida.

This Referee finds that it was never the intent of Respondent to contribute said \$5,000.00, nor did Hines intend for him to do so - - the contribution of Respondent was to be by way of legal services and not cash. Further, I find that the purpose of said Limited Partnership Agreement was not to mislead or defraud anyone and no one was misled or defrauded thereby. On the other hand, the execution and filing of said document could have misled the public or members thereof into believing that \$5,000.00 had been contributed by the Respondent to the Limited Partnership. The Referee further finds that the execution and filing of said document, with no intent whatsoever of contributing the \$5,000.00 to the Limited Partnership, was conduct, in effect, unbecoming a lawyer."

Said misconduct was not charged in the Complaint.

In addition to the foregoing, the Referee made the following Findings of Fact:

In the Spring of 1984, the Respondent advanced to Hines, the Complainant, a substantial amount of

money to repair a boat owned by Hines so that the same could be taken to the Bahamas to search for treasure. At that time, Hines executed and delivered to Respondent a Bill of Sale transferring title to said boat to Respondent and gave Respondent the original Coast Guard documents relative to said boat with the request that Respondent not transfer the title to the boat without first affording Hines an opportunity to sell the same.

Subsequently, an unsuccessful trip was made by Hines to the Bahamas in search of treasure. After the trip was concluded, Hines advised Respondent that he had a sale for the boat for \$20,000 and requested that Respondent deliver to him the unrecorded Bill of Sale above mentioned and the Coast Guard documents for the vessel so that he could consummate the sale. Respondent so delivered said documents to Hines upon Hines promise that the \$20,000 sale price for the boat would be paid to Respondent for the sums advanced by him and for legal services furnished by him. Hines sold the boat for \$20,000 and deposited the check in Independent Bank of Florida located in Tampa.

Hines failed to pay said \$20,000 or any part thereof to Respondent or to give him security for the payment of the same. As a result of this, a controversy arose between Respondent and Hines.

This Referee is uncertain as to whether the Bill of Sale to the boat and the Coast Guard documents were delivered to Respondent with the intention of transferring title thereto or whether the same was delivered as security for monies owed by Hines to Respondent. In either event, Respondent was entitled to the proceeds of said sale and Hines failed to pay the same to him. It was at this point that any attorney/client relationship between Hines and Respondent was terminated.

As a result of Hines failure to pay said monies to the Respondent, Respondent did the following:

1. He wrote a letter to Mr. A. Gerald Divers, President, Independent Bank of Florida, on August 6, 1984, which reflected that Hines had stolen the \$20,000 from Johnson, which \$20,000 was on deposit in the above mentioned bank. Said letter advised Mr. Divers that Respondent was going to bring legal action against Hines and requested that he be advised

as to the exact amount of the check that was deposited or be given a photocopy of it.
(Exhibit A attached to Complaint)

2. He wrote a letter dated August 6, 1984, to Mr. Hines. (Exhibit B attached to the Complaint)

3. He wrote a letter to the Complainant dated November 18, 1984. (Exhibit C attached to the Complaint)

4. He wrote a letter to the Complainant dated November 26, 1984. (Exhibit D attached to the Complaint)

5. He filed an affidavit with the office of the State Attorney of the Nineteenth Judicial Circuit alleging Grand Theft of the salvage vessel.

As to Item "1" above (the letter to Divers), Respondent believed that he was entitled to the \$20,000 in Independent Bank of Florida. The wording in said letter might well be ill-advised but I am unable to find that it constitutes any violation of the Code of Professional Responsibility.

As to Items "2", "3" and "4" above (the letters from Respondent to Hines), this Referee finds that said letters, when read carefully, do not constitute any threat that Respondent would in any way harm or injure Mr. Hines. The Respondent is an ordained Minister of the Church of Christ and has been such for a long period of time. Said letters express the Respondent's beliefs as to what The Lord would do to Mr. Hines as a result of his conduct not only toward Respondent but to other persons. Although the Referee does not understand said views, they might well be in conformance with the Respondent's religious beliefs. These letters are not the type of correspondence ordinarily written by a lawyer in a controversy with an ex-client over an existing indebtedness. On the other hand, neither the Respondent nor Hines were ordinary people and the controversy between them was not an ordinary fee controversy.

I find that the writing of said letters constitute conduct unbecoming a lawyer."

Based upon the Findings of Fact heretofore set out, the Referee recommended that the Respondent receive a private reprimand for Conduct Reflecting on his Fitness to Practice Law.

In addition to the above quoted Findings of Fact, the Referee made the following Findings of Fact:

"Most of the testimony in this case was directed toward conduct of the Respondent and Hines subsequent to the execution and filing of the Limited Partnership Agreement heretofore referred to and prior to August 6, 1984. I find specifically that there is no clear and convincing evidence that the Respondent violated any provisions of the Code of Professional Responsibility subsequent to the execution and filing of the Limited Partnership Agreement and prior to August 6, 1984."

This Finding of Fact, in effect, held that there was not clear and convincing evidence of any misconduct on the part of the Respondent other than the filing of the Limited Partnership Agreement (April 1983) and the writing of the letters (August 1984).

The above quoted Findings of Fact by the Referee are the facts in this case. On its Petition for Review, the Complainant does not question the Findings of Fact; the sole issue is, assuming these facts to be true, was the discipline appropriate?

Notwithstanding that the Referee found that there was not clear and convincing evidence of any misconduct between the filing of the Limited Partnership Agreement and the writing of

the letters, in Complainant's Brief it continually refers to the allegations in the Complaint, as facts, when the Referee found these allegations not supported by the evidence. Complainant's Statement of Facts consists of the evidence offered by Complainant before the Referee which the Referee completely rejected, except as to the filing of the Limited Partnership Agreement and the writing of the letters.

FIRST ISSUE
AS RESTATED BY THE RESPONDENT

IS A PRIVATE REPRIMAND ADEQUATE DISCIPLINE FOR A LAWYER WHERE THE LAWYER FILES A LIMITED PARTNERSHIP AGREEMENT REFLECTING THAT HE IS CONTRIBUTING \$5,000 TO THE LIMITED PARTNERSHIP WHEN, IN FACT, NEITHER HE NOR THE GENERAL PARTNER EVER INTENDED THAT HE CONTRIBUTE ANY MONIES THERETO AND DID NOT INTEND TO MISLEAD ANYONE?

ARGUMENT

The Issue, as stated by the Complainant, consists of two issues:

1. Whether a lawyer who files a document containing a false statement in a business venture should receive more than a private reprimand; and

2. Whether the conduct of a lawyer, pursuant to a plan to humiliate and denigrate a client, warrants more than a private reprimand.

Issue No. 1, above set out, is substantially the Issue which Respondent has restated. Issue No. 2 above is an Issue which is non-existent because there is no Finding of Fact by the Referee that Respondent's writing of the letters constituted a plan to humiliate and denigrate a client. There is a second Issue which is whether or not the writing of the various letters, under the circumstances found by the Referee, warrants more than a private reprimand. The second Issue will be handled separately in this Brief.

It would seem that the relevant circumstances relative to the filing of the Limited Partnership Agreement are:

1. The purpose and intent of the Respondent in preparing and filing the same;
2. The actual agreement between the parties relative to the contribution;
3. The possible effect that the filing of said Agreement would have on third parties.

The Referee found that, prior to Respondent's employment by Hines, a Limited Partnership Income Tax Return had been filed by a purported Limited Partnership known as Salvage Enterprises Limited when, in fact, there was no Limited Partnership Agreement and none had been filed in the Offices of the Secretary of State. Respondent, when he was employed, "concluded that a Limited Partnership should be formally formed and filed as required by law" and Respondent prepared the same and filed it. His motive obviously was to merely legalize what had been done in the past so as to protect his client insofar as possible.

The Referee found that, as between Respondent and his client, Respondent never intended to put up the \$5,000 and the client never expected him to do so.

The Referee further found that the purpose of filing the Limited Partnership Agreement was not to mislead or defraud anyone and no one was misled or defrauded thereby. Further, no one could have been misled or defrauded thereby for the reason that, having executed and filed the Limited Partnership Agreement, the Respondent became liable to the extent of \$5,000

to any parties who relied upon said Agreement and were injured thereby.

Further, the Agreement could have been modified and amended at any time after its filing by merely changing the amount of the contributions.

From the foregoing, it would seem that Respondent's motives in preparing, executing and filing the Limited Partnership Agreement were good. It conformed to the actual agreement between Respondent and his client and it was not done for the purpose of misleading any third parties and did not have that effect.

Under these circumstances, Respondent suggests that the finding of guilt as to this matter was inappropriate and further, even if appropriate, a private reprimand would be adequate discipline.

SECOND ISSUE

IS A PRIVATE REPRIMAND ADEQUATE DISCIPLINE
UNDER THE FACTS AS FOUND BY THE REFEREE FOR
WRITING THE VARIOUS LETTERS TO MR. HINES?

ARGUMENT

In this regard, there is no evidence and the Referee did not find that the letters were writern to humiliate and denigrate the client. Instead, the Referee found that Respondent advanced to Hines a substantial amount of money to repair his boat so that the same could be taken to the Bahamas to search for treasure and Hines executed and delivered to Respondent a Bill of Sale transferring title to said boat to Respondent and gave Respondent the original Coast Guard documents with a request that Respondent not transfer the title to the boat without first affording Hines an opportunity to sell the same. The client made the trip to the Bahamas and, after the same was concluded, he advised Respondent that he had a sale for the boat for \$20,000 and requested Respondent to deliver to him the unrecorded Bill of Sale above mentioned and the Coast Guard documents for the vessel so he could consummate said sale. Hines promised Respondent that the \$20,000 sales proceeds for the boat would be delivered to the Respondent for the sums advanced by him and for legal fees and, relying thereon, Respondent delivered said documents to Hines. Hines sold the boat for \$20,000, deposited the same in the bank and failed to pay Respondent said \$20,000 or any part thereof or to give him security for the payment of the same. The Referee

further found that he was uncertain as to whether the Bill of Sale and the Coast Guard documents were delivered to Respondent with the intention of transferring title thereto or whether the same was delivered as security for the monies owed by Hines to Respondent but that, in either event, Respondent was entitled to the proceeds of the sale and Hines failed to pay the same. He further found that Respondent terminated the attorney/client relationship upon Hines failure to pay him the money.

In effect, Hines obtained the Bill of Sale to the boat and the Coast Guard documents by fraudulently representing to Respondent that he would deliver to him \$20,000 from the proceeds of the sale of the boat and, instead, retained the same. Thus, in this case, we do not have lawyer trying to collect a fee. Instead, we have a lawyer who was defrauded into giving up the Bill of Sale to the boat and the Coast Guard documents thereby enabling the client to wrongfully procure the proceeds from said sale. It is indeed understandable that Respondent, having been conned by his ex-client, was upset and angry.

It must be understood that, as found by the Referee, Respondent is not only a lawyer but is an ordained Minister of the Church of Christ, a Fundamentalist denomination. It also must be understood that Mr. Hines had been actively affiliated with the Church. A careful reading of these letters will reflect that the Respondent was not demanding payment of the \$20,000 and was not threatening to harm Hines. The only allusion to restitution is the statement in the November 26th letter which reads:

The Lord demands you return the gold and money you stole from your friends. If you fail, every business venture will collapse around you."

When read in the context of what actually happened -- the fact that Hines received substantial sums from former partners Glantz and Anderson, he undoubtedly recovered some treasure, including gold, yet Glantz and Anderson received none of their money back, nor did they receive any portion of the gold and treasure recovered -- it is apparent that the above quoted portion of the letter is referring not to the \$20,000 owed Respondent who was certainly not Hines friend, but is referring to the gold and money he stole from others. I suggest that these letters to Hines were not written by Respondent as an attorney. They were not written to recover the money owed Respondent. They were written by the Respondent as an Ordained Minister of the Church of Christ to a person who had been active in the Church but who had sinned mightily and, as a Minister, Respondent was explaining in language of the Fundamentalists, which Hines could understand, the ultimate effect of Hines transgressions unless Hines repented and sought forgiveness of The Lord. Respondent was explaining to Hines, not what he, Respondent, would do, but what, in his view as a Fundamentalist Minister, the Lord would do - something over which Respondent had no control whatsoever. The Referee well stated the situation when, in his Report, he said:

"...This Referee finds that said letters, when

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read carefully, do not constitute any threat that Respondent would, in any way, harm or injure Mr. Hines. The Respondent is an Ordained Minister of the Church of Christ and has been such for a long period of time. Said letters express Respondent's beliefs as to what The Lord would do to Mr. Hines as a result of his conduct, not only toward Respondent but to other persons. Although this Referee does not understand said views, they might well be in conformance with the Respondent's religious beliefs. These letters are not the type of correspondence ordinarily written by a lawyer in a controversy with an ex-client over an existing indebtedness. On the other hand, neither the Respondent nor Hines were ordinary people and the controversy between them was not an ordinary fee controversy."

It is submitted that said letters, although shocking to some, may be in conformance with the beliefs of others, and there is absolutely no evidence that the Respondent isn't one of them.

Respondent recognizes that one cannot shed at will the cloak of lawyer and put on the cloak of Minister. If one is both a lawyer and a Minister one wears both cloaks and should not engage in conduct suitable to a lawyer but not to a Minister or suitable to a Minister but not to a lawyer. His conduct must be suitable to both. Therefore, Respondent does not find fault with the findings of the Referee relative to the writing of the letters or the discipline recommended. On the other hand, it should be recognized that merely because Respondent was a lawyer, he should not be precluded from acting as a Minister. The Referee well recognized this when he stated:

"On the other hand, neither the Respondent nor Hines were ordinary people and the controversy between them was not an ordinary fee controversy."

Respondent submits that the recommendation of a private reprimand is adequate discipline for the conduct of the Respondent under the very peculiar circumstances of this case.

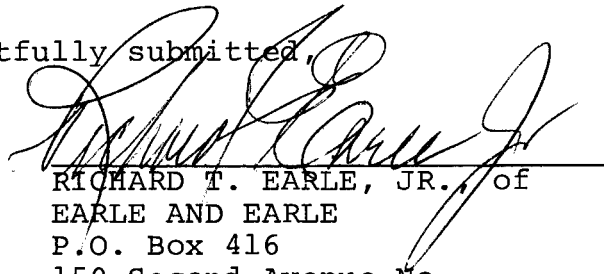
C O N C L U S I O N

Under the facts as found by the Referee, it is doubtful that the Respondent violated any of the provisions of the Code of Professional Responsibility. Further, there is no evidence that the Respondent intended to or did, in fact, defraud or mislead the client or anyone else and there is no evidence that anyone was damaged or hurt by his conduct.

On the other hand, as the Referee found, the letters which Respondent wrote are not the type of correspondence ordinarily written by a lawyer in a controversy with an ex-client over an existing indebtedness. In a usual situation, said letters might well have constituted a more serious transgression. However, as the Referee also found, Respondent and Hines were not ordinary people and the controversy between them was not an ordinary fee controversy.

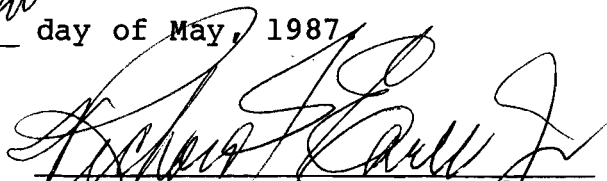
Looking at the overall picture, based upon the facts as found by the Referee, Respondent submits that a private reprimand is an adequate disciplinary measure.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to BONNIE MAHON, Attorney for The Florida Bar, Suite C-49, Marriott Hotel, Tampa International Airport, Tampa, FL 33608, and to JOHN BERRY, ESQ., The Florida Bar, Tallahassee, FL 32301, by U.S. Mail, this 19th day of May, 1987.



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