

4-3

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

vs.

JOHN G. FATOLITIS,

Respondent.

Case No. 72,613  
TFB No. 87-22,543 (06A)  
(formerly 06A87H65)

\_\_\_\_\_ /

THE FLORIDA BAR'S INITIAL BRIEF

FILED  
SID J. WHITE  
MAY 10 1989  
CLERK OF SUPREME COURT  
By \_\_\_\_\_  
Deputy Clerk

Bonnie L. Mahon  
Bar Counsel  
Atty. No. 376183  
The Florida Bar  
Tampa Airport, Marriott Hotel  
Suite C-49  
Tampa, Florida 33607  
(813) 875-9821

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES.....	ii
SYMBOLS AND REFERENCES.....	iii
STATEMENT OF THE FACTS AND OF THE CASE.....	1-3
SUMMARY OF ARGUMENT.....	4
ARGUMENT.....	5-9
ISSUE:    WHETHER A PRIVATE REPRIMAND IS INAPPROPRIATE IN LIGHT OF RULE 3-7.5 (K) (1) (3), RULE 3-5.1 (b) AND THE RESPONDENT'S PRIOR DISCIPLINARY RECORD.	
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	11

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>The Florida Bar vs. Betts</u> 530 So.2d 928 (Fla. 1988).....	7,8
Disciplinary Rules of The Florida Bar's Code of Professional Responsibility:.. 1-102(A) (5) 1-102(A) (6)	3,8
<u>Rules Regulating The Florida Bar,</u> <u>Rules of Discipline:.....</u>	3,4,5
3-5.1(b) 3-7.5(K) (1) (3)	
<u>Florida's Standards for Imposing</u> <u>Lawyer Sanctions:.....</u>	6,7
6.1 9.2	

## SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar". The appellee, JOHN G. FATOLITIS, will be referred to as "the respondent". "R" will refer to the record. "RR" will denote the Report of Referee. "TR" will refer to the transcript of the final hearing held on October 7, 1988.

STATEMENT OF THE FACTS AND OF THE CASE

On March 18, 1988, the respondent executed a written Waiver of Probable Cause Hearing and requested that the matter at hand be forwarded for trial before a referee. On June 22, 1988, The Florida Bar filed a formal Complaint against the respondent. A Final Hearing was held on October 7, 1988.

On September 3, 1982, the respondent was retained by Mike Syredis to prepare his Last Will and Testament. (RR, p.1, Section II). The Last Will and Testament required the signature of two witnesses. The two witnesses used were purportedly John G. Fatolitis and Evelyn J. Fatolitis. (R-Bar's Exhibit #1).

Mr. Syredis' Last Will and Testament was dated September 7, 1982. (R-Bar's Exhibit #1). The Florida Bar's Complaint charged the respondent with forging the signature of his wife, Evelyn J. Fatolitis, on the Last Will and Testament of Mike Syredis. (R-Complaint, p.1, para.5).

At the final hearing, Mrs. Fatolitis testified that on the evening of September 3, 1982, she burned her right hand and thus was unable to sign her own name as a witness to the execution of Mike Syredis' Will. (TR, p.8, L.11-14). In addition, Mrs. Fatolitis testified that the respondent did in fact sign her name as a witness to Mr. Syredis' Will since she was unable to do so herself. (TR, p.7, L.2-5). However, Mrs. Fatolitis also

testified that she was present when Mr. Syredis executed his Will, when the respondent signed the Will as a witness, and when the respondent signed her name as a witness to the Will. (RR, p.1, Section II; TR, p.7, L.13-25 and p.8, L.1-16).

At the final hearing, The Florida Bar submitted evidence which established that Mrs. Fatolitis could sign her own name on September 5, 1982, which was two days after she burned her hand and two days before the date of execution indicated on Mr. Syredis' Will. However, both Mr. and Mrs. Fatolitis testified at the final hearing that the Will of Mike Syredis, which was dated September 7, 1982, was actually executed on Saturday, September 4, 1982. (TR, p.10, L.19-21; TR, p.15, L.9-25; and RR, p.1, Section II).

On the date of the final hearing, Mr. Syredis was deceased. (TR, p.21, L.10). Consequently, the referee gave the respondent the benefit of the doubt and accepted the respondent's and his wife's testimony that the Will was executed on September 4, 1982 and that Evelyn Fatolitis was present when Mr. Syredis executed his Will, when the respondent signed as a witness to the Will, and when the respondent signed Mrs. Fatolitis' name as a witness to the Will of Mike Syredis. (RR, p.2, Section II).

At the conclusion of the final hearing, the referee found that the respondent violated Florida Statute Section 732.502(1)(c) by signing his wife's name as a witness to the Last

Will and Testament of Mike Syredis. In addition, the referee found that the respondent improperly dated Mr. Syredis' Will prior to its execution and then failed to correct the date contained in the Will to reflect the date that it was actually executed. (RR, p.2, Section II). In light of the above, the referee found the respondent guilty of violating Disciplinary Rule 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice) and DR 1-102(A)(6) (engaging in conduct that adversely reflects on his fitness to practice law). (RR, p.2, Section III).

After finding the respondent guilty of misconduct, the referee recommended that the respondent receive a private reprimand and that he be required to pay the costs of the proceedings. (RR, p.2, Section III).

The Florida Bar does not challenge the referee's findings of fact. However, the Bar does seek review of the referee's recommended discipline since the referee's recommendation of a private reprimand is inappropriate according to Rule 3-5.1(b) and 3-7.5(K)(1)(3), Rules of Discipline, and under the current standards for imposing lawyer sanctions.

## SUMMARY OF ARGUMENT

The referee's recommendation of a private reprimand in this case is inappropriate in light of Rule 3-5.1(b) and 3-7.5(K) (1) (3), Rules of Discipline.

Rule 3-5.1(b), Rules of Discipline, states that minor misconduct is the only type of attorney misconduct for which a private reprimand is an appropriate discipline. The case at hand is not a minor misconduct case, thus a private reprimand is inappropriate.

In addition, Rule 3-7.5(K) (1) (3), Rules of Discipline, states, in part, that a private reprimand may be recommended only in cases based on a Complaint of Minor Misconduct. The case on review is not based on a Complaint of Minor Misconduct. It is based on a formal, public Complaint which makes a private reprimand procedurally inappropriate especially in light of the public status of this case.

Furthermore, the recommended discipline is inconsistent with the current standards for imposing lawyer sanctions, which support public discipline in this case in light of respondent's prior disciplinary record and the serious consequences which could have occurred had Mr. Syredis' Will been contested.

The Florida Bar asks this Court to disapprove the referee's recommendation of a private reprimand and impose a public reprimand against the respondent.



## ARGUMENT

ISSUE: WHETHER A PRIVATE REPRIMAND  
IS INAPPROPRIATE IN LIGHT OF RULE 3-7.5  
(K) (1) (3), RULE 3-5.1(b) AND THE RESPONDENT'S  
PRIOR DISCIPLINARY RECORD.

The Rules Regulating The Florida Bar divide attorney misconduct into two categories: minor misconduct handled by a confidential Complaint of Minor Misconduct, and probable cause findings handled by a public, formal Complaint.

The case at hand is not a case of minor misconduct since the grievance committee did not recommend minor misconduct nor did the respondent tender an Admission of Minor Misconduct to Branch Staff Counsel or the Grievance Committee. (See Rule 3-5.1(b) (3), and Rule 3-5.1(b) (5), Rules of Discipline). On March 18, 1988, the respondent entered into a written Waiver of Probable Cause Hearing wherein he agreed to the entry of a finding of probable cause in this case. Since the respondent tendered a written Waiver of Probable Cause Hearing to The Florida Bar, a public, formal Complaint was filed with the Supreme Court.

According to Rule 3-7.5(K) (1) (3), Rules of Discipline, a referee can only recommend a private reprimand in cases based on a confidential Complaint of Minor Misconduct. Since the case at hand is not based on a confidential Complaint of Minor Misconduct but rather is based on a public, formal Complaint,

filed by The Florida Bar subsequent to the respondent's written Waiver of Probable Cause Hearing, a private reprimand is procedurally inappropriate.

According to Florida's Standards for Imposing Lawyer Sanctions, (hereinafter referred to as The Standards), approved November, 1986 by The Florida Bar's Board of Governors, a public reprimand is the appropriate discipline for respondent's misconduct in this case. Section 6.1 of The Standards, which addresses cases involving conduct that is prejudicial to the administration of justice, provides that absent aggravating and mitigating circumstances:

A public reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld (The Standards, Section 6.1, Subsection 6.13).

In this case, the respondent signed his wife's name as a witness to Mr. Syredis' Will, in violation of Florida Statute Section 732.502(i)(c). In addition, the respondent dated Mr. Syredis' Will prior to Mr. Syredis' execution of the same and he then negligently failed to change the date of the Will to reflect

the date that it was actually executed by his client. The respondent's misconduct in this case could potentially have caused serious injury had Mr. Syredis' Will been contested. In fact, at the final hearing, the referee set forth the potential injury by expressing his concern that had Mr. Syredis walked out of the respondent's office and died the next day, he would have had a Will dated subsequent to his death. (TR, p. 46, L.24-25; and p.47, L.1-2). Since potential for injury existed in this case, a private reprimand is inappropriate according to The Standards, Section 6.1, Subsection 6.14.

Further, a private reprimand is inappropriate in light of the respondent's prior disciplinary record, which the referee found to be an aggravating factor in this case.

The Standards, Section 9.2 provides that aggravating factors may be considered in justifying an increase in the degree of discipline to be imposed against an attorney for misconduct. The respondent's prior disciplinary record consists of a three (3) year felony suspension in 1977 for conspiracy to defraud the United States Government, to wit: the Immigration and Naturalization Service and a private reprimand in 1987. Clearly, even if a private reprimand is generally appropriate for the respondent's misconduct, an increase to a public reprimand is justified in light of the respondent's prior disciplinary record.

In The Florida Bar vs. Betts, 530 So.2d 928 (Fla. 1988), Mr.

Betts was retained to prepare the Will of his client, Claude Fairchild. Subsequently, Mr. Betts prepared two (2) codicils during a time when his client was in a rapidly deteriorating physical and mental state. Id. The referee determined that the second codicil was not read to Fairchild, that Fairchild made no verbal response when Mr. Betts presented the codicil to him, and that the codicil was executed by an "X" that Mr. Betts marked on the document with a pen he placed and guided in his client's hand. Id. The referee recommended that Mr. Betts be given a private reprimand and that he be placed on probation for a period of one year for violating Rule 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice) and Rule 1-102(A)(6) (engage in conduct that adversely reflects on his fitness to practice law). Id. at 929. The Supreme Court of Florida on review, found the referee's recommendation to be inappropriate and ordered the respondent to be publicly reprimanded. Id.

In a similar manner, the referee in the present case found respondent guilty of violating Rule 1-102(A)(5) and Rule 1-102(A)(6) and recommended a private reprimand. The referee recommended a private reprimand based on his determination that the misconduct in the Betts case was far more serious than the misconduct by the respondent in the present case. (RR, p.2, Section III).

The respondent's actions in this case involved both ethical

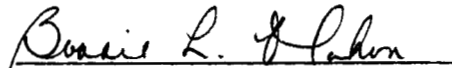
and legal impropriety, which considered along with respondent's prior disciplinary offenses and the serious consequences which could have occurred had Mr. Syredis' Will been contested, justifies the imposition of a public reprimand against respondent. Furthermore, since the case on review is not based on a confidential Complaint of Minor Misconduct, a private reprimand is procedurally inappropriate, making a public reprimand the minimum discipline that should be imposed in this case.

CONCLUSION

It is The Florida Bar's position that a private reprimand is procedurally inappropriate since the case on review is based on a public, formal Complaint rather than a confidential Complaint of Minor Misconduct. In addition, according to The Standards, a public reprimand is the appropriate discipline for respondent's misconduct especially in light of respondent's two (2) prior disciplinary offenses and taking into consideration the serious consequences which could have occurred had Mr. Syredis' Will been contested.

WHEREFORE, The Florida Bar respectfully requests that this Honorable Court disapprove the referee's recommendation of a private reprimand and impose a public reprimand against the respondent.

Respectfully submitted,



BONNIE L. MAHON  
Assistant Staff Counsel  
Atty. No. 376183  
The Florida Bar  
Suite C-49  
Tampa Airport, Marriott Hotel  
Tampa, Florida 33607  
(813) 875-9821

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished to, Michael Kinney, attorney for respondent, at his record bar address of 1009 West Platt Street, Tampa, Florida 33679; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 600 Appalachian Parkway, Tallahassee, Florida 32301-8226, this 9th day of March, 1989.

  
BONNIE L. MAHON