FILED
SID J. WHITE
NOV 27 1989
CLERK, SUPREME COURT
By ________ Deputy Clerk

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GENE M. KICKLITER,

Respondent.

CASE NO. 74,025
TFB No. 88-11,185

APPELLEE'S ANSWER BRIEF

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RESPONDENT'S ADDITIONAL STATEMENT

OF FACTS AND THE CASE

There are no issues as to the facts because they are well set out in the Referee's Report and the Complainant does not contend that the facts so found by the Referee are not supported by substantial evidence. The Complainant's Statement of Facts And of the Case is accurate, but is incomplete.

In addition to the facts as stated by the Complainant, the Referee found the following facts:

> "Upon learning of the death of Mr. Macena, and after discussing the effect of Mr. Macena's death without the execution of his Will with Nancy Meyer, Respondent determined to do what was necessary to effectuate the intent of Mr. Macena as expressed to him and in the Will which he had prepared."
>
> "In so forging the Will of Mr. Macena, causing the same to be witnessed by two witnesses, and notarizing the self-authenticating clause of the purported Will, Respondent was not motivated by any expectation of financial gain or other ulterior motives, but was acting out of misguided feeling of loyalty to his client and in an effort to carry out his client's testamentary intent."

The Referee further found as "mitigating factors" the following facts:

> "The absence of a dishonest or selfish motive: a cooperative attitude toward the disciplinary proceeding;

good character and reputation: remorse and imposition of penalties."

SUMMARY OF ARGUMENT

The Referee recommended suspension for a minimum of two years, and other sanctions. The Bar filed this Petition for Review of the Referee's Report, seeking disbarment.

It is the Respondent's position that in making his recommendation, the Referee took into consideration the facts that Respondent, over a sixteen-year period, had a clean disciplinary record; he was a respected member, not only in the legal community, but the community as a whole, in the area where he practiced; he acknowledgd that he had committed a serious breach of the Code of Professional Responsibility; he cooperated with the State in his prosecution for committing felonies; he cooperated with The Bar in the prosecution of the disciplinary proceedings; he was remorseful and fully understood the necessity of the action taken by the State and The Bar; and in committing the offense charged, he was not motivated by any ulterior motive, but acted out of a misguided feeling of loyalty to his client and the resulting effort to carry out the client's testamentary intent. Under these circumstances, and based upon the philosophy of this Court relative to disciplinary matters, the Referee recommended the suspension. Under the circumstances, said suspension is adequate to fully carry out all of the purposes of discipline. Any discipline more harsh than that recommended would be purely for the purpose of punishment and therefor is not warranted.

FIRST POINT INVOLVED

WHERE AN ATTORNEY, NOT MOTIVATED BY ANY EXPECTATION OF FINANCIAL GAIN OR OTHER ULTERIOR MOTIVES BUT ACTING OUT OF A MISGUIDED FEELING OF LOYALTY TO HIS CLIENT IN AN EFFORT TO CARRY OUT HIS CLIENT'S TESTAMENTARY INTENT, FORGED THE SIGNATURE ON THE CLIENT'S LAST WILL AND TESTAMENT AFTER THE CLIENT WAS DECEASED, CAUSED TWO OF HIS EMPLOYEES TO SIGN THE WILL AS WITNESSES, NOTARIZED THE SELF-AUTHENTICATING CLAUSE OF THE WILL AND OFFERED THE WILL TO PROBATE, IS A SUSPENSION FOR A MINIMUM OF TWO YEARS AN ADEQUATE SANCTION TO BE IMPOSED UPON THE LAWYER?

ARGUMENT

This is an important case not only from the standpoint of the Respondent, but also from the standpoint of The Bench and The Bar. The offenses to which the Respondent pled guilty are extremely serious offenses for which harsh discipline is indeed warranted, and the discipline which the Referee recommended is harsh. The Board of Governors believes that the recommended discipline is not sufficiently harsh, and that Respondent should be disbarred. It is the Respondent's position that, taking into consideration the Respondent's motives, as misguided as they may be, his cooperation with the State in the prosecution of his criminal case, his cooperation with The Bar in this disciplinary proceeding, his remorse over his conduct and his lack of a prior disciplinary record, warrants no greater sanctions than those recommended by the Referee.

This case affords the Court an excellent opportunity to re-examine and re-evaluate the purpose of disciplinary proceedings and the disciplining of lawyers. Such an Opinion would contribute much to the disciplinary program of The Bar and would materially aid and assist lawyers and referees in disciplinary proceedings.

Article XI of the Integration Rule, stated:

> "...... the primary purpose of discipline of attorneys is the protection of the public, the profession, and the administration of justice, and not the punishment of the person disciplined.

At some point in time, the above-mentioned Rule was modified so that the above-quoted portion thereof is no longer a part of the Rules Regulating The Florida Bar. However, the philosophy of the Court as expressed in said Rule has not changed.

In State ex rel Florida Bar v Murrell, Mr. Justice Terrell, for the Court, wrote an Opinion analyzing the purposes of discipline which expresses the above quoted view in Article XI of the Integration Rule and explains and expands upon the same. The philosophy set out in that case has been a guiding light to this Court ever since. In that case, the Court stated:

> "......both Mr. Drinker and the Court tell us that disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional

standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offenses like that charged against him."

The Court then went on and stated:

"The judgment in a case like this must have these factors in mind: (1) it must be just to the public and must be designed to correct any anti-social tendency on the part of respondent as well as deter others who might tend to engage in like violations; (2) it must be fair to respondent at the same time the duty of the Court to society is paramount."

State ex rel. Florida Bar v. Murrell, 74 So.2d 221.(Fla.1954)

The philosophy espoused by the Court in Murrel, supra continued in effect and was restated in The Florida Bar v. Pahules, 233 So.2d 130 (Fla.1970) In Pahules, the Court cited Murrell and

quoted extensively from it. In that case, the Referee recommended disbarment of Pahules for, among other things, commingling and using over $14,000.00 of his client's money by failing to properly account for the same or depositing it in a trust account but instead commingling said money with his own and using it for his own purposes.

In its Opinion, the Court stated:

> "In the present case, commingling of funds and embezzlement of client's funds is a very serious offense. Its seriousness is not lessened by the fact that the lawyer involved made restitution before disciplinary action was initiated. Such restitution, along with other factors reflecting on Respondent's character, properly may be examined for value in mitigation of the severity of penalty, but cannot erase the stain of unethical conduct."

The Court then went on to state:

> "In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must

be fair to the Respondent, being sufficient to punish a breach of the ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations."

The only element of punishment is in the context that the judgment must be severe enough to deter the disciplined lawyer, and others, who might be prone or tempted to become involved in like violations. Pahules was decided prior to the change in the Integration Rule.

In the Florida Bar v. Harper, 518 So.2d 262 (Fla.1988), the Referee recommended three months suspension and two years supervised probation. The Bar sought a review of said Referee's report taking the position that Harper should have received at least a one-year suspension followed by a two-year probationary period. In this case, the Supreme Court cited the above set out quotation from the Florida Bar v. Pahules, supra, and ordered a six-months suspension followed by a two-year probationary period.

In the case of Florida Bar v. Betts, **530** So.2d 928 (Fla. 1988), the Court was confronted with almost the identical facts and circumstances as in this case. Betts prepared a Codicil to a Will pursuant to the directions of his client. At the time the Will was prepared and ready for execution, the client, Fairfield, was in the hospital. Betts took the Codicil to him in the hospital and found that Fairfield was in a comatose state. The Codicil was not read

to Fairfield, Fairfield made no verbal response when Betts presented it to him and Betts placed a pen in the hand of Fairfield and guided his hand to make an **"X"** as his signature. Betts caused the Will to be witnessed and offered for probate. The Referee recommended that Betts receive a private reprimand and one year's probation. The Bar sought review of the Referee's report as to the discipline recommended. On review, this Court stated:

> "We agree with The Bar that the recommendation of the Referee is inappropriate. Improperly coercing an apparently incompetent client into executing a Codicil raises serious questions, both of ethical and legal impropriety and could potentially result in danger to the client or third parties. It is undisputed that Respondent did not benefit bv his action and was merelv acting out his belief that the client's familv should not be disinherited. Nevertheless, a lawyer's responsibilitv is to execute his client's wishes, not his **own.**

It is apparent that in Betts, although Betts' conduct was illegal and was a serious violation of The Code of Professional Responsibility, the Court took into consideration, in imposing the sanctions, the fact that Betts was not motivated by any ulterior motive but acted simply out of a misguided overzealousness to carry out the wishes of his client, and he had no prior disciplinary record.

Respondent submits that the philosophy set out in Murrell, supra, has continued to be the philosophy of this Court to the present time. Kickliter began the practice of law in October, 1972, and he continued in the practice until he was suspended from the practice of law in October, 1988-sixteen years. During that period of time, he had committed no disciplinary offenses; he was a respected member of the community engaging in various civic activities. For no ulterior motive, he committed the offenses for which he was charged. He did so out of a misguided feeling of duty to his client. He did not stand to benefit, and benefited nothing from this conduct. He was charged with a felony as a result thereof, admitted his crime by pleading guilty thereto and was found guilty and sentenced to three years probation, with some other sanctions. The circuit judge trying that case obviouslytook all of the mitigating factors above-mentioned into consideration in formulating the sentence. Hickliter still enjoys the respect of most of the community and still holds his positions of trust. He is remorseful, understanding that he committed a grave offense and he recognizes the necessity of the criminal charges, his conviction, his sentence, and the actions of the Florida Bar relative thereto.

Respondent submits that the Referee, in making his recommendations, carefully applied the philosophy set out in Pahules, supra.

1. The sanctions recommended are fair to society.

The sanctions recommend are severe enough to convince the

public that Respondent will not engage in similar conduct and there is nothing in the record that in any way would lead the public to believe that he would ever engage in unethical conduct again.

2. The recommended sanctions are sufficient to punish the misconduct of the Respondent and yet encourage him to rehabilitate himself so that he can engage in the practice of law.

3. The criminal punishment, together with the recommended suspension of the Respondent, certainly is severe enough to deter others who might be prone or tempted to become involved in like violations.

4. The Respondent has an unblemished disciplinary record extending over sixteen years.

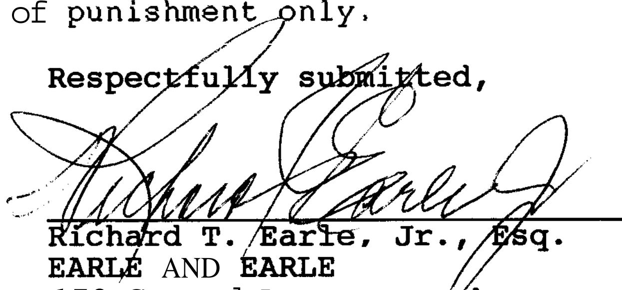
Respondent submits that under all the circumstances of this case, the Court should follow the philosophy set out in Murrell, Pahules, and Betts, supra, and affirm the recommendations of the Referee.

If the philosophy of the Court has changed so that now punishment in and of itself is the purpose of disciplinary actions, the Court should specifically so state and should set out definitively the Court's present philosophy.

CONCLUSION

Respondent submits that the discipline recommended by the Referee fully comports with the philosophy of this Court relative to the purposes of discipline as applied to the facts and circumstances of this case. Any more severe discipline would be unduly harsh and for the purpose of punishment only.

Respectfully submitted,



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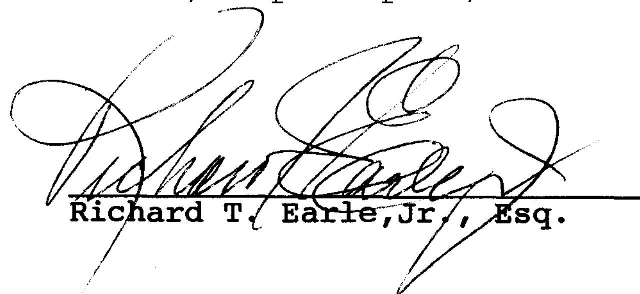
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by regular U.S. Mail this 22nd day of November, 1989, to: JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalache Parkway, Tallahassee, Florida 32399-2300; DAVID R. RISSTOFF, Branch Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607.



Richard T. Earle, Jr., Esq.