

IN THE SUPREME COURT OF FLORIDA

FILED

JUL 9 1988

THE FLORIDA BAR,
Complainant,

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

v.

W. FURMAN BETTS,
Respondent.

ANSWER BRIEF OF RESPONDENT

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STATEMENT OF FACTS AND CASE

The Respondent accepts the Statement of Facts and Case as stated by the Complainant excepting only as to the second paragraph thereof.

There were no settlement negotiations between the Bar and counsel for the Respondent and no consent judgment had been anticipated. The Bar filed its Complaint in March 1984. Counsel for the Respondent concluded that said Complaint was fatally defective in that it failed to charge the Respondent with any conduct constituting a violation of the Code of Professional Responsibility. In an effort to avoid embarrassing staff counsel and doing unnecessary work and incurring unnecessary expenses, Respondent's counsel pointed out to staff counsel the defects in the Complaint and suggested that staff counsel review it carefully with a view to amending it so as to obviate the necessity of filing the Motion to Dismiss. (See Appendix attached hereto)

Subsequently, pursuant to a stipulation, staff counsel filed an Amended Complaint which the Respondent duly answered and the matter was tried.

POINTS INVOLVED

POINT I (AS RESTATED BY RESPONDENT)

WHERE:

1. THE MATTER WAS HEARD BEFORE THE REFEREE ON JANUARY 1, 1986, AND

2. CONTRARY TO THE RULES REGULATING THE FLORIDA BAR AT THAT TIME IN EFFECT, THE REFEREE DID NOT FILE HIS REPORT UNTIL MARCH 13, 1988, (TWO YEARS AND TWO MONTHS AFTER THE HEARING), AND

3. ALMOST ONE YEAR AFTER THE HEARING BEFORE THE REFEREE THE SUPREME COURT AMENDED THE RULES REGULATING THE FLORIDA BAR BY ELIMINATING PRIVATE REPRIMAND AS AN APPROPRIATE SANCTION FOR THE MISCONDUCT CHARGED, AND

4. WHERE IN HIS REPORT THE REFEREE RECOMMENDED A PRIVATE REPRIMAND,

SHOULD THE SUPREME COURT REVERSE THE REFEREE AND ORDER A PUBLIC REPRIMAND SOLELY BECAUSE OF THE CHANGES IN THE RULES MADE WHILE THE REFEREE HAD THE MATTER UNDER CONSIDERATION?

POINT II

DOES THE MISCONDUCT FOR WHICH THE REFEREE RECOMMENDED A FINDING OF GUILTY REQUIRE THE SANCTION OF A PUBLIC REPRIMAND?

SUMMARY OF ARGUMENT

Where the hearing on the charge of misconduct was held in January 1986 and the Referee took the matter under advisement and it remained under advisement without a report for more than two years, and where almost a year after the hearing before the Referee, the court by rule changed the sanction for the misconduct so as to eliminate the possibility of Respondent receiving a private reprimand, the amendment to the rule should not be applied to Respondent's case and the Referee's recommendation of a private reprimand should be approved. Otherwise, the Respondent will be penalized for the failure of the Referee to act promptly.

Further, it is the position of the Respondent that the misconduct for which a finding of guilty was recommended does not warrant any discipline greater than a private reprimand because, although the misconduct did occur, Respondent's motives were good.

POINT I - ARGUMENT

Complainant's brief states only one point, which is:

"A private reprimand is improper where Rule 3-7.5(k)(1)(3) prohibits private discipline in a public probable cause case."

This is the same point raised by the Respondent in his FIRST POINT (restated). However, in the Bar's brief beginning on page 7, Bar counsel appears to argue that even if under the peculiar circumstances of this case, procedurally a private reprimand might be appropriate, such recommendation of the Referee should be reversed for substantive reasons. In order to clarify the two issues, Respondent has separated them into two distinct questions.

The Supreme Court in its opinion on rehearing amending the rules stated:

"These rules will become effective at 12:01 a.m. on January 1, 1987. Thereafter, the Rules Regulating the Florida Bar shall govern the conduct of all members of the Florida Bar. All disciplinary cases pending as of 12:01 a.m. January 1, 1987, shall thereafter be processed in accordance with the procedures set forth in the rules regulating the Florida Bar." (Rules Regulating The Florida Bar, 494 So.2d 977)

It would seem from this statement that the Supreme Court fully intended to give retroactive effect to the rules regulating the Florida Bar insofar as procedure was concerned. The opinion is silent as to the retroactive effect of the amendments to the rules as to as substantive matters.

Respondent suggests that a change in the rules as to sanctions for misconduct is not a procedural matter but a

substantive one. A public reprimand published in the Southern Reporter and released to the news media to be published throughout the state is a far more serious sanction than is a private reprimand.

Of even greater significance in this particular case is the time sequence of events. The Referee hearing was held on January 13, 1986. If the Referee had entered and filed his report timely and in accordance with the rules, it would have been entered long before the rule change which became effective on January 1, 1987. For reasons unknown to the Respondent, the Referee did not complete his report and enter the same until March 13, 1988 -- two years and two months after the hearing and one year and two months after the rule change became effective. In entering his report, he apparently applied the rules in effect at the time of the hearing. Respondent suggests that it was appropriate for him to do so.

Respondent submits that this court should not impose a more serious sanction on Respondent simply because the Referee did not promptly perform his duties.

SECOND POINT INVOLVED

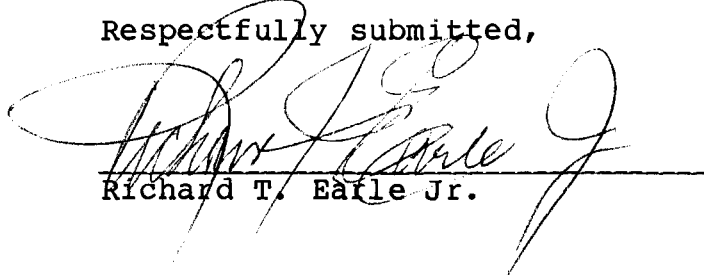
This is a unique case. Respondent admittedly is guilty of misconduct in causing his client to purportedly execute a Will when he knew or ought to have known that his client was incapable of understanding the nature of the document or even that he was executing a document of any nature. For this misconduct he should be disciplined.

The only issue is the nature of the sanctions which should be imposed and, in determining this, the Referee must have taken into consideration the intent and the mental state of the Respondent at the time he committed the act of misconduct. Mr. Fairfield had executed a Codicil to his Will which was completely unnatural in that he left his estate to a person who was not naturally entitled to receive his bounty. By this Codicil he had deprived his only daughter and her husband of all benefits to his estate. Respondent, after the execution of the Codicil, discussed this matter on four or five occasions with Mr. Fairfield in an effort to have him execute a new Codicil reinstating his daughter and son-in-law as recipients of his bounty. He convinced Mr. Fairfield that he should do so and Mr. Fairfield directed him to draft a Will to carry out this effect. Respondent drafted the Will effectuating the intent of Mr. Fairfield as expressed to him but unfortunately, when he presented this to Mr. Fairfield, he was comatose and on his death bed. Under these circumstances Respondent mistakenly, in order to carry out the intent of his client and

reinstate the daughter and son-in-law as recipients of his bounty, put a pen in Mr. Fairfield's hand and then guided his hand to make an "X" on the Will. Respondent intended to defraud no one. He did not have any financial interest in the matter -- he had nothing to gain. He did not do it surreptitiously; the whole procedure being observed by witnesses. It was his intent to assist Mr. Fairfield in righting a wrong which Mr. Fairfield had committed in executing the first Codicil -- a wrong that Mr. Fairfield himself wanted to right. Respondent's problem was that he felt a greater loyalty to his client than the law allowed. These were the matters which motivated the Referee to recommend a private reprimand. He did not believe that for this conduct the Respondent should be held up to public embarrassment and scorn.

Respondent suggests that Respondent must be disciplined because of his misconduct. On the other hand, Respondent urges that, just as the Referee recommended, a public reprimand would serve no useful purpose whatsoever and would be unduly harmful to Respondent.

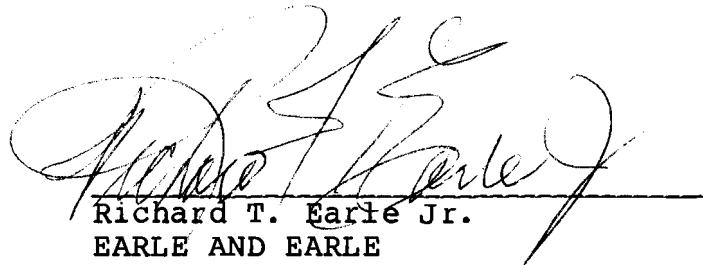
Respectfully submitted,



Richard T. Earle Jr.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Answer Brief of Respondent have been furnished, by regular U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; and a copy of the foregoing Answer Brief of Respondent has been furnished, by regular U.S. mail, to JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and to JAN K. WICHROWSKI, Bar Counsel, The Florida Bar, 605 East Robinson Street, Suite 610, Orlando, Florida 32801, this 7th day of July, 1988.



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