

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant

CONFIDENTIAL

vs.

Case No: 64,979
(TFB No. 06A82H20)

W. FURMAN BETTS, JR.

Respondent _____/

FILED
SID J. WHITE

REPORT OF REFEREE

APR 13 1988

I. SUMMARY OF PROCEEDINGS:

CLERK, SUPREME COURT
By _____
Deputy Clerk

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein, according to Article XI of the Integration Rule of The Florida Bar, a hearing was held on January 13, 1986. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits, all of which are forwarded to the Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For the Florida Bar - Jan Wichrowski

For the Respondent - Richard T. Earle, Jr.

At the outset of the proceedings, the Respondent waived venue and consented to the proceedings being held in Hillsborough County, Florida.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHARGED:

After considering all of the Pleadings and Evidence before me, pertinent portions of which are commented upon below, I find:

AS TO COUNT I

The Court finds that the Respondent, W. FURMAN BETTS, JR., at the request of his client, CLAUDE W. FAIRFIELD, created a Last Will and Testament for Mr. Fairfield, said Will being apparently properly signed and attested to by

appropriate witnesses on January 7, 1981. Said Will, with several small preliminary bequests, left the residue of Mr. Fairfield's estate to his daughter, THELMA JEAN BAYER, and her husband, WINFIELD SCOTT BAYER, share and share alike. Obviously, at this stage of the proceedings, there is no detriment to the Defendant's client or to the residuary beneficiaries who received the bulk of Mr. Fairfield's estate by the January 7, 1981 Will.

Thereafter, apparently triggered by a letter from his daughter and her husband (Respondent's Exhibit No. 1, TR. 64, Lines 23-25; TR. 65, Lines 1-25; TR. 66, Lines 1-25; TR. 67, Lines 1-17), Mr. Fairfield insisted that the Respondent change his Will, removing his daughter and son-in-law completely as beneficiaries of his estate. The Respondent thereafter prepared the first Codicil to the Will of January 7, 1981 (Composite Bar Exhibit No. 1) and the same was executed on January 23, 1981. Parenthetically, it is important to note that the execution of the Will of January 7, 1981 and the first Codicil of January 23, 1981 shows a marked difference in the signatures as executed by Mr. Fairfield in that there is an apparent, to the Referee, deterioration in Mr. Fairfield's physical ability to sign his name during the time between the execution of the two (2) documents.

The Respondent's concern with Mr. Fairfield's removal of his daughter as a beneficiary of his estate is supported by the fact that he had Mr. Fairfield's signature notarized, as well as properly witnessed, as explained by him during his testimony (TR. 67, Lines 18-25; TR. 68, Lines 1-5).

The Respondent's concern with the removal of Mr. Fairfield's daughter from his estate is also supported by his unrefuted testimony that he returned to talk with Mr. Fairfield on "four or five occasions" (TR. 68, Lines 10-11), and finally convinced Mr. Fairfield to re-establish his daughter's interest in his estate (TR. 68, Lines 20-25; TR. 69, Lines 1-21).

A second Codicil was thereafter prepared by the Respondent and taken to the nursing home, where Mr. Fairfield resided, for his signature. This Codicil, dated February 27, 1981 (Composite Bar Exhibit No. 1) was improperly executed by the Testator. Although the Respondent testified that " . . . I spoke to him, and he opened his eyes."

(TR. 72, Lines 10-11), and that " . . . I read the Will to him" (TR. 72, Line 15), the Respondent admitted (TR. 72, Lines 22-25) that he did not know whether or not the Testator was competent, or whether the Testator had the testamentary capacity to execute the second Codicil dated February 27, 1981 (TR. 73, Lines 8-9).

The testimony of witness, T. JOYCE JOHNSON, is clear and convincing evidence, that the Testator FAIRFIELD, was not read the contents of the second Codicil (TR. 45, Lines 4-7), that the Testator " . . . made no verbal response . . ." (TR. 45, Line 16) and by this Referee's determination, was incompetent to execute the second Codicil at that time on February 27, 1981.

The Respondent's act in putting the pen into Mr. Fairfield's hand, holding his hand over it and making an "X" on the paper, which constituted the second Codicil (TR. 45, Lines 7-9), constituted an improper, as well as an illegal, act.

There is insufficient clear and convincing evidence that the Respondent, BETTS, improperly assured Thelma Bayer that there were no changes in her father's Will or first Codicil which would injure her interest in her father's estate. The Respondent's primary obligation is to his client, CLAUDE FAIRFIELD, and there is no detriment to Mr. Fairfield's interest in carrying out the wishes to either remove his daughter from Mr. Fairfield's Will by the first Codicil, or by replacing her as a beneficiary in the Will by the execution of the second Codicil. The Respondent owes no allegiance to the beneficiaries of the estate so long as he carries out the intent of the Testator.

The clear and convincing evidence is that the Respondent attempted to carry out the wishes of his client, CLAUDE FAIRFIELD, who from January until his death in 1981 was in a rapidly deteriorating physical and mental condition, erratic in his wishes for inclusion of his daughter, THELMA BAYER, in the disposition of his estate (TR. 67, Lines 12-17) and that the Respondent, BETTS, in fact, did a service to the beneficiary, THELMA BAYER, and her husband in urging Mr. Fairfield to reinstitute his daughter and her husband, in the distribution of his estate (TR. 68, Lines 20-22; TR 97, Lines 17-25; TR. 98, Lines 1-25) by the execution of the second Codicil dated February 27, 1981.

The actual question of the legality of the execution of the second Codicil (Bar Composite Exhibit No. 1) must be left to the determination of the Judge in the Probate Division, to whom the Codicil is offered for Probate Administration, and is not a determination that should be made by this Referee. However, the improper execution of the second Codicil, as it is determined by this Referee in the resolution of the charges placed against the Respondent, is that the Respondent is in violation of DR1-1-102(A) (5) (engage in conduct that is prejudicial to the administration of justice); DR 1-102(A) (6) (conduct that adversely reflects on his fitness to practice law). Further, the Respondent allowed himself to be placed in a confusing position of responsibility by accepting a Power of Attorney from CLAUDE FAIRFIELD (TR. 80, Lines 20-25; TR. 81, Lines 1-25; TR. 82, Lines 1-8). However, there is no clear and convincing evidence that the Respondent ever became responsible for the control of Fairfield's assets, primarily his checking account. The payment by Fairfield of One Thousand Five Hundred (\$1,500.00) Dollars to the Respondent seems a legitimate fee payment for legal services in a Fifty Five Thousand (\$55,000.00) Dollar lawsuit (TR. 82, Lines 11-25; TR. 83, Lines 1-17; TR. 84, Lines 11-25; TR. 85, Lines 1-4).

There is insufficient evidence to connect the Respondent with the preparation or execution of a check for Ten Thousand (\$10,000.00) Dollars payable to "Miss Hodge" (TR. 83, Lines 21-25; TR. 84, Lines 1-10). The Florida Bar Complaint seems to equate the Respondent's acceptance of a Power of Attorney from CLAUDE FAIRFIELD as an acceptance of full responsibility for Mr. Fairfield's financial affairs. A Power of Attorney, unless specifically designating such duties, does not place such a burden on the Respondent. The Respondent is hereby found not guilty of violations of DR 1-102(A) (3) (engage in illegal conduct involving dishonesty, fraud, deceit or misrepresentation); DR 7-101(A) (3) (prejudice or damage his client during the course of the professional relationship); DR 7-102(A) (6) (participate in the creation or preservation of evidence when he does or it is obvious that the evidence is false); DR 7-102(b) (2) (failing to promptly reveal a fraud to a tribunal); and violation of Integration Rule 11.01(3) (a) (commission of an act contrary to honesty, justice or good morals).

AS TO COUNT II

The basic thrust of Count II of the Florida Bar's Complaint is that the Respondent received Seven Hundred Twenty (\$720.00) Dollars from Attorney Barry Steagall, based on a claim made by Attorney Steagall against the Estate of Claude Fairfield for legal services rendered, and that the Respondent denied receiving said Seven Hundred Twenty (\$720.00) Dollars in his Response to the Bar's Complaint. The evidence before the Referee indicates that some confusion seems to have existed in the Respondent's mind as to exactly how a sum in the approximate amount of Seven Hundred Twenty (\$720.00) Dollars was given to him by Attorney Steagall. The evidence is clear to the Referee that Mr. Steagall was associated with the Respondent in representation of CLAUDE FAIRFIELD, that the Respondent had advanced certain funds to Mr. Steagall in the approximate sum of

Seven Hundred Twenty (\$720.00) Dollars, and that upon Mr. Steagall making claim for such legal services against the Estate of Claude Fairfield, and upon receiving said reimbursement from the Estate, that the funds advanced to him by the Respondent were returned by Mr. Steagall to the Respondent. This financial arrangement is not uncommon among lawyers and there is no clear and convincing evidence that there was any wrong doing on the part of the Respondent. Also, the Referee finds that there is no clear and convincing evidence that the Respondent intentionally attempted to mislead the Bar regarding the payment to him of this Seven Hundred Twenty (\$720.00) Dollars when responding to the Bar's Complaint. (TR. 47, Lines 1-25; TR. 48, Lines 1-25; TR. 49, Lines 1-24; TR. 50, Lines 15-25; TR. 51, Lines 1-25; TR. 52, Lines 1-17)

By reason of the foregoing, the Referee hereby dismisses the violations of all disciplinary rules and Integration Rule 11.02(3)(a) as alleged in Count II, Paragraph 25 of the Bar's Complaint.

III. RECOMMENDATIONS AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:

As to each Count of the Complaint I make the following recommendations as to guilt or innocence;

AS TO COUNT I

I recommend that the Respondent be found guilty of violation of FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY, DISCIPLINARY RULES DR 1-102(A)(5) (engage in conduct that is prejudicial to the administration of justice) and DR 1-102(A)(6) (conduct that adversely reflects on his fitness to practice law).

AS TO COUNT II

I recommend that the Respondent be found not guilty of the violation of any of the disciplinary rules of the Code of Professional Responsibility or of the Integration Rules of the Florida Bar.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that the Respondent be privately reprimanded by the Board of Governors as provided in Rule 11.10(2) for having been found guilty of violating certain disciplinary rules as stated in the Referee's report and that he be placed on probation for a period of one (1) year as provided in Rule 11.10(1) without requiring any specific terms to be included within the period of probation.

AS TO COUNT II

V. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED:

Having found the Respondent not guilty, no discipline is recommended.

VI. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD:

After finding of guilty in Count I and prior to recommending discipline to be recommended pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record of the Respondent:

Age:	72 Years	Born:	1914
Date Admitted to Bar:			November 22, 1947
Prior Disciplinary Convictions and Disciplinary Measures Imposed Therein:		None	None
Other Personal Data:			None

VII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED:

I find the following costs were reasonably incurred by The Florida Bar.

a. Administrative Costs (Grievance Committee Level)	\$150.00
b. Administrative Costs (Referee Level)	\$150.00
c. Transcript Costs	\$477.20
d. Bar Counsel Travel Costs	\$ 51.30
TOTAL ITEMIZED COSTS:	\$828.50

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent, and that interest at the statutory rate shall

accrue and be payable beginning thirty (30) days after
the judgment in this case becomes final unless a waiver
is granted by the Board of Governors of The Florida Bar.

DATED this 14th day of March, 1988.



REFEREE

COPIES TO:

Bar Counsel
Counsel for Respondent
Staff Counsel, The Florida Bar, Tallahassee, FL 32301