IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant

vs

JOHN R. TRINKLE,

Respondent.

CASE NO. 74,156

TFB No. 87-26,030(13D)

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

In this Brief, the Respondent, John R. Trinkle, will be referred to as "Mr. Trinkle" or "the Respondent." The Respondent will use the same symbols as used by the Bar; viz., "RR" will denote the Report of the Referee; "T" will refer to the transcript of the final hearing held on February 2, 1990; "T2" will refer to the transcript of the continuation of the final hearing held on August 3, 1990.

The Bar's Statement of Facts is accurate, so far as it goes, but does not sufficiently set forth those facts which form the predicate for the Referee's action. Accordingly, the additional facts necessary for review by this Court in determining the propriety of accepting the Referee's recommendations follow.

STATEMENT OF FACTS

In November of 1980, Mr. Trinkle prepared a Will which was to establish a testamentary trust whose dispositive terms were different from those which his aunt, Gladys Anderson, had prepared in the past. The difference lay in the naming of Mr. Trinkle as the residuary or ultimate beneficiary of the testamentary trust. T: 91. Concerned about this substantive change, Mr. Trinkle consulted with his then partner, Mr. James Lehan, who had recently completed a term as Chairman of the Florida Bar Ethics Commission, as to what was required to effect the proposed testamentary disposition. T: 92. The letter of November 7, 1980, signed by Ms. Anderson, offered into evidence as Exhibit 10, was the product of that discussion, a letter which disclosed the changes which had been made. T: 91-92.

Obviously satisfied with both the instrument and the letter prepared by her nephew, Ms. Anderson executed the Will. R: 93-94.

When Ms. Anderson executed her Will, her assets consisted of approximately $140,000 in cash and a rooming house in a semi-deteriorating section on the fringes of downtown St.Petersburg, Florida, known as "the Anderson House." T: 88;96. She resided in the rooming house with her niece, Marjorie Fry, a distant cousin of the Respondent, Mr. Trinkle. Ms. Fry had lived there with Ms. Anderson since 1949, and had been the principal object of concern in Ms. Anderson's Will. The Will

incorporated the directives of Ms. Anderson set forth in a number of handwritten notes to Mr. Trinkle that the income from the trust was to be paid in such amounts as were deemed appropriate by Mr. Trinkle as Trustee to help Ms. Fry maintain the lifestyle which she enjoyed. In addition, the Will and the notes provided that Ms. Fry was also to have the use and occupancy of the apartment then occupied by Ms. Anderson in the Anderson House, so long as she should desire, and that the property should be sold if not self-supporting. T: 89-90.

Ms. Fry, although Mr. Trinkle's cousin, was never his client.

Mr. Trinkle was called by Ms. Anderson when she fell ill and he took her to St.Joseph's Hospital, T: 94, where she stayed two to three weeks. T: 95. Ms. Anderson stayed after that in nursing homes until May of 1983, when her money ran out. T: 96-97.

Mr. Trinkle and his brother, also an attorney, decided they would, as a family, bear the costs of Ms. Anderson's continued nursing care. T: 97-98.

In the meantime, Ms. Fry managed the assets of Ms. Anderson during her illness, including the Anderson House. T:98.

While the Anderson House made some money, it was not enough to meet the full time nursing expenses of Ms. Anderson and the living expenses of Ms. Fry, who herself became ill in 1982. T: 99. Obviously, the sale of the Anderson House was a

possibility, but such a sale would result in the termination of the right of Ms. Fry to any further use of the house which had been her home. T: 101. Mr. Trinkle concluded that by selling the Anderson House to an entity he controlled, he could use the Anderson House to provide some of the money needed to take care of his aunt and, at the same time, provide a home for Ms. Fry, as requested by his aunt. T: 101.

Mr. Trinkle therefore bought the Anderson House by paying what he thought was a "perfectly proper" price. T: 81-82. Mr. Trinkle knew what the adjoining property had sold for, and he regarded that property as a comparable property. T: 81; 100.

The Bar has offered no evidence of value of the Anderson House as of July, 1983, when the sale occurred. In July of 1983, Mr. Trinkle used the power of attorney which his aunt had earlier executed in his favor to transfer the Anderson House to a partnership which he controlled. T: 101. The sales price was $65,260 plus assumption of real estate taxes and other bills encumbering the property, and paid by delivering his personal note, a note which bore interest at the rate of five and one-half percent (5 1/2%) per year. T: 84. The terms were based on Mr. Trinkle's knowledge of the past net earnings record of the Anderson House in 1981 and 1982 of approximately $5,000 per year, the condition of the property, and his continuing moral obligation to provide a home for Ms. Fry. T:84;101.

The sales contract which Mr. Trinkle earlier executed had called for the delivery of a purchase money mortgage to secure payment of the note, but the necessity of borrowing the money to make the repairs which were needed to make the Anderson House a paying proposition precluded the recordation of the mortgage. T: 102.

While the terms of sale are as mentioned by the Florida Bar, the Florida Bar has failed to make any mention of the reasons impelling Mr. Trinkle to try to retain the Anderson House within his family, to provide a place for his cousin, Marjorie Fry, to reside for the remainder of her life, while at the same time trying to generate those funds necessary to offset his aunt's mounting medical bills. T: 97.

In the meantime, Ms. Fry continued to use the Anderson House as her home, and continued to collect what money was available from its limited operation. T: 98.

Mr. Trinkle's aunt, Gladys Anderson, died on December 10, 1983. T: 103. Although Ms. Fry had no legal right to continue to occupy the Anderson House after the death of Mr. Trinkle's aunt, Mr. Trinkle permitted her to do so. T: 104. Mr. Trinkle did not question Ms. Fry with respect to her management activities of the Anderson House after the death of Ms. Anderson: she was treated as a member of the family, and her operation of the House was one conducted on faith. T: 104-105.

In connection with his administration of Ms. Anderson's estate, Mr. Trinkle advanced his personal funds to pay claims which had been asserted against the estate, claims which amounted to between $14,000 and $16,000. T: 111. He then treated these payments as advance payments on the note he had earlier executed to pay for the House. T: 111.

Because the Anderson House had been transferred to Mr. Trinkle's partnership before the death of Ms. Anderson, the Anderson House was not an asset of her estate; that asset was represented by Mr. Trinkle's note in favor of his now deceased aunt. T: 103-104. Nonetheless, Ms. Fry was permitted to continue the arrangement which had been established before the death of Ms. Anderson, and continued to run the Anderson House in the same fashion as before, keeping such money as she wished. Because her own health had in the meantime become impaired, it was necessary to hire others to do the work which she had previously done. T: 103-106.

In April of 1986, Ms. Fry decided to leave the Anderson House for Indiana. T: 105. In the latter part of 1987, Ms. Fry retained Robert Bolton, Esquire, an attorney in Pinellas County, Florida. RR: 2. On behalf of Ms. Fry, Mr. Bolton filed an objection to Mr. Trinkle's discharge as Personal Representative of the Estate of Gladys Anderson. T2: 24. Mr. Bolton and Mr. Trinkle entered into negotiations to restructure the transaction involving the disposition of the Anderson House. T2: 28; 32-34.

After the agreement between the two of them had been reached, but while Ms. Fry was still represented by Mr. Bolton, Ms. Fry telephoned Mr. Trinkle at his home and asked him to pay some medical bills. T2: 25-26. Mr. Trinkle agreed and did so, writing out the check so Ms. Fry could pay her bills T2: 26-27. In early December, 1987, Mr. Trinkle received a call from Mr. Butz, a friend of Ms. Fry, who told Mr. Trinkle that Ms. Fry was ill, and asked that he come by to visit her. T2: 29-30. During the course of that visit, Mr. Trinkle gave Ms. Fry a $10,000 advance on the settlement he had struck with Mr. Bolton. T2: 30. Mr. Trinkle, who had been dealing with the same Ms. Fry, his cousin since childhood, did not ask the consent of Mr. Bolton to communicate with Ms. Fry.

There was no evidence that either Ms. Fry or Ms. Anderson suffered any harm from any part of the transactions described.

SUMMARY OF THE ARGUMENT

The Referee found that Respondent's conduct in 1983 violated not only DR 5-103(A)(1), Code of Professional Resposibility, but also Rule 4-1.8, Rules Regulating the Florida Bar.

The Rules Regulating the Florida Bar did not become effective until three (3) years later. Thus, the Respondent cannot have been guilty of violating a Rule which did not even exist at the time of his conduct.

The Referee clearly had the power under the Code of Professional Responsibility to recommend a private reprimand for conduct he found violative of DR 5-104(A)(1).

The Referee also found that the Respondent was guilty of violating Rule 4.4-2, Rules Regulating The Florida Bar, for communicating with his cousin, who was represented by counsel, at a time when the Respondent was a party to the involved proceeding.

Because of the technical nature of the violation of Rule 4.4-2, which, if taken alone would be no more than minor misconduct, the Referee also had the power to recommend an admonishment with respect to that conduct.

Ultimately, this Court must make the final decision with respect to the quality of the sanction to be imposed as a result of the Referee's finding of guilt. However, this Court must not be deprived of the insight of the Referee who was present at the

entire proceeding, and had the opportunity to become acquainted with all of the elements which produced the decision to recommend a private reprimand.

ARGUMENT

I. THE REFEREE WAS WITHIN THE EXERCISE OF HIS POWER TO RECOMMEND "ADMONISHMENT" BASED ON THE EVIDENCE BEFORE HIM.

A.

Punishment of the Respondent Under Post-1987 Rules for Conduct in 1984 Would Violate the Prohibition Against ex post facto Laws.

With respect to the Referee's finding that Mr. Trinkle violated DR 5-103(A)(1), Code of Professional Responsibility, and Rule 4-1.8, Rules Regulating The Florida Bar, the acts involved all occurred before the effective date of the Rules Regulating The Florida Bar, which were adopted by the Supreme Court of Florida July 17, 1986, effective January 1, 1987. Rules Regulating The Florida Bar, 494 So.2d 977, at 978 (Fla. 1986).

Indeed, review of the Complaint filed by the Florida Bar reveals that at the time it filed the complaint the Florida Bar was not of the opinion that Mr. Trinkle could be charged with violation of Rule 4-1.8. This conclusion is obvious from the fact that Mr. Trinkle was not charged with violation of Rule 4-1.8.

Accordingly, the Referee's finding with respect to Rule 4-1.8, Rules Regulating The Florida Bar, should be disregarded as being without legal or factual basis.

However, the Referee did find that the conduct of Mr. Trinkle violated DR 5-103(A)(1), Code of Professional Responsibility, the antecedent Code to the Rules Regulating The Florida Bar, and specifically, the Rule which was the predecessor to currently existing Rule 4-1.8, Rules Regulating The Florida Bar. Mr. Trinkle does not take issue with the Referee's inherent power to have made that determination. The regulation governing the conduct of lawyers before January 1, 1987 is one with respect to which Mr. Trinkle was required to conform his conduct before January 1, 1987, and if the Referee's recommendation as to punishment for his violation be accepted by this Court, then Mr. Trinkle must be sanctioned for the violation in accord with the penalties which were then in existence. Any other result would violate the Constitutional prohibition against ex post facto laws.

Accordingly, the narrow issue before this Court with respect to the findings of the Referee under II.A. is whether or not having found that Mr. Trinkle violated DR 5-103(A)(1), the Rule which then governed Mr. Trinkle's conduct, the Referee could make a recommendation for private reprimand, a sanction which was available before January 1, 1987 for violation of that Disciplinary Rule. The Referee correctly resolved the issue in favor of Mr. Trinkle because at the time Mr. Trinkle was engaged

in conduct which the Referee characterized as violative of DR 5-103(A)(1), the Integration Rule of the Florida Bar contemplated the power of the Referee to make any recommendation which was available under the Integration Rule. Rule 11.06, "Trial by Referee," Sec. 9, Integration Rule of The Florida Bar; Rule 11.10, "Discipline by Supreme Court," Sec. 3, Integration Rule of The Florida Bar.

Obviously, as appears from Rule 11.10: "Discipline by Supreme Court," Sec. 2, this Court was then, as now, the ultimate arbiter of whether or not a private reprimand would be appropriate discipline for a violation of a Disciplinary Rule.

However, to suggest, as has the Florida Bar, that the Referee today has been divested of his power to make a recommendation by virtue of a Rule which was not in existence at the time of the alleged offense is to ignore the ex post facto effect of the argument.

Rule 3-7.6, "Procedures Before a Referee," Rules Regulating The Florida Bar, is a procedural Rule, but it is a procedural Rule with substantive effect. If the Bar's contention is correct, then the adoption of that Rule changed the existing law by eliminating the power of a Referee to make a recommendation of a private reprimand unless a Grievance Committee has previously determined that the matter as to which probable cause has been established is one warranting minor misconduct.

This type of change can hardly be characterized as procedural; it is obviously a substantive change, because it increases the minimum amount of punishment which may be imposed upon a lawyer.

A lawyer who was found guilty of a violation of DR 5-103(A)(1) before January 1, 1987, would be entitled to have the Referee who heard his case make a recommendation of private reprimand if the Referee felt in the exercise of his discretion that such a recommendation was appropriate.

The Bar's contention with respect to this case is that the Referee no longer has the power to make a recommendation of a private reprimand. The implication of this contention is that the punishment upon a finding of probable cause and a subsequent finding of guilt has been increased, effective January 1, 1987, by virtue of the adoption of the Rules Regulating The Florida Bar, for conduct before January 1, 1987.

This is the equivalent of imposition of an ex post facto punishment. The Bar contends that the punishment for conduct in 1983 or 1984 may be increased by virtue of the adoption of a new set of Rules in 1987, a position which is not supported by law.

The case of Wilner v. Department of Professional Regulation, 563 So.2d 805 (Fla. 1st DCA 1990) is on point. Before 1986, Sec. 458, Fla. Stat. permitted a maximum administrative fine for violation of Sec. 458.331(1) in the amount of $1,000 per violation. However in 1986, that Section was amended to increase the amount of maximum administrative fine from $1,000 per violation to $5,000 per violation.

Dr. Wilner was found guilty under the statute by the Department of Professional Regulation of conduct which occurred before the effective date of the 1986 amendment. However, the fine which was imposed was imposed by virtue of the amended provision of the Section. The effect was that instead of finding Dr. Wilner should have been fined only $1,000 per violation, he was subjected to a fine of $5,000 per violation. The punishment had been increased.

On appeal, Dr. Wilner contended that the increase in punishment imposed upon him was a violation of the ex post facto provisions of the State and Federal Constitutions. The First District Court of Appeal, following this Court's decision in Florida Patients Compensation Fund v. Scherer, 558 So.2d 411 (Fla. 1990), agreed. The same principle is operative here: Mr. Trinkle was found guilty of conduct which occurred in 1983, a date which was before the effective date of the Rules Regulating the Florida Bar, whose provisions afford the basis for the assertion by the Florida Bar of the limitation on the ability of the Referee to recommend a private reprimand. To accept the Florida Bar's position would be contrary to the principles in Wilner v. Department of Professional Regulation, supra.

While this Court is not controlled by a determination made by the First District Court of Appeal, that Court's invocation of Florida Patients Compensation Fund v. Scherer, supra, as authority for its disposition is persuasive. The only distinction between the two cases is that this Court's decision

in Florida Patients Compensation Fund v. Scherer, supra, involved a civil proceeding, rather than an administrative or quasi-criminal proceeding, such as now pends before this Court with respect to Mr. Trinkle.

In Florida Patients Compensation Fund v. Scherer, supra, the plaintiff's injuries were the result of an act of malpractice which occurred in June, before the effective date in 1980 of Sec. 768.56, the statutory section which formed the basis for the plaintiff's action. She was granted a substantive right by that statutory section by way of entitlement to attorney's fees which she did not have as of the date of the accrual of her cause of action.

This Court held that to permit her to recover for attorney's fees by virtue of a statute giving her a right which did not exist at the time of the conduct complained of would be a violation of State and Federal prohibitions against ex post facto laws, citing Morales v. Scherer, 528 So.2d 1 (Fla. 4th DCA 1988).

This Court must therefore reject the argument of the Florida Bar that the Referee has no power to make a recommendation of private reprimand since the conduct of which Respondent was found guilty is conduct which occurred at a time when the Referee had that power. To limit the power of the Referee under the guise of recognizing a new procedure, when in fact the limitation would be a substantive limitation on the power of a Referee to make a recommendation, would be a

violation of the ex post facto laws of the Constitutions of this State and of the United States.

B.

The Bar's Interpretation of the Rules Regulating the Florida Bar Must be Considered Because the Referee's Finding That Mr. Trinkle Violated Rule 4.4-2, Where That Conduct, a Communication with a Party Represented by an Attorney, Took Place in 1987, After the Effective Date of the Rules Regulating The Florida Bar.

As noted above, Mr. Trinkle's contact with his cousin, Ms. Fry, was a contact which was essentially initiated by or on her own behalf. Mr. Trinkle was a party to the proceeding, and was communicating with a cousin with whom he had more than thirty-five years experience.

These facts were undoubtedly uppermost in the Referee's mind when he made the recommendation he did with respect to a private reprimand.

Nonetheless, the Bar wishes to strictly interpret the Rules Regulating The Florida Bar by contending that Rule 3-7.6(k)(1)(3) limits the power of a Referee to make a recommendation of punishment. That Rule provides in relevant part that a Referee may make:

> ...(3) recommendations as to the disciplinary measures to be applied, provided that an admonishment may be recommended only in cases based on a complaint of minor misconduct;

To so read the Rule would limit the power of this Court to determine the nature of the discipline ultimately to be imposed on the errant lawyer, since this Court would never have the benefit of the Referee's recommendation of a lesser punishment if the Referee should disagree with a Grievance Committee.

This Court has the inherent power under Sec. 3-5.1(a) "Admonishments," Rules Regulating The Florida Bar, to impose an admonishment if it makes a determination that the Respondent has been guilty of minor misconduct, no matter what the Grievance Committee did. There is no rational basis for depriving this Court of the valuable recommendation of a Referee where the Referee, after having heard the evidence, having heard the testimony, and being otherwise completely advised with respect to the proceeding, desires to make a recommendation of a private reprimand.

The argument of the Florida Bar must therefore be rejected because it would permit an admonishment to be administered only in those instances where the Grievance Committee had found the complained of conduct was minor misconduct. The effect of the Bar's recommendation would be even to deprive this Court of the right to impose an admonishment unless it were in the position of rejecting a Referee's recommendation of more severe punishment.

The Rule interpreted as suggested by the Bar would result in a situation where only a Grievance Committee would make the determination of the propriety of an admonishment; never the

Referee, although perhaps this Court would retain the power to reject a recommendation of a Referee for a higher punishment, and reduce it.

This structure is not warranted by the Rules or by the policies involved.

The finding of a probable cause by a Grievance Committee is not subject to review. Probable cause as to something more serious than a determination of minor misconduct is a matter which must ultimately be determined by this Court after a hearing by the Referee. The finding of the Grievance Committee is the predicate for action by the Florida Bar and the Board of Governors, both arms of this Court for purposes of administering discipline, which eventuates in the filing of a complaint with this Court.

The real question is not if Rule 3-7.6(k)(3) limits the power of the Referee; the real question is whether it should.

This case limns the issue: in a family matter, the Referee considered all the evidence and determined that the violation involved was so technical, so minor, that the conduct of the Respondent had to have been minor misconduct, and made a recommendation accordingly.

The key is not what the Referee did, but whether this Court agrees with what the Referee did. In other words, since this Court clearly has inherent power to make a determination of whether or not a private reprimand should be imposed, there is no reason to limit the power of a Referee to recommend an

admonition if, after hearing all the evidence, he concludes in good conscience that an admonition is the proper punishment.

The Bar has failed to offer any policy served by limiting the power of the Referee to make a recommendation as he deems fit.

Indeed, this Court may have already ruled on this point. In The Florida Bar v. Kirkpatrick, 567 So.2d 1377 (Fla. 1990), the Referee tried a case on a Complaint from the Florida Bar which was not designated a complaint for minor misconduct. Nevertheless, the Referee recommended a private reprimand. While this Court held that under the circumstances of that case, a public reprimand was appropriate, it is significant that this Court did not reject the Referee's recommendation on the ground he did not have the power to make it, but on substantive grounds going to the nature of the offense.

This Court should reaffirm the power of the Referee to make whatever recommendations he deems appropriate, and pay to that recommendation the deference it has in the past. In this particular instance, where the recommendation of private reprimand was based upon a violation of an unauthorized contact between a party who happened to be a lawyer and his cousin who happened to be a party, this Court should accept the recommendation of a private reprimand.

II. THE CONDUCT OF THE RESPONDENT WARRANTS NO MORE THAN AN ADMONISHMENT.

Ultimately, as has been stated, this Court has the power to determine the sanction which is to be imposed on a lawyer who has been found guilty of violating the Rules Regulating The Florida Bar. The Board of Governors of The Florida Bar assists this Court in maintaining discipline within the Bar. Thus, its recommendations are useful and functional in an adversary system in presenting views to this Court which may differ from those embraced in a recommendation of punishment by a Referee.

The Florida Standards for Imposing Lawyer Sanctions was adopted by the Board of Governors, not this Court, in 1986 as a codification for the benefit of the Bar at large and particularly for the Board of Governors in fulfilling its duties to this Court by establishing a baseline for action in deciding whether to accept or reject a recommendation made by a Referee.

While the Standards are useful in the guidance of the Board of Governors, and should be given the respect and weight accorded the product of a conscientious body attempting to perform its delegated duties, until those Standards are codified as a Regulation of the Florida Bar, those Standards should be accorded weight, but not deemed dispositive of any recommendation.

The Referee below was aware of the existence of those Standards when he recommended that a private reprimand be given to Mr. Trinkle. Mr. Trinkle and the Referee disagreed with the Bar's characterization of the nature of the offense. No one, not Mr. Trinkle, and not the Referee, disagrees with the statement made by this Court in The Florida Bar v. Kirkpatrick, 567 So.2d 1377 (Fla. 1990) that:

> A private reprimand is the appropriate disciplinary sanction when the conduct can be characterized as minor misconduct. See rule 3-5.1(b), Rules Regulating The Florida Bar. In other words, a private reprimand is the appropriate sanction only for the most insignificant of offenses.

The Referee applied the standard of this case, for standard it is, to the conduct of Mr. Trinkle, and for the following reasons.

1. Mr. Trinkle was impelled at all times by a concern for the welfare of his aging aunt and the implementation of her desires to provide a home for his cousin, Ms. Fry.

2. Mr. Trinkle used his own funds to pay expenses of the Estate.

3. The conduct as to the violation of DR 5-103(A)(1) involved but a single transaction.

4. The conduct concerning Mr. Trinkle's contact with Ms. Fry, a party, at a time when Mr. Trinkle was also a party, a contact with his cousin, was but a single incident.

5. The conduct was obviously in a familial context.

6. There was neither potential or actual harm to any client at any time. Ms. Fry, the cousin of Mr. Trinkle, was never a client, and the care Mr. Trinkle directed to his aging aunt clearly demonstrated the lack of potential harm.

CONCLUSION

For a sixty-two (62) year old lawyer, who has heretofore had an unblemnished record to be publicly reprimanded for conduct arising out of his concern for his aging aunt and a cousin who was not his client is to subject him to an unnecessary public humiliation which serves neither him nor The Bar.

The Referee, before whom the entire situation unfolded, correctly recognized that this was not a situation requiring public reprimand. That recommendation should be accepted by this Court, and a private reprimand, no more, imposed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies hereof have been furnished to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval, Tallahassee, Florida, 32399-1927 by Federal Express, and copies have been furnished by U.S. Mail, to Joseph A. Corsmeier, Esq., The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida, 33607; and John T. Berry, Esquire, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 4th day of February, 1991.

Attorney