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SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar". The appellee, JOHN R. TRINKLE, will be referred to as "the Respondent". "RR" will denote the Report of 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.

STATEMENT OF THE CASE AND FACTS

The grievance committee heard testimony in this matter on November 2, 1988, and unanimously voted to find probable cause on December 7, 1988. The Florida Bar filed its formal Complaint on May 18, 1989, and Respondent filed his Answer on June 5, 1989. The Florida Bar filed an Amended Complaint on February 2, 1990, and Respondent submitted his Answer to the Amended Complaint on March 3, 1990.

The Final Hearing in this matter was held on February 2, 1990, August 3, 1990, and August 14, 1990. The Amended Report of Referee dated October 10, 1990 was filed with this Court on November 19, 1990. (The original Report of Referee, dated September 27, 1990, incorrectly stated Respondent's name.) The report was considered by the Board of Governors at its meeting which ended November 30, 1990. The Board voted to seek review of the discipline recommended by the Referee. The Bar's Petition for Review was filed with this Court on December 17, 1990.

The facts in this case are not contested by The Florida Bar and are as follows:

Respondent prepared a Will for his aunt, Gladys Anderson, in 1980. The Will made Respondent personal representative of the estate, trustee of a testamentary trust on behalf of his cousin, Marjorie Fry, and residual beneficiary of Ms. Anderson's estate. Ms. Fry was to become beneficiary of a trust for her lifetime. (Bar's Exhibit #2).

The main asset of the estate, at the time the Will was prepared, was a rooming house in St. Petersburg, Florida called the Anderson House.

In April of 1981, Ms. Anderson became ill and was admitted into a nursing home. (T,p.95,L.24-25). The expenses of the nursing home and the 24 hour nursing care rapidly depleted Ms. Anderson's savings. (T,p.96,L.5-22). In October of 1981, Ms. Anderson gave Respondent a general power of attorney to transfer her property. The power of attorney was prepared by Respondent. (Bar's Exhibit #3).

Using the power of attorney, Respondent conveyed the Anderson House to 72nd Avenue Associates, a partnership he controlled. (T,p.37,L.15-19) This transaction occurred while Gladys Anderson was still alive. (T.p.37,L.15-19). The contract for sale of the rooming house provided for a sale price of \$65,160 and provided that financing was to be by a purchase money mortgage and note with five and one half percent (5 1/2%) interest. (Bar's Exhibit #4). No purchase money mortgage was ever executed, although Respondent did sign a promissory note evidencing the debt. The terms of the Contract for Sale of Real Estate provided for interest only payments for five (5) years, and then interest and principal payments for twenty (20) years. (Bar's Exhibit #4). This transaction left Respondent's aunt, Ms. Anderson with an unsecured promissory note and no mortgage. (RR, p.1, Section II (A)).

Gladys Anderson died in 1983. Ms. Fry later contacted an attorney, Robert Bolton, stating that she had received no payments under the terms of the trust. Mr. Bolton then contacted Respondent who agreed to restructure sale of the rooming house so as to make it more beneficial to Ms. Fry. (T,p.32,L.6-23 and Bar's Exhibit #16-D).

During negotiations to restructure the transaction, Respondent was in contact with Ms. Fry without the knowledge or consent of Robert Bolton and paid \$10,000.00 toward the amount owed pursuant to the restructured settlement. Ms. Fry signed a receipt evidencing this payment. (T2,p.9,L.6-25 and p.10,L.1-13). (Bar's Exhibits 14 and 15).

After the conclusion of the Final Hearing in this case, the Referee, in his Report, made the following "Findings of Fact of Misconduct":

After considering all the pleadings and evidence before me, I find two (2) areas of misconduct. Except as hereinafter stated I find no other basis for action against Respondent as set forth in paragraph 37 of the Amended Complaint.

A. I find that Respondent violated DR 5-103(a)(1) and Rule 4-1.8. Without going into great factual detail in this report, I find that when Respondent used his Aunt's Power of Attorney to transfer her property into a partnership he controlled, then to a corporation he controlled, he left his Aunt with an unsecure promissory note and no mortgage; he valued the property for purposes of the note at something less than fair market; he set the interest rate substantially less than the going rate (5 1/2%) and the payment terms were skewed in his favor (interest only for 5 years, then payments for 20 years). This transaction was hardly arms-length or commercially reasonable. While there was some benefit to his infirmed Aunt, there was little or no benefit to her primary

heir, Respondent's Cousin (Marjorie Fry) but great benefit to Respondent as ultimate beneficiary under his Aunt's Will. Respondent recognized his over-reaching and improper conduct when, several years later, he agreed to renegotiate this transaction at a higher value, higher interest rate and quicker pay-out, so as to provide more benefits for his Cousin under the trust provisions of his Aunt's Will.

B. I find that Respondent violated Rule 4-4.2. During that later part of 1987, Respondent's Cousin, Marjorie Fry, retained an attorney, Robert Bolton. In December, 1987, Respondent met with his cousin and made substantial payments (\$10,000.00) to her directly, knowing she was represented by counsel. He had her sign a receipt which he prepared. This transaction was done without the knowledge or consent of Ms. Fry's attorney. Respondent did not advise Mr. Bolton of this payment for some months. Even though it was "family" and even though Ms. Fry was not injured by the payment, Respondent's conduct violated the aforementioned Rule 4-4.2.

The Florida Bar does not challenge the Referee's findings of fact. However, The Bar does seek review of the Referee's recommended discipline as the Referee's recommendation of an admonishment is inappropriate according to Rule 3-5.1(b) and 3-7.6(k)(1)(3), Rules of Discipline, the facts herein, and under the current standards for imposing lawyer sanctions.

SUMMARY OF ARGUMENT

The Referee's recommendation of an admonishment in this case is inappropriate in light of Rule 3-5.1(b) and 3-7.6(k)(1)(3), Rules of Discipline.

Procedurally, an admonishment (formerly private reprimand) is not appropriate because Rule 3-5.1(b), Rules of Discipline, states that minor misconduct is the only type of attorney misconduct for which an admonishment is an appropriate discipline. Further, Rule 3-7.6(k)(1)(3), Rules of Discipline, states, in part, that an admonishment may be recommended by the Referee 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 probable cause Complaint. The grievance committee found probable cause that the attorney violated disciplinary rules and did not exercise its option to find minor misconduct. Therefore, an admonishment is procedurally inappropriate.

Additionally, the facts in the instant case are sufficient to warrant a public reprimand and an admonishment is an inappropriate sanction based on the Florida Standards for Imposing Lawyer Sanctions.

The Florida Bar asks this Court to disapprove the Referee's recommendation of an admonishment and impose a public reprimand against the Respondent.

ARGUMENT

- I. WHETHER AN ADMONISHMENT IS APPROPRIATE WHERE THE RESPONDENT ENGAGED IN A CONFLICT OF INTEREST, COMMUNICATED DIRECTLY WITH A PERSON REPRESENTED BY COUNSEL, AND WHERE THE MINIMUM SANCTION ENUMERATED BY THE RULES OF DISCIPLINE IN A CASE BASED UPON PROBABLE CAUSE AND NOT MINOR MISCONDUCT IS A PUBLIC REPRIMAND.

The Bar submits that a Referee, on his own initiative, is not authorized by the Rules Regulating The Florida Bar to recommend that an attorney be admonished in a case where probable cause is found by a grievance committee. Rule 3-5.1(b) clearly states that "minor misconduct is the only type of misconduct for which an admonishment is an appropriate disciplinary sanction". This is reiterated by Rule 3-7.6(k)(1)(3) which states that a Referee may recommend an admonishment only in cases based upon minor misconduct.

The present Rules Regulating The Florida Bar divide complaints for misconduct into two separate categories: minor misconduct findings to be handled by the filing of a Complaint of Minor Misconduct and probable cause findings to be handled by the filing of a formal Complaint. In the instant case, there was no finding of minor misconduct by the grievance committee and this was not a Complaint of Minor Misconduct based upon the Respondent's or the Board's rejection of the minor misconduct report.

While previously a Referee could recommend an admonishment (private reprimand), the current rules adopted January 1, 1987, prohibit such a discipline except in cases in which a complaint of minor misconduct has been filed. Rule 3-7.6(k)(1) describes those items to be included in the Referee's report. Subsection 3 of that rules states:

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

Allowing a Referee in the present case to recommend an admonishment when there was no complaint of minor misconduct filed would ignore the underscored language of Rule 3-7.6(k)(1)(3) or at least render it meaningless.

In addition, The Florida Standards for Imposing Lawyer Sanctions (hereinafter referred to as the Standards), adopted November, 1986 by the Board of Governor's of The Florida Bar would dictate the imposition of a public reprimand for Respondent's misconduct.

Section 4.3 of the Standards (Failure to Avoid Conflicts of Interest) provides that, absent aggravating and mitigating circumstances:

4.33 Public reprimand is appropriate when a lawyer is negligent in determining whether the representation of a client may be materially affected by the lawyer's own interests, or whether the representation will adversely

affect another client, and causes injury or potential injury to a client.

The Referee found that Respondent had acted improperly in skewing the terms of the sale of his aunt's property to himself. Respondent's actions resulted in injury or potential injury to Gladys Anderson and violated Disciplinary Rule 5-103(A)(1).

Section 6.3 of the Standards (Improper Communications with Individuals in the Legal System) provides that, absent aggravating and mitigating circumstances:

6.32 A public reprimand is appropriate when a lawyer is negligent in determining whether it is proper to engage in communication with an individual in the legal system, and causes injury or potential injury to a party or interference or potential interference with the outcome of the legal proceeding.

The Referee found that Respondent knowingly communicated with Ms. Fry while she was represented by counsel, a violation of Rule 4-4.2.

The instant case is not a situation involving a single act of misconduct on the part of the attorney, but rather a combination of acts. Considering the Respondent's violations together, and the potential injury to Ms. Fry, Respondent's misconduct is not minor or insignificant. In The Florida Bar v. Kirkpatrick, 567 So.2d 1377 (Fla. 1990), This Court held that a private reprimand (admonishment) is

the appropriate disciplinary sanction only for the most insignificant of offenses.

Thus, for the previously stated reasons, the appropriate discipline, both procedurally and substantively, is a public reprimand. The Rules of Discipline prohibit the recommendation of an admonishment except in minor misconduct cases and the facts in the instant case are sufficient to support the imposition of a public reprimand.

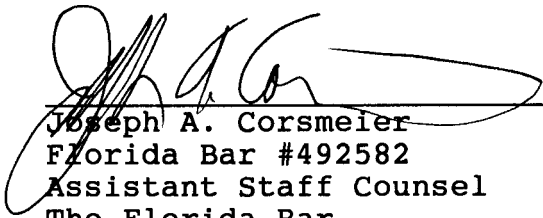
CONCLUSION

An admonishment inappropriate where the Respondent has engaged in conflict of interest and communicates with a person represented by counsel and a public reprimand is the minimum sanction enumerated by the Rules of Discipline in a case based upon probable cause.

WHEREFORE, The Florida Bar respectfully request that this Honorable Court review the Referee's recommendation and order a public reprimand.

Dated this 11th day of January, 1991.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT the original and seven (7) copies of the foregoing Florida Bar's Initial Brief has been furnished to SID J. WHITE, Clerk, the Supreme Court of Florida, Supreme Court Building, 500 South Duval, Tallahassee, Florida 32399-1927, by Express Mail, No. RB-523054356; a copies by regular U.S. Mail were furnished to DAVID A. MANEY, Esq., Counsel for Respondent, John R. Trinkle, at his record Bar address of Post Office Box 172009, 606 E. Madison Street, Tampa, Florida 33672-0009; and a copy to JOHN T. BERRY, Staff Counsel, The Florida Bar, Legal Division, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 11th day of January, 1991.


JOSEPH A. CORSMEIER