IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant,

v.

JOHN R. TRINKLE,
Respondent.

_____/

CASE: 74,156
(TFB No. 87-26,030 (13D))

REPLY BRIEF OF THE FLORIDA BAR

JOSEPH A. CORSMEIER
Florida Bar #492582
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607
(813) 875-9821

TABLE OF CONTENTS

	Page
Table of Contents	i
Table of Citations	ii
Symbols and References	iii
Statement of Facts	1,2
Summary of Argument	3
ARGUMENT:	
I. It is not a violation of the ex post facto provisions of The Florida and Federal Constitutions to apply a rule prohibiting the Referee from recommending an admonishment (private reprimand) to conduct occurring before the effective date of the rule when the Supreme Court retains final authority to impose discipline	4,5
II. The conduct of Respondent in violating DR 5-103(A) (1) and 4-4.2, Rules of Professional Conduct, when considered together, warrant a public reprimand regardless of the Referee's recommended discipline	6-8
Conclusion	9
Certificate of Service	10

TABLE OF CITATIONS

Cases:	Page
The Florida Bar v. Kirkpatrick 567 So.2d, 1377 (Fla. 1990)	5
The Florida Bar v. Bajoczky 558 So.2d, 1022 (Fla. 1990)	2
The Florida Bar v. Carter 410 So.2d, 920 (Fla. 1982)	2
The Florida Bar v. Lopez 406 So.2d, 1100 (Fla. 1981)	2
The Florida Bar v. Stillman 401 So.2d, 1306 (Fla. 1981)	2
The Florida Bar v. McCain 361 So.2d 700 (Fla. 1978)	2

Rules:

Rules Regulating The Florida Bar	
Rules of Discipline	
Chapter 3	
Rule 3-5.1(a)	3,5
Rule 3-7.6 (k)(1)(3)	3,4
Rules of Professional Conduct	
Chapter 4	
Rule 4-4.2	3,6
Code of Professional Responsibility	
Disciplinary Rule 5-103(A)(1)	3,6,7

SYMBOLS AND REFERENCES

In this Brief the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, John R. Trinkle, will be referred to as "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. "RB" will denote Respondent's Answer Brief.

STATEMENT OF FACTS

The Florida Bar filed the Petition for Review in this cause and, in its Initial Brief, stated, "The facts in this case are not contested by The Florida Bar and are as follows...". Respondent did not file a Cross-Petition for Review challenging the facts as found by the Referee and so cannot attack the Referee's findings of fact.

Respondent, however, includes in his Statement of Facts certain statements which are contrary to the findings of the Referee in his report. Specifically, Respondent states, in his brief, that "(t)he Bar has offered no evidence of value of the Anderson House as of July, 1983, when the sale occurred." RB page 5. The Referee, in his "Findings of Fact of Misconduct", states the following: "(Respondent) valued the property for purposes of the note at something less than fair market..." RR page 1.

Although The Florida Bar recognizes this Court's inherent right to review the findings of fact by the Referee, it is respectfully submitted that this Court should not consider this or any challenge of the findings of fact by Respondent as these factual findings have not been

challenged by the Respondent by Petition for Review.

However, upon review of the facts, it is clear that, although no expert witness was called to prove value, there was testimony regarding the fair market value of the property at the final hearing upon which the Referee could properly base his findings.

The Referee's findings of fact are clothed with the presumption of correctness and "will be upheld unless they are without support in the evidence". The Florida Bar v. Bajoczky, 558 So.2d 1022, 1023 (Fla.1990) (citing The Florida Bar v. Carter, 410 So.2d 920, 922 (Fla.1982); The Florida Bar v. Lopez, 406 So.2d 1100, 1102 (Fla.1981); The Florida Bar v. Stillman, 401 So.2d 1306, 1307 (Fla. 1981); The Florida Bar v. McCain, 361 So.2d 700, 706 (Fla. 1978)).

Therefore, applying the standard of Bojoczky, the Referee's findings as to the value of the property should be upheld as they are not "without support in the evidence."

SUMMARY OF ARGUMENT

The application of the rule prohibiting the recommendation of an "admonishment" (private reprimand) to conduct prior to the effective date of Rule 3-7.6(k)(1)(3) is not a violation of the ex post facto provisions of the Florida and Federal Constitutions as the Bar rule prohibits only the recommendation of an admonishment to this Court, which retains the ultimate power to impose discipline under Rule 3-5.1(a), Rules of Discipline.

Respondent's conduct in violating DR 5-103(A)(1) and 4-4.2, Rules of Professional Conduct, when considered together, warrants a public reprimand and this Court should consider all of Respondent's actions to determine the appropriate discipline regardless of the Referee's recommended discipline.

ARGUMENT

I. IT IS NOT A VIOLATION OF THE EX POST FACTO PROVISIONS OF THE FLORIDA AND FEDERAL CONSTITUTIONS TO APPLY A RULE PROHIBITING THE REFEREE FROM RECOMMENDING AN ADMONISHMENT (PRIVATE REPRIMAND) FOR CONDUCT OCCURRING BEFORE THE EFFECTIVE DATE OF THE RULE WHEN THE SUPREME COURT RETAINS THE FINAL AUTHORITY TO IMPOSE DISCIPLINE.

Respondent, in his Answer Brief, argues that Rule 3-7.6(k)(1)(3), which prohibits the Referee from recommending an admonishment except in cases of a complaint for minor misconduct, should only be applied to conduct occurring after the effective date of the rule, January 1, 1987. The basis of the argument is that the rule is in some way substantive in nature, not procedural, and increases the minimum amount of discipline that can be imposed on the lawyer. This argument is without merit on both grounds.

The first point, that the rule is with substantive effect, ignores the fact that this Court retains final authority to determine the sanction to be imposed upon an attorney who has been found guilty of violating Bar disciplinary rules.

The public policy reasons for this rule are clear: it would be inappropriate in most cases for a public probable cause case to be resolved with an admonishment which remains, essentially, a confidential disposition and is not published or readily accessible to the public. This Court

retains the authority to impose an admonishment after a review of the facts and any mitigating factors but the imposition of an admonishment (private reprimand) "is the appropriate sanction only for the most insignificant of offenses." The Florida Bar v. Kirkpatrick, 567 So.2d 1377 (Fla. 1990).

Respondent's second point, that the rule increases the minimum discipline that can be imposed upon a lawyer, is erroneous. This Court retains final authority under Rule 3-5.1(a), to impose an admonishment (private reprimand) upon the Respondent. Each case must be examined upon its own merit and the standard of Kirkpatrick should be applied to diminish the discipline, increase the discipline, or approve the Referee's recommendation. The imposition of an admonishment, however, should be reserved only for "the most insignificant of offenses". It is submitted that the Respondent's conduct rises above the minimal standard enunciated by This Court in the Kirkpatrick decision.

II. THE CONDUCT OF RESPONDENT IN VIOLATION OF DR 5-103(A)(1) AND 4-4.2, RULES OF PROFESSIONAL CONDUCT, WHEN CONSIDERED TOGETHER, WARRANTS A PUBLIC REPRIMAND REGARDLESS OF THE REFEREE'S RECOMMENDED DISCIPLINE.

Respondent argues that his conduct in this case warrants no more than an admonishment. In support of his position, Respondent presents a number of factors which would presumably support this contention. RB p.21-22.

First, Respondent argues that at all times he was concerned for the welfare of his aging aunt and her desires to provide a home for his cousin, Ms. Fry. Respondent legally terminated the provision in his aunt's will which provided for a life estate for Ms. Fry when he transferred ownership of the home to himself before his aunt died. If Respondent died or otherwise lost control of the Anderson House through bankruptcy or other means, Ms. Fry would have no legal recourse to regain her life estate in the home. This is certainly a potential injury which Respondent, with his substantial experience in the practice of law, should have foreseen, regardless of the familial context of the transaction.

Secondly, Respondent argues that he paid expenses of the estate with his own funds. This statement is correct, as far as it goes, but Respondent fails to mention that these payments were then treated by him as advance payments on the promissory note he had executed to pay for the

Anderson House. Clearly, Respondent was not paying the claims for the benefit of Ms. Fry.

Thirdly, Respondent states that the conduct in violation of DR 5-103(A)(1) involved but a single transaction. The Referee found that this transaction involved a transfer by Respondent of his aunt's property to a partnership he controlled and then into a corporation he controlled. The Referee also found that the transactions left Respondent's aunt with an unsecured promissory note and no mortgage, that Respondent set the interest rate at substantially less than fair market value and skewed payments in his favor, and that the transaction was hardly arms lenth or commercially reasonable. Additionally, the Referee found that the transaction resulted in little, if any, benefit to Respondent's aunt and no benefit to Ms. Fry, the primary heir, but resulted in great benefit to Respondent as ultimate beneficiary under the will.

Fourth, Respondent argues that the conduct where he had contact directly with Ms. Fry, who was represented by counsel, was a single incident. It is true that the evidence showed but one contact, but it must be considered in the context of the overall conduct of Respondent in violating not only the conflict of interest rules but also this rule.

Fifth, Respondent states that the conduct was obviously in a familial context. This fact is clearly one which should have caused Respondent to be especially diligent in avoiding both conflict of interest and communication with unrepresented persons. Traditionally, a family member occupies a position of trust and confidence. When that person is a lawyer, the trust and confidence is magnified and family members may come to rely upon the lawyer member of the family in making decisions. Such is what occurred in this case. By failing to recognize or ignoring potential and actual violations of the ethical rules, Respondent took advantage of his stature as a lawyer member of his family for his own benefit.

Lastly, Respondent argues that there was no potential or actual harm to any client at any time. As trustee of the testamentary trust, Respondent had a fiduciary duty toward Ms. Fry and violated this duty by engaging in the transaction transferring the property from his aunt to the entities he controlled.

CONCLUSION

Respondent, a sixty-two (62) year old lawyer admitted to practice in 1953, had substantial experience in the practice of law. The conduct of the Respondent is neither insubstantial nor insignificant. This Court should reject the recommendation of the Referee for an admonishment and impose a public reprimand.

JOSEPH A. CORSMEIER
Florida Bar #: 492582
Assistant Staff Counsel
The Florida Bar
Suite C-49
Tampa Airport Marriott Hotel
Tampa, Florida 33607
(813) 875-9821

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies hereof have 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, and copies have been furnished by regular U.S. Mail to DAVID A. MANEY, Esquire, Attorney for John R. Trinkle, at his record Bar address of Post Office Box 172009, 606 East Madison Street, Tampa, Florida 33672-0009, and a copy to JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; this 14th day of February, 1991.

JOSEPH A. CORSMEIER