IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
Complainant,	)	CONFIDENTIAL
vs.	)	Supreme Court Case No. 61,410
BURNETT ROTH,	)	The Florida Bar Case No. 11E79M90
Respondent.	)	

COMPLAINANT'S ANSWER BRIEF

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INTRODUCTION

The Florida Bar, Complainant, will be referred to as either "The Florida Bar" or "Complainant".

Burnett Roth, Respondent, will be referred to as either "Respondent" or "Burnett Roth".

The Honorable Paul M. Marko, III, the Referee, will be referred to as the "Referee".

The following symbols will be used in this Answer Brief:

"T. Nov." Transcript of disciplinary proceedings convened before the Referee on November 30, 1983, to be followed by page reference number.

"T. Dec." Transcript of disciplinary proceedings convened before the Referee on December 9, 1983, to be followed by page reference number.

"T. Jan." - Transcript of disciplinary proceedings convened before the Referee on January 6, 1983, to be followed by page reference number.

"RR" - Report of Referee dated April 4, 1984, to be followed by a paragraph number reference "par." or page number reference "p.".

All exhibits admitted into evidence by this Referee will be referred to by either The Florida Bar's or Respondent's numbers, and will be identified as composite's, where applicable.

POINTS ON APPEAL

I.

WHETHER THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AND PROPOSED DISCIPLINE ARE SUPPORTED BY CLEAR AND CONVINCING RECORD EVIDENCE AND ARE CONSISTENT WITH EXISTING CASE LAW?

II.

WHETHER THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE DISBARRED IS CONTRARY TO THE FACTS OR OTHER MATTERS OFFERED IN MITIGATION?

STATEMENT OF THE CASE

On November 17, 1981, The Florida Bar filed a formal four-count Complaint against Respondent, Burnett Roth, alleging numerous instances of breaches of trust and fiduciary duties, fraud, deceit, and misrepresentation and acts of misappropriation, conversion and personal use of entrusted clients' funds, in violation of variously charged and specifically identified provisions of Article XI, Rule 11.02(4), in toto, of the Integration Rule of The Florida Bar and the Disciplinary Rules of the Code of Professional Responsibility. All of the foregoing allegations had their genesis in the manner in which Respondent, in his capacity as attorney and administrator, represented and managed the Estate of Florence Einbinder.

On December 10, 1981, the Honorable Paul M. Marko, III, was appointed by Order of the Chief Justice of the Supreme Court to serve as Referee.

On February 18, 1982, Respondent filed an Answer. On February 23, 1982, The Florida Bar propounded its Request for Admissions, and on March 25, 1982, Respondent filed same.

Formal evidentiary hearings were convened on November 30, 1983, December 6, 1983, and January 6, 1984. During the course of these disciplinary hearings, the Referee entertained the testimony of the three surviving heirs of Florence Einbinder, the testimony of the heirs' successor attorney, the expert testimony

of The Florida Bar's investigator/auditor, the testimony of four distinguished witnesses who testified regarding Respondent's character, and the exhaustive testimony of Respondent. In all, 576 pages of testimony were transcribed during these hearings. In addition, both Respondent and The Florida Bar introduced numerous individual and comprehensive composite exhibits which were duly admitted into evidence and considered by the Referee.

At the close of the final hearing of January 6, 1984, the Referee permitted both parties to submit written Memoranda of Discipline. Both Respondent and The Florida Bar availed themselves of this opportunity and said Memoranda were accepted and duly considered by the Referee.

On or about April 4, 1984, Judge Marko filed his Report of Referee wherein he entered specific findings of fact to each count of the Complaint and recommended to this Honorable Court that Respondent be found guilty of each count, as charged, and that Respondent be disbarred from the practice of law.

On or about May 19, 1984, the Board of Governors of The Florida Bar considered the Report of Referee and recommended to this Honorable Court that said Report, including all findings and recommendations, be approved as submitted and that the Court issue an Order of Discipline effectuating Respondent's disbarment.

On or about June 18, 1984, Respondent filed a Petition for Review, requesting this Court's review of the Referee's findings of fact, recommendations of guilt, and recommendation as to disbarment. On or about July 25, 1984, Respondent filed his Brief. This Answer Brief of The Florida Bar is filed in response thereto.

STATEMENT OF THE FACTS

Respondent was the long-time attorney, counselor and trusted confidant for the family of Eli Einbinder (deceased) and Florence Einbinder and their three daughters, Phyliss, Andee, and Shaune Harriet. (T. Nov. 29-33; T. Nov. 88-90; T. Nov. 136-141; T. Dec. 20-22).

On November 5, 1973, Florence Einbinder died, intestate, in Dade County, Florida, leaving her three adult daughters, as her sole heirs at law (T. Nov. 38).

Florence Einbinder's estate legitimately consisted of a family business known as Eli Einbinder, Inc., cash, stock, and personal items such as jewelry, furniture, and other such personalty (T. Nov. 35).

Shortly after her death, Florence Einbinder's surviving daughters retained the services of Respondent to handle all matters pertaining to her estate (T. Nov. 33). In addition to serving as attorney for the estate, on or about November 13, 1973, Respondent was also appointed administrator of the estate (T. Nov. 36).

On November 20, 1973, Respondent opened a non-interest bearing checking account in the name of the Estate of Florence Einbinder. Respondent was the sole signatory on this account (T. Nov. 42, 63). [For purposes of this Brief, this checking account will be referred to as the "Estate Account".]

During all times material to Respondent's involvement with the Estate of Florence Einbinder, Respondent also maintained an unrelated non-interest bearing checking account in the name of Burnett Roth Special Account. Respondent was the sole signatory on this account (T. Nov. 42, 63). [For purposes of this Brief, this checking account will be referred to as the "Special Account".]

Immediately subsequent to the opening of the estate, Respondent advised the three heirs that the proceeds of all insurance policies were to be treated as all other estate assets. Acting in reliance thereon, each of the three heirs endorsed separate life insurance proceeds checks in the identical amounts of $15,678.34, and tendered same to Respondent. Each of these checks represented a one-third interest in the life insurance benefits paid by New England Mutual Life Insurance Company on the life of Florence Einbinder. On December 10, and December 12, 1973, Respondent deposited these checks (in the aggregate amount of $47,035.02) into the Estate Account (T. Nov. 58-60, 62-64; T. Nov. 106-109; T. Nov. 142-144; T. Dec. 25-27).

On December 31, 1973, Washington National Insurance Company of Evanston, Illinois, issued three separate checks in the individual amounts of $2,500.00, each check payable to an individual surviving heir. Respondent continued to advise the heirs that the proceeds of insurance policies were to be treated as all other estate assets. Acting in reliance thereon, each heir

separately endorsed her respective check, tendered same to Respondent, and on January 9, 1974, and March 28, 1974, Respondent deposited the three checks (in the aggregate amount of $7,500.00) into his Special Account (T. Nov. 74-76; T. Nov. 106-109; T. Nov. 142-144; T. Dec. 25-26).

Contemporaneous with these events, Respondent, as administrator for the estate, was entrusted with various amounts of other funds in the nature of true estate assets in the aggregate amount of $41,699.23; $15,199.23 of these funds were deposited directly into the Estate Account and $26,500.00 of these funds were deposited directly into the Special Account (T. Nov. 44, 55, 57, 72, 74, 78).

During the period November 5, 1973 to April 8, 1974, Respondent, as administrator of and attorney for the estate, was entrusted with the total sum of $96,234.25 of monies lawfully belonging to either the estate, or the heirs/beneficiaries (T. Nov. 80; T. Jan. 89-90; Bar Exh. 15).

During this same period of time, Respondent made legitimate disbursements (on behalf of the estate) to the three heirs/beneficiaries in the aggregate amount of $14,065.00 (T. Nov. 80; T. Jan. 98; Bar Exh. 16).

As of April 8, 1974, Respondent had made legitimate disbursements (on behalf of the estate) in the aggregate amount of $1,153.85 (T. Nov. 80-81; T. Jan. 99; Bar Exh. 16).

During the period November 5, 1973 to April 8, 1974, Respondent commingled, misappropriated, and converted to his own personal use the total sum of $80,874.15 in derogation of his responsibilities as administrator of and attorney to the estate, and to the heirs/ beneficiaries (T. Nov. 81-83 and T. Jan. 104, 176-177). Respondent testified that he had used $16,000.00 of these funds to satisfy his personal obligations with the Internal Revenue Service (T. Jan. 176-177 and Bar Exh. 16). Upon extensive examination by both Counsel for The Florida Bar and the Referee, Respondent was unable to explain the specific manner in which he used the balance of these funds, although he never denied using same for his personal use (T. Jan. 177-181). Respondent denied any psychiatric, alcohol, gambling or drug-related problems during the period 1973 to the present (T. Jan. 181-182).

At the time of Florence Einbinder's death, her three surviving daughters ranged in ages from twenty-one to thirty years (T. Dec. 20). Each of the heirs relied exclusively upon the advices and guidance of Respondent until 1977. In addition to the attorney-client relationship, each of the heirs believed that there existed a strong family and social relationship between the Einbinder family and Respondent. Each of the three heirs referred to Respondent as "Uncle Burnie", and at the time of their mother's death, they naturally turned to Respondent for his expertise and guidance regarding the probate of her estate. The three heirs

placed their total trust and confidence in Respondent and at all times Respondent encouraged their investiture of faith (T. Nov. 29-32; T. Nov. 88-90, 101-102; T. Nov. 136-138, 141; T. Dec. 19-25).

Each of the three heirs testified that Respondent had advised them, individually and/or collectively, that all insurance benefit proceeds were to be treated as estate assets and were required to be deposited into the Estate Account (T. Nov. 106-109; T. Nov. 142-144; T. Dec. 25-28). Each of the three heirs testified that at no time did Respondent request their permission to use estate assets or insurance proceeds for his own personal benefit, and that at no time did they authorize Respondent to utilize either estate funds or insurance proceeds for his own personal use (T. Nov. 67; T. Nov. 119-120; T. Nov. 144-145; T. Dec. 28-29). Further, the heirs testified that they had discussed with Respondent his placing estate funds and insurance proceeds into an interest bearing account; however, at no time were these monies placed in an interest-bearing account (T. Nov. 48-49, 63, 82; T. Nov. 104-105; T. Nov. 144-147).

During the course of the disciplinary hearings, four prominent persons testified on behalf of Respondent as character witnesses. Each person testified that they believed Respondent's reputation for truth and veracity was good and that Respondent was an honorable man. Each witness testified that Respondent had

performed significant pro bono work and that he was actively involved with many charitable causes (T. Dec. 3-18; T. Dec. 71-83; T. Dec. 83-87; T. Dec. 87-95).

Although Respondent testified that he had advised the three heirs that the insurance proceeds should be handled in a manner consistent with the other estate assets, he denied ever advising the heirs that the insurance proceeds were, in fact, properly includable within the probate estate (T. Nov. 58-59). Respondent testified that he was of the opinion that the three heirs, all of whom being over the age of majority, were not responsible enough to handle their new-found wealth, and took it upon himself to manage their money for them (T. Nov. 45, 47, 59; T. Jan. 185-186). Respondent denied any conversations with the heirs regarding the deposit of either estate funds or insurance proceeds into an interest-bearing account (T. Nov. 48; T. Jan. 185-187). Respondent testified that he had the heirs' implicit permission to use both the estate funds and insurance proceeds for his own personal use and that at all times the heirs knew and understood that he was using the estate funds and insurance proceeds for his own personal use (T. Nov. 47-48, 59, 63).

Respondent testified that he advised the heirs that he would use all funds coming into the estate "as he saw fit"; however, Respondent testified that he did not expressly advise the heirs that he would use these funds for his own personal purposes (T. Nov. 46-48; T. Jan. 188-189). Although Respondent testified

that he viewed himself as a "self-appointed guardian", he offered no explanation for his failure to invest the heirs' funds in an interest-bearing, protective account (T. Jan. 185-186). Respondent testified that rather than apply the heirs' funds to a particular investment which might accrue to their prospective benefit, he instead utilized the funds for his own personal use (T. Jan. 186). Respondent testified that notwithstanding his advices to the adult heirs that the insurance proceeds should "come to me and be treated like the other monies", Respondent advised the Referee that he did not believe these advices to be deceptive or misleading (T. Jan. 190-192).

During or about the latter part of 1977, the heirs became dissatisfied and suspicious of Respondent's administration of the estate and brought an Action for an Accounting in the Probate Division of the Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida (T. Nov. 115-116; T. Nov. 155-157; T. Dec. 32-36).

Incidental to this litigation, on September 7, 1977, Respondent was deposed under oath for the purpose of ascertaining the true financial status of the Estate of Florence Einbinder. During the course of this deposition, Respondent was queried as to the then-present balance of the Estate Account. Respondent testified under oath that the then-present balance of the Estate

Account was $23,230.34. In fact, two days prior to the taking of this deposition, the balance of the Estate Account was $580.34; in fact, one day prior to the deposition, Respondent withdrew the sum of $22,650.00 from his Special Account and deposited this sum into the Estate Account. In fact, immediately subsequent to the taking of this deposition, Respondent withdrew said sum in the amount of $22,650.00 from the Estate Account, thereby creating an actual balance in said account of $580.34, the very same balance as had existed just two days prior to the taking of the deposition (T. Dec. 48-66; Bar Comp. Exh. 3, Bar Comp. Exh. 4).

Respondent freely admits to violating Article XI, Rule 11.02(4)(b) of the Integration Rule of The Florida Bar, and the applicable Bylaws thereto, by failing to maintain and preserve the records of all bank accounts or other records pertaining to the funds and property of a client and by commingling the funds of his clients with those of his own (T. Dec. 67-71; T. Jan. 183-185).

During the course of the disciplinary proceedings, the Estate Account checkbook was moved and admitted into evidence. An examination of the checkbook revealed that whenever Respondent drafted a check on the Estate Account to satisfy a legitimate estate purpose, such check would be drafted in a sequentially-numbered manner from the front of the checkbook. However, during the initial five months of the estate, Respondent drafted many checks made payable either to himself or to cash. These checks

were normally "unnumbered" and, therefore, not easily identifiable or amenable to reconstructive audit. Many of these checks were drafted from the rear of the Estate Account checkbook; the remaining check stubs are "unnumbered" and do not reflect either the amount of the check or the purpose for which the check was intended (T. Dec. 111-119; Bar Exh. 8). After carefully examining the Estate Account checkbook, the Referee was "compelled to conclude that the Respondent's failure to maintain proper records served to conceal his true actions and his wrongful use of estate funds and insurance proceeds" (RR par. 38).

Notwithstanding Respondent's wrongful conversion and misappropriation of the insurance proceeds and estate assets, Respondent had returned all of these funds to the heirs/beneficiaries prior to the initiation of the instant disciplinary proceedings (T. Jan. 121).

As a result of ancillary civil litigation, Respondent and the heirs entered into a settlement agreement wherein Respondent agreed to pay past-due interest, surcharge penalties, and successor attorney's fees in the amount of $60,000.00, of which Respondent has fully paid in the agreed-upon amount (T. Dec. 165).

Respondent's past disciplinary history with The Florida Bar was not at issue, as it is clear that he has never been the subject of prior disciplinary proceedings other than the matters sub judice (RR p. 19).

ARGUMENTS

I.

THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS AS TO GUILT AND PROPOSED DISCIPLINE ARE SUPPORTED BY CLEAR AND CONVINCING RECORD EVIDENCE AND ARE CONSISTENT WITH EXISTING CASE LAW.

IN GENERAL

The ultimate judgment as to the correctness and the imposition of discipline upon an attorney in any disciplinary action is exclusively vested in this Court. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978).

Notwithstanding, this Court has long-held that:

> [t]he initial fact-finding responsibility is imposed upon the referee. His findings of fact should be accorded substantial weight. They should not be overturned unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Wagner, 212 So.2d 770, at 772 (Fla. 1968).

Ten years later, this Court re-examined this synergistic relationship:

> It is our responsibility to review the determination of guilt made by the Referees upon the facts of record, and if the charges be true, to impose an appropriate penalty for violation of the Code of Professional Responsibility. Fact-finding responsibility in disciplinary proceedings is imposed on the Referee. His findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Hirsch, 359 So.2d 856 at 857 (Fla. 1978).

Additional procedural considerations pertaining to trials by Referees in disciplinary proceedings include:

> Findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in the civil proceeding. Fla. Bar Integr. Rule art. XI, Rule 11.06(9)(a).

* * * * * * * * * * * *

> Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a Referee sought to be reviewed is erroneous, unlawful, or unjustified. Fla. Bar Integr. Rule art. XI, Rule 11.09(3)(e).

* * * * * * * * * * * *

Finally, The Florida Bar is charged with the burden of presenting clear and convincing evidence of a breach of the Code of Professional Responsibility before the Supreme Court of Florida may conclude that any Respondent has committed ethical misconduct warranting disciplinary sanctions. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

AS TO COUNT I

It is undisputed that Respondent was, for many years, the attorney, counselor, and confidant for the entire family of Eli Einbinder. At the time of Florence Einbinder's death on November 5, 1973, it is undisputed that her three surviving adult

daughters retained the services of their "Uncle Burnie" to serve as both administrator and attorney for their mother's estate. Certainly, it is undisputed that the heirs' decision was motivated by their affection for and implicit confidence and trust in Respondent. (T. Nov. 29-33; T. Nov. 88-90, 101-102; T. Nov. 136-141; T. Dec. 19-25).

It is undisputed that in his capacity as administrator and attorney for the Estate of Florence Einbinder, Respondent opened a non-interest bearing checking account known as the Estate Account. (T. Nov. 42, 63).

It is undisputed that at all times material to Respondent's involvement in the Estate of Florence Einbinder, he also maintained an unrelated non-interest bearing checking account known as the Special Account. (T. Nov. 42, 63).

It is undisputed that Respondent directed each of the three heirs to endorse certain life insurance proceeds checks in the aggregate amount of $54,535.02. (T. Nov. 58-60, 63-64, 74-76; T. Nov. 106-109; T. Nov. 142-144; T. Dec. 25-27).

It is undisputed that the heirs, all being over the age of majority, had an absolute right to take immediate possession of these monies and to exercise their complete dominion and control over same. (T. Dec. 20).

Notwithstanding, it is an uncontested fact that Respondent failed to advise the heirs in this regard. (T. Nov. 59). Rather, it is an undisputed fact that Respondent advised the heirs that

the life insurance proceeds should be "treated as any other estate asset". (T. Nov. 58-59; T. Nov. 106-109; T. Nov. 142-144; T. Dec. 25-27).

It is an undisputed fact that Respondent exercised his personal dominion and control over these funds. He used these funds and all other estate funds, "as he saw fit". (T. Nov. 46-48; T. Jan. 188-189).

It is an undisputed fact that during the period November 5, 1973 to April 8, 1974, Respondent, as administrator for and attorney of the estate was entrusted with the total sum of $96,234.25 of monies belonging either lawfully to the estate or the heirs/beneficiaries. (T. Nov. 80; T. Jan. 89-90; Bar Exh. 15).

It is an undisputed fact that, during this same period of time, Respondent made legitimate disbursements, on behalf of the estate, to the three heirs/beneficiaries in the aggregate amount of $14,065.00. (T. Nov. 80; T. Jan. 98; Bar Exh. 16).

It is an undisputed fact that as of April 8, 1974, Respondent had made other legitimate disbursements (on behalf of the estate) in the aggregate amount of $1,153.85. (T. Nov. 80-81; T. Jan. 99; Bar Exh. 16).

It is an undisputed fact that as of April 8, 1974, there existed a deficit balance in the Special Account in the amount of $697.87 and a positive balance in the Estate Account in the amount of $141.25. (T. Jan. 101-104; Bar Exh. 16).

There now arises the issue of the "missing" monies which (as of April 8, 1974) constituted the balance of the life insurance proceeds and other estate assets in the aggregate amount of $80,874.15. (T. Nov. 80-84; T. Jan. 101-104). The Florida Bar maintains, and the Referee has determined, that the non-existence of these funds in either the Special Account or the Estate Account constituted an ongoing and continuing misappropriation and conversion of clients' funds. Respondent has advised both The Florida Bar and the Referee that the non-existence of these funds in either the Special Account or the Estate Account does not constitute misappropriation or conversion, but merely demonstrates a commingling of these funds with those of his own.

Respondent's contention in this regard is founded upon the following considerations:

> (1) That Respondent had received the heirs' implicit permission, albeit not in writing, to use any and all funds, be they insurance proceeds or other estate monies, for any purpose he saw fit.
>
> (2) That notwithstanding the fact that all of the heirs were over the age of majority, Respondent designated himself as a "self-appointed guardian", and determined that he would exercise his learned judgment and acumen on their behalf.
>
> (3) That whenever any of the heirs requested partial distributions of their money, Respondent always complied with their request.
>
> (4) That the entire balance of all entrusted funds, be they the proceeds from life insurance

policies or other estate monies, was always available for immediate distribution in the event that the heirs should ever request same.

(5) That Respondent eventually returned all previously entrusted funds to the heirs, and, subsequent thereto, paid to the heirs, vis-a-vis a settlement, significant monies representing interest due the heirs, surcharge penalties, and successor attorney's fees.

(6) That as a result of his having restored the heirs to their financial status quo (in addition to the "assessed penalties"), no one was hurt.

* * * * * * * * * * * *

During the course of these disciplinary hearings, each of the three heirs testified that Respondent had advised them, individually and/or collectively, that all insurance benefit proceeds were to be treated as estate assets and were required to be deposited into the Estate Account. (T. Nov. 58-59; T. Nov. 143; T. Dec. 25-28).

Each of the three heirs testified that at no time did Respondent request their permission to use either estate assets or insurance proceeds for his own personal benefit, and that at no time did they authorize Respondent to use either estate funds or insurance proceeds for his own personal use. (T. Nov. 67; T. Nov. 119-120; T. Nov. 144; T. Dec. 25-29).

Respondent's contention is further discredited by the heirs testimony that they had discussed with him his placing of the

estate funds and the insurance proceeds into an interest bearing account; however, at no time were these monies placed in an interest bearing account. (T. Nov. 104-106; T. Nov. 145-147; T. Dec. 25-26, 29).

Certainly, such discussions refute and negate any belief on the part of Respondent that he had the heirs' permission (expressed, implied, or otherwise) to use the insurance proceeds or other estate funds for his own personal purposes.

In this regard, the Referee made the following specific findings:

> That having heard the testimony of the three heirs and having observed their demeanor, the undersigned Referee is of the belief that their testimony was totally credible, that their sincerity was genuine, that their motivation is not at issue, and that their testimony was extremely believable and should be afforded the utmost weight. In light of the foregoing, I specifically find that at no time did the Respondent ever request the heirs' permission to use either the estate funds or the insurance proceeds for his own personal benefit, and at no time did the heirs ever authorize the Respondent to do so. Further, I specifically find that the heirs, individually and/or collectively, discussed with the Respondent his investing these funds in an interest bearing account and, that in fact, at no time did the Respondent so invest the funds. Finally, I specifically find that the three heirs placed their total trust and confidence in the Respondent and that at all times the Respondent encouraged their investiture of faith. (RR par. 23).

During the course of the Disciplinary hearings, Respondent testified that he would use all funds coming into the estate "as

he saw fit"; however, Respondent testified that he did not expressly advise the heirs that he would use these funds for his own personal purposes. (T. Nov. 47-48, 57, 63; T. Jan. 188-189).

* * * * * * * * * * * * * *

In support of his having advised the heirs that the insurance proceeds should be treated in a manner consistent with the handling of the other estate assets, and his advices to the heirs that he would use all funds coming into the estate "as he saw fit", Respondent advised the Referee that he viewed himself as a "self-appointed guardian". (T. Nov. 48, 63, 82; T. Nov. 106-109; T. Nov. 143-145; T. Jan. 185-186).

At the time of their mother's death, all three heirs were sui juris. Respondent, in his testimony before the Referee, professed concern that the heirs were not sufficiently mature or financially competent to manage their new-found wealth. Notwithstanding, Respondent's self-appointment constituted an outrageous assumption of authority unknown to the law. It invaded the exclusive province and domain of the Probate Court, and it made a mockery of the existing Probate Code.

Respondent's failure to prudently invest these funds on behalf of the heirs and his conscious and deliberate decision to utilize these monies for his own personal purposes serves to undermine his professed benevolent guardian theory and vitiates

Respondent's contention that his testimony be afforded credibility. In this regard, the Referee offered the following insight:

> Burnett Roth wants this Referee to believe that he had permission to use these funds. That position is ludicrous. Heirs do not ask for their own money and receive it piece-meal if they know it was theirs.....I find no merit in his benevolent guardian theory. (RR p. 18).

* * * * * * * * * * *

Because funds were always made available to the heirs "whenever they asked for them", Respondent suggests that this fact should militate against a finding that he had misappropriated or converted their funds. The absurdity of this position is painfully apparent. In reliance upon Respondent's advices, the heirs were lead to believe that they had no right to request the immediate and absolute return of their funds. The heirs' belief was the direct and proximate result of Respondent's own advices to them. In this regard, it is important to note that at no time did Respondent ever tender money or other assets to the heirs unless first requested to do so by an individual heir. (RR par. 31).

* * * * * * * * * * * *

Respondent "claims" that the entire corpus of all previously entrusted funds was always available for distribution to the heirs in the event they were needed or requested. As a result,

Respondent is heard to suggest that his actions, therefore, did not constitute misappropriation or conversion.

Again, under what possible set of circumstances (save a catastrophic tragedy) would the heirs have requested their monies in light of Respondent's earlier advices?

Respondent testified that as of April 8, 1974, funds in the amount of $80,874.15 were no longer on deposit in either the Special Account or the Estate Account. (T. Nov. 80-84).

However, Respondent would have this Honorable Court believe that at all times subsequent to April 8, 1974, he exercised the unbridled and exclusive dominion and control over these funds; that is, Respondent suggests that the total amount of these funds were always in existence and were always available for distribution.

This position is devoid of merit and is absolutely contrary to the record evidence. During the course of the final disciplinary hearing convened before the Referee on January 6, 1984, the following colloquy pertaining to this very point transpired:

> Mr. Rosenbloom: Let me suggest this to you, that with regard to the statement you made that you did not use all the money, that all the money was not in the account, you were then talking about $80,000.00; that is when that statement was made.
>
> Now, I want to know what did you do with the $80,000.00?

Mr. Roth: I used part of it to pay some obligations that I had.

Mr. Rosenbloom: How much of it?

Mr. Roth: As reflected by some --

Mr. Rosenbloom: How much of it?

Mr. Duval: I think it shows --

Mr. Roth: It looks like I paid some IRS thing and it was not for the estate, so it had to have been for me. I don't know who I paid it for and that is $16,000.00.

Mr. Rosenbloom: That is $16,000.00 of $80,000.00?

Mr. Roth: I cannot tell you.

Mr. Rosenbloom: What did you do with the other $64,000.00?

Mr. Roth: I don't know. If I knew what I did with it at this point in time, where I had it at that point, I would tell you. I just do not know, Sir. I would have no hesitancy in telling you. (T. Jan. 177-178).

Although, Respondent would have this Court believe that he had the capacity to immediately, and, at any time, return the heirs' funds, by virtue of his own sworn testimony, Respondent lacked the capacity and the requisite dominion and control over these funds to comply with any such request. Indeed, in light of the foregoing, Respondent was fortunate that the heirs did not make any such request.

* * * * * * * * * * * * * * * * * *

Because Respondent maintains that he eventually returned all funds to the heirs prior to the initiation of this disciplinary action, Respondent argues that the Record will not support a finding of conversion and misappropriation. Respondent further maintains, arguendo, that the Referee's recommendation that he be disbarred is without sufficient foundation. This Court should not overlook the fact that Respondent did not return these funds until such time as the heirs retained successor counsel, as evidenced by the fact that Respondent admits that, on or about September 6, 1977, he deposited $22,650.00 into the Estate Account, thereby replacing funds which properly belonged to the estate. (T. Dec. 54-57; Bar Comp. Exh. 3). Respondent's misplaced reliance on this position is obvious; in fact, his argument directly supports the finding of the Referee that he was never entitled to either possess or use the funds in the instance.

* * * * * * * * * * * * * * *

Finally, Respondent is heard to suggest that his actions did not "harm" his clients. Apparently, Respondent equates the absence of "harm" with the financial restoration of his clients to the status quo. The unmitigated callousness of Respondent's argument demonstrates a disturbing lack of awareness of and appreciation for the full panoply of human emotion. The insensitivity of Respondent's argument becomes clearly manifest when viewed against the testimony of one of the three heirs who was

questioned as to her feelings upon learning that Respondent had improperly used her funds:

> I think that deceived is a very light word considering the mental cruelty and the anguish of having this happen and having to go through this whole thing for the last I would say eight years.
>
> My mother died in 1973 and we are still involved with something that has to do with her death and with her estate.
>
> Yes, I think it is the highest form of insult and harrassment and deceit.
>
> It was done not only personally, but from someone who has a code of ethics to uphold, his responsibilities as a lawyer.
>
> I think that's the worst travesty right there. (T. Nov. 121).

* * * * * * * * * * *

Respondent would have this Honorable Court believe that he is guilty of nothing more than commingling and inadequate record keeping. When viewed against the evidence of record, his contention shocks the conscious; indeed, it seriously and adversely reflects upon Respondent's perception and acknowledgement of his own ethical and moral accountability.

In light of the foregoing, The Florida Bar maintains that there exists more than a mere clear and convincing factual predicate to permit the Referee to conclude:

[t]he Respondent admits, and the Record demonstrates beyond a doubt, that he commingled the estate funds and the insurance proceeds with his own personal funds. By his own admissions, and through the expert testimony of The Florida Bar's Staff Investigator, James D. Hayes, the Record demonstrates beyond a doubt that during the period November 5, 1973, to April 8, 1974, the Respondent diverted EIGHTY-THOUSAND, EIGHT HUNDRED SEVENTY-FOUR DOLLARS AND FIFTEEN CENTS ($80,874.15) to his own personal use. The undersigned Referee specifically finds that the Respondent's actions amounted to a misappropriation and conversion of the estate funds and the insurance proceeds. Indeed, the Respondent admitted that, on two separate occasions, he utilized a total of SIXTEEN THOUSAND DOLLARS ($16,000.00) of estate funds and/or insurance proceeds to satisfy his personal obligations with the Internal Revenue Service. When queried repeatedly during the course of these disciplinary hearings as to the other uses he made of the remaining SIXTY-FOUR THOUSAND, EIGHT HUNDRED SEVENTY-FOUR DOLLARS AND FIFTEEN CENTS ($64,874.15), the Respondent was either unable or unwilling to account for same. (RR par. 26).

* * * * * * * * * * * *

[t]he Respondent's failure to account for the uses he made of the remaining entrusted funds, his cavalier attitude regarding his authority to actually make use of these funds, and his self-appointment as the "guardian angel" of three adult heirs, seriously taints the credibility of his entire testimony. Indeed, for these very reasons, the undersigned Referee considers the Respondent's testimony to be untruthful. I specifically find that the Respondent had neither moral justification, nor the legal right to perceive himself as a self-appointed guardian; and that at no time did the Respondent have the heirs' permission or authorization (either implicit, explicit, or otherwise) to use the estate funds and/or the insurance proceeds. (RR par. 27).

AS TO COUNT II

That a fiduciary relationship existed between Respondent and the estate, both as administrator and attorney, and between Respondent and the heirs, as a result of Respondent's long-time relationship with the Einbinder family is not disputed. (T. Nov. 29-32; T. Nov. 88-90, 101-102; T. Nov. 136-137, 141; T. Dec. 19-25).

Count II is founded upon breaches of fiduciary duties; duties that have their genesis in Respondent's obligation to abide by that high degree of morality required of a civilized society. It is this sense of morality which serves as the true cornerstone of the legal profession. It is founded upon the preservation and maintenance of the trust and confidence which exists between attorney and client.

As a result of his fiduciary relationship, Respondent had a duty imposed by law, ethics, and morality to deal with the heirs with a superlative degree of frankness and honesty. He was required to act only in their best interests and to the total exclusion of his own personal gain.

Notwithstanding Respondent's contention that he always honored the heirs' request to forward funds (in the nature of partial distributions), the Referee specifically concluded:

> At no time during this period did any distributions to the heirs occur without an heir first requesting them. The balance of all other funds remained within the use and control of the Respondent. Contrary to the realities of the situation, the Respondent continuously reassured the heirs that he would

> safely maintain their money and that he was precluded from distributing the remainder of the funds until the estate was closed. (RR par. 31)

That Respondent grossly abused the heirs' confidence in him should not even be considered at issue. The Florida Bar has consistently maintained that Respondent's representations and actions were deceitful, untruthful, and calculated to maintain the heirs' trust and confidence for as long a period of time as possible. Indeed, Respondent was able to maintain the trust and confidence of three innocent women for almost four years. For this very reason, the Referee concluded:

> [i]t is my specific finding that the Respondent's attitude, actions, and strategy reflected disfavorably upon himself and the profession, and greatly detracts from the Respondent's contention that he is an ethical practitioner. (RR par. 33).

AS TO COUNT III

During or about 1977, there came a time when the heirs became suspicious of the manner in which Respondent was administering the probate of the estate. They engaged successor counsel in this regard and an Action for an Accounting was duly filed. (T. Nov. 115-116; T. Nov. 155-157; T. Dec. 29-39).

Successor counsel for the heirs noticed Respondent's deposition for the purpose of determining the true financial status of

the Estate of Florence Einbinder. Respondent's deposition was taken on or about September 7, 1977, almost four years after the opening of the estate. (T. Dec. 48-50; Bar Comp. Exh. 3).

During the course of the taking of this deposition, Respondent testified, under oath, that the then-present actual balance of the Estate Account was $23,230.34. The Record clearly substantiates the following facts:

> (1) That two days prior to the taking of the deposition, the balance of the Estate Account was $580.34.
>
> (2) That one day prior to the deposition, Respondent withdrew the sum of $22,650.00 from his Special Account and deposited said sum into the Estate Account.
>
> (3) That immediately subsequent to the taking of this deposition, Respondent withdrew said sum in the amount of $22,650.00 from the Estate Account.
>
> (4) That this action resulted in the creation of an actual balance in the Estate Account of $580.34; the very same balance as had existed just two days prior to the taking of the deposition. (T. Dec. 48-66; Bar Comp. Exh. 3; Bar Comp. Exh. 4).

Based upon Respondent's conscious and deliberate actions, the Referee concluded:

> That although The Florida Bar and the Respondent have stipulated that the Respondent later redeposited TWENTY-FIVE THOUSAND DOLLARS ($25,000.00) into the Estate Account, and that this money was used for the purpose of paying

> the heirs, the undersigned Referee could only conclude that the Respondent's representations and actions were calculated to confuse and deceive the heirs, that his representations and actions were deceitful and inconsistent with the highest goals of the profession, and that the Respondent's representations and actions fell far below the minimally accepted standards of the profession. It is the further opinion of the undersigned Referee that this particular course of conduct militates against the Respondent's professed good-faith in the cause sub judice. (RR par. 36).

AS TO COUNT IV

Respondent freely admits to violating Article XI, Rule 11.02(4)(b) of the Integration Rule of The Florida Bar, and the applicable Bylaws thereto, by failing to properly maintain and preserve the records of all bank accounts or other records pertaining to the funds and property of a client. (T. Jan. 185, 223-224).

One might initially attribute Respondent's failure, in this regard, to ignorance of the Integration Rule or neglect and ineptitude.

However, evidence adduced at the trial dramatically refutes this position and suggests a more corrupt and deceptive modus operandi.

During the course of the disciplinary proceedings, an examination of the Estate Account checkbook revealed that whenever Respondent drafted a check on the Estate Account to satisfy a legitimate estate purpose, such check would be drafted in a

sequentially-numbered manner from the front of the checkbook. However, during the initial five months of the estate, Respondent drafted many checks made payable to either himself or to cash; almost invariably, these checks were "unnumbered" and were drafted from the rear of the Estate Account checkbook. It is extremely noteworthy that the remaining check stubs are "unnumbered" and do not reflect either the amount of the check or the purpose for which the check was intended. (T. Dec. 111-119; Bar Exh. 8).

The Florida Bar submits that Respondent's maintenance of the Estate Account in the above-described manner demonstrates a premeditated intentional course of conduct calculated to foster deception and thwart any attempt at meaningful reconstructive audit. Indeed, the Referee concluded:

> Based on the Respondent's testimony, his admissions, and his demonstrated course of conduct throughout the entire estate matter, the undersigned Referee is compelled to conclude that the Respondent's failure to maintain proper records served to conceal his true actions and his wrongful use of Estate funds and insurance proceeds. (RR par. 38).

* * * * * * * * * * *

In summary, Respondent's contention that he is guilty of nothing more than the commingling of entrusted funds and inadequate record-keeping relative to these funds does not comport to the Record. Indeed, Respondent's contention is borne of disjunc-

tive logic, his unwillingness to accept the orderly and considered fact-finding process, and his sense of personal desperation.

THE CASE LAW

Respondent suggests that the imposition of a "reprimand", constitutes the appropriate disciplinary sanction for his misconduct mandatory of pro bono service, and the payment of costs. The Florida Bar takes grave exception to this position, and, instead, maintains that Respondent's disbarment is consistent with Respondent's misconduct and the great weight of the applicable case law.

This Honorable Court has established a "three prong" formula for determining the proper discipline in actions brought against attorneys pursuant to Article XI of the Integration Rule of The Florida Bar. The Court's mandate included:

> [F]irst, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Pahules, 233 So.2d 130, at 132 (Fla. 1970) Accord, The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979), The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1982), and The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

In 1979, this Court formally adopted a fourth factor to be considered in determining appropriate punishment in attorney disciplinary matters; i.e., the imposition of consistent discipline for related violations. In The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), the Court was confronted with a Report of Referee wherein Respondent was found to have engaged in a check-kiting scheme. Further, Respondent had failed to maintain adequate records, had failed to reconcile escrow accounts, had commingled his own funds with those of his clients, and had misused and misappropriated his clients' funds. None of the clients had suffered any "real" loss, as their funds were eventually returned to them. The Report of Referee recommended that Respondent be disbarred, the Referee expressing the following position:

> If one looks strictly at the conduct of a lawyer's practice, the misuse of clients' funds, whether it be using commingled funds or otherwise, is certainly one of the most serious offenses a lawyer can commit. Few offenses have such an adverse public impact. While many disciplinary infractions involve situations where matters in mitigation should be considered, a violation involving the misuse of clients' funds is not one of them. Recognizing restitution (or "nobody lost anything") as a defense or in mitigation may help client losses, but it should not mitigate the discipline. The referee is aware that other referees have found that a "lack of intent to deprive the client of his money" and "personal hardship" justified relatively minor punishment. Such excuses stand out like an invitation to the lawyer who is in financial difficulty for one reason or another. All too often he is willing to risk a slap on the wrist, and even a little ignominy, hoping he

> won't get caught, but knowing that if he is, he can plead restitution, but duly contrite, and escape the ultimate punishment. The profession and the public suffers as a consequence. The willful misappropriation of client funds should be the Bar's equivalent of a capital offense. There should be no excuses. Id. at 784.

Respondent Breed argued that disbarment was an unnecessarily harsh penalty for the cited misconduct, particularly when disbarment was compared with past attorney discipline imposed by the Supreme Court. Breed asserted that no one had suffered any loss and that disbarment should not occur under the circumstances discussed above.

The Court, in a 4 to 2 decision, determined that Respondent Breed was correct in his assertion that past disciplinary proceedings involving similar misconduct had not resulted in disbarment. The majority determined that:

> We recognize that each case must be assessed individually and in determining the punishment we should consider the punishment imposed on other attorneys for similar misconduct. To totally ignore these prior actions would allow caprice to substitute for reasoned consideration of the proper discipline. Id. at 785.

The majority opinion concluded with an unequivocal and a stern warning directed to the membership of The Florida Bar, stating:

> However, we agree with the referee that misuse of clients' funds is one of the most serious offenses a lawyer can commit. We find that in this instance a two-year suspension with

> proper proof of rehabilitation before readmission is the appropriate penalty. We give notice, however, to the legal profession of this state that henceforth we will not be reluctant to disbar an attorney for this type of offense even though no client is injured. Id. at 785 (emphasis added).

In dissent, Chief Justice England and Justice Sundberg concurred in the Referee's finding that Breed had willfully disregarded his fiduciary responsibilities and that his acts evinced moral turpitude. Both Justice England and Justice Sundberg would have upheld the Referee, believing that the appropriate penalty was disbarment.

* * ** * * * * * * *

Indeed, this Court has acted upon its warning as set forth in the Breed opinion, supra. In The Florida Bar v. Drizin, 420 So.2d 878 (Fla. 1982), the Court disbarred Respondent for commingling and converting clients' funds. In The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981), the Court disbarred Respondent for his irresponsible pattern of conversion of his clients' trust funds. In The Florida Bar v. Ross, 417 So.2d 985 (Fla. 1982) the Court disbarred Respondent for converting the entrusted funds of two separate clients, for failing to maintain adequate trust accounting records, and for making a false statement in the filing of an accounting to a client.

* * * * * * * * * * *

This Court has not hesitated to order the disbarment of those attorneys who have chosen to abuse their fiduciary duties by converting or misappropriating funds belonging to estates. In The Florida Bar v. Lewin, 342 So.2d 513 (Fla. 1977), the Court disbarred Respondent for using estate funds to make personal investments without court authorization or the consent of the beneficiaries. In The Florida Bar v. Davis, 272 So.2d 485 (Fla. 1972), the Court disbarred Respondent for his misappropriation of estate funds and for applying same to his own personal use. In The Florida Bar v. Harper, 421 So.2d 1066 (Fla. 1982), the Court disbarred Respondent for making improper payments to himself for commissions and expenses, for acting as the executor of the estate, for converting estate funds to his own purposes, and for failing to comply with a court order assessing a surcharge in favor of the estate. Finally, in The Florida Bar v. Rhodes, 355 So.2d 744 (Fla. 1978), the Court disbarred Respondent based upon his improper withdrawal of funds from an estate, notwithstanding his bare contention that the withdrawal of funds was in the nature of a loan.

In The Florida Bar v. Owen, 393 So.2d 551 (Fla. 1981), the Court disbarred Respondent for four counts of commingling clients' funds and his failure to use entrusted funds for their intended purposes. Three of the counts involved his violation of the "specific purpose doctrine" relating to trust funds; the final count involved Respondent, as personal representative and attorney

for an estate, commingling the assets of a revokable trust with his personal funds and with the funds of other clients. As a result, the trust funds were never fully and properly disbursed to the beneficiaries of the trust. Respondent also failed to provide the beneficiaries of the trust a full and accurate accounting of the estate assets.

* * * * * * * * * *

Most recently, and perhaps most persuasive and enlightening, is the matter of The Florida Bar v. Baker, 419 So.2d 1054 (Fla. 1982). The facts in this decision bear a striking similarity to the facts in the matter sub judice. In December 1978, Respondent, acting as attorney for the executor of an estate, caused the sale of securities belonging to the estate, and deposited the proceeds in his general account. Subsequently, Respondent tendered a check to one of the beneficiaries of the estate from his general trust account and the check was returned reflecting insufficient funds. Between December 1978 and October 1979, the monthly balances in Respondent's trust account were well below the sum required to pay the inheritance which the named beneficiary was entitled to receive, although sufficient estate funds had initially been placed in Respondent's trust account. Between November 1971 and January 1973, Respondent had issued approximately ten checks totalling $35,000.00 from the estate account to himself or his law firm. This was accomplished without prior

court approval and without disclosure to or approval by the beneficiaries of the estate. The beneficiaries of the estate were forced to institute proceedings to compel Respondent to file an accounting. Respondent finally reached a settlement with the beneficiaries of the estate in November 1979 and consistent with the settlement, reimbursed the beneficiaries all monies due them. Notwithstanding, on these facts, this Court ordered Respondent's disbarment from the practice of law.

* * * * * * * * * * * *

It is respectfully submitted that under all of the circumstances, the Referee's recommendation that Respondent be disbarred is both warranted and appropriate. The Florida Bar believes that the Record supports, by clear and convincing evidence, that Respondent engaged in a course of conduct calculated to willfully deprive the heirs of their money by misappropriating the funds to his own personal use; that he engaged in deceit and misrepresentation; that he assumed authority unknown to the law; and that he willfully violated his solemn duties imposed by his fiduciary position.

His actions constituted not only unethical conduct, but also transgressed upon any reasonable interpretation of moral decency. Respondent's misconduct goes to the very heart of a lawyer's

qualifications and fitness to practice law; he has failed in his obligations and responsibilities to his clients, the public, the profession, and himself.

ARGUMENT

II.

THE REFEREE'S RECOMMENDATION THAT RESPONDENT BE DISBARRED IS NOT CONTRARY TO THE FACTS OR OTHER MATTERS OFFERED IN MITIGATION.

Again, Respondent is heard to appeal that the Referee failed to properly evaluate the evidence of record and that the Referee's recommendation that Respondent be disbarred from the practice of law is contrary to the facts or other matters offered in mitigation.

Respondent's contention that the Record does not support, by clear and convincing evidence, a finding of misappropriation and conversion is totally devoid of merit. Indeed, this very assertion critically challenges Respondent's ability and/or willingness to differentiate between that which is morally correct and that which is morally wrong.

The Florida Bar respectfully submits that it has demonstrated that Respondent is guilty of the most aggravated form of conversion and misappropriation. His wrongdoing was couched in deceit and misrepresentation, and was borne of a classical betrayal of

trust. In support thereof, The Florida Bar has previously discussed this point in the Argument Section, directly above.

That this Court be fully advised, let there be no doubt that The Florida Bar has never contested the following facts:

> (1) That Respondent has been a member in good standing of The Florida Bar for approximately 50 years.
>
> (2) That Respondent has never been the subject of prior disciplinary proceedings convened by The Florida Bar.
>
> (3) That Respondent has an excellent record for public service.
>
> (4) That Respondent returned all converted and misappropriated funds to the heirs (save interest due the heirs, surcharge penalties, and successor attorney's fees), prior to the initiation of the disciplinary proceedings sub judice.
>
> (5) That Respondent "claims" remorse with regard to his wrongful acts.

The foregoing factors are of Record; they were heard and considered by the Referee and incorporated, either expressly or by reference, in his Report.

The Florida Bar, however, concedes no other matters incident, material, or relevant to this particular point. Notwithstanding these five above-enumerated factors, the Referee has determined Respondent's conduct to be so aggravated, corrupt, and antithetical to his ethical responsibilities as to warrant his disbarment.

The Florida Bar maintains that Respondent's disbarment is absolutely necessary to preserve the public's trust and confidence in the legal system, and to protect the public in the future.

In The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961), this Court formally announced its philosophical justification regarding the disbarment of an attorney, stating:

> We have said however, that we have come to regard disbarment as the most severe disciplinary prescription that can be imposed on a lawyer. The cases generally regard a judgment of disbarment as one reserved for the most infamous type of misprision and as justifiable in those instances where the possibility of the lawyer's rehabilitation and restoration to an ethical practice are the least likely. Id. at 143.

Accordingly, in reviewing the appropriateness of the Referee's recommendation of disbarment, both the seriousness of the misconduct and the possibility of Respondent's rehabilitation and restoration to an ethical practice are clearly at issue.

The seriousness of Respondent's misconduct is clearly evident. Obviously, the betrayal of trust incident to the misappropriation and conversion of clients' funds by an attorney is the Bar's equivalent of a "capital offense". The Florida Bar v. Breed, 378 So.2d at 784 (Fla. 1979). Certainly, the Referee recognized the seriousness and significance of Respondent's misconduct; he entered specific findings against Respondent regarding conversion, misappropriation, fraud, deceit and misrepresentation. Additional

specific findings against Respondent included conduct prejudicial to the administration of justice and breaches of fiduciary duties owed to clients.

The only remaining question involves the Referee's implicit determination that the possibility of Respondent's rehabilitation and restoration to an ethical practice is not likely.

In response to this issue, The Florida Bar respectfully submits and maintains the following:

> (1) That Respondent's misconduct was not the result of an "isolated incident". Rather, the Referee concluded that Respondent's wrongdoing constituted a course and pattern of conduct extending over a number of years. (RR par. 33 and 38).
>
> (2) That contrary to Respondent's contentions, the Referee determined that:
>
> > "[He] did not lend his full cooperation to successor-counsel or the Probate Court, and that he continued to conduct himself in a manner inconsistent with the highest goals of the legal profession. Rather than admit his incompetence, ineptitude, and what can only be characterized as deceptive actions, the Respondent engaged the heirs in protracted civil litigation. In this regard, it is my specific finding that the Respondent's attitude, actions, and strategy reflected disfavorably upon himself and the profession, and greatly detracts from the Respondent's contention that he is an ethical practitioner. (RR par. 33, emphasis added).

(3) That contrary to Respondent's contention that his actions did not involve any "corrupt motive", the Referee has concluded otherwise. Respondent's conduct can only be characterized as corrupt, deceitful, and deceptive. When viewed in its totality, Respondent's actions at all times reflected a disdain and disregard for the law and a betrayal of the total trust and confidence previously reposed in him by his clients.

(4) Finally, Respondent maintains that he has demonstrated remorse, that he has been open and candid with the Court, and that he is deserving of continued membership in The Florida Bar. Although Respondent has "professed remorse" and suggests that he has sufficiently rehabilitated himself and should therefore be permitted to continue as a member of The Florida Bar, the Referee specifically found otherwise, stating:

> That the Respondent's failure to account for the uses he made of the remaining entrusted funds, his cavalier attitude regarding his authority to actually make use of these funds, and his self-appointment as the "guardian angel" of the three adult heirs, seriously taints the credibility of his entire testimony. Indeed, for these very reasons, the undersigned Referee considers the Respondent's testimony to be untruthful (RR par. 27, emphasis added).
>
> * * * * * * * * * * * * *
>
> That I specifically find the Respondent's representations and actions to have been deceitful, untruthful and calculated to maintain the heirs' trust and confidence for as long a period of time as possible..... (RR par. 33).
>
> * * * * * * * * * * * * *

> [T]hat the Respondent's representations and actions were calculated to confuse and deceive the heirs, that his representations and actions were deceitful and inconsistent with the highest goals of the profession, and that the Respondent's representations and actions fell far below the minimally accepted standards of the profession. It is the further opinion of the undersigned Referee that this particular course of conduct militates against the Respondent's professed good-faith in the cause sub judice (RR par. 36, emphasis added).

Contrary to his impassioned plea, Respondent does not come before this Honorable Court with clean hands; nor does he come before this Honorable Court with genuine remorse. Respondent seeks the relief of this Honorable Court without either the requisite purity of principle or the integrity demanded by the profession.

The Referee has found Burnett Roth guilty of a pattern and a course of misconduct inherently offensive to the honor of the profession and the sanctity of the Courts. The Referee has determined that Burnett Roth is untrustworthy and, therefore, not deserving of belief or credibility. Burnett Roth has been branded a liar; he bears this brand as he approaches this Court in his pursuit of relief.

Although a civilized society must never abandon its belief in compassion and its ability to forgive, it must always be careful not to favor these worthy concepts upon the undeserving.

Compassion and forgiveness are inappropriate when they are bestowed upon a person who fails to acknowledge the wrongfulness of his past conduct and, instead, subordinates truth in deference to self-interest.

The Florida Bar most respectfully submits that before a person is able to take the first step toward meaningful rehabilitation, he must, as a conditioned precedent, demonstrate a present and unerring quality of trustworthiness. This, Burnett Roth is unable to do. This, the Referee has so determined.

These lofty aspirations and goals are not foreign to this Honorable Court; indeed, this Court has consistently recognized that the strength of the legal profession is neither greater nor less than the overall integrity of its members.

> By traditional American standards we judge people by the integrity of their character. Character is not a pliable substance like putty that may be made to give anyplace or anytime that pressure is applied. Character is spiritual and rigid, it guides one's conduct by set moral values and no external immoral or amoral influence can veer his course from approved ethical standards. Integrity of character is the first prerequisite to dependablity, to constancy of purpose, no single racial or economic group has a corner on it, it is found among the lowly as often as it is among the well-born. When a client has a real job to do, it looks for the lawyer with character. The Florida Bar v. Murrell, 74 So.2d 221 at 225, 226 (Fla. 1954).

CONCLUSION

The Florida Bar respectfully maintains that the Referee, as the trier of fact, properly entertained and considered the entirety of all testimony and documentary evidence duly admitted during the course of these disciplinary proceedings.

The Florida Bar further maintains that the Referee's findings of fact and recommendations as to guilt are fully supported by clear and convincing evidence.

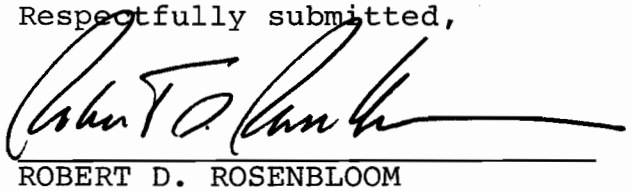
Finally, The Florida Bar submits that the Referee's recommendation that Respondent be disbarred is not contrary to the facts or other matters offered in mitigation.

In the final analysis, Burnett Roth orchestrated his own downfall. The Referee determined that Burnett Roth was untrustworthy and, therefore, not deserving of belief. Burnett Roth was the master of his own destiny.

This Honorable Court has never held that any man is above the spirit, the intent, or the letter of the law. Indeed, as this Court concluded in a prior disciplinary action, the former Chief Justice Sundberg offered the following Biblical justification regarding the disbarment of a then-prominent member of The Florida Bar:

> For unto whomsoever is much given,
> of him shall be much required:
> And to whom men have committed much,
> of him they will ask the more.
> The Florida Bar v. McCain, 361 So.2d 700 at 709 (Fla. 1978).

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Complainant's Answer Brief was hand-delivered to Harvie S. Duval, Esquire, Law Offices of Greenfield and Duval, 1680 N.E. 135th Street, North Miami, Florida 33181 on this 17TH day of August, 1984.

ROBERT D. ROSENBLOOM
Bar Counsel