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IN THE SUPREME COURT OF FLORIDA

CASE NO. 61,410
(The Florida Bar File No. 11E79M90)

FILED
SID J. WHITE
JUL 26 1984
CLERK, SUPREME COURT
By
Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

vs.

BURNETT ROTH,

Respondent.

BRIEF OF RESPONDENT

C O N F I D E N T I A L

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INTRODUCTION

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

The Respondent, BURNETT ROTH, will be referred to as the "Respondent".

The following symbols will be used in this Brief:

"T. Nov." - Transcript of November 30, 1983, hearing before the Referee, to be followed by the page number.

"T. Dec." - Transcript of December 6, 1983, hearing before the Referee, to be followed by the page number.

"T. Jan." - Transcript of the January 6, 1984, hearing before the Referee, to be followed by the page number.

Exhibits comprising those specifically introduced will be referred to by The Florida Bar or Roth's numbers, and composites where applicable.

"Ref. Rep."- Report of Referee dated April 4, 1984.

"APP." - Appendix attached.

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STATEMENT OF THE CASE

A formal Complaint was filed on November 17, 1981, by The Florida Bar against the Respondent, Burnett Roth, averring violations of Article XI of the Integration Rule of The Florida Bar, and various portion of the Disciplinary Rules of The Florida Bar, and the Code of Professional Responsibility of The Florida Bar, all arising out of one singular instance of violations of the said Article XI.

The Respondent filed an Answer to the Complaint.

The Hon. Paul M. Marko III was appointed as the Referee by Order of the Chief Justice of the Supreme Court on December 10, 1981.

Hearings on this matter were held on November 30, 1983, December 6, 1983, and January 6, 1984.

On April 4, 1984, the Referee filed his report recommending the disbarment of the Respondent.

The Respondent did file its Petition for Review of the Referee's Findings of Fact, and the Referee's recommendation of discipline.

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STATEMENT OF FACTS

The Respondent, a member of the Bar at all times since 1934, is subject to the jurisdiction of this Court. He was a long time friend and confidant of the family of Eli Einbinder (deceased), and Florence Einbinder, and their three daughters, Phyllis, Andee and Shaune Harriet.

On November 5, 1973, Florence Einbinder died intestate, in Dade County, Florida, leaving her three daughters, all of whom were over the age of majority as her sole heirs at law.

Florence Einbender's estate consisted principally of a family business known as "Eli Einbinder, Inc.", and some miscellaneous items of personal property. After consultation between Respondent and the heirs, the Respondent filed a Petition for Letters of Administration in the Circuit Court of Dade County, and was duly appointed as the Administrator of the Estate. The Respondent was also the attorney for the Estate.

The Respondent opened an account referred to in the proceedings as an "Estate Account", into which Estate proceeds were deposited. He undertook the operation of the business practically giving up his practice, and finally negotiated the disposition of the wholesale meat business, obtaining approval to the sale of the business (T. Nov. 33). Proceeds from the sale were being paid into the Estate over a period of four years.

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The last proceeds of this sale were deposited into the Estate account on January 5, 1978 (Roth Ex. "9"; APP. 1).

A total of $89,717.37, came into the Estate over a period of four years. In addition there were proceeds of insurance policies which the surviving daughters were the beneficiaries. The proceeds of these policies were deposited either into the Estate account or into a Special Account being maintained by the Respondent; the full amount of the insurance proceeds collected was $54,035.02.

On the advice of the Respondent these funds collected from time to time were not immediately distributed to the beneficiaries, but were accumulated with such funds as came into the Estate, to be held either in the Estate Account or placed into the Special Account maintained by the Respondent. These funds were commingled with the funds of the Respondent and periodically distributed to the heirs.

During the period from November 5, 1973, to April 4, 1974, the Respondent made legitimate disbursements on behalf of the Estate to the beneficiaries/heirs of $14,065.00, and legitimate disbursements for Estate purposes of $1,153.85 (Ref. Rep. par. 18 and 19).

During the period of time a total of $96,234.25 had come into the possession of the Administrator of the Estate (Ref. Rep. 17).

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Thereafter, it is acknowledged that whenever any of the heirs requested funds from the Respondent, payment was made of the amount requested (T. Nov. 79, 83, 122; T. Dec. 33; T. Jan. 144).

Funds were always available for distribution (T. Jan. p. 143; T. Nov. p. 83; T. Dec. p. 47).

The records of payments made to the heirs/beneficiaries is undisputed (Roth Ex. "8" & "9"). Payment to Phyllis Wagner, one of the heirs, were made on four occasions when requested from December 10, 1973, through September 21, 1977, and as funds were received by the Estate, totalling $14,033.34; and to Andee Weiner on six occasions between said dates totalling $14,533.43 (T. Dec. p. 43); and to Harriet Einbinder between said dates on six occasions totalling $14,984.34 (T. Nov. p. 160; APP. 2-7).

All of the funds belonging to the Estate were either distributed to the heirs by September 21, 1977, or were properly in the Estate Account on that date. Subsequently other monies came into the Estate Account from the last payment due to the Estate from the sale of the property and that was in like manner properly distributed to the heirs.

During this time there were distributions being made to the beneficiaries of the insurance proceeds. There is no dispute that such distribution was made when requested by the beneficiaries, as reflected above (Roth Ex. "1" and "8"; APP. 1-4).

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There was introduced into the record the statement of the monies received in the Estate of Florence Einbinder and the payments made from the Estate, which reflects the periodic monies received and disbursed. The funds were disbursed to the heirs or for Administrative expenses. This reflects the distribution of all funds prior to the last receipt of monies by the Estate in January 5, 1978, when the last payment of the mortgage was received, which mortgage was received on the sale of the assets in 1973. This report reflects the full distribution of the assets, and the periodic payments made by the Respondent as the Administrator (Roth Ex. "9"; T. Jan. p. 150; APP. 5-7).

The record of these payments is not disputed. Payments were made to PHyllis Wagner of the full amount of the insurance proceeds of $18,178.34, as requested, on seven occasions. Payments were made to Andee Weiner of the said amount on 19 occasions the last one being on February of 1977. Payments were made to arriet Einbinder on 38 occasions when requested, the final payment being made on June 24, 1976 (Roth Ex. "1"; APP. 1).

The Respondent had warned Harriet that she was withdrawing too much money and exhausting her funds (T. Jan. p. 146). There was an overpayment to Harriet from the insurance monies of $5,899.66, which was later repaid from other Estate funds (APP. 2-4).

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The Respondent and the heirs all agreed that such payments were made periodically and as requested. The heirs state that they sometimes had to wait for funds, but in no instance more than a day or two while funds were being transferred into the account for distribution (T. Jan. 161-162).

Paragraph 64 of the Complaint erroneously contended that the Respondent held certain funds of the heirs/beneficiaries to October 1977. The Florida Bar stipulated to the Referee that this was erroneous and that the date intended was April 8, 1974, and not October 1977 (T. Jan. p. 117).

The Florida Bar also stipulated that by September 17, 1977, all funds of the heirs/beneficiaries that had been received by the Respondent, had been paid to them (T. Jan. p. 117). There were several acknowledgments that by that time in 1977 there were no funds which had not been paid to the heirs/beneficiaries or to the Estate.

There has never been a question of "restitution" be required to be made to the heirs/beneficiaries from the time of the initial Complaint against the Respondent. All funds had long prior thereto been distributed to the heirs/beneficiaries. Actually the heirs/beneficiaries had received all funds nineteen months prior to any complaint arising in these proceedings, i.e., from September 1977 to April 1979, when the first Complaint was made to The Florida Bar.

At no time were funds withheld from the heirs, and they received all funds many months before the Complaint (T. Jan.

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120). Mr. Hayes, The Florida Bar investigator, when queried, testified:

> Q. In other words, he admittedly used funds but he returned funds and was all of it returned and accounted for, as far as you know, at the time the successor took over except for interest?
>
> A. Again, I didn't go into that at this stage of the investigation. I am not concerned with it, but nothing came to my attention.
>
> Q. Well, the Bar is not accusing Mr. Roth withholding any funds in this estate at this time?
>
> A. As far as I am concerned, No.
>
> MR. ROSENBLOOM: I can answer that on behalf of the Bar and the answer is "No".

The Complaint did not involve, as will be further elaborated upon, the repayment of any monies which came into the possession of the Respondent, but rather involved certain penalties sought to be assessed against the Respondent because of the commingling of funds. Or in the words of the successor attorney for the heirs, who pressed these proceedings, "getting my clients some money". (T. Dec. p. 163).

One of the sole issues before the Referee was whether the Respondent acted in the interest of the heirs in his handling of the Estate and insurance monies. The Respondent has at all times maintained that he felt it to be in the best interest of the heirs to preserve the assets of the Estate and insurance funds from rapid dissipation by distributing such funds as the heirs requested same as to their needs (T. Nov. pp. 39, 45).

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Respondent has all times contended that the heirs knew there was a commingling of funds. All parties acknowledge that before any complaint was made to the Florida Bar of the handling of the Estate, the Respondent has consistently maintained that the heirs knew of the manner in which the funds were being handled (T. Nov. 45, 47, 66; T. Dec. p. 62; T. Jan. pp. 143, 144).

At all times the Respondent has stated that such fact did not justify the commingling of funds. He has always acknowledged that regardless of the motivation there was an improper commingling. However, there were always funds available for distribution and funds were distributed to the heirs when requested (T. Nov. pp. 45-47; 48, 49; 65-67; T. Dec. 33; T. Nov. 122).

The Referee determined that the heirs did not approve of the commingling of the funds, and disbelieved the Respondent's contention that they were so knowledgeable.

The Referee further found that the Respondent admitted that his records were not properly kept. The Respondent did cooperate in the investigation, acknowledging that the commingling did take place.

Notwithstanding the agreement of all parties that the heirs/beneficiaries had received all of their funds by late September 1977, or were in the Estate account at that time, there remained otherareas of dispute between the heirs and the Respondent.

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These areas of dispute related to three areas:

1. The heirs/beneficiaries claimed they should be recipients of interest on the funds paid; (the Respondent immediately acknowledged this penalty, but there remained a dispute as to the amount of such interest).

2. The Certified Public Accountants who had prepared the Estate Tax Return, Form 706, had prepared it and overpaid the tax; (the Respondent immediately accepted a surcharge of such overpayment. Actually the funds were later repaid with interest by the Federal Government).

3. The heirs claimed attorney's fees for their substitute attorney; (the amount of such fee was in dispute, but the Respondent agreed to pay a fee).

On December 23, 1978, by service made upon the Respondent on January 5, 1979, more than sixteen months after the parties acknowledged that all funds had been distributed to the heirs/beneficiaries or the Estate, a lawsuit was filed by the heirs "claiming" interest, income tax overpayment and attorney's fees.

After the proceedings in the Dade County Circuit Court were served on Respondent in January of 1979, the successor attorney decided, on April 9, 1979, to file a complaint with The Florida Bar.

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The Respondent replied to that Complaint setting forth in his response of May 5, 1979, that he had acted in the interest of his clients, with their full knowledge and consent. In that communication the Respondent freely acknowledged an obligation for interest, the surcharge and attorney's fees.

On May 7, 1979, the complaining attorney wrote to The Florida Bar, saying:

> The claim of the Estate of Florence Einbinder and its heirs against Burnett Roth might be based upon a serious misunderstanding. I therefore request that you stay your proceedings in this matter until I notify you of the results of my investigation on or about June 1, 1979. I apologize for any inconvenience and thank you for your attention to this matter.

The Florida Bar did, on May 23, 1979, close its files.

Subsequently, in June 1979, the Respondent and the heirs after a conference with the Chancellor, agreed that the Respondent would pay a penalty of $60,000.00 for his improper commingling of funds, and the handling of the Estate, to cover the claimed interest, attorney's fees and the surcharge of the IRS overpayment, with a credit for the IRS repayment, if and when made.

This amount of $60,000.00 is approximately forty (40%) percent of the entire amount which came into the hands of the Respondent during his administration of the Estate, including the insurance proceeds and was a penalty for the act of commingling the funds. It was not a payment of any funds, all of which had been paid nineteen months previously

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and over a period of years prior thereto.

The payments were to be made over a period of time. Because the December 1979 payment of $10,000.00 was not made, the attorney, a day later, refiled his Complaint to The Florida Bar in an effort to force immediate payment from the Respondent of the agreed upon penalty.

When security for the balance was furnished to the successor attorney for the heirs, he again wrote a letter to The Florida Bar, stating in part as follows:

> [I]t became apparent that there had, in fact been an unfortunate breakdown in communication and that in fact the actions which occurred and which are referred to in the prior correspondence were apparently the subject of a serious misunderstanding between the parties.

(Roth Ex. "3" and "4").

At the time of writing this letter, the attorney advised his clients to supersede this communication to The Florida Bar in which it was implicit that there had been a misunderstanding, and that the Respondent had acted with the full knowledge and approval of the heirs.

The heirs wrote to The Florida Bar asking that the Complaint be pursued. The attorney for the heirs testified that he had acted in a "manner deceptive to the Respondent", reflecting vindictiveness and The Bar proceeded with its investigation.

The attorney said:

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> I have never done anything like that before. I guess it was in a manner deceptive to Mr. Roth, but I felt that in light of what had happened, that it was the only way that I could achieve getting my clients some money...."

(T. Dec. p. 163).

It is clear that he was not at this point of time talking about any of the money the Respondent ever had from the Estate or the insurance as these monies had been repaid more than two years previously. It was the excess penalty monies that they were seeking, relating to the $60,000.00 penalty.

In the settlement of the litigation between the parties the attorney for the heirs/beneficiaries and for the Respondent did stipulate in part as follows:

> The parties did, before the Court, reach an amicable agreement for the payment of certain monies allegedly due by the Defendant to the Plaintiffs, which the Defendant did agree to pay to the Plaintiffs in settlement of this cause, the Defendant having denied all purported wrongdoing being claimed in the Complaint, but acknowledging an obligation for certain interest, attorney's fees, and a surcharge in connection with certain overpayments to the Internal Revenue Service, and all of said payment and monies agreed to be due from the Defendant to the Plaintiffs having been paid, the parties do hereby agree as follows...."

There was an approval to dismiss the cause with prejudice (Roth Ex. "6"; T. Jan. p. 69).

At the hearing before the Referee, the Respondent introduced testimony of his intense remose, anguish, embarrassment and the sleepless nights resulting from the commingling of assets (T. Jan. 175, 176, 184, 193-195; APP. 8-13).

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Proof was elicited and not disputed that the additional out-of-pocket expenses paid to the heirs/beneficiaries by the Respondent was $53,061.51.

Testimony was further elicited and without objection reflected and the Referee found that there had not been a single Complaint against the Respondent to the Florida Bar in his fifty years of practice, prior to or subsequent to this single incident.

The record reflected and the Referee found, that there has not been a Complaint of any kind, relating to Respondent's practice of law other than this incident, subsequent to his resignation as attorney of this Estate in 1977.

The record is further undisputed and the Referee found that the Respondent had a lifetime of pro bono work both charitable and civic, and was most active in local and national organizations. During his practice from 25% to 50% of his time is performing pro bono work (T. Jan. 128-130; APP.

The Chief Judge of the Federal District Court, another United States District Court Judge, a Circuit Judge, and the spiritual leader of the Respondent, Rabbi Irving Lehrman, recognized as an outstanding American leader, testified to the excellent reputation and standing of the Respondent in the community. Each of the witnesses testified that they trust the Respondent. When asked, the testimony was that they were cognizant of the facts in this case, and would

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still have no hesitancy in having the Respondent handle their own estates. They were convinced that the Respondent was completely rehabilitated and that this one time offense would not be possible of being repeated. (See excerpts of testimony of Dr. Irving Lehrman (T. Dec. 87-94; APP. 17-25) Judge Sam I. Silver (T. Dec. 71-82; APP. 26-36), Judge Sidney M. Aronovitz (T. Dec. 3-17; APP. 37-46), and Judge Joe Eaton (T. Dec. 83-86; APP. 47-51).

The Referee noted the lifetime of pro bono work of the Respondent. There has been more than ten years of active practice since the original dereliction of commingling of funds, and it is seven years since the full payment of the funds; and that in the prior and intervening years there had never been a Complaint of any nature against this Respondent.

Nonetheless, the Referee recommended Disbarment, which was approved by the Board of Governors of The Florida Bar.

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ARGUMENT

I.

THE REFEREE ERRED BY FAILING TO BASE HIS RECOMMENDATIONS UPON THE EVIDENCE PRESENTED, AND MADE A RECOMMENDATION OF DISBARMENT, CONTRARY TO THE CASE LAW.

This cause arose out of a dereliction by an attorney in a single isolated alleged violation of the Integration Rules. The facts reflected that there were many mitigating circumstances which were disregarded by the Referee. His recommendation of disbarment was unduly harsh and violative of the case law. The applicable cases consider various criteria, factual situations, and mitigating facts which must be considered in any disciplinary action.

A. Criteria for Penalty of Disbarment

The Florida Supreme Court has suggested three criteria to be kept in mind in reaching a Judgment in disciplinary cases:

> First, 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, 132 (Fla. 1970).

In Pahules, supra, the Court found that where there had been a commingling of funds, the recommendation of disbarment

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was too severe even though Pahules had violated separate trust funds. The seriousness of the case is examined along with the restitution which was considered in mitigation.

The Court referred to the case of The Florida Bar v. Murrell, 74 So.2d 221, 223 (Fla. 1954), hereinafter analyzed.

In The Florida Bar v. Ruskin, 126 So.2d 142 (Fla. 1961), the Supreme Court predicated its determination of a six month suspension (rather than the recommended disbarment), giving consideration to the fact that a penalty should not be retributive, saying:

> In prescribing the judgment thereafter announced, we take into consideration that our order should give due regard to the public interest in such matters and should be fair to the accused attorney. It should not reflect a retributive penalty. Its objective should be to correct the wayward tendency in the accused lawyer while offering him a fair and reasonable opportunity for rehabilitation.

In like manner the Court enunciated in The Florida Bar v. Thomson, 271 So.2d 758 (Fla. 1973), where six separate instances of violations were found, that the disbarment recommended was excessive and beyond the criteria. The Court pointed out that the penalty assessed should not be for the purpose of punishment, citing The Florida Bar v. King, 174 So.2d 398 (Fla. 1966), but that the penalty is to protect the public and to give fair treatment to the accused attorney. The Florida Bar v. Ruskin, supra; The Florida Bar v. MacKenzie, 319 So.2d 9 (Fla. 1975), where there were separate not isolated cases, and a commingling of funds. A six month sus-

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pension was directed. This principle was also followed in The Florida Bar v. Pettie, Jr., 424 So.2d 734 (Fla. 1983) and in The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983).

In the instant case the Respondent has continued for some seven years since his termination with the subject estate, to practice law and render public service, without a complaint. There is no indication in this record that he will ever again be derelict in his practice of law. The record reflects he has suffered severe mental anguish and remorse. He has been and will be severely punished as this case becomes public knowledge as well as having suffered more than $53,000.00 of monetary damages plus the additional costs assessed in this action.

There is no question of fraud in this case or that the heirs did not receive all the estate monies plus additional penalty payments.

And, there is no question that there has been full reformation and rehabilitation by the Respondent.

B. Disbarment is the Extreme Measure of Discipline

Long before the case of The Florida Bar v. Murrell, supra, it had been clear that disbarment is the extreme measure of discipline. In Murrell, the Court said:

> Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear that he

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> is one who should never be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private is more appropriate. Only for such single offenses as embezzelment, bribery of a juror or Court official and the like should suspension or disbarment be imposed, and even as to these, the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation and record free from offense like that charged against him.
>
> (Emphasis Supplied)

Clearly, in the instant case there is no dispute that this is an isolated case, and that the Respondent should be given every benefit of doubt as to the principal matter in contention (though not excused) that the heirs knew of the commingling.

Disbarment and suspension of an attorney should not be imposed lightly. The Florida Bar v. Wendel, 254 So.2d 119 (Fla. 1971). Not only a wrong, but a corrupt motive is required to be present to authorize disbarment. The Florida Bar v. Thomson, supra. Here there can be no claim by anyone that there was a corrupt motive. Funds were paid to the heirs whenever requested, and all estate funds were paid long before the commencement of disciplinary proceedings.

The Court in the Ruskin case found that the recommendation of disbarment was unduly severe, decreeing a six month suspension. In this case there had been a commingling of funds of numerous clients, not the single isolated instance as here. The Court in Ruskin made reference to restitution

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of misused funds as "evidence of repentance which suggests that his offenses will not likely happen again". In the instant case, there was no question of restitution, as all funds were paid.

In like manner in The Florida Bar v. Oxford, 127 So.2d 107 (Fla. 1961), and in The Florida Bar v. Dunham, 134 So.2d 1 (Fla. 1961), the Court had before it in both cases numerous instances of separate violations of the Cannons of Ethics, but the Court recited that extreme punishment would not be meted out, even where only partial restitution had been made and directed suspension. See also The Florida Bar v. Thomson, supra, which recognized the need for a corrupt motive to be present to authorize disbarment and pointed out that disbarment was the extreme measure, citing again the Murrell case.

So, too, the cited case of Pahules, supra, which listed the three criteria to be considered, pointed out that the Bar-sought disbarment was too extreme when the misconduct was commingling funds, was accompanied by evidence of rehabilitation and repentance, and even where it was not an isolated instance. A six month suspension was directed.

This case also cited the Murrell case where the Court had held that "for isolated acts, censure, public or private is more appropriate". In the instant case there was an isolated act.

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Again in the case of The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980), this Court disagreed with the recommended disbarment as being too severe, pointing out that the client had not suffered. The Court points out cases in which there had been a conversion of funds; the Court pointed out that each case is to be handled separately.

In The Florida Bar v. Felder and Berman, 425 So.2d 528 (Fla. 1983), the Court denied the request for disbarment, believing such a determination was inflicting an extreme penalty under the facts where there had been a commingling of funds and where restitution had occurred; and here no client was actually "hurt".

C. Impropriety of Commingling of Funds

One of the leading cases involving the penalty for commingling of funds is the cited case of The Florida Bar v. Ruskin, supra, where the seriousness of such commingling is pointed out. But in the Ruskin case the punishment under those facts, where there had been restitution and every likelihood of rehabilitation, was a six months' suspension.

In the instant case it is respectfully suggested that there was no need to have restitution, since all funds had been delivered to the heirs sixteen months before any question arose. The only funds thereafter involved was the penalty assessed against the Respondent for having commingled the funds, as recited in the Statement of Facts.

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In The Florida Bar v. Hoffman, 107 So.2d 137 (Fla. 1963), there was a three months' suspension for commingling. In this case there was also a forged endorsement. Also, in The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970), the attorney misused funds for personal purposes but with no larcenous intention. This record is devoid of any suggestion of larcenous intention by Respondent.

In Randolph, supra, the Respondent pointed out the more than six years that he had been exposed to the agonizing order of investigations, charges and hearings, and spoke of the embarrassment generated by the charges.

In Randolph there was no dishonesty, though there was a transgression and misuse of funds. There were a number of instances involved. And it was pointed out that it was over ten years since the alleged misconduct had occurred. The record reflected the rehabilitation of Randolph and his acceptance in the community as an ethical practitioner.

The facts of this case are very similar to Randolph, supra, in that it has been more than seven years since the alleged conduct occurred. The record in this case as in Randolph shows that highly reputable judges and laymen testified as to Mr. Roth's rehabilitation and acceptance in his community as an ethical practitioner. In Randolph this Court issued a public reprimand, suspension for ninety days and payment of costs.

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A reprimand was directed also in the case of The Florida Bar v. Reese, 263 So.2d 794 (Fla. 1972), in which there were several separate breaches in different Will cases, and where commingling and misuse of funds was involved.

There had been a previous case against the Respondent in that case but inasmuch as the commingling took place in the same time frame, the Court restricted its punishment for the offenses to a reprimand.

In the case of The Florida Bar v. Weaver, 279 So.2d 298 (Fla. 1973), where there was a commingling of funds and no defense, and where there were inadequate bookeeping records kept, the Court reprimanded the Respondent. Also see the cases of The Florida Bar v. Boyce, 313 So.2d 708 (Fla. 1975); The Florida Bar v. MacKenzie, supra, two separate cases of commingling, and there was a six months' suspension ordered, and the case of The Florida Bar v. Pahules, supra.

A public reprimand was ordered against the Respondent in The Florida Bar v. Horner, 356 So.2d 292 (Fla. 1978), where there was commingling of clients' funds, with no intent to defraud. In that case, the Respondent believed that he had the consent of the client to so commingle, as did the Respondent in the instant case. The Respondent here recognizes that even with such consent, the commingling was improper.

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In the case of The Florida Bar v. Harnett, 368 So.2d 353 (Fla. 1979), and with no appearance of the Respondent it was agreed that a suspension was proper. The Breed case, supra, also provided for a suspension, not a disbarment. As did the case of The Florida Bar v. Bryan, 396 So.2d 165 (Fla. 1981), where there was a commingling, and no economic loss to the client, and where there were inadequate records kept.

A public reprimand was directed where there were mishandling of trust funds and inadequate records, where there was no prior disciplinary action. See The Florida Bar v. Golden, 401 So.2d 1340 (Fla. 1981). While in The Florida Bar v. Lee, Jr., 397 So.2d 921 (Fla. 1981), the clients funds were used for personal purposes and there was a commingling of funds with the punishment being a three month suspension.

D. Repayment of Funds Commingled

A number of cases involving commingling of funds reflect that where restitution has occurred this will be considered a mitigating circumstance. In the case before the Court there was no reason for consideration of "restitution", as all of the funds of the heirs/beneficiaries had been paid in full long before the Complaint and before the controversy between the parties arose over the claimed interest, attorney's fees and the IRS overpayment.

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In the case of The Florida Bar v. Brown, 111 So.2d 668 (Fla. 1959), a commingling and restitution case resulted in the disapproval of the requested disbarment. Here the Court pointed out the unblemished record of the Respondent, his restitution and contrite attitude. This was also present in Ruskin, Randolph, Pahules, Hartnett, supra, and in The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981).

In Pincket, supra, the Court denied the disbarment and ordered suspension. In that case there were various instances of misuse of funds though only a partial restitution made later in the proceedings.

The Court pointed out that it was confronted with discretionary penalties and the philosophy that where a specific penalty is not expressly mandated, the Court will take consideration of the element of restitution in considering the appropriate punishment.

The Referee in the instant case misunderstood the facts, constantly relating to the question of "restitution", and repeatedly inferred that there was a question of restitution. Not even The Bar suggests that there was any question of any funds being withheld from the heirs/beneficiaries. And in fact, the civil litigation which ensued and which disturbed the Referee and apparently influenced his determination in this cause related only to the penalty funds and not to any of the funds entrusted to the Respondent, the receipt of all

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having been acknowledged by each of the heirs and by The Bar and by the successor attorney for the heirs. The Referee apparently did not understand that all of the estate funds had been delivered to the heirs, confusing these monies with the penalty assessed against Respondent.

E. Client Not Hurt By Actions

Another of the mitigating circumstances considered by the Supreme Court, and which was disregarded by the Referee, is the mitigation implicit in the question whether the client was hurt.

The Respondent constantly repeats that the commingling is never justified or excused but the case law suggests in many cases cited, that where such commingling did not result in harm to the client such fact should be taken into consideration in considering mitigation and the punishment being inflicted.

Such was the determination in The Florida Bar v. Breed, supra, where the conversion of funds to the use of the Respondent resulted not in disbarment but in a suspension. The Court made it clear that in similar cases, disbarment had not been ordered, even where there was a conversion of funds by the Respondent, which did not occur here.

The Court indicated that the client had not suffered in the Breed case, supra, and that each case had to be handled separately, but "to totally ignore these prior actions

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would allow caprice to substitute for reasoned consideration of the proper discipline".

Failure to suffer economic loss by the client was also considered in the Bryan case, supra, where a suspension was imposed and in the Felder case, supra, where no loss was sustained.

F. Isolated Instances and Cumulative Misconduct

Again, in considering punishment to be imposed, the Courts have in many cases indicated that they will treat an isolated instance in a different manner than cumulative or repeated acts. It is important to recognize that this present cause is an isolated instance in a lifetime of fifty years of practice by the Respondent.

In the case of The Florida Bar v. Baron, 392 So.2d 1318 (Fla. 1981), there were a number of separate instances involving disciplinary action, but the Court still said, in imposing a 60 day suspension, with later, probation, that: "In supervising the discipline of lawyers, this Court deals more severely with cumulative misconduct than with isolated instances of misconduct".

In the case before this Court, the Referee failed to take into consideration the fact that this was an isolated instance, and while making a passing reference to such fact, he did not take this into consideration as a mitigating circumstances in his recommendation of disbarment.

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It was in the Murrell case, supra, where the Court enunciated the principle that even where there were nine separate cases, each violative of the Code of Ethics, disbarment was too severe and that: "For isolated acts, censure, public or private is more appropriate". So too in the Dunham case, supra, where there were six separate misuse of funds of various clients, the Court did not approve disbarment.

The Pincket case, supra, also involved various instances of misuse of funds and disbarment was sought, but a suspension was directed even where there were multiple misuse of funds.

The Court does "...deal more harshly with cumulative misconduct than with isolated misconduct". The Florida Bar v. Bern, 524 So.2d 526 (Fla. 1982). We have an isolated instance in this case before the Court.

G. Cooperative Attitude

No one has suggested that the Respondent was not fully cooperative with The Florida Bar.

From the first instance the Respondent has admitted the commingling of funds and admitted inadequate records were maintained. To be sure the Referee would have preferred that the Respondent acknowledged some "excuse" for the commingling, such as bad health, drunkedness, gambling, financial problems, or some other explanation, but the Respondent refused to attempt to falsely explain the commingl-

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ing and lay the blame therefor to any of these reasons. He consistently explained that the truth was that the commingling was improper but motivated by his desire to preserve the funds for as long as possible for the heirs so they were not quickly spent and dissipated, and that he did so with the knowledge of the heirs. That was his explanation, and remains so to the present time -- but is not intended as an excuse.

The Referee found this explanation unacceptable, notwithstanding it was the truth. In all areas the Respondent cooperated with the investigation to the extent that he had records and files; this should have at least been considered in mitigation by the Referee, but it was not. The Florida Bar v. Bryan, supra. Also see The Florida Bar v. Pincket, supra.

H. Excellent Record of Public Service

In submitting oneself to the Bar for permission to practice an individual, it is felt, should have a desire to render public service. This is exemplified by the public service of the Respondent, probably more than by a vast majority of the members of The Bar. A lifetime of altruistic service to the community has been the lot of the Respondent. Respected for community service, nationally as well as locally, such service deserves consideration by this Honorable Court.

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It is uncontradicted and the record reflects that, over the years, Respondent rendered exemplary pro bono efforts to all important institutions and causes from the South Florida United Cerebral Palsy Association which he headed, to the Jewish War Veterans; from the Miami Heart Institute, where he gave countless hours of pro bono legal work, to the religious institution he was associated with; from the municipality in which he was a Commissioner and Vice Mayor, to the national leadership of the Anti-Defamation League of Bna'i B'rith, where he is still a life member of its National Executive Committee; from the State Department Commander of the Jewish War Veterans, to countless other community organizations to which he lent his pro bono talents and continues so to do.

This work and services should be considered in mitigation of the recommended punishment. This service was acknowledged by the Referee, but was not given any consideration. The Florida Bar v. Richardson, 242 So.2d 706 (Fla. 1971), and The Florida Bar v. Lord, supra.

The Referee, early in the proceedings, and without any provocation by the Respondent or his attorney, announced (T. Nov. p. 18):

> "If you are ready to proceed to trial, we can put on part of the testimony today. If Mr. Roth is not in a position to call on all these thousands of people he is going to have traipsing through here -- We are going to go to trial...."

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There had been no intimation that the Respondent would call a host of character witnesses. To be sure he could have called literally hundreds of the most prominent members of the Florida community and Bar and national leaders as well, who would have gladly testified to his excellent character, and their confidence in his ability to render outstanding and honest service to his clients and to The Bar, as well as to the community.

He elected instead to call upon the three jurists and his spiritual leader to attest to their confidence at the present time in the Respondent, even to the extent, in light of all the circumstances of this case, to utilize his services and have confidence in him handling their estate.

Such testimony, it is submitted, should have been considered under applicable law as mitigating, and important in reaching a recommendation by the Referee. It attests to his rehabilitation, furthered by the fact that this isolated complaint was the only one in more than fifty years and remains the only mark against his record of service.

The kind of exemplary life he has led does not excuse professional misconduct, but in the words of this Court, in The Florida Bar v. Goodrich, 212 So.2d 764 (Fla. 1968):

> "However, it does tend to suggest that an individual so committed and so oriented professionally is not likely to do wilful violence to the ethics of the profession...."

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I. Unblemished Professional Record

So too do the foregoing cases suggest that where one has an unblemished record as an attorney, consideration should be given to that fact in determining disciplinary action for an isolated instance of dereliction. The Florida Bar v. Brown, 111 So.2d 668 (Fla. 1959). In the Brown case, disbarment sought was not approved, this Court saying:

> However, in view of respondent's unblemished record prior to his derelictions in 1955, the fact that he made restitution to all of the complaining witnesses, and his present contrite attitude, we are of the opinion that the respondent represents suitable material for possible future rehabilitation....

In the instant case it is respectfully suggested the passage of years without any other complaint reflects that the rehabilitation of the Respondent is complete and secured.

This Court has consistently considered the disciplinary history of a Respondent, as recited in The Florida Bar v. Bern, supra. In the instant case, all parties, including the Referee, agree that there has been no prior dereliction over the past fifty years by the Respondent and the evidence isclear that there is no likelihood of future dereliction by him.

This principle was enunciated in the Murrell case, supra, and in the Richardson case, supra, in which there were no prior charges against this civic leader and successful lawyer.

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In the case of The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978), there were a number of counts against the Respondent arising out of the same estate. The Court found mitigating circumstances to reduce the recommended disciplinary action, the Court finding:

> Respondent was admitted to the Florida Bar in 1958 and has no record of any disciplinary activity prior to the present disciplinary proceedings. Furthermore, counsel for the Florida Bar and the Respondent reported at the bar of this Court that there have been no subsequent disciplinary charges filed against respondent.

In the instant case, Roth was admitted to the Florida Bar in 1934 and had no disciplinary activity prior to the present disciplinary proceedings. The record shows that there has been no subsequent disciplinary charges filed against Roth since.

The Court in Papy, supra, rejected the Referee's recommendation of disbarment and entered one of a suspension. See also The Florida Bar v. Bryan, supra, where there had been no prior disciplinary record.

The Referee here failed to give this principle of law and the mitigating circumstance, any consideration.

J. Respondent's Remorse

Probably the least understood of all of the erroneous findings of fact by the Referee, and particularly his appraisal of the testimony, is the Referee's suggestion that the Respondent showed no remorse.

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That is an incredible assumption, since there can be and could not be, a person more remorseful than is the Respondent. This was evidenced not only by his demeanor before the Referee, but in the testimony before the Referee. It is believed that the Referee's diagnosis of no remose, and therefore, no mitigation, is because the Respondent refused to acknowledge before the Referee that he had some excuse of a personal nature for the dereliction and commingling; and the Referee's obvious desire to read no remose into the Repsondent's insistence that the heirs knew of the commingling. There was never an excuse or justification for such commingling by the Respondent.

The record does not disclose, but the Referee must recall, that during the testimony of Rabbi Irving Lehrman, the Respondent was so distraught and upset that he had to leave the hearing chambers because of the obvious emotional trauma of hearing his spiritual leader defend his reputation (T. Dec. p. 87-95; APP. 17-25).

Likewise, the record reflects the constant expressions of remorse by the Respondent, of his inability to sleep, his embarrassment, his chagrin, the years he has lived under the cloud of these proceedings, all of the repentant spirit of the agonizing order of the investigation, charges and hearings (T. Jun. 1984, pp. 193-195; APP. 8-13).

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These were believed to be mitigating circumstances in the case of The Florida Bar v. Randolph, supra. The Court in the Ruskin case, supra, referred to the repentance of the Respondent there. And in the Lord case, supra, reference is made to the acute personal embarrassment and personal tragedy resulting from the investigation and charges of The Bar.

Here there could be no more remoseful person than the Respondent, and such conern should be a consideration for mitigation in this cause.

K. Determination of Disciplinary Action By The Supreme Court

The case law reflects that while the Supreme Court will examine most carefully any dissent from the facts found by the Referee, it takes upon itself the determination of the disciplinary action to be taken.

In this case before the Court, many of the findings of fact by the Referee are disputed and many facts of great importance and necessary for a determination of the case and particularly the question of mitigation, were not even referred to in the report of the Referee. Reference will be made to some of those matters in the next portion of the ensuing Argument.

The Supreme Court makes the decision as to the discipline to be meted out. The Supreme Court does not have

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to accept the conclusions of the Referee, or his recommendations. The Florida Bar v. Scott, 197 So.2d 518 (Fla. 1967).

In the case of The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968), it was obvious that the findings of fact by the Referee are distinct from the recommendations of the Referee of disciplinary action to be taken. Here the findings of fact in important areas are disputed, and under any and all circumstances, the recommendations of the Referee are inconsistent with all of the reported case law.

II.

THE REFEREE ERRED IN FAILING TO MAKE FINDINGS OF FACTS ESSENTIAL TO A DETERMINATION OF THE VALIDITY OF THE RECOMMENDATIONS OF DISCIPLINARY ACTION.

A. The Referee made Findings of Facts which are not supported by the record as follows:

(1) Paragraph 20: There is no testimony that the Respondent misappropriated or converted any funds to his personal use. It is undisputed that all funds were paid to the heirs/beneficiaries as they requested such funds.

(2) Paragraph 22: The testimony does not disclose that the Respondent advised that the insurance proceeds would be treated as estate assets and had to be deposited into the Estate Account, but rather that said insurance funds would be handled in the same manner as the estate funds, as found in Paragraph 25. The disputed testimony was that the heirs

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knew the funds were being commingled by the Respondent.

(3) Paragraph 25: The record does not substantiate the suggestion that the Respondent misappropriated or converted any funds, it is undisputed that the funds were available at all times when requested by the heirs.

(4) Paragraph 30: The testimony does not show any conversion or appropriation of any funds by the Respondent.

(5) Paragraph 31: The testimony does not disclose in any area that the Respondent said that he was precluded from distributing any of the funds until the estate was closed. This is obviously not consistent with the constant payments to the heirs during the administration and their receipt of all funds prior to the estate being transferred by the Respondent to the successor Administrator.

(6) Paragraph 33: The monies were paid to the heirs at all times that they requested same, and there was no testimony of any misappropriation or conversion of the funds.

Further, the Referee misunderstood the nature of the civil litigation. It not only was not "protracted civil litigation", but was not filed until December 22, 1978, and served in January 1979, some sixteen months after all monies had been paid to the heirs. The Referee fails to disclose that this litigation did not involve any estate funds or insurance proceeds, but only the penalty to be paid

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by the Respondent for interest, IRS surcharge and attorney's fees to the successor attorney. This is acknowledged by all parties, but not recognized by the Referee.

(7) Paragraph 34: The lawsuit brought by the heirs was filed in December 1978, more than a year after the date suggested by the Receiver and did not involve other than the penalty above referred to.

(8) Paragraph 35: The monies referred to herein had no relation to any misrepresentation and was deposited within two weeks thereafter and never thereafter used except to pay such monies as the heirs desired.

B. The recommendations of guilt by the Referee are contrary to the evidence in the areas referred to in the foregoing Paragraph "A", and involve no conduct as referred to therein by the Referee. All parties have agreed that there was no damage to the heirs.

C. The recommendations of the Referee are not based upon the facts elicited in the testimony. There was no evidence of any misappropriation of any funds, all funds being available at all times. This is uncontroverted.

The recommendation suggests that there are no facts in mitigation and that the Respondent showed no remorse. The prior recitation of facts within this Brief with references to the Transcript of the record and Exhibits, and the Appendix, shows clearly that the Respondent showed

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extreme remorse, and that the facts in mitigation just were not considered by the Referee.

D. The Referee erred in not referring to or making reference to or considering the following facts, whether in mitigation or otherwise, presented in evidence:

(1) The Referee makes no reference to the constant and consistent payments of all funds entrusted to Respondent made to the heirs over the entire period of the Administration.

(2) That the Respondent paid as a penalty the sum of $53,061.51, from his personal funds, because of the commingling, this being over and above all funds which had been returned to the heirs by September 1977.

(3) That all funds had been paid to the heirs sixteen months before the filing of the civil lawsuit and more than nineteen months before any complaint was made to The Bar.

(4) Failed to make findings of fact that at all times the Respondent had acknowledged that there had been a commingling of funds and inadequate records.

(5) Fails to make findings of fact that the heirs and their counsel had twice acknowledged to The Bar that there had been a serious misunderstanding between the heirs and Respondent, and requesting that the Complaint be withdrawn.

(6) Failed to acknowledge the undisputed fact that the only controversy between the parties was over the matter

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of the unpaid interest, the IRS surcharge, and the successor attorney's fees.

(7) Failed in spite of the voluminous testimony to make any reference to the statements and actions of remorse by the Respondent.

(8) Failed to make a finding that the heirs and their successor/counsel acknowledged the making of deceptive statements to The Bar to hurt the Respondent.

(9) Failed to make a finding that the heirs had suffered no loss.

(10) Failed to make any finding of mitigation from all of the events which transpired and the applicable law of mitigation as follows:

(a) All of the monies were paid to the heirs before any claim was made.

(b) The remorse of the Respondent.

(c) This was an isolated instance of dereliction.

(d) The criteria for disbarment.

(e) The punishment for commingling.

(f) The heirs were not harmed.

(g) No cumulative misconduct.

(h) The cooperative attitude.

(i) The admission of commingling and poor records.

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(j) The excellent record of public service.

(k) The unblemished professional record.

(l) The punishment already suffered by the Respondent.

(m) The payment of penalty cash of $53,061.51.

(n) The additional cost of the investigation.

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CONCLUSION

The recommendation of disbarment is excessive and unwarranted punishment under the facts and circumstances of this case. The Referee's recommendation of disbarment is contrary to the applicable law, in similar cases and not warranted by the evidence and circumstances shown before the Referee.

Disbarment will not serve the public interest and will destroy an attorney respected in his community for fifty years as a result of a single incident which there is no indication would ever occur again.

It is respectfully submitted that a reprimand, coupled with a requirement of providing 500 hours of supervised pro bono service annually during the remainder of Respondent's practice, plus payment of costs, would meet all criteria under the facts and circumstances of this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was this 25th day of July, 1984, mailed to:

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