IN THE SUPREME COURT OF FLORIDA

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

THE FLORIDA BAR,

Complainant,

vs.

BURNETT ROTH,

Respondent.

REPLY BRIEF OF RESPONDENT

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

GREENFIELD & DUVAL
1680 N.E. 135th Street
N. Miami, Fl. 33[illegible]
(305) 893-9270
Attorneys for Respondent

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33261-0488
TEL. (305) 893-9270

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LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1880 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33261-0488
TEL. (305) 893-9270

TABLE OF AUTHORITIES

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33261-0488
TEL. (305) 893-9270

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 the Referee dated April 4, 1984.

"APP." - Reference to the Separate Appendix filed with the Main Brief of the Respondent followed by the page number.

STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The Respondent hereby adopts and realleges the Statement of the Case and Statement of the Facts as presented in his Main Brief filed in this case.

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33261-0488
TEL. (305) 893-9270

QUESTIONS PRESENTED FOR REVIEW

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.

II.

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

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0468
TEL. (305) 893-9270

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.

II.

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

The Florida Bar finds solace in the phraseology of the findings of the Referee, understandably, since such phraseology finds its imprimatur in the initial recommendations of The Florida Bar.

The Answering Brief of The Florida Bar has not sought to argue the points raised in the Main Brief of the Respondent as to the application of the law in the case before the Court.

This Reply Brief will address itself to some of the points made, and not referenced to in the Answering Brief, and will distinguish cases cited in the Brief of The Florida Bar.

It is significant that Respondent has never denied, even before any Complaint was made to The Florida Bar that he had not comingled funds. However, there is no proof of any conversion or misappropriation of any Estate funds. The Respondent recognizes he was wrong, and has from the inception

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0488
TEL. (305) 893-9270

of this case admitted the impropriety of the withdrawal of Estate funds, all of which he replaced and were distributed to the heirs. He has consistently contended that such was done with the knowledge and approval of the heirs.

The heirs, on two occasions, through their counsel, acknowledged the misunderstanding with the Respondent on this subject. Yet the Referee and The Florida Bar have not made even a passing reference to the two times that the heirs admitted there was a misunderstanding as to the use of the funds (ROTH Ex. "3" and "4"; pp. 10A and 11, Initial Brief).

Not that this justifies the commingling, but it does sustain the contention that the actions of the Respondent were known to the heirs, and it supports to some measure the insistence of the Respondent that he wanted to insure that the funds would "last as long as possible" (T. Nov. 47), to "preserve" funds (T. Nov. 45, 59), and "not to dissipate the funds" (T. Jan. 185).

There was admittedly no investment of the funds in an interest bearing account. The Respondent did acknowledge the obligation for interest and paid all claimed interest to the heirs.

Nowhere in the Record is there any statement by any heir that they were told the funds were in an interest bearing account. The citations of transcript references to the interest bearing accounts in The Florida Bar's Brief

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0488
TEL. (305) 893-9270

reflect only one instance in which one of the heirs mentioned that she wanted the funds invested in an interest bearing account. Such single statement is disputed. It is here referred to only because of the many references in the Bar's Brief to suggest that the heirs had discussed the placing of the funds into an interest bearing account.

The Florida Bar in its argument suggests that after making a deposit of $22,650.00 into the Estate account on September 6, 1977, the monies were withdrawn a few days later, but The Florida Bar fails to acknowledge that on September 27, 1977, there was paid into the Estate account by the Respondent the sum of $25,000.00. The Referee refers to this deposit (Ref. Rep. 36; The Florida Bar Brief, p. 30), and which sum was paid to the heirs soon thereafter.

This sum represented the final monies ever held by the Respondent. It was more than a year later that the lawsuit was filed by the heirs to extract the penalty from the Respondent, that is, the interest, the tax surcharge and the attorney's fees, and it was more than a year and a half before any complaint was made to The Florida Bar.

It is not disputed that on September 27, 1977, the last monies were available in the Estate Account. Nor that there had been previous continuous payments of the funds to the heirs as reflected by Respondent's Exhibit, APP. 1-7, listing the payment over the years as requested. The Florida Bar does acknowledge that the payments periodically, as requested

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0488
TEL. (305) 893-9270

were so made.

The Florida Bar, notwithstanding the facts presented, and the questions raised by the admissions of the complaining heirs of the misunderstanding, ignores this acknowledgment of the existence of a misunderstanding as to whether the funds were being used by the Respondent. It is unquestioned, however, that the funds were available to the heirs whenever they asked for them.

The twice acknowledged misunderstanding referred to above points to the fact that such use was known to the heirs. Even with such permission Respondent admits the funds should not have been so commingled and used.

The Florida Bar raises the question in its Brief whether the Respondent had the capacity to return the funds immediately at any time requested. There is no testimony to refute the testimony of the Respondent that he could do so. Every time funds were sought by any heir, it is admitted, she received same. This question raised by The Florida Bar is not supported by the evidence.

As for the contention of the Referee that use of unnumbered checks was calculated to foster deception, it is respectfully suggested that there is no evidence that the use of unnumbered checks was recognized by any recipient or deceived anyone.

The use of unnumbered checks is not uncommon, and the record of the checks in this instance shows no possiblity of deception by such use upon anyone. Not that it is suggested

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0488
TEL. (305) 893-9870

such practice is the best practice to follow, but there should be no inference from such practice as was made by the Referee that it was calculated to conceal any wrongful use of funds.

It is again urged upon this Honorable Court that the foregoing response to The Florida Bar's Brief is not intended to excuse the commingling by the Respondent, nor the faulty records maintained, but is calculated to express findings improperly made by the Referee, and sought to be defended by The Florida Bar in its Brief.

With all respect to the Referee and The Florida Bar, one should not, in a cavalier manner, discount a lifetime of service to the Bar and to the public. Nor should there be disregarded the testimony of outstanding witnesses of their confidence in the Respondent and of his present rehabilitation.

The Referee and The Florida Bar completely disregarded the case law as applied to the facts in this case, and as reviewed in the Initial Brief.

The cases cited by The Florida Bar are discussed and distinguished in the following portion of this Reply Brief.

The Case Law

The Florida Bar, in its Brief, has not sought to dispute the theories and applicability of the law enunciated by the Respondent in his Initial Brief. The Florida Bar case law cited is here reviewed and distinguished.

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0488
TEL. (305) 893-9270

For example, in the case of The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979), this Court directed a notice to the profession for the offenses thereafter committed, was a decision reached years after the commingling and claimed misuse of the funds in the instant case. That decision was in 1979. The instant case relates to the period from 1973 to 1977, and the Complaint made to The Florida Bar was in April 1979, withdrawn, and then remade in December of 1979.

Not that this in any way justifies the commingling. The point is respectfully made, however, that in Breed and its emphasis by The Florida Bar is not applicable to the instant case.

The case of The Florida Bar v. Drizin, 420 So.2d 878 (Fla. 1982), is distinguished from the instant case. In Drizin there were three separate unquestioned patently dishonest violations by the attorney who embezzeled funds from his separate clients. There was no Petition for Review by virtue of the attorney's gross misconduct.

Again, the case of The Florida Bar v. Harris, 400 So.2d 1220 (Fla. 1981), involved a consistent pattern of misappropriation of funds in seven separate instances with various clients. In addition the funds of most clients had never been paid to the clients, so that disbarment was approved.

In The Florida Bar v. Ross, 417 So.2d 985 (Fla. 1982), cited by The Florida Bar, we find no presence of the Respondent at any hearings, no explanation sought of the charges

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33261-0488
TEL. (305) 893-9270

and the obvious loss to the clients, with no Petition for Review. Such facts are consistent with disbarment, and are not comparable with the facts applicable in the instant case.

So, too, the case of The Florida Bar v. Lewin, 342 So.2d 513 (Fla. 1977), is not applicable. We have none of the elements in this case which persuaded the Court to disbar Mr. Lewin. Here we have no false receipts, no false reports, and no false filings before the Court as was present in the Lewin case, nor was there any appearance by the Respondent in that case, or any responsive pleadings.

While The Florida Bar calls to this Court's attention a number of cases where disbarment was directed, none of them are comparable to the facts in the case presently before the Court.

This case is not a reimbursement to the Estate of an unauthorized transfer of funds, as is the case of The Florida Bar v. Baker, 419 So.2d 783 (Fla. 1979), but rather a penalty paid by the Respondent for interest which had never been earned by the Estate, a surcharge of an overpayment paid to the Internal Revenue Service and attorney's fees.

Those sums were acknowledged to be owning by the Respondent as a penalty more than a year before the Complaint made to the Bar. It was just the amount of such penalty which was in dispute. In the instant case there were all of the

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0488
TEL. (305) 893-9270

other defenses, facts, and misunderstandings between the parties which were acknowledged to exist. There was never any question of a false accounting of the proceeds of Estate funds.

None of the facts in Baker met the criteria fixed in the law enunciated by the Respondent in his Initial Brief. There, under Subsections "A" through "K", on pages 15 to 35, the Respondent analyzes the Florida case law as applied to the facts in the instant case. The law substantiates the basis of this Petition for Review and is clearly against the Referee's recommended punishment.

A review of the law set forth in the Respondent's Initial Brief clearly suggests as applied to the facts in the instant case, that the additional punishment suggested by the Referee is contrary to the criteria set forth by this Court in disciplinary actions.

The Court is respectfully requested to review the mitigating facts not referred to in the Referee's Report or in the Brief of The Florida Bar, which facts are capsulized on pages 38-40 of the Initial Brief of the Respondent, and will not be repeated in this Reply Brief.

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR · 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0488
TEL. (305) 893-9270

CONCLUSION

For the reasons stated in the Respondent's Initial Brief and in this Reply Brief, the Respondent does respectfully request this Honorable Court to find that the recommendation of disbarment is excessive, cruel and unwarranted punishment under the facts and circumstances.

The Referee's recommendation of disbarment is contrary to the applicable law in similar cases and not warranted by the evidence and circumstances presented before the Referee.

Disbarment under the circumstances of this case will not serve the public interest and will destroy an attorney respected in this community and in his profession for more than fifty years, resulting from a single case in an otherwise unblemished legal career. There is substantial evidence that such would never occur again. He has continued to actively practice his profession since his resignation as the attorney for the subject estate in 1977, a period of some seven years, without a suggestion of a complaint from any client or source. The Respondent's record in the profession subsequent to the subject incident clearly shows his rehabilitation and his ability to continue in the legal profession in an honorable manner.

The punishment respectfully suggested in Respondent's Initial Brief of a reprimand and the requirement of pro

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1650 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-0486
TEL. (305) 893-9270

bono supervised service during the remainder of Respondent's practice, plus payment of costs, would meet all the criteria under the facts and circumstances of this case.

Respectfully submitted,

GREENFIELD & DUVAL 1680 N.E. 135th Street N. Miami, Fl. 33181 (305) 8939270 Attorneys for Respondent

By Harvie S. DuVal

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33181-6488
TEL. (305) 893-9270

CERTIFICATE OF SERVICE

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

ROBERT D. ROSENBLOOM, ESQ.,
Bar Counsel, The Florida Bar
200 South Miami Avenue
Suite 300(A)
Miami, Fl. 33130-1989

JOHN T. BERRY, ESQ.,
Staff Counsel
The Florida Bar
600 Apalachee Parkway
Tallahassee, Fl. 12301-8226

By Harvie S. DuVal
Harvie S. DuVal

LAW OFFICES
GREENFIELD & DUVAL
SECOND FLOOR - 1680 NORTHEAST 135TH STREET
NORTH MIAMI, FLORIDA 33261-0488
TEL. (305) 893-9270