IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant,

-vs-

ROGER R. MAAS,

Respondent.

CONFIDENTIAL

CASE NO: 67,854

RESPONDENT'S INITIAL BRIEF IN SUPPORT OF

PETITION FOR REVIEW

ROGER R. MAAS
2901 First Avenue North
St. Petersburg, Florida 33713
813/327-8767
Respondent

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In this Brief, The Florida Bar may be referred to as the "Bar"; the Respondent, Roger R. Maas, may be referred to as "Respondent".

APPENDIX

Filed with this Brief is an Appendix which contains and will be reffered to as indicated:

Excerpts from transcript of Grievance Committee Hearing..... (C-

Excerpts from transcript of Referee's Hearings..... (R-

Documents from the Probate Court file or previous exhibits and documents..... (A-

TABLE OF CITATIONS AND AUTHORITIES

CASE CITATIONS

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STATEMENT OF THE FACTS

On or about July 20, 1981, Judy Lyons contacted the Respondent to handle the estate of her mother, Ruth Leto. The Respondent advised Mrs. Lyons that, because of his recent hospitalizations, he was not taking any new cases, but that he would recommend attorney H. H. Baskin, Jr. (R-112, 7-18)

Respondent agreed to meet with Mrs. Lyons and attorney H. H. Baskin, Jr. and met with her at attorney Baskin's office in Clearwater, Florida. Mr. Baskin was unable to attend the initial conference and, in his absence, Respondent signed the Petition for Administration. (R-102 10-11; C 148 lines 6-9)

Mrs. Lyons wanted Respondent present because she and the decedent had used his services before and had confidence in him. However, it was explained to Mrs. Lyons that attorney H. H. Baskin, Jr. would be representing her.

The estate assets were in excess off $300,000, the bulk of which was transferred in 1981.

However, there were certain stocks and bonds that were, apparently, turned over to H. H. Baskin, Jr. through his secretary/wife, Joyce Baskin, that were not transferred.

These three stocks and/or bonds totalled about $19,000.

Ms. Baskin maintains these stocks and bonds were not turned over to her. Ms. Baskin then apparently attempted to transfer the stocks without the stock certificates. However, Mrs. Lyons had moved and letters were not forwarded.

A grievance was then filed against not only the Respondent, but also Ms. Baskin in the capacity as "attorney". Respondent attempted to obtain the file from attorney H. H. Baskin, Jr. for the purpose of closing the estate. All of Respondent's many calls and letters were ignored. (A-13)

The Respondent then asked the Court for guidance. Circuit Judge Thomas Penick, who was sitting in probate, advised the Respondent that this was a regular problem with attorney H. H. Baskin, Jr.'s office and suggested that perhaps attorney Mark Shames should take over the case, since a grievance had been filed against the Respondent.

Attorney Mark Shames filed a Notice of Appearance and attempted to get the file from attorney H. H. Baskin, Jr., to no avail, until, at Judge Penick's suggestion, Baskin was threatened with having the Sheriff come seize the file.

Shortly thereafter attorney Mark Shames transferred the stocks.

The estate has not been closed, however, since there remains to be heard a Petition to Surcharge Attorney for Personal Representative. The Petition to Surcharge attorney is seeking relief of, inter alia, return of all attorney's fees and costs to one of the heirs, Franklin Leto's, attorney, and for damages. (A-7)

Attorney Mark Shames has filed a Motion To Withdraw as attorney citing lack of cooperation of heirs. (A-10)

The Respondent further has reason to believe that

Ms. Baskin was charged and disciplined for unauthorized practice of law as a result of her involvement in this case. The Respondent heard this after the Referee's hearing and The Florida Bar has refused to either confirm or deny it.

In considering these charges against the Respondent, The Florida Bar and/or the Referee, ignored the testimony which would show attorney H. H. Baskin, Jr. accepted ultimate responsibility for the estate. It is, incidentally, acknowledged that H. H. Baskin, Jr. is an expert in probate law. The testimony regarding attorney Baskin's responsibility, and acceptance of same, is found in the appendix at:

R pg. 96, 11-15
R pg. 97, 22-24
R pg. 99, 25 through pg 100, 1-8, 15-14
R pg 100, 1-8 and 14-15
R pg 108, 20-25
R pg 141, 5-16
C pg 145, 17-19
C pg 148, 3-14
C pg 148, 20-23
C pg 150, 14-18
C pg 151, 17-25
C pg 152, 7-13
C pg 153, 9-13
C pg 153, 24-25
C pg 154, 17-19
C pg 154, 20-25
C pg 155, 6-8
C pg 156, 15-16
C pg 158, 2-3
C pg 158, 23-25
C pg 159, 1-2
C pg 160, 3-8
C pg 164, 1-18
C pg 165, 19-20
C pg 167, 4-10
C pg 169, 7-11
C pg 171, 6-9
C pg 171, 12-16

C pg 172, 2-4
C pg 174, 21-23

Further, the probate file reflects attorney H. H. Baskin, Jr. initiated these proceedings by charging the costs of filing to his personal law practice account with the Clerk's Office. (A-5)

STATEMENT OF THE CASE

On November 26, 1983, Frank S. Leto, an heir in the Estate of Ruth Leto, filed a complaint with the Florida Bar. Under "Attorney Complained Of:" Mr. Leto wrote first, the name of Joyce Baskin and then that of the Respondent herein. Mr. Leto goes on to refer to Joyce Baskin as an attorney in the body of the complaint form. Respondent, after numerous inquiries to The Florida Bar and their Unauthorized Practice of Law Section, has been refused information regarding any action against Joyce Baskin. (A-1)

On December 11, 1984 Grievance Committee 6-C convened in St. Petersburg, Florida. The Committee took testimony, deliberated in Executive Session and "found that there is in the record evidence to support violations..."

"The Committee also, in Executive Session, considered the matter of recommended punishment, and it is the unanimous conclusion of the Committee on motion made and duly seconded, that the Board of Governors issue its private reprimand to the respondent attorney..." (emphasis added) (C pg. 180, lines 18-23)

The Committee further found that "there is a sufficient basis in this record for investigation by staff counsel or The Florida Bar with regard to possible violations of disciplinary rules by the witness, Attorney (H.H.) Baskin, and does respectfully request that The Florida Bar, through its professional staff institute and conduct whatever investi-

gation it feels is appropriate and takes whatever action thereafter is considered to be proper under the circumstanc-
lines 24-25 and pg 181, ines 1-9)
es." (C pg 180 / This most critical fact was not learned by the Respondent for some twenty-seven months and was withheld from the Referee as well.

Contrary to Integration Rule 11.04: GRIEVANCE COMMITTEE FUNCTION AND PROCEDURE; Rule 11.04(6)(c)(i), this report was not served on the Respondent. The Respondent was not even advised of the Committee's actual recommendation of a private reprimand. On the contrary, Florida Bar Staff Counsel, Dian Victor Kuenzel, advised the Respondent that the Committee had recommended a public reprimand. Not until March 20, 1987 did Respondent discover the truth when he received a copy of the transcript of Grievance Committee 6-C.

On November 5, 1985 The Florida Bar filed its Complaint against Roger R. Maas, the Respondent, charging a violation of Disciplinary Rule 2-107(A)(1) (division of fees with another attorney who is not a partner without full disclosure and consent of the client); D.R. 6-101(A)(1) (handling a legal matter which he know or should know he is not competent to handle); D.R.6-101(A)(3) (neglect of a legal matter).

The Respondent filed his Answer denying the charges. Upon Motion requesting confidentiality be maintained, an Order granting said Motion was entered, and later denied but published by Bar Counsel (A-11).

A waiver of venue, by a Referee approved stipulation, moved the proceedings to Hillsborough County and hearing began June 20, 1986. Thereafter, at the Court's request, certain witnesses were recalled for October 2, 1986. The Referee requested counsel for Respondent provide cases in favor of Respondent at the close of said hearing.

Accordingly, Respondent requested The Florida Bar either produce, in camera, or produce to the Respondent, all similar cases where there was no sanction or the sanction was less than recommended here. This was refused.

The Respondent was, of course, unable to cite any cases, as requested by the Referee, wherein there was no sanction or the sanction was less than Recommended here. Staff Counsel for The Florida Bar, contrary to Rules of Professional Conduct, Rule 4-3.3 Candor toward the tribunal; and 4-3.4 Fairness to opposing party and counsel, did not cite to the Referee any similar cases where sanctions less than public reprimand and suspension were imposed.

This Court ordered the Referee to file his report within 180 days of November 15, 1985. No motion for extension of time was filed, nor was any Order extending the time filed. The report of the Referee was filed November 17, 1986 - some one hundred eighty-eight (188) days late.

The Referee recommended Respondent be found guilty of D.R. 6-101(A)(1) (handling a legal matter an attorney knows or should know he is incompetent to handle); and D.R.

6-101(A)(3) (neglect of a legal matter).

The Referee recommended the Respondent be found not guilty of D.R. 2-107(A)(1) (division of fees with another attorney who is not a partner without full disclosure and consent of the client). (A-2)

The Referee recommended that:

> "...the respondent be suspended for a fixed period of four months, thereafter until he shall prove his rehabilitation and for an indefinite period until he shall pay the cost of this proceeding and make restitution to his client in the amount of $11,300 as provided in the rule 11.10(4); said amount was determined as follows:
>
> 1. $1,500 fee paid to Mr. Shames
> 2. $6,000 fee paid to Mr. Winick
> 3. $3,000 refund of the $9,000 fee paid to Mr. Maas
> 4. $ 800 bond premium the estate was required to post.
>
> and pay costs of $1,577.74."

The Motion by Respondent for an extension of time to file a Petition For Review was granted up to and including March 19, 1987; and a Motion For Extension of Time to File Brief was granted up to March 30, 1987.

As a result of the Referee's report, the status of the Complaint is now as follows: (A-12, Complaint)

1. Admitted or proven.

2. Contested in that the evidence is more susceptible to the inference that attorney H. H. Baskin, Jr., was hired at least as co-counsel.

3. Admitted or proven.

4. Admitted or proven.

5. Contested in that the evidence is more susceptible to the inference that attorney H. H. Baskin, Jr. was hired at least as co-counsel.

6. Contested in that it was never shown that Respondent had "little experience" and that the balance of the paragraph is contested.

7. Referee's findings are in accord with allegations of paragraph 7, but it is contested that the evidence supports it.

8. Referee's findings are in accord with the allegations of paragraph 8, but it is contested that the evidence supports it, and is in fact in direct conflict with the evidence, for instance:

a) Attorney H. H. Baskin, Jr. testified that he reviews and approves everything that leaves his office. (R pg 100, lines 7-15)

b) The Notice to Creditors names H. H. Baskin, Jr. as co-counsel. (A-3)

c) The initial document in the probate file is to Paul (Cloninger), chief probate clerk, directing all correspondence to this estate should be mailed to Roger R. Maas c/o H. H. Baskin, Jr. This letter is on attorney H. H. Baskin, Jr.'s letterhead and the address and phone number for correspondence is that of H. H. Baskin (A-4) Further, this was approved by H. H. Baskin, Jr. as shown

in "a)" above.

d) Letter to Judy Lyons, Personal Representative, on attorney H. H. Baskin, Jr.'s letterhead and the salutation is:

"Law Offices Of Baskin & Bennison"

(Mrs.) Joyce Baskin
Secretary to Roger R. Maas

9. By implication, accepted by the Referee. But Mrs. Joyce Baskin does not have an office; it is the office of her husband, attorney H. H. Baskin, Jr. of Baskin and Bennison.

10. That the Letters of Administration not filed until October 9, 1981 has been proven, but, the responsibility therefore has not been established as the responsibility of the Respondent.

11. Contested that the inventory was not drafted until January 20, 1982, but accepted as proven it was not signed until January 20, 1982.

12. Accepted as proven that the Inventory was not filed until February 11, 1982 and that a citation to Show Cause was served on Judy Lyons, but the responsibility therefor has not been established, and now, after more than five years, all witnesses memories have faded. It should be pointed out that the probate court, on February 17, 1982, discharged the citation, without any finding of fault, undue delay or contemptious act. No witness was able to recon-

struct the events of that time.

13. Allegations correct as to the signing of check number "5", but it is unsubstantiated that Respondent requested same.

14. Allegations correct as to the signing of check number "13", but unsubstantiated that Respondent requested same.

15. Allegation 15 is true, but immaterial since F.S. 733.106 does not require a petition for fees and it is, therefore, a mistaken application of law.

16. Uncontested and proven.

17. Uncontested and proven.

18. Admitted that Joyce Baskin used Respndent's letterhead, but contested it was with Respondent's knowledge or permission. Further, attorney H. H. Baskin, Jr. testified that he reviewed everything that left his office and that he is responsible. (R100 lines 7-8; C-171, lines 8-9; C-156 lines 15-16 /

19. Not supported by the evidence and contested that Joyce Baskin was not supervised. Her husband and employer, attorney H. H. Baskin, Jr. and experienced probate lawyer, testified that he supervised all of the work, including this estate. (C-156, lines 6-8)

20. Allegation of paragraph 20 are misleading. Please see paragraphs "18." and "19." above.

21. Referee made no finding of late penalty.

22. Referee made no finding.

23. Referee made no finding.

24. Referee made no finding.

25. Allegations of paragraph 25 are misleading and contrary to testimony. After the grievance was filed, Respondent sought the aid and advice of Circuit Probate Judge Thomas E. Penick on three occasions, who suggested that the Respondent seek the aid of attorney Mark Shames, and because attorney H. H. Baskin, Jr. refused to return the file, that he, Judge Penick, would order the Sheriff to retrieve the file if need be. (R-122 lines 13-22; R-124, lines 7-17; C-63, line 21 through page 64)

26. The Referee recommended as to:

D.R. 2-107(A)(1) not guilty

D.R. 2-101(A)(1) guilty

D.R. 2-101(A)(3) guilty

SUMMARY OF ARGUMENT

Prior to the Greivance Hearing where the Respondent has been advised he had to testify, the Chairman advised Respondent that he was being investigated for four separate violations of the Discipline Rules. Testimony was taken, and the Committee found violations of several Disciplinary Rules, but unanimously recommended a private reprimand. The Respondent was not served with this report, in violation of the Integration Rule. The Florida Bar filed its Complaint, alleging violations of 3 Disciplinary Rules, only one of which was the subject of the original hearing. The Respondent was found not guilty of that violation, but guilty of the two "new" violations. This was clearly a violation of procedural due process of law.

Bar Counsel cited several cases to the Referee, all of which involved public reprimands and suspensions. Bar Counsel failed and refused to reveal any of the many cases wherein any lesser sanctions or dismissals were the result. This violated the Respondent's right to equal protection and due process of law.

The Referee recommended a finding of guilt on D.R. 6-101(A)(1) (handling a legal matter an attorney knows or should know he is incompetent to handle); and D.R. 6-101 (A)(3) (neglect of a legal matter). D.R. 6-101(A)(1) had not been specifically pled in the Complaint and was contrary

to the evidence and testimony. Further, even if true, an admitted expert in probate matters, attorney H. H. Baskin, Jr., stated without reservation that he was involved in the case and that it was his responsibility.

Regarding D.R. 6-101(A)(3) there were two attorney's who testified. One who is seeking fees from the Respondent testified that there appeared to be neglect. The other, H.H. Baskin, Jr., testified there was no neglect. The Court file reflects that the Personal Representative moved without leaving a forwarding address for eight (8) months. Further, testimony revealed that stock certificates were lost in the mail. The total estate was approximately $300,000, all of which was transfered, with the exception of the $18,000 in stock. After the new attorney entered the case over seven (7) months elapsed before the stocks were transferred.

Another attorney, representing one of the heirs, asked for, and it was recommended by the Referee, that he receive from Respondent, $6,000 for his efforts in transferring the stock. He was not the attorney for the estate, no expert testimony regarding reasonableness and necessity was presented and the recommendation is in direct violation of F.S. 733.

The Referee was ordered by the Supreme Court to have his report filed within 180 days. His report was 188 days late, which the Respondent suggested was no worse than the alleged neglect of the Respondent.

The Referee further ordered restitution, which

was never pled, nor was the Respondent given notice that it would be an issue, which denied Respondent due process of law, and was in violation of F.S. 733.6175.

The Complaint contained no allegations to advise the Respondent that this was not considered a minor misconduct case that would involve anything more than a private reprimand. Further, none of the guidelines in the Integration Rule for determining discipline to be other than minor misconduct were alleged. Bar Counsel further withheld from the Referee and the Respondent, the Grievance Committee's unanimous recommendation of a private reprimand.

The ultimate result was that the charges were not proven by clear and convincing evidence and the Respondent was denied euqal protection and denied due process of law.

ISSUE I

WAS THE RESPONDENT DEPRIVED OF PROCEDURAL DUE PROCESS OF LAW WHEN CHARGES OF VIOLATING D.R. 6-101(A)(1) and D.R. 6-101(A)(3) WERE ADDED TO THE ORIGINAL CHARGES BASED UPON, AND AS A RESULT OF, TESTIMONY PRESENTED AT DISCIPLINARY HEARINGS

On December 11, 1984 Respondent was advised of the charges against him by Gilbert MacPherson, investigating member of Grievance Committee 6-C. The hearing was held to take testimony regarding violations of D.R. 2-102, D.R. 2-107(A)(1), D.R. 2-107(A)(2) and D.R. 9-102(A)(4).

After testimony was taken, and without notice to the Respondent, the Committee ruled that they found evidence to support violations of D.R. 2-107(A)(1), D.R. 6-101 (A)(1), D.R. 6-101(A)(3) and D.R. 1-102(A)(4).

The Florida Bar subsequently filed a complaint for violations of D.R. 6-101(A)(1), D.R. 6-101(A)(3) and D.R. 2-107(A)(1).

The only charge ultimately heard by the Referee that was subject of the original hearing, and prior to testimony, was D.R. 2-107(A)(1). The Referee recommended Respondent be found not guilty of that Disciplinary Rule.

The United States Supreme Court, in one of its very rare reviews of Bar disciplinary matters, heard the case of **In the Matter of John Ruffalo, Jr., 390 US 544, 20 L Ed 2d 117, 88 S Ct 1222, reh den 391 US 961, 20 L Ed 874,**

88 S Ct 1833 (1968). The Ruffalo case involved disbarment proceedings wherein attorney Ruffalo was found to have engaged in misconduct consisting of hiring a railroad car inspector during his off-duty hours, to investigate FELA claims against the inspector's employer. This charge of misconduct was not in the original charges against the petitioner, but was added as a result of testimony presented during disbarment hearings. The attorney was disbarred.

On certiorari, the United States Supreme Court reversed. In an opinion by Douglas, J., expressing the views of five members of the court, it was held that since there was a lack of fair notice as to the reach of the state disbarrment proceedings and the precise nature of the charges, the petitioner was deprived of procedural due process.

Justice Douglas stated, at 122,

> Disbarment, designed to protect the public, is a punishment or penalty on the lawyer. Ex parte Garland, 4 Wall 333,380, 18 L Ed 366,369; Spevack v. Klein, 385 U.S. 511,515, 17 L Ed 574, 577, 87 S Ct 625. He is accordingly entitled to procedural due process, which includes fair notice of the charge. See in re Oliver, 333 US 257, 273, 92 L Ed 682, 694, 68 S Ct 499.
>
> These are adversary proceedings of a quasi-criminal nature. Cf. In re Gault, 387 US 1,33, 18 L Ed 2d 527,549,87 S Ct 1428. The charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused. He can then be given no opportunity to expunge the earlier statements and start afresh.

The Ohio State Bar Association and the Mahoning County Bar Association, amicus curiae, argued there was no due process violation because the petitioner was given several months to respond to the charge. The U.S. Supreme Court responded to this argument by pointing out that serious prejudice may well have occurred because of the original 12 specifications of misconduct. The Court, in footnote 4, page 122, stated that Ruffalo:

> (The Petitioner) may well have been lulled into a "false sence of security." (Bouie v City of Columbia, 378 US 347, 352, 12 L Ed 2d 894,899, 84 S Ct 1697), that he could rebut charges Nos. 4 and 5 by proof that Orlando was his investigator rather than a soliciter of clients. In that posture he had "no reason to even suspect" (ibid.) that in doing so he would be, by his own testimony, irrevocably asuring his disbarrment under charges not yet made.

The Respondent was notified by the Florida Bar that, unless he claims privilege or right under Federal or State law, he would be required to testify. (A-6)

ISSUE II

WHETHER THE REFEREE ERRED FINDING THE RESPONDENT GUILTY OF D.R. 6-101(A)(1), HANDLING A LEGAL MATTER AN ATTORNEY KNOWS OR SHOULD KNOW HE IS INCOMPETENT TO HANDLE; OR D.R. 101(A)(3), NEGLECT

The Referee clearly erred in finding that Respondent undertook a legal matter he was not qualified to handle.

The very most the record reveals is that Respondent told the client, initially, that he was not mechanically set up in his office to handle probate matters. To infer from that that Respondent was incompetent to handle a probate matter would require impermissible speculation.

The underlying facts are essentially undisputed and a finding not supported by the evidence should not be upheld. **The Florida Bar v Dingle, 220 So.2 9(Fla.1969).**

In **Dingle**, the attorney, without advising his client, did not file a Notice of Appeal from a criminal conviction after specifically agreeing to do so.

The Board of Governors entered a judgment ordering a one year suspension and thereafter until he shall demonstrate his fitness to resume the practice of law.

Upon Petition for Review, the Bar urged that substantial evidence supported the judgment of the Board of Governors and this mandated the affirmance of it's judgment.

This Court rejected this argument and reversed all of the Board's judgment except that portion relating to costs and ordered a public reprimand in lieu of the one year suspension.

The Referee was in error, factually, when he found that Respondent was incompetent to handle the estate because of his personal and professional problems and that, in realization of this incompetency, tried to get a legal secretary to handle it.

The Respondent testified that:

> "I didn't have a probate secretary although I had a lot of probate experience..." (R-110, 7-9; R-111, 17-20)

There is nothing to rebut this statement of <u>competence</u>. Throughout, the Respondent contended he had referred the case to attorney H. H. Baskin, Jr. and that the file was, and always had been, kept in attorney Baskin's office. (C-160, 4-8; C-171, 8-12; C-92, 3-6; C-65, 18-25; R-97, 21-24) / As stated earlier, he referred the case because he was not mechanically set up with a probate secretary.

There is little question that attorney Baskin was involved since the file cover of the Probate File No. 81-5141 Circuit Court, Pinellas County, shows the attorneys to be Roger R. Maas and H. H. Baskin, Jr. (A-8) The proof of Notice to Creditors in that file also carries the name of H. H. Baskin, Jr. as an attorney of record, thereby giving notice to the world. (A-3)

Further, attorney Baskin testified that, not only did he feel this estate file had been handled appropriately, but that he oversaw everything in this file and that it was his responsibility. Attorney Baskin stated he was directly involved to see that the work was done properly because he was the lawyer. Also, he stated he did what was required and necessary. (Please see over 35 references on pages 3 and 4 in Statement of the Facts) The Referee and Bar clearly misapprehended the legal affect of testimony and evidence.

The probate court found nothing wrong in the timing of the filing of the Petition for Administration or in the filing of the inventory. Contrary, the Personal Representative received a Citation to Show Cause which was dismissed on the probate court's own motion on February 17, 1982. The Bar is collaterally estopped from now raising that issue, some five (5) years later. **James Tulcott, Inc. v Allahabad Bank, supra.**

Further, testimony of Joyce Baskin was ignored (C-132, lines 20-25) that the Personal Representative had moved with no forwarding address which delayed the probate, and in the Bar's zealousness to prosecute Respondent, chose to omit proof of same by failing to include the entire content of the probate file. On two occasions the clerk had letters returned to them that were addressed to the Personal Representative spanning March to September, 1984. (A-9)

These return envelopes further document Mrs. Baskin's testimony that it was not the neglect of any attor-

ney that caused the delay in the probate proceedings, and filing of tax matters. On the contrary, necessary bank statements were also sent by the bank to the Personal Representative's old address and the post office held the undelivered mail.

The Referee apparently accepted the argument of Bar counsel, Diane Kuenzel, that the tardy filing of the probate petition was evidence of incompetence. Respondent has made no allegations of incompetence of Bar counsel or of the Referee, even though Bar counsel failed to comply with the Integration Rules and the Referee was one-hundred eighty-eight (188) days late in complying with this Court's order in filing his report. It is mentioned only as a comparative argument. See **The Florida Bar v. Rubin, 362. So.2 12 (Fla.1978),** where this Court held that inordinate delay by the Bar in meeting the prompt filing obligations imposed upon it

> "...inflicted upon Rubin the agonizing ordeal of having to live under a cloud of uncertainties, suspicions and accusations for a period in excess of that which the rules were designated to tolerate."

and:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will

> hold the Bar accountable for any failure to do so.
> "We have pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is so even though the record shows that the conduct of the lawyer merits discipline." **The Florida Bar v. Randolph, 238 So.2 635, 639 (Fla.1970).**

The Referee's report does not clarify if he feels lateness in filing probate papers is neglect or incompetence, however, the matter had been previously determined by the probate judge when, upon the Court's own Motion the Order to Show Cause was discharged after the Inventory was filed. The filing of the Inventory brought the question of fact before the Court for its determination if the late filing was contemptuous.

As a general rule, where a questions of fact is put in issue by the pleadings, and is submitted to the... trier of fact for its determination, and it is determined; that question of fact has been "actually litigated". **James Tulcott, Inc. v Allahabad Bank, Ltd. 44 F.2d 451,459 (5th Cir.1971)**, citing **Restatement of Judgments, §68, comment (c)(1942).**

The Order to Show Cause brought the question of fact to issue. The question of fact is: Is the late filing improper? The determination, or discharge in this case, is the ultimate ruling and the issue has, therefore, been liti-

gated, and the principle of collateral estoppel applies.

It is, therefore, a denial of due process of law and the equal protection of the law for a county judge, not sitting in probate, but rather as a Referee in a Bar grievance hearing, to now relitigate a matter that was before the proper tribunal almost five years later.

ISSUE III

WAS RESPONDENT DENIED DUE PROCESS OF LAW WHEN THE FLORIDA BAR MISREPRESENTED AND WITHHELD THE RECOMMENDATIONS OF THE GRIEVANCE COMMITTEE FROM RESPONDENT AND BY NOT SERVING SAID RECOMMENDATIONS ON RESPONDENT AS REQUIRED BY THE 1984 FLORIDA BAR INTEGRATION RULE 11.04(6)(c)(i).

The 1984 Florida Bar Integration Rule 11.04(6)(c) provides:

> (c) Discipline of minor misconduct.
> (i) If a grievance committee finds an accused guilty of minor misconduct or if an accused shall admit his guilt of minor misconduct by a writing filed with a grievance committee, the grievance committee may recommend an order providing for a private reprimand recommending the manner of administration and for the taxing of costs against him. The report recommending a private reprimand shall be forwarded to staff counsel for review. If staff counsel does not return the report to the grievance committee to remedy a defect therein or if the report is not referred to the disciplinary review committee by the designated reviewer, the report shall then be served on the accused by the executive director or staff counsel. The order of private reprimand shall become final unless rejected by the accused attorney within 15 days after service upon him. If rejected by the accused, the report shall be referred to bar counsel and referee for trial on complaint to be prepared by staff counsel as in the case of a finding of probable cause. The Board of Governors may order an accused attorney to appear before the board for administration of a private reprimand.

The grievance committee, in executive session, con-

sidered the matter of recommended punishment, and it was the unanimous conclusion of the committee that the Board of Governors issue its private reprimand. (C pg 180, lines 18-23)

The 1984 Florida Bar Integration Rule 11.04(6)(c)(i) directs the executive director or staff counsel serve the report recommending a private reprimand upon the accused attorney, which becomes final unless the accused attorney rejects the report. Service on the accused attorney shall be done unless staff counsel returns the report to the grievance committee to remedy a defect or the report is referred to the disciplinary review committee. The record does not reflect that either of these actions were taken nor was the accused attorney (the Respondent herein) ever served.

The Respondent only became aware of the grievance committee's unanimous recommendation for a private reprimand when he received a copy of the transcript on March 20, 1987, for use in preparation of this brief.

The failure of the Florida Bar to abide by the Integration Rule denied the Respondent due proces of law.

ISSUE IV

WAS THE RESPONDENT DENIED DUE PROCESS OF LAW WHEN THE FLORIDA BAR STAFF COUNSEL WITHHELD ALL UNPUBLISHED CASES THAT INVOLVED LESSER PENALTIES, FROM THE RESPONDENT AND THE REFEREE.

The 1986 Florida Bar Rules of Professional Conduct, Rule 4-3.3 provide:

> 4-3.3 Candor toward the tribunal.
> (a) A lawyer shall not knowingly:
> (1) Make a false statement of material fact or law to a tribunal;
> (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or...

The comment following Rule 4-3.3 provides:

> Misleading legal argument.
> Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal. A lawyer is not required to make a disinterested exposition of the law, but must recognize the existence of pertinent legal authorities. Furthermore, as stated in paragraph (a)(3), an advocate has a duty to disclose directly adverse authority in the controlling jurisdiction which has not been disclosed by the opposing party. The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case. (emphasis added)

The 1986 Florida Bar Rules of Professional Con-

duct, Rule 4-3.4 provides:

> 4-3.4 Fairness of opposing party and counsel. A lawyer shall not:
> (a) ...conceal a document or other material that the lawyer knows or reasonably should know is relevant to a pending... proceeding. (emphasis added)

Staff Counsel cited to the Referee only those cases which involved a public reprimand and suspension. Staff Counsel did not advise the Referee the Grievance Committee, sitting in Executive Session, had unanimously recommended a private reprimand. Further, Staff Counsel did not advise the Referee of the large number of similar cases where less than a public reprimand was imposed.

Of course, all cases involving private reprimands, committee warnings, or that resulted in findings of no probable cause, are confidential and the only record kept is by The Florida Bar. These cases are compiled, extensively indexed and distributed to all Staff Counsel. This compilation of cases, commonly called "The Red Book" are for use by Staff Counsel as a guide. Neither the accused attorney, the Grievance Committee nor the Referee have access to these cases, even in a "sanitized" form, such as is utilized in the reporting of confidential juvenile cases.

Under the guise of confidentiality, The Florida Bar is able to pursue or abandon most grievances without any Committee, Referee or accused attorney being able to cite applicable and appropriate precedent.

Because of this secrecy, The Florida Bar has an even more compelling duty to abide by Rules 4-3.3 and 4-3.4. Unlike any other case, civil or criminal, opposing counsel has to merely research to find the appropriate cases, and if opposing counsel does not research, Rules 4-3.3 and 4-3.4 would require that, in candor and fairness, the tribunal and counsel be advised of all pertinent and material facts and law.

In the case at bar, not only did Staff Counsel cite cases where the facts were substantially disimilar, but also, Staff Counsel did not advise the Referee of <u>any</u> similar cases where the sanctions were less than asked for by Staff Counsel.

Further, Staff Counsel would not allow any discovery of these cases in any form and, in fact, led the Referee to believe that the cases cited represented the standard disposition. Staff Counsel's burden and responsibility should have been even greater in this case as the Referee requested and received assistance from Staff Counsel.

By withholding the rulings in these cases the Staff Counsel for The Florida Bar, although, perhaps, not in bad faith, violated Rules 4.3-3 and 4.3-4 of the Florida Bar Rules of Professional Conduct and, by so doing, denied Respondent due process of law and the equal protection of the law as provided by the Fourteenth Amendment to the United States Constitution and Sections 2 and 9 of Article I of

the Constitution of the State of Florida.

The withholding of information; in this instance "confidential" cases, is a similar situation that the United States Supreme Court faced in **Brady v. Maryland, 373 U.S. 83**, wherein the Court said:

> A prosecution that withholds evidence on demand of an accused which, if made available, would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant. That casts the prosecutor in the role of an architect of a proceeding that does not comport with standards of justice, even though, as in the present case, his action is not "the result of guile," to use the words of the Court of Appeals. **226 Md., at 427, 174 A. 2d, at 169** (emphasis added)

The Supreme Court in **Brady**, at page 86, further stated:

> We now hold that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of prosection. (emphasis added)

The Respondent was therefore, under the principle in **Brady**, denied due process of law and the equal protection of law.

ISSUE V

WHETHER THE REFEREE ERRED IN HIS RECOMMENDED PUNISHMENT WHEN NONE OF THE CONDITIONS OF INTEGRATION RULE 11.04(6)(c)(ii) WERE PRESENT

The Florida Bar Integration Rule 11.04(6)(c)(ii) states:

> (ii) Minor misconduct for which a recommendation of a private reprimand might be appropriate is a relative rather than a precise terms. In the absence of unusual circumstances expressly described in detail in the grievance committee report, misconduct shall not be regarded as minor if any of the following conditions exist:
>
> (a) The accused has been disciplined by private reprimand more than once in the preceeding ten years.
>
> (b) The accused has been disciplined by a measure more severe than a private reprimand in the past ten years.
>
> (c) The accused is the subject of other pending idsciplinary proceedings at the time of the order.
>
> (d) The misconduct involves any of the following: dishonesty, misrepresentation, deceit, fraud, commision of a felony, failure to account for money or property, performance of the offending act with knowledge and intent that such would breach the standards of ethical and professional conduct and misconduct similar to that for which the accused has been previously punished.

None of the conditions delineated in the Rule

existed, nor were they alleged, in the case at bar, and therefore, by definition, the alleged misconduct is minor and a private reprimand would be the most severe sanction that should be imposed. It should be noted that the Grievance Committee unanimously recommended a private reprimand prior to the Referee finding the Respondent not guilty of two charges.

ISSUE VI

WHETHER THE REFEREE ERRED IN RECOMMENDING RESTITUTION PURSUANT TO RULE 11.10 (4), FLORIDA BAR INTEGRATION RULE

Rules 11.10(4) reads:

> (4) Suspension. The respondent may be suspended from the practice of law for an appropriate time or for a definite period of time and an indefinit period thereafter to be determined by the conditions imposed by the judgment. During such suspension the respondent shall continue to be a member of The Florida Bar but without prililege of practicing; and upon the expiration of the suspension period and the satisfaction of all conditions accompanying the suspension, the respondent shall become eligible to all of the privileges of membership of The Florida Bar. A suspension of three months or less shall not require proof of rehabilitation or satisfactory passage of the Florida bar examination; a suspension of more than three months shall require proof of rehabilitation; no suspension shall be ordered for a specific period of time in excess of three years. Suspensions which continue over three years shall require proof of rehabilitation and may require satisfactory passage of the Florida bar examination subsequent to the date of suspension.

There is nothing in this Rule relating to restitution and there is nothing in the record to support a recommendation or order of restitution.

This is contrary to the law. The award of attorney's fees in a probate matter is solely the province of

the probate court. § 733.106(3)(4) Florida Statutes; Garvey v. Garvey, 219 So.2 685 (Fla. 1969); even the District Courts of Appeal are without jurisdiction to award attorney's fees in probate. Jordan v. Jordan, 384 So.2 277 (4DCA 1980).

Accordingly, this Court has no jurisdiction to award attorney's fees, or to order repayment of fees received as recommended by the Referee.

The issue surcharging the Respondent is currently pending in the probate court, pursuant to a Petition to Surcharge Attorney. (A-7)

The Petition to Surcharge the Respondent requests identical relief as was recommended by the Referee and should be heard by the Circuit Court Probate Judge, not by the County Judge sitting as a Referee.

It should further be noted that The Florida Bar's Complaint alleges that the Respondent did not apply to the probate court as <u>required</u> by § 733.106 Florida Statutes. This has apparently been misconstrued by The Florida Bar as a violation of the Integration Rules. The Florida Bar's position is a misapplication of the law. Florida Statute 733.106 states that an attorney <u>may</u> apply for an order awarding attorney's fees, or be paid directly, F.S. 733.617.

Attorney's fees in a probate proceedings may be by contract. In re; Estate of Buchman, Turner et al v Estate of Buchman, 270 So.2 384 (3DCA 1972).

Further, the Personal Representative agreed to

the fee and is not a party to the grievance nor a party to surcharge the Respondent in probate court.

The Referee further erred in recommending that $6,000.00 be paid by Respondent to Respondent's client (Judy Lyons, personal representative). This is error for numerous reasons:

1. It is contrary to the law as noted above.

2. It was not pled in the Complaint and the Respondent was without notice and opportunity to defend.

3. There was no expert testimony that the requested attorney's fees were reasonable and neccessary.

4. Mr. Frank Leto contends he has paid this amount to Attorney Winick; but the Referee recommends Judy Lyons be reimbursed.

5. The fees are unconscionable. Of the $300,000 estate, only $18,000 in stock was left to be transferred for which Mr. Winick contends $6,000 in attorney's fees has been paid to him. Although, he further states transferring of stock certificates, even if lost, is a simple matter.

ISSUE VII

DID THE REFEREE ERR IN RECOMMENDING ALL COSTS BE PAID BY RESPONDENT, AND THAT HE BE PUBLICLY REPRIMANDED AND SUSPENDED IN LIGHT OF THE TOTALITY OF THE FACTS

The grievance was filed on November 26, 1983 and has yet to be heard by this Honorable Court. The Referee was ordered by this Court to submit his report within 180 days of November 15, 1985. The Report was filed on November 17, 1986, over 188 days late.

The Respondent would suggest that the filing of the inventory approximately 90 days late is the major thrust of the pending disciplinary procedure.

Further, The Florida Bar, through the Grievance Committee, originally found probable cause on violations of four Disciplinary Rules. The Respondent has prevailed on two issues, but the Referee failed to recommend proration of costs. **The Florida Bar v. Davis, 419 So.2 325 (Fla. 1982).**

Because of the inordinate delay in this matter, this Court should consider the case of **The Florida Bar v. Rubin, 362 So.2 12,** citing **The Florida Bar v. Randolph, 238 So.2 635, 639 (Fla. 1970):**

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources

> to prosecute for attorney misconduct. We have previously indicated that we too will demand responsible prosecution of errant attorneys, and that we will hold the Bar accountable for any failure to do so.
>
> We have pointedly held that the responsibility for exercising diligence in the prosecution rests with the Bar. When it fails in this regard the penalizing incidents which the accused lawyer suffers from unjust delays, might well supplant more formal judgments as a form of discipline. This is so even though the record shows that the conduct of the lawyer merits discipline.

Also worthy of note is **The Florida Bar v. Bieley, 120 So.2 587, 589:**

> More than four years have elapsed from the date of the filing of the original complaint before the Grievance Committee to the date of the filing of the judgment of the Board of Governors in this cause. I can discern no justification for taking all these years to bring to a conclusion an investigation of this nature. One of the great truths is that "justice delayed is justice denied". It is my view that if the Bar is to continue to supervise its own ranks and be responsible therefor, assuredly a worthy objective, its proceedings must be expedited and there must be a prompt disposition of these cases.

This Court further stated in **The Florida Bar v. Papy, 358 So.2 4, 7:**

> Our ultimate judgment as to the disciplinary penalty to be imposed must not only be just to the public but also must be fair to the accused. **Cf. State v. Bass, 106 So.2 77 (Fla. 1958).**
>
> The totality of the circumstances in this cause, which include the inordinate delay caused by the Bar, no previous

> record of any disciplinary activity and his good behavior subsequent to the charged incident, mandate that the recommendation of disbarment by the referee be rejected and, in lieu of such penalty, respondent be, and is hereby suspended for one year, beginning March 2, 1978.

The Respondent has been admitted to practice since 1970 and has never been disciplined in any manner. Further, The Florida Bar has allowed this case to go on in excess of three years and four months, since the filing of the Complaint by Mr. Leto. Accordingly, The Florida Bar's reommendations and the Referee's report are unduly harsh, particularly in light of the Grievance Committee's unanimous recommendation of a private reprimand.

CONCLUSION

Respondent respectfully requests that this Court take the same position as it did in **Rubin**, supra, and the United States Supreme Court took in **Ruffalo**, supra, and reject the Referee's recommendations and exonerate the Respondent. The Respondent has suffered enough over the four years this action has been pending, the Complaintants still have an adequate remedy at law, and the Respondent's reputation and standing in the community have been permanently crippled.

Respectfully submitted

ROGER R. MAAS
2901 First Avenue North
St. Petersburg, Florida 33713
813/327-8767
Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the forgoing has been served by regular U.S. Mail upon DIAN VICTOR KUENZEL, ESQUIRE, Bar Counsel, The Florida Bar, Suite C-49, Tampa Marriott Hotel, Tampa, Florida 33607; and to JOHN T. BERRY, ESQUIRE, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, this 30th day of March 1987.

ROGER R. MAAS
2901 First Avenue North
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Respondent