THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

ALBERT D. GREENFIELD,

Respondent.
_____/

CONFIDENTIAL

THE FLORIDA BAR
Case Number 1[illegible]86M34

SUPREME COURT CASE #68,857

PETITION TO REVIEW
REPORT OF REFEREE

BRIEF OF RESPONDENT

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INTRODUCTION

For the purpose of this brief, ALBERT D. GREENFIELD, Respondent below, will be referred to as Respondent, and THE FLORIDA BAR, Complainant below, will be referred to as Complainant. The symbol (T) will be used to designate the Record-of-Proceedings held Thursday, December 11, 1986, before Linda Vitale, Referee, and the symbol (A) will be used to designate the Appeal.

STATEMENT OF THE CASE AND FACTS

Respondent, ALBERT D. GREENFIELD, accepts the summary of facts contained in paragraph II of the Report of the Referee, with two minor exceptions. On page two of said report, the Referee states:

> "Mr. Greenfield claims that [redacted] consented to the borrowing of funds."

Mr. Greenfield's actual testimony at the hearing (T-17), in discussing his borrowing of funds from the estate, was as follows:

> "Q: (Ms. Lazarus) Did you at any time request Mrs. [redacted]s permission to borrow funds?
> A: No, I did not."

Respondent's second exception goes to the characterization of the borrowing of funds as a "misappropriation". In all other aspects Respondent adopts said findings of fact as and for his Statement of the Case and Facts.

POINT ON APPEAL

Respondent respectfully submits the following as his point on Appeal:

1. THE REFEREE ERRED IN IMPOSING THE OVERLY SEVERE PUNISHMENT OF A ONE-YEAR SUSPENSION, UNDER THE FACTS AND CIRCUMSTANCES IN THE INSTANT CASE.

ARGUMENT

THE REFEREE ERRED IN RECOMMENDING A ONE-YEAR SUSPENSION FOR THE ALLEGED VIOLATIONS OF THE CODE OF PROFESSIONAL RESPONSIBILITY AND THE INTEGRATION RULES OF THE FLORIDA BAR.

It is the Respondent's contention that the Referee erred in recommending a one-year suspension for the alleged violations of the Code of Professional Responsibility and the Integration Rules for two reasons, first, it is too harsh and severe a punishment for the acts of Respondent, and secondly, because of the substantial mitigating circumstances attendant at that time.

As to the severity of the punishment, it should be noted that the borrowing of money from an Estate by a personal representative is not precluded by any provisions of §733 et seq., FSA. The acts of a personal representative are subject to the scrutiny and supervision of the Judge of the Circuit Court, Probate Division, in whose division the case is docketed. Said Judge has the right to penalize the personal representative, and/or the attorney for said personal representative, in the event he finds misconduct on the part of either, such penalty being imposed by way of surcharge and/or the disallowance of all or a portion of the fees requested by the personal representative or the attorney. In the instant case, no such penalty has been determined by the Probate Judge. Indeed, if Respondent was not an attorney, no one other than the Judge of the Probate Division would have the right, or the ability, to in any way punish the personal representative for his actions; however, this Court and The Florida Bar have chosen to impose a higher standard of behavior upon attorneys acting as personal representatives than can be imposed upon any other professional or non-professional person acting

as such, and respondent and your undersigned are bound by the decisions of this Court.

Reported cases involving disciplinary proceedings brought against attorneys who are also personal representatives of Estates, include, THE FLORIDA BAR vs. DAVID A. RHODES, 355 So.2d 774 (1978), THE FLORIDA BAR vs. HUGH R. PAPY, 358 So.2d 4 (1978), THE FLORIDA BAR vs. IRVING M. FELDER, 425 So.2d 528 (1982), and THE FLORIDA BAR vs. RICHARD C. DAVIS, 272 So.2d 485 (1972). Each of the four cases differs from the instant case in one crucial fact. In the instant case, Respondent borrowed money from an Estate of which he was the personal representative, he evidenced said borrowing, albeit not by a promissory note but by notations on the check stubs of the Estate checking account as to his loans, he repaid a substantial portion of these funds prior to the audit by The Florida Bar of his Trust Account, and, as of the date of the hearing before the Referee, all funds including interest had been repaid. As stated by the Referee on page two of her report:

> "Respondent misappropriated the money but at all times intended to repay same and did not conceal his actions and did, in fact, repay said amount."

In the RHODES case, supra, which involved the withdrawal of funds from an Estate by an attorney/personal representative, the Referee's finding of fact, at page 775, states the following:

> "I find no evidence from the testimony or the documentary evidence to substantiate Respondent's theory that the funds were withdrawn in the nature of a loan to him from the Estate. A review of the testimony and of the documentary evidence discloses no intent to repay said funds at the time of withdrawal and, therefore, I have concluded that the funds were improperly withdrawn for the personal use and benefit of the Respondent."

In the PAPY case, supra, Mr. Papy, as administrator/attorney, was charged with conduct involving dishonesty, fraud, deceit, and misrepresentation. The

Referee found that Mr. Papy utilized falsified figures in valuing the estate accounting, concealed that which was required to be revealed, and falsified evidence presented either to the Circuit Court or the hearing Referee, thereby violating certain disciplinary rules. In the FELDER case, supra, the examiner found Respondent, Irving M. Felder, guilty of three counts of misconduct, one of which is not pertinent to this Appeal. The Referee did find that Mr. Felder, as executor of an Estate, transfered from the Estate to himself and his wife shares of stock, without permission of the beneficiaries or notice to the Court or beneficiaries, and subsequently, after restoring the stock certificates and the earned dividends to the Estate, falsified accounts and records in an attempt to cover-up the transfers. The Referee also found that Mr. Felder, in allowing the estate to remain open for a period of twelve years, neglected his legal duties. In the DAVIS case, supra, Respondent, Richard C. Davis, had, in the performance of his duties as administrator of an Estate, committed the crime of Grand Larceny by stealing assets of the estate.

The glaring difference between the cases of RHODES, PAPY, FELDER, and DAVIS, supra, and the instant case, is that each of the four prior cases involved serious acts of moral turpitude, to wit, conversion, theft, fraud, etc. In the instant case, the Referee found, clearly and concisely, that Respondent borrowed money from the Estate with the intention to repay and did, in fact, repay. It is patently clear that the borrowing of funds by Respondent from the Estate of which he was the personal representative did not involve acts of moral turpitude or dishonesty.

As to the question of mitigation, The Florida Bar, at the hearing held before the Referee on December 11, 1986, put forth the case of THE FLORIDA BAR vs. BREED, 376 So.2d 783 (1979), for the proposition that mitigation should not be considered in this case. Notwithstanding the language of BREED, supra,

the later cases of THE FLORIDA BAR vs. ROBERT J. PINCKET, 398 So.2d 802 (1981), THE FLORIDA BAR vs. EMILE GUS MUSLEH, 453 So.2d 794 (1984), and THE FLORIDA BAR vs. WILLIAM A. LORD, 433 So.2d 983 (1983), specifically authorized a Referee to take into consideration mitigating circumstances. The Referee's findings as to mitigating circumstances cannot even remotely begin to describe the actual facts and circumstances existing in Mr. Greenfield's life at the time he borrowed funds from the Estate of which he was personal representative. The testimony of your undersigned, commencing at page 108 of the record of proceedings, pales in comparison when compared with the actuality of the circumstances; it is impossible for your undersigned to paint a word picture of what actually was going on at the time. Briefly stated, Mr. Greenfield was deliberately and intentionally harassed by the Internal Revenue Service, whose allegations as to Mr. Greenfield's tax returns and the alleged unreported income, which led to the imposition of taxes and penalties, defied credibility. In simple terms, Internal Revenue held a gun to the head of Mr. Greenfield and said "pay or we will pull the trigger". The fact that, in the end, Internal Revenue gave him back substantially all of the funds cannot even begin to repair the damage and destruction wrought upon him. The harassment by the Internal Revenue Service lead to a substantial deterioration of Respondent's health; your undersigned had the extremely unpleasant experience of seeing his long-time friend and client ashen-faced, in extreme pain, in the intensive-care unit of South Miami Hospital as a result of a bleeding ulcer, a condition which did not exist prior to the harassment by the Internal Revenue Service. It is impossible to determine to what extent the Referee took these mitigating circumstances into consideration in determining the discipline to be imposed upon Respondent, but, in light of the one-year suspension,

Respondent would contend that insufficient weight was given to these mitigating circumstances. Harassment by The Internal Revenue has been previously deemed to be a factor in mitigation; see THE FLORIDA BAR vs. W. ED WEAVER, JR., 279 So.2d 298 (Fla. 1973).

Respondent, and his undersigned counsel, are cognizant of The Florida Bar's position that mishandling of monies entrusted to an attorney by a client is a very serious offense, and totally agree with the Bar's laudable efforts in that direction; however, the instant case is a horse of a different color. Money was not entrusted to Respondent by a client for a specific purpose, but rather, Respondent, as personal representative, acquired control of funds and assets belonging to an Estate, with the right to use and invest these funds within the guidelines mandated by the controlling Florida Statutes, and subject to the review and supervision of the Probate Court. The Referee found no fraud, deceit, dishonesty, misrepresentation, conversion, theft, etc., on the part of Respondent, and accordingly, the imposition of a one-year suspension is strongly protested, especially in the light of discipline imposed on other attorneys for actions which, in Respondent's opinion, are far more detrimental to the good name of the legal profession. For example, an attorney who engaged in conduct involving dishonesty, fraud, deceit and/or misrepresentation was suspended for only six months; THE FLORIDA BAR vs. FOGARTY, 485 So.2d 416 (1986); an attorney who prepared and used a forged use and occupancy permit in a real estate closing received a sixty day suspension, THE FLORIDA BAR vs. BABBITT, 475 So.2d 242 (1985); an attorney who attempted to have his clients paid for their testimony, which conduct has overtones of illegality and a subversion of justice, received a three month suspension; THE FLORIDA BAR vs. JACKSON, 490 So.2d 935 (1986); see also THE FLORIDA BAR vs. GARY H. NEELY, Case Number 66,91412 FLW 86 (February 6, 1987); see also

Stanley Bernard Gelman, Vol. 14, No. 9, FLORIDA BAR NEWS. In addition, attorneys have received public reprimands for such things as conduct involving dishonesty, fraud, deceit or misrepresentation, THE FLORIDA BAR vs. JENNINGS, 482 So.2d 1365 (1986); and for the mishandling of trust funds and to promptly return trust funds when requested, THE FLORIDA BAR vs. BORNS, 428 So.2d 648 (1983); see also John T. Carlton, Jr., Vol. 14, No. 10, FLORIDA BAR NEWS.

Based upon the immediate foregoing, and all of the facts and circumstances surrounding this case, Respondent respectfully submits that the Referee's recommendation of a one-year suspension is far too severe in this case.

CONCLUSION

To quote the trier of fact in a Gilbert & Sullivan opus, his function is to "make the punishment fit the crime". In the instant case, the "crime" of Mr. Greenfield was the borrowing of funds from an Estate of which he was the personal representative, an act not precluded by any of the statutes governing the conduct of a personal representative. There is no finding by the Referee of dishonesty, deceit, fraud, misrepresentation, theft, or any other act involving moral turpitude, but rather a finding that Respondent borrowed the funds with the intent to repay and did, in fact, repay all of the borrowed funds, with interest, a substantial portion of which being paid before the matter was even discovered. Respondent, at the time he borrowed the funds from the Estate of [redacted], deceased, was in a position of extreme financial distress, as a result of improper and unlawful harassment by an agency of the United States government. He was a desperate man, with a desperate need to save his home and his family. Considering the nature of the acts done by Respondent, his intentions, and subsequent actions as to those intentions, and the facts and circumstances existing in his life at the time, Respondent would respectfully submit that a suspension of one year is an excessive discipline, a punishment that does not fit the crime.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief was mailed this 26th day of May, 1987, to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, FL 32301-8226, and to Randi Lazarus, The Florida Bar, Suite 211, Rivergate Plaza, 444 Brickell Avenue, Miami, FL 33131.

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