IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Appellant/Cross-Appellee,

vs.

CASE NO. 69,956

KEITH A. SELDIN,

Appellee/Cross-Appellant.

ANSWER BRIEF OF APPELLEE/CROSS-APPELLANT, KEITH A. SELDIN

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STATEMENT OF THE CASE AND FACTS

The Florida Bar's Statement of the Case and Facts omits many critical details necessary to a complete understanding of this appeal and generally misinterprets what facts actually were adduced below as well as the import of the special referee's rulings. Because of this pervasive inaccuracy, Appellee/Cross-Appellant Keith Seldin ("Seldin" or "Mr. Seldin") finds it necessary to provide the following Statement of the Case and Facts.

This Statement will examine the facts as they are germane to the specific allegations in The Florida Bar's five-count complaint. The facts germane to these various counts, however, will not be examined in sequence, for certain of the counts are overlapping and a sequential examination of the facts would result in unnecessary repetition. The counts germane to Counts II and V will therefore be examined first, followed by an examination of the facts relevant to Counts I, III and IV. Finally, Seldin shall set forth the mitigating factors relied upon by the special referee in his report.

COUNTS II AND V

The real focus of The Florida Bar's disciplinary action concerns certain events involving the sale of real property, i.e., an old liquor store building, formerly owned by one Bob Stephenson on Bridge Street, Jupiter, Florida. Since Mr. Stephenson committed suicide in September, 1983, this property passed to Stephenson's Estate, the personal representative of which was the decedent's sister, Kathy Mills, and the attorney for which was Mr. Seldin. [R: 28, 64][1]

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[1] References to the transcript of the proceedings below shall be made by the following designation: "[R:___]"

After Mr. Stephenson's death, Thomas E. Lee, Jr., a local property investor, became interested in the liquor store property. Just how he became interested in that property, however, is subject to some dispute.

Betty Boneparth, who shared office space with Seldin and subsequently married him in December of 1983, testified that she had known Bob Stephenson before his death in September of 1983. Their association came about because he had seen an advertisement for her promotional business and needed some speciality advertising. When they finally met, Ms. Boneparth disclosed that she was also a realtor. He, in turn, expressed a certain dissatisfaction with the way his current realty company was handling his listings and asked her to handle his property. [R: 43]

Of course, sometime after she made his acquaintance, Bob Stephenson killed himself in September of 1983. At about that time, Ms. Boneparth had a conversation with Mr. Lee in the hallway of their office building where he mentioned that he purchased investment properties. [R: 43-44] She, in turn, informed him that the Stephenson property on Bridge Street was available. While he knew of the property, he had no information on it. Therefore, Ms. Boneparth advised Mr. Lee that Seldin was the attorney for the Estate and that he could provide Lee with the appropriate details. [R: 44-45] Ms. Boneparth also testified:

> Normally acting as a Realtor, I would have to protect myself. I would have gone to the person handling the Estate, the attorney handling the Estate and said Judge Lee let me get back to you with the details.
>
> But, in this case, since he was right next door to Keith you know I really didn't feel that my interest was at stake, there was really not a need to run and register it with Keith which I normally would have done in a situation like that.
>
> Because I saw in my mind, here was (a) potential buyer for the Bridge Street Property, I said Judge Lee, let me speak to Keith and he will give you the details. [R: 44-45]

In other words, because of her close personal relationshiup with both Seldin and Lee, Boneparth did not need to take any immediate actions to insure that a commission was duly paid her for her efforts. [R: 44-45,48]

According to Ms. Boneparth, Mr. Lee eventually got the information he required and was sufficiently interested to inspect the premises. She then obtained the keys and showed him the property. She was also subsequently involved in establishing the purchase price for the property, for Seldin relied upon her expertise as to such matters in setting that price. [R: 46] Thus, Ms. Boneparth testified, she regarded herself as the "procuring cause" for the sale of the property because:

> [I]n real estate, it's my understanding that if you bring a ready and willing buyer to a seller and it results in a contract and the contract is closed, then you're entitled to a commission and you are in fact the procuring cause. [R: 46-47]

Thomas E. Lee, Jr.'s recollection of these events differs (perhaps) in a very slight way. For example, when asked how he learned that Seldin was representing the Stephenson Estate, Lee equivocally stated: "I don't know, maybe Keith told me. I could see him in the parking lot or in the hall." [R: 29] However, while Mr. Lee initially stated that he had perhaps learned that Seldin was representing the Estate from Seldin himself, he subsequently admitted that he could also have learned about the property's availability from Betty Boneparth. [R: 32]

He did subsequently inspect the premises with Ms. Boneparth for about ten to fifteen minutes. As a result of that inspection, his interest was sufficiently piqued to make an offer to Seldin for the property. [R: 31-33]

COUNT I

When Mr. Lee came to him with an offer to purchase the old liquor store building, Seldin telephoned the Estate's Personal Representative, Kathy Mills, and told her that Ms. Boneparth had found an interested buyer. He also advised Ms. Mills at that time that should the matter go to contract, a commission would be due to her broker, Fidelity Properties, for whom Ms. Boneparth worked. [R: 64]

During that conversation Kathy Mills prevailed upon Seldin to try to save the Estate some money. Thus, as a result of that conversation with Mills, Seldin convinced Ms. Boneparth to accept a commission or finder's fee directly from the Estate in a lesser amount in order to save the Estate money and not pay what would ordinarily be due to the broker ($31,500.00). [R: 39, 64] Thus, while he candidly admitted that his advice to Kathy Mills was in error and was his fault alone, he did save the Estate money "because of personal acquaintances and friendship." [R: 64]

COUNT III

Seldin admitted that he had notarized two documents not in the presence of the signatory party. At the time of the first incident the signator, Kathy Mills, was pregnant and did not want to leave the house. He therefore told her that, considering the circumstances, she should just sign the document and return it to him for notarization. The second time also occurred when she was ill, and Seldin simply had her do the same thing. [R: 67]

COUNT IV

At the time he was representing the Stephenson Estate, Seldin was also representing one Dennis Setterfield in divorce proceedings. Setterfield had been employed by the decedent, Bob Stephenson, to build and manage the lounge which was attached to the liquor store. [R: 65] After Stephenson's death, Setterfield submitted to Seldin a bill for his labors and wanted to be paid. Because he was essential to the operation of the lounge (which generated the revenues for the Estate), Seldin rationalized that payment was also necessary and helpful to the Estate. However, Setterfield never received the money. [R: 66]

Seldin again candidly admitted that he had been wrong to do so and should have recognized the impropriety of representing these two clients at the same time. Nevertheless, there is no proof whatsoever in the record that Setterfield's claim was not otherwise valid and due.

MITIGATING FACTORS

Keith Seldin is married to Betty Boneparth Seldin and has one child, a two year old daughter. [R: 74] He is a charter member of the Jupiter-Tequesta Jaycees and its first Vice-President. He is also President of the Exchange Club, which sponsors the Jupiter-Tequesta Tennis Tournament, the proceeds of which go for a scholarship fund for needy children. He is also the Vice-President of the Reformed Temple of Jupiter and its general counsel. [R: 56]

He also serves as liaison between the legal community and local realtors. [R: 57] He has never been disciplined before, either in New York or in Florida [R: 74] and is held in high regard in his local community.

For example, James C. Hill of the Florida House of Representatives testified that Keith Seldin is a "contributing leader of our community" and "has an outstanding reputation of giving in the community and performing in various civic organizations." [R: 75]

Joyce Bartlett, the head of the Jupiter Association of Realtors, testified that Seldin enjoys a good reputation in the community, personally and professionally," and is "honest and upstanding." [R: 81]

Another local attorney who has been opposing counsel to Seldin, Scott Kramer, opined that Seldin has an "excellent" reputation in the community and further noted that, while he may have done wrong, he did indeed save the Estate money. [R: 89, 94]

Mary Hinton, the Mayor of Jupiter, testified that Seldin had provided numerous young families with legal services they otherwise could not have afforded. [R: 97-98] Accordingly to Ms. Hinton, his reputation "within the community is very good"; his course of conduct has always been "outstanding"; and he "has volunteered a tremendous amount of time." [R: 97-99]

Another Jupiter attorney and former member of the Town Council, Charles Burns, also opined that Seldin had a "very good reputation." [R: 99, 100, 103]

These mitigating factors[2], coupled with Seldin's own candid admissions, prompted the following finding by the special referee:

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[2] Seldin proferred numerous other persons' written testimonials of his character and reputation within the community. [Indeed, Seldin's character and reputation evidence stands unrebutted by the Bar.] However, apparently because these letters had not previously been presented to the Bar's counsel, their admission was denied by the referee. True and accurate copies of these letters are included in the Appendix as Composite Appendix "B."

> This Referee is mindful of the Bar's recommendation for disbarment; however, I feel in view of the Respondent's absence of any adverse conduct prior to or subsequent to the conduct involving the Stephenson Estate, as well as the favorable recommendations from civic leaders in his community and the Respondent's own civic leadership endeavors subsequent to the conduct here complained of, disbarment would be too harsh and punitive. Further considered by this Referee as impressionable was the Respondent's believable sincerity in admitting his wrongdoing, the seriousness of same and his remorseful and cooperative attitude. [Report of Referee, p. 6, a copy of which is attached to this Brief as Appendix "A."]

The special referee therefore recommended that Seldin be suspended from the practice of law for one year and 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, the Estate of Robert A. Stephenson, in the amount of $10,000 and also attain a passing score on the ethics portion of The Florida Bar exam. [Appendix "A," p. 6]

SUMMARY OF THE ARGUMENT

ISSUE I ON CROSS-APPEAL

The special referee's findings of fact on Counts II and V, in particular his finding that Betty Boneparth played no part in procuring the purchaser for the sale of the Stephenson Estate property are not supported by competent, substantial evidence appropriate to a clear and convincing evidentiary standard. Quite the contrary, the testimony of Thomas Lee is equivocal and ambiguous. Since the Bar's disciplinary action cannot be sustained by evasive and inconclusive testimony, see e.g., State ex rel The Florida Bar v. Junkin, 89 So.2d 41 (Fla. 1956), these findings of fact and the conclusions of law based on these findings should be stricken.

ISSUE II ON CROSS-APPEAL

Since the special referee's recommendation of a one-year suspension is predicated upon his conclusion that Seldin was guilty on all five counts, and since Counts II and V are not supported by competent, substantial evidence, the recommended suspension should be reduced to a period of time more commensurate with Seldin's violations. This is particularly so when one considers the absence of any adverse conduct prior to or subsequent to the conduct involving the Stephenson Estate, the many favorable recommendations from civic leaders in his community as to his character and reputation and Seldin's own civic leadership endeavors.

ISSUE I ON APPEAL

Disbarment is an extreme measure 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 is one who should never be at the Bar. The Florida Bar v. Penn, 421 So.2d 497 (Fla. 1982). Here, even if one views the evidence in a light most favorable toward sustaining the referee's findings of fact and conclusions, the conduct complained of is an isolated anomaly in Seldin's otherwise spotless career. Given the many mitigating factors in his favor, disbarment is unwarranted under the circumstances of this case, particularly if the Court agrees that Counts II and V are not supported by competent, sustantial evidence.

ISSUE II ON APPEAL

Contrary to the Bar's argument, the special referee did not err in admitting into evidence certain of Seldin's character and reputation letters in this quasijudicial administrative proceeding. If any error occurred, such error is harmless because the evidence complained of is merely cumulative to other testimony. Further, even though the referee may have improperly concluded that Seldin was guilty of commiting some acts which the evidence does not otherwise demonstrate, he is still best situated to evaluate Seldin's character and recommend an appropriate punishment therefor.

ISSUE III ON APPEAL

The Bar's argument for "automatic" disbarment cites the very cases which defeat the argument. It concentrates solely on the idea of punishment to the exclusion of

corollary principles of securing justice and rehabilitation for the accused. Thus, even when the facts are viewed in a light most favorable toward sustaining the referee's decision, disbarment is not justified under the facts of this case, particularly when one considers the many mitigating factors in Seldin's favor. Further, should the Court conclude that Counts II and V are not supported by competent, substantial evidence, the recommended penalty, if anything, should be reduced.

ISSUE I ON CROSS-APPEAL

THE SPECIAL REFEREE'S FINDINGS ON COUNTS II AND V ARE NOT SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE APPROPRIATE TO THE ISSUE.

The sine qua non of the special referee's conclusions on Counts II and V is his particular finding that Betty Boneparth played no part in procuring the purchaser for the sale of the Stephenson Estate property.[3] This central finding of fact, however, is not supported by competent, substantial evidence appropriate to the character of this disciplinary proceeding.

It is, of course, settled law that a special referee's findings of fact are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Neely, 502 So.2d 1237, 1238 (Fla. 1987); The Florida Bar v. Marks, 492 So.2d 1327 (Fla. 1986). However, it is equally well established that the correct standard of proof for the revocation of a professional license such as that of a lawyer is that the evidence must be clear and convincing. See, e.g., Ferris v. Turlington, __ So.2d __ (Fla., July 16, 1987) [12 FLW 393]; The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). The evidence produced below by The Florida Bar simply does not measure up to this standard.

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[3] Counts II and V, though separately stated, are based upon the same circumstances. In the former, the special referee found that Betty Boneparth, who soon became Seldin's wife, had played no part in procuring the purchaser of the Stephenson Estate property and thus did not merit a finder's fee from the Estate; in the latter, the Bar alleged that the payment of this finder's fee to Boneparth furthered Seldin's own personal and financial interests, and Seldin's defense thereto was that Boneparth did indeed play a role in procuring the purchaser. [Report of Referee, pp. 2, 4, Appendix A.]

Here, the central inquiry is whether the broker, in this case Betty Boneparth, was the "procuring cause" of the sale. Whether the broker is the procuring cause of a sale is necessarily dependent upon the facts and circumstances of the particular case. See, e.g., Salter v. Knowles, 97 So.2d 138 (Fla. 2d DCA 1957). The courts have held, for example, that where a sale is consummated as a result of the broker's bringing the parties together, there is no necessity for the broker to have made a physical introduction of the purchaser and seller. See, e.g., National Airlines, Inc. v. Oscar E. Dooly Associates, Inc., 160 So.2d 53 (Fla. 3d DCA 1964). In fact, so long as the broker calls a purchaser's attention to the property and starts the negotiation, he or she is entitled to a commission even where the sale is consummated by the owner or even through another broker. See, e.g., Pensacola Finance Company v. Simpson, 82 Fla. 368, 90 So. 381 (1921); Smith Real Estate, Inc. v. Gables Venetian Waterways, Inc., 98 So.2d 372 (Fla. 3d DCA 1957); Alcott v. Wagner & Becker, Inc., 328 So.2d 549 (Fla. 1976).

Similarly, Betty Boneparth's and Keith Seldin's unequivocal testimony established that Boneparth's association with Bob Stephenson originally came about because he had seen an advertisement for her promotional business and needed some specialty advertising. When Boneparth disclosed that she was also a realtor, he, in turn, asked her to handle his real estate listings.

Moreover, subsequent to Stephenson's death, Boneparth had a conversation with the purchaser, Thomas Lee, at which time she informed him that the Stephenson property was available, that Seldin was the attorney for the Estate and that he could provide Lee with the appropriate details. Because of her uniquely personal relationship with Seldin, she did not have to protect herself by continuing an aggressive course of participation in the negotiations for the sale of the property. Nevertheless, it is also undisputed that she

helped set the purchase price for that property. Thus, it is clear that "but for" her efforts, the sale would never have taken place. At the very least, the Bar has not provided competent, substantial evidence to the contrary.

Boneparth's and Seldin's testimony stands uncontradicted and should have been relied upon by the special referee. While it is a general rule that the credibility of witnesses is for the trier of fact to determine, that general principle does not mean that the trier is at liberty to disregard or reject arbitrarily uncontradicted testimony. Florida East Coast Railway v. Michini, 239 So.2d 452 (Fla. 2d DCA 1962). Indeed, where uncontradicted testimony is not illegal, improbable, unreasonable, or contradictory within itself, it should be accepted as proof of the issue. Bergh v. Bergh, 160 So.2d 145 (Fla. 1st DCA 1964). Further, such testimony cannot be disregarded or arbitrarily rejected simply because the witness giving it may have been an interested party. Vilas v. Vilas, 153 Fla. 102, 13 So.2d 807 (1943).

Boneparth's and Seldin's testimony in this regard meets all of these tests. Their testimony establishes quite clearly that Betty Boneparth was, indeed, the "procuring cause" of the sale of the Estate's property to Thomas Lee. The mere fact that fortuitously she may not have been required to expend much energy in the pursuit of this sale should not defeat the merits of her claim. Quite the contrary, the unique facts surrounding her special relationship with Seldin, coupled with the virtually uncontradicted testimony of her having brought Seldin and Lee together, is more than ample proof that she was the procuring cause for this sale.

The Florida Bar, of course, will rejoin that Thomas Lee testified differently. That, however, is not quite the case, for Mr. Lee's recollection of these very same events is, to put it mildly, vague and contradictory. For example, when asked how he learned that Seldin was representing the Estate, he equivocally stated: "I don't know, maybe Keith

told me. I could see him in the parking lot or in the hall." On the other hand, he also admitted that he could also have learned about the property's availability from Betty Boneparth. [R: 29,32]

In State ex rel. The Florida Bar v. Junkin, 89 So.2d 481, 482 (Fla. 1956), this Court held that the Bar's disciplinary action cannot be sustained by evasive and inconclusive testimony. Similarly, in State ex rel. The Florida Bar v. Bass, 106 So.2d 77, 78 (Fla. 1958), this Court stated that the power to discipline or disbar should be exercised only "in a clear case for weighty reasons and on clear proof." Mr. Lee's testimony, which is the Bar's only meaningful proof on this issue, is obviously inadequate to meet this standard. Therefore, the Bar failed to carry its burden of proof in this crucial regard, and the special referee's findings on Counts II and V must necessarily fall.

We are dealing here with a matter of competent, substantial evidence to support a finding of fact in an administrative proceeding with penal ramifications. Accordingly, the following comment is of particular significance to this proceeding:

> [T]he violation of a penal statute is not to be found on loose interpretations and problematic evidence, but the violation must in all its implications be shown by evidence which weighs as "substantially" on a scale suitable for evidence as the penalty does on the scale of penalties.

Bowling v. Department of Insurance, 394 So.2d 165, 172 (Fla. 1st DCA 1981); accord Ferris v. Turlington, supra. The evidence that is cited by the Bar would be problematic even under a preponderance of the evidence standard; it is clearly insufficient under a clear and convincing standard.

This evidentiary deficiency cannot be remedied by an assertion that Boneparth's or Seldin's testimony was not credible to or accepted by the special referee. First of all, there is no indication in the record that the referee so regarded their testimony. Second, as the First District Court of Appeal stated in Bowling:

> We of course defer to the hearing officer on a question of the believability of witnesses. Were there substantial evidence showing the asserted fact which (the respondent's) testimony contradicted, the rejection of (the respondent's) testimony as "not believable" would leave the substantial evidence uncontradicted. But, as we have held, that substantial evidence is missing. A witness who was found to be untruthful gives the trier of facts an additional reason to believe substantial evidence to the contrary, but in our heritage, the accused's unbelievable denial of an essential element in the accusation does not prove the accusation. (e.s.)

394 So.2d at 175.

As the preceding paragraphs have clearly shown, the special referee's findings that Betty Boneparth was not the procuring cause of this sale are based, at best, upon conjectural, speculative, and equivocal testimony. They are wholly unsupported by competent, substantial evidence probative of the issues involved. Compare State ex rel. The Florida Bar v. Junkin, supra; Bowling v. Department of Insurance, supra. Therefore, for all these reasons, the special referee's findings regarding Counts II and V, and the conclusions of law based on those findings, are not supported by competent, substantial evidence and should be stricken.

ISSUE II ON CROSS-APPEAL

THE SPECIAL REFEREE'S RECOMMENDATION THAT SELDIN BE SUSPENDED FROM THE PRACTICE OF LAW FOR ONE YEAR IS TOO HARSH AND SHOULD BE REDUCED TO A PENALTY THAT IS COMMENSURATE WITH THE PROVEN VIOLATIONS.

The special referee's recommendation that Seldin be suspended from the practice of law for a period of one year is predicated upon the referee's conclusion that Seldin was guilty of all five counts. However, in the preceding argument we have seen that the referee's findings regarding Counts II and V, and thus his conclusions of law on those counts, are not supported by competent, substantial evidence. With those two counts stricken, the Court is left with a decidedly less serious set of offenses. Logically, then, the recommended suspension for one year, which is admittedly otherwise appropriate, should be reduced to a period of time more commensurate with Seldin's violations.[4]

Of course, the fact that these two counts have been stricken does not diminish the seriousness of the remaining three charges. They are serious violations, as was recognized below and in these proceedings by Seldin. However, certain factors should be kept in mind by the Court in determining just what sentence is appropriate.

First, Seldin admitted all the facts necessary to the referee's findings on Counts I, III, and IV. Not only did he admit those facts, he candidly acknowledged the seriousness of the violations and expressed his contrition for those acts. Indeed, even the special referee noted Seldin's believable sincerity in admitting his wrongdoing and the seriousness of that wrongdoing and his remorseful and cooperative attitude.

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[4] Seldin does not contest the remaining parts of the special referee's disciplinary recommendations, i.e., that he prove his rehabilitation, that he pay the cost of the proceedings and make restitution to the Stephenson Estate, and that he obtain a passing score on the ethics portion of The Florida Bar exam.

Second, it is important to note that Seldin's diversion of a commission from the realty company to Betty Boneparth [Count I], actually saved the Estate money which would otherwise have been due to the broker, Fidelity Properties, for whom Ms. Boneparth worked. That diversion, Seldin testified without contradiction, occurred because the Estate's personal representative, Kathy Mills, had prevailed upon him to try to save the Estate some money, whereupon he convinced Boneparth to accept a commission or finder's fee from the Estate in a lesser amount than would ordinarily be due the brokerage. Thus, this admitted error in judgment, though quite serious, was motivated not by personal avarice, but by Seldin's desire to benefit the Estate.

Third, while Seldin's improper notarization of two documents [Count II] is a serious matter, its seriousness should not be blown out of all proportion. There is no testimony or evidence whatsoever that any party was harmed by this action. The violation itself is not a malum in se but rather a malum prohibitum. Moreover, his uncontradicted motive for doing so was that the signator on one occasion was pregnant and on the second occasion was ill and thus did not wish to leave her house. Thus, if anything, the facts indicate that Seldin is overly solicitous of his client's wishes. A mistake surely, but not a capital one.

Likewise, Seldin's admitted conflict of interest in representing the Estate at the same time that another client submitted a bill for payment to the Estate [Count IV], while certainly an error in judgment, should not be blown out of proportion. Again, there is no indication that anyone, particularly the Estate, was harmed by this action. Indeed, Seldin's uncontradicted justification for his proposed payment of the claim (which payment was never made) was that it would be of benefit to the Estate. Again, Seldin may have been overly solicitous of his client's welfare, but that does not make his actions

in this regard intrinsically wrong. Further, he candidly admitted the impropriety of his actions.

Finally, there are many mitigating factors which weigh in Seldin's favor. As the special referee recognized, the absence of any adverse conduct prior to or subsequent to the conduct revolving the Stephenson Estate (which occurred four years ago), the many favorable recommendations from civic leaders in his community as to his character and reputation and Seldin's own civic leadership endeavors reveal, at most, that this is anomalous behavior that is not likely ever to be repeated. Those factors, coupled with Seldin's duty and responsibility to care not only for his wife, but also for his two-year old daughter, provide ample justification for reducing the recommended penalty.

Seldin would therefore respectfully submit that, should the Court agree that the referee's findings on Counts II and V are not supported by competent, substantial evidence, it should also refashion Seldin's suspension to one that is better tailored to the charges actually proven. A suspension of no more that ninety (90) days, it is suggested, would be an appropriate sanction given the circumstances. Compare, e.g., The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979).

ISSUE I ON APPEAL

DISBARMENT IS A WHOLLY UNJUSTIFIABLE SANCTION. IF ANYTHING, SELDIN'S SUSPENSION SHOULD BE REDUCED.

In its Initial Brief The Florida Bar vigorously urges that the circumstances of this case warrant the extreme sanction of disbarment. However, even if one accepts the special referee's findings of facts and conclusions regarding each of the five counts charged, the Bar paints a pervasively inaccurate picture of the evidence adduced below, grossly overstates the seriousness of the charges, and completely ignores the many mitigating factors in Seldin's favor. If anything, the recommended suspension for a period of one year is itself too harsh, particularly since the Court should find that the special referee's findings of fact and conclusions regarding Counts II and V are not supported by competent, substantial evidence. [See Seldin's argument on Issue I on Cross-Appeal, pp. 11 - 15]

First of all, this Court should disabuse itself of any notion that Seldin committed a "theft" from the Stephenson Estate. There is absolutely nothing in the special referee's report that expressly or by fair implication so holds.

Second, the Bar's claim that such a "theft" from the Estate occurred is belied by and thoroughly inconsistent with its other claim that the brokerage firm for which Betty Boneparth worked, Fidelity Properties, was "defrauded" by Seldin's payment of a commission or finder's fee to Betty Boneparth. How can it logically be argued that Seldin committed a "theft" from the Estate when the same monies (by the Bar's lights) are due to the broker, Fidelity Properties? The Bar cannot have its cake and eat it too.

More importantly, Seldin, in his argument on Issue I on Cross-Appeal, has demonstrated that the special referee's finding of fact that Betty Boneparth was not the

"procuring cause" of the purchaser for the Estate's property is not supported by competent, substantial evidence appropriate to a clear and convincing evidentiary standard. If the Court subscribes to this view of the evidence (which it should), there is even less cause for the Bar to maintain that a "theft" from the Estate occurred. This is even more the case when one considers the uncontradicted evidence that Boneparth's commission or finder's fee was less than that which would have been due Fidelity. So, did a theft from the Estate occur? Hardly.

It is, of course, true that the Court's scope of review is broader in regard to the special referee's legal conclusions and recommendations than is the case for his findings of fact. See, e.g., The Florida Bar v. Inglis, 471 So.2d 38 (Fla. 1985). Nevertheless, this Court has also held:

> While the power to render the ultimate judgment in these cases is vested in this Court, the findings and recommendations of the constituted officers of The Florida Bar are entitled to receive due consideration and are of persuasive force.

Application of Harper, 84 So.2d 700, 706, 54 A.L.R.2d 1272 (Fla. 1956); The Florida Bar v. Abramson, 199 So.2d 457, 460 (Fla. 1967).

Here, the duly constituted officer of the court responsible for recommending a penalty is the special referee. Accordingly, his recommendation as to a one year suspension of Seldin's license to practice law is "of persuasive force," even and especially if this Court otherwise concludes (contrary to Seldin's argument on cross-appeal) that Counts II and V are supported by competent substantial evidence.

Even though he adjudicated Seldin guilty on all five counts, and expressly noted the Bar's recommendation for disbarment, this special referee still found:

> I feel in view of the Respondent's absence of any adverse conduct prior to or subsequent to the conduct involving the

> Stephenson estate as well as the favorable recommendations from civic leaders in his community and the Respondent's own civic leadership endeavors subsequent to the conduct here complained of, disbarment would be too harsh and punitive. Further considered by this Referee as impressionable was the Respondent's believable sincerity in admitting his wrongdoing, the seriousness of same and his remorseful and cooperative attitude.

The special referee is best situated to determine what is appropriate and just because only he can personally observe the participants, the credibility of the testimony and the events of the trial. His recommendation, if otherwise supported by the evidence, should therefore not lightly be disturbed unless there is some compelling reason to do so.

Here, there is no such reason. Even considered in a light most favorable to the special referee's report, the circumstances here complained of are, at worst, an anomaly in an otherwise spotless career. They are focused upon the administration of one estate, and there is not one iota of evidence that Mr. Seldin's misconduct was caused from a willful, intentional desire to do wrong, but rather resulted from a lack of judgment and from being overly solicitous to his client's wishes.

For example, the uncontradicted evidence establishes that the diversion of a broker's fee from Fidelity to Betty Boneparth was caused not by any venality on Seldin's part but rather upon an effort, requested by the client, to save the Estate money. It is, moreover, undisputed that the broker's fee paid Boneparth ($10,000.00) was much less than that which would otherwise have been due Fidelity ($31,500.00) Further, the special referee has appropriately recommended that restitution be made of this $10,000 fee to the Estate.

It is not necessary to reiterate the actual facts surrounding the five charges made by the Bar, for they are more than adequately recounted in Seldin's Issues I and II on Cross-Appeal. Those arguments are therefore incorporated here by reference. It should

be sufficient to note, however, that the special referee was cognizant of all these facts and, assuming that his findings of fact are otherwise correct, his recommendation as to a one year suspension should be upheld. Compare The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979); The Florida Bar v. Berger, 358 So.2d 14 (Fla. 1978).

As this Court has properly noted, disbarment is an extreme measure 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 is one who should never be at the Bar. The Florida Bar v. Penn, 421 So.2d 497 (Fla. 1982). Even viewing the evidence in this cause in a light most favorable to sustaining the special referee's findings of fact, the conduct here complained of is an isolated anomaly in Seldin's career. Given the esteem in which he is held by the members of his local community, his many civic endeavors and his duty and responsibility to provide for a family, it is respectfully submitted that disbarment is wholly unwarranted under the circumstances of this case. If anything, the one year suspension should be reduced to a suspension, reprimand, or probation that is more commensurate with the misconduct involved.

ISSUE II ON APPEAL

THE SPECIAL REFEREE'S DISCIPLINARY RECOMMENDATION IS BASED UPON COMPETENT, SUBSTANTIAL EVIDENCE

Assuming that the special referee is otherwise correct in his findings of fact regarding Counts II and V, his recommendation that Seldin be suspended from the practice of law for one year is supported by competent, substantial evidence. The Bar's scattershot argument in this regard is nothing more than an improper attempt to reargue the weight of the evidence on appeal.

The Bar erroneously postulates that Hathaway v. The Florida Bar, 184 So.2d 426 (Fla. 1966) absolutely bars the admission into evidence of character letters, where copies of the letters had not been afforded to Bar counsel prior to their submission and the writers themselves were not available for cross-examination. That peculiar decision may, or may not, so hold; however, in the one instance in which it was cited, this Court appeared to sanction the use of that very form of written evidence in a disciplinary proceeding. See The Florida Bar v. Randolph, 238 So.2d 635, 639 (Fla. 1970).

Moreover, it is contrary to a long line of decisions on administrative law generally and disciplinary proceedings specifically. It has long been established that the technical rules of evidence do not apply before administrative tribunals and thus hearsay is generally admissible; however, it cannot support a finding unless it is otherwise admissible over objection or is corroborated by other competent substantial evidence. See, e.g., Spicer v. Metropolitan Dade County, 458 So.2d 792 (Fla. 3rd DCA 1984). This is equally true in a Bar disciplinary proceeding. See, e.g., State ex rel. The Florida Bar v. Dawson, 111 So.2d 427, 431 (Fla. 1959), where this Court rejected a contention that certain testimony was hearsay and should therefore have been excluded from evidence.

Thus, it is well established that in administrative proceedings such as this hearsay evidence may be used for the purpose of supplementing, explaining or bolstering other evidence. See, e.g., Campbell v. Central Florida Zoological Society, 432 So.2d 684 (Fla. 5th DCA 1983); Spicer v. Metropolitan Dade County, supra.

Moreover, the Bar's very own rules expressly identify a disciplinary proceeding such as this as a quasijudicial administrative proceeding. Rules Regulating The Florida Bar, Rule 3-7.5(e)(1), which states: "A disciplinary proceeding is neither civil nor criminal but is a quasijudicial administrative proceeding."

This tribunal's administrative character being well established, it was entirely appropriate for the special referee to receive into evidence over hearsay objection Seldin's character and reputation letters.[5] They do not stand alone; instead, they merely bolster and are consistent with the oral testimony of Seldin's character witnesses who appeared at the hearing. In any event, given that the comments contained in these written testimonials to Seldin's character and reputation within the community are merely cumulative to oral testimony otherwise in the record, error, if any, is clearly harmless, particularly since the Bar did not introduce any evidence to the contrary whatsoever. The Court should therefore not succumb, as Bar counsel would urge, to an invitation to "speculate" as to the weight afforded to these letters.

The Bar goes on to complain as to the referee's finding as to Seldin's "believable sincerity in admitting his wrongdoing." The Bar further urges that Seldin never admitted to the most serious charge for which he was found guilty, i.e., the outright "theft" of $10,000 from his client.

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[5] If anything, the special referee erred in excluding Seldin's other character and reputation letters. [R: 112-113]

Unfortunately, for the Bar's argument, the special referee did not find, and The Florida Bar did not demonstrate by clear and convincing evidence, that a theft of $10,000 from the Estate had occurred. [See argument on Issue I, pp. 19 - 20] When the Court considers this incontrovertible fact along with Seldin's corollary argument that the Bar did not prove by competent, substantial evidence that Betty Boneparth was not the "procuring cause" for the sale of the Estate property [see argument on Issue I on Cross-Appeal, pp. 11 - 15], one can hardly find fault as to Seldin's reluctance to admit the commission of an act which the evidence never demonstrated.

In any event, one need not engage in an orgy of self-flagellation in order for a special referee, or for that matter a hearing officer or a trial judge, to conclude that one is indeed sincere in admitting one's guilt and remorseful for one's conduct. Cf. Bernal v. Department of Professional Regulation, ___So.2d ____ (Fla. 3d DCA December 29, 1987) [13 FLW 23, 24] ("[O]ne's conduct in defending an action against him may not be the subject of an increased penalty if he is nevertheless found guilty of the substantive crime charged.") More to the point, these are matters that are most particularly suited for evaluation by the trier of fact. He is the one who is ordinarily best situated to determine whether Seldin is genuinely contrite because only he can personally observe Seldin in the context of the events of the trial. That is what this special referee has done, and even though he perhaps inaccurately concluded that Seldin was guilty of comitting some acts which the evidence does not otherwise demonstrate, he is still best situated to evaluate Seldin's character and recommend an appropriate punishment therefor. His judgment in this regard should therefore not be disturbed.

ISSUE III ON APPEAL

DISBARMENT IS APPROPRIATE PUNISHMENT ONLY FOR THOSE LAWYERS UNWORTHY TO PRACTICE LAW IN FLORIDA.

The Florida Bar's argument in support of "automatic" disbarment is nothing more than a polemical statement. In fact, it defeats itself, for the Bar's own brief demonstrates all too well that the argument made is inconsistent with a long line of decisions by this Court. Just as importantly, the grand sweep of the Bar's argument is particularly inappropriate for a case such as this. Even when the facts are viewed in a light most favorable toward sustaining the referee's decision, disbarment is not justified. And, when one considers that Counts II and V are not supported by competent, substantial evidence appropriate to the issue, the recommended penalty, if anything, should be reduced.

In State v. Murrell, 74 So.2d 221, 223 (Fla. 1954), this Court specifically recognized that:

> [D]isbarment 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 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 embezzlement, 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 a record free from offenses like that charged against him. (e.s.)

To like effect is this Court's more recent decision in The Florida Bar v. Hirsch, 342 So.2d 970 (1971) (Fla. 1977) where the Court observed:

> Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is

> reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws of the Society of which they are a part. (e.s.)

The Bar's argument completely disregards such holdings. It concentrates solely on the idea of meting out punishment (presumably for the benefit of public relations) to the exclusion of the corollary principles of securing justice and, where appropriate, rehabilitation for the accused. Thus, while the Bar's zeal in tracking down and punishing wrongdoing is always commendable, that zeal can become a dangerous tool where, as here, it is pursued with blinders. As this Court has observed:

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. 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, 238 So.2d 130, 132 (Fla. 1970); accord State v. Murrell, 74 So.2d at 227.

Even if one accepts the premise that Seldin is also guilty of the actions charged in Counts II and V of the complaint, the punishment recommended by the special referee is sufficient. It recommends that Seldin be suspended from the right to practice his chosen profession for a period of one year, that he make restitution to the Estate, and that he be required to pass the ethics portion of The Florida Bar exam. In addition to its obvious economic consequences for Seldin, his wife and daughter, this recommended disciplinary action is more than sufficient to serve as a deterrent to others and to demonstrate to the public at large that such conduct will not be countenanced by the Court.

This recommendation, however, is also tempered by compassion, for the special referee has also recognized Seldin's contribution to church and community and the esteem in which he is held by persons in that community. It reflects also, as the referee put it, his remorse for his admitted wrongdoings and his "believable sincerity" in doing so. Finally, it cannot go unrecognized that neither prior nor subsequent to the actions complained of here (which occurred four years ago) has Seldin ever been the subject of any disciplinary investigation, much less sanctions, by the Bar.

Given all these factors, i.e., the findings of misconduct (assuming they are otherwise supported competent, substantial evidence), Seldin's lack of a prior disciplinary record, and his standing within the local community, Seldin's misconduct simply does not "occupy that rung of the ladder reserved for those most serious breaches of ethical conduct which warrant disbarment." The Florida Bar v. Budish, 421 So.2d 497, 501 (Fla. 1982); compare, e.g., The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978); The Florida Bar v. Neely, supra. When one considers that the special referee's findings of fact on Counts II and V are not supported by competent, substantial evidence, this histrionic request for disbarment becomes even less appropriate. If anything, the sentence recommended by the special referee should be reduced to a penalty that is far more commensurate with the seriousness of the misconduct actually proven below.

REQUEST FOR RELIEF

Appellee/Cross-Appellant, Keith A. Seldin, respectfully requests this Court to find that the special referee's findings of fact and conclusions regarding Counts II and V are not supported by competent, substantial evidence appropriate to the issue. Upon doing so, the Court should reduce the recommended discipline from a one year suspension to a sanction that is far more commensurate with the admittedly serious misconduct actually proven. Seldin would suggest that, at most, the suspension should be for no more than 90 days. Compare The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979).

Should the Court decide that the findings of fact and conclusions of law regarding Count II and V are otherwise supported by competent, substantial evidence, it should ratify the special referee's recommended sanctions.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served by U.S. Mail upon David M. Barnovitz, Esquire, Assistant Staff Counsel, The Florida Bar, 915 Middle River Drive, Suite 602, Ft. Lauderdale, Florida 33304 and John T. Berry, Esquire, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226 on this 19th day of January, 1988

William L. Hyde

WILLIAM L. HYDE

WLH/cjm/Seldin