IN THE SUPREME COURT

OF FLORIDA

CASE NO. 74,157

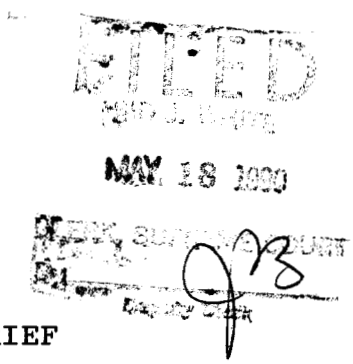
THE FLORIDA BAR,

Complainant,

vs.

JAMES C. BURKE,

Respondent.



RESPONDENT'S INITIAL BRIEF

ON APPEAL FROM REPORT OF REFEREE

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TABLE OF CASES CITED

OTHER AUTHORITIES

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OVERVIEW

Respondent James C. Burke, then a sole practitioner, was elected to the Florida Legislature in 1982 from District 107 comprising Liberty City and North Miami. For a time - which continued through 1984 - he tried to juggle his practice and his legislative duties in Tallahassee simultaneously, and he did so with inadequate accounting assistance or procedures. The result was that two problems arose with the processing of clients' funds. One problem, involving a $6,567.35 trust account payment to Janet and Ivette Alvarez, was addressed by this Court in The Florida Bar v. Burke, 517 So.2d 684 (Fla. 1988), in which the source of the difficulties was pinpointed in the Court's opinion:

> Many of Respondent's problems arose from trying to maintain his law practice by himself while attending to legislative duties, and extremely shabby accounting procedures.

517 So.2d at 685. Noting that Mr. Burke had since taken measures to correct his accounting procedures and had entered a partnership with other lawyers to help cover his practice while he was in the legislature, this Court imposed a 90-day suspension.

In 1987-1988, it emerged that Mr. Burke's division of his energies between his practice and legislative duties and his poor accounting procedures had caused another problem in 1984. This problem involved the distribution of settlement proceeds to estate beneficiaries from a wrongful death suit. Bad accounting and arithmetic caused a $9,919.45 shortage in distributions to the

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beneficiaries out of the $150,000 settlement. The distribution of the $150,000 was set out in writing, reviewed and agreed to by all parties. No one, including Mr. Burke, picked up on the $9,919.45 error. When the figure was particularized for Mr. Burke at a Bar grievance committee hearing in the latter part of 1988, and Mr. Burke realized that there had been an error, he repaid the amount.

A Bar complaint about the $9,919.45 error was filed in 1989, and the referee below recommended eighteen months suspension. Respondent respectfully submits that the proposed sanction is too harsh given the fact of his prior punishment for those same poor accounting procedures during that same time period, and given the fact that he has corrected the procedures and had no further problems with them since that time.

STATEMENT OF THE CASE AND FACTS

a. Procedural history

The Bar filed its Complaint on May 16, 1989. (A. 1-7).[1] The Complaint alleged conversion of the $9,919.45, acknowledged repayment of the amount, and charged violations of Disciplinary Rules 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6) of the Code of Professional Responsibility, Rule 11.02(4) of the Integration Rules of The Florida Bar, and Rule 5-1.1, Rules Regulating Trust

[1]Respondent has prepared all pleadings in an Appendix to his brief, numbered sequentially from A. 1- A. 121 and referenced herein as (A._____). References to the transcript of the hearing before the magistrate appear as (T._____), and to the exhibits entered at the hearing as (Bar Exhibit No.____; Respondent Exhibit No.____). All emphasis is supplied unless otherwise indicated.

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Accounts. (A. 1-7). Numerous exhibits were attached to the Complaint. (A. 8-26). The Bar also propounded a request for admissions. (A.27-51).

This Court thereupon appointed a referee by order dated June 2, 1989. (A.52). Respondent James Burke filed his answer and affirmative defenses on June 12, 1989 (A.53-55), and responded to the Bar's request for admissions on July 20, 1989. (A.56-57).

A hearing was held before the referee on October 24, 1989. (T.1-249). At the request of the referee, memoranda were submitted by the parties thereafter. (A.58-117).

The referee issued his report on January 30, 1990. (A.118-121). The referee found violations of rules as charged, and recommended an eighteen month suspension and that Respondent be required to retake the ethics professional responsibilities portion of the Florida Bar. (A.120). Respondent thereupon initiated the present proceedings for review by this Court. (A.122).

b. <u>The Banks v. Firestone lawsuit, initial settlement, and proposed distribution</u>

In 1984, James Burke was representing the family of Samuel Banks in a wrongful death action against Firestone Tire and Rubber Company. (A.28, 56). The case was tentatively settled for $150,000 in about May of 1984 (T.54, 113-114), but Firestone required Court approval before finalization and payment. (T.143). The $150,000 settlement check was received July 31, 1984. (A.26, T.160).

When the initial settlement was proposed and approved in

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May of 1984, a certain distribution had been determined among the beneficiaries and recipients, who were: (1) Dorothy Banks, mother of the deceased, and the personal representative, (2) James Banks, father of the deceased, (3) two guardianships for DeMarco Lamont Tyler and Duane Randall, illegitimate sons of the deceased by different mothers, (4) Pantry Pride, employer of the deceased who had a workers' compensation lien, (5) the law firm of Spence, Payne, Masington & Grossman, P.A., which had some minor administrative costs, and (6) the attorneys for the Banks, i.e., handling attorney James Burke, and referral attorney Eric Hendon. (T. 36, 67, 69, A.9-10). The agreed distribution amounts are reflected in the settlement approval order. (A.9-10).

c. <u>The changed distribution plan</u>

Subsequently, James Banks, the deceased's father, decided he wanted more money. (T.38-39, 114-116). Respondent Burke called a meeting or meetings among the beneficiaries, during which all agreed to change the distribution. (T. 38-39, 195). As summarized by Phyllis Tyler, mother and guardian of one of the boys, Mr. Burke wrote out the new allocation and everyone got a copy. (T.40, see also 119-121). Ms. Tyler, who has an accounting background, confirmed that everyone knew there was a difference between what they were getting under the new allocation they had agreed upon and what the initial settlement approval order said. (T.40, 50-51).

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d. The new allocation and distribution of the funds

At the time of the adjustment to the settlement allocation and for some years thereafter, James Burke believed that the adjustment was made on a percentage basis with each of the estate beneficiaries (except the father) and Burke taking a reduction in their portions. (T.49, 116, 118, 122-123, 146). The distribution of the funds was made in accordance with the new written allocation everyone had agreed upon. (T. 38-40, 50-51, 116, 117, 119).

The methods of calculating the new allocation and intaking and disbursing the funds, however, were typical of the then problems with Mr. Burke's practice and bookkeeping.

The new allocation was calculated by Mr. Burke, partially over the phone with his secretary:

> Afterwards [i.e., after discussing with the beneficiaries the change in allocation engendered by James Banks' demand for a greater cut] I sat down and basically did some addition, based upon a percentage of what was supposed to be my fee, money from the two boys and Mrs. Banks, and it was supposed to add up.
>
> I did the figuring, most of which was done over the phone between me and my secretary, because we were in the legislative process from April to May.

(T.116).

The sheet of paper Mr. Burke prepared reflecting his figuring was the one shown to the beneficiaries and agreed upon. (T.40, 116, 119-120). Everything was thereafter prepared in accordance with that sheet. (T.116).

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When the $150,000 check was actually received on July 31, 1984, the intake and disbursement of the funds was as irregular and haphazard as the figuring process.

Mr. Burke initially checked into depositing the check into a firm trust account at People's National Bank, but was told it would take at least two weeks to clear. (T.192). He therefore checked with Southeast Bank where he knew an officer and was told he could get one day clearance. (T.193). Burke asked whether he should open a trust account to take in the funds, but Southeast suggested he just use a basically dormant personal account (with a $7.08 balance) since he would just be clearing the funds through to the trust account at the Peoples Bank. (T.160, 193, 203).

The $150,000 was thus deposited in the Southeast account, and $8,000 and $112,251.77 were thereafter transferred to the trust account for a total of approximately $120,251.77. (T.160, 161-162). Mr. Burke's original fee agreement of 40% of the fee would have entitled him to $60,000, but his fee had been reduced to something less than 30% such that the fee was to be only $40,080.55 (T.117). Mr. Burke had promised to pay referral attorney Eric Hendon one-third of the fee, and he made this payment in full. (T.67-69).

One hundred thousand dollars was paid from the trust account into an account established for the Estate of Samuel Banks, and from there paid out by personal representative Dorothy Banks exactly in accordance with the agreed allocation. (T.50, 51, 119). No check was ever written to Mr. Burke from either the Southeast account or the Peoples trust account, so he never had a specific

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record of what he had received in fees. (T.183, 198). As Mr. Burke put it, up until the time the discrepancy showing an overpayment of his fee was pointed out to him following the events outlined below, "I was going along thinking I had done this great thing giving up part of my fee, so that we could have a general agreement." (T.146).

In any event, all of the beneficiaries were satisfied with the distribution and their agreed upon allocation. (T.50-51). Beneficiaries saw both Mr. Burke and Mr. Hendon over time, and Mr. Burke, in fact, continued to help with various matters for the guardianships for the boys and no one expressed any dissatisfaction. (T.40-41, 69, 125).

e. Judge Newbold initiates a file review

Judge Newbold is a Dade County Circuit Court judge, and was the assigned judge on the probate file for the Estate of Samuel Banks which had been opened in 1982. (T.52-53). From 1984 through 1987, there was no activity relative to the Banks Estate file, and Judge Newbold appointed Dade County probate attorney James Sloto as an administrator ad litem just to check the status of the file. (T.80, 83-84; Bar Exhibit 2, Dade County Circuit Court File for Banks Estate, Order dated April 17, 1987). Mr. Sloto filed his acceptance of the appointment on June 15, 1987. (Bar Exhibit 2, Dade County Circuit Court File for Banks Estate, Oath of Administrator Ad Litem, dated June 15, 1987).

The administrator filed an interim report in June of 1987

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which merely chronicled the events in the estate through that time. (Bar Exhibit 2, Dade County Circuit Court file for Banks Estate, Interim Report). Later in that same month, the administrator filed a Supplemental Report, which simply noted that funds had not been reserved in the Estate to pay administrative expenses, and recommended that the beneficiaries be charged pro rata for a fee for the Administrator Ad Litem. (Bar Exhibit 2, Dade County Circuit Court File for Banks Estate, Supplemental Report of Administrator Ad Litem, dated June 23, 1987).

Sloto also at some point reviewed the guardianship files and saw that the guardianships had received lesser amounts from the settlement proceeds than those set out in the order approving the settlement in the Firestone case. (T.83). Mr. Burke and the estate beneficiaries, including the boys' guardians, already knew that fact because they had all agreed to the reductions in the summer of 1984. (See section d, supra). An agreed order was entered, though, that Mr. Burke would file an explanation with the probate court of the actual distribution and why it varied from the approved settlement. (Bar Exhibit 2, Dade County Circuit Court File for Banks Estate, Agreed Order, dated August 3, 1987).

Mr. Burke was to file his report within 30 days of the August 3, 1987 order, but the Legislature was in extraordinary sessions that year almost through December involving, inter alia, the issue of the sales tax in Florida (Mr. Burke was Chairman of the Sales Tax Subcommittee), so Mr. Burke called the Judge to notify him of his legislative commitments. (T.102, 130, 131; Bar

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Exhibit 2, Dade County Circuit Court File on Banks Estate, Response dated January 25, 1988). He also asked the administrator for a time extension. (T.102). In December of 1987, the Administrator filed a petition for order to show cause why Mr. Burke should not be held in contempt, and set it for hearing in January of 1988. (Bar Exhibit 2, Dade County Circuit Court File for Banks Estate, Petition and Notice of Hearing, dated December 11, 1987).

Mr. Burke filed his response on January 25, 1988, and Judge Newbold determined Mr. Burke should not be held in contempt. (T.87, 57, 65, 110-111). The Administrator presented Judge Newbold with an order that he asked be entered - and which was entered - which recited that:

> [T]hrough the pleadings, and oral arguments made to the Court by James Burke, Esq., a satisfactory explanation has been given of the distribution of the settlement proceeds in Dade Circuit Case No. 84-04140.

(T.60; Bar Exhibit 2, Dade County Circuit Court File for Banks Estate, Agreed order dated February 2, 1988). There the matter rested as far as the probate court and Administrator were concerned at the time.

f. The Bar proceedings, Mr. Burke's awareness of the error, and repayment of the funds

The Bar thereafter scheduled a hearing before a grievance committee initially for July of 1988, but rescheduled to October of 1988. Carlos Ruga, a CPA who does audit work for the Bar, was asked to look into Mr. Burke's bank accounts for August and

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September of 1984 regarding the receipts and disbursements for the Samuel Banks Estate. (T.157-159). Mr. Ruga prepared a written audit report addressed to Assistant Staff Counsel Louis Thaler on May 31, 1988. (A.46-50).

Mr. Burke saw the report for the first time at the grievance committee hearing in October of 1988. (T.146, 194, 201). Mr. Burke then first discovered there had been the error of approximately $9,919, i.e. at the time of the grievance committee hearing before the Bar when "Ruga presented the numbers." (T.194). Until that time, Burke thought he had received less than his $40,000 fee minus the $13,000 referral fee - believing that his fee as well as the beneficiaries' distributions had been cut. (T.146, 194, 201). He testified that he never intended to take an additional dime from the clients. (T.194).

After Mr. Burke learned of the $9,919 error in his favor, he paid the money back into the guardianships in December of 1988. (T.61-62, 126).

g. James Burke as a member of the Florida Bar

Mr. Burke was admitted to the Florida Bar in 1973. (T.189). The same year he became a member of the Dade County Bar Association, and later served on its Legislative Committee. (T.189). He also served as Chairman of its Constitutional Revision Committee in 1980. (T.189). Mr. Burke's first four years of practice were with Legal Services, and then he spent one and a half years as a legislative aide. (T. 199).

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With the Florida Bar, Mr. Burke served on a Grievance Committee for Dade County in 1981 to 1983. (T.189). He also served on the Florida Bar Continuing Legal Education Committee from 1982 to 1984, and as a member of the Judiciary Committee. (T.190). Mr. Burke is an active member of the Black Lawyers' Association. (T.70).

Mr. Burke was elected to the legislature in 1982 from District 107, which is the Liberty City-North Miami area. (T.190). As a freshman representative, he was appointed to chair the Subcommittee on Ethics in Elections. (T.190). He has also served on the Judiciary Committee, and as Chairman of the Subcommittee on Court Systems. (T.190). In 1985, he was nominated as Speaker Pro-Tem of the House for the years 1986 to 1988. (T.191). He has also served as Chairman of the Claims Committee, and on the Appropriations Subcommittee that handles the criminal justice system. (T.191).

As summed up by this Court in its decision in the Alvarez case:

> Mr. Burke has made many contributions to his community and the State.

517 So.2d at 685.

h. <u>The problems with Mr. Burke's accounting procedures in 1984</u>

Mr. Burke recognized that after the Alvarez problem came up in 1984, "it became apparent that part of my problem was trying to be in the legislature and also practicing law". (T.196). Also,

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Burke did not have an accountant or bookkeeper doing any work on his books during that time period. (T.186). During the period reviewed by Mr. Ruga - i.e., August and September of 1984, Burke did not have someone specifically responsible for reconciling his bank account and his check book. (T.195).

> My secretary or I would try to do it when we could. There was nobody that was responsible for it, no.

(T.195). Bank reconciliations were not done on a regular basis. (T.195).

The Referee at the hearing specifically asked about the relationship between the accounting procedures in the Alvarez and the Banks matters:

> THE REFEREE: What was the status of the bookkeeping going on or whatever arrangements were happening in your office at the time that this payment [in Banks] was made with regard to the grievance hearing on Alvarez [held August 7, 1984]?
>
> THE WITNESS [Mr. Burke]: Basically, the same process that we have here.
>
> Somewhere between me and Joyce, my secretary, things would kind of get done.

(T.210-211).

Again, as aptly summarized by this Court in Alvarez:

> Many of Respondent's problems arose from trying to maintain his law practice by himself while attending to legislative duties, and extremely shabby accounting procedures.

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517 So.2d at 685.

i. Correction of the problems

Having realized that his problems were engendered in part by competing demands of his sole practitioner law firm and his legislative duties, Mr. Burke went into a partnership. (T.186). His partners started doing the accounting in 1985-1986. (T.186). Mr. Burke also employed a CPA, Ron Tompkins & Co., and has two administrative attorneys in the partnership - a senior partner and another lawyer - who tie in all his accounts. (T.186).

Since 1984, Mr. Burke has maintained and handled trust accounts properly, kept law office accounts separately, and has had no further problems with his accounting. (T.209).

Mr. Burke's efforts to correct the problems with his practice and accounting procedures which existed through 1984 were also recognized by this Court in its 1988 opinion in Alvarez:

> Respondent has tried to remedy these conditions by having an accountant monitor his accounting procedures and his books and by forming a partnership so that other lawyers can handle his cases for him while he is attending legislative sessions.

517 So.2d at 685.

j. Mr. Burke's commentary on his role in causing the accounting problems

Mr. Burke was forthcoming in his testimony, which recognized both his responsibilities and his mistakes. He

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acknowledged that in 1984 his accounting system was "messed up", and candidly stated that in trying to work things through his secretary while he was away at the Legislature: "What I did a lot was just screw it up". (T.127, 209). He said that disbursement and monitoring of settlement funds were his responsibility, and stated:

> I think I owe it to myself as a lawyer and to my clients to pay closer attention. I feel that duty is owed.

(T.199). He forthrightly stated that he felt the duty was breached in the Banks matter. (T.199).

k. Evidence indicating mistake rather than intentional act

Again, Mr. Burke testified that he was operating under the belief that he had done a good thing by cutting his fee to help reach a general agreement on the re-allocation of the Banks settlement funds, up until the time he saw Ruga's figures in October of 1988:

> [T]hat's basically when it became clear to me that not only didn't I cut it [the fee], but more went in than should have.

(T.148).

Back in the summer of 1984, however, the new allocation had been fully disclosed in writing to all the appropriate recipients of settlement funds. (T.45, 50-51). As stated by guardian Phyllis Tyler, who, again, had an accounting background:

> We [the settlement proceeds participants] knew

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> exactly how much we were getting reduced, because it was all in writing.

(T.50-51).

Far from terminating his contacts and relationship with the Banks clients (as an intentional wrongdoer might be expected to), Mr. Burke in fact continued to do things for the guardianships for a period of some years, and without further remuneration:

> I represented [the guardians] Phyllis Tyler and Doris Randall in going to the Court and having hearings to pay money out.
>
> For Mrs. Randall, I went to a hearing once to get money for educational purposes, I believe, or to purchase property. Those were orders that are in the file.
>
> Also, with Mrs. Tyler, we actually went to court several times. One time was to get money for her son to go to private school, and another time was to get money to buy computer equipment for her son.
>
> A third time was to go in to change where the money was, because she had gotten an investment account.
>
> A fourth time, we talked about -- and I went out to South Dade to visit with somebody once that she said she wanted to buy property from and discussed it with her.
>
> Also, we did an inventory somewhere along the line.

(T.125).

The probate judge and administrator ad litem both acknowledged that the reductions in distributions from the original amounts in the approved settlement, e.g. to the guardianship accounts, were fully made a matter of public record. (T.64-65, 96).

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Mr. Burke was thinking the difference between the initial proposed settlement distribution and the actual distribution was simply the agreed upon re-allocation, and so reported to the probate judge, who said:

> Mr. Burke didn't make any bones about the fact that it was short. He didn't lie and say the money was there. He came out and said -- there is a written response in the estate file saying that the money wasn't there and a reason for it.

(T.61).

1. Report of Referee

The Referee below entered various findings of fact, most of which merely chronicle the sequence of the above events. (A.118-120). Respondent takes no exception to the majority of these findings, and comments only on Findings 10, 15, 16, and 18.

Finding 10 recites that the Firestone check for $150,000 was issued on May 25, 1984. That is the date on the check, but it is undisputed that the check was not delivered to Mr. Burke for disbursement until July 31, 1984. (T.160, A.47).

Findings 15 and 16 state:

> 15. That upon the completion of the distribution, the remaining funds left in the account were to be those attorney fees taken by Respondent.
>
> 16. That said amount remaining in this account was $50,000.

These recitals do not accurately reflect the actual

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activity in the bank accounts as presented by the Bar's own auditor. (A.46-50). As reflected in the audit, $150,000 went into the Southeast Account 081192874 on August 2, 1987. Then, $8,000 was transferred to the People's National Bank Trust Account No. 32109173201 on August 7, 1984, and $112,251.77 on August 22, 1984, for a total of $120,251.77. (A.48). That left the sum of $29,748.23 out of the $150,000 in the Southeast account. From the People's National trust account, $100,000 was written to the Estate of Samuel Banks on August 24, 1984, and $13,616.82 was written as the agreed one-third referral fee to referral attorney Eric Hendon on August 24, 1984. (A.48). That left $6,634.95 of the $150,000 in the People's National trust account and $29,748.23 in the Southeast account for a total of $36,383.18.

The point is that there was never a flat sum of $50,000 remaining in one account - as stated in Finding 16. Unquestionably, the odd sums transferred and disbursed were a source of confusion, and equally unquestionably Mr. Burke's own poor accounting practices were responsible for the confusion. All that is being underscored here is that the figures showing actual amounts transferred and disbursed show how mistakes arose, while a lump sum of $50,000 sitting in one would have been more readily apparent as a divergence from the $40,080.55 attorneys' fee originally approved in the settlement.

As to Finding 18, Respondent notes that while the Referee's findings track most of the Bar's complaint allegations sequentially and verbatim, the complaint alleged "That Respondent

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converted $9,919.94 in excess of Court awarded attorney fees"; Referee Finding 18 says only "That Respondent appropriated $9,919.44 in excess of Court awarded fees."

Finally, Respondent notes that no factual findings were made by the Referee that Respondent acted intentionally or deliberately or that Respondent's clients were harmed.

SUMMARY OF ARGUMENT

The evidence did not show - nor did the Referee make any finding - that there was intentional or knowing misconduct on the part of James Burke. Rather, he was a man operating on too many fronts with too little backup, with the resultant shambles of an accounting system on which this Court has previously remarked. Mr. Burke's problems in that regard spanned a general time period ending with 1984.

After 1984, Mr. Burke took measures to correct the problems in his practice and accounting procedures and no further difficulties arose thereafter. He was also punished for the error of his pre-1985 ways by a 3-month suspension imposed in 1988.

In this case it has emerged that there was another mistake with client funds in the 1984 period, which was undiscovered until 1988 and which Mr. Burke was not aware of until that time. After he knew of it, he made restitution for the mistake.

Under the Florida Standards for Imposing Lawyer Sanctions and the circumstances of this case, it is respectfully submitted that the Referee's recommendation of an 18-month suspension is

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unwarranted, and that the interests of the public and the Bar will be served by reprimand and imposition of supervision at Mr. Burke's expense for such time as may be deemed appropriate.

ARGUMENT

Based on the evidence presented and the findings made, there is no basis for the legal conclusions regarding violations of DR 1-102. Respondent has acknowledged the infractions of the trust accounting rules, Rule 11.02(4) of the Integration Rules and Rule 5-1.1 of the Code of Professional Responsibility. Respondent respectfully submits that the Referee's recommended sanction of an 18 month suspension is excessive and beyond stated guidelines and purposes for lawyer sanctions.

a. The issue

In the early years of his service in the Legislature, sole practitioner James Burke was trying to do too much without enough help. He tried with his secretary to manage all his duties and obligations, but his accounting procedures fell short resulting in two errors with client funds - Alvarez and Banks. Both arose in the same general time period - 1984 - and both from the same set of circumstances, viz, competing time demands and inadequate accounting procedures.

Respondent was punished for, inter alia, his 1984 bad accounting practices and failure to properly maintain trust accounts by a 90-day suspension in 1988 as ordered by this Court in

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The Florida Bar v. Burke, 517 So.2d 684 (Fla. 1988). It then turned out that the 1984 bad accounting practices and failure to properly maintain trust accounts had caused another problem during that year. The question is, given the initial punishment, and the circumstances of the Banks error, what further punishment or discipline is appropriate.

b. The findings and evidence

Respondent acknowledges that findings of the referee will be deferred to unless they have no support in the evidence or are clearly erroneous, see, e.g., The Florida Bar v. Johnson, 526 So.2d 53 (Fla. 1988), and Respondent had only de minimus exceptions to the findings as set out above. What is noteworthy for purposes of these proceedings is findings that were not made.

There was no finding or evidence that Mr. Burke's distribution error was done with "intent" or "knowledge" as defined either in the Florida Standards for Imposing Lawyer Sanctions (which were provided to the Referee by this Court) or elsewhere. Neither was there a finding or any evidence that the Banks clients were dissatisfied or unhappy with Mr. Burke's representation or in any way deceived by him. Nor was there a finding or any evidence that Mr. Burke is a man or lawyer of bad character or with a reputation for dishonesty.

On the contrary, the evidence affirmatively showed James Burke to be a man of considerable dedication to the Bar and to his community. Since beginning his legal career with four years of

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work for Legal Services, Mr. Burke has continually dedicated himself to endeavors of public service. He has been an active member of the Legislature and an active participant in Bar service.

He unquestionably engendered problems by spreading himself too thin in his early years of service in the Legislature, but since 1984 he has taken steps to correct those problems and has corrected them. This Court recited his remedial efforts at 517 So.2d 684, 685. Mr. Burke testified without contradiction or contrary evidence from the Bar, that his corrective efforts -- including entering into a partnership with partners supervising the accounting, and hiring a Certified Public Accountant - have been successful and he has had no further problems since 1984.

The mistake in the Banks calculations and distribution in the summer of 1984 was unfortunate, but not wholly surprising arising, as it did, during a period in which, this Court has noted: "The entire accounting procedures were a shambles." 517 So.2d 684, 685. The direct testimony and only reasonable inference from the evidence was that the mistake was inadvertent. Mr. Burke was entirely open and above board in showing all of the settlement participants the adjusted figures for distribution of the settlement proceeds, including Ms. Tyler who had an accounting background. He also filed as a matter of public record the reduced amounts paid to the guardianships. Under the circumstances, certainly no fraud or concealment or misrepresentation could be attributed to Mr. Burke.

It is also clear that once Mr. Banks became aware that

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the discrepancy being identified was not the difference between the initial approved settlement distribution and the readjusted distribution everyone had agreed upon, but rather an actual error in calculations which resulted in an overpayment to him, he repaid the money.

In short, the findings and evidence show only a mistake of long ago, rectified when learned of, and arising from circumstances also long since corrected in time-proven manner.

c. The standards

The Florida Standards for Imposing Lawyer Sanctions, published, e.g., in the Florida Bar Journal/September 1989, set guidelines for discipline of Florida attorneys. The purposes for lawyer discipline proceedings and for the standards are set out:

> 1.1 Purpose of Lawyer Discipline Proceedings
>
> The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly.
>
> 1.3 Purpose of These Standards
>
> * * *
>
> The Standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct.
>
> They are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanctions in an individu-

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> al case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions.

The standards then set general factors to be considered in imposition of sanctions:

> In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:
>
> (a) the duty violated;
>
> (b) the lawyer's mental state;
>
> (c) the potential or actual injury caused by the lawyer's misconduct; and
>
> (d) the existence of aggravating or mitigating factors.

Specific guidelines are then also provided for listed areas of misconduct. Those pertinent here based on the referee's recommendations are failure to preserve clients' property (Section 4.1), and failure to maintain personal integrity (Section 5.1). Given the lack of findings or evidence of intentional or knowing misconduct, the guidelines set out in the Standards indicate that the following of the choices of sanctions most closely fit the conduct:

> 4.14 Private reprimand is appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client or where there is a technical violation of trust account rules or where there is an unintentional mishandling of client property.

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* * *

> 5.14 Private reprimand is appropriate when a lawyer engages in any other conduct that reflects adversely on the lawyer's fitness to practice law.[2]

Respondent respectfully submits that sanctions in accordance with the above guidelines are appropriate. The poor accounting procedures were discovered and corrected as were the two mistakes they engendered. Mr. Burke has been punished for the problems he had during the Banks error period by a three month suspension. The purposes of lawyer sanctions have been served; deterrence and rectification have occurred.

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[2]This should be contrasted with the guideline suggesting public reprimand for the 5.1 Failure to Maintain Personal Integrity category:

> 5.13 Public reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law.

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CONCLUSION

Based on the foregoing facts and authorities, Respondent respectfully submits that the Referee's recommendation should be disregarded and that this Court should impose the sanction of reprimand as set forth in the Florida Standards for Imposing Lawyer Sanctions. As indicated to the Referee below, Respondent is also willing to submit to a continuing program of Bar supervision of his accounts at his expense for such time as may be deemed appropriate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 17th day of May, 1990, to: WARREN JAY STAMM, ESQUIRE, Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131; and JOHN T. BERRY, ESQUIRE, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

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