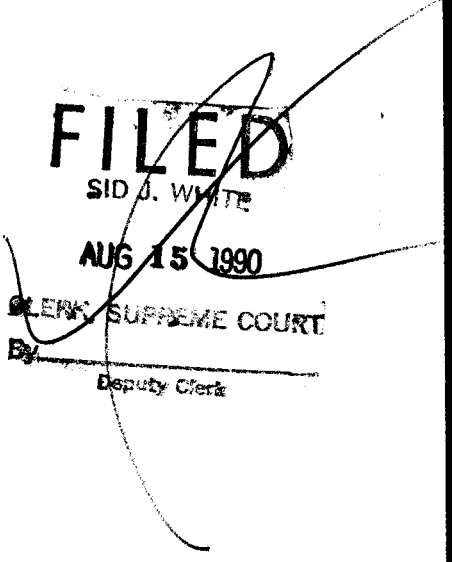

IN THE SUPREME COURT

OF FLORIDA

CASE NO. 74,157

THE FLORIDA BAR,

Complainant,

vs.

JAMES C. BURKE,

Respondent.

RESPONDENT'S REPLY BRIEF

ON APPEAL FROM REPORT OF REFEREE

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TABLE OF CASES CITED

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Preliminary Statement

The Bar is taking the position that the Referee's recommendation of an eighteen month suspension is insufficient and that Respondent should be disbarred. Thus, the Bar cross appealed. However, the Bar has filed just one brief, although it is labelled as both "answer brief to Respondent's petition to review" and "initial brief of the Florida Bar". Since the Bar presents its arguments all as one brief, Respondent replies accordingly.

Reply to Statement of the Facts

Respondent takes exception to the Bar's statement of the facts which contains both misleading and unsupported assertions. Respondent makes specific reply to those assertions here.

Firstly, on page four of its brief, the Bar states that: "Respondent also admitted that his actions/inactions were not in compliance with the court order of distribution." The Bar's reference here is most unfair since it was specifically agreed that this case by the Bar against James Burke does not have anything to do with compliance or non-compliance with the distribution order in the Banks estate case. (T.11-23). As background, when the Firestone settlement was in the offing in the Banks case, there was the customary need to allot the expected settlement proceeds among the estate beneficiaries with a court order memorializing the allotment. All of the beneficiaries agreed upon the allotment initially -- which, it should be noted, included a reduction in Mr. Burke's contractually agreed upon attorney's fees from forty

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percent to less than thirty percent -- and an order was entered upon the allotment. (A.9-10; T.117). After entry of the allotment order, one of the beneficiaries -- the deceased's father -- demanded an increased share. (T.38-39, 114-116). Given this development, Mr. Burke called a meeting with all of the beneficiaries and all determined that they were willing to accede to the father's demands and reduce their shares in order to get the settlement in hand. (T.38-39, 195). Thus, an agreement was reached by all concerned and the settlement proceeds were -- when received -- given out in exactly the amounts agreed upon by all the beneficiaries. (T.38-40, 50-51, 116, 117, 119). There was no disregard of a court order to anyone's detriment -- as the Bar now seeks to imply. More importantly, no one ever took Mr. Burke to task for failing to memorialize the revised allotment in a second court order, including the Bar. No proceedings of any kind exist in which that issue has been raised, and, as stated, the Bar specifically agreed that it would go forward only on the allegations of its complaint, which does not raise that issue. (T.22, A.5). Respondent accordingly respectfully takes exception to the Bar's unsporting and unjustified attempt to blacken the picture against him in a matter of such grave importance to Respondent.

The next statement by the Bar with which Respondent takes issue is also found at page 4 of the Bar's brief. The Bar states: "Due to Respondent's failure to close out the estate, the probate court appointed attorney James Sloto to act as Administrator Ad Litem for the estate and Guardian Ad Litem for the guardianships."

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(Emphasis added). This statement -- notably and understandably -- has no record citation because it simply is not true. The evidence, on the contrary, showed that Mr. Sloto was appointed as a matter of routine because there had been no activity relative to the Banks estate file for some time, and Sloto was merely directed to engage in a status check. (T.80, 83-84; Bar Exhibit 2, Dade County Circuit Court file for Banks estate, Order dated April 17, 1987). This reference by the Bar is clearly just another unwarranted attempt to make the Respondent sound bad.

The next unsubstantiated statement by the Bar, at page 5 of its brief, also appears without record support: "Multiple requests were made of Mr. Burke to explain the discrepancies, but this was to no avail." As set out in Respondent's initial brief, the evidence shows a very different picture, i.e., that there was just one agreed order entered in August of 1987 providing that Mr. Burke would file an explanation with the court about the difference between the distribution originally outlined and the distribution actually made. (Bar Exhibit 2, Dade County Circuit Court File for Banks Estate, Agreed Order, dated August 3, 1987). (In Mr. Burke's mind, of course, this was to have included the simple explanation about the universally agreed upon reallotment engendered by the father's demands for a greater share, as well as some checking he needed to do about a comp lien that had been filed in the case for which he needed to retrieve his records of some three years previous). (T.130-131). The report was not forthcoming from Mr. Burke as early as expected because -- as explained to both the

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administrator and the Court by Mr. Burke -- the Legislature went into extraordinary session that year continuing almost through December. (T.102, 130, 131). The extended session was engendered, for one reason, by the issue of a then potential sales tax in Florida. Mr. Burke was Chairman of the Sales Tax Subcommittee. The Administrator filed a petition for order to show cause in December of 1987, and the matter was resolved to the probate court's then satisfaction in early February of 1988. (A.15-16; Bar Exhibit 2, Dade County Circuit Court File for Banks Estate, Agreed Order dated February 2, 1988). There is simply no record evidence of multiple unavailing requests made of Mr. Burke to explain the discrepancies, as the Bar falsely recites.

The Bar was clearly unhappy with an order which the Administrator himself had presented to probate Judge Newbold for entry, which was in fact entered, stating: "Through the pleadings, and oral arguments made to the Court by James Burke, Esquire, 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). As the order is detrimental to the Bar's position, the Bar makes the following twisted and out of context recital: "In retrospect, the Honorable Judge Edmund Newbold testified that this order should not have been entered in that Respondent failed to comply with the order to show cause." (Bar Brief at page 5). In fact, the referenced testimony from the judge had to do with a different question which arose subsequent to

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entry of the order and which the Bar also specifically agreed would not be made an issue in these proceedings. (T.11-23, 60).

The Bar next recites at page 5 of its brief that: "Respondent still has not accounted for the whereabouts of the $10,000." The Bar does not identify what it means by "the $10,000". If the Bar is referring to the $9,919.45, it knows perfectly well that Mr. Burke has repaid that amount, as acknowledged by the Bar on page 15 of its brief, not to mention in the Bar's own initial complaint in this matter. (A.5).

The Bar says: "This matter was brought to the attention of the Florida Bar by Judge Newbold." (The Bar's Brief at page 5). No record cite appears for this statement, no evidence in the record supports it. If the statement is true, it is the first the Respondent has heard of it and it represents a most unjust tactic by the Bar. If Judge Newbold was to be a witness on this point against Mr. Burke, he was entitled to know of it and to respond at the fact finder level. Here, the Bar makes the assertion with the direct implication that Judge Newbold passed unfavorable judgment on Mr. Burke's conduct when Mr. Burke has been given no knowledge of that fact -- if fact it is -- until this time.

Finally, Respondent takes exception to the following inaccurate statement at page 15 of the Bar's brief: "It should be noted at this point that it was not until December 7, 1988 that Respondent paid back the $9,919.45 to the respective guardianship accounts <u>despite the fact that he was aware of the discrepancy as early as August, 1987</u>." This is a wholly misleading statement by

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the Bar. As the sequence of events clearly shows -- and there is no evidence to the contrary -- the "discrepancy" that Mr. Burke was aware of in August of 1987 was the difference between the initial allotment of settlement funds and the universally agreed upon change in that allotment. (T.146, 194, 201). It is uncontradicted that at that time and up through and including October of 1988, Mr. Burke believed that he too -- like the other beneficiaries -- had taken a lesser share of funds. He testified without contradiction, and without contrary finding by the Referee, that it was not until the Bar's auditor presented his report -- which was done for the first time at the Bar hearing in the end of October, 1988 -- that he realized that far from receiving a lesser share, an excess amount of funds had ended up remaining in his account. (T.146, 194, 201). Upon learning about the excess, he repaid it less than two months later in December of 1988. (A.5, T.61-62, 126).

Respondent accepts the Bar's general interest in policing its members, and accepts responsibility for the errors which arose from his unsuccessful attempts simultaneously to attend properly to his legislative duties and law practice simultaneously. However, the Bar's zeal has no reason to burn beyond the actual facts surrounding its members' activities. Respondent is dismayed by the Bar's inexplicable attempts to distort the facts against him in these proceedings. Respondent very respectfully requests that all unsupported statements and all misstatements be disregarded, and that he be judged on the facts as they stand.

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ARGUMENT

The cases cited by The Florida Bar in support of its recommendation of disbarment are distinguishable, and should not be followed in this case.

Initially, the Bar relies on cases which involve knowing and/or intentional misconduct although it remains undisputed that there has been no finding that Mr. Burke's distribution error was done with intent or knowledge as defined either in the Florida Standards for Imposing Lawyer Sanctions or elsewhere. In The Florida Bar v. Newhouse, 520 So.2d 25 (Fla. 1988), the respondent, three years after filing the complaint on behalf of an injured minor, attempted to amend it to add the minor's parents as plaintiffs and to seek recovery for their derivative claims. The respondent's motion was denied as being too late. Id. at 26. Subsequently, the case was settled and the court entered an order approving the settlement and directed that, after deducting amounts for the respondent's fee, medical bills and costs, the balance be placed in a guardianship account. Id. Subsequent orders specifically rejected respondent's attempt to claim part of the settlement for the parents. Id. 26-27. Nevertheless, in direct violation of the court orders, the respondent transferred a portion of the net settlement proceeds directly to the parents and a portion to himself; he also retained an amount that had been designated for payment of outstanding medical bills. Id. at 27. In light of these facts, the referee found that the respondent had knowingly converted a client's property and that therefore disbarment was

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appropriate. The referee also found that respondent's previous record, dishonest motive, pattern of misconduct, deceptive practices, failure to acknowledge wrongdoing and length of experience were aggravating factors. Id. Contrary to the assertion of the Bar, these are not the same factual circumstances as those in this case. Here, when it became necessary to distribute the settlement funds in a manner different from that reflected in the settlement order, it was done in accordance with a new written allocation everyone agreed upon. (T.38-40, 50-51, 116, 117, 119). Furthermore, the probate judge and administrator ad litem both acknowledged that the reductions in distributions from the original amounts in the approved settlement were fully made a matter of public record. (T.64-65, 96).

Similarly, in The Florida Bar v. Golub, 550 So.2d 455 (Fla. 1989), this Court disbarred the respondent because he stole over $23,000,000 over an extended period of time from a "client who had bestowed his trust upon the respondent to see that the client's beneficiaries were cared for after his death". Id. at 456. The Court noted that not only had the respondent betrayed the client's trust, he had also failed to repay the monies he removed from the estate. Id. Once again, unlike the facts in Golub, Respondent herein was expressly authorized to remove a portion of the settlement funds as his fee. (T.36, 67, 69, A.9-10). Unfortunately, due to the then existing accounting and bookkeeping problems, there was a then undetected $9,919.45 error in his favor. The evidence shows that Mr. Burke first discovered this error at the

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time of the grievance committee hearing in October of 1988 when Mr. Ruga, the auditor for the Bar, presented the numbers. (T.146, 194, 201). After Mr. Burke learned of the error he paid the money back into the guardianships. (T.61-62, 126). Clearly, the actions of Mr. Burke, unlike those of Mr. Golub, cannot be -- and were not by the Referee -- characterized as stealing. On the contrary, the Referee specifically did not use the term 'conversion' as the Bar had in its complaint. (Compare A.5 with A.120).

In Golub, this Court held that the extent and weight of mitigating circumstances depends upon the seriousness of the misconduct. Golub, 550 So.2d at 456. In applying that balancing test to the facts before it, this Court determined that Mr. Golub's alcoholism and cooperation in the proceedings did not outweigh the fact that he stole substantial sums of money over an extended period of time because "in the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the list." Id., citing The Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla. 1986). There is simply no analogy between the facts of Golub and this case. The direct testimony and only reasonable inference from the evidence was that Mr. Burke's mistake was inadvertent.

Equally inapposite are the facts of The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1980). In Breed, the referee recommended disbarment for an attorney who had initiated a check-kiting scheme and then tried to cover the kite with funds from an escrow account. The referee recommended disbarment although no client was

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hurt by the scheme because he believed that "[t]he willful misappropriation of client funds should be the Bar's equivalent of a capital offense." Id. at 784 (emphasis added). Although this Court rejected the referee's recommendation, it gave notice to the legal profession that henceforth it would not be reluctant to disbar an attorney for this type of offense even though no client is injured. Id. (emphasis added). Mr. Burke, however, did not commit "this type of offense". Unlike Mr. Breed, Mr. Burke did not willfully misappropriate client's funds. There is no evidence of any knowledge, intent, fraud, concealment or misrepresentation on the part of Mr. Burke. The evidence shows only a mistake, rectified upon discovery and arising from circumstances long since corrected. Disbarment is not the appropriate sanction for this type of conduct. See The Florida Standards for Imposing Lawyer Sanctions, The Florida Bar Journal, September 1989, § 4.14 and 5.14.

The rest of the cases cited by the Bar are also off-point. In The Florida Bar v. Rhodes, 355 So.2d 774 (Fla. 1978), the respondent withdrew over $19,000.00 from an estate claiming that the funds were withdrawn in the nature of a loan. The referee found that the evidence disclosed no intent on the part of the respondent to repay the funds at the time of withdrawal and based on this concluded that the funds were withdrawn for the personal use and benefit of the respondent. Id. at 775. ($2,500.00 was deposited in the account of respondent's motorcycle business). The referee recommended disbarment and this Court approved the

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recommendation. Id. In contrast, no check was ever written to Mr. Burke from either the Southeast account or the Peoples trust account, so he never even had a specific record of what he had received in fees. (T.183, 198). Not being aware that there are extra funds in an account is very different from consciously withdrawing client's funds from an estate account for the attorney's personal use and benefit.

Although The Florida Bar describes The Florida Bar v. Casler as just involving misappropriation of funds, commingling of assets and failure to comply with various trust accounting procedures, in fact it involved much more than that. Mr. Casler was charged with and pled guilty to conduct involving fraud, dishonesty, deceit, misrepresentation, engaging in illegal activity, failure to deliver to clients funds to which they were entitled, and use of clients' funds for purposes other than those designated. 508 So.2d 721, 722 (Fla. 1987). The referee accepted Mr. Casler's guilty plea and recommended that he be disbarred for three years. This Court adopted the referee's recommendations as to guilt and discipline. Id. at 723. It is abundantly clear that unlike Mr. Burke, Mr. Casler was guilty of much more than a failure to comply with trust accounting procedures.

Similarly, in The Florida Bar v. Leopold, 399 So.2d 978 (Fla. 1981), Leopold was disbarred because he consistently "exhibited an inability to conduct his activities according to the profession's standards", not as the result of a failure to comply with trust accounting procedures. 399 So.2d at 979. The Board of

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Governors had privately reprimanded Mr. Leopold in 1966 and almost ten years later he was publicly reprimanded by this Court. Id. at 979. On the other hand, Mr. Burke's problem was inadequate accounting practices in 1983/1984. This singular problem, however, resulted in two errors in the processing of clients' funds. The error with respect to the Alvarez sisters was addressed by this Court in The Florida Bar v. Burke, 517 So.2d 684 (Fla. 1988). In 1987-1988, it became apparent that Mr. Burke's extremely shabby accounting practices had unfortunately also resulted in a $9,919.45 error in the distributions to the beneficiaries of the Banks estate. The Alvarez matter and the Banks matter presently before this Court are not two separate, isolated incidents of misconduct as was the case in Leopold. They are the unfortunate, but certainly not surprising, result of the same set of circumstances, viz, inadequate accounting and bookkeeping practices in 1983.

The absence of cumulative misconduct distinguishes the case at Bar from The Florida Bar v. Golden, 561 So.2d 1146 (Fla. 1990). In Golden, the referee found the respondent guilty of trust accounting violations, bad faith and misrepresentation. Id. The referee concluded that Mr. Golden's prior disciplinary offense (insurance fraud), his dishonest or selfish motive, the pattern of misconduct and his refusal to acknowledge the wrongful nature of his conduct constituted aggravating factors. Id. This Court agreed and disbarred Golden for a period of five years. Id. at 327. None of those aggravating factors are present in Mr. Burke's case. As previously noted, the error in the distribution to the Alvarez

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sisters is not a "prior disciplinary offense" but one of two unfortunate consequences of the same disciplinary offense, viz, inadequate accounting procedures in 1983. Furthermore, the Referee in this case made no findings of dishonest or selfish motive and Mr. Burke both candidly acknowledged of his error and made restitution when he learned of it. (T.61-62, 126, 127, 199, 209). See also, The Florida Bar v. Owen, 393 So.2d 551 (Fla. 1981) (cumulative misconduct -- three distinct and flagrant violations of the trust rules -- resulted in disbarment).

The absence of distinct and repeated incidents of misconduct also distinguishes this case from The Florida Bar v. Baron, 392 So.2d 1318, 1321 (Fla. 1981) (four separate disciplinary violations); The Florida Bar v. Vernell, 374 So.2d 437, 475 (Fla. 1979) (three distinct instances of misconduct plus two previous reprimands: a private reprimand in 1964 and a public reprimand in 1974); The Florida Bar v. Green, 515 So.2d 1280, 1283 (Fla. 1987) (attorney disciplined three times for different misconduct and once held in contempt for failing to observe the conditions of his probation); and The Florida Bar v. Shupack, 523 So.2d 1139, 1140 (Fla. 1988) (two different instances of misconduct occurring within three months of each other). Notably, none of these cases resulted in disbarment despite the presence of cumulative misconduct.[1]

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[1]The two remaining cases cited by the Bar, The Florida Bar v. Owen, 393 So.2d 551 (Fla. 1981) and The Florida Bar v. Burton, 218 So.2d 748 (Fla. 1969), each reference a detailed review of the record by this Court in reaching its decision, but insufficient details of what appeared in those records is recited in the face of the opinion for Respondent to determine if any meaningful comparisons exist.

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Disbarment from the practice of law is an extreme penalty and should be imposed only in those cases where rehabilitation is improbable. The Florida Bar v. Davis, 379 So.2d 942, 944 (Fla. 1980). In The Florida Bar v. Bern, 433 So.2d 1209 (Fla. 1983), this Court -- even in light of four previous incidents of misconduct -- held that a public reprimand would be the appropriate discipline for an attorney who refused to turn over funds to a client and who improperly commingled funds in his trust account. Id. Accord The Florida Bar v. Suprina, 468 So.2d 988 (Fla. 1985). Mr. Bern had been privately reprimanded in 1975 and again in 1978. In 1980, a public reprimand was ordered for a different disciplinary violation. Finally, an incident in April of 1980 resulted in his suspension from the practice of law for three months and one day. Id. In rejecting the referee's recommendation that Mr. Bern also be placed on probation, this Court noted that there was no evidence that Mr. Bern had converted any funds to his own use and that he would have to prove rehabilitation before the three month suspension could be lifted. Id. Similarly, there is no evidence or finding that Mr. Burke converted any funds to his own use and Mr. Burke has unquestionably rehabilitated himself. His corrective efforts -- including entering into a partnership with partners supervising the accounting, and hiring a Certified Public Accountant -- have been successful and there have been no problems since 1984. Finally, it is undisputed that when Mr. Burke learned of the $9,919.45 error in his favor he made restitution. (T.61-62, 126).

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Respondent submits that the arguments and citations presented in Complainant's brief are inapposite and do not support Complainant's recommendation of disbarment. As previously noted in Respondent's initial brief, the guidelines set out in The Florida Standards for Imposing Lawyer Sanctions indicate that a private reprimand is the sanction which most closely fits Respondent's conduct. The Florida Standards for Imposing Lawyer Sanctions, §§ 4.14 and 5.14.

CONCLUSION

Based on the foregoing facts and authorities, and those set forth in Respondent Burke's initial brief, Respondent submits 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.

Respectfully submitted,

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By: Elizabeth Koebel Russo
ELIZABETH KOEBEL RUSSO

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed this 13th day of August, 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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