IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Petitioner,

v.

JAMES ALFRED GARLAND,

Respondent.
_____/

Case No. 81,981
TFB No. 92-11,532(12C)

# ANSWER BRIEF

# OF

# THE FLORIDA BAR

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

## SYMBOLS AND REFERENCES

In this Brief, James Alfred Garland will be referred to as the "Respondent". The Florida Bar will be referred to as "The Florida Bar", "TFB", or "The Bar". "TR" will refer to the transcript of the Final Hearing in this case held on January 27-28, 1994. "R" will refer to the record in this cause. "RR" will refer to the Report of Referee dated May 19, 1994. "AIB" will refer to Respondent's Amended Initial Brief, and Resp. Exh. will refer to Respondent's Exhibits.

## STATEMENT OF THE FACTS AND OF THE CASE

The statement of facts in Respondent's Amended Initial Brief is incomplete. The Bar also asserts that the Respondent's statement of the case is incorrect and submits the following statement as to the proceedings in this case.

In October 1990, the Respondent prepared a Will for Lois Locke which appointed Respondent to act as personal representative of Ms. Locke's estate upon her death (TR, p. 12). On or around June 15, 1991, Respondent commenced guardianship proceedings for Mrs. Locke due to her failing health. However, on or about July 11, 1991, Lois Locke died in Manatee County, Florida (TR, p. 17), and Respondent was appointed to act as the personal representative and attorney for her Estate (TR, p. 20; RR p. 1, ¶1). At the time of Ms. Locke's death, her Estate was valued at approximately $590,000.00 and consisted of assets that included stocks, bonds, a checking and a savings account, and a house with furnishings (TR, p. 19; RR p. 1, ¶2).

On or about August 27, 1991, Respondent informed Mr. John Stagg and Mr. Keith Stagg, both residuary beneficiaries of Ms. Locke's Estate, that Respondent's fee as personal representative and attorney for the Estate would be $150.00 per hour (TR, p. 305 RR p. 2, ¶8).

The probate of Ms. Locke's Estate was routine (TR, pp. 127-128, 304; RR p. 1, ¶2). From the beginning of the representation, Respondent and his secretarial staff prepared contemporaneous time slips for the services they performed for the Estate (TR, pp. 26-

30; R, TFB Exhs. #3, 4A, 4B, 11A, 11B; TR, pp. 68-69; RR, p. 2, ¶9 a).

Patricia Jackson was Respondent's receptionist from 1989 to February 19, 1992 (TR, p. 196). Ms. Jackson's duties included entering the information from the time slips into a computer (TR, p. 197). The information on the time slips indicated the case, what was done, and the amount of time that was used (TR, p. 197). Ms. Jackson worked on Respondent's computer for at least two years (TR, p. 201). Respondent purchased new computer software before he opened the Locke Estate, but the new software was almost the same as Respondent's old software (TR, p. 203). Ms. Jackson received the time slips from Respondent and the secretaries for work they had done (TR, pp. 198-199). When Ms. Jackson entered the information from the time slips into the computer, she referenced Respondent's time as James Garland and the secretaries' time as "legal assistant" (TR, pp. 204, 211). Ms. Jackson did not separate Respondent's time for attorney services and personal representative services, in that the time slips did not make such a distinction (TR, p. 198). After the time slips were entered into the computer, they were shredded or thrown away (TR, p. 199). No one ever told Ms. Jackson that the information that she put into the computer with respect to the time slips was inaccurate (TR, pp. 199, 203).

During the course of the representation, Respondent transferred funds from the Locke Estate account to his trust account and then to his operating account in payment of fees that he had not yet earned (TR, pp. 105-106; R, TFB Exhs. #3, 4A, 4B,

12, and 13; RR pp. 1-2. ¶3). Respondent misappropriated funds from the Locke Estate by paying himself fees from the trust account in excess of the fees he was entitled to receive for the hours of services that he and his staff had provided (TR, pp. 106, 266-267, 271,; R, TFB Exhs. #4A, 4B, 12, and 13; RR p. 2, ¶4).

On or about December 17, 1991, John Stagg, a residuary beneficiary of the Locke Estate, sent a letter to Respondent wherein he voiced his concern regarding the length of time that Respondent was taking to disburse the Estate assets and close out the probate case. Mr. Stagg asked Respondent to advise him of the final Estate legal expenses and fees (R, TFB Exh. 10 "I").

On or about December 18, 1991, Respondent sent a letter to Mr. Stagg indicating that Respondent would be submitting his time and expense sheets to Mr. Stagg and the probate judge (TR, pp. 333-334; R, Resp. Exh. #3). Respondent further advised Mr. Stagg that the length of time to close the Estate would depend on Mr. Stagg's reaction to Respondent's accounting. Respondent stated that if Mr. Stagg did not approve the accounting, a hearing would be held before a judge to determine appropriate fees and expenses, and it could take two months before they could get a hearing because of crowded court dockets (TR, pp. 307, 333-334; R, Resp. Exh. #3; R, TFB Exh. #10 "I").

Poppy Hyre was Respondent's secretary from May 1991 to May 1993 (TR, p. 206). Ms. Hyre began the final time accounting on the Locke Estate regarding the services rendered by Respondent's office by going to the computer and printing out the data for the Locke

Estate compiled from the time slips of Respondent and his legal assistants (TR, pp. 212- 213). The time accounting data recovered from the computer included two time accountings, one which covered from June 15, 1991 (when the guardianship proceedings commenced) through September 30, 1991, (R, TFB Exh. #3) and the other one covered from September 30, 1991 to February 1992 (TR, pp. 213-214).

The computerized time accountings did not separate the personal representative services from attorney services (R, TFB Exh. #3). The computerized time accounting which covered from June 15, 1991 to September 30, 1991 indicated that Respondent and his staff spent 43.4 hours performing attorney and personal representative services to the Estate through September 30, 1991 (R, TFB Exh. #3). After Ms. Hyre obtained the computerized print-outs, she took them to Respondent for help with converting the James Garland and legal assistant categories on the print-outs into categories for attorney services and personal representative services (TR, pp. 214, 241). Respondent did not indicate that any times on the computer print-outs were not correct (TR, p. 215). Ms. Hyre then wrote the time related to personal representative services on a yellow sheet of paper and the time related to attorney services on another sheet of yellow paper (TR, p. 215; R, TFB Exhs. #11A and 11B). After Ms. Hyre prepared the yellow sheets, (R, TFB Exhs. #11A and 11B) she went to the Respondent's ledger cards for the Locke Estate and added up the fees that Respondent had taken (TR, p. 220). The ledger cards indicated that Respondent had taken $27,500.00 in fees as of January 30, 1992, and

Ms. Hyre wrote that sum on the yellow sheet of paper relating to the time for attorney services (TR, p. 220; R, TFB Exh. #4A). Ms. Hyre also wrote on the yellow sheet of paper relating to the time for attorney services that the fee rate was to be $175.00 per hour. She wrote on the yellow sheet of paper relating to the time for personal representative services that the fee rate was to be $120.00 per hour. The work performed on the Locke Estate by Respondent's legal assistants was included on the yellow sheets of paper and charged at $175.00 per hour or $120.00 per hour depending on the type of services performed. The yellow time sheets represented work performed by Respondent and his staff through January, 1992 (TR, p. 220; R, TFB Exh. #4A and 4B).

Although Respondent's trust account ledger cards for the Locke Estate indicated that Respondent had taken $27,500.00 in fees through January 1992, the ledger cards failed to include a fee transfer to Respondent of $1,200.00 on July 16, 1991, thus Respondent had actually received $28,700.00 as of January 30, 1991 (R, TFB Exh. #12, attachments 1 and 4).

Ms. Hyre added up the hours on the time accountings and multiplied the same by the respective hourly rates and determined that the fees taken by Respondent were in excess of the amount Respondent was entitled to per the personal representative and attorney time accountings prepared on the yellow sheets of paper. Ms. Hyre advised Respondent of the foregoing. Thereafter, Respondent reviewed the time accountings and the ledger cards, and instructed Ms. Hyre to increase most of the time entries that were

based on contemporaneous time slips that had been destroyed. Ms. Hyre felt uncomfortable about the changes, but followed Respondent's instructions (TR, pp. 222, 232). After the hours were changed, the handwritten attorney and personal representative time accountings on yellow sheets of paper indicated that Respondent was entitled to a fee of $27,500.00 (TR, p. 249). When Respondent finished changing the times, Ms. Hyre typed the handwritten accounting (TR, p. 250; R, TFB Exhs. #4A and 4B).

On or about February 6, 1992, Respondent sent Mr. Stagg the typed accounting of time regarding the services that Respondent and his staff had rendered to the Locke Estate along with a waiver of accounting and consent to discharge to be executed by Mr. Stagg (TR, pp. 162, 305-307). The time accountings indicated that as of September 30, 1991, Respondent and his staff spent 68.7 hours performing personal representative and attorney services to the Estate rather than 43.4 hours as indicated by the computerized time accounting for June 15, 1991 through September 30, 1991 (R, TFB Exhs. #3 and 4). The time accounting that Respondent submitted to Mr. Stagg contained intentional misrepresentations as to the time that Respondent and his staff worked on the Locke Estate matter (TR, pp. 107, 305-306; R, TFB Exhs. #4A, 4B, and 8; RR p. 2, ¶8).

Respondent's final yet altered time accountings (R, TFB Exh. #4) did not indicate the hourly rate that Respondent intended to charge (TR, p. 306). As a result, Mr. Stagg called Respondent to verify that Respondent's fee rate for all services rendered to the Estate would be $150.00 per hour. Mr. Stagg was advised by

Respondent's secretary that the fee rate was $175.00 per hour for attorney services and time and $120.00 per hour for Respondent's time as personal representative (TR, p. 305). Mr. Stagg and his brother signed the waiver of accounting and consented to discharge Respondent as personal representative in February 1992 (R, TFB Exh. #8) because they thought it would cost too much money to get it reviewed by the court, and because they thought Respondent would not release the rest of the Estate assets if they did not sign it (TR, p. 307).

On March 3, 1992, Respondent paid himself, as fees from the Locke Estate, an additional $2,000.00 (TR, pp. 109-110, 115-116, 268: R, TFB Exhs. #12 and 17; RR p. 3, ¶14). On March 12, 1992, Respondent paid himself another $1,800.00 (TR pp. 110-112, 115-116; R, TFB Exhs. #12 and 17; RR p. 3, ¶14). On April 16, 1992, Respondent paid himself an additional $436.56 (TR, pp. 110, 269; R, TFB Exhs. #12 and 17; RR p. 3, ¶14), which was subsequent to Circuit Judge Paul Logan's entry of an Order of Discharge (R, TFB Exh. #8, enclosure 6), closing the Locke Estate. All of the above were unearned and unjustified fees and were taken by Respondent without the consent of the beneficiaries (TR, pp. 115-116, 312; RR p. 3, ¶14). There were no time slips to support the charges for fees assessed after the February 6, 1992 accounting (TR, p. 116; R, TFB Exh. #12: RR, p. 2, ¶9(c)). The total fee that Respondent paid himself on the Locke Estate through April 16, 1992, was $32,956.30 (R, TFB Exh. #13). A reasonable fee for the services rendered by Respondent would have been between $15,000.00 and $18,000 (TR, p.

126; RR, p. 4, ¶17).

On April 3, 1992, an Order of Discharge was entered, discharging Respondent as personal representative and closing the Locke Estate (TR, p. 163; TFB Exh. #7; RR, p. 4, ¶18). On April 15, 1993, John Stagg filed a complaint with The Florida Bar against Respondent in which he complained about the fees that Respondent had charged the Locke Estate (TR, p. 164). In his complaint John Stagg stated that his brother, Keith Stagg, the other residuary beneficiary, had received $4,000.00 more than he had received (R, TFB Exh. #8). Prior to the final distribution to the residuary beneficiaries, Respondent had advanced Keith Stagg $4,000.00 without advancing the same to John Stagg (TR, p. 335).

On June 5, 1992, Respondent wrote to The Florida Bar, in response to John Stagg's Grievance/Complaint and admitted that Keith Stagg had received from the Locke Estate, $4,000.00 more than John Stagg. On June 5, 1992, Respondent issued a $4,000.00 check to John Stagg, drawn on Respondent's general account to equalize the distribution made to the residual beneficiaries (TR, p. 165; R, TFB Exhs. #9 and 10; RR p. 4, ¶19).

On July 23, 1992, John Stagg wrote a letter to Respondent requesting a copy of the Locke Estate checkbook register. On August 7, 1992, Respondent sent John Stagg a copy of the checkbook register along with a letter that set forth the total amount of receipts and disbursements. The letter also indicated that after subtracting the disbursements from the deposit receipts, a balance of $5,093.30 of assets remained on account. The letter advised Mr.

Stagg that $4,000.00 of the balance represented the sum forwarded to him on June 5, 1992, and that the remaining $1,093.30 was in a separate savings account and was intended to be used to pay for the tax accountant for the preparation of the Federal K-1 (R, TFB Exh. #23A).

On August 5, 1992, two days prior to the August 7, 1992 letter to John Stagg, Respondent deposited $1,093.30 into a savings account at Nations Bank (R, TFB Exh. #23B). On October 16, 1992, Respondent paid $1,096.98 (the $1,093.30 plus interest) to the Internal Revenue Service on behalf of the estate from a savings account (TR, pp. 169, 182-183, 271-272; R, TFB Exhs. #13 and 23A; RR, p. 4, ¶20).

On January 8, 1993, Respondent falsely advised Steven Brannan, a member of The Florida Bar Grievance Committee Twelve "C", that $5,093.30 of Locke Estate funds had been deposited in a special savings account for the Estate for payment of taxes, C.P.A. fees, and last minute items. He falsely advised Mr. Brannan that the $4,000.00 paid to John Stagg in June 1992, was paid from the special savings account (TR, pp. 167-168, 193-194; R, TFB Exhs. #9, 23 and 24; RR, p. 4, ¶21).

During the course of the disciplinary proceedings, Respondent also made false statements to the Bar's investigator regarding the preparation of the accounting, the amounts of time charged, whose time was charged, and the justification for the hours charged (TR, p. 70- 72, 179; R, TFB Exhs. #3, 4A, 4B, 9, 10, 11A and 11B; RR p. 4, ¶23).

An evidentiary hearing before the Referee, Brenda C. Wilson, was held on this case on January 27-28, 1994; and a hearing on discipline was held on April 21, 1994. At the discipline hearing, The Florida Bar argued that disbarment was appropriate for Respondent's misconduct. On May 19, 1994, the Referee issued her report wherein she recommended that Respondent be found guilty of violating Rule 4-1.5(a) (1) and (2); Rule 4-8.1(a); Rule 4-8.4(c); Rule 4-1.15(a); and Rule 5-1.1. (RR, p. 5, Section III). The Referee recommended that Respondent be suspended for a period of three (3) years and thereafter until Respondent proves rehabilitation; for an indefinite period until Respondent pays the costs of the disciplinary proceedings and makes restitution to the beneficiaries of the Locke Estate in the amount of $9,529.50; and until Respondent passes the ethics portion of the Florida Bar Examination (RR, p. 5, Section IV).

The Respondent filed his Petition for Review with this Court, and on or about August 15, 1994, Respondent filed his Initial Brief. On August 25, 1994, Respondent filed his Amended Initial Brief. This brief is filed as an Answer to Respondent's Amended Initial Brief.

## SUMMARY OF THE ARGUMENT

The Respondent's Amended Initial Brief presents several arguments alleging that the Referee's findings of fact and recommendations of guilt are erroneous and contrary to the evidence and recommended discipline is excessive.

The Referee found that, Respondent misappropriated funds from the Locke Estate by paying himself fees from the trust account in excess of the fees he was entitled to receive for the hours of services he provided; that he charged a clearly excessive fee by assessing more hours than were necessary to handle a routine estate, by charging for calculating his billable hours and by charging attorney fees for secretarial time; that he altered his contemporaneous time records and his fees per hour in an effort to justify the fees he had already taken from the Estate; and that he made intentional misrepresentations to the residual beneficiaries of the Estate by submitting to them, a false time accounting dated February 6, 1991. The Respondent denied engaging in the aforementioned acts. However, the Referee obviously found the Respondent's testimony was unworthy of belief and rejected the same. The Referee's rejection of Respondent's testimony was justified in light of the numerous contradictory and evasive statements made by Respondent, and based on the testimony of other witnesses and the documentary evidence produced during the final hearing.

The Referee's findings of fact are presumed to be correct and it is the Respondent's burden to demonstrate that the Report of

Referee is erroneous, unlawful or unjustified. The Respondent has failed to rebut the presumption of correctness. The record in this case, taken as a whole, clearly supports not only the Referee's findings of fact, but also her recommendations of guilt, and thus the same should be upheld.

Respondent challenges the Referee's recommended discipline as being too severe and he cites several cases in support of his argument. The cases cited by Respondent do not involve misconduct similar to the misconduct engaged in by Respondent. The case law cited herein by the Bar involves misconduct that is similar to, yet less serious than that engaged in by Respondent. In those cases, the attorneys were disciplined by being suspended or disbarred. The discipline recommended by the Referee is at least appropriate, if not generous, for Respondent's misconduct based not only on the case law cited by the Bar, but also based on the Florida Standards for Imposing Lawyer Sanctions.

The Florida Bar asks this Court to approve the Referee's findings of fact, her recommendations of guilt, and her recommended discipline of a three year suspension.

## ARGUMENT

### I. THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE AND SHOULD BE UPHELD.

The Respondent challenges the Referee's findings of fact as being unsupported by clear and convincing evidence. A Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. The Florida Bar v. Stalnaker, 485 So. 2d 815 (Fla. 1986). In this case, the Referee's findings of fact are not erroneous or lacking in evidentiary support. The Referee's findings are supported by the record in this case as cited to by the Referee in her report. The Respondent was not a credible witness in this case. His testimony was impeached by letters, by other witnesses, by documentary evidence, and even by Respondent's own testimony.

#### A. THERE IS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS OF FACT AND HER RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING RULE 4-1.5(a)(1) OF THE RULES REGULATING THE FLORIDA BAR.

Rule 4-1.5(a)(1) states as follows:

> **Illegal, Prohibited, or Clearly Excessive Fees.** An attorney shall not enter into an agreement for, charge, or collect an illegal, prohibited, or clearly excessive fee or a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar. A fee is clearly excessive when:
>
> (1) after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee exceeds a reasonable fee for services provided to such a degree as to constitute clear

overreaching or an unconscionable demand by the attorney.

Respondent in his Amended Initial Brief argues that the Referee's recommendation that Respondent be found to have violated Rule 4-1.5(a)(1) and the Referee's findings of fact numbered 5, 7, 14, 15, and 17, that support the recommendation were not proven by clear and convincing evidence (AIB, p. 8). The Referee's findings of fact numbered 5, 7, 14, 15 and 17 of the Report of Referee are supported by the Record in this case, as cited to by the Referee in her report.

In the present case, the Referee found that Respondent assessed more hours than were necessary to handle a routine estate. (RR, p. 2, ¶5). In The Florida Bar v. Richardson, 574 So. 2d 60, (Fla. 1991), the Supreme Court of Florida disciplined Mr. Richardson for charging a clearly excessive fee in a routine probate matter. The estate in Richardson consisted of one piece of real property valued at $22,000.00. Richardson charged the Estate $10,550.99 for services he rendered as an attorney. The court determined that Richardson had violated Rule 2-106, Code of Professional Responsibility, which was the predecessor to Rule 4-1.5(a), Rules Regulating The Florida Bar. The Court said:

> . . . This Court recognizes that a lawyer's fee will vary in accordance with many factors; however, we fully concur with the expert witness's statement in this case that all of the time a lawyer spends on a case is not necessarily the amount of time for which he can properly charge his client. As explained by the expert witness, `It's the time that reasonably should be devoted to accomplish a particular task. This statement is consistent with the principles we set forth in Standard Guaranty Insurance Co. v. Quanstrom, 555 So. 2d 828 (Fla. 1990), and Florida Patient's Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), neither of which allows billing of clients

> solely on billable hours or charging clients without determining what is the reasonable time to accomplish a particular task.

Richardson, 574 So. 2d at 63.

The Referee's findings bring this case squarely under the rule set down in Richardson: It is the time that reasonable should be devoted to accomplish a particular task, not the time that Respondent spent on the task, that forms the basis for a reasonable fee.

The Referee found that Respondent had charged a prohibited or clearly excessive fee (RR, p. 1, ¶1, 2, 3; p. 2, ¶4, 5, 6 and 7). The Florida Bar's expert witness on attorney fees was Joseph B. Cox, Esquire, who is Board Certified in wills, trusts and estates and in tax. He was admitted to The Florida Bar in 1976 (TR, pp. 118-119).

Mr. Cox testified that prior to reaching an opinion regarding the reasonableness of the fees charged by Respondent to the Lois Locke Estate, he reviewed In Re: Estate of Lester Platt, 16 FLW 5237 (April 4, 1991) (Platt I); 586 So. 2d 328 (Fla. 1991) (Platt II), the lodestar doctrine of time, Rule 4-1.5(b), the Respondent's file which included correspondence, probate pleadings, real estate documents, tax return documents, time records, broker's statements, bookkeeping documents, and documents from this disciplinary case (TR, p. 125).

At the time Respondent sought the residual beneficiaries' consent to the fee he had already taken,(Platt, id.), and the "lodestar" method of computing fees as set forth in Florida Patient Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985) controlled

the manner for determining what a reasonable fee is.

Rule 4-1.5(b), Rules Regulating The Florida Bar, provides as follows:

> Factors to be considered as guides in determining a reasonable fee include:
>
> (1) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;
>
> (2) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;
>
> (3) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;
>
> (4) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;
>
> (5) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;
>
> (6) the nature and length of the professional relationship with the client;
>
> (7) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill, expertise, or efficiency of effort reflected in the actual providing of such services; and
>
> (8) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

Rule 4-1.5(b) is substantially consistent with the "lodestar" method of computing a reasonable fee, and is controlling in this disciplinary proceeding.

Mr. Cox testified that the Locke Estate was not complex; that initially there was one unique issue involving an alleged fraudulent codicil that was filed in the probate case, but that the matter never developed into a problem because the beneficiaries of the codicil failed to pursue a claim within 90 days after being

duly served with a Notice of Administration (TR, pp. 127-129); that he would have spent about 10-15 hours, and that his least expensive paralegal would have spent about 100 hours working on the Locke Estate case (TR, pp. 150-151); that the Locke Estate would not have precluded other employment; that a fee rate of $175.00 for legal services performed by Respondent; $120.00 for personal representative services performed by Respondent; and $30.00 to $40.00 per hour for secretarial or paralegal services would be a reasonable fee rate; and that the estate was valued at less than $600,000.00, making it a non-taxable estate for Federal Estate Tax purposes, and thus less risky; that he saw no special time limitations on the Respondent; and that the probate case was opened and closed within nine months (TR, pp. 127-128).

The Respondent's secretary, Poppy Hyre, testified that the initial computerized time accountings were based on contemporaneous time slips prepared by herself for the work she did for the Estate and by Respondent for the work he did on the Estate. One of the computerized time accountings which covered from June 15, 1991 through September 30, 1991 (R, TFB Exh. #3) indicates that a large portion of the work performed for the Estate was done by Respondent's legal assistants.

Mr. Cox did not accept all of the time indicated by Respondent in the time accountings (R, TFB Exhs. #4A and 4B) submitted to the beneficiaries. Mr. Cox found a lot of the Respondent's time entries to be highly questionable based on the tasks involved and the documents contained in Respondent's file (TR, pp. 132-137).

Mr. Cox stated that he had no way to determine the time that Respondent actually spent; however, there were excessive amounts of time charged for the tasks involved (TR, p. 150). Mr. Cox said that he believed the total times of approximately 130 hours for attorney time and 39 hours for personal representative time contained "a lot of softness, excessive or inefficient use" (TR p. 137).

Mr. Cox testified that a reasonable fee for all of Respondent's and his staff's services to the Estate would be between $15,000.00 and $18,000.00 (TR, p. 126).

The Referee properly found that Respondent violated Rule 4-1.5(a)(1), Rules Regulating The Florida Bar, because there was unrebutted expert testimony and clear and convincing evidence that Respondent charged fees based on amounts of time that exceeded the amounts of time that reasonably should have been devoted to accomplish the particular tasks in the Locke Estate.

**B. THERE IS CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE REFEREE'S FINDINGS OF FACT AND HER RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING RULE 4-1.5(a)(2) OF THE RULES REGULATING THE FLORIDA BAR.**

The Referee recommended that Respondent be found guilty of violating Rule 4-1.5(a)(2) of the Rules Regulating The Florida Bar. Rule 4-1.5(a)(2) states as follows:

> A fee is clearly excessive when:
> (2) The fee is sought or secured by the attorney by means of intentional misrepresentation or fraud upon the client, a non-client party, or any court, as to either entitlement to, or amount of, the fee.

Respondent argues in his Amended Initial Brief that the

Referee's findings of fact numbered 4, 8, 9, 10, 11, 12, and 13 which support the Referee's recommendation are not supported by clear and convincing evidence and that the Referee's recommendations and findings are not supported by competent substantial evidence. The evidence in this case is clear and convincing that Respondent sought and secured a fee from the Locke Estate by means of an intentional misrepresentation as to both his entitlement to and the amount of the fee.

The Referee found that Respondent altered his time records to justify the fees that he had already taken (RR, ¶9). The evidence in this case clearly and convincingly indicates that Respondent did just that.

Respondent testified that time slips were prepared at the time he performed services for the Estate. (TR, p. 27) Poppy Hyre, Respondent's probate secretary from May 1991 to May 1993, testified that she prepared contemporaneous time slips for the work she did on the Locke Estate (TR, p. 208).

Respondent and Ms. Hyre testified that they gave their contemporaneous time slips for services rendered to the Estate to Trisha Jackson, Respondent's receptionist/clerk, and that she was to put the information from the time slips into a computer accounting program regarding attorney and legal assistant's time for work on a case (TR, pp. 29, 208).

Poppy Hyre testified that the computer accounting program did not make a distinction between Respondent's services as attorney versus his services as personal representative. She testified that

there was only one accounting program for attorney time and one program for legal assistant time (TR, p. 211).

Trisha Jackson testified that she received time slips from Respondent and from the secretaries (TR, pp. 198-199). She testified that Respondent's time was entered under his name and that the secretaries' time was entered under the category of "legal assistants" (TR, p. 204). Ms. Jackson also testified that she entered into the computer from the time slips, the case and the services and time indicated thereon (TR, p. 197).

Poppy Hyre testified that when the time came to close the Locke Estate, she went to the computer in Respondent's office and printed therefrom, the Locke Estate data that was imputed into the computer by Ms. Jackson from the contemporaneous time slips of Respondent and his secretaries. Ms. Hyre testified that the data obtained from the computer covered from June 15, 1991 through September 30, 1991, and September 1991 to February 1992 (TR, pp. 212-214). Ms. Hyre testified that she took the two computerized accountings of time into Respondent's office and asked Respondent to distinguish between the services that would be charged as personal representative time and the services that would be charged as attorney time (TR, p. 215). Ms. Hyre also testified that legal assistant time was charged at Respondent's fee rate as attorney or personal representative (TR, p. 209). Ms. Hyre explained that Respondent charged his fee rate for the services she performed because he had to review her work. However, Ms. Hyre further testified that Respondent prepared time slips for the time it took

him to review her work (TR, pp. 208-209).

Respondent separated the computerized time accounting data into two categories, attorney time and personal representative time. Ms. Hyre testified she then handwrote onto a yellow sheet of paper "Atty Time Acct $175.00". She testified that on another yellow sheet of paper she handwrote "Personal Representative Time $120.00". Ms. Hyre testified that thereafter, she transferred onto the respective yellow sheets of paper, the information on the computerized time accountings (R, TFB Exh. #3 and an unaccounted for computerized time accounting that covered from September 1991 to February 1992) as separated by Respondent (TR, pp. 213-216; R, TFB Exhs. 11A and 11B).

Ms. Hyre testified that her next step, in preparing the final time accounting, was to pull the Locke Estate trust account ledger card and determine the amount of funds Respondent had disbursed to himself as fees. She testified that the ledger card indicated that as of January 1992, Respondent had received funds totalling $27,500.00. She testified that she wrote said sum on the top of the handwritten "Atty Time Acct" (R, TFB Exh. #11A; TR, pp. 216, 220). She testified that thereafter she determined that the amount of time on the two handwritten time accountings did not justify a fee for Respondent of $27,500.00; and that she went into Respondent's office and advised Respondent of the problem (TR, p. 232). Ms. Hyre testified that thereafter Respondent reconstructed the time accountings (TR, p. 223). Respondent also testified that he reconstructed the computerized time accountings by increasing

the times thereon (TR, pp. 65-66). Ms. Hyre testified that after the reconstruction of the accountings was completed by Respondent, that the same indicated that Respondent was entitled to a fee of $27,529.00 (TR, p. 249).

Prior to the final hearing, Ms. Hyre advised The Florida Bar investigator, Joseph McFadden, that when she asked Respondent why he was changing the accounting, the Respondent said he needed to reach the figure of $27,500.00 (TR, p. 233; R, TFB Exh. #26). At the final hearing, Ms. Hyre testified that she did not recall advising The Florida Bar investigator of the foregoing, but she did testify that she assumed Respondent altered the time because he needed to reach the figure of $27,500.00 for fees (TR, p. 229).

Although Respondent's trust account ledger card indicated he had received $27,500.00 as of January 30, 1992, Respondent had actually received an additional $1,200.00 disbursement on July 16, 1991, a sum that was not reflected on the ledger card (R, TFB Exh. #12 attachment 4; TFB Exh. #13).

A cursory review of The Florida Bar Exhibit #11(A) and (B) indicates most of the original time entries were erased and increased on the handwritten accounting on yellow sheets of paper, and that new services and time were added. Further, a comparison between the original computerized time accounting based on contemporaneous time slips and the Final Time Accountings sent to the residual beneficiaries (R, TFB Exhs. #4A and 4B) clearly shows that Respondents altered the time records solely in an effort to justify the funds he had disbursed to himself as fees. For example,

the computerized accounting that covered from June 15, 1991 to September 30, 1991 (R, TFB Exh. #3) indicates that Respondent and his staff spent 43.4 hours performing personal representative and attorney services to the Estate; the time accountings dated February 6, 1992 (R, TFB Exh. #4) indicated that Respondent and his staff spent 68.7 hours from June 15, 1991 through September 30, 1992 performing attorney and personal representative services to the Estate (R, TFB Exhs. #3 and 4).

On February 6, 1992, Respondent sent the altered time accountings to the residual beneficiaries and asked them to approve the same (R, TFB Exh. #10C). In February 1992, the residual beneficiaries executed a document entitled "Waiver of Accounting and Service of Petition for Discharge and Receipt of Beneficiaries and Consent to Discharge" (R, TFB Exh. #10D).

On March 3, 1992, Respondent disbursed to himself, another $2,000.00 for fees. On March 23, 1992, Respondent disbursed an additional $1,800.00 to himself for fees. Finally, on April 16, 1992, Respondent disbursed $456.30 to himself for fees. Respondent testified that he did not have time slips to support the additional fees (TR, p. 116). As of April 16, 1992, Respondent had paid himself $32,956.30 from the Locke Estate assets (R, TFB Exh. #13).

On June 5, 1992, Respondent paid John Stagg, from Respondent's own funds, the sum of $4,000.00 due to an unequal distribution to the residual beneficiaries (TR, p. 165; R, TFB Exhs. #12 and 13). On October 10, 1992, Respondent refunded the Estate $1,096.98 of his own funds that he deposited into a NationsBank savings account

for the Estate on August 5, 1992 (R, TFB Exh. #23). Respondent refunded to the residual beneficiaries the sum of $329.82 on February 22, 1993 (TR, p. 328).

Respondent received a refund on behalf of the Estate from the Internal Revenue Service (TR, p. 350). Respondent used a portion of the I.R.S. refund to pay C.P.A. fees, and he refunded the difference of $823.32 to the Staggs on April 23, 1994 (AIB, p. 23).

All of the foregoing is ample support for the Referee's finding that Respondent violated Rule 4-1.5(a)(2), Rules Regulating The Florida Bar.

Respondent's own time records and accounting records show that Respondent took money from the Locke Estate and later altered his time records so his fees would match the amounts that he had already taken. Respondent misrepresented to the residuary beneficiaries and to the probate court that he was entitled to all of the fees he took. There is clear and convincing evidence that Respondent violated Rule 4-1.5(a)(2) and the Referee's findings and recommendations regarding the same should be upheld.

**C. THE REFEREE PROPERLY FOUND THAT RESPONDENT HAD VIOLATED RULE 4-8.1(a), RULES REGULATING THE FLORIDA BAR, AND THE REFEREE'S FINDINGS OF FACT THAT CONSTITUTE THE VIOLATION ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.**

Rule 4-8.1(a) states as follows:

> An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not:
> (a) knowingly make a false statement of material fact.

The Referee found that during the course of this disciplinary

proceeding, Respondent falsely advised The Florida Bar Grievance Committee that $5,093.30 of the Locke Estate funds had been deposited in a special savings account for the estate, when in actuality the funds had been paid to Respondent and were placed in Respondent's general account and commingled with Respondent's property (RR, p. 4, ¶21). As of April 16, 1992, Respondent had disbursed all of the Estate's funds that he held in trust (R, TFB Exh. #12, attachment 4). On June 5, 1992, Respondent sent John Stagg $4,000.00 drawn on his general account (R, TFB Exh. #10). On August 5, 1992, Respondent deposited $1,093.00 of his funds into a special savings account for the Estate (R, TFB Exh. #23).

On January 8, 1993, Respondent wrote a letter to Steven Brannan, who was a member of The Florida Bar Grievance Committee investigating this matter, and represented that the $4,000.00 that Respondent disbursed to John Stagg on June 5, 1992, came from a special account for the payment of taxes, C.P.A. fees, and any last minute items (TR, pp. 167-168; R, TFB Exh. #9). The check for the $4,000.00 was drawn on Respondent's general account, not a savings account or trust account (TR, pp. 168, 170).

Not only did Respondent represent to Mr. Brannan that he had the $4,000.00 in a special account, but that the total in the account was $5,093.00. Respondent stated in his Amended Initial Brief that $1.093.00 was not deposited into a special account until August 5, 1992 (AIB, p. 19; TR, p. 172; R, TFB Exh. #23).

Respondent argues that he made a mistake about the whereabouts of the $4,000.00. The evidence points to repeated

misrepresentations regarding the $4,000.00. In a letter dated August 7, 1992, to John Stagg, Respondent represented that the $4,000.00 came from a separate savings account (TR pp. 168-170, 313-314). Respondent stated in his letter that after disbursing the $4,000.00 to John Stagg, he had $1,093.30 in the separate savings account awaiting completion of a tax form (TR pp. 168-170; R, TFB Exh. #23). Respondent wrote John and Keith Stagg on October 20, 1992, that the $4,000.00 came from a special account containing funds that Respondent had reserved for taxes (TR pp. 193-194; R, TFB Exh. #24).

The Referee found that during the course of this disciplinary proceeding, Respondent also made false statements to the Bar's investigator regarding the preparation of the accounting, the amounts of time charged, whose time was charged, and the justification for the hours charged (RR, p. 4, ¶23; R, TFB Exhs. #4A, 4B, 9, 10, 11A and 11B).

Respondent testified that his time accountings for his services as personal representative and as attorney for the Locke Estate were as accurate as he could make them (TR p. 71; R, TFB Exhs. #4A and 4B). Respondent did not advise The Florida Bar or the grievance committee of a time accounting dated September 30, 1991, a copy of which is the Bar's exhibit number three. Respondent denied that the document was an accounting (TR, p. 179; R, TFB Exh. #3). However, the document was found in Respondent's files during discovery for this proceeding (TR, p. 179). Poppy Hyre testified that Bar Exhibit Three was based on contemporaneous

time slips prepared by herself and Respondent for services rendered to the Estate.

Respondent increased the amounts of time for services rendered on the February 1992 accounting (R, TFB Exhs. #4A and 4B) over the amounts of time for services that were reflected on the September 1991 accounting (R, TFB Exh. #3). The September accounting was printed from the computer where Respondent's receptionist, Patricia Jackson, had put the times that were indicated on time slips and time sheets (TR, p. 65-72). Respondent stated there were times when he estimated the time on the February accounting (TR, p. 65; R, TFB Exhs. #4A and 4B). Respondent testified that he did not know of any times that were decreased on the February accounting (TR, pp. 65-66).

Ms. Jackson testified that she put into the computer the information that was indicated on the time slips, and that she was never advised that the information that she put into the computer was not accurate (TR, pp. 199, 203, 210).

Respondent testified that he did not pay any attention to the times on the computer sheets (R, TFB Exh. #3) when he and Ms. Hyre did the accounting for February 1992 (R, TFB Exhs. #4A and 4B) because he did not think it was accurate (TR, pp. 66-69). Ms. Hyre testified that Respondent had the Estate's trust account ledger card to review as he changed the hours (TR, p. 249). Ms. Hyre further testified that when Respondent had finished changing the hours on the accounting, the hours equalled the $27,500.00 that Respondent had already taken in fees (TR, p. 249).

The testimony of the witnesses and the Respondent together with the documentary evidence that was presented indicate that more than a mere mistake in accounting occurred. The evidence was clear and convincing that Respondent lied to The Florida Bar and the grievance committee in an effort to conceal his fraud and his theft from the Estate. There is clear and convincing evidence to support the Referee's findings and recommendations regarding Rule 4-8.1(a).

**D. THE REFEREE PROPERLY FOUND THAT RESPONDENT HAD VIOLATED RULE 4-8.4(c), RULES REGULATING THE FLORIDA BAR, AND THE REFEREE'S FINDINGS OF FACT THAT CONSTITUTE THE VIOLATION ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.**

Rule 4-8.4(c) states as follows:

> A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

The Referee found that Respondent engaged in conduct involving dishonesty, fraud, deceit or misrepresentation through his handling of the Locke Estate. The Referee's finding is based on clear and convincing evidence. Respondent fraudulently altered time accountings based on his and his secretarial staff's contemporaneous time records in an effort to justify fees he had disbursed to himself, but had not earned. The Bar hereby adopts herein, the portion of its Argument I regarding Issue B relating to Rule 4-1.5(a)(2).

Respondent made intentional misrepresentations to The Florida Bar grievance committee and The Florida Bar investigator. In support of the foregoing, The Bar hereby adopts herein, the portion of its Argument I regarding Issue C relating to Rule 4-8.1(a).

The Referee found that Respondent had advised the Staggs that

he would charge $150.00 per hour for services he rendered to the Estate. This was based on the telephone testimony of John Stagg (TR, pp. 301, 305). Respondent testified that the fee rate quoted to the Staggs was $120.00 per hour for personal representative services and $175.00 per hour for legal services. The Referee rejected Respondent's testimony and found that Respondent altered his fee rate in an effort to justify fees he had taken from the Estate but had not earned. Respondent argues that the Referee had nothing by which to judge the credibility of Mr. Stagg because Mr. Stagg testified by telephone (AIB, p. 17). Respondent's argument is weak because it assumes that the Referee could judge Mr. Stagg only through her sense of sight and ignores the fact that the Referee could rely on her sense of hearing.

The Referee had clear and convincing evidence that Respondent engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation in handling the Locke Estate matters. The recommendation that Respondent be found guilty of violating Rule 4-8.4(c) should be approved.

**E. THE REFEREE PROPERLY FOUND THAT RESPONDENT HAD VIOLATED RULE 4-1.15(a), RULES REGULATING THE FLORIDA BAR, AND THE REFEREE'S FINDINGS OF FACT THAT CONSTITUTE THE VIOLATION ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.**

Rule 4-1.15(a) states as follows:

> A lawyer shall hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation. All funds, including advances for costs and expenses, shall be kept in a separate account maintained in the state where the lawyer's office is situated or elsewhere with the consent of the client or third person, provided that funds may be

> separately held and maintained other than in a bank account if the lawyer receives written permission from the client to do so and provided that such written permission is received prior to maintaining the funds other than in a separate bank account. In no event may the lawyer commingle the client's funds with those of the lawyer or those of the lawyer's law firm. Other property shall be identified as such and appropriately safeguarded. Complete records of such account funds and other property, including client funds not maintained in a separate bank account, shall be kept by the lawyer and shall be preserved for a period of 6 years after termination of the representation.

The Referee found that Respondent as a regular practice transferred estate monies representing earned and unearned fees from the estate account into his trust account, commingling the funds with the property of others, and thereafter transferred earned and unearned fees into his general account (RR, p. 4, ¶22). Respondent states that there is no question that he did as the Referee found in Paragraph 22 (AIB, p. 23). Respondent offered as an excuse that he was advised to do so by a CPA (AIB, p. 23; TR pp. 104-105). Respondent argues that "fees <u>may</u> have been transferred on at least one occasion prior to them being fully earned; however, such was not an intentional violation, and the fees were subsequently earned" (AIB, p. 23). The Bar submits that the use of <u>may</u> in the Amended Initial Brief instead of <u>were</u> and the words <u>at least</u> continue Respondent's pattern of being less than candid.

Respondent testified that there was one time when he "transferred a little bit ahead" (TR, p. 105). When Respondent was asked if it occurred only once, he said: "How many times is it, two, three? I don't know. But there would have been times I had money that the work was going to be done shortly, to cover it" (TR,

p. 106). Then Respondent was asked if he took fees knowing that he was taking them before they were earned. Respondent replied, "not knowingly saying I'm doing that, knowing that I have got so much work to do on an estate that's going to be earned very shortly, so I went ahead and did it at times, yes ma'am" (TR, p. 106).

Respondent argues: "The actions of the Respondent concerning the transfer of funds may, at worse, constitute a technical violation of the Rules." Rule 5-1.15(a) is written in the form of a command: "A lawyer shall hold in trust, separate from the lawyer's own property..." The Rule does not anticipate only a technical violation. Moreover, Respondent did not testify that he transferred the fees on the mistaken belief that they were earned. He transferred the fees knowing he had not yet earned them.

In addition to the fees that Respondent admitted transferring to himself before he earned them, Respondent transferred monies representing fees that the Referee found were excessive and fraudulent. Those transfers were addressed in the Bar's argument I (A) and (B) regarding Rule 4-1.5(a)(1) and (2). There was clear and convincing evidence that Respondent violated Rule 4-1.15(a) and the Referee's recommendation of guilt regarding said rule should be approved.

**F. THE REFEREE PROPERLY FOUND THAT RESPONDENT HAD VIOLATED RULE 5-1.1, RULES REGULATING THE FLORIDA BAR, AND THE REFEREE'S FINDINGS OF FACT THAT CONSTITUTE THE VIOLATION ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.**

Rule 5-1.1 is too long to set out in its entirety. The

relevant part for this proceeding is as follows:

> Money or other property entrusted to an attorney for a specific purpose, including advances for costs and expenses, is held in trust and must be applied only to that purpose. Money and other property of clients coming into the hands of an attorney are not subject to counterclaim or set off for attorney's fees, and a refusal to account for and deliver over such property upon demand shall be deemed a conversion.

The Referee found that Respondent misappropriated funds to his own use which were intended only for costs and expenses of the Locke Estate and owed the Locke Estate $823.32, which were unaccounted-for funds (RR, p. 4, ¶24) based on Respondent's altered accounting of time (R, TFB Exh. #4). Respondent states that since the hearing he has paid those funds to the beneficiaries (AIB, p. 23). However, restitution of the $832.32 does not negate the violation. The estate was closed April 3, 1992. John Stagg filed his grievance with the Bar on April 15, 1992. Respondent states that the first time he tendered those funds to the beneficiaries was February 22, 1993 (AIB, p. 23).

In addition, Locke Estate funds were entrusted to Respondent to pay the costs of administering the Estate, which included personal representative and attorney fees. The Referee found that Respondent misappropriated funds from the Locke Estate by paying himself fees from the trust account in excess of the fees he was entitled to receive for the hours of services he provided. Respondent attempted and almost succeeded in covering up his defalcation by altering computerized time accounts that were based on contemporaneous time slips in an effort to justify the excessive funds he had taken from the Estate. Argument I, Issue B supports

the foregoing and will not be reargued.

The Bar was unable to establish the exact sum of money that Respondent misappropriated from the Estate because the computerized time accounting that was based on contemporaneous time slips for the period covering from September 1991 to February 1992 could not be located.

However, the Bar's expert witness on fees, Joseph B. Cox, testified that $15,000.00 to $18,000.00 was a reasonable fee for the services rendered by Respondent to the Locke Estate. Mr. Cox's testimony was unrebutted. Respondent disbursed to himself, $32,956.30 of Estate assets, and refunded approximately $5,400.00. The Referee recommended that Respondent be required to make restitution to the Estate in the sum of $9,529.50. This is the sum that Respondent misappropriated from the Estate by altering his time records. There is clear and convincing evidence that Respondent misappropriated Estate funds and the Referee's recommendation that Respondent be found guilty of violating Rule 5-1.1 should be approved and adopted by the Court.

## II. THE REFEREE'S RECOMMENDATIONS AS TO DISCIPLINARY MEASURES ARE SUPPORTED BY CASE LAW AND THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS.

The Referee recommended that Respondent be suspended for a period of three (3) years, and thereafter until he proves rehabilitation and for an indefinite period until Respondent pays the cost of these proceedings and makes restitution to the beneficiaries of the Locke estate, in the amount of $9,529.50; and until Respondent passes the ethics portion of the Florida Bar examination (RR, p. 5, §IV).

Respondent contends that the recommended penalty in this case is excessive (AIB p. 27). Respondent's conclusion is based on a false premise, that his only ethical violations were unintentional violations of trust accounting procedures and commingling of funds. The cases cited by Respondent in support of his position do not involve misconduct similar to the misconduct of Respondent.

In The Florida Bar v. Johnson, 526 So. 2d 53, (Fla. 1988) cited in Respondent's Amended Initial Brief (AIB p. 27), the court ordered a public reprimand plus restitution of $2,268.78 because Johnson took $4,716.78 as legal fees from an estate, and the court determined that a reasonable fee would be $2,500.00. That was the sole issue in the Johnson case.

Unlike Johnson, the Referee in the instant case found that Respondent misappropriated estate funds, that he charged excessive amounts of time for the given tasks, that he fraudulently altered time records, that he charged attorney fees for secretarial time, that he double billed for research on the codicil issue, that he

made misrepresentations to the beneficiaries as to time spent and the hourly rates that he intended to charge, that he submitted a false accounting that contained intentional misrepresentations, and that he lied to the Bar's investigator and the Bar Grievance Committee. (see RR)

In The Florida Bar v. Hosner, 513 So. 2d 1057 (Fla. 1987), which was also cited by Respondent, this Court found that a public reprimand was appropriate for Hosner's negligent failure to follow trust accounting rules.

Unlike Hosner, the Referee in the present case found Respondent's misconduct involved intentional rather than negligent acts in that he misappropriated funds; he sought and secured a fee by means of intentional misrepresentation or fraud; he lied to the residual beneficiaries; and he lied to the Bar investigator and the Bar grievance committee in an effort to conceal his misappropriation of Estate funds. Respondent engaged in several violations of the Rules Regulating The Florida Bar which were "intentional", not negligent; therefore, a suspension is required.

Respondent also cited The Florida Bar v. Suprina, 468 So. 2d 988 (Fla. 1985) as authority that a suspension is an *excessive* penalty for his misconduct (AIB, p. 27). In Suprina, the lawyer was given a public reprimand for mishandling of trust funds, conduct adversely reflecting on fitness to practice law, improper advance of loans to clients, improper contact with opposing party represented by counsel, commingling of personal funds with trust funds, and improper trust account record keeping. Suprina, 468 So.

2d at 989. The referee found that no deficits or overdrafts resulted from the improper use and commingling of personal funds in the trust account. Suprina, 486 So. 2d at 989.

In the Respondent's case there were funds that were unaccounted for through the date of the evidentiary hearing (RR, p. 4, ¶24). In addition, the Referee found that Respondent's multiple offenses included misrepresentations to the beneficiaries of the Locke Estate (RR, p. 3, ¶12, 16, p. 2, ¶8) and the misappropriation of funds from the Estate (RR, p. 2, ¶4, p. 3, ¶14, p. 4, ¶24). The Referee found as an aggravating factor that Respondent submitted false statements and engaged in other deceptive practices during the disciplinary process (RR, p. 6, ¶2). The nature of Respondent's misconduct is more serious than that of Suprina.

The discipline recommended by the Referee is not excessive based on recent case law involving misconduct similar to that of Respondent and the Florida Standards for Imposing Lawyer Sanctions.

In The Florida Bar v. Shuminer, 567 So. 2d 430 (Fla. 1990), the Referee found that Shuminer misappropriated trust funds from several clients; that he settled a client's case without the prior knowledge and consent of the client; and that he made misrepresentations to a client in order to conceal his defalcations.

The Referee found in mitigation: an absence of a prior disciplinary offense, great personal and emotional problems, a timely and good faith effort at restitution, cooperation with the Bar, inexperience in the practice of law, good character and

reputation, and remorse which the Referee felt was genuine.

The Referee recommended that Shuminer be suspended from the practice of law for eighteen months. On review, the Supreme Court held that disbarment was the appropriate discipline for the Shuminer's misconduct, notwithstanding the numerous mitigating factors found by the Referee. The Court stated as follows: "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." Shuminer at 432 and 433.

The Respondent's misconduct in the instant case is analogous, to Shuminer. Like Shuminer, the Respondent misappropriated client funds (RR, p. 2, ¶4). Respondent transferred funds from the Locke Estate account to his trust account and then to his operating account in payment of fees he had not earned (RR, p. 2, ¶4). Respondent misappropriated funds from the Locke Estate by paying himself fees from the trust account in excess of the fees he was entitled to receive for the hours of services he provided (RR, p. 4, ¶22).

Like Shuminer, Respondent made intentional misrepresentations to conceal his defalcations by misrepresenting the time Respondent worked on the estate case and the hourly fee rates which Respondent intended to charge (RR, p. 3, ¶12, p. 2, ¶8). Respondent submitted a false time accounting which contained intentional misrepresentations and which represented that Respondent was entitled to fees of $27,529.50, based on altered time records. Thereafter, Respondent paid himself an additional $4,236.56 for

unearned and unjustified fees (RR, p. 3, ¶14).

Respondent also made an intentional misrepresentation to The Florida Bar grievance committee. Respondent falsely advised The Florida Bar grievance committee that $5,093.30 of Locke Estate funds had been deposited in a special savings account for the estate, when the funds had been paid to Respondent and placed in Respondent's general account (RR, p. 4, ¶21).

Like Shuminer, the Respondent does not have a prior disciplinary record. However, unlike Shuminer, the Respondent has not made full restitution to the Estate in that he still owes the Estate $9,529.50 (RR, p. 5).

The evidence established that Respondent prepared time slips for work performed on the Locke Estate contemporaneous with the services rendered (RR, p. 2, ¶9(a)). Since Respondent destroyed the time slips, it is impossible to determine the exact number of hours Respondent actually worked on the Locke Estate and the exact fee Respondent was actually entitled to receive. However, the Bar's expert witness testified that a reasonable fee for handling the Locke Estate would be between $15,000.00 and $18,000.00 (RR, p. 4, ¶17). The Referee accepted Mr. Cox's expert testimony and found that Respondent overcharged and misappropriated from the Locke Estate $9,529.50 (RR, p. 5, §IV, A). (This sum is reached by subtracting $18,000.00 from $27,529.50, the sum Respondent received from the Estate after subtracting several refunds totaling approximately $5,400.00 made by Respondent after the Estate was closed.) Respondent has failed to make restitution to the Estate,

and Respondent continues to maintain that he earned the fees (AIB, p. 26, ¶5).

Unlike Shuminer, the Respondent did not cooperate in the disciplinary proceedings in that he lied to the grievance committee and he refused to answer even the simplest of questions asked by Bar counsel during the final hearing in this cause (TR, p. 97-100, 105-106). Also, unlike Shuminer, Respondent does not have a good reputation in the legal community as testified to by two lawyers presented by the Bar (TR, pp. 60-71, 190-195).

In The Florida Bar v. MacMillen, 600 So. 2d 457 (Fla. 1992), The Florida Bar filed a five-count complaint alleging misconduct relating to MacMillan's duties as guardian of the property which the minor Scott T. Ellison (Ellison) received from his deceased father's estate. As guardian, MacMillan received six pieces of the father's jewelry to hold until Ellison reached the age of majority. In anticipation of Ellison's eighteenth birthday, MacMillan delivered three pieces of jewelry to Ellison's mother, who was the guardian of Ellison's person. MacMillan was unable to locate the other three pieces of jewelry.

In addition, MacMillan transferred $4,000.00 from the Ellison guardianship account to his personal account. MacMillan reimbursed the entire amount to the guardianship account within two weeks of the original transfer, and notified the mother of the transfer and reimbursement. However, MacMillan filed a Return of Guardian of Property with the Circuit Court which reported neither the withdrawal nor the reimbursement.

The Referee recommended that MacMillan be suspended from the practice of law for a period of two years, after finding in mitigation, an absence of a prior disciplinary record, a cooperative attitude toward the proceedings, a timely good faith effort to make restitution, and good character and reputation. The Referee also found in aggravation, substantial experience in the practice of law, a dishonest or selfish motive in the misappropriation of the $4,000.00, a pattern of misconduct regarding the handling of guardianship property, an apparent cover-up to the court in not revealing the transactions involving the $4,000.00, and the existence of multiple offenses.

MacMillen argued that the Bar failed to prove by clear and convincing evidence that he intended to misappropriate funds from Ellison. He also claimed there was no evidence to support the Referee's conclusion that the omissions of the transfers from the Return of Guardian of property was an intentionally dishonest act.

The Supreme Court found that the record supported the Referee's findings that both the misappropriation of funds and the failure to disclose the transfers in the guardian's report were intentional acts. The Supreme Court reiterated its repeatedly asserted position that misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate discipline. However, the Court also stated that the presumption of disbarment can be rebutted by various acts of mitigation, such as cooperation and restitution. MacMillan, 600 So. 2d at 460. Based on the mitigating factors

found by the Referee in MacMillan, the Court approved the Referee's report and suspended MacMillan from the practice of law for two years.

Respondent's misconduct in the instant case is more serious than Macmillan's misconduct, making a three year suspension more appropriate in this case. Like MacMillen, the Respondent misappropriated client funds. (RR, p. 1, ¶3, p. 2, ¶4, p. 3, ¶12-16, p. 4, ¶19-22 and 24). However, unlike MacMillan, Respondent has not made full restitution of the funds he misappropriated, as previously set forth. Like MacMillan, Respondent does not have a prior disciplinary record, but unlike MacMillan, Respondent was not cooperative with The Florida Bar. Unlike MacMillan, Respondent made intentional misrepresentations to a grievance committee and to the beneficiaries who bore the impact of his thefts, in order to conceal his defalcations.

In The Florida Bar v. Williams, 604 So. 2d 447 (Fla. 1992), the Referee found multiple violations that included misrepresentation to the grievance committee. Patricia Williams (Williams) was retained by Melvin Judge (Judge) to represent him in a criminal case. Williams received a quitclaim deed on real property as security for her fee in representing Judge. Williams recorded the deed and mortgaged the property for $25,000.00. When Williams appeared before the Eleventh Judicial Circuit Grievance Committee, in unsworn testimony, she stated that she had no money from that property and no mortgage on it that she was aware of. At the time of Williams' comment, she had, in fact, received money

from the property, had a mortgage issued, funded, and recorded regarding the property.

In addition to lying to the grievance committee, Williams had issued a worthless check for a payment toward the mortgage on the land deeded to her by Judge, and an audit showed that she had numerous trust accounting violations. Moreover, Williams had accepted representation of a Ms. Annie Ingraham and her minor son in an action against the Dade County School Board. Williams had Ms. Ingraham and her son sign a retainer that gave Williams forty percent of any award or settlement. At the time that the contingency agreement was executed the statutory limitation on such cases was twenty-five percent of recovery. Williams also failed to pursue the legal matter for Ms. Ingraham and her son, then had the case dismissed without ever discussing the action with her client.

The Referee found Williams guilty of violating Disciplinary Rule 2-106(A) (a lawyer shall not enter into an agreement, charge, or collect an illegal or clearly excessive fee) of the former Code of Professional Responsibility.

The Referee recommended a public reprimand and a ninety day suspension from the practice of law with automatic reinstatement. However, The Florida Supreme Court agreed with The Florida Bar that the Williams' case rose to the level of disbarment. In so ruling, the Court noted Williams' lack of diligence in representing clients on two separate cases. The Court also viewed Williams' trust account violations as serious transgressions. Further, the Court

applied Standard 9.22 of Florida Standards for Imposing Sanctions and found the following aggravating factors:
multiple offenses, dishonest motive, prior disciplinary offenses, submission of false statements or deceptive statements during the disciplinary process, and vulnerability of victims.

The Court found Williams' false and misleading statement to the Eleventh Circuit Grievance Committee concerning whether she had mortgaged the property in question or received any money from the property to be a serious aggravating factor. The Court cited several cases where attorneys had been suspended for lying and said, "Dishonesty and a lack of candor cannot be tolerated in a profession built upon trust and respect for the law." Williams, 604 So. 2d at 451.

The only mitigating factor was Williams inexperience in the practice of law.

The Court found that Williams cumulative misconduct demonstrated an attitude and course of conduct that was inconsistent with Florida's standards for professional conduct and warranted disbarment.

Like Williams, Respondent charged and collected an illegal or clearly excessive fee by altering his time records, by fraudulently increasing the hours of services he and his staff performed in regard to the administration of the Locke Estate, and by charging his hourly rate for his staff's time (RR, p. 2, ¶9). Like Williams, Respondent made an intentional misrepresentation to a grievance committee to conceal his misconduct (RR, p. 4, ¶21). In

addition, like Williams, Respondent had trust account violations. (RR, p. 1, ¶3, p. 2, ¶4, 21, 22, and 24). Respondent's dishonesty and lack of candor should not be tolerated. Williams was disbarred for misconduct that was less egregious than that of Respondent.

The Florida Standards for Imposing Lawyer Sanctions support the Bar's position that a three year suspension is not an excessive discipline for the Respondent's misconduct. The following sections of the Standards apply in the instant case:

Standard 4.1 (failure to preserve the client's property); 4.11 Absent aggravating or mitigating factors, Disbarment is appropriate when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury to a client.

Standard 4.6: (Lack of Candor)

4.61 Absent aggravating or mitigating factors, disbarment is appropriate when a lawyer knowingly or intentionally deceives a client, with the intent to benefit the lawyer or another regardless of injury or potential injury.

Standard 9.2: (Aggravation);

9.22(d) multiple offenses; (RR, p. 5, §5, ¶A, 1)

9.22(f) submission of false statements or other deceptive practices during the disciplinary process; (RR, p. 6, ¶A, 2)

9.22(g) refusal to acknowledge wrongful nature of conduct; (RR, p. 6, ¶A, 3)

9.22(h) vulnerability of victim; (RR, p. 6, ¶A,4)

9.22(i) substantial experience in the practice of law; (RR, p. 6,

¶A 5) and

9.22(j) indifference to making restitution. (RR, p. 6, ¶B,1)

Standard 9.3: (Mitigation);

9.32(a) absence of a prior disciplinary record; (RR, p. 6, ¶B,1)

9.32(d) effort made at restitution of money he believed to be owed to heirs, but which remained undistributed; (RR, p. 6, ¶B,2) and

9.32(g) character and reputation testimony from family and clients. (RR, p. 6, ¶B, 3-4)

There was injury to the residual beneficiaries of the Locke Estate in the instant case. Monies that should have been available for distribution to the residual beneficiaries were misappropriated from the Estate by Respondent for fees that Respondent did not earn.

Rule 3-5.1(h) provides for the forfeiture and return of fees in appropriate cases. The Referee found that Respondent charged a clearly excessive fee to the Locke Estate. The Florida Bar produced expert testimony that a reasonable fee should be between $15,000.00 and $18,000.00. The Referee recommended that the Respondent should return the amount of $9,529.50 ($27,529.50 - $18,000.00) to the Locke Estate and distribute it to the residual beneficiaries.

A three year suspension is a generous discipline for Respondent's misconduct as established by Shuminer, McMillan, and Williams and The Florida Standards for Imposing Lawyer Sanctions and should be upheld.

III. THE FINDINGS AND REPORT OF THE REFEREE ARE BASED ON RESPONDENT'S VIOLATION OF HIS ETHICAL RESPONSIBILITIES AS A MEMBER OF THE FLORIDA BAR AND HAVE NO EFFECT ON THE PRIOR DECISION OF THE PROBATE COURT.

IV. THE DOCTRINE OF COLLATERAL ESTOPPEL AND PRIOR CONSENT DO NOT APPLY TO THIS BAR DISCIPLINARY PROCEEDING.

Respondent argues in Section III of his Amended Initial Brief that these matters should have been addressed in the probate court, and that the findings and report of the Referee reverse the prior decision of the circuit court, probate division. Without question, the residual beneficiaries could have challenged Respondent's fees in the probate court; however, they felt it was not economically feasible to do so. Instead, John Stagg filed a grievance complaint and asked The Florida Bar to determine whether or not Respondent engaged in unethical conduct. As a result of the foregoing, the probate court never became aware of Respondent's fraud in altering his time records or his misappropriation of Estate funds. In addition, at the time the beneficiaries signed the waiver of accounting and consent to discharge, they were not aware that the time accounting regarding Respondent's services was fraudulent in that it was based on altered time records. Further, they were not aware that Respondent misappropriated Estate funds because Respondent was never required to prepare a final accounting of Estate assets. The fraud did not come to light until the Bar discovered the computerized time records (R, TFB Exh. #3) during the Bar disciplinary process and conducted an audit regarding Estate assets.

Respondent argues in Section IV of his Amended Initial Brief that the Bar should be estopped to pursue this matter due to the doctrine of collateral estoppel and prior consent (AIB, pp. 29-35). Respondent ignores the fact that Bar disciplinary matters are based on ethical violations of his responsibilities as a member of The Florida Bar. Collateral estoppel and prior consent do not apply to this case.

Rule 3-4.4, Rules Regulating The Florida Bar, states, in part:

> The acquittal of the respondent in a criminal proceeding shall not necessarily be a bar to disciplinary proceedings nor shall the findings, judgment, or decree of any court in civil proceedings necessarily be binding in disciplinary proceedings.

In The Florida Bar v. Swickle, 589 So. 2d 901, 905 (Fla. 1991), Swickle argued that his acquittal of criminal charges should preclude disciplinary action against him. The Florida Supreme Court cited Rule 3-4.4, Rules Regulating The Florida Bar, and stated that whether Swickle had engaged in criminal conduct was not the issue in the disciplinary proceeding. The Court said, "We are concerned with violations of ethical responsibilities imposed on Swickle as a member of the Bar of this state." Swickle, 589 So. 2d at 905.

In the case styled The Florida Bar v. Bennett, 276 So. 2d 481 (Fla. 1973), Bennett, a Florida attorney, was a party in a civil suit in which the trial court found that his conduct in a business transaction involved misrepresentation, fraud, and deceit towards his business partners. A judgment was entered against Bennett.

The civil suit gave rise to a disciplinary action against

Bennett; however, much of the documentary evidence from the civil trial had been lost, disappeared, or was not available for the Referee's consideration by the time the disciplinary proceedings began. The Florida Supreme Court, after commending the trial judge for his caution against being influenced by the mere conclusion of the civil suit against Bennett in the absence of most of the supporting documentary evidence of the trial record, held that the results of a civil suit are not necessarily conclusive of disciplinary action. The Supreme Court stated there must be proof of a breach of the Code of Professional Responsibility before discipline will result.

In Tennessee Bar Association v. Berke, 344 S. W. 2d 567, 48 Tenn. App. 140 (Middle Ct. App. 1960), the Court of Appeals of Tennessee held that records, including pleadings and proof, in civil cases in which the attorney appeared as an attorney or party, can be offered in evidence to the extent they are relevant to the issue of fitness to practice, but that such records and judgments are not res judicata and do not necessarily work as an estoppel in a subsequent disbarment suit. Berke, 344 S. W. 2d at 570.

In this disciplinary proceeding, the Bar is pursuing this action due to Respondent's violations of his ethical responsibilities as a member of The Florida Bar. This disciplinary proceeding against Respondent has no effect on the prior decision of the probate court, and the decision of the probate court is not res judicata and does not work as an estoppel in this case. Respondent violated the Rules Regulating The Florida

Bar and he should be disciplined for the same.

## CONCLUSION

The Referee's findings of fact and recommendations of guilt are supported by clear and convincing evidence. A three year suspension together with restitution for the fraudulent and excessive fees that Respondent charged and collected from the Locke Estate, proof of rehabilitation, and retaking the ethics portion of The Florida Bar Examination are the appropriate discipline for Respondent's cumulative misconduct in this case.

WHEREFORE, The Florida Bar respectfully requests this Court to uphold the Referee's findings of fact and recommended discipline and suspend James Alfred Garland from the practice of law for three years. In addition, The Florida Bar requests this Court to require Respondent to make restitution to the Locke Estate for distribution to the beneficiaries, the amount of $9,529.50, submit proof of rehabilitation and pass the ethics portion of The Florida Bar Examination prior to any reinstatement to The Florida Bar as a member in good standing. Further, the Bar requests this Court to require Respondent to pay the costs incurred by The Florida Bar in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of The Florida Bar's Answer Brief have been furnished by Airborne Express to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-2300; a true and correct copy by U. S. certified mail No. Z789387405, return receipt requested, and by regular U. S. mail to James Alfred Garland, Esq., Respondent, at his record Bar address of 20 North Orange Avenue, Suite 700, Orlando, Florida 32801; and a copy by regular U. S. mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399 this _____ day of September, 1994.

Bonnie L. Mahon