

**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR,**

**Complainant,**

**v.**

**JOSEPH FRANCIS KEELEY III,**

**Respondent.**

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**Supreme Court Case  
No. SC04-48**

**The Florida Bar File  
No. 2002-51,363(15D)**

**THE FLORIDA BAR'S ANSWER BRIEF**  
**WITH CORRECTED TABLE OF AUTHORITIES**

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## **PRELIMINARY STATEMENT**

Throughout this Answer Brief, The Florida Bar will refer to specific parts of the record as follows: The Report of Referee will be designated as RR \_\_\_\_ (indicating the referenced page number). The transcripts of the Final Hearings are designated as follows: September 20, 2004, TT1: \_\_\_\_, (indicating the referenced page number); September 21, 2004, TT2: \_\_\_\_, (indicating the referenced page number); September 29, 2004, TT3: \_\_\_\_, (indicating the referenced page number); November 10, 2004, TT4: \_\_\_\_, (indicating the referenced page number; March 10, 2005, TT5: \_\_\_\_, (indicating the referenced page number. Exhibits introduced by the parties will be designated as TFB Exh. \_\_ or Resp. Exh. \_\_. The Florida Bar will be referred to as “the Bar.” Joseph Francis Keeley III will be referred to as “respondent.”

## STATEMENT OF THE CASE AND FACTS

Respondent's statement of the case and of the facts is in large part unsupported by the record and contains numerous inaccuracies. The Florida Bar's statement of the case and facts are as follows:

The Report of Referee contains extensive findings of fact and makes direct references to testimony and evidentiary exhibits contained in the record. On July 28, 1997, James B. Rice hired respondent to represent him as the Personal Representative of the estate of Myra B. Campbell (RR 2). Mr. Rice is a resident of Pennsylvania, however, the probate matter was filed in the Circuit Court for Palm Beach County where the decedent had resided (RR 2). Respondent testified that the gross estate was worth approximately \$900,000.00 and the total gross estate set forth on the Estate Tax Return (IRS Form 706) was \$888,712.65 (RR 2).<sup>1</sup>

Included in the Campbell estate was decedent's homestead, which was sold on or about September 1, 1997. As of that date, respondent held \$141,051.84 in his trust account belonging to the Campbell Estate from the proceeds of the homestead sale (RR 2-3). An estate bank account was opened, and Mr. Rice pre-signed his name to blank checks, which were left in the respondent's care to be used for estate purposes (RR 3).

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<sup>1</sup> The referee found that respondent was unable to accurately account for estate distributions (RR 14). The only accounting respondent had prepared was a "draft final accounting," sent to Rice on May 21, 2002, which showed the gross estate valued at \$791,320. (TFB Exh. 9). Respondent has admitted that this draft accounting was not accurate (RR 14; Respondent's Initial Brief, p. xvii.).

In addition to the real estate proceeds respondent held in his trust account, respondent transferred \$132,650 from the estate account to his trust account with the pre-signed estate bank account checks (RR 3). The total funds placed in respondent's IOTA Trust Account, which belonged to the Campbell Estate, was \$273,701.84 (\$141,051.84 + 132,650) (RR 3).

In April 2002, Mr. Rice brought the instant Bar complaint against respondent. Mr. Rice alleged that respondent had failed to deposit sufficient funds in the estate's bank account from his trust account to fund final distributions to two of the beneficiaries (Myra and Peggy) of \$25,000 each. The estate's bank account held only \$10,847.41, and therefore was short by \$39,152.59 (RR 4-5).

On August 21, 2001, respondent had written Mr. Rice a letter, which stated in pertinent part (RR4):

“As you already know, Myra and Peggy received \$50,000 towards their final distribution. I will send them their additional \$25,000 upon receiving paperwork back from James Anderson. Upon receiving the paperwork back from James and making distributions to James (\$75,000), Myra (\$25,000) and Peggy (\$25,000), I will file a Petition for Discharge with the Court.”

Respondent subsequently prepared and filed the Petition for Discharge, which stated the estate was fully administered. The court entered an order discharging the estate on October 25, 2001. However, when the estate was discharged, the promised final distribution to Myra and Peggy of \$25,000 apiece had not been made (RR 4). Mr. Rice also stated in the complaint that he had made repeated requests to respondent to deposit

the necessary sums into the estate's bank account from his trust account, and respondent failed to make the deposit despite promises to do so (RR 4-5). Upon receipt of the Bar complaint, respondent acknowledged the money was due and thereupon wrote a check from his trust account in the amount of \$39,152.59, deposited the check into the estate's bank account on May 13, 2002, and the final distributions to the two beneficiaries were paid (RR 5).

An audit by the Bar of respondent's IOTA trust account was conducted and respondent's records and trust accounting procedures were found to be insufficient under the rules (RR 5). The Bar's auditor, William M. Luongo, testified that because of respondent's poor and incomplete record keeping, he had to reconstruct every transaction from respondent's trust account and the Campbell estate bank account from bank statements, deposit slips and cancelled checks. The auditor prepared complete reconstructed ledgers for both the Campbell Estate bank account and respondent's IOTA trust account to track the funds held in trust for the Campbell Estate (RR 5).

The referee found that the audit determined respondent did not have sufficient funds in his trust account to cover his liabilities for the Campbell estate and the shortage was caused by respondent paying himself in excess of his agreed fee (RR 5-6).

It was discovered during the audit respondent had written a series of 29 checks from the Campbell Estate funds which he held in his trust account. The checks were made payable to respondent or his law firm and deposited into his general business bank account. The checks were dated from September 3, 1997, through October 10, 2002,

and in various incremental amounts totaling \$98,742.33 (RR 6-7).

The referee found that in addition to the \$98,742.33 in Campbell funds which respondent withdrew from his trust account, respondent received an additional \$6,869.89 from the estate from three other checks, which he also deposited directly into his business account, thereby totaling \$105,612.22 as the amount of Campbell Estate funds received by respondent (RR7). Respondent testified and the referee found that the total agreed fee for respondent's legal services in connection with the Myra Campbell estate was \$60,000 (RR 7-8, TT1: 62-63, TT2: 41). The referee found that the Bar presented clear and convincing evidence that respondent did not document or prove any entitlement to almost all of the \$45,612.22, which he took from the Campbell estate in excess of the agreed \$60,000 fee and deposited into his business checking account, and respondent misappropriated those excess funds (RR 8-12). The referee further found respondent's testimony was evasive and inconsistent in attempting to explain his entitlement to the misappropriated funds and that respondent did not provide documentation to justify the excess money he took (RR 8-9).

Respondent produced 2 ledger cards to the Bar which related to respondent's handling of funds for the Campbell Estate and the ledger cards were introduced into evidence by the Bar (RR 9). The referee found that those ledger cards were incomplete and inaccurate (RR 13). The Bar's auditor prepared complete reconstructed ledgers for the Campbell Estate bank account as well as respondent's IOTA trust account as it pertained to money held in trust for the Campbell Estate (RR 5).

The expenses noted on respondent's ledgers were paid from both respondent's general business bank account and the Campbell Estate funds respondent held in his trust account (RR 9; TT3: 72). The referee found the total Campbell Estate related expenses shown by respondent, as being paid from his general account, was \$2,096.20, which left an unexplained excess of \$43,516.02 of Campbell Estate funds taken by respondent (RR 11). Furthermore, the referee found that the total of \$2,096.20 should be reduced by those expenses paid to JM Paralegal Services (\$1,414.75), as those expenses should have been absorbed by respondent's agreed fee of \$60,000.00 (RR 11).

The referee found that respondent's misappropriation of the estate funds created a shortage of Campbell estate funds in respondent's trust account. Because of the shortage, the estate did not have the necessary funds for the final distributions of \$25,000 each to the beneficiaries Myra and Peggy (RR 12). There was only \$116 of Campbell estate funds remaining in respondent's trust account on May 13, 2002 when he wrote the check for \$39,152.59, which was deposited into the estate bank account so the 2 distributions could be made (RR 12).

The referee further found that this shortage was covered by respondent's own money, which he had commingled into his trust account (RR 12). Respondent admitted commingling his own money with the client funds he held in trust. Respondent testified he used his own money from proceeds of a personal real estate transaction, which closed on February 28, 2001 (RR 12, TT2: 10-11,51-54,60-61). These funds were deposited into his trust account and used to cover the shortage of the Campbell funds (RR 12, TT2:

10-11).

The referee found that respondent's trust records were incomplete and not in compliance with Rules 5-1.2(b)(4) and (6) Rules Regulating The Florida Bar. Respondent also failed to maintain the required records for 6 years. Although respondent maintained a client ledger card for the Campbell Estate and a second ledger card for the Campbell Estate's real estate transaction, the referee found the ledgers were incomplete and inaccurate, in that they did not show every transaction respondent made in his trust account concerning the Campbell matter. Respondent did not record on the ledger cards any of the 29 checks he wrote to himself from his trust account, or the several transfers of funds from the Campbell Estate bank account into respondent's trust account. Respondent's records lacked the documentation required by the rules to support the Campbell Estate funds he withdrew and deposited into his trust account and his general business bank account (RR 13). Respondent did not comply with the minimum trust accounting procedures in that he failed to prepare monthly reconciliations, monthly comparisons between the trust balances and ledger card balances, and annual trust balances (RR 13).

The referee found that respondent did not diligently represent the estate's Personal Representative (RR 14). Respondent was unable to account accurately for the distribution of an estate he testified was worth approximately \$900,000. Respondent had obtained waivers of a formal accounting from the beneficiaries, and therefore, a formal final accounting was never prepared (RR 14). After Mr. Rice filed the Bar complaint,

respondent had a “draft accounting” of the Campbell estate prepared at Mr. Rice’s request, which he sent to Mr. Rice on May 21, 2002. This was the only accounting provided to his client (RR 14.) Respondent admitted it was not accurate (RR 14, TT3: 59-63), and concedes that on page xvii of his Initial Brief. Respondent attempted to shift the blame to his former associate, Stacy Burnston, for the inaccuracies of the draft accounting. However, the draft accounting was sent by cover letter signed by respondent. Ms. Burnston testified that while she helped respondent prepare it, she had no access to his trust account records, it was subject to his final review and she obtained the information concerning the \$60,000 fee from respondent (RR 14).

The referee found respondent’s testimony that he overpaid the estate was devoid of any credible documentation and contradicted the evidence (RR 14-15). The referee also found respondent was not diligent in that he did not act with reasonable promptness in making the final distribution to the beneficiaries, which was finally done on May 13, 2002, after the Bar complaint was filed (RR 15). Respondent claimed an Internal Revenue Service statutorily imposed lien prevented him from distributing the funds until all estate taxes were paid. However, the referee noted the lien did not prevent respondent from withdrawing the excessive estate funds to himself during the time which respondent alleged this lien was in effect (RR 15). Even assuming the lien prevented distribution until the estate tax liability was discharged, the referee found that, at the very least, the distributions should have been made prior to the discharge of the estate, as respondent had promised Mr. Rice he would do (RR 15).

The referee found respondent guilty of violating Rules [former rules] 4-1.3, 4-1.15(a), 4-1.15(b), 4-1.15(d), 5-1.1(a), 5-1.2(b), 5-1.1(c), and 5-1.1(d) of R. Regulating Fla. Bar and recommended disbarment.

## **SUMMARY OF THE ARGUMENT**

A referee's finding of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The party contesting the referee's findings of fact and conclusions as to guilt must demonstrate either a lack of record evidence to support such findings and conclusions, or that the record evidence clearly contradicts such findings and conclusions. The Bar provided competent, substantial evidence in this case to support the referee's findings of fact and guilt. Moreover, the evidence in the record does not support respondent's version of events. The referee's findings that respondent's trust account had shortages; respondent misappropriated funds from the estate, commingled personal funds with client trust funds, did not maintain minimum trust account records or procedures, and did not diligently represent the Campbell Estate was based on competent and substantial evidence.

This Court has held a bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct. Furthermore, the discipline must have a reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The recommendation by the referee in this case adheres to the purposes of lawyer discipline. In addition, existing case law dictates that an attorney who misappropriates client trust funds should be disbarred. Given respondent's conduct, the discipline given in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee in this case properly recommended disbarment.

Rule Regulating The Florida Bar 3-7.6(q)(2) states the referee shall have discretion to award costs and, absent an abuse of discretion, the referee's award shall not be reversed. Furthermore, Rule 3-7.6(q)(3) states when the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated. Respondent did not prove the referee in the case at bar abused his discretion in awarding costs in favor of the Bar nor demonstrate that the costs of the bar were unnecessary, excessive, or improperly authenticated.

## ARGUMENT

### **I. THE REFEREE'S FINDINGS OF FACT AND GUILT ARE SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.**

A referee's finding of fact regarding guilt carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000). This Court has the authority to review the record to determine whether "competent substantial evidence supports the referee's findings of fact and conclusions concerning guilt." The Florida Bar v. Cueto, 834 So. 2d 152 (Fla. 2002), citing The Florida Bar v. Jordan, 705 So. 2d 1387 (Fla. 1998). The party contesting the referee's findings of fact and conclusions as to guilt must demonstrate either a lack of record evidence to support such findings and conclusions, or that the record evidence clearly contradicts such findings and conclusions. The Florida Bar v. Feinberg, 760 So. 2d 933 (Fla. 2000), quoting The Florida Bar v. Sweeney, 730 So. 2d 1269, 1271 (Fla. 1998).

The Bar presented competent, substantial evidence to support the allegations in the Bar's complaint. The Bar's auditor testified and the referee was provided with a copy of the compliance audit,<sup>2</sup> which demonstrated the shortages in respondent's trust

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<sup>2</sup>The Florida Bar's auditor is a Certified Public Accountant of 17 years, who has performed over 500 audits for the Bar over twelve years. He was admitted as an expert witness in both accounting and trust compliance audits without objection (TT4 pp. 5- 7).

account, his commingling, and his insufficient trust account records and procedures (RR 5). The auditor testified that he completed a series of reports and documents concerning the audit and that his first report was dated January 14, 2003. (TT4: 13; TFB Exh. 17). That report raised issues concerning respondent's apparent commingling of funds, the series of checks he wrote to himself from the estate, and trust record keeping deficiencies. The auditor sent respondent a letter, dated January 23, 2003, requesting respondent to provide further information on those issues. (TT4: 37- 41; TFB Exh. 19). Respondent did not provide all the requested information and the auditor had to obtain documents directly from respondent's bank. (TT4: 41-45). As a result of respondent's inadequate records and record keeping, the Bar's auditor had to prepare a complete reconstruction of respondent's trust account for the years 2001 and 2002, by accounting for all transactions that went through his trust account bank statements. The auditor prepared a second report incorporating the findings made as a result of that reconstruction to update his first report (TT4: 45-47; TFB Exh. 20). The Bar's auditor testified that respondent's "draft accounting" (TFB Exh. 9) was not accurate and the auditor prepared a comprehensive accounting with ledgers detailing each and every transaction for both the Campbell Estate bank account and the estate's funds that were placed in respondent's trust account (TT4: 59-80; TFB Exh. 21).

The Bar and respondent introduced into evidence various checks written from the Campbell estate account made payable to respondent or his law firm (RR 6-7, TFB 4, Resp. Exh. 28). The Bar also introduced into evidence checks respondent made payable

to himself or his law firm from the Campbell Estate funds held in his trust account (RR 6, TFB Exh. 5). The referee found that respondent withdrew more money than he was entitled to withdraw (RR 7-12). Respondent did not have an expert witness but presented his own exhibits in an attempt to explain his reconciliation of estate funds. The referee determined that respondent's testimony was evasive and inconsistent in attempting to explain his entitlement to the misappropriated funds (RR 8-9). Further, respondent did not have documentation to support his version of the activity in the trust account or the reasons he distributed more money to himself than the fee agreed upon with Mr. Rice (RR 8-12).

The evidence presented by the Bar and the findings of the referee are in conflict with respondent's version of the facts presented in his initial brief. The only point respondent asserts in his brief is that his version of the facts is correct and the referee's findings are incorrect. However, a party does not satisfy his or her burden of showing that a referee's findings are clearly erroneous by simply pointing to contradictory evidence where there is also competent, substantial evidence in the record that supports the referee's findings. The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004); The Florida Bar v. Vining, 761 So. 2d 1044 (Fla. 2000). This respondent has not satisfied his burden of demonstrating that there is a lack of record evidence to support the referee's findings and conclusions or that the record evidence clearly contradicts such findings and conclusions. As demonstrated above, the Bar provided competent and substantial evidence to prove its allegations, which support the referee's findings of fact and guilt.

The referee found respondent guilty of violating Rules 4-1.3, 4-1.15(a), 4-1.15(b), 4-1.15(d), 5-1.1(a), 5-1.2(b), 5-1.1(c), and 5-1.1(d) of R. Regulating Fla. Bar.<sup>3</sup> The evidence in this case does not contradict the referee's findings of fact and conclusions as to guilt. The evidence in this case supports the referee's findings.

Moreover, the referee is charged with the responsibility of assessing the credibility of witnesses based on their demeanor and other factors. The Florida Bar v. Senton, 882 So. 2d 997 (Fla. 2004); The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999); The Florida Bar v. Hayden, 583 So. 2d 1016 (Fla. 1991). The referee in this case listened to the testimony provided by the Bar auditor and respondent and found the Bar's evidence to be more credible.

Much of what is stated in respondent's initial brief is done without references to the record. Respondent has chosen to omit transcripts of several hearing dates from the record before this Court. The final hearing took place on September 20, 2004; September 21, 2004; September 29, 2004; November 10, 2004; November 30, 2004; January 3, 2005; January 4, 2005; February 9, 2005; February 10, 2005; February 23, 2005; February 24, 2005; and March 10, 2005. The hearing transcripts for the dates September 20, 2004; September 21, 2004; September 29, 2004; November 10, 2004 were obtained by The Florida Bar and made part of the record during the proceedings before the referee. R. 3-7.7(c)(2), Rules Regulating The Florida Bar provides that the

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<sup>3</sup> Rule 4-1.3 relates to lack of diligence and Rules 4-1.15(a), 4-1.15(b), 4-1.15(d), 5-1.1(a), 5-1.2(b), 5-1.1(c), and 5-1.1(d) relate to mishandling of client funds and the

report and record filed by the referee constitutes the record on review. That rule<sup>4</sup> places the burden on the respondent, as the party seeking review to provide all hearing transcripts that were not part of the record filed by the referee. Indeed, in Paragraph 4 of respondent's Motion For Extension of Time to File Initial Brief, respondent stated to the Court that he had obtained transcripts for four of the hearing sessions and had "contracted the court reporting firm and ordered the transcripts for the other days of the evidentiary hearing." Yet, respondent did not file those transcripts of the other hearing dates with the Court, or serve copies on the Bar when he filed the Initial Brief. In response to the Bar's Motion to Dismiss For Failure To Timely File and Serve Transcripts, respondent stated to the Court that it was his understanding the transcripts filed with the referee by the Bar would be part of the record forwarded to this court and requested that those transcripts already filed be considered the transcripts as required by Rule 3-7.7(c)(2). Respondent was thus afforded a reasonable opportunity in accordance with R. 9.200(f)(2) Florida Rules of Appellate Procedure to supply the omitted portions of the record and has chosen not to do so. It is submitted that with respect to the

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trust account.

<sup>4</sup>R. 3-7.7(c)(2), Rules Regulating The Florida Bar provides, "*Record on Review*. The report and record filed by the referee shall constitute the record on review. If hearings were held at which testimony was heard, but no transcripts thereof were filed in the matter, the party seeking review shall order preparation of all such transcripts, file the original thereof with the court, and serve copies on the opposing party, on or before the time of filing of the initial brief, as provided elsewhere in this rule. The party seeking review shall be responsible for, and pay directly to the court reporter, the cost of preparation of transcripts. Failure to timely file and serve all such transcripts may be cause for dismissal of the party's petition for review."

transcript of the testimony that is not before this Court, the Court should assume that the referee acted correctly in resolving factual issues. Applegate et ux., v. The Barnett Bank of Tallahassee, 377 So. 2d 1150 (Fla. 1980); Hill v. Hill, 718 So. 2d 967 (Fla. 2001).

What the record does demonstrate is that respondent never provided documentation to prove he was entitled to all of the disbursements he took from the estate account and his trust account regarding the Campbell estate (TT3: 70-72). Respondent failed to demonstrate he was entitled to the excess funds he took from the Campbell estate. The Bar gave respondent several opportunities to produce the documentation he claimed he had, but he never produced the documentation (RR 8-9; TT1: 85-86; 88-89; TT3: 57-60, 70-72).

Furthermore, during his testimony, respondent admitted to commingling his funds with those of his clients (TT2: 10-11, 51-53, 60-61). Respondent testified that he deposited substantial funds from a personal real estate transaction and his mother's trust into his trust account and used the funds from the personal real estate transaction to cover the shortage of the Campbell funds (RR12-13; TT2: 9-11). Respondent claims at p. xix of his initial brief (without making reference to the record) that he objected when the Bar introduced evidence of these deposits of his personal funds into his trust account to cover the shortages in respondent's trust account without amending its complaint to include those transactions. The record demonstrates that the Bar, without objection by respondent, introduced evidence of these transactions (TT2: 10-15). Furthermore respondent introduced into evidence the closing statement of his personal real estate

transaction (Resp. Exh. 1; TT2: 52- 53). Respondent also introduced testimony concerning deposits into his trust account of funds from his mother's trust TT2: 58-61). Respondent was charged with the commingling violation in Count II of the complaint, and knew that those transactions were involved in the commingling charge. These transactions were the subject of questions posed to him by the auditor (TFB Exh. 19), the questions posed to him at his sworn statement before the grievance committee, dated March 19, 2003 (TFB Exh. 24, pp. 8-13, 86-92), and the questions posed to him at his deposition, dated June 23, 2004 (TFB Exh. 23, pp. 57-58, 71-72). Thus, the evidence of these instances of commingling was properly heard by the referee. The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999).

Respondent also concedes in his initial brief at pages 3-4 that he failed to prepare monthly reconciliations of his trust account bank statements, failed to prepare monthly comparisons of his trust account obligations to the bank statements and failed to prepare an annual listing of all trust account obligations. Respondent asserts the Bar provided no evidence that the Campbell estate ledger cards failed to comply with the applicable rule. However, the Bar showed respondent did not account for all transactions on the ledger cards as is required. Respondent did not record on the ledger cards any of the 29 checks he wrote to himself from his trust account, or the several transfers of funds from the Campbell estate bank account into respondent's trust account. Respondent testified that he thought there was another ledger card he could not locate (RR 13-14; TT 1: 45-46, 57-59, 70-71). A failure to account for all transactions on a ledger card and not having a

ledger card for a client is violative of the trust accounting rules. Respondent claims he maintained minimum trust accounting records for the Campbell estate funds and he maintained the records as to the Campbell estate funds for 6 years. However, the Bar auditor testified he had to subpoena bank records directly from the bank because respondent did not have the records and he had to reconstruct respondent's trust account with the bank account records, which included reconciling respondent's trust account (TT4: 12-13,29-33). If respondent had maintained his minimum trust accounting records and kept them for the required 6-year period, the Bar auditor would not have had to subpoena respondent's records from the bank and prepare a reconstruction of respondent's trust account.

Finally, the evidence presented by the Bar demonstrated the Discharge of the Campbell estate was entered on October 25, 2001 (RR 4; TFB Exh. 10). However, respondent did not reimburse the estate for the money he took from the estate account so that the two beneficiaries could obtain their final distributions until May 13, 2002, which was after Mr. Rice filed the Bar complaint against respondent (RR 5; TT2: 9). The referee found respondent was not diligent in his representation of Mr. Rice as the personal representative of the Campbell estate because he failed to make the final distributions of the estate in a timely manner. The referee found as further evidence of his lack of diligence, respondent was unable to account accurately for the distribution of an estate worth approximately \$900,000. As demonstrated above, the Bar provided competent,

substantial evidence to support the referee's findings of fact and guilt in this case, thus, this Court should approve the referee's report.

**II. THE REFEREE'S RECOMMENDED SANCTION OF DISBARMENT IS THE APPROPRIATE SANCTION WHEN RESPONDENT'S CONDUCT INVOLVES MISAPPROPRIATION OF CLIENT TRUST FUNDS ABSENT EXTENUATING MITIGATING CIRCUMSTANCES, WHICH WERE NOT PRESENT IN THIS CASE.**

While a referee's findings of fact should be upheld unless clearly erroneous or without support in the record, this Court's scope of review is broader when it reviews a referee's recommendation for discipline because this Court has the ultimate responsibility of determining the appropriate sanction. The Florida Bar v. Rue, 643 So. 2d 1080 (Fla. 1994); The Florida Bar v. Grief, 701 So. 2d 555 (Fla. 1997). In The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), this Court held three purposes must be held in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter others attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. The Florida Bar v. Sweeney, 730 So. 2d 1269 (Fla. 1998); The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997). In the instant case, existing case law and the Florida Standards for Imposing Lawyer Sanctions support the referee's recommendation of disbarment as the appropriate discipline while conforming to the purposes of lawyer discipline.

This Court has held that 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. The Florida Bar v. Korones, 752 So. 2d 586 (Fla. 2000). This Court has also held that disbarment is presumed to be the appropriate discipline for misuse of client funds; however, this presumption can be rebutted by mitigating circumstances. The Florida Bar v. Travis, 765 So. 2d 689 (Fla. 2000); The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996); The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991). This Court stated that in the overwhelming number of recent cases, it has disbarred attorneys for misappropriation of client trust funds notwithstanding the mitigating evidence presented. The Florida Bar v. Shanzer, 572 So. 2d 1382 (Fla. 1991).

In The Florida Bar v. Korones, 752 So. 2d 586 (Fla. 2000), an attorney was the executor of his uncle's estate and a residual beneficiary of the estate. In 1988, the attorney filed an inventory valuing the estate at approximately \$343,752. During 1989-1991, the attorney converted \$123,750 to his own use, paid himself \$7,611 in fees, and paid himself \$4,750 and his son \$7,000 more than the other beneficiaries. In 1994, the attorney submitted a purported final accounting to each of the residual beneficiaries falsely stating \$115,291.53 remained in the estate. However, there were actually only a few dollars left in the estate. A substantial judgment in favor of the estate was entered against the attorney after he was removed as personal representative of the estate. The attorney stipulated to violating R. Regulating Fla. Bar 4-8.4(c) and 5-1.1(a) and other minor trust account violations. The referee recommended the attorney be suspended for

90 days because although conversion of funds is a serious matter, the 7 mitigating factors<sup>5</sup> in the case warranted discipline less severe than disbarment. In addition, this Court found the attorney filed a false accounting with the beneficiaries of his uncle's estate that clearly indicated the attorney was well aware of the wrongfulness of the conduct. This Court held a 90-day suspension was far too lenient given the status of Florida law and that the appropriate discipline given the attorney's conduct was disbarment.

The attorney in Korones was the personal representative of his uncle's estate and used the money from the estate for his own purposes. In this case, respondent was the attorney for the personal representative and not the personal representative of the estate. However, this respondent did have access to estate funds through the signed blank checks given to him by the personal representative, and the sale proceeds of the homestead property of the decedent, which respondent kept in his trust account instead of depositing them in the estate account. This respondent, like the respondent in Korones, did have access to the estate funds and used the funds for his own purposes. Respondent in the case at bar agreed to a \$60,000 fee for his services, but he took more money from the estate than he was entitled to take like the attorney in Korones. Respondent in this case wrote a series of 29 checks totaling \$98,742.33 to his law firm or himself from the estate funds he held in his trust account. This respondent also received an additional \$6,869.89

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<sup>5</sup>The mitigating factors were: personal or emotional problems, good faith efforts to make restitution, full and free disclosure to the disciplinary board, cooperative attitude towards the proceedings, good character and reputation, mental or physical disability or impairment, and remorse. The aggravating factors were: dishonest or selfish

from the estate account making the total amount of funds received from the estate \$105,612.22.

In Korones, the attorney converted \$123,750 to his own use, paid himself \$7,611 in fees and paid himself \$4,750 and his son \$7,000 more than the other beneficiaries. In this case, respondent converted to his own use approximately \$45,000 through the estate funds kept in his trust account and the additional money he received through checks from the estate account. Respondent in this case attempts to claim an entitlement to the money he converted to his own use, but failed to provide any evidence he was entitled to any of the money above his \$60,000 fee except for the \$681.45 in documented costs (RR 11; TT3 83-86). Given the similarities between this respondent's conduct and the attorney in Korones' conduct, this respondent should receive a similar sanction as the attorney in Korones. Thus, the referee in the instant case was proper in recommending disbarment as the appropriate sanction for respondent's misuse of client funds.

An attorney's trust account was audited pursuant to a request from a grievance committee in The Florida Bar v. Travis, 765 So. 2d 689 (Fla. 2000). During the audit period, the trust account showed various shortages amounting to \$22,209.47. The attorney admitted that if his trust account was audited past the audit period, the trust account would probably have an additional shortage of \$1,500. The audit revealed payments for \$35,850, which the attorney paid to himself, but were not authorized by his clients. Although the attorney had money to replace the trust funds, he did not. In

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motive, and substantial experience in the practice of law.

addition, the attorney had not made any substantial efforts to pay back his trust account at the time of the final hearing and he had not told his clients any money was owed to them. Many witnesses, including 3 circuit court judges and several attorneys, testified in support of the attorney's character and fitness to practice law. Other witnesses testified as to the attorney's contribution to the legal profession and to his community during his 28-year legal career. The attorney's psychiatrist also testified to the attorney's depression during the period covered by the audit. The referee recommended the attorney be found guilty of violating R. Regulating Fla. Bar 5-1.1, 5-1.2(b), and 5-1.2(c) and he be suspended for 90 days followed by 3 years probation. The referee found 4 aggravating factors<sup>6</sup> and 5 mitigating factors.<sup>7</sup> This Court commended the attorney for his past good works, but stated the good works did not overcome the attorney's pattern of conduct in which he intentionally misappropriated client funds for his own use. This Court held the appropriate sanction for the attorney's misuse of client trust funds was disbarment.

In The Florida Bar v. Tillman, 682 So. 2d 542 (Fla. 1996), an attorney misappropriated client funds, failed to pay clients' medical expenses with funds supplied to her to do so, drew excessive and premature fees and costs, commingled personal funds

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<sup>6</sup> Substantial experience in the practice of law, exposure of clients to substantial risk, failure to make restitution, and making a payment from his trust account to his daughter for a trip to Costa Rica.

<sup>7</sup> No prior discipline, personal or emotional problems, cooperative attitude during the disciplinary proceedings, provided exceptional service to the profession of law and the community, and service to indigent clients for many years and established services for the poor.

with client funds, and failed to follow the rules for trust accounting set forth by the Bar.<sup>8</sup> The referee found in mitigation no prior disciplinary record and short period of time in practice. The referee found in aggravation a dishonest or selfish motive, pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct and lack of remorse. The referee recommended disbarment. This Court held the presumed punishment for misuse or misappropriation of client funds was disbarment and the mitigation was not adequate in the case to warrant a reduction in the discipline. This Court approved the referee's report and disbarred the attorney.

Travis and Tillman are also analogous to this case. In Travis and Tillman, the attorneys' trust accounts revealed shortages, which is similar to the case at bar where shortages were discovered in respondent's trust account. The attorneys in Travis and Tillman withdrew money from their trust account, which was not authorized by their clients. Respondent, in this case, also withdrew money from his trust account and the estate account, which the client did not authorize. The referees in Travis and Tillman found both mitigating and aggravating factors. However, in the case at bar, the referee did not find any mitigating factors although he did find aggravating factors. Additionally, this court held in Travis and Tillman that although there was mitigation present, the mitigation did not overcome the presumption of disbarment as the appropriate sanction for misuse or misappropriation of client funds. Hence, this respondent's sanction should

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<sup>8</sup>The referee found the attorney violated R. Regulating Fla. Bar 4-1.15(b), 4-1.15(d), 4-8.4(c), 5-1.1, 5-1.1(d), and 5-1.2.

parallel the sanction given in Travis and Tillman, as the cases are analogous. This Court should approve the report of referee in this case and disbar respondent.

In the instant matter, the referee found no mitigating factors in favor of respondent. Respondent has alleged at page 6 of his Initial Brief (again without referencing any support from the record) that the referee did not conduct a “discipline hearing” to give him an opportunity to “to present evidence of his professional reputation garnered from thirty years of practice in the same community.” What the record does show is that respondent was given the opportunity to proffer all evidence of mitigation, without limitation (TT5: pp89-99).

At TT5, page 89, line16 to page 90, line 15, the referee stated as follows:

“Well, listen to what I’m saying, and I think you’ll be in agreement with me. Here’s what I want, here’s my proposal. I would like both parties to submit a report to me just as you described that you have in front of you, Mr. Soifer, showing me piece by piece what supports your position and your findings, your conclusions, and what I want is your conclusions and your basis for them.

Having said that, I want to know from Mr. Keeley anything they can present – Let’s say hypothetically I find you liable on one, two, three, or as to all these rule violations. I want to know what you have to say in mitigation. That’s something for the referee to consider, am I correct? I mean that’s what all these books I’ve been reading tell me that the Court looks at the mitigating factors.

Now don’t assume anything, I haven’t made any final decision but I’m suggesting that both sides – What I’m going to ask you unless you can suggest otherwise, maybe you’re prepared to give it to me right now is a report supporting your position, making findings as if I wrote it, and I want to see if – I’m going to review it. I want after Mr. Garret gets the Bar’s report, I want you to consider – assume the worse and give me all the mitigation you can based on the record.”

At TT5, page 91, lines 19-24, the referee stated as follows:

“What I’m suggesting – This is what I want you to do and I would like to have it within 10 working days so that I can finalize it. Then I may call you back on the issue of sanctions. If I deem it’s appropriate. Let’s see what my conclusions are and if I deem it appropriate we’ll talk about sanctions.”

At TT5, page 94, lines 1-13, the referee stated as follows:

“Okay, is it clear what I want from everybody? I want this initial thing from you Mr. Garrett, by the 25<sup>th</sup>.

Now if you’re going to do anything in – no, you’re getting this today, you give me everything on the 24<sup>th</sup>. I want you to give me your proposed order. I want you to give me an analysis – everything you can say in mitigation as to the claims. Assume the worse, like I said, and give me everything in mitigation you can on behalf of your client as to the findings of the Bar and then the following Friday we’re going to meet at 1:30, maybe a little later, I’m going to tell you my ruling and then we’ll talk about sanctions if it’s appropriate, all right.”

In response to the referee’s mandate, respondent submitted his proposed report of referee wherein respondent requested at pages 16-17 thereof, that the referee find only the following pertaining to mitigation:

“V. Personal History, Past Disciplinary Record, And Aggravating Factors

Prior to recommending discipline, I considered the following: Keeley, a 59-year-old, husband and father of three (3) children, has practiced law in Boca Raton, Florida for almost 33 years. Although Keeley has been twice disciplined by the Bar, both have been for minor misconduct. Keeley did not act with dishonest or selfish motives. The shortcomings for which Keeley is to be disciplined concern only one of Keeley’s many clients and all relate to inadequate record keeping. Keeley has maintained his extremely

active law firm that has many long time clients while dealing with personal tragedy (the death of his 10 year old daughter) and the personal tragedies of key office personnel (death, life threatening illnesses, marital problems, etc.).”<sup>9</sup>

The referee considered the mitigation evidence presented by respondent and found that none of the proffered mitigation was applicable to reduce the disbarment sanction. (RR 18, 20).

The Florida Standards for Imposing Lawyer Sanctions Standard 4.1 deals with the proper sanctions for an attorney failing to preserve client property. Standard 4.11 suggests disbarment is the appropriate discipline when a lawyer intentionally or knowingly converts client property regardless of injury or potential injury. In this case, the referee found respondent misappropriated his client’s trust funds and The Florida Standards for Imposing Lawyer Sanctions and existing case law suggest disbarment is the appropriate sanction for respondent’s misappropriation of client funds.

When considering the discipline delineated in The Florida Standards for Imposing Lawyer Sanctions, any applicable mitigating or aggravating factors must be considered. The referee in the instant case found no mitigating factors in respondent’s behalf. In aggravation, the referee found prior discipline, dishonest or selfish motive, multiple offenses and respondent’s substantial experience in the practice of law. Based on existing case law and the Florida Standards for Imposing Lawyer Sanctions, the

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<sup>9</sup> Respondent testified his 10-year-old daughter was killed in an automobile accident in 1993, his law partner passed away from a brain tumor in 1995, and his secretary of 11 years left his employment after her husband left her and she developed breast cancer.

presumptive discipline for respondent's misconduct in this case is disbarment. Considering the cases cited above and the aggravation and lack of mitigation the referee found in this case, the proper sanction for respondent's misconduct is disbarment. Therefore, this Court should approve the referee's report in this case.

**III. THE REFEREE HAS THE DISCRETION TO AWARD COSTS IN FAVOR OF THE FLORIDA BAR WHEN THE BAR IS SUCCESSFUL, IN WHOLE OR IN PART, UNLESS IT IS SHOWN THAT THE BAR'S COSTS WERE UNNECESSARY, EXCESSIVE, OR IMPROPERLY AUTHENTICATED.**

Rule Regulating The Florida Bar 3-7.6(q)(2) states the referee shall have discretion to award costs and, absent an abuse of discretion, the referee's award shall not be reversed. Furthermore, Rule 3-7.6(q)(3) states when the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated. Respondent in his initial brief simply points to the fact that the referee did not conduct a hearing as to the Bar's costs. There is no requirement a referee conduct a hearing to determine the Bar's costs. Respondent did not allege, or provide, any evidence that the Bar's costs were unnecessary, excessive, or improperly authenticated. See The Florida Bar v. Von Zamft, 814 So. 2d 385, 389 (Fla. 2002); The Florida Bar v. Williams, 753 So. 2d 1258, 1264 (Fla. 2000). Bar Counsel provided an affidavit to the referee and respondent delineating the Bar's costs in this matter. The affidavit was signed under oath

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(TT2: 26-28).

and included the taxable costs allowed under R. Regulating Fla. Bar 3-7.6(q)(1). See The Florida Bar v. Carson, 737 So. 2d 1069, 1073 (Fla. 1999). Therefore, there was no abuse of discretion by the referee in assessing costs in favor of the Bar and this Court should approve the assessment of costs against respondent.

## CONCLUSION

This Court should approve the referee's report in this case and respondent should be disbarred and required to pay the Bar's costs in this matter because the Bar provided competent substantial evidence to support the referee's findings of fact and guilt, the referee's recommendations as to discipline is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions while conforming to the purposes of lawyer discipline , and the referee did not abuse his discretion in awarding costs to the Bar.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY true and correct copies of The Florida Bar's Answer Brief With Corrected Table of Authorities have been furnished by regular U.S. Mail to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; Eugene S. Garrett, counsel for respondent, Keeley, Hayes, Garrett et. al., 2424 North Federal Highway, Suite 314, Boca Raton, FL 33431-7780 and to Staff Counsel, 651 East Jefferson Street, Tallahassee, FL 32399-2300 on this 30<sup>th</sup> day of January, 2006.

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MICHAEL DAVID SOIFER

**CERTIFICATE OF SIZE, TYPE, STYLE, AND ANTI-VIRUS SCAN**

Undersigned counsel hereby certifies that The Florida Bar's Corrected Answer Brief Correcting Page References in the Table of Authorities is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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MICHAEL DAVID SOIFER