

IN THE SUPREME COURT OF FLORIDA

JOSEPH FRANCES KEELEY III,

CASE No.: SC04-48

Petitioner,

Lower Tribunal No.: 2002-51,363(15D)

v.

THE FLORIDA BAR,

Respondent.

PETITIONER'S INITIAL BRIEF

Attorney for Petitioner
Peninsula Plaza - Suite 314
2424 North Federal Highway
Boca Raton, Florida 33431-7781
Telephone: 561.392.4300
Telefax: 561.392.4409

TABLE OF CONTENTS

Table of Contents	I
Table of Citations	ii
Statement of the Case and of the Facts.....	vi
Statement of the Case.....	vi
Statement of the Facts.....	vii
Summary of the Argument.....	xxiii
Argument.....	1
Point 1	1
THE REFEREE’S FINDINGS OF FACT AND CONCLUSIONS AS TO PETITIONER’S GUILT WERE CLEARLY ERRONEOUS	
Point 2	5
THE REFEREE’S RECOMMENDED DISCIPLINE WAS EXCESSIVE AND UNWARRANTED	
Point 3	15
THE ASSESSMENT OF COSTS WAS UNNECESSARY, EXCESSIVE, AND IMPROPERLY AUTHENTICATED	

Conclusion.....	16
Certificate of Service and Certification as to Font Requirements.....	17

TABLE OF CITATIONS

Cases:

<u>Amendment to Rules Regulating Florida Bar</u> , No. SC03-705 (Fla. May 20, 2004).	4
<u>State ex rel. The Florida Bar v. Dawson</u> , 111 So. 2d 427 (Fla. 1959).....	9
<u>State ex rel. The Florida Bar v. Dunham</u> , 14 So. 2d 1 (Fla. 1961).....	9
<u>State ex rel. The Florida Bar v. Evans</u> , 94 So. 2d 7340 (Fla. 1957).....	9
<u>State ex rel. The Florida Bar v. Hathaway</u> , 145 So. 2d 483 (Fla. 1962).....	9
<u>State ex rel. The Florida Bar v. Murrell</u> , 74 So. 2d 221, 223 (Fla. 1954).....	7
<u>State ex rel. The Florida Bar v. Ruskin</u> , 126 So. 2d 142 (Fla. 1961)	9
<u>The Florida Bar v. Aaron</u> , 4090 So. 2d 941 (Fla. 1986)	8
<u>The Florida Bar v. Adler</u> , 589 So. 2d 899 (Fla. 1991)	7
<u>The Florida Bar v. Batista</u> , 846 So. 2d 479 (Fla. 2003).....	xix
<u>The Florida Bar v. Borja</u> , 554 So. 2d 514 (Fla. 1990)	12
<u>The Florida Bar v. Bryan</u> , 396 So.2d 165 (Fla. 1981)	10
<u>The Florida Bar v. Carr</u> , 574 So. 2d 659 (Fla. 1990).....	15
<u>The Florida Bar v. Condon</u> , 647 So. 2d 823 (Fla. 1994).....	12
<u>The Florida Bar v. Dingle</u> , 235 So. 2d 479 (Fla. 1970)	12
<u>The Florida Bar v. Dykes</u> , 469 So.2d 741 (Fla. 1985).....	10
<u>The Florida Bar v. Fredericks</u> , 731 So. 2d 1249 (Fla. 1999).....	xix

<u>The Florida Bar v. Harper</u> , 518 So. 262 (Fla. 1988).....	6
<u>The Florida Bar v. Hosner</u> , 513 So. 2d 1057 (Fla. 1987).....	xix, 7, 8, 13
<u>The Florida Bar v. Lipman</u> , 497 So. 1165 (Fla. 1986).....	6
<u>The Florida Bar v. Lumley</u> , 517 So. 2d 13 (Fla. 1987).....	12
<u>The Florida Bar v. MacKenzie</u> , 319 So. 2d 9 (Fla. 1975)	11
<u>The Fla. Bar v. McClure</u> , 575 So. 2d 176 (Fla. 1991)	1
<u>The Florida Bar v. McFall</u> , 863 So. 2d 303, 307 (Fla. 2003)	6
<u>The Florida Bar v. Miele</u> , 605 So. 2d 866, 868 (Fla. 1992)	1
<u>The Florida Bar v. Mitchell</u> , 493 So. 2d 1018 (Fla. 1986)	8
<u>The Florida Bar v. Mitchell</u> , 645 So. 2d 414 (Fla. 1994).....	14
<u>The Florida Bar v. Moore</u> , 194 So.2d 264 (Fla. 1966)	9
<u>The Florida Bar v. Moxley</u> , 462 So. 2d 814 (Fla. 1985).....	14
<u>The Florida Bar v. Neu</u> , 597 So. 2d 266 (Fla. 1992)	1, 10
<u>The Florida Bar v. Padgett</u> , 481 So. 2d 919 (Fla. 1986)	10
<u>The Florida Bar v. Pahules</u> , 233 So. 130 (Fla. 1970).....	7, 9
<u>The Florida Bar v. Rayman</u> , 238 So. 2d 594 (Fla. 1990)	xvi
<u>The Florida Bar v. Staley</u> , 457 So. 2d 489 (Fla. 1984)	8
<u>The Florida Bar v. Stillman</u> , 401 So. 2d 1306, 1307 (Fla. 1981).....	xix
<u>The Florida Bar v. Suprina</u> , 468 So. 2d 988 (Fla. 1985).....	8, 13

<u>The Florida Bar v. Turk</u> , 202 So. 2d 848 (Fla. 1967)	9
<u>The Florida Bar v. Vannier</u> , 498 So. 2d 896, 898 (Fla. 1986)	1
<u>The Florida Bar v. Welty</u> , 382 So.2d 1220 (Fla. 1990)	10
<u>The Florida Bar v. Whigham</u> , 525 So. 2d 873 (Fla. 1988).....	13

Statutes:

Section 733.6171(4)(e) of The Florida Statutes	viii
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Other Authorities:

Florida’s Standards for Imposing Lawyer Sanctions Sec. 4.12 (Fla. Bar Bd. Governors 1986).....	7
Rule 5-1.1 of the Rules Regulating The Florida Bar	4
Section 4.13 of the American Bar Association’s Standards for Imposing Lawyer Sanctions (1986).....	7
Section 4.14 of the American Bar Association’s Standards for Imposing Lawyer Sanctions (1986).....	7

STATEMENT OF THE CASE AND OF THE FACTS

Statement of the Case

In January, 2004, Respondent The Florida Bar (Bar) filed a two (2) count complaint against Petitioner Joseph Francis Keeley, III (Keeley) that alleged various violations of the Rules Regulating the Florida Bar. Count I alleged that, when hired to represent the personal representative of the Estate of Myra B. Campbell (Campbell Estate), Keeley did not “promptly deliver the real estate sale proceeds held in [Keeley’s] trust account.” Count I charged that Keeley did not act with reasonable diligence and promptness in representing a client; did not, upon receiving property in which the client had an interest, promptly notify the client and deliver such property to the client; did not render a full accounting regarding such property; and did not comply with Bar rules regulating trust accounts. Count II alleged that an audit conducted by the Bar concluded that “[Keeley] had significant and multiple shortages of trust account funds relating to the Campbell Estate; failed to place the estate funds in a separate estate account and instead left such funds in his general trust account and used such funds for purposes other than for which they were intended; wrote checks to himself totaling \$93,742.33 from the trust account which reference the Campbell Estate; lack[ed] documentary support the aforesaid disbursements from the trust account; and by removing funds

that should have been held in trust for his client, [Keeley] misappropriated client funds.” The audit also concluded that Keeley’s trust accounting procedures were deficient, in that Keeley failed to prepare monthly bank reconciliations and comparisons of trust liabilities to reconciled bank balances; failed to maintain annual listing of trust account obligations; and failed to maintain client ledger cards in compliance with the rules regulating the Bar. Count II charged that Keeley did not hold in trust, separate from his own property, the property of the Campbell Estate; did not comply with Bar rules regulating trust accounts; did not hold and apply the Campbell Estate property entrusted for a specific purpose for that purpose; did not maintain minimum trust accounting records; did not preserve to banking records pertaining to property of a client for a period of not less than six (6) years from the conclusion of his representation of the personal representative; and did not follow minimum trust accounting procedures.

At conclusion of the final hearing that took place over the course of nearly a year, the referee found Keeley guilty of all of the alleged violations and recommended that Keeley be disbarred and charged the costs incurred by the Bar.

The petition for review followed.

Statement of the Facts

In July, 1997, Keeley's law firm and James B. Rice (Rice), the Personal Representative of the Campbell Estate, signed an agreement entitled, "Authority to Represent" (Bar's Exhibit 1). The agreement provided that Keeley's law firm's compensation would be paid out of the assets of the Estate as follows:

- A. For routine services involved in normal administration of the estate, an hourly rate of \$200.00 for attorneys services, an hourly rate of \$100.00 for law clerk services, and an hourly rate of \$60.00 for paralegal services for professional time expended with a fee cap for ordinary services of three per cent (3%) of the inventory value of the estate and income earned by the estate.
- B. In addition, if the estate is required to file an estate tax return, an additional ½ of one percent on the balance of the gross estate as finally determined for federal estate tax purposes, as provided by Florida Statute 713.6171(4)(e) which ½ of one percent is agreed to be compensation for preparation of Federal Estate Tax Return.
- C. For extraordinary services, such as sale of property, litigation of all kinds, etc., compensation to be negotiated based upon nature of services, complexity of legal questions involved, time spent and results obtained.

* * * If the undersigned requests said attorney to perform any of the duties of the undersigned as Personal Representative, or if it becomes necessary for the said attorney to do so, after notice to the undersigned, the undersigned agrees to compensate the said attorney therefor at the rate of Two Hundred (\$200.00) Dollars per hour.

Rice, who did not testify during the hearing, is a resident of the Commonwealth of Pennsylvania, however, the probate was filed in the Circuit

Court of Palm Beach County, where the decedent had resided. The gross estate set forth on the Estate Tax Return (Form 706), filed in August, 1999, was \$888,712.65 (Keeley's Exhibit 9). Rice paid the estimated Federal Estate Tax in March, 1998 (Bar's Exhibit 21), and requested an extension of time to file the Federal Estate Tax Form 706 (Form 706). In order to figure the estimated Federal Estate Tax, which had to be paid with the request for extension of time, the estimate of the \$60,000.00 attorney's fees had to be made. The extension was needed because of the objection by the Campbell Estate to Beverly Walker's (Walker) claim that the decedent's homestead had been given to her (any amount paid to settle the claim would be deductible by the Estate on the Form 706). The Walker claim was settled in December, 1998. In August, 1999, Rice filed the Form 706, which showed "estimated" attorney's fees of \$60,000.00 (Keeley's Exhibit 9). In October, 1999, Rice received a "706 refund" (Bar's Exhibit 21). The Federal Closing Letter (Bar's Exhibit 7) ("not a formal closing agreement") did not issue until July, 2000. As of August, 2000, the Campbell Estate owed Keeley's law firm \$30,142.33 as additional attorney's fees and costs for extraordinary services (authorized by section 733.6171 of the Florida Statutes) rendered by Keeley and his associates and paralegals for Campbell Estate litigation and tax matters (Bar's Exhibit 8 and Keeley's Exhibit 14). In April, 2001, The Florida Estate Tax (Bar's Exhibit 21)

was paid, after Keeley resolved a controversy over penalties and interest. In August, 2001, Keeley distributed \$100,000.00 to the Campbell Estate by check from his law firm's trust account (IOTA) (Bar's Exhibit 11). The Florida Final Certificate and Receipt For Estate Tax (Bar's Exhibit 7) was issued in September, 2001. Rice was discharged as personal representative in October, 2001 (Bar's Exhibit 10). In April, 2002, Rice filed a Bar Complaint that alleged Keeley's law firm owed the Estate \$39,152.59 (Bar's Exhibit 12).

Because the federal and state governments have a tax lien on any real estate property (Keeley's Exhibits 17 and 15), Keeley could not disburse the proceeds of the sale of the decedent's homestead until waivers of the federal and state estate taxes were obtained. Also, an underwriter will not authorize a title insurance agent (Keeley was the title insurance agent for the sale of the decedent's homestead) to issue a title policy for estate property without an exception for estate tax liens unless proof is shown that such taxes have been paid (Keeley's Exhibit 16). Also, Walkers' claim involved the proceeds of the sale held by Keeley's law firm's IOTA. Thus, the timing of the \$100,000.00 distribution by Keeley to the Campbell Estate was dictated by the issuance of the required Internal Revenue Service and State of Florida Department of Revenue waivers and the resolution of Walker's claim.

Although Keeley believed that his law firm did not owe the Estate the amount alleged by Rice, in May, 2002, in an attempt to resolve the Bar Complaint, upon advice of counsel, Keeley made a “final distribution” of \$39,152.59 to the Estate by check from his law firm’s funds deposited in its IOTA (Bar’s Exhibit 14) and chose to pursue, at a later time, the amount owed to his law firm for additional attorney’s fees and costs.

The decedent’s homestead sold in August, 1997, and the deposit and cash to close totaled \$141,051.84, which Keeley, as the closing attorney, deposited in his law firm’s IOTA and recorded on a ledger card entitled “Campbell/Walsh” (Bar’s Exhibit 3). Keeley disbursed the \$141,051.84 as follows:

Check # 14913, dated October 8, 1997, payable to Clerk of the Circuit Court, in the amount of \$1,000.60, for fees and revenue stamps.

Check #14966, dated November 6, 1997, payable to John and Jacqueline Walsh, in the amount of \$1,750.00, for an adjustment to purchasers of the homestead.

Check #15064, dated December 15, 1997, payable to Boca Land Surveyors, in the amount of \$275.00, for survey of the homestead.

Check # 17633, dated August 21, 2001, payable to Estate of Myra R. Campbell, in the amount of \$100,000.00, as a distribution to the Estate.

Check #17895, dated May 13, 2002, payable to Estate of Myra Campbell, in the amount \$39,152.39, as the final distribution to the Estate .

Thus, not only did Keeley account for and disburse all of the \$141,051.84, he disbursed \$142,178.19, which was \$1,126.35 more than should have been disbursed. Although Rice (as the personal representative of the Campbell Estate), had the duty to account for all Campbell Estate funds. Keeley only had the duty to account for the proceeds from the sale of the decedent's homestead.

In addition, to the proceeds of the sale of the homestead, Rice sent Keeley the following checks written on the Campbell Estate's Bank of America checking account (Bar's Exhibit 21):

Check #1058, dated June 10, 1998, payable to Keeley's law firm's IOTA, in the amount of \$42,500.00, as partial payment of the settlement of the Beverly Walker claim, and deposited in the IOTA.

Check #1062, dated July 7, 1998, payable to Keeley's law firm's IOTA, in the amount of \$22,800.00, as partial payment of the Florida Estate Tax, and deposited in the IOTA.

Check, # 1064, dated March 11, 1999, payable to Keeley's law firm's IOTA, in the amount of \$3,750.00, as balance of the payment of the settlement of the Beverly Walker claim, and deposited in the IOTA.

The aforesaid deposits of Campbell Estate funds to Keeley's law firm's IOTA totaled \$69,050.00, which Keeley used as follows:

Check #15613, dated December 3, 1998, payable to Beverly Walker, in the amount of \$46,500.00, for settlement of Beverly Walker's claim against the homestead.

Check # 17180, dated April 26, 2001, payable to Florida Department of Revenue, in the amount of \$30,567.11, in payment of the Florida estate tax.

(Keeley's Exhibit 14). Thus, not only did Keeley account for and disburse all of the aforesaid \$69,050.00, he disbursed \$77,067.11, which was \$8,017.11 more than he received to pay the Walker claim and the Florida estate tax.

All of the deposits of Campbell Estate funds into Keeley's law firm's IOTA totaled \$210,101.84. Excluding the aforesaid \$39,152.59 paid to the Estate, all of the other disbursements of Campbell Estate funds from Keeley's law firm's IOTA totaled \$179,842.71, which left Campbell Estate funds of \$30,259.13 in Keeley's law firm's IOTA (Keeley's Exhibit 14). Thus, when Keeley paid the \$39,152.59 to the Estate, as he has contended throughout these proceedings, he overpaid the Estate by \$8,893.46 (Keeley's Exhibit 14), which when coupled with the aforesaid over-disbursement of \$1,126.35, meant that the Estate owed Keeley a total of \$10,019.81, plus the unpaid fees for the attorneys, associates and paralegals, and costs.

Rice opened and maintained a Campbell Estate checking account and pre-signed his name to blank checks, which, at Rice's suggestion, were left in Keeley's care. When authorized by Rice, Keeley would "fill-in" the pre-signed checks and deposit them in his law firm's IOTA to give Rice the opportunity to review the

monthly statement for the Campbell Estate's checking account in case Rice wanted to question any of the pre-signed checks. The checks were used, with Rice's approval, to pay \$63,600.00 to Keeley's law firm as follows:

Check # 1055, dated March 16, 1998, payable to Joseph F. Keeley, P.A., in the amount of \$15,000.00, for "Attorney's Fees," and deposited in Keeley's law firm's IOTA.

Check # 1057, dated May 8, 1998, payable to Joseph F. Keeley, P.A., in the amount of \$5,000.00, for "Attorney's Fees," and deposited in Keeley's law firm's IOTA.

Check # 1059, dated June 10, 1998, payable to Joseph F. Keeley, P.A., in the amount of \$4,400.00, for "Attorney's Fees," and deposited in Keeley's law firm's IOTA.

Check #1060, dated June 23, 1998, payable to Joseph F. Keeley, P.A., in the amount of \$4,400.00, for "Attorney's Fees," and deposited in Keeley's law firm's IOTA.

Check #1061, dated June 29, 1998, payable to Joseph F. Keeley, P.A., in the amount of \$9,800.00, for "Attorney's Fees," and deposited in Keeley's law firm's IOTA.

Check # 1065, dated June 1, 1999, payable to Joseph F. Keeley, P.A., in the amount of \$10,000.00, for "Attorney's Fees," and deposited in Keeley's law firm's IOTA.

Check #1066, dated June 2, 1999, payable to Joseph F. Keeley, P.A., in the amount of \$15,000.00, for "[Attorney's fees]," and deposited in Keeley's law firm's IOTA.

(Bar's Exhibits 4 and 21; Keeley's Exhibit 18). Upon payment of the aforesaid checks, the respective attorney's fees became the property of Keeley's law firm.

From September, 1997 to August 11, 2000, Keeley wrote checks against the \$63,600.00 deposited in his law firm's IOTA and against other funds of his law firm that were deposited in the IOTA as the result of attorney's fees earned from representing other clients. The checks totaled \$93,742.33, referenced either "Campbell Estate" or "Est of Myra Campbell," and were deposited in Keeley's law firm's general account. The deposited funds were used to pay Keeley and the firm's associates and paralegals for extraordinary (statutorily authorized) legal services performed and costs incurred in connection with the administration of the Campbell Estate. Stacy Burnston (Burnston) and Richard Maita, both independent contractors associated with the Keeley law firm, testified by deposition that they worked on the Campbell Estate file as a paralegal and/or attorney and were paid by Keeley's law firm for such work (Bar's Exhibit 2; Keeley's Exhibits 19 and 20). Thus, applying the aforesaid \$63,600.00 to the aforesaid \$93,742.33, the Campbell Estate owed \$30,142.33 to Keeley's law firm as additional attorney's fees (Keeley's Exhibit 14). Also, although Keeley's law firm held the \$30,142.33 pursuant to its right to an attorney's lien to secure payment of the fees and costs owed to the law firm, Keeley voluntarily relinquished such right when the \$39,152.59 was paid to the Estate.

From at least August, 2001 to May, 2002, Rice communicated with Burnston about the administration of the Campbell Estate, and somewhere along the way, Rice concluded that Keeley's law firm owed the Campbell Estate \$39,152.59. Although Keeley denied that his law firm owed the Campbell Estate \$39,152.59, Rice persisted and in April, 2002, filed a Bar Complaint against Keeley (Bar's Exhibit 12), which complained about the "failure to get final distribution from the Escrow account [SALE of REAL ESTATE]." The Bar Complaint alleged that Rice needed a distribution of \$50,000.00 to pay \$25,000.00 to Myra Isenberg (Isenberg) and \$25,000.00 to Peggy Dieber (Dieber) (Bar's Exhibit 21). Rice alleged that he needed the additional distribution of \$50,000.00 because he had paid himself and James Anderson (Anderson) each \$25,000.00 more than he had paid to Isenberg and Dieber. Rice further alleged that \$39,152.59 was needed to make up the difference between the then \$10,847.41 balance in the Campbell Estate's checking account and the \$50,000.00 needed to pay Isenberg and Dieber.

The Florida Bar's auditor, who was the Bar's only witness and who did not have first hand knowledge of the facts and whose testimony was contradicted by the testimony given by Keeley, who has first hand knowledge of the facts, attempted to validate Rice's claim by preparing an "Analysis of Shortages in [Keeley's IOTA],"

dated June 16, 2004 (Keeley's Exhibit 7).¹ The first entry on the flawed analysis is "Estate of Campbell Liability as of 1997 - [\$]169,719.70," which had no basis in fact, but was used to assert that Keeley owed the Campbell Estate \$39,152.39. By subtracting the \$30,567.11 that Keeley's law firm paid to the Florida Department of Revenue and the \$100,000.00 that Keeley's law firm distributed to the Campbell Estate from the "fudged" figure of \$169,719.70, the auditor's analysis asserted that Keeley's law firm owed \$39,152.59 to the Campbell Estate. Also, the Bar's auditor used the inflated figure of \$169,719.70 to assert that significant shortages existed in Keeley's law firm's IOTA (Bar's Exhibits 19 and 20).

In August, 2001, Burnston prepared a letter to Rice for Keeley's signature. The letter stated that Isenberg and Dieber would be sent "their additional \$25,000 upon receiving paperwork back from Anderson. Upon receiving the paperwork back from [Anderson] and making distributions to [Anderson (\$75,000), [Isenberg] (\$25,000), and Dieber (\$25,000), [Keeley] will file a Petition for Discharge with the Court" (Bar's Exhibit 6). The beneficiaries of the Campbell Estate had waived a formal accounting.

¹Keeley cited The Florida Bar v. Rayman, 238 So. 2d 594 (Fla. 1990), for the proposition that the degree of evidence necessary to sustain a charge of attorney misconduct cannot flow from the testimony of one witness unless that witness is corroborated to some extent by either the facts or circumstances.

In May, 2002, after Keeley paid the \$39,152.59 to the Campbell Estate, Burnston mailed Rice the draft of the “Final Accounting for the Estate of Myra Campbell” she prepared after her review of the Campbell Estate file and conversations with Rice (Bar’s Exhibit 9). The draft was incorrect as it showed that in April, 1998, Rice, Anderson, Isenberg, and Dieber each were paid \$50,000.00 and \$30,000.00; whereas, they were each paid \$50,000.00 in April, 1998, and \$25,000.00 in December, 1998 (Bar’s Exhibit 21). The cumulative error of \$20,000.00 (\$5,000.00 each) reduced the “Bank of America checking account balance plus interest earned and transferred” figure of \$50,820.39 (Bar’s Exhibit 21) to \$30,820.39, which, if the draft was accurate, only allowed a \$15,000.00 distribution to both Isenberg and Deibler, not the \$25,000.00 distributions made by Rice to each of them in May, 2002. The aforesaid August 21, 2001 letter to Rice and the conversations that Burnston and Rice had leading up to Burnston’s preparation of the final accounting were what lead Rice to believe that he needed to add \$39,1562.39 to the \$10,847.47 balance in the Campbell Estate checking account to have \$50,000.00 to disburse the \$25,000.00 each to Isenberg and Deibler to equal what he had disbursed to himself and Anderson. To make the \$15,000.00 distributions to both Isenberg and Dieber, Rice needed to add \$19,152.59, not \$39,162.39 to the Estate checking account balance of \$10,847.47 to reach a balance

of \$30,000.00. Because Rice only distributed \$50,000.00 to Isenberg in June, 2001 and \$50,000.00 to Deibler in July, 2001, but distributed \$75,000.00 to himself and Anderson in August, 201, the differences between the distributions should have been paid by Rice and Anderson to Isenberg and Dieber, not by Keeley to the Campbell Estate.

In January, 2003, the Bar's auditor asserted that two (2) of Keeley's "transactions need to be investigated . . . both would be consistent with an attorney attempting to rectify a shortage in the trust account." Neither of the asserted shortages were alleged in the complaint, which only concerned "shortages of trust funds relating to the Campbell Estate" (Count II, ¶ 11). The Bar never moved to amend the complaint.² The Bar's auditor made the same assertion when he testified

²Keeley objected to the introduction of evidence on issues not alleged in the complaint and cited The Florida Bar v. Batista, 846 So. 2d 479 (Fla. 2003), which cited The Florida Bar v. Fredericks, 731 So. 2d 1249 (Fla. 1999), for the proposition that "[a] rule violation cannot be prosecuted during the same trial unless it is within the allegations of the Bar's complaint." Although The Florida Bar v. Hosner, 513 So. 2d 1957 (Fla. 1987) also held: "Misconduct not charged may not provide the basis for punishment," Keeley acknowledges that in The Florida Bar v. Stillman, 401 So. 2d 1306, 1307 (Fla. 1981), this court held:

It is proper for the referee, in making his report, to include information not charged in [the Bar's] complaint. Evidence of unethical conduct, not squarely within the scope of the Bars' accusations, is admissible, and . . . if established by clear and convincing evidence, should be reported because it is relevant to the

during the final hearing. The first transaction involved the sale of real property owned by Keeley and his wife and it was alleged that Keeley “disbursed \$99,807 in excess of the proceeds.” In June, 2004, after the Bar’s auditor realized that he had overlooked a wire transfer of \$224,685.00 (Keeley’s Exhibit 10, page 14) and, not willing to admit his mistake, the Bar’s auditor then asserted that Keeley “left approximately \$135,000 of his personal real estate sale proceeds in the IOTA to further cover his on going shortage (Keeley to Costa)” (Bar’s Exhibit 20). Keeley testified that the balance of the proceeds was actually \$157,990.56 (Keeley’s Exhibit 10) and the funds were left in his firm’s IOTA while he and his wife were having a marital discussion as to how the balance of the proceeds were to be disbursed.

The second transaction involved the trust of Keeley’s mother, of which Keeley was a co-trustee. The Bar’s auditor asserted that Keeley made two (2) deposits to his law firm’s IOTA “in the amount of \$90,000.00 each [and t]he reference on these deposits may well be another account of [Keeley’s].” In June, 2004, after the auditor learned that “source of [the \$90,000.00 deposits] was the Millicent Eleanor Keeley Trust (Keeley’s mother’s trust) and, not willing to

question of the [attorney’s] fitness to practice law and thus relevant to the discipline to be imposed.

withdraw his assertion, the auditor then alleged “[d]ue to the ongoing trust account shortages relating to both the Campbell [Estate] funds and other unrelated liabilities, [Keeley] deposited a total of \$380,000 of personal funds into the [IOTA] to offset the shortage. These funds were added to [the IOTA] in five (5) separate deposits beginning in November 2001 and ending in March 2002” (Bar’s Exhibit 20). Keeley testified the deposits were made because his mother’s health was failing and she was no longer attending to her financial affairs and that the deposits were made to safeguard his mother’s funds until Keeley could develop, then as successor trustee of his mother’s trust, a plan as how to handle his mother’s financial affairs. Keeley further testified that his mother passed away in April, 2002 and Keeley’s sister moved from Atlanta, Georgia, to Port St. Lucie, Florida, to care for Keeley’s father and that he transferred the funds back into his mother’s trust so that his sister could manage the trust, pay household bills, etc.

Also in January, 2003, the Bar’s auditor asserted that “[d]uring the audit period [between July 1997 and ending May 2002], bank statement balances [for Keeley’s law firm’s IOTA] briefly fell as low as \$5,610 and were significantly lower than \$141,000 on several dates throughout the months. As such, it is clear that [Keeley] did not maintain the [proceeds of the Campbell/Walsh real estate closing] entrusted funds intact in the [IOTA] but rather allowed them to be mixed

and used with other trust funds” (Bar’s Exhibit 17). In June, 2004, the Bar’s auditor alleged that “[d]uring [2001 and 2002, Keeley] had used [Campbell Estate] funds for other unrelated purposes causing a shortage which ranged form \$(9,152.54) to \$(146,606.97)” (Bar’s Exhibit 20; Keeley’s Exhibit 7). The Bar’s auditor used the September, 1997 bank statement for Keeley’s law firm’s IOTA as an example of the alleged shortages (Bar’s Exhibit 18). Also, the Bar’s auditor asserted that “[p]art of the shortage was caused by [Keeley] withdrawing fees to himself which exceeded the amount available in trust for these fees [and the] excessive fee withdrawal caused a deficit of Campbell [Estate] funds in the IOTA amounting to (\$33,242.92)” (Bar’s Exhibit 20; Keeley’s Exhibit 7). In September, 2004, the Bar’s auditor then alleged that the “[d]eficit caused by excess fee withdrawals [was] \$43,553.02” and also alleged that the “[d]eficit created in IOTA account [was] \$(44,035.79)” (Bar’s Exhibit 22; Keeley’s Exhibit 8).

There never a shortage of Estate funds in Keeley’s law firm’s IOTA. As shown by Keeley’s Exhibit 14, the Campbell Estate funds held in Keeley’s law firm’s IOTA always had a credit (or positive) balance (Keeley’s Exhibit 14).

Furthermore, any “brief” shortages in Keeley’s law firm’s IOTA can be attributed, first, to the Bar auditor erroneously asserting that Keeley had to account for \$169,719.70, and second, to the nature of Keeley’s law firm’s extremely active

real estate practice that causes its IOTA balance to rapidly fluctuate as closing funds are received and disbursed because deposits are not cleared by the bank as quickly as checks are paid or deposited (Keeley's Exhibit 13).

SUMMARY OF ARGUMENT

As to Count I of the Complaint

Keeley did not fail to promptly deliver the real estate sale proceeds held in trust to the Campbell Estate. Keeley acted with reasonable diligence and promptness in representing Rice (personal representative of the Campbell Estate). Upon receiving Campbell Estate property, Keeley promptly notified Rice. Keeley promptly delivered Campbell Estate property to Rice and (although waived by the beneficiaries of the Campbell Estate) promptly rendered a full accounting regarding such property.

As to Count II of the Complaint

Keeley did not have significant and multiple shortages of trust account funds relating to the Campbell Estate. Keeley did not fail to place Campbell Estate funds in a separate estate account; did not leave such funds in his general trust account; and did not use such funds for purposes other than for which they were intended. Keeley accounted for all the Campbell Estate funds entrusted to him.

Keeley had documentary support for disbursements of Campbell Estate funds from his trust account.

Keeley did not misappropriate Campbell Estate funds by removing funds that should have been held in trust for the estate.

Keeley held in trust, separate from his own property, Campbell estate funds. Keeley only applied Campbell Estate funds for the specific purpose for which they were held in trust. Keeley preserved the financial records pertaining to the Campbell Estate funds in substantial compliance with Bar rules for a period of not less than 6 years from the conclusion of his representation of the personal representative. Keeley maintained minimum trust accounting records and followed minimum trust accounting procedures pertaining to the Campbell Estate funds.

ARGUMENT

Point 1

THE REFEREE’S FINDINGS OF FACT AND CONCLUSIONS AS TO PETITIONER’S GUILT WERE CLEARLY ERRONEOUS

This point presents questions of law and requires an independent review of the referee’s legal conclusions and their legal effects, while giving deference to the referee’s factual findings that are based on competent and substantial evidence.

In Bar discipline proceedings, the referee must find the evidence of a lawyer’s misconduct proven by clear and convincing evidence. The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992) (citing The Florida Bar v. McClure, 575 So. 2d 176 (Fla. 1991)).

Keeley acknowledges that “the party contending that the referee’s findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions.” The Florida Bar v. Miele, 605 So. 2d 866, 868 (Fla. 1992).

Keeley also acknowledges that “[a] referee’s findings 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. Vannier, 498 So. 2d 896, 898 (Fla. 1986).

Keeley only intended to get paid for the legal work that he did for the personal representative of the Campbell Estate. Nothing that Keeley did in this case was done with the wrongful intent to cause injury or potential injury to his client.

As shown by the exhibits in the case, Keeley accounted for all of the Campbell Estate funds that he held in trust; in fact, as Keeley has contended throughout, he overpaid the Campbell Estate and it owes him the balance of his attorney’s fees.

As shown by the exhibits in the case, the checks written by Keeley from his trust account for the payment of his fees only referenced the Campbell Estate for future use, they did not use Campbell Estate funds.

As to Count I of the Complaint
(only concerned the proceeds from the sale of the decedent’s homestead)

As shown heretofore, Keeley did not fail to act with reasonable diligence and promptness in representing the personal representative. The timing of the subject distributions was dictated by the need to obtain estate tax waivers and Keeley’s belief that he did not own the Campbell Estate what Rice claimed was owed to the

Campbell Estate and that Keeley's law firm was entitled to be paid additional attorney's fees.

As to Count II of the Complaint

(which attached the Bar's Exhibit 17 as its Exhibit A and only referred to the Campbell Estate, Costa/Keeley, and the Keeley Trust)

As shown heretofore, Keeley's law firm's IOTA did not have significant and multiple shortages of trust account funds relating to the Campbell Estate. At all times relevant thereto, the estate funds held in Keeley's law firm's IOTA had a credit (or positive) balance.

As shown heretofore, Keeley did not fail to place Campbell Estate funds in a separate estate account and instead left such funds in his general trust account and used the funds for purposes other than for which they were intended. The funds were not commingled ("put in one mass"). The Campbell Estate funds were kept separate from the other funds deposited in Keeley's IOTA and were only used for the purposes for which they were intended.

As shown heretofore, Keeley did not lack documentary support for the checks referenced Campbell Estate. The checks themselves were documentary support as was deposition testimony of the paralegals and/or associates that worked on the estate file.

As shown heretofore, Keeley did not misappropriate Campbell Estate funds by removing funds that should have been held in trust for the estate. All of the Campbell Estate funds entrusted to Keeley were held in trust and such funds were only removed by Keeley to pay Campbell Estate liabilities or make disbursements.

Keeley concedes that the record reflects whether or not his trust accounting procedures were deficient as alleged. Keeley concedes that his notations on his law firm's bank statements and the review of the bank statements, client ledgers cards, and file statements was not the preparation of a monthly bank reconciliation, as that term is commonly understood. Keeley also concedes that his notations on his law firm's bank statements and the review of the bank statements, client ledgers cards, and file statements was not the preparation of a monthly comparison of trust obligations to reconciled bank statements, as those terms are commonly understood. Keeley also concedes that his notations on his law firm's bank statements and the review of the bank statements, client ledgers cards, and file statements was not an annual listing of all trust account obligations, as that term is commonly understood.

No evidence was presented by the Bar as to how the Campbell Estate ledger cards failed to comply with the applicable rule.

As shown heretofore, the Campbell Estate funds were held separately from Keeley's own funds (Costa/Keeley) and Keeley's law firm's funds (because of the

nature of Keeley's extensive real estate practice, as a benefit (without any harm) to his clients, he needs to have substantial funds available in his trust account at the time of a closing to "cover" the disbursement checks issued before the clearing of the received checks.³ Keeley only applied the Campbell Estate funds for the purposes the funds were entrusted to Keeley. Keeley did maintain minimum trust accounting records for the Campbell Estate funds. Keeley did maintain the records as to the Campbell Estate funds for six years. Keeley did maintain minimum trust accounting records and follow minimum trust procedures as to the receipt or disbursements of Campbell Estate funds.

In light of the foregoing, it is respectfully submitted that Keeley is only guilty of misconduct for his failure to prepare monthly bank reconciliations; his failure to prepare a monthly comparison of trust liabilities to reconciled bank balances; his failure to maintain an annual listing of all trust account obligations, and the violation of Rule 5-1.1 to benefit his clients, and that he be disciplined accordingly.

Point 2

**THE REFEREE'S RECOMMENDED DISCIPLINE
WAS EXCESSIVE AND UNWARRANTED**

³ Keeley concedes that the recent amended Bar Rule 5.-1.1 reads: "A lawyer may maintain funds belonging to the lawyer within a trust account in amount no more than is reasonable sufficient to pay bank charges related to the account." Amendment to Rules Regulating Florida Bar, No. SC03-705 (Fla. May 20, 2004).

This point presents a mixed question of law and fact subject to plenary review.

Even if this court sustains the referee's recommendation as to Keeley's guilt, the penalty of disbarment is excessive and unwarranted and, as shown hereafter, does not have a reasonable basis in existing case law.

Keeley chose to contest the Bar's allegations of attorney misconduct and rejected its offer of settlement and remains adamant in his belief that he did no wrong. This court had stated that "it is improper for a referee to base the severity of a recommended punishment on an attorney's refusal to admit alleged misconduct or on 'lack of remorse' presumed from such refusal." The Florida Bar v. Lipman, 497 So. 1165 (Fla. 1986). It should be likewise improper for the Bar to base its argument for discipline on an attorney's refusal to admit alleged misconduct or on "lack of remorse" presumed from such refusal.

The referee did not conduct a "discipline" hearing after he found Keeley guilty of the alleged violations and thus, Keeley was not given the opportunity to present evidence of his professional reputation garnered from thirty years of practice in the same community.

“When reviewing a referee’s recommended discipline, this Court’s scope of review is broader than that afforded to the referee’s findings of fact because this Court has the ultimate responsibility to determine the appropriate sanction.” The Florida Bar v. McFall, 863 So. 2d 303, 307 (Fla. 2003). This court can “second-guess” a referee’s recommendation if the discipline does not have a reasonable basis in case law. Id. “When deciding what punishment is proper in a bar discipline case, a number of interests are to be balanced.” The Florida Bar v. Harper, 518 So. 262 (Fla. 1988).

“Disbarment is only one penalty which may be imposed on a lawyer for ethics violations. Suspension, probation or public or private censure or reprimand also may be appropriate in individual cases.” The Florida Bar v. Pahules, 233 So. 130 (Fla. 1970). “Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved professional standards. It must be clear the he is one who should never be at the bar, otherwise suspension is preferable. For isolated acts, censure, public or private, is more appropriate. Only for such single offenses as embezzlement, bribery of a juror or court official and the like should suspension or disbarment be imposed, and even as to these the lawyer should be given the benefit of every doubt, particularly where he has a professional reputation

and record free from offenses like that charged against him.” Id. at 131-132 (quoting State ex rel. The Florida Bar v. Murrell, 74 So. 2d 221, 223 (Fla. 1954)). “Florida’s Standards for Imposing Lawyer Sanctions Sec. 4.12 (Fla. Bar Bd. Governors 1986) provides that “[s]uspension is appropriate when a lawyer knows or should know that he is dealing improperly with client property and causes injury or potential injury to a client.”” The Florida Bar v. Adler, 589 So. 2d 899 (Fla. 1991). As pointed out in The Florida Bar v. Hosner, 513 So. 2d 1057 (Fla. 1987), section 4.13 of the American Bar Association’s Standards for Imposing Lawyer Sanctions (1986), provides that “[Public] Reprimand is generally appropriate when a lawyer is negligent in dealing with client property and causes injury or potential injury to a client” and section 4.14 provides that Admonishment [private reprimand] is generally appropriate when a law is negligent in dealing with client property and causes little or no actual or potential injury to a client.”

Hosner also pointed out that:

Professional misconduct of the nature and severity shown in the present case—failure to follow trust accounting rules and intermingling personal funds with those held in trust—has been found to warrant a public reprimand in other cases. E.g., The Florida Bar v. Suprina, 468 So. 2d 988 (Fla. 1985). Public reprimands have also been imposed in more serious cases where such misconduct has been combined with other additional violations and in second-offense cases. E.g., The Florida Bar v. Mitchell, 493 So. 2d 1018 (Fla. 1986) (with probation); The Florida Bar v. Aaron, 4090 So. 2d 941 (Fla. 1986) (with

probation; The Florida Bar v. Staley, 457 So. 2d 489 (Fla. 1984) (with probation).

Id.

“First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue hardness in imposing penalty. Second, the judgment must be fair to the [lawyer], being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.” Id. at 132.

In Pahules, the attorney received \$14,052.37 from the sale of his client’s real estate and proceeded to commingle the money with his own; used it for his own interests; and made several attempts to pay his client with checks returned marked “insufficient funds.” Id. at 131. The Pahules court suspended the attorney for a period of six months, citing State ex rel. The Florida Bar v. Ruskin, 126 So. 2d 142 (Fla. 1961) (“that case was similar to the one Sub judge”), wherein, the court “concluded that disbarment, as ordered by The Florida Bar, was too severe a penalty.” Id. at 132. The Pahules court also cited State ex rel. The Florida Bar v. Dunham, 14 So. 2d 1 (Fla. 1961), where the court ordered a twelve-month

suspension for the attorney, “whose transgressions against his clients were more serious than those in the case at bar, and against whom The Florida Bar had recommended disbarment.” Id. “For other selected cases in which this Court ordered suspension after The Florida Bar recommended disbarment, suspensions ranging from three months to three years, see The Florida Bar v. Turk, 202 So. 2d 848 (Fla. 1967); The Florida Bar v. Moore, 194 So.2d 264 (Fla. 1966); State ex rel. The Florida Bar v. Hathaway, 145 So. 2d 483 (Fla. 1962); State ex rel. The Florida Bar v. Evans, 94 So. 2d 7340 (Fla. 1957); State ex rel. The Florida Bar v. Dawson, 111 So. 2d 427 (Fla. 1959).

In Harper, the attorney deposited \$26,109.00 in his trust account to be used to pay his client’s construction loan; instead, the attorney paid \$12,100.00 to himself, which caused the trust account to be overdrawn. The attorney then sent an unsigned \$27,008.05 check to the bank when the balance of his trust account was only \$39.86. Harper at 263. The referee recommended that the attorney be suspended for three months and placed on two-year probation and semiannual audits of his trust account with the suspension to run concurrent with the suspension on another disciplinary case. Id. at. 264. Upon review, although the Bar argued that the attorney should receive at least a one-year suspension followed by a two-year probationary period, Id., this court imposed a six-month suspension followed by a

two year-year probationary period and noted that “Six-month suspensions were given to the attorneys under somewhat similar circumstances in The Florida Bar v. Padgett, 481 So. 2d 919 (Fla. 1986); The Florida Bar v. Dykes, 469 So.2d 741 (Fla. 1985); The Florida Bar v. Bryan, 396 So.2d 165 (Fla. 1981); The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1990) [(attorney suspended for six months for misuse of trust funds where no client suffered a loss by the attorney’s conduct)].” Id.

In The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992), the attorney made unauthorized withdrawals that totaled \$40,000.00 from a client’s guardianship account and deposited the money into his own trust account. The attorney also used \$5,648.49 of the guardianship funds to pay his personal taxes to the Internal Revenue Service. The attorney also kept \$6,386.84 interest that should have been paid to Florida Voluntary Interest on Trust Accounts program. The referee recommended that the attorney be suspended for ninety (90) days and the Bar argued that the attorney deserved a three-year suspension. This court overturned the referee’s recommendation and suspended the attorney for six (6) months.

In The Florida Bar v. MacKenzie, 319 So. 2d 9 (Fla. 1975), the attorney received the proceeds of the sale of his clients’ real property and deposited it in his trust account. A \$13,000.00 check drawn on the trust account (also used by the attorney as his office account) to one of the clients was returned marked

“insufficient funds.” The check was later “made good,” but the attorney never furnished the requested accounting. The referee recommended suspension of the entry of guilt and that the attorney be placed on probation for three years. The referee also “strongly recommended” that the attorney institute new accounting procedures, but as of the date of this court’s opinion, that had not been done. Although the Executive Committee of the Board of Governors directed the Bar to petition this court to sustain the finding of guilt and suspend the attorney for one (1) year, this court suspended the attorney for six (6) months with automatic reinstatement thereafter followed by three years probation and noted “the consideration that should go into an order of discipline is that the discipline should be fair to both the public and to the attorney, with an object of correcting “the wayward tendency in the accused lawyer while offering to him a fair and reasonable opportunity for rehabilitation” Id. at 11.

In The Florida Bar v. Borja, 554 So. 2d 514 (Fla. 1990), the attorney (and personal representative for an estate) issued a \$10,000.00 check from his trust account to pay estate’s taxes when there were no funds in the account for that purpose. Although, at the time of the follow-up audit of his records, the attorney still was not in compliance with the rules, this court publicly reprimanded the attorney and placed him on probation for two years.

In The Florida Bar v. Condon, 647 So. 2d 823 (Fla. 1994), this court suspended the attorney for three years because he could not account for a \$9,500.00 escrow given to him by a client and he had been “recently found guilty of engaging in similar misconduct during the same time frame.”

In The Florida Bar v. Dingle, 235 So. 2d 479 (Fla. 1970), the attorney did not maintain a trust account, escrow account or client’s account in which to deposit trust funds. The attorney admitted that he always commingled his own funds with those of his clients and he did not maintain a bank account because of his troubles with the Internal Revenue Service. The referee recommended suspension for three (3) years and the Bar sought disbarment. This court agreed with the recommendation of the referee.

In The Florida Bar v. Lumley, 517 So. 2d 13 (Fla. 1987), the attorney deposited personal funds in the same bank account held in trust for clients, which resulted in deficits to the clients’ funds. The referee recommended a private reprimand and the Bar argued for suspension. This court took into consideration that (as here) “although at times there were deficits in the amounts of money held in trust, [the attorney] in every case restored the balance in the account in time to meet his obligations to his clients [and n]o client suffered any loss or delay in the disbursement of funds” and concluded that a public reprimand was appropriate. Id.

In The Florida Bar v. Hosner, 513 So. 2d 1057 (Fla. 1987), an audit of the attorney's trust account revealed "shortages" for three months. The referee recommended a ninety (90) day suspension and the Bar argued that the referee's recommendation should be upheld. This court concluded that a public reprimand was the appropriate discipline.

In The Florida Bar v. Whigham, 525 So. 2d 873 (Fla. 1988), a subsequent audit of the trust account of an attorney, who had been previously disciplined for commingling trust funds with personal funds and having overdrafts, trust account shortages and incomplete records, revealed more overdrafts, checks stamped "Returned NSF," and commingling of funds. The referee recommended a three year suspension and the Florida Bar Board of Governors voted to seek disbarment. This court adopted the referee's recommendation and suspended the attorney for three years.

In The Florida Bar v. Suprina, 468 So. 2d 988 (Fla. 1985), the referee recommended a public reprimand for the attorney, who mishandled trust funds and commingled personal funds with trust funds, and this court approved the recommended discipline.

In The Florida Bar v. Mitchell, 645 So. 2d 414 (Fla. 1994), the attorney deposited personal funds and legal fees into his trust account. He had previously

received a private reprimand for failing to maintain appropriate trust accounting records and a public reprimand for the same thing and commingling personal funds with trust funds. Also, the attorney failed to submit interest earned on his trust account to The Florida Bar Foundation and did not appear for the taking of his deposition and This court adopted the referee's recommendation that the attorney be suspended for three (3) months.

In The Florida Bar v. Moxley, 462 So. 2d 814 (Fla. 1985), the attorney utilized the same checking account for both his client and trust fund and his business venture. The referee recommended a public reprimand, which was rejected by this court in favor of a suspension of sixty (60) days.

In light of the facts and circumstances of this case, it is respectfully submitted that a less sever discipline than disbarment has a reasonable basis in the standards for imposing lawyer sanctions, the existing case law, and will be sufficient to fulfill the threefold purpose of attorney's discipline, and thus, a less severe discipline should be imposed upon Keeley.

Point 3

**THE ASSESSMENT OF COSTS WAS
UNNECESSARY, EXCESSIVE, AND IMPROPERLY
AUTHENTICATED**

This point presents a question of the referee’s exercise of discretion and requires an independent review of the competent and substantial evidence to determine whether the referee court abused its discretion. This point also presents a question of law and requires an independent review of the referee’s legal conclusions.

Keeley acknowledges that the “assessment of costs in a disciplinary proceeding is within the discretion of the referee, and this Court will not reverse the assessment in the absence of an abuse of discretion.” The Florida Bar v. Carr, 574 So. 2d 659 (Fla. 1990). Here, however, the referee did not conduct a hearing as to the Bar’s costs. At the conclusion of the hearing, the referee merely told each party to submit a proposed Report of the Referee. The report issued by the referee found “the following reasonable costs have been incurred by The Florida Bar:”

A. Grievance Committee Level Costs:		
1. Court Reporter Costs	\$	586.25
2. Bar Counsel Travel Costs	\$	-0-
B. Referee Level Costs:		
1. Court Reporter Costs	\$	3,411.50
2. Bar Counsel Travel Costs	\$	115.32
C. Administrative Costs:	\$	1,250.00
D. Miscellaneous Costs		
1. Investigator Costs	\$	345.81
2. Witness Fees	\$	-0-
3. Copy Costs	\$	-0-

4. Telephone Charges	\$ -0-
5. Auditor Costs	\$ 7,778.00
TOTAL ITEMIZED COSTS:	<u>\$13,710.40</u>

After the referee filed his report, the Bar filed a second Affidavit of Costs that increased the “TOTAL ITEMIZED COSTS” to \$15,818.76.

Keeley should have been given the opportunity to review the documentation for costs sought by the Bar and to contest any cost that was unnecessary, excessive, and improperly authenticated or not authorized by the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

CONCLUSION

This court should reject the referee’s findings of guilt as to the allegation that Keeley misappropriated Campbell estate funds and the recommendation that Keeley be disbarred. If this court adopts the referee’s finding of guilt as to any of the other allegations of the complaint, this court should conclude that the appropriate discipline in this case is a public reprimand and a period of probation with the requirement that Keeley file quarterly trust account audit reports with the lawyer regulation staff of the Bar.

Also, the referee should be directed to conduct a hearing as to the costs that the Bar seeks to charge to Keeley.

Respectfully submitted,

EUGENE S. GARRETT FBN 140524
Attorney for Petitioner

Certificate of Service and Certification as to Font Requirements

The undersigned certifies that a copy hereof was furnished to John A. Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; Michael David Soifer, Bar Counsel, The Florida Bar, 5900 North Federal Highway, Fort Lauderdale, Florida 33309, by mail on September 6, 2005, and the undersigned further certifies that this initial brief complies with the font requirements of Rule 9.120 (a) of the Florida Rules of Appellate Procedure.

EUGENE S. GARRETT FBN 140524
Attorney for Petitioner
Peninsula Plaza - Suite 314
2424 North Federal Highway
Boca Raton, Florida 33431-7781
Telephone: 561.392.4300
Telefax: 561.392.4409