IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

JOSEPH S. GILLIN, JR.,

Respondent.

_____/

CONFIDENTIAL

Case No. 65,651

(18B84C36)

ANSWER BRIEF OF RESPONDENT AND
BRIEF ON CROSS APPEAL

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I N D E X

CITATIONS OF AUTHORITY

PRELIMINARY STATEMENT

The Bar's Statement of the Facts does not reflect all of the relevant evidence in the record. Further, since the Statement is of such an argumentative nature, it is absolutely necessary for Respondent to restate the facts of the case.

STATEMENT OF THE FACTS

The Respondent received from Brown University a Bachelor's degree in electrical engineering and economics. He then attended Florida Institute of Technology, where he received his Master's degree in electrical engineering. For a period of time he was employed by Harris Company as an electrical engineer. He then decided to attend law school and received his law degree in 1973 from the University of Florida and was admitted to the Bar in 1974. He has practiced law continuously since 1974 (Tr.74). He is married and has four children, ranging from age 20 through 13 (Tr.74). The two oldest children, at all material times, have been enrolled in Brown University (Tr.75). He has no disciplinary record (Tr.75). He has been active in the Brevard County Bar Association, having served as a director of the Association for four or five years and on numerous committees (Tr.76), and has served several years on the local Grievance Committee (Tr.75). He was president-elect of the local Rotary Club and served as a member of the Board of Directors at the Brevard County Chamber of Commerce (Tr.76). He has been active in his church, a member of the Vestry for three years, a member of the School Board and

President of the School Board (Tr.76). He coached a Little League ball team for four years (Tr.77).

After being admitted to the Bar in 1974, he became an associate with the Professional Association, Storms, Pappas and Krasney, where he worked for approximately five years (Tr.78). About 1979, Storms and Krasney merged with the law firm of Normile and Dettener, and Respondent became a partner in said firm (Tr.78), which was known as Storms, Krasney, Normile, Dettener, Gillin and Frieze, P.A.

When the two law firms above mentioned were merged and Respondent became a partner, a formula for fixing the distributive shares of income for the partners was adopted. This formula had been in use by the firm of Normile and Dettener prior to the merger (Tr.22,23).

Approximately two years after the merger of the two law firms, the Respondent became dissatisfied with the formula for distribution of income, believing that it was not fair to him because he was paying more than his share of the overhead (Tr.79,23,40). On numerous occasions, Respondent discussed the formula and his dissatisfaction at Firm meetings (Tr.39,40,41,79). However, despite said dissatisfaction and objections to the formula, no basic changes were made in it.

In late 1982, Respondent, on behalf of the law firm, agreed to represent Michelle Hobson in an action for dissolution of her marriage and he so represented her (Tr.7). According to the Respondent, he agreed to handle the matter on the basis of a reasonable fee, taking into consideration all of the relevant factors required in fixing a fee (Tr.80,81). There was no discussion at that time relative to the amount of a reasonable fee, nor was there discussion relative to an hourly basis therefor. Respondent agreed to attempt to recover as much of his fee as possible from the husband and the balance, if any, would be payable by the wife (Tr.81). Mrs. Hobson's testimony varies from this in that she contended that Respondent's fee would be recovered entirely from the husband (Tr.8). The case was settled, and as a result of the settlement agreement, the wife received one-half of the marital home, her half having a value of $75,000 (Tr.19), a vacant lot having a value of $65,000, a tractor-trailer having a value of somewhere between $50,000 and $100,000 and Peugot automobile (Tr.81,82,83).

The settlement agreement between Mr. and Mrs. Hobson (Bar's Exhibit 1) provided, in effect, that the husband would contribute $5,000 toward Mrs. Hobson's attorney fee, which substantiates Respondent's testimony relative to Mrs. Hobson's

liability for the payment of his fee. Respondent tesified that not only did Mrs. Hobson understand that she was responsible for a reasonable fee, but that she suggested to Respondent that he should be compensated for the results he had obtained for her, well in excess of what her husband's contribution was (Tr.82), and that she suggested $25,000 in addition to her husband's contribution would be reasonable (Tr.83). Admittedly, Mrs. Hobson did not state to Respondent any objections to the amount of the fee (Tr.18,19). The Respondent's composite Exhibit 3 consists of two letters from Mrs. Hobson to the Respondent written after the settlement ageement was entered into and after she had agreed to pay the additional $25,000. In neither of these letters did Mrs. Hobson complain about the amount of the fee.

Respondent, prior to receiving the $25,000 Hobson fee, determined that he would, without any authorization from the firm, divert said fee and purchase a new Porshe automobile with it, . Resondent's mechanisms to accomplish this are well itemized in paragraphs 7, 8(A)(B)(C) of the Referee's Report and it is not necessary to detail them herein. It is obvious from the record that Respondent attempted to keep the law firm from immediately learning anything about the $25,000 fee and the purchase of the Porshe automobile.

Relative to this matter, there is no conflict in the testimony nor are the above-cited portions of the Referee's report in error. However, it was the uncontroverted testimony of the Respondent that when he ordered the Porshe automobile, he told the dealer, Contemporary Motors, that he would take the title to the car in the name of the law firm (Tr.86).

Volker V. Zielke, the agent for Contemporary Motors who took the order for the Porshe, testified that when the Respondent ordered the Porshe, the Respondent told him that the car was to be registered in the name of the law firm (Tr.45,46,47). There is no evidence that the Respondent did not intend to take title to the Porshe in the name of the law firm and the Referee did not so find. Instead, the Referee found "he testified that he would have put the title to the automobile in the firm name, but could not explain how the firm could be persuaded to accept this arrangement" (Tr.80). Respondent admitted that the purchase of the Porshe automobile was not authorized and was wrong and attempted to explain but did not attempt to excuse his conduct (Tr.86). He had two children in college, had practiced law for 10 years, had a minus capital account of $58,000, with no savings. He was making no progress economically, and yet he could not afford to disassociate himself from the law firm (Tr.80). His conduct

relative to purchasing the Porshe was the result of complete frustration with the economic situation that he was in. He felt that if he put the $25,000 fee in the firm, thereby reducing his deficit capital account, the partners would assure him that the formula was right and it was going to work out. Thus, he believed putting the $25,000 in the firm would remove any hope he had of getting equitable changes made to the formula. He ordered the Porshe, recognizing that when title was put in the name of the firm, the firm would have to record it as an asset, he had to tell them about it and in some obscure manner this would enable him to bring about a change in the formula (Tr.86,87). Respondent admitted that this was not a rational explanation for his conduct. On the other hand, his frustration was so great that he wasn't rational (Tr.87).

Mrs. Hobson complained to the Florida Bar about the $25,000 fee and in the course of its investigation, the Bar learned about the unauthorized attempted purchase of the Porshe, which resulted in this disciplinary action. The purchase of the Porshe was never consummated, and the $12,500 was refunded by Respondent to client, the second $12,500 never having been paid.

The matter came to the attention of the law firm and Respondent continued as a partner for approximately six weeks thereafter, at which time he was requested to withdraw (Tr.91).

Circuit Judges Frances Jamieson (Tr.50), Jed Woodson (Tr.55) and John Antoon (Tr.66) were called as character witnesses, all of whom testified that they had known Respondent from eight to ten years. They had complete confidence in his honesty and integrity and that his reputation in the community for honesty and integrety was excellent. Father William G. Lewis, the Pastor of Redspondent's Church, testified that Respondent was an active member of the Church, having served as a member of the Vestry and served as an appointed member of the Church's School Board and President of the School Board. He attended Church regularly and had been very helpful in carrying out the purposes of the Church. Father Lewis further testified that in the Church Community, Respondent's reputation for honesty and integrity was good (Tr.58,59,60).

Frank Griffith, the President of the Brevard County Bar Association, testified that Respondent was on the Board of Directors of the Bar Association and had been on the Board for four or five years; that Respondent was more than willing to take on assignments requested by the Bar Association. Mr. Griffith further testified that Respondent had a very high reputation as an honest and capable lawyer (Tr.62,63).

John Antoon testified that he had known Respondent for between eight to ten years; Judge Antoon was a Past President

of the Brevard County Bar Association and it was his experience that Respondent had always been reliable and hard-working for the Bar Association and turned down no task which he was asked to perform. He further testified that he had confidence in Respondent's honesty and integrity and that Respondent had made a mistake, but he still had confidence in him. He further testified that Respondent's reputation for honesty and integrity in the Community was excellent (Tr.66,67).

William C. Potter, a lawyer practicing in Melbourne, testified that he had known the Respondent since 1958 when they were fraternity brothers in college; he also knew him when they both worked for Harris Company and he had known him at all times since. Mr. Potter had complete confidence in Respondent's honesty and integrity and that his reputation among the members of the Bar for honesty and integrity was excellent.

FIRST POINT INVOLVED

IS THE REFEREE'S RECOMMENDED SUSPENSION FOR SIX MONTHS, WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS, ADEQUATE DISCIPLINE FOR THE MISCONDUCT OF RESPONDENT?

ARGUMENT

The Referee in his report found:

> "The net effect of this activity (Respondent's misconduct) had it been completed as Respondent planned, would have been to conceal from his Firm the receipt of $25,000 in fees (P. 3 Referee's Report).
>
> ...If he had not been intercepted, he would have effectively stolen $25,000 directly from his Law Firm and, indirectly, from his partners".

For the purpose of arguing this point and for no other purpose, Respondent will assume that these facts are supported by clear and convincing evidence.

The purposes of discipline for unethical conduct have been carefully laid out by this Court and it has consistenly followed them. The purposes are well set out in The Florida Bar v. Lord, 433So2d. 983 (FLA 1983) as follows:

> "...First, the judgment must be fair to society, both in terms of protecting the public fron unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, 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."

Because of these criteria and the necessity of applying them to individual situations and lawyers, it is impossible to find any consistencys in the discipline which this Court metes out, other than consistencys in applying the above-stated purposes of discipline. When these purposes are applied to individual cases, of necessity, the Court reaches different results.

In this case, the record reflects, and the Referee found:

> "The Respondent has been a practicing member of the Florida Bar since May, 1974. This is the first time he has been referred to the Bar for a disciplinary matter. He has been an active and concerned member of his community. He has been very active in his Church and in various civic activities, including participation in local Bar functions. He has been a devoted husband and father to his wife and four children. Although, probably due to more to the Bar's involvement than to any pang of conscience on the Respondent's part, there was, in fact, no real damage suffered to any party as a result of Respondent's misdeeds."

The evidence not only supports the above findings, but reflects that the Respondent cooperated fully with the Bar in its investigation; he fully understood that he had committed a wrong; he understood that the wrong was inexcusable and that his conduct was not justified and he had learned his lesson (Tr.92,93). The evidence also reflects that Respondent is a capable and caring lawyer.

Suspension for six months requires proof of rehabilitation. At the end of the six-month suspension, Respondent can apply for reinstatement, a Referee will be appointed, the Bar will file pleadings necessary to get the matter at issue, it will be tried before a Referee, who will make his report to this Court, and this Court will then determine whether the Petition for Reinstatement should be granted. Assuming that everyone moves promptly, it will take at least seven months to determine the Petition for Reinstatement and it will probably take almost a year. Thus, a six-month suspension actually amounts to a suspension for a year or a year and a half. Thus, the discipline recommended by the Referee will effectively terminate Respondent's practice of law for said period. The Bar desires to terminate his practice for at least one year and seven months and, more probably, two years.

The Court must determine what is an appropriate discipline under the facts of this case and as applied to this individual lawyer under the guidelines set out in The Florida Bar v. Lord, supra. The Referee, an experienced trial judge, attempted to do exactly this when he set out the mitigating and aggravating circumstances, and assuming that his conclusions as to the nature of Respondent's misconduct are justified, Respondent

submits that the discipline recommended is not only adequate but, in fact, is harsh when one realizes the problems involved in proving rehabilitation and getting reinstated.

The public needs no protection from this lawyer. His unethical conduct was not directed to the public and the public was not affected thereby. The six-month suspension requiring proof of rehabilitation for reinstatement is, indeed, a sufficient punishment and anything longer might well, instead of encouraging reformation and rehabilitation, deter these objectives.

Certainly six months suspension with proof of rehabilitation is severe enough to deter other lawyers from engaging in similar conduct. The suspension for more than six months will benefit neither the Bench, the Bar, nor the public. It can only result in severly damaging the Respondent as to his future ability to practice law and his ability to maintain support and educate his family. For this reason, any greater discipline than that recommended by the Referee would be punitive in nature and far beyond the scope of the purposes of discipline.

CONCLUSION

Respondent submits that, assuming he attempted to "steal" $25,000 from his Law Firm, under the facts of this case, a suspension of six months is at least adequate to further all of the purposes of discipline.

SECOND POINT INVOLVED
(AS RAISED IN RESPONDENT'S CROSS APPEAL)

ARE THE FINDINGS OF FACT AND RECOMMENDATIONS OF THE REFEREE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE?

ARGUMENT

Bar Counsel begins his argument with the statement:

> "This is not a complex factual situation. Boiled to its simplest, the Respondent, out of apparent frustration with his Firm's billing policy, saw an opportunity to put $25,000 into his own pocket and did so."

Then on page 11 of its Brief, it is stated:

> "In sum, Respondent deprived and, in fact, stole $25,000 directly from his Firm by virtue of this transaction with Mrs. Hobson and, indirectly, from the members of the Firm. Had he been successful, he simply would have deprived them of that income."

These statements by Bar Counsel are based upon the following portions of the Referee's report"

> "The net effect of this activity, had it been completed as Respondent planned, would have been to conceal from his Firm the receipt of $25,000 in fees (p. 3 Referee's Report).
>
> ...If he had not been intercepted, he would have effectively stolen $25,000 directly from his Law Firm and indirectly from his partners. This conduct by the Respondent is unconscionable and can in no way be justified by the Respondent's dissatisfaction with the formula by which his firm accounts for fees received and paid out."

It is Respondent's position that there is no clear and convincing evidence in the record to substantiate the finding that the Respondent "stole" the $25,000 fee.

The evidence is clear that Respondent collected $12,500 from Mrs. Hobson, used the money directly as a deposit for the

purchase of a Porshe automobile and intended to collect an additional $12,500 and use it to complete the purchase of the automobile.

The Respondent testified that when he ordered the Porshe from Contemporary Cars, he told the salesman, Mr. Zielke, that the title to the car would be taken in the name of the Law Firm. Mr. Zielke, the salesman, testified that when he took the order for the Porshe from the Respondent, Respondent told him that the title would be taken in the name of the Law Firm. When Col. Larsen, the Bar's investigator, first questioned the Respondent about the transaction, Respondent told him that he had intended taking the title to the automobile in the name of the Law Firm. There is nothing in the record to refute or in any way question this testimony. It would seem that, considering Respondent's impecable background, his reputation for honesty and integrity, and his candor with the Bar in its investigation, weight should have been given to his testimony in this regard. There is no reason to doubt the testimony of Mr. Zielke, who had no interest in the matter whatsoever. If this testimony by the Respondent and Mr. Ziegler had been believed, it is obvious that the Respondent did not intend to appropriate the $25,000 to his own use; he intended, without any authorization, to take the Firm money and purchase an asset which would become an asset of the Law Firm. The law is clear that clear and convincing evidence is necessary in order to find a lawyer guilty of misconduct. Not only is there no clear and convincing evidence that the Respondent attempted to steal

the $25,000, but the evidence is clear and convincing that he did not intend to do so.

In his report, the Referee stated that the Respondent "could not explain how the Firm could be pursuaded to accept this arrangement", and it was apparently this factor which led the Referee to conclude that Respondent intended to steal the money. The Respondent couldn't explain "how the firm could be pursuaded to accept this arrangement" for the reason that he had not considered whether the Firm would or wouldn't accept it. He was attempting to demonstrate his dissatisfaction with the Firm's formula for distributing income among its members and to bring issues concerning said formula to a head. If the purchase of the car had been consummated and the title taken in the name of the Law Firm, inevitably, the Law Firm would have discovered that it was the owner of the automobile. Respondent would have had to tell them because the car would have been an asset of the Firm and the Firm would have had to treat the purchase price as income. The insurance on the car would have had to have been in the name of the Firm and the car could not have been disposed of without the knowledge and consent of the Firm. If the Firm did not like the arrangement, it could have sold the car and the sales price would have gone into the Firm, or it could have transferred the title to the car to the Respondent, in which event Respondent's deficit capital account would have been increased by $25,000, and in addition to either one of the above, the Respondent could have been removed from the Firm. Any of these alternatives would have brought about a

serious discussion of the "formula" and, according to Respondent's irrational thinking, would have resulted in a change of some kind.

Respondent's conduct does not involve stealing -- putting $25,000 in his own pocket. It involves the unauthorized purchase of a Firm asset with Firm money -- the misapplication of Firm money, not the appropriation thereof. The Law Firm did not consider Respondent's conduct as stealing. As a matter of fact, Respondent remained a member of the professional association for some six weeks after the Firm had learned of his conduct. It is inconceiveable that they would have maintained a thief in their office with ability to steal even more.

In making this argument, it is not the Respondent's position that he committed no wrong. It is his position that by ignoring the uncontroverted testimony of the Respondent and Mr. Zielke, the Referee concluded that Respondent stole $25,000 while, if said testimony is given any weight, it is apparent that Respondent didn't steal anything. He intended to purchase an automobile, taking the title thereto in the name of the Law Firm, without any authorization whatsoever. This is not appropriate conduct, but it is a far cry from stealing.

THIRD POINT INVOLVED
(RAISED ON CROSS APPEAL)

IS THE RECOMMENDED DISCIPLINE OF SIX MONTHS SUSPENSION AND UNTIL RESPONDENT PROVES REHABILITATION EXCESSIVE?

ARGUMENT

If Respondent's position in the Second Point Involved has merit, Respondent submits that the discipline recommended is excessively harsh.

Respondent is not going to argue that a six-month suspension is excessive for stealing $25,000. However, it is his position that the expenditure of Firm monies to purchase a Firm asset, without proper authorization, does not merit this disciplinary measure.

If Respondent had consummated the purchase of the automobile and taken the title in the Firm's name, he would have deprived the firm of very little, if anything. The car could have been sold by the Firm for substantially the amount of the purchase price, or title to it could have been transferred to the Respondent and his capital account charged with the purchase price. The Firm had complete control over the matter. Respondent is not going to argue that his conduct was logical or even rational. He was completely frustrated with the "formula". He had discussed it on numerous occasions

with the Firm and could bring about no adjustments relative thereto. His conduct was that of an individual completely frustrated, floundering around to find some method of bringing the matter up in a dramatic way and securing some change in his position. Incidentally, he accomplished this, which may have been his subconscious wish -- his association with the firm wass terminated and he got out from under the "formula". However, regardless of his lack of logic, his misconduct consisted of attempting to buy a Firm asset with Firm money, without authorization.

Considering Respondent's background, his involvement in civic and Bar activities, his reputation for honesty and integrity, his position in the Community in which he lives and, more importantly, considering his cooperation with the Bar in its investigation, his acknowledgement that he had done wrong and his assurance that he would never wrong again, Respondent submits that a public reprimand would be more than adequate for this misconduct or, stated another way, anything more than a public reprimand would be excessively harsh. Using the criteria in The Florida Bar v. Lord, supra, and all of the other cases which have been before this Court, the public needs no protection from Reponsdent, a public reprimand would deter anyone else who is prone to engage in similar conduct, and such a disciplinary measure would be fair to the Respondent.

CONCLUSION ON APPEAL

Respondent submits that there is no clear and convincing evidence, or even any evidence, that he intended to appropriate the $25,000 fee to his own use, thereby intending to steal it. If the Referee had given any credence to the Respondent's testimony or the testimony of Mr. Zielke to the effect that Respondent intended to take title to the automobile in the name of the Law Firm, the only misconduct of which Respondent would have been guilty was the unauthorized misapplication of Firm monies in a Firm asset, and this conduct does not warrant any discipline greater than a public reprimand.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief of Respondent and Brief on Cross Appeal has been furnished by United States Mail, postage prepaid, to JOHN T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301; JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, Tallahassee, Florida 32301; and DAVID G. McGUNEGLE, Bar Counsel, The Florida Bar, 605 E. Robinson Street, Suite 610, Orlando, Florida 32801, this 28 day of May, 1985.

RICHARD T. EARLE, JR.