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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOSEPH S. GILLIN, JR.,

Respondent.

_______________________/

CASE NO. 65,651

(18B84C36)

COMPLAINANT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
OTHER AUTHORITIES	iii
STATEMENT OF THE CASE	1-3
POINT INVOLVED ON APPEAL	4
STATEMENT OF THE FACTS	5-9
ARGUMENT:	
WHETHER THE REFEREE'S RECOMMENDED SUSPENSION FOR SIX MONTHS WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS UNJUSTIFIED AND ERRONEOUS GIVEN RESPONDENT'S ACTIONS AND WHETHER A SUSPENSION FOR AT LEAST ONE YEAR WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT OF COSTS IF THE JUSTIFIABLE AND APPROPRIATE DISCIPLINE.	10-18
CONCLUSION	19
CERTIFICATE OF SERVICE	21
APPENDIX	A-1 - A-7

TABLE OF AUTHORITIES

	Page
The Florida Bar v. Bradham, 446 So.2d 96 (Fla. 1984)	14
The Florida Bar v. Bryan, 396 So.2d 165 (Fla. 1981)	13
The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978)	12
The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980)	12
The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984)	17
The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983)	16
The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982)	13, 18
The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983)	13
The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981)	13
The Florida Bar v. Ryan, 394 So.2d 996 (Fla. 1981)	14
The Florida Bar v. Unnamed Attorney, Confidential case number 09A77121	15
The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980)	13
The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982)	13
Matter of Salinger, 452 N.Y.S., 2d 623 (App. Div. 1st Dept. 1982)	15

OTHER AUTHORITIES

Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar

1-102(A)(3)	1
1-102(A)(4)	1
1-102(A)(6)	1

Florida Bar Integration Rule, Article XI, Rules

11.02	17
11.02(3)(a)	1
11.06(9)(a)(1)	12

STATEMENT OF THE CASE

Michelle Hobson complained to The Florida Bar in January 1984, and respondent later waived probable cause. The Bar's complaint was filed with this court on July 30, 1984. The Honorable Ted P. Coleman, Circuit Judge in the Ninth Judicial Circuit was appointed referee and held final hearing on November 15, 1984. This report was thereafter forwarded to this court on January 24, 1985.

In that report, the referee recommends the respondent be found guilty violating Article XI, Rule 11.02(3)(a) of The Florida Bar's Integration Rule, for acts contrary to honesty, justice, and good morals. He further recommends violations of the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(3) for illegal conduct involving moral turpitude; 1-102(A)(4) for conduct involving dishonesty, fraud, deceit and misrepresentation; 1-102(A)(6) for conduct adversely reflecting on his fitness to practice law. The referee's recommendations were predicated on his findings. The respondent had attempted to divert $25,000 in one fee stemming from a dissolution of marriage case from his law firm reportedly

because he was totally frustrated and dissatisfied with the firm's compensation policies.

As discipline, the referee recommends the respondent be suspended for a period of six months and thereafter until he proves rehabilitation and pay costs currently totaling $674.03. At their March 1985 meeting, the Board of Governors of The Florida Bar considered the referee's report and recommendations approved the referee's findings of fact, recommendations of guilt but voted to appeal the referee's recommended discipline as erroneous and unjustified given the respondent's actions. Instead, the Board of Governors of The Florida Bar seeks review by this court and urges it adopt a discipline of a suspension for at least one year with proof of rehabilitation required prior to reinstatement in a public opinion order and tax costs now totaling $674.03 against the respondent with interest accruing at the legal rate beginning thirty days after this court's order becomes final.

The Bar's petition for review was filed on March 21, 1985 along with a motion for extension of time to file this brief. Respondent's cross-petition for review was filed late on April

22, 1985. The court granted The Florida Bar until April 30, 1985 to serve this brief.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE'S RECOMMENDED SUSPENSION FOR SIX MONTHS WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS UNJUSTIFIED AND ERRONEOUS GIVEN RESPONDENT'S ACTIONS AND WHETHER A SUSPENSION FOR AT LEAST ONE YEAR WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS THE JUSTIFIABLE AND APPROPRIATE DISCIPLINE.

STATEMENT OF THE FACTS

Respondent was retained by Michelle Hobson to represent her in a dissolution of marriage action which concluded in May 1983. She paid him a retainer fee of $500. There was no specific agreement between the parties at time she retained him as to what the ultimate fee would be. According to the respondent, he expended between 70 and 100 hours on the case. On May 11, 1983, the respondent and his client appeared in the opposing counsel's office and entered into a customony, alimony and property settlement agreement (Bar Exhibit 1). The dissolution of marriage went through pursuant to the agreement shortly after with respondent appearing at that hearing on behalf of his client.

Pursuant to the terms of the agreement, the respondent was soon paid $5,000 by the husband for his fees. Respondent was also to receive Ms. Hobson's $75,000 share of equity in a jointly owned residence for her in two equal installments of $37,500. The first installment was sent to the respondent in June 1983 and deposited into the firm's trust account. At or about this time, the respondent conferred with Ms. Hobson and advised her that he

was entitled to an additional $25,000 for his representation. She apparently acquiesced in the arrangement at the outset.

Respondent practiced as a member of a several member professional association in Melbourne, Florida. The additional fee was not divulged to the other members. Respondent advised Ms. Hobson he would pay $20,000 to her which was done. In turn, she was to provide him with a certified check for $12,250 made payable to Contemporary Cars, Inc. located in Orlando, Florida. When he received that money, he paid her the balance of the remaining funds from the $37,500 or $17,500. Respondent then took the certified check for $12,250 and used it as a deposit on a 1984 Porsche automobile on June 16, 1984. Several days later, he received $11,000 back from the automobile dealership which he placed on a certificate of deposit pending the second payment and arrival of the automobile.

Some time prior to the second $37,500 installment being paid to the respondent's trust account in December 1983 he rented a post office box in a Melbourne post office in the name of the automobile dealership in care of himself. The company had no connection with the post office box. When the second $37,500

installment came in, respondent released $20,000 to Ms. Hobson and advised her he would pay over the balance on receipt of a check again payable to Contemporary Cars, Inc. in the amount of $12,500. This check was to be mailed to respondent's post office box.

Ms. Hobson became disenchanted with this arrangement and complained to The Florida Bar. Following a discussion with James D. Larson the Chief Staff Investigator with The Florida Bar, respondent deposited into the firm's trust account $11,586.68 which was the amount of money from the certificate of deposit plus interest along with a personal check in the amount of $663.32. He then caused the law firm to issue its trust account check payable to Ms. Hobson in the total sum of $29,750 which represented the $12,250 paid to Contemporary Cars, Inc. in June 1983 and the $17,500 still held by the respondent in her behalf. Referee noted the effect of these transactions was that the respondent repaid his client all money he had received in her behalf except the $5,000 in fees contributed to the husband and the original $500 retainer. All money received by Contemporary Cars was returned to the respondent.

The Referee further noted that had the Bar not interceded, the respondent would have apparently purchased a 1984 Porsche automobile with the fee he withheld from his firm. Respondent stated 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. Respondent further stated he was doing this so that he could put some funds into an asset which would not depreciate (T., p. 97). Respondent stated his actions were as a result of complete total frustration and dissatisfaction with the formula by which his firm accounted for fees received and paid out. The referee noted that had respondent not been intercepted he would have successfully concealed from his firm the receipt of $25,000 in fees. Moreover he would have stolen it directly from the law firm and indirectly from his partners. Ironically, under the formula, he was entitled to approximately $20,000 of the fee.

Finally, the referee noted in a footnote to his recommendations that his findings and recommendations were based on the charges in the Bar's complaint noting that respondent's fee of $30,500 would have been clearly excessive given the

relatively uncomplicated dissolution activity and the hours spent but for the prompt return of the money.

ARGUMENT

THE REFEREE'S RECOMMENDED SUSPENSION FOR SIX MONTHS WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS UNJUSTIFIED AND ERRONEOUS GIVEN RESPONDENT'S ACTIONS AND A SUSPENSION FOR AT LEAST ONE YEAR WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT AND PAYMENT OF COSTS IS THE JUSTIFIABLE APPROPRIATE DISCIPLINE.

This is not a complex factual situation. Boiled to its simplest, the respondent out of apparent frustration with his firm's billing policies saw an opportunity to put $25,000 into his own pocket and did so. There is no question he did not tell other members of the professional association. In fact he made some rather interesting and clever arrangements to insure the firm would not become aware of what was transpiring. He arranged for her to procure for him a check payable to the car company for $12,250 in June 1983 which she did. Thereafter, he ordered the Porsche automobile placing the money on deposit but taking back $11,000 which he put in a certificate of deposit pending arrival of the automobile and the second installment. In preparation of that installment he took out a post office box in Melbourne in the name of the car company which had no connection with it in care of himself.

Had Ms. Hobson not become disenchanted, it is without question that respondent would have secured the entire $25,000. The referee noted that although he said he was going to put the car in the firm's name, he could not provide a satisfactory explanation on how the firm be made to accept same.

In sum, respondent deprived and in fact stole $25,000 directly from his firm by virtue of this transaction with Ms. Hobson and indirectly from the members of the firm. Had he been successful he simply would deprived them of that income. Interestingly enough, under the formula arrangement, respondent would have been entitled to approximately $20,000 of those funds as his fee. Nevertheless, he chose to follow the route he did. Due to the Bar's intervention, the monies were repaid to Ms. Hobson and he did not collect a hugely excessive fee for the work done.

The referee has recommended the respondent be suspended for six months and thereafter until he proves rehabilitation in a separate proceeding. In making that recommendation, the referee considered several matters in mitigation and aggravation. This was respondent's first disciplinary matter. He has been an

active and concerned member of his community in civic and church activities and Bar functions. He also has been a devoted father and husband finally, no real lasting damage was done probably due to the Bar's involvement. In aggravation, the referee noted the sheer enormity of the offense he sought to commit. He found respondent's conduct was unconscionable and could never be justified by his dissatisfaction with his firm's fee formula.

A referee's findings of fact are given the same weight as a civil trier of fact. See Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a)(1). Of course, the findings must be supported by clear and convincing evidence which is the case here. This court reviews the report and if the recommendation of guilt is supported by the record imposes the appropriate penalty see The Florida Bar v. Hoffer, 383 So.2d 639, 642 (Fla. 1980) and The Florida Bar v. Hirsch, 359 So.2d 856, 857 (Fla. 1978). In this case the Board of Governors of The Florida Bar believes the recommended suspension is erroneous and unjustified for the offense committed. Instead, the Board believes the appropriate penalty should be a suspension for at least one year with proof of rehabilitation required prior to reinstatement and payment of the costs.

Clearly, if these monies had been trust funds there would be no question the respondent under the applicable case law would be suspended for a much longer period of time if not disbarred notwithstanding repayment of the monies. See e.g. The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983); The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982) and the cases cited therein; The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982); and The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981). The Bar does note there are cases involving misappropriation of trust funds and restitution which resulted in similar suspensions as recommended by this referee. See e.g. The Florida Bar v. Bryan, 396 So.2d 165 (Fla. 1981) and The Florida Bar v. Welty, 382 So.2d 1220 (Fla. 1980). However, a longer suspension is warranted here due to the efforts the respondent took to hide what he was doing. If these were trust funds, this would not be a case of an attorney who for whatever reason began using trust funds to cover his pressing current obligations thereafter cooperated fully when the situation became known. Rather, here it involves an individual who clearly thought out his plan to divert the funds from his law firm and took steps to insure he would not be found out. He would have succeeded but for Ms. Hobson's dissatisfaction toward the end. His cooperation came only after

he was confronted at which time he quickly decided to repay the funds.

Should it matter whether the funds in question are trust funds of a client or fees which are supposed to be turned into the firm and thereafter distributed according to whatever method when money has been wrongfully diverted and misappropriated? The Bar submits that it should not make a material difference. He may have been entitled under the firm's formula to a substantial portion of those funds but his actions prevented operation of formula. Instead all of the funds went into his pocket.

In the past, there have not been many reported cases dealing with attorneys misappropriating fees from their law firms and firm members. The recent case of The Florida Bar v. Bradham, 446 So.2d 96 (Fla. 1984) involves a thirty day suspension followed by a two year's probation where a senior partner diverted a large amount of funds due the law firm to his own use. However, this case involved a consent judgement on much more contested facts and a fairly old case. In The Florida Bar v. Ryan, 394 So.2d 996 (Fla. 1981) an attorney was disbarred for misappropriating $20,000 from his law firm. Criminal action was filed against him

and he had made restitution of $17,500 prior to the referee hearing. He had also been indicted for importation of more than 100 pounds of marijuana with intent to sell and then jumped bail. In The Florida Bar v. Unnamed Attorney, Confidential case number 09A77121 a private reprimand was ordered by this court where the attorney diverted $3,031 in fees from clients he had accepted while employed as a salary member of a firm. Basically, that attorney had been moonlighting. He also had no prior record. Finally, in a New York case an attorney was disbarred where he had diverted $8,800 in fees and costs to his own personal use from the firm over a several month period. See Matter of Salinger 452 N.Y.S. 2d 623 (App. Div. 1st Dept. 1982). He had no prior discipline. That court also found no difference between theft of fees entrusted to an attorney and escrow or trust monies per se.

The Bar submits that there is no demonstrable difference from stealing trust funds or in stealing fees from your other firm members. Misappropriation is misappropriation and should be treated accordingly. This referee's recommended six months suspension is clearly erroneous, unjustified and insufficient. It does not meet the test of the purposes of discipline most

recently set forth in The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). First, the judgement must be fair to both society and the respondent protecting the former from unethical conduct and not unduly denying them the services of a qualified lawyer. While the respondent is qualified, the offense plainly merits more than a mere six month suspension. The public will not be unjustly deprived if this court imposes a stiffer discipline as recommended by the Board of Governors. Second, it must be fair to the respondent both sufficient to punish the breach and at the same time encourage reform and rehabilitation. The Board of Governors submits that the referee's recommendation is overly fair to the respondent and that his offense demands a lengthier suspension so that he may sufficiently contemplate the outrageousness of his conduct prior to petitioning for reinstatement. Third, the judgement must be severe enough to deter others who might be tempted to engage in similar misdeeds.

The gravest problem this court confronts in disciplining attorneys are those cases involving misappropriation of funds. Nothing undermines the public confidence in the legal professional more completely than a lawyer who has stolen trust

funds. Accordingly, this court has meted out the most serious disciplines in those cases. The Bar submits that no material distinction can or will be made by the public between a lawyer who steals from his clients and one who steals incoming fees from the other members of his firm. Stealing is stealing. It is without question that the public has a vital interest in an effective attorney disciplinary program. See Fla. Bar Integr. Rule, art. XI, Rule 11.02 which states in part, "The primary purpose of discipline of attorneys is the protection of the public, and the administration of justice, as well as the protection of the legal profession through the discipline of members of the Bar." In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984) this court adopted a referee's statement that:

> Protection of the public, punishment, rehabilitation of an attorney who commits ethical violations are three important purposes of disciplinary measures. Equally important purposes, however, are a deterrence to other members of the Bar and the creation and protection of a favorable image of the profession. The latter will not occur unless the profession imposes visible and effective disciplinary measures when serious violations occur. (At page 1341).

The Board has recommended suspension for a period of at least one year with proof of rehabilitation required prior to reinstatement. It will better enhance that public confidence in

the discipline process than will the referee's current recommendation. Accordingly, the Board of Governors strongly urges this court to adopt its recommendation in lieu of the referee's. In Morris, Supra, the court imposed a two year suspension in a case involving misappropriation of trust funds. Justice Alderman noted in his dissent preferring disbarment at page 1275 that, "A lawyer who steals from his trust account is worse than a common thief, and there is no place for such person in The Florida Bar". Stealing from one's law firm and members of the firm is equally egregious and there should be little, if any room, for such a member in The Florida Bar as well.

CONCLUSION

WHEREFORE, The Board of Governors of The Florida Bar respectfully prays this Honorable Court will review the referee's findings of fact, recommendations of guilt and discipline and support the findings of fact and recommendations of guilt, but reject his recommended six months suspension with proof of rehabilitation required prior to reinstatement and instead impose his discipline a suspension for a period of at least one year with proof of rehabilitation required prior to reinstatement and order payment of the costs in this matter currently totalling $674.03.

Respectfully submitted,

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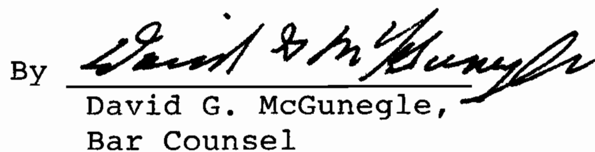
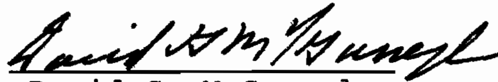
By 

David G. McGunegle,
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Brief in Support of Petition for Review have been furnished by mail to the Clerk of the Supreme Court, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing Brief has been furnished by mail to Richard T. Earle, Jr., Counsel for Respondent, 447 Third Avenue North, St. Petersburg, Florida 33701; a copy of the foregoing Brief has been furnished by mail to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301 on this 29th day of April, 1985.



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