

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,
Complainant,
v.
JOSEPH S. GILLIN, JR.,
Respondent.

PUBLIC
CASE NO. 65,651
(18B84C36)

REPORT OF REFEREE

FILED
SID J. WHITE
JAN 28 1985
CLERK, SUPREME COURT
By *[Signature]*
Chief Deputy Clerk

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, a hearing was held in the above entitled cause on November 15, 1984, in Courtroom E, Orange County Courthouse, Orlando, Florida. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: David G. McGunegle, Bar Counsel

For The Respondent: Richard T. Erle, Jr., Esquire

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is Charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

1. On a date uncertain to this referee but between November 1, 1982, and May 11, 1983, the Respondent was retained by one Michelle Hobson to represent her in a divorce action. She paid the Respondent a retainer fee of \$500.00 at that time. There was no specific agreement made at that time as to what the ultimate fee would be.

2. The Respondent expended between 70 and 100 hours, according to his testimony (see transcript, page 104).

3. On May 11, 1983, the Respondent and his client appeared in the office of Michael R. Walsh, Esquire, of Orlando, Florida, ^{and} entered into a "Custody, Alimony and Property Settlement Agreement" (see Bar Exhibit 1).

4. Pursuant to that agreement Mr. Walsh, who represented the opposing party, and his client appeared before a judge and obtained a dissolution of marriage. The Respondent appeared at the final hearing on behalf of his client.

5. Pursuant to the terms of the dissolution the Respondent subsequently received payments totaling \$75,000.00. These payments represented the amount due to Mrs. Hobson for the equity she possessed in a jointly owned residence. This money was to be paid to the Respondent in two installments of \$37,500.00 each. As these payments were received they were deposited in the Respondent's firm trust account.

6. At some point in time not clear to this referee the Respondent told his client that he was entitled to an additional fee of \$25,000.00 for his representation in the dissolution. Mrs. Hobson, his client, apparently acquiesced in this arrangement, at least at the outset. This additional fee would not be made known to his law firm.

7. In order to keep secret the payment by his client of this \$25,000.00 fee the Respondent opened a bank account or money market account for the sole purpose of receiving clandestine payments from his client. He also rented a post office box for the sole purpose of receiving the payments from his client.

8. The Respondent then instructed his client as follows:

(A) Upon receipt of the first \$37,500.00 payment he would pay over \$20,000.00 to her. She was then to provide him with a check for \$12,250.00 made payable to Contemporary Cars, Inc., located in Orlando, Florida. Upon receipt of that check he then paid the balance of the funds to her from the \$37,500.00 payment.

(B) The Respondent used the money received from his

client as a deposit on a 1984 Porsche automobile on June 16, 1984.

(C) When the Respondent received the second \$37,500.00 installment in December, 1983, he released \$20,000.00 to Mrs. Hobson and told her that he would pay over the balance upon receipt of a check, again made payable to Contemporary Cars, Inc., in the amount of \$12,500.00.

9. At this point the Respondent's client became disenchanted with this arrangement and complained to The Florida Bar. Following a discussion with James D. Larsen, Chief Staff Investigator with The Florida Bar, the Respondent issued a check payable to Mrs. Hobson for \$29,750.00. This check represented the \$12,250.00 she had paid to Contemporary Cars, Inc. earlier and the \$17,500.00 still held by the Respondent on her behalf. The effect of these financial transactions was that the Respondent refunded to his client all money that he had received on her behalf except \$5,000.00, the amount that was agreed to be contributed by her husband toward her attorney's fees. The Respondent also retained the original \$500.00 retainer, which meant that he received a total fee of \$5,500.00 for his services. All money received by Contemporary Cars was returned to the respondent.

10. Had he not been intercepted by The Florida Bar investigator the Respondent would apparently have purchased a 1984 Porsche automobile with this fee he had withheld from his firm. 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. He testified that he was engaging in this exercise so that he could put some funds into "an asset which would not depreciate" (transcript, page 97).

The net effect of this activity, had it been completed as the Respondent planned, would have been to conceal from his firm the receipt of \$25,000.00 in fees.

III. Recommendations as to Whether or Not the Defendant Should Be

Found Guilty: This referee recommends that the Defendant be found guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility:

(A) 1-102 (A) (3) for illegal conduct involving moral turpitude.

(B) 1-102 (A) (4) for conduct involving dishonesty, fraud, deceit and misrepresentation.

(C) 1-102 (A) (6) for conduct adversely reflecting on his fitness to practice law.

(D) In addition this referee would recommend that the Respondent be found guilty of violation of The Florida Bar's Integration Rule, Article XI, Rule 11.02 (3) (a), for acts contrary to honesty, justice, and good morals.

IV. Recommendation as to Disciplinary Measures to be Applied:

In determining a recommendation as to disciplinary measures to be applied this referee has considered the following matters in mitigation and aggravation:

1. 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 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 the Respondent's misdeeds. These circumstances have been given weight as mitigating factors.

2. The aggravating factor found by this referee is the sheer enormity of the offense the Respondent sought to commit. If he had not been intercepted he would have effectively stolen \$25,000.00 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.

Upon due consideration of these mitigating and aggravating circumstances it is the recommendation of this referee that the Respondent be suspended for a period of six months and thereafter until he shall prove his rehabilitation as provided in Rule 11.10 (4) of the Integration Rules of The Florida Bar.¹

V. Statement of Costs and Manner in Which Costs Should be Taxed:

I find the following costs were reasonably incurred by The Florida Bar:

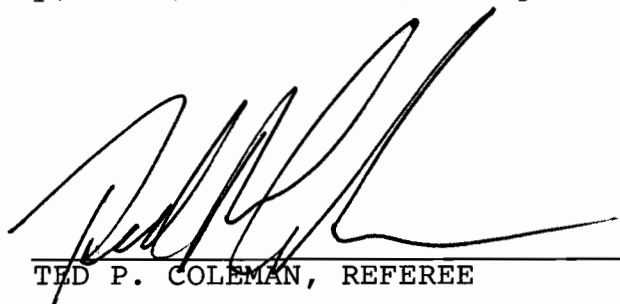
(A) Grievance Committee Level Costs	
1. Administrative Costs	\$150.00
(B) Referee Level Costs	
1. Administrative Costs	150.00
2. Transcript Costs	260.10
3. Deposition of Joesph S. Gillen, Jr.	105.80
(C) Miscellaneous Costs	
1. Telephone charges	8.13
	<hr/>
Total Costs to Date	\$674.03

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

¹These findings and recommendations have been based upon the charges prosecuted by the Bar; however, this referee cannot help but comment upon the observation that what is in dispute here is the disposition of what would have been a fee of \$30,500.00 in a relatively uncomplicated dissolution action in which the Respondent, by his own testimony, expended between 70 and 100 hours. Perhaps the Bar chose not to consider the amount of this fee since the additional \$25,000.00 was eventually returned to the client. One cannot help but be reminded of the old story about the two business partners who operated a store together. While one partner was out to lunch a customer came in and paid on his account. The partner who received the payment discovered that the customer overpaid the amount due. The only moral dilemma the storekeeper saw was whether to tell his partner about it, or keep the windfall to himself.

I CERTIFY that the original of this report, as well as the original of all exhibits and transcripts, has been forwarded this day to The Supreme Court of Florida and that copies of this report have been furnished this day to David G. McGunegle, Bar Counsel, 605 East Robinson Street, Orlando, Florida 32801 and Richard T. Earle, Jr., Esquire, 447 Third Avenue North, St. Petersburg, Florida 33731.

DATED this 24th day of January, 1985, at Orlando, Orange County, Florida.



TED P. COLEMAN, REFEREE