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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 65,651

(18B84C36)

v.

JOSEPH S. GILLIN, JR.,

Respondent.

______________________________/

COMPLAINANT'S REPLY BRIEF IN SUPPORT OF PETITION FOR REVIEW

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PRELIMINARY STATEMENT

Argument will be limited to matters raised in respondent's Response Brief.

Complainant considers matters raised in points one and three of respondent's brief to have been fully covered in the main brief.

ARGUMENT

THE FINDINGS OF FACT AND CONCLUSIONS OF THE REFEREE ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE WHEREAS THE DISCIPLINE SHOULD BE INCREASED.

Respondent asserts the referee erroneously found that respondent in fact stole the twenty five thousand dollar fee. Respondent admits his conduct was improper but argues that it was not theft. He asserts he misapplied the fee owed to the firm to purchase a Porsche automobile. However, he argues that since he was going to title the car in the firm name and present it as an asset, it was not misappropriation of funds to his own personal use.

Respondent buttresses his argument through his own testimony and that of the car salesman. However, there are problems with this approach. First, when respondent approached his senior partner, Elting Storms, and told him of the problem after having been confronted by the Bar Staff Investigator, he did not advise him that he had utilized the money to order the car. This only surfaced in subsequent conversations over the next few days. Mr. Storms testified that he first learned of the auto purchase plan either from Bar Counsel or the Staff Investigator and not the respondent. (T. pp. 28-29, 31-32, 38). Next, although the firm

name was placed on the purchase order respondent's home address was used and respondent instructed the salesman not to send mail to the firm (Respondent's Exhibit 1, T., pp. 94-95). Moreover, it is patently clear from all of the evidence respondent did not want members of his firm to know what was transpiring. He was quite devious in his arrangements with Ms. Hobbs for delivery for the first check for $12,250.00 and more so in taking out a post office box in Melbourne in the name of the auto company solely for the purpose of arranging the delivery of the second check. Finally, as found by the referee he could not explain how he was going to convince the firm to accept title to the automobile which he admits he had no authority to purchase for them. (T., pp. 86, 95-97).

Respondent asserts the firm could have refused the automobile, sold it for substantially the same amount of the purchase price or increased his capital account deficit. He further asserts that he figured somehow his conduct would have stuck a blow against the ubiquitous "formula" which had driven him to irrationality. Had the matter been consummated and the automobile purchased, the Bar submits it probably would not have been titled in the firm's name. Surely it could have been titled

in respondent's name, his wife's name, the firm's name or another's if the respondent so chose at the time he completed the purchase. Whatever respondent may have told the salesman when he ordered the car is not necessarily determinative of what he would do when it arrived. Moreover, it appears this asset which he was going to give to the firm be one for his personal and professional use and not other members of the firm. This was not an automatic word processing system, office furniture or legal volumes for the library; it was a Porsche sports car. In sum, respondent's argument does not undermine the referee's finding that he had attempted to divert the $25,000.00 from the firm to his own personal use.

The referee's findings of fact are given the same weight as a civil trial fact pursuant to Fla. Bar Integr. Rule, art. XI, Rule 11.06(9)(a)(1). The Florida Bar v. Hawkins, 444 So.2d 961, 962 (Fla. 1984). This court reviews the record and if the recommendation of guilt is supported by same 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 the latter case, this court wrote, "Fact finding responsibility in disciplinary proceedings is

imposed upon the referee. His findings should be upheld unless clearly erroneous or without support in the evidence. The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968)." Hirsch at page 857.

As this court's finder of fact, the referee was entitled to give whatever weight he believed appropriate to the testimony of the witnesses including the respondent and the car salesman. It appears respondent's machinations with respect to the handling of the funds and his inability to explain how he could convince the firm to accept title to the automobile weighted heavily in the referee's thinking. His findings of fact as well as his conclusions are clearly and convincingly supported by the record. They should be upheld.

Finally, the Bar notes that in parts one and three of respondent's brief he asserts that the disciplines sought by the referee and the Bar on this appeal are excessive arguing the public needs no protection from him in that his transgression did not impact upon the public. Does not the public need protection from one who would engage in the conduct he did? The answer is obvious.

The Bar would also point out that in charging the additional $25,000.00 his total fee would have been $30,500.00 in a case in which by his own testimony he expended between 70 and 100 hours. Taking the larger figure, the respondent apparently would have charged his client a clearly excessive fee by charging $300.00 an hour in the referee's opinion. The Bar submits that the public may also need some protection from an attorney in this area as well.

The Board of Governors believes that the suspension period should be for at least one year with proof of rehabilitation required prior to reinstatement and that the respondent should be further ordered to pay costs in this matter currently totalling $674.03.

CONCLUSION

WHEREFORE The Board of Governors of The Florida Bar respectfully prays that 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 as 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 [signature]
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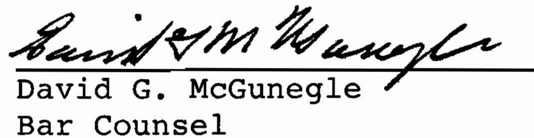
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Complainant's Reply Brief in Support of Petition for Review has been furnished by Federal Express 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 10th day of June, 1985.



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