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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)

RESPONDENT'S REPLY BRIEF ON CROSS-APPEAL

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I N D E X

PRELIMINARY STATEMENT

The Respondent filed his Answer Brief and his Main Brief on Cross-Appeal in a single brief. The first point involved as stated by the Respondent in said brief was in answer to the only point raised in the Complainant's main brief. The second and third points raised in the Respondent's brief were the points raised by the Respondent in his Cross-Appeal and were so labeled. The Complainant filed a document designated "Complainant's Reply Brief in Support of Petition for Review" In Complainant's preliminary statement it is stated:

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

Thus, Complainant's reply brief is, in fact, Complainant's answer brief to Respondent's main brief on cross-appeal, in which the Respondent did not deign to address the third point involved as stated by the Respondent in his main brief on the cross-appeal. This brief, therefore, is the Repondent's Reply Brief on Cross-Appeal.

POINT INVOLVED ON CROSS-APPEAL
(As stated in Respondent's Second Point Involved in Respondent's Main Brief)

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

ARGUMENT

It was Respondent's position that the Referee recommended a finding of guilt of what amounted to "stealing", or attempting to "steal", $25,000 in fees from the professional association of which he was an employee and he, therefore, recommended a suspension of six months and until Respondent could prove rehabilitation. Respondent contended that there was no clear and convincing evidence in the record that he attempted to "steal" anything from the professional association but instead, that he attempted to utilize the $25,000 for the purpose of purchasing a Porshe automobile, the title to which was to be taken in the name of the professional association, and that this conduct, although wrongful, constituted an unauthorized application of the professional association's monies for the purchase of an asset, the title to which would be in the professional association.

The Respondent and Mr. Zielke, the salesman for Contemporary Cars, both testified that when Respondent gave Zielke the $12,500 deposit on the automobile, Respondent told Zielke that he wanted the title to the car placed in the name of the professional association. The transaction was never consummated and, in fact, the automobile company returned $11,500 of the deposit to the Respondent, who placed said money in a time deposit in his name, which funds remained intact and were ultimately used to settle the matter. There is no evidence in the record that in any way questions or refutes the testimony of the Respondent and Mr. Zielke in this regard and the exhibits corroborate their testimony.

The Complainant's argument basically consists of the following statements:

1. ..."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."

2. "...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." (Emphasis supplied)

3. "Respondent did not want members of his firm to know what was transpiring"

4. Respondent "could not explain how he was going to convince the firm to accept title to the automobile"

5. "Had the matter been consummated and the automobile purchased, the Bar submits it probably would not have been titled in the firm's name."

6. The car "which he was going to give to the firm would be one for his personal and professional use and not other members of the firm."

As to (1) above, it is undisputed that when the Bar Investigator discussed the matter with Respondent the first time, Respondent told the Investigator that he had intended to take title to the car in the firm's name (TR90, Exhibit 4). Further, the law firm was shown as the purchaser of the automobile on the purchase order, as admitted in the Bar's brief.

As to (2) and (3) above, admittedly, Respondent did not want the law firm to know that he was purchasing the Porshe until after the transaction had been consummated and title taken in the firm's name, otherwise the transaction might well never have been consummated.

As to (4) above, the firm would not have had to accept title to the automobile if the transaction had been consummated. Title to the automobile would have been in the firm. It could have transferred title out to the Respondent and charged his account with the $25,000, or it could have charged the Respondent's capital account with $25,000, sold the car and credited his account with the sales price, or it could

have retained the title in the firm name, treating it as a firm asset and allowing the Respondent to use it. In none of said events would he have had to convince the firm to accept title. This argument is especially interesting in the light of the testimony of Mr. Elting Storms, who testified that Respondent could have used the $25,000 to buy the car without the consent of the law firm and no one would have said anything about it (Tr.35,36,37).

As to (5) above, it is without any basis in the record and actually has no place in the Complainant's brief. The record reflects that the Respondent has an excellent reputation for honesty and integrity, he has been a leader in Bar activities, civic activities and in his church. There is nothing in the record reflecting, or even giving any indication, that Respondent would lie or that he would steal. This statement is pure conjecture on Complainant's part and has no basis in the record.

As to (6) above, it has little, if any, validity. It's true the Porshe was a sports car and not a word processor or a piece of furniture. As to whether the Porshe, when titled in the firm, would be used by the Respondent is problematical. It would have been so used only with the approval of the firm, as the firm would have been the owner of the automobile and could designate how it was to be used. It is not unusual for

law firms to furnished automobiles to its partners or employees for their use and it is not unknown that law firms furnish Porshes to their partners to be used in firm business.

The argument of Respondent on this point consists of mere conjecture and suspicion not supported by any of the evidence, and Respondent submits that there is no clear and convincing evidence in the record to support the Referee's finding, in effect that Respondent intended to "steal" the $25,000 and convert it to his own use.

In making this argument, Respondent is not suggesting that Respondent's conduct was not wrongful. The unauthorized use of firm monies for the purchase of an asset for the firm is wrong, but it is a far cry from misappropriating money for personal use -- "stealing". The conduct of the Respondent should not go unpunished, but a private reprimand or, at the most, a public reprimand, would be an adequate discipline to carry out the purposes of the Integration Rule.

On page 6 of the Complainant's reply brief it is stated:

> The Bar would also point out that in charging the additional $25,000 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." (Emphasis supplied).

There was no issue in this case as to whether the $30,500 fee was excessive or not. The testimony that the Respondent expended between 70 and 100 hours in the case was a mere estimate by Respondent. If this matter had been an issue Respondent, by reviewing his files, could have ascertained the time expended by him. Further, there was no testimony whatsoever as to whether $300.00 per hour is reasonable or excessive. Surely, the Florida Bar does not take the position that $300.00 per hour is always a clearly excessive fee or, stated another way, if the Florida Bar does take this position, it is without any basis in law or fact. Of even greater importance, the client initially did not take issue with the fee and, as a matter of fact, indicated in correspondence that she was well satisfied.

Respectfully submitted,

EARLE AND EARLE

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's Reply 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 12th day of June, 1985.

RICHARD T. EARLE, JR.