

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

Case No. 73,905

THE FLORIDA BAR,  
Complainant,

v.

THOMAS R. ROGERS,  
Respondent

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, hearings were held on the following dates:  
December 18, 19, 20 and 28 of 1989  
and April 18, 1990.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: David G. McGunegle

For The Respondent: John A. Weiss and John A. Leklem

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:

As to Count I

1. The respondent resides and practices law in Seminole County, Florida. He is also a certified public accountant.

2. In 1981, the respondent first met Father John Mitzi, a Catholic priest. Shortly thereafter, he offered his assistance to the Church as a certified public accountant and as an attorney should the Church require the services of either. TR29.

3. Shortly thereafter, Father Mitzi met the respondent concerning rental property that Father Mitzi wished to purchase. For personal reasons, Father Mitzi did not want his name to appear in connection with the purchase. The respondent proposed that he utilize a trust arrangement to

accomplish Mitzi's goals including avoidance of public knowledge of Mitzi's investments. TR29.

4. Thereafter, Father Mitzi began utilizing the respondent's professional services in connection with a number of real estate investment transactions. In connection with the various transactions, the respondent formed several trusts for Father Mitzi, including the M-R trust on February 18, 1982.(Bar Exhibit 1). The respondent prepared the document and acted as trustee at Mitzi's request. Father Mitzi was both beneficiary and grantor. Father Mitzi made all of the cash contribution to the M-R Trust. Respondent had no monetary interest in the trust. TR31.

5. In 1982, Father Mitzi introduced the respondent to Frank Gorman. Gorman, a resident of Michigan, was a long time friend of Father Mitzi. Respondent was advised that Gorman was interested in investing in Florida real estate. TR131.

6. On or about July 13, 1983, Frank Gorman sent a check in the amount of \$30,000 to the respondent for investment purposes without specific instructions. Subsequently, on either August 6 or September 6 of 1983, Frank Gorman executed a General Power of Attorney appointing respondent as his attorney in fact. (Bar Exhibit 4) TR132,133.

7. On October 31, 1983, Frank Gorman and the respondent, acting as trustee for the M-R Trust, entered into a partnership agreement to form the G-M Partnership (Bar Exhibit 3 in evidence). Respondent drafted the agreement. The initial capital of G-M was \$45,000 with Gorman contributing \$30,000 and the respondent, acting as trustee for the M-R Trust, \$15,000. Gorman was allocated 90% of the tax benefits associated with the investments of the partnership. The respondent had the authority to make all ordinary managerial decisions, being compensated by 20% of the gross rental amount of the investment properties. All legal services were to be provided by the respondent's law firm at a rate of \$65 per hour. The respondent maintained the partnership books and records at his law office, until the latter part of 1986, at which time Frank Gorman took possession of the books and records and commenced management of the G-M Partnership. Pursuant to the partnership agreement, the respondent had a financial interest in G-M in the when an investment property was sold for a profit he would receive 1/6 of the appreciation, as compensation for locating the property and directing repairs and interior decorating.

8. The sole investment of G-M was Sun Bay Condominium

unit 236B. A Purchase and Sale Agreement for the purchase of the unit was signed on August 20, 1983, for a purchase price of \$99,900. Respondent represented the M-R trust at the closing and received a legal fee for doing so. The purchase contract dated August 20, 1983, was assigned to the G-M Partnership after the partnership was formed. Father Mitzi was not made aware that the down payment at the closing of Sun Bay Unit 236B was only \$10,000. During the period the unit was rented, including the period the respondent lived there, it failed to generate sufficient rental income to cover the mortgage obligation.

9. Respondent charged G-M a monthly management fee from October 1986 through October 1988, totalling \$3,965. Neither Mr. Gorman nor Father Mitzi received billings. Instead, the funds were taken directly from the G-M account by the respondent by adjusting entries made from time to time crediting the respondent with a capital contribution. TR80II.

10. To facilitate another investment purchase, the respondent suggested that he, Father Mitzi, and Frank Gorman form the R-M-G Partnership. The purpose of the new partnership was to purchase a townhouse unit at Sun Bay. On October 31, 1983, an agreement to form the R-M-G Partnership was entered into between the G-M Partnership and the respondent, who drafted the partnership agreement (Bar Exhibit 5 in evidence). The initial capital was \$45,000 with the G-M Partnership contributing \$30,000 and the respondent \$15,000. Contributions were to be made in cash or its equivalent, according to the agreement. Father Mitzi and Frank Gorman believed all contributions were made in cash. TR38-42 (Mitzi) and TR135, lines 18-21, and TR16, lines 12-17, Vol. II. (Gorman) Father Mitzi understood the term "cash or its equivalent" to refer to the use of a cashier's check or money order in place of currency. TR41,42.

11. The respondent maintained the partnership books and records at his law office, from October 31, 1983, until the latter part of 1986. Respondent billed the R-M-G Partnership for legal services without advising either Father Mitzi or Frank Gorman directly the amount of the accounting entries. The transfers were made directly from the account the respondent maintained for the R-M-G Partnership. Respondent was to receive 1/6 of the appreciation if an investment property was sold at a profit.

12. The sole investment of the R-M-G Partnership was townhouse unit #8 at Sun Bay Club Condominium purchased on October 31, 1983, for \$120,000 with a \$6,000 down payment.

Financing was contingent upon the unit being owner occupied for at least one year. The respondent resided in the townhouse as it was not possible for Father Mitzi or Frank Gorman to reside therein. Father Mitzi was not aware that the respondent intended to live in the unit until after he had already moved in. TR45, lines 14-17.

13. The respondent resided in the Sun Bay townhouse Unit 8, from November, 1983, to March, 1985. From March 1985, through July 1985, he lived in the Sun Bay Club Condominium Unit 236 B. During this time period, the respondent rented out his single family home and obtained a tax benefit on his personal income tax return. TR97,98 Vol. II. The respondent paid \$600 per month rent to the R-M-G Partnership for the townhouse although the fair market value was \$900 per month. He determined this to be the appropriate rent by deducting his 1/3 ownership interest from the fair market value. This created a negative cash flow of more than \$700 per month, the mortgage payments being \$1325 per month. TR76II.

14. Commencing September of 1984, the respondent periodically requested additional cash contributions from Frank Gorman to cover the negative cash flow first for the G-M and R-M-G Partnerships. TR139. The two Sun Bay Condominium units generated a \$1,620 negative cash flow in 1983. In the year 1984, the amount grew to \$13,470. In 1985, the total negative cash flow was \$17,545. The period from January through August of 1986, the negative cash flow was \$14,110. The approximate total negative cash flow of the Sun Bay properties was \$49,745. (See Bar Exhibit 25).

15. Father Mitzi was not clearly made aware of the monthly operating costs associated with either unit at Sun Bay. Frank Gorman advised Father Mitzi that he (Gorman) was assuming the negative cash flow alone. TR47, lines 15-22 and TR55.

16. The respondent failed to discuss fully his fees for managerial services with either Father Mitzi or Frank Gorman or advise them of his intention to contribute services in lieu of cash. While he was living in the townhouse, the respondent claimed a non-cash contribution of approximately \$5,452 as an equivalent of the 20% of the gross rentals for his management fee for the Sun Bay townhouse, Unit 8. The respondent also claimed non-cash contribution for attorney fees. The only service for which respondent billed directly was income tax form preparation. These bills did not indicate his charges for managerial fees to either G-M or R-M-G. TR150.

17. There is no evidence of any cash contributions made to any trust or partnership by the respondent.

18. Respondent did not discuss fully any potential conflict of interest he may have had with Father Mitzi or Frank Gorman prior to the execution of the G-M and R-M-G Partnerships. Prior to entering into the agreements, he did not advise them of a possible conflict of interest between his role as the attorney for the partnership and his role as an investor. Respondent did not advise Father Mitzi and Frank Gorman that they should consider the advice of another attorney prior to entering into the G-M and R-M-G partnership agreements.

19. Father Mitzi and Frank Gorman were not unsophisticated investors.

As to Count II

20. In August of 1983, the respondent decided to purchase a condominium unit at The Moorings on Lake Maitland. This was a pre-construction development. TR84II. On September 2, 1983, the respondent entered into a condominium purchase and sale agreement for unit 101 Building 2A, The Moorings, signing the agreement as an individual purchaser. (Bar Exhibit 8).

21. The contract was non-assignable by the purchaser. The respondent testified that he secured a verbal agreement with the sales director, Eleanor Ecker that the contract was assignable. TR84-86II and TR128II. See also Respondent's Exhibit DDDD (Affidavit of Eleanor Ecker).

22. The purchase price was \$104,000 with an initial deposit of \$10,400. The initial deposit on the unit plus an additional deposit was drawn by the respondent from the funds of Frank Gorman in respondent's account. TR84, 85II. Frank Gorman testified that Respondent made these decisions without notifying his clients. TR30II. Father Mitzi testified likewise. TR54, lines 1-18.

23. On April 17, 1985, the respondent and Krista R. Rogers, his wife, signed a Good Faith Estimate of Borrower's Settlement Costs with Countrywide Funding Corporation, the mortgage lender. (Bar Exhibit 9). TR87,88 VOL.II.

24. On April 29, 1985, the respondent sent a handwritten six page memo letter to Frank Gorman covering a multitude of subjects, both personal and business. Respondent indicated

that he had previously "offered to take over responsibility for the Moorings unit". Respondent requested that Frank Gorman let him know in writing how he wanted to proceed with regard to The Moorings, insinuating that Gorman was not an investor on April 29, 1985. (Respondent's Exhibit SSS).

25. Ultimately, Father Mitzi and Frank Gorman decided not to purchase The Moorings condominium unit, based in part upon the respondent's recommendation that they not invest in The Moorings. TR88-90 Vol.II and 94 (lines 13-15) Vol.II.

26. The respondent advised Frank Gorman that he would take over responsibility for the expense the Moorings unit and reduce his partnership interest in R-M-G from 1/3 to 1/6. Respondent denied that it was intended to cover the \$12,650 out of the R-M-G account used as the deposit on the unit. Respondent testified that he could not answer what his percentage interest was at any particular point. TR104, VOL. II. Respondent admitted instructing an associate to reduce Respondent's interest in R-M-G Partnership to 1/6. (Respondent's Response to Request for Admissions INNN.)

27. The closing for The Moorings unit 101 occurred June 12, 1985. The settlement statement dated June 12, 1985, for the mortgage on The Moorings unit signed by the respondent showed a purchase price of \$105,130 and indicated a deposit of \$11,530. (Bar Exhibit 9.)

28. In August of 1985, Frank Gorman decided against the investment in The Moorings unit after reviewing Respondent's cash flow chart. He then requested the respondent return his share of the \$12,650 used as a down payment on The Moorings in cash. TR180 and TR128-130. Respondent refused to return the equity of Frank Gorman and failed to return any cash to the R-M-G account. TR52, lines 8-20. Frank Gorman testified that the response of respondent to his request was, "Do you want a bum check?" TR154.

#### As to Count III

29. The respondent kept client investment funds in a Rogers & Associates bank account, the name being changed to Rogers et al. Investments in 1983. The account was established to contain the funds of respondent's investments and respondent's investment clients. This account was separate from the respondent's law firm trust account. TR98 Vol.II.

30. The respondent used a ledger card system of

segregating capital investments within the Rogers et al. Investments account. The account contained the funds of an average of ten clients, totalling some 22 or 23 ledger cards over a six year period. This account contained the funds of Father Mitzi, Mitzi Investments, M-R Trust, Francis (Frank) Gorman, Thomas Rogers, G-M Partnership and R-M-G Partnerships among others. TR98,99,114-116 II.

31. Respondent opened two separate accounts for the G-M Partnership and R-M-G Partnership in July of 1986 because of respondent's concern for internal control over particular investments under the ledger card system. TR100,101,106, 107 II.

32. Respondent at that time denied Frank Gorman a direct refund in cash of his investment in The Moorings. After a discussion with Father Mitzi, Frank Gorman then asked respondent to furnish him with an accounting. TR48,85,86.

33. The respondent in response had several conferences with Frank Gorman and Father Mitzi, furnishing them with a number of charts and summaries. See Bar Exhibits 10 through 14, 17 through 20, and 23 for examples.

34. The respondent advised Frank Gorman that a formal accounting as requested would cost twelve thousand dollars. Father Mitzi and Frank Gorman believed that respondent was responsible to them for an accounting without charge. TR86,87,146,147.

III. Recommendation As to Whether or Not the Respondent should be Found Guilty: As to each count of the Complaint, I make the following recommendations as to guilt or innocence:

As to Count I

I recommend that the respondent be found guilty and specifically that he be found guilty of the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(6) for engaging in conduct that reflects adversely on his fitness to practice law; 5-101(A) for accepting employment where the exercise of his professional judgment on behalf of clients would be or reasonably may be affected by his own financial, business, property or personal interests; and 5-104(A) for entering into a business transaction with clients when they had differing

interests therein, and the clients expected the exercise of his professional judgment therein for the protection of the clients.

As to Count II

I recommend that the respondent be found guilty and specifically that he be found guilty of the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(6) for engaging in conduct that reflects adversely on his fitness to practice law; 5-101(A) for accepting employment where the exercise of his professional judgment on behalf of clients would be or reasonably may be affected by his own financial, business, property or personal interests; and 5-104(A) for entering into a business transaction with clients when they had differing interests therein and the clients expected the exercise of his professional judgment therein for the protection of the clients.

As to Count III

I recommend that the respondent be found guilty and specifically that he be found guilty of violation of Article XI, Integration Rule 11.02(4) for failing to furnish an accounting of the funds as requested.

IV. Recommendation as to Disciplinary Measures to be Applied:

I recommend that the respondent receive a public reprimand as provided in Rule 3-5.1(d), Rules of Discipline.

V. Personal History and Past Disciplinary Record:

After a finding of guilty and prior to recommending discipline, pursuant to Rule 3-7.5(k)(1)(4), I considered the following personal history and prior disciplinary record of the respondent:

- A. Date Admitted to The Florida Bar: 1977
- B. Prior disciplinary convictions: none
- C. Respondent's character and reputation: Six witnesses, including three attorneys, testified in support of respondent's character and good reputation in the community. The witnesses testified as to their belief in respondent's diligence, honesty, integrity, and trustworthiness. Further, the testimony was unanimous that respondent was not motivated out of any corrupt motive.

- D. The testimony of respondent and respondent's wife



with respect to respondent's strong faith, integrity, and devotion to family.

VI. 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:
    - Transcript Costs .....\$ 914.15
  - B. Referee Level Costs:
    - 1. Transcript Costs .....\$1899.50
    - 2. Bar Counsel/Branch Staff Counsel Travel Costs .....\$ 5.00
  - C. Administrative Cost .....\$ 500.00
  - D. Miscellaneous Costs:
    - 1. Investigator Costs .....\$1405.25
    - 2. Investigator Travel .....\$ 10.70
    - 3. Copies .....\$ 58.30
- Total Itemized Costs .....\$4,792.90**

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 cost be charged to the Respondent.

DATED this 27th day of April, 1990.



Referee

I certify that I have furnished by U.S. Mail copies of the foregoing to David G. McGunegle, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801-1085, John A. Weiss, Esquire, Post Office Box 1167, Tallahassee, Florida 32302-1167, and to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399 this 27th day of April, 1990.



Referee

IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 73,905

[TFB No. 88-30,503 (18A)]

v.

THOMAS R. ROGERS,

Respondent.

PRELIMINARY AFFIDAVIT OF COSTS

STATE OF FLORIDA)  
COUNTY OF ORANGE)

BEFORE ME, personally appeared David G. McGunegle, who,  
first being duly sworn and under oath states the following:

Below is an itemized list of the expenses incurred in  
the above-styled cause.

A.	Grievance Committee Level Costs	
1.	Transcript Costs	\$ 914.15
2.	Bar Counsel/Branch Staff Counsel Travel Costs	\$ --
B.	Referee Level Costs	
1.	Transcript Costs	\$1592.25 **
2.	Bar Counsel/Branch Staff Counsel Travel Costs	\$ 5.00
C.	Administrative Costs	\$ 500.00
D.	Miscellaneous Costs	
1.	Investigator Costs	\$1405.25
2.	Investigator Travel	\$ 10.70
3.	Copies	\$ 58.30

**TOTAL ITEMIZED COSTS: \$4,485.65**

\*\* Transcript costs for the disciplinary hearing held on April  
18, 1990, are not yet known.

*David G. McGunegle*

David G. McGunegle  
Bar Counsel  
The Florida Bar  
880 North Orange Avenue  
Suite 200  
Orlando, Florida 32801-1085  
(407) 425-5424  
Attorney No. 174919

Sworn to and subscribed before  
me this 23 day of April, 1990.

*Cathy Cline*

Cathy Cline, Notary Public  
State of Florida at Large

MY COMMISSION EXPIRES: **Notary Public, State of Florida**  
**My Commission Expires June 14, 1993**  
Bonded Thru Troy Fain - Insurance Inc.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original of the foregoing Preliminary Affidavit of Costs was hand delivered The Honorable Thomas R. Kirkland, Referee, 37 North Orange Avenue, Orlando, Florida, 32801; a copy has been furnished by certified mail receipt requested no. P 866 939 093, to respondent's counsel, John A. Weiss, Post Office Box 1167, Tallahassee, Florida, 32302-1167; and a copy has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 23rd day of April, 1990.

*David G. McGunegle*  
David G. McGunegle  
Bar Counsel