IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THEODORE W. HERZOG,

Respondent.
_____/

Case No. 68,750
(1985C77)

RESPONDENT'S ANSWER BRIEF

Sherman N. Smith, III
886 Dahlia Lane
Vero Beach, FL 32963
305/231-5500

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SYMBOLS AND REFERENCES

The Referee Report shall be referred to as R. The transcripts of the Final Hearing will be referred to as TI for the November 24, 1986 Hearing and TII for the December 4, 1986 Hearing. Bar exhibits will be referred to as BEX- and Respondent's exhibits REX-. The transcript of the hearing before the grievance committee will be referred to as BEX-A, p. ___.

SUMMARY OF ARGUMENT

While not disputing the referee's findings of fact, complainant contends that the referee erred in his conclusions on three issues, namely:

1. "The respondent deliberately, knowingly and improperly retained the Fellsmere $150.00 per month retainer during the year he was at MH&L." (Complainant's Summary of Argument, p. 15)

2. "His [Respondent's] deceptive billing practices deprived the firm of an unknown amount of fees estimated in excess of $60,000.00 including uncollectible costs of over $20,000.00." (Id.)

3. Respondent improperly or illegally paid over some $14,000.00 to the English stockbroker in the Harrigan transaction or Respondent fabricated an excuse to cover his own misuse of the money. (Id.)

Respondent submits that the referee's findings of fact are amply supported by the record and that the referee's recommendation for a private reprimand and payment of costs is appropriate.

The three issues raised by complainant are discussed and rebutted by respondent in the following Points I, II and III in the same order as argued in complainant's initial brief. Since, in respondent's opinion, this appeal is based primarily on complainant's interpretation of the

facts of the case, respondent's arguments are almost exclusively devoted to a review of the testimony and evidence, presented with appropriate references to the record on appeal in each instance.

ARGUMENT

POINT I

Respondent testified at length regarding the hard feelings or feud that existed between George Moss, as manager of Jones & Foster's Vero Beach office, and George Bailey, head of J&F's West Palm Beach office, when all of J&F's lawyers in Vero Beach decided to leave J&F and form Moss, Henderson & Lloyd.

Respondent testified that he started representing the Fellsmere Water Control District at "about the time when George [Moss] was breaking up with the fellows in West Palm Beach." (BEX-A, p. 96) Respondent described the relationship between George Moss and George Bailey as having

> "a certain amount of acrimony, so that George couldn't talk with George Bailey in West Palm, and he [George Moss] issued an edict with regard to their [MH&L's] handling of issues, no more money that comes in is to be sent down to West Palm Beach. Right about that time is when the Fellsmere Water Control District came into the picture." BEX-A, p. 97

According to George Moss' version of the facts, respondent on his own had decided at the time of the firm split that he wasn't going to "let the guys in West Palm get another hunk of money, ..." But months later respondent was still keeping the retainer "and he was sorry." (BEX-A, p. 42)

It must be remembered that the Fellsmere Water Control

District retainer amounted to only $150.00 per month during respondent's 11 months of employment at MH&L. In addition to respondent's assertion that George Moss had "issued an edict" regarding sending money to J&F's West Palm Beach office after the decision to secede from that firm, the referee noted that "Respondent paid MH&L the sum of $10,000.00 after leaving the firm to be applied, if required, toward this and other financial controversies existing between Respondent and the remaining shareholders of MH&L subject to final accounting reconciliation under the shareholders' agreement." (R.II B)

The shareholders' agreement referred to by the referee is one of two agreements which respondent entered into with his law firm, MH&L. Several months after MH&L was formed, two agreements were finally prepared to be signed by the attorneys in MH&L, the first being an employment agreement (BEX-3) which was signed by all attorneys and the second being a stockholders' buy/sell-deferred compensation agreement (BEX-14) with MH&L. All parties agree that respondent signed these agreements not later than June of 1984 and that the agreements were then backdated to October 1, 1983. (Complainant's Statement of the Facts, p. 6) Respondent left MH&L in "late August or early September of 1984" (T.I., p. 34). Thus it appears that respondent signed his agreements with MH&L approximately three months before he left that firm.

Paragraph 1(b)2. of respondent's buy/sell agreement provides that upon "[t]ermination of the corporation's employment of the stockholder [respondent], the corporation [MH&L] shall purchase or redeem all of said stockholder's shares of the corporation's stock, at the price and on the terms provided for in this agreement." (BEX-14, p. 1) Paragraph 2 of this agreement provides that the "purchase price" of such stock:

> "shall be an amount equal to the sum of the Stockholder's proportion and interest in the Stockholder's equity, as shown by the books of the Corporation. The Stockholder's proportion and interest in the Stockholder's equity shall be the prorata share of the book value of the capital stock, of the paid in capital account, and of retained earnings at the close of the last fiscal year." (BEX-14, p. 2)

Paragraph 3 provides that the purchase price as determined in paragraph 2 is to be paid to the "terminated Stockholder ... within ninety (90) days following the effective date of termination ... with interest at the prime rate ...." (BEX-14, p. 2)

When testifying before the grievance committee Mr. Moss stated that respondent "invested a total of $30,000.00 in the ... professional association, for stock. $10,000.00 of that was paid back, $20,000.00 is still under a various -- whether it's shares of stock, or loans, or whatever, there would be -- I'm sure his claim is that he is owed something along those lines." (BEX-A, p. 43) When he subsequently testified before the referee, however, Mr. Moss

contended that respondent was owed nothing under this provision in his buy/sell agreement because he had determined that the stockholders' equity in MH&L when respondent left the firm was zero. (T.I, pp. 78-79)

Additionally, Mr. Moss conceded that there were debits and credits between MH&L and respondent which had not been resolved. (Id.)

Paragraph 4 of this agreement provides in subparagraph (b) that upon "termination of employment" the respondent was also entitled to receive "an amount equal to the sum of the following:

> 1. 50% of the stockholders proportionate "share" of cash on hand as shown on the books of the corporation as of the close of the previous month. "Share" shall mean the total cash on hand multiplied by the stockholder's stock ownership percentage.
>
> PLUS
>
> 2. 35% (plus 1% for each year of employment with the corporation as a shareholder commencing with the year 1983 including the year of withdrawal) of the accounts receivable and work in progress attributable to said terminating shareholder as of the effective date of termination which are actually collected by the corporation during the ensuing one year following the date of termination." (BEX-14, p. 3)

Mr. Moss agreed that respondent was entitled to receive some compensation under the above provisions of this agreement and Mr. Moss testified that he thought the amount payable to respondent was equal to one-third of all sums billed by respondent which the firm collected after respondent left MH&L. (BEX-A, p. 44)

Respondent testified that he requested information from MH&L in order to determine the amount MH&L owed him pursuant to ¶4(b) of the buy/sell agreement. Based upon MH&L computer printouts which respondent obtained for the periods ending 11/14/84 (REX-2) and 4/30/85 (REX-3) -- bearing in mind that respondent left MH&L in late August or early September of 1984 -- respondent would be entitled to receive 36% of MH&L's "accounts receivable and work in progress attributable" to him which the firm "actually collected ... during the ensuing one year following the date of termination." (BEX-16, ¶4(b))

Since respondent left MH&L in the summer of 1984, it is apparent that he would be entitled to 36% of at least $90,641.89, which is the amount attributable to respondent which MH&L had collected by April 30, 1985 of the ensuing year. (REX-3; T.I, pp. 140-141)

There is ample testimony to support the referee's finding and conclusion that "there is no clear and convincing evidence that Respondent deliberately intended to deprive the firm of the monthly retainer" and that "this is primarily a dispute between Respondent and his former employer, MH&L, and their interpretation of the employment agreement and Respondent's understanding of his obligations." (R.II. B, pp. 2-3)

Although there was conflicting testimony by respondent and Mr. Moss concerning the $150.00 monthly retainer,

"[t]he referee, as our fact finder, properly resolves conflicts in the evidence." The Florida Bar v. Hoffer, 383 So.2d 639 at 642 (Fla. 1980)

POINT II

Next, Complainant contends that the evidence proves that respondent's billing practices deprived MH&L "of an unknown amount of fees estimated in excess of $60,000.00" in addition to "uncollectible costs of over 20,000.00." (Complainant's Summary of Argument, p. 15)

On the contrary, respondent respectfully submits that the referee reached the only conclusion he could have on the evidence presented. Specifically,

1. There was no firm policy whatsoever at MH&L concerning the writing-off of fees by an attorney in the firm. When testifying before the grievance committee, George Moss stated that he personally felt that every attorney had "a duty to each other to be honest with our accountings," but as to Branch Staff Counsel's specific question as to whether there was "a firm policy" requiring a firm decision (as opposed to the individual attorney's decision) "on writing down fees," Mr. Moss' answer was "No." (BEX-A, p. 38)

When Branch Staff Counsel inquired further: "And were fee write-offs discussed at firm meetings?" Mr. Moss replied: "No." (BEX-A, p. 39)

Additionally, it must be borne in mind that throughout respondent's tenure at MH&L, George Moss obtained a computer printout referred to as a "detailed billing report" on the activities of each individual shareholder in the firm at the end of each month. (BEX-A, p. 45)

When respondent's counsel asked Mr. Moss to acknowledge that, at the end of each month, he (Mr. Moss) should have told respondent to bill his time currently (or as shown by the printouts) and bill his costs (or stop accumulating such costs as shown on the printouts), Mr. Moss replied that:

> "We responded to an ad in the Florida Bar Journal, bought a computer which almost bankrupted us, and we had very many bookkeeping problems until we went and purchased our present computer program. In June of 1984, we first got the ability to know, really, where we were." (BEX-A, p. 45)
>
> Q (by respondent's counsel): "But you had a similar capability, didn't you, through your bookkeeper or in-house accountant, to get status reports."
>
> A (by Mr. Moss): "We were supposed to have. But it just didn't work. It would round off and forget large sums of money, and we were having trouble balancing our books, including the trust account. And the explanation -- we would have five and a half hours at a hundred dollars an hour, and it wouldn't be the right amount. And the computer program guy kept telling us that it was a new program that we must buy, and we ultimately fired the people and got what we have now. So we should have had it, we didn't." (BEX-A, pp. 45-46)

Although Mr. Moss repeatedly states that MH&L's computerized bookkeeping and accounting functions were totally inaccurate from the inception of the new firm to June or July of 1984 (and respondent left MH&L in late August or early September of 1984), Mr. Moss and complainant have relied entirely on information allegedly obtained (but not produced at trial) from MH&L computer-produced records and

printouts generated during this same period of time in arriving at their otherwise unsupported assertion that MH&L lost "an unknown amount of fees estimated in excess of $60,000 ...." (Complainant's Summary of Argument, p. 15)

Not only were MH&L's bookkeeping and accounting records inaccurate and unreliable, according to Mr. Moss, the firm was unable to reconstruct these records and determine how much money, if any, MH&L lost as a result of respondent's alleged billing malpractice. "[W]e hired a CPA to find out how much we have lost by this practice, and there is no way of knowing." (BEX-A, p. 35) Mr. Moss described his firm's records as being "completely inaccurate" until their new computer suystem was "finally in place, in June and fully operational in July of the next year [1984]." (T.I, p. 38)

Furthermore, Mr. Moss' testimony acknowledges that he knew that respondent and number two shareholder, Steve Henderson, neither of whom were involved in insurance defense work, did not like to send computer-generated bills to their clients. (Id. at 34)

> "[T]he primary use of the detailed bills was for those of us that did trial work for insurance companies, and they wanted every tenth of an hour. And so, to justify our fees, we had these printouts of time in tenths of a hour. And Ted's opinion was that this wasn't necessary for people, and they didn't need to know. Sometimes it was a flat-fee arrangement, and he just didn't send them out." Id. at 34.

Mr. Moss' testimony also indicated that he was com-

pletely familiar with the format of statements prepared by respondent and that he, Mr. Moss, discussed these issues as they arose.

Question (by Branch Staff counsel): "Now, did you have discussion with Mr. Herzog with respect to the bills that he sent out?" (Id. at 33)

Answer (by Mr. Moss): "Yes. And I had discussion with his secretary, also, in this period of time ... well, I knew, before this, that Ted did not like computer bills." (Id. at 33-34)

Additionally, Mr. Moss indicated that he knew that respondent was writing off fees and he discussed this subject with respondent at that time.

Question (by Branch Staff Counsel): "My follow-up question is, did you have any discussion with Ted as to whether or not he was writing off fees?" (Id. at 35)

Answer (by Mr. Moss): "Yes. He said that was his practice." (Id. at 35)

At the hearing before the referee, the following additional colloquy occurred between Mr. McGunegle and Mr. Moss regarding adjustments to attorneys fees:

> Q (by Mr. McGunegle): "Did you have a firm policy within the firm as to shareholders on writing down fees?"
>
> A (by Mr. Moss): "Well, the policy was that the shareholder had to approve a bill that went out. It was presumed that if a shareholder sent a bill out, it would be either written down or written up or done something with to accurately reflect the value of the work done for a client.

"It was pretty much in the discretion of the shareholder to bill whatever amount was fair and the circumstances of the case and what was called for."

Q. "Would it require any internal approval to say write off fifty percent of the substantial bill?"

A. "No."

Q. "And Mr. Herzog was a shareholder in the firm?"

A. "From its inception." (T.I, p. 37)

POINT III

Complainant's third and final point (argument) is that the referee should have found from the evidence presented that respondent either (1) improperly or illegally paid $14,000.00 to his client's London stockbroker or (2) misappropriated this money for his own personal use. (Complainant's Summary of Argument, p. 15)

First of all, it must be remembered that the $14,000.00 in question was at all times the client's money and there has been no complaint by the client whatsoever. In the absence of any complaint or testimony by the client, complainant's argument on this point is pure conjecture.

What little evidence there is shows that George Moss reviewed the Harrigan matter after respondent had left MH&L and Mr. Moss concluded that Mr. Harrigan "got screwed" or at least paid some unnecessary or, in Mr. Moss' mind, unjustifiable expenses in the London stock transaction. (BEX-A, p. 20)

Mr. Moss further informed Mr. Harrigan that MH&L had malpractice insurance "and I offered to let him file a claim against our firm ... [but] he refused to do anything." (Id. at 20-21)

Mr. Moss also asserted that a local stockbroker, unnamed and who did not testify, said that the same stock could be purchased from "any stockbroker" at "the going price." (Id. at 17) Mr. Moss conceded, however, that

"this is not my specialty" and acknowledged that he presumed there might be no U.S. taxation on a foreign corporation's purchase of stock on another foreign exchange "as long as the stock doesn't come in [to the United States] and you don't bring the money in, you don't pay any tax." (Id. at 19)

Respondent testified that Mr. Harrigan called him regarding an "offshore" investment or the purchase of a "relatively liquid" investment of securities listed on a foreign stock exchange. (T.I, p. 116) Although respondent has a background in international law, he indicated to Mr. Harrigan that "I have never engaged in a transaction on a foreign stock exchange in my life, never." (Id.) Respondent mentioned to Mr. Harrigan that Dale Sorensen, a mutual acquaintance of theirs in Vero Beach, was now working as president of a company that was a subsidiary of a British corporation. (Id.) Respondent told Mr. Harrigan that "I don't know if this company is any good or not. But, I know that you can call Dale Sorensen ... call Dale and talk to him." (Id. at 117).

Respondent subsequently called Mr. Sorensen, who told respondent to contact the head of the parent company in London, who in turn said the person to deal with was Martin Reilly, a stockbroker with an English brokerage house,

Henderson Crosthwaite and Company.[1] (Id. at 117-118)

Respondent testified that the client, Mr. Harrigan, asked him to go to London to buy the stock. (Id. at 117) Mr. Harrigan did not want the purchase of the stock to be transacted by respondent from the United States because Mr. Harrigan was acting as agent for a Bahamian corporation and he did not wish to subject this foreign corporation to possible U.S. income taxation. (Id. at 114-116)

Respondent testified that he discussed the proposed stock transaction with the recommended stockbroker, Martin Reilly. Not being familiar with the London Penny Stock Exchange and also finding Mr. Reilly to be "a little mysterious" (T.I., p. 119), respondent called Mr. Harrigan regarding the transaction.

Respondent testified that he went to Mr. and Mrs. Harrigan's residence in late January of 1984 to discuss the proposed transaction once more and, if Mr. Harrigan still wanted to go ahead with it, to ask Mr. Harrigan to sign a document authorizing respondent to handle the stock purchase in the manner proposed by Mr. Reilly. (T.I, p. 122) Respondent brought with him a typed document which, among other things, stated that Mr. Harrigan had given both

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1 The name "Crosthwaite" is misspelled in the transcript. I have used the correct spelling throughout this brief, as the name is spelled in the affidavit from Martin Reilly. See BEX-18.

his prior authorization and subsequent approval of "Payment ... of approximately $7,000.00 U.S.$ of miscellaneous travel expenses and transaction expenses." (BEX-17, ¶3) Mr. Harrigan signed the document. Respondent had Mr. Harrigan sign the same document both before and after each stock transaction was consummated. (T.I, p. 122)

Respondent then traveled to London and met with Mr. Reilly on February 3, 1984. Mr. Reilly's statement claims that this was his first contact with respondent (BEX-18, ¶1). On February 6, 1984, Mr. Reilly purchased 347,502 shares of Sheraton Securities at a price of 13-1/2 pence for a total purchase price of $68,000.00 U.S.

After receiving confirmation of the first stock purchase, respondent (on his next trip to London) paid Mr. Reilly the sum of $7,000.00 as previously agreed and approved by Mr. Harrigan. (T.I, pp. 120-121; 124-125)

Although respondent's sworn testimony and Mr. Reilly's statement (BEX-18) are conflicting, Mr. Harrigan appears to have been aware of the essential facts and presumably believed that he was acting in his own best interest. Accordingly, it is interesting to note that on March 12, 1984 -- five weeks after concluding the first stock transaction -- Mr. Harrigan instructed respondent to repeat the transaction. (T.I., p. 127) Martin Reilly's statement indicates the second stock purchase, for 194,100 shares of Sheraton Securities at 15 pence or a total price of U.S.

$43,000.00, took place on March 12, 1984. (BEX-18, ¶¶3 and 4) Respondent testified that, as with the previous transaction, on his next trip to London he paid Martin Reilly the sum of $7,000.00 in connection with the second transaction. (T.I, p. 130)

Another indication of Mr. Harrigan's approval of the manner in which these transactions were handled is the copies of correspondence attached to Mr. Reilly's statement. In their letter dated 21st August 1985, Mr. and Mrs. Harrigan use Henderson Crosthwaite as their broker in the sale of 541,620 shares in Sheraton Securities (BEX-18, item G). According to Mr. Reilly's letter of 3rd September 1985 to Mr. Harrigan, he states: "I was sorry to miss you when you passed through London on August 21st." (BEX-18, item H) Mr. Reilly goes on to confirm the sale of the stock and concludes: "I understand that you are looking for a reasonable income combined with the prospect of capital appreciation from this money." (Id.)

In short, a year and a half after the original stock purchases, there appears to be no complaint by MH&L's client, Mr. Harrigan, regarding any aspect of the handling of these transactions by respondent. There certainly is no evidence in the record that these transactions, or respondent's role in them, violated a particular law of the United States, Great Britain or a regulation of the London stock exchange. See generally C. W. Wolfram, Modern Legal Ethics §13.3.2 (1986)

In all of the cases cited by complainant involving criminal conduct, there was proof that each attorney's conduct violated a specific criminal statute. Due to the potential damage to the attorney's reputation and the severity of the punishment, this court has repeatedly reaffirmed that "the quantum of proof necessary ... is something more than the mere 'preponderance of the evidence' sufficient for a civil action. We have defined that quantum as 'clear and convincing evidence', not as stringent a standard as that required in criminal cases, but most certainly more than the contradictory and inconclusive testimony adduced in the instant case." The Florida Bar v. Quick, 279 So.2d 4 at 8-9 (Fla. 1973)

CONCLUSION

A private reprimand is appropriate punishment for respondent where the evidence shows that

1. the attorney performed services in the manner requested by the client and neither the services performed nor the request made by the client is shown or proven to be illegal or improper;

2. the attorney's billing practices subsequently complained of were known to the complaining witness, George Moss, at or near the time of the occurrences. Furthermore, Mr. Moss openly discussed these matters at the time with respondent and his secretary and the evidence indicates that Mr. Moss had a reasonable opportunity to correct or curtail respondent's billing practices.

The referee's findings of fact are supported by the testimony and evidence presented and the recommended punishment of a private reprimand and payment of costs is appropriate.

Respectfully submitted,

Sherman N. Smith, III
886 Dahlia Lane
Vero Beach, Florida 32963
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Respondent's Answer Brief have been furnished by U. S. Mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing was mailed by U. S. Mail to John F. Harkness, Jr., Executive Director and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, and to David G. McGunegle, Bar Counsel, The Florida Bar, 605 E. Robinson Street, Suite 610, Orlando, Florida 32801 on this 2 day of June, 1987.

Sherman N. Smith, III