IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

THEODORE W. HERZOG,

Respondent.

_____/

Case No. 68,750
(1985C77)

INITIAL BRIEF OF THE FLORIDA BAR

JOHN F. HARKNESS,JR.
Executive Director
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

and

DAVID G. McGUNEGLE
Bar Counsel
The Florida Bar
605 East Robinson Street
Suite 610
Orlando, FL 32801
(305) 425-5424

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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-.

STATEMENT OF THE CASE

Following a complaint to The Florida Bar in February, 1985, an extensive investigation was undertaken. Probable cause was found on March 12, 1986. The formal complaint was filed May 14, 1986 and evidentiary hearings held on November 24, 1986 and December 4, 1986. The referee's report is dated January 30, 1987 and the amendment March 14, 1987. The referee recommends the respondent be found guilty of improper and deceptive billing practices in violation of Article XI, Rule 11.02(3)(a) of the Integration Rule of The Florida Bar for conduct contrary to honesty, justice or good morals. He also recommends the respondent be found guilty of violating the following Disciplinary Rules of The Florida Bar's Code of Professional Responsibility: 1-102(A)(4) for conduct involving deceit, dishonesty, fraud or misrepresentation and 1-102(A)(6) for other misconduct reflecting adversely on his fitness to practice law. The referee recommends he be found not guilty of all other rules charged including Rules 11.02(4) for misuse of trust funds, and 11.02(4)(c) and the accompanying Bylaw for improper trust account record keeping with respect to these transactions, as well as Disciplinary Rules 1-102(A)(3) for illegal conduct involving moral turpitude, and 9-102(B)(3) for failing to keep adequate documentation on the use of trust funds and to render appropriate accounts to clients. As discipline, the referee recommends that

the respondent be privately reprimanded by the Board of Governors as provided in Rule 3-5.1(a) of the Rules of Discipline. Finally, he recommends the costs be assessed against respondent which currently total $2,350.72.

The Board of Governors of The Florida Bar reviewed the referee's findings of fact and recommendations of guilt and discipline at their March, 1987 meeting. The Board voted to approve the referee's findings of fact but to dissent from his conclusions as being insufficient and erroneous resulting in incorrect and inadequate recommendations as to guilt or innocence as well as an inadequate, erroneous and unjustified recommendation as to discipline. In the opinion of the Board, the record supports findings of guilt that respondent knowingly withheld a monthly retainer for approximately one year from the law firm when he was not entitled to do so and that respondent utilized approximately $14,000 either for illegal or improper purposes or failed to adequately account for the use to his clients and utilized the funds for his own personal purposes. Further, the Board believes the evidence clearly indicates the respondent systematically deprived the law firm of many thousands of dollars in lost fees and uncollectible costs through his improper billing procedures. Finally, the Board fully supports the referee's recommendation of guilt that the respondent engaged in improper billing practices which deprived the clients from

knowing the basis for their bills relative to the split between fees and costs and thus any meaningful input into how the case was being handled. In the opinion of the Board, the appropriate discipline should be a suspension for a period of at least one year with proof of rehabilitation required prior to reinstatement and payment of costs which currently total $2,350.72.

POINT INVOLVED ON APPEAL

WHETHER THE REFEREE DREW ERRONEOUS AND UNJUSTIFIED CONCLUSIONS FROM THE FINDINGS OF FACT BASED ON THE EVIDENCE PRESENTED AND THUS MADE INADEQUATE RECOMMENDATIONS AS TO GUILT AND DISCIPLINE AND WHETHER THE BOARD'S RECOMMENDATION OF A ONE YEAR SUSPENSION WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT IS THE APPROPRIATE MEASURE OF DISCIPLINE.

STATEMENT OF THE FACTS

Respondent was a corporate counsel for Gulf and Western Corporation in Vero Beach for several years. Sometime thereafter, he joined the law firm of Jones and Foster and worked directly for George Moss, who is the complainant in these proceedings. While associated with Jones and Foster, George Moss was his supervisor and had authority to approve all billing statements produced by respondent which he rarely did (TII pp. 80-82). In September, 1983, respondent, Mr. Moss and others left Jones and Foster to form a new law firm called Moss, Henderson and Lloyd (MH&L). This firm began doing business on October 1, 1983. As found by the referee, all shareholders understood they were to pay over to the firm all compensation which they received from their professional services unless exempt (R. II B). In fact, respondent testified before the grievance committee that this was his general understanding. All fees generated were to be paid to the professional association (BEX-A, pp. 107-108). Furthermore, respondent was exempted for fees generated when he was in a previous unrelated partnership. Several months after forming MH&L, respondent and the other shareholders and employees in the firm entered into an employment agreement which provided in paragraph 4 that:

> "the EMPLOYEE shall account to and pay EMPLOYER all compensation received and attributable to

services EMPLOYEE has rendered in his/her professional capacity...."(BEX-3).

This agreement was backdated to October 1, 1983 and had generated considerable discussion. However, respondent did sign it probably not later than June, 1984 by his own testimony and well before he left in September (TII pp. 36-38 ; BEX-A, pp. 94-95).

The respondent began receiving a $150.00 per month retainer from the Fellsmere Water Control district prior to leaving Jones & Foster. He continued to receive the retainer during his twelve months of employment with MH&L. He did not pay any of this retainer over to MH&L although other fees generated from work for the water control district were paid over to the firm. Approximately $1,800.00 was retained by the respondent for his own personal purposes. Mr. Moss indicates he was unaware of the retainer until after the respondent left the firm in September, 1984. He also unequivocally testified that all firm participants understood at the outset that legal fees generated were to be turned over to the firm and compensation distributed according to the firm formula (TI pp. 32-33). His testimony is supported by the testimony of shareholder Steve Henderson (TII pp. 61-62). Although the respondent testified that this was his understanding at the grievance committee hearing, he testified at the final hearing that he was not clear on the arrangements regarding attorney's fees generated in behalf of the firm. He further

stated that he withheld Fellsmere funds purportedly on the advice of Mr. Moss since the latter did not want monies going to the former firm's parent office in West Palm Beach until they had sorted out their financial arrangements from the previous split (TII pp. 35-38). Mr. Moss disputed this testimony at the final hearing (R. II B; TI pp. 52,72). Furthermore, he testified the respondent told him when initially confronted about Fellsmere that he had made a mistake (TI p. 52) and that respondent also stated that he did not want the funds to go down to West Palm Beach (TI p. 72).

The referee found the monthly retainer clearly was not remitted to the firm as perhaps it should have been. However, he did not find that there was clear and convincing evidence respondent had deliberately intended to deprive the firm of the retainer. He noted the respondent also paid MH&L $10,000.00 after leaving the firm which could be applied toward this and other financial controversies that existed upon the breakup subject to a final accounting and reconciliation under the shareholders' agreement. He then concluded that this was the dispute between respondent and his former employer and the interpretation of the employment agreement and the respondent's understanding (R. II B).

During his employment with MH&L, respondent traveled considerably on business trips for clients. On several

occasions, he was accompanied by a non-lawyer employee of the firm who performed no work for the clients. On at least one occasion, the non-lawyer employee and respondent traveled to the Caribbean and back to Miami where the respondent flew on to Europe while the non-lawyer employee went back to Vero Beach. On this particular occasion, the price of her air fare was charged back to the firm and to one of respondent's clients, a Mr. Sorenson (TII pp. 69-71; BEX-10). It does appear that this particular cost was never paid and that Mr. Sorenson refused to pay several of the outstanding costs. This came at a time when Mr. Moss had advised respondent against running up large amounts in costs. Further, the bill was paid several months after the actual March flight had been accomplished and caused over $57.00 in interest to be paid on the bill.

On one of the trips to New York in December of 1973, respondent rented a limousine for two days costing $835.00. This apparently was his standard practice. The non-lawyer employee utilized the limousine while respondent was engaged in business on behalf of the firm's clients. The referee specifically found that such use of the limousine was not improper in that it apparently was rented for the entire day at a set rate so that more than one client could be met at different locations. He noted the personal use by the non-lawyer did not increase the cost of the client's business. He also noted that there was

insufficient evidence regarding the purchase of a coat for the non-lawyer to find that those expenses had been charged back to one of the firm's clients (R. II D). However, it is also uncontroverted the respondent had advised Staff Investigator James Larson that the clients would not approve and pay for a limousine if the bills were presented to them in plain form so they knew they were paying for a limousine. Further, while he indicated it was to see more clients, he could not provide the staff investigator with the names of other clients (BEX-A, pp. 68-69; TII pp. 39-40).

During the year he was with MH&L, respondent did considerable work for two clients, Messrs. Harrigan and Sorenson. He took two business trips to London, England for Mr. Harrigan in February and March, 1984 to purchase stock on the London Stock Exchange. George Moss testified the stock which he purchased for Mr. Harrigan could have been purchased in Vero Beach at the same price. However, respondent testified the stock was purchased by a foreign corporation in which Mr. Harrigan had some interest and that to do it in the United States might have subjected the corporation to U.S. tax laws. Accordingly, it was purchased in London, England. The total amount of stock purchased on the two trips was $111,000.00 from client funds totaling $125,000.00 which had been in the firm's trust account. The "expenses" in connection with these trips totalled approximately $14,000.00.

For the first trip, respondent wrote one trust check to a travel agency for $502.00, one to cash for $2,000.00 and one to himself for $4,498.00 which he cashed upon his return (BEX-5 and 7). For the second trip, he wrote three trust checks for expenses to cash totalling $7,000.00 (BEX-6 and 7). He also cashed one for $3,000.00 after the March trip. All but the check to himself were hand written and its amount was later penned in. The referee found that while his accounting was slim regarding the expenses, he noted that Mr. Harrigan had not complained regarding respondent's handling of the transactions and had given his written ratification to the actions taken by the respondent (R. II F; REX-A and B). In fact, the accounting consisted of the ratifications and a check for one airline ticket. There were no records.

Respondent's position regarding the expense money is that substantially all of it was paid over to Martin Riley, an English stockbroker, who needed the money so that purchases of this penny stock in Shariton International Limited would go smoothly. It was done to affect a better price on the stock market according to the respondent (TI pp. 118-133; TII pp. 8-31; See Appendix). The stockbroker denies receiving any cash other than the price of the purchases (BEX-18). Respondent further indicates that he believes he paid the money in cash to the stockbroker at the conclusion of the entire transaction. He

testified that he probably took it in cash on more than one occasion in trips to England on other business subsequent to the second purchase in March, 1984 (TII pp. 10-16,22). While he cashed some $7,500.00 subsequent to the trips, he could not remember what he had done with the money prior to purportedly turning it over to Mr. Riley (TII pp. 29-31). He did not put it back in the firm's trust account from which it came nor did he think he put it in his personal account. Finally, he did not ask the stockbroker what he was going to do in order to affect a more favorable price to keep the stock from becoming volatile apparently due to the expected purchases (TII p. 21-22). Interestingly, while the February purchase of stock was for $68,000.00 and the March for $43,000.00, the purported amounts to Mr. Riley for each purchase remained the same for his alleged favorable intercession with the market rates. The referee found on the evidence presented that he could not determine that the respondent utilized the money for any improper purpose (R. II(2) I).

MH&L utilized detailed computer billings which would print out an itemized breakdown of hours spent by attorneys and costs incurred in connection with each client account. However, respondent ordinarily used a one page statement for describing his services rendered which noted only the total hours and costs. The evidence clearly indicated respondent routinely adjusted his

bills to lower the amount of costs presented to clients and particularly Messrs. Harrigan and Sorenson. He admitted that, if presented with a large amount of costs, neither client would authorize nor approve the expenditures (TII pp. 40-45). Accordingly, he adjusted those bills to lower the face amount of the costs and to increase the amount of hours. He did assert he never increased the hours to more than the number he had spent on a particular matter. The final result was that the total charge to the client generally remained reasonable. However, the breakdown or subtotals between fees and costs could be grossly incorrect. At the time the respondent left the firm there were over $19,000.00 in unbilled costs of which a substantial portion belonged to either Mr. Harrigan or Mr. Sorenson (R. II H).

The referee noted it did not appear that either individual was aware or authorized much of those unbilled costs which respondent incurred in their behalf on business trips although they were aware of the trips. Respondent's position, which was disputed by Mr. Moss, was that he was attempting to build an international law practice and the shareholders in the firm understood he might incur substantial costs and expenses which would not be billed to the firm's clients (R. II H). It does appear that his individual practice was becoming profitable at the end of his year with MH&L. In any event, Mr. Moss testified when he spoke to Messrs. Harrigan and Sorenson regarding their

costs, they indicated they did not owe MH&L costs in such large amounts (TI pp. 43-44). The respondent did not dispute that he had advised Staff Investigator Larson that neither Harrigan nor Sorenson, if presented with the two true costs of the trips, would pay them (TII p. 44). The referee did also note that MH&L had made no formal attempts to collect the outstanding costs (R. II H).

The referee found that respondent's billing practices were deceptive and that they misrepresented to the clients for what they were actually paying. He did note that there did not seem to be a clearly enunciated policy at MH&L with respect to reducing or writing down fees or client costs and that the management of these matters were somewhat lax. He again noted the respondent paid MH&L approximately $10,000.00 since his departure. Finally, with respect to this area he concluded that since MH&L has made no attempt to collect any fees and costs, which may be owed the firm by clients who have been represented by the respondent, it cannot be ascertained whether or not his billing practices in fact deprived MH&L of any attorney's fees or costs (R. II H). George Moss testified that he believed the firm was out approximately $62,500.00 in uncollected fees including some $23,000.00 in uncollected costs taking into account the $10,000.00 payment (TI p. 64). Further, some $200,000.00 had been borrowed at high rates of interest to meet expenses during

the firm's first year (TI p. 39). Respondent's position was that the firm owed him money from any ultimate settlement which was disputed by Mr. Moss (TII pp. 75-79). Finally, the respondent testified that he paid the $10,000.00 over in an attempt to avoid the grievance in that Mr. Moss indicated he would not file with the Bar in exchange for $20,000.00 (TII p. 34-35). No formal civil action has been filed by the respondent or MH&L to settle the problems left over from the split.

SUMMARY OF ARGUMENT

The referee properly found that respondent's billing practices at MH&L were misleading and deceptive, thus depriving the clients from knowing the basis for their bills relative to the split between fees and costs. However, the referee has reached erroneous, inadequate and unjustified conclusions from his total findings of fact. While the Board of Governors of The Florida Bar accepts the referee's findings of fact, it disagrees with his conclusions from those findings. Specifically, the Board believes different legal conclusions from the findings of fact and the evidence apply. The respondent deliberately, knowingly and improperly retained the Fellsmere $150.00 per month retainer during the year he was at MH&L. His 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. Finally, the Board submits the referee's conclusion that the respondent had not improperly paid over most of $14,000.00 to the English stockbroker or improperly utilized a large portion of the funds himself is based solely on a conflict in the testimony and the after the fact ratifications submitted by the client. Respondent's own asserted position makes the only appropriate conclusion that the money either was used for an improper or illegal purpose if given to the stockbrokers or was an excuse fabricated to cover his own misuse of the money.

A referee's findings of fact are given the same weight as a civil trial of fact and not subject to attack unless they are without support in the evidence. The findings and recommendations of guilt are given a presumption of correctness and should be upheld unless they are clearly erroneous or without support in the record. See, The Florida Bar v. Vannier, 498 So.2d 896,898 (Fla. 1986). However, the legal conclusions and recommendations are subject to broader consideration by this court since it is the court's responsibility to enter an appropriate judgment. See, The Florida Bar; In Re Inglis, 471 So.2d 38,41 (Fla. 1985). In this instance, the Board of Governors of The Florida Bar submits the referee has reached inadequate, erroneous and unjustified conclusions in all but the deceptive billing practices area. Accordingly, most of his recommendations as to lack of guilt are also erroneous; and thus his recommendation for a private reprimand and payment of costs is also inadequate, erroneous and unjustified. The Board of Governors submits the appropriate level of discipline, given the appropriate conclusions, is a suspension for one year with proof of rehabilitation required prior to reinstatement and payment of costs.

ARGUMENT

THE REFEREE DREW ERRONEOUS AND UNJUSTIFIED CONCLUSIONS FROM THE FINDINGS OF FACT BASED ON THE EVIDENCE PRESENTED AND THUS MADE INADEQUATE RECOMMENDATIONS AS TO GUILT AND DISCIPLINE AND THE BOARD'S RECOMMENDATION OF A ONE YEAR SUSPENSION WITH PROOF OF REHABILITATION REQUIRED PRIOR TO REINSTATEMENT IS THE APPROPRIATE MEASURE OF DISCIPLINE.

A: THE FINDINGS AND CONCLUSIONS

The referee drew improper conclusions from the findings of fact based on the evidence presented and thus made inadequate recommendations as to guilt and discipline. The Board of Governor's recommendation of at least a one year suspension with proof of rehabilitation required prior to reinstatement is the appropriate measure of discipline. The referee found that respondent's billing practices were deceptive and recommended that the respondent receive a private reprimand and pay the costs of these proceedings currently totaling $2,350.72. He concluded that respondent had not willfully withheld the Fellsmere retainer of approximately $1,800.00 over twelve months from the law firm; that by his billing practices he had not deliberately deprived the law firm of several thousands of dollars in earned attorney's fees and uncollectible costs and; the purported payment of most of $14,000.00 to the English stockbroker was not done for improper purposes or improperly used by himself.

Beyond question, a referee's findings of fact are given the same presumption of correctness as those of a trier of fact in a

civil proceeding. See Article XI, Rule 11.06(a)(1) of The Florida Bar's Integration Rule for cases prior to January 1, 1987 and the identical current rule which is 3-7.5(k)(1)(1) of the Rules of Discipline. This court will not rewrite a referee's findings of fact and will adopt same including the recommendations of guilt unless they are clearly erroneous or lacking in evidentiary support. See The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986); The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986); The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986); The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986); The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985); The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985); The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978); and The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968). As noted in Stalnaker, supra, at page 816, and several of the other cases, the referee is the fact finder for this court in disciplinary proceedings and resolves the conflicts in the evidence. The Board of Governors of The Florida Bar does not argue with the referee's findings of fact.

However, it believes that most of his legal conclusions from those findings of fact and thus his recommendations are erroneous and unjustified other than his clear finding the respondent engaged in deceptive billing practices which deprived his clients from knowing for what they were paying. This court has more

latitude to consider whether the referee's legal conclusions and recommendations therefore are warranted by the findings of fact as noted in Inglis, supra. Although it was a reinstatement case, the standard disciplinary law applied and the court noted it had to accept the referee's findings of fact unless they were not supported by competent substantial evidence in the record. The court went on to note:

> "With regard to legal conclusions and recommendations of the referee, this courts scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment." At page 41.

The Bar submits that most of the conclusions the referee drew were unnecessarily narrow, erroneous and unjustified absent those dealing with the deceptive billing practices. Accordingly, most of his recommendations were similarly flawed since they flowed from those conclusions.

In Section II B of his findings, the referee discussed the Fellsmere Water Control District retainer of $150.00 a month. He found all shareholders understood they were to turn into the firm all legal fees they generated unless exempted. There is no question that approximately $1,800.00 was not remitted to the firm. The referee noted that perhaps it should have been. However, he could not find that the respondent intentionally

intended to deprive the law firm. He followed this finding with one that respondent paid MH&L $10,000.00 after leaving to be applied, if required, toward this and the other financial controversies which existed between the respondent and his former employers. The referee then concluded:

> "In my opinion, 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)

This conclusion is at odds with his finding that all shareholders understood their duties and ignores the fact that the respondent testified to the grievance committee that he understood all fees generated were to be turned over to the firm unless exempted (BEX-A, pp. 107-108). Of course at the final hearing, the respondent asserted he did not understand that all fees had to be turned over (TII pp. 35-36). Yet, George Moss testified that when he initially confronted him about the retainer situation that respondent stated he had made a mistake (TI p. 52). Both men directly contradicted each other as to whether he had been authorized by Mr. Moss to withhold the retainer or whether the respondent not wish the money to be sent down to the former employer (TI pp. 52, 71; TII pp. 35-38). Mr. Moss was certain the respondent understood his obligations especially since he asked Mr. Moss about whether he had to turn in monies earned in a previous partnership which was exempted (TI

pp. 32-33). Additionally, shareholder Steve Henderson clearly understood the firm's policy fees and was certain the others did (TII pp. 61-62). Finally, the employment contract, which was identical with that utilized at the prior firm, required turn in of all fees unless exempted. Even if it was not signed by him for several months (June, 1984 at the latest) and if it generated considerable discussion, clearly the respondent understood the common practice that all members of a professional association, unless exempted, turned in all legal fees which were then to be divided according to whatever formula. In fact, he even had one exemption from a prior partnership which should have further underscored the conclusion that the retainer had to be turned in. Clearly, the discussion and the agreement had to heighten respondent's knowledge.

The referee's conclusion that this is a civil fight does not resolve the question whether respondent was entitled to place the fees in his own pocket. The Bar submits he was not and the referee's conclusion was erroneous. Clearly, once the contract of employment was signed, the respondent had to know that the monthly retainer was willfully being withheld from the law firm. In fact, he did not assert as an affirmative defense lack of knowledge but rather that he had been given permission by Mr. Moss to withhold that particular retainer which is disputed by Mr. Moss. At the final hearing, respondent did state he may have

been at fault but that he had bigger problems on his mind with firm members and policies (TII pp. 36-38). Finally, it should be noted that this activity occurred during the first year of a new law firm which was forced to borrow considerable sums of money at times in order to make the payroll and expenses. The only proper conclusion from the clear and convincing weight of the evidence is the respondent knew the firm's policy from the outset and deliberately pocketed the retainer in violation of it,thus cheating the other shareholders.

The referee properly concluded that respondent's billing practices whereby he commonly adjusted bills, particularly for Messrs. Harrigan and Sorenson, so that those clients would not be privy to the huge amount of costs incurred in relation to legal fees was deceptive and misleading to the clients. For example, if the respondent had a $10,000.00 bill with $7,000.00 in costs and $3,000.00 in legal fees, he would adjust the bill sent to the client so that while the overall amount might not change, the amount of legal fees would be substantially increased while the amount of costs would be substantially decreased. Once the bill was paid, it would be readjusted within the system so that the advanced costs would be covered. Further, it was common for the respondent to routinely write down substantial amounts in legal fees. Clearly, most attorneys in law firms have to engage in writing down or writing off fees as a matter of practice.

However, the respondent was systematically doing this in a manner which resulted in depriving the law firm of considerable sums of legal fees estimated by Mr. Moss to be in excess of $60,000.00 counting the unpaid and/or unbilled and uncollectible costs of approximately $20,000.00.

The legal conclusion that the practice was deceptive is entirely appropriate and clearly and convincingly supported by the evidence. However, that conclusion does not go far enough in that his billing practices by definition deprived the firm of fees and/or uncollectible costs. While the referee found there was no clearly enunciated policy at MH&L with regard to reducing or writing down attorneys fees or costs, the other shareholders did not routinely write off large sums as did the respondent who reportedly was attempting to build an international law practice. Finally, it is directly disputed as to whether Mr. Moss understood respondent's billing practices at MH&L from the prior days at Jones & Foster (TI pp. 104-105, TII pp. 79-83). The high costs incurred could not be presented to the clients who had not authorized them and were not aware of those costs regarding the business trips. In all probability they would never have paid them according to the testimony (R. II H).

The referee noted that since MH&L had made no formal attempt to collect any unbilled fees and costs which they may be owed by respondent's former clients it could not be ascertained from the

testimony whether or not his billing practices in fact deprived MH&L of attorneys fees and costs. Obviously this ignores the sworn testimony of Mr. Moss. Moreover, even though these proceedings are not designed to be a substitute for civil proceedings, the conclusion that respondent's billing practices were deceptive and improper fully warrants the further conclusion that the firm through those practices was deprived of an unknown amount of fees and collectible costs. Certainly, Messrs. Harrigan and Sorenson had no intention of paying over the costs incurred in their behalf which were unbilled and uncollected at the time of respondent's departure. Must the firm sue first to establish a dollar figure and then file a complaint? The Bar submits that such should not be the case. It is the practice that is under scrutiny and not the exact dollar amounts.

Respondent paid over to the firm $10,000.00 at the time he left and was confronted as noted by the referee. The respondent indicates that this payment was primarily an effort to avoid a grievance since he was originally advised that the firm would settle for $20,000.00. He also took the position that once he settled with the firm he would be owed money pursuant to the buy/sell agreement (TII pp. 31-35). This was disputed by Mr. Moss (TII pp. 75-79). His payment of $10,000 is simply inconsistent with his position that he would be owed funds

pursuant to the buy/sell agreement once a final settlement had been made.

The referee's conclusion that the respondent did not pay money to the English stockbroker for an improper purpose is simply not supported by the evidence. The stockbroker adamantly denies receiving any funds other than the $111,000 necessary for the purchases. Respondent asserts that he paid the money in cash to the stockbroker subsequent to the March, 1984 trip on one or more of his other trips to England. He never asked the stockbroker what the money was needed for other than it was apparently to effect a more favorable price on a stock market. He never asked the stockbroker what he would do with the money in order to effect a more favorable price. His explanation to the referee was that it was to insure this penny stock did not become volatile purportedly through the news of the impending purchases. Additionally, it is interesting that apparently the amount to be paid, approximately $7,000.00 for each trip was not tied to the amount of stock being purchased. $68,000.00 worth was purchased on the February trip and $43,000.00 in March.

Moreover, respondent's handling of the trust checks for expenses is interesting, since four were handwritten to cash, one to a travel agency and one to himself. The last one was the only check on which the payee was typed in, but the amount was left blank. His handling of the two checks subsequent to his return

from both trips totaling some $7,500.00 is very intriguing. Essentially, he does not remember how he handled the money. He did not put it in his personal account nor did he put it back in the firm's trust account from whence it came. It was apparently kept in cash until one of his later trips wherein he purportedly paid Mr. Riley. He asserts he paid over almost all of the $14,000.00 less travel expenses to Mr. Riley; yet his ability to account for any of the funds other than a check for an airline ticket on one trip is nonexistent outside of the after the fact ratifications. Respondent's explanations at both the grievance committee and the final hearing as to the purpose of this money and its disposition were bewildering and frankly unbelievable.

The referee appears to have concluded that he could not find that the purpose of giving the money was improper since it was disputed as to whether the stockbroker had received the money. The problem with the conclusion is that the respondent claims that he understood the purpose of the extra money was to procure a more favorable price on the market. If this were a proper and legal purpose, and if Mr. Riley had indeed received the funds, he would have had no hesitancy in so revealing. By denying any such receipt vehemently, Mr. Riley clearly demonstrated that had he solicited and received extra money it would have been improper, if not illegal. Obviously, one can pay a broker whatever price is agreed. Indeed, if respondent were paying the funds for a

proper purpose, a check or checks could have been made out to Mr. Riley. Why was he purportedly paid in cash? It clearly stretches the fabric of common sense when so much money is involved for the stated purpose that whatever actions the broker was going to take in order to affect a better price would not be improper and/or illegal. It appears that the referee reached his conclusion primarily because there was a direct conflict between the respondent and Mr. Riley on whether the latter received the funds and not on whether the intended purpose of the payments was proper or improper. The Bar believes this conclusion also was erroneous and unjustified.

B. THE RECOMMENDED DISCIPLINE

The referee has recommended the respondent receive a private reprimand by the Board of Governors as provided in Rule 3-5.1 (a) of the Rules of Discipline. He also recommended he pay the costs of these proceedings currently totaling $2,350.72. The Board of Governors believes the discipline is erroneous and unjustified under the circumstances wherein the referee reached erroneous and unjustified conclusions from the evidence presented. The Board further believes that the appropriate measure of discipline would be a suspension for at least one year with proof of rehabilitation required prior to reinstatement and payment of the costs.

Clearly if this case involved the mishandling of trust funds, the respondent would be facing a long term suspension if not a disbarment. See e.g. The Florida Bar v. Pierce, 498 So.2d 431 (Fla. 1986); The Florida Bar v. Kent, 484 So.2d 1230 (Fla. 1986); The Florida Bar v. Perri, 435 So.2d 827 (Fla. 1983); The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982, and the cases cited therein); The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982) and The Florida Bar v. Pincket, 398 So.2d 802 (Fla. 1981).

Did it matter that the funds involved are fees which are suppose to be turned in to the firm or advanced costs incurred in such a manner that they were unauthorized and now virtually uncollectible. The Bar submits that it should make no material

difference where the firm has been wrongfully deprived of fees, the money diverted or misused. This respondent engaged in deceptive practices which deprived his firm of several thousand dollars in fees as well as in uncollectible costs. Furthermore, he either knowingly pocketed several thousand dollars of expense money or assisted in utilizing it for an improper or illegal purpose. Finally, he knowingly failed to turn in a monthly retainer of $150.00 for approximately a year. Even if he had misconceived his duty at the outset, clearly further down the line he was aware that there was no excuse not to turn that money in to the firm.

Assuming this court accepts the Bar's argument that the referee made improper conclusions from the evidence, then what is the requisite level of discipline. The two most recent cases include The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986) and The Florida Bar v. Gillin, 484 So.2d 1218 (Fla. 1986). In the latter, the attorney was suspended for six months with proof of rehabilitation required for diverting $25,000.00 of a fee into his own pocket for his own personal use. In the former, the attorney was suspended for ninety days with automatic reinstatement. The case involved diverting almost $37,000.00 in fees from a law firm for approximately two years where the evidence was directly conflicting as to whether an oral side agreement existed between the attorney and a senior partner of

the firm. Justice Erlich dissented in Gillin, supra, and would have imposed a much more stringent discipline. Regarding a problem that this type of case presents in almost every instance, he wrote:

> "Mistrust among partners has no place in a firm. Each partner must of necessity have almost blind faith and confidence in the honesty and integrity of his partners. This is the way it should be, and a breach of this succeedingly close relationship is an offense which merits discipline commensurate with the gravity of the offense." At page 1220-1221.

Disbarment was ordered in The Florida Bar v. Ryan, 394 So.2d 996 (Fla.1981) where the attorney admittedly diverted approximately $20,000.00 from a law firm. He also fled the jurisdiction after being indicted for bringing marijuana into the state of Florida and being charged with conspiracy to possess more than one hundred pounds with intent to sell. One other Florida case is The Florida Bar v. unnamed attorney, confidential case no. 09A77121. In that matter, a private reprimand was ordered by this court where the attorney diverted $3,031.00 in fees from clients he had accepted while employed as a salaried member of a firm. Basically, that attorney had been moonlighting. Finally, in a New York case, an attorney was disbarred where he diverted $8,880.00 in fees and costs for his own personal use from the firm over a seven month period. See Matter of Salinger, 452 N.Y.S.2d 623 (App. Div. 1st. Dept. 1982).

That court found no difference between theft of fees entrusted to an attorney and escrow of trust funds per say. Justice Erlich also wrote in Gillin, supra:

> "It is my opinion that stealing by a lawyer whether from a client, a member of the general public or from his law firm, is utterly reprehensible, and that by such act the lawyer has forfeited his position in society as a member of the bar and an officer of the Court, and disbarment is the proper discipline." At page 1220.

Note, there were some matters in mitigation.

In this instance, the referee's recommended reprimand is totally inadequate. There is deceit and dishonesty present here as well as misappropriation of monies. It is just that and should be treated accordingly. The Board's recommended suspension for at least one year and thereafter until respondent proves rehabilitation prior to reinstatement is the appropriate measure of discipline. It meets the tests of discipline as recently enunciated in The Florida Bar v. Lord, 433 So.2d 983, 986 (Fla. 1983). First, the judgment must be fair to both society and the respondent, protecting the former from unethical conduct and not unduly denying them the services of a qualified lawyer. While this lawyer is qualified, the offenses plainly merit the recommended suspension and the growth of the Bar in recent years has undermined that particular argument. The public will not be unjustly deprived if this court imposes a suspension.

Second, it must be fair to the respondent both sufficient to punish the breach and at the same time encourage reform and rehabilitation. The recommended suspension will punish the breach and also encourage reform and rehabilitation with regard to not engaging in deceptive and dishonest conduct and the need of utmost faith and fidelity to the other shareholders in a law firm. Third, the judgment must be severe enough to deter others who might be tempted to engage in similar misdeeds.

As noted by Justice Erlich, the need for trust among shareholders or law partners is paramount within a law firm. While this court should not attempt to resolve a civil dispute through a discipline case, it must discipline those attorneys who have engaged in deceptive and improper conduct regarding their arrangements on fees and costs whether respecting clients or the other members of the firm. A suspension would obviously accomplish that aim and put other members of the Bar on notice that their conduct towards their partners or shareholders is every bit as important as their conduct towards their clients. It is also needed for those who would be tempted to handle a stock deal as did respondent.

Finally, the public has a vital interest in an effective attorney discipline program. See e.g. The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984). In that case, this court adopted a referee's statement that:

> "Protection of the public, punishment, rehabilitation of an attorney who commits ethical violations are three important purposes of disciplinary measures. Equally important purposes, however, are a deterrence to other members of the Bar and the creation and protection of a favorable image of the profession. The latter will not occur unless the profession imposes visible and effective disciplinary measures when serious violations occur". At page 1341.

The Board of Governors of The Florida Bar submits that its recommended suspension for at least one year with proof of rehabilitation required prior to reinstatement is the appropriate discipline in this matter and that the referee's recommended private reprimand and payment of costs is clearly erroneous and unjustified. This Board's recommended discipline will better enhance the public confidence, if adopted, and which it should be.

CONCLUSION

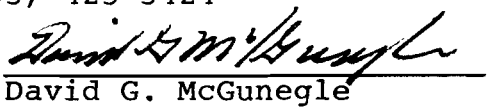
WHEREFORE, the Board of Governors of The Florida Bar respectfully prays this Honorable Court will review the referee's findings of fact, conclusions, recommendations of guilt and discipline and support the findings of fact and recommendation of guilt as to the deceptive billing practices but reject the conclusions and recommendations as to lack of guilt with respect to the retainer, expense money in the stock matter and the deprivation of the firm of fees and costs as erroneous, inadequate, and unjustified from the evidence; also reject the recommended private reprimand for similar reasons; and order the respondent be suspended for a period of one year with proof of rehabilitation required prior to reinstatement and to pay the costs of these proceedings which currently total $2,350.72.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

JOHN T. BERRY
Staff Counsel
The Florida Bar
Tallahassee, FL 32301
(904) 222-5286

DAVID G. McGUNEGLE
Bar Counsel
The Florida Bar
605 E. Robinson St.
Suite 610
Orlando, FL 32801
(305) 425-5424

By: 
David G. McGunegle
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief Of The Florida Bar and accompanying Appendix have been furnished by Federal Express mail to The Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing was mailed by ordinary U.S. mail to Sherman Smith III, counsel for the respondent, and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 24th day of April, 1987.

David G. McGunegle
Bar Counsel