IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

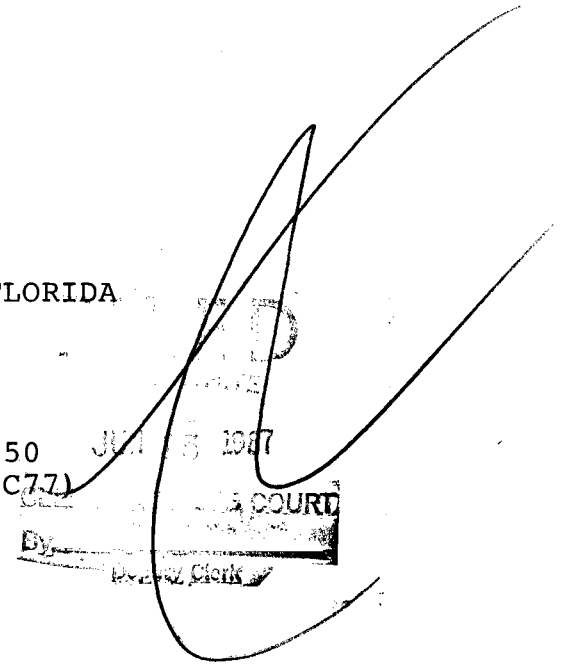
Complainant,

Case No. 68,750
(TFB No. 1985C77)

v.

THEODORE W. HERZOG,

Respondent.
_____/



COMPLAINANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

ARGUMENT

Respondent's several arguments do not have merit. The referee drew erroneous, inadequate and unjustified conclusions from the findings of fact on the evidence presented and thus made inadequate recommendations as to guilt and discipline. The Board's recommendation of a one year suspension with proof of rehabilitation required prior to reinstatement is the appropriate measure of discipline.

The Bar reiterates and stands on its initial arguments as to all matters.

AS TO POINT I

THE RESPONDENT DELIBERATELY, KNOWINGLY AND IMPROPERLY RETAINED THE $150.00 MONTHLY RETAINER HE RECEIVED FROM THE FELLSMERE WATER CONTROL DISTRICT WHILE HE WAS EMPLOYED BY MOSS, HENDERSON, AND LLOYD.

Respondent argues he did not deliberately intend to deprive the law firm of MH&L of the $150.00 monthly retainer fee he received from the Fellsmere Water Control District.

Much of respondent's argument here centers on the buy-sell agreement which is not the issue. Respondent maintains he is owed 36 percent of $90,641.89. Is it not inconsistent for him to

pay MH&L $10,000.00 when he claims he is the one who is owed money (TI p. 112)? The Bar submits it is certainly inconsistent.

Regardless of whether or not respondent initially knew he was wrongfully withholding the monthly retainer, he did become aware by June 1984 at the latest that the monies should be turned over to the firm. Much earlier when MH&L was formed respondent and Mr. Moss had a discussion as to whether or not the respondent should turn over fees he had earned while associated with another attorney not associated with MH&L. Mr. Moss advised him those fees did not but that if the work had been done for MH&L then the money needed to be paid over (TI p. 33). After this conversation any money earned by him while working in his legal capacity for MH& L was to be turned over to the firm as set forth in the employment contract he later signed. The amount of money involved here is immaterial. It is the fact that he knowingly and wrongfully withheld legal fees due the firm which, incidentally, was struggling financially. Plainly, what he did with the monthly retainer was wrong and he had to know it.

AS TO POINT II

THE RESPONDENT'S DECEPTIVE BILLING PRACTICES DEPRIVED THE FIRM OF AN UNKNOWN AMOUNT OF FEES ESTIMATED TO BE IN EXCESS OF $60,000.00 INCLUDING UNCOLLECTIBLE COSTS OF OVER $20,000.00

Respondent argues that his billing practices were proper. The Bar contends that they were improper and damaged both the clients and MH&L. The respondent routinely manipulated the bills being sent to Mr. Sorenson and Mr. Harrigan and most probably others. He adjusted the amount due by increasing the legal fees and decreasing the costs. He readjusted later when paid so the costs would be covered. As a result, the clients were misled as to what they were paying for.

In addition, MH&L was deprived of an unknown amount of fees estimated to be in excess of $60,000.00 including uncollectible costs of more than $20,000.00. Although MH&L had no firmly established policy on writing down fees, common sense dictates that the respondent was wrong to manipulate his bills to cover his hourly costs associated with his trips through fees when he knew the clients would object and not pay (TII pp. 40-45). Mr. Sorenson and Mr. Harrigan did not approve the unbilled costs of some $19,000.00 nor had they authorized all of the trips to Europe and other places (TI p. 43, 43). Mr. Moss was also

unaware of respondent's practice of writing down his fees to cover travel expenses (BEX-A p. 36).

AS TO POINT III

THE RESPONDENT IMPROPERLY OR ILLEGALLY PAID OVER SOME $14,000.00 TO THE ENGLISH STOCKBROKER IN THE HARRIGAN TRANSACTIONS OR THE RESPONDENT FABRICATED AN EXCUSE TO COVER HIS OWN MISUSE OF THE MONEY.

Respondent argues the stock transactions he handled for Mr. Harrigan were proper and legal. It is true that the London Stock Exchange rules and practices were not explicitly made a part of these proceedings. However, common sense dictates that respondent's version of these transactions goes totally against any set of proper rules. According to him, extra cash was being paid to apparently keep the volatility of the stock down. On cross-examination the respondent's testimony indicated he did not pay the broker his full payment after receiving confirmation of the first transaction. Rather, he paid him only a small portion of the money at that time. The remainder was not purportedly paid over until after the second transaction (TII pp. 14-16).

Even if one could infer that such a transaction was proper and the broker was cheating his own firm, respondent's involvement in such a deal is still improper. Furthermore, respondent was unable to recall what he had done with the

$7,500.00 he had cashed to cover the "expenses" of the transactions after he had returned to Vero Beach prior to paying the broker (Appendix P-49, TII p. 30).

The fact that Mr. Harrigan has never complained is not surprising especially if he thought the deal from which he profited was being done in an improper manner. His participation is immaterial to the case at hand. It is respondent's activities that are under scrutiny. Either he knowingly participated in an improper transaction or he pocketed the cost money. Both are wrong.

Assuming the Bar's positions have merit, there are numerous cases supporting the Bar's contention that the respondent should receive a stronger measure of discipline given the nature of his offenses. In The Florida Bar v. Ryan, 394 So.2d 996 (Fla. 1981), the attorney was found guilty of misappropriating some $20,000.00 belonging to his law firm for his own personal use. In addition, he was indicted on felony charges for drug smuggling and left the country to avoid prosecution. Together these actions resulted in his disbarment.

In The Florida Bar v. Parish, 471 So.2d 1283, (Fla. 1985) the attorney on at least five occasions received legal fees from

clients and failed to record the fees or deposit them in the firm's account as he was required to do. In addition, he refused to return certain funds to a client when requested and refused to file a final judgment in a dissolution of marriage until the client paid the fee. The court granted his petition for leave to resign permanently.

In The Florida Bar v. Gillin, 428 So.2d 1218 (Fla. 1986), an attorney improperly retained part of a large fee that was to have been turned over to the law firm. There was a dispute between Gillin and the other partners as to the fee distribution formula being used. He secretly was using it to purchase an automobile. The court stated that it would not "tolerate misguided, irrational acts of self-help involving disputes between partners who are members of the Bar." (Id. at 1219) The court considered several mitigating factors in its decision. The attorney had never been disciplined before in his twelve years of practice. He had been active in local Bar functions and was active in his church. As a result the court suspended him for six months. In a dissenting opinion, Justice Ehrlich felt that a one year suspension would be more appropriate. Had it not been for the mitigating factors, he would have recommended disbarment. It is important to note that none of the above mitigating factors are present in the respondent's case.

In The Florida Bar v. Stalnaker, 485 So.2d 814 (Fla. 1986) the associate attorney failed to turn legal fees over to the firm as he was supposed to have done. Instead he placed the money in his personal bank account. The lawyer was given a ninety day suspension. The majority felt there was evidence of an oral side agreement between Stalnaker and the senior partner. Although it did not modify his employment contract regarding fees, it apparently gave Stalnaker reason to believe the partner approved of his retention of the money. Justice Ehrlich dissented.

In The Florida Bar v. Farver, No. 66,463 (Fla. April 23, 1986), an attorney failed to turn over legal fees he had earned to the firm. After being arrested and charged with grand theft, he agreed to repay some $6,671.00. He did repay the amount in full. The court approved a one year suspension. In his dissent Justice Ehrlich felt a two year suspension would have been more appropriate since this was the first time a disciplinary action had been brought against this attorney. Had it not been for this mitigating factor he would have recommended disbarment.

The foregoing cases support the Bar's contention that a one year suspension is the appropriate measure of discipline where an attorney has deprived his law firm of fees, let alone the other

misdeeds present here. In each case strong measures of discipline have been recommended. The present case is no different. In all, the respondent's position is not born out by the clear and convincing evidence.

The referee's findings of fact are fully supported. However, most of his conclusions are erroneous, inadequate and unjustified. Most of his recommendations as to innocence or guilt are similarly flawed and his recommendation of discipline is totally inadequate.

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 for 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 to be suspended for a period of one year with proof of rehabilitation and to pay the costs of these proceedings which currently total $2,350.72.

Respectfully submitted,

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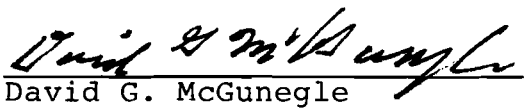
By: 
David G. McGunegle
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Reply Brief has been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301; a copy of the foregoing was mailed by ordinary U.S. mail to Sherman Smith, III, counsel for respondent, 886 Dahlia Lane, Vero Beach, Florida 32963, and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, on this 12th day of June, 1987

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