IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

THEODORE W. HERZOG,

Respondent. /

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

AMENDMENT TO REPORT OF REFEREE

Pursuant to the stipulation of counsel, the Report of Referee dated January 30, 1987, is amended as follows:

1. Paragraph II.E. is deleted in its entirety and the following paragraph is substituted in lieu thereof:

> "E. At the outset of one of Respondent's trips to Europe, he was accompanied by a non-lawyer employee of MH&L. The non-lawyer employee returned to Vero Beach from Miami and there is some evidence indicating that the non-lawyer employee's portion of the expenses particularly for airline tickets were charged back to MH&L's clients. There is no clear and convincing evidence that this was done intentionally by the Respondent or that the client actually paid any of the expenses attributable to that individual. Nor was there any testimony indicating that Respondent had been asked to reimburse the firm for these expenses."

2. Paragraph VI.A. and B. are hereby deleted in their entirety and the following new paragraphs A. and B. are substituted in lieu thereof:

A. Grievance Committee Level Costs:

1.	Administrative Costs	$ 150.00
2.	Transcript Costs	463.20
3.	Bar Counsel/Branch Staff Counsel Travel Costs	113.40
4.	Investigator's Expenses	315.29

B. Referee Level Costs:

1.	Administrative Costs	$ 150.00
2.	Transcript Costs - less 94 pages	490.00
3.	Bar Counsel/Branch Staff Counsel Travel Costs	65.82
4.	Investigator's Expenses	524.24

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(Before a Referee)

PUBLIC
Case No. 68,750
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THE FLORIDA BAR,

Complainant,

v.

THEODORE W. HERZOG,

Respondent. /

REPORT OF REFEREE

I. Summary of Proceedings:

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar and Chapter 3 of the Rules of Discipline, hearings were held on November 24, 1986 and December 4, 1986, in Melbourne, Florida. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case. The following attorneys appeared as counsel for the parties:

For The Florida Bar:

David G. McGunegle, Esquire
Bar Counsel
The Florida Bar
605 E. Robinson St.
Suite 610
Orlando, Florida 32801

For the Respondent:

Sherman N. Smith, III, Esquire
886 Dahlia Lane
Vero Beach, Florida 32963

II. Findings of Fact as to each item of misconduct of which Respondent is charged:

After considering all of the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

A. At all times material, Respondent was a member of The Florida Bar subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida. He resides and practices law in Vero Beach, Florida.

B. The testimony indicated that, along with several other attorneys, Respondent left the law firm of Jones & Foster in September of 1983 and became a shareholder in a new professional association called Moss, Henderson & Lloyd (MH&L) which began doing business on October 1, 1983. As is common practice, all sharenolders understood they were to pay over to the firm all compensation received attributable to their professional services unless exempted. Several months after forming MH&L, Respondent and the other shareholders and employees in the firm entered into an employment agreement which provides in ¶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 ...." Respondent testified that there was considerable discussion among the shareholders regarding the employment agreement, but Respondent was the first employee to sign the agreement which was then backdated to October 1, 1983.

Respondent received a $150 per month retainer from the Fellsmere Water Control District ("FWCD") during his twelve months term of employment with MH&L. Respondent did not pay this retainer over to MH&L, although all other fees generated from work for FWCD were paid over to the firm. Respondent testified that George Moss, the managing partner of the firm, had advised him not to remit those moneys to MH&L until the new firm had settled up with its predecessor firm, Jones & Foster. This testimony was disputed by George Moss at the hearing.

While it is clear that the FWCD monthly retainer of $150 was not remitted to the firm as perhaps it should have been, there is no clear and convincing evidence that Respondent deliberately intended to deprive the firm of the monthly retainer. Additionally, Respondent paid MH&L the sum of $10,000 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. 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.

C. Respondent traveled considerably on business trips for clients during his employment with MH&L. On several occasions, he was accompanied by a non-lawyer employee of the firm who performed no work for clients. The testimony is unclear as to whether or not Respondent ever charged the non-lawyer's air fare to any of the firm's clients. There was no clear and convincing evidence or testimony, however, indicating that Respondent intentionally charged the non-lawyer employee's fare to any MH&L client or that a client actually paid any of the expenses attributable to the non-lawyer employee.

D. On one of the trips to New York in December of 1983, Respondent rented a limousine for two days costing $835. The non-lawyer employee utilized the limousine while Respondent was engaged in business on behalf of the firm's clients. I cannot find that such use of the limousine was improper. Respondent testified that the limousine was rented for the entire day at a set rate so that he could meet with more than one of the firm's clients at different locations in New York City. The non-lawyer employee's personal use of the limousine was not improper because it did not increase the cost of the clients' business. Regarding the Respondent's purchase of a coat for the non-lawyer employee, there is no clear and convincing evidence that Respondent charged the expense back to one of the firm's clients.

E. Respondent traveled considerably on behalf of clients during this period of time. On several occasions, he took a non-lawyer employee of the firm along who performed no work for the clients. While there is some evidence indicating that the non-lawyer employee's portion of the expenses particularly for airline tickets were charged back to the firm's

clients, there is no clear and convincing evidence that this was done intentionally by the Respondent or that the client actually paid any of the expenses attributable to that individual. Nor was there any testimony indicating that Respondent had been asked to reimburse the firm for these expenses.

F. During the period of Respondent's employment with MH&L, he did considerable work for two clients, Messrs. Harrigan and Sorensen. Respondent took two business trips to London, England for Mr. Harrigan in February and March of 1984 to purchase stock on the London Stock Exchange. On the one hand, witness George Moss testified that the stock which Respondent purchased for Mr. Harrigan in London could have been purchased in Vero Beach at the same price. On the other hand, Respondent testified that the stock was purchased by a foreign corporation (in which Mr. Harrigan had some interest) and that the corporation might have been subjected to U.S. tax laws had the purchase taken place in the United States.

The total amount of stock purchased on the two trips was $111,000 from client funds totaling $125,000. The expenses incurred by Respondent in connection with these business trips totaled $14,000. Additionally, he cashed a check for almost $4,500 after he returned from the February trip and another for $3,000 after he returned from the March trip. Although the accounting is slim as to Respondent's expenses, I specifically note that there has been no complaint by Mr. Harrigan regarding Respondent's handling of these transactions and Mr. Harrigan has given his written ratification to the action taken by Respondent (Respondent's Exhibits A and B attached to the Answer To Amended Complaint).

G. It appears that Respondent often asked other members of MH&L to sign cost checks on transactions Respondent was handling, even though Respondent could have signed these checks himself. While it is puzzling why he would approach another member of the firm to sign those checks, there is no clear and convincing evidence that this was done for any particular or improper purpose.

H. MH&L utilized a detailed computer billing which could print out an itemized breakdown of hours spent by attorneys and costs incurred in connection with each client account. However, Respondent ordinarily utilized a one-page statement for describing his services rendered in which he described only the total hours and costs. The evidence indicates that Respondent routinely adjusted his bills to lower the amount of costs presented to clients, Harrigan and Sorensen. Respondent testified that he believed that, if presented with a large amount of costs, neither client would authorize or approve the expenditures. Accordingly, he would adjust these bills to lower the face amount of the costs and increase the amount of hours, although Respondent asserts that he never increased the hours to more than the number that he had spent on a particular matter. The result was that the total charge to the client was generally reasonable, but the breakdown or subtotals for attorney's fees and costs was incorrect.

Based upon the testimony, it does not appear that either Mr. Harrigan or Mr. Sorensen was aware or authorized much of the over $19,000 in unbilled costs which Respondent incurred in their behalf on business trips, although they were aware the trips were being taken. Respondent testified that he was developing an international law practice and that the shareholders in the firm understood that, initially, Respondent might incur substantial costs and expenses which would not be billable to the firm's clients. George Moss' testimony disputes the foregoing view.

Respondent testified and offered in evidence an MH&L computer printout entitled "GHM Special" which indicated that Respondent's practice was profitable toward the end of his tenure with MH&L. George Moss testified that when he spoke to Messrs. Harrigan and Sorensen regarding their costs they indicated that they did not owe MH&L costs in such a large amount. On the other hand, MH&L has made no attempts to collect those outstanding costs.

I find Respondent's billing practice to be improper and I recommend that Respondent be privately reprimanded for his misconduct. I do find his practice was deceptive in that it misrepresented to the clients what they were actually paying for. Also, it appears that there was no clearly enunciated policy at MH&L with respect to reducing or writing down attorney's fees or client costs and that management of those matters was somewhat lax. While I note that Respondent has paid MH&L at least $10,000 since his departure, there apparently has not been any formal action instituted by the firm regarding these financial matters. Since MH&L has made no attempt to collect any fees and costs which may be owed the firm by clients who had been represented by Respondent when he was with MH&L, it cannot be ascertained from the testimony whether or not Respondent's billing practices have in fact deprived MH&L of any attorney's fees and costs.

I. With regard to the matter presented in the Confidential Addendum relating to the London trips, there is no clear and convincing evidence that Respondent paid the money to the stockbroker for an improper purpose. Respondent testified that he paid the money to the stockbroker in order to obtain a better price for the stock purchased for Mr. Harrigan after completion of both trips. The stockbroker, by affidavit, denies receiving any funds other than those needed to purchase the stock at its market price. From the evidence presented, I am unable to determine that Respondent utilized the money for an improper purpose.

III. Recommendations as to whether or not Respondent should be found guilty:

As to the Amended Complaint and the Confidential Addendum to the Amended Complaint, I find the Respondent to be guilty of improper and deceptive billing practices as alleged in ¶15 of the Amended Complaint. I recommend that Respondent be found guilty of violating Rule 11.02(3)(a) of the Integration Rule of The Florida Bar and Disciplinary Rules 1-102(A)(4)

and 1-102(A)(6) of The Florida Bar's Code of Professional Responsibility. I find Respondent not guilty of all other charges.

IV. Recommendations as to disciplinary measures to be applied:

I recommend the Respondent be privately reprimanded by the Board of Governors as provided in Rule 3-5.1(a) of the Rules of Discipline.

V. Statement of any past disciplinary measures and personal history as to the Respondent:

Respondent testified that he had not previously been the subject of any disciplinary measures taken by The Florida Bar.

Respondent is 41 years of age, married and has no children. He was admitted to The Florida Bar in 1972. He is an inactive member of the Bar of the State of Texas.

VI. Statement of Costs of the proceedings and recommendations as to the manner in which costs should be taxed:

A. All of the costs at the Grievance Committee level, namely:

Charge for administrative costs	$ 150.00
Total	$

are taxed to the Respondent.

B. The following costs at the Referee level, namely:

Charge for administrative costs	$ 150.00
Total	$

are taxed to the Respondent.

The taxation of costs will be addressed in an amendment to this Report as soon as the total costs are known, given my

findings and recommendations. As to the amendment, counsel have stipulated to this procedure.

Dated at Melbourne, Florida, this 30 day of January, 1987.

J. William Woodson, Referee

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