IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

62,657

THE FLORIDA BAR,

Complainant,

vs.

WALLACE F. STALNAKER, JR.

Respondent.

_____/

CONFIDENTIAL

Case No. 18A82C04

ANSWER BRIEF OF RESPONDENT

* *

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I N D E X

CITATIONS OF AUTHORITY

STATEMENT OF THE FACTS

In January, 1978, Jones, as President of a professional association known as Jones and Bishop, P.A., employed Respondent as an attorney in said professional association and Respondent was to receive an annual salary of $20,400, together with fringe benefits and 16-1/2% of the net profits of the professional association (Complainant's Exhibit #1). Shortly after being employed by Jones and Bishop, P.A., Bishop withdrew from the professional association, although it was still known as Jones and Bishop, P.A. for the remainder of 1978. At that time the employment contract was modified so that the Respondent would receive 30% of the profits of the professional association (Respondent's Exhibit 1). Said professional association made no profit for the year 1978.

In January, 1979, Morrison acquired half of the stock of Jones and Bishop, P.A. and the professional association then became known as Jones, Morrison and Stalnaker, P.A. Jones was President (TR. 108) and Manager (TR. 63), Stalnaker was Vice President and Morrison was Secretary/Treasurer of the professional association (TR. 108). AT the time of the formation of Jones, Morrison and Stalnaker, P.A., it was orally agreed between Jones, Morrison and Respondent that each of them would receive a salary of $27,000 per year and certain fringe

benefits (TR. 109). This agreement was never reduced to writing. At about the same time, it was agreed between Jones, as President and Manager, and Respondent, that Respondent would receive either 25% or 33-1/3% of the profits of the professional association (TR. 37, 38). The details relative to this agreement are important because they demonstrate the lack of consistencies in the testimony of Jones. Jones testified that there was an agreement that Respondent would receive a portion of the profits, which portion was either 33-1/3% or 25%, he wasn't sure which and that Morrison was privy to the agreement. (TR. 36-38). Morrison testified that he never heard of the agreement and that it was his understanding that he would receive 50% of the profits and Jones would receive 50% of the profits (TR. 112). Respondent testified that he was to receive 33-1/3% of the profits and the agreement was made solely between Jones, as President and Manager, and himself (TR. 229).

During the year 1979, Jones became increasingly involved in real estate developments in which he was the developer (TR. 225,226,231,399,300) and Jones, Morrison and a third party became involved in Altamont Title Company, which they owned (TR. 22-26). At the same time, Respondent's law practice was increasing (TR. 235). As a result of the foregoing, in 1979

Respondent produced fees for the professional association of in excess of $70,000 (TR. 235), Jones produced fees of between $25,000 and $30,000, and Morrison produced fees of between $25,000 and $30,000 (TR. 235,236). There was no profit for the professional association in 1979 (TR. 38).

Respondent testified that in the latter part of 1979, he became disenchanted with the professional asociation because he could resign as an employee thereof, taking his clients with him, and make substantially more money practicing on his own (TR. 235-236). He approached Jones and explained to him his dissatisfaction; he was working full time in the practice of law, earning fees in excess of the total fees earned by Jones and Morrison, yet each of them was receiving the same compensation, while Jones and Morrison were engaged in other activities (TR. 232-237). At this conference, Jones told Respondent that as additional compensation to him, he could retain and use portions of the fees generated by him, so long as the fees turned into the professional association would not be less than Respondent's share of the overhead, measured by at least the fees turned in for the year 1979. Jones told Respondent to keep this agreement under his hat (TR. 232-238). Jones testified that he never made this agreemment. Morrison testified that he had no knowledge of this agreement.

It is undisputed that, after retaining portions of the fees generated by him, in the year 1980 Respondent turned into the professional association fees totalling $78,150, while Jones and Morrison turned into the professional association fees of $37,268 and $34,838, respectively. During the first eight months of 1981 (Respondent withdrew from the professional association in August 1981), Respondent turned into the professional association fees totalling $80,038, while Jones and Morrison turned in fees of only $26,354 and $61,971, respectively. (Respondent's Exhibit 2).

Respondent kept the subsequent agreement "under his hat" insofar as the professional association was concerned. However, he advised his C.P.A., Mike Vestal, of the agreement and asked him how to handle it and Vestal advised Respondent to keep a record of the additional compensation and discussed various methods of dealing with if for income tax purposes (TR. 73-74,237,238,356,358, Bar's Exhibit 5). Respondent also advised Tom Lang, a lawyer practicing in Orlando, of the subsequent agreement (TR. 374,375,400-402,404-410). LIkewise, he told a friend and former law associate, Gene Stevenson of the subsequent agreement.

It was not unusual for Jones to make agreements relative to compensation without the knowledge or consent of Morrison.

Thus, Jones, acting as President of the professional association, made an agreement with Albert Cook, whereby the professional association became bound to pay Cook a bonus. Cook operated under this agreement for some period of time before it was reduced to writing (TR. 66,125,217,282-284)(Bar's Exhibit 9). This agreement was made without consulting Morrison and Morrison did not know about it until some time after it was reduced to writing. Jones' testimony relative to this transaction is very appropriate because it is applicable to the agreement he made with Respondent. Jones testified as follows:

Q Now with respect to Al Cook, was he an employee at the firm?

A Yes, he was.

. . . . . .

Q Let me show you an agreement which is after Mr. Stalnaker's departure, April 29, 1982.

A Yes, Sir.

Q Did you negotiate that on behalf of the firm?

A Yes, I did. Again, this was done prior to April 29th. Al actually sent me this memo. I had been a little dilatory in putting into writing what we had talked about, but Bill Morrison and I had discussed, again, this, in very general

terms, as to what we were going to try to do to -- incentive for employees. But, yes, I did. Al sent that to me after we negotiated it.

(TR. 65,66)

. . . . . .

Q Did you tell Mr. Cook not to tell Mr. Morrison about the existence of this bonus, this $5,000 bonus?

A No, I didn't tell him not to tell him about the $5,000 bonus. My comment to Cook was that that bonus arrangement was between he and I, that I would personally guarantee the bonus arrangement. If the firm could not make it, that I would personally guarantee the payment myself.

That was not a secretive thing to anybody, it was just that I needed Al Cook at that time, he was doing a fair job, it was a time when we needed a city attorney in the firm, and it was for my own personal benefit, and that's why I agreed to handle the payment of the $5,000 bonus personally.

(TR. 67)

Jones also admitted making an employment contract with Michael Carpenter without discussing the details of it with Morrison. (TR. 63,64,65).

Respondent, beginning in January, 1980 and continuing to August, 1981, retained a portion of the fees earned by him to

the extent of approximately $38,000. He kept a record of the cases where he retained portions of the fees and the amounts retained, which record was in his desk drawer, unlocked (TR. 254,255). Prior to going on his vacation in July, 1981, for various reasons, Respondent determined that he would withdraw from the professional association. There is no evidence that he himself communicated this intention to Jones (TR. 290,376), but he did tell Tom Lang and Gene Stevenson (TR. 250-253). While Respondent was on vacation, Jones opened Respondent's desk drawer and removed Respondent's accountings of the fees which he had retained.

Prior to Respondent's return from his vacation, Jones contacted various judges, attorneys, and the State Attorney's office, under the guise of asking their advice about what he should do relative to the Respondent retaining portions of the fees (TR. 52,150-153,218,260-263). Respondent testified that the reason Jones engaged in this conduct was because Jones recognized that Respondent was going to leave the professional association and felt that Respondent's leaving would hurt the professional association and, further, because he wanted to put Respondent in a position where he could not take his clients with him (TR. 298,299).

When Respondent returned from his vacation, he found himself locked out of the office and his employment with the

professional association had been termninated. After Respondent's employment had been terminated, the sign in front of the firm's office, for a period of approximately seven months, reflected that the firm was still Jones, Morrison and Stalnaker, P.A. (TR. 298,310-312,402,403,413.

Subsequently, Respondent paid to the professional association approximately $38,000. The settlement agreement entered into between Respondent and the professional association did not contain an admission of liability. Respondent testified that he paid this money because he recognized that Jones was an extremely vindictive person and would go to any lengths to destroy him and to retain Respondent's clients for the professional association (TR. 295-298). This testimony was corroborated by the testimony of Respondent's attorney at that time, Gene Stevenson (TR.379-380).

FIRST POINT INVOLVED

DO THE REFEREE'S FINDINGS OF FACT SUPPORT HIS RECOMMENDATION OF THE FINDING OF GUILT?

ARGUMENT

The Complaint alleges in paragraph 8 that:

> "Respondent systematically diverted portions of the legal fees being generated by him for the professional association, from the association, for his own personal bank account and use, without informing the bookkeeper or principals, Jones and Morrison. Respondent followed this improper course of conduct without the permission or knowledge of **either** Messrs, Jones or Morrison until confronted in late August, 1981." (Emphasis supplied).

Thus, if either Jones or Morrison knew of or consented to Respondent's conduct, the Respondent should have been found not guilty.

The issues of fact set out in the Pre-Trial Statement provide:

> "The ultimate issue of fact is whether or not Stalnaker, without the permission or knowledge of either Jones or Morrison, retained the fees."

This is a mere para-phrasing of the allegations in paragraph 8 of the Complaint, recognizing that the issue was whether either Jones or Morrison had knowledge of or consented to the Respondent's conduct and the knowledge or consent of either would require a finding of not guilty. Unfortunately, the second sentence from the above quotation reads:

> "The Bar has the burden of proving the lack of knowledge or permission of <u>either</u> Jones or Morrison by clear and convincing evidence."

The purpose of this provision was to clearly make the trial judge aware of the fact that the Bar had the burden of proving its case by clear and convincing evidence. The meaning of this sentence is contrary to the meaning of the allegations in the Complaint and the first sentence in the issues of fact of the Pre-Trial Statement. The word "either" should actually be "both", in which event, it would be consistent with the allegations in the Complaint and the first sentence under issues of fact.

Respondent prepared to try, and tried, this case on the issues framed by the Complaint and Respondent's answer, that is, that it was the burden of the Bar to prove, by clear and convincing evidence, that neither Jones nor Morrison had knowledge of or consented to Respondent's conduct.

It was Respondent's position that Jones, as President and Manager of the professional association, entered into an oral agreement (the "oral side agreement" referred to in the Referee's Report) whereby Respondent was authorized to retain a portion of the fees generated by him.

The Referee, in his report, found:

> That based on the totality of all of the testimony in this case, there was no oral side agreement between Michael Jones and Wallace Stalnaker which would rise to the level of an oral modification of the employment remuneration agreement between the partnership and Wallace Stalnaker. (Emphasis supplied).

This is not a finding that there was no oral side agreement between Jones and Respondent. Inferentially, it is a finding that there was an oral agreement between Jones and Respondent, but that said oral agreement did not "rise to the level of an oral modification of the employment remuneration agreement between the partnership and Wallace Stalnaker." If there was such an oral side agreement, it is not material whether it rose to the level of an oral modification of the "employment remuneration agreement". It was incumbent upon the Bar to prove that Jones did not consent to or have knowledge of the conduct of the Respondent, and if there was an oral agreement, its validity or invalidity would make no difference whatsoever, because valid or invalid, Jones had knowledge of and consented thereto.

Further, in said finding, the Referee refers to "an oral modification of the employment remuneration agreement between the partnership and Wallace Stalnaker", but fails to identify said employment remuneration agreement. Respondent's Exhibit 1 and Complainant's Exhibit 1 are the only written agreements. These agreements were between Respondent and Jones and Bishop, P.A., which were entered into almost a year prior to Morrison acquiring an interest in Jones, Morrison and Stalnaker, P.A. The initial remuneration agreement between Respondent and Jones, Morrison and Stalnaker, P.A. was an oral agreement, which provided that Stalnaker was to receive a salary of $27,000 per year and certain fringe benefits. (TR. 35). In addition to this agreement, there was an oral agreement made by Jones as President of Jones, Morrison and Stalnaker, P.A. that Respondent would receive either 25% or 33-1/3% of the professional association's profits. (TR. 37,38,229, 230). The testimony of Respondent reflects that said agreement relative to Respondent receiving 33-1/3% of the profit was between Jones and Respondent and was oral. (TR. 229,230). The testimony of Jones reflects that said oral agreement was made at a time when he, Morrison and Stalnaker were present. (TR. 37,38). On the other hand, the testimony of Morrison reflects that he had no knowledge of any agreement whereby Respondent would share in the profits of the professional association. (TR. 89). These

are the only remuneration agreements between Stalnaker and the professional association, excepting only the "oral side agreement".

The findings of fact of the Referee further state:

> "That even if there had been an oral modification of said employment remuneration agreement by Michael Jones and Wallace Stalnaker (which this Referee has ruled there was no credible evidence rising to the level of an oral modification) this would violate the contractual rights of William Morrison, as he at no time was a party to such agreement. His consent was critical for such a modification to be valid. Thus, even if there were such an agreement, Respondent totally ignored William Morrison's financial interests by diverting said funds by secret agreement."

This finding of fact demonstrates first, that the Referee misconceived the nature of the charge against the Respondent. Respondent was not charged with violating the contractual rights of William Morrison. He was charged simply with converting to his own use the professional association's assets, without the knowledge or consent of either Jones or Morrison. Further, this finding of fact and the one quoted above it demonstrates that the Referee was confused as to the relationshp between the parties. There was no partnership between Jones and Morrison. There was a professional association of which Jones was the President and the manager, (TR. 63) Stalnaker was the Vice President and Morrison was the Secretary/Treasurer. (TR. 108). There is no evidence in the

record reflecting that Jones, as President of the professional association did not have and did not exercise the authority to negotiate the compensation of the various employees of the professional association. The evidence clearly reflects that Jones alone made the final decisions. (TR. 65).

Respondent submits that the above-quoted findings of fact cannot be the basis of a finding that Jones did not know of or consent to Respondent's conduct and inferentially reflect that the Referee believed that there was some type of oral agreement between Jones and Stalnaker which, for some reason, unstated, did not serve as a modification of the "remunerationagreement", but that if said oral agreement would have had the effect of modifying the remuneration agreement, it would have been ineffective, because Morrison did not enter into it. These were not the issues. The issue was very simple -- did Jones know or consent to, validly or invalidly, the conduct of the Respondent. Under these circumstances, these findings of facts do not support the recommendation of guilt.

SECOND POINT INVOLVED

IS THERE CLEAR AND CONVINCING EVIDENCE IN THE RECORD THAT NEITHER JONES NOR MORRISON KNEW OR CONSENTED TO RESPONDENT'S USE OF THE PROFESSIONAL ASSOCIATION'S MONIES?

ARGUMENT

The trial of this case was based upon the Complaint, the Answer, the Pre-Trial Statement, and the issues therein raised. The sole issue that was addressed by the Respondent was whether he had used the professional association's monies for his own use without the consent of either Morrison or Jones. He never took the position that Morrison knew or consented to his use of these monies, but it was his position that Jones consented to said use and knew of it and it was incumbent upon the Bar to prove by clear and convincing evidence that Jones neither consented to nor knew of Respondent's conduct.

So that there will be no mistake, the "oral side agreement between Michael Jones and Wallace Stalnaker" referred to in the Referee's report was the alleged agreement entered into in the latter part of 1979 by Jones, as President and Manager of Jones, Morrison and Stalnaker, P.A., on behalf of said professional association, and the Respondent, to the effect that Respondent could retain for his own use a portion of the fees generated by him, provided that he pay to the professional association a sufficient portion thereof, so that the gross amount thereof would not diminish the amount of fees which he generated and paid into the professional association for the year 1979. (TR. 234-237). This agreement will hereinafter be referred to as "subsequent agreement". Jones testified that

said subsequent agreement was never entered into. Respondent testified that the subsequent agreement was entered into.

It is incumbent upon this Court to determine whether the evidence is clear and convincing that Jones and Respondent did not enter into the "subsequent agreement". The Referee evaded this issue by finding that "there was no credible evidence rising to the level of such an oral modification"

Respondent submits that there was credible evidence that the subsequent agreement existed. This evidence consists primarily of his own testimony. The Respondent submits that the testimony of Jones does not constitute clear and convincing evidence. In this regard, this Court must evaluate the testimony of Jones and Respondent in the light of all of the surrounding circumstances.

In January, 1978, Jones, as President of the professional association known as Jones and Bishop, P.A., on behalf of said professional association, employed Respondent and Respondent entered into an employment contract whereby Respondent was to receive an annual salary of $20,400, together with certain fringe benefits, and 16-1/2% of the net profits of the professional association. (Complainant's Exhibit #1). Shortly after being employed by Jones and Bishop, P.A., Bishop

withdrew from the professional association, although it was still known as Jones and Bishop, P.A. for the remainder of 1978. At that time, the employment contract was modified, so that the Respondent would receive 30% of the profits of the professional association. (Respondent's Exhibit #1). During Repondent's employment by Jones and Bishop, P.A., said professional association made no profit.

In January, 1979, Morrison acquired half of the stock of Jones and Bishop, P.A. and the firm then became known as Jones, Morrison and Stalnaker, P.A. Jones was President and Manager, Stalnaker was Vice President, and Morrison was Secretary/Treasurer of the professional association. (TR. 108). Stalnaker may have held one share of stock in the professional association, but this share was never issued.

At the time of the formation of Jones, Morrison and Stalnaker, P.A., it was orally agreed between Jones, Morrison and Stalnaker that each of them would receive a salary of $27,000 per year and certain fringe benefits. (TR. 109). This agreement was never reduced to writing, but there is no dispute about it. At about the same time, it was agreed between Jones, as President and manager of the professional association, and Respondent that Respondent would receive either 25% or 33-1/3% of the profits of this professional association. (TR. 37,38).

The testimony relative to this agreement varies. Jones testified that there was an agreement that Respondent would receive a portion of the profits, which portion was either 25% or 33-1/3% -- he wasn't sure which, and that Morrison was privy to the agreement. (TR. 36-38). Respondent testified that it was 33-1/3%, being 3-1/3% more than his prior agreement with Jones and Bishop, P.A. (TR. 229) and that it was made solely between Jones, as President and Manager of the professional association, and himself. (TR. 229). Morrison testified that he never heard of it and that his agreement was that he would get 50% of the profits and Jones would get 50% of the profits of the professional association. (TR. 112).

During the year 1979, Jones became increasingly involved in real estate developments in which he was the developer. (TR. 225, 226, 231, 399, 400), and Jones, and Morrison and a third party became involved in Altamont Title Company, which they owned. (TR. 22-26). At the same time, Respondent's law practice was increasing. (TR. 235). As a result of the foregoing, in 1979, Respondent produced fees for the professional association of in excess of $70,000, (TR. 235) Jones produced fees of between $25,000 and $30,000 and Morrison produced fees in the amount of between $25,000 and $30,000. (TR. 235,236). Thus, Respondent produced fees for the

professional association in excess of the total fees produced by Jones and Morrison, while all three employees were drawing the same salary. There was no profit for the professional association in 1979. (TR. 38).

In the latter part of 1979, Respondent became disenchanted with the professional association because he could resign as an employee, take his clients with him, and make substantially more money practicing on his own. (TR. 235,236). He approached Jones and explained to him his dissatisfaction; he was working full time in the practice of law, earning fees in excess of the total fees earned by Jones and Morrison, and yet each of them were receiving the same compensation while Jones and Morrison were engaged in other activities. (TR. 232-237). It was at this point that the "subsequent agreement" was entered into. (TR. 236,237). Jones told Respondent that he could retain and use portions of the fees generated by him, so long as the fees turned into the professional association would not be less than his share of the overhead measured by at least the fees turned in for the year 1979. This was the "subsequent agreement". Jones told Respondent "keep it under your hat". (TR. 233-238). Respondent testified that such were the circumstances leading to the subsequent agreement and the subsequent agreement itself. Jones testified that there was no subsequent

agreement. Morrison testified that he had no knowledge of such an agreement, just as he testified that he had no knowledge of the agreement that Respondent would receive 33-1/3%, or any other percentage of the profits of the professional association. In evaluating the testimony of Jones and Respondent relative to the subsequent agreement, the Court must look to all of the circumstances.

Respondent submits that such an agreement meets the standard of reasonableness. Respondent was devoting his full time to the practice of law, while Jones and Morrison were engaged in other activities. In 1979, Respondent had produced more than the income produced by both Jones and Morrison and under the subsequent agreement, he had to continue turning into the professional association as much as he turned in in 1979. The result of this subsequent agreement is reflected on Respondent's Exhibit #2, which reflects that in the year 1980, he turned into the professional association fees totalling $78,150, while Jones and Morrison turned over to the professional association total fees of $37,268 and $34,838, respectively. Said exhibit also reflects that during the first eight months of 1981 (Respondent withdrew from the professional association in August, 1981), Respondent turned into the professional association fees totalling $80,038, while Jones

and Morrison turned in fees of only $26,354 and $61,971, respectively. The monies turned into the professional association, as reflected on Exhibit #2, were monies turned into the professional association after Respondent had retained a portion of the fees generated by him. Thus, it is apparent that even after retaining a portion of the fees for his own use, Respondent still produced for the professional association fees almost equal to the total fees produced by both Jones and Morrison. In short, it is apparent that Respondent, through his efforts, and even after retaining a portion of the fees, furnished the money necesary to keep the professional association operating. When this is considered in the light of Respondent's expressed dissatisfaction in late 1979 with what he was receiving and the risk of his leaving the law firm and taking a large portion of his business with him, the subsequent agreement was highly beneficial to the professional association. From Respondent's position, it was likewise reasonable because, although he contributed the greater bulk of the professional association's income, under the subsequent agreement, he still appreciably increased his own income.

Respondent kept the subsequent agreement "under his hat" (TR. 233-238), as far as the professional association was concerned; however, he advised his C.P.A., Mike Vestal, of the

agreement and asked him how to handle it and Vestal advised Respondent to keep a record of the additional compensation and discussed various methods of dealing with the additional compensation, such as dividends, bonuses or loans, (TR. 73-74, 237,238, 356, 358), (Bar's Exhibit #5). He also advised Tom Lang, a lawyer practicing in Orlando, of the subsequent agreement. (TR. 374, 375, 400-402, 404-410) (Lang's deposition 1/25/83, pgs. 14-16, 45, 46). Likewise, he told a friend and former law partner, Gene Stevenson, practicing law in Casselberry, Florida of the subsequent agreement. Admittedly, said statements are self-serving declarations, but at the same time, there were valid reasons for making these disclosures.

Respondent's agreements with Jones as President of the professional association made without the knowledge of Morrison was not unusual. Thus, Jones, as President of the professional association, made an agreement with Albert Cook, whereby the professional association agreed to pay Cook a bonus. Cook operated under this agreement for some period of time, before it was reduced to writing. (TR. 66, 125-217, 282-284) (Bar's Exhibit #9), (Deposition of Cook taken 1/25/83, pages 35-40, 59), but Jones made this agreement with Cook without consulting Morrison and Morrison did not know about it until some time after it was reduced to writing (TR. 125,126).

In evaluating the testimony of Jones, Jones' attitude toward Respondent is important. On cross-examination, Jones testified as follows:

Q During the course of that conversation, did you tell Mr. Lang that you were going to put Mr. Stalnaker in a position wherein Mr. STalnaker would have to sell his home and move out of town before you got through with him; did you tell him that?

A I really don't recall, but if Mr. Lang says I did, I wouldn't deny it.

Q That expressed your view, didn't it?

A That pretty -- I think that's pretty soft as compared to what it really is.
(TR. 162)

On redirect, Jones testified as follows:

Q Mike, after you came to understand what had happened there in August, while Wally was on vacation, from there through the settlement, what was your mental temperament towsard this whole transaction?
A I was damn mad.

Q Did you stay mad throughout?

A The last meeting that Wally came in the office with Gene, it was Wally, Gene and Bill Morrison and I, we sat down and signed the document. We had been paid nothing near what it cost us, but we'd been reimbursed at least what was taken. And while I was still damn mad about it, there's no need carrying a grudge. He was going to be here and I was going to be here.

After all, Wally had been a friend of mine. That's way before we went into practice together. I would call Wally on the phone at night and we'd go out together. Wally had been - he'd been a friend. I trusted him.

But, then, when it came up that it became a character assassination on me, when I didn't do a damn thing, I must say that yeah, I'm damn mad about it, exactly.

BY MR. EARLE:

Q You're still mad, aren't you?

A That's an understatement, Yes, I am.

It's obvious from this that Jones was zealous in his efforts to bring about the absolute destruction of Respondent. Examination of all of Jones' testimony reflects that he had a "selective memory" which was not always confined to the truth.

Admittedly, on the Monday that Respondent was terminated from the professinal association, he met with someone. Illustrative of Jones' attitude is his version of what occurred at this meeting:

Q In your discussion with Mr. Stalnaker that morning, did you show him these sheets?

A Yes. I told him Wally, you owe us. I picked it up and showed him according to his own figures that he owed us 38,000, or that he had taken 38,000-odd dollars. I don't remember the exact figure here, but 38,000. And he said Well, I'll pay it back. And right then, I wasn't worried about him paying it back; right then, I was a little hot. But subsequently we did reach an agreement to pay it back.

Q What was his attitude during this meeting?

A Totally remorseful. It was almost like -- he did everything but cry. It was like you guys don't want me here? You're not going to let me practice with you any more You know, I don't know what I'm going to do. Have you gone to the Bar; can you withdraw the complaint to the Bar? Have you gone to the State Attorney?

At that time we had gone to the State Attorney, and they had withheld investigation. Mr. Chris Ray, who was with the State Attorney at that time, I interviewed with him for a long time on it, and they withheld investigation pending what the Bar decided to do.

So it was one of total remorse. Never offered an excuse, never one time said anything about all this defense that I've heard about since he paid us off. (TR. 55).

After testifying so zealously and positively about the meeting on that Monday morning, on cross-examination, Jones testified as follows:

Q Now you remember the Sunday afternoon when he got back from vacation and he came to see you?

A Yes, sir.

Q Then the next morning there was a conference in the firm's office, was there not?

A Yes, sir.

Q Who was present at that conference?

A Bill and Wally and myself.

Q Bill being Mr. Morrison.

A Correct.

Q If Mr. Morrison testified that you weren't there, he'd be incorrect, wouldn't he?

A Well, there were a series of meetings that morning. Bill met with Wally before I got there or after our meeting, I don't know. But, in particular, the meeting that I'm talking about on the Monday morning, Wally was---

Bill did meet with -- yeah, he did meet with Wally alone without me being present. I believe that was at Bill's request, too. But we did meet, the three of us did meet with Wally again, as I said earlier.

Q And if Mr. Morrison said that you and Mr. Morrison and Mr. Stalnaker never met that morning, he'd be wrong, wouldn't he?

A Yeah, he'd be wrong. That he'd be wrong. Because we did meet together that Monday morning. Best of my recollection, I'd say he was wrong.

Hey, I tell you what, let me take that back. Heck, it's been so long and I never have thought about this thing, but he may be right. It may be that I only met with -- it may be that I only met with Bill Morrison. In fact, the more I think of it, it probably was. I met with Bill and went over the whole thing, and I wouldn't meet with Wally because I was too mad. And Bill met with Wally by himself. I believe that's what happened.

Q Now then you didn't meet with Wally that Monday morning then, did you?

A I believe -- Well, I know I saw him, but I don't ---

Q You didn't meet with him though, did you?

A I was in the office with he and Bill and Wally, and I got up and left. And I think Bill handled the rest of it.

Q Well, what was said before you got up and left; anything?

A Yeah, the part about; You guys don't want me to practice with you any more? That was said again, too, now that I recall Bill telling me that.

As far as the meeting with Bill and I, I guess it didn't take that long come to think of it -- I mean Bill and Wally and I, and then I got up and left, and Bill handled it.

Q Let me tell you where I find myself. You've testified that yes, you attended a meeting with Wally and Mr. Morrison. No, I didn't attend a meeting with Mr. Morrison and Mr. Stalnaker. Yes, I was present for a short time during the meeting.

Now which is it, if you know; and if you don't know, just say I don't know.

A We were in Bill Morrison's office. I don't recall how long I was there. I thought it was longer, but it only may have been a minute or two, and then Bill did meet with Wally outside my presence.

Q And when you were in the room with Bill Morrison and Mr. Stalnaker, what was said, if anything? Wasn't anything said, was there?

A I don't recall now.

Q. You don't remember anything being said, do you?

A Not with specifics, no.

In regard to the meeting or lack of meeting about which Jones testified in the foregoing excerpt from the transcript, Morrison testified that Jones was not present at such a meeting -- the meeting was attended solely by Morrison and Respondent. (TR. 118-119).

The foregoing quoted testimony of Jones is the most dramatic of his inconsistencies. There are many others. Thus, Jones testified that Morrison was privy to the agreement that Respondent would share in the profits of the professional

association to the extent of either 25% or 33-1/3%, while Morrison testified he knew nothing about it and Respondent testified that the agreemnt was made solely with Jones, as President of the professional assocation. An examination of all of Jones' testimony will reflect other inconsistencies too numerous to set out in this brief.

Respondent was a respected lawyer in the Community in which he practiced (TR.222,266). He had been Treasurer, Secretary, Vice President and President of the Seminole County Bar Association (TR. 208,209). He had served on the Seminole County Legal Aid Committee. He had formed the Seminole County Lawyers Referrel Service. He had been and is, the Chairman of the Youth Law Committee. He kept accurate records of the fees that he retained for his own use, which he kept in his unlocked desk drawer, available to anyone who opened it. There are no discrepancies in his testimony.

The Court might consider the fact that the Respondent paid in excess of $36,000 to Jones, Morrison and Stalnaker, P.A., thereby refunding all fees which he had retained as an admission of his guilt in wrongfully retaining the same. The explanation for this is simply that Respondent recognized that Jones was an extremely vindictive person and would go to any lengths to destroy him and to retain Respondent's clients in

the professional association. A complete explanation of the settlement is set out in the testimony of the Respondent on pages 295-298. The testimony of Respondent was corroborated by his attorney at the time, Mr. Gene Stevenson, on pages 379, 380.

Respondent submits that his testimony relative to the subsequent agreement and his testimony relative to all of the matters herein involved is reasonable and forthright. Under these circumstances, Respondent submits that there is credible evidence that there was a subsequent agreement as testified to by Respondent. Respondent further submits that the testimony of Jones, standing alone and uncorroborated, in the light of Respondent's testimony, is not clear and convincing evidence of Respondent's guilt for having retained and used for his own purposes fees generated by him without the knowledge or consent of Jones.

THIRD POINT INVOLVED

ASSUMING THAT THE RESPONDENT IS GUILTY OF VIOLATING THE CODE OF PROFESSIONAL RESPONSIBILITY, IS HIS SUSPENSION FOR A PERIOD OF ONE YEAR AND UNTIL HE PROVES REHABILITATION AN EXCESSIVE DISCIPLINE?

ARGUMENT

Respondent does not contend, and will not argue here, that a one year suspension is excessive if, in fact, he retained the fees as alleged in the Complaint without the knowledge or consent of Jones. However, it is his position that if the Court finds, as the Referee suggested, that by retaining the fees with the knowledge and consent of Jones, Respondent totally ignored Morrison's financial interest and should be disciplined therefor, the discipline recommended is excessive.

The Respondent was charged with retaining the fees without the knowledge or consent of either Jones or Morrison. The answer denied this. It was on this issue alone that the case was tried. This was the sole issue which Respondent was prepared to try and it was Respondent's position that retention of the fees was with the knowledge and consent of Jones. Certainly, the Respondent had the right to anticipate that he would be tried on the issues framed by the pleadings and to be found guilty or not guilty on charges alleged, and no others.

If Respondent had been charged with retaining the fees without the consent of Morrison, Respondent would have prepared for said charge. He would, of course, have argued that Jones, as President and Manager of the professional association of Jones, Morrison and Stalnaker, P.A., had the authority to enter

into any employment contract with Respondent without the consent of Morrison. (See 8 FLA. JUR. 2d. 411-414 and the cases cited therein.)

If, despite the law, this Court is of the view that in some manner Respondent treated Morrison unfairly and violated some provision of the Code of Professional Responsibility, Respondent submits that a one year suspension or, for that matter, any suspension thereof, is excessive. In this regard, Respondent points out that if there was a subsequent agreement, as a result of which Morrison was treated unfairly, Jones has never been subjected to any discipline therefor, even though he participated equally with Respondent.

CONCLUSION

Respondent submits that there is not clear and convincing evidence that Jones, the President and Manager of Jones, Morrison and Stalnaker, P.A., did not know or consent to Respondent retaining the portions of the fees which he retained. Further, the findings of fact of the Referee do not support the recommendation of guilt, because he did not find that there was clear and convincing evidence or, for that matter, any evidence that Jones did not have knowledge of or consent to Respondent's conduct. This requires a finding by this Court of not guilty of the conduct alleged.

If a lawyer can be charged with one offense and be found guilty of a different offense, and if Respondent's conduct in some manner totally ignored Morrison's financial interest, both of which Respondent denies, the discipline of one year suspension and until he proves rehabilitation is harsh and excessive and the greatest discipline that should be administered should be a public reprimand, which would be adequate protection for the Bench, the Bar and the public, and should deter other lawyers from engaging in said conduct.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief has been furnished by United States Mail, postage prepaid, to Staff Counsel, The Florida Bar, Tallahassee, Florida 32301, and David G. McGunegle, Esquire, Bar Counsel, 880 N. Orange Avenue, Room 102, Orlando, Florida 32801, this 2nd day of May, 1985.

RICHARD T. EARLE, JR.