62657

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

WALLACE F. STALNAKER, JR.

Respondent.

_____/

CONFIDENTIAL

Case No. 18A82C04

RESPONDENT'S REPLY BRIEF

* *

RICHARD T. EARLE, JR.
EARLE AND EARLE
447 Third Avenue North
St. Petersburg, FL 33701
(813) 898-4474
Attorney for Respondent

I N D E X

	PAGE
CITATIONS OF AUTHORITY.	ii
POINTS INVOLVED.	iii
STATEMENT OF THE CASE.	2
POINTS INVOLVED:	
FIRST POINT INVOLVED.	4
SECOND POINT INVOLVED.	8
THIRD POINT INVOLVED.	15
ARGUMENTS.	4,8,15
CONCLUSION	19
CERTIFICATE OF SERVICE.	21

CITATIONS OF AUTHORITY

The Florida Bar v. Wagner 212 So.2d. 770 (Fla. 1968)

The Florida Bar v. Hirsch 359 So.2d. 856 (Fla. 1978)

POINTS INVOLVED

FIRST POINT INVOLVED

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

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?

STATEMENT OF THE CASE

Inadvertently, Respondent omitted from his main brief the STATEMENT OF THE CASE. Complainant's Statement of the Case is so inadequate that Respondent must restate it.

On September 24, 1982, The Florida Bar filed its Complaint in this cause with the Clerk of the Supreme Court of Florida. The Complaint alleged that at all times material, Respondent was employed by the Professional Association of Jones, Morrison and Stalnaker, P.A. Paragraph 8 of the Complaint states the gravamen of Respondent's alleged conduct as follows:

> "8. Respondent systemically diverted a portion of the legal fees being generated by him for the Professional Association from the Association to 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. Respondent then left the Association." (Emphasis supplied)

On or about August 1, 1983, the Respondent filed his answer to the Complaint, wherein he alleged that Jones, on behalf of the Professional Association, entered into an agreement with Respondent whereby Respondent was authorized to retain a portion of the fees generated by him and, believing that Jones had the authority to enter into such an agreement on behalf of the Professional Association, Respondent did retain a portion of the fees generated by him.

Prior to the hearing before the Referee, Complainant and Respondent entered into a pre-trial statement which set out the issues of fact. The statement of issues of fact in the pre-trial statement provides:

> "The ultimate issue of fact is whether Stalnaker, without the permission or knowledge of either Jones or Morrison, retained the fees."

This is the issue which was actually raised by the Complaint and the Answer.

The matter was tried before the Referee who, almost a year after the trial, found, among other things, that:

> "Based on the totality of all of the testimony in this case, there was no oral side agreement between Michael Jones and Wallace Stalnker which would rise to the level of an oral modification of the Employment Remuneration Agreement between the partnership and Wallace Stalnaker." (Emphasis supplied)

The Referee further found 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 such an oral modification), this would violate the contractual rights of William Morrison, as he at no time was a party to such an agreement. His consent was critical for such a modification to be valid. Thus, even if there was such an agreement, Respondent totally ignored William Morrison's financial interests by diverting said funds by a secret agreement." (Emphasis supplied)

Based upon these two findings of fact, which are the only findings of fact relating to the issues as framed by the pleadings and the pre-trial statement, the Referee recommended

that the Respondent be found guilty of violating various provisions of the Code of Professional Responsibility and recommended that he be suspended for a period of one year and until he could prove rehabilitation.

Respondent filed his Petition for Review of the Referee's report.

FIRST POINT INVOLVED

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

ARGUMENT

Respondent, in his first point involved, took the position that the sole issue in the case was whether or not Michael Jones, on behalf of the Professional Association, made an agreement with the Respondent, which agreement permitted Respondent to retain a portion of the fees generated by him and that, therefore, Jones had knowledge of and consented to Respondent's retention of portions of said fees and, further, that the Referee did not find as a fact that there was not such an oral agreement.

The Referee's finding of fact in this regard is as follows:

> "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)

The issue was simply whether there was an agreement which would necessarily entail notice by Jones and not whether the agreement "would rise to the level of an oral modification of

the Employment Remuneration Agreement between the partnership and Wallace Stalnaker". The words "which would rise to the level of an oral modification of the Employment Remuneration Agreement" qualify the words "oral side agreement between Michael Jones and Wallace Stalnaker". Thus, the finding of fact is not a finding that there was no oral agreement.

The Complainant disposes of this question very easily, as follows:

> "Respondent makes much of the Referee's further statement in his finding that there was no such agreement. . .which would rise to the level of an oral modification of the Employment Remuneration Agreement between the partnership and Wallace Stalnaker. However, the main point is that the Referee found it did not exist. <u>The Bar submits the quoted language is more in the nature of surplusage</u>."

The Referee is an experienced trial judge and certainly selected this language carefully. Meaning should be given to every word and nothing should be treated as surplusage. The Referee meant exactly what he said

On page 15 of Complainant's Brief, Complainant recognizes that Respondent was an employee of the Professional Association, of which Jones was President and that, as President, Jones could have modified or altered the employment agreement. Thus, Complainant says:

> "Of course, as President of the Professional Association, Jones could enter into such arrangements."

"such arrangements" being employment contracts with employees of the Professional Association.

The Referee's particular language arises out of the fact that the Referee did not recall that there was not a partnership between Jones and Morrison, but that, in fact, there was a corporation, a professional association, of which Jones was the President and the manager, and that Jones had the authority to make an agreement with Stalnaker and further, the Referee failed to remember that there was no written employment contract between the Professional Association and Respondent. In fact, the only agreements relative to Respondent's compensation consisted of the agreement to pay Respondent $27,000 per year, plus certain fringe benefits, which was oral, the oral agreement made only by Jones and Respondent that Respondent would receive 30 or 33-1/3% of the profits of the Professional Association, of which Morrison had no knowledge, and the oral agreement here involved. The language "which would rise to the level of an oral modification of the Employment Remuneration Agreement between the partnership and Wallace Stalnaker" was not surplusage. It was a finding that whatever agreement there was between Jones and Stalnaker could not be valid and binding unless also entered into by the other partner, Morrison, and further, that it would not, being oral, be a valid modification of a written agreement.

Respondent submits that this finding of fact by the Referee is not a finding of fact to the effect that there was no oral agreement between Jones, on behalf of the Professional Association, and Stalnaker, allowing Stalnaker to retain a portion of the fees generated by him. Thus, this finding of fact cannot support a 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

Both Complainant and Respondent recognize that to find guilt, the Complaint of the Florida Bar must be supported by clear and convincing evidence. Thus, the Second Point on Appeal in both briefs is stated in the same language:

> "Is there clear and convincing evidence in the record that neither Jones nor Morrison knew or consented to Respondents use of the Professional Associations' money".

Respondent recognizes that the Referee is the finder of fact in disciplinary proceedings. Respondent also recognizes that if a Referee's recommendation of a finding of guilt is not supported by clear and convincing evidence in the record, his finding should be set aside. The Florida Bar v. Wagner 212 So.2d. 770 (Fla. 1968). The Florida Bar v. Hirsch 359 So.2d. 856 (Fla. 1978). It was and is Respondent's position that the Referee's recommendation of guilt was not supported by clear and convincing evidence and that, therefore, this Court should set said recommendation aside.

On page 20 of Complainant's brief, it is stated:

> "Essentially, it is a credibility contest between the hot-tempered Jones and the cool, relaxed, confident Respondent."

This was the Respondent's view in his main brief in which he undertook to demonstrate that the testimony of Jones, because of its nature, its inconsistencies and contradictions, and his bias and prejudice against Respondent did not constitute clear and convincing evidence of anything.

So that there is no mistake, the sole issue was whether Jones knew or consented to Respondent retaining a portion of the fees generated by him. Admittedly, Morrison did not know of this agreement. On the other hand, Bar Counsel acknowledges, on page 15 of the Bar's brief, that "of course, as President of the Professional Association, Jones could enter into such arrangements", "such arrangements" being making agreements for remuneration with employees of the Professional Association without the knowledge or consent of Morrison.

In his argument on the Second Point Involved, Bar Counsel states:

> "First, no one disputes that Morrison had no knowledge of any alleged oral agreement between Jones and Respondent."

This statement is ambiguous. Admittedly, there were two oral agreements between Jones and Respondent. The first oral agreement between Jones and Respondent was made in the presence

of Morrison, which was an agreement that Respondent would be employed by the Professional Association and receive a salary of $27,000 per year, plus certain fringe benefits. The second oral agreement between Jones and Respondent was an agreement that Respondent would receive either 30 or 33-1/3% of the profits of the Professional Association. Both Jones and Respondent testified that this oral agreement was made. Jones testified that Morrison was well aware of this agreement, while both Morrison and Respondent stated that Morrison was not aware thereof. On page 16 of Complainant's brief, counsel states:

> "Morrison was unaware of the profit sharing arrangement with Respondent."

thereby acknowledging that Jones' testimony relative to this agreement was erroneous as to Morrison's knowledge thereof. The third oral agreement was the agreement between Jones as President and Respondent, whereby it was agreed that Respondent could retain a part of the profits generated by him. Admittedly, Morrison had no knowledge of this agreement, just as he had no knowledge of the profit sharing arrangement.

Bar counsel argues that:

> "It is totally inconceivable that Jones would have entered into such an arrangement with the Respondent in such a clandestine fashion at a time when the Professional Association was in such rocky shape."

The arrangement was not inconceivable when considered in the light of the circumstances; it was a sound business decision. In 1979, Respondent produced income for the Professional Association in the amount of $70,000, while Jones and Morrison produced total income between them of only $60,000. Jones and Morrison had outside income and the amount that they produced, $60,000, was just a little over the amount of their salaries, $54,000. In that year, after deducting Respondent's salary of $27,000 from the gross fees generated by him of $70,000, the Professional Association netted $43,000, without considering overhead expenses. In 1980, after retaining portions of the fees generated by him Respondent deposited in the Association fees in the amount of $78,150, while Jones and Morrison together produced fees of only $72,106. The fees generated by the Respondent paid his salary of $27,000 and left an overage of $51,150. In 1981, Respondent, after retaining portions of his fees, produced fees for the Professional Association of $80,038 for the first eight months which, after deducting 2/3 of his salary of $27,000, left in excess of $62,038. As a cold business proposition, by making the oral agreement and keeping Respondent in the Professional Association, the Professional Association benefited enormously; or stated another way, if he had left and taken his clients with him, the

losses of the Professional Association would have been far greater than those that actually developed.

Respondent, in his main brief, attempted to bring to the Court's attention various important inconsistencies in the testimony of Jones, believing that such inconsistencies should have been carefully considered in evaluating his credibility. Bar counsel apparently believes that inconsistencies, which actually amount to lying, constitute "nit picking" and attributes such inconsistencies to the dimming of Jones' memory as to events that occurred 2-1/2 years before. Respondent suggests that Jones testified positively as to many matters on direct examination and yet, on cross-examination, his memory dimmed and even faded away completely. If, in fact, Jones' memory had been dimmed and had faded away on direct examination, he should have acknowledged that he didn't know the answers to the questions. Yet on direct, Jones testified as to the answers with great clarity, while on cross-examination, he had a memory backout. Respondent suggests that if, in fact, Jones' memory had dimmed as to most of the matters he testified about and gave inconsistent testimony, it had probably dimmed, even blacked out relative to the oral agreement which is the subject matter of this controversy.

In his main brief, the Respondent attempted to show the bias or prejudice of Jones against Respondent and Jones' motive in instituting disciplinary proceedings, believing that such bias, prejudice and motive should be considered in evaluating the credibility of Jones' testimony in this case. Apparently counsel achieved this result. Thus, on page 19 of the Complainant's brief, counsel admits that Jones was extremely mad at the Respondent and that he may even have been vindicative. This is a mild way of stating the attitude of Jones toward Respondent, as reflected in Jones' testimony.

On page 18 of the Bar's brief, it is stated:

> "Jones is a boisterous, excitable, strong-willed man of considerable temper". . ."The Bar submits that Jones' testimony is entirely consistent with his character".

This is exactly Respondent's contention and exactly the thought he hoped to convey to the Court in his main brief. Jones was an argumentive, vindicative, strong-willed, boisterous person who set out to destroy the Respondent. He was not angry because of the retention of portions of the fees. He was angry because the Respondent had threatened to leave the Professional Association and further, because the Respondent had undertaken to defend himself against the charges brought by Jones. As a result of this attitude, which was a part of his character, Jones had a selective memory. He could "remember" anything he

believed necessary to destroy the Respondent, but when on cross-examination it appeared that his memory was defective, he then ceased to remember. This is Jones' character.

Respondent believed that it was relevant and material to demonstrate that Jones made other agreements with Respondent and other employees of the Professional Association relative to their compensation, without the knowledge or consent of Morrison, because this would show a course of conduct on the part of Jones, which would be consistent with the agreement here in controversy. Respondent submits that the agreement between Jones and Respondent relative to Respondent's sharing in the profits of the Professional Association, without the knowledge of Morrison, and the agreement between Jones and Cook relative to a $5,000 bonus, without the knowledge or Morrison, demonstrate such a course of conduct and that the oral agreement between Jones and Respondent, without the knowledge of Morrison, was not unusual.

The sole issue in this case was whether Jones knew or consented to Respondent retaining a portion of the fees earned by him. The sole testimony upon which the Referee's report can be based is the testimony of Jones. Respondent submits that said testimony is so tainted by inconsistencies, prejudice and bias and a desire to destroy Respondent that it does not and cannot constitute clear and convincing evidence of guilt.

THIRD POINT INVOLVED

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

ARGUMENT

In the first sentence of Complainant's Answer Brief, counsel states:

> Respondent concedes if this Court upholds the Referee's findings of fact and recommendation of guilt, that a one year suspension is not excessive."

In his main brief, Respondent did not so concede and Bar Counsel misconceived the thrust of Respondent's argument under this point.

In his main brief, Respondent did not argue, and he will not here argue, 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. Under the first point in Respondent's main brief, he argued that the Referee did not find as a fact that Respondent retained the fees without the knowledge or consent of Jones as alleged in the Complaint. Under the Second Point in Respondent's brief, he argued that there was not clear and convincing evidence that Respondent

retained the fees without the knowledge or consent of Jones. It was Respondent's position in the third point that if he did retain the fees with the knowledge and consent of Jones and if, in some manner, it was unfair to Morrison, as suggested by the Referee, a one year suspension was excessive. This position of the Respondent was not addressed by the Complainant in its answer brief. Instead, practically all of Complainant's arguments under the third point are to the effect that a one year suspension is not excessive for stealing from one's Professional Association.

The Referee found:

> "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 such an oral modification), this would violate the contractual rights of William Morrison, as he at no time was a party to such an agreement. His consent was critical for such a modification to be valid. Thus, even if there was such an agreement, Respondent totally ignored William Morrison's financial interest by diverting said funds by secret agreement."

It is Respondent's position that if a finding of guilt is based upon this finding of fact, a one year suspension is excessive and a public reprimand would be adequate for the purpose of discipline.

It was further Respondent's position that Jones, as President and Manager of the Professional Association, had the

authority and exercised it in making employment contracts with employees of the Professional Association, without either the knowledge or consent of Morrison. Thus, admittedly, Jones and Respondent entered into an agreement without the knowledge and consent of Morrison that Respondent would receive either 30% or 33-1/3% of the profits of the Professional Association, in addition to his salary and fringe benefits. It is not controverted that Jones, as President of the Professional Association, without the knowledge or consent of Morrison, entered into an agreement with Al Cook to pay him a $5,000 annual bonus. It is apparent from the record that Jones, as President of the Professional Association, without the knowledge or consent of Bishop, initially employed Respondent and Tom Lang as employees of the Association, while Bishop was still a member and stockholder thereof. As a matter of fact, on page 15 of Complainant's brief, Complainant acknowledges that Jones, as President of the Professional Association, had the authority to make such contracts, in the following language:

> "Of course, as President of the Professional Association, Jones could enter into such arrangements."

It was Respondent's position in point three that if, despite all of the foregoing, Respondent in some manner illegally

ignored William Morrison's financial interests, a public reprimand would be an adequate discipline and a suspension would be excessive.

In this connection, on or about May 24, 1985, Complainant filed with this Court a Motion to Waive Confidentiality. In said Motion Complainant alleged:

> "3. Respondent's counsel concedes in point three of their brief that a public reprimand would be appropriate if the Court rules the alleged 'side agreement' existed."

Such was not an accurate statement of Respondent's position. Hopefully, this is the result of Bar Counsel's failure to recognize Respondent's position as expressed in Respondent's main brief.

Respondent submits that:

1. He should not be found guilty, based upon the aboved-quoted finding of fact of the Referee, because said finding of fact is based upon erroneous conclusions of law.
2. If, in fact, in some manner Respondent wrongfully ignored Morrison's financial interests, he should not receive more than a public reprimand.

CONCLUSION

The recommendation of the Referee that the Respondent be found guilty must be supported by findings of fact which demonstrate that Respondent was guilty of the conduct alleged. The sole issue in this case was whether Jones consented to or had knowledge of the retention by Respondent of a part of the fees generated by him. The Referee did not find as a fact that Jones did not consent to or have knowledge of said retention of fees, but instead found that there was no oral "side agreement" between Jones and Morrison "which would rise to the level of an oral modification of the employment remuneration agreement between the partnership and Wallace Stalnaker". This finding of fact will not support a finding of guilt that Jones did not have knowledge of or consent to the retention of said fees.

Respondent further submits that the above-mentioned finding of fact will not support a finding of guilt. The finding of fact is not based upon clear and convincing evidence. The only testimony offered by the Complainant in this regard was the testimony of Jones, which was so deficient in credibility that it could not constitute clear and convincing evidence.

Respondent further submits that there is no evidence to support the finding of fact that Respondent "totally ignored William Morrison's financial interests by diverting said funds

by a secret agreement". The "secret agreement" was made between Jones, as President and Manager of the Professional Association, and Respondent and Jones had the authority and exercised it to enter into said agreement. However, if the Court finds there was something wrongful in Respondent's conduct, suspension would be harsh and a public reprimand adequate.

Respondent submits that the Referee's report should be reversed and the Respondent found not guilty of any of the violations alleged in the Complaint.

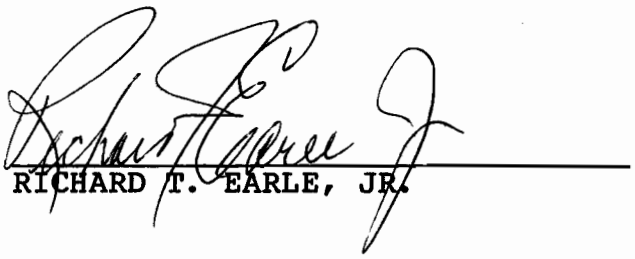
Respectfully submitted,

EARLE AND EARLE

RICHARD T. EARLE, JR.
447 Third Avenue North
St. Petersburg, FL 33701
(813) 898-4474
Attorney for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Respondent's reply 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, The Florida Bar, 880 N. Orange Avenue, Room 102, Orlando, Florida 32801, this 13 day of June, 1985.



RICHARD T. EARLE, JR.