

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHARLES OSBORNE,)
)
 Petitioner,)
)
 vs.) Case No. 07-3045FE
)
 ALEXANDER J. MILANICK,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER ON ATTORNEY'S FEES AND COSTS

This cause came on for formal hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on September 28, 2007, in Daytona Beach, Florida.

APPEARANCES

For Petitioner: Robert J. Riggio, Esquire
Riggio & Mitchell, P.A.
400 South Palmetto Avenue
Daytona Beach, Florida 32114

For Respondent: Dr. Alexander J. Milanick, pro se
7250 AlA South
St. Augustine Shores, Florida 32080

STATEMENT OF THE ISSUE

The issue is whether Respondent should pay Petitioner's attorney's fees and costs, and, if so, the amount.

PRELIMINARY STATEMENT

Petitioner Charles Osborne (Mayor Osborne), the former mayor of Beverly Beach, Florida, successfully defended an ethics complaint filed by Dr. Alexander J. Milanick (Dr. Milanick). Subsequently, Mr. Osborne sought an award of attorney's fees and costs for his defense because Dr. Milanick did not voluntarily pay those attorney's fees and costs. The matter was referred to the undersigned Administrative Law Judge who, on July 1, 2005, recommended that the Ethics Commission (Commission) enter an order requiring Dr. Milanick to pay Mayor Osborne \$4,976.00 in attorney's fees and costs pursuant to Subsection 112.317(8), Florida Statutes (2004). This was Division of Administrative Hearings Case No. 04-4110FE.

The Commission, in a Final Order Denying Attorney Fees and Costs filed October 19, 2005, declined to approve the award of fees and costs to Mayor Osborne, as recommended by the Administrative Law Judge. This was set forth in Ethics Commission Final Order Number 05-599.

Mayor Osborne appealed the Commission's Order to the Fifth District Court of Appeal. That court, in an opinion dated February 16, 2007, concluded that, pursuant to Subsection 112.317(8), Florida Statutes (2004), Dr. Milanick had made false material allegations against Mayor Osborne and reversed the action of the Commission. Specifically, the court held that

Dr. Milanick falsely claimed that Mayor Osborne was opposed to the annexation into the city limits of Beverly Beach property owned in part by Dr. Milanick, because of some personal investment that might be diminished. This was Fifth District Court of Appeal Case No. 5D05-3954.

The court remanded the matter to the Commission for entry of an order awarding the fees and costs in favor of Mayor Osborne. This amount, as noted above, is \$4,976.00. Mayor Osborne thereafter filed a Motion for Award of Attorney's Fees and Costs before the Commission, seeking the aforesaid amount. Dr. Milanick opposed this Motion. The Commission forwarded that Motion to the Division of Administrative Hearings for resolution in a letter dated July 6, 2007. This part of the action will be termed the Original Award of Attorney's Fees. There is nothing left to be decided by the Administrative Law Judge with regard to this action.

The Fifth District Court of Appeal, also on February 16, 2007, entered an Order stating, "Appellant's Motion For Attorney's Fees, filed May 16, 2006, is granted and the above-styled cause is hereby remanded to the Commission on Ethics, pursuant to Fla. R. App. P. 9.400(b), to determine and assess reasonable attorney's fees for this appeal."

Mayor Osborne thereafter filed a Motion for Petitioner's Appellate Attorney's Fees and Costs before the Commission,

asserting that Dr. Milanick should pay to Mayor Osborne the sum of \$14,626.00 in attorney's fees and \$859.70 in costs incurred during the appeal. Dr. Milanick opposed this Motion.

The Commission forwarded that Motion to the Division of Administrative Hearings for resolution in the letter dated July 6, 2007, addressing the Original Award of Attorney's Fees. This part of the action will be termed the Appellate Attorney's Fees. The only question is the amount of attorney's fees and costs that should be awarded.

Mayor Osborne also filed before the Commission a Motion for Petitioner's Attorney's Fees and Costs Incurred in Proving Entitlement to Fees and Costs. This Motion asserted that Dr. Milanick should pay to Mayor Osborne \$53,008.00 in attorney's fees and \$3,764.73 in costs. Dr. Milanick opposed this Motion.

The Commission forwarded that Motion to the Division of Administrative Hearings for resolution in the same July 6, 2007, letter that addressed the Original Award of Attorney's Fees.

This part of the action will be termed Entitlement to Attorney's Fees, and the issue is whether attorney's fees and costs should be awarded, and, if so, the amount for the effort expended to prove that Mayor Osborne was entitled to attorney's fees and costs as a result of having to defend against Dr. Milanick's false allegations.

The matter was set for hearing in Daytona Beach for September 28, 2007. Prior to the hearing, Mayor Osborne attempted discovery, but Dr. Milanick failed to participate. The hearing was held as scheduled.

At the hearing, Mayor Osborne presented the testimony of three witnesses and offered seven exhibits into evidence. Respondent called no witnesses and offered no exhibits into evidence.

A Transcript was filed on October 24, 2007. After the hearing, Petitioner and Respondent filed their Proposed Recommended Orders on November 5, 2007.

References to statutes are to Florida Statutes (2004) unless otherwise noted.

FINDINGS OF FACT

1. Mayor Osborne was the Mayor of Beverly Beach, Florida, during 1999 through 2001.

2. Dr. Milanick was a dentist who owned property immediately north of Beverly Beach, Florida. Dr. Milanick desired that the property be annexed into the town and initiated annexation proceedings before the City of Beverly Beach.

3. Mayor Osborne did not facilitate the requested annexation during the time he served as Mayor of Beverly Beach. Dr. Milanick alleged to the Commission that Mayor Osborne opposed the annexation for personal, financial gain. In order

to defend himself against these false allegations, Mayor Osborne retained Robert J. Riggio, Esquire, of the Riggio and Mitchell firm of Daytona Beach.

The Original Award of Attorney's Fees

4. An award of attorney's fees and costs in favor of Mayor Osborne was recommended in Division of Administrative Hearings Case No. 04-4110E. The Recommended Order stated that the amount of attorney's fees and costs for Mayor Osborne to defend against Dr. Milanick's allegations was \$4,976.00.

5. The Commission did not address the amount of attorney's fees and costs in its Final Order, but instead held that Mayor Osborne was not entitled to any award. Subsequently, the Fifth District Court of Appeal found the Commission's Final Order to be erroneous and remanded the matter ". . . for entry of an order making the awards recommended by the ALJ." A Mandate with regard to the Fifth District Court of Appeal issued April 11, 2007.

6. The award recommended by the ALJ was, as stated above, \$4,976.00, and that amount should be awarded by the Commission in a Final Order.

Appellate Attorney's Fees

7. Mayor Osborne filed a Motion for Petitioner's Appellate Attorneys' Fees and Costs before the Commission on May 10, 2007, noting the Fifth District Court of Appeal, in its Order dated

February 16, 2007, stated that, "Appellant's Motion For Attorney's Fees, filed May 16, 2006, is granted and the above-styled cause is hereby remanded to the Commission . . . to determine and assess reasonable attorney's fees for this appeal."

8. The Fifth District Court of Appeal addressed only attorney's fees. However, because Mayor Osborne's Motion sought both attorney's fees and costs, and because the Commission sent that Motion without special directions to the Division of Administrative Hearings for resolution, it is found that the Administrative Law Judge has jurisdiction to recommend awards of both attorney's fees and costs expended in prosecuting the appeal.

9. David C. Robinson, an attorney in Daytona Beach, Florida, testified as an expert on attorney's fees in Volusia County, Florida. He has practiced law in Daytona Beach for 26 years and has testified in other attorney's fees cases. He is familiar with the fees charged by attorneys in the Daytona Beach and Volusia County area. He knows Attorney Robert Riggio, of Daytona Beach, Volusia County, and Attorney Martin Pedata, of Deland, a town that is also located in Volusia County.

10. Mr. Robinson is found to be an expert on the subject of reasonable attorney's fees and costs in Volusia County.

11. Mr. Robinson reviewed the bills and records relating to the fees charged to Mayor Osborne as to the appellate filings made by Mr. Riggio. In doing so he considered the Lodestar approach as described in Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985).

12. Mr. Robinson opined that the services performed by Mr. Riggio in the appellate proceeding were provided in a manner that an attorney would be reasonably expected to provide. He reviewed the hourly rate charged by Mr. Riggio and stated that the reasonable rate should be \$250.00 per hour, but that Mr. Riggio only charged \$150.00 per hour.

13. Mr. Riggio's law firm, Riggio and Mitchell, billed Mayor Osborne for 95 hours. A small portion of the work was accomplished by his partner Jerome D. Mitchell. Other work in the amount of 9.4 hours was billed for paralegal work at \$40.00 per hour. The 95 hours of attorney work was billed at \$150.00 per hour for a total of \$14,250.00, and the paralegal work totaled \$376.00. Costs amounted to \$859.70. This resulted in a total of \$14,626.00 for fees and \$859.70 in costs.

14. Mayor Osborne paid these charges in full. Mr. Robinson opined that the rate charged and hours expended by Mr. Riggio in the appellate proceeding were appropriate, as were the costs incurred. His testimony is found to be credible.

15. As a result of Mr. Riggio's efforts, Mayor Osborne prevailed in the appeal. It is found that Dr. Milanick caused Mayor Osborne to pay attorney's fees and costs in the amount of \$15,485.70.

Proving Entitlement to Fees and Costs

16. Subsequent to Dr. Milanick's allegations of misconduct before the Commission, and after an investigation, the Commission, in a Public Report dated September 8, 2004, dismissed the complaint on a finding of no probable cause in the case of Mayor Osborne.

17. Pursuant to Subsection 112.317(8), Florida Statutes, Mayor Osborne was entitled to be reimbursed for the attorney's fees and costs associated with defending himself against Dr. Milanick's allegations. Because Dr. Milanick did not voluntarily remit the fees and costs expended, a hearing was required.

18. A hearing was held in this matter in Daytona Beach, Florida, on May 11, 2005. The hearing in Division of Administrative Hearings Case No. 04-4110FE, lasted an entire day.

19. Prior to the hearing, Mayor Osborne engaged the services of Attorney Martin Pedata in addition to those provided by Mr. Riggio. The agreement for representation by Mr. Pedata was reduced to writing on April 6, 2005. The agreement provided

that Mayor Osborne would pay Mr. Pedata \$250.00 per hour for his services and \$75.00 per hour for paralegal services.

20. Mr. Robinson reviewed the bills and records relating to the fees charged to Mayor Osborne for the preparation for and the conduct of the hearing of May 11, 2005. Mr. Robinson stated that the hourly rate of \$250.00 was a reasonable one for the type of services provided by Mr. Pedata. He stated that the number of hours expended by Mr. Riggio and Mr. Pedata in connection with this hearing was reasonable. In analyzing this claim he used the Lodestar approach set forth in Rowe.

21. Mr. Riggio and his partner Mr. Mitchell, expended 160.6 hours proving entitlement to fees and costs. Mr. Pedata, as lead attorney in the entitlement case, expended 107 hours. In addition, 54.2 paralegal hours were expended in proving the entitlement case. These hours include the time up to the filing of the appeal with the Fifth District Court of Appeal. These hours also include the time spent before the Commission.

22. As a result of the efforts of Mr. Riggio and Mr. Pedata, Mayor Osborne prevailed in the entitlement hearing, which resulted in a Recommended Order in his favor.

23. Mayor Osborne paid Mr. Riggio and Mr. Pedata a total of \$50,840.00 for their services in proving entitlement to attorney's fees. He also paid \$2,168.00 for paralegal services.

Total costs amounted to \$3,764.73, which Mayor Osborne paid.
The total fees and costs to Mayor Osborne was \$56,772.73.

24. Mr. Robinson opined that the rate charged and hours expended by Mr. Riggio in the appellate proceeding were appropriate, as were the costs incurred. His testimony is found to be credible.

25. It is found that Dr. Milanick was responsible for Mayor Osborne having to pay attorney's fees and costs in the amount of \$56,772.73.

Additional fees and costs

26. Mr. Riggio presented Mayor Osborne with an invoice in the amount of \$2,370.00 for the cost of the current proceeding. However, the Administrative Law Judge is without jurisdiction to address this claim in this proceeding.

CONCLUSIONS OF LAW

27. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. § 120.57(1), Fla. Stat. and Fla. Admin. Code R. 34-5.0291.

28. Subsection 112.317(8), Florida Statutes, provides as follows:

112.317. Penalties

* * *

(8) In any case in which the commission determines that a person has filed a complaint against a public officer or employee with a malicious intent to injure the reputation of such officer or employee by filing the complaint with knowledge that the complaint contains one or more false allegations or with reckless disregard for whether the complaint contains false allegations of fact material to a violation of this part, the complainant shall be liable for costs plus reasonable attorney's fees incurred in the defense of the person complained against, including the costs and reasonable attorney's fees incurred in proving entitlement to and the amount of costs and fees. If the complainant fails to pay such costs and fees voluntarily within 30 days following such finding by the commission, the commission shall forward such information to the Department of Legal Affairs, which shall bring a civil action in a court of competent jurisdiction to recover the amount of such costs and fees awarded by the commission.

29. As noted above, the sum of \$4,976.00 has been determined by the Fifth District Court of Appeal, and Dr. Milanick is required to remit this sum to Mayor Osborne.

30. Because the Fifth District Court of Appeal granted Mayor Osborne's Motion for Attorney's Fees in Case No. 5D05-3954, the only question is the amount of the fees to be awarded.

31. Subsection 112.317(8), Florida Statutes, provides for the award of attorney's fees and costs in certain proceedings before the Commission.

32. In Florida Patients Compensation Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985), the Florida Supreme Court adopted the criteria set forth in Disciplinary Rule 2-106(6) (now numbered 4-1.5) of the Florida Bar Code of Professional Responsibility to be used in determining reasonable attorney's fees.

33. The Florida Bar Rules Regulating the Florida Bar, Rule 4-1.5(b)(1), provides guidance when considering reasonable attorney's fees as follows:

(b) Factors to Be Considered in Determining Reasonable Fees and Costs.

(1) Factors to be considered as guides in determining a reasonable fee include:

(A) the time and labor required, the novelty, complexity, and difficulty of the questions involved, and the skill requisite to perform the legal service properly;

(B) the likelihood that the acceptance of the particular employment will preclude other employment by the lawyer;

(C) the fee, or rate of fee, customarily charged in the locality for legal services of a comparable or similar nature;

(D) the significance of, or amount involved in, the subject matter of the representation, the responsibility involved in the representation, and the results obtained;

(E) the time limitations imposed by the client or by the circumstances and, as between attorney and client, any additional or special time demands or requests of the attorney by the client;

(F) the nature and length of the professional relationship with the client;

(G) the experience, reputation, diligence, and ability of the lawyer or lawyers performing the service and the skill,

expertise, or efficiency of effort reflected in the actual providing of such services;
and

(H) whether the fee is fixed or contingent, and, if fixed as to amount or rate, then whether the client's ability to pay rested to any significant degree on the outcome of the representation.

34. The Florida Bar Rules Regulating the Florida Bar, Rule 4-1.5(b)(2), provides guidance when considering reasonable costs as follows:

(2) Factors to be considered as guides in determining reasonable costs include:

(A) the nature and extent of the disclosure made to the client about the costs;

(B) whether a specific agreement exists between the lawyer and client as to the costs a client is expected to pay and how a cost is calculated that is charged to a client;

(C) the actual amount charged by third party providers of services to the attorney;

(D) whether specific costs can be identified and allocated to an individual client or a reasonable basis exists to estimate the costs charged;

(E) the reasonable charges for providing in-house service to a client if the cost is an in-house charge for services; and

(F) the relationship and past course of conduct between the lawyer and the client.

All costs are subject to the test of reasonableness set forth in subdivision (a) above. When the parties have a written contract in which the method is established for charging costs, the costs charged thereunder shall be presumed reasonable.

35. Using the Rowe standard, as illuminated by the Rules Regulating the Florida Bar, the attorney's fees charged and the amount of costs assessed for the appeal are found to be reasonable.

36. Using the Rowe standard, as illuminated by the Rules Regulating the Florida Bar, the attorney's fees charged and the amount of costs assessed for proving entitlement to attorney's fees are found to be reasonable.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law, it is

RECOMMENDED that the Commission on Ethics award attorney's fees and costs as follows:

1. The original award of attorney's fees in the amount of \$4,976.00.

2. Attorney's fees and costs for appellate attorney's fees and costs in the amount of \$15,485.70.

3. Attorney's fees and costs for proving entitlement to fees and costs in the amount of \$56,772.73.

DONE AND ENTERED this 14th day of November, 2007, in
Tallahassee, Leon County, Florida.



HARRY L. HOOPER
Administrative Law Judge
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Filed with the Clerk of the
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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.