

STATE OF NEW YORK
DEPARTMENT OF STATE

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In the Matter of the Complaint of

**DEPARTMENT OF STATE
DIVISION OF LICENSING SERVICES,**

Complainant,

DECISION

-against-

LINWOOD LEWIS

Respondent.

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Pursuant to the designation duly made by the Hon. Gail S. Shaffer, Secretary of State, the above noted matter came on for hearing before the undersigned, Roger Schneier, on November 16, 1992 at the office of the Department of State located at 270 Broadway, New York, New York.

The respondent, of 684 Britton Street, Bronx, New York, was represented by David M. Goldberg, Esq., Suite 1703, 401 Broadway, New York, New York.

The complainant was represented by Compliance Officer William Schmitz.

COMPLAINT

The complaint in the matter alleges that the respondent, a licensed private investigator, used a statement of services that failed to set forth the specific services to be performed and failed to set forth the periodic rate to be charged, and failed to maintain records of services performed which identified the person performing the services, in violation of 19 NYCRR 173.1 and 173.2.

FINDINGS OF FACT

1) Notice of hearing together with a copy of the complaint was served on the respondent by certified mail (Comp. Ex. 1).

2) The respondent is duly licensed as a private investigator in his own name, with an office located at 684 Britton Street, Bronx, New York (Comp. Ex. 2).

3) On April 13, 1990 the respondent entered into a contract with Carol Leon pursuant to which he was to provide investigative services to her (Comp. Ex. 3). The agreement lists the services to be provided as "Surveillance to see if Boy friend as (sic) some one else," and sets a flat rate payment of \$750.00. It does not state for how long the investigation was to be conducted, although the respondent claims that there was an oral understanding that a total of twenty four hours would be expended.

Upon signing the agreement Leon paid the respondent a "retainer" of \$375.00. The next day the respondent commenced his investigation, which according to his "surveillance sheet" encompassed a total of twenty eight and one half hours (Comp. Ex. 4). That sheet describes in some detail what occurred during the investigation, but does not state who conducted the investigation. According to the respondent, however, in those cases where he has used someone other than himself to conduct an investigation (he usually works alone), that person signs the surveillance sheet. In this case there is no signature on the sheet and, according to the respondent, that is an indication that he conducted the investigation himself.

OPINION

I- 19 NYCRR 173.1 states:

"(a) No licensed private investigator...shall undertake to perform any services on behalf of a client unless such licensee shall have delivered to the client a written statement, signed by the licensee, which shall set forth the specific service or services to be performed and the charge or fee therefore. In the event any or all of the services are to be performed on an hourly or other periodic basis, the rate therefore shall be set forth...." (emphasis added).

The purpose of the regulation is to establish the legal right of a client to clearly understand the work scope and costs of the employment of the licensee. Department of State v Recovery Investigations, Ltd., 44 DOS 89. That understanding should be exact, and without the mandated written statement of services the client may not be aware of and/or be able to hold the licensee to the performance of the licensee's obligations. Department of State v Aranzullo, 54 DOS 87. One of the essential elements of that understanding is, of course, the amount of time to be expended on the investigation. The failure of a licensee to provide a client with a fully detailed written, as opposed to oral, statement of services which is in compliance with the requirements of the regulation may be a demonstration of untrustworthiness and

incompetency. Department of State v Greenberg, 32 DOS 87, conf'd. sub nom Greenberg v Shaffer, 139 AD2d 648, 527 NYS2d 287 (1988); Division of Licensing Services v E.M.H. Investigation Service, Inc., 8 DOS 92; Department of State v Recovery Investigations, Ltd., supra; Department of State v Byrne, 34 DOS 88; Department of State v Zaretz, 19 DOS 88; Department of State v Aranzullo, supra.

II- Where a licensee has received money in a transaction in which he has acted in violation of his legal obligations, he may be required to return the money to the payor as a condition of retaining his license, even in the absence of a specific statutory provision authorizing such a requirement. Kostika v Cuomo, 41 NY2d 673, 394 NYS2d 862 (1977); Berlow v Lomenzo, 49 AD2d 160, 373 NYS2d 907 (1975); Edelstein v Department of State, 16 AD2d 764, 227 NYS2d 987 (1962); Department of State v Recovery Investigations, Ltd., supra; Department of State v Zaretz, supra; Department of State v Aranzullo, supra. A refund may ordered where the licensee failed to give his client a sufficiently detailed written statement of services, even in a situation in which substantial services were provided. Division of Licensing Services v E.M.H. Investigation Service, Inc., supra.¹

III- 19 NYCRR 173.2 states:

"Every licensee shall retain the statement of services and charges...as part of the licensee's records relating to the client. In addition, the licensee shall maintain...records indicating...who, on behalf of the licensee, rendered such services."

The respondent's practice of not indicating on his "surveillance sheet" who it was that conducted an investigation when that investigation was conducted by him is sloppy, and, as demonstrated by this case, can lead to misunderstandings. It is not, however, in violation of the regulation, because in such cases the services are rendered by the licensee himself, and not by someone on his behalf, and, if one is aware of the licensee's practice, such records do indicate who it was that conducted the investigation. The respondent is admonished, however, that to avoid future misunderstandings he should place a specific notation on the sheet as to the name of the person who conducted the investigation, even when that person is he himself.

CONCLUSIONS OF LAW

1) By failing to specifically state in his written contract with Leon the number of hours which would be expended in the

¹ In this case the respondent only received the initial \$375.00 "retainer", and Leon never paid the balance of the fee.

investigation the respondent violated 19 NYCRR 173.1 and demonstrated incompetency as a private investigator.

2) The respondent did not violate 19 NYCRR 173.1 by failing to state in his contract with Leon the periodic rate to be charged her, inasmuch as he did not charge her a periodic rate and did state in the contract the flat rate which was to be charged.

3) The respondent did not violate 19 NYCRR 173.2 by failing to maintain records which identified the person who performed the investigative services for Leon, inasmuch it was the respondent himself who performed those services and the records maintained by the respondent, according to the system established by him, indicate such.

DETERMINATION

WHEREFORE, IT IS HEREBY DETERMINED THAT Linwood Lewis has violated 19 NYCRR 173.1 and has demonstrated incompetency, and accordingly, pursuant to General Business Law §79, he shall pay a fine of \$250.00 to the Department of State on or before December 31, 1992, and should he fail to pay the fine then his license as a private investigator shall be suspended for a period of one month, commencing on January 1, 1993 and terminating on January 31, 1993, and upon payment of the fine or termination of the suspension his license shall be further suspended until such time as he shall present proof satisfactory to the Department of State that he has refunded the sum of \$375.00, plus interest at the legal rate for judgements from January 1, 1993, to Carol Leon; and

IT IS FURTHER DETERMINED THAT all other charges herein are dismissed.

These are my findings of fact together with my opinion and conclusions of law. I recommend the approval of this determination.

Roger Schneier
Administrative Law Judge

Concur and So Ordered on:

GAIL S. SHAFFER
Secretary of State
By:

Maureen F. Glasheen
Deputy Secretary of State