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## PRELIMINARY STATEMENT

References to the original trial transcript will be made by the designation "R" followed by the page number (R-page number).

References to the transcript of the cost hearing will be made by the designation of "R(CH)" followed by the page number (R(CH)-page number).

References to the Referee's original Report dated January 27, 1988, nunc pro tunc December 22, 1987, will be made by the designation of "REF" followed by the page number (REF-page number).

References to the Supreme Court's Opinion dated June 22, 1989, will be made by the designation "SCT" followed by the page number (SCT-page number)

References to the Referees Report of Recalculation of Costs will be made by the designation "REF(CH)" followed by the page number (REF(CH)-page number).

References to the exhibits at the original trial will be made by denoting whether the exhibit was the Complainant's exhibit ("CX") or Respondent's exhibit ("RX") followed by the exhibit number, e.g. (CX-exhibit number).

References to the exhibits at the cost hearing will be made in the same manner as the original trial exhibits only using the additional designation "CH" to signify an exhibit at the cost hearing, e.g. (CX(CH)-exhibit number).

**STATEMENT OF THE CASE AND OF THE FACTS**

This Honorable Supreme Court of Florida entered its disciplinary decision in this case on June 22, 1989. It was entered after the Referee, the Honorable Hugh MacMillan, filed his original Report of Findings and Recommendations dated January 27, 1988, dated nunc pro tunc, December 22, 1987.

This Honorable Court's decision of June 22, 1989 adopted the Referee's findings of fact, and disbarred the Respondent, ALPHONSE DELLA-DONNA, from the practice of law in the State of Florida for a period of five (5) years and directed him to make certain restitution as a condition of his reinstatement and further directed that a Judgment for Costs in the amount of \$104,700.10 be entered against the Respondent, ALPHONSE DELLA-DONNA, for which sum execution would issue.

By further Order of this Court dated October 24, 1989, this case was remanded to the Referee for a recalculation of costs. THE FLORIDA BAR had joined in a request to have the exact amount of costs recalculated inasmuch as certain costs had been estimated prior to the final opinion being entered by the Florida Supreme Court.

The total cost amount sought by THE FLORIDA BAR to be assessed against the Respondent, ALPHONSE DELLA-DONNA, was \$103,315.52. These total costs were categorized and explained in detail in Letter Memoranda filed with the Referee on behalf of THE FLORIDA BAR, on July 23, 1990 and September 14, 1990. Copies of these Letter Memoranda are filed this same date with this

Supreme Court with the Notice of Filing. Each of the costs were specifically itemized and explained. They were listed under six (6) basic categories, to wit:

|   |                        |
|---|------------------------|
| 1. Expenses Grievance Committee Level   | \$ 11,308.27           |
| 2. Expenses Referee Level for Court Reporter Fees, less credits                           | 65,883.35              |
| 3. Fees and Expenses for Expert Witnesses   | 20,072.03              |
| 4. Process Serving Charges and Subpoena Serving Charges and Delivery Charges              | 3,291.19               |
| 5. Copy Costs, Travel and Out-of-Pocket and Miscellaneous Expenses of Special Bar Counsel | 2,610.68               |
| 6. Administrative Costs Pursuant to Rule 3-7.5  | <u>150.00</u>          |
| Total Expenses:   | \$ 103,315.52<br>===== |

Prior to the initial Referee Report, the Respondent, ALPHONSE DELLA-DONNA, never raised any objections to nor sought any hearing upon any "objections", to the expenses taxed against the Respondent. After remand, the Respondent, ALPHONSE DELLA-DONNA, and Complainant, THE FLORIDA BAR, were given a full hearing on costs and expenses sought by THE FLORIDA BAR to be taxed against the Respondent, ALPHONSE DELLA-DONNA.

The costs were \$103,315.52, all of which were reasonable and necessary to advance the cause on behalf of THE FLORIDA BAR against the Respondent, ALPHONSE DELLA-DONNA, and are properly assessable and taxable under Rule 3-7.5. The applicable Rule regulating THE FLORIDA BAR has been filed with this Court with the Notice of Filing this same date.

The most serious charges made by THE FLORIDA BAR against the Respondent, ALPHONSE DELLA-DONNA, were affirmed both at the Referee level and before the Florida Supreme Court. The majority of the charges for unethical conduct against the Respondent, ALPHONSE DELLA-DONNA, involved the filing of frivolous lawsuits and the advancing of frivolous and baseless positions, being over litigious, being involved in conflicts of interests which were actual and existing, forum shopping, conduct which was prejudicial to the administration of justice and involved bad faith actions of moral turpitude. THE FLORIDA BAR also charged the Respondent, ALPHONSE DELLA-DONNA, with having received excessive fees and THE FLORIDA BAR sought restitution.

SUMMARY OF ARGUMENT FOR COMPLAINANT'S ANSWER

The Respondent, ALPHONSE DELLA-DONNA, should be required to pay to THE FLORIDA BAR and to reimburse THE FLORIDA BAR for the entire and total costs of \$103,315.52, and there was no competent substantial evidence and/or legal support for any lesser amount.

All of the costs and expenses sought by THE FLORIDA BAR to have taxed against the Respondent, ALPHONSE DELLA-DONNA, were reasonable and necessary in the prosecution of Respondent and were allowable under Rule 3-7.5.

THE FLORIDA BAR conducted a thorough, proper and necessary proceeding against the Respondent, ALPHONSE DELLA-DONNA, in what has been referred to by THE FLORIDA BAR, as the "most lengthy, complex and extensive disciplinary case ever prosecuted" in the State of Florida and therein conducted itself professionally and properly.



## POINT I

Respondent, ALPHONSE DELLA-DONNA, should reimburse THE FLORIDA BAR for the total \$103,315.52 in costs expended in this prosecution.

The ethical charges against the Respondent, of which he was found guilty, were extremely serious in nature and further constituted a breach of the public and legal trust. The Supreme Court in its decision of June 22, 1989, referred to the Referee's initial Report to identify the Respondent, ALPHONSE DELLA-DONNA's, misconduct:

'He (Respondent) is responsible as an officer of the Court for the plethora of litigious and frivolous Court proceedings in which he was involved, plus matters wherein there were conflicts of interest on his part and excessive fees extracted on his behalf.' (SCT-2-3)

The Referee went on to state that the testimony and exhibits presented during the hearing established:

'(A) pattern of conduct and attitude' by ALPHONSE DELLA-DONNA 'to misuse the judicial system for his personal advancement and to disregard ethical considerations.' (SCT-3)

This Supreme Court adopted all of the findings of fact of the Referee, who had determined that the clear and convincing evidence supported the allegations against the Respondent. In displaying its appreciation for the seriousness of the conduct of the Respondent, this Court referred to certain other findings of fact of the Referee:

'(T)he Referee specifically found DELLA-DONNA's conduct to have been 'motivated by personal and financial self-gain and aggrandizement;' that DELLA-DONNA 'acted in

complete derogation of his ethical and fiduciary responsibilities to enrich, unjustly and financially, himself and the attorneys' working on his behalf;' and that 'the evidence concerning Respondent's conduct taken at a whole, when viewed in the total perspective, is clearly indicative of fostering protracted unnecessary litigation for the self-interests and desires of Respondent alone.' The Referee also found that DELLA-DONNA used funds from Sr.'s estate to advance issues in which . . . the estate 'had no reasonable, actual or necessary interest' and that \$100,000.00 of the \$1,100,000.00 paid by Nova 'constituted an excessive fee and was clearly an unlawful and unethical procurement.' (SCT-3)

THE FLORIDA BAR had filed a multi-count (Three Count) Complaint against the Respondent, ALPHONSE DELLA-DONNA. This Supreme Court affirmed and ratified the findings and recommendations of the Referee as to Counts I, II and III, and agreed with the Referee that some of the conduct of the Respondent, although "unethical" was not tantamount to extortion. In this regard, the same elements of proof were necessary and the same evidence had to be presented to the Referee whether the conduct was determined to be tantamount to extortion or not.

Specifically addressing Count III, this Honorable Court referred again to the findings of the Referee which it affirmed and adopted and found that DELLA-DONNA had breached his responsibilities:

DELLA-DONNA 'acted in derogation of his legal and fiduciary responsibilities,' that he 'caused extensive delay, damage and expense to the Burns' Estate and beneficiaries,' and that he 'acted in bad faith in handling the Burns' estate in . . . misusing positions of trust for personal and financial gain.' The Referee also found \$46,498.37 of DELLA-DONNA's fees from the Burns Estate to be 'clearly excessive . . . both in amount and . . . unethical manner in which' DELLA-DONNA 'extracted that money. Although the Referee decided that DELLA-DONNA did not commit extortion, he found

that clear and convincing evidence supported the BAR's allegations. (SCT-3-4)

DELLA-DONNA, throughout the BAR disciplinary proceedings contended that "he cannot be disciplined for action he took as a client rather than an attorney". (SCT-4) He also asserted that he could not be disciplined for working under certain conflicts of interest when he did not act as a lawyer representing a particular client. (SCT-4-5) The Florida Supreme Court rejected Respondent, ALPHONSE DELLA-DONNA's, arguments in this regard and accepted the BAR's position in total.

References have been made to this Supreme Court's earlier decision of disbarment in order to explain the severity of the misconduct. Respondent's Brief appears to avoid any statement of appreciation for the severity and seriousness of the misconduct. The Supreme Court not only upheld the disbarment recommended by the Referee, but further found that "DELLA-DONNA's misconduct fully warrants a five (5) year disbarment, regardless of which rules are applied". (SCT-10)

Respondent, ALPHONSE DELLA-DONNA, in his Brief, appears to be more concerned with attempting to criticize and draw attention to Bar Counsel and THE FLORIDA BAR, rather than addressing the issues on review. There was nothing improper that THE FLORIDA BAR did in proceeding with disciplinary action against the Respondent. It is characteristic of Respondent that attempted diversionary tactics be raised, in order to cloud the issue and divert attention from the real issues. It was necessary at trial to show the Referee, in detailed fashion, the underlying facts

and theories involved in the litigations in which DELLA-DONNA was involved, in order to clearly display the lack of any genuineness and good faith purpose to his litigation. When voluminous records of pleadings would be examined, it would not only be shown that Respondent took and/or advanced contradictory positions, but also that he was predominantly interested in advancing his own concerns and desirous of personal financial rewards and influence that would come with his position being accepted by the Court. Respondent would fight a war of attrition against individuals, entities and attorneys, in order to "wear them down". Ultimately, the opposition would be so frustrated by time delays and the expenses involved in litigation and appeals, that they would be "forced to capitulate" and compromise or give up on their positions due to financial considerations. The Nova litigation, in which DELLA-DONNA was paid 1.1 Million Dollars in order to stop the litigation against Nova, is merely one example of this.

When Respondent would raise "fabricated" legal and factual arguments, which superficially would appear credible, it was necessary for THE FLORIDA BAR to go into depth and relate to other cases to show the error and lack of credibility in Respondent's position. Special Bar Counsel was retained in this case because of the extraordinary number of hours that would be necessary in order to present the case properly to the Grievance Committee and ultimately to the Referee. This case involving THE FLORIDA BAR and ALPHONSE DELLA-DONNA, has lasted over nine (9)

years and many hours. There is no way that Bar Counsel will ever be monetarily compensated for his time and for Respondent to infer otherwise is wrong. The principal reasons for its extended life and the necessary large amount of costs incurred in its prosecution, relate to Respondent and what was necessary in order to establish the case against him. It was Respondent, at the Grievance Committee level for example, who asked for and received from the Committee Chairman, the extraordinary and unprecedented right to take extended discovery in the form of lengthy and costly depositions. Extensive pre-Grievance Committee discovery was permitted to the Respondent in order to allow him an opportunity to fully prepare his defense and to be apprised of all the charges against him. Further, at the Grievance Committee level, it was the Respondent who sought to have additional copies of hundreds of pages of exhibits provided to each of the Committee members.

There is no precedent for the Referee to only assess part of the costs at the Grievance Committee level as he did in this case. In the case law authority cited by the Respondent, the Supreme Court apportioned the cost at the Referee trial level between the charges on which the Respondent was found guilty or not guilty. At bar, the Referee has also divided the cost at the Grievance Committee level. In point of fact, the vast majority of the time, effort and cost at the Grievance Committee level were extended on the matters on which the Grievance Committee found probable cause.

The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978) is not applicable in any regard to the facts of this case. By referring to the Rubin decision, Respondent in his Brief would seem to want to imply to this Court that there were improprieties or misconduct on the part of THE FLORIDA BAR in proceeding with this case against the Respondent. Such is just not the case and the reference in Respondent's Brief to alleged instances of "irresponsible conduct on the part of the BAR", are merely allegations, red herrings and diversionary tactics.

There is nothing improper with THE FLORIDA BAR desiring to present its "strongest possible case" to the Grievance Committee and then to the Referee on those charges on which probable cause has been found.

Part of the difficulty in presenting a case of this magnitude and complexity to the Referee, is that the educational process that is initially required, to acquaint the Referee with the case, will take more time than the majority of cases. Nonetheless, THE FLORIDA BAR did not shirk nor shy from its responsibility, nor fail to proceed with disciplinary actions, merely because the issues involved were complex and the records voluminous.

The "extortion charge" against the Respondent involved the presentation of testimony and evidence which would have had to be presented to the Referee in either case.

The Referee has made a mention about the undersigned Bar Counsel being retained on a contingency fee agreement to collect

the costs in this case. The Referee specifically, in stating his own opinions in this regard, came far short of attributing any bad motive or misconduct to THE FLORIDA BAR or Bar Counsel. It was after the Supreme Court entered its opinion disbarring Respondent that Bar Counsel was retained on a contingency fee basis. This contract has been produced and made available to opposing counsel, although irrelevant. The date of the contract is October 27, 1989. The vast majority of costs incurred in this case were incurred prior to the entry of the contract. It was only the additional costs attendant to the cost hearing itself that were additional costs. Respondent is attempting to ascribe some bad motive in this regard and he is wrong.

With regard to the Referee's trial transcript, the Respondent states that a copy of same was refused to him. In point of fact, the record would reflect that the Respondent never requested of THE FLORIDA BAR, nor Bar Counsel, a copy of the Referee's trial transcript. The Rules regulating THE FLORIDA BAR provide that certain costs should be paid for certain documents. THE FLORIDA BAR had incurred an additional cost in having two (2) copies made of the trial transcript. It was the intention of THE FLORIDA BAR at all times to provide ALPHONSE DELLA-DONNA, upon his request, a copy of the transcript when the cost of same was paid. If he did not wish to pay the cost of the Court Reporter's actual bill that was incurred by THE FLORIDA BAR, the undersigned Bar Counsel specifically and on the record told DELLA-DONNA that he could have a hearing before the Referee to determine what cost

should be assessed him to receive the transcript.

THE FLORIDA BAR, consistent with the Rules Regulating THE FLORIDA BAR, also sought for DELLA-DONNA to pay for a copy of the cost transcript as permitted by the Rules. After the Referee was asked in this instance to have a copy provided to the Respondent, the Referee applied the Rule and DELLA-DONNA paid for his copy. A copy of the transcript was thereupon immediately provided to Respondent's counsel. In this regard, it is the position of the BAR that the actual court reporter charge should have been paid by Respondent. The Rule was inapplicable at bar and only applied to "copying" the BAR would do itself.

All of the costs incurred, whether expert witness fees, court reporter fees, copying charges or process serving charges or otherwise, were all reasonable and necessary and consistent with business standards, amounts and practices at the time.

The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978) does not apply to the facts of our case. Therein THE FLORIDA BAR took an excessively broad approach and did not abandon claims against the Respondent early on, which they could not prove. That did not happen in the case at bar. THE FLORIDA BAR did not litigate, with the intent to have findings of guilt attributable to the actions, those charges on which probable cause had not been found at the Grievance Committee level. The Referee found that certain testimony and exhibits were relevant and properly held admissible in Court, even though testimony and evidence related to charges on which the Grievance Committee had found no



probable cause. Certain testimony and evidence were submitted for specific purposes and THE FLORIDA BAR did not seek to have the Referee find Respondent guilty of a "no probable cause" charge.

In his Brief, the Respondent is also attempting to relitigate or re-explain his conduct, which has already been reviewed by the Supreme Court and found to be serious enough to deserve and merit disbarment from the practice of law in the State of Florida. Nevertheless, there are certain additional statements made by Respondent to which the BAR must respond.

With regard to the character witnesses called by the Respondent before the Referee, certain of them agreed that if the charges as presented by THE FLORIDA BAR against Respondent were found to be correct and supported by clear and convincing evidence, that their opinions as to the reputation of Respondent as to truthfulness would be different.

With regard to the witness that was never called by THE FLORIDA BAR to testify live, certain matters must be addressed. The witness was Sally Detterman, who is an attorney in Washington, D.C. and the immediate Past-President of the Washington, D.C. Bar Association. Her deposition had been taken several times in different cases involving DELLA-DONNA, in which her testimony related to issues involved in the Grievance proceedings. THE FLORIDA BAR used her testimony and presented it to the Referee. DELLA-DONNA was given leave of Court to specifically take her deposition again in Washington, D.C. and

address any issues related to these proceedings. DELLA-DONNA chose not to depose her in this case or present her to the Referee to let her testify. Now DELLA-DONNA would have this Honorable Court believe that he was prejudiced because THE FLORIDA BAR did not call her as a witness and that THE FLORIDA BAR only used depositions previously taken to present certain facts to the Referee. DELLA-DONNA had an opportunity to call a witness if he felt her testimony would support his position and he chose not to. THE FLORIDA BAR believes that the reason the Respondent did not redepose Sally Detterman or call her as a witness was because she did not agree with the interpretation of DELLA-DONNA as to certain documents, nor as to the intent of Respondent.

Respondent alleges that THE FLORIDA BAR made certain misrepresentations to this Honorable Court either in its written word or in oral argument in May of 1989. Both allegations are totally incorrect and false. There was a present need to have confidentiality lifted and removed when THE FLORIDA BAR petitioned some of the Court prior to oral argument. In this regard, the Honorable Raymond J. Hare, who presided over the Leo Goodwin, Sr. Estate, was about to approve additional distributions and fee payments to Respondent and his law firm. Certain prior fees that related to the Goodwin Estate matters, that is \$100,000.00 for alleged results obtained in the apportionment case, had been previously determined by the Referee to be excessive. Inasmuch as Judge Hare presided over the Sr.'s

Estate in which all fees and expenses had to be approved, the representation of Bar Counsel was entirely correct. Bar Counsel admitted to the Referee that THE FLORIDA BAR was not charging the Respondent with excessive fees with reference to "what Judge Hare ordered". (R-6233-34) However, the \$100,000.00 which was part of the 1.1 Million Dollars in the Nova litigation, had to be approved as fees paid from the estate's assets and Judge Hare presided over the Estate. In this regard, in the transcript, Bar Counsel went on to explain to the Referee:

The only question of excessive fees that the Bar is charging is in the Burns' Estate which is approximately \$50,000.00 to \$65,000.00 excessive and extortionate and the 1.1 Million Dollars in the Nova related matters. (R-6234)

Lastly, Respondent states that THE FLORIDA BAR has charged the Respondent with "434 potential charges" (Respondent Brief-10). These are not actual charges. What the Respondent has done, is to take all of the unethical actions and omissions that he was guilty of and multiplied and extrapolated those charges times the number of actual Rules (Canons) regulating THE FLORIDA BAR that were violated. The charges themselves were not 434 but rather the underlying conduct violated numerous rules and Canons which govern the conduct of lawyers in this State.

After THE FLORIDA BAR had taken all necessary and reasonable steps in order to process the disciplinary action against the Respondent, the Respondent is now saying that THE FLORIDA BAR was too efficient and too thorough in holding him accountable for his numerous violations. Regardless of the degree of complexity and

sophistication of ethical violations of a particular lawyer, it is indeed ironic that Respondent would now assert that one of the reasons that he should have protection from being assessed the costs of these proceedings, is that THE FLORIDA BAR was too thorough and complete and effective in its prosecution. Respondent himself was a parcipitating cause of these proceedings having to be necessary. THE FLORIDA BAR did what was necessary- nothing more or less - in prosecuting DELLA-DONNA.

The expenses of THE FLORIDA BAR which were assessed by the Referee totalled \$63,306.17 (SCT(CH)-1-6).

As this Court stated in its opinion disbarring Respondent, a Referee's finding of fact will be presumed correct.

A Referee's findings of fact are presumed correct and will be upheld unless clearly erroneous. The Florida Bar v. Stalnaker, 485 So.2d 815 (Fla. 1986). The standard on review is whether those findings are supported by competent substantial evidence, and this Court will not substitute its judgment for the Referee's. The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987). (SCT-6)

In all respects, the Referee's Cost Report with regard to assessing costs of \$63,306.17 should be affirmed; however, in addition to these expenses, it is the position of THE FLORIDA BAR that there was no competent substantial evidence presented which would authorize the Referee to not assess the additional costs which were incurred by THE FLORIDA BAR and necessary and reasonable in prosecuting this claim against the Respondent. Therefore, the entire costs that were reasonably incurred by THE FLORIDA BAR should be taxed and the total amount of the award should be \$103,315.52.

THE FLORIDA BAR would ask that this Court affirm the cost findings and recommendations of the Referee in all respects except that the total costs assessed against the Respondent be increased to \$103,315.52. The actual costs of the Court Reporter bills (as opposed to \$1.00 a page) and related expenses, as well as all of the costs at the Grievance Committee level should have been taxed against Respondent by the Referee.

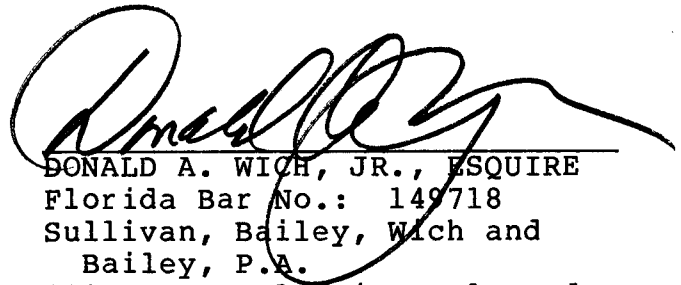
## CONCLUSION

THE FLORIDA BAR and the lawyers of this State should not be penalized for the prosecuting Respondent for his years of unethical conduct which "fully warranted" being disbarred. This Honorable Supreme Court has held in the past that the individuals themselves who are guilty of the misconduct should bear the responsibility of paying and reimbursing THE FLORIDA BAR and that the other members of THE FLORIDA BAR should not have to absorb this expense, albeit a necessary and reasonable one. This case was handled in a professional, responsible, diligent and efficient manner and THE FLORIDA BAR should be commended as opposed to being criticized, for having the commitment and determination to bring the Respondent's unethical misconduct to the proper forum for appropriate action and discipline.

THE FLORIDA BAR would ask that this Court affirm the cost findings and recommendations of the Referee in all respects except that the total costs assessed against the Respondent be increased to \$103,315.52. The actual costs of the Court Reporter bills (as opposed to \$1.00 a page) and related expenses, as well as all of the costs at the Grievance Committee level should have been taxed against Respondent by the Referee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief and Initial Cross-Appeal Brief has been furnished by regular mail to: Larry Simpson, Esquire, 1102 East Gadsen Street, Post Office Box 10368, Tallahassee, Florida 32302; John Anthony Boggs, Esquire, The Florida Bar, Tallahassee, Florida 32301; and John Berry, Esquire, The Florida Bar, Tallahassee, Florida 32301 this 4th day of March, 1991.



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