IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ALPHONSE DELLA-DONNA,

Respondent.
_____/

SUPREME COURT CASE
NO.: 69,324

THE FLORIDA BAR CASE
NO.: 17E82F69

COMPLAINANT'S CROSS-APPEAL REPLY BRIEF

Submitted by:

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PRELIMINARY STATEMENT

In Complainant's Answer and Cross Appeal Brief as well as this Reply Brief, designations to the pretrial hearings are being made by the designation (R(A-Volume Number)-page number).

All other references to the Record are being made by the same designations as were made in Complainant's Initial Brief.

SUMMARY OF THE ARGUMENT

Respondent was found guilty of unethical conduct and disbarred for five (5) years and restitution provided. The Rules Regulating The Florida Bar and applicable Florida case law authority provide that he should pay costs to The Florida Bar.

There was no misconduct on the part of the Bar in presenting this serious grievance matter.

The total reasonable taxable and necessary costs are $103,315.52 and the substantial competent evidence supports the Bar's position that the Referee's award should be increased to this amount.

POINT I

RESPONDENT SHOULD REIMBURSE THE FLORIDA BAR FOR ALL OF ITS REASONABLE, NECESSARY AND AWARDABLE COSTS TOTALING $103,315.52

It is well-established in Florida that generally when an attorney has been found guilty of ethical violations, the Bar should be awarded its costs. The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). This issue was addressed in the Lehrman case:

> The final questions presented here involves the referee charging the Bar for the cost of a transcript of the grievance committee hearing. This would have been appropriate had the respondent been exonerated of the charges. That was not the case here and we adhere to the general rule that an attorney found guilty of charges brought by the Bar will have the cost assessed against him. See The Florida Bar v. Davis, 419 So.2d 325, 328 (Fla. 1982). We held that the $861 assessed against the Bar by the referee should be taxed to the respondent. The Florida Bar v. Lehrman, 485 So.2d 1276, 1278 (Fla. 1986).

It is unclear in Lehrman as to whether the attorney was exonerated of any charges; further, the "exoneration" would have presumably in the form of a "not guilty" at the trial before the referee, rather than at the grievance committee level.

Even though Respondent herein was "no probable caused" on some of the charges at the grievance committee level, he should still be required to pay the Bar's costs. The majority of the time, exhibits, testimony, record and costs at the grievance

committee level were spent on the nine(9) charges on which "probable cause" was found, which was ultimately confirmed by action of the Bar's Board of Governors to be ten (10) charges of unethical conduct. It was no more than .05% of the work, labor, costs and time that was sent on the "extortion" issue, on which Respondent was found not guilty. The evidence and testimony was nearly all the same, except for brief testimony that the ethical misconduct was "tantamount to extortion".

Even if two-thirds (2/3) of the grievance committee level costs are deducted from the awardable costs, because Respondent was "no probably caused" on them, and even if .05% (for the "extortion" charge at the trial level) is also deducted, the total awardable costs are as follows:

Grievance Committee Level	
Total Bar Costs	$ 11,308.27
Two-Thirds (2/3) Costs	- 7,463.46
	$ 3,844.81
Referee Trial Level	
Total Bar Costs	$ 95,007.25
Sub-Total	$ 95,852.06
.05% (extortion charge) costs	- 47.93
Total	$ 95,804.13

The Bar does not believe any reduction should be permitted, however, if it is, then the awardable costs to the Bar, paid by the Respondent, should be no less than $95,804.13.

There is no evidence that the McCain rationale applies at Bar. as Respondent suggests.

> While we find that McCain has been shown by clear and convincing evidence to have committed the acts charged in Counts 3A and 3C, we must agree with the Referee that The Florida Bar took an excessively broad approach to this case and failed to early abandon counts that could not be proved. For this reason we find it inequitable to impose all costs of these proceedings upon McCain. Thus, each party shall bear its own costs.
>
> Accordingly, the Referee's Report is approved in all respects except punishment, and David Lucius McCain is disbarred from further practice of law in the State of Florida, effective immediately.
>
> It is so ordered. (Emphasis supplied). The Florida Bar v. McCain, 361 So.2d 700, 707 (Fla. 1978).

It was allegations that the Bar couldn't prove at trial and not grievance committee that the Court was referring to in McCain. A further examination of what Justice Hatchett wrote, clearly shows that the McCain analysis just does not apply here. We do not have an analogous situation in the least.

> In considering the assessment of costs, by referee reported that "[t]he Bar willfully undertook this most complex, expensive and time-consuming prosecution. It continued to prosecute this matter when it know or should have known from the advice of Bar Counsel that it could not prove a large number of the charges set forth in its amended complaint or its second amended complaint

> This entire matter was poorly and illogically planned by the Bar. It was laboriously presented before me at the final hearing. It has been largely a trial by insinuations, inferences, and innuendos accompanied by a minimum of evidence of a clear and convincing degree." McCain, at 708.

Respondent herein fails to appreciate that in McCain the attorney prevailed on eighteen (18) of twenty (20) counts before the referee at trial. At bar, Respondent was basically found guilty of all charges, except that the "misconduct" did not rise to the level of "extortion."

The Respondent never raised his specific and itemized objections to any specific Bar costs while the matter was before the Referee before initially being ruled upon by this Court on June 22, 1989. He never, at any time, for example, made any of the assertions he now contends; and further, Respondent never, at that time contended that the Bar's costs were unreasonable or unnecessary.

Lastly, we feel compelled to respond to the fee contract and newspaper article business. The Respondent is trying to infer or insinuate some wrongdoing on the part of the Bar by referring to a Broward Review article of July 28, 1989. This was not unlike Respondent's tactics at the trial below to try to cloud the issues, as well as taking words and phrases out of context in order to try to support his own view. To put the record straight, the entire article is here reproduced. This is done to further show that Respondent is throwing up a red herring and it has no relevance to the real issues.

A nice payday, if he can find the money

When Pompano Beach lawyer **Donald A. Wich Jr.** was named prosecutor in the Florida Bar's discipline case against former Fort Lauderdale lawyer **Alphonse Della-Donna**, he had no idea the job would consume six years and 2,250 hours of his time.

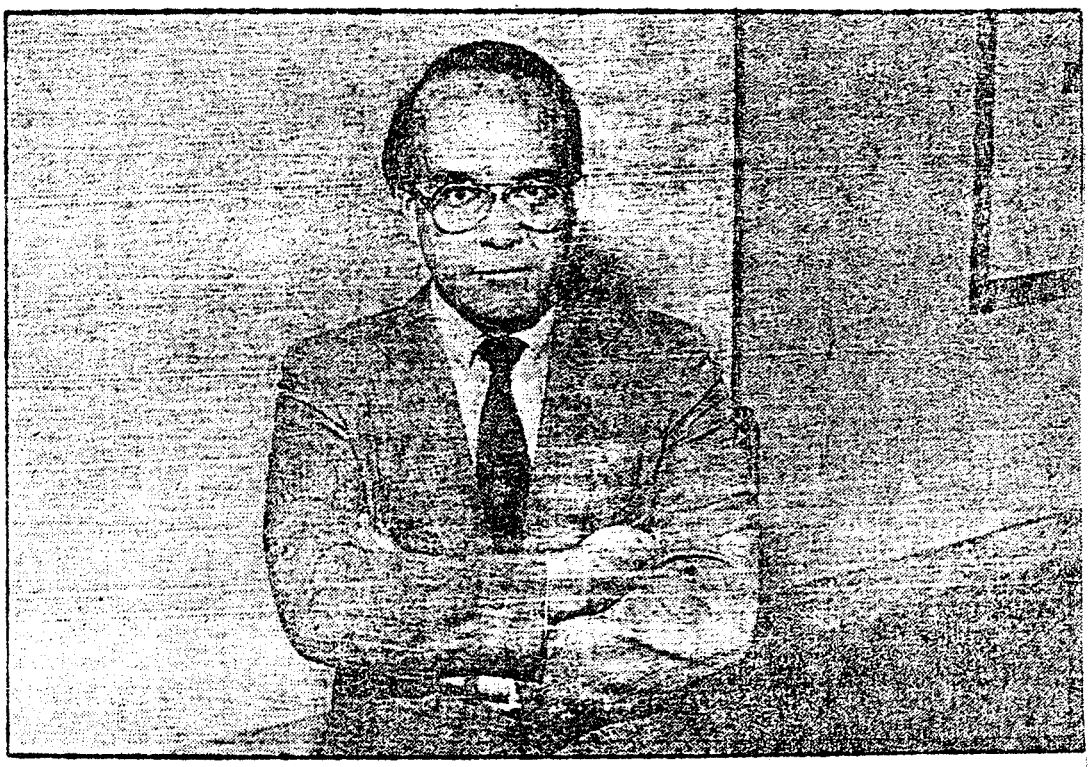
Because it did, the flat fee of about $54,000 that the Bar paid Wich works out to $24 an hour — a piddling sum for a name partner in five-lawyer **Sullivan, Bailey, Wich & Stockman** who normally charges $225 an hour.

Now, the Bar has found a way to boost that amount. The Board of Governors last week hired Wich to help collect the $96,988.37 that the Florida Supreme Court ordered Della-Donna to reimburse the Bar for the cost of its lengthy investigation. Wich will be able to keep one-third of what he recovers, plus costs.

Wich doubts the job will be easy.

"I think the assets are there," he said. "It is just a matter of finding them. It will be a task."

The Florida Supreme Court disbarred Della-Donna in June for five years after finding he had mishandled the $55 million estate of insurance tycoon Leo Goodwin Sr. and collected more than $3 million in fees by engaging in frivolous litigation and appeals. In the process, Bar investigators said Della-Donna nearly bankrupted Nova University, which was to get almost $16 million of the estate.



Donald A. Wich Jr., above, earned only about $24 an hour helping prosecute lawyer Alphonse Della-Donna, who was disbarred for mishandling the $55 million estate of insurance tycoon Leo Goodwin Sr.

In its disbarment order, the Supreme Court ordered Della-Donna to reimburse the Bar $104,700 it had spent investigating the case. That sum was since reduced to $96,988.37.

As a condition of reinstatement to the Bar, the court ordered Della-Donna to pay those injured by his actions nearly $450,000, including interest. Nova would receive approximately $200,000.

But it is doubtful Nova will get the money. Bar officials don't expect Della-Donna, 66, to seek reinstatement. He retired from the active practice of law two years ago, and resigned from the Bar last year.

— Mary Hladky

A fair and honest presentation of the chronology is that on June 22, 1989 this Court entered its opinion in Della-Donna and awarding the Bar $104,700.10 in a cost judgment. Respondent and the Bar moved for rehearing. The Bar on July 5, 1989 filed a Motion for Clarification and Rehearing seeking to have the cost judgment reduced. The actual costs sought were then $96,988.37. At its July, 1989 (July 18-22, 1989) Board of Governors meeting in Naples, Florida, the Bar voted to hire Bar Counsel, on a one-third (1/3) contingency basis to collect the cost judgment, which had been entered for $104,700.10 and anticipated to be reduced to $96,988.37. The contract was not fully signed until October, 1989. On October 24, 1989, this Court entered an Order remanding this cause for a recalculation of costs. The newspaper reporter reported on the action which was taken at the July Board meeting, which did not include any signing of a contract. A copy of the signed contract was first sent to Bar Counsel with a cover letter dated November 7, 1989. Any innuendo of Respondent that costs were somehow incurred in order to raise fees for Bar Counsel is both untrue and ridiculous.

With regard to the court reporter charges for the hearings, trial and depositions, the Bar relies on its argument in its Answer and Initial Cross Appeal Brief filed March 4, 1991. The entire court reporter paid bills should have been allowed as awardable costs and not reduced by the Referee. The substantial competent evidence is uncontroverted as to the reasonableness of the charges. The "additional" copy of the record was an unavoidable cost to the Bar and the Respondent should bear it.

Even Respondent's own expert who testified before the Referee stated that the charges were reasonable and customary. The following is an excerpt from the sworn testimony of Respondent Della-Donna's expert witness, Edward Lawrence, who was a certified court reporter. The questioning was conducted by counsel for The Florida Bar:

Q. And your appeal charge, original and two, was $5.05, correct?

A. Yes.

Q. In 1988, Capital Reporting was charging $5.50. Do you know whether or not that was reasonable at that time?

A. Yes. Based on the $3.25 and $2.20 thats $5.45, so it's close to that figure.

Q. So that $5.50 for an original and two in 1988 for the appeal preparation of the record was reasonable?

A. I suppose so. I don't quite understand why it would be more. Our $5.05 appeal charge comes about because the copies is $1.95 a page and the original is $3.10 which is $4.95. And if their rate was $3.10 and $2.00, I don't quite understand why it isn't $5.10. (Transcript of 3/1390, page 226-7).

Q. Have you ever prepared an original and one for an appeal?

A. Yes.

Q. Okay. Are you familiar with the Florida Rules of Appellate Procedure, 9.200(b)?

A. Somewhat.

Q. And it is customary in the court reporter business on the appeal record to prepare an original and two?

A. Yes, it is.

Q. And to bill the requesting party who has requested the transcript for the original and two?

A. Yes.
(Transcript of 3/13/90, pages 236-7).

CONCLUSION

All of the $103,315.52 incurred by the Bar were necessary and reasonable expenses in the proceedings against Respondent. The overwhelming majority of the costs were expended on the charges on which Respondent was found guilty. Even if a proportionate share of the costs are deducted for the "no probable cause" and "extortion" matters, the costs should be no less than $95,804.13 and a cost judgment entered for same.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to LARRY SIMPSON, ESQUIRE, 1102 North Gadsen Street, P.O. Box 10368, Tallahassee, Florida, 32302, JOHN A. BOGGS, ESQ. The Florida Bar Center, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 and THE HONORABLE HUGH MACMILLAN, Referee Retired Circuit Court Judge, 6614 Pamela Lane, West Palm Beach, FL 33405, by United States Mail on the 5th day of April, 1991.

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