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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ALPHONSE DELLA-DONNA,

Respondent.

_____/

SUPREME COURT CASE NUMBER: 69,324

THE FLORIDA BAR CASE NUMBER: 17E82F69

RESPONDENT'S REPLY AND CROSS-APPEAL ANSWER BRIEF

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SUMMARY OF THE ARGUMENT

The Bar's Brief further confirms Respondent's argument that the Bar has acted irresponsibly in the prosecution of this case. The Bar's Brief contains a series of factual misrepresentations that are clearly refuted by the record, together with other argument outside the record.

This Court should not approve or condone the Bar's actions in this case and, at a minimum, should require the Bar to pay the freight for its decision to present the "strongest possible case" against Respondent.

The Bar's cross appeal seeking to increase the cost assessment is without merit. At a minimum, the Referee had the discretion to reduce the Bar's claimed costs; however, the Referee should have gone farther, considered the Bar's irresponsible behavior and recommended that the Bar bear its own costs.

POINT I

THE FLORIDA BAR SHOULD BEAR ITS OWN COSTS

Contrary to the Bar's assertion, Respondent is not trying to reargue the merits. Respondent's only point is that, if the Bar's actions in this case are approved, then the words of Justice Sundberg in The Florida Bar v. McCain, 330 So.2d 712, 718 (Fla. 1976) mean nothing:

> The Florida Bar as an arm of this Court is charged to act responsibly. If it acts irresponsibly this Court has the power and the duty to impose appropriate sanctions against the offending members.

The Bar's Brief further demonstrates why this principle should be applied to this case because of the Bar's irresponsible conduct before the Grievance Committee, the Referee, and now before this Court. The Bar's Brief contains a series of self-serving declarations and erroneous representations (without any citations to the record) that are contradicted by the evidence and the overall circumstances of this case. The Respondent has repeatedly tried to draw this Court's attention to the Bar's strategy and can only hope that the Court will eventually put its foot down.

An excellent example of the Bar's tactics is on page 11 of the Bar's Brief, wherein Special Bar Counsel attempts to justify his actions in denying Respondent a copy of the trial transcript because "THE FLORIDA BAR had incurred an additional cost in having two(2) copies made of the trial transcript" (Bar's Brief at p.11). If this Court will simply review the transcript of the Cost

Hearing, it will see that the Bar spent nearly two days of argument and testimony at the cost hearing attempting to establish that there was no additional cost to the Bar from having two copies made of the transcript. The Bar's letter memorandum to the Referee summarized the Bar's position on costs and stated:

> The Referee has requested that the Florida Bar provide a breakdown of the cost of the Court Reporter's transcript for an original and one copy and an original and two copies of the record for appeal.
>
> Capital Reporting Service, Inc.'s reasonable charge to the Bar, which was their customary rate for transcription of the record for appeal and review purpose was as follows:
>
> For record for appeal:
> For an original and one copy $5.50/page
> For an original and two copies $5.50/page
>
> The court reporter, as was consistent with reasonable community standards, charged and billed the same whether there were two copies or one. This was the cost actually paid by the Bar in this case. (Bar's Letter Memorandum of July 23, 1990 at p.3)

Yet another example occurs on page two of the Bar's Brief, where Special Bar Counsel states that:

> 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. (Bar's Brief at p.2)

At a hearing on December 22, 1987, (prior to the initial Referee's Report), Respondent's counsel stated:

> And Your Honor, we'd like to point out further that the enormous costs that have been incurred in this case have been incurred by virtue of the activities of the Bar. I frankly find it difficult to believe that a case can go on from 1981.
>
> If the Bar felt like they had grounds for a complaint, surely, with all the wisdom that they have and the long arm of the Bar, they could have narrowed it down to a specific area instead of interviewing 80 lawyers and 12 judges and no telling who else that they got involved in these proceedings.
>
> Your Honor, I think that we would submit that the costs, the respective costs that have been incurred by both the Respondent and the Bar should be assessed against them individually; in other words, each should pay their own costs. (Hearing of December 22, 1987, at pgs. 55-56)

For the Bar to now say that Respondent never raised any objections to costs is nothing more than an outright misrepresentation. This type of misrepresentation[1] permeates this case and is found not only in the briefs, motions[2] and arguments[3] filed with this Court, but in the presentation of evidence to the

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[1]Respondent, in cross examination by Bar Counsel, charged:

> A. My position is in view of the corrupt proceedings that all the costs are improper....With all the false testimony that you allowed before the referee -- You, yourself, lied before the panel, before the Supreme Court in oral argument, and you filed a false pleading before the Court, the Supreme Court. And those things you cannot erase, Mr. Wich. (R(CH)-328)

[2]See Respondent's Initial brief at p.12.

[3]See Respondent's Motion For Rehearing filed July 7, 1989.

Referee, with some of them incorporated in the Referee's Original Report that was prepared by Bar Counsel[4].

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[4]For example, compare Bar Counsel's statement to the Referee "...the institution, NYIT, never did control NOVA anyway" (R-7239) that was later incorporated into the Referee's original Report written by Bar Counsel (paragraph 32), with the NOVA-NYIT contract of July 1, 1970 (RX-1):

> Six of Nova's present Board of Trustees shall continue as members of the new Board. The remaining trustees shall resign as of July 2, 1970, and shall then become members of Nova's Board of Governors.
>
> The Institute's [NYIT] Board of Trustees shall designate nine members who shall then be elected by Nova to Nova's new Board of Trustees as of July 1, 1970.
>
> In addition, Dr. Abraham Fischler, Nova's President, and Dr. Alexander Schure, Chancellor of Nova and of the University Consortium, shall also become members of Nova's Board of Trustees. When completed in accordance with the foregoing designations, the new Board of Trustees of Nova shall consist of 15 members plus the Chief Executive Officer of each college.

Thus, it is clear that NYIT possessed 10 of the 17 seats on NOVA's Board. The other documentary evidence is in accord: See the Official SACS Report (RX-2); (RX-2); ABA Report (RX-25) that states "effective control of Nova remains with the NYIT members of the board of trustees"; the Barton-Gillette Report (RX-24); NOVA's financial statements (CX-58). These Respondent's exhibits can be found in Respondent's Cost Hearing Exhibit #22.

Another example is found in paragraph 18 of the Referee's Report prepared by Bar Counsel stating that NOVA "reasonably relied upon" Respondent's alleged promises in late 1977 and early 1978 in making expenditures of approximately $215,000.00 for the architect's plans (RX(CH)(22)-14, 18). Compare that statement with the documentary evidence that NOVA had hired architects and began site preparations for the law school long before that time period (R-6127, 6141-4, 6154; RX(CH)(22)-2-12).

Also compare Bar Counsel's statement to the Referee that NOVA's attorney was "very candid with the Court" (R-7245) with that attorney's representations to Judge Richardson (RX(CH)(22)-136-138) and Judge Hoeveler (RX(CH)(22)-143-153): "There has been a distribution of funds....the money is available for our use" which is directly contradicted by the documentary evidence of the secret escrow agreement (RX(CH)(22)-172-178), NOVA's request to release the funds (RX(CH)(22)-139-140) and the Bank's refusal to do so (RX(CH)(22)-142).

It is impossible for any accused attorney to counter the Bar's extensive disciplinary machinery, when it is coupled with the tactics used by the Bar in this case. With the Bar's direction to present the "strongest possible case" against Respondent, Special Bar Counsel was given free rein to create a record that could be manipulated to support the Bar's desired result.

In its brief, the Bar repeatedly states that all of the Bar's expenses were "reasonable and necessary" and should be taxed against the Respondent. However, the Bar offers only two generic reasons why it went to such extraordinary lengths trying to prove the allegations against Respondent:

1. It was necessary to show the Referee the underlying facts of the case (Bar's Brief at p.7).

2. It was necessary to educate the Referee (Bar's Brief at p.10).

Respondent would respectfully submit that, while both of these reasons are laudable in a given case, this is not what the Bar did sub judice. A fact finder can be educated through many devices short of a thirty-five (35) day trial and a lawyer can be disciplined without an all out assault upon every action he took over a ten year period.

The Referee was fully "educated" on the case through eight days of extensive pretrial hearings, a thirty -two (32) page complaint with 250 pages of exhibits, as well as the Bar's opening statement that included charts and diagrams completely laying out the facts of this case for the Referee. (R-23 et seq)

The Bar did not merely seek to "educate" the Referee or to place the facts of the cases before the Referee. Instead, the Bar set out to present a massive prosecution that would overwhelm the Referee and the Respondent. As pointed out in previous briefs, the Referee repeatedly asked the Bar to simplify the issues and "not try everything that's ever happened in this courthouse" (R(A-II)-72, 73). Nevertheless, the Bar insisted on trying to prove every conceivable issue, while also introducing improper attacks upon Respondent's character; "Williams Rule" testimony; and evidence of matters no probable caused, tactics which the Bar concedes were used in this case.

The Bar created this monster record, but does not include any record citations[5] in its brief while adding facts d'hors the record, e.g. that Sally Determan is past-president of the Washington D.C. Bar Association. No testimony to that effect ever came before the Referee. More importantly, Bar Counsel's statement that Respondent did not re-depose Determan because she did not agree with his interpretation of certain documents (Bar's Brief at p.14) is likewise without record support.

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[5]The Bar's only record citation is to R-6233-34, a record citation provided by Respondent in his Initial Brief. Furthermore, to date, in Briefs filed with this Court, Respondent has included over 600 direct citations to the record, while the Bar has made 17 citations to the record of which 14 were to the testimony of two witnesses whose testimony was in direct conflict with documentary evidence discovered after the underlying litigation ended. See Footnote #11 of Respondent's Initial Brief.

The Bar now claims that it was Respondent's obligation to produce Sally Determan at trial, but it is clear from the record that the Referee expected the Bar to call her as a witness - not Respondent (R-5507, 6178, 7117). The Bar simultaneously criticizes Respondent for taking depositions during the grievance committee process (Bar's Brief at p.9), and criticizes him for not taking Determan's deposition in Washington, D.C. (Bar's Brief at p.14).

The Bar also states that the Referee was not justified in reducing the grievance committee expenses because "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" (Bar's Brief at p.9). There is likewise no support in the record for this statement. The only evidence in the record on this point is found in the pre-trial hearings when Respondent's counsel stated that 60% of the grievance committee transcripts involved proceedings where no probable cause was voted and another 20% dealt with inadmissible matters (R(A-III)-55). These statements were not contested by Bar Counsel.

Special Bar Counsel also attempts to justify the contingent fee agreement[6] that he has with the Bar saying he could never be "monetarily compensated" for his time in this case. It is indeed ironic that the Bar with its massive disciplinary machinery and

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[6]The contingent fee agreement produced by Special Bar Counsel is dated October 27, 1989. The newspaper article that reported the existence of this contingent fee agreement is dated July 28, 1989, three months earlier. (See Respondent's Motion To Unseal Respondent's Exhibit Number 7 (For Identification) filed December 28, 1990.)

financial resources must resort to a contingent fee agreement to pay its lawyer. How can a sole practitioner, faced with this same machinery, possibly expect to compete on a level playing field? While the Bar was running up a tab of over $100,000.00 in costs, the Respondent incurred over $42,000.00 in out-of-pocket expenses attempting to defend himself (R(CH)-303). While the Bar is quick to point out that this case has been ongoing for ten years, it conveniently ignores the devastating effect, financially and otherwise, on a Respondent whose conduct is under scrutiny. Under the circumstances of this case, the vast majority of Florida lawyers simply could not afford to undergo the rigors of a prosecution of this sort.

In a nutshell, the Bar's argument in this appeal is that this Court should approve the Bar's actions in targeting Respondent to present the "strongest possible case" against him; hiring Special Counsel and giving him unlimited resources to secure the conviction; proceeding with a massive complaint containing three major areas[7], any one of which, if proven, would justify discipline; and using extensive collateral evidence dealing with Respondent's character and matters that were no probable caused.

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[7]The Bar's Brief attempts to downplay the fact that there were 434 potential charges in the complaint. Nevertheless, Respondent was exposed to discipline if any one of the 434 permutations of the myriad of alleged rule violations were committed. Thus, all 434 had to be defended. This is unlike the grievance committee proceedings where the Bar "shotgunned" twenty-four charges against Respondent only to lose on all but nine. Rather than take a chance of likewise losing the majority of the charges before the Referee, the Bar created a sophisticated complaint with multiple rule violations that would justify conviction upon virtually any set of facts.

The Bar, while condemning Respondent for allegedly fighting a "war of attrition" against his opponents in lawsuits, resorted to the exact same tactics to secure Respondent's conviction in this case and should not be rewarded for doing so. Is the Bar now resorting to giving a lawyer a "dose of his own medicine" in disciplinary cases?

The Bar claims that the Respondent's contentions on this appeal are diversionary tactics that unjustifiably criticize the Bar's actions. The Respondent would respectfully point out that he is not alone in his criticism of the Bar in this case. Throughout the proceedings, the Referee criticized the manner in which the case was handled. Beginning with the pre-trial hearings wherein the Referee repeatedly urged the Bar to simplify the issues (R(A-II)-72, 73; R(A-III)-22, 23) and continuing throughout the trial to the cost hearing when the Referee called into question the "policy and propriety" of the Florida Bar entering into a contingent fee agreement with Special Bar Counsel (REF(CH)-6), the Referee voiced his concern over the Bar's actions.

The Bar's cross appeal seeking to tax the full amount of $103,315.52 in costs against Respondent is totally without merit. At a minimum, the Referee found that one-half of the claimed court reporter charges and five-eighths of the Grievance Committee expenses were not reasonable and necessary and accordingly reduced the Bar's costs to $63,306.17 (REF(CH)-3,6). There is ample evidence and justification for the Referee to reduce these costs; however, the Referee should have gone farther, considered the Bar's

irresponsible behavior and recommended that the Bar bear its own costs.

Respondent also recognizes that generally this Court adopts the discretionary approach to the taxation of costs in disciplinary matters. The Florida Bar v. Davis, 491 So.2d 325 (Fla. 1982). However, it is also clear that when the Bar fails to turn "square corners" this Court has taken appropriate corrective action that has involved dismissal of charges, The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978); and requiring the Bar to absorb its own costs even though the attorney was disciplined and disbarred, The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). Respondent would respectfully submit that this Court should not condone the Bar's actions in this case and should require the Bar to pay the freight for its decision to present the "strongest possible case" against him, while using the tactics that it did.

CONCLUSION

The Bar's actions in this case should not be approved or condoned. At the least, the Bar should be required to bear its own costs consistent with the dictates of The Florida Bar v. McCain, supra, and The Florida Bar v. Rubin, supra.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U.S. Mail to Mr. Donald A. Wich, Sullivan, Bailey, Wich & Stockman, P.A., 2335 East Atlantic Boulevard, Suite #301, Glendale Federal Building, Pompano Beach, Florida 33062, this 29th day of March, 1991.

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