IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

SANDRA E. ALLEN,

Respondent.

_____/

CASE NO. 71,019
TFB NO. 86-21,271 (20A)

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar." The Appellee, Sandra E. Allen, will be referred to as "the Respondent." "TR" will denote the transcript of the hearing on costs, held July 6, 1988. "RR" will denote the Report of Referee.

STATEMENT OF THE FACTS AND THE CASE

Respondent has no quarrel with the accuracy of the Bar's statement of facts. However, certain other material factors need to be brought to this Court's attention.

In the Bar's initial complaint and the amended complaint (there is no material distinction between the two complaints), Respondent was charged with numerous disciplinary rule violations. Ultimately, as reflected in her consent judgment, she stipulated to three disciplinary rules relating to conflict of interest [Disciplinary Rules 5-101(A), 5-104(A), and 5-105(A)] and to two generic rule violations [Disciplinary Rule 1-102(A)(6), prohibiting conduct adversely reflecting on one's fitness to practice, and Integration Rule 11.02(3)(a), proscribing conduct contrary to honesty, justice, or good morals]. The Bar abandoned its claims that Respondent violated Disciplinary Rules 1-102(A)(4), prohibiting conduct involving fraud, dishonesty, misrepresentation or deceit; 5-105(B), proscribing the continuation of multiple employment if there is a conflict of interest; and 7-101(A)(3), which prohibits a lawyer intentionally prejudicing or damaging his client during the course of the professional relationship.

As part of the stipulated settlement to this case, The Florida Bar struck from its complaint paragraphs 18 through 22. The gravamen of those five paragraphs was that Respondent misled her client, refused to provide her client with a copy of a lease, and that her actions cost the client $5,000.

The Bar's amended complaint contained 23 counts of misconduct. Respondent either admitted or did not deny 10 of those paragraphs. Ultimately, the Bar abandoned 5 paragraphs and 6 others were modified by stipulation.

On the morning of final hearing, The Florida Bar accepted an outstanding offer by Respondent to enter into a consent judgment for a public reprimand.

In his report accepting the consent judgment jointly tendered by The Florida Bar and Respondent, the Referee assessed against Respondent costs in the amount of $1,616.30. They included $300 in administrative costs, $399.77 court reporter expenses, Bar counsel travel expenses totaling $853.50, and $63.03 staff investigator charges.

The Referee only denied the Bar $1,819.48 in expenses incurred by one of its investigators. That investigator claimed to have spent 104½ hours on Respondent's case.

In assessing costs, the Referee made the following statement in the last paragraph of his report:

> Of these costs, I recommend that Respondent be assessed $1,616.30. In making this recommendation, I have considered the specific language of Rule 3-7.5(k)(5) and the holding of the Supreme Court of Florida in The Florida Bar v. Gold, 13 FLW 368 (Fla. 1988). I am of the opinion that 104½ hours investigation time is excessive and unreasonable.

The Bar has appealed the Referee's denial of its investigative costs.

SUMMARY OF ARGUMENT

The Referee has the discretion to assess costs in disciplinary proceedings and his recommendation will not be disturbed unless it is unreasonable. There are numerous instances where Referees have either denied the Bar any costs or have divided them on equitable grounds despite a finding that a respondent is guilty of unethical behavior.

Rule 3-7.5(k) does not require the Referee to assess investigative costs. In fact, the Referee found in the instant case that one of the investigators' hours on the case, totaling 104½ hours, was "excessive and unreasonable."

The Bar over-investigated this case. They tried to find something where nothing existed. Finally, immediately prior to final hearing, the Bar acknowledged that it could not present evidence to support a substantial portion of its case, and agreed to an outstanding offer to settle for a public reprimand.

For all intents and purposes, the most serious allegations against Respondent were, commendably, dropped by The Florida Bar due to a lack of evidence. After considering the numerous allegations that were not proven, it was not unreasonable of the Referee to award to The Florida Bar slightly less than half of its costs spent in pursuing its case.

It is this Court's policy that innocent members of the Bar should not be penalized the costs of pursuing disciplinary proceedings against lawyers guilty of wrongdoing. However, it should not be this Court's policy to penalize Respondents not

guilty of serious allegations by assessing against them "excessive and unreasonable" costs needlessly expended while pursuing groundless allegations.

The Referee specifically considered the clear language of Rule 3-7.5(k)(5), which does not require the assessment of investigators' time. He assessed some staff investigator time against Respondent and assessed all of the Bar's lawyers' expenses, totaling some $853.50. These expenses included the cost of sending <u>two</u> Bar counsel to various pretrial meetings and to the final hearing (Respondent had but one counsel). The Referee specifically found that the bulk of the Bar's investigative time was excessive and unreasonable, and it was within the parameters of his discretion to not assess them.

Absent a showing of unreasonableness, the Referee's recommendation as to cost should be upheld.

ARGUMENT

POINT ON APPEAL

THE REFEREE'S RECOMMENDATION THAT ALL OF THE BAR'S INVESTIGATIVE COSTS NOT BE ASSESSED AGAINST RESPONDENT WAS WITHIN HIS DISCRETION, WAS A REASONABLE PROPORTION OF THE BAR'S INVESTIGATIVE EXPENSES, AND SHOULD NOT BE DISTURBED.

A. The Referee in Disciplinary Proceedings Has the Discretion to Deny the Bar an Award of Excessive Costs.

Rule 3-7.5(k)(1)(5) requires a Referee to include in his report a statement of costs and a recommendation as to the manner in which costs should be taxed. The rule then lists certain expenses which shall be charged against the Respondent. Investigators' costs is not mentioned anywhere within that rule.

Previous decisions of this Court indicate that Referees have wide discretion in assessing costs in disciplinary proceedings. The most significant opinion of this Court relating to this issue is The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). In that case, after a contested final hearing, the Referee found the accused lawyer guilty of one of the three counts brought against him. In his assessment of costs, the Referee ordered the Respondent to pay $5,026 of the $16,977 of the costs incurred by The Florida Bar. The Bar challenged the Referee's recommendation as to costs. In upholding the Referee's decision, this Court stated on page 328 that:

> The bar incurred costs much greater than those recommended by the referee. The underassessment of costs was caused in part by the finding of not guilty in two of the three charges. The referee recommended one-third recovery on some of the costs such as the

> court reporter. The underassessment was likely influenced by a perception of the referee that the costs were greatly disproportionate to those generally generated in a disciplinary action. We have set no hard or fast rules relative to the assessment of costs in disciplinary proceedings. In civil actions the general rule in regard to costs is that they follow the result of the suit, Section 57.041, Florida Statutes (1981), Dragstrem v. Butts, 370 So.2d 416 (Fla. 1st DCA 1979), and in equity the allowance of costs rests in the discretion of the court. National Rating Bureau v. Florida Power Corp., 94 So.2d 809 (Fla. 1956).
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> We hold that the discretionary approach should be used in disciplinary actions. Generally, when there is a finding that an attorney has been found guilty of violating a provision of the code of professional responsibility, the bar should be awarded its costs. At the same time, the referee and this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable. The amount of cost in these circumstances should be awarded as sound discretion dictates. In this case the bar submitted no information on its cost restricted to count I. We find that the referee's recommendation of allowing one-third of certain costs where there has been a finding of guilt on one charge but not on two others to have been reasonable.

Clearly, Davis permitted the Referee in the instant case to deny the Bar an award of all of its costs. He obviously considered the fact that Respondent was "acquitted on some charges" and he specifically found that some of the Bar's costs were "unreasonable."

The plain language of Rule 3-7.5(k) does not require a referee to automatically assess costs against a Respondent. For example, in The Florida Bar v. Weed, 513 So.2d 126 (Fla. 1987), no costs were assessed because The Florida Bar presented no evidence to the Referee on costs, and the Bar did not appeal his decision.

This Court has upheld the recommendations of referees in at least two prior cases that no costs be assessed despite a guilty finding. In The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978), no costs were awarded to The Florida Bar even though the accused lawyer was disbarred. This Court emphatically upheld the Referee's recommendation that none of the Bar's $25,908 in costs be charged to the Respondent because of its shotgun approach to prosecuting the case, and because the Bar did not abandon counts after it was learned that there was no evidence to support them. In fact, the Respondent was acquitted of 18 of the 20 counts brought against him. Similarly, in State ex rel. Florida Bar v. Bieley, 120 So.2d 537 (Fla. 1960), costs were not assessed against the Respondent because of the Bar's delay in prosecuting the action.

On at least three occasions, this Court has upheld a Referee's recommendation that costs be assessed in rough proportion to the Respondent's success in defeating the charges brought by the Bar. In Davis, supra, less than one-third of the Bar's costs ($5,026 of $16,977) were assessed after Respondent was found guilty of one of three counts brought against him. In The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968), this Court approved the Referee's recommendation that one-half of the costs incurred by The Florida Bar be assessed against the Respondent after he was found guilty of two of the four counts brought. Similarly, in The Florida Bar v. GBT, 399 So.2d 357 (Fla. 1981), the costs were split evenly between Respondent and The Florida

Bar after he was found guilty of one of the two counts brought against him.

The undersigned has been able to find no cases in Florida disciplinary jurisprudence where this Court has said that a Referee must assess any costs, let alone excessive investigative costs. The Florida Bar v. Gold, 526 So.2d 51 (Fla. 1988), is not inconsistent with Respondent's position.

In Gold, the Referee exercised her discretion and assessed all of the Bar's costs against Respondent. The Court upheld the Referee's rejection of Mr. Gold's argument that the Bar carelessly incurred excessive costs. The Court then noted that they found nothing in the record to suggest that the Bar's costs were "unnecessary, excessive, or not properly authenticated." In other words, the Referee in Gold made a factual finding, i.e., the Bar's costs were reasonable, and the Respondent was not able to show on appeal that her findings were without basis.

In the case at bar, the Referee specifically found that the Bar's investigative costs were "excessive and unreasonable." His recommended denial of costs is within his sound discretion and is reasonable, and should not be disturbed on appeal. The Florida Bar v. Davis, supra.

B. The Referee's Assessment of Costs in the Instant Case is Reasonable and Should Not be Disturbed.

In The Florida Bar v. Davis, 419 So.2d 328 (Fla. 1982), this Court held that the discretionary approach should be followed in

awarding costs in disciplinary proceedings. There, this Court found that the Referee's recommendation that the Bar receive but one-third of its costs was reasonable and upheld it. A similar finding is appropriate in the instant case.

Paragraph 23 of the Bar's complaint charged Respondent with numerous disciplinary rule violations. The most serious of those allegations were the ones abandoned by the Bar: engaging in conduct involving dishonesty, fraud, deceit, and misrepresentation in violation of DR 1-102(A)(4); intentionally prejudicing the client during the course of the representation in violation of DR 7-101(A)(3); and continuing a conflict of interest after learning of its existence in violation of DR 5-105(B).

The most serious allegations against Respondent were contained in paragraphs 13 through 15 and 18 through 22 of the Bar's complaint. The language of the Bar's allegations in paragraphs 13 through 15 was substantially modified and the allegations in the latter five paragraphs were dropped.

Paragraphs 13, 14, and 15 charged Respondent with participating in the improper purchase of liquor with the Soozi's license, improperly using Soozi funds to do so, and then illegally participating in the transportation of that liquor. Respondent is innocent of those charges.

The consent judgment agreed to by the party indicates that while improper activities may have taken place, Respondent's only misconduct was a failure to monitor the business sufficiently to uncover any improprieties.

The allegations dropped by the Bar included charges that Respondent lied to her client, refused to provide him with documents upon demand and, impliedly, cost him $5,000. The Bar commendably dropped those charges because the evidence showed them to be without basis.

Respondent has successfully defended herself against the most serious charges brought by the Bar. While she has acknowledged a conflict of interest, the Bar has acknowledged she is not guilty of dishonesty, fraud, deceit, misrepresentation, and intentionally prejudicing her client. The Referee should be able to, and obviously did, consider the Bar's lack of success in awarding costs.

In futilely trying to prove groundless allegations brought against the Respondent, the Bar's investigator needlessly expended 104½ hours of time which, when billed at $15.50 and added to his expenses of $199.73, totaled $1,819.48. At hearing, the Referee found that this expenditure of time on the case at bar was excessive and unreasonable. His findings are well-taken.

A referee does not operate in a vacuum. He can readily determine what misconduct incurred and can judge what efforts it took to prove up that misconduct.

The Bar argues that it was necessary to spend its time investigating the case because Respondent initially denied numerous allegations against her. Clearly, she was justified in denying the violations of misconduct involving fraud, deceit, dishonesty, and misrepresentation and intentional conduct which

prejudiced her client contained in paragraphs 13 through 15, and paragraphs 18 through 22.

In her answer to the Bar's complaint, Respondent admitted or else did not deny 10 of the 23 paragraphs of the complaint. At the final hearing before the Referee, 5 of the paragraphs of the complaint were dropped, and of the remaining paragraphs denied by Respondent, all but 3 of them were modified in the consent judgment.

In essence, The Florida Bar wasted its investigator's time pursuing groundless leads and trying to dredge up evidence that simply did not exist. Respondent should not now be penalized because The Florida Bar insisted on flogging a dead horse. She is still being assessed a material portion of the Bar's costs (i.e., 47%), which is about the same percentage of the Bar's allegations that were proven up.

In denying the Bar approximately one-half of its costs, the Referee might well have taken note of the extensive travel expenses incurred by Bar counsel in investigating this case. In fact, over $850 of the costs assessed are attributable directly to counsel investigation and travel. The Referee might also have noted in the Bar's statement of costs that it took two of its staff lawyers to simultaneously conduct interviews in this matter and to independently travel to Naples for the prosecution of the case. (Respondent is not asserting any impropriety by the Bar's using two lawyers. She is asking this Court to note, however, that the Referee may have elected to decide that only one staff lawyer was necessary for the prosecution of this matter.)

While the Bar argues that the Referee ruled that he cannot assess investigator's costs, he did just that. Included on page 3 of the Referee's report is an assessment of $63.03 in staff investigator expenses. Clearly, the Referee did not have a philosophical objection to assessing investigator costs, he just found that the 104½ hours expended by Investigator Smith was excessive and unreasonable.

In Gold the Referee found that all of the Bar's costs were reasonable. In the instant case, the Referee found that a portion of the Bar's costs were excessive and unreasonable. Both referees acted within their discretion in making their recommendations. This Court upheld the Referee in Gold. It should uphold the Referee in the case at Bar.

In Davis, supra, this court found that a referee's apportionment of costs based loosely upon the Bar's success in proving up its case was "reasonable." In these proceedings, the Bar has the burden of proving that the Referee's recommendation is unreasonable. They have not done so. Accordingly, the Referee's recommendation should be upheld, the consent judgment should be adopted by this Court, and this matter should be laid to rest.

CONCLUSION

The Referee acted within the parameters of his discretion in recommending that Respondent be assessed $1,616.30 in costs. His recommendation is not unreasonable and it should be upheld. The consent judgment and the report of referee filed in this cause should be adopted by this Court without modification.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief was mailed to Thomas E. Deberg, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport, Marriott Hotel, Tampa, Florida 33607, on this 3rd day of October, 1988.

JOHN A. WEISS