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IN THE SUPREME COURT OF FLORIDA

CLERK OF THE COURT
Deputy Clerk

THE FLORIDA BAR,

Complainant,

CASE NO. 71,019

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

v.

SANDRA E. ALLEN,

Respondent.

_____ /

COMPLAINANT'S REPLY 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. "RA" will denote Respondent's answer.

STATEMENT OF FACTS

Complainant has no objection to respondent's supplement to complainant's Statement of Facts in the Initial Brief.

SUMMARY OF ARGUMENT

Respondent sought to strike investigator's costs based on the failure of Rule 3-7.5(k) to specifically state that an investigator's costs should be included in the report of referee. (TR, p.5, L.12-14). Respondent's challenge was limited exclusively to the \$1,619.75 in fees paid to the investigator. (TR, p.6,L.9-11). Respondent made it clear to the referee that the investigator's out of pocket expenses that the Bar reimbursed him for were not being challenged. (TR. p.6, L.6-7). All investigator costs challenged based on the wording of Rule 3-7.5(k) were denied. The assessment of unchallenged investigator's costs does not suggest that challenged costs were denied by the Referee based on something other than Rule 3-7.5(k).

The referee does indicate that it was hard for him to fathom 104 hours of investigative work (being required) and wondered whether or not there was a case of over billing. (TR, p.14, L.15-21). He was of the opinion that this amount of hours was excessive and unreasonable. (TR, p.15, L.12-18). However, he did not state that the basis for denying the costs was their unreasonableness, nor did he indicate the amount of hours which he felt would be reasonable.

Payment of reasonable investigator's fees is not precluded by Rule 3-7.5(k), and this case should be remanded for a determination of the amount of investigator's fees which should be assessed against the respondent.

RESPONSE TO ARGUMENT

The Florida Bar does not contest respondent's argument that the Referee in a disciplinary proceeding has the discretion to deny the Bar an award of excessive costs. The Bar does contest the statement by respondent that the Referee "obviously considered the fact that respondent was acquitted on some charges." No statement to that effect was made by the Referee.

The Florida Bar has not contended that the Referee is required to assess investigator's fees in the instant case. It has requested that This Court determine whether or not investigator's fees are an allowable costs which may be assessed against a respondent. The Bar has further requested that the matter be referred to the Referee for a determination of the extent to which the investigator fees in the instant case are reasonable.

The respondent accurately indicates that the most serious allegations against the respondent were not incorporated into the Consent Judgment. She goes on to indicate that the Referee should be able to consider the Bar's lack of success in awarding costs. The report of referee does not, however, indicate that the denial of investigator fees was related to the fact that the Consent Judgment did not reflect findings of guilt on all specific allegations against the respondent.

Respondent states that she is being assessed the material portion of the Bar's costs, reflecting about the percentage of the Bar's allegations which were proven up. (RA, p.11). However, the investigator fees were denied in total, without regard to whether they were related to proven or unproven allegations. The investigator fees were the only costs challenged by the respondent. The assessment of unchallenged costs should not be a factor in determining the extent to which challenged investigator fees should be assessed. Further, the percentage of allegations proven is not an adequate basis for determining whether or not the portion of Bar costs assessed was reasonable. Obviously some allegations require far more investigation than others, and investigative efforts are not limited to one allegation at a time.

Respondent notes that the Referee may well have taken note of the extensive travel expenses incurred by Bar counsel in investigating this case. She further suggests that the Referee may have elected to decide that only one staff lawyer was necessary for the prosecution of this case, and taken that into account in making his decision. (RA, p.11). Respondent's suggestions are highly speculative, especially in light of respondent's unequivocally indicating to the referee that she was exclusively challenging investigator costs.

Respondent states that clearly the Referee did not have a philosophical objection to assessing investigator costs, since he

did assess \$63.03 in staff investigator expenses. (RA, p.12).

The respondent stated very succinctly and clearly to the Referee that she was not challenging the investigator's out of pocket expenses (TR, p.6, L.6-7). The matter of whether or not these particular types of costs are assessable under Rule 3-7.5(k) was not before the Court.

The Florida Bar does not contest the statement that the Referee was of the opinion that the investigator fees were excessive and unreasonable. The Bar simply reiterates its position that denial in total of investigator's fees was based on the respondent's challenge to the assessability of such fees under Rule 3-7.5(k). If in fact the Referee elects to deny a portion of the investigator's fees because he finds them unreasonable, the Florida Bar should be afforded an opportunity to present to the Court evidence to support the reasonableness of the expenditure of investigator time.

CONCLUSION

The issue before this Court is whether or not investigator costs may be assessed against an attorney who is found guilty of misconduct in a Bar proceeding.

It is the Bar's position that investigator fees may be assessed against the respondent to the extent they are reasonable, and that they are not excluded as allowable costs simply because they are not specifically listed within Rule 3-7.5(k), Rules of Discipline, as a cost that shall be assessed.

WHEREFORE, The Florida Bar respectfully requests that this Honorable Court reject the referee's denial of investigator costs and remand the matter for a hearing to determine reasonable investigator fees.



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