IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

PAUL S. CARR,

Respondent.

Case No. 72,576
TFB No. 87-26,050(13D)

COMPLAINANT'S ANSWER BRIEF

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent's Facts and Statement of Case contains many misrepresentations and distortions. As he did in letters and pleadings sent to the referee during the period between the final hearing which concluded on February 8, 1989 and the issuance of the Report of Referee on May 19, 1989, respondent has set forth many so-called "facts" which are not found in the record below.

Respondent has also accused The Florida Bar of electing to continue prosecuting this case on charges which were weak and unsupported by complainant's witnesses and evidence. It is important to note, however, that at the conclusion of the final hearing on February 8, 1989, the referee indicated his preliminary findings as follows:

> "That's a real concern to me and it's a concern to me that even if he did not suborn the perjury, that he has a duty as an officer of the Court to be very careful that people who he presents to the Court do not perjure themselves and under these rules for false statements, fraud and misrepresentation, we have certainly negligence and we almost have a level of negligence--we have two cases such as this that rises to the level that would require some period of suspension and some period of rehabilitation." (Transcript - February 8, 1989, Vol. 6, page 878, lines 13 through 25).

"In other words, what I'm saying is at the very least I would find would be a public reprimand and I would probably look towards some period of suspension but probably not over the ninety days. What I would probably--if I'm free to do what I want to do, I would probably give you a period of suspension followed by some probation, require you to take some ethics courses, some evidence courses, probably a period of probation following that." (Transcript - February 8, 1989, Vol. 6, page 879, line 19 through page 880, line 4).

"I think I've indicated here that part of my ruling is going to be on the basis of what I've got in front of me which is six people have come in that say Paul Carr took me into Court and I committed perjury. That's been the testimony that I've heard. That concerns me." (Transcript - February 8, 1989, Vol. 6, page 881, lines 14 through 20).

SUMMARY OF ARGUMENT

I. The referee did not abuse his discretion in recommending that each party bear their own costs in this proceeding. The respondent's reliance on civil case law and statutory authority for the awarding of costs is misplaced.

ARGUMENT

ISSUE: WHETHER THE REFEREE ABUSED HIS DISCRETION IN RECOMMENDING THAT EACH PARTY BEAR THEIR OWN COSTS INCURRED IN THESE PROCEEDINGS.

The taxation of costs is a matter traditionally within the discretion of the trial court. del Real, M.D. vs. Dawson, 320 So.2d 20,21 (Fla. 4th DCA 1975). The referee in the instant case properly exercised the discretion provided to him under Rule 3-7.5(k) (1)(5), Rules of Discipline, when he recommended that each party shall bear their own costs incurred in this matter. Report of Referee, Section V.

It is a well-established principle that the discretionary decision of a trial court should not be reversed absent a finding of a clear abuse of that discretion. Astor v. Astor, 89 So.2d 645, 648 (Fla. 1956). The respondent has failed to set forth any portion of the record below or any authority which would support a finding that the referee clearly abused his discretion in the matter of the awarding of costs.

In addition, it is significant that the respondent failed to request the awarding of costs from the referee. On or about March 13, 1989, the respondent, pursuant to the request of the referee, submitted a written Memorandum to the referee. The Memorandum never requested the taxation of costs against The

Florida Bar.

Respondent has cited The Florida Bar vs. Lehrman, 485 So.2d 1276 (Fla. 1986), for the proposition that a prevailing attorney in a Bar disciplinary proceeding is entitled to taxation of costs against The Florida Bar. Respondent has either intentionally or unintentionally misread the Lehrman case and its holding.

In The Florida Bar vs. Lehrman, this Court addressed the question of a referee charging The Bar for the costs of a transcript of the grievance committee hearing. The respondent in Lehrman had been found guilty of violating various provisions of the Code of Professional Responsibility and the Integration Rule of The Florida Bar. This Court held that charging The Florida Bar for the cost of the grievance committee transcript would have been appropriate had the respondent been exonerated of the charges. Id. at 1278. The Court did not hold, as respondent alleges, that an exonerated respondent is entitled to the taxation of costs against The Florida Bar.

Respondent has also completely overlooked the amendment to Rule 3-7.5(k)(1), Rules of Discipline, which took effect April 20, 1989, while this matter was pending before the referee. (See The Florida Bar In re: Amendment to Rules Regulating The Florida Bar, Rule 3-7.5(k)(1) Cost of Proceedings, 542 So.2d 982 (Fla. 1989). Rule 3-7.5(k)(1)(5), Rules of Discipline, is now specific in that it relates only to "costs incurred by The Florida Bar".

(emphasis supplied). While respondent may argue it is unfair to allow only for the taxation of those costs incurred by The Florida Bar, respondent obviously failed to file an objection or comment with this Court prior to the amendment's approval by this Court.

Respondent has cited The Florida Bar vs. McCain, 361 So.2d 700 (Fla. 1978), for the proposition that "it is basically wrong for The Florida Bar to pursue cases against lawyers when the evidence and testimony are inherently weak and fail to support the allegations of wrongdoing." A close reading of The Florida Bar vs. McCain reveals no language which supports respondent's reliance upon this case. In addition, as was pointed out in the Statement of the Case and of the Facts, the referee clearly did not feel that The Florida Bar's case was inherently weak.

The respondent has also argued that the costs of this proceeding "would have been automatically taxed against respondent had respondent been the losing party." As The Florida Bar vs. McCain shows, however, costs are not automatically taxed against a guilty respondent in attorney disciplinary proceedings.

In The Florida Bar vs. McCain, this Court disbarred the respondent yet held that each party would bear its own costs. Id. at 707. If it is appropriate for The Florida Bar to bear its own costs in a case which resulted in disbarment, then it is also appropriate for a respondent attorney to bear his own costs in a

case in which the referee made a preliminary finding of misconduct by the respondent.

The respondent states he has learned from "overhearing conversations of other attorneys" that costs have been taxed against The Florida Bar in cases wherein the attorney was exonerated. The respondent has failed, however, to cite a single case in support of his position.

Respondent has cited Section 57.041, Fla. Stat.(1967), and numerous cases for the proposition that costs should be awarded to the prevailing party and that costs should follow the judgment. The statute and prior court decisions relied upon by respondent are inapplicable in a Bar disciplinary matter as they are based upon either other court rules or statutory provisions which have not been specifically authorized by the Rules Regulating The Florida Bar. Since the Rules Regulating The Florida Bar set forth the manner in which costs should be taxed, these rules prevail over any contrary statutory or case law.

Respondent's reliance upon Section 57.105, Fla. Stat.(1988), in seeking the award of attorney's fees is totally misplaced. First of all, Section 57.105, Fla. Stat.(1988), applies "in any civil action". Rule 3-7.5(e)(1), Rules of Discipline, clearly provides that "a disciplinary proceeding is neither civil nor criminal but is a quasijudicial administrative proceeding." In addition, respondent's assertion that there was a complete

absence of a justiciable issue of either law or fact is refuted by the referee's preliminary findings set forth in the Statement of the Case and of the Facts.

It is also well-settled that attorneys' fees cannot be awarded unless authorized by statute, by contract or by agreement of the parties. Dorner vs. Red Top Cab & Baggage Co., 37 So.2d 160, 161 (Fla. 1948). There is no applicable statute, nor has there been an agreement of the parties for payment of attorneys' fees in the present case.

If this Court should decide that respondent is entitled to any costs it is imperative that this matter be referred to the referee for a hearing on the costs to be assessed and the reasonableness thereof. Many of the costs set forth in respondent's Affidavit of Costs are ridiculous. For example, respondent lists "administrative costs" in the amount of $64.00 for "payment of parking ticket fines to the clerk of county court in Sarasota, Florida and to city [sic] of Bradenton." In addition, respondent has included $30.00 for "costs of hiring laborer to transport numerous boxes of court files to and from the court room [sic] during Referee Hearing." Obviously, these costs and many others set forth in respondent's Affidavit of Costs are not appropriate under any circumstances.

CONCLUSION

The referee properly exercised his discretion in recommending that each party bear their own costs incurred in this matter. This Court should deny the relief requested by the respondent. In the alternative, this Court should remand the issue of costs to the referee for hearing.

Respectfully submitted,

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:E ICA OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Complainant's Answer Brief has been furnished by Certified Mail No. P 827-895-822 to Paul S. Carr, respondent, at his record bar address of 602 North Tamiami Trail, Suite #1, Ruskin, Florida, 33570, also by Certified Mail No. P 827-895-823 to Paul S. Carr, respondent, at Post Office Box 965, Ruskin, Florida, 33570; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida, 32399-2300, this 13th day of September, 1989.

R. A. Greenberg

RICHARD A. GREENBERG