IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

PAUL S. CARR,

Respondent /

CASE NO. 72,576

FLORIDA BAR #288111

RESPONDENT'S INITIAL BRIEF REQUESTING THAT COSTS BE TAXED AGAINST COMPLAINANT AND RESPONDENT BE AWARDED COSTS IN ATTORNEY DISCIPLINARY PROCEEDINGS

HONORABLE JOHN BLUE REFEREE

RESPONDENT'S INITIAL BRIEF

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TABLE OF CITATIONS

APPLICABLE SECTIONS OF THE RULES OF DISCIPLINE ARE CITED THROUGHOUT THIS BRIEF INCLUDING SECTIONS 3-7.5(k), (n)

FACTS AND STATEMENT OF CASE

In July, 1986, the Respondent was arrested and charged with numerous criminal offenses of perjury by the State Attorney's Office of Hillsborough County, Florida. All charges were dismissed by Circuit Judge WILLIAM GRAYBILL due to the prosecutorial error and/or misconduct of said State Attorney's Office in questioning the witnesses against Respondent. The Respondent was completely acquitted in the summer of 1987.

Shortly after his acquittal, The Florida Bar (RICHARD GREENBERG), filed this Complaint against Respondent based on the same criminal allegations.

The court file with the Clerk's Office (Hillsborough County) consists of approximately ten thousand (10,000) documents, or more. In preparing the defenses to this case, the Respondent was required to copy the entire criminal court file as well as numerous other documents, depositions, pleadings, etc. pertaining to this matter.

In addition to substantial copy expense, the Respondent also incurred other substantial expense items during the successful defense of this case. The Respondent's Affidavit of Costs filed herein set forth the expense items totalling twenty-one thousand four hundred forty-seven dollars and twenty-one cents ($21,447.21) exclusive of interest.

Following the filing of this Complaint there were several hearings held in this case which required the Respondent and his co-counsel/wife D. KAY CARR to travel to Sarasota, Florida and Bradenton, Florida on several various occasions. Further, both sides engaged in discovery proceedings including depositions, interrogatories, requests for admissions and extensive investigation.

In December, 1988, depositions were taken at the Hillsborough County Courthouse attended by RICHARD GREENBERG for The Florida Bar and the Respondent. The sworn depositions clearly indicated that the Respondent was innocent of all charges and following the depositions RICHARD GREENBERG, ESQUIRE, did relate to the Respondent that if the deposition testimony were corroborated by witness SCOTT GORDON then MR. GREENBERG would voluntarily dismiss the entire Complaint against the Respondent. This offer ~~did not~~ arise as a result of settlement negotiations but was directly related to Respondent following these depositions. Further, at that time, RICHARD GREENBERG, ESQUIRE, also related, several times, his personal doubts as to the guilt of the Respondent and acknowledged that The Florida Bar indeed had a very weak case.

Within several weeks following these depositions counsel for both sides began an intense search for witness SCOTT GORDON. He was finally located and interviewed by both parties. During the interim, both attorneys further discussed the voluntary dismissal but RICHARD GREENBERG did send a letter to the Respondent warning him that if such doubts were revealed to the referee then the

Respondent would be threatened with further disciplinary proceedings. A copy of said letter is in possession of the Respondent.

SCOTT GORDON was eventually located and interviewed by both sides. SCOTT GORDON clearly supported the position that the Respondent was completely innocent of all charges and that RICK RAZZICK, TONY MYERS and himself had concocted a perjurous story way before even meeting with Respondent. These facts were revealed to RICHARD GREENBERG, ESQUIRE, however, despite the earlier assurances of voluntary dismissal, MR. GREENBERG elected to continue prosecuting the Respondent on charges acknowledged to be extremely weak and without any credible support in the facts, evidence or testimony. A full review of the record in this case will clearly show the obvious innocence of the Respaddent to all charges.

On May **19, 1989,** the referee entered his report finding the Respondent not guilty as to all charges and finding that The Florida Bar had wholly failed to even meet its burden of proof as to any charge herein. However, despite the complete exoneration of Respondent, the referee recommended that each party bear their own costs. A copy of the Report of Referee is attached as Exhibit "A".

At approximately 11:00 am on August **4, 1989,** the Respondent received a letter which had been delivered to his office at **9:00** am that morning. This letter was from JOHN BOGGS, Director of Lawyer Regulations, informing the Respondent that the Board of Governors of The Florida Bar considered this case at a meeting held July **20, 1989** and rejected any further review by the Supreme Court. This

letter, copy attached as Exhibit "B", also informed Respondent that any petition for review by either party must be filed on or before August 4, 1989. Respondent immediately enlisted the services of a courier to deliver Respondent's Petition for Review to the Supreme Court in Tallahassee, Florida on the same day in which Respondent received said letter from JOHN BOGGS (approximately 300 miles from Ruskin, Florida).

The referee erred in failing to tax costs against The Florida Bar and in failing to award costs to Respondent. As seen below, the referee should have followed the well established rule that costs should be taxed against the losing party and there is no valid reason to require Respondent to bear his own costs which are quite substantial.

ARGUMENT

It is well established by case law and statutory authority that Respondent should be awarded his costs incurred herein. Respondent has reviewed numerous cases before the Supreme Court wherein the Supreme Court has taxed costs against attorneys found guilty in disciplinary proceedings plus interest at the statutory rates.

Failure to tax costs against the Complainant would send the wrong message to other attorneys and the general public. To permit The Florida Bar to escape taxation of costs against it would permit an injustice and inequity resulting in a dual standard.

The Supreme Court has previously ruled that a prevailing attorney is entitled to a taxation of costs against The Florida Bar, see The Florida Bar vs. Lehrman **458** So.2d **1276** (1986) at Page **1278.**

The Supreme Court has also determined 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 wrong doing, see The Florida Bar v McCain **361** So.2d **701** and at **330** So.2d **712, 718 (1976).**

As seen by the Respondent's Affidavit of Costs, and review of the record herein, the costs sought to be recovered by Respondent include travel costs of Respondent, co-counsel and witnesses; administrative costs, copy costs, court reporter and deposition fees, witness fees, and all other costs normally taxed against lawyers when found guilty in attorney disciplinary proceedings. However, since the Respondent is the prevailing party then such costs should therefore be taxed against The Florida Bar to promote the equality and fairness in the system. Failure to tax costs against The Florida Bar would acknowledge a dual system of different standards of justice.

Section **3-7.5** (k) mandates that the referee recommend the manner in which costs should be taxed. Per said rule, the costs shall include court reporter fees, copy costs, witness fees and travel expenses, and reasonable traveling and out of pocket expenses of the referee and the Bar Counsel if any. Costs shall include a

one hundred fifty dollar ($150.00) charge for administrative costs at the grievance committee level and a one hundred fifty dollar ($150.00) charge for administrative costs at the referee level.

Rule 3-7.5(n) mandates that the actual costs of reproduction for the purposes of these rules is determined by the board to be one dollar ($1.00) per page. The required taxable costs to be awarded Respondent therefore include all of the foregoing plus any copy expense taxed at the sum of one dollar ($1.00) per page.

The copy expense incurred by Respondent included the hiring of a professional copy company in the sum of two hundred thirty-three dollars ($233.00) plus the copying of thousands of documents at the law office of Respondent resulting in a total of over fourteen thousand (14,000) copies. If the rules are to be applied equally then the Respondent should be awarded one dollar ($1.00) per copy as mandated by the Supreme Court's own rules per Section 3-7.5(n) which requires the assessment of one dollar ($1.00) per copy in all cases.

The required administrative costs of one hundred fifty dollars ($150.00) each at the grievance committee level and the referee level should also be taxed against The Florida Bar per Rule 3-7.5(k)(1) since this is the same cost which PAUL CARR would have had to pay had PAUL CARR been the losing party. However, since PAUL CARR was the prevailing party, then what is good for the goose should be good for the gander.

In summary, The Florida Bar should not have any qualms about having costs taxed against them because costs would have been automatically taxed against Respondent had Respondent been the losing party. However, since Respondent is the prevailing party, in all cases, then justice, equality and equity would demand that costs be taxed against The Florida Bar in accordance with Respondent's Affidavit filed herein.

The Respondent has learned from overhearing coversations of other attorneys that in other cases wherein the attorney was the prevailing party against The Florida Bar, that costs have been taxed against The Florida Bar because it was the losing party in attorney disciplinary proceedings. This court should not deviate from the general principles governing the taxation of costs or from its own rules which would have required the Respondent from automatically pay costs herein had he been the losing party.

Having read numerous Supreme Court cases, the Respondent is well aware that the Supreme Court also charges interest at the statutory rate of twelve per cent (12%) per annum until all costs are paid. Equally, the Respondent also requests judgment bearing interest of twelve per cent (12%) since May 19, 1989, the date of the referee report. Failure to do so would result in obvious inequality and perception of a dual standard.

The case law citations in the State of Florida regarding the award of costs to the prevailing party are legion and are too numerous to cite here. However, Respondent has cited several cases in

his initial Petition filed herein and in the Petition and Brief filed in case 72,707, made a part hereof by reference. Any deviation from the general rule in civil cases or the rules contained in The Florida Bar Journal (Rules of Professional Conduct) would result in a manifest injustice and perception of inequality.

The Respondent also believes he should be entitled to an award of reasonable attorney fees against The Florida Bar, over and above the costs herein pursuant to the administrative code and applicable case law in administrative or quasi-administrative proceedings. When The Florida Bar seeks to prosecute an honest attorney on charges which cannot be possibly proven and for which they cannot possibly obtain a conviction then the Supreme Court should step in and correct this injustice and award costs plus attorney fees to Respondent for which there is ample statutory and case law.

RICHARD GREENBERG knew before the referee hearing that he could not prove his case by any credible evidence or testimony and knew that he could not meet his required burden of proof by "clear and convincing evidence". By this standard, attorney fees should be awarded to Respondent under the provisions of Section 57.105, Florida Statutes, wherein The Florida Bar had no justicible action against Respondent.

The Respondent hereby incorporates by Reference his Affidavit of Costs and the citations of Rules set forth therein as well as all other Pleadings or documents filed in this case.

The Referee clearly erred in recommending that each party should bear its own costs herein. This is completely contrary to long established Florida law, both case law and statutory, and contrary to the attorney Disciplinary Rules established by the Supreme Court.

Rule 3-7.5(k)(l) states that a Referee's Report shall enjoy the same presumption of correctness as the judgment of the trier of fact in a Civil proceeding. Therefore, the long established general rule in Civil proceedings that "costs follow the judgment" should be adhered to in this case and there is no reason to deviate from this principle, Mack v. Garcia, 453 So2d 465, Spicuglia v. Green, 302 So2d 772, Murray v. Plastridge, Inc., 338 So2d 260, and numerous other cases.

Accordingly, the Referee has no discretion in the taxation of costs because the Judgment is considered to be a Civil rather than Equitable proceeding. Therefore, under Section 57.041, Florida Statutes only the "prevailing party" is entitled to an award of costs, see Fernandez v Hendry Tractor Company, 436 So2d 1213 (1981).

The costs of copy and reproduction incurred by the Respondent is mandated to be at the rate of $1.00 per page, Rule 3-7.5(n). Therefore, the Court has no discretion to award Respondent any lesser sums for copy and reproduction expenses.

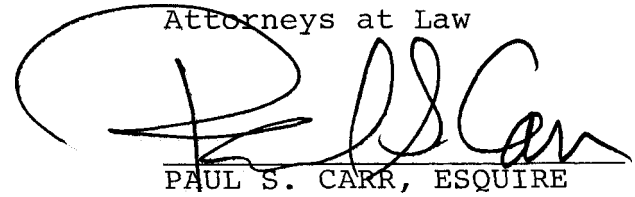
The Referee failed to provide any reason or basis for deviating from the long established Rule that the prevailing party should be awarded his costs. In this respect the Referee committed error in recommending that each party bear its own costs incurred herein.

CONCLUSION AND REQUESTED RELIEF

The Respondent requests that a Final Judgment or Order be Entered against the Complainant, THE FLORIDA BAR, ordering THE FLORIDA BAR to pay the costs of the Respondent as set forth in the Affidavit, totaling $21,447.21, that such Order or Judgment bear interest at the Statutory rate of 12% per annum until paid and, if appropriate, should reserve jurisdiction for consideration of an award of attorney fees or for application of appropriate Sanctions against offending members of THE FLORIDA BAR who brought this action against Respondent.

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by Hand/U.S. Mail on this 25th day of August, 1989 to Richard Greenberg, Esquire, The Florida Bar, Suite C-49, Marriott Hotel, Tampa Airport, Tampa, Florida, 33607, and John T. Barry, Esquire, Lawyer Regulation Department, The Florida Bar, Tallahassee, Florida, 32301.

CARR & CARR.
Attorneys at Law



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