IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

GARY G. WOLDING,

Respondent.

_____/

Case No. 74,504
TFB Nos. 88-10,702(13E)
88-10,023(13E)

COMPLAINANT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The Petitioner, Gary G. Wolding, will be referred to as "the respondent". "IB" will denote the Initial Brief of Petitioner for Review. "RR" will denote the Report of Referee. "RDM" will denote the Referee's Recommendation as to Disciplinary Measures to be Applied.

STATEMENT OF FACTS

The Florida Bar adopts the factual findings as set forth in the Report of Referee.

SUMMARY OF ARGUMENT

The referee recommended that respondent be found in violation of Rule 4-1.6, Rules of Professional Conduct. This recommendation was predicated on the referee's finding that respondent failed to secure his law office files while maintaining a separate title closing agency in the same suite of offices and failed to remedy law office acoustics after being warned of the problem of potential disclosure of client secrets by an employee of the closing agency. The referee appropriately imposed a duty to safeguard client's secrets even in the absence a showing of actual disclosure.

The referee properly recommended that respondent be responsible for the amount of costs as adjusted and reduced by The Florida Bar in its Statement of Costs. The Bar acted in good faith in proceeding on the two (2) count complaint and, after the referee found respondent not guilty of Count II of the Complaint, the costs statement was adjusted by deleting those costs directly attributable to that Count of the Complaint.

ARGUMENT

ISSUE: I. THE REFEREE'S FINDING THAT RESPONDENT FAILED TO TAKE REASONABLE STEPS TO PROTECT HIS CLIENT'S CONFIDENTIAL INFORMATION AND RECOMMENDATION THAT RESPONDENT BE FOUND GUILTY OF VIOLATING RULE 4-1.6, RULES OF PROFESSIONAL CONDUCT SHOULD BE UPHELD.

The referee found that respondent violated Rule 4-1.6 by keeping his office files unlocked and readily accessible to employees of a title closing agency which shared the same suite of offices with respondent's law office. Additionally, respondent failed to correct an acoustics problem within the suite of offices which allowed the title closing personnel to overhear lawyers in respondent's law firm conversing with client's and others about confidential client information. Rule 4-1.6 provides, in pertinent part:

> "A lawyer shall not reveal information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client."

The referee, in his Recommendation As To Whether Or Not The Respondent Should Be Found Guilty made the following statements regarding respondent's failure to secure office files and remedy the law office acoustics:

> "Unsecured files: Clearly, respondent's files were open to inspection by employees of S.C.A., with whom respondent shared his office. (May transcript, pp. 47 & 57). While it would be impractical to keep file cabinets locked constantly during working hours, the law firm's [sic] clearly should have been located in an area to which only

> law firm employees had access. Since there were no actual disclosures of confidential materials proven as a result of respondent's "loose" practices, the question becomes whether or not practices which create the potential for such improper disclosures are sufficient to demonstrate a violation of Rule 4-1.6. It is the undersigned's belief that Rule 4-1.6 creates an implied duty to take reasonable steps to protect the confidences of ones clients. Failure to take such reasonable steps should be enough to cause a violation of Rule 4-1.6 and the undersigned recommends that the respondent be found guilty of a violation of said rule as to the manner in which his files were maintained.
>
> Law Office Acoustics: For the same reasons set forth above, the undersigned feels that respondent had a duty to take reasonable steps to insure that confidential communications cannot be overheard, particularly when the law office is shared with another business entity. Although it would have been better to have had more specific examples which did not involve shouting (May transcript, p. 54), the evidence is clear that the respondent allowed a situation to exist in which anyone who wished to eavesdrop could have easily done so. This situation existed despite warnings. (May transcript, p. 55). Again, the fact that no specific confidences were shown to be disclosed is not the point. The potential for disclosure was allowed to exist in the face of respondent's duty to take reasonable steps to eliminate the potential harm. The undersigned recommends that the Respondent be found guilty of a violation of Rule 4-1.6 as to the matters regarding law office acoustics."
>
> (RR p. 7-8).

As outlined by the referee, respondent's failure to recognize the problems and take appropriate steps to correct the potential for dissemination of client's confidences

violated the implied duty within Rule 4-1.6. A lawyer should be held to a high standard in preserving and protecting his client's secrets and confidences. The comment to Rule 4-1.6 states the following:

> A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

Respondent's clients formed a trusting, confidential relationship with him and his law firm. They were entitled to rely on respondent to protect their confidences and secrets from potential or actual disclosure.

Although Rule 4-1.6 does not explicitly prohibit an attorney from creating and tolerating an environment where the potential for the disclosure of client secrets and confidences is very high, a reasonable attorney would understand the Rule to provide for an implied duty to guard those client's secrets and confidences zealously.

All lawyers are held to the high standards of the profession. As the preamble to the Rules of Professional Conduct provides:

> The rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules. The rules simply provide a framework for the ethical practice of law.

The respondent in his Initial Brief, argues that the

Rules of Professional Conduct are penal in nature, citing The Florida Bar v. Quick, 279 So.2d 4 (Fla. 1973). Justice Boyd, concurring in a more recent case, has clarified the nature of disciplinary proceedings: "We have held that suspension and disbarment are not used as punishment but as protection of the public and to maintain high standards in the profession". (citing cases). The Florida Bar v. Prior, 330 So.2d 697, 706 (Fla. 1976) (Justice Boyd concurring in part).

In The Florida Bar v. Musleh, 453 So.2d 794, 796 (Fla. 1984), this Court considered a disciplinary proceeding wherein the respondent was charged with disciplinary rule violations even though he had been acquitted of underlying criminal charges involving the same conduct. In denying respondent's contention that the Bar was collaterally estopped from proceeding against the attorney because of the differing goals and evidentiary standards, this Court went on to state that, "... even though bar disciplinary proceedings share the same goals as criminal proceedings (punishment, deterrence, protection of society), they do so in the context of enforcing the higher standard of duty and conduct required of those who exercise the privilege of practicing law."

Respondent maintained his office in such a manner as to invite disclosure of client secrets and confidences. Although no actual disclosures were shown in the testimony

and evidence, respondent failed to act to insure that these disclosures could not occur. This is a violation of Rule 4-1.6 and in order to protect the public and to "enforce the higher standard of duty and conduct required of those who exercise the privilege of practicing law", (Id. at 796) the referee's findings of guilt should be upheld.

ISSUE: II. THE REFEREE PROPERLY RECOMMENDED THAT RESPONDENT BE ASSESSED THE PROPORTIONATE AMOUNT OF COSTS AS ADJUSTED AND REDUCED BY THE BAR IN ITS STATEMENT OF COSTS.

Respondent, in his initial brief, argues that it was an abuse of discretion for the referee to recommend that the entire amount of costs enumerated by the Bar in its Statement of Costs be assessed against Respondent. This Court has held that the taxation of costs rests within the discretion of the referee. The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). In a recent opinion, The Florida Bar v. Carr, (S.C. No. 72,576 and 72,707, February 12, 1991), the Court reaffirmed this position and stated, "[t]he taxation of costs is a matter within the discretion of the referee, and should not be reversed absent an abuse of discretion."

In Davis, the referee found the attorney guilty on one of three counts of the Complaint and assessed approximately one-third recovery on some costs, including the court reporter costs. The Bar contested this cost assessment, arguing that all costs incurred by the Bar should have been taxed against respondent. This Court upheld the cost assessment stating that:

> "...the discretionary approach should be used in disciplinary cases. 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 costs in these circumstances should be awarded as sound discretion dictates. In this case the Bar submitted no information on its costs restricted to Count I."

The Florida Bar v. Davis, 419 So.2d 325, 328 (Fla. 1982).

In the instant case, the Bar has submitted information that its costs were restricted to the one count on which respondent was found guilty. A review of the Statement of Costs submitted by the Bar shows that costs associated with Count II, in which respondent prevailed, were not charged to respondent. The total costs incurred by the Bar, excluding the administrative cost of $500.00 mandated by Rule 3-7.6(k), were $2,841.10. Court reporter costs directly attributed to Count II of the Complaint at the Grievance Committee were not charged to respondent. This resulted in a reduction of $302.30 in costs to respondent. One half of investigative costs were not charged to respondent, thereby reducing costs to respondent by $392.50. Finally, respondent was charged for one half of the court reporter's costs at the final hearing, thereby reducing respondent's costs by $525.15. The reduction of costs to the respondent was $1,219.95 out of a total cost incurred by the Bar of $2,841.10, excluding the $500.00 administrative cost.

The Bar, in good faith, reduced costs chargeable to

respondent by an appropriate amount. The Bar cannot be expected to analyze and quantify every line of a transcript to determine to which count each witness' testimony applied. The Bar prevailed on Count I and the referee found insufficient proof on Count II. The Bar adjusted and reduced the costs charged to respondent by approximately one half and these costs were not unreasonable. It would be unduly burdensome to require a determination of the percentage of allegations proven within each count in assessing costs. Further, it is not this Court's duty to go beyond the referee's recommendation and determine the percentage of allegations proven within each count in reviewing the referee's discretionary imposition of costs.

The referee recommended the taxing of the adjusted costs as reflected in The Bar's Statement of Costs. In making this recommendation, the referee stated the following:

> "Although the Bar did not prevail on all of its allegations, it appears that the bulk of the testimony contributed, to at least some degree, to the findings upon which the Bar did prevail. Consequently, since it seems virtually impossible to separate the expenses, the entire amount of costs (Two Thousand One Hundred Twenty-one Dollars and Fifteen Cents ($2,121.15) should be assessed against Respondent. (RDM p. 2).

The referee considered the case in its entirety and, in his discretion, determined that the Bar's reduction of costs was

appropriate and any further separation of costs and expenses would be "virtually impossible."

Respondent was provided with a copy of the Statement of Costs in this case by U.S. Mail on or about October 18, 1990. Between that date and the date of the referee's disciplinary recommendations on or about December 11, 1990, respondent made no objection to the referee that the costs were unreasonable. Respondent has chosen to make his objection for the first time in his Initial Brief on Petition for Review by this Court.

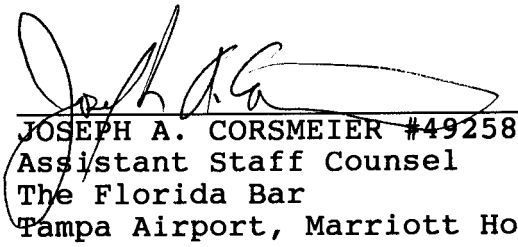
Finally, respondent argues that the costs are unreasonable because the Bar's charges were overbroad, citing The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). In the McCain decision, however, the referee found "that the Bar took an excessively broad approach to the case and failed to early abandon counts that could not be proved." (McCain at 707). In the instant case, the referee did not find that the Bar took an excessively broad approach to the case or failed to early abandon counts that could not be proved. The referee stated that "[a]lthough the Bar did not prevail on all of its allegations, it appears the bulk of the testimony contributed, to at least some degree, to the findings upon which the Bar did prevail." (RDM p. 2). The referee made no assertions that the Bar acted in bad faith in charging respondent initially in the complaint or in proceeding on the Complaint to final hearing. The referee's

recommendations and finding are entitled to great weight and should not be reversed absent an abuse of discretion. The referee has made an implicit finding that the Bar did not take an excessively broad approach or fail to abandon counts that could not be proven. This finding should not be reversed as there has been no abuse of discretion. The referee appropriately taxed the costs as stated by the Bar to the respondent.

CONCLUSION

The referee's finding of guilt and recommendations as to discipline and costs were appropriate and should be upheld.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished by regular U.S. Mail to William A. Wares, Esq., attorney for Gary G. Wolding at his record Bar address of 609 W. Azeele Street, Tampa, Florida 33606, and a copy to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 33607, this 1st day of March, 1991.

JOSEPH A. CORSMEIER