IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant, vs. GARY G. WOLDING, Respondent/Petitioner for Review,	CASE NO. 74,504 (TFB NOS. 88-10,702(13E) 88-10,023(13E) ON PETITION FOR REVIEW OF A REPORT OF REFEREE AND REFEREE'S RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED ENTERED BY THE REFEREE FOR THE SUPREME COURT OF FLORIDA

INITIAL BRIEF OF PETITIONER FOR REVIEW

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STATEMENT OF THE CASE AND OF THE FACTS

This is a petition for review by the Respondent below, GARY G. WOLDING[1], (a) of the Report of Referee, ruling that the Respondent had violated Rule 4-1.6 of the Rules Regulating the Florida Bar despite the fact that no actual disclosure of client information occurred, and (b) of the Referee's Recommendation as to Disciplinary Measures to be Applied, taxing costs to the Respondent, entered by the Honorable Stanley R. Mills, Referee, respectively on October 9, 1990, and December 11, 1990. (A. 1-15).

The proceeding before the Referee commenced with the filing of a two-Count Complaint by the Bar. In Count I, the Bar alleged that Mr. Wolding had violated Disciplinary Rule 4-101(B)(1) of the Florida Bar Code of Professional Responsibility and Rule 4-1.6 of the Rules Regulating the Florida Bar by (1) using a common telephone system for law and title company businesses; (2) holding joint meetings between those two businesses; (3) revealing confidential information regarding two clients: Michael Fayman and Richard Castro; (4) failing to secure law office files from access by non-law office employees; and (5) maintaining an office with acoustical problems. In Count II, the Bar alleged that Mr. Wolding

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[1] In this Brief, the Petitioner/Respondent, Gary G. Wolding, will generally be referred to as "Mr. Wolding". The Complainant, The Florida Bar, will be referred to as "the Bar". Record references "A" are to the Appendix to this Brief. Record references to "the Report" are to the Report of Referee entered on October 9, 1990, and record references to "the Recommendation" are to the Referee's Recommendation as to Disciplinary Measures to be Applied entered on December 11, 1990. All underlining is supplied unless otherwise indicated.

had violated Rules 4-1.6 and 4-1.7 of the Rules Regulating the Florida Bar by having simultaneously represented Gulf American SBL, Inc. and Joseph Eastburn and by having revealed client information received from Gulf American to Mr. Eastburn. (A. 16-22).

After hearings on May 4, 1990, and July 6, 1990, the Referee found Mr. Wolding not guilty as to Count II of the Complaint and as to the matters concerning telephone lines, joint meetings, and revelation of information pertaining to Mr. Fayman and Mr. Castro raised in Count I of the Complaint. (A. 6, 8-11; Report 6, 8-11).

As to the remaining matters, the Referee found that the evidence clearly indicated no actual disclosure of client information and no actual damage as a result of the unsecured law office files and law office acoustics. (A. 7, 8, and 13; Report 7, 8, Recommendation 1). The Referee found that there was a "potential for disclosure" because of the unsecured law office files, but there was no evidence that any non-law office employees had ever gone into those files without permission. (A. 2; Report 2)[2]. The Referee found that there was a "potential for disclosure" of client information because of the law office acoustics, (A. 8; Report 8), but that no actual disclosure had occurred.

Consequently, the Referee framed the question before him as:

> "Whether or not practices which create the potential for ... improper disclosure are

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[2] The reason for the Referee's finding that non-law-employees had not inspected law office files <u>without</u> <u>permission</u> was apparently because the evidence showed that a title company employee had reviewed the files of Mr. Fayman and Mr. Castro with Mr. Wolding's permission and with the consent of those clients.

> sufficient to demonstrate a violation of Rule 4-1.6. (A. 7; Report 7)."

The Referee answered this question in the affirmative on the grounds that:

> "... Rule 4-1.6 creates an implied duty to take reasonable steps to protect the confidences of one's clients. Failure to take such reasonable steps should be enough to cause a violation of Rule 4-1.6... (A. 7; Report 7)."

On this basis, the Referee found that Mr. Wolding had violated Rule 4-1.6 by failing to locate his law firm's files in an area to which only law firm employees had access and by failing to correct acoustical problems after warning, thereby permitting a "potential for disclosure" to exist. (A. 7-8; Report 7-8).

Noting that the Bar did not prevail on all of its allegations, the Referee nevertheless taxed all costs requested by the Bar to Mr. Wolding on the grounds that the bulk of the testimony contributed, in at least some degree, to the matters upon which the Bar had prevailed. (A. 14, Recommendation 2).

SUMMARY OF THE ARGUMENT

1. Mr. Wolding should not be found guilty of violating Rule 4-1.6 of the Rules Regulating the Florida Bar because there was no actual disclosure of client information and the creation of a potential for such disclosure is insufficient to violate the Rule or otherwise constitute a cause for discipline.

2. The Bar's entire costs expended on Count I of the Complaint should not be assessed against Mr. Wolding because the Bar took an overbroad approach to the case, and proved few of its allegations, and very little of those costs were related to the charges on which Mr. Wolding was found guilty.

ARGUMENT

I. THE REFEREE'S DETERMINATION THAT MR. WOLDING VIOLATED RULE 4-1.6 OF THE RULES REGULATING THE FLORIDA BAR WAS ERRONEOUS, UNLAWFUL, AND UNJUSTIFIED.

Mr. Wolding recognizes that his failure to locate law office files in an area from which non-law office employees were excluded and his failure to remedy his law firm's poor acoustics were neither wise nor prudent; and he has long since cured those problems. Nevertheless, Mr. Wolding maintains that those omissions were insufficient to constitute a violation of Rule 4-1.6 or otherwise give rise to a cause for discipline, as a matter of law.

Rules 3-4.2 and 3-4.3 of the Rules Regulating the Florida Bar frame the universe of conduct for which attorney discipline will lie. Rule 3-4.2 provides that:

> "Violation of the Rules of Professional Conduct as adopted by the Rules Governing the Florida Bar is a cause for discipline."

Rule 3-4.3 states that the Rules of Professional Conduct are not all inclusive, and that an attorney may additionally be disciplined for acts which are "unlawful or contrary to honesty and justice". Simply stated, Mr. Wolding's practices did not fall within the purview of either Rule.

Mr. Wolding's omissions did not violate the express provisions of Rule 4-1.6. That Rule provides that:

> "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 able Referee expressly found that there was no actual disclosure of client information as a result of Mr. Wolding's unsecured files and law office acoustics. (A. 7, 8; Report 7, 8). This, in itself, should have mandated Mr. Wolding's acquittal.

The Referee erred, however, in deciding that "practices which create the potential for ... improper disclosures" are sufficient to demonstrate a violation of Rule 4-1.6. (A. 7, Report 7). In reaching this conclusion, the Referee reasoned that every lawyer should take reasonable steps to protect client confidences and that the failure to do so should be enough to cause a violation of the Rule. Certainly, the Referee was correct in believing that lawyers have a duty to take reasonable steps to protect the confidences of their clients. He was mistaken, however, in asserting that the failure to take such steps should be enough to violate Rule 4-1.6, and therefore a cause for discipline. At bottom, the effect of the Referee's position is to make the creation of "the potential" for a violation of Rule 4-1.6 into a violation of the Rule per se. Such a concept has no parallel elsewhere in the law. Moreover, if it were the intention of the Bar that the creation of a potential for the violation of Rule 4-1.6 should be a cause for discipline, one would assume that the Bar would say so in the Rule itself. At least in the past, when the Bar has believed that the failure to take reasonable steps to protect against disclosures should constitute a violation of the disciplinary rules, it has expressly so stated. See e.g. Fla. Bar Code Prof. Resp., D.R. 4-101(E)(1986). Furthermore, the Rules of Professional Conduct,

while not criminal in character, are penal in nature. Florida Bar v. Quick, 279 So. 2d 4 (Fla. 1973). As such, they should clearly define the conduct on the part of attorneys that will be sanctioned by the Bar. This will hardly be the case if rule violations can be found in the creation of potential dangers of violations, without attorneys being so advised.

Finally, it can hardly be maintained that Mr. Wolding's omissions rose to the status of acts which are unlawful or contrary to honesty and justice. The Referee found that Mr. Wolding had acted unwisely in locating law office files in an area to which non-law office employees had access, although there was no evidence that such employees ever sought entry to those files. The Referee found that Mr. Wolding erred by failing to correct acoustical problems which permitted eavesdropping, although most of the evidence on the acoustical problems involved incidents of shouting in a lawyer's office. (A. 7, 8, Report 7, 8). Clearly, such misdeeds just do not possess the moral opprobrium contemplated by Rule 3-4.3 of the Rules Regulating the Florida Bar.

Thus, in sum, although Mr. Wolding's omissions concerning the unsecured files and law office acoustics were inadvisable, they did not constitute acts contemplated by the Rules of Professional Conduct as giving rise to a cause for discipline, and Mr. Wolding should not be found guilty of violating Rule 4-1.6 by virtue of their occurrence.

II. THE REFEREE ABUSED HIS DISCRETION IN RECOMMENDING THAT THE ENTIRE AMOUNT OF COSTS REQUESTED BY THE BAR BE TAXED AGAINST MR. WOLDING.

In his Recommendations, the Referee recommended that the entire amount of costs requested by the Bar be assessed against Mr. Wolding. (A. 14, Recommendation 2). In its Statement of Costs, the Bar requested that $2,121.15 in costs be so taxed. (A. 24). These costs were approximately one half of the costs incurred by the Bar in this proceeding; and, in consultation with the Bar, its counsel stated that the costs which the Bar did not seek were those that it believed pertained to Count II of the Complaint, on which the Bar did not prevail. Thus the costs awarded against Mr. Wolding were those which, in the eyes of the Bar, were spent in the pursuit of Count I of the Complaint.

This Court has held that the assessment of costs in Bar proceedings is within the sound discretion of the Referee. Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982). In exercising that discretion, the Referee should consider whether and to what extent an attorney has been acquitted on charges in a multi-count complaint. Davis, 419 So. 2d at 328. Thus, in Davis, this Court deemed a Referee's allowance of one third of certain costs to the Bar to be reasonable where the Bar had prevailed on only one of the charges and had submitted no information on costs restricted to the count on which it had prevailed.

In addition, the Referee should also take note of the reasonableness of the Bar's approach to the case, and, in particular, whether the Bar's charges were overbroad. For example,

in Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978), the respondent was disbarred for tampering with the administration of justice by attempting to influence the decisions of two courts. Despite this outcome, this Court directed that each party bear its own costs, stating that:

> "While we find that McCain has been shown by clear and convincing evidence to have committed that acts charged in Counts 3A and 3C, we must agree with the Referee that the Florida Bar took an excessively broad approach to this case and failed to early abandon counts that could not be proven. For this reason we find it inequitable to impose all costs of these proceedings on McCain. McCain, at 707."

In this proceeding, the Bar brought charges against Mr. Wolding on six different factual bases, albeit subsumed in two counts. The Bar failed to prevail on the complicated fact pattern, involving a significant amount of investigation and testimony at trial, set forth in Count II. The Bar failed to prevail on three of the matters (telephone lines, joint meetings, and disclosure of client confidences of Mr. Fayman and Mr. Castro) advanced in Count I. The Bar only prevailed, however tenuously, on those matters concerning unsecured files and law office acoustics set forth in Count I. Of these, the problem with the law office acoustics was admitted by Mr. Wolding from the start. (A. 3, 18). Thus, the only matter on which the Bar prevailed which necessitated any significant investigation and testimony was the subject of unsecured files.

The Referee taxed the costs requested by the Bar to Mr. Wolding because:

> "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 ... should be assessed against Respondent. (A. 14, Recommendation 2)."

It is thus apparent that the Referee wholly failed to exercise his discretion in taxing costs. First, it is not true that the bulk of the testimony contributed in any part to the findings upon which the Bar prevailed. A review of the record shows that there was distinctly separable testimony on the 5 topics comprising Count I, and that that testimony occurred in roughly equal proportions. Second, the matters on which the Bar prevailed could hardly have necessitated much of the Bar's expenditures in these proceedings, either by way of investigation or a trial. They involved relatively simple fact patterns: the location of law office files within the office and sound levels within the office. Moreover, as stated above, the acoustical problem was admitted from the outset. (A. 27 Answer and Affirmative Defenses 2). Thus, although, as in Davis the Bar submitted no information on costs restricted to unsecured office files and acoustical problems, the Referee should have acknowledged that these two areas of investigation were but forty percent of the matters raised by Count I and certainly required less of an expenditure on the part of the Bar in proof. With the end of this lengthy proceeding in sight, the Referee failed to do so, however, and thereby departed from a proper

exercise of his discretion. Such an exercise would have awarded no more than $848.50 in costs against Mr. Wolding, if that.

CONCLUSION

For the reasons stated, the Recommendations of the Referee that Mr. Wolding should be found guilty of a violation of Rule 4-1.6 and that costs in the amount of $2,121.15 should be assessed against Mr. Wolding should be rejected.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing have been furnished by United States mail to JOSEPH CORSEMEIR, ESQUIRE, The Florida Bar, Tampa Airport, Marriott Hotel, Suite C-49, Tampa, Florida 33607, counsel for The Florida Bar, and JOHN T. BERRY, Staff Counsel, The Florida Bar, 600 Appalachee Parkway, Tallahassee, Florida 32399-2300, this 7th day of February, 1991.

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ATTORNEY