IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

GUILLERMO J. FARINAS,

Respondent.
_____/

Case No. 77,910
[TFB Case No. 90-70,897 (19A)]

REPLY BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

and

DAVID G. McGUNEGLE
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, FL 32801-1085
(407) 425-5424
ATTORNEY NO. 174919

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "the Bar".

The Referee's Report, dated December 3, 1991, shall be referred to as "RR".

ARGUMENT

POINT I

THE RESPONDENT'S REQUEST OF HIS EMPLOYEE TO NOTARIZE A DOCUMENT ALTHOUGH THE SIGNATORS WERE NOT PRESENT BEFORE THE NOTARY AT THE TIME THEY EXECUTED THE DOCUMENT WAS NOT AN EXCEPTION UNDER FLORIDA STATUTE 117.09(1).

In his Answer Brief, the respondent disputes that his request of the notary to notarize a clients' document even though the clients were not present before the notary at the time of the notarization was improper under Florida Statute 117.09(1). In fact, the respondent asserts that such conduct was an exception to Florida Statute 117.09(1).

It should first be noted that on page one of his Answer Brief, the respondent claims the Bar incorrectly termed the notary as his secretary. "The notary public was not the respondent's employee at any time nor was she ever controlled or supervised in any way by the respondent.'' However, in the Bar's Amended Requests for Admission, the following request was presented to the respondent at paragraph "**NN**": "You requested your secretary, who was a notary public, notarize the documents." The respondent admitted that request in his Reply to the Amended Requests for Admission. Therefore, based upon the respondent's own admission, it is apparent the notary referred to in this matter was the respondent's employee under his direct supervision and control.

Even if she was not his secretary and was merely a notary in the respondent's building, it was still wrong for the respondent, an attorney, to ask a notary to acknowledge a document without the presence of the signators when such an act was clearly in violation of Florida Statute 117.09(1).

The respondent suggests there is an exception to Florida Statute 117.09(1) and that his secretary's notarization of the clients' document falls under this exception. The respondent claims that if a notary has satisfactory proof of the identity of the person(s) signing the document, then it is not necessary to the validity of the notary's acknowledgement that the signator(s) sign in the notary's presence. The respondent asserts he provided satisfactory proof to the notary regarding his clients' signatures. However, Florida Statute 117.09(1) states:

> Every notary public in the state shall require reasonable proof of the identity of the person whose signature is being notarized and such person must be in the presence of the notary public at the time the signature is notarized. (Emphasis added).

The above statute is clear and unambiguous. The signator must be present before the notary at the time the signature is notarized. There can be no exception to the statute and there is no exception in this case.

The Bar also inquires how the respondent would provide the

notary with satisfactory proof of the signatures of the signators so that the notary could be satisfied as to the validity of them. The notary generally would not have satisfactory proof absent the presence of the signators unless she/he personally knew them and their signatures. Therefore, the respondent's argument is invalid.

POINT II

THE CASE LAW CITED BY THE RESPONDENT IN HIS ANSWER BRIEF IS NOT DISPOSITIVE OF THE IMPROPER NOTARIZATION ISSUE.

The respondent cites a **1978** 1st **DCA case,** Walker v. City of Jacksonville, **360** So.2d 52, to support his arguments. That court ruled on the validity of a deed witnessed by **a** notary. The Bar would point out that the **1st DCA** was not deciding on whether the requirements of Florida Statute **117.09(1)** were followed. Rather, the court was determining the sufficiency or insufficiency of the instrument.

Further, the respondent mentions Florida Statute **689.01** as being applicable under the Walker **case.** However, that stature concerns the witnesses required in the execution of a deed and is silent as to notarizations of deeds. Thus, that statute is inapplicable to the instant matter.

The respondent relied heavily on the Walker case in his brief. That case is not dispositive of this issue because it does not address the proper notarization of documents. Rather, the 1st **DCA** court addressed the validity of a deed. The Bar reiterates that Florida Statute **117.09(1)** is clear and unambiguous on its face. Therefore, the respondent's discussion of the Walker case is merely dicta.

The Bar submits that, despite his arguments to the contrary, the respondent is guilty of requesting his secretary improperly notarize a client's document in violation of Florida Statute 117.09(1).

POINT III

IT IS INAPPROPRIATE TO AWARD ATTORNEY'S FEES TO THE RESPONDENT IF HE IS FOUND NOT GUILTY OF ALL THE CHARGES.

The respondent has requested that should this Court uphold the Referee's finding of not guilty, that he be awarded the attorney's fees he expended in his defense of the Bar's charges. The Bar submits that attorney's fees have never been awarded to the accused attorney in a Bar disciplinary case and it would be inappropriate to do so in this matter.

Generally in civil proceedings, the prevailing party recovers costs against the losing party. Accordingly, in disciplinary proceedings, when The Florida Bar prevails, the respondent has routinely been required to pay costs incurred by the Bar. However, in this case, the Referee found the respondent not guilty and thus ruled that each party bear its own costs. (RR p. 4).

In the early 1970s, the Florida Supreme Court assessed costs against The Florida Bar when dismissal was based upon a not guilty finding. The Florida Bar v. Matthews, 296 So.2d 31 (Fla. 1974); The Florida Bar v. Ellis, 313 So.2d 33 (Fla. 1975). In both cases, the not guilty finding was by the court and not the referee's recommended discipline.

More recently, in The Florida Bar v. Carr, 574 So.2d 59 (Fla. 1990), the Court ruled that the referee had discretion to require each party to bear its own costs when the referee recommended the respondent be found not guilty. Although the court noted the respondent's proposed referee report suggesting that each party bear its own costs, it clearly stated taxation of costs was a matter of discretion with the referee. Even more recently, in two 1991 disciplinary cases, the court upheld the referee's recommendation that each party pay its own costs when the respondent was found not guilty or when The Florida Bar voluntarily dismissed it own case. The Florida Bar v. Feinberg, 583 So.2d 1037 (Fla. 1990); The Florida Bar v. Icardi, Case No. 78,797 (Mar. 12, 1992).

The current Rules Regulating The Florida Bar specifically provide that the only costs to be considered for taxation in disciplinary proceedings include investigative, travel, out-of-pocket, court reporter, copying, and witness costs, incurred by The Florida Bar. In The Florida Bar In Re: Amendment to Rules Regulating The Florida Bar, Rule 3-7.5(k)(1) Cost of Proceedings, 542 So.2d 983 (Fla. 1989), the rule [now numbered 3-7.6(k)(5)] was amended by changing the language "costs of proceeding" to "costs incurred by The Florida Bar" which would indicate that only the Bar's costs should be considered by the referee for purposes of taxation thereof. It is further noted that only those costs enumerated in the rule are taxable and they

do not include attorney's fees.

Please note, prior to the latest rule change which now allows investigator costs, the Bar sought to have them taxed against a respondent. The Court clearly stated that only costs listed in the rule were to be taxed and refused to award investigator costs stating that:

> If investigator time and expenses or any other unspecified items are to be taxed as costs, the rule will need to be amended.

See The Florida Bar v. Allen, 537 So.2d 105, 107 (Fla. 1989). Clearly attorney's fees are not stated in the rule. Bar Counsel knows of no decision of this Court that awarded attorney's fees to a respondent.

Based upon the case law, it is clearly within the discretion of the referee to require each party to pay its own costs whether the complaint is dismissed as the result of a not guilty finding or voluntarily by The Florida Bar. In this case, the Referee recommended that the respondent be found not guilty of all the charges and that each party bear it own costs. The Bar submits that if this Court approves the Referee's report and finds the respondent not guilty, then the Referee's recommendation that each party bear its own costs should also be approved.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review, with respect to Count 11, the referee's findings of fact and recommendation of not guilty; accept the findings of fact, but reject the not guilty recommendation; order the respondent be found guilty of the rules charges; impose a discipline of at least a sixty day suspension; and tax the costs against the respondent which now total **$2,582.60.**

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN T. BERRY
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5600
ATTORNEY NO. 217395

and

DAVID G. McGUNEGLE
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlando, FL 32801-1085
(407) 425-5424
ATTORNEY NO. 174919

By: 

DAVID G. McGUNEGLE
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Reply Brief have been furnished by Airborne Express overnight mail to Mr. Sid J. White, Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, **32399-1927**; a copy of the foregoing has been furnished by certified mail number P **399** 876 **155**, return receipt requested, to the respondent, Mr. Guillermo Jose Farinas, **2121** Ponce De Leon Boulevard, Suite **240**, Coral Gables, Florida, **33134**; and a **copy** of the foregoing has been furnished by First-class mail to Staff Counsel, **The Florida** Bar, **650 Apalachee** Parkway, Tallahassee, Florida, **32399-2300**, this 22nd day **of** June **, 1992.**

David G. McGunegle

DAVID G. McGUNEGLE
Bar Counsel