IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CALVIN HORVATH,

and

VICTOR O. MEAD,

Respondent.

Case No: 78,522
[TFB Case Nos. 90-30,392 (09B) and 90-31,128 (09B)]

Petition for Review on the Report of the Referee of January 19, 1992.

RESPONDENTS ANSWER BRIEF

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STATEMENT OF THE FACTS AND CASE

The issue before the Court is new to both the Court and the litigants; that is, can costs be taxed against The Florida Bar as a non-prevailing party in a disciplinary proceeding.

This matter originated as a result of a newspaper advertisement by the Respondents' in the Orlando Sentinel. The Complainant was William Miller who, after satisfactory completion of the dissolution, complained he had paid the Respondents too much. At no time were any funds placed in trust by Mr. Miller nor were there any allegations by the complainant of the misuse of trust funds. All cost money was paid directly by him to the Clerk of the Court by money order.

The Bar/Grievance Committee in its investigation, however, sought, among other documents, the Respondents' trust account records for the three (3) preceding years. The Respondents felt this was burdensome and un-related to the complaint made against them and utilized acceptable legal procedures to quash, or limit, the scope of the subpoena. The Referee, Circuit Judge Mark Hill, recommended limiting the scope of the subpoena to one (1) year and the Supreme Court accepted the Referee's recommendation. See this Court's Ruling of May 9, 1991 (Case No: 75,728; TFB No 90-30,392-09B), which is indexed as A-13 in the Bar's brief, The Florida Bar v. Horvath, 581 So. 2d 1310 (FLA. 1991) and The Florida Bar v. Mead, 581 So. 2d 1311 (FLA. 1991).

A review of this Court's Order of May 9, 1991 and the memorandum decisions indicate the Respondents were at least partially successful in limiting the scope of the subpoenas.

The Bar examined the Respondents trust account records and after such examination did not find nor pursue any trust account violations against the Respondents.

Costs were taxed against the Respondents in the amount of $553.50. These costs have been paid by the Respondents.

The matter was tried on the substantive issues before Circuit Judge Mark Hill, as Referee, on December 18, 1991. By stipulation, prior to the Referee's hearing, the Bar had dismissed the charges against Respondent, Victor O. Mead and proceeded on the charges against Calvin Horvath.

The Referee found the Bar had failed to prove its case on all counts of misconduct alleged to have been committed by Respondent Horvath.

In his report the Referee also recommended the taxing of the costs against the Bar. See REPORT OF REFEREE of January 19, 1992. (Bar's Index A-2 through A-5)

It is only the issue of taxing of costs against the Bar that is before this Court.

SUMMARY OF ARGUMENT

The Florida Bar, simply because it is the Bar, should not enjoy any special privileges and immunities that would prohibit the taxation of costs against it as a non-prevailing litigant. To do so would mean that it would maintain a special status that neither private citizens nor governmental agencies enjoy.

There is no provision in the Integration Rule nor the Rules Regulating The Florida Bar that prohibit the taxation of costs against the Florida Bar.

In equitable proceedings such as grievance proceedings, the taxation of costs has always been a matter of discretion with the trier of fact. There is no compelling reason to abandon this well-settled rule.

The Bar's argument that to allow costs would be a **"chilling"** effect on its activities during this period of a "funding crisis" are not legal arguments nor are they insightful or **helpful** in resolving the issue since they are only economic arguments. But as a brief response, it must be noted at this particular moment in our nation's history the government, private citizens and the Bar are in the midst of a funding crisis or recession and, yes, the taxation of costs against an unsuccessful litigant may very well have a chilling effect. It is this very chilling effect that has been recognized by this Court as the basis in persuading litigants to settle their cases. See Florida Rule of Civil Procedure 1.442, Offer of Judgement.

ISSUE I

THERE IS NEITHER STATUTORY LAW, REGULATORY NOR CASE LAW PROHIBITING TAXATION OF COSTS AGAINST THE FLORIDA BAR. THIS COURT HAS PREVIOUSLY RULED IN DISCIPLINARY MATTERS COSTS ARE A MATTER OF DISCRETION.

The recovery of costs by a prevailing litigant is a fundamental right in the jurisprudence of this state. This common law principle has been codified into both statute, Florida Statute 57.041 (1981), and by this Court's Administrative Order of October 28, 1981 (432 So. 2d 1346) incorporating the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions.

The Florida Bar, contrary to Petitioner's argument, is not a state agency enjoying sovereign immunity, but is at most quasi-judicial in nature with its members being "officers of the court", thereby subjecting them to the control of the Florida Supreme Court. See Petition of The Florida State Bar Association (FLA. 1949) 40 So. 2d 902 and the Integration Rule of The Florida Bar. To make individual lawyers and/or the Bar agents of the state would expose the state government to every conceivable claim within the scope of the doctrine of respondent superior. Surely, this was not the intention of the Court or the Bar when the Integration Rule was adopted.

This Court has consistently held in litigation involving the Bar's disciplinary procedure the taxation of costs is within the discretion of the trier of fact. The doctrine was clearly and unequivocally stated in The Florida Bar v. Davis (FLA. 1982), 419 So. 2d 325. In Davis we find this holding,

"... we have set no hard or fast rules relative to the assessment of costs in disciplinary proceedings. In civil actions the general rule is that they follow the result of the **suit,** section 57.041 Florida Statutes (1981), Dragstrem **v.** Butts, 370 So. 2d 416 **(FLA.** 1st DCA 1979), and in equity the allowance of costs rests in the discretion of the court. National Rating Bureau **v.** Florida Power Corp., **94** So. 2d 809 (FLA. 1956).

We hold that the discretionary approach should be used in disciplinary actions..."

Again, in The Florida Bar v. NEU 17 **F.L.W.** ***266*** (April 2, 1992) one of the issues raised was the determination of costs and this Court referred to The Florida Bar v. Davis decision and re-affirmed the doctrine that disciplinary matters are of an equitable nature and the trier of fact is vested with discretion in assessing costs,

Admittedly, both Davis and NEU, infra, involved costs being taxed by the Bar against attorney Respondents but, more significantly, the positions of the parties does not appear to be the rationale of the Court's decisions. The Court approved the law of taxation in **disciplinary** matters and **did** not limit it to benefit the Bar alone.

ISSUE II

SHOULD THE BAR ENJOY ANY SPECIAL PRIVILEGES AND IMMUNITIES REGARDING TAXATION OF COSTS THAT ARE UNAVAILABLE TO OTHER CITIZENS OR GOVERNMENTAL AGENCIES OF FLORIDA.

The just answer is the Bar should not enjoy any special status unavailable to other litigants. Governmental agencies in Florida do not enjoy such protection. See Berek V. Metropolitan Dade County (FLA. 1982) 422 SO 2d 838, holding that governmental agencies can be subjected to the taxation of costs. Additionally, private litigants do not enjoy such special privilege or immunity.

Why, then, should The Florida Bar? There simply is no compelling reason that would be a foundation for such a privilege.

The Supreme Court of Florida by virtue of its "inherent power" to govern attorneys and the disciplinary process can clarify this imbalance in the rules regulating the Bar by allowing a successful litigant the opportunity to tax costs against the Bar. It is this "inherent power" that was the basis for the integration of the Bar as set forth in Petition of The Florida Bar Association, (FLA. 1949), 40 So. 2d 902. To balance the rights of the litigants in the disciplinary process would be consistent with what the Court has sought to do by the Florida Rules of Civil Procedure and other state statutes.

CONCLUSION

The Respondents were successful at every level of the proceedings in this cause. They did not prevail entirely on their attempt to limit the scope of the Bar's subpoena but they did succeed in part. The Respondents feel the assessment of costs at that preliminary hearing was premature and should have only been made after a final hearing in the merits. Nevertheless, they absorbed costs of $553.50 at that stage of the proceedings and paid them. In order to protect their rights they were required to present the issue to this Court which resulted in the companion decisions of The Florida Bar v. Horvath (FLA. 1991) 581 So 2d. 1310 and The Florida Bar v. Mead (FLA. 1991) 581 So. 2d 1311. The Respondents, in all fairness, should at least recover their filing fees filed with the Clerk of the Supreme Court.

At the hearing on the merits, the Referee found no basis or evidence to support any of the Bar's allegations. The Respondents should recover the costs necessarily expended because of the hearing.

In summary, there is no reason why the Florida Bar should not be treated as every other litigant in the State of Florida and it should bear the costs incurred by the prevailing Respondents in this cause.

Respectfully submitted,

Hartselle Baker, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing was furnished by United States Mail this 2nd day of July, 1992, to: Jan K. Wichrowski, Assistant Staff Counsel, 880 North Orange Ave., Orlando, Florida 32801 and John Harkness Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and the original of the foregoing has been furnished by U.S. mail to Mr. Sid White, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399.

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