IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

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

v.

VICTOR O. MEAD,

and

C. CALVIN HORVATH,

Respondents.
_____/

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND FACTS

The law firm of Horvath and Mead ran a newspaper advertisement in or around early 1989, A-1. Although the ad claimed that divorces would be handled for a fee of $50.00, the grievance committee, pursuant to a complaint by an unsatisfied client, found the ad misleading in that a) it failed to clearly advise the consumer that costs were to be added to the fee, and b) few, if any, actual cases were conducted for the advertised fee of $50.00.

On December 19, 1989, the grievance committee began hearing this case. A delay was caused by respondents' refusal to comply with the Bar's subpoena requesting information regarding respondents' trust account, internal office manuals, and files of divorces actually conducted for the advertised $50.00 fee. The Florida Bar filed a Petition for Order to Show Cause with this Court, The Florida Bar v. Horvath, 581 So. 2d 1310 (Fla. 1991), and The Florida Bar v. Mead, 581 So. 2d 1311 (Fla. 1991), resulting in this Court appointing a referee who conducted a hearing and recommended compliance with the Bar's subpoena, limiting the scope of the trust account records to a one year period. The referee further recommended that respondents pay the Bar's costs in bringing the Order to Show Cause. Respondents appealed the referee's recommendations in regard to the costs assessment only. On May 9, 1991, this Court ruled that respondents should reimburse The Florida Bar for all costs previously ordered with the exception of administrative costs of $500.00 which were not authorized by the rules for a contempt

proceeding.

On March 19, 1991, the grievance committee considered the evidence obtained through the contempt proceeding and voted that a finding of minor misconduct against each respondent was appropriate due to their violations of the 1989 advertising regulations: 4-7.1(a) for making or permitting to be made a false or misleading communication about an attorney's services where the communication contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading; 4-7.2(a) for making or permitting to be made a misleading advertisement through public media, such as a newspaper, that contains a material misrepresentation of fact or law or omits a fact necessary to make the statement considered as a whole not materially misleading; and 4-7.3(f) for failing to provide proof that any statement or claim made in an advertisement is not directly false or misleading, impliedly false or misleading, unsubstantiated in fact, unfair, or fails to disclose material information.

The Report of Minor Misconduct outlining the above rule violations was served upon respondents on June 7, 1991. On July 10, 1991 respondents rejected the minor misconduct. The Florida Bar filed a Complaint of Minor Misconduct and a final hearing was held on November 20, 1991. In the Report of Referee dated

January 19, **1992**, the referee found respondents not guilty and stated, "I find The Florida Bar should bear the costs incurred in these proceedings,'' **Report** of **Referee**, **A-5**.

The Florida Bar moved for reconsideration and clarification of this costs assessment and a telephone hearing was held on this subject on March **17**, **1992**. The referee clarified that **The** Florida Bar should be responsible for respondents' costs, see Respondents' Affidavit of Costs, **A-11**, as well **as** the Bar's own costs, see Order on The Florida Bar's Motion for Reconsideration and Clarification of the **Report** of **Referee**, **A-17**.

The Florida **Bar's Board** of Governors considered this finding at their May, **1992** board meeting and voted to seek review of this costs assessment against the Bar.

SUMMARY OF ARGUMENT

The Referee erred in ordering The Florida Bar to bear respondents' costs as well as its own costs in this disciplinary proceeding,

The Rules Regulating The Florida Bar do not authorize the payment of respondents' costs in a disciplinary case. Rule 3-7.6(k)(1) provides that taxed costs should be payable to The Florida Bar.

Clearly, no provision is made or inferred that The Florida Bar should in any circumstances be responsible for the costs of a respondent in a disciplinary proceeding.

Further, forcing The Florida Bar to pay the costs of prevailing respondents in disciplinary proceedings would be contrary to the public purpose and have a chilling effect on the disciplinary process. The goals of attorney discipline are too important to be curtailed by the funding crisis which would most definitely be created by forcing this arm of the Supreme Court of Florida to pay prevailing respondents' costs.

Further, respondents seek costs which are wholly inappropriate to the case at hand. Eight hundred and three dollars of the $869.00 sought relates to the Order to Show Cause

in which this Court has already ordered costs assessed against respondents, The Florida Bar v. Horvath, 581 So. 2d 1310 (Fla. 1991) and The Florida Bar v. Mead, 581 So. 2d 1311 (Fla. 1991).

There is no logical reason consistent with the public purpose which would allow a prevailing respondent to recover his costs where The Florida Bar brings a disciplinary action in a good faith effort to investigate and prosecute ethical violations.

These are no allegations or evidence of improper actions in this case by The Florida Bar. This is simply a case where the referee heard the evidence and, while admitting the advertisement was confusing, T-12-18 and 120-121, ultimately held that the advertisement did not contain a "material" misrepresentation. It would be contrary to the purposes of attorney discipline to force The Florida Bar to pay respondents' costs in this instance.

ISSUE

I. THE **RULES REGULATING THE FLORIDA BAR DO NOT ALLOW A COSTS ASSESSMENT AGAINST THE FLORIDA BAR IN A DISCIPLINE MATTER.**

The Rules Regulating The Florida Bar, Rules of Discipline, provide:

> **3-7.6(k)(1)** The referee's report shall include ...
>
> **3-7.6(k)(5)** A statement of costs incurred **BY THE** FLORIDA **BAR and** recommendations as to the manner in which SUCH COSTS should be taxed. The costs of the proceedings shall include investigative costs, including travel and out-of-pocket expenses, court reporters' fees, copy costs, witness and traveling expenses, and reasonable traveling and out-of-pocket expenses of the referee and bar counsel, if any. Costs shall also include a **$500** charge for administrative costs. **COSTS** TAXED **SHALL BE PAYABLE TO THE FLORIDA BAR.** (Emphasis added).

The rule is clear. It specifically delineates which **costs** are recoverable by The Florida Bar. It makes no provision for recovery of costs by a respondent or anyone other than The Florida Bar.

It should be noted that this rule was last amended in 1989, after this Court held that The Florida Bar could not recover any investigative costs because such ***costs*** were not specifically authorized by the costs rule, The Florida Bar v. Allen, **537 *So.*** 2d 105 (Fla. 1989). In Allen, this Court stated:

> In view of the clear language of Rule **3-7.5(k)(1),** the **referee** had no authority to tax as costs the time and **expenses** of the investigator. At **107.**

Thus, the court rejected the Bar's argument in Allen that the rule should **be** interpreted to include items not listed therein, noting that when read in its entirety, the rule is too clear to permit such a construction. "If investigative time and expenses or any other unspecified items are **to** be taxed as costs, the rule will need to be amended," at **107.** This **is a** strict construction of the rule.

It is appropriate to use this strictly construed view of interpreting the rule because public policy interests are at stake. Case law mandates that **statutes** purporting to waive sovereign immunity are to be strictly construed against indicating any waiver of immunity. State ex rel. Davis v. Love, **126** So. 374, **99** Fla. 333 (Fla. 1930). **The** Florida Bar is an official arm of the Supreme Court of Florida pursuant to the Rules Regulating The Florida Bar, Chapter 1, General Introduction. Thus, it would be improper to liberally construe the rule to allow any costs assessment against The Florida Bar and through inference, the state.

It is obvious that forcing The Florida Bar to pay the costs of a prevailing respondent would have a chilling effect on the disciplinary process and would, in fact, likely bring an abrupt curtailment to the disciplinary process. The Bar's budget is

funded entirely by the dues of Florida Bar members and is strictly allocated pursuant to the Rules Regulating The Florida Bar, Section 2-6, Fiscal Management. No budgetary allocation has been made for the payment of respondents' costs because this is not authorized or contemplated by the rules. Given the current Bar budget situation, it is impossible to suggest that the payment of all prevailing respondents' costs could be managed.

The referee's order on The Florida Bar's Motion for Reconsideration and Clarification of the Report of Referee reasons that common and civil law precedent routinely allows the prevailing party to recover costs and The Florida Bar should not be treated any differently. However, the Florida Rules of Civil Procedure do not make any standard provision for costs assessment against a non prevailing party where a party simply fails to prevail despite a good faith and proper action. Although certain statutory authority exists for awarding costs, none is present here.

As the Supreme Court of Florida noted in Allen United Enterprises v. Special Disability Fund, 288 So. 2d 204 (Fla. 1974), Florida Statute Section 57.041(1), which addresses allowing prevailing parties to recover legal costs, does not apply to quasi-judicial administrative proceedings. Allen involved a claim for costs in a workers compensation matter where the Court noted, "... a 'judgment' as contemplated in the

statutes does not include an award of benefits under the Workmens' Compensation Law by a Judge of Industrial Claims; nor does it contemplate any other order or award obtained through any 'quasi-judicial' administrative agency.", at page 206. It is well settled that Bar disciplinary cases are quasi-judicial administrative proceedings, Rules of Discipline, Rule 3-7.6(e)(1) and State v. Dawson, 111 So. 2d 427, 431 (Fla 1959).

ISSUE

11. IT IS NOT PROPER TO TAX RESPONDENTS' COSTS AGAINST THE FLORIDA BAR WHERE THE BAR PROPERLY AND IN GOOD FAITH PURSUED A DISCIPLINARY ACTION AGAINST THE RESPONDENTS.

The Florida Bar is charged with policing its own members and maintaining high ethical standards, Rules of Discipline 3-3.1 and 3-3.2. The Rules of Discipline detail the process required in investigating and disciplining members of the Bar.

There is no indication whatsoever that the Bar presented anything other than a properly investigated good faith disciplinary action in this matter. The case was properly investigated by Bar staff and the grievance Committee, who conducted hearings and determined that probable cause for violations of rules was present, Although there was a delay between the initial grievance committee referral and their vote of probable cause, this was entirely caused by respondents' refusal to comply with the grievance committee subpoena. This required the Bar to pursue an Order to Show Cause and resulted in this Court's order of May 9, 1991, ordering respondents to comply with substantially all of the Bar's subpoena, The Florida Bar v. Horvath, 581 So. 2d 1310 (Fla. 1991), The Florida Bar v. Mead, 581 So 2d 1311 (Fla. 1991). Ultimately, the grievance committee recommended minor misconduct which would have expedited the conclusion of the case had respondents chosen to accept this

recommendation.

At no time and in no manner has any Bar misconduct been alleged in this case by either the respondents or the referee.

In fact, the referee acknowledged the validity of the Bar's complaint at the final hearing. Where the Bar's complaint alleged violations of the Rules of Discipline for misleading advertising by stating "Uncontested Divorces $50.00", A-1, the referee acknowledged at the conclusion of the final hearing:

> I believe it's clear from the evidence that the ward "uncontested" as used in the ad, can be confusing. At page 119.
>
> Further, I would like to make a comment. I do think the words "uncontested divorce" are confusing. It appears in Florida Bar's Exhibit 3 that some lawyers, in most of the ads on that exhibit, do not use the word "uncontested". It seems to me the better practice, after hearing all the testimony today, would be, for instance, to put "Uncontested divorce $50.00 and up", because of the confusion of what truly contested is. At page 120.

The referee reasoned however, that this "confusion" was not a "material" misrepresentation in violation of the rule. This, despite the fact that the complaining witness testified that he had complained about the ad because he felt that he had been misled by the ad into believing he could obtain an uncontested divorce for $50.00 from the respondents, T. 13-19, and the fact that respondents offered no evidence of divorces they had actually completed for $50.00.

Clearly, the referee's acknowledgement of the confusion caused by the ad indicated the Bar had a reasonable basis on which to proceed for prosecuting the respondents for placing a misleading or unfair ad, as was charged. In this instance, the referee weighed the evidence and found in the respondents' favor. This result is inevitable in some cases and is no basis for penalizing the Bar and thus the members of The Florida Bar who pay the dues which fund the disciplinary process.

In The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982), the Court held that a discretionary approach should be used in disciplinary actions in awarding costs. Absent any lack of good faith or misconduct by the Bar, discretion calls for each party to bear its own costs in this matter.

In The Florida Bar v. Neu, 17 FLW 226 (Fla. April 2, 1992), Neu was charged with misappropriating guardianship funds. The referee recommended that he be found not guilty of some, but not all, of the rules charged. The Bar sought an appeal of the referee's findings and recommendations and Mr. Neu filed a cross-claim seeking to reduce the amount of costs taxed against him. The court found that considering the seriousness of the charges brought against the attorney, the Bar did not act unreasonably in seeking a harsh punishment and challenging the referee's finding. Therefore, the attorney was ordered to bear the full costs of the disciplinary proceedings. The Bar submits that under **Neu**, unless the referee finds the Bar has acted unreasonably in the bringing of disciplinary charges, costs should not be assessed against the Bar.

ISSUE

111. THE COSTS CLAIMED BY RESPONDENTS SHOULD BE DISALLOWED IN THIS CASE BECAUSE THEY ARE UNRELATED TO THE MATTER AT HAND AND HAVE PREVIOUSLY BEEN RULED UPON BY THIS COURT.

Additionally, it must be noted that respondents seek costs totalling $869.00, Respondents' Affidavit of Costs, A-11. As The Florida Bar pointed out to the referee in the Bar's Response to Respondents' Affidavit of Costs, $803.00 of this sum relates to a case not even before this Court, but to the previous Order to Show Cause prosecution, The Florida Bar v. Horvath, 581 So. 2d 1310 (Fla. **1991)** and The Florida Bar v. Mead, 581 So. 2d 1311 (Fla. 1991).

To wit: Respondents seek **$250.00** regarding their filing fee for filing a Petition for Review of the Report of Referee in the previous contempt action, The Florida Bar v. Horvath and The Florida Bar **v.** Mead, supra, which is not the **case** at hand, and further seek **$553.50** costs awarded against them and the Bar in that case. It must be noted that the only issue on which the respondents sought review in the contempt case was the referee's order requiring respondents to pay the costs of The Florida Bar in successfully bringing the Order to Show Cause action. On May

9, 1991, this Court ordered respondents to comply with the subpoena and to pay Bar costs totalling **$553.50**. Thus, respondents have already been denied their costs reimbursement as well as been ordered to pay The Florida Bar's ***costs*** in the Order to Show Cause action. Because no provision was made for readdressing this **costs award** in the Court's final order of May 9, 1991, respondents have no authority to change the previous final order of this Court, Fla.R.App.P., Rule 9.330.

CONCLUSION

WHEREFORE, The **Florida** Bar prays this Honorable Court will **review** the referee's recommendations as to the assessment of costs against The Florida Bar **and** direct that each party should bear its own costs in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1925; a copy of the foregoing has been furnished by ordinary mail to Mr. F. Hartselle Baker, Counsel for Respondents, 1407 East Robinson Street, Orlando, Florida 32801; and a copy of the foregoing has been furnished by ordinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, on this 26th day of June, 1992.

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