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JUL 17 1992  
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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.

\_\_\_\_\_ /

REPLY BRIEF

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### STATEMENT OF THE FACTS AND CASE

The Florida Bar refers to its Initial Brief for a complete summary of the facts and case.

It is necessary to correct certain statements in respondents' Statement of the Facts and Case. To wit, Mr. Miller's complaint was not that he had paid the respondents too much money. Mr. Miller's complaint was that the respondents had misrepresented the cost of a divorce in their newspaper advertisement, a copy of which **was** entered as The Florida Bar Exhibit 1 at the final hearing of December **18**, 1991.

Further, all cost money was not paid directly by Mr. Miller to the Clerk of Court by money order. Rather, respondents' office was **paid** cash by Mr. Miller for the cost of the filing fee as well as other costs. **See** the grievance committee transcript of December 19, **1989**, pages **78-79**, attached in the Appendix to this Reply Brief of **The Florida Bar**. By accepting the client's cash for costs purposes, respondents were placed in a position which required the funds to be deposited in **a** trust account. The grievance committee was therefore concerned when respondent Horvath stated he did not have a trust account. See the grievance committee transcript of December 19, **1989**, p. **79**, Appendix.

Further, in regard to the final hearing on December **18**, **1991**, the Bar had not dismissed the charges against respondent

Victor O. Mead. Rather, The Florida Bar agreed to accept Mr. Mead's conditional guilty plea with the condition that if Mr. Horvath was found not guilty, Mr. Mead would be allowed to be included in the not guilty finding.

While the only issue before this Court is the issue of taxable costs, the above clarification is necessary to show the Bar's prosecution of this matter was fully proper and not frivolous.

## SUMMARY OF ARGUMENT

In Florida, there is no provision for the recovery of costs by a prevailing litigant absent specific statutory law. There is no statute granting a respondent the recovery of costs in Bar disciplinary proceedings. Although respondents rely on Florida Statute Section **57.041** (1981), this applies only to civil proceedings and has no bearing on a Florida Bar disciplinary **case**, which is clearly controlled by the Rules Regulating The Florida Bar. See Rule of Discipline 3-1.2.

Further, disciplinary proceedings are administrative in character, not civil or criminal, and the Florida Rules of Civil Procedure do not apply if provisions otherwise are found in the Rules Regulating The Florida Bar. **See** Rule of Discipline **3-7.6(e)(1)**.

The Rules Regulating **The** Florida Bar provide only for the assessment of The Florida Bar's costs, not of respondents'. See Rule of Discipline **3-7.6(k)(1)(5)**. Therefore, it is not proper to **force** The Florida Bar to pay respondents' costs in this case where The Florida Bar has acted in good faith and brought this action in full accordance with the Rules Regulating The Florida Bar. No Bar misconduct has been alleged. The proper resolution of this matter calls for each party to bear their own costs.

ISSUE

I. BOTH DISCRETION AND THE RULES OF DISCIPLINE CALL FOR EACH PARTY TO BEAR THEIR OWN COSTS IN THIS MATTER WHERE RESPONDENTS HAVE BEEN FOUND NOT GUILTY AND NO PROSECUTORIAL MISCONDUCT IS PRESENT.

The Florida Bar does not suggest that it is a state agency. Clearly, The Florida Bar is an arm of the Supreme Court of Florida and is thus part of the judiciary branch of the State of Florida.

Respondents argue the Bar should be responsible for their **costs** under the principle that prevailing parties often are awarded their costs pursuant to Florida Statute Section 57.041 (1981). However, this statute applies to civil actions only. Bar proceedings are administrative in nature and neither civil or criminal. Rule of Discipline 3-7.6(e)(1). The Florida Rules of Civil Procedure do not apply if provisions otherwise are found in the Rules Regulating The Florida Bar, Rule of Discipline 3-7.6(e)(1). Because Rule 3-7.6(k)(1)(5) provides only for the taxation of costs payable to The Florida Bar, the Rules Regulating The Florida Bar clearly prohibit any application of the civil statute.

In The Florida Bar v. Carr, 574 So. 2d 59 (Fla. 1990), this

Court clearly stated it does not follow civil procedure in assessing costs. Where the respondent was found not guilty, the respondent failed to ask the referee for costs and the referee recommended that each party bear their own costs. The Court denied respondent's appeal seeking costs, providing clear language that the Court does not follow a prevailing party rule in awarding **costs**:

Respondent argues that because The Florida Bar is customarily awarded costs in cases where a lawyer is disciplined, it follows that a lawyer who prevails against charges brought by the Bar should be awarded costs as a matter of right. We disagree. The taxation of costs is a matter within the discretion of the referee, and should not be reversed absent an abuse of discretion.

It is clear, however, that this Court has used a discretionary approach in assessing **costs** in disciplinary **cases**. In The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992), and The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982), this Court used a discretionary approach in calculating the Bar's costs taxed to the respondents. Although each respondent was found guilty and disciplined, the Court did not grant The Florida Bar all of the **costs** requested in Davis because the Bar did not **prove** all of the charges. In Neu, the Court again emphasized the importance of the discretionary approach in considering a respondent's request to reduce the amount of costs taxed against him. The Court found that the Bar had acted reasonably and thus the respondent would be taxed the full Bar costs. The Bar submits that the true standard in determining costs is thus whether or not the Bar



acted reasonably and prosecuted the manner properly.

In this matter, The Florida Bar has acted reasonably and in good faith. Although the proceedings have been protracted, this is due to respondents' conduct in refusing to comply with the Bar's subpoenas until ordered to do so in contempt proceedings. No Bar misconduct has ever been alleged. It would be an abuse of discretion to **force** The Florida Bar to bear respondents' costs where the referee acknowledged the basis for the Bar's charges and recommended changes in respondents' conduct. **See** the final hearing transcript of August 14, 1990, page 120.

If respondents' costs were assessed against the Bar, Bar dues of unerring and uninvolved Bar members would necessarily be used to pay the assessment. It is inappropriate to reduce the resources available to fund services for Bar members and to fund the discipline process by assessing costs against The Florida Bar. In The Florida Bar v. Gold, 526 So. 2d 51 (Fla. 1988), the Court rejected the respondent's argument that the Bar's **costs** should be reduced where he was found guilty but alleged the Bar had incurred excessive and unnecessary costs. The Court based its rejection on the fact that all charges were encompassed in the same investigation and the costs incurred were not excessive or improper. **As** this Court noted,

In these cases, the choice is between imposing the costs of discipline on those who misbehave or on the members of the Bar who have not misbehaved. We see no reason to excuse respondent. **At** page 52.

The **Rules** of Discipline do not provide for the recovery of costs by anyone other than the Bar. Case law clearly emphasizes the discretionary approach be required in determining costs and tends to reduce Bar costs where prosecutorial misconduct is alleged.

In the case at hand, no prosecutorial misconduct is alleged or present. The referee assessed costs against the Bar based upon the prevailing party theory, which is clearly inappropriate under Carr, supra.

Further, as noted in detail in the Bar's Initial Brief, respondents seek costs belonging to an entirely different case, Supreme Court of Florida Case No. 76,138, which is totally inappropriate in this case.

Proper discretion calls for each party to bear their own costs in this matter.

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 their 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 Reply Brief have been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing Reply Brief 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 15<sup>th</sup> day of July, 1992.

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