IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 78,882
(TFB No. 91,217)

vs.

RICHARD E. BOSSE,

Respondent

ANSWER BRIEF

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SYMROLS AND REFERENCES

The Florida Bar shall be referred to as the Bar.

The Report of Referee dated March 31, 1992, shall be referred to as R1.

The Report of Referee dated June 18, 1992, shall be referred to as R2.

The transcript of Charles Chilton's Motion to Tax Costs shall be referred to as TR.

The transcript of Bosse's Trial shall be referred to as TR1

STATEMENT OF THE CASE AND FACTS

Respondent does not accept the accuracy of the Statement of Case and of the Facts filed by the Florida Bar as set forth in it's Brief, because of the errors set forth therein,

The case against Respondent originally arose as a result of a complaint to the Florida Bar filed by the grandmother and great-grandmother of a child who was the subject of an adoption in Polk County. The gravamen of this complaint was that attorneys Charles R. Chilton and Richard E. Bosse were involved in the "sale of a child". The investigation of Mr. Bosse was conducted initially through the local office of the Florida Bar in Fort Lauderdale. The complaint of these ladies was unsubstantiated and the Bar did not pursue it. Nonetheless, the present case grows out of this same complaint in that the matter was transferred back to the Orlando office of the Florida Bar, which subsequently investigated another complaint against Chilton and Bosse by the prospective, adoptive parent, Dr. Bruce Patsner. Dr. Patsner, accompanied by his lawyer C. Ray McDaniel (who was representing Patsner in a malpractice claim against Chilton and Bosse) gave a sworn statement to Staff Counsel, David McGunegle. No further investigative work was conducted by the Florida Bar except for a brief statement elicited from Marie Crews, HRS caseworker. This matter was then brought directly to the Tenth Judicial Circuit Grievance Committee (A).

After being advised of this action, Respondent Bosse had requested that he be afforded the right to appear before the Grievance Committee and present his side of the case. The week before the committee took its vote, he was told by Associate Staff Counsel Kristen M. Jackson, that he could not appear. The Rules of Professional Discipline were changed substantially in 1989 so that an attorney does not have the right to appear before the Grievance Committee to give testimony or to cross-examine witnesses. In fact, a finding of probable cause may emanate from a "paper vote" on evidence presented by the Staff Counsel only. Apparently the Grievance Committee had a change of heart because Ms. Jackson called Bosse at 12:30, August 13, 1991

at Mr. Bosse's offices in Delray Beach, Florida. He was told he could appear before the Grievance Committee in Winter Haven, Florida for a fifteen minute statement (over one hundred miles distant) at 6:00P.M. that evening!

The Grievance Committee took a vote and found probable cause in case no. 91-5091-50,217(10A) for violating Rules 4-1.4, 4-1.5, 4-3.3(a)(2), 4-3.4(b) and 4-8.4(c) of the Rules of Professional Conduct. The most serious complaint against Bosse was that he failed to apprise the Circuit Court of material information, namely that the adoptive parents had moved out of the State during the ninety (90) day period following placement and, therefore, they did not qualify for an adoption under Chapter 63, Florida Statutes. The Bar also alleged that the Respondent had charged an excessive fee and failed to keep his clients informed. Apparently the Bar persuaded the Board of Governors that his was a particularly egregious matter and the Bar would not even consider anything less than a substantial punishment for what it perceived to be a very serious violations of the Rules of Professional Conduct.

Bosse answered the complaint of the Florida Bar which had been filed on November 1, 1991. He attached an extensive affidavit prepared by attorney Weston Sigmund in his response to the initial complaint. If the Florida Bar had paid any attention to that affidavit and had interviewed Weston Sigmund this case, in all probability, would not have gone to trial. Sigmund's affidavit, concerning a critical meeting among attorneys Charles Chilton, Richard E. Bosse, Weston Sigmund and Dr. Patsner on June 15, 1990, following a hearing in Pasco County, directly contradicted Patsner's sworn testimony that he gave to the Florida Bar prior to the vote of probable cause. The Bar never retained an expert in Adoption Law with reference to Chapter 63 prior to filing it's complaint. Associate Staff Counsel Jackson has testified under oath that the only legal research that was conducted prior to the filing of the complaint was that of her paralegal (TR, p.88). She also testified that she didn't recall if the Bar's investigator talked to either Charles Chilton or Richard E. Bosse. In fact, at no time did any investigator talk to either of them prior to filing the complaint. More importantly, Staff Counsel never reviewed Bosse's filed prior to the

trial of this case. An investigator was sent from the Ft. Lauderdale office who spent approximately on an hour with Mr. Bosse. Mr. Bosse agreed to have his entire file copied for the Florida Bar, but Staff Counsel declined this offer (TR, p.90).

The Florida Bar did contact Attorney Linda McIntyre, who specializes exclusively in Adoption Law, and asked her to testify on its behalf. She thought this was a case of an routine adoption involving an excessive fee (McIntyre deposition, p. 6). When Mrs. McIntyre read Bosse's answer to the complaint, she immediately contacted the Florida Bar on February 14, 1992, and told Associate Staff Counsel Jackson that she did not agree with the position of the Florida Bar and, in her opinion, Bosse didn't do anything wrong (McIntyre deposition, p. 12). The Bar never told Bosse's attorney or Chilton's attorney of this conversation. In fact, on February 19, 1992, when Chilton's attorney, Jack Brandon, and Bosse's attorney, T.N. Murphy, Jr., met with Kristen Jackson in Orlando, Ms. Jackson told them that the reason that Linda McIntyre was not testifying was because of a scheduling conflict (Brandon affidavit; TNM affidavit; TR, p. 91; McIntyre deposition, p. 14). Respondent's attorney, on his own initiative, called Linda McIntyre at which time she told him that her legal opinion was totally contrary to that of the Florida Bar on all charges. Ms. McIntyre agreed to testify on behalf of Mr. Bosse and Mr. Chilton and refused their offer to compensate her for her expert time and expenses.

Associate Staff Counsel Jackson has admitted, under oath, that she knew that C. Ray McDaniel (who gave sworn testimony together with Dr. Patsner to Staff Counsel David McGunegle), was representing Dr. Patsner in a malpractice claim against Bosse and Chilton prior to the vote of probable cause and the filing of the complaint by the Florida Bar (TR, p. 93).

Although Mrs. Jackson has testified that the Florida Bar got commitments from two or three attorneys to testify at the Bosse trial, no experts actually appeared on behalf of the Bar at Bosse's trial. Charles Carlton, the only expert who was retained by the Florida Bar (on the issue of excessive attorney's fees), testified at his deposition that he could not say that Bosse's fees

were clearly excessive and he was not called to testify at trial on behalf of the Bar. (TR1, p. 14). Thus at no time did the Florida Bar present any expert testimony whatsoever that Bosse's conduct violated the Rules of Professional Conduct.

The Referee issued his report following the trial on March 31, 1992. **As** to the charge of excessive fees, the Referee stated, ... "the Bar has failed to submit **any** evidence that the hourly rate of Respondent was excessive for these proceedings and the hourly time was excessive" (R1, p. **2).** As to Count II, obviously the most serious violation, since it included failing to disclose a material fact to a tribunal and engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, the Referee said, ... "The Florida Bar has failed to meet its burden of proof by presenting evidence of a clear and convincing nature" (R1, p. **2).** The Referee quoted from testimony presented at trial concerning the meeting among Dr. Patsner, Bosse, Chilton and attorney Weston Sigmund on June 15, 1990. The Court found that Mr. Chilton, Mr. Bosse and Mr. Sigmund all testified that Dr. Patsner and his family did not tell Mr. Bosse that Dr. Patsner had already moved to New Jersey on that date. The Court also noted that Dr. Patsner testified that he would not dispute that either he or his wife told Marie Crews, the HRS case worker, that he was **not going to tell his attorneys about his move to New Jersey:** and Marie Crews' hand-written, contemporaneous notes, which were put into evidence, state unequivocally that Mrs. Patsner told her that the Patsner's were not going to tell their attorneys that they had moved to New Jersey. (Crews deposition p. 28, 29; 8/16/91 Crews' File Note). All of this evidence, particularly that of Chilton, Crews and Sigmund, was in the hands of the Florida Bar prior to trial.

The Referee's Findings of Fact totally refute the position of the Florida Bar. Contrary to the Bar's recitation of facts, the Referee said in his report,

> because of that provision of the Statute (F.S. 63.092(7)), the Referee is of the opinion that there is no clear duty by an attorney to notify the court of a change of residency by the adopting parent outside of the State of Florida and because at the final hearing the question of residency will have to be proven... (R1, **p. 4).**

The Referee said

> There is no evidence that Respondent Bosse knew that at the time of the filing of the Petition that the Patsner's had not intended to continue to reside in Florida and, ...under these circumstances there is no duty for Respondent to notify the court of the adopting parents... change of residency from Florida. (R1, pp. 4,5)

> Similarly, **as** to Count III the Referee found ...

> that the Florida Bar has failed to present clear and convincing evidence that Respondent failed to reasonably keep the Patsner's informed about the status of this case. (R1, p.5)

Remarkably, the only evidence that the Bar did not have an opportunity to review before trial was Bosse's own testimony and that of one of Respondent's experts, former Circuit Judge Lewis Kapner, a Family Law Specialist. Bosse's testimony did not differ in any respect, however, from the extensive answer that he had filed in response to the Bar's complaint.

The Referee never heard Bosse's Motion to Dismiss prior to trial. Bosse had filed a Motion for Summary Judgment during the course of the proceedings against him. A hearing was conducted on March 10, 1992 before the Referee and Bosse's Motion was denied.

The final hearing was held on March 23rd and 24th in St. Lucie, Florida. At the close of the Bar's case the Referee granted a directed judgment of not guilty on the charge of excessive fees (R1, p. 2). At the close of all the evidence the Referee told the parties that he would prepare a report wherein he would recommend that Bosse be found not guilty of all other charges. The Bar and Respondent agreed that Respondent's Motion to Tax Costs would be heard at a later date. The Bar did not object and did not tell the Referee that costs cannot be awarded to the Respondent. This point was not raised by the Bar until the hearing on Bosse's Motion to Tax

Costs and in Memoranda of Law filed after the trial,

The Referee issued his report on March 31, 1992, which was considered by the Board of Governors at its May 1992 meeting. The Board voted to accept the Referee's recommendation.

The Referee issued his order on Respondent's Motion to Tax Costs on June 18, 1992, and recommended that costs be awarded to Respondent in the total amount of $9,065.36 (R2, p. 2). On the same day this Court approved the Referee's prior report of March 31, 1992 and dismissed the case.

The Board of Governors reviewed the Report of Referee recommending that costs be awarded to Respondent and, at its July 1992 meeting, voted to appeal the recommendation of the Referee.

Respondent filed a Petition for Review on the issue of costs on June 23, 1992 and the Bar filed a Cross-Petition for Review on July 2, 1992. The Court granted Respondent's Motion to Waive the Filing of his Initial Brief and the Bar filed a respondent to Respondent's Motion to Review on July 17, 1992. The Bar requested permission to file an Initial Brief which was granted.

SUMMARY OF THE ARGUMENT

The Referee did not err in recommending that Respondent Richard E. Bosse be awarded costs in the amount of $9,065.36 to be paid by the Florida Bar.

In almost all civil cases in the State of Florida the prevailing party is entitled to recover costs against the losing party. This has, in fact, been the law with respect to the taxation of costs against the Florida Bar when it has been unsuccessful in its prosecution of an attorney. <u>The</u>

Florida Bar vs. Matthews 296 So. 2nd 31 (Fla. 1974); The Florida Bar vs. Johnson 313 So. 2nd 33 (Fla. 1972); The Florida Rar vs. Dennis 589 So. 2nd 293 (Fla. 1991).

Nothing in the Rules prevents this Court from approving recommendations of a Referee awarding costs to a Respondent who has been found not-guilty, particularly after the Bar has had an opportunity to review exculpatory evidence prior to trial.

This Court has utilized the discretionary approach with reference to awarding costs in Bar discipline cases as opposed to the prevailing party rule. This Court has never decided that **only** the Bar is entitled to be awarded costs in disciplinary proceedings. In fact, existing case law does shed light on the issue raised before the Court in this case, because they demonstrate that the Court has indeed affirmed the recommendations of the Referees in awarding costs to successful Respondents in Bar disciplinary matters.

The Court has repeatedly sided with respondents who are found guilty of some but not all charges during those instances when the Bar has sought to recover all of it's costs. The Court has stated that the Bar is entitled to only those costs directly associated with the charges upon which the Respondents have been found guilty.

This case is not merely one where the Bar did not prevail because a Referee determined that respondent's version was more believable than the testimony of the chief complaining witness, Dr. Patsner. Rather, the Report of the Referee includes evidence which was in the hands of the Bar prior to trial and which the Bar chose to ignore. Dr. Patsner's testimony was directly contradicted by totally disinterested witnesses, including Marie Crews, the HRS case worker, and attorney Weston Sigmund.

Prior to a major revision to the Rules attorneys were allowed to appear before the Grievance Committee, present evidence and cross-examine witnesses. Now, Staff counsel for

the Bar act in the role of a prosecutor before a Grand Jury, and **a** Grievance Committee can refer a complaint to a Referee on a "paper vote". This system itself seriously undermines any notions of fundamental fairness and due process. The Bar complains that it will have too great a burden if they have to "pre-try" a case. Historically and until 1989 the prior disciplinary rules provided for such a procedure. Perhaps it was flawed, but it prevented many cases, where an attorney was innocent, from being tried before a referee. Respondent doesn't ask that the Bar be required to "pre-try" a case, but, at the very least, the Bar should be required to look at all of the evidence in its possession prior to insisting upon a trial. In this case the clear and unequivocable evidence pointing to Bosse's innocence was ignored.

The goal of attorney discipline is not to penalize innocent attorneys who prevail in disciplinary matters. Any grievance proceeding which is referred to a Referee is, perhaps, the most serious matter to ever confront a practicing attorney. Not only is his ability to practice his profession and make a living at stake, but he is also required to obtain legal representation and spend thousands of dollars in fees and costs, When, as in this case, the respondent is a "strong prevailing party" and the Bar presents an "extremely weak case", it is fundamentally unfair that the respondent is not able to recover his costs. It is a disservice to the attorneys of this State that the Bar should take such a draconian position with reference to the award of taxable costs. Moreover, a scrutiny of evidence prior to trial does nothing to increase the disciplinary bureaucracy. It merely makes the bureaucracy do its job more efficiently and more effectively. It may also have the additional, salutary effect of not burdening our judiciary with unsubstantiated grievance proceedings.

Finally, the attorneys of this State who are involved in disciplinary proceeds and who prevail should not have to prove by clear and convincing evidence that Staff Counsel engaged in prosecutorial misconduct in order to be awarded their costs. Why should the burden of proof shift to the lawyer who has prevailed when historically this burden has been shouldered by the Florida Bar? Nothing suggested in the Bar's brief should compel the Court to endorse such a

change.

ARGUMENT

I, THE RULES REGULATING THE FLORIDA BAR DO NOT PREVENT THE COURT FROM AWARDING COSTS TO A SUCCESSFULRESPONDENT.

In the Florida Bar vs. Davis, 419 So. 2nd 325 (Fla.1982), which was decided three years subsequent to the change in former Integration Rule 11.06(9)(a) (wherein the language "costs taxed shall be payable to the Florida Bar" were inserted), the Court stated

> We have set no hard or fast rules relative to the assessment of costs in disciplinary proceedings. In civil actions the general rule in regard to costs is that they follow the result of the suit, Section 57.041, Florida Statutes (1981), Draastem vs. Butts, 370 So. 2nd 416 (Fla.1st D.C.A. 1979),and in equity the allowance of costs rests in the discretion of the Court. National Rating Bureau vs. Florida Power Corp. 94 So. 2nd 809 (Fla. 1956).

The Court went on to say, "We hold that the discretionary approach should be used in disciplinary actions".(Supra. p.328). At no place in this opinion did the Court declare that the Florida Bar, and only the Florida Bar, is entitled to recover costs in a disciplinary proceeding. Thus the existing case law does shed light on the issue of whether respondent Bosse is entitled to taxable costs in this case.

The Bar suggests to the Court that a prevailing respondent should be entitled to costs only when the Bar has engaged in prosecutorial misconduct, and that such misconduct can be proved by clear and convincing evidence. Perhaps the Bar is relying upon the language contained in The Florida Bar vs. McCain, 316 So. 2nd 700 (Fla. 1978), to buttress this position. Respondent notes, however, that Staff Counsel have said in their brief that this alternative has not been approved by the Board of Governors. Respondent asks, therefore, on whose behalf is

this argument made if the Board of Governors has not approved this departure from existing case law? In any event, the Court, unless it finds extremely good cause to do otherwise, customarily follows the doctrine of stare decisis. There is no compelling reason to depart from the Court's previous holdings with respect to the taxation of costs.

The cases cited by the Bar to support their argument that respondent is not entitled to recover taxable costs **(The Florida Bar vs. Davis 419 So.2nd 325 (Fla. 1982); The Florida Bar vs. Wilson 599 So.2nd 100 (Fla. 1992); and The Florida Bar vs. Neu 597 So. 2nd 266 (Fla. 1992))** are totally inapposite to the facts of this case. In each of those other cases the Referee recommended that Respondent be found guilty on at least some of the charges. In none of those cases was the Respondent found not guilty of all charges. In **none** of those cases did the Referee find that the Bar had presented "an extremely weak case" and the Respondent was the "strong prevailing party". **A** fair interpretation of those cases leads one inexorably to conclude that they reinforce the argument of Respondent rather than derogate from it. This Court has consistently reviewed the record and disallowed taxable costs to the Bar for those costs expended on charges where the Respondent was found not guilty, That is the only proposition for which this line of cases stand.

The Bar misstates the facts when it suggests that conflicting factual issues existed until the final hearing. The Referee denied Bosse's Motion for Summary Judgment, but that ruling is not depositive of this issue. (The Bar has mistakenly called the Motion for Summary Judgment a Motion to Dismiss.) The only testimony presented at the final hearing by Respondent which wasn't known to the Bar was the expert opinion of Lewis Kapner. Nonetheless, counsel for Bosse and counsel for Chilton had repeatedly told Associate Staff Counsel Jackson and Staff Counsel McGunegle that Mr. Kapner would testify that neither lawyer violated any Rule of Discipline, particularly with reference to the interpretation of Chapter 63. The Bar itself knew that the expert they had intended to call, Linda McIntyre, was being called as an expert on behalf of Bosse and Chilton. In fact, her affidavit had been submitted to the Referee and to the Bar **prior to the final**

hearing. Attorneys for Respondent Bosse and Chilton implored Staff Counsel to look at the facts of the respective cases in the cold light of day and to understand that there was no basis for bringing these lawyers to trial. Staff Counsel refused. To reiterate, Staff Counsel:

1. Never reviewed Bosse's file.
2. Never took Bosse's deposition.
3. Ignored Weston Sigmund's affidavit substantiating all that Bosse had said in his answer to the complaint.
4. Ignored Charles Chilton's testimony when Staff Counsel took Chilton's deposition prior to the Bosse trial.
5. Were unable to obtain expert testimony to support the charges against Bosse and Linda McIntyre became Bosse and Chilton's own expert; and Natalie Shasha, whom the Bar asked to testify on its behalf refused. (NS affidavit)
6. Agreed at trial that the deposition of Charles Carlton, did not support the Bar's position that Bosse had charged an excessive fee.
7. Ignored Marie Crews' contemporaneous, hand-written notes which were attached to her deposition which the Bar took several weeks before the Bosse trial, and
8. Ignored the affidavits in support of Bosse which were executed prior to trial by attorneys James T. Joiner and Linda McIntyre. (JTJ affidavit; LMcI affidavit)

Respondent's costs are properly taxed against the Florida Bar when the Bar brings an unsuccessful disciplinary action against a Respondent. This is particularly so when the Bar does not examine the evidence in it's possession in order to determine whether it can meet it's burden of proof.

II. THE RESPONDENT'S COSTS ARE PROPERLY TAXED AGAINST THE FLORIDA BAR EVEN WHERE THE BAR PROPERLY AND IN GOOD FAITH BRINGS AN UNSUCCESSFUL DISCIPLINARY ACTION AGAINST THE RESPONDENT.

The Bar has a duty to review its evidence prior to trial in order to assess the probability

of success in light of its burden of proof prior to filing its complaint and certainly prior to trial. It is true that **McCain, Supra, and The Florida Bar vs. Rubin, 362 So.2nd 12 (Fla. 1978)** were examples of outrageous prosecutorial misconduct. These cases, however, should not be used to support the Staff Counsels' suggestion of creating a new standard for awarding costs. McCain was found guilty of a blatant disregard for the integrity of the truth finding process. The Court approved his disbarment. The Court refused to award costs to the Bar in that case. In Rubin, where the conduct of the Bar was equally bad, the Court quashed the Referee's Report, finding Rubin guilty of some of the charges, and ordered the Bar to pay its own costs. In neither of these cases was the Respondent found not guilty on the merits. In **The Florida Bar vs. Icardi** No. 78,797 (Fla. March 12, 1992) the Bar and Icardi stipulated to the Bar's filing a Motion to Dismiss wherein each party would bear its own costs. There was no hearing before a Referee on the issue of taxable costs in that case.

The Bar itself says on page twenty-two (22) of it's Brief that "it does not take issue with the fact that the awarding of costs in Bar Discipline cases is within the Referee's sound discretion". It argues, however, that the **Florida Bar vs. Allen 537 So. 2nd 105 (Fla. 1989),** where the Court refused to award costs to the Bar for costs not enumerated in the Rules *of* Professional Conduct, provides precedent for refusing to award costs to Bosse, This case is not dispositive of the issue involved, nor should it be; finally, the Bar cites **State ex rel. Shevin vs. Indico Corporation, 319 So.2nd 173 (Fla. 1st D.C.A. 1975), certiorari dismissed, 339 So. 2nd 1169 (Fla. 1976)** to suggest that this Court should apply the facts of that case to this case where a Respondent is found not-guilty of all charges in a Bar complaint. The Bar argues that it is **never** appropriate to award a respondent costs absent a showing by clear and convincing evidence that the Bar engaged in misconduct. The Bar (or Staff Counsel, since the Board of Governors has not approved such a standard) has not advised the Court how this process will work. Does the burden shift to a Respondent during the course of a trial? Is the Respondent going to have to prove by clear and convincing evidence that the Bar was guilty of misconduct? Does the Court determine misconduct from the record alone? Respondent believes that if the

Florida Bar does not take the time and effort to determine that it can meet its burden of proving an attorney's guilty by clear and convincing evidence' that attorney should be entitled to recover his costs if he is the prevailing party.

If, however, the Court is persuaded that the standard for the recovery of costs is prosecutorial bad faith, the record of this case clearly does not show that the Bar acted reasonably and in good faith. It demonstrates the opposite. Associate Staff Counsel Jackson was questioned by Charles Chilton's lawyer at Chilton's hearing on his Motion to Tax Costs. Chilton's lawyer asked her the following questions:

Q: "In a proceeding of this nature isn't the burden of proof by the Bar a clear and convincing evidence standard?"

A: "Yes."

Q: "So in other words to file the complaint the Bar goes into it knowing its got to prove its case by a clear and convincing standard?"

A: "Yes".

Q: "And you would agree with what we've talked about earlier that in the Florida Rules of Criminal Procedure that a prosecutor has a duty to disclose exculpatory evidence?"

A: "From what I know of criminal law, yes."

Q: "Wouldn't you also agree that that should apply in this type of proceeding?"

A: "Yes. And I think we've done that."

Q: "Did you ever contact Mr. Brandon or the attorney for Mr. Bosse and advise them that ... that Linda McIntyre would testify in a way that's not favorable to The Florida Bar?"

A: "I don't recall specifically doing that. It seems to me that they were in my office within a day or two after I received her letter and

they knew at that time. There was no need to contact him."

Q: "But it's your testimony that you never took the initiative on behalf of the Bar to disclose that information to either of the attorneys?"

A: "I don't recall one way or the other." (TR, pp. 90, 91)

Ms. Jackson's testimony also included the following series of questions and answers:

Q: "Isn't it true that when the Bar went to trial in the companion case that it didn't know what the exact factual pattern was for either of these cases?"

A: "The exact factual pattern?"

Q: "Or factual background?"

A: "There were still issues in dispute if that's what you mean."

Q: "No. What I mean is isn't it true the Bar didn't even know itself exactly what had happened in terms of background facts?"

A: "I think that's why we went to trial."

Q: "So it's your testimony that in a disciplinary proceeding the Bar goes to trial to find out what happened?"

A: "To some extent I think all cases come down to that."

Q: "And would you agree that a disciplinary proceeding against a lawyer is a very serious matter?"

a: "Yes."

Q: "Would you agree with what Mr. McGunegle represented to the Court saying that the role of the Bar prosecutor is to find the full truth and go wherever it leads?"

A: "Yes."

Q: "And would you also agree with his statement that even as the Bar approached final hearing in Bosse, the Bar was in a quandary as to what the true situation was and the factual pattern?"

A: "Well, I don't know exactly what Mr. McGunegle meant when he said that. I can't read his mind, but I'll leave it at that." (TR, pp. 95, 96).

Judge John W. Springstead was the Referee who was appointed to preside over the companion case against Charles Chilton. During Chilton's hearing to Tax Costs he said,

> ...I view my position here as Referee to weigh over these things and give my best advice and counsel to the Supreme Court who will make the final decision based upon the facts as I find them to be in my Order and, again, with the fair consideration I presume given to my recommendations based on those facts.
>
> It is the opinion of the court that clearly the Rule - counsel is correct and I think counsel is not arguing that there is no specific provision of the Rule that says in the event that a respondent shall prevail he will get costs X, Y and Z. It just doesn't say that. But, again, I think as Americans -and I'm not trying to get overly emotional here, but there is a sense of fair play that has historically permeated our system of justice.
>
> And clearly the <u>Dennis</u> decision reflects that. And the Supreme Court in a given set of circumstances is simply not going to cast adrift a party who has been exonerated and yet has incurred substantial amount of costs. (TR, pp. 99, 100)

The Judge also said,

> ...I do think it is noteworthy, and you have to call 'em like you see 'em and the facts take you where they take you, that clearly the Bar - and, again doing what it should have done in contacting Ms. McIntyre, was put on notice that the two primary and essential issues that were being pursued against Mr. - not only Mr. Chilton, but Mr. Bosse, that being the excessive fee and the impropriety of allowing the child, particularly adoptive parents to leave the state, were unfounded.
>
> That it was in her experience that it was not a routine adoption as it was

represented to her (by the Florida Bar), that it was very complex due to the nature and, again, I think criminal activity of the natural mother who got this whole thing started and I would so indicate for the record. (TR, p. 105)

...and one must wonder whether or not, if there had been live testimony at the initial Grievance Committee hearing, whether or not this would have gone any farther... maybe if that had been done in this case we wouldn't have been here. In any respect I think that the costs, the Supreme Court should give strong consideration to paying the costs. I think Mr. Chilton would be - the Bar and the Supreme Court would be doing a disservice to him based upon the totality of the circumstances in not reimbursing him for his costs which would appear substantial. (TR, p. 106)

The Judge went on to say:

...when Ms. McIntyre surfaced in what February or March of 1992, which, again, was before the bulk of all of these costs were incurred, the Bar was on notice that she is an expert, an acknowledged expert because the Bar sought her out, that these issues simply weren't there and they were very weak and I presume that that was what they were being sought out for. (TR, p. 108)

How can Staff Counsel say that the Bar acted reasonably and in good faith in either this case or in Chilton's case? Conflicts in evidence and questions of credibility were not such that they could only be decided by the Referee. Fair minded counsel for the Florida Bar should not have let the trial even begin. For the Bar to state that the question as to whether or not the Respondent had a duty to report to the trial court the child's removal from the State still existed even after the Referee resolved the evidentiary conflicts, is totally false and refuted by the Referee's own report in the Bosse case. Even at this late date, the Bar refuses to see the truth.

Judge Smith made his recommendations, in part, as a result of expert opinions that were rendered and offered by Bosse prior to and during the trial. The Court ought to send a strong message to The Bar that it cannot dispense with the fundamental notions of fairness and due

process in disciplinary proceedings just because the accused happens to be a lawyer.

CONCLUSION

Respondent respectfully requests that this Honorable Court affirm the recommendation of the Referee awarding costs to Respondent Richard E. Bosse to be paid **by** the Florida Bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Answer Brief 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 the following: JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; DAVID G. McGUNEGLE, Staff Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL 32801 and KRISTEN M. JACKSON, Co-Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, FL, 32801 this 4th day of September 1992.

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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 78, **882**
(TFB No. **91,217)**

vs.

RICHARD E. BOSSE,

Respondent

APPENDIX

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