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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD E. BOSSE,

Respondent.

Case No. 78,882
[TFB No. 91,217 (10A)]

INITIAL BRIEF

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SYMBOLS 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 the final hearing before the referee on March 23 and 24, 1992, shall be referred to as TR.

STATEMENT OF THE CASE

The Tenth Judicial Circuit Grievance Committee "A" voted to find probable cause in The Florida Bar case number 91-50,217 (10A) on August 13, 1991, 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 Bar filed its complaint on November 1, 1991. The respondent filed a motion to dismiss which was heard on March 10, 1992, and denied. The final hearing was held on March 23 and 24 of 1992. The referee recommended respondent be found not guilty of all charges without mention as to the award of costs. The recommendation was made only after the respondent's case was presented because the referee had denied his motion for directed judgment following the Bar's case. The Bar's case had included examination of the respondent as an adverse witness.

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

The respondent filed a motion to tax costs against the Bar on April 8, 1992. A hearing was held on June 4, 1992. The referee recommended an award of costs to the respondent and issued a report of referee on June 18, 1992. The Supreme Court approved the referee's prior report which recommended dismissal on June 18, 1992, without mentioning costs.

The respondent filed a petition for review as to costs on or about June 23, 1992. The Bar filed its cross-petition for review on July 2, 1992, The respondent filed a motion to waive the filing of his initial brief on July 10, 1992. The Bar filed a response to the respondent's motion on July 17, 1992, and requested permission to file an initial brief. The Supreme Court granted the respondent's motion to waive the filing of his brief on July 21, 1992.

The Board of Governors considered the report of referee as to taxation of costs at its July, 1992, meeting and voted to appeal same.

STATEMENT OF THE FACTS

The Florida Bar filed a complaint against the respondent based upon a finding of probable cause by the grievance committee without a "live" hearing pursuant to Rule 3-7.4(g). However, the respondent was permitted to be present and gave a thirty minute statement. The formal complaint alleged that he, as counsel for the adoptive parents, the Patsners, in a contested adoption proceeding, had failed to apprise the court of material information, i.e., that the adoptive parents had moved out of state, and therefore, they did not qualify for an in-state adoption pursuant to Florida Statutes Chapter 63. Further, the Bar alleged the respondent had charged an excessive fee and failed to keep his clients informed.

The respondent filed a motion to dismiss the case arguing that there were no issues of material fact or law. The referee denied the motion on March 10, 1992, stating that certain factual issues were still in dispute. After extensive discovery, including the taking of several depositions of witnesses and statements of experts, the case was tried before the referee. After the Bar presented its case, including examination of the respondent as an adverse witness, the respondent moved for a directed judgment which the referee granted only as to the count relating to excessive fees. However, the referee denied the motion as to the remainder of the complaint due to disputed

factual issues (TR,p.278). At the conclusion of the respondent's case, the referee recommended he be found not guilty as to all charges (R1,pp.5-6).

The Report of Referee reflected the referee's belief that although respondent could have apprised the court of the adoptive parents' location out of state, the Florida Statutes' provisions were conflicting and did not set forth a clear duty, and therefore, no ethical obligation to do so existed (R1,p.4). The referee reserved ruling on the issue of costs but did not make any mention of costs in the initial report. The respondent then filed a motion to tax costs against the Bar. The Board of Governors reviewed this case at its May, 1992, meeting and voted to accept the referee's recommendation of dismissal.

A hearing on the issue of costs was held by telephone before the referee on June 4, 1992, to determine awardability of costs. Both parties had previously filed extensive pleadings in the form of memoranda of law regarding the awardability of costs.

The respondent argued that costa should be awarded to him because he had been found not guilty and the Bar has in the past, been assessed costs of the prevailing pasty. To support his argument he cited The Florida Bar v. Dennis, 589 So. 2d 293 (Fla. 1991). The respondent further relied upon Florida

Statutes, Section 57.041(1), wherein the prevailing party in civil actions is entitled to costs. The respondent further asserted he had advised the Bar "early on" that the Bar's case was weak and only Dr. Patsner's testimony supported the Bar's position. The respondent faulted the Bar for not having deposed the respondent prior to the final hearing.

The referee recommended assessment of costs against the Bar stating in his second report that the Bar's case was "extremely weak" and the respondent was the "strong prevailing party." (R2,p.2)

The referee issued his second report on June 18, 1992. On that same date, the Supreme Court entered an order approving the referee's first report and dismissing the case. However, the Court made no mention as to the award of costs.

Because the issue of casts had not been considered or addressed by the Court, the respondent filed a petition for review. The Bar then filed a cross-petition for review. The respondent having motioned to waive the filing of a brief and the Court having granted same, the Bar chooses to file this initial brief,

SUMMARY OF THE ARGUMENT

The referee erred in ordering The Florida to bear the respondent's costs as well as its own costs in this disciplinary proceeding.

The Rules Regulating The Florida Bar do not authorize the payment of a respondent's costs in a disciplinary case. Rule of Discipline 3-7.6(k)(1) specifically provides that costs taxed shall be payable to The Florida Bar, A referee cannot award costs, even to the Bar, if they are not specifically enumerated in the rule. The Florida Bar v. Allen, 537 So. 2d 105 (Fla. 1989).

The discretionary approach, as opposed to the prevailing party approach, has long been used by this Court in awarding costs in Bar discipline cases. This is in keeping with the quasi-judicial administrative character of these proceedings.

The existing case law in the area of a respondent's entitlement to costs does little to shed light on the issue. It appears that it may be acceptable for a prevailing respondent to recover his costs if he can prove, by clear and convincing evidence, the Bar engaged in some type of prosecutorial

misconduct, although the available case law is not in unanimous agreement on this position. More often, when cost awards are mentioned, each party is ordered to bear its own coats where the respondent is found not guilty. Where a respondent is found not guilty of only some of the charges, more often than not the respondent is ordered to bear only those costs the Bar incurred directly relating to the charges on which the respondent is found guilty.

Requiring the Bar to bear a prevailing respondent's costs in this case would, in effect, result in penalizing the Bar for doing what it was required to do under the rules. The grievance committee found probable cause even though the respondent was allowed to personally present his side of the story. In preparing any case, witness credibility is examined as well as possible but it is ultimately the referee who resolves any conflicts in testimony. Just because the referee here determined the respondent's version was more believable than the testimony of the Bar's witness does not mean the Bar engaged in prosecutorial misconduct.

In order for the Bar to begin paying the costs of prevailing respondents, a restructuring of the grievance committee process would be necessary so that, in essence, the Bar's case would be "pre-tried". The referee would assume more of an appellate function to review the committee's findings of fact and recommend

the appropriate level of discipline.

Further, there would be a serious impact on the Bar's budget, The funding crisis which could result, coupled with the significant increase in time each case would remain at the grievance committee level, would be contrary to the goals of attorney discipline. It would neither protect the public nor the accused attorney. Many cases might never be pursued by the Bar because of the need to be able to prove every case before filing the formal complaint. The increase in bureaucracy would adversely affect the memories of witnesses and the availability of evidence. This would also be a disservice to the accused attorney who might find it harder to adequately defend his position.

Perhaps the best solution would be a rule amendment specifically prohibiting the award of a respondent's costs, except possibly in extreme cases involving prosecutorial bad faith on the part of the Bar. It must be cautioned that in presenting this matter to the Court, Bar counsel and Co-Bar counsel are not empowered to suggest that this proposed solution has been approved by the Board of Governors. At this time, the Board has not addressed the issue.

ARGUMENT

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

Former Integration Rule 11.06 provided that a referee's report must contain a statement of costs of the proceedings and recommendations as to the manner in which they would be taxed. It was amended on May 24, 1979, to add that "[c]osts taxed shall be payable to The Florida Bar." See Petition of Supreme Court Special Committee, etc., 373 So. 2d 1 (Fla. 1979). In 1987, the Rules of Discipline were adopted by the Court and replaced the Integration Rules. Former Rule of Discipline 3-7.5(k)(1) was based upon former Integration Rule 11.06(9)(a). On April 20, 1989, it was amended to read that a report of referee must include "a statement of costs incurred by The Florida Bar and recommendations as to the manner in which such costs should be taxed." See In re: Amendment to Rules Regulating The Florida Bar, Rule 3-7.5(k)(1) Cost of Proceedings, 542 So. 2d 982 (Fla. 1989). [The rule has now been renumbered as 3-7.6(k)(1).] The Bar submits this last amendment clarified the ambiguity which existed under the former rules as to how costs should be determined. The rule now clearly states the only costs to be considered in Bar disciplinary proceedings are those incurred by the Bar.

No provision has been made for the calculation and inclusion of a respondent's costs. This argument is further supported by the inclusion of administrative costs as an amount which must be included in a statement of costs. Strictly speaking, administrative costs are those miscellaneous costs barn by the Bar in administering the disciplinary program and do not appear to apply to respondents.

Interpretations of both the present rule and the past versions have been scant. The first real discussion of the taxation of costs occurred in The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982). Mr. Davis was found guilty of some, but not all, of the charges against him. The referee recommended the Bar recover only one-third of the costs it incurred in prosecuting the case, This Court, in considering whether or not the Bar was entitled to recover its *costs*, noted that it did not follow a hard and fast rule with respect to assessing disciplinary costs. The Court observed that in civil actions costs are generally awarded to the prevailing party pursuant to Florida Statutes Section 57.041. In equity actions, costs are generally awarded at the discretion of the court. This Court specifically found the discretionary approach should be used in disciplinary proceedings and thus rejected the provisions of Florida Statutes

Section 57.041. The Court went on to note that a referee and the Court, in making the cost assessment, should be able to consider the fact that an attorney was acquitted on some charges or that the costs incurred by the Bar were unreasonable. In sum, the costs should be awarded as sound discretion indicates. No mention was made of awarding to an attorney any costs he incurred in defending those charges.

The discretionary approach was most recently followed in The Florida Bar v. Wilson, 599 So. 2d 100 (Fla. 1992), where upon appeal this Court found the evidence did not support the referee's recommendation of guilt on some of the charges. The matter was remanded to the refereee to recalculate the costs which should be assessed against Mr. Wilson in connection with the one charge of which he was found guilty.

The Bar has been cautioned not to abuse its prosecutorial discretion and pursue charges that will obviously fail the clear and convincing evidence test, In The Florida Bas v. McCain, 361 So. 2d 700 (Fla. 1978), the Court ordered each party to bear its own costs after finding the Bar had used an excessively broad approach by failing to dismiss early on those charges which could not be proven. It is interesting to note that despite the evidence of prosecutorial misconduct, the Bar was not ordered to pay Mr. McCain's costs. This position was reiterated in The

Florida Bar v. Gold, 526 So. 2d 51 (Fla. 1988), where the Court found that the costs of investigating a Bar discipline case should be taxed against the respondent who "misbehaved" rather than against the membership of the Bar so long as those costs were necessary, not excessive, and properly authenticated. Mr. Gold was found guilty of some, but not all, of the charges against him.

In The Florida Bar v. Neu, 597 So, 2d 266 (Fla. 1992), this Court rejected Mr. Neu's cross-claim to reduce the costs taxed against him in a disciplinary proceeding. The Bar had appealed the referee's recommendation as to discipline and his findings that Mr. Neu had not acted with dishonesty, deceit, misrepresentation, or fraud in misusing client trust funds. This Court found that although the Bar failed to prove the referee's findings were either erroneous or not supported by the record, it did not act unreasonably in challenging the findings in light of the seriousness of the charges. The Court therefore taxed all costs of the proceedings against Mr. Neu.

The Bar submits the above cases and Rule 3-7.6(k)(1) govern this matter. Under the case law outlined above it is clear this Court follows the equitable determination of costs approach rather than the approach used in civil proceedings. This is in keeping with Rule of Discipline 3-7.6(e)(1) which provides that

Bar proceedings are neither civil nor criminal but rather are quasi-judicial administrative proceedings and the Florida Rules of Civil Procedure apply only to the extent they do not conflict with the Rules of Discipline. Therefore, only Rule 3-7.6(k)(1) is applicable to costs in Bar proceedings and no other court rule or state statute would be controlling, despite the respondent's previous arguments made to the referee to the contrary.

This Court strictly construed the provisions of Rule 3-7.6(k)(1) in The Florida Bar v. Allen, 537 So. 2d 105 (Fla. 1989), where the Bar was denied recovery of investigative costs because such costs were not specifically authorized by the rule as it was then written. In reasoning its decision, this Court stated the following:

> The Bar asserts that because the rule only states that taxable costs "shall include" certain specified items, it should not be interpreted to exclude other items. 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...
>
> 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 p. 107).

It should be noted the rule was subsequently amended.

Thus, the Court rejected the Bar's argument that the rule should be interpreted to include items not listed therein, noting

that when read in its entirety, the rule was too clear to permit such a construction. The Bar submits that at the very least the referee abused his discretion by awarding the respondent $12 for service of process expenses and $87.86 for long distance telephone charges. These costs were not authorized by the rule. Further, the referee abused his discretion by awarding the respondent court reporter and expert witness fees in the amount of $2,106.45 and $6,859.06, respectively. A strict construction of the rule indicates that only the Bar's costs are awardable and an award of the respondent's costs was neither contemplated nor intended.

Although it is clear a referee has the discretion to determine the award of costs, the Bar submits that allowing the award of costs to a respondent in a Bar proceeding where the Bar has not abused its prosecutorial discretion would not be in keeping with either past case law or the rules and would set bad precedent. After extensive research, only three cases could be located where a respondent was awarded costs by this Court. Bas counsel and Co-Bar counsel caution that research in this area is difficult due to the summary nature of the cases and the failure of West Publishing to include many of these cases in its key number system. Therefore, it is entirely possible more cases where a respondent was awarded costs could exist. The three cases located are The Florida Bar v. Matthews, 296 So. 2d 31

Fla. 1974); The Florida Bar v. Johnson, 313 So. 2d 33 (Fla. 1975); and The Florida Bar v. Dennis, 589 So. 2d 293 (Fla. 1991). Matthews and Johnson occurred under former Integration Rule 11.06(9)(a) while Dennis occurred under newly amended Rule of Discipline 3-7.6(k)(1). None of these cases provide any guidance as to why the Court elected to award these respondents their costs. Of these three, only Mr. Dennis was found not guilty by the referee and the recommendation was upheld by this Court. These three cases appear to conflict with the rules and other case law. Therefore, their precedental value is questionable.

Under Rule of Discipline 3-7.4(j), once a grievance committee finds probable cause the Bar must promptly prepare a formal complaint for filing with this Court. If the Bar disagrees with the committee's findings, the matter may be reviewed by the Designated Reviewer under Rule 3-7.5(b) and, at his or her discretion, forwarded for further review to the Disciplinary Review Committee under Rule 3-7.5(a). In this case, the Bar did not disagree with the committee's decision to find probable cause based upon the evidence presented. Although no full testimonial hearing was held, the respondent was in attendance and personally presented his side of the story to the committee. The committee's decision was in full accord with Rule 3-7.4(g). Conflicting factual issues existed until the final hearing, as evidenced by the referee's denial of the respondent's

motion to dismiss. This was a case of first impression with respect to the respondent's duties under the controlling adoption statutes which turned out to be vague and of little assistance in determining the respondent's ethical obligations to the court and his clients. Simply put, there were no clear cut answers. Conflicting stories were being told by the various witnesses. In preparing any case the question of a witness' credibility is examined to the extent possible, The referee, however, is the finder of fact and as such one of his functions is to resolve conflicts in testimony and evidence. The Florida Bar v. Bajoczky, 558 So. 2d 1022 (Fla. 1990); The Florida Bar v. Herzog, 521 So. 2d 1118 (Fla. 1988).

The Bar further submits it would have a chilling effect on the disciplinary process if the Bar was routinely required to pay the costs of a prevailing respondent. The Bar's budget is funded entirely by the dues of attorney 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 has not been authorized or contemplated by the rules. In fact, not even the Bar's state funded counterpart, The Department of Professional Regulation, is required to pay the costs of a prevailing respondent absent a showing that the agency's actions were not substantially justified under Florida Statutes Section

57.111. Also by way of analogy, an action for malicious prosecution will not lie absent a showing of, among other things, a lack of probable cause for prosecution, Clearly, this was not the case here. The respondent moved for a dismissal prior to the final hearing and the referee denied his motion. He also moved for a directed verdict after the Bar had presented its evidence, including the respondent's own testimony given as an adverse witness. The respondent's motion prevailed only on the issue concerning charging an excessive fee and was otherwise denied. Both motions were denied because there still remained factual issues in dispute.

To require the Bar to bear the costs of a respondent in a situation such as is presented here would further disrupt the disciplinary process by requiring the grievance committee to assume the role of the referee. Historically, the grievance committee's function has been primarily investigative. This Court has analogized its role to that of a grand jury. The Florida Bar v. Swickle, 589 So. 2d 901 (Fla. 1991). The committee does not determine guilt or innocence but only whether or not probable cause exists to pursue the matter further. When a state attorney takes a matter to a grand jury, the grand jury does not sit as the trier of fact. Its ro e is to determine the existence of probable cause, not guilt or innocence. The state is not required to prove its case beyond a reasonable doubt at that stage.

To require the Bar to prove its case before the grievance committee or face the penalty of shouldering the respondent's costs if he or she is found not guilty of the charges, assuming no prosecutorial misconduct occurred, would lead to a complete restructuring of the disciplinary process. All cases would need to be fully tried by the grievance committee. The referee's sole function would be to review the committee's findings and recommend the appropriate level of discipline. The Bar would be placed in the position of intensely reviewing the committee's findings. This might necessitate referral to a panel of the Board of Governors to assess the impact an adverse finding would have on the Bar's budget. Many cases may never be filed because the Bar would need to resolve all conflicts in evidence before filing its formal complaint. Such a result would not serve to protect the public which is the main purpose of lawyer discipline.

II. THE RESPONDENT'S COSTS ARE NOT PROPERLY TAXED AGAINST THE FLORIDA BAR WHERE THE BAR PROPERLY AND IN GOOD FAITH BRINGS AN UNSUCCESSFUL DISCIPLINARY ACTION AGAINST THE THE RESPONDENT.

Generally, in civil proceedings, the prevailing party is entitled to recover costs against the losing party. Accordingly, in disciplinary proceedings, when The Florida Bar prevails, the respondents routinely have been required to pay those costs incurred by the Bar. However, in proceedings where referees have found the respondents not guilty or where The Florida Bar voluntarily dismisses its complaint, the referees essentially have either advised that each party bear its own costs or have not mentioned costs at all.

A review of the case law indicates that over the years the assessment of costs has been inconsistent and sometimes contradictory. For example, of the twenty-six cases dealing with this issue, six resulted in each party bearing its own costs where the respondent was found not guilty. Three cases resulted in the respondent's costs being paid by the Bar. In three of the cases the cost award could not be clearly determined from the language of the court opinion. Two of the cases resulted in each party bearing its own costs even though the respondents received discipline. Twelve of the opinions made no mention of costs at all even though the charges against the respondents were dismissed. Due to the difficulty in researching this particular

topic, clearly there must be additional cases which simply could not be located.

As noted, of the twenty-six cases located, only three resulted in the Bar being ordered to pay a respondent's costs.

In The Florida Bar v. Matthews, supra, the referee recommended a finding of guilt with which the Court disagreed. The charges were dismissed and the Bar was required to bear the costs of the proceedings. No reason was given for the cost award against the Bar.

In The Florida Bar v. Johnson, supra, proceedings were brought against two attorneys, Stephen Johnson and Clyde Ellis. The two attorneys were found guilty by the referee of only one count of the Bar's complaint. The Court found there was no evidence to support the referee's findings and recommendation as to guilt. The referee's findings were quashed and the costs assessed against the Bar. Again, no reason was given although reading the opinion in its entirety leads one to believe that the Bar may have abused its prosecutorial discretion in pursuing the matter.

The most recent case, which occurred after Rule 3-7.5(k)(1) was amended in 1989, is The Florida Bar v. Dennis, supra. No

formal opinion was issued and the case merely appears in a table of cases listed in The Southern Reporter, Because the Court's slip opinion contains slightly more information, it is included here in the Appendix along with the Report of Referee. In Dennis, the attorney was found not guilty by the referee and she recommended the Bar bear the costs of the proceeding. The Bar failed to raise the issue, through oversight, until it was too late to petition for review of this portion of the referee's recommendation. The cost issue, therefore, was never directly raised for this Court's consideration. The effect of this case as a precedent is unknown given the lack of an opinion.

In two cases the Court entered orders that each party bear its own costs despite the fact that prosecutorial misconduct occurred. The first one, The Florida Bar v. McCain, supra, was discussed previously, In the second, The Florida Bar v. Rubin, 362 So. 2d 12 (Fla. 1978), the referee recommended the attorney be found guilty of only some of the charges against him. In reviewing the case, this Court determined the Bar had failed to comply with the various provisions of the disciplinary rules and should be held accountable for any failure to responsibly prosecute a disciplinary matter. The attorney was acquitted of all charges and the Bar was ordered to bear its own costs. No mention was made of the Bar paying Mr. Rubin's costs.

More recently in The Florida Bar v. Feinberg, 583 So. 2d

1037 (Fla. 1991), and The Florida Bar v. Icardi, No. 78,797 (Fla. March 12, 1992), the Court upheld the referee's recommendation that each party bear its own costs where, in the former case, Ms. Feinberg was found not guilty, and in the latter case the Bar voluntarily sought a dismissal of the charges against Mr. Icardi. Because both of these cases were issued without a detailed opinion, the respective Reports of Referee are included in the Appendix.

The Bar does not take issue with the fact that the awarding of costs in Bar discipline cases is within the referee's sound discretion. The Bar does submit, however, that a referee is not empowered to award costs which do not fall within the parameters of Rule 3-7.6(k)(1). For example, In The Florida Bar v. Allen, supra, the Court declined to include investigative expenses in the costs taxed against the respondent. At the time, former Rule of Discipline 3-7.5(k)(1) did not include among the enumerated costs investigative expenses incurred by the Bar. As was previously noted, the Court specifically stated it would not grant costs for an item not included by the rule and if the Bar wanted those costs awarded it would need to petition for an amendment to the rule to provide therefor. Likewise, the current rule simply does not mention a respondent's costs and the Bar cannot determine from the available case law under what circumstances the respondent might be eligible for an award of costs.

One case that is of interest, although certainly not directly on point, is State ex rel. Shevin v. Indico Corporation, 319 So. 2d 173 (Fla. 1st DCA 1975), certiorari dismissed, 339 So. 2d 1169 (Fla. 1976). The district court's opinion contains an interesting discussion of the interpretation of a Florida statute. The case arose from a suit brought by the Attorney General of the State of Florida against three developers seeking to abate an alleged public nuisance. Summary judgment was entered on behalf of one developer, Indico, because the State conceded the development project had commenced prior to the enactment of the ordinance under which the action had been brought. A remaining unresolved issue went to final hearing and a judgment was entered on behalf of Indico. Costs were taxed against the State. An interlocutory appeal was taken from the final costs judgment by the Attorney General who contended that costs should not have been assessed against him in the action because it had been brought under Florida Statutes Section 60.05. The statute authorized either the Attorney General, the State Attorney, or any citizen of the county to bring an action in the name of the State for the abatement of an alleged nuisance. The statute specified the parties against whom costs could be assessed. Neither the Attorney General nor the State Attorney were mentioned as parties against whom costs could be assessed. The court applied the rule "expressio unius est exclusio alterius" or "express mention of one thing as exclusion of the

other." The court reasoned that because the statute expressly mentioned those persons against whom costs could be assessed in an action, the legislature intended to exclude from assessment of costs the two not mentioned - the Attorney General and the State Attorney. Although Indico also argued that Florida Statutes Section 57.041 applied, the court found that both Section 57.041 and Section 60.05 needed to be read together. By doing so, the court found costs could not be taxed against either the Attorney General or the State Attorney when bringing an action to abate an alleged public nuisance.

The Bar submits the rationale applied in State ex rel. Shevin, supra, and Allen, supra, should be applied to Rule of Discipline 3-7.6(k)(1). Although this Court has awarded costs to respondents in the past, there has never been an opinion which delineated under what circumstances such an award is appropriate. The Bar submits it is never appropriate to award a respondent's costs absent a showing by clear and convincing evidence the Bar engaged in misconduct associated with prosecuting the matter.

If the Court chooses to award costs to respondents who prevail, the Bar submits the standard should be a determination of whether or not there is clear and convincing evidence the Bar abused its discretion and unreasonably prosecuted or continued to

prosecute the case when it was obvious from the available evidence that the Bar could not prevail. Bar counsel and Co-Bar counsel caution, however, that in presenting this matter to the Court they are not empowered to suggest the recommended standard has been approved by the Board of Governors, as at this time, the Board has not addressed the issue.

The record in this matter clearly shows the Bar acted reasonably and in good faith. The conflicts in evidence and questions of credibility could only be decided by the referee. In fact, 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. It would be inequitable to impose as an penalty upon the Bar the payment of the respondent's costs in a case where the Bar did not clearly abuse its prosecutorial discretion.

Finally, it is suggested that to solve this apparent dilemma the better course would be by a rule amendment to prohibit any cost award to respondents except possibly in extreme cases involving prosecutorial bad faith of the Bar.

CONCLUSION

Wherefore, The Florida Bar prays this Honorable Court will review the referee's recommendation as to the assessment of costs against the Bar and deny any award of costs to the respondent because the rule does not provide for such an award and the Bar did not prosecute this case in bad faith, or, in the alternative, deny the respondent's costs and enter an appropriate opinion providing the Bar with guidance as to when awarding a respondent's costs is appropriate.

Respectfully submitted,

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KRISTEN M. JACKSON
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial 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 Counsel for Respondent, T.N. Murphy, Jr., 700 West Hillsboro Boulevard, Building 4, Suite 206, Deerfield Beach, Florida, 33441, 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 6th day of August, 1992.

KRISTEN M. JACKSON
Co-Bar Counsel

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APPENDIX

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Supreme Court of Florida

THURSDAY, SEPTEMBER 12, 1991

THE FLORIDA **BAR,**

Complainant,

v.

ROBERT LEE **DENNIS,**

Respondent.

CASE NO. 76,121

TFB **No.** 89-31,214(19)

SEP 1 5 1991

The referee's report and recommendation filed in the above cause are hereby approved, respondent is found **not** guilty of any misconduct and **the** case **is** dismissed.

The Florida Bar shall pay all costs.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. Becky Titus, **Referee**
John B. **Root**, Jr., Esquire
David G. McGunegle, Esquire
John M. Jeffries, Esquire
John **A.** Boggs, Esquire
G. **D.** Dugan, III, Esquire

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THE FLORIDA EAR

PUBLIC RECORD

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,

complainant,

v.

CASE NO. 89-31,214(19)
Supreme Court No. 76,121

Robert Lee Dennis,

Respondent.

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee *to* conduct disciplinary proceedings herein according to the Rules of Discipline, a hearing was conducted on May 21, 1991.

The following attorneys appeared as counsel for the parties:

For the Florida Bar: John B. Root, Jr.
For the Respondent: George Dugan, III

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent is Charged: After considering all of the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As To The Wilful Failure to Disclose
His Wife's Pregnancy

1. The Bar charges that the respondent was aware of his wife's pregnancy at the time he filed his divorce petition in May, 1980 and wilfully failed to disclose this fact to *the* Special Master at the divorce hearing on July 2, 1980. The record does not contain clear and convincing evidence to support this charge.

2. The respondent filed his divorce petition on or about May 15, 1980. (R-18). At that time, he was unaware of his wife's pregnancy. (R-17). His petition for divorce averred that one (1) child, Johnathan, was born of *the* marriage and did not state that the wife was pregnant. (Plaintiff's Composite Exhibit A).

3. Respondent's divorce hearing before the Special Master occurred on July 2, 1980. He testified that one child, Johnathan, had been born of the marriage. (Plaintiff's Composite Exhibit A). Although he was at that time aware *of* his wife's pregnancy, he did not disclose this fact to the Special Master because his wife had told him the child was not his. (R-109).

As a result, the final judgment entered July 10, 1980 failed to make a finding of paternity or an award of support for the unborn child. (Plaintiff's Composite Exhibit A).

4. There are several factors which support the respondent's position that he did not wilfully conceal the existence of his wife's pregnancy to avoid an obligation of support. First, the wife was personally served with the divorce petition and a copy of the final judgment. She did not appear at the final hearing or in any way bring the matter to the attention of the judge for several years. (R-80). The wife had transportation to attend the hearing because she had a motor home and also possibly a Chevette automobile. (R-75, 76, 83, 84, 103 and Defendant's Exhibit 1). Even if, as she claims, she had no money for gas to attend the hearing, there is no reasonable explanation for why this issue was never brought to the attention of the Special Master or presiding judge at least by mail. Second, the wife did not sign a complaint for paternity until December 15, 1986. (Defendant's Exhibit 4). Although the circuit court subsequently entered a judgment of paternity against the respondent, he at all times denied the allegations of paternity. (Defendant's Exhibit 4).

As To The Wilful Misrepresentation That He Was Separated From His Wife

1. The Bar charges that the respondent wilfully misrepresented to the Special Master at his divorce hearing on July 2, 1980 that he separated from his wife on April 3, 1980 when in fact the two were still living together. The record does not contain clear and convincing evidence to support this charge.

2. At his divorce hearing on July 2, 1980, the respondent testified that he separated from his wife on April 3, 1980. (Plaintiff's Composite Exhibit A). There is little, if any, evidence in the record which conclusively shows that the parties were in fact living together at that time. The wife's mother, Dorothy Slayton, testified through deposition that she hired Detective Simmons to locate her daughter sometime between May and November, 1980. (Plaintiff's Exhibit B at pp. 7, 8). Although Detective Simmons determined that respondent and his wife were living together in a mobile home park in Ft. Myers, it is unclear whether this was before the divorce hearing, at the time of the divorce hearing, or thereafter but before' November, 1980. (Plaintiff's Exhibit B at p.8). More importantly, the wife testified that even as of May, 1980 when she received notice of the divorce, she had no idea where the respondent principally lived or what his movements were, that he would "come and go" with some of his clothing at her house and some everywhere else. (R-61, 81).

As To All Other Charges of Misconduct

1. The Bar announced at the outset of the trial that it intended to litigate only the two charges outlined above. (R-12). Therefore, any other charges of misconduct were either voluntarily dismissed or dismissed by the court at the close of the evidence. (R-93).

III. Recommendation at to Whether or Not The Respondent Should Be Found Guilty: As to each charge of misconduct in the complaint, I recommend that the respondent be found not guilty and specifically that he be found not guilty of a violation of Article XI Integration Rule 11.02(3)(a) and Disciplinary Rules 1-102(A)(4), 1-102(A)(5) and 1-102(A)(6) of the Florida Bar's Code of Professional Responsibility. It is further recommended that all costs be paid by the Florida Bar.

Dated this 29 day of May, 1991.

BECKY A. TITUS, REFEREE

Certificate of Service

I hereby certify that a copy of the above report of referee has been served on John B. Root, Jr., Esquire, The Florida Bar, 880 North Orange Avenue - Suite 200, Orlando, Florida 32801, George D. Dugan, 111, Esquire, 207 South Second Street, Fort Pierce, Florida 34950 and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 31st day of May, 1991.

Judicial Assistant

file

Supreme Court of Florida

WEDNESDAY, JULY 3, 1991

THE FLORIDA BAR,

Complainant,

v. CASE NO. 76,322

BRENDA J. FEINBERG, TFB No. 90-30,261(19)

Respondent.

The referee's report and recommendation filed in the above cause are hereby approved, respondent is found not guilty of any misconduct and the case is dismissed.

Each party shall pay their own costs.

A True Copy

TEST: SUPREME COURT OF THE STATE OF FLORIDA

Clerk, Supreme Court

TC

cc: Hon. Vaughn J. Rudnick, Referee
David G. McGunegle, Esquire
Mark Finkelstein, Esquire
John A. Boggs, Esquire
Jerry Schreiber, Esquire

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THE FLORIDA BAR

PUBLIC RECORD

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

BRENDA J. FEINBERG,

Respondent.
_____/

Case No. 76,322
[TFB Case No. 90-30,261 (19)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, hearings were held on Wednesday, November 14, 1990, and Wednesday, March 6, 1991. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar	David G. McGunegle
For The Respondent	Jerry B. Schreiber

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

1. The Seventeenth Judicial Circuit Grievance Committee "E" voted to find probable cause in March, 1990. The undersigned was appointed to act as referee and on November 14, 1990, a hearing was held to consider the respondent's Motion To Dismiss. At that time, the court determined that the allegations contained in paragraphs one through seventeen of the Bar's Complaint concerning the respondent's activities in pursuit of increased child support and in particular her letter dated May 23, 1989, to her former in-laws, Stanley and Sally Levine, were properly noticed and before the grievance committee when it heard the case.

EX "A"

2. Paragraphs eighteen through twenty-two of the Bar's Complaint concerning the respondent's telephone conversation with her former husband's attorney, Harold Bluestein, her letter to Mr. Bluestein memorializing the statement she made in the telephone conversation that unless her former husband paid $100,000.00 cash for child support she would file a suit against her former in-laws, and the resulting suit against Stanley and Sally Levine were not expressly noticed as a subject of the grievance committee's hearing.

3. After argument, this court granted in part and denied in part the respondent's Motion To Dismiss and remanded the not noticed portion of the Bar's Complaint to the grievance committee for further consideration.

4. After a full evidentiary hearing on January 10, 1991, and a subsequent executive committee session on January 31, 1991, the committee voted to find no probable cause as to the information remanded to it and no probable cause as to the rest of the Bar's Complaint believing it to be fatally weakened.

5. Although this referee is not bound by the grievance committee's decision or recommendation, I have attached considerable weight to it and to the arguments of counsel. I find that the material contained in paragraphs eighteen through twenty-two of the Bar's Complaint should be dismissed because it is no longer properly before this referee. Even if said material was properly before this court, I have been apprised by counsel for both The Florida Bar and the respondent that the evidence presented to the committee would mandate a finding of not guilty.

6. After reviewing the remaining material contained in paragraphs one through seventeen of the Bar's Complaint, I find the evidence presented to the grievance committee on remand was sufficient to show that the lawsuit the respondent filed against her former husband war founded on good faith and supported belief that her former in-laws intended, at least until early 1989, to assist in paying for their granddaughter's college tuition.' It appears from the pleadings that there is little dispute as to the facts with the critical issue being the position of Stanley and Sally Levine concerning their intent to pay at least part of their granddaughter's college tuition.

7. Accordingly, paragraph sixteen of the Bar's Complaint is the remaining critical area. It concerns the respondent's letter to her in-laws dated May 3, 1989, in which she discussed possible terms of settlement at that point in time. (See Exhibit A) Although the letter is inartfully worded and on first impression could be termed extortionate, I find that it is only a memorialization of a settlement position which could have changed if the proposed terms were not accepted within the stated time frame. Under these circumstances, I find the respondent's letter does not violate the Rules of Professional Conduct.

8. It appears from the evidence presented to the grievance committee which led to the finding of no probable cause as to the material contained in paragraphs eighteen through twenty-two also fatally undermines the Bar's case with respect to the ability to prove by clear and convincing evidence that a violation of the rules alleged occurred.

9. Finally, I note this occurred within months of the respondent being admitted to The Florida Bar where she was then representing herself in bitter and protracted litigation over child support for her daughter's college education.

III. Recommendations as to whether or not the Respondent should be found guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence: I concur with the grievance committee and recommend the respondent be found not guilty of any violations. Although the facts generally are not contested, from the statements of counsel it is clear the Rules of Professional Conduct have not been violated.

IV. Recommendation as to Disciplinary measures to be applied: Having found the respondent not guilty, no disciplinary is recommended I further recommend that each party bear its own costs.

V. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.5(k)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 43
Date admitted to Bar: December 24, 1988
Prior Disciplinary convictions and disciplinary measures imposed therein: None

I. Statement of costs and manner in which costs should be taxed: I recommend each party be required to bear its own costs.

Dated this 6th day of March, 1991.

Referee

Copies to:

Noel A. Pelham, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801-1085.

Jerry B. Schreiber, Counsel for Respondent, Biscayne Building, Suite 207, 19 West Flagler Street, Miami, Florida, 33130.

Mr. John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300.

ICARDI, ALDO

Supreme Court o

THURSDAY, MARCH 12, 1992

TEE FLORID BAR,

Complainant,

v.

ALDO ICARDI,

Respondent.

CASE NO. 78,797

TFB No. 91-30,303(09B)

The Florida Bar having filed a voluntary dismissal which was accepted by the referee, the referee's report recommending dismissal of the Bar's complaint is hereby approved and the case is dismissed, each party to bear its own costs.

A True Copy

TEST:

SUPREME COURT OF THE STATE OF FLORIDA

Sid J. White
Clerk, Supreme Court

TC
cc: Hon. John Antoon, II, Referee
Jan K. Wichrowski, Esquire
Roy B. Dalton, Jr., Esquire
John A. Boggs, Esquire
Jeffrey A. Icardi, Esquireqd

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ALDO ICARDI,

Respondent.
_____/

Case No. 78,797
(TFB Case No. 91-30,303 (09B)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, the Pleadings, Notices, Motions, Orders, Transcripts and Exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitutes the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Jan K. Wichrowski

For The Respondent - Jeffrey Icardi

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

All charges against respondent [redacted] dismissed with predjudice pursuant *to* The Florida Bar's Motion to Dismiss, attached hereto as Attachment One.

III. Recommendations as to whether or not the Respondent should be found guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

Respondent is not guilty as all charges are dismissed.

IV. Recommendation as to Disciplinary measures to be applied:

No disciplinary measures shall be applied.

VI. Statement of costs and manner in which costs should be taxed: I find the following costs were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
	1. Transcript Costs	$225.25
	2. Bar Counsel/Branch Staff Counsel Travel Costs	$ 0
B.	Referee Level Costs	
	1. Transcript Costs	$ 0
	2. Bar Counsel/Branch Staff Counsel Travel Costs	$ 0
C.	Administrative Costs	$500.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	$ 90.02
	2. Telephone Costs	$ 0
	3. Witness Fees	$ 0
	TOTAL ITEMIZED COSTS:	$815.27

Each party shall bear its own costs in this matter.

Dated this 1 day of MARCH, 1992.

/s/John Antoon II

John Antoon, II
Referee

Copies to:

Ms. Jan K. Wichrowski, Bar Counsel, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801
Mr. Jeffrey Icardi, Counsel for Respondent, 990 Lewis Drive, P. O. Box 879, Winter Park, Florida 32790-0879
Mr. John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ALDO ICARDI,

Respondent.
_____/

Case No. 78,797
[TFB Case No. 91-30,303 (09B)

MOTION TO DISMISS

COMES NOW The Florida Bar and moves this court to recommend dismissal of this cause to the Supreme Court of Florida and as grounds states:

1. Since the probable cause finding on September 17, 1991, additional evidence has been presented to bar counsel which indicates there is not cause for further prosecution of this case.

2. The grievance committee "B" of the Ninth Circuit and the designated reviewer of the Board of Governors concur in this dismissal.

3. Respondent has no objection and concurs in this dismissal.

WHEREFORE, The Florida Bar requests this Honorable Court to recommend to the Supreme Court of Florida that this cause be dismissed, with predjudice, each party to bear its own costs.

Respectfully submitted,

Jan K. Wichrowski
Bar Counsel
The Florida Bar
880 North Orange Avenue
Suite 200
Orlendo, Florida 32801
(407) 425-5424
Attorney No. 381586

ATTACHMENT ONE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Motion to Dismiss has been furnished by regular U.S. Mail to The Honorable John Antoon II, Chief Judge, 50 S. Nieman Avenue, Melbourne, Florida; a copy of the foregoing Motion to Dismiss has been furnished by regular U.S. Mail to Counsel for Respondent, Mr. Jeffrey Icardi, 990 Lewis Drive, P. O. Box 879, Winter Park, Florida 32790-0879; and a copy has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 18th day of January, 1992.

Jan Wichrowski

Jan K. Wichrowski
Bar Counsel