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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)]

REPLY BRIEF

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have a staff attorney review his file and interview him before filing the formal complaint, in fact these actions would not have shed such light on the issues as to warrant dismissing the case. The respondent's file was reviewed by an investigator from the Ft. Lauderdale branch office. No new information was revealed which the Bar did not already have in its possession and review of the file by Bar counsel would have been pointless. The respondent had provided a detailed written statement of his position and had personally presented same to the grievance committee before its vote for probable cause. The Bar's research was properly directed toward the question of whether or not the respondent violated the controlling statutes, something which could not have been answered by the respondent's file. As for the issue concerning the respondent's fee, the respondent's billing statements, which the Bar had in its possession, were sufficiently detailed that little, if any, information would have been gained by Bar counsel reviewing the respondent's file, other than to examine the volume thereof and style of pleadings, which was discerned by the Bar investigator's review.

The Bar counsel to whom a case is assigned functions as the initial screener for a grievance. Rule of Discipline 3-7.3 provides that if the facts, if proven, would constitute a violation of the Rules Regulating The Florida Bar, counsel shall investigate those allegations **and** may refer it to a grievance committee if further consideration and investigation is warranted. Even if the Bar counsel elects not to pursue an

inquiry, this does not preclude further action or review. The facts of the initial grievance certainly gave rise to the appearance of a serious breach of the rules in that it was alleged the respondent committed a fraud on the court. Legal research indicated that the respondent may have violated the applicable statutes. The grievance committee performed its investigative function as outlined in The Florida Bar v. Wagner, 175 So. 2d 33 (Fla. 1965), and more recently in Rule of Discipline 3-7.4. The chair and another attorney member investigated the allegations against the respondent and Mr. Chilton by interviewing various witnesses and other attorneys who practice adoption law. These investigative members then made their reports on the two cases to the committee. Therefore, the respondent's statement that the Bar did no further investigative work through its Orlando branch office, other than obtaining a statement from the HRS caseworker, is incorrect.

The respondent also argues that the Bar should have notified him that its proposed expert witness, Linda McIntyre, did not agree with the Bar's position. The respondent fails to cite any authority for his position that an opposing party has any duty to disclose the opinions of a proposed expert witness absent a discovery request. Ms. McIntyre called Assistant Staff Counsel Kristen Jackson on February 14, 1992, and advised she would not testify and sent a confirmation letter on February 18, 1992. The respondent's counsel came to the Bar's office on February 19,

1992, and at that time already knew of Ms. McIntyre's position. Because it appears the respondent's counsel knew of Ms. McIntyre's opinion only a few days after the Bar learned of it, any duty the Bar might have had to notify the respondent's counsel vanished when the Bar discovered the respondent already knew Ms. McIntyre's position. Further, Ms. McIntyre's position had no impact on the respondent's case because any number of expert witnesses could have testified for either position. Although the Bar ultimately chose not to present an expert witness, an HRS attorney and two Orlando area judges were informally consulted and agreed with the Bar's position. As this case routinely displayed, expert witnesses were able to be found easily to support both positions.

With respect to the real issue here, the awardability of costs to a respondent in Bar proceedings, the respondent is incorrect in his statement that Bar cases have followed the general rule in civil cases that costs are awarded to the winning party. Bar disciplinary proceedings sound in equity and are not civil actions, therefore, the discretionary approach has been followed. *See* The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982). The respondent's discussion of stare decisis with respect to the taxing of costs is somewhat confusing. Simply put, there are no cases which delineate under what circumstances a respondent should recover his costs. None of the case law provides guidance on this issue. Rather, the accused attorneys'

costs have been awarded without explanation. The recent cases where costs have been awarded against the Bar, in main, have been where the referee's recommendation was overlooked and not appealed by the Bar.

The Bar did not act in bad faith by pursuing this grievance. Conflicting factual issues did exist until the final hearing. Had this not been the case, the referee would have granted the respondent's motion for summary judgment on March 10, 1992. The respondent's motion to dismiss became moot upon the filing of the motion for summary judgment. Respondent's counsel did not ensure the motion to dismiss was considered by calling it up for hearing. The court heard his motion for summary judgment only two weeks before the final hearing and after all the witnesses, other than the respondent, had been deposed. Deposing the respondent would have been done had time and schedules allowed, however little, if anything, new would have been learned because his position was already clearly set forth in his detailed initial response to the grievance and his statement made to the grievance committee. If the referee believed there were sufficiently conflicting factual issues to warrant denial of a summary judgment, then how can the Bar be expected to have already resolved the conflicts in evidence before presenting its case? The Bar never ignored any of the evidence but rather viewed it in light of other, sometimes conflicting, evidence. Questions as to credibility, facts and the duty of respondent as

and officer of the court are properly disposed of by the referee, not the Bar or the grievance committee. The unfortunate truth is that sometimes witnesses misstate facts, either intentionally or because human memory is imperfect. The Bar is well aware of the evidentiary standard it must meet as are the grievance committees who consider whether or not probable cause exists for further proceedings. There is no guarantee the committee would have found no probable cause had all the witnesses testified at the hearing. Not only were there conflicting points in evidence until the final hearing, which the referee properly resolved, but also conflicting issues as to the respondent's reporting requirement. The Bar submits the referee, in his report, does not entirely support the respondent's position. It is also arguable that had Dr. Patsner appeared less clever and more credible, the referee may have ruled in favor 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 an award of a respondent's costs is appropriate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven 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, **32399-1925**; 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 15th day of September, 1992.

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