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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v. CASE 78,882 79,115

CHARLES R. CHILTON,

Respondent.

I

BRIEF OF AMICUS CURIAE

BRIEF AMICUS CURIAE

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STATEMENT OF THE CASE AND FACTS

Amicus curiae is a member of The Florida Bar. He has obtained telephonic permission from both parties to file this brief and has sent to each of them a formal written consent that will be filed with this Court as soon as received.

In this brief amicus will refer to The Florida Bar as the Bar and to respondent as respondent.

Amicus accepts the statement of the case and the facts as submitted by the parties.

Amicus believes the Court knows of amicus's interest in the grievance procedures as implemented by the Bar, but adds this brief statement concerning amicus's interest.

The Bar grievance machinery has become complex and bureaucratic from the time when the local grievance committee knew all of the lawyers in the area and could make a proper assessment of a complaint based on background knowledge, much as an early jury did. Because of the growth of the Bar, some of this is not now possible. The former right of the accused lawyer to appear before the grievance committee should not have been changed because former practice gave the grievance committee a better perspective in making its determination.

The grievance machinery of the Bar is now used often for legalized extortion and political purposes. It is also used to build a Bar bureaucracy at the expense of members. The case at bar is a typical, and all too prevalent, example.

SUMMARY OF THE ARGUMENT

The referee was correct in recommending that the Bar bear the respondent's costs in this case.

The Bar is required to bear the costs when it loses if the Bar can charge costs when it wins for equal protection reasons and ordinary fairness.

Amicus does not appear in connection with the attorney fee issue.

ARGUMENT

WHETHER COSTS OF A GRIEVANCE PROCEEDING CAN BE ASSESSED AGAINST THE BAR WHEN IT LOSES

The Bar has broken this point into two questions. Amicus submits that it is only one question. The second question as posed by the Bar brings the proper filing of the complaint and the Bar's good faith into the issue. Neither, amicus submits, are relevant. Proper filing is accomplished by a finding of probable cause and the initiation of the complaint against the accused in this court. That question is purely administrative.

The good faith of the Bar is a subjective matter. It might require a lengthy evidentiary hearing to determine good faith, even for the assessment of costs. The good faith of a party in an ordinary civil action is immaterial. It is a question of whether the party won or lost. It is often overlooked that §45.021 Florida Statutes makes Chapter 57 Florida Statutes applicable to all actions, whether at law or in chancery. To the extent that Chapter 57 Florida Statutes applies, the chancellor no longer has discretion in the allowance of costs.

As the Bar asserts, the present Rule 3-7.6(k)(1) of the Rules Regulating The Florida Bar specifically authorizes costs to be taxed in favor of the Bar. It does not forbid the taxation of costs against the Bar. That question is left open.

As the Bar points out in its brief, this Court has not set the precise rule for awarding costs in grievance matters. Amicus submits that this Court should. The only principle that can be

gleaned from the cases is that whatever the referee recommends is likely to be affirmed by this Court. Amicus has no quarrel with that principle when (1) the attorney is found guilty of some, but not all charges; (2) the Bar is not permitted to charge unreasonable amounts for any item; and (3) the costs attributable to the unproven charges are not allowed or are appropriately reduced under the circumstances of each case. In passing, amicus points out that the statement about costs in civil actions in The Florida Bar v Davis, 419 So2d 325 (Fla. 1982) did not take into account the 1967 enactment of §45.021 Florida Statutes.

This Court said in Insurance Company of Texas v Rainey, 86 So2d 447 (Fla. 1956):

> "Equal protection demands only that the rights of all persons must rest upon the same rule under similar circumstances."

There can be no doubt that the circumstances are similar in a grievance proceeding when either party loses. Equal protection demands that the same rights be accorded to the prevailing party.

Amicus takes issue with the following statements from the Bar's brief:

1. On page 12 the Bar asserts that the disciplinary system "...is to protect the public when a lawyer's fitness is called into question and not to protect the attorney from laypersons who make complaints" There is a correlative right on the part of the lawyer to have the Bar make an appropriate and complete investigation to determine whether there is a basis for the complaint. This Court has assumed the duty of protecting the public when dealing with lawyers. It must also protect the lawyer from groundless accusations. It is difficult for amicus to digest the position of the Bar in encouraging complaints to be filed, but saying it has a duty to

prosecute baseless complaints. How far has the Bar fallen from the days of Homer Cummings?

2. On page 13 it says that baseless complaints do not proceed beyond the grievance committee level. This is not true. Amicus knows of many baseless complaints that have proceeded beyond that level. The one in this case did! Amicus knows of one that proceeded from his local grievance committee for purely political reasons and was delayed in being made public so as to affect the outcome of a political election. A grievance committee's determination of probable cause makes a baseless complaint a good complaint. It merely shows that a group of lawyers and laymen are ill informed, biased or swayed by some other improper emotion when probable cause is found and the complaint is baseless. The same thing applies to the Board of Governors.

3. On page 13 reference is made to pleading to minor misconduct. The fact that a lawyer should be put in the position of wanting to tender a plea to avoid expensive and time consuming litigation should be eliminated. It is the duty of the Bar to do so. It is the duty of this Court to see that the Bar does so. A lawyer's reputation is a fragile thing at best. He should never be placed in the position of having to "cop a plea" when he is not guilty.

4. On page 23 the Bar says that assessment of costs in favor of accused lawyers would require a more careful examination of the complaints because it would cost money the Bar can ill afford. Is it too expensive to do justice? Is it too expensive to do it at the earliest opportunity? A fundamental reason why The Bar has lost the confidence of its members to a large extent is because of this attitude. It has become a cancer growing on the body of its membership., It is viewed by the membership as unresponsive, bureaucratic and undevoted to the interests of its members. The least its members can expect from it is fairness. This, the brief says, the Bar is not prepared to give.

The cases cited by the Bar in support of its opposition to the imposition of costs deal with members who were found, at least partly, guilty of misconduct. This case is distinguished from the cited cases because the accused lawyer was found not guilty

on a summary manner in which the Bar had to concur. It is apparent from the referee's findings and conclusions that he did not believe the Bar "...acted reasonably and in good faith" as said on page 28 of the Bar's brief. It is equally clear the Bar lacked an intelligent lawyer to point the error of its ways.

Finally §120.59(6)(1) Florida Statutes provides for the recovery of costs by the prevailing party in administrative proceedings, but does not allow costs to an agency of the State. That is a fair rule also because it treats both parties equally. Unfortunately, that would not have the salutary effect of requiring the Bar to look more carefully at complaints.

CONCLUSION

Amicus curiae submits that costs should be allowed to the prevailing party in a Bar grievance proceeding. Since the present rule allows costs to the Bar specifically, the prevailing accused lawyer should be entitled to costs as well. The referee's recommendation about the allowance of costs should be affirmed. Insofar as the allowance of particular items of costs are concerned, amicus submits that the same rule should apply to both parties. If the Bar is customarily allowed a category of costs, the successful accused attorney should be allowed the same costs.

The undersigned certifies that a copy of the foregoing has been furnished to John F. Harkness, Jr. as Executive Director of The Florida Bar; John T. Berry; David G. McGuenegle; Kristen M. Jackson and Sharit, Bunn, Chilton & Holden by mail on November 20, 1992.

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