IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CHARLES R. CHILTON,

Respondent.

Case No. 79,115
[TFB Case No. 91-30,250 (10A)]

RESPONDENT'S ANSWER BRIEF

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TABLE OF CONTENTS

TABLE OF CASES

OTHER AUTHORITIES

I.

PRELIMINARY STATEMENT

The Respondent, CHARLES R. CHILTON ("Chilton"), is compelled to supplement the Statement of Case and Statement of Facts set forth in the Initial Brief of the Complainant, THE FLORIDA BAR ("Florida Bar"). Simply put, Rule 3-7.7(c)(2) of the Rules of Discipline provides that the report and record filed by the Referee shall constitute the record on review. Accordingly, the Respondent will confine the tenor of this Answer Brief to the appropriate record, and would incorporate by reference the objections to the Complainant's Initial Brief, as set forth in the Respondent's Motion to Dismiss served on November 9, 1992.

Essentially, the issues of awarding costs and attorney's fees to a prevailing Respondent stem from two hearings before the Honorable John W. Springstead in Brooksville, Florida, the Referee appointed by this Court pursuant to Rule 3-7.6(a) of the Rules of Discipline. The first hearing occurred on April 9, 1992, and the second hearing took place on June 29, 1992. For this Answer Brief, references to the transcript fox the corresponding hearings will be designated as "(April Tr., Page ____)," and "(June Tr., Page ____)."

As a result of each hearing, an order was rendered by the Referee, and the respective record references will be designated as "Summary Judgment Order" for the Order of April 9, 1992, and "Referee's Report" for that report dated August 26, 1992. References to deposition testimony received into evidence by the Referee during the June 29, 1992, hearing will be designated as "(McIntyre Tr., Page ____)."

II.

STATEMENT OF THE CASE AND FACTS

During the course of the summary judgment hearing, the Florida Bar conceded many significant facts pertaining to the evolution of this case. Specifically, Bar counsel submitted that:

> And I would represent to this Court as I certainly did to Judge Smith, that even as we approached the final hearing we were in a bit of a quandary as to what the true situation was and the factual pattern.
>
> * * *
>
> But, needless to say, the statute -- it was a real educational process for the Bar and I'm sure for everybody involved -- the statute is very nebulous on its conflicting duties. (April Tr., Page 13). (emphasis added)

The resulting Summary Judgment concludes, among other things, that:

> 2. Upon a careful review of all evidence and pleadings on file in this case, the undersigned Referee finds that there is no genuine issue of material fact as to the Petition filed by the Complainant, and there is an absence of any justiciable issue of fact or law in this case. (Summary Judgment Order, Page 4). (emphasis **added)**

This Order was explicitly stipulated to by the Florida Bar during the April hearing:

> But I have conferred with the board members on this matter and would represent to you this morning that the Bar is in a position to support their motion and not argue against it; in other words, we would urge that Your Honor in reviewing this matter enter an Order recommending that the Respondent be found not guilty. (April Tr., Page 4). (emphasis added)

For the purpose of determining entitlement to costs and

attorney's fees during the June hearing, the Respondent presented the uncontroverted testimony of Ms. Linda McIntyre, the expert witness who was initially contacted by the Florida Bar to testify on behalf of the Bar against the Respondent. (June Tr., Page 52; McIntyre Depo., Page 6).[1] Ms. McIntyre recalled that Bar counsel advised her:

> that they needed an expert witness because of proceedings that were filed against Mr. Bosse and a Mr. Chilton and particularly wanted me to testify with regard to the fees that had been charged. He said that they had had trouble getting a witness and would I be willing to do it?
>
> I asked what exactly the problem had been. Mr. Barnovitz [Bar counsel] said that the lawyer, Mr. Bosse, had charged between 10 and $15,000, he thought, for a relatively routine adoption. And so I agreed to testify as a witness that that particular fee would be unreasonable, and I based that on the fact that I thought that lawyers like that would give us all a bad name and it seemed to be very - a very unreasonable fee for a routine adoption. (McIntyre Depo., Pages 6, 7).

The expert witness also testified that Bar counsel:

> said that a Charles Chilton was also involved in the case and that he was a very nice man, very highly thought of and that he believed that Mr. Chilton had not charged a fee for his services in that case and that the Bar had - I hate to say the exact language, but that they weren't as concerned about Mr. Chilton as they were about Mr. Bosse. (McIntyre Depo., Page 7) (emphasis added)

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[1]Ms. McIntyre has finalized over 300 adoptions over the last several years; is a member of the Florida Association of Adoption Lawyers and the Family Section on Adoption; and recently received the Florida Bar President's Pro-Bono Service Award for the 17th Circuit for her efforts in assisting with HRS adoptions (McIntyre Depo., Page 5).

Ms. McIntyre further testified that:

> The first thing that concerned me in reading the [Bar's] pleadings was that, and I am just looking at the notes that I made, I am reviewing the pleadings that I have received and the notes that I made at the time.
>
> The first thing that concerned me was that Paragraph 8 documented the proceeding as a routine adoption, and I had since discovered that it really wasn't a routine adoption. It was, in fact, a contested adoption, which is really one of the most emotional and difficult issues that can come before a court.
>
> * * *
>
> The further allegations in the pleading that concerned me a little bit were in Paragraph 12, indicating that the Patsners would not have qualified for an in-state adoption in Florida, which of course was not, is not, by law, correct because they could have moved from the State of Florida and still qualified for an adoption here in the state. (McIntyre Depo., Pages 9-11). (emphasis added)

Ms. McIntyre then proceeded to explain that:

> So I was in a quandary as to what I should do. In all fairness to the Florida Bar, I had agreed to testify and had actually been noticed of a hearing. And I contacted a few of my attorney friends and asked their advice as to whether I should appear at the hearing or call the Bar and tell them what I had - what my feelings were about the case.
>
> And so I decided I was advised to contact Kris Jackson of the Florida Bar and let her know exactly what my position was so that she could act accordingly.
>
> Q. Did you then proceed to contact Ms. Jackson?
>
> A. Yes, I did. On February 14th I contacted her by telephone and told her that I had reviewed the file very carefully and I did not see anything wrong with the billing that Mr. Bosse had set forth and that I would not be

able to testify in a favorable way on behalf of the Bar, and that I wanted to warn her of that.

Q. During that conversation, did Ms. Jackson ask for a more detailed explanation for conclusions that you reached?

A. Not really with regard to that. The only thing that she did, our conversation was over a car phone. The only thins that she did was in closing said well what do you think about the issue regarding the Patsners living in New Jersey? Do you see any problem with that, and I said no, there wasn't. That happens all the time.

We have young families that are relocated during an adoption proceeding and that I - the statute provides exactly what is to happen in that instance and that it seems as though the attorneys, Mr. Chilton and Mr. Bosse, complied with all of those requirements as did HRS. And so I didn't see anything wrong, and she said well, okay, thank you very much.

* * *

Q. During that conversation, was there a final agreement or arrangement made in relation to your scheduled deposition.

A. She told me that she would not be needing me to testify.

Q. Did you ever advise her that you had some sort of scheduling conflict for that deposition that had been set by the Florida Bar?

A. No. (McIntyre Depo., Pages 12-14). (emphasis added)

Jack Brandon, one of the attorneys representing the Respondent also testified as to the manner in which this case was prosecuted by the Florida Bar:

Q. Mr. Brandon, was there a time early on in the proceedings where you contacted Bar counsel and advised them of the weakness of

their case?

A. **Yes.** I spent a considerable amount of time in this case and it's reflected in the attorney's fees, if you will look at the attorney's fee billing, preparing a response with appendix to this case. It's probably one of the more detailed responses in my practice that I have ever prepared in response to a complaint.

* * *

And I felt like that response along with the exhibits really answered all of the questions that had been raised in the **case**. And I then scheduled a meeting with the Florida Bar counsel for the purposes of sitting dawn and going over allegation by allegation and reviewing that response, hopefully with the thought in mind that the case would not proceed as to Mr. Chilton. (June Tr., Page 37). (emphasis added)

Mr. Brandon further testified:

Q. Mr. Brandon, in preparing for trial of this matter on behalf of Mr. Chilton did vou ever visit Bar Counsel at their offices in Orlando?

A. Yes, I did, on two separate occasions.

Q. What was the purpose of each of those visits?

A. The first occasion was, as I earlier testified to, was to sit down and review the response in detail that I had prepared and all the exhibits which I had attached to that response so that there was a clear understandins on the **part** of everyone involved in this case as to what Mr. Chilton's role was, the fact that he was an intermediary, after just a short period of time after filing the petition he became an intermediary and the case was turned over to trial counsel Mr. Rick Bosse, and to further be prepared to respond to any questions.

Your Honor, Charles Chilton was never interviewed in this case, I offered to the

investigating members of The Bar, of the grievance committee, to open our file, to interview Charles Chilton. I offered to Bar Counsel the same opportunity to come down and sit down and interview this lawyer and find out why he did what he did in terms of handling this case. And no one ever elected to sit down and review the file or interview Charles Chilton with respect to the allegations.

The second meeting was for the Purpose of reviewing The Bar's file alons with Tom Murphy, who is trial counsel for Rick Bosse in the companion case. And we went to Orlando and we met with Bar Counsel for purposes of going through the Bar's file. (June Tr., Pages 39, **40**). (emphasis added)

In relation to Ms. McIntyre's testimony, Bar counsel testified that she did not specifically recall advising Mr. Brandon as to a purported "scheduling conflict," but that she "may have." (June Tr., Page **85**). (emphasis added) Mr. Brandon also testified that Bar counsel never disclosed the exculpatory evidence and opinions provided by Linda McIntyre:

Q. When you met with Bar Counsel in Orlando did the subject of the proposed expert witness Linda McIntyre ever come up?

A. **Yes.** The question was asked of Bar Counsel Kris Jackson who was helping us review the files, because Linda McIntyre's deposition had been scheduled in the Bosse case. **The** question was raised as to why the Bar had canceled that deposition. And the response was given that the deposition was canceled because of conflicting schedules. That was the response that was given to Mr. Tom Murphy and me at that time.

We later learned that the deposition necessarily had been canceled because Linda McIntyre did not agree with the Bar's position and felt like the conduct of Mr. Chilton as well as the conduct of Mr. Bosse under the circumstances of the case was proper in all

respects. (June Tr., Pages 41, 42) (emphasis added)

In response to this question of affirmatively advising Respondent's counsel of Ms. McIntyre's statements and opinions, Bar counsel testified that she did not recall "one way or the other." (June Tr., Page 91). Bar counsel also testified as to the burden of proof and duty to disclose exculpatory evidence:

> 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 it's got to prove its case by clear and convincing standard?
>
> A. Yes.
>
> Q. And would you agree with what we've talked about earlier, that in the Florida Rules of Criminal Procedure, that a srosecutor 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. (June Tr., Page 91). (emphasis added)

Bar counsel also testified about the Bar's unfamiliarity with background facts involved in the serious charges brought against the Respondent:

> Q. No. What I mean is isn't it true that The Bar didn't even know itself exactly what had happened in terms of backsround 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.** (June Tr., Page 95). (emphasis added)

Testimony elicited by the Florida Bar further delved into the Bar's own failure to gather all background facts, during its cross-examination of Mr. Brandon:

Q. Were there not also factual disputes in regard to the June 15, 1990 meeting in Pasco County?

A. I don't think so. And that's a good example, because there was a lawyer there who was never interviewed by the Florida Bar who was totally independent. He had no ax to grind with anybody. Weston Sismond came up for that hearing. He was a Fort Lauderdale adoption lawyer who volunteered his time to come up. He was not anybody's client. He was not said by anybody.

He came up, was available for that conference, and The Bar never even interviewed him. I did obtain an affidavit from him and attached it as part of my response in the case. But he was never interviewed by The Bar. He testified at the Bosse case and to my knowledge, that's when the Bar first knew about what Weston Sismond was going to say in terms of what transpired at the June 15th meeting. There should have been no questions of fact with respect to the June 15th meeting. (June Tr., Pages 50, 51). (emphasis added)

Testimony was also presented with respect to research undertaken prior to the filing of the Complaint against the Respondent:

Q. Ms. Jackson, what type of research did you

do prior to the filing of this Complaint?

A. With respect to?

Q. To the issues raised in the disciplinary Complaint against Mr. Chilton.

A. You mean legal research, or did you mean discussing it with others?

Q. Legal research.

A. My paralegal did the legal research and she did an extensive job. (June Tr., Pages 88, 89). (emphasis added)

The Respondent also testified in connection with the Bar's failure to gather background facts prior to the commencement of proceedings:

Q. Mr. Chilton, did The Bar at any time in relation to this case ever ask to sit down with you and get your side of the story?

A. No.

Q. Did The Bar ever at any time in this case ask to review your files or any documents in relation to the subject adoption?

A. No. I tried to appear at the grievance hearing. Number one, they didn't want me to come. And the second one, I sat outside in the hallway, but I was never allowed inside.

* * *

Q. And is it your testimony that you showed up and made yourself available at the second grievance committee meeting?

A. Uh, yes.

Q. Did the Florida Bar through any of its representatives ask you to come in and testify then?

A, No, I was never allowed to come into the meetings.

Q. Do You consider the charges in this case to be serious against You?

A. **Yes,** I considered them very serious and an extreme threat to my career as an attorney.

Q. Prior to this case that was filed by the Florida Bar had there **ever** been **any** other Grievance Committee proceedings or complaints filed against you as a Florida lawyer?

A. No.

* * *

Q. Mr. Chilton, in relation to the subject adoption You were serving in the capacity as an intermediary; is that correct?

A. Yes.

Q. Were You paid any type of fee in relation to that?

A. No, I didn't charge a **fee** for that. (June Tr., Pages **56-58**, 60). (emphasis added)

During the course of the June hearing, the Referee noted:

The Court's well aware of the serious nature of the allegations **as** well as I think the tragic way in which this whole thins sot started.

* * *

THE COURT: Again, I'm sitting here and looking. I know Mr. Bosse has incurred some terrible expenses and Mr. Chilton has incurred some terrible expenses. (June Tr., Pages 67, **68)**. (emphasis added)

The Referee also reasoned that:

I think The Bar has a hard time arguing against those expenses particularly in view of the information that they are charged with having knowledge of an behalf of Ms. McIntyre and her expertise. Again, I understand for the record she was originally sought out by The Bar as an expert.

* * *

> **THE COURT:** Again, in support of my position that the costs should be awarded, the fact is material, that the vast bulk of these costs incurred by Mr. Chilton in preparation for his defense were incurred after The Bar was put an notice that their two primary and central issues, the attorney's fees and the impropriety of allowing the client to leave the state were without merit at least in the opinion of Ms. McIntyre, the expert. (June Tr., Pages 71, 72.) (emphasis added)

Ultimately, the Referee provided a detailed analysis of the evidence presented by the parties for the benefit of the Florida Supreme Court:

> 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 on 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's the opinion of the Court that clearly the rule -- Counsel I think is correct and I think Counsel is not arguing that there is no specific provision of the rule that says that in the event that a Respondent shall prevail he will get costs "X", "Y", "Z". It just doesn't say that. But, again, I think as Americans -- and I'm not trying to set overly emotional here -- but there's a sense of fair play that has historically permeated our system of iustice.
>
> And clearly the Dennis decision reflects that. And the Supreme Court in a given set of circumstances is simply not going to cast as drift [sic] a party who has been exonerated and yet has incurred substantial amount of costs. (June Tr., Pages 99, 100). (emphasis added)

Furthermore, the Referee found the attorney's fees incurred by the Respondent in the proceeding to be reasonable and

that the costs set forth in the Respondent's Affidavit be paid by the Bar. (June Tr., Page 103). Significantly, the Referee outlined his thinking in terms of arriving at the cost award in favor of the Respondent:

> THE COURT: Very well. It should reflect that it's noteworthy to this Court that while the allegations that were brought by the Bar were fairly in contest at the outset of the proceedings based on the information the Bar had available to it, that slowly but surely -- and I don't think anyone would argue and it's my finding -- that the Bar became aware that the complaint against Mr. Chilton was not aasrosriate.
>
> And correctly at the time before it went to final hearing, albeit the day of the final hearing, the Bar announced a stipulated dismissal of that complaint. Now, I do not find any fault with the action of the Bar in doing that. It was appropriate.
>
> But I do think it's noteworthy, and you got 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 the allowing the child, particularly adoptive parents, to leave the state were unfounded.
>
> * * *
>
> That the record is clear that Mr. Brandon, Counsel for Respondent, made I think a very good effort to try to head this off, if you will, nip the case in the bud by making its client available, trying to conduct an interview.
>
> * * *
>
> 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 on the totality of the circumstances in not reimbursing him for his costs which would appear substantial. (June Tr., Pages 104-107).

Against this factual backdrop, the Referee entered the August 26, 1992, Report recommending a costs award to the Respondent in the amount of $9,281.38, and also recommended against an award of attorney's fees. The Referee did, however, certify the question as to whether the Respondent can recover attorney's fees against the Bar, given the totality of the circumstances of the case. It is this Report from which the Florida Bar now seeks review under Rule 3-7.7 of the Rules of Discipline.

II.

SUMMARY OF ARGUMENT

Rule 3-7.6(f) of the Rules of Discipline provides: "Bar Counsel. Bar counsel shall make such investigation as is necessary and shall prepare and prosecute with utmost diligence any case assigned." (emphasis added) In light of the uncontroverted facts contained in the record, it is crystal clear that the Florida Bar failed to prepare and prosecute the case sub judice with "utmost diligence," and that any "investigation" undertaken by the Bar in these proceedings fell woefully short of the reasonable bounds of fair play for the bringing of career threatening charges against a member of the Florida Bar who had not been the previous subject of any type of complaint to the Bar; who participated in this case and numerous other adoption cases on a pro bono basis; and who was never interviewed or deposed by the Florida Bar to discover the background facts or ascertain his side of the story.

This case is further aggravated by the fact that Bar counsel was specifically advised by the Bar's expert witness that the Respondent's conduct violated no disciplinary rule or legal requirement and, yet, Bar counsel failed to disclose this exculpatory evidence and, more significantly, Bar counsel misrepresented the effect of the expert's conclusions by claiming that the expert was unavailable due to a scheduling conflict.

Although Rule 3-7.6 of the Rules of Discipline does not affirmatively address the issue of costs awardable to the

prevailing respondent, the Rule is merely silent in this regard. This Court has already established the "discretionary approach" to be utilized by the Referee in arriving at an award of costs in disciplinary proceedings. The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). Furthermore, an award of costs against the Florida Bar which was apparently not reversed or modified by this Court in The Florida Bar v. Dennis, Case No. 76,121 (Fla. 1991). (Appended to the Initial Brief)

Although the Bar urges this Court to disallow an award of costs in favor of a prevailing Respondent because of a "chilling effect" upon disciplinary proceedings, our system of justice has historically followed the award of costs -- and sometimes attorney's fees -- to the prevailing party. Examples are found in §57.014, Fla.Stat. (1991), which requires an award of costs in favor of prevailing litigants, and §§57.105 and 57.111, Fla.Stat. (1991), which provide for an award of attorney's fees in certain instances.

Here, the evidence demonstrates that the proceedings developed to the point where the Complainant was apprised of the lack of genuine issue of material fact, yet, the Respondent was forced to continue to incur casts and attorney's fees in this matter. Due to the Complainant's failure to disclose exculpatory evidence during its prosecution, and due to the Complainant's disregard of the Respondent's efforts to fully apprise the Complainant of the true issues and facts from the outset, Article I, Section 21, of the Florida Constitution certainly applies

through the fundamental doctrine of every person's right to judicial redress for any injury. Since these proceedings are the only forum in which the Respondent can attain relief, it is incumbent upon this Court to protect and uphold the rights of the injured Respondent with the same zeal that seemingly drives the Bar in its prosecutions.

III.

ISSUE ON APPEAL

WHETHER THE RESPONDENT IS ENTITLED TO AN AWARD OF COSTS AND ATTORNEY'S FEES GIVEN TEE TOTALITY OF THE CIRCUMSTANCES OF THE DISCIPLINARY PROCEEDINGS.

IV.

ARGUMENT

ALTHOUGH THE FLORIDA BAR CONTENDS THAT THE AWARD OF COSTS IN FAVOR OF A RESPONDENT IN DISCIPLINARY PROCEEDINGS IS NEBULOUS IN TERMS OF PREVAILING FLORIDA LAW. THIS COURT HAS FIRMLY ESTABLISHED CONTROLLING PRINCIPLES IN TEE CASE OF THE F'LORIDA BAR V. DAVIS, 419 SO.2d 325 (FLA. 1982).

FURTHERMORE, THE RESPONDENT SHOULD BE ENTITLED TO ALL COSTS AND ATTORNEY'S FEES INCURRED IN DEFENDING THE DISCIPLINARY PROCEEDINGS BROUGHT BY THE COMPLAINANT.

In The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982), this Court was faced with the question of costs assessed against the Respondent in proportion to the total costs incurred by the Bar. Id. at 327. After reciting the appropriate standard of

review,[2] this Court then addressed the Bar's objection to Referee's failure to assess all costs against the Respondent. Id. In Davis, this Court succinctly held:

> 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, Fla.Stat. (1981), Dragstrem v. Butts, 370 So.2d 416 (Fla. 1st DCA 1979), and in equity the allowance of costs rests in the discretion of the Court, National Rating Bureau v. Florida Power Corp, 94 So.2d 809 (Fla. 1956).
>
> We hold that the discretionary approach should be used in disciplinary actions. Generally, when there is a finding that an attorney has been found guilty of violating a provision of the Code of Professional Responsibility, the Bar should be awarded its costs. At the same time the Referee in this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable, The amount of costs in these circumstances should be awarded as sound discretion dictates. Id. at 328. (emphasis added)

With this precedent found in Davis, the Referee in the case at bar was certainly in a position to adopt the discretionary approach in arriving at an award of costs in favor of the Respondent. Moreover, the presence of competent substantial evidence to support the Referee's findings of fact should not be disturbed on review, and the Bar's recital of the many cases where the Bar has sometimes borne some or all of the costs of the respondent serves to buttress the decision reached in this case.

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[2] "We have reviewed the record and the Referee's Report and find that there is competent substantial evidence to support the Referee's finding of fact." Id. at 327. (emphasis added)

On the other hand, the Bar's reference to an absence of precise language favoring a respondent in Rule 3-7.6(k) only tends to obfuscate the primary considerations involved. For example, the Referee undeniably found that "slowly but surely... the Bar became aware that the Complaint against Mr. Chilton was not appropriate." (June Tr., Page 104). With the failure to disclose exculpatory evidence to the Respondent, and in view of the overall failure of the Bar to investigate as is necessary and to prepare and prosecute the case with "utmost diligence," the decision reached by the Referee patently falls within the realm of the "discretionary approach" to the award of costs.

In its Initial Brief, the Bar also focuses upon its budget for the payment of costs and the negative impact of costs awards in favor of respondents. This argument is specious for several reasons. First, there is no evidence in the record on review as to Florida Bar's budget for costs awards. Second, the ability of a party to pay costs has never been an influential factor for a trial court in arriving at an award of costs in an action at law. Third, the Respondent could advance the same type of argument to the effect that his budgetary constraints mitigate against having to absorb any of his own costs resulting from the Bar's flawed prosecution. Fourth, the travesty arising out of these proceedings should be equitably resolved through the spreading of the loss among the Bar as a whole, as opposed to the innocent victim who was faced with career-threatening charges arising out of a pro bono appearance as an intermediary.

Likewise, attorney's fees should be awarded to the Respondent in this instance because Rule 3-7.6(k) is merely silent in that respect. In several areas, the Florida Legislature has seen fit to allow the award of attorney's fees in favor of the prevailing party under Sections 57.105 and 57.111 of the Florida Statutes. Although these legislative directives are not binding upon Bar disciplinary proceedings, the concept is nonetheless noteworthy in rendering just results in the wake of an unsuccessful prosecution by the Bar, More important, however, Section 21 of Article 1 of the Florida Constitution provides that:

> The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial, or delay, (emphasis added)

Consequently, this Court can draw upon this constitutional precept to effect redress for the injury sustained by the Respondent, and an award of attorney's fees to that end is a step in the right direction. Obviously, the emotional trauma suffered as a result of these proceedings -- for which the Bar eventually agreed were without a genuine issue of material fact -- cries out for redress by the courts of this state, and the same tenets supporting an award of costs against the Bar are equally apposite in terms of correcting the financial hardship suffered by the Respondent herein.

The Referee explicitly found that the attorney's fees charged by Mr. Brandon to the Respondent in the amount of $27,190.00 were fair and reasonable, and the various fees and costs affidavits filed with the Referee constitute competent and

substantial evidence necessary to such an award. Of great significance is the certification of the issue of attorney's fees to the Supreme Court for review. Without question, the Referee could have denied the Respondent's request far attorney's fees as a perfunctory matter, but the Referee voiced his reluctance to make such an award because "there seems to be no provision in the rules that govern this type of proceeding for that award." (June Tr., Pages 102, 103).

On this appeal, the Florida Bar also suggests that a Respondent should not be awarded costs "absent a showing by clear and convincing evidence the Bar engaged in misconduct associated with prosecuting the matter." (Initial Brief, Page 23). Naturally, the Respondent disagrees with this narrow and self-insulating measure proposed by the Bar, for those reasons set forth above. Beyond that, however, the record for review does indeed contain evidence reflective of **prosecutorial** misconduct. In addition to the failure to disclose the exculpatory evidence, along with the misleading representation as to a scheduling conflict for the expert witness, the Florida Bar has also ignored the Rules of Discipline and Florida Rules of Appellate Procedure by predicating its statement of case and facts and portions of **its** argument section of the Initial Brief on matters which are unsupported by the record. More disturbing is the Complainant's reference **to** an offer of admission of minor misconduct by **the** Respondent.[3] This type of argument undeniably violates the

[3] **See** Pages 1 and 13 of the Initial Brief.

spirit of the confidentiality and inadmissibility of offers of settlement. Although the Rules of Discipline indicate that the disciplinary proceedings are of a quasi-judicial nature, the principles found in §§90.408 and 90.410, Fla.Stat. (1991) still come into play. Section 90.408 provides:

> Evidence of an offer to compromise a claim which was disputed as to validity or amount, as well as any relevant conduct or statements made in negotiations concerning a compromise is inadmissable to provide liability or absence of liability for the claim or its value. (emphasis added)

Section 90.410 provides:

> Evidence of a plea of guilty, later withdrawn, a plea of nolo contendere, or an offer to plead guilty or nolo contendere to the crime charged or any other crime is inadmissable in any civil or criminal proceeding. Evidence of statements made in connection with any of the pleas or offers are inadmissable, except when such statements are offered in a prosecution under Chapter 837. (emphasis added)

Despite these axiomatic rules of law and the extremely prejudicial effect of dwelling upon an offer in settlement or an offer of plea, the Complainant still weaves this "factor" into its Initial Brief with the apparent intention of showing that such an offer undermines the finding by the Referee that the proceedings were without merit. Although the Bar qualifies its mention of the offer by matter-of-factly alluding to certain "tenders in hopes of avoiding further time-consuming litigation,"[4] this cavalier reference further exemplifies the manner in which the Complainant

[4]This was the precise reason why the offer was made by Mr. Chilton -- to avoid emotional trauma and costs and fees in excess of $36,000.

has compounded the injustice wrought against the Respondent.

Lastly', the Bar argues that the risk of bearing the costs incurred through an unsuccessful prosecution would disrupt the disciplinary process. This contention, however, flies in the face of Rule 3-7.6(f) which requires Bar counsel to make such investigation as is necessary and to prepare and prosecute the **case** with "utmost diligence." As long as Bar counsel adheres to these Rules of Discipline, then there should realistically be no disruptive effect from the risk of paying a costs award to a respondent. In actuality, it is the Respondent who has suffered an immeasurable disruption of his personal and professional life, and the Bar's apparent indifference to this outcome raises the question as to the motivating objective of the Florida Bar in bringing disciplinary proceedings.[6]

In a similar vein of assessing the burden of costs and attorney's fees, Rule 11 of the Federal Rules of Civil Procedure enables the trial judge to impose these costs and fees sanctions

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[5]At Pages **20** and 21 of the Initial Brief, the Bar also indulges in a misinterpretation of the timing of the expert fee charged by Bennett Cohn. **Even** though the Referee's ***Report*** reflects the April 15, 1992, date for this cost (Referee's Report, Page ***5)***, the itemized services detailed in this entry are retrospective in nature, and are typical of the manner in which most attorneys submit statements for services performed in arrears. The April 15, 1992, date is nothing more than the date of the expert's statement -- nevertheless, the Bar attempts to create the proverbial mountain out of a molehill.

[6]Many other facets of our judicial system tax costs against non-prevailing parties including criminal prosecutions which are brought for the benefit of society as a whole. Hence, one must rhetorically ask the question why the Bar needs some special immunity in its prosecutions.

against litigants bringing actions which are not grounded in fact or warranted by existing law after reasonable inquiry by the party litigant. There is no reason why a similar standard cannot be imposed by this Court for Bar proceedings for the recovery of attorney's fees.

In summary, the precedent of this Court's ruling in The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982), unequivocally controls this case through the application of the "competent, substantial evidence test," as well as the "discretionary approach" to the award of costs by the referee in disciplinary proceedings. Therefore, the only novel issue before this Court emanates from the Respondent's request for attorney's fees incurred, which request was denied by the Referee.

For the legal and equitable parallels previously mentioned in this Answer Brief, it is respectfully submitted that Section 21 of Article I of the Florida Constitution mandates that this Court provide redress to the Respondent who, through no fault of his own, was forced to incur thousands of dollars of attorney's fees in defending a proceeding for which the Bar later represented to the Referee to be the appropriate subject of a motion for summary judgment because of a lack of a genuine issue of material fact. Although research undertaken by the Respondent fails to disclose any disciplinary case in which an award of attorney's fees was entered against the Bar and in favor of a respondent, the lamentable facts of this case forcefully suggest that there has been no disciplinary proceeding quite like this one, and it is the

sincere hope of the Respondent that there will never be any similar prosecution by the Bar against its members in the future. Moreover, the Respondent respectfully requests that this Court will grant the Motion for Oral Argument, served on November 9, 1992, given the background of this case, and the significance of the issues involved.

V.

CONCLUSION

For the reasons set forth above, the Respondent, CHARLES R. CHILTON, respectfully requests this Court to affirm the Referee's award of costs against the Complainant, THE FLORIDA BAR, in the amount of $9,281.38, and to answer the Referee's certified question concerning an award of attorney's fees against the Complainant and in favor of the Respondent in the affirmative, and in the amount ($27,190) already found to be reasonable by the Referee.

Respectfully submitted,

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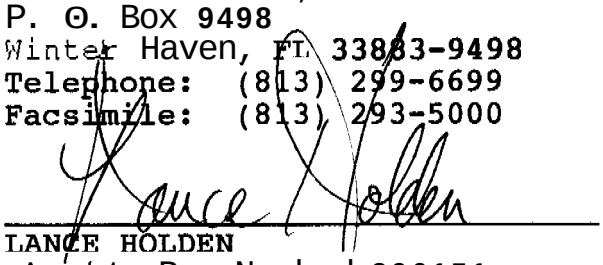

LANCE HOLDEN
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CO-COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have served the original plus seven copies of the foregoing by mail to **The** Supreme **Court of Florida,** Supreme Court Building, Tallahassee, Florida 32301; and a copy by mail to **David G. McGunegle,** Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801; **Kristen** M. **Jackson, Co-Bar** Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801; David **Ristoff,** Co-Bar Counsel, The Florida Bar, Tampa Airport Marriott Hotel, Tampa, Florida 33607; **John** T. **Berry,** Staff Counsel, The Florida Bar, **650** Apalachee Parkway, Tallahassee, Florida 32399-2300; **Henry** P. **Trawick, Jr., 2051** Main Street, P.O. Box 4019, Sarasota, Florida 34230, Amicus Curiae Appearance; and Jack P. **Brandon,** Counsel for Respondent, P.O. Box **1079, Lake Wales, Florida 33859,** this 23rd day of November, **1992.**

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