IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

CHARLES R. CHILTON

Respondent.

Case No. ~~78,882~~ 79,115
[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 Order Granting Respondent's Motion for Summary Judgment dated April 9, 1992 shall be referred to as RR1.

The Report and Findings of Referee Relating to Respondent's Motion to Tax Costs and Motion for Attorney's Fees dated August 26, 1992 shall be referred to as RR2.

The transcript of the Motion for Summary Judgment hearing held on April 9, 1992 shall be referred to as TR1.

The transcript of the Cost Award hearing held on June 29, 1992 shall be referred to as TR2.

STATEMENT OF THE CASE

The Tenth Judicial Circuit Grievance Committee "A" initially voted to find probable cause in The Florida Bar Case Number 91-30,250 (10A) an August 13, 1991 for violating Rules 4-3.3(a)(1), 4-3.3(a)(2), 4-3.4(b), 4-8.4(c), and 4-8.4(d) of the Rules of Professional Conduct. The respondent tendered an admission of minor misconduct on August 27, 1991 pursuant to Rule of Discipline 3-5.1(b)(5) with which the committee agreed. The Board of Governors, however, disagreed with the minor misconduct recommendation when it considered the case at its November, 1991 meeting. The Bar filed complaints in this case, and in the companion case against Richard E. Bosse, on December 20, 1991. The respondent filed a motion for summary judgment on March 2, 1992. The Bosse case was tried on March 23 and 24, 1992. The referee in Bosse recommended that Mr. Bosse be found not guilty.

The respondent's motion for summary judgment was heard on April 9, 1992. The referee issued an order granting the motion and recommending that the respondent be found not guilty, with which the Bar concurred, without ruling on the issue of costs or attorney's fees,

The Board of Governors voted to accept the referee's recommendation at its May, 1992 meeting.

The respondent filed motions for award of costs and attorney's fees in May, 1992. Both motions were heard on June 29, 1992. In his report dated August 26, 1992, the referee recommended an award of costs to the respondent but denied an award of attorney's fees and certified that issue to this Court.

The Board of Governors considered the report recommending costs be taxed against the Bar at its September, 1992 meeting and voted to appeal same.

STATEMENT OF THE FACTS

The Florida Bar filed a complaint against the respondent based upon the initial finding of probable cause by the grievance committee without a "live" hearing pursuant to Rule 3-7.4(h). The respondent's counsel was permitted to be present and gave a thirty minute statement before the committee. The Bar's formal complaint alleged that the respondent, as intermediary and/or as an officer of the court, failed to advise the court of material information, i.e., that the adoptive parents had moved out of the state. A companion case against Richard E. Bosse was separately filed based on similar charges arising out of the same adoption proceeding.

The respondent filed a motion for summary judgment on March 2, 1992. Extensive discovery had been undertaken in the related Bosse case, including taking several witness depositions and expert witness statements, in which the respondent was permitted to participate in preparation for his own case. The Bosse case was tried before a referee on March 23 and 24, 1992 after a previous motion for summary judgment was denied. Both the respondent and his counsel were present at the Bosse final hearing. The referee recommended a not guilty finding only after the entire case was tried and all witnesses, including Mr. Bosse, had testified.

At the hearing on the respondent's motion for summary judgment on April 9, 1992 the referee in this case recommended the respondent be found not guilty which the Bar did not oppose. He based his recommendation on the not guilty finding in Bosse. The referee's order granting the respondent's motion for summary judgment reflected the referee's belief that the respondent had no legal or ethical duty to notify the trial judge of the adaptive parents' move out of state after filing the petition for adoption. The referee further found there was no genuine issue of material fact and there was an absence of justiciable issue of fact or law at the time he made his findings. The referee reserved ruling on the issue of costs (TR1, pp. 18-19; RR1, p. 4).

The respondent filed motions to tax costs and attorney's fees against the Bar, The Bar and the respondent filed extensive memoranda of law as to the awardability of costs.

The Board of Governors reviewed this case at its May, 1992 meeting and voted not to appeal the referee's recommendation of not guilty and dismissal of the case.

A hearing on the issues concerning the awardability of costs and attorney's fees was held before the referee on June 29, 1992. The respondent argued, citing The Florida Bar v. Dennis, 589 So. 2d 293 (Fla. 1991), that costs should be awarded to him because

he had been found not guilty and the Bar had in the past been assessed coats of the prevailing party. The respondent further relied on the fact that the referee in the companion Bosse case recommended assessing costs against the Bar. In addition, the respondent argued that cost awards to prevailing parties are recognized under Florida Statute Chapter 57 in routine circuit court cases (TR2, p. 21). The respondent argued that the Bar admitted there was no genuine issue of material fact by the time of final hearing given the Bosse outcome and concurred with the referee's order granting the motion for summary judgment (TR2, p. 22). A3 further support for his position, the respondent presented a video deposition of expert witness Linda McIntyre and presented testimony of his legal counsel, Jack Brandon, arguing that the Bar had been advised "early on" that its case was weak (TR2, p. 37). The respondent faulted the Bar for not heeding Mr. Brandon's advice.

The referee recommended the assessment of costs, including the respondent's own investigative time, against the Bar stating that the bulk of the respondent's costs were incurred after the Basse trial (RR2, pp. 3-4). The referee denied an award of attorney's fees, having found no provision in the rules therefor, but certified to this Caurt the issue of whether attorney's fees in disciplinary cases are awardable (TR2, p. 103; RR2, p. 6).

The referee issued his report awarding costs to the respondent on August 26, 1992. The Board of Governors considered the recommendation of the referee at its September, 1992 meeting and voted to appeal same. The Bar filed its petition for review on the issue of costs on September 28, 1992.

SUMMARY OF THE ARGUMENT

The referee erred in recommending the Bar bear the respondent's costs, including his own charges to himself for time he spent "investigating" the matter, in this disciplinary proceeding. Neither the rules nor case law provide for the award of attorney's fees in Bar discipline cases regardless of which party prevails. This is a quasi-judicial administrative proceeding, not a civil action.

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)(E) specifically provides that costs taxed shall be payable to The Florida Ear. Although the discretionary approach, as opposed to the prevailing party approach, has long been used by this Court in awarding costs in Bar discipline cases, referees cannot award costs, even to the Bar, if those costs are not specifically enumerated in the rule. The Florida Bar v. Allen, 537 So. 2d 105 (Fla. 1989). A referee's recommendation as to costs will be upheld, unless it is shown that there was an abuse of discretion. The Florida Bar v. Carr, 574 So. 2d 59 (Fla. 1990).

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, in those cases where cost awards have been mentioned, each party was ordered to bear its own costs where the respondent was found not guilty.

In the respondent's case, there was a question as to whether or not he owed a duty to the court to advise it of the adoptive parents' move out of state. The statutes are unclear in this respect. In addition to this legal issue, there were questions of fact with respect to when the respondent knew of the move in connection with filing the petition for adoption and the circumstances surrounding his meeting with Dr. Patsner on June 15, 1990. The companion case, The Florida Bar v. Bosse, Case No. 78,882, proceeded to final hearing before the respondent's case and, after hearing all of the testimony, the referee in Bosse, simply put, believed Mr. Bosse's version of the events rather than Dr. Patsner's version. It is not always possible to accurately gauge the demeanor of a witness prior to testifying. No doubt Dr. Patsner's hostile attitude damaged his overall credibility in the *eyes* of the referee in Bosse. However, this does not mean the Bar engaged in prosecutorial misconduct by bringing these proceedings.

With respect to awarding attorney's fees, in this case the respondent moved the referee to award him his fees pursuant to Florida Statutes Sections 57.105 and 57.111 (1991). The first statute provides for the award of fees to a prevailing party where there is an absence of justiciable issue of either law or fact at the outset. The second statute provides for the award of attorney's fees to a prevailing party in a state agency action. The Bar submits the separation of powers doctrine precludes recovery by either party under the Florida Statutes. Even if recovery could be had, this action was not frivolous from its inception. The grievance committee found probable cause. It was not until the end of the final hearing in the Bosse case that it became apparent there was no basis to proceed further in this matter. The respondent had already filed a motion for summary judgment and the Bar concurred in the dismissal at the hearing on said motion.

In order for the Bar to begin paying the costs and attorney's fees of prevailing respondents, a restructuring of the grievance committee process would be necessary so that, in essence, the Bar's cases would be "pretried." The referee would assume more of an appellate function to review the committee's findings of fact and recommend the appropriate level of discipline. There could also 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 protect neither the public nor the accused attorney. Many cases may never be pursued by the Bar because of the need to be able to unequivocally prove every case before filing the formal complaint. The increase in processing time such additional bureaucracy would create could adversely affect both the participants and the process.

ARGUMENT

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

In his report dated August 26, 1992, the referee recommended this Court give strong consideration to awarding the respondent all of his costs which total $9,281.38. These costs include approximately $385.75 in Federal Express charges, $168.50 of which were incurred after the referee granted the respondent's motion for summary judgment on April 9, 1992; a $200 expert witness fee and a $1,000 charge for review of documents by and conference with an expert witness; and $107.33 for "mounting of display items" incurred on June 26, 1992, well after the Bar's case had been dismissed. In fact, a total of $2,883.33 in costs was incurred by the respondent after the referee recommended dismissal. Additionally, Bar counsel advised the respondent's counsel at the conclusion of the final hearing in Bosse, on March 24, 1992, that he intended to seek permission from the Board of Governors to move for a dismissal in the respondent's case. Despite this, the respondent incurred $314 in costs between April 7, 1992, and April 9, 1992, when the case was dismissed by the referee. This, combined with the $2,883.33 incurred after the dismissal, totals $3,197.33 in costs which the respondent incurred after the Bar advised him it would seek dismissal of its charges against him. It is noteworthy that the $1,000 associated

with expert witness Bennett S. Cohen's review of the file and conference with the respondent was, according to the respondent's affidavit of costs on page five of the Report of Referee, incurred on April 15, 1992, well after the case had been recommended for dismissal. While logic would indicate this cost was incurred prior to April 9, 1992 the timing is not at all clear from the respondent's statement of costs. The Bar cannot help but to question the validity of many of the respondent's costs, especially the aforementioned expert witness fee which, if truly incurred on April 15, 1992 is clearly inappropriate because there was no need to incur expert witness costs after the case was dismissed. In fact, it could be argued that many of the respondent's costs, especially those incurred after the dismissal, were incurred with an eye toward obtaining a successful award against the Bar as retribution for the Bar having pursued the disciplinary charges.

The purpose of the Bar's 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. One of the responsibilities of this profession, and in fact any profession, is conducting one's self and one's practice in a manner that does not give rise to the appearance of impropriety. The public has a right to file a grievance against an attorney. Stone V. Rosen, 348 So. 2d 387 (Fla. 3rd DCA 1977). The Bar must examine each of these complaints and determine whether the allegations, if proven, would constitute a violation of the

rules. See Rule of Discipline 3-7.3. Baseless complaints do not proceed beyond the grievance committee level because either the alleged conduct does not constitute a breach of the rules or the evidence does not appear to be clear and convincing. This case was not a baseless complaint, as evidenced by the grievance committee's determination that probable cause existed to proceed with the filing of a formal complaint. Further, this case also was reviewed by the Board of Governors after the respondent tendered an admission of minor misconduct and it too determined there was probable cause. The Bar cautions that although the respondent submitted an admission of minor misconduct, in no way should this be taken to mean he engaged in any misconduct. Sometimes accused attorneys make such tenders in hopes of avoiding further time consuming litigation. The Bar does not take issue with the referee's recommendation of not guilty.

Former Integration Rule 11.06(9)(a)(5) provided that a referee's report must contain a statement of costs of the proceedings and recommendations as to the manner in which they should be taxed, This rule 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, 22 (Fla. 1979). In 1987, the Rules of Discipline were adopted by this Court and replaced the Integration Rule. Former Rule of Discipline 3-7.5(k)(1) was based upon former Integration Rule 11.06(9)(a). On April 20, 1989, Rule of Discipline 3-7.5(k)(1) 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." (Emphasis added). See The Florida Bar, 542 So. 2d 982 (Fla. 1989). This rule has since been renumbered as 3-7.6(k)(1) although the above quoted language has remained the same. Under the former rules there was a certain degree of ambiguity as to how costs should be determined. The Bar submits the last amendment clarified this ambiguity. It 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 borne by the Bar in administering the disciplinary program and do not apply to respondents.

Prior to 1982, there was no clear procedure for awarding costs where the Bar did not prevail or prevailed as to only Some of the charges alleged. In instances where a respondent prevailed, the Bar could only locate three cases where the respondent was awarded his costs. It must be cautioned, however, that it is entirely possible more cases where a respondent was awarded costs could exist because 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. In The Florida Bar v. Matthews, 296 So. 2d 31 (Fla. 1974), and The Florida Bar v. Johnson, 313 So. 2d 33 (Fla. 1975), both respondents were found not guilty and the Bar was ordered to pay their costs. These cases occurred under former Integration Rule 11.06(9)(a). The third case, The Florida Bar v. Dennis, 589 So. 2d 293 (Fla. 1991), occurred under Rule of Discipline 3-7.6(k)(1) shortly after its amendment. Mr. Dennis was found not guilty and the referee's recommendation that the Bar bear his costs was not timely appealed by the Bar. Because the Court's slip opinion and report of referee contain more information, they are included in the Appendix. None of these cases provided any guidance as to why the Court elected to award these respondents their costs. The cases appear to conflict with the rules and subsequent case law and therefore their psecedental value is questionable.

More recently, in The Florida Bar v. Feinberg, 583 So. 2d 1037 (Fla. 1991), and The Florida Bar v. Icardi, 599 So. 2d 659 (Fla. 1992), the Court upheld the referee's recommendation that each pasty 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 orders were issued without a detailed opinion, the respective reports of referee are included in the Appendix.

With The Florida Bar v. Davis, 419 So. 2d 325 (Fla. 1982), this Court sought to clarify the award of costs in disciplinary proceedings where the Bar prevails as to only some of the charges. 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 were generally awarded to the prevailing party pursuant to Florida Statute Section 57.041. In equity actions, costs were 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 Statute 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 incurred in defending those charges of which the attorney was acquitted.

The discretionary approach was recently followed in The Florida Bar v. Wilson, 599 So. 2d 100 (Fla, 1992), where upon appeal the Court found the evidence did not support the referee's

recommendation of guilt on some of the charges. The matter was remanded to the referee to recalculate the costs which should be assessed against Mr. Wilson in connection with the one charge of which he was found guilty. Again, no mention was made of awarding to him any costs he incurred in defending those charges of which he was not found guilty.

The case of The Florida Bar v. Miele, 17 FLW 613 (Fla. Oct. 8, 1992), appears to have limited the position in the above cases that a respondent should not be liable for costs associated with charges on which the Bar did not prevail. Mr. Miele was found guilty of some, but not all, of the charges against him. He argued that because he had been "partially vindicated," he should not be required to bear the Bar's costs incurred in prosecuting those charges. This Court found his argument to be without merit because had there been no misconduct there would have been no Costs. The Court reiterated its position stated in The Florida Bar v. Gold, 526 So. 2d 51 (Fla. 1988), that costs should be borne by the misbehaving attorney rather than by the Bar's membership. This Court also noted that Mr. Miele had the burden of proving there had been an abuse of discretion and nothing in the record showed the costs incurred by the Bar were unnecessary, excessive, or improperly authenticated.

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 unsupported 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 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. Additionally, there appears to be a trend, as evidenced by **Neu**, supra, and Miele, supra, toward imposing costs on respondents even though they have been found guilty of only a portion of the charges.

The Bar questions the respondent's charging of his own "investigative time" as a cost (RR2, pp.5-6). The respondent charged a rate of $35 per hour and incurred sixty-three hours worth of "investigative time" for a total of $2,205. Among the

respondent's "investigative" expenses were charges for his time spent in conferences with his attorneys, his time spent at the grievance committee meeting place (his presence before the committee was neither requested nor allowed), his attendance at the summary judgment hearing and final hearing in the Bosse case, conferences with expert witnesses or potential expert witnesses, his own preparation of a historical summary of the adoption case, and his attendance at the summary judgment in his own case. The Bar submits it is not proper for a respondent to charge his own time as a cost. The Bar utilizes professional staff investigators when it is necessary to investigate allegations. They are compensated on a case by case basis at an hourly rate of no more than $21 per hour. The respondent requested $35 per hour for his investigative time. The respondent is not a professional investigator and the functions he lists in his affidavit do not appear to be investigative in nature but rather relate to the normal preparation by any respondent in a Bar discipline case. By way of analogy, in awarding statutory attorney's fees under Florida Statute Section 57.105(1), a party who also happens to be an attorney is not entitled to payment for time expended in the attorney's capacity as a client. Recovery can be made only for any actual legal services rendered and care must be taken not to duplicate compensation between the attorney and the attorney's counsel. See TransFlorida Bank v. Miller, 576 So. 2d 752 (Fla. 4th DCA 1991), as clarified on the denial of a motion for rehearing on April 1, 1991. Therefore, the Bar submits the referee erred in awarding these costs to the respondent.

The respondent also requested, and the referee recommended, he be awarded $500 in administrative costs. Presumably the respondent obtained this figure from Rule of Discipline 3-7.6(k)(1)(E). [It should be noted this rule was recently renumbered from 3-7.6(k)(1)(5)]. The intent of this provision was to cover only Bas administrative costs incurred in prosecuting Bar discipline cases. The Bar understands such costs to include those incurred by the grievance committee and staff in administering these duties and other miscellaneous costs not specifically enumerated by the rules. The respondent's Costs, such as Federal Express, some long distance telephone calls, postage, and research expenses, are miscellaneous expenses which are not enumerated in Rule 3-7.6(k)(1)(E). Had these been incurred by the Bar, they would have been covered in the administrative costs. Therefore, the respondent is requesting, and the referee has recommended, he be awarded twice for the same expenses.

With respect to his expert witness fees, which total $1,200, in civil cases the awardability and the amount are left to the discretion of the referee. In his report, the referee included these costs in his recommendation that they be taxed against the Bar. Again, Rule 3-7.6(k)(1)(E) does not provide for the award of expert witness fees. The Bar submits the referee abused his discretion by awarding costs which are not provided for by the rule. See Allen, supra. Further, Bennett Cohn's fee of $1,000, according to the respondent's affidavit of costa, was incurred on

April 15, 1992. If in fact this is accurate, such a charge was unwarranted because the referee had already recommended a dismissal of the case. Logic dictates that the fee should have been incurred before April 9, 1992, although the respondent's affidavit of costs shows otherwise.

This Court strictly construed the provisions of Rule 3-7.6(k)(1) in Allen, supra, 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 was 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 page 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 canstruction. The Bar submits that at the very least the referee abused his discretion by awarding the respondent $1,200 in expert witness fees and $107.33 for mounting display items.

Further, 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.

One case that is of interest, although certainly not directly on point, is State ex rel. Shevin v. Indico Corp., 319 So. 2d 173 (Fla. 1st DCA 1975), certiorari dismissed, 339 So. 2d 1169 (Fla. 1976). The District Court's opinion contains an incisive 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. Costs were taxed against the state. A remaining unresolved issue went to final hearing and a judgment eventually was entered on behalf of Indico. In the interim, 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 Statute 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 exlusion 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 Sections 57.041 and 60.05 must be read together. By doing so, the court found costs could not be taxed against either the Attorney General or the state when bringing an action to abate an alleged public nuisance.

The Bar submits the rationale applied in 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, it has never issued 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.

There also could be 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 allowance has been made for the payment of respondent's costs because this has been neither authorized nor 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 Statute Section 57.111. By way of analogy, an action for malicious prosecution will not lie absent a showing of, among other things, a lack of probable cause prosecution. Clearly, this was not the case here.

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 role 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 the attorney 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 reduced to reviewing the committee's findings and recommending the appropriate level of discipline. The Bar would be placed in the position of scrutinizing 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 TAXABLE AGAINST THE FLORIDA BAR WHERE THE BAR PROPERLY AND IN GOOD FAITH BRINGS AN UNSUCCESSFUL DISCIPLINARY ACTION AGAINST THE RESPONDENT.

In two cases the Court entered orders requiring each party to bear its own costs despite the fact that prosecutorial misconduct occurred. In the first one, The Florida Bar 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. This position was reiterated in Gold, supra, 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 second case, 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.

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.

Under Rule of Discipline 3-7.4(k), 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 forwarded for further review to the disciplinary review committee under Rule 3-7.5(a) as discretion dictates. 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's counsel was in attendance and presented argument to the committee. The committee's decision was in full accord with Rule 3-7.4(h). Conflicting factual and legal issues existed until the conclusion of the final hearing in the Bosse case on March 24, 1992. This was a case of first impression with respect to the respondent's duties under the controlling adoption statutes which were 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 witness credibility is examined to the extent possible. The referee, however, not the Bar or the grievance committee, is the finder of fact and as such one of his or her functions is to resolve conflicts in testimony and evidence. See e.g., The Florida Bar v. Bajoczky, 558 So. 2d 1022 (Fla. 1990); and The Florida Bar v. Herzog, 521 So. 2d 1118 (Fla. 1988).

The record in this matter clearly shows the Bar acted reasonably and in good faith. The conflicts in evidence and questions of credibility were best decided by a 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 in the Bosse case resolved the evidentiary conflicts. The Bar's position was, and continues to be, to seek the truth, no matter where it leads. Bar counsel advised the respondent's counsel immediately following the Bosse trial he intended to seek permission from the Board of Governors to dismiss this action based upon the outcome of the Bosse case. Bar counsel did so and the Board approved the dismissal. Before the Bar could file a motion to dismiss, respondent's counsel filed a motion for summary judgment. Because the respondent's motion would achieve the same result, the Bar did not file a motion to dismiss but rather orally advised the referee it did

not oppose the respondent's motion. In light of the circumstances, it would be inequitable to impose as a penalty upon the Bar the payment of the respondent's costs in this matter.

If the Court chooses to award costs to a prevailing respondent, the Bar submits the standard should be 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 it 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 a recommended standard has been approved by the Board of Governors, as at this time the Board has not addressed the issue.

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

III. THE PREVAILING PARTY IN A BAR DISCIPLINE CASE IS NOT ENTITLED TO AN AWARD OF ATTORNEY'S FEES

The Rules Regulating The Florida Bar do not provide for the award of attorney's fees in Bar disciplinary proceedings. The Bar is not aware of any cases where this Court has awarded attorney's fees to either party.

In his arguments before the referee, the respondent relied upon Florida Statutes Sections 57.105 and 57.111 to authorize the payment of his attorney's fees. The Bar submits the above statutes are not applicable to Bar disciplinary proceedings because Article V, Section 15, of the Constitution of the State of Florida provides that the Supreme Court of Florida has exclusive jurisdiction over the regulation of attorneys. The Rules Regulating The Florida Bar govern Bar disciplinary proceedings and do not explicitly provide for the award of attorney's fees to respondents. The rules provide that, except where in contradition with the Rules of Discipline, the Rules of Civil Procedure apply. Statutes do not apply because they, unlike court rules, are created by the legislature and the separation of powers doctrine prohibits one branch of the government from interfering with the other.

In 1975, the Supreme Court of Florida addressed the applicability of Chapter 74-177, also known as the Financial Disclosure Law, to officers of the judicial branch, including members of the Bar serving the Court in administrative or supervisory capacities necessary to operate the Bar and judicial system. See In re The Florida Bar, 316 So. 2d 45 (Fla. 1975). In reaching its decision, the Court discussed, at length, the history of the power of courts to discipline attorneys at law. The authority for each branch of government to adopt an ethical code has always been within the inherent authority of the respective branches of government and each has its own separate authority and procedure for disciplining its officers. The judicial branch has both a code of conduct for the judiciary and a code of professional responsibility for lawyers, and, in addition, has the procedure to interpret them and the authority to enforce them. The separation of powers doctrine does not permit the interference by either the executive or legislative branches in the exercise by the judicial branch of its inherent and constitutional power to discipline members of the Bar. Any statute enacted by the legislature which attempted to do so would, of necessity, be struck down as unconstitutional. Therefore, the Court found that Chapter 74-177 could not be construed to apply to the judiciary, Board of Governors of The Florida Bar, officers of The Florida Bar, referees appointed by The Florida Bar, or any other officials of The Florida Bar. Persons falling under the judicial branch of the government would

not be considered public officers to whom the Financial Disclosure Law was applicable.

In 1977, this Court considered the applicability of Chapter 77-63, Laws of Florida, to the Florida Board of Bar Examiners. The law dealt with the modification or adaption of certain examinations administered by state agencies to persons who were classified as either blind or deaf. The Board of Bar Examiners petitioned the Court for an advisory opinion concerning the validity of the law to the board. Chapter 77-63 specifically addressed itself to the administration of The Florida Bar examination and purported to regulate the manner in which the examination was administered by the board. Additionally, the act provided that a violation would constitute a criminal misdemeanor. The Court found the law was invalid because it violated the separation of powers doctrine. The Florida Board of Bar Examiners was an attache of the Supreme Court of Florida and therefore Article V, Section 15, of the Florida Constitution was applicable. In re The Florida Bar Board of Examiners, 353 So. 2d 98 (Fla. 1977).

In The Florida Bar, 398 So. 2d 446 (Fla. 1981), the Court considered whether the Public Records Law was applicable to unauthorized practice of law investigative files maintained by the Bar. Florida Statutes Chapter 119 provided that certain agency records were subject to inspection by members of the

press. The definition of "public records" and "agency" were found by the Court to be far reaching and broad enough to include the records of judicial branch entities. In considering the issue, the Court discussed the fundamental doctrine that legislative powers of the state which are not withheld or vested elsewhere by the constitution reside in the legislature. Where a limitation does exist, however, the legislature may not exceed such limitation. Article II, Section 3, of the Florida Constitution provides that no person belonging to one branch of the government shall exercise any power appertaining to either of the other branches unless explicitly provided in the Constitution. Neither the legislature nor the Governor can control what is a purely judicial function. The Court found that if judicial entities were included within the scope of Chapter 119, this would have resulted in the legislature seeking to exercise legislative power concerning a matter that was explictly withheld and vested elsewhere in the Constitution, i.e., Article V. The unauthorized practice of law investigative files were subject to the control and direction of the Supreme Court of Florida because the files were maintained by The Florida Bar which was an official arm of the Court. Chapter 119 was therefore not applicable to the Bar's files.

The Supreme Court of Florida in Allen United Enterprises v. Special Disability Fund, 288 So. 2d 204 (Fla. 1974), held that Florida Statute Section 57.041(1) was not applicable to awards by

the Judge of Industrial Claims in workers' campensation matters. In Allen, the Judge of Industrial Claims directed that the Special Disability Trust Fund pay the costs of the proceedings and make reimbursement to the petitioner for certain workers' compensation benefits the petitioner should have received. Because there was no provision for the assessment of costs against the Special Disability Trust Fund under the Workers' Compensation Law, the petitioner argued that Section 57.041(1) applied. The Court, however, disagreed and found "that a 'judgment' as contemplated in the statutes does not include an award of benefits under the Workmen's Compensation Law by a Judge of Industrial Claims; nor does it contemplate any other order or award obtained through any 'quasi-judicial' administrative agency." It should be noted that Bar disciplinary Proceedings have long been defined as quasi-judicial administrative proceedings. State v. Dawson, 111 So. 2d 427, 431 (Fla. 1959); Rule 3-7.6(e)(1). "A disciplinary proceeding is neither civil nor criminal but is a quasi-judicial administrative proceeding."

This Court discussed the development of the Rules of Evidence in the case of In re Florida Evidence Code, 372 So. 2d 1369 (Fla. 1979). The Court noted the rules were of both substantive and procedural derivation and the legislature had responsibility for the substantive area of the rules. The legislature had recently adopted the Florida Evidence Code. The Court adopted, on a temporary basis, the provisions enacted by the legislature to avoid confusion in the operation of the courts

resulting from assertions that the procedural portions of the code would be unconstitutional if not adopted by the Supreme Court of Florida pursuant to its rule making authority. Had the Court not adopted the procedural portions of the code, parts would have been rendered unconstitutional due to the operation of the separation of powers doctrine.

In the case of In re Amendments to Rules of Civil Procedure, 458 So. 2d 245 (Fla. 1984), the Court considered and adopted certain amended and new provisions of the rules. The Court rejected the proposed amendment to Rule 1.432 dealing with the disqualification of judges which would have provided that supporting affidavits were not required. The Court found this amendment unncessary because the rule contained no reference to affidavits. The procedural requirement of affidavits was contained solely in Florida Statutes Sections 38.02, 38.04 and 38.10. The Court specifically stated that in view of its continuing refusal to adopt the statutory provisions as a rule of the Court, the statutory requirement was unconstitutional.

Florida Statutes Section 57.105 applies only to cases where there was no judiciable issue of law or fact at the time the case was filed. In other words, the statute applies to baseless and sham pleadings where there was never a cause of action. The

action, from its inception, must be found to be so clearly devoid of merit on both the facts and law that the action is rendered frivolous. The purpose of the statute is to discourage baseless claims, stonewall defenses, and sham pleadings. See Whitten v. Progressive Casualty Insurance Co., 410 So. 2d 501 (Fla. 1982). The party whose claim is nonfrivolous at its inception should not be assessed attorney's fees under Florida Statutes Section 57.105 even though at some point during the course of the litigation it becomes apparent there no longer exists any justiciable issue of fact. *See* Marexcelso Compania Naviera, S.A. v. Florida National Bank, 533 So. 2d 805 (Fla. 4th DCA 1988), citing Klein v. Layne, Inc. of Florida, 453 So. 2d 203 (Fla. 4th DCA 1984). Although Florida Statutes Section 57.105 requires a party to make reasonable efforts before commencing litigation to investigate the claims, absolute verification is not required because it is often impractical or even impossible to accomplish. See In the interest of A.C., K.C., and J.B., Jr., 580 So. 2d 884 (Fla. 1st DCA 1991), where the court found HRS was not responsible for paying the attorney's fees incurred by the parents in defending a dependency action. Additionally, the voluntary dismissal of the suit does not necessarily justify the award of attorney's fees. The determining factor remains whether or not the claim was frivolous from its inception. Lambert v. Nelson, 573 So. 2d 54 (Fla. 1st DCA 1990).

The language contained in Stevenson v. Rutherford, 440 So. 2d 28 (Fla. 4th DCA 1983) is particularly noteworthy. The

general manager of a corporate automobile dealer had made a written statement identifying the defendant as having made a defamatory statement to the dealer's principal. The dealer and its principal sued the defendant and his employer. When the general manager's deposition was taken, he was shown a photograph of the defendant. Only then did it become clear that whoever had made the defamatory statement was not the individual identified by the general manager in his written statement. The trial court awarded summary judgment to the defendants and also awarded them attorney's fees pursuant to Florida Statutes Section 57.105. The Fourth District Court of Appeals reversed the award of attorney's fees and in doing so stated the following:

> Perhaps someday lawyers will regularly have psychics on their payroll capable of determining whether witnesses really know what they're talking about. Until then, in a case such as this, Section 57.105 should not be employed as if absolute verification was available prior to suit. (at p. 29).

Even if Florida Statutes Section 57.105 did apply to these proceedings, the Bar's case was not frivolous from its inception. The grievance committee found probable cause which takes the case beyond the threshold requirement. It was not until the end of the trial in the Bosse case that it became apparent there was no basis to proceed further with the instant action due to serious questions concerning the credibility of certain witnesses and

whether or not the respondent owed a duty of notification to the court. The respondent now argues with the benefit of hindsight that the Bar should have concluded in the beginning that there was no basis to pursue this action. However, the reliability of affidavits are subject to question and even when a witness is deposed, evaluating that testimony from a prosecutorial standpoint differs from evaluating it from a judicial standpoint. In addition, there were two justiciable factual issues presented from the inception of this case. First, when did the respondent know the Patsners either planned to **move** or actually moved out of state and took the child? Second, did the respondent owe a duty to advise the court of this development? The respondent's actions certainly gave the appearance of impropriety which the available evidence did not refute. There was merit to the Bar's case until the referee in the Basse matter ruled that Mr. Bosse's duty did not rise to the level of an ethical duty. The referee, **however,** rejected Mr. Bosse's argument that to advise the court would have breached the confidentiality of the proceeding and opined that he could have advised the court the **child** was no longer in the jurisdiction.

The respondent also argued before the referee that Florida Statutes Section 57.111 authorizes the recovery of attorney's fees and costs in actions initiated by a state agency against a small business party. A close reading of the applicable statute clearly shows it does not apply to Bar disciplinary proceedings.

Subparagraph seven requires each state agency to report to the president of the Senate and the Speaker of the House of Representatives the amount of attorney's fees and costs paid pursuant to the provisions of this section during the preceding fiscal year by the agency, The Florida Bar does not make such a report to the legislature, nor is it required to do so because it receives no state funding. The Bar is not a state agency. It is an offical arm of the Supreme Court of Florida and as such is an attache of the judicial branch of the government. See the general introduction to Chapter 1 of the Rules Regulating The Florida Bar.

Attorney's fees are not recoverable unless the enabling statute or contract specifically authorizes their recovery or unless equity allows the fees to be recovered from a fund or estate which has been benefited by the legal services rendered. Estate of Hampton v. Fairchild-Florida Construction Co., 341 So. 2d 759 (Fla. 1976). The Bar submits that the Florida Statutes are inapplicable to Bar disciplinary proceedings due to the separation of powers doctrine even though the awarding of attorney's fees is a matter of substantive law properly under the control of the legislature. See Whitten, supra. The Rules Regulating The Florida Bar do not provide for the award of attorney's fees to either side.

CONCLUSION

Wherefore, The Florida Bar prays this Honorable Court will review the referee's recommendation as to the assessment of costa 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. The Bar further prays this Honorable Court will enter an appropriate order denying the recovery of attorney's fees by either party in a Bar disciplinary proceeding.

Respectfully submitted,

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BY: 

KRISTEN M. JACKSON
Co-Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief and the Appendix have been furnished by Airborne Express 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 Mr. Jack P. Brandon, counsel for the respondent, 130 East Central Avenue, Post Office Box 1079, Lake Wales, Florida, 33859-1079; a copy has been furnished by ordinary mail to Mr. Lance Holden, co-counsel for the respondent, 99 Sixth Street, S.W. Winter haven, Florida, 33880; a copy also has been furnished by ordinary mail to Mr. David Ristoff, Co-Bar counsel, The Florida bar, Tampa Airport Marriott Hotel, Tampa, Florida, 33607; and a copy has been furnished by ordinary mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 27th day of October, 1992.

KRISTEN M. JACKSON
Co-Bar Counsel

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Hand delivered at hearing 4/9/92

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

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

CHARLES R. CHILMN,

Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR *SUMMARY*

THIS MATTER came on to be heard **before** the undersigned Referee on April 9, 1992 in relation to Respondent's Motion for Summary Judgment. Present and heard were counsel representing the Complainant as well as counsel representing the Respondent. Upon review of the **pleadings** and affidavits filed in this **case**, upon consideration of argument of counsel, and in consideration of the lack of controverting affidavits or any other controverting evidence in connection with Motion for Summary Judgment, the undersigned Referee finds as follows:

STATEMENT OF ISSUE

The issue in this **case** is whether the Respondent complied with Chapter **63** of the Florida Statutes in all aspects of his involvement in the subject adoption proceeding and whether such involvement violated any legal or ethical obligation or duty under Chapter 63, Florida Statutes, or the Rules of Professional Conduct for the Florida Bar.

RECORD **EVIDENCE**

The following evidentiary items have been considered by the Referee in relation to the Respondent's Motion for Summary

Judgment:

1. Affidavit of Bennett S. Cohn, a member of the Florida Bar who has been involved in over 1,000 adoptions, and a guest lecturer for the Florida Bar, Continuing Legal Education, on the topic of adoptions, and author of a chapter in the new Adoptions, Paternity & Selective Family Law Topics, to be published by the Florida Bar.

2. Affidavit of Anthony B. Marchese, a member of the Florida Bar who has been involved in over 250 adoptions including numerous contested adoption matters at the trial, appellate, and Supreme Court levels in the state of Florida and is a member of the Adoption Committee of the Family Law Section of the Florida Bar and guest lecturer at the current Continuing Legal Education Seminar on independent adoptions sponsored by the Florida Bar.

3. Affidavit of J. Weston Sigmond, a member of the Florida Bar who devotes the majority of his legal practice to adoptions, and who is both a "fact" witness in this case, as well as an expert witness, appearing on behalf of the Respondent.

4. Affidavit of Linda W. McIntyre, a member of the Florida Bar who has finalized over 300 adoptions, and who was initially contacted by the Florida Bar to appear as an expert witness on behalf of the Complainant in a companion case before this Court.

5. Affidavit of James T. Joiner, a member of the Florida Bar who has finalized over 200 adoptions in the central Florida area and is the current Secretary of the Florida Association of Adoption Lawyers, and who is acquainted with the procedural aspects of the Department of Health and Rehabilitative Services involvement in the adoption process in the central Florida area.

6. Affidavit of Irving Grass, a member of the Florida Bar who has finalized approximately 200 adoptions and has been for two years and is at present a member of the Florida Advisory Council on Adoptions as created by Chapter 63.301, Florida Statutes.

7. The undersigned Referee notes that the Complainant has failedto produce any controverting affidavit by any expert witness or any other evidence which controverts a material issue which suggests that the Respondent has violated any of the Rules of Professional Conduct or Florida law in relation to this case.

FINDINGS OF FACT

1. At the time of filing the Petition for Adoption on behalf of Dr. and Mrs. Bruce Patsner on June 6, 1990, the Patsners were, in fact, residents of the State of Florida.

2. At the time of filing the Petition for Adoption, the biological father was not listed on the child's birth certificate, had never previously acknowledged paternity of the child; and Respondent along with the Florida Department of Health & Rehabilitative Services had the statement from the natural mother that the father was unknown; that the father had not adopted the child; that the father had not supported the child; that the father was not married to the mother when the child was born; and there were no court proceedings establishing paternity.

3. After June 14, 1990, Respondent served in the capacity as an "Intermediary" and all of his activities after June 14, 1990 were in compliance with Chapter 63 of the Florida Statutes.

4. The Florida Department of Health & Rehabilitative Services had the authority and right at any time during this

ad ption proceeding to allow the child to leave the State of Florida with the adopting parents in accordance with Chapter 63 of the Florida Statutes.

CONCLUSIONS OF LAW

1. The Respondent was under no legal or ethical obligation to notify the trial judge of Dr. and Mrs. Patsner's move to New Jersey after the filing of the Petition for Adoption. All evidence in this case demonstrates that the Respondent complied with Chapter 63 of the Florida Statutes in all aspects of his involvement in the subject adoption proceeding and did not violate any legal or ethical **obligations** or duties under Chapter 63, Florida Statutes, or the Rules of Professional Conduct for the Florida Bar.

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,

RECOMMENDATION

It is, therefore, upon consideration of the foregoing, RECOMMENDED:

That the Respondent be found not guilty of any violation alleged in the Complainant's complaint and that jurisdiction be reserved for the award of costs in favor of the Respondent and against the Complainant, as well as the consideration of any other

matter necessary to effect the intent of this order, for hearing at a later date.

DONE AND ORDERED this 9th day of April, 1992 in Brooksville, Hernando County, Florida.

John W. Springstead
JOHN W. SPRINGSTEAD, Referee

Case No. 79,115
TFB File No. 91-30,250 (10A

Copies to:

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Mr. Jack P. Brandon, Counsel for Respondent, Post Office Box 1079, Lake Wales, Florida 33859

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,

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

v.

CHARLES R. CHILTON,

Respondent.
_____/

REPORT AND FINDINGS OF REFEREE RELATING TO RESPONDENT'S MOTION TO TAX COSTS AND MOTION FOR ATTORNEY'S FEES

THIS MATTER came before the Referee on Respondent's, CHARLES R. CHILTON, Motion to Tax Costs and motion for Attorney's Fees. The Referee, having reviewed the respective memoranda of law provided to him by The Bar and Respondent, having reviewed the multiple pleadings on file and argument of counsel for the Bar and Respondent, and having carefully considered all evidence presented, finds, among other things, that:

A. On April 9, 1992, this Referee granted Respondent's Motion f r Summary Judgment, with which The Florida Bar concurred and entered his order thereon. This Referee recommended Respondent be found not guilty of any violation alleged in the Bar's complaint based on his finding of an absence of any justiciable issue of fact or law in this case. However, this Referee clarified such finding at the hearing as to awardability of costs and attorney fees by stating that "it was not the intent

of the Court to indicate that from the outset (emphasis added) there was (sic) no arguable issues of law or fact... in using the words 'absence of justiciable issue'." See Transcript, p. 84.

B. After the grievance .committee's finding of probable cause and the filing of the formal complaint, and prior to the final hearing in Bosse, the Bar contacted Ms. Linda McIntyre to serve on behalf of the Bas as an expert witness as to the excessiveness of Mr. Bosse's fees in what was erroneously represented to her as a routine adoption. Ms. McIntyre, after reviewing the pleadings in the case determined it was a contested adoption and declined to testify on behalf of the Bar in the Bosse case and so informed the Bar that she did not feel his fee was unreasonable for this non-routine adoption. She also stated that neither Bosse nor Respondent had acted unethically under the statute in her opinion. Based on Ms. McIntyre's video taped deposition, this Referee finds that the Bar, at the time of her declination, should have reconsidered the continued Chilton case and although Respondent's counsel was advised at the close of the Bosse trial that Bar counsel was going to consult with his superiors regarding possible dismissal, it was apparently not a clear enough signal to cease preparations for trial.

C. The allegations brought by the Bar were fairly in contest at the outset of the proceedings. The Bar, through Respondent's counsel, discovery, and the Bosse trial, slowly

learned that its complaint against Respondent was inappropriate and correctly stipulated to a recommended summary judgment for Respondent. The bulk of Respondent's costs and attorney's fees were incurred after the Bosse trial.

D. The Respondent has incurred and paid attorney's fees and seeks the recovery thereof from the Florida Bar pursuant to Fla.Stat. Section 57.105. There is no provision in the procedural rules governing Bar disciplinary proceedings to permit this Referee to award reasonable attorney's fees incurred by the Respondent. However, so that this matter may be reviewed by the Supreme Court of Florida, based on the evidence presented, the Referee makes and certifies the following findings of fact:

1. A reasonable amount of time to be expended on behalf of the Respondent in these proceedings, by his attorney, is 247.25 hours, as such services are enumerated in the affidavit filed in these proceedings.

2. A reasonable hourly rate for services of Respondent's attorney in these proceedings is $175.00 per hour.

3. The reasonable value of attorney's fees in these proceedings for the services rendered by Respondent's attorney is the sum of $27,190.00.

E. Respondent also incurred and paid certain costs in connection with this proceeding and seeks recovery thereof from the Bar. It is within the sound discretion of the Referee to recommend that costs be awarded to Respondent. Therefore, this Referee recommends that the Respondent, Charles R. Chilton, be awarded costs in the total amount of $9,281.38 to be paid by The Florida Bar, those costs being enumerated as follows:

12/21/90	Federal Express: Richard Bosse ($30.00)
06/13/91	Debra B. Coker, RPR: original and one copy of December 14, 1990 hearing transcript ($202.00)
07/09/91	Department of State: disbursement for adoption statute ($26.25)
07/23/91	Secretary of State: research copy ($3.25)
08/14/92	Federal Express: filing of response ($52.50)
02/19/92	Federal Express: Kristen Jackson ($22.50)
02/25/92	Ann S. Horne Reporting Service: Florida Bar v. Bosse/Ray McDaniel ($97.25)
03/01/92	Rita Mott, CVR: transcript of Deposition of Charles Chilton; Deposition of Marie Crews; reproduction of Exhibits; Federal Express ($292.00)
03/03/92	Federal Express: Anthony Marchese, Esquire ($21.75)
03/03/92	Federal Express: Bennett Cohn, Esquire ($24.50)
03/05/92	Travel Expenses to West Palm Beach for conference with Bennett Cohn re: affidavit ($130.00)
03/06/92	Travel Expenses to Tampa for conference with Anthony Marchese re: affidavit ($94.00)
03/09/92	Rita Mott, CVR: transcript of Deposition of Dr. Bruce Patsner; reproduction of Exhibits; postage ($328.35)
03/10/92	Travel Expenses to Vero Beach to attend Rick Bosse's Summary Judgment Hearing ($168.00)
03/18/92	Travel Expenses to Cocoa Beach for conference with Irving Grass re: affidavit ($160.00)
03/23/92	Travel Expenses to Ft. Pierce for Rick Bosse's trial ($160.00)
03/23/92	Atlantic Reporting: transcript of hearing re: The Florida Bar v. Bosse - Charles E. Smith, Referee ($636.70)
03/24/92	Travel Expenses to Ft. Pierce for Rick Bosse's trial ($160.00)
04/07/92	Federal Express: from Atlantic Reporting to Jack Brandon (Bosse transcript) ($32.50)
04/07/92	Federal Express: Anthony Marchese ($9.00)
04/07/92	Federal Express: Richard Bosse ($13.00)
04/07/92	Federal Express: Irving Grass ($11.50)

04/09/92	Travel Expenses to Brooksville for Summary Judgment Hearing ($48.00)
04/29/92	Federal Express: David McGunegle ($13.00)
04/29/92	Federal Express: Honorable John Springstead ($13.00)
04/09/92	Anthony B. Marchese, Esquire: Expert Witness fee ($200.00)
04/15/92	Bennett S. Cohn, Esquire: office meeting with Charles Chilton; review of deposition of Charles Chilton, sworn statement of Marie Crews, Charles Chilton's response to the Florida Bar's complaint before the local grievance committee, pleadings in Florida Bar case before the Referee, sworn statement of Bruce Patsner, affidavit of Weston Sigmond, affidavit of Linda McIntyre; telephone conference with Attorney Linda McIntyre; two telephone conferences with Attorney Richard Bosse; telephone conference with Attorney Lewis Kapner; preparation of affidavit for use at Referee hearing ($1,000.00)
04/16/92	Federal Express: Chilton **($52.75)**
07/91 through 04/92	3,000 (estimated) copies at .25 per copy used in preparing "package" summarizing case history for attorneys to review relative to affidavits and defense of case. ($750.00)
06/19/92	Appearance and transcript of deposition of Kent Lilly on 6/15/92. ($330.50)
06/22/92	Federal Express to David R. Ristoff at The Florida Bar. ($13.00)
06/25/92	Legal Video Services, Inc. for **Video** of T.M. Murphy's deposition. ($295.00)
06/25/92	Atlantic Court Reporting, Inc. for deposition of T.M. Murphy. ($219.00)
06/25/92	Capital Reporting for deposition of Linda McIntyre. ($392.00)
06/25/92	Collect Federal Express transcript and video of Linda McIntyre from Capital Reporting. ($26.75)
06/25/92	Collect Federal Express **video** from Legal Video Service, Inc. **($25.00)**
06/26/92	B & B Sunshine Frames, Mounting of display items. ($107.33)
07/01/92	Joy Hayes Court Reporting for transcript of fee and cost hearing and fee to record hearing. ($371.00)
07/01/92	Federal Express collect from Joy Hayes. ($25.00)

INVESTIGATIVE TIME

01/10/91	Conference in Bartow with Ray McDaniel **and** Jack Brandon (2.5 hours)
03/28/91	Conference in Bartow with Ray McDaniel and R. Scott Bunn (1.5 hours)
09/06/91	Attendance at local grievance committee meeting (remained outside and did not testify) (2.5 hours)

02/03/92 Conference with Marie Crews and Jack Brandon (2.0 hours)
02/24/92 Meeting with Adoption Lawyers Committee in Orlando (4.5 hours)
03/05/92 Conference with Bennett Cohn in West Palm Beach (5.0 hours)
03/10/92 Attendance at Bosse Summary Judgment Hearing (6.0 hours)
03/11/92 Preparation of historical summary of case (6.0 hours)
03/18/92 Conference with Irving Grass and Ranier Munns in Cocoa Beach and Orlando (7 hours)
03/23/92 Attendance at Bosse trial (10 hours)
03/24/92 Attendance at Bosse trial (10 hours)
04/09/92 Attendance at Summary Judgment Hearing in Brooksville (6.0 hours)

TOTAL INVESTIGATIVE TIME: 63 HOURS @ $35.00 PER **HOUR = $2,205.00**

ADMINISTRATIVE COSTS: $500.00

TOTAL COSTS AWARD TO RESPONDENT: $9,281.38

It is the opinion of the Referee that the Supreme Court should give strong consideration to requiring the Bar to pay all costs incurred by Charles R. Chilton, and the undersigned **Referee** further certifies to the Supreme Court the issue of:

WHETHER THE RESPONDENT IN A BAR DISCIPLINARY PROCEEDING CAN RECOVER ATTORNEY'S FEES AGAINST THE BAR GIVEN THE TOTALITY OF THE CIRCUMSTANCES OF THE CASE.

DATED THIS 26 DAY OF Aug, **1992.**

JOHN W. SPRINGSTEAD, REFEREE

Copies to:

Lance Holden, Esq., P. O. Box 9498, Winter **Haven, FL** 33883-9498
Kristen M. Jackson, Esq., **880** N. Orange Avenue, Suite 200, Orlando, Fl **32801-1085**
John T. Berry, Esq., 650 Apalachee Parkway, Tallahassee, Fl **32399**
David R. Ristoff, **Esq.**, Suite C-49, Tampa Airport, Marriott Hotel, **Tampa**, FL 33607
Jack P. Brandon, **Esq.**, P. O. **Box 1079, Lake Wales, FL 33859**

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,

Complainant,

v.

Robert Lee Dennis,

Respondent. /

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

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 Preqnancv

1. The Bar charges that the respondent was aware of his wife's pregnancy at the time he filed his divorce petition in May, 1960 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, 1960. (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, 1960, 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 T 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, III, Esquire, 207 South Second Street, Fort Pierce, Florida 34950 and Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 30th day of May, 1991.

Judicial Assistant

Supreme Court of Florida

WEDNESDAY, JULY 3, 1991

THE FLORIDA BAR,

Complainant,

v.

BRENDA J. FEINBERG,

Respondent.

CASE NO. 76,322

TFB No. 90-30,261(19).

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. McGuneçle, Esquire
Mark Finkelstein, Esquire
John A. Boggs, Esquire
Jerry Schreiber, Esquire

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

BRENDA J. FEINBERG,

Respondent.

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

REPORT OF WE —

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.

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 was 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

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:

David G. McGunegle, 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

THE FLORIDA 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 [illegible]
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,

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

v.

ALDO ICARDI,

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 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. Michrowski

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 are 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

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
Orlando, 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 15th day of January, 1992.

Jan K. Wichrowski
Bar Counsel

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complaintant,

vs. Case No. 78,882

{TFB No. 91-50,217(10A)

RICHARD E. BOSSE,

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 Regulating The Florida Bar, the final hearing was held on March 23 and *24,* 1992. *The* pleadings, Notices, Motions, depositions, 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, Bar Counsel and
Kristen M. Jackson, Co-Bar Counsel

For the Respondent: T.N. Murphy, Jr.

11. Findings of Fact as to Each Item of Hisconduct 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:

As to All Counts

The respondent is a member of The Florida Bar, subject to the jurisdiction of the Florida Supreme Court and Rules Regulating The Florida Bar. Respondent was admitted to the Florida Bar in 1972; he is a resident of Palm Beach County and has his law office in Palm Beach County, Florida.

As to Count I

1. *On* or about June *8,* 1991, by telephone, Dr. Patsner, the adopting parent employed the respondent and respondent agreed to represent Dr. and Mrs. Patsners in a

contested adoption proceeding in Polk County, Florida at an agreed fee for the respondent on an hourly basis of $200.00 per hour for non-court time and $250.00 per hour for court time. This agreement was later reduced to writing and signed by Dr. and Mrs. Patsner on August 15, 1990 (Complaintant's Exhibit #6). Respondent submitted detailed, itemized billing from time to time to the Patsners, setting forth the hourly time spent and the total bill. These bills have been admitted into evidence and pursuant to these bills, the Patsners paid respondent over $32,000.00 for his services. Respondent testified that there was a clear understanding with Dr. Patsner that he was to be compensated for travel time at the hourly rate. Dr. Patsner denied that this was the understanding, although Dr. Patsner admitted that when he hired the respondent he knew that his office and residence was in Palm Beach County and that the adoption proceedings were in Polk County. The Bar has failed to submit any evidence that the hourly rate of respondent was excessive for these proceedings and the hourly time was excessive. A directed judgment in favor of the respondent's motion was granted since The Florida Bar failed to establish a prima facie case of clearly excessive fees under Count 1.

As to Count II

1. The Florida Bar Complaint, on Count 11, is entitled Fraud on Court and alleges that respondent has violated the following rules of professional conduct: 4-3.3A(2) for failing to disclose material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by client; '4-3.43for fabricating evidence, counsel or assisting a witness to testify falsely, or offering inducement to a witness as prohibited by law; 4-8.4C for engaging in conduct involving dishonesty, fraud, deceit ok misrepresentation and 4-8.4D for engaging in conduct as prejudicial to the administration of justice.

2. The Florida Bar has failed to meet it's burden of proof by presenting evidence of a clear and convincing nature that respondent violated any of these rules.

3. Charles Chilton, as intermediary and attorney for Dr. and Mrs. Patsner prepared the Petition for Adoption which was signed by the Patsners on June 1, 1990. This petition by *the* Patsners alleged that they now reside and have resided for the past one and one-half years in Lakeland, Florida. Attached to the petition was the Affidavit of the Natural Mother consenting to the adoption by persons unknown to me and in this affidavit she stated that "I do not know the whereabouts of the natural father or' the child to be adopted." There were no allegations in the Petition for Adoption nor this affidavit by the natural mother that the father was unknown only that his whereabouts were unknown. Hr. Chilton filed this Petition on June 6, 1990. The Patsners had already received custody of the child on May 25, 1990 from the Department of Health and Rehabilitative Services (HRS). Mr. Chilton learned on June 5, 1990 from an attorney representing the grandmother and

great-grandmother of the child that was intended to be adopted, that they were going to ask for custody of this child and that they and the natural father of the child had supported the child in the past. Mr. Chilton, by letter of June 6, 1990, to Mr. and Mrs. Patsner, informed them of this problem with the adoption and suggested in that letter that since there was going to be a contested adoption he suggested that the Patsners contact an attorney in West Palm Beach, the respondent, who had recently handled several contested adoption cases. On or about June 8, 1990, Dr. Patsner by telephone contacted the respondent who agreed to represent the Patsners in the contested adoption proceeding in Polk County.

4. The respondent met the Patsners for the first time on June 15, 1990. On this date a hearing was held in Pascoe County on the grandmother's petition for temporary custody of the child. This petition was denied by the court in Pascoe County and the petition was transferred to Polk County because of the previously-filed adoption proceedings in Polk County. After this hearing, respondent met with Dr. Patsner, Mr. Chilton and with attorney Weston Sigmond in Dr. Patsner's motel room. Respondent advised Dr. Patsner of the Florida residency and employment requirement pursuant to Chapter 63 of the Florida Statutes. Mr. Chilton, respandent and Mr. Sigmond, all testified that Dr. Patsner did not tell him that he had already moved to New Jersey. Dr. Patsner further testified before he signed the Petition for Adoption he informed Mr. Chilton that he was moving to New Jersey in the immediate future and would that be a problem and Mr. Chilton advised him that he did not think it would be a problem and he received the child from the HRS the next day. Dr. Pastner also testified that at this meeting that respondent advised him that he was going to have to re-establish residency in the State of Florida and re-establish work in Florida. However, he also testified that he would not dispute that either he or his wife told Marie Crews, the HRS adoption case worker, he was not going to tell the attorneys about his move to New Jersey. Marie Crews' handwritten contemporaneous notes which are in evidence state that Mrs. Patsner told her that they were not going to tell the attorneys that they had moved to New Jersey. Based on all of this testimony, the Referee concludes that Dr. Patsner did not tell the respondent or other attorneys at the meeting on June 15, 1990 that he had already moved to New Jersey. Dr. Patsner rented a small one-bedroom apartment in Lakeland, Florida to maintain residence in Florida and the testimony is undisputed that Dr. Patsner arranged for Marie Crews to make a home study with the child and Mrs. Patsner at this apartment in Lakeland. The Patsners moved to New Jersey during the week of June 12, 1990.

5. Respondent admitted that he learned the Patsners had moved their residency to New Jersey and Dr. Patsner was working in New Jersey around August of 1990. Mr. Chilton testified that he did not know the Patsners had moved their

rasidency until he received Marie Crew's letter of September PI, 1990, to him.

6. On September 12, 1990, respondent attended another hearing on a motion for temporary custody by the grandmothers. At this hearing, the court inquired whether Marie Crews, the HRS caseworker knew where the child was and if anything was *amiss.* The transcript of that hearing indicates the respondent said "thats Marie Crews from HRS". The court, "I thought so. Apparently she knows where the child is." Respondent, "Yes". The court, "O.K., HRS knows where *the* child is, so the child is somevh---if something is amiss you have an obligation of law to report it wouldn't you?" Ms. Crews, "right". The respondent at that hearing and at no time advised the court that the Patsners had moved to New Jersey, nor did Mr. Chilton. Respondent's position is that to disclose the Patsners out-of-state residency would violate the confidentiality of the adoption proceedings. The referee rejects this position as respondent could have informed the court that the Patsners had moved their residency from the State of Florida without disclosing the name of the Patsners or where they had moved, The question then, was there a duty on respondent to disclose to the court the fact that the Patsners, *the* petitioners in the adoption, had moved their residency from outside of the State of Florida. The Bar contends that the respondent had this duty and the respondent contends that there was no duty to inform the court because a) under F.S. 63.092(7), it is the duty of HRS to notify the court and the home study; and b) the information that the Patsners had moved their residency and place of employment to New Jersey would have been disclosed to the court at the final hearing by not only Dr. Patsner, but by the HRS home study. Residency requirements for adoption under Chapter 63.185 require that for any person to adopt in this state, primary residency and place of employment in Florida is required. Under the definitions, under P.S. 63.032(12), primary residence and place of employment: in Florida, means a person lives and works in this *state* at least six months of the year and intends *to* do so for the foreseeable future. That statute *seems* to be in conflict with F.S. 63.092(7) which provides in part that if at any time prior to the discharge. of the responsibility of the department or agency, the adopting family moves to another state, the department or agency shall notify the agency most similar to the department in the state in which the family is at that time residing for the purpose of protecting the child's interest. Because of that provisiun of *the* statute the referee is of the opinion that there is no clear duty by an attorney to notify the court of a change of residency by the adopting parents outside of the state of Florida and because at the the final hearing the question of residency will have to be proven. In this case, the respondent did not file the initial Petition for Adoption, he was not employed until some two days after the petition was filed. There is no evidence that respondent knew that at the time of the filing of the petition thePatsners had not intended to continue to reside in Florida. Therefore, under these circumstances

there is no duty for respondent to notify the court of the adopting parents, the Patsners, change of residency from Florida.

7. Judge Susan Roberts, by order dated April 17, 1991, found that the natural father's parental rights had not been terminated pursuant to Chapter 39, Florida Statutes and found that the natural father/Intervenor did not consent *to* the adoption of the child and that the natural father did not abandon the child. Subsequent *to* this order, Dr. and Mrs. Patsner returned the child to Florida and the natural father. The Patsners had received temporary custody of the child from HRS on May *25*, 1990.

As to Count 111, Failure *to* Keep Clients Informed

1. Respondent only wrote to Dr. and Mrs. Patsner two letters about the status of this *case*, dated July 16, 1990 and September 21, 1990. However, there are at least fifteen documented phone calls between respondent and the Patsners. The respondent met with the Patsners on four different occasions and there is undocumented additional telephone calls by Dr. Patsner to the respondent at his home. The Florida Bar has failed to present clear and convincing evidence that respondent failed to reasonably keep the Patsners informed about the status of this case.

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

As to Count I

I recommend that the respondent be found not guilty and specifically be found not guilty of the following violation of Rules of Professional Conduct, to wit: Rule 4-1.5 for charging a clearly excessive fee.

As to *Count* II

I recommend that the respondent be found not guilty and specifically be found not guilty to the following violations of Rules af Professional Conduct, to wit: Rule 4-4.3(a)(2) for failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client; Rule 4-3.4(b) for fabricating evidence, counsel or assisting a witness to testify falsely; Rule 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and Rule 4-8.4(d) for engaging in conduct that is prejudicial *to* the administration of justice.

As to Count III

I recommend that the respondent to be found not guilty and specifically be found not guilty to the following violation of Rules of Professional Conduct, to wit: Rule 4-1.4 for failing to keep

clients reasonably informed about the status of a matter or to explain matters to the extent reasonably necessary to permit clients to make informed decisions.

Dated this 3/18 day of March, 1992.

CHARLES E. SMITH, Referee

Copies to:

Mr. David G. McGunegle, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801

Ms. Kristen M. Jackson, Co-Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801

Mr. T. N. Murphy, Jr., Counsel for Respondent, 700 West Hillsboro Blvd., Building 4, Suite 206, Deerfield Beach, Florida 33441

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,

Complaint,

vs:

RICHARD E. BOSSE,

Respondent.
_____/

CASE NO. 78,882

TFB No. 91-50,217 (10A)

REPORT OF REFEREE

THIS CAUSE having come before the Referee on Respondent, RICHARD E. BOSSES, Motion to Tax Costs, and the Referee having examined extensive, multiple, Memoranda of Law provided to the Referee by the Bar and Respondent, and the Referee having heard argument of counsel far Respondent and the Bar, and the Referee having been otherwise duly advised in the premises, the Referee makes the following findings of fact

A. The Referee directed a verdict on behalf of Rapondent and found Respondent not guilty of Rule 4-1.5 for charging a clearly excessive fee.

B. The Referee found Respondent not guilty of violating Rule 4-4.3 (a)(2) for failing to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a [redacted] or fraudulent act by a client; Rule 4-3.4 (b) for fabricating evidence, counseling. or assisting a witness to testify falsely; Rule 4-8.4 (c) for engaging in conduct involving dishonestly, fraud, deceit or misrepresentation; and Rule 4-8.4 (d) for engaging in conduct that is prejudicial to the administration of justice;

C. The Referee found Respondent not guilty of Rule 4-1.4 for failing to keep clients reasonably informed about the status of the matter, or to explain matters to the extent reasonably necessary to permit clients to make informed decisions;

D. That the Florida Bar presented an extremely weak case before the Referee against the Respondent, RICHARD E. BOSSE.

E. That Respondent, RICHARD E. BOSSE, was the strong prevailing party in the complaint filed against him by The Florida Bar.

F. That it is within the sound discretion of the Referee *to* recommend that costs be awarded *to* Respondent.

THEREFORE, the Referee recommends that Respondent, RICHARD E. BOSSE, be awarded costs in the total amount of $9,065.36 to be paid by The Florida Bar described as follows:

1. Court Reporter's fees in the total amount of *$2,106.45;*

2. The expert fee of Lewis Kapner, Esquire, in the total amount of $5,059.05. Mr. Kapner, an experienced family lawyer and long-standing member of The Florida Bar, charged Respondent, RICHARD E. BOSSE, $300.00 per hour for his services rendered for his expert testimony prior to and during the trial of the, complaint filed against Respondent by The Florida Bar. $300.00 per hour is a reasonable rate and 16.87 hours i.s a reaonable time expended.

3. The expert fee of J.Weston Sigmond, Esquire, in the total amount of $1,800.00. Mr. Sigmond, whose practice is devoted exclusively to adoption law, charged Respondent, RICHARD E. BOSSE, $150.00 per hour for 'his services rendered for his expert testimony presented at trial and for reviewing the file prior to trial. $150.00 per hour is a reasonable rate and 12 hours is a reasonable time expended.

4. Sheriff's fees in the amount of $12.00;

5. Long distance expense in the amount of $87.86.

DATED this 18th day of June, 3.992.

CHARLES E. SMITH, Referee

Copies to:

David G. McGunegle, Bar Counsel

Kristen M. Jackson, Co-Bar Counsel

T.N. Murphy, Jr., Esquire

John T. Berry, Staff Counsel

The Florida Bar