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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

NANCY MARGARET LECHTNER,

Respondent.

Supreme Court Case
No. 83,720

The Florida Bar File
No. 94-71,295 (11L)

FILED

SID J. WHITE

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ANSWER BRIEF OF RESPONDENT, NANCY MARGARET LECHTNER

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SYMBOLS AND REFERENCES

For the purposes of this Answer Brief, the Respondent will be referred to either as Nancy Margaret Lechtner or Respondent. The Florida Bar will be referred to as either The Florida Bar or the Bar. References to an Appendix are to the Appendix of the Complainant, The Florida Bar, as attached to their Initial Brief.

STATEMENT OF THE CASE AND FACTS

Due to this case being on Appeal in the substantive criminal case, the Respondent, Nancy Margaret Lechtner hereby adopts the Statement of the Case and Facts of the Florida Bar in its initial Brief, with the exception of the last sentence, in which the Bar contends that the Referee denied the Motion for Reconsideration of Costs based upon the Respondent being declared indigent for the purposes of her criminal appeal and therefore would be unable to pay costs. More specifically, as set forth in the argument herein, the Referee based her determination not to tax costs on the totality of the circumstances before her, the punishment of disbarment being sufficient in this case, as well as the taxing of costs being inappropriate in this case.

SUMMARY OF THE ARGUMENT

The Referee's Findings and Recommendations come before this Court with a presumption of correctness. The Florida Bar has attempted to say that the discretion allowed by the Rules of Discipline and case law was erroneous. Respondent contends that the Referee's position was not erroneous based on the evidence before her, the facts presented to her, the basis for attorney disciplinary proceedings and the presumption, which has not been overcome, as to the discretion allowed the Referee.

ARGUMENT

WHETHER THE REFEREE'S FINDINGS AND RECOMMENDATIONS CAN BE DISTURBED ON APPEAL AS TO THE TAXING OF COSTS IN THE ABSENCE OF AN ABUSE OF DISCRETION.

The Findings and Recommendations of the Referee come before this Court with a presumption of correctness. See, The Florida Bar v. Miele, 605 So.2d 866 at Page 869 (Fla. 1992). The burden of the Florida Bar is to overcome that presumption.

A. Discretion of the Referee.

Rule 3-7.6 (o) (2) of the Rules of Discipline provide that:

Discretion of Referee. The Referee shall have discretion to award costs and absent an abuse of discretion the Referee's award shall not be disturbed.

It is well settled law in the State of Florida, as well as the above Rule of Discipline, that the Referee has the discretion to award costs, absent an abuse of discretion.

This Court, in The Florida Bar v. Carr, 574 So.2d 59 (Fla. 1990) states:

The taxation of costs is a matter within the discretion of the referee, and should not be reversed absent an abuse of discretion.

In the instant case, the Referee exercised her discretion and, in this case, waived the costs of the disciplinary proceedings which amounted to \$1,086.48. See Complainant's Appendix D at Page 9, specifically noting that the Referee found, in her discretion:

... "I do find that Miss Lechtner has been severely punished. She has lost her right to practice. She has been declared indigent.

"I don't see that recording a judgment against her will do anything or add anything to

the Bar's case, and it's just like putting another nail in the coffin. I do not feel that it's necessary in this case..."

The Referee in this case carefully considered all aspects of these disciplinary proceedings. This particular Defendant in the "Operation Courtbroom" trial was found to have had a minor role by The Honorable Jose Gonzalez, she had no prior disciplinary proceedings other than the Suspension based on this Judgment of Guilt. The substantive case is presently being appealed. The Referee has discretion, in this case exercised that discretion, and her findings must not be disturbed on appeal.

Rule 3-7.6 (o) (3) of the Rules of Discipline provides that:

When the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated. (emphasis added)

In the instant case, although the Findings and Recommendations of the Referee (See Complainant's Appendix "A"), indicates that the costs incurred by the bar were reasonable, the Complainant notes in its Appendix "D" at Page 5, "I acknowledge gratefully that Miss Lechtner was cooperative in these proceedings and that in no way did she do anything to increase the costs incurred by the Bar."

Under the circumstances of this case, when there has been a Judgment of Guilt, now under appeal, there is little, if anything, that the Respondent could have done, other than attempting to have the proceedings stayed or abated until after the appeal, to have avoided the Complainant's incurring its expenses. At this juncture, the Respondent's hands are tied. After the Referee denied her Motion to Stay or Abate these proceedings, everything else was beyond her control, without resigning from The Florida Bar. The Respondent did not resign due to

her belief that she will prevail on appeal and ultimately be vindicated of all the charges lodged against her. If that were not the case, the Respondent would have resigned and saved everyone's time and effort. At the time of the making of the Motion to Stay or Abate these disciplinary proceedings, and as grounds therefore, the Respondent argued, among other grounds, that the Respondent was automatically suspended, and not practicing law based on the Judgment of Guilt. ¹

Just as the Referee had the discretion in that instance, to deny Respondent's Motion, so did she have the discretion to tax or not tax costs in these Florida Bar disciplinary proceedings.

B. Purpose for Attorney Discipline.

The Florida Bar has misplaced its priorities. The Florida Bar condemns the passing on of costs to the Bar membership at large, at the same time it brings this appeal, the cost of which, inherently, is passed on to the members of the Bar.

One may argue that the purpose of this Complaint being reviewed by the Supreme Court, was a concern by The Florida Bar, that a precedent would be set by allowing "the inability to pay" as grounds for failure to tax costs. This is not the case. The Findings and Recommendations of the Referee in this case could just as well have set out that the Respondent was being punished enough by being disbarred for ten (10) years and under the

¹Two of Respondent's Co-Defendants filed similar Motions before other Referees, and their Motions were granted. The Florida Bar contended in the instant case, as did the Referee, that each Referee has the discretion to grant or deny the Motions before him or her. It is the understanding of the instant Respondent that The Florida Bar has appealed this discretion of the Referees. The outcome of those proceedings are not known to the Co-Defendant/Respondent herein.

circumstances of this case, taxing of costs would be waived. In all the cases set forth in The Florida Bar's Initial Brief, each case was very narrow as to its holding. Words like "generally", and or "in this case" abound. Cf. The Florida Bar v. Lehrman, 485 So.2d 1276 (Fla. 1986) and The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982).

There is one theme that underscores most of the decisions of this Court, and which has been a strongly held precedent, that being, in determining the appropriate discipline to impose in a particular case, the Court must remain mindful of the purpose of attorney discipline, as set out in The Florida Bar v. McShirley, 573 So.2d 807 (Fla. 1991):

First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla.1970). Accord, The Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla.1989); The Florida Bar v. Hartman, 519 So.2d 606 (Fla.1988).

In the instant case, the Respondent has been disbarred for ten (10) years.² The ten (10) year disbarment at the age of 48 well protects society and deters other attorneys from alleged improper conduct. The waiving of the costs in these proceedings is fair to the Respondent, being sufficient to punish any breach of ethics and at the same time encourage

² The same sanction imposed against at least one of the Judges who was found guilty of releasing the name of a confidential informant, knowing that the informant would be murdered.

reformation and rehabilitation.

This is the expressed purpose of Bar Disciplinary proceedings as pronounced by this Court. This purpose has been met in this case.

C. Referee as trier of fact.


The Referee's Findings and Recommendations are presumed correct and will not be overturned unless the Supreme Court finds that it is clearly erroneous or lacking in evidentiary support. The Florida Bar v. Simring, 612 So.2d 561 (Fla. 1993); See, also, The Florida Bar v. Smiley, 622 So.2d 465, as modified on denial of rehearing (Fla. 1993). Although Referee's recommendations for discipline of member of the bar are subject to broader scope of review by Supreme Court, recommendations come to Court with presumption of correctness. See, The Florida Bar v. Roberts, 626 So.2d 658 (Fla. 1993). This Court cannot substitute its decisions for that of the Referee, even if this Court would have decided the matter differently. In all of the cases cited by the Florida Bar in support of their position on review, the Respondent did not find one case in which the Referee failed to tax costs and was thereafter overturned by this Court. In each case where a change was made, the change was as to an improper amount taxed or something of that nature. Not one case found by the Respondent or cited by The Florida Bar taxed costs when the Referee recommended that they not be taxed. The case the Bar cites as being directly on point, The Florida Bar v. Glant, correctly cited herein as Case 81757 (February 20, 1995), not as cited in the Bar's Brief, merely denies the Respondent's Petition for Waiver of Costs due to Extreme Financial Hardship. The Referee had taxed costs to Ms. Glant, the amount was properly defined by this Court. The Florida Bar v. Glant, 645 So.2d 962 (Fla. 1994) rehearing denied on February 20, 1995 with instructions to the Bar to

develop a payment plan upon the petition of respondent.

CONCLUSION

The Referee did not abuse her discretion pursuant to the Rules of Discipline and the case law of the State of Florida. The Respondent respectfully requests that the Referee's recommendations as to the waiving of costs be adopted.

Respectfully submitted,


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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copiers of the above and foregoing Answer Brief of the Respondent was sent via Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and an true and correct copy wa sent via regular mail to Arlene K. Sankel, Bar Counsel, The Florida Bar, 444 Brickell Ave., Suite M-100,, Miami, Florida, 33131; John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399; and John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399.



NANCY M. LECHTNER