047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD E. BOSSE,

Respondent.
_____/

Supreme Court No. 85,125

Florida Bar File No. 95-50,361 (15D)

ANSWER BRIEF OF THE FLORIDA BAR

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COUNTER STATEMENT OF FACTS

Respondent has salted his statement of facts with so much hyperbole as to render it argument rather than an objective statement of what transpired below. The bar deems it necessary to present this counter statement.

Heretofore, on or about April 16, 1992, respondent made application to tax costs against the bar in connection with the dismissal of a bar prosecution, **Florida Bar v. Bosse**, 601 So. 2d 554 (Fla. 1992).

In a sworn motion to tax costs [bar's exhibit 1 in evidence],[1] respondent, through his then counsel, sought, among other costs, reimbursement for an expert witness, one Lewis Kapner, Esquire, in the sum of $5,059.05.

In **Florida Bar v. Bosse**, 609 So. 2d 1320 (Fla. 1992), this Court entered a judgment for costs in respondent's favor against the bar in the sum of $8,977.50 [bar's exhibit 3 in evidence]. On or about January 15, 1993, in compliance with the Court's judgment, the bar issued its check payable to respondent's order in the sum of $8,977.50 [bar's exhibit 4 in evidence].

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[1] References to exhibits admitted and page references to testimony given at the August 24, 1995 original hearing will contain no letter prefix. References to exhibits admitted and page references to testimony given at the May 14, 1996 remand hearing will contain a prefix, "R".

As appears from the notations appearing on the back thereof, the bar's check was negotiated on or about January 25, 1995.

At the August 24, 1995 hearing, respondent introduced into evidence an April 20, 1995 affidavit of his then wife, Cynthia Bosse [respondent's exhibit 2 in evidence] in which Mrs. Bosse averred that she had informed respondent in January, 1993 of the receipt of the bar's check. Notwithstanding his own evidence, respondent testified that he had no recollection of his wife's report to him regarding the subject bar check.

Upon the May 14, 1996 remand hearing, Thomas Murphy, Esquire, who had represented respondent in the 1992 bar proceedings, including the proceedings resulting in the taxation of costs against the bar, testified that respondent came to him to inquire regarding the issuance of the bar's check in payment of the costs judgment [page R 13]. Mr. Murphy's testimony on direct examination regarding when respondent made such inquiry was as follows:

> Q. Now my next question: Did there come a point in time after January of 1993 when Mr. Bosse made an inquiry of you or asked you to find out in words, in effect, where that check was from the Bar?
>
> A. Yes. Some weeks had passed after January and I can't recall, Chuck, because I moved my office and I don't have any written record in front of me, but I talked this over with my former legal assistant and it wasn't my plan to pressure the Bar. We were on to other things and Mr. Bosse came in many weeks later. I had

thought it was in March but I can't be sure of the date [pages R 12, 13].

Mr. Murphy further testified that within a few days he received word from the bar that the check had been issued and cashed in January, 1993 and immediately informed respondent of that fact [page R 14]. Mr. Murphy explained that respondent confirmed with him the receipt of the bar's check [page R 15].

During the period from March 1, 1993 through March 31, 1993, the balances in the account into which the bar check was deposited ranged from $34,987.00 to $27,780.00 [bar's exhibit R 6].

Respondent testified at the remand hearing that the meeting between him and Mr. Murphy, at which respondent made inquiry regarding the issuance of the bar's check in payment of the costs award, took place on April 26, 1993 [page R 46]. At that time [April 26, 1993] there was a balance in the subject account of approximately $20,000.00 [page R 56].

Respondent filed for bankruptcy protection and sought in such proceeding to have his indebtedness to Mr. Kapner discharged [pages 17 and 18].

Throughout the entire bar proceeding, respondent, under oath, insisted that he had been rendered destitute by virtue of his payment of legal fees and costs well over $100,000.00 in connection

with the underlying bar prosecution leading to the costs judgment award. Such averment was made in respondent's affidavit in support of his motion for summary judgement [respondent's exhibit 1 in evidence] and repeated in his testimony at the August 24, 1995 hearing [page 47]. When respondent presented Thomas Murphy, Esquire, the attorney who represented him in the underlying bar proceeding leading to the costs judgment, at the remand hearing, Mr. Murphy testified that he was the only lawyer involved in Mr. Bosse's representation [other than respondent, himself], and explained, after consulting his records, that the total fees he charged to Mr. Bosse were over $50,000.00 but not over $60,000.00; that his costs were "insignificant" [pages R 16 through 18].

Mr. Kapner testified on behalf of the bar. He ratified and confirmed the averments contained in a June 30, 1995 sworn declaration admitted into evidence as the bar's exhibit 5 [15]. The following is Mr. Kapner's testimony as elicited from his sworn declaration:

1. I have been informed by bar counsel that an issue has been presented to the referee regarding what notification, if any, I received from Mr. Bosse as to the payment by The Florida Bar to Mr. Bosse of costs awarded to him in **The Florida Bar v. Bosse**, 609 So. 2 1320 (Fla. 1992).

2. My connection to the referenced bar disciplinary proceeding was as an expert witness. I was advised regarding Mr. Bosse's acquittal and forwarded to his attorney an itemized bill for my expert witness fee and costs. Mr. Bosse's attorney informed me that he had forwarded my bill to Mr. Bosse. Not receiving payment, or for that matter, any word from Mr. Bosse, I mailed several requests to him requesting payment. I heard nothing in return.

3. In my June 21, 1993 letter attached to Mr. Bosse's application for summary judgment I made the statement: "I understand that the Bar has transmitted said costs to you. . ." That statement to Mr. Bosse was not predicated upon any advice or notification from him or from any other source, that he had, in fact, received payment. He gave me no such notification or advice. He totally avoided me. My statement regarding my understanding that the bar had paid the costs was based upon my assumption. I did not know, for certain, when I sent my June 21 letter to Mr. Bosse that the costs had, in fact, been paid. I was attempting to prod him into action such as to disabuse me of my understanding or to remit to me as I believed he was ethically obligated to if he had received payment. My next letter to Mr. Bosse is reflective of the fact that I did not know whether or not he had, in fact,

received payment from the bar.

4. Attached hereto is a copy of a July 15, 1993 letter that I sent to Mr. Bosse. In it, I once again expressed my concern regarding the fact that Mr. Bosse had ignored by several requests regarding the costs. I then stated to Mr. Bosse:

> Has the Florida Bar in fact awarded such costs? If not, and if you wish me to seek enforcement of the court's award directly from the Florida Bar, I will do so. Please let me hear from you right away.

5. Mr. Bosse responded to such letter by telephoning me. He did not advise me whether or not he received payment but discussed with me that he was anticipating an imminent receipt of a fee which would enable him to discharge his responsibility to me. That precipitated an August 18, 1993 letter I directed to him, a copy of which is attached, in which I expressed by disappointment to him that he had once again become incommunicative.

6. On September 15, 1993, I directed yet another letter to Mr. Bosse, this time suggesting that he had left me with no choice but to request advice from the bar regarding whether or not the costs award had been paid. I felt certain that such suggestion would precipitate some action on Mr. Bosse's part as I assumed that he would appreciate that I would have no choice, if informed by the bar that it had paid such award, but to file a grievance against

him; something I did not want to do.

7. On October 12, 1993, I drafted a letter to Mr. Bosse expressing disappointment that he had again failed to communicate with me and suggested to him that he might wish to consider a credit card type of arrangement for discharging his obligation. A copy of such letter is attached. Shortly thereafter, I received my first written communication from Mr. Bosse dated October 12, 1993, a copy of which is attached, in which Mr. Bosse expressed his embarrassment, thanked me for my patience and suggested that he was imminently to receive fees from which he could pay me. I responded to Mr. Bosse by another letter dated October 12, 1993, a copy of which is attached, which letter appears to have been computer generated from my first October 12 letter without the date having been changed. It [my second October letter] probably was generated several days later in that it responded to Mr. Bosse's October 12, 1993 letter.

8. Subsequently, Mr. Bosse telephoned me and offered me a second mortgage on an improved parcel of Florida realty. I accepted. On December 1, 1993, I wrote to him to ask when I might expect the mortgage. A copy of my letter is attached. I received no response. On December 9, 1993, I again wrote to him. A copy of my letter is attached. Mr. Bosse ignored my requests. In April,

1994, he wrote to me to object to that clause in the mortgage note rendering it due on demand and requesting that it be changed to a due on sale provision. A copy of his letter is attached. I responded on May 3, 1994 telling him to change the clause as he requested. A copy of my letter is attached.

9. Thereafter, Mr. Bosse ignored me until after I filed my original grievance with the bar in September, 1994. That grievance was not verified in the manner mandated by the Rules Regulating The Florida Bar and was dismissed for that reason by letter copied to Mr. Bosse from the bar dated November 22, 1994. On November 30, 1994, Mr. Bosse, obviously concerned at receiving notice of my complaint to the bar, finally wrote to me to inform me that he would have my bill discharged in bankruptcy. Such bankruptcy proceeding was in fact filed and my fee was listed.

10. I mentioned in paragraph 6 of this statement that I assumed that Mr. Bosse would appreciate the fact that once I learned, definitively, that he had been paid the costs award, that I would have no choice but to file a grievance. I would like to explain. By the time that I wrote my June 21, 1993 letter to Mr. Bosse, I assumed that the bar had paid the costs. I couldn't imagine that the bar would ignore a mandate from the Supreme Court. I did not feel compelled however to file a grievance upon my

assumption. I wanted to afford to Mr. Bosse every conceivable opportunity to address his obligation to me. I knew that once I learned, for certain, that the costs award had been paid, absent the immediate payment, in turn to me, I would become ethically obligated to report the matter to the bar in that Mr. Bosse's receipt of such payment and failure to remit would, in my opinion, constitute a fraud on the Supreme Court and a breach of the trust obligation to me. Rule 4-8.3(a), Rules of Professional Conduct mandates that lawyers report violations reflecting on another lawyer's honesty or trustworthiness. That is why I deferred going to the bar. When Mr. Bosse totally ignored my repeated requests for status vis a vis the payment and then held me at bay, first by promising payment from various fees he was collecting and then regarding his offer to furnish the mortgage, I determined to get a definitive response from the bar. It was in that vein that in my November 2, 1994, letter to the bar, a copy of which is attached, I asked for confirmation regarding whether or not the costs award had been paid and opine:

> If the fees were paid to Mr. Bosse for the purpose of discharging the Florida Bar's obligation to me, then I would think that Mr. Bosse would have an obligation to simply pass those fees onto me. If Mr. Bosse did not do this the (sic) this situation would certainly be comparable to a lawyer receiving money in trust, that is for a specific purpose, and then converting those funds

to his or her own use.

End of Sworn Declaration

According to respondent, the explanation he gave to Mr. Kapner, for not remitting to Mr. Kapner, was that Mr. Kapner's money has been spent. Respondent testified:

> Q. How did you arrive at the conclusion that his money had been spent as distinguished from your money, Mr. Bosse? Because that's what you told him. You said, Lou, I got the check. It was deposited and it's been spent.
>
> A. I don't think that was my words. I think I told him, Lou, I got the check. It was deposited. It's been spent.
>
> Q. How did you arrive at the conclusion that Lou's money had been spent but not yours?
>
> A. Because if I paid out the nine or ten thousand dollars, I wouldn't have enough money to pay my taxes.
>
> - - -
>
> Q. But you agree with me that the amount of costs that were awarded to Mr. Kapner was five thousand?
>
> A. Fifty three and some change [62,63].

The referee, in her second report found, inter alia:

> H. Check number 72566 was delivered to Respondent for the specific purpose of being applied either to reimburse Respondent for any of the costs specified in the motion to tax costs that he had paid or for payment of any such costs that were unpaid.
>
> I. Respondent did not notify Lewis Kapner, Esquire of Respondent's receipt of the costs awarded to

Respondent upon receipt or shortly thereafter. Respondent's telephonic and written communications with Mr. Kapner were evasive and non-responsive. Respondent did not specifically deny receipt of the check from the Bar, however, he avoided answering that direct question. See Bar Exhibit #5 and testimony of Lewis Kapner, Esquire page 14 - 32 in the transcript of final hearing.

J. The Respondent testified on May 14, 1996, that by April 26, 1993, he knew that the check had been received and deposited in the joint account. On April 30, 1993, the balance in the joint account was $19,633.44 (See Bar Exhibit 6). The Respondent's testimony that the funds received from the Florida Bar had been spent is not supported by the evidence [Second Report of Referee, page 3].

After finding no violations of Rules Regulating The Florida Bar 5-1.1(a), the referee recommended as follows:

As to the Violation of Rule 3-4.3 and Rule 4-8.4(c)

The Bar argues that Respondent's behavior violated Rule 3-4.3 which states in relevant part:

> "The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorneys relations as an attorney or otherwise. . .may constitute a cause for discipline."

In addition the Bar alleges that Respondent's behavior violated Rule 4-8.4(c) which provides that:

> "A lawyer shall not. . .engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

I find by clear and convincing evidence that Respondent made a conscious decision to apply the

proceeds of check number 72566 to his own purposes rather than pay Mr. Kapner and that Mr. Bosse's course of dealings with Mr. Kapner were evasive and non-responsive. I have reviewed Mr. Kapner's post payment affidavit (Respondent's Exhibit 7). Mr. Kapner's affidavit does not change my conclusions in this matter. I find Mr. Bosse's conduct to be both contrary to honesty and justice and conduct involving dishonesty [Second Report of Referee, pages 4 and 5].

SUMMARY OF ARGUMENT

An attorney cannot honestly and ethically petition a court seeking an award of costs for a designated, unpaid service rendered by a third party at the specific instance of the attorney, secure such award, receive payment of the award and then pocket the fund for his own use and purpose at the expense of the third party. That's dishonest and contrary to justice.

POINT I

THE REFEREE'S FINDINGS OF FACT AND VIOLATIONS RECOMMENDATIONS ARE PREDICATED UPON CLEAR AND CONVINCING EVIDENCE SPECIFICALLY ENUMERATED IN HER REPORT AND SHOULD BE CONFIRMED.

It is axiomatic that in bar proceedings, a referee's findings of fact are entitled to a presumption of correctness when supported by competent substantial evidence. **Florida Bar v. MacMillan**, 600 So. 2d 457 (Fla. 1992). It is respectfully submitted that the referee's findings in the case at bar are so supported.

The referee has found:

B. In The Florida Bar v. Bosse, Case No. 78,882, Respondent, through counsel, sought to have costs taxed against the Bar. One of the specifically enumerated costs sought by Respondent was recited in the motion, as follows:

3/24/92 Lewis Kapner, Esquire $5,059.05

C. By report dated June 18, 1992, the referee appointed in the referenced case, recommended that Respondent be awarded costs in the total amount of $9,065.36 and specifically enumerated the costs comprising such $9,065.36 including "The expert fee of Lewis Kapner, Esquire, in the total amount of $5,059.05." The referee also included in his recommended award of costs "Long distance expense in the amount of $87.86."

D. By order dated December 10, 1992, [609 So. 2d 1320], the Supreme Court of Florida disallowed the award of a $87.86 long distance expense, and otherwise approved the referee's report and recommendations awarding costs in the sum of $8,977.50.

E. On or about January 15, 1993, in compliance with the Court's judgment, The Florida Bar issued its check number 72566 payable to Respondent, not to his counsel, in the sum of $8,977.50.

F. This check was mailed to Respondent's business address in Florida. Pursuant to Respondent's instructions to the U.S. Postal Service the check was forwarded to Respondent's address in Minnesota.

G. Respondent's wife received this check in Minnesota and deposited it in a joint personal checking account of the Respondent and his wife. In January, 1993, Respondent's wife claims that she informed him that the check had been deposited in their joint account. See Respondent's Exhibit 2, Affidavit of Cynthia Bosse. Respondent testified that he did not remember his wife telling him of the receipt of the check in the amount of $8,977.50. Between February 11, 1993, and April 19, 1993, the Respondent signed six (6) checks drawn on the joint account and payable to himself totaling $4,081.13.

H. Check number 72566 was delivered to Respondent for the

specific purpose of being applied either to reimburse Respondent for any of the costs specified in the motion to tax costs that he had paid or for payment of any such costs that were unpaid.

I. Respondent did not notify Lewis Kapner, Esquire of Respondent's receipt of the costs awarded to Respondent upon receipt or shortly thereafter. Respondent's telephonic and written communications with Mr. Kapner were evasive and non-responsive. Respondent did not specifically deny receipt of the check from the Bar, however, he avoided answering that direct question. See Bar Exhibit #5 and testimony of Lewis Kapner, Esquire page 14 -32 in the transcript of final hearing.

J. The Respondent testified on May 14, 1996, that by April 26, 1993, he knew that the check had been received and deposited in the joint account. On April 30, 1993, the balance in the joint account was $19,633.44 (See Bar Exhibit 6). The Respondent's testimony that the funds received from the Florida Bar had been spent is not supported by the evidence.

Based upon such findings of fact, the referee concluded:

As to the Violation of Rule 3-4.3 and Rule 4-8.4(c)

The Bar argues that Respondent's behavior violated Rule 3-4.3 which states in relevant part:

"The commission by a lawyer of any act that is

> unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorneys relations as an attorney or otherwise. . .may constitute a cause for discipline."

In addition the Bar alleges that Respondent's behavior violated Rule 4-8.4(c) which provides that:

> "A lawyer shall not. . .engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

I find by clear and convincing evidence that Respondent made a conscious decision to apply the proceeds of check number 72566 to his own purposes rather than pay Mr. Kapner and that Mr. Bosse's course of dealings with Mr. Kapner were evasive and non-responsive. I have reviewed Mr. Kapner's post payment affidavit (Respondent's Exhibit 7). Mr. Kapner's affidavit does not change my conclusions in this matter. I find Mr. Bosse's conduct to be both contrary to honesty and justice and conduct involving dishonesty [Second Report of Referee, pages 4 and 5].

In the bar's view, the issue presented "four square" to the referee and which the referee addressed "four square" is whether a lawyer can, ethically, secure an award of costs from a court having represented to such court that the costs requested were incurred

and expended, receive payment thereof and then, rather than applying such costs proceeds to the specific indebtedness represented in the costs application as having been expended, use such proceeds for his own purposes. That is precisely what respondent did; that is precisely what respondent concedes he did as recited in his motion for summary judgment and in his testimony at the initial and remand hearings.

There is no discipline case in which facts identical to those at bar have been presented. The bar would urge that the reason therefor is that the concept involved is so fundamental that the fact pattern has not heretofore manifested itself. It is respectfully requested that the Court consider a scenario where a lawyer [whether in a bar proceeding or not] seeks an award of enumerated costs incurred in a particular litigation and in the application states that any costs so awarded will **not** be used to pay the costs so incurred, but, rather, will be used for purposes having no nexus thereto. The bar would ask, rhetorically, whether is hasn't always been and isn't now the tacit understanding in any and every forum that costs sought and awarded will be used either to pay the unpaid providers or to reimburse the litigant where the costs have been pre-paid? Does it not constitute ipso facto dishonesty for a lawyer to represent to a court that costs are

sought for a specific provider, receive such costs and then pocket the funds for his own use, leaving the provider unpaid?

The referee found such conduct to constitute dishonesty. It is respectfully submitted that this Court should affirm such recommendation.

POINT II

THE REFEREE'S RECOMMENDED SANCTION SHOULD BE CONFIRMED.

The bar has found no discipline case in which facts identical to the case at bar have been presented. Nonetheless, it is respectfully submitted that **Florida Bar v. Hill**, 265 So. 2d 698 (Fla. 1972), where the respondent received a public reprimand, is both analogous and persuasive. In **Hill**, one of the counts alleged was that "the respondent had incurred an indebtedness to an expert witness for per diem, conference and court appearance; that the respondent had failed to pay the indebtedness; that it was reduced to judgment and remained unpaid." Finding that the respondent had been cooperative, openly admitting the charges against him and "that respondent had not been guilty of any intentional misconduct but had "exercised poor judgment and experienced financial difficulties", the referee recommended that the respondent be found guilty. A unanimous Court approved the referee's recommendations. It is respectfully argued that the failure to pay a debt to an

expert witness as in the **Hill** case where no application was made for costs reimbursement hardly rises to the level of failing to pay the debt after money is received which was requested, awarded and paid allocated to a specifically designated debt such as in the case at bar.

Florida Bar v. Cook, 567 So. 2d 1379 (Fla. 1990) cited by respondent is inapposite. There, the bar petitioned for review of a referee's guilt and sanction recommendation involving a case where the respondent failed to pay a court reporter bill for a deposition transcript and for a transcript of final hearing where the facts disclosed a sharp conflict over whether the respondent had ordered the final hearing transcript. The bar urged that "disciplinary proceedings are not appropriate in cases such as this which do not involve misrepresentation, dishonesty, deceit or fraudulent procurement and which involve a dispute over an attorney's failure to pay a personal debt." At the bar's behest this Court reversed the referee's finding of guilt and cautioned the bar to exercise caution in instituting such proceedings in the future. Respectfully, the **Cook** case is readily distinguishable from the case at bar. In **Cook**, the respondent had not applied for a costs award designating therein the court reporter's unpaid bills, did not receive a cost award therefor, and did not then

receive payment of such costs award and pocket the same rather than paying the reporter.

The bar is confused at respondent's cite to **Florida Bar v. Price**, 478 So. 2d 812 (Fla. 1985) where this Court directed that the respondent be disbarred. There, the referee, finding serious drug related violations, also, sua sponte, determined that respondent had committed the crime of perjury which finding he factored into his sanction recommendation. The bar agreed with the Court that the referee's sua sponte finding was invalid for due process irregularity. Respondent's citation of **Price** as standing for the proposition that the bar engaged in "overreaching and prosecutorial zeal" is hardly consistent with the reality of such case.

CONCLUSION

This Court is presented with a scenario where a respondent requested a costs award to pay an expert who rendered a valuable service to respondent, received the award, was paid and then expended the money received for his own uses and purposes. Pressed by his creditor, respondent was evasive and non-responsive. Having pocketed the expert's fee, respondent then attempted to have his debt discharged in bankruptcy. It is respectfully submitted that the referee's finding that such conduct is contrary to honesty is

eminently reasonable and her recommended sanction of a public reprimand is eminently fair under the circumstances.

All of which is respectfully submitted.

David M. Barnovitz #0335551

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished to by U.S. Mail addressed to Charles Wender, Esquire at 190 West Palmetto Park Road, Boca Raton, Florida 33432 this 24th day of October, 1996.

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