

**IN THE SUPREME COURT OF THE STATE OF FLORIDA**

**Supreme Court Case No. 85,125**

097 11-4

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

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By \_\_\_\_\_  
Chief Deputy Clerk

**THE FLORIDA BAR,**

Complainant,

vs.

**RICHARD E. BOSSE,**

Respondent.

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**RESPONDENT'S INITIAL BRIEF**

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CHARLES WENDER  
Attorney-at-Law, Chartered  
Attorney for Respondent  
190 West Palmetto Park Road  
Boca Raton, Florida 33432  
(561) 368-7004

On The Brief: CHARLES WENDER  
Florida Bar No. 246271

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## INTRODUCTION

After having defended and exonerated himself from a pernicious disciplinary proceeding, the Respondent herein, RICHARD E. BOSSE, was forced to petition this court for the Florida Bar to pay his court costs. In Florida Bar vs. Bosse, 609 So.2d 1320 (Fla. 1992), this Court ordered the Florida Bar to pay Bosse's taxable court costs. The Florida Bar, not pleased with Bosse's handling of his cost award, filed the present proceedings that are now before this Court. It is respectfully submitted that, as a matter of law, fact, fairness and justice, the Referee erred in recommending a public reprimand to the Respondent, a Board Certified Trial Lawyer of twenty-three years practice, with an unblemished disciplinary record.<sup>1</sup>

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<sup>1</sup>A public reprimand has the severe collateral consequence of automatically stripping Richard Bosse of his Board Certification.

## STATEMENT OF FACTS

In 1992, RICHARD BOSSE defended himself against a spurious, but serious accusation of misconduct. The Florida Bar relentlessly pursued BOSSE, as the referee stated, with an "extremely weak case". Although BOSSE completely exonerated himself, it was a pyrrhic victory. In the course of defending himself he depleted his personal resources, and lost a once-thriving civil trial practice. (Respondent's Exhibits 1 and 3, August 24, 1995 hearing.)

In 1993, thoroughly disillusioned and burned out, RICHARD BOSSE decided to leave the State of Florida for good and start fresh in the Midwest. He left for the small town of Henning, Minnesota, in Otter Tail County, with a modest nest egg for his family and deeply in debt. (Respondent's Exhibits 1 and 3, August 24, 1995 hearing.)

As noted above, the Florida Bar had forced BOSSE to litigate his right to collect his court costs from the initial grievance proceedings. This Court ordered the Florida Bar to pay to BOSSE approximately \$9,000.00. (See, Florida Bar v. Bosse, *supra*.) One of the cost items was a bill from LEWIS KAPNER<sup>2</sup>, a well-respected family law practitioner (and former Circuit Court Judge) who had appeared as an expert witness on behalf of RICHARD BOSSE.

The Bar paid the cost award of \$9,064.36 to BOSSE sometime in the middle of January 1993. The check was paid directly to RICHARD BOSSE, and not to his attorney; nor was

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<sup>2</sup>Another expert, Linda McEntire, originally a witness for the Florida Bar, was so offended by the Bar's position that she offered her services to Bosse, gratis. (Respondent's Exhibit 1 and 3, August 24, 1995 hearing.)

it paid in any trust or representative capacity. The check was mailed to BOSSE's business address in Florida, but forwarded by mail to his new address in the State of Minnesota. The check was endorsed and deposited by BOSSE's then wife, CYNTHIA, in a joint checking account. (The facts of the mailing and receipt of the check are not in dispute.) BOSSE did not find out about the check being received until sometime in April 1993.<sup>3</sup> By then his financial condition has so deteriorated that he could not afford at that time to pay LEWIS KAPNER. As a result, the Florida Bar initiated the present disciplinary proceedings.

The entire thrust of the Bar's accusations centered around "trust fund violations". (Pleading #1, paragraphs 10, 11, 12) The Florida Bar's position was untenable from the very instance, since the cost award to BOSSE was never trust funds nor intended to be trust funds. (Florida Bar's Exhibit 4, "the check", August 24, 1995 hearing.) The Bar knew this from the very inception of the case, since it was the Bar's funds (it's own check) that were involved. The Bar also knew that the costs awarded were paid by the Florida Bar to RICHARD E. BOSSE as an individual, and were never intended to be placed in trust or held in trust, or were they in any way restricted. The hearing officer, The Honorable DEBORAH D. PUCILLO, County Court Judge, Palm Beach County, Florida, had no difficulty in finding that the funds paid by the Bar were "monies paid to the Respondent in his capacity as a party to litigation", and found him not guilty of any trust fund violation. (D.E.17, III) (The Florida Bar has not petitioned this Court for review of those findings.)

Respondent RICHARD BOSSE, having committed no trust fund violation, nonetheless stands convicted of what the Bar admitted were "add-on" or supplemental charges. (See,

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<sup>3</sup>An affidavit by CYNTHIA BOSSE indicated that she told her husband about the check. (Respondent's Exhibit 2, Pleading #3.) Bosse steadfastly denied remembering being told, and his version of the facts was corroborated by significant independent evidence at a second hearing.

transcript p.6, August 24, 1996.) These “add-on” allegations are found in paragraph 12 of the initial complaint. (Pleading #1) There, it is alleged that by “converting the costs to his own purposes, the respondent thereby violated Rules 3-4.3 and 4-8.4(c), engaging in conduct contrary to honesty and engaging in conduct constituting dishonesty, fraud, deceit and misrepresentation”. (Emphasis added.) Thus, the theory goes, the Respondent committed acts of dishonesty by “converting” KAPNER’s funds.

Although finding no trust fund violations, the Referee nonetheless found violations of Rules 3-04.3 and 4-8.4(c) (general “dishonesty”). The Referee found that BOSSE made a conscious decision to apply the proceeds of the check to his own purposes rather than pay KAPNER, and that BOSSE’s course of dealing with KAPNER was “evasive and nonresponsive”. She recommended that the Respondent be publicly reprimanded. Not having “converted” any funds (that of which he was accused), BOSSE has nonetheless been convicted of having acted dishonestly. Neither the complaint, nor the facts, nor the law support these findings.

### THE HEARINGS

Two hearings were conducted in this case.<sup>4</sup> At the first hearing only Respondent BOSSE and LEWIS KAPNER testified. At the second hearing only Respondent BOSSE and his former attorney, THOMAS MURPHY, testified, although LEWIS KAPNER presented an affidavit in which he stated, in his own words:

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<sup>4</sup>After the conclusion of the first hearing and while this matter was pending in this Court, the Florida Bar petitioned the Court to remand the proceedings to take additional evidence based upon information supplied by Richard Bosse’s estranged wife, Cynthia Bosse. In response, the Respondent moved to present new evidence as well. (D.E. 1, 3, 8)



"I am a member in good standing of the Florida Bar, and a former Circuit Court Judge whose primary practice is now in the field of domestic relations. As such, I am involved daily in the travails of parties going through divorces, and I am conversant with the financial machinations that parties engage in during these proceedings.

"Since my last appearance before this Court, I have had an opportunity to discuss with RICHARD E. BOSSE some details concerning his present divorce, domestic difficulties over the last few years, and the financial condition he was in at the time this dispute arose. I am sympathetic as to what happened to him and, now knowing what did happen to him, it is my belief that RICHARD BOSSE made a sincere effort to pay the money in controversy." (Respondent's Exhibit 7.)

At the first hearing LEWIS KAPNER had testified that he had been an expert witness for BOSSE in his Bar proceeding and was owed \$5,059.05 from BOSSE. KAPNER believed that BOSSE had not done anything improper in the prior proceedings and had been "wrongfully charged". (D.E. 2, p.21) KAPNER was aware that the Bar would be paying BOSSE the cost money, and when KAPNER did not receive payment he "so inquired". (D.E. 2, p.22) According to KAPNER, BOSSE never mislead him into believing that he had not been paid by the Bar. (D.E. 2, p.22) In fact, by at least June 21, 1993, KAPNER wrote to BOSSE asking for payment and noting that:

"I understand the Bar has transmitted said costs to you..." (Bar's Exhibit 5)

Not having obtained a response he again wrote to BOSSE on July 15, 1993. (p.23, August 24, 1995 hearing ) Thereafter, they spoke by telephone, and BOSSE indicated that he was hoping to receive some funds which would enable him to discharge his responsibilities to KAPNER. (p.24, August 24, 1995 hearing) At one point, BOSSE even offered a second mortgage on some property. LEWIS KAPNER, always the gentleman, never asked BOSSE point blank what had happened to the Bar money. KAPNER could not pin a date as to when he first knew that BOSSE had received the funds

from the Bar, but by his own letter of June 21, 1993, he had assumed BOSSE's receipt of the funds -- this was well before he even spoke to BOSSE about it. In short, there was absolutely no evidence that BOSSE misled KAPNER into believing that he, BOSSE, had not received the money. It was just a question of paying KAPNER, how, and when.

### RICHARD BOSSE'S TESTIMONY

RICHARD BOSSE is a Board Certified Civil Trial Lawyer who, for over 23 years, has had an unblemished disciplinary record. In January 1993, he moved his then family to Henning, Minnesota to "start over again". He had a small nest egg to keep him and his family going. His then wife, CYNTHIA, had opened a joint checking account in a local Henning bank. She handled all of the books and records. (pp.41-42, May 14, 1996 hearing) BOSSE arrived in Henning with approximately \$40,000.00, which was to carry him through the next year or so until he began to rebuild his life and law practice. (p. 53, May 14, 1996 hearing)

Unbeknownst to BOSSE, CYNTHIA had been systematically depleting their checking account for her own benefit without her husband's knowledge. All he knew was that they were always "in dire financial straits"<sup>5</sup>. (p.45, May 14, 1996 hearing)

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<sup>5</sup>At the time of the second hearing, Bosse was already divorced from Cynthia, having gone through an acrimonious divorce. It was through subpoena power of the divorce proceedings that he was able to get hold of his own bank records, discovering for the first time the machinations of his estranged wife. (D.E. 16, pp.42-43) She diverted \$28,409.94 of their funds for her own benefit. (D.E. 16, p.43) This includes some \$7,000.00 or \$8,000.00 she used as a down payment to buy her parents a home. (D.E. 16, p.50)

On April 26, 1993, BOSSE had an appointment with his attorney, THOMAS MURPHY. TOM MURPHY had represented BOSSE in the original grievance proceedings. BOSSE set the date of the meeting through a diary entry. (Respondent's Exhibit 8, May 14, 1996 hearing.) At that meeting BOSSE complained to MURPHY that he had not received the Bar's check. MURPHY said he would look right into it. MURPHY called the Bar a few days later to "raise cane" and was told by the Bar that the check was sent and cashed "months ago". (p.14, May 14, 1996 hearing) MURPHY was livid, having been embarrassed. He confronted BOSSE. According to MURPHY, BOSSE was "stunned and speechless". At that time BOSSE confronted his wife, CYNTHIA, and learned that the money was received and spent. (p.16, May 14, 1996 hearing)

THOMAS MURPHY corroborated BOSSE's claim of ignorance, "It seemed to me, clear, that Mrs. Bosse had taken the check and deposited it without his [Bosse's] knowledge". (p.15, May 14, 1996 hearing) It also cleared up the discrepancy between the then Mrs. Bosse's claim that she had told her then husband about the check and his total lack of recall. It was apparent that CYNTHIA BOSSE never told her husband about the check, making it easier for her to pilfer the account.

At no time did RICHARD BOSSE ever mislead LEWIS KAPNER about not receiving the check. (p.51, May 14, 1996 hearing; also found at D.E. 16) At worst, he procrastinated in having to tell KAPNER that he could not pay him. (pp.51-52, May 14, 1996 hearing) In April, when BOSSE found out the true state of his funds and account, there remained approximately only \$20,000.00 to carry his family. This included a \$20,000.00 I.R.S obligation. (p.56, May 14, 1996 hearing) Although THOMAS MURPHY begged BOSSE to pay KAPNER, since KAPNER was

threatening to go to the Florida Bar, BOSSE just could not pay KAPNER from the \$20,000.00 needed to support his family. According to THOMAS MURPHY:

“Bosse was trying to keep his family together financially and that was his priority....” (p.22, May 14, 1996)

The bank account which held the \$20,000.00 represented most of BOSSE’s worldly assets. He intended for his family to live off those funds, because he was afraid, “...I wasn’t going to make money -- I was not admitted when I moved to Minnesota. I was not admitted to practice”. (p.67, May 14, 1996 hearing)

After the first hearing, but prior to the second hearing, BOSSE borrowed the funds and paid KAPNER in full.

### SUMMARY OF ARGUMENT

The Florida Bar failed to present a scintilla of credible evidence that BOSSE “converted” the costs to his own purposes. The cost award belonged to BOSSE, and one cannot “convert” one’s own property. The overwhelming testimony was that BOSSE did not find out about the funds being sent until April 1993. By then his estranged wife, CYNTHIA, had depleted the account for her own benefit, placing BOSSE in the embarrassing position of not being able to pay KAPNER. There was no substantial competent evidence that BOSSE mislead or acted fraudulently or dishonestly with KAPNER, and KAPNER himself stated so under oath. At the worst, this is a case of an attorney failing to pay a debt. The Referee’s finding that BOSSE “made a conscious decision decision to apply the proceeds of the check to his own purposes rather than pay KAPNER”,

which was true, but cannot be equated with unethical conduct in choosing family survival over delaying payment to a creditor.

**POINT I**

**THE BAR FAILED TO PRESENT COMPETENT  
SUBSTANTIAL EVIDENCE THAT RESPONDENT  
ACTED UNLAWFULLY, DISHONESTLY, OR  
FRAUDULENTLY WITH THE COST MONEY OR  
WITH LEWIS KAPNER.**

The Bar's burden in this litigation was to prove the Respondent's alleged misconduct by "clear and convincing evidence". The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987). Since this Court delegated its fact-finding responsibility to a referee (See, Florida Bar v. Bajoczky, 558 So.2d 1022 (Fla. 1990), the referee's findings were presumed correct unless "clearly erroneous or lacking in evidentiary support". The Florida Bar v. Wagner, 212 So.2d 770 ((Fla., 1968); The Florida Bar v. Niles, 644 So.2d 504 (Fla. 1994). The referee reports will not, however, be upheld if not supported by "competent and substantial evidence". The Florida Bar v. Bajoczky, *supra*; The Florida Bar v. Gross, 610 So.2d 442 (Fla. 1992). This Court neither reweighs the evidence on the record nor substitutes its judgment for that of the referee; nonetheless there must still be competent substantial evidence to justify a finding of misconduct. The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).

Since the Bar's burden of proof is by "clear and convincing evidence", it is suggested that this Court should review the evidence with the view that the evidence, in fact, be clear and convincing, or as recently offered in a different context, "sufficient to convince the trier of fact without hesitancy". G.W.B. v. J.S.W., 658 So.2d 961 (Fla. 1995), citing The Florida Bar v. Hooper, 509 So.2d 289 (Fla. 1987) for this very proposition.

It is respectfully suggested that, in applying the above standard, there was a total absence of any competent and substantial evidence of any act of dishonesty, deceit, misrepresentation or fraud by RICHARD BOSSE. He simply failed to pay his debt to LEWIS KAPNER.

As, hopefully, the Bar will concede, they needed more than just BOSSE's failure to pay KAPNER to discipline and punish him. As this Court made clear in The Florida Bar v. Cook, 567 So.2d 1379 (Fla. 1990), the mere failure to pay a debt is not within the province of the Bar's disciplinary arsenal, and cautioned the Bar "to consider the implications instituting such proceedings in the future". To put it crassly -- The Florida Bar is not a collection agency.

The evidence below suggested nothing more than BOSSE's failure to pay KAPNER. The Bar's entire thrust against BOSSE was an alleged trust fund violation and conversion of KAPNER's funds. The Bar did not present a scintilla of evidence of either a trust fund violation or a conversion of "KAPNER's funds", and the Referee so held. Nonetheless, the Referee made a finding of dishonesty in his dealing with KAPNER. Having found no trust violation, no conversion, and no misappropriation, the Referee, in a "leap of faith", equated BOSSE's timely failure to pay KAPNER as dishonest. BOSSE did choose to apply those funds toward the survival of his then family, and prioritized his limited assets, elevating their needs over that of LEWIS KAPNER. His conduct was neither deceitful nor dishonest -- embarrassing, yes -- unethical, no.

The record does not support any finding that BOSSE did anything illegal or unethical. The overwhelming, corroborated testimony was that BOSSE did not know of receipt of the Bar's check until April 1993, some three months after its receipt by his then wife, CYNTHIA. He confronted his wife to learn that the family account was down to \$20,000.00. Although BOSSE delayed in dealing with KAPNER about the money, at no time did he mislead KAPNER in any respects.

In his affidavit, KAPNER himself states that he believed that BOSSE had "made a sincere effort to pay the money in controversy" and, upon reflection, found what had happened to be "understandable", and prayed for a dismissal of the proceedings.

The only conceivable "theory" in which a charge of dishonesty could lodge is that BOSSE "converted" KAPNER's money. This presupposed that KAPNER had some vested ownership rights in those funds. No legal authority exists for such a proposition and even the Bar, when pressed for authority, merely claimed the case is "sui generis". (p.52, August 24, 1995 hearing)

By its very nature, the costs awarded to BOSSE were BOSSE's funds. Costs are statutory allowances to a party which are received as part of a judgment. See, 20 Am. Jur.2d, Costs, Section 1; 12 Fla. Jur.2d, Costs, Section 1; Florida Statutes Chapter 57. The costs in an action belong to the party, and are not recoverable by a person not a party to the litigation. See, 20 Am. Jur.2d, Costs, Sections 3 and 26. Likewise, a judgment is owned by the Plaintiff in the action for which it is recovered. 33 Fla. Jur. Judgments and Decrees, Section 83.

The award of costs to BOSSE in this case belonged to BOSSE. KAPNER had no legal or equitable claim to those specific funds, and the Bar has failed to present any authority to the contrary. KAPNER had no lien rights to those funds. The Bar itself de facto never recognized

KAPNER'S interest in the funds, since they did nothing in issuing the check to recognize that interest. In short, KAPNER had no claim to those specific funds of money. Without such a legal claim, the Bar's position of a "conversion" or, as it argued, a "misappropriation" (D.E. 2, p.7, Bar's opening argument) cannot be sustained.<sup>6</sup>

Even assuming *arguendo* (without for one moment conceding the point) that KAPNER did have some property rights to the Bar's check, BOSSE's conduct toward the check was totally innocent. He did not know about the check until April 1993. By then the family nest egg had dwindled to \$20,000.00, and the money was long gone. BOSSE could have depleted the account by 25% and paid KAPNER, but chose instead to protect his family with the necessities of life and let KAPNER wait. BOSSE made that decision, and is now being punished for it. The Florida Bar utterly failed to show, demonstrate or suggest that RICHARD BOSSE intended to convert or misappropriate "KAPNER's funds", or do anything dishonest. See, The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992); The Florida Bar v. Burke, 578 So.2d 1099 (Fla. 1991); The Florida Bar v. Lumley, 517 So.2d 13 (Fla. 1987), requiring a mens rea for acts of dishonesty. Here, there is no evidence to sustain a finding that BOSSE intended to misappropriate any funds belonging to LEWIS KAPNER. The money was already gone -- taken by BOSSE's now estranged wife.

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<sup>6</sup>Above and beyond the unassailable fact that the funds were his, there are other compelling reasons why Bosse could not have "converted" or "misappropriated" the funds. The Bar paid Bosse some \$9,000.00 in one lump sum without restriction. A "conversion" of money can only be maintained where the money at issue has been kept separate. Rupp vs. Schon, 608 So.2d 934 (Fla. 4th DCA 1992); Belford Trucking Co. vs. Zagar, 243 So.2d 646 (Fla. 4th DCA 1970).



Without doubt, RICHARD BOSSE was, and still is, terribly embarrassed that he could not timely pay KAPNER. LEWIS KAPNER had been instrumental in his vindication and had become a friend. He never lied to KAPNER, nor did he ever deceive or mislead him. He didn't pay him, choosing instead to preserve his family. KAPNER accepted the situation, but the Florida Bar could not.

The Bar prosecuted BOSSE in a case bordering on the frivolous. It then challenged BOSSE's right to court costs. BOSSE prevailed, and in these proceedings the Bar has challenged his use of "the Bar's" money. The Bar's actions against BOSSE are relentless. It would appear that the Bar is determined to pursue him to ruin. The lynchpin of the present proceedings was concocted under the rhubarb of "trust account violations" and "conversion". The Bar knew from the outset that the cost judgment which it paid did not involve trust funds. The Bar proceeded nonetheless, and pursued BOSSE -- convicting him on a generalized theory never plead. The due process of law is to protect BOSSE against such overreaching and prosecutorial zeal. See, The Florida Bar vs. Price, 478 So.2d 812 (Fla. 1985).

The Florida Bar has enormous power and, as its original prosecution demonstrates, can destroy careers by the sheer weight of its prosecution. The Bar, having prosecuted one specious proceeding, has, it is submitted, prosecuted another against a fellow brethren who had the misfortune of being impoverished by the same Bar punishing him for not paying a debt.

"Revenge is a kind of wild justice, which the more man's nature runs to, the more ought law to weed it out."

-Francis Bacon, Of Revenge, 1625

CONCLUSION

THERE WAS A TOTAL LACK OF SUBSTANTIAL OR  
COMPETENT EVIDENCE TO SUSTAIN A FINDING OF  
DISHONEST CONDUCT. A FINDING OF "NOT GUILTY AS  
CHARGED" SHOULD BE ENTERED BY THIS COURT.

Respectfully submitted,

CHARLES WENDER  
Attorney-at-Law, Chartered  
190 West Palmetto Park Road  
Boca Raton, Florida 33432  
(561) 368-7004

BY 

Charles Wender, Esquire

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by  
U.S. mail to David M. Barnovitz, Esquire, THE FLORIDA BAR, 5900 North Andrews Avenue, Fort  
Lauderdale, Florida 33309, on this 9<sup>th</sup> day of October, 1996.

BY 

Charles Wender, Esquire