IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	
Complainant-Appellee,	Supreme Court Case No. 91,839
v.	
THOMASINA H. WILLIAMS	The Florida Bar File No. 97-70,838(17F)
Respondent-Appellant.	

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Appellee, will be referred to as "the bar" or "The Florida Bar". Thomasina H. Williams, Appellant, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

CERTIFICATION AS TO FONT SIZE AND STYLE

Pursuant to this Court's Administrative Order In Re: Brief Filed in the Supreme Court of Florida, undersigned counsel for the bar hereby certifies that this Brief is produced in a font that is 14 point proportionately spaced Times New Roman type.

STATEMENT OF CASE AND FACTS

The respondent's version of the statement of the case and of the facts is not complete and therefore the bar feels constrained to set forth a fuller version of the operative procedural and factual issues.

The Florida Bar's complaint in this matter was filed on November 18, 1997. In Count I of the complaint the respondent was charged with failing to return certain master tape recordings to a third party and with failing to honor a court order to turn over such tapes. In Count II, the respondent was charged with making a misrepresentation by omission to the bankruptcy court concerning her possession of these tape recordings. As the respondent failed to file her answer, the bar filed a motion for default on December 29, 1997. Respondent thereupon filed her answer and the bar's motion was denied as moot. On February 8, 1998, the bar served its first set of interrogatories and its first request for production both of which were returnable in thirty days. The respondent served similar discovery requests on March 3, 1998. The bar timely answered the respondent's discovery requests, but the respondent did not answer or object to the bar's discovery. Therefore, the bar served its motion to compel on April 15, 1998 and the referee, by order dated April 16, 1998, compelled the respondent to answer the bar's discovery within five days of the court's order. The respondent failed to comply with the referee's order and the bar

filed a motion to compel and for sanctions on April 27, 1998. On April 27, 1998, the referee granted this motion and required full compliance within seven days. The discovery answers were served by the respondent on April 30, 1998, which was just three weeks away from the trial of this cause. Because of this late arriving discovery and the respondent's failure to comply with any aspect of the referee's pretrial order concerning the disclosure of witnesses, the bar filed a motion to strike respondent's answer, her affirmative defenses and her witnesses. This motion was granted in part on May 13, 1998 and certain witnesses were stricken from the respondent's witness list.

This case was tried on May 22, 1998 and a report of referee was issued on June 30, 1998. The report of referee at paragraph M reads:

> Additionally, this court itself is puzzled as to when respondent knew she had the tapes in her possession. Mr. Wolfe, the bar's witness, cannot say with certainty when respondent knew she had the tapes in her possession, and thus, while respondent's testimony is inconsistent itself as to when she gained knowledge about her possession of these tapes, this court must give respondent the benefit of the doubt, and therefore, conclude that the bar has not met its burden of clear and convincing evidence that respondent knew of the tapes existence during the period from May, 1995 until June, 1995 and failed to turn these tapes over or advise any party as to their existence.

As the respondent was found not guilty, the referee did not impose a disciplinary sanction. RR Section IV. However, the court in discussing the costs of the proceedings at Section V of the report states:

> I recommend that the foregoing costs be divided between the respondent and the bar, and that respondent shall pay exactly one half of these costs ($742.40) to the bar within 30 days of the date of this Report of Referee, or the bar can seek further discipline against respondent for her noncompliance with this order.

The respondent appeals the recommendation of a partial assessment of costs.

SUMMARY OF ARGUMENT

The only issue on this appeal is whether a referee can award costs against a respondent who has been found not guilty. The issue of the assessment of costs is left to the wide discretion of the referee. In order for the respondent to prevail on this appeal, she must be able to demonstrate that the referee abused that discretion. In the bar's view, the referee did not abuse that discretion because of close decision on the merits of the case and the respondent's dilatory and uncooperative attitude throughout the proceeding.

ARGUMENT

I. Whether a respondent may be assessed costs notwithstanding a finding of not guilty of the ethical misconduct charged by the bar?

At issue on this appeal is the referee's recommendation that:

> . . . costs be divided between the respondent and the bar, and that respondent shall pay exactly one half of these cost ($742.40) to the bar within 30 days of the date of this Report of Referee, or the bar can seek further discipline against the respondent for her noncompliance with this order. (RR at para. V.).

The respondent, in her brief and before the referee, contended that the assessment of costs was inappropriate. The bar and more importantly the referee disagreed with this proposition.

The Rules Regulating The Florida Bar set forth several provisions concerning the imposition of costs in a disciplinary proceeding. R. Regulating Fla. Bar 3-7.6(o)(2) is the more important provision and it provides that "(t)he referee shall have discretion to award costs and absent an abuse of that discretion the referee's award shall not be reversed." The burden for the respondent on this appeal is therefore to convince this court that the referee abused his discretion. The Florida Bar v. Carr, 574 So. 2d 59 (Fla. 1990). For a multitude of reasons this court should not find any abuse of that discretion.

The respondent contends that since she was found not guilty she should not have to pay the bar's costs. Her argument is based upon her interpretation of R. Regulating Fla. Bar 3-7.6(o)(3). This rule reads as follows:

> Assessment of Bar Costs. 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.[1]

The respondent contends that, based upon R. Regulating Fla. Bar 3-7.6(o)(3), a referee may only assess costs against the respondent "when the bar is successful." Respondent's interpretation gives no consideration to the first cost provision found in the rules - R. Regulating Fla. Bar 3-7.6(o)(2) which allows the referee the discretion to award costs in any manner except where it can be demonstrated that such discretion was abused. In fact, the first time costs were awarded against the bar there was no provision in the rules for such an assessment. See for example The Florida Bar v. Horvath, 609 So.2d 1318 (Fla. 1992); The Florida Bar v. Bosse, 609 So.2d 1320 (Fla. 1992).

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[1] The respondent has made no claim that the fees being assessed are "unnecessary, excessive, or improperly authenticated". The only issue therefore is entitlement and not amount.

A similar question was posed in The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982). In Davis the respondent had been found guilty of one count of misconduct and not guilty of two others. The referee was recommending that the bar only be allowed one third of its costs. While the court did find that a referee could "consider the fact that an attorney has been acquitted on some charges" as one of many factors in reaching a cost award, the court did not hold that the bar would never be entitled to costs in cases where the respondent was found not guilty. In fact, the court has clearly stated that even though a respondent has been partially vindicated, that lawyer may still be assessed all of the costs of prosecution. The Florida Bar v. Miele, 605 So.2d (Fla. 1993); The Florida Bar v. Cox, No. 87,536, Slip op. (Fla. 1998).

The respondent contends that the award of costs in this case is punitive and a sanction in a case where she has been found not guilty. Firstly, R. Regulating Fla. Bar 3-5.1 enumerates the forms of discipline and the imposition of costs (or a fine) is not set out as a form of discipline[2]. Secondly, the respondent misinterprets the referee's comments which were "the bar can seek further discipline against the respondent for her noncompliance with this order." (RR at para. V.). The clear

[2] Bar counsel is aware of one instance where a referee found a respondent guilty of misconduct and only awarded the bar its costs without any disciplinary sanction otherwise being imposed. The Florida Bar v. Israel, 703 So.2d 478 (Fla. 1997).

meaning of these comments is that the bar *could* seek a disciplinary sanction if the respondent failed to pay costs. In essence, the bar could seek a sanction if the respondent engaged in contempt of court for failing to follow a court order.

The respondent presented all of these arguments to the referee in her letter of June 25, 1998. Her letter was the focus of a hearing held on June 30, 1998.[3] The referee rejected each of these arguments. The bar believes that costs were awarded for two reasons. Firstly, this was an extremely close case and the referee gave the respondent the benefit of the doubt and chose not to sanction her. The referee's ruling on the record included the following comments:

> The court is puzzled as to when it was you learned you had them (the tapes which were at issue). Your testimony is inconsistent. I've heard a number of possible dates. But I think I must give the benefit of the doubt to you because I think you're confused as to when you realized you got them.
>
> I boil this issue down in my mind as to when you had the tapes prior to Judge Ramirez's order or even immediately after Judge Ramirez's order, which was March 24th, that the bar would have sustained its position, and you would have been subject to a public reprimand. TT p.211 l. 16 to p. 212 l. 1.

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[3] Unfortunately, there is no transcript for this hearing conducted over the telephone with no prior notice to the bar.

Secondly and more importantly, the respondent engaged in dilatory and obstructive actions during this proceeding. For example (as is set forth in the statement of the case) the respondent failed to timely file an answer, failed to timely give discovery, failed to honor court orders compelling answers to such discovery, failed to timely disclose witnesses, failed to timely provide trial exhibits, and failed to comply with the referee's pretrial order. The respondent even failed to give her own witnesses, including several opposing counsel, ample notice that they would be testifying, causing at least one lawyer to miss a hearing before another judge. See TT p. 1 through p. 16. Lastly, the referee in finding the respondent not guilty was authorized under the rules to award the respondent her costs. R. Regulating Fla. Bar 3-7.6(o)(4). He chose not to do so and instead decided that the respondent should pay half of the bar's costs.

CONCLUSION

The respondent must demonstrate that the referee abused his discretion in awarding the bar one half of its costs ($742.40). She has failed to meet that burden and therefore the referee's discretionary recommendation should be approved.

WHEREFORE, The Florida Bar respectfully request this court to affirm the referee's recommendation assessing the respondent half of the bar's costs.

Respectfully submitted,

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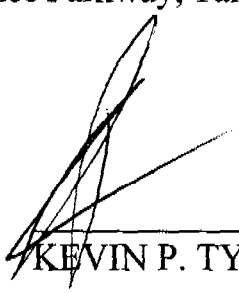
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing answer brief of The Florida Bar have been furnished via regular U.S. mail to Thomasina H. Williams, at Williams & Associates, Brickell Bay View Tower, 80 Southwest 8 Street, #1830, Miami, Florida 33130; and to Billy J. Hendrix, Director of Lawyer Regulation, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 20th day of October, 1998.



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