

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Case No. SC95720

[TFB Case No. 1999-32,169(07A)(CRE)]

IN RE: WALTER BENTON DUNAGAN,
Petitioner.

**THE FLORIDA BAR'S REPLY BRIEF ON CROSS-PETITION
FOR REVIEW**

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850)561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850)561-5600
ATTORNEY NO. 253847

AND

FRANCES R. BROWN-LEWIS
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(407) 425-5424
ATTORNEY NO. 503452

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CERTIFICATE OF TYPE, SIZE AND STYLE and ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

FRANCES R. BROWN-LEWIS
Bar Counsel
ATTORNEY NO. 503452

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the Bar."

The transcript of the reinstatement hearing held on November 30, 1999, shall be referred to as "T" followed by the cited page number.

The Report of Referee on Petition for Reinstatement dated January 12, 2000, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached (ROR-A_____).

The Bar's exhibits will be referred to as B-Ex.____, followed by the exhibit number.

Petitioner's exhibits will be referred to as P-Ex. _____, followed by the exhibit number.

POINT I
**THE REFEREE ABUSED HIS DISCRETION IN
FAILING TO AWARD THE BAR ITS FULL COSTS**

By rule the Supreme Court of Florida has provided for cost assessments in Bar reinstatement cases. Rule 3-7.10(o)(1) of the Rules Regulating The Florida Bar sets forth "taxable costs" which include such items as investigative costs, court reporter's fees, copy costs, telephone charges, fees for translation services, expenses of the referee, witnesses' expenses, bar counsel travel and out-of-pocket expenses and an administrative fee in the amount of \$750.00. Rule 3-7.10(o)(3) provides that "when the bar is successful, in whole or in part, the referee may assess the bar's costs against the petitioner unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated." The referee made no finding that any of the Bar's costs were unnecessary, excessive, or improperly authenticated. In fact, the referee found that all of the Bar's costs were reasonably incurred but left it to this Court to determine if the Bar's full costs or a minimum of \$1,982.00 should be assessed.

The Petitioner contends that the assessment of costs herein is discriminatory, in violation of the requirements of due process and equal opportunity, and that it departs from established rules of cost assessment without just cause. Petitioner was served with the Bar's Affidavit of Costs on January 7, 2000. He never challenged or objected to the Bar's costs despite being afforded the opportunity to do so. He does not indicate

how such costs are discriminatory or how such costs depart from the established rules of cost assessment.

Despite Petitioner's argument to the contrary, this Court has awarded the Bar its full costs in reinstatement proceedings where the petitioning attorney has failed to carry his or her burden of proof. In The Florida Bar re Roberts, 721 So. 2d 283 (Fla. 1998), the attorney's petition for reinstatement was denied and she was assessed the Bar's costs incurred during the proceeding in the amount of \$5,062.97. In The Florida Bar re Shores, 587 So. 2d 1313 (Fla. 1991), the attorney's petition for reinstatement was denied after he failed to meet his burden of proving his fitness to resume the practice of law. He was assessed the Bar's costs of \$4,634.14. In fact, the Bar's research revealed only one case, The Florida Bar, 382 So. 2d 650 (Fla. 1980), where a petition for reinstatement was denied yet the petitioner was not assessed the Bar's costs. The case concerned the petition of Gregory Pahules. This Court denied Mr. Pahules' petition for reinstatement without prejudice to the petitioner's right to petition again when he had successfully completed his probation, made restitution or made satisfactory arrangements for such and furnished evidence that his civil rights had been restored. This Court did not specify in its opinion the reasons for not assessing the Bar's costs against Mr. Pahules. Justice Alderman, in a dissenting opinion on this point, stated that it was unfair to the other members of the Bar to

decline to assess the Bar's costs against the unsuccessful petitioner. He pointed out that the costs were incurred as a result of Mr. Pahules' misconduct.

In order to be awarded costs in a disciplinary proceeding, a party must prevail in some respect. See The Florida Bar v. Williams, 734 So. 2d 417, 419 (Fla. 1999).

However in contrast to disciplinary cases, Rule 3-7.10(k) provides that a judgment reinstating a previously suspended attorney “may make such reinstatement conditional upon the payment of all or part of the costs of the proceeding” This Court in Williams, 734 at 420, pointed out that unlike disciplinary proceedings, where an attorney who is found not guilty has, by definition, not engaged in any misconduct and thus cannot be assessed any portion of the Bar's costs, in a reinstatement proceeding, the petitioning attorney has been found guilty of misconduct and thus can be taxed with the Bar's costs even if the petitioner is reinstated. The Bar submits that if a petitioner can be assessed costs if successful in being reinstated, an unsuccessful petitioner should be taxed the full amount of the Bar's costs. This Court's position over the years on costs in disciplinary cases has been that while the referee has discretion in awarding costs, and absent an abuse of that discretion this Court will not reverse the referee's recommendation, it is not equitable to cause the general membership of the Bar to bear costs that should be born by the attorney whose misconduct gave rise to the costs in the first place. See The Florida Bar v. Kassier, 730 So. 2d 1273, 1276

(Fla. 1998). There is no compelling reason herein to treat Petitioner any differently than any other unsuccessful petitioner in a reinstatement proceeding. Herein, the Bar was the prevailing party as the Petitioner failed to carry his burden of proof (ROR-A1). Therefore, under the aforementioned rules, clearly it was an abuse of discretion to not award the Bar its full costs in this matter¹.

The tone of Petitioner's Amended Reply Brief to the Answer of the Bar and Petitioner's Amended Answer to the Initial Brief of the Bar is troubling and is a further indicator of his ill will toward the Bar, his lack of a strong resolution to adhere to the principles of correct conduct and his lack of fitness to practice law. In re Petition of Dawson, 131 So. 2d 472, 474 (Fla. 1961). While the petitioner's dissatisfaction with the referee's recommendation is understandable, his personal attacks on the referee and Bar Counsel exceed the bounds of zealous representation. Of particular concern is his statement on page 15 of Petitioner's Amended Reply Brief to The Answer of The Florida Bar and Petitioner's Amended Answer to the Initial Brief of the Bar:

The Referee was so defensive about his failure to give the Bar everything it asked for, he felt that he had to justify and excuse himself by explaining that he was merely suggesting or recommending and the

¹Rule 3-7.10(o)(2) states "the referee shall have discretion to award costs and absent an abuse of discretion the referee's award shall not be reversed."

Supreme Court had the ultimate authority. It is a shame when anyone is so afraid of having an opinion differing from the Bar, that they feel an urgent, overwhelming need to justify themselves explicitly and immediately. It is submitted that Bench and Bar are, ideally, to proceed fearlessly in presenting what they feel to be right and just, without thought of fear or favor.

It appears that Petitioner implies that the Bar improperly and impermissibly influenced the referee in this matter and impugns the integrity of the referee. Herein, Petitioner had the burden of proving he was entitled to be reinstated to the practice of law. The Bar merely opposed the petition for reinstatement based upon the results of its investigation and based upon Petitioner's failure to meet his burden of proof during the evidentiary proceeding. The purpose of a reinstatement proceeding is not to rehabilitate a petitioning attorney or to punish a recalcitrant attorney. The petitioning attorney should already have achieved rehabilitation before petitioning for reinstatement. It is unfortunate for Petitioner that he failed to present a prima facie case proving his rehabilitation but it is not appropriate to place the blame on the Bar for this failure and it borders on misconduct to imply the Bar inappropriately influenced the referee in making his recommendation in this case.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of denial of reinstatement and payment of no less than \$1,982.00 in costs and instead assess the Bar's total costs of \$4,603.33 against Petitioner and uphold the referee's recommendation that reinstatement be denied at this time.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850)561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850)561-5600
ATTORNEY NO. 253847

AND

FRANCES R. BROWN-LEWIS
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(850)425-5424
ATTORNEY NO. 503452

By: _____
Frances R. Brown-Lewis
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Reply Brief on Cross-Petition for Review has been sent by Priority U.S. Mail to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to Petitioner, Walter Benton Dunagan, 1141 S Ridgewood Avenue, Daytona Beach, Florida, 32114-6149; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this _____ day of April, 2000.

Respectfully submitted,

Frances R. Brown-Lewis
Bar Counsel