IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC08-1278

v.

TFB File Nos. 2008-90,049(02S);
2008-90,094(02S)

GARY ELVIN DOANE,

Respondent.

______________________________________/

ANSWER BRIEF

Jan K. Wichrowski, Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida 32804-6314
(407) 425-4235
Florida Bar No. 381586

Kenneth Lawrence Marvin, Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 200999

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF CITATIONS ii
SYMBOLS AND REFERENCES iv
STATEMENT OF THE CASE 1
STATEMENT OF THE FACTS 2
SUMMARY OF ARGUMENT 8
ISSUE I 10
THE REFEREE'S FINDINGS OF FACT AND EVIDENCE SUPPORT THE FINDING THAT RESPONDENT'S TRADE NAME VIOLATED THE RULES REGULATING THE FLORIDA BAR 10
ISSUE II 16
THERE IS NO CREDIBLE EVIDENCE OF DUE PROCESS VIOLATIONS OR SPOILATION OF EVIDENCE REQUIRING DISMISSAL 16
ISSUE III 22
THE BAR'S REFERRAL OF THIS MATTER AT THE INITIAL INVESTIGATIVE STAGE TO THE SECOND JUDICIAL CIRCUIT GRIEVANCE COMMITTEE "S" WAS PROPER 22
ISSUE IV 24
THE REFEREE HAD PROPER AUTHORITY AND JURISDICTION IN THIS MATTER 24
ISSUE V 26
THE REFEREE DID NOT ABUSE HIS DISCRETION IN TAXING COSTS AGAINST RESPONDENT 26
CONCLUSION 30
CERTIFICATE OF SERVICE 32
APPENDIX 34

TABLE OF CITATIONS

Page No.

Cases

In re R. M. J., 455 U. S. 191 (1982)....................14
The Florida Bar v. Bosse, 609 So. 2d 1320 (Fla. 1992)....................27
The Florida Bar v. Carson, 737 So. 2d 1069 (Fla. 1999)....................28
The Florida Bar v. Dove, 985 So. 2d 1001 (Fla. 2008)....................26
The Florida Bar v. Elster, 770 So. 2d 1184 (Fla. 2000)....................14
The Florida Bar v. Fetterman, 439 So. 2d 835 (Fla. 1983)....................13
The Florida Bar v. Gold, 526 So. 2d 51 (Fla. 1988)....................27
The Florida Bar v. Gold, 937 So. 2d 652 (Fla. 2006)....................13
The Florida Bar v. Kassier, 730 So. 2d 1273 (Fla. 1998)....................27
The Florida Bar v. Lange, 711 So. 2d 518 (Fla. 1998)....................15
The Florida Bar v. Lusskin, 661 So. 2d 1211 (Fla. 1995)....................21
The Florida Bar v. Martinez-Genova, 959 So. 2d 241 (Fla. 2007)....................27
The Florida Bar v. Nicnick, 963 So. 2d 219 (Fla. 2007)....................10
The Florida Bar v. Pape, 918 So. 2d 240 (Fla. 2005).................... 13, 14
The Florida Bar v. Roth, 693 So. 2d 969 (Fla. 1997)....................21
The Florida Bar v. Sibley, 995 So. 2d 346 (Fla. 2008)....................25
The Florida Bar v. Swickle, 589 So. 2d 901 (Fla. 1991)....................20
The Florida Bar v. Varner, 992 So. 2d 224 (Fla. 2008)....................10
The Florida Bar v. Wagner, 175 So. 2d 33 (Fla. 1965).................... 20, 22, 23

Rules Regulating The Florida Bar

3-4.3. 22
3-5.3(i.)....................21
3-7.2(q)(2)....................26
3-7.3(c)....................12
3-7.5....................23
3-7.6....................9
3-7.6(a)....................24
3-7.6(q)(1)....................26
3-7.6(q)(3)....................26
4-7.2(b)(1)....................4
4-7.2(c)(1)....................6
4-7.2(c)(1)(A)....................1

4-7.2(c)(3) 2, 4
4-7.2(c)(6) 6
4-7.2(c)(6)(A)..1
4-7.9(a) 1
4-7.9(b)...1, 6
4-7.10(b)...4
6-3.4(c) 1, 2

SYMBOLS AND REFERENCES

Complainant will be referred to as The Florida Bar, or as the bar. Gary Elvin Doane, Respondent, will be referred to as respondent throughout this brief.

References to the Report of Referee shall be by the symbol ROR followed by the appropriate page number of the attached Appendix (e.g., ROR A1).

References to specific pleadings will be made by title. References to the transcript of the final hearing are by the symbol T followed by the appropriate page number (e.g., T p. 289).

References to Bar exhibits shall be by the symbol B-Ex. followed by the appropriate exhibit number (e.g., B-Ex. 10). References to respondent's exhibits shall be by the symbol R-Ex. followed by the appropriate exhibit number (e.g., R-Ex. 10).

STATEMENT OF THE CASE

The Second Judicial Circuit Grievance Committee "S" voted to find minor misconduct in this matter on April 21, 2008, and issued a Report of Minor Misconduct. Respondent rejected this report on April 30, 2008, and, as a result, the bar filed its Complaint of Minor Misconduct. On July 7, 2008, this Court issued its order directing the Chief Judge of the Nineteenth Judicial Circuit to appoint a referee within 14 days. The referee was appointed on July 11, 2008. On December 29, 2008, the bar sought an extension of time to file the Report of Referee that this Court granted on February 2, 2009, allowing the referee until March 5, 2009, to file his report. The final hearing was held on February 6, 2009, and the Report of Referee was issued on February 20, 2009, recommending respondent be found guilty of violating R. Regulating Fla. Bar 4-7.2(c)(1)(A), 4-7.9(a), and 4-7.9(b) in Count I and 4-7.2(c)(6)(A) in Count II. The referee recommended respondent be found not guilty of violating rule 6-3.4(c) in Count II. The Board of Governors of The Florida Bar considered the Report of Referee at its April 2009 meeting and voted not to seek an appeal. Respondent served his Notice of Appeal on April 16, 2009, and his second amended Initial Brief on July 2, 2009.

STATEMENT OF THE FACTS

On April 13, 2005, respondent filed a telephone book advertisement with the bar wherein he used the name "Legal Expert, L. L. C." for his sole practice law firm (ROR A2; Stipulation of Facts attachment L). Respondent's telephone book alphabetical listing for 2005, however, used the plural form of the name, i.e. "Legal Experts," thus indicating he practiced law with more than one attorney[1] (ROR A2; Stipulation of Facts attachment F). The bar advised respondent on May 5, 2005, that the name "Legal Expert, L. L. C." violated the Rules Regulating The Florida Bar because a law firm could not be certified as implied by his use of the term "expert" (ROR A2; Stipulation of Facts attachment K). Because respondent disagreed with the bar's position, the Standing Committee on Advertising reviewed the matter and upheld the bar's initial position that respondent's use of this particular trade name violated rules 4-7.2(c)(3) and 6-3.4(c) because a law firm could not be board certified. The bar advised respondent on July 1, 2005, of the committee's position and cautioned him that continued use of the trade name could result in disciplinary action against him (ROR A2). Respondent waived his right to seek review of the committee's opinion within 30 days by the Board of Governors of The Florida Bar

1 Because alphabetical listings containing only the name and telephone number are not considered to be advertisements, this listing was not filed with the bar and, for this reason, the bar's advice to respondent in 2005 did not address the use of the plural form of the word "expert."

(ROR A2; Stipulation of Facts attachment O). Respondent continued using the trade name “Legal Expert” and/or “Legal Experts” despite being on notice that this could subject him to disciplinary action by The Florida Bar (ROR A2-A3; Stipulation of Facts). Such proceedings were, in fact, commenced against respondent in 2005 that resulted in the Ninth Judicial Circuit Grievance Committee “D” issuing a No Probable Cause and Letter of Advice to the Accused on October 27, 2005 (ROR A3; Stipulation of Facts attachment P). The grievance committee advised respondent that it did not condone his conduct in this matter, that he needed to exercise care in his use of trade names, and that he should modify his current trade name to accurately reflect his area of certification as a civil trial attorney in order to avoid creating unjustified expectations about the results he could achieve or otherwise mislead the public about his legal expertise (ROR A3; Stipulation of Facts attachment P).

On April 3, 2006, respondent filed a new telephone book advertisement using the now plural trade name “Legal Experts” (ROR A3; Stipulation of Facts attachment Q). His letterhead for the cover letter enclosing the advertisement also reflected the plural use of the word ”experts” in his trade name, his name and his certification in the area of Civil Trial (ROR A3; Stipulation of Facts attachment Q). On May 15, 2006, the bar advised respondent for the second time that his advertisement did not comply with the rules because a law firm could not be board certified (ROR A3; Stipulation of

Facts attachment S). The bar also advised respondent that his area of certification was not specified in the trade name itself and his use of the plural word "experts" was misleading because it implied he practiced law with at least one other attorney when in fact he was a sole practitioner (ROR A3; Stipulation of Facts attachment S). Respondent again disagreed with the bar's position and sought review by the Standing Committee on Advertising which, for the second time, agreed with the bar's initial position (ROR A4; Stipulation of Facts attachment T). On July 20, 2006, the bar advised respondent that the Standing Committee on Advertising had determined his use of the trade name "Legal Experts" violated rule 4-7.2(c)(3) because it failed to include his area of certification and because a law firm could not be board certified (ROR A4; Stipulation of Facts attachment U). It also violated rules 4-7.10(b) and 4-7.2(b)(1) because respondent was a sole practitioner and the name implied otherwise (ROR A4; Stipulation of Facts attachment U). The bar advised respondent, for the second time, that his continued use of this trade name could subject him to disciplinary action and of his right to appeal the committee's determination to the Board of Governors within 30 days (ROR A4; Stipulation of Facts attachment U). Respondent did not seek an appeal to the Board of Governors (ROR A4). Respondent continued using the trade name and the bar brought a second disciplinary action against him in 2006 resulting in the Ninth Judicial Circuit Grievance Committee "D"

issuing a Notice of No Probable Cause and Letter of Advice to Accused on December 27, 2006 (ROR A4; Stipulation of Facts attachment V). The grievance committee advised respondent that he needed to comply with all future opinions and directions from the Standing Committee on Advertising regarding his advertisements and trade names without delay (ROR A4; Stipulation of Facts attachment V). The committee further advised him that his failure to do so could result in additional disciplinary proceedings against him and that he should not view this advisory letter by the grievance committee as an exoneration, but rather, he should consider it as a "forewarning that all of The Florida Bar rules and regulations relating to advertisements must be followed by all Florida Bar members" (ROR A4; Stipulation of Facts attachment V). The grievance committee made it clear to respondent that its recommendation of a no probable cause finding in the matter should not be construed as being a finding that his advertisement complied with the rules (ROR A4; Stipulation of Facts attachment V).

Respondent's use of the trade name "Legal Expert" and/or "Legal Experts" continued unabated through respondent's filing of the Petition for Review in this matter (ROR A5; Stipulation of Facts attachments B, C, D, E, F, G H, I and J).

After these proceedings were commenced, respondent filed his telephone book advertisement for the third time with the bar on March 27, 2008, using the trade name

"Legal Experts, P. L." and the web site address of www.legalexpert.cc (ROR A5; Stipulation of Facts attachment XYZ). On April 10, 2008, the bar again advised respondent that a law firm could not be board certified, thus his trade name and web site address violated rule 4-7.2(c)(6), and that his trade name violated rule 4-7.9(b) and 4-7.2(c)(1) for being misleading because respondent practiced law as a sole practitioner and the use of the word "experts" implied otherwise (ROR A5). After April 30, 2008, respondent changed his firm name to "Legal Expert, L. L. C.," although not all of the venues bearing his prior law firm name, such as his web site, were changed (ROR A5; Stipulation of Facts). Most of the venues containing the old name continued to exist only due to respondent's oversight or his inability to effect an immediate change (ROR A5; Stipulation of Facts). Regardless of whether respondent used the word "expert" or "experts" in his trade name and advertisement, he was advised by the bar in 2005 that it considered the use of the word as part of respondent's firm name or trade name to be a violation of the rules (ROR A5; Stipulation of Facts). Therefore, respondent's trade name/law firm name has remained essentially unchanged since 2005 and he has refused to refrain from using it despite having been advised on no less than 7 occasions by the bar that its use violated the Rules Regulating The Florida Bar (ROR A6). He has continued using the trade name on his office sign, letterhead, envelopes, pleadings, website, telephone book

listing, and telephone book advertisements (ROR A6; Stipulation of Facts). Respondent is a sole practitioner board certified only in the area of civil trial and thus is not an "expert" in every field of law (ROR A6; Stipulation of Facts). He had two opportunities to seek an appeal of the Standing Committee on Advertising's opinion and never chose to do so. Respondent is aware that a Florida law firm cannot be board certified or described as expert because only an individual member of the bar may be board certified and only an individual member of the bar, who is board certified, may use the term "expert" or "specialist" in that person's area of certification (ROR A7). Respondent's occasional inclusion of his area of certification does not cure the inherent defect in his trade name (ROR A 6). Respondent's intent is for the general public to view him as being an expert in the law in general as compared to other attorneys (ROR A6).

SUMMARY OF ARGUMENT

The issue of whether respondent's trade name, Legal Experts and/or Legal Expert, is deceptive speaks for itself. Respondent is a sole practitioner. Legal Experts clearly indicates otherwise and therefore is misleading. Furthermore, respondent is not an "expert" in all areas of the law as the name implies. Inclusion of his area of certification does not cure the inherent defect present in the name itself. The trade name violates the Rules Regulating The Florida Bar regardless of whether it is plural or singular and regardless of whether respondent includes his area of certification below the name. The bar advised respondent of the problems with his firm name no less than 7 times between April 2005 and the probable cause finding in this case. Respondent chose to persist in the use of the name.

Respondent's arguments contained in issues II, III and V were considered and rejected by the referee. Respondent has not shown the referee abused his discretion in his rulings on respondent's motions wherein these issues were raised. The bar did not engage in "forum shopping" by having the present matter considered by the Second Judicial Circuit Grievance Committee "S." Respondent's misconduct continued over a period of years and thus each new incident was reviewed by a different grievance

committee. No rule requires consistency in the grievance committee assignments, as found by the referee.

Respondent’s argument, raised for the first time in this appeal, that the referee was without authority to consider this matter is without merit. The referee was appointed by the Acting Chief Judge of the Nineteenth Judicial Circuit.

The bar’s costs were accurate and authorized by R. Regulating Fla. Bar 3-7.6 as the referee found.

ARGUMENT

ISSUE I

THE REFEREE'S FINDINGS OF FACT AND EVIDENCE SUPPORT THE FINDING THAT RESPONDENT'S TRADE NAME VIOLATED THE RULES REGULATING THE FLORIDA BAR

In his second amended Initial Brief, respondent failed to show that any of the referee's factual findings were erroneous. Virtually all of the referee's factual findings were based on the Stipulation of Facts entered into by respondent and the bar. Although respondent disagreed with the findings of the bar and of the referee, he failed to present any authority to support his position.

The party contending that a referee's findings of fact and conclusions of guilt are erroneous carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the conclusions. *The Florida Bar v. Nicnick*, 963 So. 2d 219, 222 (Fla. 2007). This Court's review of a referee's factual findings is limited to determining whether they are supported by competent, substantial evidence. *The Florida Bar v. Varner*, 992 So. 2d 224, 228 (Fla. 2008). In this matter, the referee's factual findings were based on the parties' Stipulation of Facts. The facts in this case are not complex. Respondent used the trade name "Legal Experts" and/or "Legal Expert" continuously from 2005 until he filed the Petition for Review in this matter (ROR A5, A6).

The bar has advised respondent on no less than 7 occasions that his trade name, whether in the plural or the singular form, is a violation of the Rules Regulating The Florida Bar but respondent refused to refrain from using it because he did not agree with the bar's position (ROR A6). Nevertheless, respondent chose not to appeal the Standing Committee on Advertising's position to the Board of Governors of The Florida Bar and, instead, persisted in using the improper trade name from 2005 through the date he filed his Petition for Review in this case. The bar advised respondent as to the problems with his trade name on May 2, 2005, July 1, 2005, October 27, 2005, May 15, 2006, July 20, 2006, December 27, 2006, and April 10, 2008 (Stipulation of Facts).

The real issue is whether the trade name "Legal Expert" or "Legal Experts" violates the Rules Regulating The Florida Bar. The referee determined that issue finding the use of the trade name Legal Expert/Legal Experts was a violation. The referee's factual findings are supported by the evidence. Furthermore, his legal conclusion that respondent's trade name "Legal Experts" is misleading and thus impermissible is supported by the fact that respondent has been a sole practitioner since 2005 (ROR A6; Stipulation of Facts; T p. 26) and it is merely common sense that a reasonable person would assume from the plural form of the name that respondent practices law with at least one other attorney.

Although respondent testified that he created the name “Legal Experts” at some point prior to his partner retiring in late 2004, he did not actually begin using the name, in its plural form, until after his partner’s retirement (T pp. 26, 54). He did not change the name to the singular version until after April 30, 2008, and even then not all his advertising venues, such as his website, reflected the change (Stipulation of Facts).

The referee’s legal conclusion that the trade name “Legal Experts” and/or “Legal Expert” was misleading because it implied that all attorneys in the firm were “experts” in all legal fields is supported by the evidence. The trade name is a violation of the Rules Regulating The Florida Bar because it is overly broad. Respondent’s occasional inclusion of his particular area of certification does not cure the defect inherently present in the trade name itself. The name clearly intends to convey the message to the general public that all attorneys in this law firm are experts in the law in general as compared to other lawyers (ROR A6). Additionally, the Rules Regulating The Florida Bar are quite clear and unambiguous that a law firm cannot be board certified or described as expert.

There is no requirement that a member of the public complain in order for the bar to commence disciplinary proceedings against an attorney. Pursuant to R. Regulating Fla. Bar 3-7.3(c), the bar is permitted to initiate complaints, as was done

here. There is no requirement that testimony be presented from a third party or a sworn complaining witness. In *The Florida Bar v. Gold*, 937 So. 2d 652 (Fla. 2006), the bar initiated the disciplinary case based on an anonymous grievance regarding a direct mail solicitation letter. There is no need to present testimony from members of the general public when a law firm name that clearly indicates the presence of more than one attorney, when in fact the firm is a sole practice, is inherently misleading and thus fully satisfies the requirements of *The Florida Bar v. Fetterman*, 439 So. 2d 835 (Fla. 1983).

The purpose of the rules contained in section 4-7 of the Rules Regulating The Florida Bar is to "permit lawyer advertisements that provide objective information about the cost of legal services, the experience and qualifications of the lawyer and law firm, and the types of cases the lawyer handles." *The Florida Bar v. Pape*, 918 So. 2d 240, 243 (Fla. 2005). Mr. Pape's television advertisement with its logo of a pit bulldog and the telephone number of 1-800-PIT-BULL was found to be, among other things, misleading and manipulative in violation of the rules because it was suggestive of the results he could achieve and implied that he engaged in a combative style of advocacy. The court found the suggestion was inherently deceptive because there was no way to measure whether Mr. Pape and his partner in fact conducted themselves like pit bulldogs and thus there was no way to ascertain whether the logo and phone

number conveyed accurate information. Thus, in order for an advertisement not to be misleading, it must be possible to verify its truthfulness and accuracy. This Court interpreted the prohibition against advertising statements that are false or misleading to mean those advertisements that suggest behavior, conduct, or tactics that are contrary to the Rules of Professional Conduct. At p. 246. It is not a violation of the First Amendment to restrict advertising content that is inherently misleading. *Pape*, 918 So. 2d at 248, quoting *In re R. M. J.*, 455 U. S. 191 (1982).

In *The Florida Bar v. Elster*, 770 So. 2d 1184 (Fla. 2000), this Court found that a firm name or advertisement violated the rules if it was inherently or operatively misleading, even absent any showing that the public was misled. This Court did not define what constituted inherently or operatively misleading. Instead, it stated that it depended upon the particular facts and circumstances of each case. In Mr. Elster's situation, his nonlawyer employee's business card read "Immigration Verification Associates." It was deemed to be inherently misleading because Mr. Elster admitted he had never employed any associate attorneys. Although not specifically stated by this Court, it can be assumed his law firm name was found to be misleading because it implied Mr. Elster operated a law firm that employed more than one attorney. In other words, Mr. Elster, like respondent, wanted to give the false impression he was something more than a sole practitioner.

This Court found that a statement in an attorney's telephone book advertisement, "All Federal & State Courts in 50 States," was misleading because it implied the attorney was admitted to practice law in all state and federal courts, which in fact the attorney admitted was not true. *The Florida Bar v. Lange*, 711 So. 2d 518 (Fla. 1998). This admission, and not Mr. Lange's interpretation of the commerce or interstate travel clauses of the federal constitution, was what determined the resolution of the issue presented. This Court stressed the importance of the public being able to rely on and have confidence in the truthfulness of attorney advertising and found that false and deceptive ads had great potential for public harm. Additionally, Mr. Lange was advised twice by the standing committee on advertising to change this ad but he refused, resulting in the bar initiating disciplinary proceedings against him. Mr. Lange's case is quite similar to respondent's in that respondent also has been repeatedly advised by the bar that his trade name does not comply with the rules and respondent, like Mr. Lange, refused to change it.

ISSUE II

THERE IS NO CREDIBLE EVIDENCE OF DUE PROCESS VIOLATIONS OR SPOILATION OF EVIDENCE REQUIRING DISMISSAL

The referee considered and rejected respondent's arguments that due process violations or spoliation of evidence required dismissal of the instant matter. Respondent continues to argue that the two no probable cause findings with letters of advice from the Ninth Judicial Circuit Grievance Committee "D" issued to him regarding issues raised in the Bar's Complaint exonerated him from any misconduct and, therefore, the bar violated his due process rights by bringing this present disciplinary proceeding against him. Respondent made this argument first in his Motion to Dismiss, Answer and Defenses that the referee denied by order dated November 14, 2008. Respondent then re-argued the same point in his Motion for Summary Judgement [sic] and Motion for Sanctions. The referee denied this argument, for the second time, by order dated January 30, 2009. Respondent has failed to show the referee abused his discretion in denying these motions.

Respondent still appears to misapprehend the nature and purpose of these letters of advice from the grievance committee. On neither occasion did the grievance committee condone respondent's advertisement and trade name. In fact, the grievance committee made it clear that it condemned respondent's conduct and directed him to

comply with the Rules Regulating The Florida Bar in the future and to seek advice from the bar's Standing Committee on Advertising regarding his trade name (Stipulation of Facts attachments P, V; ROR A3-A4). In fact, the October 27, 2005, letter of advice specifically stated that the grievance committee's finding of no probable cause to file further proceedings at that time "[did] not indicate that it [condoned respondent's] conduct in this matter" and that it "strongly [recommended] that [respondent] modify [his] current trade name to accurately reflect [his] area of certification as a civil trial attorney to help avoid creating unjustified expectations about the results [he could] achieve or otherwise [mislead] the public about [his] legal expertise." (Stipulation of Facts attachment P; ROR A3). The December 27, 2006, letter of advice specifically advised respondent to comply with all future "opinions and directions from the Standing Committee on Advertising" regarding his advertisement/trade name "without delay." (Stipulation of Facts attachment V; ROR A4). The committee warned respondent that his failure to comply could result in further charges and formal disciplinary proceedings against him and that he should not view this letter from the committee as an "exoneration, but rather should be considered as forewarning that all of The Florida Bar rules and regulations relating to advertisements must be followed by all Florida Bar members."

Ironically, respondent already had obtained an opinion from the Standing Committee on Advertising on July 20, 2006, informing him that his trade name and advertisements violated the Rules Regulating The Florida Bar (Stipulation of Facts attachment U). This was the second such opinion he had received advising him that his trade name did not comply with the rules, the first having been issued on July 1, 2005 (Stipulation of Facts attachment O). On both occasions, respondent was advised that he could appeal the decision of the Standing Committee on Advertising to The Florida Bar's Board of Governors but he did not do so (Stipulation of Facts attachments O, U; ROR A2, A4). Respondent continued using the same trade name after receiving his second letter of advice that put him on notice that his failure to follow the recommendations of the Standing Committee on Advertising concerning the necessary changes could result in further disciplinary proceedings being brought against him. Respondent knew his trade name did not comply with the Rules Regulating The Florida Bar and that he could be subjected to further disciplinary proceedings but he chose to ignore the grievance committee's warning. Respondent testified at the final hearing that he did not change his trade name to reflect the singular form of "Expert" after his partner retired because it was too expensive to change his signage and letterhead, so he "just didn't do it" (T p. 54).

Respondent's argument that the bar "improperly" destroyed evidence that would be of assistance to his defense is unproven and without merit. Respondent raised this issue in his Motion for Summary Judgement [sic] and Motion for Sanctions. The referee specifically found in his order denying this motion that respondent "failed to show that the bar 'improperly' destroyed evidence that would be of assistance to his defense" (Order on Respondent's Motion for Summary Judgment and Motion for Sanctions.) Respondent has failed to show the referee abused his discretion in denying respondent's motion.

The bar's longstanding statewide standard office policy is to destroy grievance files after the passage of one year from the administrative closure date where no formal disciplinary proceedings were filed. Likewise, respondent misapprehends what constitutes a formal disciplinary proceeding. Formal disciplinary proceedings that result in an adjudication are not commenced until the filing of a formal Complaint with this Court. These types of files, regardless of whether the bar prevails, are not destroyed. The types of files that are destroyed are ones where no formal disciplinary proceedings were taken against an attorney. There is no adjudication on the merits, therefore these files have no precedential or evidentiary value and most certainly would not be binding on this Court. Respondent misapprehends what constitutes a "prosecution" in a bar disciplinary matter. Grievance investiagtions that are closed

without the bar filing a Complaint or a Complaint of Minor Misconduct have not been "prosecuted" resulting in an "exoneration" of the accused attorney. These are not files where the bar has "lost." Such matters are at an investigatory stage. Cases that are pending before the grievance committee are investigatory in nature, not adversarial, and the accused attorney has only limited rights. *The Florida Bar v. Swickle*, 589 So. 2d 901, 904 (Fla. 1991). The committee does not render a determining judgment that probable cause exists. Instead, its vote is merely a recommendation to the Board of Governors of The Florida Bar. *The Florida Bar v. Wagner*, 175 So. 2d 33, 34 (Fla. 1965).

The types of cases that would be of benefit to respondent are ones where the bar unsuccessfully prosecuted an attorney for violating the rules alleged. Any such case law that exists is available to respondent through legal research because such cases result in the issuance of an opinion by this Court. Although the bar is under no obligation to conduct respondent's legal research for him, the bar is not aware of any cases in Florida where an attorney was found not guilty of violating the Rules Regulating The Florida Bar with a factual situation similar to respondent's. The case to which respondent refers in his second amended Initial Brief concerning attorney S. D. M. was not a case that was prosecuted by the bar. The case was referred to the Second Judicial Circuit Grievance Committee "S," the same committee that

considered this present matter. In S. D. M.'s case, based upon its particular facts, the grievance committee voted to recommend diversion to the Advertising Workshop. A diversion is not a disciplinary sanction and it is not a permanent part of an attorney's disciplinary history. R. Regulating Fla. Bar 3-5.3(i.).

As the referee found, the bar complied with respondent's discovery requests to the best of its abilities. The bar provided respondent with those documents that were not destroyed as scheduled due to a pending federal suit. The referee denied respondent's motion to dismiss and his motion for summary judgment based on this same argument. The referee has discretion to grant or deny motions and his or her ruling will not be disturbed absent a clear showing there was an abuse of that discretion. *The Florida Bar v. Roth*, 693 So. 2d 969, 972 (Fla. 1997); *The Florida Bar v. Lusskin*, 661 So. 2d 1211 (Fla. 1995). Respondent has failed to meet this burden.

ISSUE III

THE BAR'S REFERRAL OF THIS MATTER AT THE INITIAL INVESTIGATIVE STAGE TO THE SECOND JUDICIAL CIRCUIT GRIEVANCE COMMITTEE "S" WAS PROPER

The referee considered and rejected respondent's argument that the bar's referral of this matter at the initial investigative stage to the Second Judicial Circuit Grievance Committee "S" was improper. There is no requirement in the Rules Regulating The Florida Bar that a particular grievance committee consider an accused attorney's case. R. Regulating Fla. Bar 3-4.3. The grievance committee's function is analogous to that of a grand jury. *Wagner*, 175 So. 2d at 35.

The bar did not engage in "forum shopping." Respondent's misconduct occurred over a period of years, commencing in 2005 and continuing through the filing of the Petition for Review in this case. As a result, his various advertisements and trade names were necessarily considered by more than one grievance committee. The Rules Regulating The Florida Bar do not require consistency in grievance committee assignments as this would be impossible given that the make up of the members of the grievance committees regularly change due to term expirations. Furthermore, grievance committees do not adjudicate cases and thus cannot be considered as forums. Grievance committees act in a manner that is similar to that of grand juries and vote to make recommendations. Those recommendations are subject

to final review by the Board of Governors of The Florida Bar. R. Regulating Fla. Bar 3-7.5; *Wagner*, 175 So. 2d at 34-35. The Rules Regulating The Florida Bar do not require cases to be referred by the bar to particular grievance committees nor are accused attorneys afforded a right to choose what committee considers their cases.

ISSUE IV

THE REFEREE HAD PROPER AUTHORITY AND JURISDICTION IN THIS MATTER

Respondent raises the issue of the referee's authority and jurisdiction for the first time on appeal. He did not challenge the referee's authority at the trial level.

Pursuant to R. Regulating Fla. Bar 3-7.6(a), "[t]he chief justice shall have the power to appoint referees to try disciplinary cases and to delegate to a chief judge of a judicial circuit the power to appoint referees for duty in the chief judge's circuit. Such appointees shall ordinarily be active county or circuit judges, but the chief justice may appoint retired judges." In this case, on July 7, 2008, the Chief Justice delegated to the Chief Judge of the Nineteenth Judicial Circuit, the Honorable William L. Roby, the authority to appoint a referee in this matter within 14 days of the date of the order. Because respondent did not raise this issue at trial level, there is no evidence as to the reason Judge Roby was not available to appoint a referee within the stated time frame. The Honorable Elizabeth A. Metzger signed the order appointing the referee on July 28, 2008, in her stated capacity as Acting Chief Judge. Respondent has cited no authority or facts to support his argument that the Acting Chief Judge was without authority to appoint a referee in this matter.

In *The Florida Bar v. Sibley*, 995 So. 2d 346 (Fla. 2008), the accused attorney argued, without success, that the referee and all but one of the justices were without authority to act because they had not executed loyalty oaths to serve as constitutional officers with their respective courts. This Court found that, even if the referee or justices inadvertently had failed to comply with the technical requirements of the applicable statute, the *de facto* doctrine would cure any defect. *De facto* officers exercise the functions of office under color of title, in full view of the public, and in such manner and under circumstances of reputation, or acquiescence that would suggest no ineligibility. A *de facto* officer exercising the functions of office in consequence of a known and valid appointment, as in the case of the acting Chief Judge in respondent's case, may serve if the only defect in title is a failure to comply with some requirement or condition such as executing an oath or doing so in accordance with prescribed form. There is no evidence of any such defect in the acting Chief Judge's appointment, but if there were, the *de facto* doctrine would act to cure it. Respondent's argument is totally devoid of merit.

ISSUE V

THE REFEREE DID NOT ABUSE HIS DISCRETION IN TAXING COSTS AGAINST RESPONDENT

The referee in bar disciplinary proceedings has the discretion to award costs and, absent a showing of an abuse of that discretion, the referee's award shall not be reversed. *The Florida Bar v. Dove*, 985 So. 2d 1001, 1011 (Fla. 2008); R. Regulating Fla. Bar 3-7.2(q)(2). Rule 3-7.6(q)(1) of the Rules Regulating The Florida Bar sets forth the allowable taxable costs in bar disciplinary proceedings. Rule 3-7.6(q)(3) provides that the referee may assess the bar's costs against a respondent when the bar is successful, in whole or in part, unless it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated. The bar submitted its Affidavit of Costs on February 17, 2009, and respondent filed his objection to the costs on February 23, 2009. The referee entered his order denying respondent's objection on March 2, 2009, finding that the bar's affidavit complied with R. Regulating Fla. Bar 3-7.6(q)(1), that there was no evidence that the bar's costs were excessive, unnecessary, or improperly authenticated, and that the Statewide Uniform Guidelines for Taxation of Costs in Civil Actions did not apply.

The assessment of costs in bar disciplinary proceedings against an attorney who has been found guilty of violating the Rules Regulating The Florida Bar, as opposed

to requiring the general membership of the bar to bear the cost burden, is a policy decision. *The Florida Bar v. Martinez-Genova*, 959 So. 2d 241 (Fla. 2007). It is only fair to require the member who violated the rules to bear the cost burden rather than impose it on the members who have not engaged in misconduct. *Martinez-Genova*, 959 So. 2d at 249. The final discretionary authority, however, rests with this Court. *The Florida Bar v. Bosse*, 609 So. 2d 1320, 1322 (Fla. 1992).

There is no evidence in the record that the bar's costs in this matter were excessive, unnecessary or improperly authenticated. *The Florida Bar v. Kassier*, 730 So. 2d 1273 (Fla. 1998). There is no evidence that the sole rule the referee recommended respondent be found not guilty of violating, out of the five rules charged, caused any additional costs. The rule was directly related to the other rules and facts charged concerning respondent's use of an improper trade name and improper advertising. Even where an attorney is found not guilty of some charges of misconduct, the costs associated with the bar's investigation are fully taxable where the charge is encompassed within the investigation of the misconduct and causes no additional expenses. *The Florida Bar v. Gold*, 526 So. 2d 51 (Fla. 1988). Furthermore, the costs in this matter were minimal. The court reporter costs were $650.50, bar counsel travel costs $172.46, investigator costs $92.50, and copy costs $75.00. The administrative cost of $1,250.00 is the standard amount assessed in all

bar disciplinary proceedings for one case. The bar waived costs in the amount of $1,250.00 that could have been charged in the second case.

In *The Florida Bar v. Carson*, 737 So. 2d 1069 (Fla. 1999), an attorney argued that the bar's costs were excessive and were not properly authenticated. Specifically, he disputed the grievance committee level costs, because other grievance matters were considered by the grievance committee the same day as his case, the bar counsel travel costs and transcript costs at referee level, and the copy costs. This Court found his arguments to be without merit because all of the costs were permitted as taxable costs by the Rules Regulating The Florida Bar, bar counsel signed the affidavit of costs under oath and there was no evidence in the record to show the costs were excessive. Likewise, in respondent's case all costs taxed by the referee were permissible under the Rules Regulating The Florida Bar, bar counsel signed an affidavit of costs under oath, and there is no evidence in the record to support respondent's argument that the costs taxed were excessive or improperly authenticated.

Respondent has not made a showing that any of the costs set forth in the bar's Affidavit of Costs were unreasonable. All of the enumerated costs were those permitted by the Rules Regulating The Florida Bar and were minimal in nature. The fact that the referee recommended respondent be found not guilty of one rule violation had no bearing on the costs the bar incurred in investigating and prosecuting this

simple matter. Respondent's argument that he should not be taxed all of the disciplinary costs in this matter is without merit.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of an admonishment for minor misconduct, completion of the Advertising Workshop, one year of nonreporting probation requiring submission of all advertisements to the bar for approval prior to dissemination and payment of the bar's costs and enter an order approving same.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
651 East Jefferson Street,
Tallahassee, Florida 32399-2300
(850) 561-5600
ATTORNEY NO. 123390

KENNETH LAWRENCE MARVIN
Staff Counsel
The Florida Bar
651 East Jefferson Street,
Tallahassee, Florida 32399-2300
(850) 561-5600
ATTORNEY NO. 200999

AND

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314

(407) 425-5424
ATTORNEY NO. 381586

By:

____
Jan K. Wichrowski
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to the Clerk of the Court, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent, Gary Elvin Doane, 738 West Colonial Drive, Orlando, Florida 25460; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, this _____________________ day of July, 2009.

Respectfully submitted,

____
Jan K. Wichrowski
Bar Counsel

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

Undersigned counsel does hereby certify that the Answer Brief is submitted in 14 point proportionately spaced Times New Roman font, and that the brief has been filed by e-mail in accord with the Court's order of October 1, 2004. Undersigned counsel does hereby further certify that the electronically filed version of this brief has been scanned and found to be free of viruses.

____
Jan K. Wichrowski
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

SC Case No. SC08-1278

v.

TFB File Nos. 2008-90,049(02S);
2008-90,094(02S)

GARY ELVIN DOANE,

Respondent.
____/

APPENDIX

Jan K. Wichrowski, Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida 32804-6314
(407) 425-4235
Florida Bar No. 381586

Kenneth Lawrence Marvin, Staff Counsel
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 200999

John F. Harkness, Jr., Executive Director
The Florida Bar
651 E. Jefferson Street
Tallahassee, Florida 32399-2300
(850) 561-5600
Florida Bar No. 123390

INDEX

PAGE

Report of Referee A1