The Supreme Court of Florida

(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JEREMY W. ALTERS,

Respondent.
_____/

Case No.: SC14-100

TFB File No.: 2012-70,119 (11P)

RESPONDENT, JEREMY ALTERS',
SUPPLEMENTAL ANSWER BRIEF

ANDREW S. BERMAN
Florida Bar No. 370932
JAMIE L. WEBNER
Florida Bar No. 105634
Young, Berman, Karpf & Gonzalez, P.A.
1001Brickell Bay Drive, Suite 1704
Miami, FL 33131
(305) 945-1851 (phone)
(305) 377-2291 (direct)
(786) 219-1980 (telefax)
Email: aberman@ybkglaw.com
Jwebner@ybkglaw.com
Counsel for Respondent

TABLE OF CONTENTS

TABLE OF CITATIONS

OTHER SOURCES:

SYMBOLS AND REFERENCES

For convenience, references to the record is generally consistent with the Bar's approach. Reference to the Report of Referee is by the symbol "(ROR__)," to the trial transcript by "(T.__)," to the Appendix to this brief by "(A._)," to transcripts other than that of the trial by "(T. [date] __)," to the Bar's brief by "(Br._)," and to the pleadings and motions by "(Index _)." As all exhibits are differentiated by number (Bar) versus letter (Alters), they will simply be referenced by their number or letter.

Reference to the cost recommendations shall be identified as either the recommendation on the Bar's motion or Alters'.

All emphasis is ours unless otherwise indicated.

STATEMENT OF THE CASE

Alters takes no issue with the Bar's statement of the case, but for a pertinent omission. The Bar failed to file a written objection to Alters' motion to tax costs at all, let alone within 15 days of service as required. *See* Rule Reg. Fla. Bar 3- 7.6(q)(5).

STATEMENT OF THE FACTS

The Bar did not provide a separate statement of facts, but incorporated by reference those from its principal brief, which were largely **rejected** by the Referee. Alters agrees that the underlying facts, as found by the Referee, are highly relevant here and incorporates by reference the statement from his principal brief. He nevertheless offers this limited statement to present the Referee's cost determination in context.

Prior to the Bar's December 2011 petition for emergency suspension, Alters' counsel supplied it with several detailed letters identifying all of the improper transfers from the ABBRC trust account. (Ex. EEE.) It is undisputed that the trust account was fully replenished and in order at the time the Bar petitioned for Alters' emergency suspension in late 2011. (A.74-75 ¶¶5-8; Ex.53 pp. 23, 158.) The

transfers and amounts have never again been an issue.[1] There was thus no need for the Bar to expend further time, with attendant costs, on that issue after 2011.

In her 2012 Report and Recommendation, the Referee found that the Bar's first auditor, Carlos Ruga, "had no basis in fact to swear under oath [in support of the emergency petition for suspension] that Alters made or authorized the transfers from trust to operating, and he admitted that fact during his testimony." (A.79.) After this criticism, the Bar replaced Ruga with Thomas Duarte. (T. 2042-3.)

Duarte (who sat at counsel table during the entire trial), was commissioned to, among other things, retrace Ruga's work because of the Referee's stinging criticism. (T.2042-43.) Claiming in his cost hearing affidavit that he was allocating the cost of most of his substantial work one-half to Kimberly Boldt and one-half to Alters, (TFB Ex. 1 in cost hearing), Duarte spent most of his time trying to prove who had authorized the improper transfers.

Duarte averred in paragraph 6 of his affidavit that "the 2,054.75 hours I spent working on both the Alters and Boldt files ... have been allocated equally to Alters

---

[1] In fact, some of the Bar's composite trial exhibits included charts and summaries that both sides introduced at the January 2012 hearing to lift the emergency suspension. For example, Bar Exhibit 38 includes Alters' exhibit 6 from the January 2012 hearing; Bar Exhibits 39 and 41 include Alters' exhibit 7 and Bar Exhibits 36 and 39 include its exhibits 12, 14, 17,19, 21, 23, 25 and 29 from January 2012. Many of the reused documents contained the undisputed exact shortages at various points in time.

and Boldt." *Id.* Not true. The Bar did not allocate half of the cost of those hours to Boldt, but only assessed her with the standard fee of $1,250 (plus $750 for the ethics course). Yet, the Bar seeks to assess Alters with $114,681.25 of in-house audit costs, even though the Referee found that all were associated with claims it failed to prove.

The Referee found that the Bar did not conduct a fair and impartial investigation, but tried a case it knew it could not prove. To be sure, Bar counsel promised in his March 3, 2015 opening statement that the Bar would prove the following:

> Now the evidence will show that on February 9th [2010] Respondent claims that he was first advised that there had been a number of improper trust account transfers that resulted in a massive shortage in the firm's trust account. However, the evidence will show that Respondent was responsible for authorizing each and every one of the 20 improper transfers from January 12, 2010, through February 9, 2010.

(Tr. Vol. I, p.20.)

The Referee held: "on the issue of whether Respondent actually authorized the improper transfers, this Referee finds there was no justiciable issue of law or fact from the beginning." (Recom. on Alters' Motion to Tax Costs, p. 4.) The record reflects the Bar was fully aware of the following evidence when that opening statement was given, and before:

A. In September 2009, Kimberly Boldt sent a firm-wide blast email on behalf of Alters announcing that she was named managing partner of the firm and in charge of all its finances. (Ex.3.);

B. Bruce Rogow had testified at the hearing to lift Alters' suspension in January 2012 that Kimberly Boldt had confessed that she, not Alters, authorized the 20 transfers in January and February 2010. (Ex.53 pp. 370-83); Rogow also testified it appeared that Alters had just found out about them on or about February 9, 2010, when Boldt confessed to both of them. (Ex. 53 p.375);

C. Both computer experts found several email chains on Rogow's old computer showing that Boldt transmitted her draft confession letter and revisions to Rogow and Alters, thus at once proving Boldt's denial that she drafted it untruthful and exonerating Alters. (A.64 ¶9).[2]

D. The computer forensic experts for both sides agreed Boldt authored the initial draft of the confession letter and the last revision (according to the metadata associated with the document found on Rogow's computer). (A.64 ¶9.);

E. The Bar's auditor, Duarte, himself concluded in October

---

[2] To this day, the Bar's continued reliance on an exhibit introduced by Alters at the hearing to lift his emergency suspension, where a draft confession letter was associated with the wrong transmittal email (referred to as Rex 6), is perplexing at best, since the Referee expressly rejected the Bar's position on the issue as a matter of fact. The Referee found that the substance of that draft - as it pertained to the material issue that it was Boldt who mistakenly authorized the improper transfers - was consistent with all other drafts. There were several drafts ultimately found and each contained the same admission that Boldt, not Alters, authorized all of those 20 transfers. (A.63-4,¶¶8-9.) Hence, the Referee explicitly found that Alters never intended to mislead anyone.

2012 that Boldt drafted the confession letter (admitting she authorized the improper transfers from trust). (T.2546-7);

F. At trial, Duarte reversed himself and testified that he then did not know who authorized any improper trust account transfers, despite the confession letter. (T.2349.);

G. Three polygraph test results determined that Alters was telling the truth to the highest degree, including two tests consisting of questions that Duarte posited should be asked of Alters, but weren't in the initial test. (Ex. JJJ.); and

H. The Referee had found in her January 2012 report that Boldt was not a credible witness with respect to material issues surrounding who authorized those January and February 2010 transfers. (A.84-86.) Yet, the Bar believed everything she said, even though there were many inconsistencies in her stories and with the physical evidence.

The Referee further found that Alters was "the prevailing party on the substantial issues in this case" and that "the Bar's costs were unnecessary and excessive in connection with the rules violations found to have occurred." (Recom. on Bar Cost Motion, p.3.) She noted that this was not a "garden variety" case and the Bar proved only that Alters failed to take sufficient remedial action following his discovery of the defalcations, which violated two rules. But the Referee also found that Alters had taken responsibility for that from the beginning. Thus, at the end of four weeks of trial, the only matter proven by the Bar was one that was not contested. All of the Bar's costs were incurred in connection with its failed prosecution of other

claims.

The Referee also noted the Bar's failure to itemize its auditor's time, making it impossible to allocate the costs between checking Ruga's prior work and its investigation of "whodunit." (Recom. on Bar Costs p. 14, n.4.) Thus, even if the Referee were inclined to award some costs, it was impossible to determine which portion might be taxable. As such, "[t]he Bar must bear the consequences of that failure of proof." (*Id.*)

The Bar also lost on all computer related issues. A large amount of its costs (about one-third) were for its computer expert, who himself undermined its effort to prove that Alters authorized the January and February 2010 transfers by confirming that Boldt drafted the confession letter (through metadata) and authenticating the email chains. On the question of whether the bookkeeper, Salpeter, tampered with text messages in an effort to frame Alters, the Referee found that Yalkin Demirkaya, Alters' expert, conclusively established that he did, as part of an elaborate fraud to frame Alters.[3] (A.62-3.) Importantly, Duarte himself identified anomalies with the

---

[3] A January 2012 email chain from Salpeter to Boldt to her assistant shows Boldt asking for a sample of what a text message downloaded using the software Salpeter used looked like, because, "I would like to be able to show that what Marc [Salpeter] provided to the Bar looks the same," thus implicating her in at least being aware of the text message scheme. (Ex. CC, A.9, 10, 118.) Why would she need to compare Salpeter's format to the format generated by the software if there was no tampering?

modify times of the text messages, (T.2880-85) (which was the evidence that helped prove them to be fake), thereby putting the Bar on notice much earlier in its prosecution that the authenticity of the text messages was suspect. The Referee therefore found that the Bar should not be awarded exorbitant costs associated with matters on which it lost.

In recommending that Alters recover his expert costs against the Bar, the Referee stated:

> Why the Bar chose to side with [Boldt] and ignore the evidence remains a mystery, but it must pay the cost of that bad choice because there were no justiciable issues of law or fact; simply there was no evidence that Respondent authorized or that he knew about the improper trust account transfers when they occurred.

(Recom. Alters' Costs at 5.)

The Referee equated the required conditions to its cost award to Alters under Rule 3-7.6(q)(4) to the requirements of Florida Statutes Section 57.105 (2017) (requiring award of attorneys' fees against party for pursuing frivolous claim or defense), noting that even if the Bar began its prosecution in good faith, it was required to reevaluate its case as additional facts came to light which had a bearing on the viability of a particular claim.

SUMMARY OF THE ARGUMENT

Both case law and the applicable rules make cost recommendations to the Bar and to a respondent (as to the latter, if a predicate of frivolity is established) a matter of referee discretion. The Referee did not abuse her discretion with respect to either cost recommendation.

The Bar's Motion

The Referee recommended a nominal administrative award of $1,250 for myriad reasons, all of which were grounded in fact and law. Aside from court reporter costs, the Bar lost every issue to which its costs are attributable. In addition, the Referee found the Bar's core claim to be meritless and frivolous.

No hard and fast rules apply to cost recommendations. A referee should be able to consider that an attorney has been acquitted on some charges or that the incurred costs are unreasonable or unnecessary. Here, the Bar succeeded on a claim that the Referee found was never in dispute (Alters should have done more to avoid a repeat of prior mistakes), but other than court reporter fees, it incurred no costs on that issue. Moreover, a trial of the issue on which the Bar succeeded would not have taken four weeks and this Court in *Florida Bar v. Davis,* 419 So. 2d 325 (Fla. 1982), held that a referee's award of less than all court reporter costs was not an abuse of discretion. Given the unique facts of this aberrational case, even court reporter costs

were properly denied as excessive and unnecessary.

All of the Bar's arguments challenging the Referee's discretion are without merit. It argues that it is entitled to costs if it prevails on any claim, but Rules 3-7.6(q)(2) and (3) state otherwise. It argues it acted in good faith at inception, but even if that were true, it still lost on issues associated with its costs. It then improperly argues the merits of its claims, but depending upon how this Court disposes of the Referee's Report, Rule 3-7.5(q)(5) leaves the Bar an avenue of relief to come back for its costs. Its remaining arguments, including that the Referee prejudged the case and Monday morning quarterbacked, are all meritless. The Bar placed into evidence the entire transcript of the 2012 proceedings and cannot be heard to complain that the Referee considered it.

Alters' Motion

The Bar never objected to Alters' motion, as Rule 3-7.6(q)(5) mandates. The Referee found the Bar's claims of wilful misappropriation frivolous and awarded Alters his expert fees associated with those claims. The Bar argues that the rule requires a finding that its entire case be frivolous to trigger such an award, but it is wrong. The rule speaks of "a particular matter" being frivolous, which means less than the entire case. Logic dictates that be so, as does favorable comparison with Section 57.105, *Fla. Stat.* (2017). Neither the dissenting Justices to Alters'

reinstatement, the grievance committee probable cause finding, nor Alters' aborted motion for summary judgment undermine the finding of frivolity, especially where it is a fluid concept that can change as additional evidence surfaces.

Both Referee cost recommendations should be approved.

ARGUMENT

I. THE REFEREE PROPERLY EXERCISED HER DISCRETION UNDER RULES 3-7.6(q)(2) and (3) IN DENYING THE BAR'S COSTS ASSOCIATED WITH FAILED CLAIMS.

Subsection (2) of the above rule provides as follows:

> *Discretion of Referee.* The referee shall have discretion to award costs and, absent an abuse of discretion, the referee's award shall not be reversed.

Subsection (3) of the above rule provides 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.

A plain reading of the rule yields the following indisputable interpretation: (1) a referee has discretion to award costs, or not, and may even deny costs when the Bar prevails,[4] but (2) when the respondent demonstrates that costs are unnecessary,

[4] Although in a garden variety case, without more, it is expected that costs would be

excessive, or improperly authenticated, costs should not be awarded. *See Florida Bar v. Martinez-Genova,* 959 So. 2d 241, 249 (Fla. 2007)(Well, J, dissent).

A. The Bar lost every claim to which its costs were attributable.

The Bar only prevailed on the claim that Alters failed to take sufficient remedial action after he became aware of the problems, but the Referee found he conceded that point early on and that none of the Bar's costs were reasonable, necessary or even relevant to that issue. She also found that the primary focus of the Bar's prosecution was meritless and frivolous and most of its excessive costs were associated with that misadventure. The Referee was thus well within her discretion to deny costs to the Bar (other than the standard administrative $1,250 cost that should be assessed whenever a rule violation is found).

In *Florida Bar v. Davis,* 419 So. 2d 325 (Fla. 1982), this Court formulated the current paradigm for awarding costs in bar disciplinary cases. Davis was charged with three counts, but found guilty on just one. The Bar did not attempt to isolate its costs among the counts, but sought all of its costs for the entire case. The referee awarded the Bar one-third of its costs, inclusive of court reporter fees. The Bar complained and argued, as it does here, that all of its costs were taxable upon any

assessed in favor of the Bar after a successful prosecution.

finding of guilt. This Court disagreed and held no hard and fast rules applied and, "the discretionary approach should be used in disciplinary actions." *Id.* at 328. It further held that a referee, "should ... be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable." The opinion continued: "We find the referee's recommendation of allowing one-third of certain costs where there has been a finding of guilt on one charge but not on two others to have been reasonable."[5] *Id.* Thus a cost award based upon results obtained has long been accepted as within the bounds of discretion.

Although *Davis* predates the modern Rules Regulating The Florida Bar, its holding has been codified in the controlling rule that, as noted earlier, affords the referee discretion to award costs and to disallow costs upon proof that they are unnecessary, excessive or improperly authenticated.[6]

---

[5] This Court also surmised from the referee's report in *Davis* that, "the under-assessment [of costs] was likely influenced by a perception of the referee that the costs were greatly disproportionate to those generally generated in a disciplinary action." In that case the total costs sought in 1982 dollars were just shy of $17,000. Here, the Bar's costs exceeded $300,000.

[6] The Bar argued below that *Davis* was no longer good law in view of the modern rules. It has wisely abandoned that argument here. *See Florida Bar re Amendment to Rules Regulating the Florida Bar,* 644 So. 2d 282, 283 (Fla. 1994), where this Court stated that Rule 3-7.6 "codifies the Court's reaffirmation that the award of costs in disciplinary actions is subject to the referee's discretion... This discretionary standard for costs in disciplinary proceedings had earlier been adopted by this Court (continued on next page).

Applying *Davis* and the rule here, the failure of the Bar to prove its core case of wilful misappropriation; the finding that such claim was frivolous; and the finding that the Bar's extraordinary expenditures of money and time were excessive, unreasonable and unnecessary and were associated with claims on which Alters prevailed (other than the trial transcript),[7] coalesce to make the cost recommendation within the bounds of the Referee's reasonable discretion. The Referee felt that one-third of costs, as in *Davis*, would ordinarily be a starting point, but the costs here were out of all proportion to what was provable. The Referee further observed that Alters long ago conceded the point that he should have replaced both Boldt and Salpeter after he first discovered their mistakes in February 2010, which ultimately was the only conduct for which he was faulted. In other words, Alters prevailed on the substantial contested issues.[8]

---

explicitly over the alternative civil standard, under which the prevailing party 'shall recover all his or her costs.'" [cites omitted, but *Davis* was among cases cited].

[7] But even the court reporter costs were excessive and unnecessary because had the Bar not pursued its vacuous claim of wilful misappropriation, the trial would have lasted maybe two or three days, not four weeks. And the Bar never attempted to separate out portions of the transcript that arguably related to the proven violation. Unlike *Davis* a simple formulaic or percentage calculation would be arbitrary given the overwhelming focus on the wilful misappropriation claim.

[8] *Cf. Moritz v. Hoyt Enterprises, Inc.,* 604 So. 2d 807, 810 (Fla. 1992)(For purposes of awarding attorney's fees, "the fairest test to determine who is the prevailing party is

The Referee further found that the Bar refused to fairly and impartially evaluate the case as it evolved. She found noteworthy that its auditor, Duarte, sat through the entire trial and would not even concede, when he testified after Boldt, that she authorized the January and February 2010 transfers. At the time he testified the evidence was already overwhelming that Boldt had authorized those transfers and that she had been untruthful in her denials. (T.2938-3013 [key parts of Duarte cross].)

In assessing costs the Referee was entitled to take into account a whole host of factors, tangible and intangible, such as Duarte's demeanor, his retrenchment from his earlier conclusion that Boldt authored the draft confession letter admitting her fault, his failure to properly evaluate the evidence (such as that certain emails and even the portions of the draft letter that Boldt admitted writing flatly contradicted her testimony),[9] and impeachment. Duarte's incredulity was palpable in the courtroom, but the cold transcript does not reflect it, as it does not reflect other intangibles. *Cf.*

---

to allow the trial judge to determine from the record which party has in fact prevailed on the significant issues tried before the court.").

[9] In addition to the forensic evidence that Boldt drafted the confession letter admitting she mistakenly authorized the 20 transfers, Duarte and the Bar ignored the email from Rogow to Boldt in which he spoke of improper trust account transfers, plural, (Ex. HHH, tab 5, Ex. K), and that the five paragraphs of the letter she actually admitted to drafting (relating to the M case and Culmo wiring settlement funds) made no sense given her testimony that she was aware of only one improper transfer (which formed the basis of her consent judgment with the Bar). *See* page 12, n. 10 in Alters Response Brief on merits.

Smith v. State, 866 So. 2d 51, 64 (Fla. 2004)(in a case involving a request for mistrial due to prosecutorial misconduct during closing, this Court held that, "[i]n respect to claims such as this, we respect the vantage point of the trial court, being present in the courtroom, over our reading of a cold record."). Even beyond Duarte, the prosecution simply had no credibility.

At every turn the Bar and its staff wilfully ignored all evidence of Alters' innocence (i.e. the truth) and everyone in the courtroom could hear, see and sense it, including the Referee. She wrote:

> That [Duarte's steadfast denial of the obvious], as much as anything, illustrates the Bar's attitude in ths matter. It did not conduct a fair and impartial investigation. Instead, it held onto claims to the bitter end, despite overwhelming evidence that would have caused a reasonable prosecutor to drop substantial parts of the Bar's case, even mid-trial. Respondent should not have to pay for the Bar's misguided efforts. (Recom. on Bar Costs, p.14.)

Based upon the findings in the Report and Recommendation and the two recommendations on costs, the Referee's recommendation to deny most of the Bar's costs was not an abuse of discretion. To the contrary, it would have been an abuse of discretion to award the Bar its costs on this aberrant record.

B. The Bar's arguments that the Referee abused her discretion have no merit.

Although not divided into subsections by the Bar, we have identified seven (7)

arguments embedded in its brief as to why the Referee allegedly abused her discretion in denying its costs. None have merit. We address each in turn.

I.

The Bar claims entitlement to all of its costs as a matter of policy, whenever it succeeds in whole or in part. It relies on two rules: Rules 3-7.6(q) and Rule 5-1.2(g) and (h). Its argument was, however, expressly rejected in *Davis* and is inconsistent with the text of Rules 3-7.6(q)(2) and (3). It is not apodictic that the Bar is entitled to all of its costs just because it is successful on any part of its multi-faceted case. The issue is remanded to a referee's discretion.

The Bar fares no better under the trust account rules - Rule 5-1.2(g) and (h) - which it argued at the hearing, but did not reference in its motion. First, the rule on costs of an audit applies only in the context of a bar audit, not a proceeding before a referee. Rule 3-7.6(q) is the exclusive rule that governs taxation of costs in such proceedings. Moreover, the trust audit was completed in 2011 in connection with the emergency suspension case even before the emergency petition was filed. Accordingly, no such audit was justified in this 2014 case.

Even if audit costs were theoretically recoverable (and ignoring all other Referee findings and recommendations), Rule 5-1.2(h) provides in pertinent part that the cost of the audit will be at the expense of the lawyer "only when the audit reveals

that the lawyer was not in substantial compliance with the trust account requirements." "Reveal" is defined in *Cambridge Advanced Learner's Dictionary and Thesaurus*, © Cambridge University Press (Online Ed.), as "to make known or show something that was surprising or previously secret." The Bar's "audit" that it seeks to tax in this case did not "reveal" anything previously unknown or secret regarding the ABBRC trust account because Alters laid out the improper transfers to the Bar from the beginning and the Bar reviewed and accepted his analysis in 2011. The Bar even admits in its supplemental brief that its work here was all geared to proving "whodunit," not an audit. Hence, under the plain language of the rule the Bar is not entitled to audit costs.

Because the Bar failed to prove its case of wilful misappropriation against Alters the Referee was entitled, as a matter of discretion, to weigh the results obtained and consider that the costs were associated with a failed prosecution (not an audit) in denying their reimbursement.

II.

The Bar next argues that it had to make "good faith decisions at inception of an investigation as to the scope and its path" and should not therefore be penalized with a denial of its costs. But the Bar has no inalienable right to costs. Denial of its costs is not a penalty. Results matter and should be taken into account.

The Bar also claims that if it doesn't recover its costs in this case, it would "create a chilling effect on the scope of bar counsel investigations in the future." (Br. at 8.) Incredibly, it seems to be saying that unless it receives its costs for pursuing failed and frivolous litigation, it will hesitate to vigorously pursue non-frivolous claims in the future. This Court rejected that argument long ago on less onerous facts. *See Florida Bar v. Bosse,* 609 So. 2d 1320 (Fla. 1992)(costs to a successful respondent do not have a chilling effect on prosecutions).[10]

All trial lawyers have an ethical and legal obligation to not advance claims or defenses that have no basis in fact or law, and there are consequences for not abiding those responsibilities. *See* Rule Reg. Fla Bar. 4-3.1 (Meritorious Claims and Contentions) and *Florida Statutes* §57.105 (2017). No one wants to encourage frivolous litigation, especially this Court. The Referee had discretion to conclude that to award the Bar its costs in this aberrant case was not justified and would reward irresponsible and frivolous prosecutions.

Contrary to the Bar's claim, the Referee never suggested that it should have shut down its investigation in 2011. But a responsible prosecutor would have been

---

[10] *Bosse* was since modified and codified through Rule 3-7.6(q)(4), discussed in Section II, below. The rule is now as found by the Referee and as argued by Alters with respect to his costs.

more probing and critical of its case in view of the available testimony and other evidence at that time. The Bar was aware of Rogow's clear testimony; there were irreconcilable conflicts between Boldt's affidavit, everyone else's testimony and the documentary evidence; and the Referee questioned Boldt's credibility in her 2012 Report and Recommendation. All should have been red flags to the Bar to reevaluate where it was headed. Yet, all warnings signals were ignored. The fact is that the Bar did not conduct a fair and just investigation, but did all it could to protect Boldt and try to pin everything on Alters. The facts didn't seem to matter.

Neither has anyone ever suggested the Bar walk away without fully investigating. But what everyone demanded was that the Bar act responsibly and not pursue an unjust cause when it had overwhelming evidence that its claim was specious. In *Smith v. State,* 95 So. 2d 525, 527 (Fla. 1957), this Court made the following observation, which is equally relevant here:

> It is not the duty of a State Attorney merely to secure convictions; the State Attorney is required to represent the State, it is his duty to present all of the material facts known to him to the jury; and it is as much his duty to present facts within his knowledge which would be favorable to the defendant as it is to present those facts which are favorable to the State; being an arm of the Court he is charged with the duty of assisting the Court to see that justice is done, and not to assume the role of *persecutor*.

Although *Smith* addressed the duty of a state attorney in a criminal case, it is no different for bar counsel. *Florida Bar v. Kane,* 202 So. 3d 11, 19 (Fla. 2016)("Bar has an obligation to process disciplinary cases in a fair and just manner."); *In re. Dianne F. Dillon,* 2004 WL 5215018 (Mass. 2004)(Sosman, J.)("Just as we expect of prosecutors in criminal cases to pursue the overarching goal of justice, and not just the zealous pursuit of convictions, I expect bar counsel to pursue the overarching goal of justice, and not just the zealous pursuit of discipline.").

The Bar wields tremendous power and there are real life consequences when it wields it irresponsibly. This is a case in point.

III.

Next, the Bar continues to argue for Alters' guilt on all charges, relying upon its failed narrative to justify its claim that the Referee abused her discretion in denying it the bulk of its costs. But its theory was rejected by the Referee as a matter of fact, and there is substantial competent evidence to support her findings. If any of those findings should, however, be later rejected by this Court, the Bar will have a full opportunity to come back and seek its costs under Rule 3-7.6(q)(5), which leaves that door open in circumstances where, as here, it is not appropriate for the Bar to seek such costs based upon the current landscape.

IV.

The Bar argues that the two rule violations against Alters (failure to take sufficient remedial action) were serious. This characterization is irrelevant as none of the Bar's costs was associated with those violations. It does not contend otherwise. Even as to transcripts, the Referee was well within her discretion in denying reimbursement because this one month trial could have been completed in a matter of a few days had the Bar proceeded fairly and responsibly. The Bar also never attempted to apportion transcript costs among the claims, as was its burden.

V.

The Bar claims that the Referee was "Monday morning quarter-backing" its case. Not so. To assess whether costs are appropriate a referee must assess what the claims were and what the results were. That can only occur at the end of the case and many factors should be and were weighed. *Davis* and the applicable rule afford the Referee the discretion, if not the obligation, to consider the results obtained and other factors. The Bar just doesn't like the result. That does not mean that discretion was abused.

VI.

The Bar argues that its costs were expended in an effort to establish who was responsible for the improper transfers. But, again, it failed to prove it was Alters! By

any measure, there is no requirement that a referee award the Bar costs on a particular matter that it lost, especially where its claim was found to be meritless and frivolous and its costs were deemed excessive, unreasonable and unnecessary.

VII.

Finally, the Bar claims the Referee prejudged its case as she allegedly measured it against her 2012 Report. But she was entitled to take into account her memory as well as evidence and testimony from an earlier hearing, *Bailey v. Christo,* 453 So. 2d 1134, 1137 (Fla. 1st DCA 1984)(testimony from earlier hearing properly considered in issuing injunction), especially where the Bar introduced the entire 2012 hearing transcript into evidence in this case. (Ex. 53.)

Moreover, a judge or referee is presumed to follow the law. If the Bar had any issue concerning the Referee's partiality, it could have sought to recuse her. In fact, Kimberly Boldt did, based upon findings in the 2012 Report and Recommendation that her affidavit was contradicted by other testimony and physical evidence. (A.84-86.) It is far too late for the Bar to now make partiality arguments after it lost. That is just playing the result. *Cf. Correll v. State,* 698 So. 2d 522 (Fla. 1997)(adverse rulings are not a basis to recuse a judge).

In addition, this case was assigned to Judge Caballero as part of standard operating procedure because she had presided over the January 2012 proceeding.

Nothing in the Report and Recommendation suggests anything other than that the Referee ruled upon the mounds of testimony and evidence before her in this case. She was certainly entitled to make reference to her earlier observations about the weakness of the Bar's case, especially since it didn't improve with age and the Bar introduced the transcript of that proceeding into evidence.

Instead of taking responsibility for its blind and misguided pursuit of Alters and its failure to pursue and prosecute this case in a fair and just manner, or to pursue the true guilty party, the Bar is still intent on blaming everyone but itself for its failures. Its continued intransigence is troubling.

C. The Bar's cases are inapposite.

The fact patterns contained in the cases cited by the Bar are either distinguishable, or the standard of review distinguishes their results.

The first case cited is *Florida Bar v. Lechtner,* 666 So. 2d 892, 894 (Fla. 1996). The referee there refused to assess what it deemed to be reasonable costs solely because of Lechtner's inability to pay. This Court rejected that concept and held that the appropriate course is to establish a payment plan. In dicta this Court cited to *Davis* and several other cases stating that generally and as a matter of policy, costs should be taxed against a respondent who has violated the rules. Alters accepts that general proposition, but for all of the reasons outlined by the Referee it doesn't fit this

case. As with all general propositions, there are exceptions. And the case at bar is the ultimate outlier.

Florida Bar v. Wilson, 616 So. 2d 953 (Fla. 1993), involved a remand to the referee for a redetermination of costs following review on the merits, where this Court found Wilson committed numerous trust account violations, but other charges were not proven. The auditor's work and court reporter costs were associated with both proven and unproven claims that could not be readily untangled. Unlike here, the referee recommended assessment of all costs, and this Court found it not to be an abuse of discretion. It is distinguishable for several reasons. First, the standard of review played a key role, as it does in every case. Second, the costs could not be apportioned, whereas here they could be and the Bar has not challenged the Referee's conclusion that none of its costs were associated with the violation that was proven. Third, the Bar's reckless pursuit of an unprovable claim here justifies, if not mandates, a denial of its costs directly related to that misadventure.

In *Florida Bar v. Miele,* 605 So.2d 866 (Fla. 1992), the results were a mixed bag: guilty on some charges, acquitted on others. Again, the referee recommended all costs be taxed. This Court began its analysis, as it does in just about all cases, by citing to the standard of review. The *Miele* referee rejected the argument for apportionment and this Court found that was not an abuse of discretion, noting that

but for Miele's misconduct there would have been no complaint in the first place. In sharp contrast with this case, nothing in *Miele* suggested that the costs were unnecessary or excessive. In further contrast, the Referee here made specific findings based upon justice, equity and policy to deny the Bar's excessive and unreasonable costs associated with its pursuit of unprovable and frivolous claims. That determination was not an abuse of discretion.

Next is *Davis*, which Alters has already fully analyzed and applied. The Bar tries to use its ratification of a formulaic award (one-third of costs for proving one of three claims) to argue that the award here was deficient because the costs it was awarded was only .4% of the total, rather than one-third. But *Davis* was far deeper than that, and defined discretion far more broadly and flexibly than by a simple formulaic analysis.

The Bar also claims that the Referee's award was indefensible. For myriad reasons already discussed, it is wrong. *Davis* does not help the Bar, especially when all of its costs were associated with failed claims.

In *Florida Bar v. Martinez-Genova*, 959 So. 2d 241 (Fla. 2007), the Court, in a 4-3 decision, ratified a referee recommendation that the Bar receive its appellate costs where it prevailed in its appeal to correct the referee's erroneous recommendation of discipline. The Bar there, unlike here, prevailed on the matter

for which the costs were incurred and sought. Costs are a virtual certainty in such instances. Yet the dissent, while agreeing that costs should generally be awarded as a matter of policy, noted that "no authority dictates that a respondent must always pay the Bar's costs," and that as a matter of discretion this Court should not have awarded costs in view of mitigating evidence. The dissent underscored that the issue is one of discretion - *Martinez-Genova* was obviously a close call, but in the end the Referee's recommendation prevailed - and absent an abuse of discretion the Referee's recommendation should be heeded. *Davis, supra*.

The last case cited by the Bar is *Florida Bar v. Whitney,* 132 So. 3d 1095 (Fla. 2013). There, the referee reduced an approximately $15,000 request by about $3,100, but "the referee's report does not fully discuss his decision to reduce costs." It appeared that the reduction was for all investigative and some expert fees associated with time waiting to testify. There was no showing or finding that the costs were excessive and there appeared to be no basis to deny investigative costs, which are ordinarily properly taxable. In sharp contrast, the Referee here explicitly found the Bar's costs excessive and unnecessary and that it pursued vacuous and frivolous claims out of which its costs arose. Given the dissimilarity in facts, *Whitney* is of no value to the Bar.

II. THE REFEREE DID NOT ABUSE HER DISCRETION IN AWARDING ALTERS SOME OF HIS COSTS.

A. The Bar never timely objected to Alters' motion to tax costs.

Rule 3-7.6(q)(5) provides in pertinent part that, "[t]he party from whom costs are sought shall have 10 days from the date of the motion in which to serve an objection." The Bar failed to file any objection to Alters' motion, timely or otherwise. Accordingly, it waived any objections to the motion.

The Bar tries to obscure its failure by arguing that "as there were dueling motions for costs in this case, it was obvious that each party was objecting to the opposite side's costs." Not so. Alters timely objected to the Bar's motion while filing his own motion for costs as well. There is nothing in the rule that says an affirmative motion is the indubitable equivalent of an objection to a competing one. In fact, there are circumstances, as here, where each side could be awarded some of its costs.

The Bar is required to follow the rules like everyone else. It is incongruous for the entity charged with enforcing all rules to insist that some do not apply to it.

B. The finding that the Bar's prosecution of a particular matter was frivolous supports the cost award to Alters.

Rule 3-7.6(q)(4) states as follows:

> *Assessment of Respondent's Costs.* When the bar is unsuccessful in the prosecution of a particular matter, the referee may assess the respondent's costs against the bar in the event there was no justiciable issue of either law or fact raised by the bar.

The Bar makes two arguments to try to show the Referee abused her discretion in finding its claim that Alters wilfully misappropriated trust account funds was frivolous, as the springboard for awarding him costs. First, it argues that the Referee misinterpreted the word "matter" in the above rule, which it claims refers to the entire case, not a portion of it. Second, it argues that the fact that: (1) Alters was reinstated through a split decision (5-2) by this Court; (2) a grievance committee found probable cause; and (3) Alters abandoned his motion for summary judgment, preclude a finding of frivolity as a matter of law. The Bar is wrong in all respects. Each argument is addressed in turn.

i. The Bar's interpretation of the language of Rule 3-7.6(q)(4) is contrary to its plain meaning.

Selectively lifting one word from a sentence in a rule (as the Bar does here) is not interpretation, it is cherry picking. Basic principles of statutory or rule

construction require that the rule be interpreted as a whole and that no word is to be treated as surplusage if it can be given a meaning consistent with the entire provision. *State v. Bodden,* 877 So. 2d 680, 686 (Fla. 2004)("words in a statute are not to be construed as superfluous if a reasonable construction exists that gives effect to all words.").

Rule 3-7.6(q)(4) refers to "a particular matter" not just to a "matter." The Bar ignores the word "particular" entirely. It instead focuses only on "matter" and argues that it refers to the entire case or prosecution. Its interpretation violates basic rules of construction. There would be no reason to use the narrowing term "particular" to qualify "matter" if the rule were designed to refer to the entire prosecution. As used, " particular" is an adjective that in this context limits "matter" to a single or specific claim, rather than the entire matter. Put another way, a "particular matter" is an individual part of a greater whole. *See The American Heritage Dictionary, New College Ed.* (1979) (defining "particular" as "[e]ncompassing some, but not all, of a class or group"). This is especially so where throughout the rest of Rule 3-7.6, "case" is identified repeatedly as a "proceeding" or in one instance "cause" (when referring to setting the proceeding for trial). There can be no doubt but that the language used here is intended to denote a further distillation of a proceeding or case down into component "particular matters" of a greater whole.

Accordingly, the Referee's interpretation of the rule permitted an award of costs to a respondent when a particular matter is frivolous, as contrasted with the entire case. It is also consistent with reality. Often the Bar may join unrelated issues in a single prosecution. If one divisible issue is entirely frivolous the respondent should, as a matter of policy, get his or her costs attributable to that divisible claim, even if others are not frivolous.[11]

In fact, the rule's use of the phrase "particular matter" bears a striking similarity to *Florida Statutes* §57.105 (2017). The early iterations of the statute required the entire case be frivolous in order to award attorneys' fees.[12] But a 1999 amendment changed the landscape, to wit: "the 1999 version of the statute applies to any claim or defense, and does not require that the entire action be frivolous." *Mullins v. Kennelly,* 847 So. 2d 1151, 1154 (Fla. 5th DCA 2003). All that is required is that a lawyer knew or should have known that any claim or defense was not supported by the facts or existing law. *Boca Burger, Inc. v. Forum,* 912 So.2d 561,

---

[11] The Bar argues that the absence of similar language "in whole or in part" as used in the immediately preceding subsection addressing the Bar's costs - Rule 3-7.6(q)(4) -undermines the Referee's interpretation. Not so. That language does not fit subsection (5) as well as "particular matter" does. The different verbiage is a matter of style and proper English, not substance.

[12] The old language was that there had to be "a complete absence of a justiciable issue of either law or fact raised by the losing party." §57.105, Fla. Stat. (1988).

570 (Fla. 2005). In addition, the statute reads that fees shall be assessed against a party if it "knew or should have known that a claim or defense when initially presented to the court or at any time before trial ... (a) [w]as not supported by the material facts necessary to establish the claim or defense." In other words, it is not sufficient to rely upon good faith at the time of filing, but a party must continue to objectively evaluate its case throughout its life.

The statute, as the rule here, subdivides a case into individual claims and defenses - or here "particular matters" - such that the pursuit or reliance upon any particular claim or defense that has no basis in fact or law exposes a party to fees or costs as the case may be, even if other claims or defenses (or particular matters) have merit.[13] This Court held that the amendment "greatly expanded the statute's potential use." *Id.*

The above concept sheds light on why the "particular" qualifies "matter" in the rule. As with Section 57.105, the rule embodies a policy that the Bar cannot hide behind the prosecution of particular or divisible meritorious claims in order to contemporaneously advance particular divisible frivolous ones without consequence.

---

[13] The rule here was enacted in 1994. *The Florida Bar re Amendments to Rules Regulating The Florida Bar,* 644 So. 2d 282, 299 (Fla. 1994). Before the rule this Court held an attorney could recover all costs the Bar could have recovered if successful. *Bosse,* 609 So. 2d 1320.

In fact, apart from a prosecutor's moral compass, it is the only check and balance to ensure that the Bar engages in only responsible prosecutions, as fees are not recoverable in bar disciplinary cases. *Florida Bar v. Chilton,* 616 So. 2d 449 (Fla. 1993)(fees may not be awarded to the Bar or the Respondent).

ii. The split decision reinstatement order, the probable cause finding and the withdrawal of summary judgment do not preclude a finding of frivolity.

Fortunately, this case is an aberration. After taking the time to reflect upon all the testimony and evidence, and the history of the entire prosecution, the Referee determined that the Bar's claim that Alters authorized or knew about the improper transfers was frivolous. Although she was able to conclude that it was frivolous from the beginning, that was not required. As the somewhat parallel Section 57.105, *Florida Statutes* makes clear, if at any time a party is presented with information that establishes that a claim or defense has no basis in law or fact, it must be withdrawn, regardless of whether a party believed in good faith at inception that its position was viable. Certainly by the time the Bar made its opening statement in March 2015, there was no question its claim was not viable.

The earlier dissent by two Justices to Alters' 2012 reinstatement has no bearing

on the frivolity of the Bar's position for three reasons. First, this Court has held that even an appellee is not shielded from an award under Section 57.105 by hiding behind a "'presumption of correctness' of an order that the appellee itself procured by misrepresenting the law or the facts." *Boca Burger, supra* at 571. That principle makes reliance by the Bar on two dissents to Alters' reinstatement - which were expressly based solely upon the Bar's unilateral showing - all the more misguided, particularly where the Referee found in 2012 that the Bar's auditor essentially lied to this Court in his affidavit in support of the emergency suspension.

Second, a non-frivolous position may become frivolous as further evidence erodes the Bar's case. *Boca Burger, supra* at 570. Third, even as to an earlier time period, the fact that two Justices dissented from the decision to dissolve the suspension order and reinstate Alters is of no legal moment and certainly is not law of the case.[14] In fact, findings of fact or conclusions of law made at a preliminary injunction phase (typically at a truncated hearing) including an appellate affirmance or reversal "are not binding on the court on final hearing, where the parties present

---

[14] The existence of dissent does not vitiate a finding of frivolity. That would mean that an appellate court could never by a vote of 2-1either sustain or order an award of fees under Section 57.105. Recently the Fifth District upheld a 57.105 award by a split panel. *See Austin & Laurato, P.A. v. State Farm Ins. Co.,* 229 So. 3d 911 (Fla. 5th DCA 2017) (affirmed 57.105 fees by a 2-1 decision).

their full case to the court." *Kozich v. DeBrino,* 837 So. 2d 1041 (Fla. 4th DCA 2002); *see also Ladner v. Plaza Del Prado Condo. Ass'n., Inc.,* 423 So. 2d 927 (Fla. 3d DCA 1982). In reviewing the results of the January 2012 hearing, this Court's majority determined that the Bar did not make a proper showing for an emergency suspension. The dissenters felt that it did. But development of additional facts (or more carefully reviewing evidence that the Bar had in its possession back then) established that the Bar knew or should have known that it could not prove that Alters authorized the January and February 2010 transfers or engaged in wilful misappropriation.

So too, the grievance committee's probable cause determination is not conclusive. First, Rule 3-7.6(q)(4), which permits an award of costs to a respondent when a particular matter is deemed frivolous, only applies to cases before referees. Cases only get before referees (with rare exceptions that don't aid the Bar's argument) when there is a finding of probable cause.[15] R. Reg. Fla. Bar 3-7.6(b). Given that inevitability, the Bar's argument makes no sense because it would read the rule right out of the book, as a finding of probable cause is almost always the

---

[15] The earlier 2011 case here was such an exception, where Alters sought to dissolve the emergency suspension, and that matter was immediately remanded to the Referee for a hearing. The Bar bypassed the grievance committee process, as it is permitted to do when it considers a matter an emergency. *See* R. Reg. Fla. Bar 3-5.2. Other instances where a grievance committee would be bypassed involves determinations of guilt in criminal cases. R. Reg. Fla. Bar 3-7.2.

exclusive way a case gets before a referee.

Second, the Bar's auditor, Duarte, conducted the investigation for the committee. As has been shown in the principal brief on the merits and the Referee's findings, his investigation was not fair as he and the Bar totally dismissed Boldt's role, ignored and obscured the obvious inconsistencies in her submissions and testimony, and ignored Rogow's testimony, the hard documentary evidence, as well as mounds of other Alters exculpatory evidence. The committee also did not have the benefit of the computer expert opinions at the time it made its determination. The Bar's own computer expert further undermined its case. As frivolity is a fluid concept, the Bar had a continuing obligation to back off its stance as evidence against it continued to mount.

Lastly, Alters' summary judgment motion also does not undercut a finding of frivolity. First, the Referee never made any determination on the merits, so no *res judicata* would apply. Alters canceled the hearing on his motion after the Bar filed, among other things, Boldt's perjury-riddled affidavit in opposition; the same one it used at the emergency suspension hearing. He tried to use the summary judgment device to put the Bar to the test of recognizing it had no case because the testimony and evidence on which it was relying was not credible. He was hoping the Bar would use that opportunity to act responsibly. It didn't. But under the summary judgment

standard, even a perjured affidavit is sufficient to defeat the motion if it creates genuine issues of material fact. *See Gorrin v. Poker Run Acquisition, Inc.,* Case No. 3D16-1426, Slip. Op. at 11-12 (Fla. 3d DCA Jan. 31, 2018)(summary judgment reversed because , "on a motion for summary judgment, it is well-established that the trial court may not adjudge the credibility of witnesses or weigh evidence"). In that case, the trial judge struck Gorrin's affidavit as a sham (without an evidentiary hearing) because it conflicted with other testimony and documents. That was error.

Given well established summary judgment doctrine, the only remedy Alters then had was to attack Boldt's affidavit and the Bar's case as a sham, which would have required a full evidentiary hearing. *See* Fla. R. Civ. P. 1.150 (Sham Pleadings) (trial judge must take evidence). He deemed it not worth the effort. That doesn't mean, in the end, that Boldt's affidavit was not false and the Bar's claim was not frivolous. The Referee found respectively that each was.

This case is like no other. For reasons never fully understood, the Bar was bent on destroying Alters' career from the start. The case drew close media attention because he was a prominent rising star in legal circles. Despite overwhelming evidence of Alters' innocence on the claim of wilful misappropriation in connection with the January and February 2010 transfers, the Bar gave an opening statement that it knew it could not prove. A message must be sent - and the Referee sent it - that

such prosecutorial abuse will not be tolerated. It was that claim that all but destroyed Alters' legal career and to this day the Bar has no regrets or remorse. To the contrary, it continues to pursue the ultimate discipline and its frivolous claim by challenging findings that are not only supported by substantial competent evidence, but clear and convincing evidence.

CONCLUSION

The Referee's cost recommendations should be approved and the Bar's objections overruled.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been delivered via electronic filing to: William Mulligan, wmulliga@flabar.org Bar Counsel, The Florida Bar, and Adria Quintela, aquintel@flabar.org Staff Counsel, The Florida Bar this 5th day of February, 2018.

YOUNG, BERMAN, KARPF & GONZALEZ, P.A.
Counsel for Respondent
1001 Brickell Bay Drive, Suite 1704
Miami, FL 331131
Direct Telephone (305) 377-2291
Telephone: (305) 945-1851
Facsimile: (786) 219-1980
Email: aberman@ybkglaw.com
Secondary email: mherrera@ybkglaw.com

By: /s/ Andrew S. Berman

ANDREW S. BERMAN
Florida Bar No. 370932
JAMIE L. WEBNER
Florida Bar No. 105634

CERTIFICATE OF COMPLIANCE

I certify that the font used herein is Times New Roman 14 point

/s/Andrew S. Berman
ANDREW S. BERMAN
Florida Bar No.: 370932

W:\WDocs\Clients\2889\001\00341516.WPD