IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR

Complainant,

v.

JEREMY W. ALTERS

Respondent.
_____/

Supreme Court Case
No. SC14-100

The Florida Bar File
No. 2012-70,199 (11P)

RECOMMENDATION ON THE FLORIDA BAR'S AMENDED MOTION TO ASSESS COSTS

THIS CAUSE was heard on Thursday, February 9, 2017 and Friday, February 24, 2017 on the Florida Bar's Amended Motion to Assess Costs. The Referee, having reviewed the motion and Respondent's Response in Opposition to Bar's Motion to Tax Costs, having received evidence from the Bar and Respondent and being otherwise fully advised in the premises, it is

RECOMMENDED as follows:

The Bar seeks to tax costs totaling $305,360.03 against Respondent, Jeremy W. Alters in this matter. It argues that all of the costs were properly incurred and are taxable under Rule 3-7.6(q) and Rule 5-1.2(h) of the Rules Regulating The Florida Bar. It further argues that the costs were necessary and reasonable to its investigation of Respondent and not excessive. Respondent timely served a Response in Opposition to Bar's Amended Motion to Assess Costs in which he

argues that the Bar did not prevail on the majority of the alleged violations and that the Bar's costs were unnecessary and excessive. Respondent was charged with six rules violations of which this Referee recommended he be found guilty of two which involved failure to take corrective action to avoid a recurrence of problems created by others. At the sanctions hearing, the Bar continued to seek disbarment even in the wake of the Report and Recommendation's factual findings that Respondent engaged in no misconduct that would justify that harsh discipline.

In contrast, Respondent argued that while the two rules he was found to have violated might carry a discipline from a public reprimand to a suspension, based upon the totality of the circumstances and the mitigation, he (1) had suffered enough at the hands of the Bar's prosecution of him and (2) proportionality required that he be treated similarly as was Kimberly Boldt, his former partner, who was offered a diversion program despite the evidence that clearly indicated her involvement in the improper transfers from their firm's trust account.

Given how this case began and was litigated by the Bar for over five years – still to this day the Bar seeks the ultimate sanction - it is hard to imagine Respondent obtaining a better result, especially considering that he admitted from the beginning to the conduct that formed the basis of the recommendation of guilt and at all times was willing to meet with the Bar or provide a sworn statement. This Referee also noted that the Respondent had fully cooperated with the Bar and provided

voluminous documentation for their review. In addition, the Respondent had also brought to the Bar's attention that there had been other improper transfers from the firm's trust account that the Bar's auditor had missed.

Rule 3-7.6(q)(2) provides in pertinent part 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.

Section 3 of the Rule provides that,

> 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.

In addition to having no trouble finding that Respondent was the prevailing party on the substantial issues in this case (which is itself sufficient to deny most costs of the Bar), this Referee also finds that the Bar's costs were unnecessary and excessive in connection with the rules violations found to have occurred. They required no forensic review, no thousands of hours trying to prove misappropriation and no significant expenditure of costs by the Bar.

The essence of this case was never a dispute over how much was improperly transferred from trust to operating, but over who was responsible. The Bar ignored evidence that was front and center and refused to believe or even interview credible witnesses such as Bruce Rogow and Respondent himself, instead siding with Kimberly Boldt whom this Referee found to be not credible. Furthermore, the Bar

relied heavily on the text messages provided by the Respondent's ex-brother in law, Mr. Salpeter, whose testimony was completely discredited by the creator of the software Mr. Salpeter claimed to have used to save the text messages as well as by the forensic expert hired by the Respondent who was able to demonstrate clearly that the text messages had been tampered with and were therefore completely unreliable. The expert's testimony towards the final stages of the disciplinary proceedings provided a clear explanation for the odd data shown on the printouts relied upon by the Bar. The Bar's auditor had testified that much of his time had been spent on analyzing and comparing the text messages to other records and financial documents and that the text messages was the evidence he relied upon heavily in arriving at his conclusions against the Respondent. Even after this evidence was demonstrated in court, the Bar was not persuaded from their effort to disbar the Respondent.

Before the emergency suspension hearing Respondent supplied the Bar with evidence that Ms. Boldt confessed to him and Bruce Rogow that she was the one who authorized the improper transfers. He also supplied her draft confession letter and email to Respondent and Bruce Rogow.[1] In letter after letter to the Bar,

[1] Even at this late date, the Bar continues to make an issue of that email and letter, claiming it was not authentic. The evidence demonstrated that Respondent's Exhibit 6 at the emergency suspension hearing, was presented in response to a November 2011 affidavit by Boldt that was emailed to Respondent' counsel at around 7 pm the evening before the emergency suspension hearing on January 5, 2012. Respondent testified that he and his staff were up most of the night pulling documents to prove

Respondent's counsel requested to meet with the Bar to explain everything. Yet the Bar refused to meet with him.[2] It did, however, meet at least six times with Ms. Boldt for hours on end, showing a remarkable and disturbing imbalance in its investigation between Respondent and Boldt.

Respondent's lawyer also warned the Bar when it was considering a petition for emergency suspension to follow the evidence and not to rely on its auditor, Carlos Ruga. Respondent' lawyer wrote on November 7, 2011 as follows:

> Our primary concern is that Mr. Ruga is drawing erroneous inferences from a cold record. We already found that his claim of 2,000 overdrafts from operating was erroneous and so advised you.
>
> I can tell you from experience in another recent case that Mr. Ruga draws improper inferences adverse to lawyers based upon an incomplete understanding of the facts and records and he scrupulously avoids asking questions of respondents to explain things.

That letter proved prophetic. The Bar moved to suspend Respondent on December 23, 2011, relying exclusively on Mr. Ruga's affidavit. At the emergency

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the falsity of her affidavit, which they did. The Report and Recommendation covers this issue completely.

[2] The Bar stated that it did meet with Respondent however Respondent' counsel argued that the meeting that did take place was about the co-counsel relationships that Respondent used to raise funds to repay the trust account, which might have resulted in additional charges being drawn against him. After the meeting no additional charges were drawn against Respondent. The unrebutted representation about the substance of the meeting was that it had nothing to do with the charges at issue here.

suspension hearing Mr. Ruga testified that he spent a total of 5 minutes reviewing Respondent' substantial submissions and evidence that exonerated him. Those submissions included Ms. Boldt's confession letter and email chain and an email announcing in September 2009 that Ms. Boldt was managing partner of the firm and in charge of all finances. None of that was disclosed to the Supreme Court in Mr. Ruga's affidavit. In this Referee's January 20, 2012 Report and Recommendation, it found as follows:

> On cross examination, Mr. Ruga testified, that he had no knowledge of who had authorized any of the transactions that went from trust to operating that he concluded were improper. It was clear from the testimony and evidence that Mr. Ruga had no basis in fact to swear under oath that Respondent made or authorized the transfers from trust to operating, and he admitted that fact during his testimony.

Having overseen this case since its inception, and having presided over the emergency suspension hearing that preceded it, this Referee has had the opportunity, first hand, to observe the demeanor and conduct of counsel and of the participants. The October 26, 2016 Report and Recommendation chronicles many of this Referee's observations about how the Bar's treatment of Respondent was so different from its treatment of Kimberly Boldt. This Referee questioned why that was so, observing how friendly Bar counsel was to Ms. Boldt in emails, referring to each other on a first name basis, having attended law school together. The Bar stood mute while Ms. Boldt sealed incriminating testimony of Mr. Rogow in her

disciplinary case. From the almost four weeks of testimony and the presentation of mounds of evidence, it was clear to this Referee that the Bar stridently pursued the wrong lawyer. It was Ms. Boldt who, despite her denials, authorized over $1 million of improper trust account transfers. Based upon her several days on the witness stand, this Referee found her not to be a credible witness. Yet, inexplicably, the charges against her were dropped and she was given diversion, which is not even considered discipline.

From day one, Respondent admitted to the improper trust account transfers from his firm's account. To justify its extraordinarily high costs, the Bar claims to the contrary, citing his deposition testimony. But even a cursory inspection of that testimony proves the Bar incorrect in their position. On page 153, Respondent's counsel stated, "Bill, just so there's no surprises, I think that we're probably in agreement on the numbers." On page 155 and 156 Respondent testified, "No... if there is a dispute I don't think it's a major dispute in terms of dollars. I'm sure they're close." Respondent goes on to concede that unless there are erroneous costs involved, "I would think [the Bar's figure is] pretty close to accurate, but I can look at it and let you know. I don't think our intention at trial is to dispute the numbers if we're on the same page... I mean, if Mr. Duarte calculated the numbers properly, you're not going to hear me dispute them over $50,000." Respondent was simply

not going to commit to a specific number because he had no personal knowledge at that moment.

The fact is that long before this matter started, in fact before the emergency suspension petition was filed in December 2011, there was agreement on the sums that had to be and were replenished to the trust account solely by the Respondent.

As for the costs of the Bar's computer expert, the Bar lost on all of the computer related issues and for that reason alone should not be reimbursed. In addition, it was because the Bar unreasonably refused to believe anything offered by Respondent, including documentary evidence, polygraph test results and the testimony of preeminent scholar and appellate lawyer, Bruce Rogow - choosing instead to align itself with Ms. Boldt whom I found not credible – that it hired the expert at all to try to help it advance factual arguments and positions that could never be proven. It paid its expert around $125,000 to try to disprove the obvious regarding Ms. Boldt's confession letter and emails and to try to counter or disprove the thesis of Respondent's forensic expert regarding the text messages. In the end, the experts were in agreement that what Respondent has been saying since before the emergency suspension petition about Ms. Boldt's confession and his lack of knowledge was the truth. Namely that Ms. Boldt drafted the letter to the Bar admitting she authorized the improper transfers in January and February 2010; Ms. Boldt admitted in the letter that Respondent was unaware of the transfers until she told him about them at their

mid-February meeting with Mr. Rogow; and that Ms. Boldt circulated the draft letter by email to Respondent and Mr. Rogow.

In the Report and Recommendation of January 20, 2012 on Respondent's petition for reinstatement from the emergency suspension this Referee wrote:

> In the end the Bar offered no evidence that Respondent misappropriated any trust funds or authorized any improper disbursements of trust funds, which is the core of its case. The Florida Bar did prove that there were improper transfers from the trust account to the operating account but this is not denied by Respondent.
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> In summary, there was no evidence that Respondent is causing or has caused harm to anyone. It is unlikely the Bar will be able to prove at a plenary hearing that Respondent misappropriated trust funds or that he authorized any improper transfers by clear and convincing evidence.

This Referee also recommended that the Bar file its complaint, if it still chose to do so, expeditiously because this Referee was then already aware of the harm the allegations of misappropriation claims was causing Respondent. Yet, the Bar did not file the within complaint for two more years (with the attendant increased investigative costs) and the end result, as this Referee correctly predicted, was the same.

In *Florida Bar v. Davis,* 419 So.2d 325 (Fla. 1982), the Bar complained that the referee failed to assess all of its costs against the respondent. The Court noted that "[t]he underassessment was caused in part by the finding of not guilty in two of

the three charges. The referee recommended a one-third recovery on some of the costs." The Court went on to state that "the underassessment was likely influenced by a perception of the referee that the costs were greatly disproportionate to those generally generated in a disciplinary action." It then stated as follows:

> We have set no hard or fast rules relative to the assessment of costs in disciplinary proceedings. In civil actions the general rule in regard to costs is that they follow the result of the suit. [cites omitted], and in equity the allowance of costs rests in the discretion of the court. [cite omitted].
>
> We hold that the discretionary approach should be used in disciplinary actions. Generally, when there is a finding that an attorney has been found guilty of violating a provision of the code of professional responsibility, the bar should be awarded its costs. At the same time the referee and this Court should, in assessing the amount, be able to consider the fact that an attorney has been acquitted on some charges or that the incurred costs are unreasonable. The amount of costs in these circumstances should be awarded as sound discretion dictates...We find that 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.

Id at 328.[3] Similarly, in *Florida Bar v. Brown,* 978 So.2d 107 (Fla. 2008), the Court affirmed a referee's reduction of costs from $9,143.84 to $1,000, even though the

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[3] The Bar claims this 1982 case is no longer good law because of more recent rules enacted on the topic. This Referee disagrees. In *Florida Bar v. Martinez-Genova,* 959 So.2d 241 (Fla. 2007), decided when the new rules were in effect, the dissent in a 4-3 decision favorably cited *Davis.* Although it was in dissent, it would not have been cited if it were not good law. Moreover, there is no inconsistency between the amended rules concerning the discretion in awarding costs and the holding of *Davis.* They are in total harmony. *Davis* offers a logical and rational methodology in

Bar was successful. In the face of the lawyer's challenge, it affirmed what it considered to be a "lenient" award, thus acknowledging that referees have discretion to do as they believe is right.

If this were a general, garden variety case, this Referee might use *Florida Bar v. Davis* and recommend that since 2 of 6 charges were proven, 1/3 of the Bar's costs should be the starting point for a cost assessment in favor of the Bar and then determine whether some costs should be eliminated in their entirety. But this is not a "general" or "garden variety" case and the costs that the Bar seeks to assess against Respondent are exorbitant and were not reasonable or necessary in connection with the rules violations that were found. Rather, they are all associated with the violations the Bar was unable to prove. There is nothing in the rules that requires a taxation of costs against a respondent where the costs were directly associated with failed claims and not necessary in connection with the rules violations that were found to have occurred.

The Bar also effectively ignored its misadventure at the emergency suspension hearing in trying to link Respondent to misappropriation. Instead, it doubled down and placed its trust in the lawyer, Ms. Boldt, for whom there was

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exercising discretion in assessing costs where the Bar prevailed on some but not other charges. Particularly where assessment of costs is discretionary, resort to how other referees handled similar issues is always helpful, especially where the methodology was favorably received by the Supreme Court.

overwhelming proof of guilt and in the unsavory bookkeeper who went to work for Ms. Boldt after he was summarily fired by Respondent. Neither of these two key Bar witnesses was credible. In the process, the Bar ignored testimony of credible witnesses such as Bruce Rogow and Respondent himself as well as written evidence that was consistent with their testimony and Respondent's innocence. In addition, had the Bar conducted a thorough investigation, it would have also discovered that Ms. Boldt also confessed to Cindy Russell, a paralegal who had lent substantial money to the firm right after she confessed to Respondent and Mr. Rogow. Respondent should not have to pay for the Bar's misadventure in continuing to pursue him for misappropriation when the evidence, from the beginning, did not support the charge.

Several additional comments on the Bar's costs are warranted. The Bar's auditor, Mr. Duarte's, affidavit in support of his costs states that through January, 2015 he spent 2,054.75 hours working jointly on both the Respondent and Ms. Boldt's files and the costs "have been allocated equally to Respondent and Boldt." While he may have allocated them equally on paper, the Bar made no effort to allocate them equally between the two in fact. Ms. Boldt, whom the overwhelming evidence showed authorized the improper transfers in January and February 2010 which caused all of the firm's trust account problems (and which would prompt an audit), paid costs of only $2,000 in her bar disciplinary case, as stipulated by the Bar.

On the other hand, the Bar wants to assess costs of $114,681.25 against Respondent, which includes 50% of the costs for Duarte's joint Boldt/Respondent investigation. On its face that is inequitable, especially when the totality of the circumstances is considered.

Since the Bar already determined the amount of the deficit before Mr. Duarte became involved (Mr. Ruga did that in the emergency suspension proceeding and the funds were replenished in full before that petition was filed), if this Referee were at all inclined to assess his costs against Respondent, it would be for that initial review of the trust account and a determination of the deficit. But those costs were incurred in the emergency suspension case and the Bar never moved for its costs there. They would be compensable under 5-1.2(h) of the Rules Regulating The Florida Bar, but this Referee has no jurisdiction to tax those costs incurred in 2011 in this proceeding which commenced January 2014.

In addition to reviewing Mr. Ruga's work – which should not be taxed against Respondent here because Respondent should not have to pay for the Bar to check its own work - Mr. Duarte's focus was to try prove Respondent guilty of misappropriation. In that endeavor he did not succeed. Respondent should not have to pay those costs when it was clear from the beginning that the Bar was stridently

pursuing the wrong lawyer and did not conduct an objective or even handed investigation.[4]

It is noteworthy that Mr. Duarte was permitted (after objection and argument that as a witness the sequestration rule should not permit him to stay) to sit through the entire trial as a Bar representative, even though he was a material witness. He sat through and heard all of Ms. Boldt's testimony. He was then asked on cross examination whether in view of her testimony he was then convinced that she at least authorized the January and February 2010 transfers. He would not concede that obvious point in the wake of Ms. Boldt's incredible testimony. That, as much as anything, illustrates the Bar's attitude in this matter. It did not conduct a fair and impartial investigation. Instead, it held onto its claim 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.

Finally, the Bar repeatedly recited generalized legal platitudes from case law and its own argument that costs should generally be awarded to the Bar because "someone has to pay them" and it should not be the membership at large. That may

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[4] In addition, Mr. Duarte's affidavit did not break down how his hours expended were divided among his various tasks. There is thus no way to determine, even if there were an inclination to award those costs associated with the trust account audit itself that was not duplicitous of Mr. Duarte's work, how much should be assessed. The Bar must bear the consequences of that failure of proof.

be the general rule, but as with all general rules there are exceptions. Respondent was wrongly overcharged with violations that the Bar could not prove. The Bar knew it had problems with its misappropriation case certainly no later than January 2012, after the emergency reinstatement hearing. And this Referee cannot overlook that the Bar did not assess Ms. Boldt with costs above a nominal amount even though its investigation was joint for most of the time period and even though the evidence was clear that she is the one who authorized the improper transfers that began this odyssey for Respondent. It would simply add further inequity to the inequity that already exists between the two of them to assess costs against Respondent that should have been borne by Ms. Boldt, but for the Bar's inexplicable decision to dismiss its claims against her.

Conclusion

1. The Bar only prevailed on two of the six rule violations that they prosecuted and neither of the two violations involved misappropriation, fraud or dishonesty on the part of the Respondent.
2. The Bar's costs were all incurred in an effort to prove charges this Referee found it did not prove or were incurred in the earlier emergency suspension proceeding in which the Bar never moved to tax costs;

3. None of the costs incurred by the Bar was reasonable or necessary to establish the violations found by this Referee, especially where Respondent admitted to them before the costs were incurred; and
4. The inequity of disparate treatment by the Bar of Respondent and Ms. Boldt and its inexplicable dismissal of charges against her commands that the Bar's costs not be taxed against Respondent, regardless of any "general policy." **This was not a garden variety or normal case.**

It is therefore this Referee's RECOMMENDATION that the Bar be awarded costs of $1,250.00, which is the standard administrative fee applicable whenever a rules violation has occurred, but execution issue only after the Supreme Court's final order.

DONE and ORDERED in Miami-Dade County, Florida on this 26th day of September, 2017.

Marcia B. Caballero, Referee

Copies to: William Mulligan, Esq.
Andrew S. Berman, Esq.