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 RESPONDENT'S AMENDED MOTION TO TAX ATTORNEY'S FEES AND COSTS AND TO AMEND THIS MOTION

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

RECOMMENDED as follows:

Respondent, Jeremy Alters, seeks an award of attorney's fees against the Bar and he seeks to recoup some of his costs associated with defending against claims that he argues the Bar knew from the beginning it could not prove. Rule 3-7.6(q)(2) provides that the referee "shall have discretion to assess costs and, absent an abuse of discretion, the referee's award shall not be reversed." Section (4) of the same rule permits a referee to assess costs against the Bar as follows:

> 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 that there was no justiciable issue of either law or fact raised by the bar.

Although the Bar never timely objected to this motion in writing (as it was required to do under section [5] of the rule), it argues that because it prevailed on some of its claim, costs cannot be assessed against it. The Bar further argues that the Respondent filed his Motion for Partial Summary Judgment and scheduled it for hearing. The Bar then filed a Response in Opposition to Respondent's Motion for Partial Summary Judgment and Respondent thereafter cancelled the hearing. The Bar argues that Respondent's failure to proceed with his motion is evidence that there were justiciable issues present. The Referee does not concur with this analysis or conclusion.

The Bar further argues that neither party in a disciplinary proceeding is entitled to the recovery of attorney's fees in a Bar proceeding. See *The Florida Bar v. Chilton,* 616 So.2d 449 (Fla. 1993). In *Chilton*, the referee found Chilton not guilty of any rule violations in the Bar's complaint. While the referee did award some costs to Chilton, the referee denied an award of attorney's fees. Thereafter, the referee certified a question to the Supreme Court as to "Whether the respondent in a bar disciplinary proceeding can recover attorney's fees against the Bar...." *Id.* at 450. The court answered the question in the negative stating that the Rules

Regulating The Florida Bar do "not provide for an award of attorney's fees to either the Bar or the Respondent." *Id.* at 451.

Respondent concedes that there is no rule authorizing attorney's fees in disciplinary proceedings and acknowledges the case cited by the Bar confirming that fact. He relies instead on the inherent power of the court, citing to *Moakley v. Smallwood*, 826 So.2d 221 (Fla. 2002). In *Moakley* the Supreme Court held that in the absence of a specific rule or statute authorizing the imposition of fees, a trial judge has the inherent authority to assess fees for attorney misconduct in the course of litigation. In this case, the Bar is representing itself and so any fees assessed will be against the Bar.

The inherent authority doctrine applies where a party acts "in bad faith, vexatiously, wantonly, or for oppressive reasons." *Id.* at 224. Although this Referee has made specific findings as to the imbalance and inequity in the handling of the cases between Respondent and Ms. Boldt, this does not rise to the level of bad faith, vexatious, wanton or oppressive prosecution by the Bar. For said reason, the referee does not recommend an award of attorney's fees to the Respondent.

In regards to the request to tax the costs incurred in his defense to the Bar, this Referee finds the Bar's argument unavailing because it is based upon a flawed interpretation of the rule. The language in the first sentence – "in the prosecution of a particular matter" – clearly contemplates that the Bar might be successful in some

parts of its' case, but not others. The Bar's interpretation would read the quoted phrase out of the rule, when basic principles of statutory construction require that effect be given to "every word, phrase, sentence, and part of the statute, if possible, and words in a statute should not be construed as mere surplussage." *American Home Assur. Co. v. Plaza Materials Corp,* 908 So.2d 360, 366 (Fla. 2005). Moreover, "a basic rule of statutory construction provides the Legislature does not intend to enact useless provisions, and courts should avoid readings that would render part of a statute meaningless." *Quarantello v. Leroy,* 977 So.2d 648 (Fla. 1st DCA 648, 652 (Fla. 5th DCA 2008)(cites omitted). These principles apply to construction of rules as well.

The standard Respondent must meet to secure an award of costs is the same standard applied under Section 57.105, Florida Statutes, i.e. no justiciable issue of law or fact as to a "particular matter." This can change with time, meaning that if additional facts come to light later in the process, the fact that a claim was justiciable on day one is no safe haven for the Bar.

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. This Referee found in January 2012 that the Bar's initial auditor, Carlos Ruga, had no basis to swear (as he did) in connection with the emergency suspension petition that Respondent authorized any transfers from trust to operating, and he

admitted as much when he was cross examined at the emergency suspension hearing.[1] The evidence at that hearing, coupled with this Referee's findings of fact back then, clearly charged the Bar with notice that it was unlikely it would prevail on this issue down the road. This Referee noted the inconsistencies between Ms. Boldt's affidavit (introduced by the Bar) and the documentary evidence in its Report and Recommendation back in January, 2012.

In fact, dating back to January 2012, the Bar had documentary evidence (draft letter and transmittal emails from Boldt) and testimony by Bruce Rogow and Respondent that Ms. Boldt was not being candid and that it was she, Ms. Boldt, not Respondent, who authorized the improper transfers in January and February 2010. The Bar also had evidence she was in charge of the day to day operations of the firm from around August or September 2009 until she left sometime in June or July, 2010. Why the Bar chose to side with her 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.

[1] The Bar introduced the transcript of that hearing into evidence in this case.

Once the Bar filed the within complaint two years later, Respondent was forced to hire a forensic computer expert to validate what he and Mr. Rogow were saying all along (and what the documents showed); that Ms. Boldt drafted the confession letter and circulated it to them by email. Further, Respondent had to prove that the text messages concerning the transfers after February 2010 were unreliable, even though the Bar had sufficient evidence they were tampered with way back in 2011, with its receipt of Exhibit EE, which was a heavily and sloppily redacted version of alleged texts between Respondent and Salpeter (containing only one side of the alleged communications) and random texts from others. That fact, coupled with the Bar's knowledge that Mr. Salpeter – who gave the Bar Exhibit EE – did not keep his cell phone from which the messages were allegedly downloaded and the fact that he mysteriously had no text messages from before February 8, 2010, **the day before Ms. Boldt confessed to Respondent and Mr. Rogow**, should have been red flags that the text messages were tampered with and unreliable (as was proven at trial by Respondent's expert and the creator of the software used by Mr. Salpeter to allegedly save the text messages). The circumstances of the PIM backups, appearing for the first time years later, in late 2014, after Mr. Salpeter was given criminal immunity, should also have given the Bar reasonable cause to be concerned about their genuineness.

As stated earlier, during the trial it was clear that neither Ms. Boldt nor Mr. Salpeter were credible witnesses. The written evidence and testimony of the Respondent's expert and the testimony of the creator of the software used by Mr. Salpeter contradicted not only the testimony of Ms. Boldt and Mr. Salpeter, but more importantly the statements made by Ms. Boldt in her affidavit which was relied upon so heavily by the Bar. If the Bar believed that there was a justiciable issue at the commencement of the trial, they certainly should have seen the lack thereof after the evidence was presented, but that has not changed their position or their pursuit of Respondent's disbarment.

Among many other troubling features of the Bar's disparate prosecutions, the only way for the Bar to categorically ignore Mr. Rogow's clear and unambiguous testimony concerning Ms. Boldt's confession was to conclude he was not telling the truth, even though his testimony was consistent with the evidence. Yet, the Bar made no effort even to try to impeach him at trial.

It is therefore this Referee's RECOMMENDATION that the Bar be assessed costs associated with Respondent's defense of the issue of his authorization and knowledge of the improper transfers, of which he was found innocent. The costs of his polygraph expert, John Palmatier, and his computer forensic expert, Yalkin Demirkaya, who proved that Respondent and Mr. Rogow were truthful all along and that the PIM backup files were tampered with and unreliable, should be assessed.

Accordingly, the sum of $143,913.35 should be assessed against the Bar and in favor of Jeremy Alters, the Respondent.

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.