IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. 67,875
(13B85H92)

v.

J.B. HOOPER,

Respondent.

_____/

**COMPLAINANT'S BRIEF**

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Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar:



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## SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "The Bar", Respondent, J.B. Hooper, will be referred to as "Respondent". The Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar will be referred to as the "Disciplinary Rules". The symbol "R" will denote the record of March 14, 1986 and March 21, 1986.

## STATEMENT OF THE CASE AND FACTS

Ms. Bonnie Rodriguez complained to The Florida Bar on March 6, 1985 regarding certain actions of the Respondent, Exhibit 7 of The Florida Bar. Ms. Rodriguez complained that Respondent had contracted with the company of which she is president, Suncoast Service Center, Inc., for the installation of a central air conditioning system into a residence owned by Respondent. Ms. Rodriguez further complained that Respondent had failed to pay for the contracted work upon completion as agreed and that she had found it necessary to retain an attorney to collect the funds, that Respondent had further contacted her agent personally after receiving a letter from Suncoast's attorney regarding the matter, failed to appear at a deposition, and wrote letters to agencies in an attempt to harass Suncoast. It also appeared that Respondent had fraudently identified himself as the dealer and salesman of the air conditioning equipment on a rebate form to Tampa Electric Company.

Ms. Rodriguez had previously complained to The Florida Bar about Respondent's actions but this complaint was closed by The Florida Bar after a short investigation.

As The Florida Bar Staff Counsel notified Respondent on March 7, 1985,Exhibit One-A of Respondent, the grievance had been reopened after The Bar was introduced to several new issues in Ms. Rodriguez' subsequent letter.

On March 25, 1985, The Florida Bar referred this grievance to the Grievance Committee "B" of the Thirteenth Judicial Circuit. The Chairman of the committee referred the case to attorney member Carolyn Fields for investigation, R-330. Ms. Fields' investigation concluded that a hearing was necessary pursuant to Rule 11.04 of The Florida Bar Integration Rules, Article XI. After some delay the hearing was held on July 12, 1986, and probable cause was found for violations of The Florida Bar Integration Rules and the Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar, see grievance committee transcript of July 12, 1985.

Pursuant to Rule 11.06 of The Florida Bar Integration Rules, Article XI, a complaint was filed on November 8, 1985, charging violations of Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar, Rules 1-102(A)(4), 1-102(A)(6) and 7-104(A)(1), and Rule 11.02(3)(a) of The Florida Bar Integration Rules, Article XI. The Bar charged the facts outlined above as well as the fact that Respondent had threatened to sue

Suncoast unless they agreed to his settlement offer which included withdrawing the complaint with The Florida Bar, R-21 and Exhibit 1 of The Florida Bar. The Supreme Court of Florida appointed The Honorable Gerard J. O'Brien, Circuit Judge of Pinellas County, Florida, as Referee.

Respondent filed a Motion to Dismiss on December 30, 1985 which alleged that The Bar's complaint was improper and that The Florida Bar and the grievance committee had not acted properly. The Bar filed a Response to the Motion to Dismiss on January 8, 1986 and the Respondent filed an Addendum to Motion to Dismiss on February 11, 1986. A hearing on this matter was held on February 11, 1986. The Referee denied the Motion to Dismiss. The final hearing was held on March 11, 1986 and March 21, 1986, in Tampa, Florida.

At this time one issue remains pending concerning the statements and actions of Ms. Carolyn Fields, the investigating member of the grievance committee. On March 21, 1986, the Referee directed the Respondent to obtain Ms. Field's affidavit and to copy The Bar with all correspondence in this matter, R-325.

## SUMMARY OF ARGUMENT

Count One of the Complaint of The Florida Bar alleges that Respondent was in violation of Disciplinary Rule 1-102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; violation of Disciplinary Rule 1-102(A)(6) for engaging in conduct that reflects adversely on his fitness to practice law; violation of Disciplinary Rule 7-104(A)(1) for communicating on the subject of the representation during the course of the representation with a party he knows to be represented by a lawyer in the matter without prior consent or other authorization by law; and with violation of Rule 11.02(3)(a) of The Florida Bar Integration Rules, Article XI. Count One describes Respondent's course of conduct in engaging in a service contract with Suncoast Service Center, Inc., evading payment after completion of the services, and directly telephoning Suncoast to discuss the matter after receiving a letter from Suncoast's counsel demanding payment. It is the position of The Florida Bar that the above violations were proved at the Referee hearing by clear and convincing evidence.

Count Two of the complaint of The Florida Bar outlines Respondent's conduct in misrepresenting himself as a dealer and

salesman of the air conditioning equipment on a rebate form, mailing a thank you card along with a copy of the rebate check and an Order granting Respondent's Motion for Summary Judgement and finally threatening to sue Suncoast unless they dropped their complaint to The Florida Bar. The above conduct was proven by clear and convincing evidence and is in violation of Disciplinary Rules 1-102(A)(4) and 1-102(A)(6) and Rule 11.02(3)(a) of the Integration Rule of The Florida Bar, Article XI. Count Two also contained a reference to Respondent writing letters of harassment which was dropped by The Florida Bar at Referee hearing and further referenced Respondent's failure to appear at a deposition. It is the position of The Florida Bar that if Respondent's defenses concerning lack of notice and lack of a subpoena are supported by the court file, then no finding of violations concerning this would be appropriate.

Respondent has complained that The Florida Bar staff counsel and the grievance committee acted improperly in the presentation and investigation of this case. However, there is no evidence of any actions contrary to the guidelines of the Supreme Court of Florida. The Referee has expressed some reservations about probing into issues which have previously been addressed by courts of the State of Florida. It is the position of The Florida Bar that attorney discipline for ethical violations is an

entirely separate matter based upon entirely different issues and standards than in courts of the State. The standards of ethical conduct which Respondent has sworn to abide provide that Respondent must maintain the integrity of the profession in all aspects of his life, personal as well as professional.

## ARGUMENT

POINT I

**THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED RULES 1-102(A)(4), 1-102(A)(6), 7-104(A)(1) OF THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR, AND RULE 11.03(3)(a) OF THE FLORIDA BAR INTEGRATION RULES, ARTICLE XI AS CHARGED IN COUNT ONE OF THE COMPLAINT OF THE FLORIDA BAR.**

The Respondent was charged in Count One of The Bar's complaint with engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in violation of Disciplinary Rule 1-102(A)(4); with engaging in conduct that reflects adversely on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6); and with communicating on the subject of the representation during the course of the representation with a party he knows to be represented by a lawyer in the matter without prior consent or other authorization by law in violation of Disciplinary Rule 7-104(A)(1). Respondent was further charged with committing actions contrary to honesty, justice or good morals in violation of Rule 11.02(3)(a) of The Florida Bar Integration Rules, Article XI. Count One described Respondent's actions in

engaging in a contract with Suncoast Service Center, Inc., (hereinafter Suncoast), evading requests for payment upon completion of the contracted work, and telephoning Suncoast directly to express his anger over the facts of the matter after learning that Suncoast had retained legal counsel to represent them in this collection.

It is well settled that the standard of proof in attorney discipline cases is that of clear and convincing evidence, The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980). It is the position of The Florida Bar that there has been presented clear and convincing evidence that Respondent has violated the above rules alleged in Count One of the Bar's Complaint.

Regarding specifically Rule 7-104(A)(1) of the Disciplinary Rules, it is clear that Respondent called Suncoast and discussed the action after receiving a letter from Suncoast's counsel which is in evidence as Bar Exhibit 4. Respondent actually admits making this call in his Answer to the Bar's Complaint filed with the Referee on March 4, 1986:

> 7. Paragraph Seven is Admitted to the extent that Respondent made one last phone call at the time the letter was received as part of a continuing effort to resolve the dispute. [Note: It is common knowledge that attorneys often times write demand letters prior to being formally engaged. (See paragraph six above.) A single phone call following the receipt of a routine demand letter might reflect poor judgement but would hardly seem to rise to the level

of a breach of the letter and intent of the Integration Rule.] The remainder of the allegations are denied.

Further, Ms. Rodriguez testified on March 11, 1986 that she was present when Respondent telephoned her agent, Mr. James Alexander, and that Respondent expressed his irritation and infuriation at their counsel's letter and threatened that if this matter became litigated he would use legal tactics to delay it for years (R-65). The deposition of Mr. James Alexander, taken during the pendency of the civil action when he was under oath and subject to cross-examination directly supports this charge and is in evidence as Bar Exhibit 8. It is well settled that such contact with an adverse party violates Rule 7-104(A)(1) and subjects an attorney to discipline, The Florida Bar v. LeFave, 409 So.2d 1025 (Fla. 1982), The Florida Bar v. Shapiro, 413 So.2d 1184 (Fla. 1982), and The Florida Bar v. Kirtz, 445 So.2d 576 (Fla. 1984). Although Respondent appears to contend that the letter from Suncoast's attorney on behalf of Suncoast was not sufficient to indicate his representation of Suncoast, it is clear that Respondent should have at least checked with their counsel to make certain of this before telephoning Suncoast. Case law provides that an attorney was found to have acted improperly in violation of Rule 7-104(A)(1) where he contacted the adverse party directly because he relied on his client's statements that

the adverse party had decided to represent himself. The Court stated that before engaging in such communication the attorney should have at least confirmed this fact with the adverse attorney, Hanley v. Hanley, 426 So.2d 1230 (Fla. App. 2 Dist. 1983), at 1232. The same logic applies to Respondent's situation where his excuses are even less logical.

Count One further alleges that Respondent's conduct outlined therein involved dishonesty, fraud, deceit, or misrepresentation in violation of Disciplinary Rule 1-102(A)(4) and reflected adversely on his fitness to practice law in violation of Disciplinary Rule 1-102(A)(6). Count One further alleged violations of the Integration Rule of The Florida Bar, Article XI, Rule 11.02(3)(a), for conduct contrary to honesty, justice or good morals, whether the act is committed in the course of his relations as an attorney or otherwise. These are general rules which have been found by the Supreme Court of Florida to encompass a wide scope of behavior from felony drug importing to simple neglect. It is well settled that an attorney may not attempt to separate certain conduct and claim that he is immune from disciplinary actions simply because he was acting as an individual rather than an attorney. As the Supreme Court noted in The Florida Bar v. Hefty, 213 So.2d 422 (Fla. 1968) every attorney takes an oath upon admission to the Bar in which he swears to

maintain his integrity in all aspects, personal as well as professional. In The Florida Bar v. Bennett, 276 So.2d 481 (Fla. 1973), the Supreme Court of Florida stated:

> Some may consider it "unfortunate" that attorneys can seldom cast off completely the mantle they enjoy in the profession and simply act with simple business acumen and not be held responsible under the high standards of our profession. It is not often, if ever, that this is the case. In a sense, "an attorney is an attorney is an attorney", much as the military officer remains "an officer and a gentleman" at all times. We do not mean to say that lawyers are to be deprived of business opportunities; in fact we have expressly said to the contrary on occasion; but we do point out that the requirement of remaining above suspicion, as Caesar's wife, is a fact of life for attorneys. They must be on guard and act accordingly, to avoid tarnishing the professional image or damaging the public which may rely upon their professional standing.

This point was reiterated in The Florida Bar v. Adams, 453 So.2d 818 (Fla. 1984) and The Florida Bar v. Jennings, 482 So.2d 1365 (Fla. 1986). Thus, while the Respondent was in no way prohibited from asserting his legal rights in this matter, the specific conduct outlined in the Complaint was in direct violation of ethical standards and is subject to discipline.

In the case at hand, it is undisputed that Respondent entered into a contract with Suncoast for the installation of air conditioning equipment and that this equipment was installed yet Respondent never paid for it. Respondent has presented witnesses who have testified that the equipment was not installed

satisfactorily due to technical wiring defects. Indeed, this issue was the subject of extensive civil litigation which ultimately concluded in Respondent's favor. This Referee has expressed some reservations about probing into their civil litigation. It is the position of The Florida Bar, however, that Respondent, as an attorney, is held to standards of conduct which are entirely separate and distinct from the civil and county court proceedings. It is well settled that attorney discipline is entirely separate and there are many cases demonstrating that discipline cases shall not be determined or constrained by the actions of state or federal courts. Rule 11.04(2)(c) specifically provides that judgements of civil or criminal courts are not necesarily binding in discipline proceedings. For example, in a case where a member of The Florida Bar was acquitted of a felony in circuit court, a referee is proper in rehearing the facts at disciplinary hearing, and finding the facts proved, and recommending appropriate punishment, see The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985) and The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984). Similarly, the Supreme Court of Florida has found it proper for a disciplinary proceeding to address issues which arose in the midst of litigation. In The Florida Bar v. Shimek, 284 So.2d 686 (Fla. 1973) the Supreme Court of Florida approved an order entered by a Circuit Court

judge who found an attorney had violated ethical standards by placing "a scurrilous attack upon members of the state judiciary" in a brief at federal court, at 686, and ordered a public apology. Thus, there is absolutely no reason that a Referee should be precluded from addressing ethical issues which may have been collaterally addressed by a court. Further, in the case at hand there are entirely different issues before the Referee than were before the court in civil litigation. While the legal issues relevant to the court proceeding involved substantive ones such as the validity of a mechanics lien, the issue before this Referee concern the morality and ethics of an attorney who participated in the type of conduct outlined in the complaint of The Florida Bar.It is further apparent from Respondent's statements to Mr. Alexander that Respondent intended to use his expertise as an attorney to the detriment of Suncoast. Therefore, the conduct outlined above is clearly in violation of the rules as charged.

## ARGUMENT

POINT II

**THERE IS CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT HAS VIOLATED RULES 1-102(A)(4) AND 1-102(A)(6) OF THE DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR AND RULE 11.02(3)(a) OF THE INTEGRATION RULE OF THE FLORIDA BAR, ARTICLE XI, AS CHARGED IN COUNT TWO OF THE COMPLAINT OF THE FLORIDA BAR.**

Count Two of the Bar's complaint alleges in part that Respondent failed to appear at depositions set as part of the underlying civil dispute. Although Respondent does not deny that he failed to appear, he claims that he was not subpoenaed to the depositions and was given notice only one day prior to the deposition. Respondent further testified that he sought to justify his failure to appear by his filing of a Motion for a Protective Order, filed at 3:24 P.M. on the date of his failure to appear. Respondent does not deny that his deposition was ultimately compelled by the court. It is the position of The Florida Bar that should the best evidence of these facts, the court record, support Respondent's defenses, no finding of violations of the Rules is warranted.

Count Two further alleges that Respondent wrote misleading letters to certain agencies in an attempt to harass Suncoast.

Although Respondent admits writing letters to these agencies, The Florida Bar chose to strike this count since its proof hinged on the state of mind of the Respondent at the time he wrote the letters which was, as the Referee pointed out, abstract and therefore beyond proof.

There is, however, clear and convincing evidence that Respondent attempted to obtain a rebate for the equipment installed by Suncoast through misrepresentation. The application form for the rebate shows clearly that the Respondent attempted to represent himself as both the dealer and the salesman of the equipment when it is undisputed and obvious that the dealer and salesman of the equipment were Suncoast, who refused to apply for the rebate since they had never been paid for the equipment. The testimony shows that Tampa Electric realized that Suncoast was the dealer and salesman and corrected the form so that Suncoast would receive the rebate portion due them rather than the Respondent. Although Respondent attempted to justify his actions through his acquaintance since 1971 who worked at Tampa Electric, this witness admitted that he did not work directly with the processing of the rebates and, although he claims his supervisor had told him that Respondent could apply for a rebate, there is no evidence that justifies Respondent's attempt to deceive Tampa Electric into believing him to be the dealer so

that he could receive the dealer's portion of the rebate as well as the buyer's. It is clear that Respondent, through such misrepresentation, violated the Integration Rule of The Florida Bar, Article XI, Rule 11.02(3)(a) for conduct contrary to honesty, justice, or good morals as well as the following Disciplinary Rules: 1-102(A)(4) for engaging in conduct involving dishonesty, fraud, deceit or misrepresentation, and 1-102(A)(6) for conduct reflecting adversely on his fitness to practice law.

Respondent freely admits to mailing a thank you card along with a copy of the check from the Tampa Electric Rebate and the Order from the circuit court granting his Motion for Summary Judgement to Suncoast's attorney shortly after the motion was granted. In fact, Respondent apparently sees nothing wrong with such an action and has stated under oath that he would have done more than this if possible. Such actions, apparently in an effort to "gloat" over a perceived victory, reflect poorly on any attorney's judgement as well as the Bar as a whole. Such conduct is clearly a violation of Disciplinary Rule 1-102(A)(6) for conduct reflecting adversely on Respondent's fitness to practice law.

The final allegation against Respondent in Count Two involves threats and demands made by Respondent towards Suncoast. Respondent wrote a letter to Suncoast's attorney who had filed a subsequent suit in county court, in which Respondent stated that

he would file additional lawsuits against Suncoast unless they dismissed the county court claim. Further, and in violation of ethical standards, was Respondent's last condition: that Suncoast "withdraw" their pending complaint against him with The Florida Bar. It is clearly stated in Article XI, Rule 11.04(4) of the Integration Rules of The Florida Bar, which all attorneys are sworn to abide, that the complainant is not a party to the disciplinary proceedings and that an investigation will not be waived because of settlement. Although Respondent is charged with notice of the rules and is held to know their provisions and standards by Article XI, Rule 11.01(1) of the Integration Rules of The Florida Bar, he claims, apparently as defense, that no one told him there was anything wrong with this. An affidavit which should shed light on this subject is presently being sought this subject by Respondent from the investigating member of the grievance committee, Ms. Carolyn Fields.

Further, Respondent continues his threats and, apparently sees fit to threaten The Florida Bar and the Referee along these lines. In Respondent's Addendum to Respondent's Motion to Dismiss, filed the 11th day of February, 1986, Respondent petitions the Referee to dismiss this disciplinary matter:

> Should Suncoast be allowed to pursue its complaint, Respondent is left with no alternative but to bring an action for

> breach of contract against Suncoast or be placed by The Bar in the unconscionable position of having bargained away significant legal rights in good faith without a remedy to reinstate those rights.

As Mr. Grover Freeman testified, Suncoast accepted the settlement offer out of desperation in an attempt to end the endless attorney fees which threatened to bankrupt the company. Clearly Mr. Freeman recognized that it was unethical of Respondent to force such an offer of settlement, and indicated his cooperation in an ethical investigation in correspondence to The Florida Bar's grievance committee. Clearly such conduct is in fact contrary to honesty, justice, and good morals in violation of Article XI, Rule 11.02(3)(a) of the Integration Rules of The Florida Bar as well as Disciplinary Rule 1-102(A)(6) for conduct reflecting adversely on his fitness to practice law.

## ARGUMENT

POINT III

**THE GRIEVANCE COMMITTEE OF THE FLORIDA BAR AND THE STAFF COUNSEL OF THE FLORIDA BAR ACTED PROPERLY PURSUANT TO THE INTEGRATION RULE OF THE FLORIDA BAR IN ALL ASPECTS OF THE PROCESSING OF THIS CASE.**

Throughout the pendency of this action at the Referee level, Respondent has complained and alleged that the Grievance Committee of the Thirteenth Judicial Circuit "B" acted improperly in the investigation and the hearing in this matter. Respondent raised these issues in his Motion to Dismiss which was heard and denied on February 11, 1986, and brought them up again at the Referee hearing on March 21, 1986. Respondent alleged that he was not allowed a reasonable opportunity to testify and appear at the Grievance Committee hearing. However, Respondent admits receiving adequate notice of the July 12 hearing yet choosing to travel with his wife to Europe on a vacation. Respondent further admits that investigating member Carolyn Fields suggested that he contact the committee chairman to arrange a continuance. Respondent states that he made telephone calls to the chairman's office and never spoke to him. Yet there is no evidence that Respondent

ever pursued the matter in writing or with other follow up. Investigating member Carolyn Fields even wrote the Chairman that should Respondent request such a continuance, she would have no objection, see Exhibit One of March 21, 1986. It seems clear that Respondent had no compelling desire to attend the grievance committee hearing. In view of the very close proximity between the final settlement of this matter and the date of the grievance committee hearing, it seems quite possible that Respondent was so assured that the settlement would dispose of the matter that he felt his attendance was unnecessary. At any rate, there is no requirement that a Respondent attend a grievance committee hearing. Under the pertinent Rule, Rule 11.04(3) of the Integration Rule of The Florida Bar, Arcticle XI, an accused attorney shall be granted the right to be present at any hearing, but there is absolutely no requirement that an attorney must be present. If this were the case, an attorney could avoid probable cause findings simply by avoiding the hearings.

Respondent further complained about alleged statements of the investigating member, Carolyn Fields to him regarding the case. Respondent has been ordered to obtain an affidavit regarding this and until that is received, The Florida Bar is unable to address this point.

Respondent further complained that the committee was at fault since they had only one witness at the hearing and the investigating member was not present. Since the witness was the complainant, Ms. Rodriquez, it is clear that she was familiar with the actions of the Respondent which led to complaint. The grievance committee found her testimony was credible and adequate to support a finding of probable cause. Ms. Diane Keunzel of The Florida Bar testified that Ms. Fields found it unavoidable to be absent and had thoroughly reviewed the file with her prior to the hearing. It is not proper to attempt to dissect the actual mental processes of the grievance committee in reaching their findings of probable cause and therefore any attempt to delve into the committees mental processes is impossible. While this Referee has noted Ms. Rodriquez' apparent belief that the trial judge was responsible for forcing settlement negotiations upon the parties and questioned why the grievance committee apparently took no action as to this statement, it remains the position of The Florida Bar that the reasons for the committee's actions are impossible to discern at this point in time. Although one respectfully understands a reason for curiosity into this issue, it is the position of The Florida Bar that this issue has no bearing on the issues assigned to this Referee by the Supreme Court of Florida. Recognizing that only speculation is possible,

one can only speculate that the committee realized that any jurisdiction over judges would fall to the Judicial Qualification Commission if one took Ms. Rodriguez' statement literally.

At any rate, the Supreme Court of Florida has authorized, through the Integration Rule of The Florida Bar, Article XI, Rule 11.04(7), that grievance committee actions are subject to review by the designated reviewer of each committee, who is a member of the Board of Governors of The Florida Bar. Absent any actions by the designated reviewer, this rule further provides that all grievance committee action shall stand. Therefore, due to the absence of any contrary direction by this committee's designated reviewer as well as the committee's and staff counsel's full compliance with the rules, it is inappropriate for Respondent to attempt to justify his violations of ethical standards by complaining about the actions of the grievance committee and staff counsel.

## CONCLUSION

WHEREFORE, The Florida Bar respectfully prays that this Referee will find Respondent in violation of the Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar and The Florida Bar Integration Rules as presented above and receommend appropriate discipline of the Respondent to the Supreme Court of Florida.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original of the foregoing Complainant's Brief has been furnished by ordinary U.S. mail to the Referee, The Honorable Gerard J. O'Brien, 315 Court Street, Clearwater, Florida, 33516; a copy of the foregoing was mailed by ordinary U.S. mail to J.B. Hooper, Respondent, at Post Office Box 1891, Tampa, Florida, 33601, on this 7th day of April, 1986.

Jan Wichrowski

JAN K. WICHROWSKI
Bar Counsel