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SID J. WHITE
JAN 23 1991
CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

ALPHONSE DELLA-DONNA,

Respondent.

SUPREME COURT CASE NUMBER: 69,324

THE FLORIDA BAR CASE NUMBER: 17E82F69

INITIAL BRIEF OF RESPONDENT

LARRY D. SIMPSON
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PRELIMINARY STATEMENT

References to the original trial transcript will be made by the designation "R" followed by the page number (R-page number).

References to the transcript of the cost hearing will be made by the designation "R(CH)" followed by the page number (R(CH)-page number).

References to the Referee's original Report dated January 27, 1988, nunc pro tunc December 22, 1987, will be made by the designation "REF" followed by the page number (REF-page number).

References to the Referee's Report of Recalculation of Costs will be made by the designation "REF(CH)" followed by the page number (REF(CH)-page number).

References to the exhibits at the original trial will be made by denoting whether the exhibit was the complainant's exhibit ("CX") or Respondent's exhibit ("RX") followed by the exhibit number, e.g. (CX-exhibit number).

References to the exhibits at the cost hearing will be made in the same manner as the original trial exhibits only using the additional designation "CH" to signify an exhibit at the cost hearing, e.g. (CX(CH)-exhibit number).

STATEMENT OF THE CASE
AND OF THE FACTS

By order of this Court, dated October 24, 1989, this case was remanded to the Referee for recalculation of costs.

During the cost hearing, the Florida Bar claimed entitlement to $103,315.52 in costs expended in the prosecution of Respondent (REF(CH)-2). These expenses were broken down as follows:

1.	Expense Grievance Committee Level	$ 11,308.27
2.	Expenses Referee Level Court Reporter - including recalculation of costs hearings, less $480 credit to Respondent for copy of the record of said hearing @ $1.00 per page.	$ 65,883.35
3.	Fees and Expenses for Expert Witnesses	$ 20,072.03
4.	Process and subpoena service charges and delivery expenses	$ 3,291.19
5.	Miscellaneous Expenses of Special Bar Counsel	$ 2,610.68
6.	Administration Charges (Rule 3-7.5)	$ 150.00
	Total	$103,315.52

(REF(CH)-2,3)

The testimony at the cost hearing reflected that, prior to commencing this proceeding before the Grievance Committee, the Bar made a determination to "present the strongest possible case" against the Respondent (R(CH)-116). The Bar hired special counsel and directed him to use his

own "judgment" in prosecuting the case, gave him authority to hire expert witnesses of his own choosing, and to arrange and pay for Court reporters (R(CH)-142).

The Bar lodged twenty-four charges against the Respondent at the grievance committee level (RX(CH)-8) where the proceedings consumed eight and one-half days (R(A-I)-69) and produced transcripts a foot and one-half thick with 600 - 700 total exhibits (R(A-III)-17). In the course of the grievance committee proceedings, the Bar incurred $11,308.27 in costs that the Bar sought to tax against Respondent, including $1,980.55 to copy all the exhibits (REF(CH)-2; R(CH)-96).

The grievance committee considered the matter for twenty months and sustained only nine of the twenty-four charges (REF(CH)-4; R(A-I)-75-75; RX(CH)-8). Following the grievance committee findings, Special Bar Counsel filed a three count complaint with this Court that contained thirty two pages of allegations and two hundred fifty pages of exhibits relating to three major areas:

1. the NOVA-Goodwin Litigation;
2. the Elizabeth Anne Goodwin case;
3. the Burns Estate.

Within each of these three major areas, the Bar alleged a plethora of ethical violations including: the filing of frivolous actions and pleadings, being overly litigious, conflicts of interest, forum shopping, fraud, deceit, moral

turpitude, conduct prejudicial to the administration of justice, excessive fees, extortion, and claims for restitution (see the Florida Bar's complaint).

Prior to the trial before the Referee, the Respondent filed a number of pretrial motions seeking to narrow the issues, e.g. a Motion to Strike matters from the complaint that were no probable caused, a Motion Re: Specification of Charges, and a Motion In Limine, Re: Expert Witnesses (R(A-I)-43; 51-53). There were four hundred thirty-four potential charges encompassed in the complaint leading Respondent's attorney to say "when I say we're confused, we're confused" (R(A-II)-45-50). The Bar agreed to provide a more definite statement, promising to provide a summary of the principal charges[1] being asserted (R(A-II)-39-40; 55-56). The Referee entered an order directing the attorneys to "simplify the issues" and "not try everything that's ever happened in this courthouse" (R(A-II)-72,73). The Referee noted "the volume of this material is overwhelming I think for the Defendant - or the Respondent" (R(A-III)-15). The Referee finally asked point blank:

> THE REFEREE: Is the Bar determined, with this tremendous, complicated three count complaint, you are attempting to prove every allegation therein....
> MR. WICH: Correct. Yes, your Honor. (R(A-III)-22,23)

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1. Special Bar Counsel said there were "ten" principal charges (R(A-II)-39-40).

With this background, the trial before the Referee commenced on July 7, 1987, and consumed thirty-five (35) days of testimony. During the trial, the Bar presented extensive testimony (over objection) on several issues that had been no probable caused by the grievance committee (See e.g., R-906 et seq; R-1382 et seq; R-2215 et seq; R-3457 et seq). The Bar also admitted extensive evidence on a theory that it was "Williams Rule" type of evidence (See e.g., R-2183 et seq; R-3272 et seq; R-6818 et seq). On many occasions, the Bar read entire documents and depositions into the record when the document was already an exhibit (R(CH)-263, 369, 382). The court reporter stated there were several times that things were "read into the record massively"[2] (R(CH)-371). The Referee commented:

> I remember one day, we had a record, we spent a half a day reading something. I don't know why. It was a transcript of a hearing (R(CH)-257).

The Bar also called three "expert" witnesses to testify at the trial. One of those experts, James Presley, billed the Bar $16,346.00 for his testimony (BX(CH)-8). George Bailey, who likewise testified as an expert for the Bar on the same issues, billed the Bar only $3,725.84 (BX(CH)-8). The third Bar "expert", Judge George Hersey of the District Court of Appeal, testified regarding the initial appeal from

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2. On one occasion, Respondent sought to publish one sentence from a transcript. Special Bar Counsel insisted on reading into the record a 77 page transcript (R(CH)-262-263; R-6646 et seq).

Judge Richardson's orders of 1978 and did not bill for his testimony. All of the expert witness fees were ultimately taxed against Respondent (REF(CH)-2, 6).

Although not raised in the pleadings, the Bar called numerous witnesses to testify to the Respondent's character and reputation for truthfulness. Special Bar Counsel's position was made clear by him:

> MR. WICH: Anything with regard to the character of Mr. Della-Donna has been put in issue (R-6823).

The Bar proceeded to elicit testimony from eight witnesses[3] that Respondent's reputation in the legal community was "bad" (R-414, 1121-22, 1637, 1728, 2299, 2672, 2914). Respondent, to rebut this evidence, was forced to likewise call character witnesses (Judge Scott, Judge Miller, Judge Marko, Sister McGrady) who testified his reputation in the community was good (R-3366, 3380, 4431, 4502) and provided the Referee with his personal history consisting of many honors and awards, including being named to the Order of the Knights of the Malta (K.M.) (REF-5-8).

Ultimately, the trial produced 8,369 pages of trial transcript that was billed by the court reporter at a rate of $5.50 per page for a total cost of $46,028.50 (R(CH)-38; BX(CH)-3). A substantial portion of the trial transcript (2,437 pages) had been previously transcribed during the

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3. Most of these witnesses were openly hostile and/or adversaries in the litigations, see e.g. Terry Russell (R-414); Bruno Diguilian (R-2672)

course of the trial and paid for by the parties. These same transcripts were reincorporated into the final trial transcript and rebilled by the Court reporters at the full cost of $5.50 per page (R(CH)-53-55; 61-62).

An original and two copies of the trial transcript was produced by the Court reporters and delivered to Special Bar Counsel who sent the original to the Referee[4]. Special Bar Counsel kept the other two copies, refusing to make a copy[5] available to Respondent unless Respondent paid the full cost thereof or there was a Court order (R(CH)-192).

Special Bar Counsel testified he only read 20 - 33 1/3% of his copy of the transcript and the other copy was never used at all (R(CH)-192-193).

Following the cost hearings, Special Bar Counsel likewise refused to provide a copy of the cost hearing transcript to Respondent without full payment of the court reporter's bill. The Referee conducted a hearing and found that the Bar should furnish Respondent a copy of the transcript "at no charge"; however "[s]ince the Bar insists upon charging for Respondent's copy of the transcript, the

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4. The Referee never read the transcript. The Referee's report was delivered to counsel months before the transcript was prepared by the court reporters and contains no references to the record (R(CH)-286).

5. The Bar also refused to allow Respondent to copy transcripts of the grievance committee hearings, even though the Bar had transcripts available in its possession (R(A-VI)-91-98).

Respondent shall pay $1.00 per page therefore" (Referee's Findings and Recommended Order of July 2, 1990 nunc pro tunc May 16, 1990).

The Referee's Report of Recalculation of Costs reduced the Bar's claim for grievance committee expenses by five-eighths (a reduction of $7,067.67) and reduced the court reporter charges by one-half (a reduction of $32,941.68). The remaining Bar expenses were taxed in full for a total cost assessment of $63,306.17 (REF(CH)-1-6).

The Respondent has filed a Petition To Review The Referee's Report Of Recalculation Of Costs and this appeal follows.

SUMMARY OF THE ARGUMENT

In this brief, Respondent argues that the Florida Bar should be required to bear its own costs.

The Bar decided to present the "strongest possible case" against Respondent and, in the course of doing so, created a massive record with expenses unparalleled in the reported history of the Bar disciplinary network. The Bar took every advantage, utilizing expert witnesses, Williams Rule testimony and presenting evidence of matters that had received a finding of no probable cause by the grievance committee.

While Respondent recognizes that this Court has determined that he should be disciplined, the Respondent respectfully argues that this Court should not condone the Bar's actions in this case and should require the Bar to bear its own costs.

POINT I

THE FLORIDA BAR SHOULD BEAR ITS OWN COSTS

It is indeed ironic that the Bar in this prosecution of Respondent on allegations of being overly litigious, has resorted to the very tactics it supposedly condemns. As the statement of facts indicates, the Bar has created a monster of a record, sought to litigate acts for which no probable cause was found, refused to concede on any issue, and ran up an enormous expense in the process. Now the Bar wishes to leave Respondent with the tab. This is unconscionable and should not be condoned by this Court.

The Referee should have required the Bar to absorb its own costs rather than attempt to "equitably" apportion the costs between the Bar and Respondent. Although the Referee found that the Bar was "acting properly and responsibly" (REF(CH)-4), this conclusion flies in the face of the Referee's other findings and the remaining facts of this case, which clearly demonstrate the irresponsible manner in which this case has been processed by the Bar.

In the **Florida Bar v. Rubin**, 362 So.2d 12 (Fla. 1978), this Court refused to tax costs against the accused attorney, Ellis Rubin, and also dismissed the Florida Bar's petition to review two Referee Reports recommending that Rubin be disciplined. Without even reaching the issue of whether Rubin had violated the Disciplinary Rules, the

Supreme Court dismissed the Bar's petition for review because of the Bar's irresponsible conduct in the prosecution of the case. The Supreme Court said:

> The Bar has consistently demanded that attorneys turn "square corners" in the conduct of their affairs. An accused attorney has a right to demand no less of the Bar when it musters its resources to prosecute for attorney misconduct. 362 So.2d at 16.

The record, sub judice, is replete with instances of irresponsible conduct on the part of the Bar in the prosecution of this case. The misconduct took many forms and began with the Bar's avowed purpose of presenting the "strongest possible case"[6] to secure Respondent's conviction. In order to ensure the desired result, the Bar hired Special Bar Counsel and gave him carte blanche authority to prosecute this matter. The result was a plethora of charges at the grievance committee level with only 9 of 24 even obtaining a finding of probable cause. In the meantime, substantial time and resources of both the Bar and Respondent were expended with the Bar claiming costs of $11,308.27 (REF(CH)-2) and the Respondent having $11,380.43 in costs (not including legal fees) defending himself at the grievance committee level (R(CH)-253). Following the grievance committee, the Bar filed a complaint 32 pages long with 250 pages of exhibits and 434 potential charges.

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6. Florida Bar Branch Staff Counsel Richard Liss testified that the Florida Bar made a decision that it "wanted Bar counsel to present the strongest possible case" (R(CH)-116).

Despite the Referee's repeated requests to simplify the issues, the Bar steadfastly pushed forward insisting on attempting to prove every conceivable issue (R(A-III-22, 23). Thirty-five days of testimony later, the Bar's efforts were rewarded with a favorable ruling. Even then, two of the Bar's principle contentions, i.e. that Respondent was guilty of extortion and that Respondent should pay 1.1 million in restitution[7], were not sustained.

In the process of creating this monstrous record, the Bar freely expended costs that now total over $100,000.00. Never before in the reported history of the Bar disciplinary network have costs been so extraordinary.

The Bar left no stone unturned[8] in the prosecution of Respondent, inter alia utilizing "expert witnesses", character witnesses, "Williams Rule" testimony, and evidence of matters where there was a finding of no probable cause.

The zeal with which this case was prosecuted is abundantly documented in the record with such examples as 1) the Bar calling sitting judges (and other witnesses) to testify to Respondent's bad character (R-1121-22; 1637; 2672); 2) the Bar calling sitting judges as expert witnesses

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7. In fact, two of the potential beneficiaries of this "restitution" filed statements with this court disavowing any claim against Respondent for restitution.

8. Except for calling the one witness who played such a vital role in the case, Sally Determan (see discussion infra at page 18).

(R-942-949); 3) the Bar's attempt before this Court to obtain a premature waiver of confidentiality based on incorrect allegations[9]; 4) Bar counsel's erroneous statements at oral argument that left the impression that Respondent hid the facts from his attorneys[10].

It is clear that the Bar intended to, and did, pull out "all the stops" to secure Respondent's conviction, and in the process, expended costs of over $100,000.00. However,

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9. On February 12, 1988, in the Response of the Florida Bar to Respondent's Motion to Dismiss, the Bar filed a pleading with this court wherein the Bar alleged:

> 9. If the Court believes termination of confidentiality entirely is inappropriate, the Florida Bar requests a limited waiver to allow notice to the judge presiding in In Re Estate of Leo Goodwin, Sr., Case No. 35629 (J. Hare), in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, Probate Division, wherein there is an impending release of $800,000.00 to respondent. In reference to said case the referee herein has made findings that respondent's fees already received are clearly excessive. [Emphasis Supplied]

In fact, the Referee did not make such a finding in the Hare case, and the Bar never alleged that the fees were excessive in that case. The trial transcript reflects:

> THE REFEREE: Well, only problem is, the Bar is not charging excessive fees with reference to what Judge Hare ordered?
>
> MR. WICH: No.
>
> (R-6233-34)

10. See Respondent's motion for rehearing filed July 7, 1989.

at the same time, Respondent incurred costs of $42,453.35 (not including legal fees) attempting to defend himself (R(CH)-303).

In the end, this was a fairly simple case wherein the Bar and its lawyer witnesses said that Respondent was overly litigious and filed frivolous lawsuits. Respondent and the many highly respected trial lawyers who actually represented him in the various proceedings steadfastly maintained that the cases were not frivolous, had merit and in some instances were "mandated" (see e.g. the testimony of Robert O'Toole (R-5114-17)). Much of the Bar's testimony was seriously impeached with evidence of "secret deals" between Respondent's opponents that directly impacted on the positions taken by Respondent and his attorneys and was further contradicted by documentary evidence.[11]

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11. Most of this documentary evidence was discovered in the files of NOVA and the Riggs Bank long after the litigation ended. Respondent's Cost Hearing Exhibit #22 is a summary of this documentary evidence that is in the record. For example, compare Dr. Fischler's testimony before Judge Richardson that, prior to February of 1978, NOVA had "monitored the gift" but had not placed itself in position where it began to believe the funds would be received (R-6095) with the documentary evidence discovered subsequently that NOVA had begun site preparation for the law school and hired architects long before February 1978 (R-6127, 6141-42, 6152). Compare NOVA's attorney's representations before Judge Richardson (RX(22)-136-138) and Judge Hoeveler (RX(22)-143-153) "There has been a distribution of funds .... the money is available for our use" with the secret escrow agreement (RX(22)-172-178), NOVA's request to release the funds (RX(22)-139-140) and the Bank's refusal to do so (RX(22)-142).

If the Respondent's actions really were as horrendous as the Bar claimed (constituting fraud, moral turpitude, etc.) then surely such charges could be sustained and the Respondent summarily disbarred without the necessity of mounting an all out assault against Respondent's every action, and his character as a lawyer and a person. This case was complex, but only because the Bar elected to present a massive prosecution that encompassed every conceivable action that Respondent took over a ten year period of time.

Under these circumstances, the case of the **Florida Bar v. McCain**, **361 So.2d 700 (Fla. 1978) [McCain II]** is directly on point. In **McCain II**, the Bar alleged that it incurred costs of over $25,000.00 in prosecuting Justice McCain. This Court refused to tax any costs against the Respondent, holding:

> "The Florida Bar took an excessively broad approach to this case and failed to early abandon counts that could not be proved. For this reason we find it inequitable to impose all costs upon McCain. Thus, each party shall bear its own costs." **361 So.2d at 707.**

Likewise, in the case sub judice, as a result of the Bar's desire to present the "strongest possible case" against Respondent, it is clear the Bar took an excessively broad approach to this case, much broader than in **McCain II**, and again should be required to absorb the costs it incurred.

Moreover, after obtaining Respondent's conviction and ultimate disbarment by this Court, the Bar entered into a contingent fee agreement with Special Bar Counsel to collect the costs that were so freely expended. The resulting testimony of Special Bar Counsel at the cost hearing (R(CH)-167-204) attempting to justify the myriad of expenses in this case just further confirms that the Bar's ultimate design was to pull out all stops to secure Respondent's conviction by presenting the "strongest possible case".

This Court should not rubber-stamp the Bar's actions in this case. The record repeatedly reflects that the Referee was troubled with the way the Bar proceeded in this matter. Before trial, the Referee repeatedly asked the Bar to "simplify the issues" and "not try everything that's ever happened in this courthouse" (R(A-II)-72, 73). The Referee stated that "the volume of this material is overwhelming I think for the Defendant - or the Respondent" (R(A-III)-15).

As pretrial hearings progressed, the Referee became increasingly frustrated with the Bar's prosecution of the case saying:

> THE REFEREE: I'm amazed at the standard that this is not going forward in a professional manner. With the Florida Bar being the complainant, I would anticipate that every rule of procedure would be meticulously followed with a meticulously particularistic type of manner. That's all I can say. (R(A-III)-26)

During the trial, the Referee continuously inquired about the Bar's key witness (Sally Determan) who dealt directly with the Respondent, but yet was not called by the Bar to testify[12]. The Referee commented "she played such a primary role .... dealing with Mr. Della-Donna ...., I'm rather surprised she wasn't here in person, but she wasn't" (R-7117); "I wish Sally Determan was here instead of these reams of documentation" (R-6178); "She's been the mystery girl in this whole trial" (R-5507).

The Bar's refusal to provide a copy of the trial transcript to the Respondent just further demonstrates the overreaching that took place in this case. Special Bar Counsel had two copies of the transcript available - he read maybe one-third of one copy - the other was never used for any purpose. Nevertheless, the Bar seeks to tax the full cost of the trial transcript against Respondent, while denying him a copy.

When the Referee found out that the Bar had refused to provide a copy of the cost hearing transcript to Respondent, the Referee said:

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12. The reason the Bar did not call Determan as a witness is abundantly clear. Determan gave a deposition in one of the cases on June 22, 1983 (R-1461) that supported the Bar's position; however, on October 8, 1984 (R-1473-74) she gave a second deposition that recanted the first. The Referee's Report (prepared by Bar Counsel) relied upon the first deposition and ignored the second (REF-14 (paragraph 25).

> "This Referee further finds that the Bar should furnish voluntarily a copy of the transcript to the Respondent at no charge and he is astounded at the Bar's refusal to do so upon Respondent's initial request. (Referee's Order of July 2, 1990 nunc pro tunc May 16, 1990.)

Finally, the Bar's action in entering into a contingent fee contract with Special Bar Counsel brought this statement from the Referee:

> "The collection of costs in this matter is being handled on a contingent fee basis. The referee questions the policy and propriety of the Florida Bar to engage the services of a private attorney for this purpose. The Florida Bar is staffed with competent attorneys, fully trained and qualified to handle this type of litigation (REF(CH)-6).

The above examples[13] are simply representative of a record that is replete with overreaching by the Bar. The Respondent summed up the overall impact of the Bar's actions as being "attacked by a State agency in a brutal way" (R(CH)-330). In the **Florida Bar v. McCain**, **330 So.2d 712 (Fla. 1976) [McCain I]**, Justice Sundberg said:

> "The Florida Bar as an arm of this Court is charged to act responsibly. If it acts irresponsibly this Court has the power and the duty to impose appropriate sanctions against the offending members." **McCain I at 718.**

In **McCain II**, Justice England quoted the above language in writing that "The Bar's absorption of its costs for this proceeding is clearly warranted." **McCain II at 708.**

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13. See also Respondent's Cost Hearing Exhibits #22 and #23.

Thus, there is clear authority to require the Bar to absorb its own costs when the Bar fails to turn "square corners". This Court should require the Bar to bear at least its own costs. It is simply inequitable to permit the Bar to focus its unlimited resources and powerful disciplinary machinery on the prosecution of a single case,[14] while running up a bill of over $100,000.00 in its grand scheme to present the "strongest possible case" against Respondent. Having made this decision, the Bar should be required to pay the freight.

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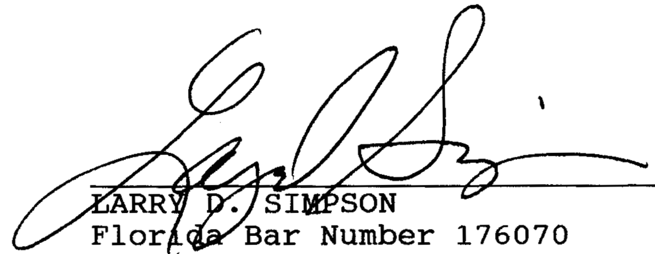
14. Considering the Bar's misconduct, it is doubtful that this Respondent (or any other) could receive a fair evaluation of his conduct.

CONCLUSION

The Florida Bar should not be rewarded for mounting an all out assault upon Respondent and his every action over a ten year period of time. This case should have been handled in a responsible manner, resulting in a swift and efficient determination of Respondent's guilt or innocence.

Instead, since the Bar elected to present the "strongest possible case" against Respondent and in the process created this massive record, the Bar should be required to pay the freight for its decision and absorb its own costs.



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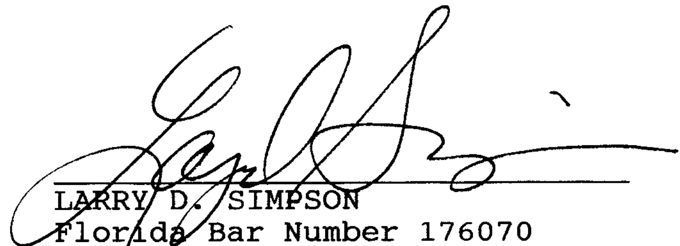
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by U. S. Mail to Mr. Donald A. Wich, Sullivan, Bailey, Wich & Stockman, 2335 East Atlantic Boulevard, Suite #301, Glendale Federal Building, Pompano Beach, Florida 33062 and Mr. John Anthony Boggs, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, this 23rd day of January, 1991.



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