Original

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	
Complainant,	)	Case No. 72,575
	)	TFB Nos. 87-23,020(06E)
vs.	)	87-23,023(06E)
	)	
JAMES C. McKENZIE,	)	
	)	
Respondent.	)	
	)	

RESPONDENT'S INITIAL BRIEF

JAMES C. McKENZIE, Respondent
P.O. Box 4579
Clearwater, FL 34618
(813) 442-6758

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE. **1-26**

SUMMARY OF ARGUMENT. 27-29

ARGUMENT 30-53

ISSUE I: Are letters to a judge without more, by themselves violation of disciplinary rules? . 30-37

ISSUE 11: Does use of perjured testimony, introduction of false and misleading evidence and use of prior reprimands by Bar counsel during trial show a mistrial should have been granted? 38-43

ISSUE 111: Is a suit against a judge permissible where he acts "wholly without jurisdiction"? . . 44-50

ISSUE IV: May the Florida Bar charge as costs, items which are not allowed by the disciplinary rules or the Florida Statutes?. 51-53

CONCLUSION. 54-55

CERTIFICATE OF SERVICE 55

TABLE OF CITATIONS

Citation	Page
BROWN v STATE, 334 So.2d 597(Fla.1976). . . .	40
FARISH v SMOTH, 58 So.2d 534(Fla.1952). . . .	49
HARPER v MERCKEL, 638 F.2d 848(5 USCA 1981) .	49
LIVINGSTON v STATE, 192 So. 327(Fla.1939) . .	41
RANDALL v STATE, 334 So.2d 81(2 DCA 1970) . .	41
STATE v MONTGOMERY, 467 So.2d 387(1 DCA 1979)	49
FLORIDA STATUTES:	
Chapter 64 Partition.	46
29.03	29,53
837.021(1).	39
837.011	39,40
TEXT AUTHORITY: 12 ALR 2d p.1067, §3	49

ABBREVIATIONS AND TERMS USED

R.AP. refers to Respondent's Appendix

T.T. refers to Trial Transcript

"Opposing counsel" refers to the attorney on the otherside of the divorce litigation

STATEMENT OF THE FACTS AND OF THE CASE

In the Referee's Report of June 2, 1989, he found that as to COUNT I of the Bar's Complaint, that exhibits No. 19, 21, 22, and 25 which were letters directed to the trial judge from the respondent constituted evidence that the respondent violated disciplinary Rules, DR 1-102(A)(5), DR 1-102(A)(6) and DR 7-106(C)(1). DR 1-102(A)(5) says a lawyer "shall not engage in conduct prejudicial to the administration of justice." And (6) is "engaging in other conduct that adversely reflects on his fitness to practice law." DR 7-106(C)(1) says a lawyer "shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence."(R.AP.1-4)

As to COUNT II of the Complaint, the Referee found a violation of DR 1-102(A)(1), "violating a disciplinary rule"; DR 1-102(A)(5) "conduct prejudicial to the administration of justice"; DR 7-102(A)(1) "filing a suit merely to harass or viciously injure another"; DR 7-102(A)(2) "advancing a claim or defense that is unwarranted under existing law," and DR 7-102(A)(7), "assisting his client in conduct that the lawyer knows to be illegal or fraudulent". (R.AP.1-4)

This case was commenced by The Florida Bar on its own, without a complaint being filed by any party. The matters involved are two separate law suits in which the respondent represented the husband in a divorce case and in the other, the wife in a divorce case. COUNT I was the LANHAM divorce and COUNT II was the **BISHOP** divorce. In the first case the respondent represented the husband and in the second case he represented the wife.

AS TO COUNT I - THE LANHAM CASE

The Bar's Complaint in COUNT I consisted of 17 paragraphs and 11 exhibits. After motions were made, the claim of "ex parte" was stricken by the Referee on November 3, 1988. (R.AP.5) The claim had been made in the Complaint that the letters which were sent, were sent "ex parte", (R.AP. 6) and after a hearing on respondent's motion were found not "ex parte", because the other side was always copied. (R.AP. 5)

Continuing again on the LANHAM matter, the Referee selected 4 Bar exhibits No. 19, 21, 22, and 25, in support of his findings. (R.AP.12-18) Included in these exhibits are also No. 20 and 24. (R.AP.13,17) While there is no need to go into all other exhibits introduced by the Bar as constituting a violation of disciplinary rules, some of them are important to show the nature and the background of how these disputes arose and will be included for that purpose along with various testimony established during the trial which took place April 6, 1989. Regarding the Bar's exhibit No. 19, dated April 11, 1986, the attorney opposing respondent therein somehow got a court date from the trial judge which allowed only a week's time between the

time it was scheduled and the time respondent was notified of such hearing for temporary alimony. The case itself, LANHAM v LANHAM was commenced in December 19, 1984 and the case had dragged on interminably for several reasons. Outside of the temporary order which was entered in January, 1985, it was impossible to get a court date from the trial judge for any number of motions which had to be made. The trial judge, at that time, was brand new, having just been appointed in the previous year and, he had inherited a tremendous back log of cases which was occupying most of his time. (R.AP.20,T.T 199)On several occasions a substitute judge had to hear some of the matters, finally near September of 1985, the trial judge started hearing vaious matters in this case. Respondent, having gotten the motion for temporary alimony on April 11, 1986, went over to ask the judge's secretary for time in which to hear respondent's Motion for Continuance, because there was no way respondent could adequately prepare to defend such motion which would require the presence of respondent's client among other things, who was in the Merchant Marines and at sea at the time. The judge's secretary informed respondent that there was no way that respondent could have a hearing on his Motion for Continuance and stated that respondent should send a letter to the judge outlining all reasons for such continuance. That resulted in the letter

of April 11, 1986, Bar's Exhibit No. 19, pointing that out and stating a conflict because of another scheduled matter. (R.AP.19-20,12,TT198) Later on, respondent found out that opposing attorney had scheduled this matter on a afternoon that the judge kept reserved for hearing matters of contempt, (involving non-payment of support), and obviously when he found out that this matter was scheduled at that time, such motion was cancelled. Respondent went to the hearing at the scheduled time, found no one there and was informed by the judge's secretary that that particular motion had been cancelled. (R.AP. 21,T.T.201) Bar's Exhibit 20 appears to be ostensibly a letter written by opposing counsel, on the LANHAM case to The Florida Bar, indicating a copy had been sent to the trial judge. That April 14, 1986 letter accuses the respondent of making "ex parte communications to the court". (R.AP. 13) On April 18, 1986 respondent sent a letter to The Florida Bar inquiring about the letter written by opposing counsel dated April 14, 1986. The Florida Bar wrote back to respondent, (R.AP. 16). Their response indicated they had never had a letter from Mr. Davis. This response was included in a letter respondent wrote to the trial judge indicating that in fact, opposing counsel had never even sent a letter to The Florida Bar, but wanted to have the trial judge think that he had done so.

The letter from The Florida Bar to respondent dated April 24, 1986, by Steven Rushing, Branch Staff Counsel, indicated that they had no letter from opposing counsel which respondent's letter referred to (R.AP.15-16). Respondent's letter of April 25, 1986 and The Florida Bar's letter of April 24, 1986 identified as Bar Exhibit No. 22, shows clearly that it was sent to opposing counsel. Bar's Exhibit No. 25, is respondent's June 12, 1986 letter to the trial judge, responding to Bar's Exhibit No. 24 which was letter written by opposing counsel to the trial judge. Bar's Exhibit No. 24, letter by opposing counsel dated June 9, 1986 accuses respondent of "lying, evasions, pretentions, unfounded and malicious charges of unethical behavior, persistent misrepresentations of this record, demanding that the trial judge set an emergency conference hearing."(R.AP. 17) Respondent's letter of June 12, 1986 accuses opposing counsel of making unfounded and odious remarks about respondent, way beyond the bounds of normal behavior.(R.AP. 18) When opposing counsel testified at the Bar hearing April 6, 1989, he stated that he was disbarred because of a felony conviction.(R.AP. 23) The Florida Bar did absolutely nothing about the misrepresentations and deceit of opposing counsel, despite DR 1-102(A)(4) and (5) and also that EC 7-37 states that "a lawyer should not make unfair or derogatory personal reference to opposing counsel."

The Florida Bar has been after respondent for years, solely because he advertises; not because he steals from clients, not because he neglects legal matters, not because he represents clients for excessive fees, not because he is an alcoholic or drug user. Providing low-cost services for routine legal matters apparently has upset The Florida Bar and certain members of the legal profession in Pinellas County. See please respondent's Exhibit (not numbered by the Referee), dated February 7, 1978, a letter from The Florida Bar to the Chairman of the Grievance Committee "C" of St. Petersburg, by a Michael C. Whittington relative to 3 matters brought to the attention of The Florida Bar, mentioning not that the 3 matters brought to The Bar's attention were violations, but that as an employee of "Consolidated Legal Clinics" he was assisting another in the unauthorized practice of law. (R.AP. 24) See also respondent's answer and affirmative defense which attempts to outline problems that respondent has had with The Florida Bar solely because he advertises consisting of trumped up cases which The Florida Bar has attempted to fit into some ethics violations.(R.AP 25 - 45) In 1978 and up until about 1981 respondent was employed by Consolidated Business and Legal Forms d/b/a Consolidated Legal Clinics, which The Florida Bar put out of business because of the claim that this company was

operating and doing legal work for which it did not have a license to do so. The case was entitled THE FLORIDA BAR v CONSOLIDATED BUSINESS & LEGAL FORMS. 386 So.2d 797 (Fla. 1980). Respondent on his own, thereafter, continued to advertise. All of this time respondent was employed by this company to do routine legal matters, and when The Florida Bar came to respondent's office in late 1977, to accuse Consolidated Legal Clinics of practicing law without a license, they informed respondent at that time that "we are going to put your employer out of business and if you don't quit advertising, we are going to get you too". Shortly thereafter The Florida Bar sent accountants to respondent's office (without any complaint from any client), and went over respondent's trust account and other matters seeking to find some evidence of defalcation in his records. They did not find any. Later on they even sent their top accountant from Miami to respondent's office in about the year 1979 or 80, one Pedro Pizzaro, who spent 4 days in respondent's office, auditing respondent's books who found absolutely nothing wrong with respondent's books. Again, said audit being conducted without anyone ever complaining; meaning that The Florida Bar performed this audit all on its own to attempt to find some way to put respondent out of practising law. Although, this matter is not in the record, it is placed in here to show what The Florida Bar has

attempted to do to respondent over the years. Included also herewith as an Exhibit is a copy from the Clerk of The Supreme Court dated January 31, 1983 showing that respondent had filed a Complaint in this court in the form of an injunction to stop The Florida Bar from harrassment of respondent.(R.AP. 46) In fact the reason this Case No. 63-139 was never further prosecuted in The Supreme Court of Florida, is because they dropped whatever charges they had at that time against respondent. It should be painfully apparent to this court that ever since BATES v O'STEEN that The Florida Bar has done everything in its power to restrict, limit or to cancel the effects of lawyers advertising in Florida by one means or another. Included in respondent's Affirmative Defense in this case, was an editorial which appeared in The Florida Bar Journal,February, 1985 which shows that The Florida Bar has prosecuted attorney advertisers as a policy because they have never accepted the Florida lawyer's right to advertise.(R.AP.43 - 45) There is pending at the present time, a move by The Florida Bar to restrict advertisers, based again upon an Iowa case that went to the U.S. Supreme Court. Of this, this court may take judicial notice. These two instant cases came on the heels of The Florida Bar suffering a defeat on 2 other cases that they had prosecuted against

respondent, again, **obviously** on trumped up charges, which that Referee immediately saw through as the trial of that matter progressed. (R.AP. 40-41)

AS TO COUNT II - THE BISHOP CASE

This case likewise involves a divorce matter in which respondent represented the wife. Again, this action was brought solely by The Florida Bar, not by any party. In COUNT 11, The Florida Bar alleges several matters which later turned out to be merely smoke, not violations, because the Referee's Report made no mention of those matters in his finding of violation by the respondent. Those matters are not necessary to go into except briefly. The Bar alleged in its Complaint that a threat was made by respondent against the attorney on the other side of the case; and, that in an attempt to engage another attorney on the other side of the case in conversation, respondent asked one of the attorneys in effect, what he was so excited about this case for, attempting to draw some conversation from the other attorney relative to perhaps to getting the matter settled, which The Bar attempted to claim had some material effect on the principal matter, (as was contained in the Referee's Report). Neither of these matters occurred anywhere near the chambers of the court and in no way was any judge involved in any way.(R.AP. 8-11) According to the Referee's Report, however, he only based his violations on a suit commenced by respondent in the nature of a declaratory judgment action which attempted to nullify a contempt order of Judge DAVIS SETH WALKER which was signed August 26, 1985 which was nunc pro tunc to the day of the hearing,

August 9, 1985. (R.AP. 47) In the divorce action itself (BISHOP v BISHOP), wife was granted 2 years of rehabilitive alimony in September, 1983; prior to the end of the period of rehabilitative alimony, respondent, on wife's behalf filed a Supplemental Petition for Modification, asking for permanent alimony. Shortly thereafter a motion for temporary alimony was filed on September 22, 1985, (R.AP. 48-51) to obtain interim alimony for wife.

Inasmuch as there was a marital home, which the trial judge in 1983 did not award to either party, husband commenced an action of partition in which the parties agreed at a hearing to sell the marital home at a private sale. This order was entered February 26, 1985 which indicated that the parties had made an agreement to sell the property by private sale rather than have it sold pursuant to Chapter 64, Florida Statutes, (which allows the court to sell such property at a public sale). (R.AP. 52 - 53) The events that followed the August 26, 1985 order of Judge DAVID SETH WALKER, finding wife in contempt for failure to list the property involved with a real estate agent, provided the sole basis for the Referee here to find ethics violations against the respondent. (R.AP. 2) All of the diciplinary rules found affected by the Referee's findings are solely based upon the events which occurred subsequent to the August 26, 1985 order. Respondent had no communication or word from his client whether or not she had signed the listing agreement by August 16, 1985 until much later, when he received a letter

from the attorney on the other side of the case indicating that his client was not cooperating with the listing agent as to showing the house, etc. (R.AP. 54) The letter was from Thomas P. Colclough, the attorney on the other side of the case, to respondent, dated September 27, 1985, and some telephone calls to respondent by him shortly prior thereto, respondent was made aware of the fact that his client had in fact signed the lisiting agreement, but was failing to cooperate with the realtors as to getting the property sold; respondent not being aware of what actions his client was taking with regard to the property until well after 30 days had expired from the time of August 26, 1985. Respondent's client had been advised she could appeal said order and so testified. (R.AP.56,T.T.62) Respondent's advise to his client was to not sign the listing agreement even though it meant that the contempt order of August 26, 1985 might be called into play, respondent did not believe that the judge could, under Chapter 64, Florida Statutes, do anything in the premises except to sell the marital home at a public sale, and that therefore his contempt order was "wholly without any jurisdiction." Therefore, on and after September 27, 1985, respondent's client filed a declaratory action against the various parties involved including the attorneys on the other side, the real estate agent, the judge involved in the matter and wife's former husband. The purpose of which was to negative the listing agreement which wife had signed in

which she had to go to jail if she did not do so. This was The Bar's Exhibit No. 6 (R.AP. 47).

In paragraphs 24 and 25 of The Bar's Complaint, it is alleged therein that respondent's client did not know that she was suing the defendants named in said law suit nor know that she was signing an affidavit of prejudice for use in that aforementioned case.(R.AP. 9) Furthermore, she signed an affidavit claiming "she was unaware she was actually suing the defendants therein for acts out of my divorce* * *"(R.AP. 57). the same as alleged in The Bar's Complaint, claiming that she was unaware she was suing the various parties named in said suit, Bar's Exhibit 9. (R.AP. 9) Furthermore, she testified at the trial to the same effect and reproduced herein in narrative form is her testimony:

> "I was ordered to sign a listing agreement and to sell the house through multiple listing, it ordered me to list it with Century 21. Mr. McKenzie advised me that I could appeal that order.(R.AP.55-56, T.T.61-62) I understood that the purpose of the complaint was that I was not getting a fair deal,just to complain. I thought it was just a complaint of the way this case was being handled. I just thought it was to complain, about something,you know, about the way it was being handled. I didn't understand it to be a law suit. Mr. McKenzie never went over the document with me before I signed it."(R.AP.58-59 T.T. 65-66)

On March 14, 1989 there was filed with the court the deposition taken of respondent's client Meriam Bishop, n/k/a

Shrock(R.AP. 61). Her deposition being taken February 24, 1989, along with exhibits introduced at said deposition. She was asked first in said deposition whether Exhibit 1 of said deposition, a motion to make her vacate the home,was true or not,that wife had frustrated all attempts by the attorney on the other said to sell the home.(R.AP.62-63) which she generally denied. She was also asked to comment on the opposing attorney's letter of September 27, 1985 in which the opposing attorney stated several things that wife had not cooperated with in an effort to sell said home, to which she generally replied that the matters in said letter were not true.(R.AP. 54) This was deposition Exhibit No. 2. As to the deposition Exhibit No. 3, identified as the Complaint seeking to negative the court's order Consisting of two Counts against the various defendants,(R.AP. 64-70) she testified as follows in narrative form:

> "I do know the purpose of that Complaint was to avoid the order that I was required to go to jail unless I signed the listing agreement. I knew that was so at the time I signed that Complaint. The purpose of that litigation was to void the judge's order. I signed the Complaint September 27, 1985. As to deposition Exhibit No. 4, that is my signature on the Affidavit of Prejudice. We felt the judge was prejudice in that case. I read the Affidavit when I was in your office on the date of signing. We are talking about David Seth Walker. We wanted to get rid of him because of his prejudice. I knew the purpose of the document and I knew it when I signed it."(R.AP. 71-77)

To go to the lengths to have respondent's client testify contrarily to the true facts, some threats somewhere must have been made by some of the principals involved, to get her to state things that simply were not true. There's no doubt from the Bar's Complaint, the Affidavit of Meriam Shrock f/k/a Bishop and her testimony on trial that her testimony at the deposition was entirely different and in fact opposite to what her testimony and the Affidavit provided.

Further, at the trial, the Bar also introduced as Exhibit No. 10 a document entitled Petition for Modification which was signed September 10, 1984, or approximately one year prior to her Supplemental Petition for Modification in order to secure permanent alimony. (R.AP.78-80,48-51) The purpose of this document was an attempt made by respondent's client to obtain the marital home as lump-sum alimony. The reason that the Bar introduced this document was to confuse the court into thinking that wife only sought to recover the home as "permanent" alimony rather than the Petition filed a year later in which she sought to recover permanent, periodic alimony. Also done for the purpose of showing that wife really didn't know anything about the events when occurred subsequent in the partition action, and that she was totally unaware what was taking place regarding the order of August 26, 1985 which following the hearing of August 9, 1985. Bar counsel BONNIE MAHON introduced the modification action commenced in 1984 in which respondent's

client attempted to obtain the marital home as lump-sum alimony, and which was subsequently denied, to show that respondent's client had "no knowledge of the events which occurred after the August 26, 1985 hearing." This was Bar's Exhibit No. 10. It was an attempt by Bar counsel to entirely shift the responsibility for the Complaint as filed September 27, 1985 on to respondent (which sought to negate the order of August 26, 1985 and the signing of the subsequent listing agreement, as being under duress). It appeared to respondent that the Bar's Complaint, the Affidavit of Meriam Bishop n/k/a Shrock, and her testimony, which was testified entirely to the contrary in the deposition of her held February 24, 1989, that she committed perjury thereby.

Not only did Bar counsel BONNIE MAHON, through the testimony of the respondent's client and the introduction of Bar Exhibit No. 10, seek to mislead the Referee, but additionally in her closing argument she is quoted as follows:

> "__ -- and because he didn't want the house sold, because he wanted to - - he wanted the house as permanent alimony for his client." (R.AP.81,T.T.213) (Emphasis supplied)

This was totally false, because that petition was a year earlier than the petition of 1985, in which respondent's client sought permanent periodic alimony, having no relation to the house itself. Bar counsel knew this pretty obviously at

the time she introduced the petition which attempted to get the house as lump-sum alimony but definitely knew it during respondent's testimony on Page 104 of the transcript when Bar counsel BONNIE MAHON was questioning respondent in which the question and answer in narrative form is as follows:

> "Yes, this document is signed by me and is a document prepared by me of course, but that is only for lump-sum alimony on the house that is all it has to do with, it has nothing at all to do with what I was suing for her to get, you know, permanent alimony on."(R.AP.82)

The questioner also knew this was so because her answer on page 104 again is:

> "Ok. Fine, Mr. McKenzie, Let's get on with my questioning.
>
> A. All right. I don't know where you got that from. It doesn't have anything to do with this."

One further thing should be explained, the partition action was brought in a court separate from the divorce action itself, because the court in its final divorce judgment did not reserve jurisdiction therein to do the partition action, which means that the suit for permanent periodic alimony was going on in a separate court at the time the partition action was ongoing.

Further, other matters were commited by Bar counsel BONNIE MAHON, contrary to the rules on ethics, which were objected to during trial by the respondent, involved prior disciplinary action by the Bar involving respondent's prior

reprimands. This was done during cross examination of respondent during the trial by Bar counsel BONNIE MAHON, commencing on Page 117 of the Transcript through page 120. (R.AP. 83–86) Starting on line 23 thereof:

Q. "Okay. Mr. McKenzie, have you had any prior disciplinary action?

A. Well - -

Q. With The Florida Bar?

A. Once back in 81 or 82.

Q. Do have one prior disciplinary record?

A. There may have been another.

Q. You have had two prior disciplinary actions?

A. Uh-uh.

Q. What kind - -

A. Is that germane at this time?

Q. I think it is.

A. I don't think it's germane.

THE COURT: objection is overruled.

By Ms. Mahon:
Mr. McKenzie, do you know what you received for discipline in both of those cases?

A. Reprimand.

Q. Public reprimand?

A. Do you know for what conduct?

Q. I don't recall.

Q. All right. Well, I have copies of the cases to help you recall. Here are two of them. (Handing documents to witness)

A. (Pausing to review document.) This one happens to one where the judge here decided no guilt and you people took it to The Supreme Court.

Q. And what did The Supreme Court rule?

A. Well, they ruled that despite the findings of facts by the Referee here - -

Q. What was the nature of the act?

A. All right you want me to go into this thing? Whatever it was?

Q. I just want to know what you were found guilty of, Mr. McKenzie.

A. Well, actually would the court like me to put these into evidence?

THE COURT, Yes, I have to consider respondent's prior disciplinary record in any event.

Ms. Mahon: I would just like to - -

Mr. McKenzie: Well, your honor, that is in case this court does find guilt or finds I am guilty of some offense.

THE COURT: That is a matter for the court to consider in reaching a conclusion.

Ms. Mahon: Your Honor, I would just say I have occasions when this hearing is concluded that it is the last I have have heard until I receive a report. So I feel obligated to inform the court of this prior record.

THE COURT: All right.

Ms. Mahon: Just for the record - -

THE COURT: Just for the record so that the record will be complete, Mr. Reporter, it should reflect that counsel for the Bar has handed to the court cases of THE FLORIDA BAR v McKENZIE, reported at 432 So 2d 566 and another case of FLORIDA BAR v McKENZIE. 442 So 2d 934.

By Ms. Mahon:

Q. I have just one other question, sir. Mr. McKenzie were you ever disciplined by the Wisconsin Bar?

A. No.

All of this was put in the record during the trial, properly objected to, and not after a finding of guilt as required by the Ethics Rules.

Under "Procedures before a Referee", 3-75(k)(4) dealing with the referee's report is found the following language:

> "A statement of any past disciplinary measures as to the respondent which are on record with the executive director of The Florida Bar or which otherwise become known to the referee through evidence properly admitted by the referee during the course of the proceedings (after a finding of guilt all evidence of prior disciplinary measures may be offered by bar counsel subject to appropriate objection or explanation by respondent)." (Emphasis supplied)

The Referee in his report makes several statements totally unwarranted by the evidence. He states that the "respondent testified that he filed a lawsuit against Judge Walker and others in order to intimidate Mr. Colclough into

not moving forward with a partition action and caused Judge Walker to have to recuse himself from the partition action." That statement is totally unwarranted by the evidence at the trial. He further states that it appeared that the lawsuit against Judge Walker and the others was done as a matter of "spite and as a vendetta? This is totally unwarranted by the evidence in the case. It just plain doesn't exist therein. And insofar as not appealing the order as entered, August 26, 1985, the only testimony in the case concerning that matter was to indicate that his client did not authorize him to take such an appeal and by the time that an appeal could be taken, the time to do so had expired. See the Bar Exhibit No. 6 the Complaint itself which was dated September 27, 1985.(R.AP. 64-69) Nor was it in any of the testimony or evidence which occurred at the April 6, 1989 trial of this matter, which would indicate that this Complaint as filed September 27, 1985, had in any way as its purpose to have Judge Walker recuse himself from the partition action. As a matter of fact, the only testimony in that regard was when asked by Bar counsel if that was respondent's purpose respondent replied, "NO, that was not one of the purposes, it did not have that purpose at all."(R.AP. 87-88, T.T. 107-108)

It seems that the Referee rested his opinion on the sole grounds that because Judge Walker had subject matter jurisdiction, and personal jurisdiction, through F.S. Chapter 64

that Judge Walker had jurisdiction to enter any order that he wanted, (R.AP.89, T.T.113) though perhaps erroneous.

The fact that he was taken in by the erroneous Petition for Modification which was dated a year prior to her Supplemental Petition for periodic permanent alimony, the alleged perjury by respondent's client at the trial, and the false Affidavit, apparently caused the Referee to conclude that respondent's client had no part in the Complaint as filed September 27, **1985** and that she was totally unaware of what was happening at that time. Also, he allowed proof of prior reprimands into the record prior to a finding of guilt in derogation of proper procedures as contained in the ethics manual, similar to allowing proof of previous convictions of a defendant in a criminal trial which, of course, is highly prejudicial and has been cause for reversalin criminal cases.

AS TO COSTS

This matter was tried April 6, 1989, and on that date, Intregation Rule 11.06(9)(5) allows costs against the respondent as follows:

> "A statement of cost of the procedings and recommendations as to the manner in which costs should be taxed. The costs shall include court reporters' fees, copy costs, witness fees and traveling expenses and reasonable traveling out-of-pocket expenses of the referee and bar counsel, if any. * * *" (Emphasis supplied.)

In the new Disciplinary Rules, the costs are exactly the same. Please see: 3-7.5(k)(5). Bar counsel filed three statements of costs. (R.AP. 90-103) It was on the basis of the Second Amended Statement of Costs, that the Referee found those costs which were stated therein at $2,069.50 in his report in which he listed the costs at $2,052.80. (R.AP. 4)

In the Preliminary Statement of Costs, dated May 1, 1989, on the last page thereof is an item called "Staff Investigator Expenses" listing hours and mileage for one Ernest J. Kirstein, Jr. coming up to a total of $540.84. (R.AP. 93) It was also listed that the administrative costs were $500.00 for both the grievance hearing and the Referee's hearing, which according to the proper costs should have been $300.00 (found on Page 1 of said Preliminary Statement). In The Second Amended Statement of Costs, dated June 2, 1989, this expense now is shown to be a total of $300.00, as this case

was tried April 6, 1989. The item now on the last page is identified as expenses of Ernest J. Kirstein, Jr. for processing and service of subpoenas, and expenses of Joseph McFadden for processing and service of subpoenas, a total of $215.90. This is on the third page of said Second Amended Statement of Costs.(R.AP. 103)

This is a totally unwarranted cost for this matter which was tried April 6, 1989. There is nothing in either the Integration Rules or the new Rules of Procedure which would authorize this cost of the Bar. They are solely limited to the costs as expressed therein. The only cost includes "court reporters fees, copy costs, witness fees and traveling expenses, reasonable traveling and out-of-pocket expenses of the referee and bar counsel, if any." The court will note, that nowhere in any of these Statements of Costs were there any witness fees or witness travel expenses. Further, the court reporter expenses of Betty M. Luria as found on page three of the report and the last item mentioned in said Second Amended Statement of Costs amounted to some $262.07 for the transcript. Respondent doesn't know why this amount of $262.07 was paid by bar counsel,if in fact bar counsel did pay this sum, but no reason exists under the law for this transcript to amount to $262.07. Included herewith of that proceeding which was May 1, 1989 are the first and last pages of said transcript showing that the length of said transcript

was from Page 1 through 37. (R.AP.104-105) According to F.S. 29.03, official court reporters are allowed the sum of "fifty cents, per page for the original and the amount of twenty-five cents per page for each carbon copy thereof, that each such transcript page shall consist of not less than 25 lines of double-spaced pica typing." If we multiply seventy-five cents times 37 pages, such transcript should have cost at most the sum of $27.75. Following the Referee's Report and the costs involved therein, Motion for Rehearing was made by respondent in which several matters were sought to be reversed and at the least thereof that there be a new trial based upon perjury and several matters. That the costs be reviewed pursuant to the applicable rules relating thereto. (R.AP. 106-123) The Referee denied same, and acting on Bar Counsel's recommendation, suspended respondent for 91 days.

SUMMARY OF ARGUMENT

Bar counsel's actions so tainted the trial which occured April 6, 1989, that she herself should be subject to discipline and a mistrial declared.

She knowingly used perjured testimony from her witness MERIAM BISHOP, who at a deposition, provided testimony which contradicted her testimony at the trial. Knowingly, because she attended said deposition and heard the witness testify to the material matters. All at the February 24, 1989 deposition.

Secondly, she used a 1984 Petition of respondent's of his client on the BISHOP case, (COUNT II of the Bar's Complaint) which was an attempt to have the court grant her the marital home as lump-sum alimony when she knew by the court record in the divorce suit itself and from testimony at this trial differently, to pretend it was the only thing respondent's client was interested in, and that respondent's client either had no knowledge or interest in the 1985 Petition which sought periodic, permanent alimony from her husband, making it appear that respondent was doing things in the divorce case all by himself. Tending to convince the referee that the Complaint filed September 27, 1985 against various parties, including the listing broker, a judge, etc. was totally respondent's with no participation by his client, even though said

Complaint shows on its face that respondent's client had signed same, had read its contents and acknowledged that it was true.

Thirdly, Bar's counsel brought up during the trial, and prior to a finding of guilt, respondent's two prior reprimands in derogation of the Bar's own Rules of Discipline, 3-7.5(k)(4), and the criminal law (when the bringing up of past criminal offenses is only for showing the bad character of a defendant or his propensity to commit a crime). She further had the temerity to ask respondent at this trial if he had prior reprimands in Wisconsin where he previously practiced.

Regarding the referee's finding that respondent had in the LANHAM divorce case, COUNT I of the Bar's Complaint, violated DR 1-102(5) and DR 1-102(6) by Bar's Exhibits 19, **21**, **22** and **25** there is no evidence to sustain those charges at all. CANON 7, DR 7-110(B)(2) permits letters to the trial judge on the merits if the otherside is sent a copy. There was no showing those letters had any effect on the "administration of justice" and do not in any way "reflect on respondent's fitness to practice law". As to violation of DR 7-106(C)(1) which only concerns TRIAL CONDUCT to begin with, but in no way do those letters have anything to do with "alluding to some matter respondent knew was not relevant".

On the BISHOP divorce, COUNT II of the Complaint against respondent, there was no basis for the referee to conclude respondent, by including a judge (among several others) in a Complaint having as its purpose to void, in a collateral attack on the court's order of August 26, 1985, finding respondent's client guilty of contempt, and unless she signed a listing agreement by August 17, 1985 she was to go to jail: started a "suit without merit", in which he concluded that so long as a "judge has subject matter and personal jurisdiction, he can make any order he wants". This is a patently false conclusion as concerns judicial immunity. And, even the Canons of ethic's support respondent's action in this regard if a good faith argument is made.

As to costs, Bar counsel again by deception, as shown in brief elsewhere, managed to include as a cost she was not entitled to under all the rules, and a reporter's cost in excess of that allowed by FS 29.03.

ARGUMENT

ISSUE I:

DO THE LETTERS IN COMPOSITE EXHIBIT 2 INDICATE ANY VIOLATION OF ETHICS?

Is the Referee's Report which indicates a violation of DR 1-102(5) which states that a lawyer "shall not engage in conduct that is prejudicial to the administration of justice"; he shall not according to DR 1-102(6) "engage in any other conduct that adversely reflects on his fitness to practice law; and, DR 7-106(C)(1) "state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.", proven at all?

First of all, checking DR 7-110(B)(2) (which allows lawyers to communicate with a judge), it says:

> "In an adversary proceeding, a lawyer shall not communicate, * * *, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:
> (2) In writing if he promptly delivers a copy of the writings to opposing counsel or to the adverse party if he is not represented by a lawyer".
> (Emphasis supplied)

It is clear that a lawyer may communicate with the judge in writing as to the merits, provided he promptly notifies the other party or the other lawyer with a copy of

said writing. In the exhibits found by the Referee to have violated the above Canons of Ethics, there is no question that these writings as found in the exhibits clearly, by copy, went to the other side. That was established when the claim of these communications being sent "ex parte", were properly stricken from the Complaint. Now, were these writings "prejudicial to the administration of justice" and, did these writings "adversely reflect on respondent's fitness to practice law"? Since this matter was entirely brought by The Florida Bar on its own, it is difficult to see where there was any prejudicial effect on the administration of justice. There was no testimony from the trial judge or his secretary, there was no complaint filed by the trial judge or his secretary, nor was there any other testimony by anyone else indicating that these identified exhibits had any prejudicial effect whatseover on the administration of justice, or any effect on the trial of this case. As far as these exhibits are concerned, were they in any conduct which "reflected on the respondent's fitness to practice law"?

Let us examine these exhibits: as to Bar's Exhibit 19, respondent's letter of April 11, 1986, in which respondent wrote to the trial judge concerning the case at hand in which opposing attorney RICHARD DAVIS had gotten a court date for a hearing for temporary alimony for his client which only allowed one week's time within which to allow

respondent's client to prepare for same; the only testimony in the record is that when respondent attempted to get a continuance of this matter for various reasons, he was told by the judge's secretary to write a letter to the judge rather than filing for a continuance of this matter because the trial judge had too many other things on his docket to hear a motion for continuance. She further told respondent that he should put in all matters which he intended to argue for a continuance in said letter. There was no other testimony concerning this matter. It is not that Bar counsel did not know the reasons for this letter, and therefore was not able to have the trial judge or his secretary appear to provide testimony, because it was made clear at the grievance committee and also in respondent's answer to this matter, that that was to be respondent's testimony. (R.AP. 26)

Examining further, Bar Exhibit 21, respondent's letter of April 18, 1986, please note that it is a letter written by respondent to The Florida Bar inquiring about a letter that opposing counsel RICHARD DAVIS had purportedly sent to The Florida Bar concerning a grievance that he had against respondent. Please refer to Bar Exhibit 20, the letter by RICHARD DAVIS to The Florida Bar claiming that respondent is "ethically forbidden from make ex parte communications to the court." Apparently referring to respondent's letter to the trial judge on April 11, 1986. This letter was by carbon copy sent to the trial judge The

Honorable GERARD J. O'BRIEN. Not only was Exhibit 20 false, in that it was not "ex parte" but apparently, according to the letter received from The Florida Bar, from Steven Rushing, it was never even received by The Florida Bar. Respondent complained to The Florida Bar in his letter of April 18, 1986, that any such communication, was not "ex parte" and asked The Florida Bar to look into Mr. Davis's conduct, which respondent felt that by sending a letter of this nature to The Florida Bar in which he complained that the letters were "ex parte" violated DR 1-102(A)(4) which states that a lawyer shall not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation". It even involved DR 1-102(A)(6), in that a lawyer shall not "engage in any other conduct which adversely reflects on his fitness to practice law", because, Mr. Davis had obviously sent this letter in an effort to prejudice the trial judge against respondent. Not only did Mr. Davis not send this letter to The Florida Bar, (because of bar counsel Steven Rushing's letter of April 24, 1986, to respondent), in denying that they had received a letter from Mr. Davis, it appears Mr. Davis engaged in deceitful conduct thereby, he not wanting The Florida Bar to become involved but only to attempt to prejudice the trial judge against respondent by his letter of April 14, 1986. This was the purpose of respondent's letter of April 25, 1986 to the trial judge, which is Bar's Exhibit 22, which respondent wrote for

the purpose of informing the trial judge that this never really did occur and that opposing attorney only stated this for the purpose of prejudicing the trial court against respondent. Bar's Exhibit 25, a letter written June 12, 1986 by respondent to the trial judge on this case, refers to Richard Davis's letter to the trial judge of June 9, 1986, in which Mr. Davis made the most odious remarks about respondent in which he stated that respondent had by "every artifice, connivance, pretext, sham and excuse imaginable has avoided every attempt for almost 2 years to bring this matter to a final conclusion." He further says he's "sick of these lies, evasions, pretentions, unfounded and malicious charges of unethical behavior and persistent misrepresentations of this record to the court by opposing counsel". And, by this tirade of Mr. Davis against respondent, respondent's reply in his June 12 letter, pointed these apparent violations out to not only the trial court, but to Richard Davis and to The Florida Bar. Citing specific violations by Mr. Davis that respondent had felt Mr. Davis violated the Canons of Ethics, particularly EC 7-36 which says: "* * *and should avoid any other conduct calculated to gain special consideration."; EC 7-37 "* * * A lawyer should not make unfair or derogatory personal reference to opposing counsel. Haranguing and offensive tactics by lawyers interfere with the orderly administration of justice and have no proper place in our legal system."

EC 7-38 says that "a lawyer should be courteous to opposing counsel and should accede to reasonable requests regarding court proceedings, settings, continuances, * * *" Most of which fits under DR 7-106(C)(6) which states that a lawyer shall not "engage in undignified or discourteous conduct which is degrading to a tribunal".

The Bar never took any action against Mr. Davis, as matter of fact, they used him as a witness during the trial of this matter, nor did the Bar ever acknowledge receiving the April 14, 1986 letter from Mr. Davis up until and during the trial of this matter. The simple question is why didn't the Bar take any action against Mr. Davis? The easy answer to this question is that they have been out to "get respondent" for years. In criminal law this would be called "selective prosecution". So it seems manifestly clear that not only was respondent's letter of April 14, 1986, with the blessing of the trial court, and so requested by the trial court, and that it was perfectly lawful within the authority of the Code of Professional Responsibility CANON 7, DR 7-110, but that it evoked responses from the other side which seemed to show that the opposing attorney was never called into account by The Florida Bar for his deceit, dishonesty, and use of derogatory remarks all tending to show his effort to obtain special consideration from the trial court through his actions. All of this tends to show that the referee on this case, was totally prejudiced against

respondent from the very beginning which had its basis somewhat in the manner in which the trial itself was conducted by him. It is not that the referee didn't have these matters in front of him at the time the Motion for Rehearing was filed, because said Motion for Rehearing did encompass the matters as has been heretofore stated.(R.AP.106-133)

As far as there being a violation of DR 7-106 (C)(1) which is shown to be that a lawyer shall not "state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence", it is difficult to see where the referee is coming from when he states that respondent violated that rule. That particular rule comes under the broad heading of "TRIAL CONDUCT" and insofar as this case is concerned there was nothing in any of the exhibits, testimony, or in any other way that would indicate that during the divorce trial that any violations at all were claimed either by the grievance committee or through the Bar's Complant which would call this particular rule into play. And, I challenge Bar counsel to point to anything in the record of this case that would indicate anything to the contrary. It would seem that the referee went far afield in his effort to "tar and feather" respondent with non-pertinent violations, saying, in effect, that respondent had no right to respond to opposing counsel's malicious charges in seeking to diminish respondent in the eyes of the trial judge by his prejudicial remarks.

ISSUE 11:

WAS THE TRIAL CONDUCTED IN SUCH AN UNFAIR AND PREJUDICIAL MANNER AS TO AFFORD RESPONDENT NO SEMBLANCE OF A FAIR HEARING?

It is not that these matters were not brought up prior to this time, as will be hereafter expressed, all of these below mentioned matters were in respondent's motion for rehearing in which he sought a new trial, or to declare a mistrial. But the referee was so disturbed and distracted by the length of time to hear this case, he gave no consideration to respondent.

The first matter of deception used by Bar counsel, BONNIE L. MAHON was when she introduced the Supplemental Petition for Modification which came about a year prior to the time that respondent filed another Supplemental Petition for permanent, periodic alimony, in September of 1985. (R.AP. 48-51) The first Supplemental Petition was only for the purpose of obtaining for her the marital home as lump-sum alimony, and which was denied by the court. (R.AP. 78-80) The object that Bar counsel MAHON wanted the referee to think was that all respondent's client was interested in was obtaining the marital home as lump-sum alimony so that the later Petition for periodic, permanent alimony would appear to be something that respondent's client was not interested in obtaining for herself and that it would later lend credence to her testimony that she didn't know

anything at all about the Complaint seeking to void the order in the partition action which required her to list the property with a broker or go to jail. It was all part and parcel of the same plan by Bar counsel to make it appear as though respondent's client knew nothing about the events which occured after August 26, 1985. These matters, are, of course, tied in with the BISHOP case in which respondent represented the wife. Perhaps, that is where the referee decided that the Complaint (against the various defendants for declaratory relief in order to nullify the order of August 26, 1985), came with no knowledge to respondent's client. He, the referee concluding that such action as taken to void the August 26, 1985 order, was done solely by respondent as a "vendetta" and only done out of "spite." There is absolutely no evidence in the record to otherwise indicate that such action was done for either of those purposes, it was done as stated in the testimony, to nullify that order because; first of all, respondent's client if she refused to go through and help the brokersell the home, she would be liable to the broker for breach of contract. Secondly, after it was explained to respondent's client by respondent that she could probably bid herself and get a better deal if the house was sold at public sale, that she agreed to sign the Complaint and proceed to attempt to have the property sold at a public sale as the action

of partition was designed to do. The second and even more prejudicial and unfair testimony used by Bar counsel BONNIE L. MAHON, concerns the perjured testimony of respondent's former client, MERIAM BISHOP n/k/a SHROCK. In the Complaint, and in her testimony at the trial, said witness said she had no idea that what was being prosecuted by her, was a law suit, seeking thereby to indicate that said litigation for declaratory judgment was done totally respondent and without his client's participation, leading again perhaps to the referee's claim that this was a "vendetta and done out of spite". Yet, on February 24, 1989, at a deposition she testified entirely contrary to that testimony at the trial. In fact that Complaint itself shows she signed an acknowledgement that she had read the complaint and it was true.(R.AP. 67) This is perjured testimony according to all the cases. She did admit during cross examination of her at the trial of April 6, 1989, that she had testified contrarily to her pervious testimony on direct examination and at the deposition of her February 24, 1989.(R.AP.124-129,T.T. 73-78) Perjury is defined by FS 837.021(1) as follows:

> "Whoever, in one or more official proceedings, willfully makes to or more material statements under oath when in fact two or more statements contradict each other is guilty of a felony of the third degree,* * *"

"Official proceeding" is defined under FS 837.011 as follows:

> "(1) 'Official proceeding' means a proceeding heard, or which may be or is required to be heard, before a legislative, judicial, administrative, or other governmental agency or official authorized to take evidence under oath, including any referee, master in chancery, hearing examiner, commissioner, notary or other person taking such testimony or a deposition in connection with any such proceeding."
> (Emphasis supplied)

That she testified and the Bar's Complaint alleging that her testimony would be that she knew nothing about the suit which she started, when she testified at the deposition absolutely contrarily to this testimony, (all according to the definitions of perjury found in Chapter 837), should be enough to show that the Bar knowingly used this testimony in an effort to indicate that respondent's client knew nothing about what was going on. Contradictory statements cannot both be true. See BROWN v STATE 334 So.2d 597(Fla.1976). The third element used by Bar's counsel BONNIE L. MAHON was the use of prior reprimands during the trial of the case on cross examination of respondent rather than bringing those matters to the referee's attention after a finding of guilt.(R.AP.83-89,T.T. 117-113) It is stated elsewhere in this brief, on page 21, that the Bar's own Rules of Discipline, indicates that prior reprimands are to be revealed only after a finding of guilt. This obviously was written into the Rules of Discipline because of the criminal rules as applicable to revealing prior convictions of a defendant on unrelated

offenses during the trial of the principal cause. This has been expressed in many cases and in one case cited as RANDALL v STATE OF FLORIDA, 239 So.2d 81(2 DCA 1970) where the court held that the separate offense is not relevant and has no probative value, on page 82 of the opinion the court states:

> "Upon a careful reading of the entire transcript of the trial of this cause we can find no relevancy of the separate offense to the issues involved in the case being tried. The sole relevancy of the separate offense being the bad character of the appellant for his propensity to commit a crime, the judgment and sentence must be reversed and the cause remanded for a new trial."

Matters such as this have always been regarded as'incurable improprieties". See, also LIVINGSTON v STATE, 140 Fla. 749(1939), 192 So. 327. This evidence, also in civil cases would be deemed irrevelant or immaterial, which was so objected to during the trial of this matter, and if the court would take the position that this really doesn't matter in a case of this sort against an attorney, then we might as well throw away the books as concerns lawyer discipline. Not only did Bar counsel refer to prior reprimands of the respondent during the trial, but she further intimated that he had prior reprimands in the State of Wisconsin, by asking respondent if he had prior reprimands while practicing in the State of Wisconsin, knowing full well. that even if this were so that it would have nothing

to do with respondent's conduct practicing here in the State of Florida, which is an entirely separate jurisdiction from this one. By asking the question, she intimated to the referee that despite respondent's denial, he probably was hiding the fact that he had been disciplined in the State of Wisconsin.

Speaking briefly to the prior reprimands, that respondent has had; the one in 1984 was originally found by the referee to have not violated any disciplinary rule at all. However, The Florida Bar would not rest with that finding so they filed a petition for review with this court. This court despite the finding of not guilty by the referee, did reverse the referee and found the respondent guility of a conflict of interest. Briefly, the facts in that case showed that respondent had accepted a retainer from one of the beneficiaries under a will to protecther interests from her other siblings. This was before respondent became attorney for the estate. Thereafter, a series of misunderstandings occured and even though respondent gave this beneficiary back the retainer, there nevertheless was a conflict of interest which arose at the time that respondent did in fact become attorney for the estate. Even though respondent did give back the retainer to that beneficiary of the will who wanted protection, after he became attorney for the estate, still, there was that technical conflict of interest which respondentdid have and he admits that he should have given the retainer back, immediately

after he was selected as attorney for the estate. There was, I suppose, a technical violation, but when you are in a series of transactions it is difficult to know exactly when you, as a lawyer, should attempt to repair damage which occurs. The other matter which occured in 1983 was a series of 5, (2 dismissed), totally inconsequential matters that the grievance committee in Pinellas County brought, the totality of which concerned matters which should have been dismissed but which were not because respondent at that time knew little about grievance matters and felt that a public reprimand did not call for him to take an appeal relative thereo. After all, it was respondent's first reprimand, even though undeserved and the matter never did get beyond the referee.

All of the matters expressed in here relative to the unfair trial perpetrated by Bar counsel, taken singly, perhaps might be viewed as an honest mistake, but cumulatively viewed it shows a calculated effort by Bar counsel to preducially attack respondent in the most unfair manner possible. EC 7-26 states:

> "the law and disciplinary rules prohibit the use of fraudulent, false or perjured testimony or evidence. A lawyer who knowingly participates * * * is subject to discipline".

ISSUE 111:

AS TO THE BISHOP CASE, DID RESPONDENT VIOLATE DR 7-102 (A)(1) and DR 7-102(A)(2)?

Despite the other violations which were cited by the referee in his report, such as DR 1-102(A)(1), a lawyer "shall not violate a disciplinary rule", DR 1-102 (A)(5), DR 1-102(A)(6) which are "engaging in conduct prejudicial to the administration of justice and engaging in other conduct adversely reflecting on his fitness to practice law", the referee did not rest his opinion on any of those other matters, but solely selected Dr 7-102(A)(1) and DR 7-102(A)(2) to support his position, According to him and as he stated on the record, that if Judge Walker had personal jurisdiction over respondent's client and subject matter jurisdiction, any law suit commenced against said judge, without anything further, amounted to unwarranted litigation. (R.AP. 89,T.T.113) That was the referee's sole conclusion. Where he came to conclude in his report that this action by respondent's client was simply a "vendetta" or a matter of "spite" commenced by respondent against Judge Walker and the other parties came from, respondent is unable to find anything in the testimony or the exhibits at the trial which so indicated. Nor was there any such testimony which indicated that said Complaint was filed merely to harrass opposing counsel, etc. Nor was there anything in any of the testimony which indicated that the law suit as filed was to intimidate

anyone into not moving forward with the partition action. Those matters are figments of the referee's imagination or a twisted attempt by him to fit this matter into some kind of a disciplinary rule.

Taking the matters as they occured, an order was entered February 26, 1985 by the Honorable DAVID SETH WALKER which stated that the parties stipulated to sell the property (the marital home) by private sale. All that order did was to confirm the fact the parties agreed to such an arrangement. Respondent's client for one reason or another felt justified not going along with the agreement because of the appraisals which were inaccurate according to her, leading to the order of Judge DAVIS SETH WALKER pursuant to a hearing held August 9, 1985 in which he orally order respondent's client to sign a listing agreement by August 16, 1985 or she would go to jail. This order was signed "nunc pro tunc" on August 26, 1985. Respondent after learning in late September, 1985 that his client had indeed signed the listing agreement, but was not cooperating with the broker in selling the house, advised his client when she came to his office that her only relief at this time, if she did not want to cooperate and sell the home was to attempt to get the listing agreement itself declared void because she signed it under duress which was brought about by the court's order of August 26, 1985 which respondent viewed as void. And, to attempt to get the matter back on the proper track for

partition purposes, that is, for a public sale of the marital home. Believing that a public sale of the marital home would be more in client's interest, at which she could be a bidder at such sale and perhaps obtain the property at a much lower figure, because she was already a half owner in said property. She thereupon told respondent to go ahead with such papers, and they were prepared and signed by her September 27, 1985, consisting of two counts, the first count for declaratory relief, asking that the court declare the listing agreement void, because it was signed under duress under a court order believed to be void, and COUNT II an action for damages against the other parties involved, for client's emotional distress. At that time, the time for appeal had expired, and she had no other ability to test this order of Judge Walker's unless it was through the vehicle of the Complaint of September 27, 1985.

According to the referee here, and upon which he solely based his report was that the action as brought September 27, 1985 was "without merit", was on the basis that if the court had jurisdiction over the subject matter and the person, the judge could make any order that he wanted to do and it would be lawful. This plainly, is not true, while the judge on this case initially did have jurisdiction over the subject and over the parties, the only jurisdiction granted to him under Chapter 64, FS, was to sell the property at public sale. In effect what was entered February 26, 1985,

called "Final Judgment in Complaint for Partition of Real Property", was not an order, but merely confirming the fact that the parties had agreed at that time to sell the property by private sale. It was further stated in such judgment that in the event that the property is not sold by the end of a six-months period, judgment of partition would be entered and the property sold by public sale. (R.AP.52-53) See paragraph 4 thereof. Respondent, believing that in the first instance that this final judgment amounted to nothing more than an agreement of the parties to sell the property by private sale and that paragraph 4 appeared to list the only sanctions in the event the property was not sold at the end of six-months period, was shocked when the Judge on the case, DAVID SETH WALKER, ordered respondent's client to sign a listing agreement by August 16, 1985 or go to jail. Learning later through an opposing attorney that his client had indeed signed a listing agreement, but was refusing to cooperate in selling the property, obtaining from the opposing attorney a motion which in effect would cause his client to vacate the home, caused the Complaint in question to be filed.

Respondent believed then, and he does now, that Judge DAVID SETH WALKER was without power to order his client to go to jail unless she signed the listing agreement.

There is no question that the court may punish for contempt, either by direct contempt which occurs in the

presence of the court or indirect contempt where a party disobeys a valid court order. Obviously, the contempt here was not direct contempt, so therefore it can only be classified as indirect contempt but that brings up the question of whether this was a valid court order, and reading it, it appears to be nothing more than to confirm what the parties had agreed to do, and not a court order in the sense that the judge ordered the property to be sold at a private sale, which of course, he could not do in the first place. If he had ordered the property sold by private sale, obviously, that would not be a valid court order because he would not have had the power to do that under FS 64. If you cannot do it directly then you cannot do it indirectly such as this document of February 26, 1985 is concerned. You cannot do indirectly what you are prohibited from doing directly. Besides, said judgment of February 26, 1985, carried the only sanction in case the property was not sold in a six-months period, to wit, that the property would be sold at a public sale.

Therefore, by such reasoning, respondent was led irresistibly to the conclusion that the judge on the matter had exposed himself to civil liability because he was totally without jurisdiction to find respondent's client in contempt. That the court's finding of contempt was wholly void. Judges may be sued where they act wholly without jurisdiction even though there may be subject and personal

jurisdiction. There is no judicial immunity where a judge acts "wholly without jurisdiction." The judge knows or is bound to know that on the facts the court over which he presides has no jurisdiction in the cause, he proceeds at his peril. See FARISH v SMOTH, 58 So.2d 534(Fla.1952).

Similar to the case in hand is FARRAGUT v TAMPA, 22 So.2d 645(Fla.1945) where the court held that in absence of legislative authority, a judge of the former municipal court had no power to issue a search warrant. Here, as there,there was no legislative authority in Judge WALKER to allow him under Chapter 64 FS to order that the property involved be sold at a private sale.

That other cases in Florida enunciating the above principle, are HARPER v MERCKEL, 638 F. 2d 848(5 U.S. C.A. 1981), STATE v MONTGOMERY, 467 So.2d 387(1 DCA 1979) and a host of other cases. Nor, is there anything wrong with taking a collateral attack on this contempt matter, where we find the following language on page 1067 in 12 ALR 2d §3:

> "* * *the rule may be said to be firmly established that a court does not possess the right or power to punish as for contempt a disregard or violation of its order * * * without power or authority to render the particular decree * * *. Lack of such * * * power * * * may be raised * * * in a collateral proceeding* * *." (Emphas supplied)

Even if respondent, after a full hearing and trial, etc. did not prevail in the matter, and if it would have been found that Judge WALKER did act with jurisdiction, even the CANONS OF ETHICS, supports respondent in the action which was taken because it is stated under CANON 7 under Ethical Consideration, EC 7-4:

> "The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail. His conduct * * * is permissible * * * if supportable by good faith argument* * *"
> (Emphasis supplied)

ISSUE IV:

WERE THE COSTS ASSESSED AGAINST RESPONDENT ERRONEOUS?

It is submitted that the costs assessed against respondent in the sum of $2,052.80 are erroneous because the authority to tax costs, as we have seen are based entirely upon the language as found under Integration Rule 11.04 (9)(5) and under the new Disciplinary Rules 3-7.5(k)(5), which are exactly the same, all as related to this matter which was tried April 6, 1989. Except for a modest reduction of $16.70 the referee adopted Bar counsel's Second Amended Statement of Costs verbatim. Under such costs, the total came to $2,069.50. Bar counsel even used deception on costs, because she, in her initial statement on costs listed the administrative expense as $500.00, when she knew that all the Integration Rules and the new Disciplinary Rules only allowed the sum of $150.00 at the grievance level and $150.00 at the referee level. Further, in her preliminary statement of costs on the 4th page thereof she attempted to charge "staff investigator expenses" of some $540.85. She states on page 21 of the May 1, 1989 hearing as follows: (R.AP. 130-133)

> "Ms. Mahon; Yes, as far as the rules that are in effect, Mr. McKenzie is correct as far as the old rules, the Integration Rules, which were in effect prior to January, 1987.
>
> However, those rules only go - - those rules are, in effect, for violation of the rules, specifically, the DR's or the integration rules.

As far as procedurally, we go under the new rules. In other words, we go under the old rules for Mr. McKenzie as for what rules he violated, but as far as procedural costs and those types of matters, we go under the new rules* * *"

And, on page 22 thereof, continuing:

"Ms. Mahon: Both of those are correct if you were to go under the old rules it - - Mr. McKenzie would be correct.

However, it is my position that the new rules apply as far as costs are concerned Mr. McKenzie. - -"

And, then on page 20 of that hearing she states the following:

"Let me explain a little bit further. As far as the investigators expenses are concerned that didn't go go just the depositions.

That went to serving of subpoenas and bringing subpoenas to the referee to have him sign, and going over and having them interviewing witnesses, specifically, Mrs. Shrock, et cetera."

After seeing that she was losing her argument on the staff investigator costs, she on page 34 of said hearing stated:

"Ms. Mahon: That type - - our investigators do it, and we include it as investigators costs because they get our subpoenas signed by you and serve them. Can we charge for those costs?

The Court: Yes."

Thereafter, said "Staff Investigator Expenses" became under those same staff investigator expenses now called "Staff Investigator Expenses of Ernest J. Kirstein, Jr. for Processing and Service of Subpoenas and of Joseph McFadden" in both the Amended Statement of Costs and Second Amended Statement of Costs.