047

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JOHN H. MYERS,

Respondent.

----------/

Case No. 75,609
(TFB No. 89-10,514(12C))

FILED
SID J. WHITE
JAN 7 1991
CLERK, SUPREME COURT
By Deputy Clerk

INITIAL BRIEF OF THE FLORIDA BAR

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TABLE OF CONTENTS

TABLE OF CITATIONS

SYMBOLS AND REFERENCES

In this Brief, the appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The appellee, John H. Myers, will be referred to as "Respondent". "TR" will denote the transcript of the Final Hearing before the Referee. "R" will refer to the record in this cause. "RR" will refer to the Report of Referee.

STATEMENTS OF THE FACTS AND OF THE CASE

In July, 1987, the Respondent was retained by Rolf Coldeway to prepare a Petition For Dissolution of Marriage; a Property Settlement Agreement; and an Answer, Waiver of Notice of Final Hearing, and a Consent to Enter a Final Judgment. When the Respondent was retained, Rolf and Sue Ellen Coldeway were contemplating the reconciliation of their marriage. (TR, p.36, L.15-25, p.37, L.1-13). Prior to reconciling the marriage, Mr. and Mrs. Coldeway executed the Property Settlement Agreement and Mrs. Coldeway executed the Answer, Waiver of Notice of Final Hearing and Consent to Enter a Final Judgment, which was prepared by the Respondent. Mr. Coldeway intended to use the executed documents in the event that the reconciliation of the marriage failed. (TR, p.25, L.7-9; C, R, Complaint paragraph 2). The Property Settlement Agreement executed by Mrs. Coldeway on July 17, 1987, provided that the parties would have shared parental responsibility for their minor child, with the primary physical residence of the minor being with Mr. Coldeway. (R, Complaint, paragraph 4; R, Respondent's Exhibit 2).

Subsequent to July, 1987, Mr. and Mrs. Coldeway reconciled their marriage and lived together as husband and wife until approximately June, 1988. (R, Complaint, paragraph 5; TR, p.28, L.24-25, p.29, L.1-2). When the parties separated in June, 1988, Mrs. Coldeway retained Floyd E. Ferguson to represent her in a dissolution of marriage action. Mrs. Coldeway advised Mr. Ferguson of the fact that her husband was represented by the

Respondent. With this information, Mr. Ferguson called the Respondent's law office and advised the Respondent of the fact that he was representing Mrs. Coldeway in a dissolution of marriage action against Mr. Coldeway. (RR, p.2, paragraph 4). During the aforementioned conversation, Mr. Ferguson and the Respondent discussed amicably settling the Coldeway divorce action, which resulted in Mr. Ferguson preparing a Property Settlement and Separation Agreement on behalf of Mrs. Coldeway. (R, Bar Exhibit 2; TR, p.40, L.19-25, p.41, L.1-3). The Property Settlement Agreement prepared by Mr. Ferguson provided that Mrs. Coldeway would have the primary custody of the parties' minor child, with each party retaining full and equal parental rights and responsibilities. (R, Bar Exhibit 1). The Respondent did not advise Mr. Ferguson of the documents that Mrs. Coldeway executed in July, 1987. (TR, p.56, L.12-22).

On July 28, 1988, Mr. Ferguson mailed the Property Settlement and Separation Agreement which he prepared to the Respondent for execution by Mr. Coldeway. (RR, p.2, paragraph 5). Mr. Ferguson's cover letter, which accompanied the Settlement Agreement advised the Respondent that after Mr. Coldeway executed the Agreement and the same was returned to him, that he would then forward to Respondent a proposed Final Judgment and an Acknowledgement of Service of Waiver of Appearance for Mr. Coldeway's signature. The cover letter also advised the Respondent that, although he personally attends all of his client's Final Hearings, he would appear for the

Coldeway's Final Hearing with or without Respondent. (R, Bar Exhibit 2). The Respondent received the proposed Property Settlement and Separation Agreement prepared by Mr. Ferguson and discussed the same, by phone, with his client. Mr. Coldeway advised the Respondent that he would not execute such an agreement. (TR,p.32, L.13-20, p.33, L.1-5). The Respondent did not advise Mr. Ferguson of his client's refusal to execute Mrs. Coldeway's proposed Property Settlement and Separation Agreement. (TR, p.59, L.2-25, p.60, L. 1-19).

On or about September 25, 1988, Mrs. Coldeway and the parties' minor child moved from Florida to Ohio. Mrs. Coldeway did not notify Mr. Coldeway of her whereabouts, however, she did advise her attorney of the same. (R, Complaint, paragraph 13; TR, p.63, L.19-25, p.64, L.1-17). When Mrs. Coldeway refused to advise Mr. Coldeway of her whereabouts, Mr. Coldeway instructed the Respondent to file the Petition for Dissolution of Marriage and the Property Settlement Agreement which the Respondent had prepared and had executed by Mr. and Mrs. Coldeway in July, 1987. The Respondent followed his client's instructions and thereafter proceeded with the Coldeway dissolution of marriage action as an uncontested matter. The Respondent intentionally failed to give Mr. Ferguson notice of the filing of the Petition For Dissolution of Marriage and Property Settlement Agreement of July, 1987. The Respondent proceeded with the Coldeway Divorce Action on an ex-parte basis because he did not consider Mr. Ferguson to be Mrs. Coldeway's attorney subsequent to September, 1988 due to

Mrs. Coldeway's departure from the State of Florida and due to her refusal to notify Mr. Coldeway of her whereabouts. (TR,p.41, L.15-25, p.42,L.1-7). The Respondent never sought to contact Mr. Ferguson to determine whether or not he knew of Mrs. Coldeway's whereabouts and whether or not Mr. Ferguson intended to continue to represent Mrs. Coldeway in the Coldeway's divorce action. (TR,p.63,L.16-25, p.65,L.1-6,p.68,L.1-6).

On or about November 10, 1988, an uncontested Final Hearing was held in the Coldeway Dissolution of Marriage Action. The Respondent intentionally failed to give Mr. Ferguson notice of the Final Hearing. (RR, p.4,paragraph 8). During the uncontested Final Hearing, the Respondent submitted to the Court the Answer, Waiver of Notice of Final Hearing, and Consent to Enter a Final Judgment executed by Mrs. Coldeway on July 17, 1987. (RR, p.4, paragraph 8). The Respondent consciously failed to inform the Court of the fact that Mrs. Coldeway was represented by counsel. (TR, p.45,L.17-24). At the conclusion of the Final Hearing, a Final Judgment was entered awarding Mr. Coldeway the primary custody of the parties' minor child. (RR, p.4, paragraph 9). Shortly after the Final Hearing, Mr. Coldeway discovered his former wife's whereabouts, went to Ohio, obtained custody of the couple's minor child, and returned to Florida. (TR,p.70,L.25, p.71,L.1-3). As a result thereof, Mrs. Coldeway retained another attorney in an effort to have the Final Judgement of Dissolution of Marriage set aside. The Final Judgement of Dissolution of Marriage in the Coldeway case was set aside, and custody of the minor child was awarded to Mrs. Coldeway. (RR,p.4,paragraph 9).

During the period of time involved in the Coldeway case, the Respondent was experiencing emotional problems associated with his former wife's absconding with his six (6) year old son and refusing to divulge to the Respondent the location of their son for over two (2) years. The Respondent was required to attend numerous hearings in an effort to locate and to obtain the custody of his own minor child. (TR,p.42,L.13-25; RR,p.5, paragraph 10).

The Florida Bar filed a Complaint against the Respondent charging him with violating the following Rules of Discipline: Rule 4-3.3(d) (a lawyer shall inform the tribunal of all material facts known, whether or not the facts are adverse); Rule 4-3.4(a) (a lawyer shall not unlawfully obstruct another parties' access to evidence); Rule 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct); Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and Rule 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice). (R, Complaint, paragraph 26).

On August 17, 1990, a Final Hearing in this cause was held before the Honorable Robert T. Schaefer, Referee. At the commencement of the Final Hearing, the Respondent's counsel advised the Referee that his client was admitting all of the factual allegations of the Bar's Complaint. (TR,p.3,L.8-9).

Thereafter, the Referee heard the testimony of several Judges, lawyers and individuals in regard to the Respondent's character and reputation. In addition, the Referee heard arguments of counsel in regard to the Rules of Discipline violated by the Respondent and the appropriate discipline for the Respondent's misconduct.

The Referee found the Respondent guilty of violating the Rules alleged by The Florida Bar to have been violated by the Respondent, with the exception of Rule 4-3.4(a) which was struck by counsel for The Florida Bar during the Final Hearing. (RR,p.5). The Referee recommended that the Respondent receive a public reprimand and probation for two (2) years, with a condition of probation being that the Respondent continue with his participation in the Florida Lawyer's Assistance Inc. program and that he make quarterly reports of said participation to The Florida. (RR,p.5-6).

The Florida Bar's Board of Governor reviewed the Report of Referee and voted to seek a six (6) month suspension as an appropriate discipline in this case.

SUMMARY OF ARGUMENT

The Respondent committed a fraud on the Court by intentionally withholding material information from the Court. Further, the Respondent engaged in an unauthorized ex-parte communication with a Judge with the intent to affect the outcome of the Coldeway dissolution of marriage action.

The Referee's recommendation of a public reprimand and probation is not a sufficient disciplinary sanction for such unethical misconduct, notwithstanding the mitigating factors considered by the Referee in reaching said recommendation.

Recent case law and The Florida Standards for Imposing Lawyer Sanctions provide that disbarment and/or a lengthy suspension is the appropriate discipline for Respondent's misconduct. However, the substantial mitigating factors present in this case justify reducing the appropriate discipline to a six (6) month suspension. The mitigating factors do not justify the imposition of a public reprimand and probation rather than a suspension from the practice of law.

Therefore, the Florida Bar respectfully requests this Court disapprove the Referee's recommendation of a public reprimand and probation and order the Respondent suspended from the practice of law for six (6) months.

ARGUMENT

ISSUE: WHETHER AN ATTORNEY SHOULD BE SUSPENDED FROM THE PRACTICE OF LAW FOR COMMITTING A FRAUD ON THE COURT, NOTWITHSTANDING NUMEROUS MITIGATING FACTORS FOUND BY THE REFEREE.

The Respondent presented his client's case to the Court as an uncontested dissolution of marriage action knowing that the same was contested due to his client's rejection of the wife's proposed settlement agreement (TR,p.45,L.10-11, p.41,L.4-10) and knowing that the opposing party was represented by counsel and entitled to notice of the filing of the divorce action and of the final hearing held in the case. (TR,p.41,L.15-25,p.42,L..1-12). The Respondent's conduct constitutes a fraud on the Court, in that he intentionally withheld material information from the Court. In addition, the Respondent engaged in an unauthorized ex-parte communication with a Judge with the intent to affect the outcome of the Coldeway case. (TR,p.45,L.17-24). Further, the Respondent's conduct prejudiced his client and deprived the opposing party of her right to litigate the issue regarding custody of the parties' minor child. The Respondent's misconduct warrants a six (6) month suspension from the practice of law regardless of the mitigating factors found by the Referee.

The Referee in the instant case recommended that the Respondent be disciplined by a public reprimand and probation. The Referee made said recommendation after taking into account several factors which he considered to be in mitigation of

Respondent's misconduct. (RR, p.5,6). The mitigating factors considered by the Referee in this case are as follows:

1. The Respondent's personal or emotional problems associated with the fact that the Respondent's former wife had absconded with the Respondent's six (6) year old son and had refused to divulge to the Respondent the location of his son for over two (2) years. During the period of time involved in the Coldeway case, the Respondent was required to attend numerous hearings in an effort to locate his child and obtain custody (RR, p. 4, 5, and 6);

2. The Respondent did not have a prior disciplinary record (RR, p. 6);

3. The absence of a selfish motive (RR, p. 6);

4. The Respondent's full and free disclosure to the disciplinary board and his cooperative attitude toward the disciplinary proceedings (RR, p. 7);

5. The Respondent's good character and reputation (RR, p. 7);

6. The Respondent's interim rehabilitation (RR, p.7); and

7. The Respondent's remorse (RR, p. 7).

The Bar submits that the mitigating factors considered by the Referee are not sufficient to justify disciplining the Respondent with a public reprimand and probation.

The Respondent's fraud on the Court is similar to that in other cases where attorneys have been disbarred or suspended from the practice of law.

In The Florida Bar v. Roman, 526 So.2d 60 (Fla.1988), Roman committed a fraud on the probate court to effectuate a theft. Roman filed false pleadings with the court which contained the forged signature of a fictitious beneficiary. Roman furthered the fraud by deceiving the court into believing that the estate assets were distributed to the fictitious beneficiary when in fact he had converted them to his own use. This Court disbarred Mr. Roman from the practice of law, notwithstanding numerous mitigating factors, to-wit: absence of a prior disciplinary history; personal and emotional instability caused by marital problems and pressures from work; he was receiving psychiatric care at the time of the misconduct; he was taking prescribed medication for depression at the time of the misconduct; remorse; restitution; cooperative attitude toward the Bar proceedings; and he was criminally sanctioned. Id at p. 3.

Unquestionably, Roman's misconduct is more egregious than the Respondent's misconduct, in that Roman not only committed a fraud on the Court but, in addition, he misappropriated client funds. However, in Roman, this Court stated that either offense was sufficiently grave to justify disbarment. Id at p. 4. The Bar is not seeking disbarment or a lengthy suspension in this case, due to the Referee's finding that the Respondent's misconduct was influenced by his own predicament in locating his

minor child over a period of two (2) years. (RR, p. 4, 5). However, this finding by the Referee does not justify reducing the appropriate discipline in this case from disbarment to a public reprimand.

The Respondent knowingly and intentionally committed a fraud on the Court and deprived Mrs. Coldeway of an opportunity to litigate the validity of the July, 1987 Settlement Agreement and to litigate her right to the primary custody of the parties' minor child, so that he could expeditiously obtain a Final Judgment awarding custody of the minor child to Mr. Coldeway. (TR,p.40,L.4-18). The Respondent's own endeavors to locate his six (6) year old son made him conscious of the fact that organizations designed to assist parents in locating children that had been abducted by a parent or grandparent would not assist Mr. Coldeway in locating his child, unless Mr. Coldeway had an Order or Final Judgment awarding him custody. (RR,p.4,5). The Respondent's knowing and intentional misconduct warrants a six (6) month suspension from the practice of law in light of the mitigating factors found by the Referee.

In The Florida Bar v. Kickliter 559 So.2d 1123 (Fla. 1990), Mr. Kickliter was retained to prepare a will for a client. The client died before signing the will prepared by Mr. Kickliter; thus, Mr. Kickliter forged the client's name on the will and he, thereafter, submitted the will to the Probate Court. Mr. Kickliter committed a fraud on the Court solely to effectuate his client's wishes under the will. The Referee found substantial

mitigation which included absence of a dishonest or selfish motive; a cooperative attitude; good character and reputation; remorse; and the imposition of criminal penalties. Based on the aforementioned mitigating factors, the Referee recommended a two (2) year suspension. On review, this Court found that, regardless of the mitigating factors, disbarment was appropriate for Mr. Kickliter's misconduct.

As in Kickliter, the Respondent committed a fraud on the Court to effectuate his client's desire to obtain an expeditious Final Judgment of Dissolution of Marriage awarding him custody of the parties' minor child. The Bar concedes that Kickliter's misconduct was more serious than that of the Respondent, since Mr. Kickliter's fraud constituted a crime, whereas the Respondent's fraud did not. However, the Respondent's misconduct is egregious enough to warrant a six (6) month suspension rather than a public reprimand and probation. The Respondent testified that he believed the documents he filed with the Court were valid even though the Coldeways reconciled their marriage after executing the documents. (TR,p.46,L.9-15, p.47,L.14-23). The Bar contends that the Respondent knew that the documents he filed with the Court were invalid in light of his intentional failure to notify Mr. Ferguson of the existence of said documents (TR,p.56,L.12-22); his intentional failure to notify Mr. Ferguson of the filing of the same with the Court (TR,p.41,L.15-25, p.42,L.1-4); his intentional failure to notify Mr. Ferguson of the Final Hearing in the case; and his intentional failure to

advise the Court of all the relevant facts. (TR,p.45,L.17-25, p.46,L.1-6). The Bar's position is supported by Respondent's answers to the following questions propounded by Bar Counsel during the Final Hearing in this cause:

> Q. You testified that you thought that the Property Settlement Agreement of 1987 was a valid agreement at the time you submitted it to the Court in 1988, correct?
> A. Yes.
> Q. If you thought it was a valid agreement and it would be upheld in a court of law, why didn't you notify Mr. Ferguson of what you were going to do?
> A. Why didn't I?
> Q. Yes.
> A. I'm not sure.
> Q. Is it because you really didn't believe it was valid?
> A. I felt the agreement was valid.
> Q. Well, once again, if you felt it was valid, why didn't you give them an opportunity to come in and protest it?
> A. Because the wife had left the state and refused to divulge her location or the child's location, I felt that Mr. Ferguson was no longer her attorney.
> Q. What would make you think that Mr. Ferguson was no longer her attorney?
> A. Her action.
> Q. Is it your opinion that anytime a client leaves the state, that they're no longer represented by counsel in the state that they left?
> A. That's not my opinion, no.
> Q. Then explain to me why you felt that her leaving the state would not make Mr. Ferguson her attorney anymore.
> A. Because my client came to me and indicated to me that she advised him on the telephone that he would never see his daughter again and my client was in a panic about that and wanted to see his daughter. I, at the same, was going through a similar situation with my son and his mother. She wouldn't divulge her location or my son's location to me. The emotional strain or trauma that I was experiencing over my own personal situation affected my judgment,

clouded my judgment, and I made a bad judgment by not notifying Mr. Ferguson.
Q. Did you call Mr. Ferguson any say, Mr. Ferguson, are you representing Mrs. Coldeway any longer?
A. No, I didn't.
Q. I understand she's left the state, are you representing her anymore?
A. No, I did not.
Q. Why not?
A. Because the wife had left the state and refused to divulge her location or the daughter's location to my client, my client was in a panic and I did what I felt was necessary to assist my client in locating his daughter.
Q. Okay, isn't it true that your client could not seek assistance through some of the programs that you had become familiar with without having a final judgment saying he would have custody of the child?
A. The minimum he needed was -- even a temporary order of custody would suffice, but he had to have a custody order in order to gain their assistance.
Q. And isn't it true that the reason you didn't contact Mr. Ferguson in regard to your plans to introduce the 1987 Property Settlement Agreement during an uncontested proceeding was because that was the fastest way that you could get your client custody so that he could get help?
A. I'm not sure. (TR,p.66,L.16-25, p.67,L.1-25, p.68,L.1-24).

In Kickliter, this Court noted that an attorney, when taking the oath of admission to the Bar, must swear to "never seek to mislead the judge or jury by way of artifice or false statement of fact or law." Id at 1124. The Respondent violated the oath of admission which he swore to uphold and, as such, he should be suspended from the practice of law regardless of his personal problems at the time of the misconduct.

In The Florida Bar v. Agar, 394 So.2d 405 (Fla. 1981), Mr. Agar represented the husband in an uncontested divorce action,

and the wife was going to act as her husband's residency witness. Shortly before the Final Hearing, Mr. Agar discovered that the Judge assigned to the case did not allow the spouse of a party to testify as to residency. Mr. Agar advised the wife to give a false identity and deceive the Court as to who she was so that she could testify as to the husband's residency. The Referee recommended that Mr. Agar be suspended from the practice of law for four (4) months. On review, this Court found that disbarment was the appropriate discipline due to the fact that Agar's conduct constituted a fraud upon the Court.

Again, the Bar concedes that Mr. Agar's misconduct was more serious than the Respondent's misconduct, in that Mr. Agar advised, encouraged, and allowed a witness to commit the crime of perjury and, in so doing, committed a crime himself. Although the Respondent did not involve his client in the fraud on the Court, he did prejudice his client in that Mr. Coldeway was required to pay a portion of his wife's attorney's fee in having the Final Judgment of Dissolution of Marriage set aside. In addition, the Respondent's misconduct deprived Mrs. Coldeway of the opportunity to contest the validity of the 1987 documents submitted to the Court and to litigate the issue of custody of the parties' minor child. Further, the Respondent's misconduct caused Mrs. Coldeway to be deprived of her child for the period of time that it took to have the Final Judgment set aside and the custody issue judicially resolved. Clearly, a punishment of a public reprimand and probation is not in keeping with the gravity

of the Respondent's misconduct. A six (6) month suspension is the appropriate discipline for the Respondent's misconduct.

In The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980), Mr. Hoffer represented Mr. and Mrs. Lantzy in a foreclosure action against J. B. White and Government National Mortgage Association (GNMA). A Final Hearing was scheduled for August 18, 1976 in the foreclosure action. Prior to August 18, 1976 Colonial Mortgage Service Company of California (CMSC) filed a Motion to Intervene in Mr. Hoffer's clients' lawsuit based on the fact that GNMA had assigned the mortgage which the Respondent was seeking to foreclose. Mr. Hoffer received a copy of CMSC's Motion to Intervene and, thereafter, advised CMSC's counsel that he would postpone the Final Hearing on the foreclosure action until after September 7, 1976, when the Motion to Intervene was scheduled to be heard. Subsequently, Mr. Hoffer failed to postpone the Final Hearing on the foreclosure action and on August 18, 1976 he submitted a Final Judgment to the Court without advising counsel for the intervener of the same. Thereafter, when the Motion to Intervene was heard, Mr. Hoffer argued that CMSC was precluded from asserting any interest because of the Final Judgment that had already been entered.

After considering the foregoing facts and an allegation that Mr. Hoffer directed his staff to alter an executed release form in a personal injury action, this Court held that a two (2) year suspension was appropriate for Mr. Hoffer's misconduct.

The Respondent engaged in misconduct similar to the

misconduct of Mr. Hoffer. In the case sub judice, the Respondent knew that Mrs. Coldeway was represented by counsel. In addition, the Respondent knew that Mrs. Coldeway was seeking the primary custody of the parties' minor child due to the proposed Settlement Agreement forwarded to him by Mrs. Coldeway's attorney. Respondent intentionally failed to advise Mr. Ferguson of the fact that his client rejected Mrs. Coldeway's proposed Settlement Agreement. (TR,p.59,L.19-25). The Respondent intentionally failed to advise Mr. Ferguson of the existence and filing of the 1987 Petition for Dissolution of Marriage, the 1987 Property Settlement Agreement executed by Mrs. Coldeway prior to the reconciliation of the parties, and Mrs. Coldeway's 1987 Answer and Waiver of Notice of Final Hearing and Consent to Entry of Final Judgment. (TR,p.41, L.15-25, p.42, L.1-12). The Respondent also intentionally failed to notify Mr. Ferguson of the Final Hearing in the Coldeway case even though Mr. Ferguson advised Respondent of the fact that he attends all of his client's Final Hearings. (R, Bar Exhibit 2, TR, p.41, L.19-25, p.42, L.1-12). Further, the Respondent consciously failed to advise the Court of the aforementioned facts and fraudulently presented the Coldeway case as an uncontested divorce. (TR,p.45,L.10-24). The Respondent knew that his actions and/or inactions were improper and a violation of the Rules Regulating The Florida Bar, yet he argued against Mrs. Coldeway's motion to have the Final Judgment set aside. (TR, p.65, L.9-25).

The Respondent's knowing and intentional misconduct is as

serious as Mr. Hoffer's misconduct, which warranted a two (2) year suspension. However, due to the substantial mitigation in this case, the Bar contends that a six (6) month suspension is appropriate for Respondent's misconduct.

According to Florida's Standards For Imposing Lawyer Sanctions (hereinafter referred to as "The Standards"), approved by the Florida Bar's Board of Governors in November, 1986, a suspension is the appropriate discipline for Respondent's misconduct in this case.

Section 6.1 of The Standards, entitled "False Statements, Fraud, and Misrepresentation," provides that, absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer: (a) with the intent to deceive the Court, knowingly makes a false statement or submits a false document; or (b) improperly withholds material information, and causes serious or potentially serious injury to a party, or causes a significant or potentially significant effect on the legal proceeding. The Respondent intentionally withheld material information from the Court and such conduct seriously injured Mrs. Coldeway, since she was deprived of the custody of her child without being given an opportunity to be heard on the issue. Therefore, the Respondent's misconduct would warrant disbarment, absent mitigating factors.

Section 9.3 of The Standards sets forth mitigating factors which may justify a decrease in the degree of discipline to be imposed against an attorney for misconduct. All of the mitigating

factors found by the Referee in this case are set forth in this section of The Standards.

Section 9.2 of The Standards sets forth aggravating factors which may justify an increase in the degree of discipline to be imposed against an attorney for misconduct. In this case, the Referee considered Respondent's substantial experience in the practice of law as an aggravating factor.

The sole aggravating factor found by the Referee does not outweigh the substantial mitigation found to exist in this case. Thus, a suspension rather than disbarment is the appropriate discipline for this case. Mr. Hoffer as a result of his misconduct, which was the most closely akin to the Respondent's misconduct, was suspended by this Court for two (2) years. However, in Hoffer, there was not substantial mitigation as was found to exist in the instant case. Therefore, a six (6) month suspension is appropriate for Respondent's misconduct in light of the mitigating factors present in this case.

Section 6.3 of The Standards, entitled "Improper Communication With Individuals in the Legal System," provides that, absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer makes an unauthorized ex-parte communication with a judge or juror with the intent to affect the outcome of the proceeding. The Respondent admitted knowingly engaging in such conduct. (TR, p.65, L.17-24, p.65, L.9-25). Thus, disbarment would be warranted absent the mitigating factors present in this case. However, the mitigating factors in this

case do not warrant decreasing the appropriate degree of discipline from disbarment to a public reprimand and probation.

Based on the foregoing, The Florida Bar respectfully requests this Court disapprove the Referee's recommended discipline of a public reprimand and probation and suspend the Respondent from the practice of law for six (6) months.

CONCLUSION

A punishment of a public reprimand and probation is not in keeping with the gravity of the Respondent's misconduct regardless of the mitigating factors considered by the Referee. The mitigating factors warrant reducing the appropriate degree of discipline in this case from disbarment or a lengthy suspension to a six (6) month suspension.

WHEREFORE, The Florida Bar respectfully requests that this Court suspend John H. Myers from the practice of law for six (6) months.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Initial Brief has been furnished by U.S. Regular Mail to Scott K. Tozian, Counsel for the Respondent, at Suite 150, 109 N. Brush Street, Tampa, FL 33602; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Ethics and Discipline Department, 650 Appalachee Parkway, Tallahassee, Florida 32399-2300, this 4th day of January, 1991.

BONNIE L. MAHON