IN THE SUPREME COURT OF THE STATE OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellee,

vs.

JACK BARITON,

Respondent/Appellant.

Supreme Court Case No.
76,157

The Florida Bar Case No.
88-51,231 (17B)

APPELLANT'S AMENDED INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES **PAGE(S)**

INTRODUCTION

The Appellant, Jack Bariton, the Respondent in the action below, shall be referred to in this brief as BARITON. The Appellee, The Florida Bar shall be referred to as the BAR. Mark Perlman of the law firm of Perlman & Perlow, shall be referred to as PERLMAN.

The designation "RA" refers to the record on appeal. Following that designation will be the transcript page followed by the line(s) number(s).

The designation "R" refers to the transcript of the proceedings held March 28, 1990 before the Seventeenth Judicial Circuit Grievance Committee 17B Case 88-51,231 (17B).

STATEMENT OF THE CASE AND FACTS

On or about April 27, 1988, the Florida Bar received a Complaint against a member of the Florida Bar, Mark Perlman. Jack Bariton, the lower tribunal Respondent, Appellant here, included with his Complaint, a copy of a letter dated January 27, 1988 addressed to Mr. Perlman. This letter was marked Exhibit "1" in the hearing held by a referee, Judge Gerald D. Hubbart on November 8, 1990. (Florida Bar Case #88-52,23 (17B).

The Florida Bar alleged that Exhibit "1" was not a true and accurate copy of Respondent's January 27, 1988 (Exhibit "2") to Mark Perlman. (Bar Complaint 88-51,231 (17B), (Complaint page 2 allegation number 4. Exhibit "1", the version of the January 27, 1988 letter submitted by [Bariton], is different from the original version of that letter [to Mark Perlman Exhibit "B"] in that portion of the first paragraph in said letter has been deleted. (Bar Complaint against Respondent) page 2 paragraph 6.

The language omitted from Exhibit "1" that appears in Exhibit "2" reads as follows:

"....and in addition, there was a two week period around my termination notice where I did not receive a pay check. Your response at that time was 'When the cases are settled and fees come in, you can deduct your hourly wages that are owed from those monies.'" Bar Complaint paragraph 7. Exhibit "1" and Exhibit "2" were also typed on different letterheads.

It was determined by Judge Hubbart that the aforementioned

omission was not material to the Respondent's Complaint to the Florida Bar (Amended Report of Referee, Page 2, paragraph 7).

In its Complaint, the Florida Bar alleged that Respondent violated Rules 3-4.2 [violation of the Rules of Professional Responsibility is cause for discipline] and 3-4.3 [the commission by a lawyer of any act contrary to honesty and justice is cause for discipline], Rules of Discipline 8.4(a) A lawyer shall not violate the Rules of Professional Conduct and 4.8.4(c) A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation of the Rules of Professional Conduct.

Although this is a case of first impression, it was the Bar's position that the aforementioned changes in the letter whether intentional or not, misled the Bar and the Grievance Committee found probable cause that this matter ought to go forward because of that alleged misrepresentation to the Bar (R 4, 17-22).

It is important to note that all through the lower tribunal proceedings, the Bar had satisfied itself that the missing sentences were strictly non-material in nature and, in fact, The Bar could find no motive on Respondent's part for deleting the same. R 29, 21-25.

Furthermore, testimony was presented by the Respondent which indicated there would be much more motive and advantage for the Respondent to have left the sentence in the letter. There was absolutely no reason that the Respondent would have intentionally left this out, since quite the opposite, if he had included the sentence, it would have served Respondent's purpose by showing that

Mr. Perlman refused to tender to Bariton his last two week pay check and also that Perlman said to take the fees collected from Bariton files in lieu of the salary. R 20, 1-25. R 21.

Respondent's contention is that when the original letter was sent to Perlman, Respondent had no office equipment or computer. Respondent only had a few files and had no place to store them. A copy of the original was never made and the letter attached to Respondent's Bar Complaint was a reconstruction from Respondent's notes (R 16, 12-23, R 17, R 18).

At the time of the Grievance Committee Hearing Case No. 88-51,231 (17B) held on the 28th day of March, 1990, Respondent was advised by his attorney, to invoke the Fifth Amendment since Perlman's "Grand Theft" criminal charges were still pending. Respondent never represented that the two letters were verbatim copies, since the letters were on two different pieces of stationery and Respondent never testified in front of the Grievance Committee. There was no evidence presented if the omission was an intentional act, or as Respondent contends, a typographical error, innocent in nature, but it was agreed by all parties to be non-material in substance.

Finally, after approximately two years, the State Attorney refused to bring this alleged "Four Hundred ($400.00) Dollar Grand Theft" to trial.

Subsequently, sua sponte, the Florida Bar brought their own action against the Respondent based upon an omission of language in the January 27, 1988 correspondence that Bariton submitted to the

Florida Bar. It is the decision by Referee, the Honorable Gerald D. Hubbart, concerning the omission in that letter, that Respondent/Appellant petitions this Court for review.

The matter was heard on March 28, 1990, wherein the Florida Bar Committee entered a finding of minor misconduct. (Letter to Jack Bariton dated May 30, 1990.) This finding was rejected by the designated reviewer, Walter B. Campbell, Jr. on May 17, 1990. The Seventeenth Judicial Circuit Court Grievance Committee on May 29, 1990, reconsidered its prior action and entered a finding of probable cause.

The Florida Bar filed its Complaint and the matter was heard before the Honorable Gerald D. Hubbard on November 8, 1990. Judge Hubbard's final decision was based upon a finding of minor misconduct (RA 36, 3-10) based upon a technical misrepresentation. The Judge did not see where anything beyond a public reprimand was warranted, but in fact the Judge preferred a private reprimand, which he suddenly discovered was no longer a sanctioning option (RA 29, 3-6) offered by the Bar. The Judge was forced into sanctioning a public reprimand rather than his preference of a less harsh remedy of a private reprimand. The Judge extended his sympathies towards Bariton (RA 32, 12-14) as he announced his decision. It is from that decision that a petition for review was sought by the Appellant.

SUMMARY OF ARGUMENT

This matter was tried before a Referee, The Honorable Gerald D. Hubbart without a jury on March 28, 1990. (Florida Bar Case No. 88-52,531 (17B)). Respondent, JACK BARITON, had previously filed a Florida Bar Complaint against another attorney, MARK PERLMAN, for the fraudulent filing of a criminal complaint against Bariton. Perlman counterclaimed with his own Bar Complaint against Respondent in addition to the criminal filing.

All charges were subsequently dropped, the State Attorney refusing to file the same.

Subsequently, the Florida Bar, sua sponte, brought charges against the Respondent based upon a document submitted with Respondent's Bar Complaint. The Bar alleged that the letter attached to Bariton's Bar Complaint differed slightly in content from the actual letter that was originally sent to Perlman in that Respondent's copy submitted to the Bar was missing two sentences as follows:

"...and in addition, there was a two week period around my termination notice when I did not receive a pay check. Your response at that time was 'When the cases are settled and fees come in, you can deduct your hourly wages that are owed from those monies'."

It was determined by Judge Hubbart that the aforementioned omission was <u>not material</u> to the Respondent's Complaint and the Bar stipulated to the same. Nevertheless, the Bar's position was

inadvertent or not, material or non-material, said omission technically constituted misrepresentation in that the Bar assumed that the document was a true and accurate copy of the letter to Perlman, even though Respondent never represented or testified to that fact and despite the fact that the two letters were on entirely different letterheads.

Evidence was presented by Respondent that in fact, the missing portion was not only favorable to Respondent's argument, but if it had been left in the letter, would have served to prove Respondent's case in that it demonstrated Respondent's claim to a disputed sum of Four Hundred ($400.00) Dollars that Perlman claimed Respondent owed to Perlman pursuant to an oral employment agreement wherein Perlman was allegedly entitled to sixty (60%) percent of the fees of all Bariton's clients.

This is a case of first impression and Respondent contends that when the original letter was sent to Perlman, Respondent, being between offices and having no file storage or office equipment, did not retain a copy of said letter. Respondent also had no anticipation that this matter would ever be before the Bar or involve litigation. The copy of the letter submitted to the Bar was reconstructed from Respondent's handwritten notes. During the hearing, Judge Hubbart found minor misconduct and recommended a private reprimand. At this point, the Bar, advising the Judge of new changes to the Florida Bar Disciplinary Rules, informed the Judge that as a sanction, a private reprimand was no longer available, only a public reprimand. The judge was thereby forced

into sanctioning a public reprimand and imposing over $1,200.00 in costs to the Respondent in spite of the fact that some of the costs involved hearings on Perlman's counterclaims which were all ultimately dismissed by the Bar.

Appellant, Bariton, argues that it was the Florida Bar itself that recommended to Bariton that he file a Complaint against Perlman. Appellant further represents that said omission was unintentional, inadvertent, and at best, a clerical error. It was Mr. Bariton's preference that the portion omitted had been included since the statements contained therein actually helped his argument and helped to prove his case since it served the purpose of explaining why the Respondent had no duty to share his client's fees with Perlman & Perlow, P.A. The Referee, pursuant to The Florida Standards for Imposing Lawyer Sanctions should have considered issues such as the duties violated, the lawyer's mental state, the potential or actual injury caused by the lawyer's alleged misconduct, the existence of aggravating or mitigating circumstances. A conscious intent to misrepresent was never proven by the Bar nor was any motive discerned for the omission.

The purpose of lawyer discipline proceedings is to protect the public, and that purpose would not be served by the undue harsh sanction of a public reprimand. No clear and convincing evidence was presented by the Bar who case in chief consisted of voluntary admissions by the Respondent in an effort to cooperate. No cases exist on point in Florida that speak to an unintentional non-material omission. A public reprimand is appropriate when a lawyer

is negligent either in determining whether statements or documents are false and no such showing was presented by the Bar to indicate negligence. No potential or actual injury to the proceeding, anyone or any client transpired. The sanction of a public reprimand in this instance will not encourage reformation and rehabilitation nor will it serve to deter others. To impose such a severe sanction as a public reprimand would establish a dangerous precedent for other attorneys, forcing them to live up to a realistically difficult standard of checking and re-checking even the most innocuous letters for potential clerical errors to avoid potential future liability. The Respondent has already suffered the hardship of living under the threat of criminal prosecution because of a frivolous, bootstrapped civil dispute and has expended over $3,000.00 for legal counsel to defend the same. Respondent's only solace during the several years of unjust oppression was that all Bar charges and criminal charges were ultimately dropped.

The Referee abused his discretion under the facts and evidence presented and the erroneous decision require that the lower court's verdict in favor of the Florida Bar be reversed and that a directed verdict in favor of Bariton be entered.

ARGUMENT

The Appellant/Respondent, attorney, Jack Bariton, upon suggestion by The Florida Bar, (R 7, 3-15) filed a Florida Bar complaint against his former employer, attorney, Mark Perlman. The two parties had re-negotiated an oral employment agreement sometime in April, 1987, wherein Bariton received $15/hour for whatever functions that were performed on behalf of the office, Perlman and Perlow, P. A. In addition, the fees derived from any client brought into the firm by Bariton, would be disbursed with 60% of the fee going to Perlman.

Subsequently, for disputed reasons, the employment was terminated by Perlman after over a five year working relationship between the parties. This termination notice was given only a few months after the five year mark had passed under the old arrangement and a few months subsequent to Perlman and Perlow entering into a new oral employment agreement with Respondent based upon the aforementioned fee disbursement arrangement. The old employment agreement called for only $10/hour salary and did not address the issue of fee sharing.

The only underlying dispute between the parties as to facts at the Florida Bar Grievance Committee hearing on this matter (R 6, 23-25) was the alleged caused for termination. Perlman alleged that Bariton was terminated because of incompetence. Bariton pointed out on cross-examination that if he (Bariton) was so

incompetent, why did Perlman and Perlow employ him for over five years and why did they re-negotiate a new employment agreement shortly before termination?

Subsequent to termination, Perlman demanded a list of Bariton's clients and the status of each matter. This list was fundamentally reflected in a letter to Perlman and Perlow from the Appellant dated January 27, 1988. (Exhibit "1")

It was determined that if the 60%-40% fee disbursement agreement were governing pursuant to the oral employment agreement, Perlman and Perlow's share would amount to somewhere in the neighborhood of Four Hundred ($400.00) Dollars. Perlman was not sure as to the exact amount, but believed it was approximately $562.00 (R 45, 6-17), if there existed a valid oral employment agreement. (R 49, 12-21). One issue at that hearing that was never addressed was, did Perlman, by terminating Bariton without cause, breach the alleged agreement. Furthermore, if Perlman committed the breach, was he entitled to any money?

Bariton alleged that Perlman withheld his final two weeks pay check to Bariton and told the Appellant that "if your cases ever win money, you can keep the fees as payment of your pay check."

It is this alleged statement by Perlman that is the crux of this petition for review. It is that very statement that was found to be missing from a copy of the January 27, 1988 letter.

Based upon Perlman's statement to Appellant, Bariton did just that: Eventually some of Bariton's client's matters were resolved and fees were collected by Bariton. The checks were made payable

to Bariton. Bariton did 100% of the work on the file and so, based upon Perlman's statement, Bariton retained close to $400.00 in lieu of the two week's salary that Perlman refused to pay Bariton.

Instead of filing a civil action to resolve a difference arising pursuant to the oral employment agreement, Perlman filed criminal charges against the Appellant since the amount in question, nearly $400.00, was sufficient under the statute jurisdictional amount of $300.00, to constitute grand theft. (R 35, 21-25, R 36, 1-6) Bariton was visited by two Hallandale detectives and was read his Miranda Rights. The State Attorney, even after two years of lobbying by Perlman, decided not to file the case.

Bariton contacted the Florida Bar Ethics Hotline for advice regarding the propriety of Perlman filing criminal charges in regards to what, in all respects, should have constituted a routine civil matter. The Ethics Hotline advised that in their opinion, Perlman's actions were reprehensible and further suggested that Bariton filed a Florida Bar Complaint against Perlman.

On or about April 27, 1988, the Florida Bar received from the Appellant/Respondent, a Complaint against Perlman who answered with a counter-claim. The Florida Bar dropped Bariton's Complaint and proceeded ahead against Bariton on the matters contained in Appellee's Counter-Claim. Coincidentally, Perlman was, at the time, a member of the Florida Bar Grievance Committee in the very same Fort Lauderdale office.

Due to a possibility at that time, of criminal charges being

filed, at Perlman's insistence by the State Attorney in this matter, Bariton was advised by counsel to invoke his Fifth Amendment privileges. In spite of having done so, the Florida Bar decided to proceed ahead with a hearing at which the only testimony heard was that of Perlman. Bariton having invoked the Fifth Amendment on advice of counsel, was not permitted to testify, however, he was allowed to cross-examine Perlman.

Pursuant to that cross-examination and the record, the Florida Bar ultimately dropped all charges levied against Respondent by Perlman.

However, included with his original Complaint against Perlman, the Appellant enclosed a copy of a letter dated January 27, 1988 (Exhibit "1" Florida Bar hearing) addressed to Perlman. In his reply to the Respondent, Perlman submitted the original letter in question that had been mailed to him by Bariton.

I. THE REFEREE FAILED TO FOLLOW THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

From the record below, it was determined and agreed that the omission of the aforementioned sentences was not substantial, i.e., it was not involving a material matter of clear and weighty importance. The evidence presented indicates there was a stronger motive for Respondent to include the missing portion of the letter, since it served the purpose of explaining why the Respondent had no duty to share his client's fees with Perlman & Perlow, P. A.

Before imposing sanction, the Referee had to, according to the Florida Standards for Imposing Lawyer Sanctions, consider the following issues: 1) duties violated 2) The lawyer's mental state

3) the potential or actual injury caused by the lawyer's misconduct and 4) the existence of aggravating or mitigating circumstances.

In this particular instance, the duty violated at best was an unintentional non-material omission of two sentences. The Respondent was not shown to have any motive or purpose whatsoever in deleting these sentences. There was absolutely no potential or actual injury caused by the omission and finally, the mitigating circumstances are that there was much more of a motive to leave the sentences in the letter.

The Bar never proved or even alleged intent on the part of the Respondent to omit the sentences. They found no conscious objective or purpose to accomplish a particular result. In addition, no knowledge was demonstrated on the part of Respondent to show that he had conscious awareness of the nature of attendant circumstances of the conduct, or the conscious objective or purpose to accomplish a particular result. There were no injuries to a client, Perlman or his firm, the public, the Bar or the legal system that was reasonably foreseeable at the time of the Respondent's alleged misconduct.

II. THE PURPOSE OF LAWYER DISCIPLINE WILL NOT BE SERVED IN THIS INSTANCE BY THE HARSH SANCTION OF A PUBLIC REPRIMAND

The purpose of lawyer discipline proceedings is to protect the public. The Florida Standards are designed for use in imposing sanctions following a determination by clear and convincing evidence that a member of the legal profession has violated a provision of the Rules of Professional Conduct. The record of the

lower court shows no such clear and convincing evidence. There are no cases in this jurisdiction on point that speaks to an unintentional non-material omission. Therefore, as of yet, there is not consistency in the imposition of disciplinary sanctions for the same or similar offenses within this jurisdiction. According to Section 6.13 of The Florida Standards for Imposing Lawyer Sanctions, a public reprimand is appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld. Actually, the sanction to be imposed is described in Section 6.14 under admonishment. In that section, admonishment is appropriate when a lawyer is negligent in determining whether submitted statements are false or in failing to disclose material information upon learning of its falsity, and cause little or no actual or potential injury to a party, or causes little or no adverse or potentially adverse effect upon the legal proceeding.

In the case before us, the document was missing an insignificant non-material section that caused no actual or potential injury to a party or to the proceeding. It was not even determined whether or not the Respondent had even been negligent under the circumstances.

"[A] judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involve in like violations." The Florida Bar v. Lord, 433 So.2d

983 (Fla. 1983).

The Bar in its Memorandum of Law submitted to Judge Hubbart, alleges that Respondent represented that the letter attached to the Respondent's Bar Complaint against Perlman, was a true and accurate copy of the original letter sent to Perlman. In fact, the Respondent never represented the letter as such, being unaware there were any differences between the two documents, and furthermore, it would appear obvious that since each letter was on different stationery, it was implicit that the letter submitted by Respondent could not be a true and accurate copy. A public reprimand is not fair to the Respondent, being an unduly harsh sanction to discipline an inadvertant non-material omission. Since the act by Respondent was unintentional, the punishment would not help to encourage reformation and rehabilitation. It certainly will not deter others who might be prone or tempted to become involved in like violations since temptation requires knowledge and a voluntary choice to commit the violation. You cannot deter behavior that was originally non-intentional and inadvertant. It happened by accident, whether by secretary or computer, that the sentences were not included in Exhibit "1". An accident can happen at any time to anybody, and a severe sanction will not deter or prevent a similar accident from occuring to any practitioner of law in the future. Behavior can only be deterred by a severe sanction if the person tempted to commit the wrongdoing, is aware of the violation and because of the sanction, is able to make a conscious choice of avoiding the questionable behavior.

Every case submitted by the Bar contemplates an overt, conscious act by the accused lawyer. The Florida Bar v. Sax, 530 So.2d 284 (Fla. 1998) and The Florida Bar v. Day, 520 So.2d 581 (Fla. 1988) involve submitting false notarized affidavits. Notarizing affidavits without requiring affiants to personally appear is a conscious, wilfull, intentional act of a material nature. In the case at hand, the act was not only immaterial, but was unintentional as well.

The inadvertant omission of a non-material nature could best be analogical to the situation where a court sets aside a default judgment due to excusable neglect. "Where (inaction) results from clerical or secretarial error, reasonable misunderstanding, a system gone awry or any other of the foibles to which human nature is heir, then upon timely application accompanied by a reasonable and credible explanation, the matter should be permitted to be heard on the merits. It is a gross abuse of discretion for the trial court to rule otherwise. Somero v. Hendry General Hospital, 467 So.2d 1103 (Fla. App. 4 Dist. 1985).

The Bar argues that the case at hand is analogical to Day, supra, because as in Day, supra, the Respondent committed a violation involving fraud and conduct prejudicial to the administration of justice, in particular, falsification of documents by the Respondent. Moreover, the Bar failed to demonstrate any prejudice whatsoever and did not demonstrate a falsification of documents.

Falsification infers a conscious intentional act to change a

document either to hide material facts or to favor the party who submitted the document. The Respondent here did not consciously or intentionally change the document and the changes were non-material in nature. There was no motive or reason for the changes.

The Bar submits The Florida Bar v. Lund, 410 So.2d 922 (Fla. 1982), wherein the attorney in question was given a ten-day suspension for giving false testimony before a grievance committee. The attorney lied about a disciplinary matter. In the Florida Bar v. Bariton, the Respondent never testified or gave false testimony, nor was the Respondent shown to have lied. In fact, Respondent had been cooperative and candid through all aspects of the grievance process.

The Florida Bar v. Langford, 126 So.2d 538 (Fla. 1961), also involved an intentional lie to a grievance committee and a further act of requesting another attorney to corroborate his testimony in an effort to conceal the fact that he had filed a forged deed. Once again, there is no forged document in the case at hand nor did Respondent lie to the committee. Nor did Respondent try to induce another to lie for him.

In The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1982), the Supreme Court of Florida held that attempt to influence a referee's decision in a disciplinary manner and also filing a knowingly false response accusing the referee about lying about what appeared is prejudicial to the administration of justice. Once again, the operative word "knowingly" is utilized in conjunction with the word "material." In the case at hand,

Respondent did not knowingly submit a document that varied, even non-materially, with the original document sent to Perlman. The case of The Florida Bar v. Neely, 372 So.2d 89 (Fla. 1979), is once again not on point since it concerns itself with an attorney lying under oath to a grievance committee in an effort to hide the fact that he had taken advantage of clients for his own personal gain. The case at hand does not rise to this level since the Respondent did not lie and was not attempting to hide any facts, nor was he attempting to affect a situation for personal gain. Any differences or omissions between Exhibit 1 and 2 are favorable to Respondent and it would have served no purpose for Respondent to alter or to omit these sentences. The missing sentences contained in Exhibit 2 only serve to enhance, prove and support the Complaint filed against Perlman and Respondent did nothing but hurt his own case by intentionally deleting these sentences from Exhibit 1.

As the Bar admitted (R 26, 12), this is a case of first impression. The have never had someone submit a document to the Bar that was an inaccurate copy of something that was not an outright fraud upon the Bar. The Bar furthermore admitted that Bariton never really made a statement to the Grievance Committee that they could rely upon other than the fact of his submission to the Bar. (R 27, 12-15). The Bar added further, "It's regretful that Mr. Bariton didn't take the time to explain that maybe this was a re-creation and not totally accurate. (R 27, 16-18). In effect, Respondent is being taxed over $1,212.00 in costs due to an inadvertant typographical error, non-material in nature. The Bar

suggests the sanction could have been avoided if Respondent had given notice that the submitted document was a re-creation. Respondent contends that the very fact Exhibit "1" and Exhibit "2" were submitted on different letterheads implicity gave overt notice that slight differences might appear in said document. Furthermore, since Respondent himself did not possess a copy of the letter, he could not in good faith determine or make representations of its accuracy based upon reconstructed notes.

III. A PUBLIC REPRIMAND IN THIS FACTUAL SETTING WOULD ESTABLISH A DANGEROUS PRECEDENT

To sanction a harsh discipline as a public reprimand would establish a precedent that even without knowledge or intent, a lawyer may face serious consequences for a secretary's error. It would impose a duty that every piece of correspondence leaving an attorney's office would be letter-perfect. There would be no room for excusable neglect or mistake. Every document leaving a lawyer's office would have to be re-checked a dozen times for accuracy, lest the attorney run the serious risk of being imposed with a public reprimand. The Judge himself stated clearly that he felt the facts, if anything in this matter, arose to what should be sanctioned by a private reprimand (R 29, 5), but was dismayed that such a sanctioning option was no longer available.

CONCLUSION

The Bar never met its burden of proving that Respondent knowingly or intentionally omitted the sentences in the letter. It would have served no purpose to omit these sentences which were not only non-material, but worked in favor of the Respondent. The sanction of the public reprimand is unduly harsh considering the action was inadvertent and none of the underlying policies for sanctioning a public reprimand would be served in this particular case since the sanction would not deter others from making inadvertent mistakes. We are all human and humans are capable of unintentional error. The Bar was not misled by the submission of the document nor was any injury to the proceeding involved. There was an abuse of discretion on the part of the Referee inasmuch there was not evidence presented that Respondent knowingly, wilfully or intentionally committed such an act that could lead the Referee to invoke such a sanction. Furthermore, since all of Perlman's charges and counterclaims against Bariton were dismissed, the Respondent should not be charged costs up until the time that the Bar, sua sponte, brought its own charges based upon the omission against the Respondent. This Court is respectfully asked to reverse the Referee's finding and to dismiss the action against the Respondent with costs assessed upon the Florida Bar.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing Amended Initial Brief of the Appellant was mailed this 4th day of April, 1991, to KEVIN TYNAN, ESQ., The Florida Bar, 5900 North Andrews Avenue, Suite 835, Fort Lauderdale, Florida 33309 and the Honorable GERALD D. HUBBART, South Dade Governmental Center, 10710 S W. 211th Street, Miami, Florida 33189.

Respectfully submitted,

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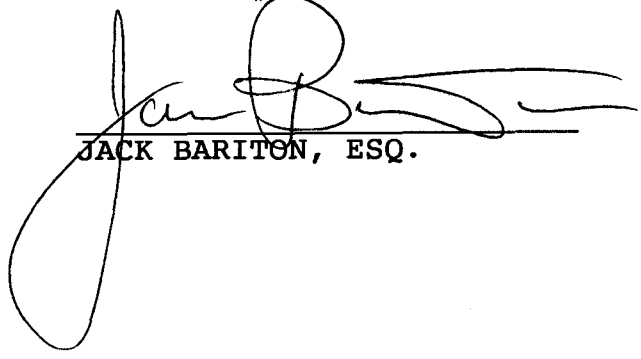

JACK BARITON, ESQ.