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11-16

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CURTIS A. LITTMAN,

Respondent.

Case No. 78,670
[TFB Case No. 91-30,906 (19A)]

ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, will be referred to as the Bar.

The transcript of the final hearing held on May 29, 1992, shall be referred *to* as "T".

The Report of Referee dated July 27, 1992, shall be referred to as "RR".

STATEMENT OF THE CASE

The Bar is in substantial agreement with the respondent's statement of the case and therefore will not reiterate it here. Although the respondent's initial brief was filed approximately twenty-five days late, the Bar did not file a motion to dismiss.

STATEMENT OF THE FACTS

The Bar is unable to accept the respondent's statement of the facts because it is insufficient on several points and therefore submits the following statement of facts which, unless otherwise indicated, is derived from the Report of Referee dated July 27, 1992.

The respondent was retained by William C. Armes on or about July 17, 1990, to represent him in several post-dissolution matters, including the closing on the sale of a marital home and obtaining permanent residential custody of his daughter, Brandi. Custody of the sixteen year old daughter originally had been awarded to the former wife. Brandi, however, wanted to live with her father and was residing in his home at the time Mr. Armes consulted with the respondent. Initially, the respondent advised Mr. Armes not to actively seek a change of custody but rather wait and see if the former wife would allow Brandi to remain with him on a voluntary basis. The respondent believed that seeking a change of custody at that point was premature.

In or around August 19, 1990, the former wife demanded that Mr. Armes return the child to her home. In response, the respondent filed a motion on August 27, 1990, to change residential custody. The respondent styled his document as a "motion" rather that a "petition". Florida Statutes section

61.132(1) requires that every party in a custody proceeding provide the court with certain information either in the pleading or in an affidavit attached to the pleading. The party must provide, under oath, the child's present address, the places where the child has lived for the past five years, and the names and addresses of the persons with whom the child has lived during that period. The party must also declare, under oath, whether the party has been a party or a witness in another custody proceeding concerning the same child, has information of any other such custody proceeding, or has any knowledge of any nonparty who has physical custody of the child or claims to have custody or visitation rights.

After the respondent filed his motion to change residential custody, the former wife retained the services of an attorney who filed a motion to dismiss on November 29, 1990, due to the respondent's failure to provide a proper petition as required. The matter proceeded to hearing on November 29, 1990, and the court entered an order on December 27, 1990, requiring Mr. Armes to pay $1,000.00 in past due child support payments within thirty days and keep his child support payments current.

The referee found the respondent failed to make it clear to Mr. Armes that he needed to continue making his child support payments to the former wife even though Brandi was residing with

him. Mr. Armes did not continue making the child support payments to his former wife. She began demanding the support payments on or about August 28, 1990.

Due to the respondent's failure to file the required petition, the court granted the former wife's motion to dismiss. Mr. Armes was granted leave to file the appropriate pleadings in a timely manner.

Mr. Armes terminated the respondent's services on December 13, 1990, and retained the services of another attorney who shortly thereafter filed the appropriate pleadings and affidavit to seek the change of custody. Mr. Armes incurred additional unnecessary attorney's fees in the approximate amount of $501.00 in this matter due to the respondent's failure to file the appropriate pleadings.

SUMMARY OF THE ARGUMENT

Although it is the duty of the Supreme Court of Florida to review a referee's findings of fact and conclusions, it is well settled that this Court will not overturn the referee's findings unless the party seeking their review clearly shows they are erroneous or without support in the record. Thus, it is inappropriate for the respondent to attempt to retry his case in this forum absent a showing that the referee's findings are erroneous or without support in the evidence. The respondent has failed to make such a showing.

The respondent, rather, dwells on the evidence presented at the final hearing which was most favorable to him without acknowledging that there were conflicts in the evidence. It is clear that the referee simply found the evidence which was unfavorable to the respondent to have greater credibility. In short, the referee believed Mr. Armes and did not believe the respondent. The referee's findings are clearly well supported by the record. The requirements of the statute were clear and the respondent's only excuse for not following them is that he did not believe the requirements were important. Although the respondent claims in his brief that Mr. Armes gave conflicting testimony with respect to whether or not the respondent advised him to cease making his child support payments, a review of the transcript of the final hearing reveals that Mr. Armes

consistently testified **he** believed the respondent advised him he did not need to continue making **his** child support payments **so** long as Brandi was living with him. The respondent further cites to Mr. Armes' testimony given before the grievance committee. This transcript, however, was not entered into evidence nor did the respondent include it in an appendix to **his** brief, therefore it is not properly before **this** Court, In any event, Mr. Armes' testimony before the grievance committee was consistent with his testimony before the referee.

Thus, although it is undisputed that there was conflicting testimony on some issues, the fact remains that the referee based his findings of violations of Rule of Professional Conduct 4-1.1 on clear and convincing evidence before him and recommended the appropriate discipline.

ARGUMENT

POINT I

RESPONDENT CANNOT ATTACK THE REFEREE'S FINDINGS OF FACT ON REVIEW IF THEY ARE NOT CLEARLY ERRONEOUS AND ARE SUPPORTED BY THE EVIDENCE.

In a Bar disciplinary proceeding, a referee's findings of fact are presumed to be correct and will not be disturbed absent a clear showing that they were not supported by the evidence. The Florida Bar v. Anderson, 594 So. 2d 302 (Fla. 1992). Rule of Discipline 3-7.6(k)(1)(A) provides that the findings of fact "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." The party seeking review of a referee's findings carries a heavy burden of proving the findings are clearly without support in the record. The Florida Bar v. McClure, 575 So. 2d 176 (Fla. 1991). Rule of Discipline 3-7.7(c)(5) provides that "[u]pon review, the burden shall be upon the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful, or unjustified." The Bar submits the respondent has failed to meet this burden.

The referee's responsibility, as the trier of fact, is to evaluate the credibility of witnesses and resolve conflicts in the evidence. The Florida Bar v. Bajoczky, 558 So. 2d 1022 (Fla. 1990). The referee heard the testimony of both the respondent and Mr. Armes and was able to observe their demeanor while

testifying. From his report, it is apparent the referee chose to believe Mr. Armes rather than the respondent with respect to whether or not the respondent had advised Mr. Armes to cease making his child support payments while his daughter was living with him.

To bolster his argument, the respondent is attempting to present evidence to this Court which was not entered into evidence before the referee, i.e. the transcript of the grievance committee hearing. This transcript is not a part of the file nor is it appended to the respondent's brief. It is a long established principle that an appellate court only considers matters which were presented to the lower tribunal. Allen v. Town of Largo, 39 So. 2d 549 (Fla. 1949); Coca Cola Bottling Co. v. Clark, 299 So. 2d 78 (Fla. 1st DCA 1974); Hillsborough County Board of County Commissioners v. Public Employees Relations Commission, 424 So. 2d 132 (Fla. 1st DCA 1981), citing Tyson v. Aikman, 159 Fla. 573, 31 So. 2d 272 (Fla. 1947); and Seashole v. F & H of Jacksonville, Inc., 258 So. 2d 316 (Fla. 1st DCA 1972).

The respondent testified that at the time Mr. Armes retained him, he had handled somewhere between six and twelve contested custody cases (T. p. 43). The respondent further testified that most of the custody cases he had handled up until Mr. Arrnes' had

been defensive in nature. He had never had to file an initial pleading in a contested change of custody action (T. p. 91). When the respondent filed the motion in Mr. Armes' case, he did not intend to go to trial. He filed the document merely in an attempt to convince the former wife to allow Brandi to continue living with her father (T. p. 94). The respondent testified that he forgot to amend the motion to contain the required UCCJA information (T. p. 94). The respondent admitted that when he drafted the motion he did not even think about the technical requirements (T. p. 95). Had the respondent considered the requirements for filing a petition to change custody at the time he drafted this document, which he knew or should have known could lead to legal proceedings, this issue might not now be pending before this Court.

The respondent's attitude conveyed during his testimony at the final hearing is troublesome. He testified that he believed there is no difference between a pleading and a motion (T. p. 80). He has been a practicing attorney for six years and has done, by his own admission, a considerable amount of trial work (T. p. 43). Further, not all of the change of custody petitions, or in his own words "motions", he has filed have been verified (T. p. 92), yet the statute clearly requires that the initial pleading must contain certain verified information.

The Bar submits that by failing to properly research the

area of law dealing with changes of residential custody and/or to comply with the requirements of Florida Statutes section 61.132, the respondent clearly fell below the standards of competent representation. The existence, or lack thereof, of prejudice the client suffered as a result is only an aggravating or mitigating factor.

In his brief, the respondent makes mention of amending pleadings under the Florida Rules of Civil Procedure. The rules are procedural in nature and the Florida Statutes contain the substantive law which controls, absent a specific provision to the contrary. While it is true the rules permit the amending of pleadings, the respondent overlooks the fact that what he filed was a motion and not a pleading. The two are not the same and the difference between them is an elementary concept in the practice of law which the respondent appears not to have grasped. Florida Rules of Civil Procedure 1.100(a) and 1.100(b) clearly dilineate the differences between the two. Rule 1.100(a) provides that the only pleadings allowed are a complaint, or when so designated by a statute or rule, a petition, an answer to the complaint or petition, an answer to a counterclaim, an answer to a cross-claim, a third party complaint, a third party answer, and a reply to affirmative defenses. Rule 1.100(b) provides that an "application to the court for an order shall be made by motion..." Motions are not pleadings. See Harris v. Lewis State

Bank, 436 So. 2d 338, 340 (Fla. 1st DCA 1983), citing H. Trawick, Florida Practice and Procedure, section 6-1 at 60 (1979 ed.). These persuasive authorities support the distinction between pleadings and motions. Further, the purpose of pleadings is to define and narrow the issues, and form the foundation of and limit the proof to be submitted at trial. The issues in an action are made solely by the pleadings. Hart Properties, Inc. v. Slack, 159 So. 2d 236 (Fla. 1963).

Florida Rule of Civil Procedure 1.010 states the following:

> These rules apply to all actions of a civil nature and all special statutory proceedings in the circuit courts and county courts except those to which the probate and guardianship rules or the summary claims procedure rules apply. The form, content, procedure and time for pleading and all special statutory proceedings shall be as prescribed by the statutes governing the proceeding unless these rules specifically provide to the contrary. (Emphasis added)

The Fourth District Court of Appeals interpreted this provision in Salvador v. Fennelly, 593 So. 2d 1091 (Fla. 4th DCA 1992). In reaching it's decision, the district court considered the Florida Supreme Court's declaration in adopting the revised Rules of Civil Procedure in 1981. The Supreme Court stated that all rules and statutes in conflict with the revised rules were to be superseded and any statute not superseded would remain in effect as a rule promulgated by the Florida Supreme Court. Therefore, the Rules of Civil Procedure do not control over Florida Statutes except in those instances where a statute directly conflicts with

an existing Rule of Procedure adopted by the Supreme Court. In such a case, the statute would be rendered unconstitutional because of the separation of powers doctrine. See Williams v. First Union National Bank of Florida, 591 So. 2d 1137 (Fla. 4th DCA 1992). The form, content, procedure and time for pleading prescribed by the statutes governing special statutory proceedings are controlling unless the Florida Rules of Civil Procedure specifically provide to the contrary. Berry v. Clement, 346 So. 2d 105 (Fla. 2nd DCA 1977).

In the matter at hand, Florida Statutes Section 61.132 is not silent as to the form and content of pleadings in a custody proceeding. The wording of the statute is clear and unambiguous. Not only did the respondent mistitle his document filed with the court as a motion rather than a petition, he failed to include certain necessary information. It is clear the respondent was not familiar with the requirements of the statute nor did he research the issue to familiarize himself with the appropriate procedures to follow in seeking a change of residential custody. Had he done so, this Bar disciplinary proceeding might never have developed.

In his initial brief, the respondent cites various cases dealing with the amending of pleadings and the court's exercise of it's jurisdiction even when the uniform child custody jurisdiction act affidavit is not attached to or included in the initial pleading. The respondent cites Hotel and Restaurant

Employees and Bartenders Union v. Boca Raton Club, Inc., 73 So. 2d 867 (Fla. 1954). The respondent is correct in stating that the Rules of Civil Procedure observe the distinction between the pleading that is merely inexpert, and thus amendable, and that which is insufficient. Had the respondent filed a pleading in this case, perhaps he would have been allowed to amend it. The fact remains, however, the respondent did not file a pleading which was appropriate for the relief sought and it was for this reason the circuit court judge dismissed Mr. Armes' action. The order signed by the trial judge, entered as Bar exhibit number seven, speaks for itself.

The respondent also cites Gambrell v. Gambrell, 272 S.E. 2d 70 (Ga. 1980) and T.L. v. State Department of Health and Rehabilitative Services, 392 So. 2d 288 (Fla. 5th DCA 1980), for the proposition that failure to include the information required by the UCCJA does not deprive the court of its jurisdiction to hear a petition in a custody or dependency action. These two cases easily can be distinguished from Mr. Armes' case in as much as the requirements of the UCCJA were ultimately complied with, albeit untimely, in both of the respondent's cited cases. The respondent, however, failed to plead and/or comply with the UCCJA requirements before the hearing or during the two week period following the custody hearing prior to his being fired by his client. The Court should also note that the Gambrell case cited by the respondent is Georgia caselaw and therefore only

persuasive and therefore not controlling. These cases are inapplicable here except perhaps to show in mitigation that the respondent's failure to include the required information would not have resulted in any prejudice to his client.

The respondent cites the case of Moser v. Davis, 364 So. 2d 521 (Fla. 2nd DCA 1978), to show that the failure to fully comply with the requirements of Florida Statute Section 61.132 pertaining to the information required to be submitted under oath is an excusable error. The respondent states that the Second District Court of Appeals assumed the information would have been submitted at a later date. What the respondent fails to note, however, is that in Moser the petition for custody had been submitted by the petitioner with only one day's notice in response to a petition for writ of habeas corpus filed by the parent asserting custody. This did not occur in Mr. Armes' case. Although Mr. Armes wanted to obtain custody of his child as quickly as possible, the respondent was under no time constraint in preparing the appropriate pleading to effect such a change. Further, the respondent had time to amend his motion to comply with the statutory requirements but failed to do so. Therefore, the respondent's argument in his initial brief that had he continued to represent Mr. Armes he would have filed an amended pleading pursuant to the court's order is without substance. When asked why he did not file the appropriate petition after the

court hearing, the respondent testified before the referee that it was because he was concentrating on arranging for the home study to be completed so the parties could quickly get back into court (T. p. 97). By his own admission, preparation of the appropriate document would have taken only about thirty minutes of his time (T. p. 98).

POINT II

WHETHER A PUBLIC REPRIMAND IS THE APPROPRIATE DISCIPLINE IN THIS CASE.

The respondent is correct in his statement that malpractice is not always grounds for discipline by this Court. The determining factor is whether or not a violation of the Rules Regulating The Florida Bar occurred. Sometimes an attorney's conduct is both malpractice and a rule violation. This is often seen in neglect cases.

In The Florida Bar v. Neale, 384 So. 2d 1264 (Fla. 1980), the attorney's failure to adequately represent the client's interests did not constitute a violation of the rules. The attorney did not neglect his client's case or incompetently handle it. Rather, he made a poor judgment call based upon an erroneous belief that the statute of limitations had not yet run. This is not analogous to the respondent's case where he had adequate time

to review the applicable statute to ensure he was providing the court with all the required information and was filing the appropriate document. The respondent's actions may or may not also constitute malpractice. That is for the civil courts and not the Bar to decide.

The purposes of attorney discipline are threefold. The discipline must be fair to the public by protecting them from unethical conduct while at the same time not denying them the services of a qualified attorney. The Bar submits the rational behind this purpose has been diluted in recent years because of the rapid growth of the Bar's membership in this state. Second, the discipline must be fair to the attorney by being sufficient to punish the breach of ethics while at the same time encouraging reformation and rehabilitation. Third, the discipline must be severe enough to deter others who might be prone or tempted to become involved in like violations. The Florida Bar v. Dubbeld, 594 So. 2d 735 (Fla. 1992). The Bar submits that a public reprimand best satisfies the purposes of attorney discipline and the referee's recommendation is adequately supported by both the Florida Standards for Imposing Lawyer Sanctions and case law.

The Florida Standards for Imposing Lawyer Sanctions, approved by the Bar's Board of Governors in November, 1986, provides that a public reprimand is appropriate when a lawyer

demonstrates a failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client or is negligent in determining whether he is competent to handle a legal matter and causes injury or potential injury to a client. See Standard 4.53. Standard 9.22 lists certain factors which may be considered an aggravation in recommending disciplinary measures. One of those factors is the existence of prior disciplinary offenses. The respondent received a letter of admonishment from the grievance committee on January 24, 1992, for engaging in conduct that was prejudicial to the administration of justice. The respondent was representing a party in a civil case and mailed three letters and a proposed order to the acting judge without sending copies to opposing counsel. He also made a misrepresentation to the court by advising it that the punitive damages issue had been argued when in fact it had not. A copy of the respondent's Report of Minor Misconduct in Case No. 91-31,075 (19A) is attached to the appendix. It was provided to the referee and he considered it In making his recommendation as to discipline.

Standard 9.32 lists certain factors which may be considered in mitigation. The Bar submits that the only possible mitigating factor is the respondent's inexperience in the practice of law. The respondent was admitted to the practice of law on November 20, 1986. At the time the misconduct occurred, he had been practicing for less than four years. The Bar submits, however,

this is not sufficient to warrant a discipline lesser than a public reprimand as the case law clearly indicates.

In The Florida Bar v. Whitley, 515 So. 2d 225 (Fla. 1987), an attorney was publicly reprimanded for incompetently representing a client with respect to the formation of a corporation. The client wanted to issue stock to raise capital. The attorney failed to correctly structure the financing plan which resulted in neither the client nor the investors being adequately protected.

In The Florida Bar v. Maas, 510 So. 2d 291 (Fla. 1987), an attorney was publicly reprimanded, ordered to make restitution to his client and placed on a two year period of probation for incompetently handling a legal matter. He was hired as the attorney for an estate. He failed to take any action to represent the estate despite the fact that interested parties repeatedly contacted him. As a result, there was a long delay in closing the estate. The referee found the attorney was incompetent to handle the matter for which he was retained. In aggravation, the attorney caused considerable inconvenience to the persons involved. In mitigation, he was going through a difficult period in his personal life, He was ordered to make restitution in the amount of $11,300.00. During his two year probationary period, he was required to file quarterly reports with the Bar setting forth the status of all pending cases.

An attorney received a public reprimand in The Florida Bar v. Hotaling, 454 So. 2d 555 (Fla. 1984). The attorney was found guilty of neglecting a personal injury matter and incompetently handling a dissolution and child custody case. In summary, the referee found the attorney represented the two clients involved in an incompetent manner. There was no indication that fraud or deceit were involved. The referee concluded that the accused attorney's organization and preparation did not meet any type of reasonable standard. In mitigation, it was considered that many of the accusations made by the clients were overreaching and unbelievable and that some of the attorney's problems appeared to stem from her inability to turn down underprivileged clients and from her propensity for taking cases on short notice. There was no prejudice to either of the clients involved. The attorney had no prior disciplinary history. The attorney was also placed on a two year period of Bar supervised probation during which time she was required to file quarterly inventory reports of her pending cases.

Incompetence in handling a criminal matter also warranted a public reprimand with a two year period of probation in The Florida Bar v. Hawkins, 444 So. 2d 961 (Fla. 1984). The attorney had been admitted by order of the Supreme Court of Florida waiving the Bar examination and law school graduation requirements because of prior racial discrimination and

segregation policies. At the time the misconduct occurred, the attorney was seventy-six years old and had no prior disciplinary history. He was working as a sole practitioner. The complaint arose from his representation of a defendant on felony charges. It was found that he lacked the competency to handle criminal defense cases and allowed the victim's ex-wife to testify under her previous married name without disclosing her marriage to the defendant. There was no indication that any of the attorney's actions were undertaken with the intent to deceive the court but resulted from a lack of experience. During his two year probationary period, the attorney was prohibited from undertaking the defense of any client in a criminal matter, was required to take thirty hours of continuing legal education courses in criminal law, associate himself with competent co-counsel in the first five criminal cases undertaken thereafter, and pay the costs of the Bar proceedings.

In The Florida Bar v. Mayo, 419 So. 2d 325 (Fla. 1982), an attorney was publicly reprimanded for his failure to disclose trust instruments which were necessary muniments of title and which he was required by law to reveal. The Court adopted the referee's finding that the attorney's actions were not of a serious nature. However, the referee noted that the attorney's obstinate refusal to do what he was clearly required to do caused needless legal expense. In mitigation, the attorney had no prior disciplinary history.

The Bar submits the foregoing standards and case law show that a public reprimand is warranted and would best serve the purposes of attorney discipline.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the Report of Referee and approve his findings of fact, recommendation of guilt, and approve the recommendation of a public reprimand and further order the respondent to pay costs in these proceedings now totaling **$1,796.23.**

Respectfully submitted,

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Attorney No. 312614

By: 

LARRY L. CARPENTER
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by Airborne Express overnight mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by certified mail, return receipt requested, no. P 399 876 080, to counsel for respondent, Patricia J. Brown, at DeHon Building, 300 Colorado Avenue, Suite 203, Stuart, Florida, 34994; and a copy of the foregoing has been furnished by regular U.S. mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 30th day of October, 1992.

Respectfully submitted,

LARRY L. CARPENTER
Bar Counsel

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

CURTIS A. LITTMAN,

Respondent.

Case No. 78,670
[TFB Case No. 91-30,906 (19A)]

APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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THE FLORIDA BAR,

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[TFB Case No, 91,30,906,(19A)]

v.

CURTIS A. LITTMAN,

Respondent.
----------/

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on May 29, 1992. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits, all of which are forwarded to the Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For the Florida Bar	Larry Carpenter
For the Respondent	Patricia J. Brown

II. **Findings of Fact as to Each Item of Misconduct of which the** Respondent is charged: After considering all the pleadings and evidence before me, I make the following findings of fact.

1. The Respondent was retained by William C. Armes on or about July 17, 1990. Mr. Armes had recently obtained a divorce from his wife, Carolyn. Mr. Armes was in the process of selling his home and his wife was seeking more of the sale proceeds than that which she was entitled. Custody of their sixteen year old daughter Brandi, had originally been awarded to Carolyn. Brandi, however wanted to live with Mr. Armes and was residing in his home at the time Mr. Armes consulted with the respondent. Mr. Armes also paid Carolyn $550.00 to cover a dental bill for Brandi.

2. Mr. Armes wanted the Respondent to handle the closing on the house, seek a change of custody for Brandi, and seek reimbursement of the $550.00 he paid to Carolyn.

3. Initially, the Respondent told Mr. Armes not to actively seek a change of custody, but rather wait and see if Carolyn would allow Brandi to remain with him on a voluntarily basis. The Respondent believed that seeking a change of custody at that point was premature. In or around August 1990, Carolyn demanded that Mr. Armes return Brandi to her home.

4. In response, the Respondent filed a motion on August 27, 1990, to change residential custody.

5. Florida Statue 61.132(1) requires that every party in a custody proceeding provide the court with certain information either in his pleading or in an affidavit attached to the pleading. The party must provide, under oath, the child's present address, the places where the child has lived for the past five years, and the names and addresses of the person with whom the child has lived during that period. The party must also declare, under oath, whether he has been a party or a witness in another custody proceeding concerning the same child, has information of any other such custody proceeding, or has any knowledge of any non-party who has physical custody of the child or claims to have custody or visitation rights.

6. The Respondent styled his pleading as a "motion" rather than a "petition".

7. The Respondent did not make it clear to Mr. Armes that child support must be paid even if Brandi was residing with Mr. Armes. Mr. Armes did not continue paying child support to his ex-wife. She began to demand the support payments on or about August 28, 1990.

8. After the Respondent filed his Motion to Change Residential Custody, Carolyn retained the serves of an attorney who filed a Motion to Dismiss on November 29, 1990, due to the Respondent's failure to provide a proper petition as required.

9. The matter proceeded to hearing on November 29, 1990, and the Court entered an Order on December 27, 1990, requiring Mr. Armes to pay $1000.00 in past due child support payments within thirty days and to keep his child support payments current.

10. Due to the Respondent's failure to file the required petition, the Court granted the Motion to Dismiss. Mr. Armes was granted leave to file the appropriate pleadings in a timely manner.

11. Mr. Armes terminated the Respondent's services on December 13, 1990, and retained the services of another attorney, L. Lisa Batts. Ms. Batts was substituted as counsel by order dated December 18, 1990.

12. Ms. Batts filed the appropriate pleadings and affidavit on December 29, 1990 to seek the change of custody.

13. Mr. Armes incurred additional unnecessary attorney's fees in the amount of approximately $501.00 in this matter due to the Respondent's failure to file the appropriate pleadings.

14. The Respondent did file a Motion for Contempt regarding reimbursement for medical bills prior to his withdrawal.

III. **Recommendations as to whether or not the Respondent should be found guilty**: I recommend that the Respondent be found guilty and specifically that he be found guilty of the following violations for the Rules of Professional conduct, to wit: 4-1.1 for providing incompetent representation under the circumstances.

IV. **Recommendation as to Disciplinary measures to be applied**: I recommend that the Respondent receive a public reprimand to be administered by letter from the undersigned referee.

V. **Personal History and Past Disciplinary Record**: After the finding of guilty and prior to recommending discipline to be pursuant to Rule 3-7.5(k)(4), I considered the following personal history and prior disciplinary record of the Respondent to wit:

Age: 39
Date admitted to Bar: November 20, 1986
Prior Disciplinary convictions and disciplinary measures imposed therein:

The Florida Bar v. Littman, case number 91-31,075 (19A) - Respondent received an admonishment for minor misconduct without an appearance before the grievance committee for engaging in ex parte communications with a Judge.

VI. **Statement of *costs* an manner in which costs should be taxed:** I find the following cost were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
1.	Transcript Costs	$ 386.90
2.	Bar Counsel/Branch Staff Counsel Travel Costs	$ 61.23
B.	Referee Level Costs	
1.	Transcript Costs	$ 601.75
2.	Bar Counsel/Branch Staff Counsel Travel Costs	$ N/A
C.	Administrative Costs	$ *500.00*
D.	Miscellaneous Costs	
1.	Paralegal Research Expenses	$ **101.40**
2.	copy fees	$ **34.00**
3.	Witness fees	**110.95**
	TOTAL **ITEMIZED COSTS**	$ 1796.23

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the Respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 27 day of July, 1992.

Referee

Copies to:

Mr. Larry Carpenter, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Suite 200, Orlando, Florida, 32801-1085

Ms. Patricia J. Brown, Counsel for Respondent, 700 Colorado Avenue, Stuart, Florida 34994

Mr. John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300

IN THE SUPREME COURT OF **FLORIDA**
(Before a Grievance Committee)

THE FLORIDA BAR,

Complainant, **Case** No. 91-31,075 (19A)

v.

CURTIS A. LITTMAN,

Respondent.
_____/

REPORT OF MINOR MISCONDUCT

I. Committee Recommendation: Pursuant to Rule 3-7.4(l), the committee recommends, after a hearing on August 21, 1991, that the respondent receive an admonishment. The respondent should not be required to appear before the Nineteenth Judicial Circuit Grievance Committee "A" for administration of the admonishment.

II. Comment on Mitigating, Aggravating or Evidentiary Matters: The committee believes that the following comment on mitigating, aggravating and evidentiary matters will be helpful in considering acceptance of the report:

The complaint against the respondent was filed by opposing counsel, Kenneth C. Sundheim, in a civil case styled Evanqelyn Berry, et.al., v. Magnolia Medical Manaqement, Inc., et.al., filed in St. Lucie County, case number 90-1083-CA-17. The case was presided over by a succession of acting judges. The respondent wrote a total of three letters to acting judge James Alderman without copying Mr. Sundheim. The first letter, dated December 12, 1990, concerned two conflicting orders signed by Judge Alderman. Apparently, after a hearing on a motion to dismiss, the judge requested that Mr. Sundheim draft the order. When the respondent read the order drafted by Mr. Sundheim, he believed it was not drafted in accordance with what the judge had ordered. The respondent then drafted his own order and submitted to the judge. Through inadvertence, the judge signed both orders. In his letter, the respondent pointed out the problem and requested that the judge rescind Ms. Sundheim's order. In a subsequent letter dated January 21, 1991, the respondent reminded the judge of the two orders and suggested that Mr. Sundheim's order be "removed from the file and destroyed". In the third letter, dated December 31, 1990, the respondent enclosed a motion to unseal a court record. Mr. Sundheim was not copied with this

letter or the motion. According to the respondent, because Mr. Sundheim's clients had no right to object to the motion, the respondent did not believe they should receive a copy. The motion concerned the unsealing of the respondent's client's criminal record in a collateral case.

According to the respondent, he intended to copy Mr. Sundheim with all the letters although he did not intend to copy him with the motion. Despite the fact that he advised his legal secretary to always copy opposing counsel on all letters, he believed that in these instances, she failed to do so.

The respondent was also charged with making false statements of law or fact to the court. The discrepancies over the two court orders concerned the respondent's prayer for punitive damages. In his letter of December 12, 1990, to Judge Alderman, the respondent stated that he did not recall arguing the issue of punitive damages during the hearing on the motion to dismiss nor did he recall the judge striking his prayer for same. According to Mr. Sundheim, argument was presented and when Mr. Sundheim drafted his order, he struck the respondent's prayer for punitive damages. The order submitted by the respondent contained the prayer for punitive damages. A hearing on a motion for rehearing was held on March 1, 1991, before acting judge Kanarek. At that time, the respondent advised the court that the punitive damages issue had been argued already before Judge Alderman and that the judge had denied Mr. Sundheim's motion to strike the punitive damages prayer.

On June 7, 1991, the respondent filed a motion for attorney's fees in which he stated that, among other things, Mr. Sundheim had filed a grievance against him which was later determined to have been frivolous. The respondent was contacted by the investigating member from the Nineteenth Judicial Circuit Grievance Committee "A" and told that this matter was still pending before the committee and had never been deemed frivolous. The respondent then filed an amended motion for attorney's fees omitting the reference to the grievance.

The respondent called Mr. Sundheim and discussed the filing of the grievance and its effect on the civil case. The respondent offered that if Mr. Sundheim would drop his Bar grievance, the respondent would agree not to continue seeking punitive damages against Mr. Sundheim's clients which came to naught.

In the committee's opinion, the violations include 4-3.5(a) for seeking to influence a judge; 4-3.5(b)(2) for communicating or causing another to communicate as to the merits of the case with the judge in writing without promptly delivering a copy of the

writing to the opposing counsel; 4-5.3(a) for failing to make reasonable efforts to ensure that the law firm has in effect measures giving reasonable assurance that a non-lawyer employee's conduct is compatible with the professional obligations of the lawyer; 4-5.3(b) for failing to make reasonable efforts to ensure that a non-lawyer employee's conduct is compatible with the professional obligations of the lawyer; 4-8.4(a) for violating the Rules of Professional Conduct; and 4-8.4(d) for engaging in conduct that is prejudicial to the administration of justice.

111. The cost of these proceedings in the amount of $698.15 are assessed against the respondent.

IV. Committee Vote: A quorum of not less than three members of the committee being present, two (2) of whom were lawyers, the committee by affirmative vote of a majority of the committee present voted in favor of the committee recommendation stated in Item I above. In accordance with Rule 3-7.4(f), the committee reports the number of committee members voting for, or against, this report as follows:

In favor of the report	3
Against the report	0
Abstaining Investigator	1

Dated this 4th day of October, 1991.

NINETEENTH JUDICIAL CIRCUIT
GRIEVANCE COMMITTEE "A"

BY: _____
ROBERT L. LORD, JR.
Vice-Chair