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OCT 12 1992
CLERK, SUPREME COURT
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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.
91-301906 (19A)

INITIAL BRIEF OF RESPONDENT IN SUPPORT OF PETITION FOR REVIEW

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PRELIMINARY STATEMENT

Throughout this Brief, The Respondent Attorney, CURTIS A. LITTMAN, shall be referred to as either "Respondent" or "Littman." The following symbols shall be used to refer to the record being reviewed: GTR - Transcript *of* the Grievance Committee Hearing; TR - Transcript of the Referee Hearing, RR - Report of the Referee,

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WHETHER A PUBLIC REPRIMAND IS THE APPROPRIATE DISCIPLINE ASSUMING ARGUENDO THAT RESPONDENT IS GUILTY OF A VIOLATION OF THE RULES REGULATING THE FLORIDA BAR

STATEMENT OF THE CASE

The instant case arose from a complaint which was filed by William C. Armes, a former client, against Respondent, Curtis A. Littman, in January, 1991. The complaint was forwarded to Grievance Committee 19A which conducted a probable cause hearing on May 15, 1991. On June 7, 1991 the Respondent was given notice that the Grievance Committee had found Probable Cause for Further Disciplinary Proceedings based upon an alleged violation of Rule of Professional Conduct 4-1.1, which states in part, "A lawyer shall provide competent representation to a client."

After the filing of a formal complaint against the Respondent, his answer, and discovery, the matter proceeded to a hearing before Referee Daniel P. Dawson on May 29, 1992. On July 27, 1992 the referee filed his Report in which he found Respondent guilty of a violation of Rule of Professional Conduct 4-1.1, and recommended that Respondent be disciplined by a Public Reprimand in the form of a letter from the Referee. Thereupon, Respondent filed a Petition for Review of the Referee's findings and this brief is submitted in support thereof.

STATEMENT OF THE FACTS

William C. Armes hired Respondent in July, 1990 to represent him in post-dissolution matters, including the closing on the sale of the marital home and the residential custody of his daughter, Brandi (Tr.p7,45). The court had awarded custody of the sixteen year old to the mother, however because of a physical altercation between the two of them, the daughter had begun living with Mr. Armes. Because of the short period of time which had passed since the dissolution, Respondent advised Mr. Armes that it would be premature to petition the court for a change of custody. He instead advised that Brandi simply continue to live with her father for a period of time in order

to establish a "track record." Mr. Littman believed that the ex-wife had acquiesced in Brandi's coming to live with her father. (Tr.p52).

Sometime in August, 1990, the former Mrs. Armes made a demand that the daughter be returned to her, whereupon, Respondent initiated a change of custody action in the Circuit Court. The pleading which he filed was denominated a "Motion for Change of Residential Custody."(Tr.Exhibits, Document #2). During the next few months prior to a hearing, Brandi continued to reside with her father. Counsel for the wife filed a Motion to Dismiss Respondent's pleading on November 27, 1990 which was the day a hearing on the pleading had been scheduled and noticed. (Tr.p69).

At the hearing before Circuit Court Judge Fenneley, the wife's Motion for Contempt for failure to pay child support was heard and Mr. Armes was ordered to pay the back child support which he had stopped paying to the mother after Brandi came to live with him. In addition, the Judge ordered that Brandi would continue living with the father pending a home study and ruling upon opposing counsel's Motion to Dismiss, dismissed Respondent's Motion with leave to file appropriate pleadings. (Tr.p.11,74).

Within a few days after the November hearing, Mr. Armes notified Mr. Littman that he was looking for another attorney. (Tr.p.14,76). He did in fact terminate Respondent's services and hired Lisa Batts to represent him in the continuing custody matter. (Tr.p.15) Mr. Armes, thereafter, failed to pay Mr. Littman's fee for the work which had been completed, and filed a grievance against him with The Florida Bar.

SUMMARY OF ARGUMENTS

THE FACTS, EVIDENCE AND TESTIMONY DO NOT SUPPORT THE REFEREE'S FINDING THAT RESPONDENT IS GUILTY OF A VIOLATION OF THE RULES REGULATING THE FLORIDA BAR.

The referee has recommended that Respondent be found guilty of a violation of Rule of Professional Conduct 4-1.1; providing incompetent representation under the circumstances. While a number of issues were raised in The Florida Bar's complaint, and while Mr. Armes cited a number of reasons for his dissatisfaction with Mr. Littman, the only two issues addressed in the referee's report are; (1) Respondent's failure to file the Petition and supporting affidavit required by Florida Statutes Section 61.132(1) and (2) Respondent's failure to "make it clear'' to Mr. Armes that child support must be paid even though Brandi was residing with him. (RR,par.5,6,7,10,13).

It is Respondent's position that neither of the two above referenced issues, nor even the two issues taken together, is sufficient basis for a determination that Respondent's representation of his client was incompetent under the circumstances. Additionally, it is Respondent's postion that he did advise Mr. Armes about the child support obligation, and that Mr, Armes either failed to note or did not understand that continuing obligation. (GTr.p.15,Tr.p.46). The testimony by Mr. Armes and Mr. Littman is in conflict on this issue, however it is clear that there were many aspects of the lititgation which Mr. Armes could not understand. (GTr. p. 15, Tr. p. 21,22).

ASSUMING RESPONDENT WERE GUILTY OF THE VIOLATION OF THE RULES REGULATING THE FLORIDA BAR AS ALLEGED A PUBLIC REPRIMAND IS NOT THE APPROPRIATE DISCIPLINE.

In Paragraph IV of his Report, the Referee has recommended that Respondent receive a Public Reprimand to be administered by letter from the Referee. (RR.par.IV). In numerous cases of attorney discipline a Public Reprimand has been administered as the appropriate discipline. In few, or no cases cited, has a Public Reprimand been administered to an attorney for such a minor act or ommission as that which Respondent has been found guilty of. Respondent's offense consisted of filing an incomplete, or inappropriate pleading, which pleading was ultimately dismissed by the Judge, but with leave to amend or refile. The Florida Rules of Civil Procedure clearly allow and in fact encourage the amending of pleadings. While it is obviously encumbent upon every member of The Florida Bar to know the statutory requirements for specific types of pleadings in his or her area of practice, can it be justified that when an attorney makes an error, which is not prejudicial to the client, and which is amendable, that he or she is automatically subject to disciplinary action. The concept of attempting to police each and every minor mistake made by every attorney is outrageous.

Additionally, to recommend that Respondent be disciplined by a Public Reprimand for his alleged failure to advise his client to pay child support is clearly erroneous. Case law does not support such a discipline and the testimony of both the Respondent and the complainant does not support the fact that Respondent did indeed fail to give such advice. Further, it is clear from the testimony, that even after ordered to pay child support by the Circuit Court Judge, the Complainant did not do so. (Tr.p.19,20,32,35).

ARGUMENT

THE FACTS, EVIDENCE AND TESTIMONY DO NOT SUPPORT THE REFEREE'S FINDING THAT RESPONDENT IS GUILTY OF A VIOLATION OF THE RULES REGULATING THE FLORIDA BAR.

Respondent has been charged with a violation of Rule of Professional Conduct 4-1.1, providing incompetent representation to his client, William C. Armes. The Referee has recommended that Respondent be found guilty of violating this rule, and that he be disciplined by the administering of a Public Reprimand. Respondent's failure to file the appropriate pleading pursuant to Florida Statutes, Section 61.132(1) is the basis for the determination of guilt. (RR.par.5,10,13).

The pleading which Respondent filed in the custody case at issue was termed a "Motion for Change of Residential Custody." (Tr.Exhibit #2). Opposing counsel in the custody litigation, on the day of the scheduled hearing on Respondent's Motion, filed a Motion to Dismiss the pleading. After hearing testimony from the two parties, and from the sixteen year old daughter, and after hearing arguments of Respondent and opposing counsel, Circuit Court Judge John Fennelly granted the Motion to Dismiss Respondent's Motion, but with leave to amend or to submit the appropriate pleading. (Tr.Exhibit #7). The Judge, however, prior to dismissing the Motion, assumed jurisdiction over the parties and the subject matter, made a ruling which allowed the minor child to continue to live with the father, Mr. Armes, ordered the father to pay back child support, and ordered a Home Study to be conducted prior to any permanent ruling on a change of residential custody. Respondent, despite his allegedly inappropriate pleading, accomplished essentially what his client has asked him to do, in that he was granted temporary custody of the minor daughter.

The Florida Bar has alleged, and the referee has recommended that Respondent's failure to file the appropriate pleading indicates incompetence in his representation of his client. The only flaws which have been cited are that the Respondent filed a "motion" rather than a "petition," and that he failed to include or attach certain information which is required by Florida Statute 61.132(1), the Uniform Child Custody Jurisdiction Act, (RR.par5,6).

To find Respondent guilty of professional misconduct and incompetence for the referenced acts is in direct contravention of the intent of The Florida Rules of Civil Procedure. Clearly, it is the stated goal of the Rules to liberalize the pleading process, and to free the courts from the technicalities of the common law. Courts are authorized to freely allow amendment of pleadings, and in addition may even allow litigants to offer proof and then conform their pleadings to the proof. The present rules observe the distinction between pleading that is merely inexpert, hence amendable and that which is insufficient. Hotel & Restaurants Employees and Bar Tenders Union v. Boca Raton Club, Inc. 73 So.2d. 867 (Fla.1954).

Case law specifically interpreting the requirements of Florida Statutes Section 61.132(1) also supports the concept that pleadings under this section are amendable. In Moses v. Davis, 364 So.2d. 521 (2d.D.C.A.1978) the court stated that the petition for custody did not fully comply with the requirements of Section 61.132 pertaining to certain information which must be submitted under oath to the court. This was the same information which Respondent omitted from his custody pleading. In Moser, the court "assumed" that the information would have been submitted later.

Additionally, in T.L. v. State Department of Health & Rehabilitative Services, 392 So.2d. 288 (5th.D.C.A. 1981) the information required by section 61.132 was omitted from the State's initial pleading in a dependency action, but was filed six weeks later. The issue raised on appeal was whether the lower court's failure to require the section 61.132 information deprived it of jurisdiction over the subject mates. The appellate court ruled that while it was error on the part of the court not to require the information, it was not sufficient to deprive the court of jurisdiction.

In Gambrell v. Gambrell, 272 S.E.2d. 70 (Ga.1980) the court held that failure to attach the requisite Uniform Child Custody Jurisdiction Act Affidavit to a custody pleading is a defect which can be cured by amending the pleading, and is not fatal to the court's ability to hear the petition. While Georgia case law is not controlling, it is persuasive in this instance because of the uniform and reciprocal nature of the U.C.C.J.A.

In the subject custody case, Respondent erred in not fully complying with the statutory requirements of section 61.132, and the court dismissed his motion, but in doing so specifically gave Respondent leave to amend or to file another pleading. Prior to taking this action, however, the court obviously assumed jurisdiction over the parties and the subject matter, held an evidentiary hearing, and granted relief to Respondent's client in line with that which he requested in the initial motion. Immediately following the hearing, the client changed attorneys and clearly it was no longer Respondent's duty to amend, or refile. Had Respondent continued to represent Mr. Armes, clearly he would have filed a new or amended pleading pursuant to the court's order, and would have included the required U.C.C.J.A. information.

The second basis for the Referee's finding that Respondent was guilty of incompetent representation is that "Respondent did not make it clear to Mr. Armes that child support must be paid even if Brandi was residing with Mr. Armes," (RR.par.7). This finding is clearly erroneous and is not supported at all by the testimony.

The Respondent has consistently testified that he did advise his client of the obligation to pay child support to the ex-wife, despite the fact that the child was living with him and he was providing direct support to her. (GTr.p.40, Tr.p.46,50). The client, Mr. Armes has consistently testified inconsistently. At the Grievance Committee hearing, Mr. Armes indicated a great deal of confusion about the status of his child support obligation at that time, while being allegedly expertly represented by his new attorney, Lisa Batts. He further indicated that he simply was not making support payments. (GTr. p.15). Again, at the Referee hearing, Mr. Armes expressed confusion about the status of his child support obligation, and again indicated that he was not paying, nor had he complied with the Judge's order requiring him to make continuing payments. (Tr.p20,21,22).

Mr. Armes expressed confusion and lack of comprehension about the advice his new attorney had given him about his requirement of paying child support. (Tr.p.34,35). Based upon Mr. Armes' acknowledged lack of understanding of the techniclities of the litigation, is it not more reasonable to assume that Mr. Littman gave his client good and valuable advice, which the client either did not hear, understand, or agree with?

Assuming, in the alternative, that Respondent is guilty of the two acts Referenced above, to wit; filing an inappropriate pleading and failing to advise his client with respect to a continuing child support obligation, does this conduct justify any disciplinary action, and specifically, does it justify a Public Reprimand? The answer to this query is found in numerous cases decided by this honorable court.

The holding in The Florida Bar v. Neale, 384 So2d. 1264 (Fla. 1980) seems particularly applicable to the instant case. In Neale, the Respondent attorney learned certain information late in the pendency of a dog-bite case, and took a voluntary non-suit thinking he was dealing with a four (4) year statute of limitations. Said statute of limitations was three (3) years and the case was barred. After a referee in the Bar proceeding recommended that Respondent be suspended, this court rejected the referee's recommendation and dismissed the charges. The court clearly stated that there is a fine line between simple negligence on the part of an attorney, and a violation of the Code of Professional Responsibility that should lead to discipline. The court went on to say that while the rights of clients should be zealously guarded by the Bar, care should be taken to avoid the use of disciplinary action as a substitute for what is essentially a malpractice action.

In addition, a review of past cases of attorney discipline in which a Public Reprimand was recommended and approved, the factual basis for discipline is consistently much more substantial and egregious than the offenses with which Respondent has been charged. Even the cases which Bar Counsel cites to justify his recommendation of a Public Reprimand seem to deal with conduct of a much more serious nature which resulted in more significant loss to the client.

For example, in The Florida Bar v. Hart, 522 So.2d.831 (Fla. 1988) the Respondent attorney, after assuring his client that he would get a continuance of a traffic court hearing, prepared a motion, but never filed it with the court, or followed up to have the motion granted, The client did show up for the scheduled hearing, which had of course, not been continued, however, his attorney did not attend. The client was forced to proceed to trial without representation. The Public Reprimand was further recommended for Count 11, in which Respondent was found guilty of not adequately protecting his client's right to a Satisfaction of Mortgage, while mailing the balance of the mortgage payment directly to the mortgagees.

Similarly, in The Florida Bar v. Whitley, 515 So.2d. 225 (Fla. 1987) the Respondent attorney received a Public Reprimand for numerous charges relative to his representation of a client in an incorporation and issuance of stock. Whitley's actions ultimately resulted in the company's going bankrupt and the stock purchasers losing their investments. He was further charged with Trust Account violation in that he mishandled trust funds in violation of the escrow agreement. Both the errors or malfeasance on the part of the attorney and the subsequent harm to his client were significantly more serious than the issues alleged in the instant case, wherein the same discipline has been recommended.

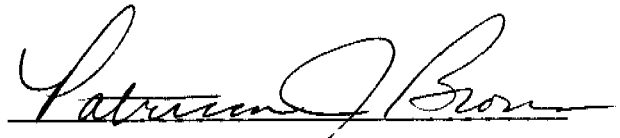
In The Florida Bar v. Maas, 510 So.2d. 291 (Fla. 1987), the Respondent attorney was hired as the attorney for an estate. He failed to take any action to represent the estate although repeatedly contacted by interested parties and caused a long delay in closing the estate. While a public reprimand was ordered, the attorney was found guilty not only of handling a legal matter which he was incompetent to handle, but also of neglecting a legal matter.

The offenses of which the Respondent was found guilty in The Florida Bar v. Lowery, 522 So.2d.27 (Fla, 1988) were substantially more egregious than those of which Respondent Littman has been accused. He failed to respond to a Show Cause Order addressed to his client in a Guardianship matter with the result that his client would have been jailed, had he not contacted other counsel. Also, Respondent received checks for a client in a settlement offer, and after being instructed by the client not to settle, but to return the checks, did not return them, but rather left them in his file. Lowery was disciplined by a Public Reprimand for two counts of neglect.

An important issue in any attorney discipline case is whether the attorney's acts or omissions caused any direct harm to the client. It is apparent that a critical issue in the mind of the complainant, Mr. Armes, was the fact that at the November 27, 1990 hearing, he was ordered to pay $1000.00 in back child support to his ex-wife, Rather than being pleased with the judge's ruling that he could have temporary custody of his daughter, which had been his purported goal, he became angry with his attorney for what he perceived to be an unexpected and adverse ruling on the child support arrearages. Not coincidentally, it was apparently after recieving a bill from Respondent that Mr. Armes decided to fire him. (Tr.p28,77,86) Additionally, Mr. Armes has never paid Respondent for the work which was completed for him. (Tr.p.25,77).

CONCLUSION

Respondent respectfully requests this honorable court to reject the Referee's finding that Respondent is guilty of a Violation of Rule of Professional Conduct 4-1.1. The record refutes the allegation that Respondent handled this legal matter incompetently, nor do his acts, even if considered *to* be a violation, justify the administering of a discipline in the form of a Public Reprimand.

By: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF OF RESPONDENT has been sent by regular U.S. Mail this 9th day of October, 1992 to David G. McGunegle, Bar Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801.

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