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SUSAN K. GLANT,

Petitioner/Respondent,

vs.

THE FLORIDA BAR,

Respondent/Complaintant.

IN THE SUPREME COURT OF FLORIDA

Case No. 81,757

PETITIONER'S AMENDED INITIAL BRIEF

PETITION FOR REVIEW FROM THE REPORT OF THE REFEREE

The Florida Bar vs. Susan K. Glant
(Before A. Referee)
TFB No. 92-30,837 (07B)

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STATEMENT OF THE CASE AND THE FACTS

The Petitioner/Respondent, SUSAN K. GLANT, files this Amended Initial Brief to her Petition For Review pursuant to this Court's Order dated January 14, 1994 (Appendix 34).

This cause was not intiated by a client of the Petitioner/Respondent. It was personally initiated by Larry Carpenter of THE FLORIDA BAR after he had investigated a complaint filed by the Petitioner against her former employer, Jonathan Hewitt of Central Florida Legal Services (Appendix 11, p.484-485). The intiation process was not in the form of an affidavit, but merely by filing the adverse ruling of an unemployment appeals referee against the Petitioner in the then pending case of Susan K. Glant v. Central Florida Legal Services and the Florida Unemployment Appeals Commission, Case No. 91-4165, Fla. 1st DCA, immediately after the Appellant had filed a Notice of Appeal in that case (Appendix 1; Appendix 2; Appendix 4, p.135).

The Petitioner was asked by THE FLORIDA BAR to explain the unemployment appeals referee's finding that the claimant (the Petitioner):

> sent a 14 page motion and a personal cover letter to the Department of Health and Rehabilitative Services asking them to further investigate her client's case. As the claimant also admitted to her supervisor on July 29, 1991, she sent the information to HRS without her client's knowledge and after the client specifically instructed her not to do so. (Appendix 1, p.14; Appendix 2, p.8).

The Petitioner replied "HOW CAN MY CLIENT INSTRUCT ME TO DO SOMETHING WHICH SHE HAS NO KNOWLEDGE OF?" (Appendix 2, p.9,17). This is the tenor of this case.

The Petitioner/Respondent was originally charged with four rule violations:

4-1.2(a) For failing to abide by a client's decisions concerning the objectives of representation;

4-1.6 For revealing confidential information relating to the representation of a client;

4-8.4(a) For violating/attempting to violate the Rules of Professional Conduct;

4-8.4(c) For engaging in conduct involving dishonesty, fraud, deceit or misrepresentation; and

4-8.4(d) For engaging in conduct that is prejudicial to the administration of justice. (Appendix 3, p.132).

Grievance Committee"B" of the Seventh Judicial Circuit, State of Florida, sitting in Palatka, Putnam County, found a violation of Rule 4-1.2(a), and by unanimous vote found no probable cause regarding possible violations of Rules 4-1.6 and 4-8.4(a),(c) and (d), (Appendix 11, p.501). The Grievance Committee recommended a finding of minor misconduct to be administered by a letter of admonishment from the chair of the committee (Appendix 11, p.501; Appendix 6, p.243).

At its March 1993 meeting the Board of Governors of THE FLORIDA BAR voted to overturn the finding of minor misconduct by the Seventh Judicial Circuit Grievance Committee "B" and entered a finding of probable cause against the Petitioner (Appendix 6, p.244). The Petitioner was charged with violating Rule of Professional Conduct 4-1.2(a) for failing to abide by a client's decisions regarding the objectives of representation (Appendix 8, p.268). The Petitioner set forth in her Answer and Request For Attorney's Fees the affirmative defenses of Rule of Professional Conduct 4-1.6(b)(2) which requires an attorney to"reveal such information to the extent the lawyer believes necessary to prevent death or substantial bodily harm to another"; and Florida Evidence Code §90.502(4)(a) which states there is no lawyer-client privilege "when the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime" (Appendix 10, p.289). The Appellant also requested attorney's fees under Florida Statutes 57.105 for THE FLORIDA BAR knowingly making false statements of material fact and law to the tribunal in violation of Rule 4-3.3(a)(1), and for bringing a case which lacks justicible issues of law or fact (Appendix 10, p.290).

On April 22, 1991, the Petitioner began working for Central Florida Legal Services as a staff attorney (Appendix 19, p.686; Appendix 10, p.287). Jonathan Hewett was Appellant's supervising attorney (Appendix 24, p.843). In the middle of May 1991 Jonathan Hewett assigned to the Petitioner a juvenile dependency case involving four minor children, Case No. 89-654-657-CJ, Seventh Judicial Circuit, Putnam County (Appendix 24, p.843; Appendix 30, p.1028, 1031). Petitioner's client was the children's natural mother, Robin Ricks (Appendix 24, p.785). The children's

natural father, John Robert Ricks, was not represented by Central Florida Legal Services (App. 24, p.785, 798, 837; App.27, p.992). Prior to the Petitioner's appearance in the case, Jonathan Hewett was the attorney of record for Robin Ricks (App. 24, p.785-86, 791, 834-35, 859-60). On January 23, 1991, while Mr. Hewett was representing the client, custody of the two minor girls was given to Robin Ricks, and custody of the two minor boys was awarded to John Ricks (App. 24, p.787, 821-25, 837-42, 871; App. 16, p.646-47). The Petitioner was given the case by Mr. Hewett solely to represent the client at the final dispositional hearing on June 27, 1991 (App. 24, p.856, 863). Upon receipt of the file the Petitioner immediately contacted the client (App. 24, p.921; App. 30, p.1028). The Petitioner drafted the Natural Mother's Motion For Custody Of All Children from the documents in the file at Central Florida Legal Services and upon a review of the court file (App.24, p.961,982; App.30, p.1028). The Motion was prepared and ready to file on the day of the final dispositional hearing (App.11, p.463). The Motion was never filed (App.11, p.460).

Court Records show that on January 11, 1989, Kristina Ricks (age 8), John Ricks (age 5), Michelle Ricks (age 4) and Charles Ricks (age 3) were taken into custody by the Department of Health and Rehabilitative Services (HRS) since Robin Ricks' whereabouts were unknown and John Ricks had been arrested and was in jail on January 11, 1989 (App.27, p.997). The children were already under Voluntary Protective Supervision due to prior neglect reports received against the parents: 3/21/88 - confirmed for neglect; 10/5/88 - unfounded for inadequate food; 12/13/88 - inadequate clothing (App.27, p.997; App.16, p.569-576). On January 26, 1989, the Petition For Dependency was dismissed and the children released to their mother (App.30,p.1034).

On May 23, 1989, HRS received an abuse report alleging medical neglect, inadequate clothes and other threatened harm. Both the mother and father were listed as the alleged perpetrators (App.27, p.997):

> It was alleged that the children's father had custody of the children and that HRS was called when he neglected the children by keeping them dirty, not feeding them, or sending them to school. The father was sent to jail on charges unknown to the reporter and as a result, custody of the children was given to the mother. The mother also neglected the children by keeping

> them dirty and not following through with medical appointments for Michelle who is deaf and needs medical care. The mother was arrested a few days prior to the report and left the children with her mother who was not able to care for them. The father was released from jail and wanted custody of the children, but HRS did not want him to have custody due to past neglect. It was also learned that the father had recently been in court for attacking and stabbing a child which was not one of his own. (App.27, p.997).

The children were placed in foster homes on May 24, 1989. Charles and Michelle were placed with Glenda Johns, and John and Kristina with June Parker (App.27, p.997).

> The children did very well while in shelter status. There was no significant behavior change on the part of any of the children while in shelter (A.27,p.997-8).

The father contested the HRS petition. At the hearing on June 22, 1989, the children were adjudicated to be dependent. Circuit Judge Robert E. Lee told the father he would consider returning the children to him if he had his own residence (App.27,p.997). John Ricks subsequently found a two-room apartment in Palatka.

On July 6, 1989, Judge Lee placed the children in the custody of the father under protective services of HRS with the provisions that the parents complete 15 week of parenting classes, provide stable housing for the children, provide financially for the children, bathe the children daily and provide three daily meals, enroll Michelle in a program for the hearing impaired and keep all appointments scheduled for her, provide medical and dental care for the children, cooperate with the assigned home-maker, and enroll Charles in a day care five days a week. The mother was in jail in Ocala at the time of this hearing (App.30,p.1036). The father at this time had

> no income but it is anticipated that he will receive Michelle's SSI checks and will receive AFDC for himself and the three other children (A.27,p.998).

At the time John Ricks was awarded custody he had a fairly extensive criminal history. He was first arrested in 1969 for going AWOL from the army. He had two DUI's. In 1978 he spent 51 weeks in the county jail for possession of marijuana. In 1980 he was charged with sexual battery but never prosecuted. In 1985 he was charged with indecent exposure. In 1987 he was charged with aggravated battery for stabbing a man in a barroom fight. The police responded to numerous spouse abuse calls (A.16,p.616).

Fifteen days after John Ricks was given custody, the children were picked up by HRS. This Petition For Dependency filed on July 25, 1989, alleged that the father

was so intoxicated/stoned on July 21st that he could not get up the stairs without assistance, and there was blood on his neck and shirt due to a fight (App.16,p.583). He attempted to abscond with the children when he learned that HRS intended to take the children into custody, but was stopped by the Palatka police. While in shelter Michelle Ricks (age 4) was observed sexually acting out. HRS received a report on August 22, 1989, that:

> Michelle had been observed masturbating and acting inappropriately with her dolls, including removing their clothes and kissing the dolls between their legs. It was suspected that the child may have been sexually abused by the father. The physical exam was inconclusive and Michelle is not able to communicate verbally because she is severly hearing impaired (A.16,p.583).

The Petitioner does not have a record of Michelle being examined on September 5, 1989 (the Petitioner does not have a copy of the Court file of Case No.89-654-657-CJ; however, that court file should be in the Record as provided by THE FLORIDA BAR). Kristine Ricks was examined on that date, and her physical exam by the Child Protection Team states "we cannot rule in or rule out sexual abuse by physical exam" (App.16, p.582). On that date, Kristina had "a pinpoint vaginal orifice without scars, lesions or discharge" (App.16, p.581). On September 7, 1989, Judge Lee again adjudicated the four children to be dependent and ordered them into foster care. HRS's report on that date stated:

> it is the agency's position that protective services has not and will not be effective because the parents are not yet motivated or capable of taking care of their children...If the children are returned to the parents at this time, we face the almost certain prospect of receiving additional neglect reports and being put in the position of removing the children once again. (App.16, p.583).
> The Court should be aware of information prior to a decision on the children's future. Mr. Ricks has many tendencies of a sociopath. He is very manipulative and will use all means to gain whatever he wants. He is attempted to manipulate counselors, his landlord, churches, and anyone else who is in a position to help him. According to those who know him best, Mr. Ricks will do whatever is necessary to obtain the children so that he might receive SSI for Michelle and AFDC income for the other children. He has never been one to readily support the children for himself. His children are his meal ticket. There are concerns about possible sexual abuse of the children in addition to Michelle behaving inappropriately, it has been noticed that Kristina seems to have reversed roles and has become the mother figure in the household. Mr. Ricks has lied to the agency several times in the past.... It has been alleged that Mr. Ricks often frequents the waterfront which is an area known to be concentrated with male and female prostitutes as well

as drugs. In each referral in which the agency has been involved, parenting has always been marginal at best. (App.16, p.584).

On October 31, 1989, a Performance Agreement was filed with the court, the goal of which was to return the children to the parents by November 3, 1990 (App. 16, p.585). It was not signed by either parent. The Agreement acknowledged that the father had a history with HRS of neglect and instability in housing and employment dating back to January 1, 1988, that he did not obtain special education for Michelle (hearing impaired), and that hearing aids were obtained for Michelle but he "sold this hearing equipment for his personal use" (App.16, p.586). The Agreement required the father to be evaluated for drugs and alcohol, complete random uring testing, maintain steady employment, and find suitable housing for the children. The Agreement required the mother to be evaluated for drug and alcohol abuse and successfully complete any recommended treatment, to maintain steady employment, to find suitable housing, and to attend to the medical and educational needs of Michelle (App.16, p.589). The hearing on the Review of the Performance Agreement was held on November 27, 1989; Judge Lee's Order was entered December 5, 1989 (App.30, p.1038).

On March 6, 1990, HRS filed a Petition For Review. In the Case Plan Update filed March 8, HRS recommended that the children continue in foster care. It was alleged that the father had a history of alcohol and crack cocaine abuse, that he still had no home but was currently residing with his Alcoholics Anonymous sponsors, and that he still had no job. The mother was residing in Ocala and was employed at a laundry. Neither parent was in substantial compliance with the Performance Plan. In the Order on Judicial Review, filed March 8, 1990, Judge Lee continued the children in foster care for six months and ordered the parents to comply by November 3, 1990. At the hearing on the Motion To Review on April 10, 1990, the children were to remain in foster care and the father was to visit weekends.

On July 5, 1990, HRS filed a Petition For Review. HRS's Case Plan Update, filed July 6, 1990, stated that the parents were in substantial compliance with the Plan and recommended returning the two older children to the parents and

continuing Michelle and Charles in foster care. On July 10, 1990, three letters were filed. Byrant Lovelace stated that the father had been employed full-time for two (2) weeks at Bryant Upholstery. Suzanne Grimes stated that the children would be allowed to live in her adults only mobile home park until the father found housing elsewhere. Margaret Walker, substance abuse therapist at Putnam County Guidance Clinic stated that the father had been sober for a year. There was no mention of the court-ordered urine testing for drug abuse. The mother was not present at the dispositional hearing on July 10, 1990. Judge Lee found that the mother had failed to comply with the Performance Agreement by not visiting the children regularly. The father was found to be in significant compliance with the Agreement. Kristina and John were returned to their father, and the case set for a 90-day review to return Charles and Michelle to their father. By August 1990, all four children were once again in their father's custody. In returning the children to their father Judge Lee ignored clear warning signals by HRS (App.27, p.997-99; App.16, p.583-84), the fact that the father was obviously not in compliance with the Agreement since he still had no stable housing or employment, and no proof of urine testing for drugs, the father's propensity for violent crimes, some of which were against children, and the fact that one of his children whom he had custody of was sexually acting out while in shelter. The sexual abuse was not addressed by the Agreement or the court.

Within four weeks, on October 4, 1990, all four children were taken into custody by HRS and returned to the same foster homes they had been in for a year (App.16, p.623). When the four children were taken into custody, they were all

> suffering from nose, ear and throat infections requiring antibiotics. Kristy had been sent home from school two days prior with a temperature of 103°. Yet, Mr. Ricks had made no attempts to obtain medical attention for her and, in fact, had her walking to downtown Palatka and back to the house. Kristy was also suffering from urinary tract infection (A.16,p.624).

The children were taken into custody because on October 3, 1990, HRS received a sex abuse referral. The Protective Investigator from HRS made initial contact on that date and reported that Mr. Ricks was not cooperative (App.16, p.623).

School professionals "report a drastic change in Michelle's emotional behavior which coincided with her sexual acting out behavior...Michelle was manifesting signs of extreme distress on October 3 and 4, 1990" (App.16,p.607). "Michelle was seen by the school bus driver to be playing in a rather sexually explicit manner with the genital area of a doll on the school bus" (App.16, p.595). The Shelter Petition filed by HRS on October 8, 1990, alleges that the father kept the children home from school, that he was under investigation for the sexual abuse of Michelle, and that the father told the Protective Investigator that he did notwant him or anyone else from HRS talking to his children.

All the children were seen at the Family Medical and Dental on Saturday, October 6, 1990, in Palatka, where they were put on medication for infections (App.16, p.595). Kristy and Michelle were interviewed by the Child Protection Team on October 9, 1990 (App.16,p.595-99). There is no record of Charles and John being interviewed by the Child Protection Team in October 1990. There is no record of a rape kit being performed on either of the two girls in October 1990.

The HRS Report To The Court, undated (App.16, p.623-628), with the Child Protection Team Reports of October 6, 1990, attached, reports to the court that:

> Michelle, a six year old, profoundly deaf child, who cannot communicate, has been acting out sexually and signing, "Daddy" since her return to his custody. This has occurred on the school bus, in school and on two occasions in the foster home. This action had not occurred prior to her return to Mr. Ricks' custody. Kristina, a nine year old child, denies any sexual activity, but demonstrates physical symptoms consistent with sexual abuse. Kristina's foster mother, June Parker, reports that following Kristina's unsupervised visits with Mr. Ricks, she noticed stains on her underwear. This had not happened prior to those visits. (App.16, p.623).
> A C.P.T. examination of Kristina on September 5, 1989, found a pin-point vaginal orifice. On October 9, 1990, a C.P.T. examination showed a significant change in the vaginal orifice. (see report attached). (App.16, p.624; see also letter of Sept.5, 1989 at App.16, p.581-82).

On October 9, 1990, the Child Protection Team reported as to Kristina:

> The child cooperated well for three positional genital examination with photography. No discharge is detected. There is no evidence of irritation or any abnormality whatsoever. With spreading of the labia majora there is mild gaping of the hymenal opening. With traction applied to the labia majora, the hymenal opening measures approximately 10 millimeters anteriorly posteriorly by 5 millimeters transversely. The posterior hymenal membrane

> appears quite narrowed with very little free border at the 6 o'clock position. The right hymenal membrane is narrow measuring approximately 1 millimeter compared to a left hymenal membrane measuring 2 to 2.5 millimeters. In the knee-chest position the openings to the hymenal membrane are approximately the same however, the posterior hymenal membrane pulls down somewhat revealing a free border of approximately 2 to possibly 3 millimeters. The entire contents of the vaginal canal are easily visualized with a pediatric otoscope (App.16, p.596).

F. Thomas Weber, M.D., Project Medical Director, Historian & Examiner, University of Florida Department of Pediatrics, Gainesville, examined both girls. As to Michelle:

> Glenda (Johns) tells me that the child was returned to her care recently after an incident on the school bus in which she was observed to be playing in a rather sexualized manner with a doll. Ms. Johns tells me that Michelle has been behaving peculiarly at home but she cannot determine why. She acted as though she had genital pain and seemed to be holding herself for the past two days. For this reason, Ms. Johns gave her some vaseline which the child applied to her genital area and seemingly has found some relief (App.16,p.598).
>
> The child cooperated well with the three position genital examination. A small amount of slippery vaseline is present on the child's labia majora. No evidence of redness, irritation or discharge is noted. The child has a small hymenal opening measuring approximately 4 millimeters transverse by 3 millimeters in the anterior posterior direction. There is 3 or more millimeters of hymenal membrane on each side and posteriorly. Traction produces similar findlings and in the knee-chest position the findings are nearly identical. I can see a short way into the vaginal canal with a pediatric otoscope and see no abnormalities, discharge or foreign bodies (App.16, p.599).

To HRS the C.P.T. examination of Kristina "showed a significant change in the vaginal orifice". Dr. Weber concludes that Kristina's genital exam is "indeterminate"

> because of a rather large anterior-posterior diameter to the hymenal opening and a narrowed right hymenal membrane and a narrowed posterior hymenal membrane at the 6 o'clock position. None of these findings are so abnormal as to and give strong evidence for prior penetration but this cannot be excluded. No discharge is detected (App.16, p.596).

Dr. Weber concludes that Michelle's genital examination is "entirely normal with the exception of vaseline application" (App.16, p.599). To the Petitioner, Dr. Weber had sufficient medical evidence of sexual abuse, "but just didn't want to put it down in his report" (App.11, p.496).

The mother was not present nor represented by counsel at the Shelter hearing on October 25, 1990. Judge Lee ordered that John and Charles be returned to their father since there was no allegations of sexual abuse against the father regarding the two boys. Kristina and Michelle were placed in foster care. Judge Lee ordered that the father be given a psychological examination by Dr. Louis Legume, a

certified psychosexual psychologist.

Dr. Louis Legum's psychological report on the father is dated December 1, 1900 (App.16, p.610-22). All of Mr. Ricks siblings had histories of alcoholism and drug problems. One brother reportedly was incarcerated for the sexual molestation of the daughter of a woman with whom he was living (App.16, p.614). Mr. Ricks admists that he drinks heavily and that he has had a couple of blackouts (App.16, p.616). He traces his addiction to drugs to the years that he was in the army. He has used hashish, hallucinogens, marijuana, and cocaine including by I.V. (App.16, p.617).

> Mr. Ricks denies all history of sexual activity with his daughters or any other children as well as involvement in other deviant sexual practices. At the same time, Mr. Ricks admits to some disturbing history including one known episode of a sexual engagement with a teenage girl when he was in his thirties, and one charge of indecent exposure which is framed by Mr. Ricks as having been an act of excretory indiscretion, as disposed to one having any provocative motivation. Mr. Ricks personal history is further evidence of an underlying and chronic personality disturbance which is reflected in an array of other criminal charges and convictions. Psychological testing discloses this individual to be of low-average intellectual capability. There are no indicants of neurological disorder or residual psychotic state. Testing is reflective of an individual who has virtually no grasp of his own pathological underpinnings, and an individual who seems to be relatively incapable of dealing meaningfully with the nuances of his own behavior, much less others. (App.16, p.621).
>
> Mr. Ricks is an individual with a rather severe personality disorder. It is ofttimes the case that such persons have histories of substance abuse, unstable personal relationships, infringments upon the law, and questionable sexual practices including paraphiliac activity. Accordingly, this psychologist would be extremely reluctant to place any female children with Mr. Ricks, in the absence of there being any active adult supervision. (App.16,p.621).

Gina B. Hardin, B.A., Human Services Program Specialist, Child Protection Team, University of Florida Department of Pediatrics, Gainesville, interviewed Kristina, Michelle and Charles in November 1990 and rendered her report on December 10, 1990 (App.16, p.601-9). There are no interviews of record on John. Ms. Hardin reports:

> Kristina feel that Michelle and Johnny are her father's favorite children. "Sometimes I think he doesn't like me and Charles." She explained that she and Charles did not get to go places with her father. She only got to go to the store one time. Her father takes Johnny and Michelle to the store, the park, and Burger King. She sometimes thinks that her father lies about where he is taking those two children and actually goes to get them a treat. She say that sometimes he takes only Michelle and sometimes he takes only Johnny. In addition, her father buys Johnny and Michelle special presents. (App.16, p.602).
>
> Kristina (now age 10) said that when she was younger she used to "do all the cleaning in (her) house." During her recent two month placement with her

father, her responsibilites included cleaning her bedroom, sometimes washing the dishes, setting the table, going "fetch" and watching the other children. She stated that she gets in trouble when Michelle does something wrong(App.16, p.603).

The only uncomfortable touch that she identified where "pops" on her bottom given by her teacher. (App.16, p.603).

Asked if she knew any adults who scared her, she responded that she becomes frightened when her father pulls out his belt even though she knows "he'll never whip us. So I'm not really afraid; but he will put us in the corner." Kristina was asked if she worries about anything. This is the only time during the two interviews when she appeared to purposefully change the subject and avert her gaze. (App.16, p.604).

Kristina denied that anyone had inappropriately touched her genital area. However, she suspects that this had occurred to Michelle. (App.16, p.604).

Michelle was interviewed by Ms. Hardin with the assistance of Susan Browning, Lake Forest Elementary School's social worker for the deaf, and Karen Pilkington, Michelle's teacher. Michelle, now 6 years old, had achieved sign language comparable to the communication skills of a hearing child of 14 to 16 months of age (App.16,p.605). Ms. Hardin states regarding Michelle:

> Michelle was very curious about the four clothed anatomically correct dolls that were carried in a basket by this interviewer. She immediately took them out and started exploring and playing with them. She became very excited when she found the male genitalia. Initially, she covered her eyes and/or the genitalia and signed "No! Bad! Dirty!"
>
> The dolls were identified as Michelle, her siblings, Kristina and Charles, and Michelle's father. This was repeated several times. Michelle demonstrated that she was placing the same identity on each of the dolls.
>
> An attempt was made to identify different types of touches beginning with hugs. Though she did demonstrate that her sister gives her hugs and kisses, it became apparent that she did not possess the language skills necessary to pursue this.
>
> Body parts were identified, beginning with the face. However, Michelle jumped ahead. She took the clothes off the dolls and placed the penis of the adult male doll into the vagina of the female child doll. She moved the dolls in a pumping manner. She was repeatedly asked to identify each of the dolls. She consistently responded that the male was her father and the female was herself.
>
> She then placed the adult male's penis into the anus and subsequently the vagina of the other female which had previously been identified as Kristina. She gyrated the two dolls together. She was repeatedly asked to identify each of these dolls as this activity was under way. She consistently identified these as Kristina and her father.
>
> The nude doll, identified as Michelle, was held. Michelle was asked "Hurt?", she agreed. She was then asked "Where?", Michelle pointed to the vaginal area of the doll representing herself. She signed, "hurt" and "cry".
>
> The two female dolls, Michelle and Kristina, were put in bed to go to sleep. Michelle placed the two male dolls, her father and Charles, on top of them, stomach to stomach.

Michelle also very determinedly performed a procedure with a stick on the penis and testicles on the doll representing Charles. She signed that it hurt Charles and that he cried.

In order to determine whether she was differentiating actual participants or playing sexual intercourse indiscriminately, the adult female doll was clearly re-identified as this interviewer. Michelle clearly demonstrated by pointing to body parts on the doll and subsequently on this interviewer, that she had re-identified this doll as the interviewer. This doll was placed stomach touching the doll representing Mr. Ricks. In response, Michelle emphatically signed, "No!" ran to the dolls, grabbed and separated them. (App.16, p.605-6).

Ms. Harden states regarding Charles:

Charles was seen on November 20, 1990, at the Putnam County HRS office. He had been picked up unexpectedly and unprepared for this interview. According to Jan Lemley, the child had recently been severely chastised after having told his mother that his father still smokes marijuana.

Charles appeared to be terrified. His body was stiff. He wimpered, did not speak, wrung his hands and rubbed his feet together forcefully and nervously. He would not be consoled. Therefore, Glenda Johns, his previous foster mother, agreed to come talk with him at the HRS office. Though he remained very weary, Charles did accept her affection. However, when this interviewer attempted to talk to him about very innocuous subjects (colors, numbers) he again commenced wringing his hands and holding back tears. Therefore, no attempt was made to address the allegations in question. The only information pertaining to his home environment which was obtained is that he does not do chores. (App.16, p.606).

Ms. Harden's assessment of the children's situation was:

This is a very concerning situation. However, due to Michelle's deafness, maturity level and language ability, the normal sexual abuse validation procedures could not be utilized. Michelle communicated primarily through action. Through her demonstration with the anatomical dolls, Michelle seems to have provided the best disclosure of sexual abuse which her capabilities allow.

The professional literature suggests that non-sexually abused children reveal very few sexually explicit behaviors when playing with anatomically correct dolls. In contrast, sexually abused children tend to interact with these dolls in a sexual and/or agressive manner or become non-responsive when they are introduced. Michelle was spontaneously very sexual with these dolls.

There are many risk factors present in this family. These include: regular intoxication by the father; a disabled child; the mother's prolonged absences from the home; and special treatment of certain children in the household.

There are corroborating factors present in this family situation. These include the father's arrangement for time alone with Michelle. In addition, school professionals report a drastic change in Michelle's emotional behavior which coincided with her sexual acting out behavior. At the very least, Michelle was manifesting signs of extreme distress on October 3 and 4, 1990. One can deduce from the immediate improvement in Michelle's emotional state upon placement in foster care, that this distress was related to her father's home situation.

Because a disabled child is frequently targeted as a victim, one cannot assume that evidence supporting sexual abuse of Michelle can also serve to support

suspicions of sexual abuse of Christina. However, if Michelle is placed out of the home and Christina is left with her father, it would seem likely that he might substitute Christina as his victim.

Charles was terrified by his interaction with this interviewer. One can only ponder the reasons for this. It might reflect the strangeness of the experience or it might be a result to his fear of reprisal if he discloses information which reflects negatively upon his father. Reportedly, he has recently been castigated by his father for telling his mother that his father is using drugs. (App.16, p.607).

Ms. Hardin concludes that "the possibility that these boys have been involved in sexual abuse cannot be discounted," and recommended that Mr. Ricks be required to submit to regular drug/alcohol testing and the Protective Services to the boys in the father's home be extended for a minimum of six months. "Future consideration may be given to placement of the boys with their mother". (App.16, p.608).

On December 13, 1990, an Order For Extension Of Time For Goal of Performance Agreement is filed. On December 27, 1990, HRS filed a Petition For Review of Placement and the hearing is set for January 23, 1991. On January 23, 1991, the guardian ad litem, Carol Schmidt, filed her report (App. 30, p.1023-25). She recommended that Kristina, John and Charles be returned to their mother, and that Michelle have weekend visits until the family is stabilized, at which time she also be returned to the mother (App. 30, p.1024). Ms. Schmidt reports:

> In listening to comments from various persons, I feel the comments from Michelle's teacher, Karen Pielkington, and the Foster Mothers Glenda Johns and June Parker, are the most disturbing. This is in reference to Michelle's communication and "signing" pertaining to "Daddy" with signs of "No!" and what appears to be a sign for "Penis" with a lot of fear in her expression. I feel that a deaf child could not be taught to express these feelings if she had not experienced them. This tends to lend validity to the alleged sexual abuse by the Father. Also, giving validity to these allegations is the report from Dr. Louis Legum in which he states that the Father should not have the custody of female children. The Father has not cooperated with the school system, resulting in Charle's dismissal from the Pre-K Program. (App.30, p.1024).

HRS filed their Judicial Review Social Study Report/Case Plan Update dated January 18, 1991 (App.16, p.629-36). HRS recommended that John, Charles and Kristina be placed in the custody of their mother (App.16, p.632). HRS recommended that Michelle remain in foster care until it was clear that the mother could properly care for her, and then Michelle would be returned to her care and custody (App.16, p.633). HRS describes the family situation, or how the children came into foster care:

> The children were ordered into the custody of HRS due to their birth parents neglecting their basic needs, alleged alcohol and cocaine use by both parents and, more recently, due to an allegation of sexual abuse by Mr. Ricks. One removal was necessitated because Mr. Ricks was too intoxicated to care for this children, and on another occasion, he had been beaten severely and was intoxicated.
>
> In August, 1990, Mr. Ricks completed his Performance Agreement and the four children were returned to his custody. However, four weeks later, on October 4, 1990, they were again removed from Mr. Ricks' custody and placed in shelter on a sexual abuse allegation. On October 23, 1990, the boys were returned to Mr. Ricks, and the girls were returned to Foster Care.(A.16,p.629).

There is no mention in this HRS report of the first sexual abuse allegation against the father in August 1989 (App.16, p.583). HRS continues the report and describes the parents' compliance with the Performance Agreement as:

> The natural father, John Robert Ricks, had successfully completed his performance agreement and the four children were returned to his care (John and Kristina in July, 1990, Michelle and Charles in September, 1990). On October 4, 1990. the Department of Health and Rehabilitative Services received a new referral of alleged sexual abuse. The four children were, once again, removed from Mr.Ricks' care and returned to the same foster homes they had resided in for the past year. On October 23, 1990, Judge Lee returned the two boys to the father and ordered the two girls back into Foster Care.
>
> A Child Protection Team physical exam of Kristina on October 9, 1990, by Dr. F. Thomas Webber concluded, "Her genital exam is indeterminate because of a rather large anterior-posterior diameter to the hymenal opening and narrowed right hymenal membrane and a narrowed posterior hymenal membrane at the 6 o'clock position. None of these findings are so abnormal as to and give strong evidence for prior penetration, but this cannot be excluded" (see report attached). Of grave concern is the fact that Dr. Webber made the "indeterminate" conclusion without benefit of a C.P.T. physical done on Kristina on 8/25/89, by Dr. Jump, C.P.T. physician who reported on his examination that he found "She has a pinpoint vaginal orifice without scars, lesions or discharge" (see report attached). Michelle's genital exam was normal on exams by Dr. Webber and Dr. Jump. (App.16, p.630-1).
>
> Kristina denies any inappropriate sexual behavior on her by her father. However,she admitsthat she suspects that it has occurred to Michelle. At one point, Kristina asked her counselor, Jan Lemley, "If I told the secret, would my Dad go to jail?" She refused to share the nature of the secret. On November 7, 1990, Michelle was interviewed at her school by C.P.T. Michelle is deaf and the interview was assisted by two school personnel, Susan Browning and Karen Pilkington, who are familar with sign language and the child.
>
> Michelle demonstrated clear sexual activity using the anatomically correct dolls. She named the dolls Kristina, Michelle, Charles and Daddy. She then placed the adult male's penis into the anus and subsequently the vagina of the other female which had previously been identified as Kristina. She gyrated the two dolls together. She was repeatedly asked to identify each of these dolls as this activity was under way. She consistently identified these as Kristina and her father. The nude doll, identified as Michelle, was held. Michelle was asked "Hurt?", she agreed. She was then asked "Where?", Michelle pointed to the vaginal area of the doll representing herself. She signed, "hurt" and "cry".

"In order tc determine whether she was differentiating actual participants or playing sexual intercourse indiscriminately, the adult female doll was clearly re-identified as this interviewer. Michelle clearly demonstrated by pointing to body parts on the doll and subsequently on this interviewer, that she had re-identified this doll as the interviewer. This doll was placed stomach touching the doll representing Mr. Ricks. In response, Michelle emphatically signed, "No!" ran to the dolls, grabbed and separated them." (See report attached). (App.16, p.631).

A subsequent interview with Charles yielded no information and he became petrified, wrung his hands, and refused to answer my questions.

The Department also has some serious concerns about the two boys. We have very few reports regarding John. Part of that may be his position as the favored child and part may be his loyalty to his father. John is the one who tells the other children to "shut up" if they say anything they shouldn't. Charles is a major concern.

Charles has been exhibiting some behaviors that are red flags for abuse. Charles has begun to soil his pants after being completely trained for a long period of time. His teacher, Ms. Davis, reports the child has been having fits of yelling, screaming, wringing his hands and acting fearful. The teacher expresses real concern regarding Charles. Since our last court appearance, Mr. Ricks has been totally uncooperative with the Department of HRS and the school. Charles has been dropped from the Pre-K program at Mellon Elementary School because of Mr. Rick's lack of cooperation with the school in fulfilling his parental obligations. For a long period of time, Mr. Ricks was bringing Charles and John to school approximately an hour early. He continued that practice for some time, claiming that John was able to watch Charles. he was told that John was much too young to watch his brother. The problem has finally been resolved. The Department of HRS has requested that Mr. Ricks continue his alcohol counseling with Margaret Walker at Putnam Guidance, and attend Parents Anonymous. Mr. Ricks has refused to do either. Furthermore, Mr. Ricks has refused to provide the Department with his A.A. sign sheets confirming his A.A. attendance. The Department did request one random drug test because the children reported him still smoking "those funny cigarettes." According to the Task Counselor at Putnam Guidance, Mr. Ricks never showed up to be tested. (App.16, p.631-2).

On November 7, 1990, Mr. Ricks underwent a psychosexual exam by Dr. Lou Legum. He concludes that "Mr. Ricks is an individual with rather severe personality disorder." Dr. Legum further states that he would be "extremely reluctant to place any female children with Mr. Ricks." (See report attached.)

The natural mother, Robin Ricks, had completed her performance agreement prior to returning to Palatka. She has been free of drugs for a over a year, and Margaret Walker at Putnam Guidance feels that she needs no further treatment. (see attached). Ms. Ricks is residing with her mother, Romaine Stacey, and a paramour, Morgan Elworthy. She is not currently employed, but is enrolled in the G.E.D. program at St. Johns River Community College. She is, also, in the process of learning sign language to better communicate with Michelle. (App.16, p.632).

Both Mr. and Mrs. Ricks, as well as the paramour, have criminal records and have served time. Mr. Ricks has been arrested fro committing violent crimes. Mrs. Ricks and the paramour's crimes were non-violent. (App.16, p.632).

These four children have been removed from and returned to Mr. Ricks on at least three occasions, and he is a confirmed abuser on the Florida Abuse Registry. The children were not removed from Mrs. Ricks. When she realized she would have to serve time, Mrs. Ricks had made arrangements for her children to be cared for in the Baptist Children's Home. Mr. Ricks intervened with those plans. (App.16, p.632).

HRS states the goal of the Performance Agreement was to return the children to the parents by November 3, 1990, but was extended by court order until May 1, 1991. The court reviewed the Performance Agreement on November 30, 1989 (App.16, p.630). "At this time the department reports that the parents substantially complied with the provisions of the Performance Agreement" (App.16, p.634). "The department recommends that the following modifications be made to the current performance agreement on file with the court: Mr. Ricks will cooperate with the formulation of a new performance agreement" (App.16, p.635).

During December 1990 to January 1991 Charles's teacher at the pre-K program expresses concern about Charles (App.16, p.577-80):

> 12 Dec Miss Clark, another faculty member, saw Charles in the office very upset. Again, he was kicking his feet and wringing his hands. He sometimes seems unable to contain himself. There are many times when it appears he is totally and purposely testing his control of the daily situations. Charles has never slept in class. He appears to struggle not to fall asleep regardless of how tired he gets. He does not remain on his mat at nap, rolls constantly across the floor. I spoke to his father about this. Mr. Ricks told me he was afraid of waking up in a new environment since he'd been moved so much. (App.16, p.577).
>
> 14 Dec Charles became upset again in the office when his brother Johnny left. I tried to talk with him about why he was worried but he seemed unable to concentrate on what I was saying. He continuously cried and wiggled in his seat. He appeared to be very frustrated. He refused to come to the classroom with me and had to be coached by Mrs. Moore and me...Finally, with gentle probing, he camse with me. It took him about twenty minutes to settle down. Mrs. Boldin, our guidance counselor, and I discussed the possibility of her seeing Charles. I asked if she was working with this particular family. She feels that Charles' problem requires a person with extensive experience working with possibly disturbed children (App.16, p.578).

Pat Davis, Jena Harden, Susan Browning, Karen Pilkington, June Parker and Glenda Johns were subpoenaedfor trial at the hearing on January 23 (App.11, p.425-7). There was no presentation of evidence or trial at that time (App.24, p.840-1). A settlement agreement was announced to the court: the parties stipulated to the father receiving custody of the two boys and the mother receiving custody of the two girls under Protective Supervision, the parents were to attend Alcoholics Anonymous meetings, visits were to be supervised by Barbara Baggs, and the parents were to comply with the Performance Agreement. When the mother was asked why a

hearing was not held on January 23, 1991, she responded (App.11, p.427-9):

A Because it seemed like the judge kind of flip-flopped through the paperwork and just jumped right in, went ahead and made a deal.

Q Okay. So those witnesses were present to testify and the judge did or didn't allow them to testify?

A Seemed to be in a hurry to do something else or something.

Q Okay. And, then, what happened?

A And, then, what happened was, at that point I believe it was the girls were put back into HRS's custody, and the boys were give to him, Robert.

Q Okay. Did you sign an agreement? Did you sign an agreement waiving the trial or the hearing on that, or was it just the judge's order?

A Waiving the hearing?

Q Yeah.

A No, I didn't.

Q So you don't--You didn't have anything to do with that.

A No. No.

Q Did your attorney come up to you and tell you that he had negotiated the two boys' custody back to Mr. Ricks or---

A More or less. More or less. Except--My attorney, no. It was more or less--It was more or less kind of...

I was expecting to get the girls back, and he was supposed to get the boys back. The girls--I didn't get the girls back; he got the boys back. And the reason I didn't get the girls back--I'm not sure right now what the reason was. But, I mean, that's what I was expecting. It was kind of done real quick like, you know, I mean, and I don't know what, you know, really what did happen.

The Grievance Committee "B" questioned the mother regarding the hearing (App.11, p.441-2):

MR. WHITEMAN: The custody agreement whereby the two boys went back with their dad and the two girls came to you.

MS. ELWORTHY: Um-hmm.

MR. WHITEMAN: Did you and Mr. Hewitt sit down in his office and discuss that nice, calmly, or was that something that was basically presented to you--

MS. ELWORTHY: It was probably--I believe it was done out in the hallway so, I mean, that was more or less--I believe it was.

MR. WHITEMAN: That was basically worked out on the day of the hearing, the--

MS. ELWORTHY: I believe it was.

MR. WHITEMAN: ---day of the court appearance---

MS. ELWORTHY: I believe it was.

MR. WHITEMAN: --when he sat you down and said this is what we want to do or this is what we---

MS. ELWORTHY: I think it was like a--yeah, more or less on that same-day-deal or something like that.

(Robin Ricks was married to Morgan Elworthy, and at the time of the grievance committee hearing is called Robin Elworthy). (App.11, p.414). The mother had told the Petitioner, at that time her attorney, that Jonathan Hewett told her on January 23 that "if she did not accept the two daughters, then she would not get any of the children because of her prior incarceration" (Mrs. Ricks had just gotten out of jail in Ocala). (App.24, p.921-2). Jonathan Hewett testified that Mrs. Ricks "brought that idea of settlement and the terms of it" to him (App.24, p.837), and that "there wouldn't have been any real settlement unless HRS had gone along with the proposal that had been discussed by Mr. and Mrs. Ricks." (app.24, p.838). The HRS attorney was Maureen Sullivan (App.24, p.838). Hewett also stated:

> it would have been in the ordinary course of business to stand out in the hallway and talk with the State's attorney or the HRS attorney, the guardian ad litem, the attorney for the father, and myself. (App.24, p.839).

On January 23, 1991, custody of the two boys was returned to the father, a confirmed abuser on the Florida Abuse Registry, primarily as a result of negotiations between the attorneys involved in the case, including the HRS attorney. It was known to HRS on this date that the father had refused to be drug tested, had refused to meet his volunteer responsibilites for the Pre-K program which resulted in Charles being dismissed (App.16, p.579-80), that Charles was a "major concern" to HRS since he was exhibiting "red flags for abuse" while in the custody of his father (App.16, p.631), that the father had committed violent crimes, some of which were against children (App.16, p.616), that the father's psychologist stated he had a "rather severe personality disorder" and would not place and female children with him (App.16, p.621), that he had been totally uncooperative with the Department of HRS (App.16, p.631), and HRS had medical evidence of sexual abvuse of Kristina and C.P.T. interviews of Michelle indicating sexual abuse of both girls while they were in the custody of the father (App.16, p.630-1).

The Order On Judicial Review, dated February 27, 1991, signed by Circuit Judge Robert K. Mathis, provided that John Ricks shall attend one AA meeting per week, that he shall have Charles in counseling with Sharon Youngerman at the Putnam Guidance

Clinic, that he shall attend Parents Anonymous, that he is to have supervised visitation at the church with Kristina and Michelle, and that he shall continue to abide by the terms and conditions of his Performance Agreement (App.16, p.646-7).

HRS's Judicial Review Social Study Report/Case Plan Update, dated March 14, 1991, indicates that both parents were in substantial compliance with the provisions of the Performance Agreement (App.16, p.638-9). HRS recommended 6 months of continued supervision under the existing order to insure that the "initial problems" were resolved (App.16, p.639). On March 27, 1991, HRS filed a Petition For Review of the case (App.16, p.642-3). In an Addendum dated March 27, 1991, HRS states:

> According to Sharon Youngerman, Children's Therapist at Putnam Guidance Clinic, Charles has only had one appointment in the three months since our last court appearance. Ms. Youngerman requested Mr. Ricks to sign a Release of Information so she could discuss Charles' progress with the Department. Mr. Ricks refused to sign the Release of Information (A.16,p.644).

A review hearing was held on March 28, 1991. The guardian ad litem states in her report to the court dated March 28, 1991 (App.30, p.1029):

> I am still deeply concerned about the father's custody of the male children, John S. Ricks and Charles Ricks, and his visitation rights with Kristina and Michelle Ricks allowing for supervised visits only. I did not agree with the attorneys negotiating the placement of these children at the last hearing, as the presentation of witnesses concerning the alleged sexual molestation of the children by the father was NOT PRESENTED to the court. All of the waiting witnesses were extremely upset, and frustrated, due to deep concern about the children, and possible future emotional and sexual abuse.

In the Dispositional Order On Judicial Review, dated March 28, 1991, Judge Mathis found "both parents are in compliance" and continued post foster care supervision for 3 months (App. 16, p.648-9).

The Petitioner was assigned the case file on May 14, 1991, to appear as the mother's attorney at the final dispositional hearing set for June 27, 1991. HRS's Judicial Review Social Study Report/Caseplan Update, date June 21, 1991, states:

> Custody of Charles and John was returned to Mr. Ricks in October, 1990. Kristina and Michelle were returned to Mrs. Ricks in January 1991. Both homes are very marginal, but the children appear to be happy and well adjusted in their respective homes. (App.16, p.651).
>
> The Department of Health and Rehabilitative Services has some serious concerns regarding the possibility of sexual abuse concerning Michelle who is profoundly deaf. Michelle continues to draw sexually explicit pictures of herself and her father and continues to sign that "daddy" does things to her.

> Of further concern is that both of these families are very marginal in their abilities to provide for the basic needs of the children in their custody. By their own admission, the parents comply with day care, A.A. and P.A. only becuase they are ordered to do so by the court.
>
> The Department of Health and Rehabilitative Services would nromally request further supervision for these marginal families, but both parents desire to have their cases closed.
>
> Since there are no new allegations to justify further involvement, it is with the greatest of reservations that the Department of H.R.S. respectfully recommends this case be closed to Post Foster Care supervision. We would further recommend that the court ordered visitation between Mr. Ricks with his daughters to remain as currently established; i.e., supervised at church. (App.16, p.652).

HRS recommends that post foster care supervision be terminated knowing that Michelle is signing that "daddy" does things to her at a time when he is having supervised visitation with the girls at the church. The guardian ad litem report, dated June 27, 1991, (App.30, p.1027) states:

> I have always had a deep concern that when this case was heard on January 23, 1991 I did not voice my feelings in greater depth!
>
> This case was heard on your Honor's first day on the bench in Putnam County and I feel everyone was allowing this fact to inhibit decisions on speaking out. There was a hallway full of subpoenaed witnesses ready to appear to testify. Michelle's teacher, social worker, foster parent and the Child Protection Team representative were all emotionally frustrated and distraught because they were not allowed to testify that day. Psychiatric evaluation reports were not addressed or used due to the fact that the case was "plea bargained" before the hearing by the HRS attorney and the Father's attorney. There were many concerned persons involved in this case who are still very worried about Michelle's safety. Their only consolation from this hearing was that "supervised visits only" with the father were the direction of the court for the daughters, Kristina and Michelle Ricks.
>
> In interviewing persons involved in this case at this time, I have been told that Michelle Ricks has done everything she can as a deaf child to communicate to caring persons that she is and has been sexually molested. Because she is deaf this case is unusual and hard to validate! It is my concern that so many professional people had knowledge about pictures drawn, and communication through "signing" was given from Michelle to them, and their testimony was NEVER HEARD. Consequently, this information was never recognized by the Court.
>
> As a guardian, I cannot ignore the probability that this child's cry for help will just be filed away in a dismissed court case history, because of lack of sufficient communication from the child. It is know that handicapped children are often targeted for abuse because of their lack of ability to make meaningful disclosure.
>
> I recommend THAT THIS CASE BE CONTINUED UNDER HRS SUPERVISION with the Father's visitaiton rights being limited to supervision at the church.

In preparing for the hearing, the Petitioner had a telephone conversation with Jan Lemley, HRS Foster Care Worker, on June 21, 1991. Ms. Lemley related to the

Petitioner that the "father said if (HRS) took (the) boys, he would kill someone, and (he) doesn't care if (he) goes to prison for it" (App.30, p.1028; App.11, p.464). Ms. Lemley placed the children in the "at high risk" category (App.11, p.479).

The Natural Mother's Motion For Custody of All Children was ready to be filed at the final dispositional hearing on June 27, 1991 (App.11, p.463). The Petitioner advised the mother that if she wished to seek custody of the two boys she would have to so inform the court at that hearing; the mother refused to do so (App.11, p.466-8). The HRS attorney moved that the case be terminated. The guardian ad litem had no objection to the custody of the two boys remaining with the father. Judge Mathis terminated the case as to the two boys and continued supervision for the two girls to determine whether the visitation with the father was to be supervised or unsupervised (App.24, p.925-7). On July 16 the Petitioner contacted the HRS attorney to see if she would set the hearing for August 12th. The Petitioner's notes in the case file indicate that the HRS attorney informed her that she "will try to get out of it because the judge does not think the children were abused" (App.11, p.465, App.30,p. 1028). After the Petitioner learned from the HRS attorney that there was not going to be a hearing on the Ricks children, she wrote a letter to Bob Williams, Executive Director of the Department of Health & Rehabilitative Services in Tallahassee, dated July 22,1991 (App.30, p.1050; App.24, p.936). The Petitioner enclosed with the letter the 16 documents as provided to this Court in the Answer And Request For Attorney's Fees, and a copy of the Natural Mother's Motion For Custody Of All Children (App.10, but see App.24, p.941). Petitioner did not consult with her client prior to sending the letter, motion and documents to Bob Williams (App.24, p.781). The client testified that she would not have authorized the Petitioner to send the letter if she had known of it (App.24,p.794, 830; App. 11, p.446-7):

> THE CHAIR: My questions is, if you had seen that letter and that motion, and your attorney had asked you whether or not it was okay to forward---
>
> MS. ELWORTHY: No.
>
> THE CHAIR: ---that to HRS---
>
> MS. ELWORTHY: No.
>
> THE CHAIR: "No" what?

MS.ELWORTHY: No way. No, I wouldn't have. Because when this did happen, I was accused of going behind--you know, trying to, I don't know, back--manipulate the deal or whatever, you know, I mean after they had done made this here deal or whatever it is, you know, I mean, that I was like---

THE CHAIR: Who accused you of what?

MS. ELWORTHY: Well, it kind of pissed off Robert and his attorney, you know, I mean, so...

THE CHAIR: Mr. McLeod?

MS. ELWORTHY: Right.

THE CHAIR: And, so, when the letter went to HRS with a copy of the motion, they accused you of having gone back---

MS. ELWORTHY: More or less.

THE CHAIR: ---gone back on their deal that had been made?

MS. ELWORTHY: Right. (App.11, p.446-7).

Mrs. Ricks had previously testified regarding her goals as to custody (the deal"):

> ...I mean, my goal was the same the whole time because I wanted it, you know, over with.
>
> And it was kind of like a threat, you know. I don't know, it was like Robert's kind of threatening me about, well, we'll drag all this out, and you may not get custody of them, you know, and blah-blah, blah, so I just wanted the deal over with, you know. I mean, I just wanted HRS out of the picture, off my back, him to get his little way about it and have the boys and me to have the girls and it done... (App.11, p.421).

Mrs. Ricks testified why she allowed this "deal" of her husband getting custody of the two boys (App.11, p.448-9):

MR. WHITEMAN: I've got one question.
At the time Mr. Hewitt was representing you, I understand that the HRS had filed some sort of a petition alleging the child, at least one child had been abused by their father.

MS. ELWORTHY: Um-hmm.

MR. WHITEMAN: Was there any allegation that you had dome anything improper with regard to the children? You weren't the subject of the HRS petition, were you?

MS. ELWORTHY: No.

MR. WHITEMAN: You were not.

MS. ELWORTHY: No.

MR. WHITEMAN: HRS was on your back, then, only because they had placed---

MS. ELWORTHY: Well, no. I had drinking problems and stuff like that, too, prior to, and I had to, you know, like remain sober for a long time and stuff like that. So I still considered them, you know, a threat.

MR. WHITEMAN: Was your concern that if there was a full-blown hearing on the boys' custody---

MS. ELWORTHY: Right.

MR. WHITEMAN: ---if you tried to regain custody---

MS. ELWORTHY: Right.

MR. WHITEMAN: ---if the court found that there was no sexual abuse, that it might get to the point where the girls would be taken from you and go back to their father?

MS. ELWORTHY: Exactly.

And (App.11, p.442-3):

MR. SMITH: I've got a couple of questions.
Ma'am, you say that you did communicate to your attorney, Ms. Glant, that you believed that the allegations of sexual misconduct by your husband or former husband---

MS. ELWORTHY: Right.

MR. SMITH: ---may have been true.

MS. ELWORTHY: Could have been, yeah.

MR. SMITH: Okay. Did that cause you to want to seek custody for the benefit of the two boys, custody for yourself?

MS. ELWORTHY: Well, it may have made me think about it, but, like I said, the whole time I was pretty adamant about what I wanted. You know, I wanted it done, and I wanted it over with.

MR. SMITH: You wanted HRS off your back.

MS. ELWORTHY: And that seemed the best way to do it. And, you know, I mean...

MR. SMITH: But thinking what you were thinking at that time, did you have any concern about the two boys, or did you feel like this was just a problem with the two girls?

MS. ELWORTHY: Well, did I have concern about them, yeah, I had concern. But, I mean, it was like I was--the judge had already give the boys back to him at, you know, the prior hearing. So really, they were--they wasn't even negotiable really, you know, I mean, so--you know, I would have come out losing all of them, and that's the way I had, you know, expressed it.

MR. SMITH: Okay. So your biggest concern was to get HRS off your back.

MS. ELWORTHY: And get the girls. Exactly.

The Petitioner was fired by Jonathan Hewett, Central Florida Legal Services, on July 31, 1991, as a direct result of the letter to Bob Williams (App.24, p.956).

The Dispositional Order On Judicial Review for the June 27, 1991, hearing was rendered by Judge Mathis on July 23, 1991 (App. 16, p.671-2). He found both parents to be in compliance, terminated jurisdiction over John and Charles Ricks, and continued protective supervision for Christina and Michelle "until such time as a hearing may be heard on the sexual abuse allegations".

On June 30, 1991, Dawn Burgess of Community Behavioral Services in Gainesville

stated in her letter to a Protective Investigator, HRS, in Palatka regarding her interviews with Michelle (App.27, p.1001-5):

> Michelle was brought to both interviews by her school social worker, Susan Browning. This child was evaluated to provide information regarding her current level of emotional functioning and to screen for possible sexual abuse. Michelle had previously been interviewed by Gina Hardin of the Child Protection Team through the assistance of an interpretor. This current interview was requested so that Michelle could be interviewed in sign language directly so as to avoid any possible communication discrepancies. Accordingly, this interview was conducted in sign language and involved two diagnostic interviews with Michelle Ricks and a brief interview with her social worker, Susan Browning. (App.27, p.1001).
>
> ...Michelle and her siblings have apparently been in and out of the foster care system with neglect seemingly to be the most prevailing cause. There have also been questions of sexual abuse of Michelle and her older sister Kristina. Both Michelle's parents would appear to be inadequate and dysfunctional parents with significant substance abuse and alcohol problems. Both parents have been incarcerated in the past... (App.27, p.1001-2).
>
> Interview with Ms. Browning, Michelle's school social worker, reveals that Michelle has displayed ongoing sexualized behavior at school and on the school bus. This behavior has been observed by a variety of different individuals working with Michelle. Michelle is also reported to spontaneously provide drawings of males and females complete with sexual parts. Michelle always completes thses pictures by drawing a line between the male and female genitalia. (App.27, p.1002).
>
> EVALUATION OF MICHELLE
> Michelle communicated solely through the use of sign language and related gestures. She vocalized on occasions but her sounds were unintelligible. Although not formally evaluated, Michelle's sign language skills are suggestive of the approximate language level of a two-to-three year old child. Michelle is assertive in her attempts to communicate and will grab one by the hand and point out that for which she does not possess language to express in sign.
>
> ...Michelle enjoyed drawing pictures and provided a picture of a girl with breasts which she identified as herself. When asked to provide the members of her family, Michelle finger spelled her name and then wrote "Michelle" on a piece of paper....When prompted as to whether she had a father, Michelle responded by stating, "Father bad," and pointing immediatley to her crotch. When asked why her father was "bad," Michelle spread her legs and took both hands and poked them into her crotch, signing without further questioning, "Father bad, father dumb." When gently probed to elaborate what she meant, Michelle shook her head strongly and rose form her chair and wandered about the room. It was difficult to redirect Michelle and this tact was abandoned when Michelle seemed resistent. (App.27, p.1002-3).
>
> Michelle observed a chair on which were seated the anatomically specific dolls as well as regular dolls and two teddy bears. Michelle chose to play with the anatomically specific dolls and immediately began to undress them, ordering the examiner to do the same, seemingly to expidite their undressing. It should be noted that Michelle was already familiar with similar dolls from her C.P.T. interview. As soon as the dolls were undressed, Michelle immediately grabbed the adult female doll and began to vigorously massage her breasts. She then pulled on the penis of the male doll and slapped him. When asked to identify the dolls, Michelle signed that the adult male doll was "father," the adult female doll was alternatively signed "Robin" and

"mother," and the female child doll was "Michelle." Although she undressed the male child doll, she essentially ignored this doll in her play. Michelle placed the adult male doll lying on top of the prone adult female doll and then on top of the prone child female doll. She was resistent to answering questions as to what was happening between the dolls and threw the male doll down, arose from the floor where she was seated and walked away. On both occasions of interview, Michelle nodded affirmatively that she had been touched in her gential area, and when asked by whom, idicated the sign "father." However, this child avoided providing any additional information to clarify the form or nature of this "touching" and it was not considered appropriate to press further at that time. (App.27, p.1003).

SUMMARY AND RECOMMENDATIONS

Michelle Ricks is a six year old profoundly deaf child who is beginning to develop sign language skills and can communicate at a basic level. She has experienced a chaotic early life, based on her parent's respective alcohol and substance abuse, personality problems, and parenting deficits. Results of this evaluation suggest a child with considerable sexualized behavior for her tender age as well as preoccupation with sexual issues. These behaviors are certainly consistent with a child who has been exposed to inappropriate sexual activity, either vicariously or directly. Such a constellation of behaviors are also consistent with a child who may have been sexually abused. There are a number of factors which contribute to difficulty in obtaining a more definitive diagnosis. This was not the first interview in which Michelle had participated so extreme caution was exercised to avoid any questions which would contaminate the validity of Michelle's responses. Further, Michelle's language limitations pose a problem in her ability to fully describe events that have transpired and to affix any time reference or clarifying details to her account. (A.27,p.1003-4).

Accordingly, in the best interests of his child, the following recommendations are offered:

1). Michelle be referred for ongoing therapy with a professional with expertise in sexual abuse......

2). In the abundance of caution, the protection of Michelle must be maintained as our foremost concern. We are dealing with a child who is unable to fully advise us as to the events in her life and who is exhibiting sexual acting out and sexual preoccupation. Michelle is clearly unable to differentiate between appropriate and inappropriate sexual activity and would neither be able to recognize or report any violations of the boundaries of adult-child sexual interaction. Since her father is consistently alluded to by Michelle as the individual with whom she has experienced sexual encounters, it is strongly recommended that Michelle continue to see her father only in the context of highly supervised visitation.

3). As Michelle progresses in therapy and there is better understanding of her sexualized behavior, reconsideration of the above recommendations may occur. To this end, it is recommended that Michelle be maintained under Protective Supervision by the Department of Health and Rehabilitative Services until a more definitive diagnosis can be obtained by an ongoing therapist. (A.27,p.1004).

The final order in this case was rendered on October 17, 1991, by Judge Mathis. The court having been advised by counsel that a stipulation and agreement had been reached regarding the issues, terminated HRS supervision over the mother, Robin Ricks, ordered supervised visitation of Robert Ricks with his daughters for 6 months, and "at the end of a six month period beginning 11 October, 1991, should there be no

additional evidence or bona fide, judicially determined founded allegations of misconduct, this case shall be dismissed" (App.30, p.1031-2). Although witnesses were once again present at the final hearing on October 11, 1991, there was no trial or presentation of evidence. The mother testified (App.24, p.800-1):

> There was never really a trial or anything like that. I mean, as far as that goes, we all come into a little room like this, and they brought Michelle in and she was--they tried to get her to sign to the judge or whatever--if you want to call that a trial. I mean, you know--but they said that she didn't sign good enough to, you know, be a witness.

The attorney for the mother, Jonathan Hewett, testified (App.24, p.855-6):

> ...the State called one of the children as a witness. The child could not--the child was so young, it could not be qualified as a witness. In fact, we sat right here in this room right here to conduct the voir dire on the child to see if the child was competent to testify, and the child was determined not to be competent to testify, and the State withdrew its Motion.

Mr. Hewett's explanation of why HRS did not call Gina Hardin of the Child Protection Team and other witnesses was that "they didn't have any personal knowledge regarding the claimed abuse, and so whatever they had to offer was going to be merely explanatory of whatever personal knowledge the child was claimed to have had regarding the case" and "it's pretty typical that they (C.P.T. witnesses)don't really provide supportative testimony for the allegations" (App.24, p.868-70).

This case is completely closed as far as HRS involvement (App.24, p.794). The children are seeing both parents (App.11, p.417-"they just, like, rotate visits and stuff like that.")

After the Petitioner's trial on October 4, 1993 (App.24), the referee rendered the decision on November 15, 1993 (App.30). The Petitioner filed a Notice of Appeal on November 17, 1993 (App.31), and upon learning of error, filed a Petition For Review on November 26, 1993 (App.33), alleging errors in Section II, III, IV and VI of the Report Of Referee.

This Court has jurisdiction; Article V, Section 15, Florida Constitution; Rules Regulating The Florida Bar 3-7.7.

ISSUES FOR REVIEW

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SUMMARY OF ARGUMENT

The issue for review is whether there is substantial competent evidence in the record to support the referee's finding that the Petitioner is guilty of a violation of Rule 4-1.2(a) for sending a letter, an unfiled motion for a change of custody and case file documents to the Executive Director of the Department of Health & Rehabilitative Services upon learning that the local authorities were attempting to cover up documented repeated sexual attacks on four minor children, ages 5,6,8 and 10. It is undisputed on the record that the Petitioner sent that information to HRS in Tallahassee without notifying the client. The mother admitted to her attorney, the Petitioner, that she knew the sexual abuse had occurred, but refused to seek custody of two of the children and was allowing the two other children to visit the natural father, who was the perpetrator of the sexual attacks.

The decision of the referee is based on finding of facts which have no evidentiary support in the record, errors in an understanding of the law and errors in application of the law to the facts of this case. The referee's finding of a violation of

Rule 4-1.2(a) is based on her perception that the local HRS officials did not litigate the sexual abuse case due to insufficient evidence to prove the allegations against the father and that the Petitioner could not identify why revealing the information to Bob Williams would have prevented death or substantial bodily harm to the four children. There was no HRS official who testified at the trial of this case, so there is no evidence on the record for the referee to find why HRS did or did not litigate their case. Upon review of this brief and the court file of the sexual abuse case, it should become readily apparrent to this Court that HRS had overwhelming evidence against the father. Likewise, the Petitioner articulated loud and clear the affirmative defense under Rule 4-1.6(b)(2).

In order to prevail at the trial of this cause, THE FLORIDA BAR had to show by clear and convincing evidence that the Petitioner violated Rule4-1.2(a) subject to paragraphs (c), (d) and (e). THE FLORIDA BAR failed to address Rule 4-1.2(d) in their case-in-chief or at the close of all evidence, even after notice that it was an element of their prima facie case. As such the record is completely devoid regarding THE FLORIDA BAR's evidence of Rule 4-1.2(d), yet the referee denied a motion for summary judgment on the grounds that THE FLORIDA BAR failed to prove or disprove Rule 4-1.2(d) (App.24,p.911,973).

The referee erred as a matter of fact and law in concluding that Rule 4-1.2(d) is an element of the Petitioner/Respondent's case (App.30, p.1020, paragraph 5-the Respondent believed she was obligated to send the letter and motion to HRS pursuant to Chapter 4, Section 1.2(d), Rules Regulating The Florida Bar). The Petitioner has always put forth the defense of Rule 4-1.6(b)(2). Therefore, this finding is lacking in evidentiary support since the Petitioner has never spoken to Rule 4-1.2(d) as a defense, and is a clearly erroneous interpretation of applicable law, Rule 4-1.2.

The referee erred as a matter of law in finding Petitioner guilty of a violation of Rule 4-1.2(a). If an attorney's duty to the client does not extend to assisting a client in committing perjury or jumping bond, then it does not extend to assisting a client in allowing her children to be sexually molested. If the Petitioner had

passively tolerated the client's conduct by failing to notify authorities, the Petitioner would be subject to criminal charges for any crimes committed against the four children and disciplinary proceedings for disbarment.

THE FLORIDA BAR has waived costs by failing to plea costs in the Complaint or to affirmatively plea them elsewhere prior to the decision of the referee being given, and by failing to adequately document the costs incurred.

The facts of record do not as a matter of law constitute a violation of Rule 4-1.2, and the case as presented by THE FLORIDA BAR lacks evidentary support for a finding of a violation of Rule 4-1.2(a). The Petitioner requests this Court to reverse the referee's finding of guilt as to Rule 4-1.2(a).

ARGUMENT

For review before this Court is the Report Of Referee which found the Petitioner SUSAN K. GLANT guilty of a violation of Rule 4-1.2(a), Rules Regulating The Florida Bar for "failing to abide by a client's decisions regarding the objectives of representation" (App.30, p.1021; App.8,p.268). At trial THE FLORIDA BAR, Respondent, must have proven by clear and convincing evidence that an ethical violation occurred, The Flordia Bar v. Simring, 612 So.2d 561, 565 (Fla.1993). Upon review by this Court, the referee's findings of fact are presumed to be correct and will be upheld unless "clearly erroneous or lacking in evidentiary support", The Florida Bar v. Hayden, 583 So.2d 1016,1017 (Fla.1991). If the testimony is conflicting, the referee has the responsibility of assessing the credibility of the witnesses and resolving all conflicts, Id. at 1017.

At the trial of this cause, THE FLORIDA BAR had to prove a violation of:

Rule 4-1.2(a) A lawyer shall abide by a client's decisions regarding the objectives of representation, subject to paragraphs (c),(d) and (e), and shall consult with the client as to the means by which they are to be pursued.

4-1.2(c) A lawyer may limit the objectives of the representation if the client consents after consultation.

4-1.2(d) A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows or reasonably should know is criminal or fraudulent. However, a lawyer may discuss the legal consequences of any proposed course of

conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.

4-1.2(e) When a lawyer knows or reasonably should know that a client expects assistance not permitted by the rules of professional conduct or by law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct.

It is undisputed in the record that the Petitioner sent the letter and documents, including a copy of the unfiled Natural's Mother's Motion For Custody Of All Children, to Bob Williams, Executive Director, Department of Health & Rehabilitative Services, Tallahassee, without notifying the client (App.24, p.957):

THE COURT: So you're not--let me understand. You are not disputing the fact that you did not follow the desires or wishes of your client. You're not disputing that.

MS. GLANT: No, Your Honor. I'm not. She would have never have let me send the letter. She would have never let me tell anybody in a position of authority that those girls were being sexually molested.

And (App.24,p.962-3):

THE COURT: Do you believe you should have disclosed to your client what you were going to do?

MS. GLANT: No.

THE COURT: Why not?

MS. GLANT: She would have said no.

THE COURT: No--in that you had made a decision--my understanding is you made a decision regardless of what your client said to send the letter.

MS. GLANT: That's right.

THE COURT: My question is--you said--my question is do you believe you should have disclosed what you're about to do, that is, in the letter and the Motion to HRS and to the Governor, you believe you should not have disclosed--

MS. GLANT: Her opinion meant nothing to me at that point in time because this is a mother who knows that sexual abuse is happening to her children and is not doing a single thing to prevent it. I don't care if she said yes or no, Your Honor. I would have sent the letter anyway.

However, in addition to proving a violation of Rule 4-1.2(a), THE FLORIDA BAR must show in their prima facie case before the referee that the Petitioner's conduct did not fall under Rule 4-1.2(c),(d) or (e). At trial THE FLORIDA BAR had to show by clear and convincing evidence that the Petitioner's conduct in sending the letter and documents did not fall under Rule 4-1.2(d)-a lawyer shall not assist a client in conduct that the lawyer knows is criminal (App.11, p.500):

...my client told me that she basically knew it was going on, but (thought) that the abuse would stop since her ex-husband had gotten himself a new woman.

THE FLORIDA BAR failed to address Rule 4-1.2(c),(d) or(e) in their case-in-chief (App.24, p.908-9-Motion For A Directed Verdict), in their argument against the motion for a directed verdict (App.24,p.909-11), at the close of all evidence (App.24,p.970-2 Renewed Motion For A Directed Verdict), or in their argument against the renewed motion for a directed verdict at the close of all evidence (App.24,p.973). The record is completely devoid of an element of THE FLORIDA BAR's prima facie case. An investigator from THE FLORIDA BAR reviewed the court file on the four Ricks children, Case No. 89-654,655, 656, 657-CJ, Seventh Judicial Circuit, Putnam County, PRIOR TO issuing the Notice of Probable Cause Vote (App.3, p.129, 47-132). There can be no excuse for THE FLORIDA BAR's failure to address Rule 4-1.2(d).

Once THE FLORIDA BAR carried their burden of proof by clear and convincing evidence that the Petitioner violated Rule 4-1.2(a) subject to section (d), then the burden shifted to the Petitioner to prove defenses to the alleged violation. The Petitioner set forth two affirmative defenses in the Answer (App.10, p.289):

Rule 4-1.6(b)(2) A lawyer shall reveal such information to the extent the lawyer believes necessary to prevent a death or substantial bodily harm to another, Rules Regulating The Florida Bar;

Section 90.502(4)(a) There is no lawyer-client privilege under this section when the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew was a crime or a fraud, Florida Evidence Code.

I. WHETHER THERE IS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE REFEREE'S FINDING OF GUILT WITHIN THE MEANING OF RULES REGULATING THE FLORIDA BAR 4-1.2.

THE REFEREE ERRED AS A MATTER OF FACT IN FINDING THAT THE SEXUAL ABUSE CHARGES WERE NOT ULTIMATELY LITIGATED BY HRS DUE TO HRS'S BELIEF OF INSUFFICIENT EVIDENCE TO PROVE THE SEXUAL ABUSE ALLEGATION (App.30,p.1019, Paragraph 2). To support this finding of fact, the referee cites to transcript pages 80 and 97-114 (App.24,p.856, 873-91). Page 80 (App.24, p.856) refers to Jonathan Hewett's testimony regarding the events of the final hearing on October 11, 1991. On that date, Michelle Ricks (age 6), the profoundly deaf child who had achieved sign language skills of the level of a two-to-three year old child, was brought in to testify regarding the sexual abuse charges, could not be qualified as a witness so HRS withdrew its motion

(App.24, p.856). HRS did not present any other witnesses, medical evidence, Child Protection Team reports, teachers, social workers, or eyewitnesses to attempt to prove this abuse. Testimony of experts is routinely used in hearings of this nature, Myles v. Department of Health & Rehabilitative Services, 590 So.2d 1053 (Fla. 3rd DCA 1991). Incompetence of the part of an HRS attorney does not equate to a belief by HRS that there was insufficient evidence to prove the sexual abuse allegations as the referee contends.

Additional support for the referee's finding there was insufficient evidence to prove the sexual abuse allegations is cited as transcript 97-114 (App.24,p.873-91). These pages are the Petitioner's cross examination of Jonathan Hewett regarding HIS opinion as to whether the evidence in the case file indicates sexual abuse, NOT HRS's opinion why the charges were not litigated (App.24, p.873):

> My opinion was that they didn't have a case. My opinion was that they didn't have a case. They had some evidence, but they didn't have what I thought to be nearly enough to get a favorable finding.

After denying specific documents indicated sexual abuse, Jonathan Hewett concluded:

> ...and I can tell you that everyone looked at these--all these reports that you're referring to--the lawyers, the judge, the parties, and I think what was needed was something that was apparently lacking and was not presented which was some concrete clearly--clear evidence indicating that there was sexual abuse. You just don't make out a sexual abuse case on the basis of a child holding herself in the genital area or stains in underwear or orifice openings. You just don't. You can't, and certainly the Department of Health and Rehabilitative Services thought they didn't have a case at that time with that kind of information. It wouldn't support a finding..... (App. 24, p.891).

THE FLORIDA BAR called no witness from HRS at the trial of this cause to testify why the sexual abuse allegations were not brought before the court on January 23, 1991, or any time thereafter, or why no witness other than Michelle Ricks (age 6) testified at the October 11, 1991, hearing. There is no direct evidence as to what HRS believed regarding the sufficiency of evidence. The record contains only Jonathan Hewett's testimony that HRS withdrew its motion on October 11, 1991, and the unsolicited comment that HRS thought it did not have a case to bolster his own opinion that the medical evidence, etc. did not equate to a provable case on sexual abuse. Therefore, the referee's finding that the sexual abuse charges were not ultimately litigated by

HRS due to HRS's belief of insufficient evidence to prove the sexual abuse allegation are clearly lacking in evidentary support since there is no substantial competent evidence on the record to indicate why the charges were not litigated by HRS, nor to conclude that HRS believed that their evidence was insufficient.

Petitioner also contends that a finding that the evidence was insufficient to prove sexual abuse allegations is clearly erroneous (App.2,p.10-HRS never filed a petition to terminate parental rights based on overwhelming evidence of sexual abuse of three of the four children; App.4,p.139-the evidence of record in the file is enough to convict the father of criminal charges; App.24,p.783-the evidence in the case file showed that the father--that repeatedly from 1989, 1990, sexually attacked, at least the two girls, probably the younger boy who was Charles; App.24, p.919-there is solid medical evidence. There are solid evidence by HRS and the Child Protection team that those children were abused..; App.24, p.935-solid medical evidence that the abuse occurred; App.24,p.936-Mr. Ricks could be convicted of criminal charges on this; App.24,p.939-40; App.11,p.473-the court had enough information to convict Richard Ricks of three counts of capital sexual battery against three of his children).

THE REFEREE ERRED AS A MATTER OF FACT IN FINDING THAT WHEN THE RESPONDENT WAS ASSIGNED THE CASE, SHE WAS PROVIDED BY MEMO REGARDING THE PURPOSE OF HER REPRESENTATION, WHICH WAS TO ATTEND A COURT HEARING IN JUNE 1991, AND TO PRESENT TO THE COURT A RECOMMENDATION AND PROPOSED ORDER FOR A CLOSURE TO TERMINATE JURISDICTION, TO TERMINATE HRS' SUPERVISION AND RETAIN CURRENT CUSTODY STATUS PER AGREEMENT, THE TWO GIRLS WITH THE MOTHER AND THE TWO BOYS WITH FATHER (App.30,p.1019-20, Paragraph 3).

The Petitioner's testimony is unrebutted that the memo referred to by the referee, Respondent's Exhibit 1, was not the memo in the case file at Central Florida Legal Services when she was assigned the case (App.24, p.917-8):

> MS. GLANT: Your Honor, the first thing I just want to apprise the Court of was that the memo that I saw when Mr. Hewett assigned the case to me, the memo that I saw was a small paragraph about two-thirds of this paragraph right here and about that same size. The first thing I want to inform the Court is that the memo I saw in the file January 15th when we testified in front of the Bar Grievance Committee is not this memo right here. The memo that I saw when we were in front of the Bar Grievance Committee was not typed on a computer typewriter but an IBM, and the margins over here were irregular, okay? So in my opinion, this is the third change I've seen in this memo right here.

The Petitioner informed the referee that the memo in the file at Central Florida Legal Services when she was first given the case in May was approximately 1/3 to 1/2 of a page long, typed in blocked margins on a computer typewriter, and was dated approximately 6 months prior to May 1991 (App.30,p.1086, Respondent's Exhibit #6). The memo in the file at the Grievance Committee hearing on January 15th was one page in length, typed on an IBM typewriter, had irregular and not blocked margins, and was loose in the file (App.30, p.1086). It is unrebutted on the record that the Closing Memo introduced into evidence as Respondent's Exhibit #1 is the third change in the memo purporting to give her directions on the case (App.24, p.917-8). Mr. Hewett's testimony regarding the memo does not support the referee's findings of fact as to the specific directions purported to be contained in the memo (App.24, p.843-4). Therefore, the memo referred to by the referee in concluding that Mr. Hewett's instructions on the case were to attend a court hearing in June 1991, and to present to the court a recommendation and proposed order for a closure to terminate jurisdiction, to terminate HRS's supervision and retain current custody status per agreement, the two girls with the mother and the two boys with father is not the memo that the Petitioner saw in May 1991, and there being no testimony as to the referee's specific findings of fact on these issues, the referee's findings are clearly erroneous and lacking in evidentary support.

<u>THE REFEREE ERRED AS A MATTER OF FACT IN DETERMINING THAT THE RESPONDENT COULD NOT IDENTIFY WHAT CRIMINAL OR FRAUDULENT CONDUCT SHE WOULD HAVE ASSISTED HER CLIENT IN ENGAGING OR WHAT CRIMINAL CONDUCT HER CLIENT HAD OR WAS ABOUT TO ENGAGE</u> (A.30,p.1020,P5).

The referee cites transcript page 176 (App.24,p.954) in support of her conclusion that the Petitioner could not identify the criminal conduct her client was engaging in, Rule 4-1.2(d). The question asked by THE FLORIDA BAR was (App.24,p.954,l.11-14):

> Q Thank you, ma'am. What criminal conduct was Ms. Glant (sic) asking you to assist her in the commission of?
>
> A None.

There is no (sic) to this question. The question asked by THE FLORIDA BAR was what criminal conduct was she (the Petitioner) assisting her client in the commission of, and the answer is "none". The referee's reliance on this part of the transcript is clearly erroneous.

The record clearly identifies the criminal conduct the client was engaging in, and the criminal conduct the Petitioner would have assisted her client in had she not notified authorities by sending the letter and documents for their review. The client, Robin Ricks, admitted to the Bar Grievance Committee on January 15, 1993, that she knew the sexual abuse had occurred (App.11, p.441):

MR. WHITEMAN: Did you ever tell Ms. Glant that you believed that the sexual allegations were true?

MS. ELWORTHY: I believe that it's--Anything's possible, you know. Yeah, I believe something was happening; she was drawing lewd pictures. You know, I mean, she had to see it somewhere. I mean, but you know, I can't say that I know, because I don't know, you know.

MR. WHITEMAN: I'm not asking you whether--

MS. ELWORTHY: Right.

MR. WHITEMAN: ---it's true or not, I'm asking whether---

MS. ELWORTHY: Yeah.

MR. WHITEMAN: ---you believed that it was true and you communicated that to your attorney, your belief.

MS. ELWORTHY: More or less, yes.

The client, Robin Ricks, told her attorney, the Petitioner, prior to the June 27, 1991, hearing that she knew that the abuse happened: "my client told me that she basically knew it was going on, but that the abuse would stop since her ex-husband had gotten himself a new woman" (App.11, p.500). Robin Ricks had all the documents in the case file with the exception of the pre-K report on Charles (App.24, p.804,807):

Q Okay. When Mr. Hewett discussed his file with you, did he give you any of these documents to read?

A Yes. I had them all.

Knowing that the sexual abuse was occurring, Robin Ricks had refused to seek custody of the two boys and was allowing the father to "rotate visits" with the two girls (App.11, p.442-3, 417). It takes no legal scholar to deduce that Robin Ricks was knowingly placing her children in a situation where they may be sexually attacked.

At trial, Robin Ricks lied to the referee regarding her knowledge of the attacks (A.24,p.827):

Q Has Michelle--I'll start over. Has Michelle based on her, for lack of a better term, improved ability to communicate, given any indication that you know of that either she or her sisters have been sexually abused--

A None.

Q --in the past?

A None whatsoever, and she goes to St. Augustine D&B School over there, and she's doing a lot better.

The Petitioner knew firsthand that the client did not care if her children were sexually molested by her ex-husband (App.24, p.954, 958-9), and for some reason the supervising attorney in this case, Jonathan Hewett, did not either (App.24, p.938-9). If the Petitioner had not advised her client to request custody of all four children on June 27, 1991, the Petitioner would have assisted her client in the criminal conduct of knowing placing the children in a situation where they could be sexually attacked. If the Petitioner had not revealed to authorities the documents on the Ricks children, the Petitioner would have assisted her client in the crime of accessory after the fact to sexual assaults on minor children, some under six years of age, and, if they are attacked again while in the custody of the father, accessory to sexual assault:

> ..according to the Rules of Professional Conduct, 4-1.6(b)(2), a lawyer shall--it's mandatory--reveal such information to the extent the lawyer believes necessary to prevent a death or substantial bodily harm to another, and I call anal and vaginal intercourse with children who are six and eight substantial bodily harm to somebody. (App.24, p.939-40).

The client was engaging in criminal conduct which the Petitioner refused to be a party to:

> THE WITNESS: Okay. All I got to ask is, you know, who is on trial here? Under the Code of Ethics of lawyers, right, isn't a lawyer supposed to do what their client asks them to do? (A.24,p.816-7).
>
> MS. GLANT: Your Honor, I have only one sentence to say. Legal representation in the State of Florida and elsewhere does not equal to committing any crime your client tells you to. It's very specific in the Rules of Professional Conduct. If my client told me that she knew the sexual abuse was going on, I was the only person in a position to step in and help those children, I am bound by the Rules of Professional Conduct to do it, and I am not bound by my client's opinion, when in my opinion, she is committing a crime. (App.24, p.973-4).

THE REFEREE ERRED AS A MATTER OF FACT IN FINDING THAT THE RESPONDENT COULD NOT ARTICULATE HOW SHE BELIEVED MAILING THE LETTER AND MOTION TO HRS AND THE VARIOUS GOVERNMENT OFFICES COULD HAVE PREVENTED DEATH OR SUBSTANTIAL BODILY HARM TO THE RICKS' CHILDREN, EXCEPT TO THE EXTENT SHE PERSONALLY BELIEVED CONTINUED SUPERVISED VISITATION OF THE GIRLS BY THE FATHER WOULD AVOID SEXUAL ABUSE (App.30,p.1030, Paragraph 5).

The referee cites transcript page 158 (App.24,p.936) to support the finding that the Petitioner could not articulate how mailing the letter and motion would have prevented substantial bodily harm to the Ricks children. This page reads (beginning on page 935):

> MS. GLANT: (testifying regarding the guardian ad litem's action in the June 27, 1991, hearing)...and when the judge asked her the

> question, do you have any problems with John and Charles going to the father, she did not say anything, and I leaned over to her and I basically--to the best of my recollection, I said, you better tell the judge what's happening now or else it's going to be over, and she said no. She said no right there in the hearing--after reading her reports, all the concerns she had for the safety of these children and she believed it was happening, there was no one who stood up for those children in the court, not even their own guardian ad litem. Okay? No one--no one. Okay? So I'm faced with a mother who has told me that the abuse is occurring. I'm faced with what I consider solid medical evidence that the abuse occurred. You cannot absolutely deny that a child who is five and deaf is manipulating anatomical dolls in that fashion and signing the way she is. There's no other way for her to be taught. There's no other way, so I'm in a quandry, you know, what in the world do I do. I didn't do anything until I learned that Maureen Sullivan did not intend to have any hearing whatsoever, ever, on this case. In my opinion, there's really only two things an attorney can do when a client say the children are being sexually molested and you're faced with this type--with this type of, what I consider, solid evidence. When I testified before the Grievance Committee , I thought that Mr. Ricks could be convicted of criminal charges on this. You can withdraw as counsel of record under Rule 4-1.16. That's what Mac McLeod did. A week before the hearing, he cited that rule and withdrew as counsel of record for the father. That document is in the court file. I can do two things. I can withdraw. If I withdrew--withdrew from that case, that case would have gone in the paper mill, and there would have been nobody to ever bring those charges up ever for those children. The guardian ad litem wasn't going to do it. HRS wasn't going to do it. If I withdrew, those children would have been buried--been buried in the paperwork, so I did the best thing that I thought in my opinion as an attorney--the next best thing was that I wrote HRS whose got access to all those documents. I said, you better take a look at what the local HRS attorney is doing to those children...(A.24,p.935-7).

The Petitioner has clearly stated that she is attempting to bring the situation of lack of prosecution of the local HRS attorney to the attention of the Director of HRS in Tallahassee so the case would not get lost in the paper mill, a concern that was also shared by the guardian ad litem (App.30, p.1027), and so the case will be prosecuted properly (i.e. the parental right of Robert Ricks terminated,App.30,p.1050), and the children will not be subjected to further abuse at his hands. The first cite by the referee reveals the opposite of her finding of fact: the Petitioner clearly articulated how the letter and motion could have prevented further abuse of the children.

The referee's cite to page 80 (App.24, p.856) concerns <u>Jonathan Hewett's</u> opinion that there was not sufficient evidence to prove the allegations of child abuse in this case, and is irrelevant to the issue of <u>Petitioner's</u> belief that she was obligated to act under Rule 4-1.6 to prevent the death or substantial bodily harm to the children.

The referee's cite to page 97-114 (App.24, p.873-891) concerns the Petitioner's cross-examination of Jonathan Hewett regarding his opinion whether specific documents

in the file are enough evidence to prove sexual abuse, and are thus irrelevant to the issue of Petitioner's motivations for sending the letter and motion.

The referee's cite to page 162 and 164 (App.24, p.940, 942) concerns Petitioner's testimony that the letter and motion could have resulted in preventing death or substantial bodily harm if it resulted in supervised vs. unsupervised visitation with the girls. The Petitioner notes that the original letter and a copy of the Motion was sent to Bob Williams, not a copy of the letter and original Motion as the referee indicates (App,24, p.941; App.11, p.460). The referee's cite to page 179-183 (App.24, p.957-61) also concerns the Petitioner's testimony that she sent the letter so the local HRS attorney would go to a hearing on the charges, enabling the local judge to order supervised visitaiton with the father. Additionally, this cite contains the Petitioner's statements that the children's own mother did not care if her children werebeing sexually molested by the father (see also App.24, p.954,958-9):

> THE COURT: So my question then is you felt that even though it was your client's desire not to seek custody of the two boys, you felt that it was your decision to be made, not your client's.
>
> MS. GLANT: When it concerns rape and sexual tortureof children under six and the mother is not doing anything, yes, it is the attorney's-- it is anybody who comes across a case like that, and as an attorney, you are an officer of the Court. You're not to stand by and watch behavior like that happen to a child because the mother doesn't care. (App.24, p.960).

The referee's cite to transcript pages 185-8 (App.24, p.963-6) concerns the reason why the Petitioner sent a letter, the documents and a copy of the motion to other governmental agencies (App.24, p.964-5):

> Q Is that correct? How did you expect sending copies of those documents, let's say to the U.S. Attorney General's Office, would further your quest in making sure that the visitation of the father with the minor daughters was supervised?
>
> A It's wouldn't have done anything for that. See, you've got a problem with the judge, the State Attorney, HRS, the mother's own attorney,the father's own attorney--everybody in the court system taking a look at that documentation and saying nothing happened. In my opinion, it's a federal corruption. I turned those people in because, in my opinion, the judge, the HRS attorney--everybody who had anything to do with turning their back on those children should be investigated by the Federal government because there is something major wrong.

The gest of this testimony is clear: John Ricks should have been criminally

prosecuted for these offenses. The Petitioner states (App.24, p.940):

> MS. GLANT: ...The State Attorney--let's don't forget the State Attorney. If the State Attorney had prosecuted this person, it would have never gotten down to me either, but to my knowledge, Richard (sic) Ricks has never been prosecuted criminally in this case or else he'd been in prison for it.....

The Petitioner clearly articulated seven reasons why she sent the letter, documents and a copy of the motion to HRS and the other governmental agencies: 1). So the case would not be buried in court paperwork, and the children's cry for help would not be ignored; 2). The children's own guardian ad litem was not taking up for them in court; 3). The children's mother was not seeking custody or opposing visitation with the father, thus potentially subjecting them to further attackes; 4). So the directors of HRS would evaluate the case, in which event they would seek termination of John Ricks parental rights; 5). So the local judge would order supervised visitation of the girls with the father as a deterrent for him attacking the girls again; 6). So federal officials would independently evaluate the actions of the judges and attorneys in this case; and 7). So the State Attorney would criminally prosecute John Ricks for the sexual attacks on his children. Therefore, the referee's conclusion that the Petitioner could not articulate her affirmative defense under Rule 4-1.6(b)(2) is clearly erroneous and lacking in evidentary support.

<u>THE REFEREE ERRED AS A MATTER OF FACT IN FINDING THAT THE RESPONDENT BELIEVED THAT SHE WAS OBLIGATED TO SEND THE LETTER AND MOTION TO HRS PURSUANT TO CHAPTER 4, SECTION 1.2(d), RULES REGULATING THE FLORIDA BAR.</u> (App.30, p.1020, Paragraph 5).

The Petitioner has at no time stated that she believed she was obligated to send the letter and motion to HRS pursuant to Rule 4-1.2(d). The Petitioner has always put forth the defense of Rule 4-1.6 (App.11, p.474, 490; App.24, p.939, 781-3). As previously stated in this brief, pages 29-31, THE FLORIDA BAR has the burden of proof to show that the Petitioner's conduct did not fall under Rule 4-1.2(d). THE FLORIDA BAR did not address Rule 4-1.2(d) in the Complaint or during the trial, even after it was put on notice that Rule 4-1.2(d) was a part of their prima facie case (App.24, p.908-9, 909-11, 970-2, 973). Therefore, the referee's finding that the Petitioner believed she was obligated to send the letter and motion to HRS pursuant to Rule 4-1.2(d) is clearly erroneous and lacking in evidentary support.

THE REFEREE ERRED AS A MATTER OF FACT IN FINDING THE RESPONDENT GUILTY OF A VIOLATION OF RULE 4-1.2(a), RULES REGULATING THE FLORIDA BAR. (App.30,p.1021,Sec.III).

Rule 4-1.2(a) is subject to paragraphs (c), (d) and (e). THE FLORIDA BAR did not address paragraphs (c), (d) or (e) in the Complaint, in their case in chief nor at the close of all evidence (App.24, p.908-9, 909-11, 970-2, 973). THE FLORIDA BAR presented no evidence for the referee to conclude that the Petitioner is guilty of a violation or Rule 4-1.2(a) subject to paragraphs (c), (d) or (e). Hwever, some evidence regarding Rule 4-1.2(d) is elicited by the referee herself (App.24, p.957-963), indirectly by THE FLORIDA BAR (App.24, p.827, 951-2, 954) and by the Grievance Committee (App.11, p.441, 500), and by the Petitioner's repeatedly voiced opinion that the mother knew of the abuse but refused to seek custody and did not object to unsupervised visitation with the father (App.24, p.954, 958-9; App.11, p.442-3, 417,500), see also pages 34-36 of this brief and the cites therein. The Petitioner's opinion that the criminal conduct that the client, the mother, was engaging in was knowingly placing the children in a situation whereby they could be sexually attacked by the father, accessory after the fact to sexual assault of minor children, and potential accessory to sexual assault of minor children is unrebutted by THE FLORIDA BAR since they put on no evidence regarding Rule 4-1.2(d). Therefore, the referee's finding of guilt as to Rule 4-1.2(a) is clearly erroneous and lacking in evidentary support since THE FLORIDA BAR put on no direct evidence of Rule 4-1.2(c), (d) or (e), the indirect evidence is unrebutted by THE FLORIDA BAR.

II. WHETHER THE REFEREE ERRED AS A MATTER OF FACT AND LAW IN REFUSING TO DIRECT A VERDICT IN FAVOR OF THE RESPONDENT (PETITIONER).

It is THE FLORIDA BAR's burden of proof to show by clear and convincing evidence all the material allegations in the Complaint (App.8). Petitioner's motion for a directed verdict assigned failure of THE FLORIDA BAR to prove several material allegations in the Complaint (App.24, p.903-9):

1. THE FLORIDA BAR failed to prove which copy of the Natural Mother's Motion For Custody of All Children the Petitioner enclosed in her letter to Bob Williams, paragraph 14 of the Complaint (App.8, p.266). THE FLORIDA BAR introduced via

Jonathan Hewett's testimony that Complainant's Exhibit #1 was the copy of the motion enclosed with the letter (App.24,p.844-5; App.30, p.1050-65):

Q Did you ever receive a copy of that letter?

A I got a copy from Mrs. Sullivan. I did not otherwise get a copy of it.

Q All right. At this time, I will show you a document and then, if you would, for the Court's benefit, would you identify that document if you can.

A This is the--this is the letter that Maureen Sullivan brought to me in late July of 1991, and it's a letter handwritten apparently by Suan Glant to Mr. Bob Williams with a Motion attached.

Q Is that a copy of the document that you received from Ms. Sullivan?

A Yes.

MR. CARPENTER: Your Honor, at this time, we'd submit that as the Florida Bar's Exhibit 1.

The Petitioner objected to the entry of Exhibit #1 since it was not a copy of the motion that she was prosecuted on, but a copy of one of the two motions taken from the file at Central Florida Legal Services (App.24, p.845; App.8, p.272-85). The two motions differed only in the marginal notes (App.24, p.845-7). A second copy of the motion with different marginal notes was taken from the Central Florida Legal Services file and introduced as THE FLORIDA BAR's Exhibit #2 (App.24, p.848-50). On cross-examination Jonathan Hewett could not identify which of the three motions was the motion that the Petitioner sent to Bob Williams, Exhibit #1, Exhibit #2 or the Motion contained in the Composite Exhibit 1 introduced into evidence by THE FLORIDA BAR at the Grievance Committee hearing (App.24, p.894-5; App.30, p.1050-65, p.1034-47; App.3, p.115-128; App.11, p.405-6):

Q Okay. So for the record, can you tell the Court, to the best of your recollection, which one of those is the Motion that Maureen Sullivan furnished to you, if any, because remember there's a third copy of the Motion. Would you like to see the third copy of the Motion? This is the copy the Florida Bar stated--

A I'm only familiar with the two that were in my files so I don't know what else.

Q The Florida Bar stated this is the copy of a Motion that they're prosecuting on. This is the one the Florida Bar states that I wrote to HRS. I show you the third copy of the Motion contained in Composite Exhibit 1 from the Grievance Committee. This is the third copy of the Motion. It does not have that writing. Just let me take a look at that. Can you recall which one of these three Motions is the one that Mrs. Maureen Sullivan gave to you?

A I wouldn't. I wouldn't be able to tell you.

When the Petitioner was asked at trial to identify which one of the three Motions she

sent with the letter to Bob Williams, she referred to her personal file which contain ed a copy of the motion (App.24, p.943-4). The motion in Petitioner's own file was completely without marginal notes (see also the copy of the motion as provided by THE FLORIDA BAR upon Petitioner's Motion To Compel, which is also without any marginal notes, App.16, p.657-70). At this point there are four copies of the motion for consideration before the Court. The Petitioner testified that to the best of her recollection, the motion she sent to Bob Williams contained notations of the prior reports dating 1988 through 1989 on the first page, and that on the second to the last page (page 13 of the motion) she had written that the mother refused to sign (App.24, p.945-6). Petitioner's testimony regarding the correct notation on the margins of the motion was unrebutted by THE FLORIDA BAR, therefore, none of the four motions of record in this case was the motion sent to Bob Williams.

2. THE FLORIDA BAR failed to prove allegation #7 of the Complaint (App.8, p.265). The mother did not testify that it was her intent to "not unnecessarily prolong" involvement of HRS in the family affairs (App.24, p.904). Intent testimony of a witness is easily elicited, THE FLORIDA BAR just failed to ask her that question.

3. THE FLORIDA BAR failed to prove that the natural mother advised the Petitioner that she did not want her to submit any motions to the court concerning custody (App.8, p.266, paragraph #12; App.24, p.906-6). The mother testified at the Bar Grievance Committee hearing on January 15, 1993, prior to THE FLORIDA BAR drafting the Complaint:

> THE CHAIR: Just for clarity's sake, let me show you one of the Bar exhibits. Ms. Glant, this is a letter dated July 22, 1991, from you to Mr. Bob Williams of HRS, and attached is a copy of a motion that was apparently prepared by you dated--well, it's certified as having been furnished to Maureen Sullivan, CWLS attorney for the Department of HRS, on June 27, 1991, which is a question that I have that I'll ask of you I guess in a minute.
>
> But, Ms. Elworthy, the cover letter on this indicates that this was being forwarded to HRS on July 22, 1991. That was after the June hearing when the Court had ordered custody of your boys to remain with your (sic) father and closed the case, but before the August hearing when apparently the issue of visitation rights were being taken up again. And that's when the Bar's evidence would show that this motion was sent to HRS.
>
> Would you take a look at that motion? We've asked you a couple of times, or Ms. Glant did, and then one of the members of the committee asked you if you had seen that motion at any time. I just wanted to go ahead and let you look at it and tell us whether or not you recall having seen that.

MS.ELWORTHY. Yes, I've seen it.

THE CHAIR: When did you see it, do you remember?

MS. ELWORTHY: No, I don't remember when I did see it, but---

THE CHAIR: Do you remember if it was shown to you by Ms. Glant or by someone-- by Mr. Hewitt or by--

MS. ELWORTHY: I believe it was showed to me by Mr. Hewitt. Yeah, he called me in, That's what I was saying about. He had called me in and, you know--He's the one that showed me the letter, as a matter of fact; and I was showed this at the same time I was showed the letter.

THE CHAIR: So you don't think you had seen the motion before Mr. Hewitt called you in and showed you the letter?

MS. ELWORTHY: No. (App.11, p.444-6).

The Petitioner testified at the Grievance Committe hearing that she showed her client the motion immediately prior to the hearing on June 27, 1991, and when the client refused to sign it, did not file the motion with the Court (App.11, p.466-7).

At trial the mother testified (App.24, p.798):

Q ...Immediately prior to the hearing, did I ask you if you wanted to go for custody of your two boys?

A I don't really remember, but I do know that we discussed it, and I told you that I didn't.

Q We had discussed it many times?

A A couple of times, not many times.

Q Do you recall me showing you a Motion that day in court?

A No. I don't recall it.

Q Do you recall me filing anything with the Court that day?

A Not that I recall. I mean, like I said, I don't remember that much.

The mother cannot remember seeing the motion on June 27, 1991, and testified the first time she recalls seeing the motion was in Jonathan Hewett's office after the Petitioner had been fired. THE FLORIDA BAR failed to carry their burden of proof as to the allegation contained in paragraph #12 that the mother instructed her attorney, the Petitioner, not to file the motion with the court.

4. THE FLORIDA BAR failed to prove allegation #14 (App.8, p.266) that the Petitioner sent the letter and motion "which also contained respondent's handwritten marginal notes about the case" to Bob Williams. THE FLORIDA BAR presented no copy of the motion which was sent to Bob Williams, see argument #1, pages 40-2 of this brief.

5. THE FLORIDA BAR failed to prove allegation #13 (App.3, p.266) of the Complaint. There was no evidence or testimony regarding the fact that the hearing was to be set

in August. The Petitioner wanted to set the hearing for August, but HRS was not willing to do so (App.11, p.465).

6. THE FLORIDA BAR failed to prove allegation #16 (App.8, p.267) that "the court was aware of the allegations that the father had sexually abused his children but the charges were never proven due to inconclusive evidence". There was notestimony by the mother or Jonathan Hewett that the court was aware of the allegations. Judge Mathis did not testify (App.24, p.892-"the Florida Bar foregoes calling Judge Mathis as a witness.") There is no direct evidence regarding why the charges were never brought to a hearing by HRS, nor that the evidence is inconclusive, see pages 31-33 of this brief.

7. There was no testimony regarding the purpose of sending the letter and motion to prove the allegations of paragraph #19 (App.8, p.267-8; App.24,p.907-8, 971-2).

8. THE FLORIDA BAR failed to prove allegation 20 (App.8, p.268) that the Petitioner "sent the letter to HRS in a personal capacity and not as the attorney for the natural mother". The Petitioner testified before the Grievance Committee prior to THE FLORIDA BAR drafting the Complaint that the letter was sent in the Petitioner's capacity "as an officer of the court" (App.11, p.493).

9. THE FLORIDA BAR failed to prove that the "letter resulted in HRS supervision for the mother and the two daughters for an additional three months (App.8, p.268, paragraph #21). The Petitioner testified before the Grievance Committee that she attempted to have the hearing set in August 1991 but the HRS attorney was unwilling to do that (App.11, p.465). If the hearing was not set in August, the next available month is September. The final hearing was on October 11, 1991. Therefore, if the letter had any effect, it could have effected the client by only one month. The mother testified at trial that the letter resulted in six months of additional supervision (App.24, p.799-800). HRS supervision over the mother was terminated by order of the court in October 1991 (App.30, p.1031). If the letter had any effect, it would have effected her by a single month, not the six months as she claimed.

10. THE FLORIDA BAR failed to prove paragraph #22 of the Complaint (App.8,

p.268) that the Petitioner violated Rule of Professional Conduct 4-1.2(a) for failing to abide by a client's decisions regarding the objectives of representation since THE FLORIDA BAR failed to address Rule 4-1.2(c), (d) or (e); (App.24, p.908-9); see also page 40 of this brief.

The standard for appellate review of a directed verdict is whether it appears as a matter of law that no proper view of the evidence could possibly sustain the position of the party against whom the verdict is sought to be directed, Clark v. Better Construction Co., Inc., 420 So.2d 929, 930 (Fla. 3rd DCA 1982). THE FLORIDA BAR had no argument in response to the Petitioner's motion for a directed verdict other than THE FLORIDA BAR is not "required to prove in each and every provision of the Complaint as it is set forth" (App.24, p.909; see also App.24, p.972-3). In order to find the Petitioner guilty of a violation of the Rules Regulating The Florida Bar, the referee had to find that THE FLORIDA BAR proved the material allegations in the Complaint by clear and convincing evidence, The Florida Bar v. McClure, 575 So.2d 176, 177-8 (Fla. 1991). The Petitioner respectfully requests that this Court reverse the ruling of the referee and grant the motion for a directed verdict since THE FLORIDA BAR has failed to prove the material allegations of the Complaint, and, as a matter of law, THE FLORIDA BAR failed to prove a violation of Rule 4-1.2a since sections (c),(d) and (e) were not addressed by THE FLORIDA BAR at the trial of this cause.

III. WHETHER THE REFEREE ERRED AS A MATTER OF LAW IN FINDING RESPONDENT GUILTY OF A VIOLATION OF RULE 4-1.2, RULES REGULATING THE FLORIDA BAR.

The United States Supreme Court has held that:

> Counsel's duty of loyalty to, and advocacy of, the defendant's cause is limited to legitimate, lawful conduct compatible with the very nature of a trial as a search for truth. Although counsel must take all reasonable lawful means to attain his client's objectives, counsel is precluded from taking steps or in any way assisting the client in presenting false evidence or otherwise violating the law. Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988, 990, 89 L.Ed.2d 123 (1986).

Nix unanimously held that, as a matter of law, the Sixth Amendment right to effective assistance of counsel was not violated by an attorney who refused to cooperate in presenting perjured testimony at trial, Id. at 998.

Comments to Rules Regulating the Florida Bar, Rule 4-1.2 (Scope of representation) state:

> Both the lawyer and client have authority and responsibility in the objectives and means of representation. The client has the ultimate authority to determine the purposes to be served by legal representation, within the limits imposed by law and the lawyer's professional obligations (emphasis added).

and (Criminal, fraudulent and prohibited transactions):

> a lawyer nay not assist a clinet in conduct that the lawyer knows or reasonably should know to be criminal or fraudulent (emphasis added).
>
> When the client's course of action has already begun and is continuing, the lawyer's responsibility is especially delicate. The lawyer is not pernitted to reveal the client's wrongdoing, except where permitted or required by rule 4-1.6 (emphasis added). Hwever, the lawyer is required to avoid furthering the purpose, for example, by suggesting how it might be concealed. A lawyer may not continue assisting a client in conduct that the lawyer originally supposes is legally proper but then discovers is criminal or fraudulent.

Comments to Rules Regulating the Florida Bar, Rule 4-1.6 (Disclosure adverse to client state:

> the lawyer may learn that a client intends prospective conduct that is criminal. As stated in subdivision (b)(1), the lawyer shall reveal information in order to prevent such consequences. It is admittedly difficult for a lawyer to "know" when the criminal intent will actually be carried out, for the client may have a change of mind.

And (withdrawal):

> If the lawyer's services will be used by the client in materially furthering a course of criminal or fraudulent conduct, the lawyer must withdraw, as stated in rule 4-1.6(a)(1). (emphasis added).
>
> After withdrawal the lawyer is required to refrain from making disclosures of the client's confidences, except as otherwise provided in rule 4-1.6. (emphasis added).

It is clear that once an attorney in the State of Florida learns that a client intends to commit a future crime, the Rules Regulating The Florida Bar make it mandatory that the attorney reveal that information to the extent the attorney "reasonably believes necessary" to prevent the crime, Comments to Rule 4-1.6, Disclosure adverse to client. The client, Robin Ricks, had no such change of mind in this case as contemplated in the comments to the rules. It is clear by her actions that she has continuously allowed the two girls to visit her ex-husband and never sought custody of the two boys, thereby placing all her children at risk for additional attacks at the hands of their father. Her attorney, the Petitioner, learned of her intent to knowingly place her children at risk prior to the completion of the juvenile dependency action and her dissolution of marriage (App.30, p.1028, entry dated 6-20-91,

"asked client if wants custody of the 2 boys/if don't ask for it here, must do it in the DOM"; App.11, p.462, lines 18-21). At that point, as an Officer of the Court, the Petitioner must disclose the information to prevent another attack on the children, Rules Regulating The Florida Bar 4-1.6(b)(2). Otherwise, Petitioner's silence would have helped her clinet to commit the crime.

The Petitioner can find no case law directly dealing with the issue of whether an attorney must disclose to police authority information which would prevent the crime of sexual battery on children. The Petitioner surmises that a case has not come before an appellate court for review since everyone in the legal universe, with the exception of THE FLORIDA BAR and the referee in this case, recognizes that sexual assault of children is a crime which is to be prevented. The Petitioner argues by analogy that had she either advocated the client's position by continuing to represent her, or passively tolerated the client's prospective crimes by failing to notify the proper authorities, she would be at risk for ciminal charges for accessory to the crimes and disciplinary proceedings for disbarment, Nix at 996-7. If an attorney's duty to the client does not extend to assisting a client in committing perjury, or jumping bond, then it cannot extend to assisting a client to allow her children to be attacked, Nix at 992; Rules Regulating The Florida Bar 4-3.3(a)(4) and Comments (false evidence); United States v. Del Carpio-Cotrina, 733 F.Supp. 95, 100 (U.S.District Court, S.D.Fla. 1990); see also The Florida Bar v. Feige, 596 So.2d 433, 435 (Fla.1992) -an attorney may not hide behind the client's instructions in order to perpetrate a fraud; see also Section 90.502, Fla. Evidence Code cases which state that the attorney-client privilege does not extend to communications regarding an intended crime: United States v. Gordon-Nikkar, 518 F.2d972,975 (5th Cir. 1975), Kneale v. Williams, 30 So.2d 284, 287 (Fla.1947), Anderson v. State, 297 So.2d 871, 875 (Fla. 2nd DCA 1974), but see Kleinfeld v. State, 568 So.2d 937, 939-40 (Fla. 4th DCA 1990), rev. den. 581 So.2d 167, appeal after remand 587 So.2d 592. The referee erred as a matter of law in finding the Petitioner guilty of a violation of Rule 4-1.2(a), Nix at 998.

IV. WHETHER THE FLORIDA BAR'S FAILURE TO PLEA ENTITLEMENT TO COSTS CONSTITUTES WAIVER OF COSTS.

The Florida Supreme Court has held that a claim for attorney's fees, whether based on statute or contract, must be pled and failure to do so constitutes waiver of the claim, Stockman v. Downs, 573 So.2d 835, 837-838 (Fla. 1991). The pleading for fees must demonstrate: "(a) the contractual or statutory basis for an award, (b) why the opposing party should be obligated to pay the award, and (c) the obligation of the moving party to pay his or her attorney", Carman v. Gilbert, 615 So.2d 701, 704 (Fla. 2nd D.C.A. 1993). The exception to this rule is where a party "has notice that an opponent claims entitlement to attorney's fees, and by its conduct recognizes or acquiesces to that claim or otherwise fails to object to the failure to plead entitlement", Stockman at 838. In that case, the party is deemed to have waived any objection to the failure to plead a claim for attorney's fees.

THE FLORIDA BAR failed to include a plea for costs in their Complaint filed on May 13, 1993 (Appendix 8). A Preliminary Affidavit of Costs was handed to the Respondent immediately prior to the final hearing before the referee on October 4, 1993 (Appendix 28, Appendix 24 p.975,976). The subject of costs was brought up sua sponte by the referee (Appendix 24p.974). The referee reserved ruling on the issue of costs without THE FLORIDA BAR presenting a Motion or argument on the subject (Appendix 24p.974-976). A Final Affidavit of Costs was filed by THE FLORIDA BAR on October 15, 1993 (Appendix 24p.1012);an Amended Affidavit of Costs was filed October 25, 1993 (Appendix 24,p.1014). No Motion for Costs was ever submitted by THE FLORIDA BAR. Each Affidavit as filed by THE FLORIDA BAR merely listed a total of expenses; there is no plea that the Respondent is responsible for the costs, or a statute, rule or case cited for the basis of Respondent's liability for THE FLORIDA BAR's costs. The Respondent objected to

payment of costs by filing Respondent's Objections To The Florida Bar's Affidavit of Costs on November 8, 1993 (Appendix 29). Respondent specifically objected to THE FLORIDA BAR's failure to plea "statutory basis for the award", (Appendix 29,p. 1016 , paragraph #2) and "why the opposing party should be obligated to pay the award" (Appendix 29,p.1016, paragraph #2 - "Respondent objects to the payment of any costs as THE FLORIDA BAR has failed to cite to any rule, statute, or cases which entitles it to recovery of costs").

The Report of Referee was rendered on November 15, 1993 (Appendix 30); Respondent filed a Notice of Appeal dated November 16, 1993 but mailed on November 17, 1993 (Appendix 31); THE FLORIDA BAR filed a Response to Respondent's Objections To THE FLORIDA BAR's Affidavit of Costs on November 17, 1993 (Appendix 32). In THE FLORIDA BAR's Response the Rule and cases are cited which entitle it to
it
recovery of costs but/failed to plea why the Respondent is obligated to pay the costs.

THE FLORIDA BAR has failed to affirmatively plea for costs prior to the decision of the referee being rendered. The record fails to establish a waiver by the Petitioner, or acquiescence or misleading conduct sufficient to support the exception to the rule established in Stockman; Taylor v. T.R.Properties, Inc. of Winter Park, 603 So.2d 1380, 1381 (Fla. 5th DCA 1992); Max Dial Porsche Audi, Inc. v. Kushner, Inc., 596 So.2d 156 (4th DCA 1992); Department of Health & Rehabilitative Services v. S.G., 613 So.2d 1380, 1386 (Fla. 1st DCA 1993).

Wherefore, the Petitioner argues by analogy to the Florida Supreme Court's decision in Stockman that THE FLORIDA BAR has waived costs by failure to plea costs in their Complaint or any time thereafter prior to the decision of the referee being rendered in this case.

V. WHETHER THERE IS SUBSTANTIAL COMPETENT EVIDENCE IN THE RECORD TO SUPPORT THE REFEREE'S AWARD OF $3,310.18 IN COSTS TO THE FLORIDA BAR.

The referee awarded THE FLORIDA BAR $3,310.18 in costs, the amount that THE FLORIDA BAR requested in its Amended Affidavit of Costs (Appendix 30,p.1021-22; Appendix 28,p.1014). The Petitioner notes for the record that there appears to be an error in the refereee's report in that two items of costs are listed two times (Bar counsel travel costs for $56.00 at the grievance committee level, and transcript costs of $982.20 at the referee level, Appendix 30,p.1021-22). Petitioner objected to the amount of these costs prior to the decision of the referee being rendered (Appendix 29). A hearing on the costs was not held by the referee.

"Florida courts have emphasized the importance of keeping accurate and current records of work done and time spent on a case, particularly when someone other than the client may pay the fee", Florida Patients's Compensation Fund v. Rowe, 472 So.2d 1145, 1150 (Fla. 1985). In addition to keeping accurate records, the records must be detailed, Id. at 1150. Thus in assessing attorney fee awards, the Florida Supreme Court has made it clear that a court should reduce the amount of a claim for excessive, unnecessary, and inadequately documented number of hours, Id. at 1150. Additionally, Rowe held that a trial court's order on fees must contain specific findings of fact as to the number of hours reasonably spent on a case, Id. at 1151; Loper v. Allstate Ins. Co., 616 So.2d 1055, 1060,1061(Fla. 1st DCA 1993). This requirement is mandatory and the failure to make the requisite finding constitutes reversible error, Id. at 1061; Jones v. Associates Finance Inc., 565 So.2d 394 (Fla. 1st DCA 1990).

The Petitioner argues by analogy that in making the award to THE FLORIDA BAR for costs in the amount of $3,310.18 the referee did not comply with the procedural requirements of Rowe. Specifically, the referee ignored Petitioner's objections to THE FLORIDA BAR's vague and lump sum statement of costs and services

performed (inadequate documentation), expedition of the transcript of the hearing before the referee on October 4, 1993 (unnecessary expense); bar counsel's travel costs on October 3, 1993 (unnecessary expense); unnecessary trips of the investigator (excessive or redundant expenses) and found without discussion of the matter, or an adequate itemized list from THE FLORIDA BAR, that all costs were "reasonable" (Appendix 29; Appendix 30,p1021). The Report of Referee failed to set forth specific findings of fact that all costs listed by THE FLORIDA BAR were not unnecessary or excessive, and were adequately documented, (Appendix 30,p.1021-22).

"A referee's findings are presumed to be correct and will be upheld unless the party seeking review shows them to be clearly erroneous or lacking in evidentary support", The Florida Bar v. Miele, 605 So.2d 866, 868 (Fla. 1992). An abuse of discretion is shown when the record reveals that costs are unnecessary, excessive or improperly authenticated, Id. at 868. Petitioner contends that an abuse of discretion is also shown when the referee awards costs based on an affidavit which includes only a summary of costs without the records from THE FLORIDA BAR which details each cost, the description of the service requiring the cost, the subject matter of the service, the day, month and year the service was rendered, and the individual performing the service, Norman v. Housing Authority Of The City of Montgomery, 836 F.2d 1292, 1303 (11th Cir. 1988) (the party seeking attorney fees bears the burden of supplying the court with specific and detailed evidence from which the court can determine a reasonable hourly rate; and a well-prepared fee petition contains both a summary , grouping the time entries by the nature of the activity or stage of the case plus the documentation of hours); Resolution Trust Corp. v. Hallmark Builders, Inc., 143 F.R.D. 277, 282 (M.D. Fla. 1992) (attorney's affidavit alone insufficient to provide satisfactory evidence of the reasonableness of requested rates); In Re Morgan, 48 B.R. 148, 150 (Bkrtcy. Md.1985); Burger King Corporation v. Mason, 710 F.2d 1480, 1497 (11th Cir. 1983), reh.den. 718 F.2d 1115, cert.den.

104 S.Ct. 1599, 465 U.S. 1102, 80 L.Ed.2d 30, appeal after remand 855 F.2d 779, citing to Matter of First Colonial Corp. of America, 544 F.2d 1291, 1299-1300 (5th Cir. 1977), cert.den. 431 U.S. 904, 97 S.Ct. 1696, 52 L.Ed.2d 388 (1977) (awards of attorney fees must be denied when records are inadequate). Petitioner notes that the Florida Supreme Court has specifically adopted the federal lodestar approach for computing reasonable attorney fees, Rowe at 1146,1150.

The referee's award of $3,310.18 based on a summary provided by THE FLORIDA BAR does not allow for meaningful review, Rowe at 1151; Norman at 1304; Adams v. Mathis, 752 F.2d 553, 554 (11th Cir. 1985); Hensley v. Eckerhart, 461 U.S. 424, 439 n.15, 103 S.Ct. 1933, 1942 n.15, 76 L.Ed.2d 40(1983)(a conclusory statement that a fee is reasonable is insufficient). There is no way the referee could have ascertained whether the costs were unnecessary, excessive or improperly authenticated based on the evidence of costs submitted by THE FLORIDA BAR. There is no way that this Court can review the record to ascertain whether there has been an abuse of discretion by the referee in awarding that amount of costs based on the evidence of costs submitted by THE FLORIDA BAR. Petitioner contends that the award of $3,310.18 in costs based solely on a summary provided by THE FLORIDA BAR is a per se abuse of discretion. Petitioner would further argue that THE FLORIDA BAR has not carried its burden of proof that the costs sought are reasonable, and that they are necessary, not excessive, and are properly authenticated, Rules Regulating The Florida Bar 3-7.6(k)(1)(E); Miele at 868. Accordingly, the award of costs in the amount of $3,310.18 to THE FLORIDA BAR should be reversed by this court.

CONCLUSION

It is the duty of every court to properly apply legal principles to the evidence of record. THE FLORIDA BAR has failed to carry the burden of proof at trial by showing by clear and convincing evidence the material allegations of their Complaint. The facts on the record do not as a matter of law constitute a violation of Rules

Regulating The Florida Bar 4-1.2(a) since THE FLORIDA BAR failed to address Rule 4-1.2(c), (d) or (e), and the indirect evidence in favor of the Petitioner is unrebutted by THE FLORIDA BAR. The finding of the referee that the Petitioner is guilty of a violation of Rule 4-1.2(a) is unsupported by the evidence, is clearly erroneous and fails to consider Rule 4-1.2(c), (d) or (e) as being a part of THE FLROIDA BAR's prima facie case. THE FLORIDA BAR has waived costs by failing to plea costs prior to the decision of the referee being rendered, and by failing to document costs by the method set forth by the Florida Supreme Court in Florida Patient's Compensation Fund v. Rowe, 472 So.2d 1145 (Fla.1985). Based on the foregoing, the Petitioner respectfully requests that this Court reverse the ruling of the referee that she is guilty of a violation of Rule 4-1.2(a), reverse the award of costs against the Petitioner, and find the Petitioner not guilty of a violation of Rule 4-1.2(a) as a matter of law.

Respectfully submitted,

Susan K. Glant

Susan K. Glant #393908
Respondent/Petitioner
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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S.Mail/hand delivery to Larry Carpenter, THE FLORIDA BAR, 880 North Orange Avenue, Suite 200, Orlando, Florida 32801; and John Harkness, Executive Director, THE FLORIDA BAR, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 28th day of January, 1994.

Susan K. Glant

Susan K. Glant #393908
Respondent/Petitioner

APPENDIX

The Petitioner relys on the Appendix as submitted in the original Appellant's Initial Brief on December 15, 1994. The Petitioner specifically notes that the original Appendix contained only matters of record.

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