IN THE SUPREME COURT OF THE STATE OF FLORIDA

BARBARA MOAKLEY,
Petitioner,

v.

W. SHERI SMALLWOOD, Esq.,
Respondent

CASE NUMBER: 95,471
3rd DCA CASE NUMBER: 98-398
730 So.2d 286 (Fla. 3DCA 1999)

PETITIONER'S AMENDED INITIAL BRIEF ON THE MERITS

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CERTIFICATE OF INTERESTED PARTIES

Counsel for Petitioner, Barbara Moakley, certifies that the following persons and entities have, or may have, an interest in the outcome of this case:

1. Margaret A. Broz, Esq.
   Trial co-counsel for Petitioner; and real party Petitioner with interest.

2. William J. Carew, Esq., Montauk, New York
   Trial co-counsel for Joseph Moakley, appearing pro hac vice.

3. John P. Fenner, Esq.
   Appellate counsel and trial co-counsel for Petitioner.

4. Barbara Moakley, a.k.a. Barbara Rewiss
   Petitioner.

5. Joseph Moakley
   Respondent, former client of Ms. Smallwood, appearing pro se on December 10, 1997.

6. W. Sheri Smallwood, Esq.
   Respondent; former trial counsel for Respondent.

7. Honorable Sandra Taylor
   Trial Judge.

8. The Florida Bar.

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PRELIMINARY STATEMENT

This is a discretionary review of a decision of the Third District Court of Appeals affirming the trial court's post-divorce, final order. The order imposed sanctions on Former Wife Barbara Moakley, and her attorney, Margaret A. Broz, Esq., for subpoenaing Former Husband Joseph Moakley's former attorney, W. Sheri Smallwood, Esq. The subpoena was to a hearing on Former Wife's Motion to Compel delivery of a mortgage note. The Sixteenth Judicial Circuit, in and for Monroe County, Florida, the Honorable Sandra Taylor presiding, entered the order.

"This Court" refers to the Supreme Court of Florida. "The trial court" refers the Circuit Court. This brief will refer to Petitioner/Former Wife, Barbara Moakley, as "Former Wife" and to Joseph Moakley, as "Former Husband".

"Mortgage" will refer to the Mortgage dated August 20, 1986, from Atlantic Waves, Inc. to Joseph and Barbara Moakley (Appendix 3).

"Note" will refer to the note secured by the Mortgage, which the trial court found to be lost, without an existing copy (R 43).

The following symbols will be used in this brief:

"R" ---- Record on Appeal from the Third District Court of Appeal.

"A" ---- Appendix to Petitioner's Initial Brief to the Third DCA.

All emphasis in this brief is supplied by the writer, unless otherwise indicated.

STATEMENT OF THE CASE AND THE FACTS

Discretionary Review from Third District Court of Appeals:

Petitioner/Former Wife, Barbara Moakley, seeks review of opinion of the Third District Court of Appeal on rehearing, Moakley v. Smallwood, 730 So.2d 285 (Fla. 3DCA 1998) and 730 So.2d 286 (Fla. 3DCA 1999). The case was a post-divorce enforcement action. This decision upheld the trial court's sanctions against Petitioner and her lawyer, payable to Respondent. Respondent was Former Husband's former counsel, but she had withdrawn, and was called as a fact witness. The trial court sanctioned Petitioner and her attorney for subpoenaing a fact witness--Ms. Smallwood--without a "reasonable explanation". The trial court made no finding of contempt, frivolous or bad faith litigation, lack of a justiciable issue, harassment, inequitable conduct, or any ethical breach.

The affirming decision cited the trial court's "inherent powers" to discipline attorneys under Sanchez v. Sanchez, 435 So.2d 347, 350 (Fla. 3DCA 1983) Patsy v. Patsy, 666 So.2d 1045 (Fla. 4DCA 1996), and other cases decided by the Third and Fourth District Courts of Appeal, and decisions by the U.S. Supreme Court.

Background of the Case: The parties' divorce involved seven different counsel, and six presiding judges in Broward and Monroe Counties, Florida, and Suffolk County, New York. The Monroe County Docket alone, is 21 pages long. Judge

Taylor was the fourth 16th Circuit Court Judge assigned to this divorce: Judges Payne, Vernon--twice, Shea and Taylor.

Former Husband's Lawyers: During most of the divorce action, other counsel represented Former Husband. Ms. Smallwood first appeared as Former Husband's co-counsel in September, 1996. (Ms. Smallwood later withdrew as co-counsel, but then appeared again as Former Husband's lead counsel in December 1996, after his former lead counsel withdrew (R 4)). Former Husband's records filled ten boxes.

This case has always been assigned to the Marathon Courthouse--50 miles from Ms. Smallwood's Key West office. Judge Taylor held the disputed December 10, 1997 hearing in Marathon.

Ms. Smallwood continued as Former Husband's principal counsel through final pretrial hearings, settlement and post-decree property transfers, until she withdrew, effective July 30, 1997 (A 5). The trial court ordered Former Husband to obtain new counsel, but no substitute counsel ever appeared. William Carew, Esq., Montauk, New York--the parties' former family attorney--also represented Former Husband in the divorce, pro hac vice.

The Final Judgment and the Note (R-6) required Former Husband to turn over to Former Wife, a $310,000 Note (the "Note") and Mortgage, made by Atlantic Waves, Inc., in favor of Joseph and Barbara Moakley. The Mortgage covered real

property in Suffolk County, New York--a Montauk Ocean-front bar and restaurant. Mr. Carew had prepared the Note and Mortgage in 1986 (A 3, p.6).

The Missing Note: The Mortgage refers to the Note it secures, and the trial court's June 5, 1997 post-decree Order (A 4) also required Former Husband to transfer the Note to Former Wife. Nonetheless, neither the Note nor a copy have ever been produced. Former Husband failed to deliver either the Note, or the original Mortgage to the Former Wife (A 6).

At the December 10, 1997 hearing--as set forth in the trial court's detailed findings in its December 26, 1997 Order--Former Husband stated that all his records were in the hands of counsel (R 42). Mr. Carew denied he had the Note (R 42, 43). He stated that the balance of Former Husband's documents had been in Ms. Smallwood's possession (R 42). Ms. Smallwood testified that the Note was not in Former Husband's ten boxes of files, when she had them (R 42).

As a result of this testimony, Judge Taylor determined in her December 26, 1997 Order, "that **the Note is lost, and there is no existing copy**."

Need for the Note in the New York Foreclosure: On July 2, 1997, Former Wife had filed to foreclose the Mortgage (A 3), in Suffolk County, New York. Section 10 of the Foreclosure Complaint states that Former Wife "is now the sole, true and lawful owner of the [Note]" (A 2, p.3).

The trial court accordingly found in its December 26, 1997 Order (R 42):

> **The Mortgage is presently in foreclosure, and the Former Wife has been prejudiced by not having the Note. Further the Mortgage could lose significant value if the foreclosure is hindered.**

Ms. Smallwood Receives Notice of Hearing: On December 4, 1997 Ms. Broz, Former Wife's lead counsel, faxed copies of her Motion to Compel Tender of Original Documents, to Mr. Carew and to Ms. Smallwood, together with a Notice of Hearing for December 10, 1997 (R 15).

Ms. Broz Issues Subpoenas: Ms. Broz gave the subpoena for Ms. Smallwood's appearance, to a licensed Monroe County process server. Ms. Broz also subpoenaed Mr. Carew, who testified by telephone.

The process server delivered Ms. Smallwood's subpoena to her secretary on December 8, 1997. Although Ms. Smallwood's service was technically defective--the subpoena was left with a secretary rather than with Ms. Smallwood personally, or with her office manager after an unsuccessful attempted service--Ms. Broz had no control over how the subpoena was served.

Ms. Smallwood Files Motion to Quash, etc.: On December 9, 1997, the day before the hearing, Ms. Smallwood served her 14-page **Special and Limited Appearance, Motion to Quash, Motion to Strike, Motion for Protective Order to be Moot, Request for Sanctions, and Request for Fees, Costs, Expenses and Suit**

Monies, by fax. The Motion stated Ms. Smallwood had insufficient time to respond to the subpoena. Ms. Smallwood's Motion for Sanctions was never set for a hearing. There was no Notice of Hearing for sanctions.

Ms. Smallwood did not ask to testify by telephone, as Mr. Carew testified. She did not offer her affidavit in lieu of testimony. Ms. Smallwood appeared in person at the December 10, 1997 hearing.

The Court Orders Sanctions: On January 28, 1998, the trial court granted Ms. Smallwood's Motion to Quash, etc., sanctioning Former Wife and Ms. Broz. This Order issued seven weeks after the hearing (set on the Motion to Compel), a month after finding the Note was lost, but without further hearing or notice.

The trial court stated that the subpoena did not give sufficient or timely notice, and added:

> **It is unclear to this Court why it was necessary to subpoena former counsel to appear and testify when all involved agreed the subpoenaed attorney did not have the document.**

The Order awarded Ms. Smallwood $1,125,

> **compensating the subpoenaed attorney for her time in responding to the subpoena** [payable by] **Former Wife and Former Wife's counsel, as a sanction for their conduct in connection with these proceedings which the court finds to have been unnecessary, and improper.**

The trial court made no finding of contempt, untruthfulness, bad faith or

frivolous litigation, lack of a justiciable issue, harassment, inequitable conduct, or any violation of any ethical standards.

The Third DCA Upholds, On Circuit Court's "Inherent Powers":. The Third DCA upheld the trial court's sanctions, on the basis of the circuit Court's "inherent powers," to discipline lawyers, citing federal cases, Sanchez v. Sanchez, supra, Patsy v. Patsy, supra, and other subsequent cases decided by the Third and Fourth District Courts of Appeal.

This appeal follows.

SUMMARY OF ARGUMENT

The Third DCA's decision gives circuit court judges--constitutional officers--discretionary power over attorney discipline, under what it calls the Circuit Court's "inherent powers." For the following reasons, this violates the Florida and United States Constitutions and the following decisions of this Court:

I. THE FLORIDA CONSTITUTION "OUSTED" ANY INHERENT POWERS OF CIRCUIT COURTS TO DISCIPLINE LAWYERS, EXCEPT FOR CONTEMPT.

Article V, Section 15 of the Florida Constitution, grants the Supreme Court "exclusive jurisdiction" to discipline lawyers.

In 1956, Article V of the Florida Constitution "ousted" Circuit Courts of whatever "inherent disciplinary power over attorneys" they previously held, except for contempt, State ex rel Arnold v. Revels. 109 So.2d 1, 3 (Fla. 1959).

The Supreme Court has redelegated concurrent jurisdiction over discipline to the Circuit Courts, in Disciplinary Rule 3-3.5 "under these Rules of Discipline"--only in accordance with the procedures of Disciplinary Procedure Rule 3-7.8--Procedures Before a Circuit Court, and Canon 3D of the Code of Judicial Conduct--Disciplinary Responsibilities.

The trial court did not follow these procedures.

II. ISSUING THE SUBPOENA, WAS NOT IMPROPER. THE DECISION

ARBITRARILY EXPANDS EVEN THE "INHERENT POWERS" DESCRIBED IN SANCHEZ v. SANCHEZ, et al.

The attorney issued a subpoena to a fact witness, because her client needed either the Note or a finding that it was lost. The fact witness appeared. Ms. Smallwood testified that she did not have the Note and had not seen it, when she was Former Husband's trial counsel.

The trial court issued its December 26, 1997 Order, stating that the Note was lost, and finding its importance to the Former Wife.

III. THE TRIAL COURT USED "INHERENT POWERS"ARBITRARILY, WITHOUT STANDARDS AND PROCEDURES, VIOLATING DUE PROCESS.

Ms. Broz broke no rule or law. The trial court used its "inherent powers" arbitrarily, without rules, guidelines or standards. It is impossible to tell in advance what conduct will be sanctioned.

Even if Ms. Broz violated a Disciplinary Rule, the trial court did not give her time to prepare a defense, or a hearing in the seven weeks between the December 10, 1997 hearing, and its January 28, 1998 Order appealed. The trial court failed to follow the procedures set forth in Disciplinary Rule of Procedure 3-7.8, or the Rules governing contempt.

By purporting to entertain the Motion for Sanctions on the day after it was served, at the hearing on the Motion to Compel, and without any notice that it was

going to be heard at that time, the trial court disregarded the basic requirements of due process.

IV. THIS DECISION CONFLICTS WITH DECISIONS OF THREE OTHER DISTRICT COURTS OF APPEAL.

The First, Second and Fifth District Courts of Appeal reject a Florida trial court's "inherent right" to sanction lawyers outside of the Disciplinary Rules.

Article V, Section 5(b), Fla. Constitution, provides that "Jurisdiction of the circuit court shall be uniform throughout the State." This is not uniform.

V. THIS DECISION HAS A CHILLING EFFECT ON LAWYERS' DUTY TO REPRESENT THEIR CLIENTS ZEALOUSLY, WITHIN THE LAW. How can lawyers obtain evidence from reluctant witnesses, if trial courts can award extra-legal sanctions (above statutory witness fees) to hostile witnesses, because they articulately complain? If lawyers can be sanctioned for using diligence, why should they take on any but the best-paying cases?

ARGUMENT

This decision expressly affects the "inherent powers" and jurisdiction of a class of constitutional officers--Circuit Court Judges, Behr v. Bell, 665 So.2d 1055 (1996). The Third DCA's decision gives the trial court discretionary power over attorney discipline, under what it calls the Circuit Court's "inherent powers."

This decision directly conflicts with the following decisions of this Court on the same question of law:

I. THE FLORIDA CONSTITUTION "OUSTED" ANY INHERENT POWERS OF CIRCUIT COURTS TO DISCIPLINE LAWYERS, EXCEPT FOR CONTEMPT.

The Supreme Court's has "Exclusive Jurisdiction". Article V, Section 15, Florida Constitution states:

> The supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law, and the discipline of persons admitted.

This Section is the successor to Article V, Section 23 of the 1956 Revision to the 1885 Florida Constitution. It gives "exclusive jurisdiction" over attorney discipline to this Court alone. Article V of the Constitution, was part of Florida's epic struggle for an independent judiciary, and for an independent, integrated Bar.

By vesting this exclusive jurisdiction in the Supreme Court, Article V took away the "inherent powers" of the Circuit Courts to discipline lawyers, previously

articulated in State ex rel Sheiner v. Giblin, 73 So.2d 851 (Fla. 1954), et al.

This Court stated this fundamental change in jurisdiction in State ex rel Arnold v. Revels, 109 So.2d 1, 3 (Fla. 1959):

> As of July 1, 1957--the effective date of revised Article V of the Florida Constitution, F.S.A.--the **circuit courts of this state were ousted of whatever inherent disciplinary power over attorneys they had previously held**, as well as the statutory power derived from Ch. 454, Fla.Stat.1955, F.S.A. This necessarily follows from the clear and unambiguous language of 23 of revised Article V, vesting in the Supreme Court of Florida '**exclusive** jurisdiction over the admission to the practice of law and the discipline of persons admitted.' (Emphasis added.) The legislature was likewise divested of any legislative control in this field by 23 of Article V. See State ex rel. Florida State Bar v. Evans, Fla.1957, 94 So.2d 730.
>
> Simultaneously, however, with the divesting of the circuit courts and the Legislature of jurisdiction in this field, and the vesting thereof exclusively in this court, this court gave back to the circuit courts the statutory power of discipline which the people, by their mandate in adopting revised Article V. had taken away. This it did by adopting Circuit Court Rule 3.1, effective July 1, 1957. State ex rel Arnold v. Revels, 109 So.2d 1, 3 (Fla. 1959)]

This Court then continued to give back disciplinary jurisdiction to Circuit Courts, by adopting then-existing Chapter 454, 1955 Florida Statutes, "as a rule of the Supreme Court....", id.

This Court continued, making it clear that Circuit Courts lacked all jurisdiction in this area, except as the Supreme Court delegated by Rule:

> Whether the St. Johns County Circuit Court entertained the disbarment proceedings against an attorney whose principal practice and office was in another county and judicial circuit, by virtue of 'the

> necessary and inherent power vested in it to control the conduct of its own affairs and to maintain its essential dignity', State ex rel. Sheiner v. Giblin, Fla. 1954, 72 So.2d 851, or by virtue of the statutory authority derived from Ch. 454, Fla.Stat. 1955, F.S.A., is beside the point. The essential fact remains that, by an organic mandate of the people, the **circuit courts of this state were divested of all power, whether inherent or statutory, to discipline attorneys.**
>
> The jurisdiction failed as completely as it would have, if such jurisdiction had depended upon a statute that was repealed by another statute. And, as stated in Ex parte McCardle, 1868, 7 Wall. 506, 514, 19 L.Ed.2d 264, 'Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.' [State ex rel Arnold v. Revels, 109 So.2d 1, 3 (Fla. 1959)]

Finally, to establish that the Legislature could no longer change or establish disciplinary rules by amending Fla. Stat. 454, this Court then ruled that its subsequent Rule "superseded" conflicting parts of that Statute:

> By its order of May 9, 1958, supra, this court adopted a Rule of Court that, in effect, divested all circuit judges in this state, except a circuit judge 'of the judicial circuit in which the accused attorney's office is located', of jurisdiction to 'try and determine' a disbarment proceeding. The May 9, 1958 order also expressly provided that Section 454.24-454.29, and such parts of section 454.30-454.32 as were in conflict with the Rule therein adopted, were 'superseded'. Thus, instead of a statute repealing a statute upon which jurisdiction depends, we have here a Rule of Court repealing those portions of a statute, adopted as a Rule of this court by Rule 3.1 supra, upon which jurisdiction depended. [State ex rel Arnold v. Revels, 109 So.2d 1, 3 (Fla. 1959)]

Exemption for Contempt. This Court later stated that other courts have the "inherent power" to punish minor attorney misconduct. These are "lesser infractions"

not requiring suspension or disbarment--through the courts' inherent powers of **contempt**, Burns v. Huffstetler, 433 So.2d 964, 965-6 (Fla. 1983); Gifford v. Payne, 432 So.2d 38, 39 (Fla. 1983); and Shelley v. District Court of Appeal, 350 So.2d 471, 472-3 (Fla. 1977)--quoting only federal cases as authority. This Court, in Burns v. Huffstetler, supra, set forth the three methods of attorney discipline:

> There are three alternative methods for the disciplining of attorneys, and the first two procedures derive directly from this Court's delegation of its power to regulate the practice of law in Florida, as conferred by Article V. section 15, Florida Constitution.
>
> The first alternative is the traditional grievance committee-referee process in which an attorney is prosecuted by The Florida Bar under the direction of the Board of Governors. Under this procedure, sanctions are imposed by the Supreme Court after the Court considers the referee's recommendations. See Fla.Bar Integration Rule, art. XI, Rules 11.02-11.13.
>
> The second alternative is a procedure initiated by the judiciary with the state attorney prosecuting. Judgment is entered by the trial court and is subject to review by the Supreme Court. See Fla.Bar Integration Rule, art. XI, Rule 11.14.
>
> The third alternative is the exercise of the inherent power of the courts to impose contempt sanctions on attorneys for lesser infractions, a procedure which this Court expressly approved in Shelley v. District Court of Appeal, 350 So.2d 471 (Fla.1977).
>
> The trial court in this case was exercising its inherent power in dealing with contempt of court and was utilizing the procedures established in Florida Rule of Criminal Procedure 3.840, to impose sanctions upon petitioner for his unethical conduct.

This Court restated this principle in 1994 in a dictum, in Levin, Middlebrooks, Mabie, et al. v. U.S. Fire Insurance Co., 639 So.2d 606, 609-610 (Fla. 1994):

> Clearly the trial judge has the inherent power to do things

> necessary to enforce its orders, to conduct business in a proper manner, and to protect the court from acts obstructing the administration of justice. In particular, a trial court would have the ability to use its contempt powers to vindicate its authority and protect its integrity by imposing a compensatory fine as punishment for contempt. South Dade Farms, Inc. v. Peters, 88 So.2d 891 (Fla. 1956).

There was no finding of contempt against Ms. Broz or her client in the case at bar, however. Their actions did not obstruct the administration of justice, challenge the trial court's authority, or undermine its integrity. They merely inconvenienced a fact witness who was necessary to the trial.

With this one exception for contempt, this Court has been consistent in its insistence on its exclusive jurisdiction to discipline lawyers. Bar Rule of Discipline 3-1.2, 605 So.2d 252 (Fla. 1992) provides:

> The Supreme Court of Florida has the **inherent power** and duty to prescribe standards of conduct for lawyers, to determine what constituted grounds for discipline of lawyers, [and] to discipline for cause attorneys admitted to practice law in Florida....

The Supreme Court Has Delegated Its Exclusive Jurisdiction over Attorney Discipline. Disciplinary Rule 3-3.1, quoted by The Florida Bar v. Smania, 701 So.2d 835, 836 (Fla. 1997), provides:

> The exclusive jurisdiction of the Supreme Court of Florida over the discipline of persons admitted to the practice of law shall be administered in the following manner, subject to the supervision and review of the [Supreme] court. The following entities are hereby designated as agencies of the Supreme Court of Florida for this purpose and with the following responsibilities, jurisdiction and powers. The

> board of governors [of The Florida Bar], grievance committees and referees....

3-3.5 redelegates Circuit Court disciplinary power "**under these Rules of Discipline**"--the Disciplinary Procedures in Rule 3-7.8, Canon 3(D) of the Code of Judicial Conduct, and the Florida Standards for Imposing Lawyer Sanctions.

Canon 3(D)(2) of the Code of Judicial Conduct--Disciplinary Responsibilities--provides:

> A judge who receives information or has actual knowledge that substantial likelihood exists that a lawyer has committed a violation of the Rules Regulating The Florida Bar shall take appropriate action.

The Commentary to Canon 3D gives judges differing options, between "minor" misconduct and "substantial" problems:

> <u>Appropriate action</u> may include direction communication with the judge or lawyer who has committed the violation, other <u>direct</u> action if available, or reporting the violation to the appropriate authority or other agency. If the conduct is <u>minor</u>, the Canon allows a judge to address the problem solely by direct communication with the offender. A judge...however that...has knowledge that a lawyer has committed a violation of the Rules of Professional Conduct that raises a <u>substantial</u> question as to the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, is <u>required under this Canon to inform the appropriate authority</u>.

The Fifth DCA described this disciplinary regime in <u>Pantori v. Stephenson</u>, 384 So.2d 1357, 1358-9 (Fla. 5DCA 1980):

> Rule 11.14, Florida Bar Integration Rule, article XI [now Disciplinary Procedure Rule 3-7.8], provides that a judge of the circuit

> court or district court of appeal upon receiving knowledge of alleged unprofessional conduct may direct the state attorney to make a motion in the name of the State of Florida to discipline the attorney. In addition, Canon 3(B)3, [now 3(D)], Florida Bar Code of Judicial Conduct, provides that a judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware. The Commentary to Canon 3B(3) notes that "(d)isciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body." By inference, the court itself is not the "appropriate disciplinary body."
>
> Thus, it appears that the supreme court alone has the power to discipline attorneys by the grant of exclusive jurisdiction. Florida Bar v. McCain, 330 So.2d 712 (Fla.1976); Application of Harper, 84 So.2d 700 (Fla.1956). The circuit and district courts have been ousted of whatever inherent disciplinary power over attorneys they may have previously held. State v. Revels, 109 So.2d 1 (Fla.1959). Therefore, these courts now have only such power as has been provided in Rule 11.14. See Florida Bar v. Tannenbaum, 240 So.2d 302 (Fla.1970).

The trial court did not follow these Disciplinary Procedures in the case at bar, State ex rel. Arnold v. Revels, supra, and Pantori v. Stephenson, supra.

The Trial Court's Sanctions were Disciplinary "Sanctions" under the Supreme Court's Rules of Discipline. The trial court's "sanctions" are the same as sanctions provided under subSection 2.8(a) and 2.8(b), Florida Standards for Imposing Lawyer Sanctions--restitution and assessment of costs.

II. ISSUING THE SUBPOENA, WAS NOT IMPROPER. THE DECISION ARBITRARILY EXPANDS EVEN THE "INHERENT POWERS" DESCRIBED IN SANCHEZ v. SANCHEZ, supra.

The Appealed decision expanded the "Inherent Powers Discipline" Doctrine in Sanchez, supra, to a Subpoena Issued Without a "Reasonable Explanation". Ms. Broz

issued a subpoena to a fact witness, because her client needed either the Note, or a finding that it was lost. Ms. Smallwood had withdrawn, there was no other way to compel her testimony. She appeared not as a lawyer, but as a fact witness. Testifying was Ms. Smallwood's civic duty, though it was inconvenient. By analogy, lawyers are not entitled to legal fees for serving on juries.

Ms. Smallwood testified that she did not have the Note and had not seen it, when she was Former Husband's trial counsel. The trial court issued the December 26, 1997 Order, stating that the Note was lost, and that it was important to the Former Wife in her foreclosure action.

None of the cases cited by the Third DCA sanctioned a lawyer for subpoenaing a fact witness. The undersigned could find no such authority.

Ms. Broz' actions would not even merit sanctions: a) under either the current, or the newly-amended, Fla. Stat. 57.105 (amended by Fla. Stat. Chapter 99-225, effective October 1, 1999); b) under Federal Rule of Civil Procedure 11; or c) under the "rarely applicable...inequitable conduct doctrine" of Bitterman v. Bitterman, 714 So.2d 356 (Fla. 1998). Petitioner was not even the "losing party".

Although Bitterman, supra (citing almost entirely federal cases), recognized that awarding attorney's fees to an opposing party is a question of substantive law, Ms. Smallwood did not represent Former Husband, and the award of fees against Ms. Broz

was specifically made as a "sanction" against her as an attorney.

The trial court made no finding of contempt, untruthfulness, lack of a justiciable issue, "bad faith" or "frivolous" litigation, inequitable conduct, or any ethical violation. Neither Respondent's pleadings, nor the Record on Appeal, support such a finding.

There was nothing frivolous, unethical, contemptuous or unsupported about the subpoena. There were mistakes in serving it, and it was untimely, but these problems were beyond Ms. Broz' control. The facts do not support sanctions.

III. THE TRIAL COURT USED "INHERENT POWERS" ARBITRARILY, WITHOUT STANDARDS AND PROCEDURES, VIOLATING DUE PROCESS.

Inherent Powers Have No Substantive Standards. In this case, the trial judge--Chief Judge Sandra Taylor--is an excellent, impartial judge, but not all judges are as impartial. The action sanctioned violated no ethical or professionalism rule. Because the "inherent powers" doctrine provides no standards or guidelines to a trial court, telling what actions should be sanctioned, it could use this power arbitrarily--without notice to lawyers of what the rules are, or where the lines are drawn.

Sanctions, imposed without rules or standards, are inherently arbitrary. See Justice Kennedy's dissenting opinion (joined by three other Justices) in Chambers v. NASCO, INC, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991), at 111 S.Ct. 2145.

Arbitrary sanctions--where lawyers do not know where, or for what reason, the court will sanction--impairs all lawyers' ability to practice, and their clients' right to due process, id.

The First DCA recently reiterated that the trial court's power to discipline is restricted either to disciplinary Rule 3-7.8, or to contempt, in Carnival Cruise Lines and Mase v. Beverly, 24 FLW D2154 (Fla. 1DCA, September 16, 1999). The First DCA went on to emphasize the need for clear and unambiguous standards of behavior:

> Prior to assessing contempt sanctions for a violation of a court order, the trial court must first have issued a clear and unambiguous order or otherwise clearly established for the record the standards of conduct required by the court. See U.S. v. Robinson, 922 F. 2d 1531, 1534-35 (11th Cir. 1991). "One may not be held in contempt of court for violation of an order...which is not clear and definite so as to make the party aware of its command and direction." Lawrence v. Lawrence, 384 So.2d at 280 [(Fla. 4DCA 1980)] see also Levine v. State, 650 So.2d 666, 668 (Fla. 4th DCA 1995). [24 FLW D2157]

There are no guidelines for "inherent powers."

Lack of Procedural Due Process. Ms. Smallwood served her Motion for Sanctions the day before the hearing, which was called for another matter. The Docket shows that no Notice of Hearing for the Motion for Sanctions was filed.

The only hearing the trial court held on Ms. Smallwood's Motion for Sanctions, etc., was the December 10, 1997 hearing on Former Wife's Motion--the day after Ms. Smallwood served Ms. Broz, without a Notice of Hearing. Ms. Broz had no chance

to prepare a defense, or summon witnesses in her defense.

In State v. Spencer, 24 FLW S433 (Fla., September 23, 1999) this Court ruled that the "sanction," of barring repetitive prisoner pleadings, required notice, a hearing, and a chance to respond:

> It is important for courts to first provide notice and an opportunity to respond before preventing that litigant from bringing further attacks on his or her conviction and sentence. [24 FLW S433]

Valid Defenses to Sanctions. If she had the opportunity to respond, Petitioner could have explained that Ms. Smallwood, Mr. Carew and Mr. Moakley all denied they had the Note, but Mr. Moakley, appearing pro se, had maintained that his lawyers had the Note. Although the trial court found that "all involved agreed that the subpoenaed attorney did not have the Note," Ms. Smallwood was the last lawyer to have inspected Mr. Moakley's ten boxes of documents. Her testimony was crucial, because Mr. Carew and Mr. Moakley also said that they thought the Note was in the boxes.

To foreclose the Mortgage in New York, Petitioner had to produce either the Note, or admissible evidence that the Note was lost. This informal, inadmissable agreement of "all involved" was not sufficient. Mr. Moakley, Mr. Carew and Ms. Smallwood all had to be brought together, to smoke this out.

Otherwise, it was possible that the trial court would not rule, because some

absent party could have the Note, or could know where it was. Since Ms. Smallwood had withdrawn, only a subpoena could compel her appearance.

There was no emergency. The trial court could have held another hearing. Nonetheless, the trial court held no further hearings on sanctions, although it waited seven weeks before ruling. Such a procedure does not satisfy Disciplinary Procedure Rule 3-7.8, Florida Rules on Contempt, Federal Rule of Civil Procedure 11(if it applied), or fundamental due process.

The trial court gave no warning, no time to reply, and held no separate hearing on sanctions, all required by Chambers v NASCO, Inc., supra, for due process. (See also The Florida Bar v. Curry, 211 So.2d 169 (Fla. 1968), cert. den., 393 U.S. 981, 895. Ct. 451, 21 L.Ed. 2d 442, on notice and hearing.) The trial court gave Ms. Broz none of the rights provided in the Disciplinary Rules, in Disciplinary Procedure 3-7.8, in Fla. Rule 3.840 of Criminal Procedure--Indirect Criminal Contempt, or in the rules governing civil contempt.

The Second District Court of Appeal, in Breed v. Nye, 263 So.2d 252, 253 (Fla. 2DCA 1977), addressed both the authority to punish by shifting fees, and procedural due process. The County Judge offered to restore an attorney's fees, if he appeared at a "rehearing" by members of the grievance committee.

The Second DCA reversed for lack of jurisdiction to impose sanctions, outside

of the disciplinary rules, and for lack of notice:

> Certainly if the County Judge thinks that there is in this case a matter requiring investigation by the grievance committee he should by all means inform its chairman and cooperate with the committee. But there is no authority for the use of an order apportioning attorney's fees as a punitive device.
>
> Furthermore, this order should not have been entered ex parte. The record shows that a dispute existed, and notice and opportunity to be heard are fundamental requirements of due process....[since] Appellant's right to a "rehearing" rests upon his being denied a hearing, the petition [to restore the shifted fees] should have been granted.
>
> There is, from this record, an apparent informality in the practice of probate law on the part of appellant, and the County Judge has ample power to insure that the rules are complied with. On the other hand, he is, like all of us, bound by them himself.

IV. THIS DECISION CONFLICTS WITH THREE OTHER DISTRICT COURTS OF APPEAL.

Contrary to Sanchez and Patsy, the First, Second and Fifth District Courts of Appeal have ruled that a trial court has no such "inherent power" to sanction lawyers: Miller v Colonial Baking Co., 402 So.2d 1365 (Fla. 1DCA 1981); Israel v Lee, 470 So.2d 86 (Fla. 2DCA 1985); and State v Harwood, 488 So.2d 901 (Fla. 5DCA 1986).

Accordingly, the Annotation to *Attorney's Liability Under State Law for Opposing Party's Counsel Fees,* 56 A.L.R.4th 486 (1987) recognizes

> A conflict is evident between the appellate districts in Florida on the question whether courts have the inherent power to assess attorney

fees against counsel.

In State v. Harwood, supra, the Fifth DCA held there was no authority to assess attorney's fees against a lawyer who was late for a hearing. It held that, if the trial court felt its authority or dignity was offended, it could institute a proceeding for indirect criminal contempt under Fla. R.Crim. Pro. 3.840.

Israel v. Lee, 470 So.2d 861 (Fla. 2DCA 1985) reversed an award of fees, finding no authority to award fees against a lawyer who refused to testify or produce documents:

> Attorney's fees may be awarded only where authorized by either a contract or by a statute or where the attorney's services create or bring a fund or other property into the court.

In Miller v. Colonial Baking Co., 402 So.2d 1365 (Fla. 1st DCA 1981), counsel intentionally caused a mistrial. He was ordered to pay the opposing party's fees. The order was reversed for lack of authority. Like Harwood, supra, Miller suggested that indirect criminal contempt was available, but it rejected a contempt proceeding begun on a motion by counsel, even after a hearing.

In Carnival Cruise Lines and Mase v. Beverly, supra, the First DCA held that punitive sanctions were for direct criminal contempt, and required following Fla. R.Crim.Pro.3.830, even though the court did not designate its sanctions as punishment for "contempt."

> The order on review does not expressly find Mase in contempt. Nevertheless, because the sanction assessed is necessarily founded upon the court's inherent contempt powers, we conclude that a finding of indirect criminal contempt is implicit in the instant order.
>
> Further, although the trial court possessed the authority to assess compensatory fines against Mase for civil contempt, **see** Lamb, v. Fowler, 574 So.2d 262 (Fla. 1st DCA 1991), the order before us must be categorized as one based on direct criminal contempt because it provided punishment rather than coerced compliance with a court order [citations omitted]. [24 FLW D2157]

Article V. Section 5(b), Fla. Constitution, provides that "Jurisdiction of the circuit court shall be uniform throughout the State." This split of authority between District Courts of Appeal does not result in uniform jurisdiction.

V. THIS DECISION HAS A CHILLING EFFECT ON LAWYERS' DUTY TO REPRESENT THEIR CLIENTS ZEALOUSLY

Most importantly, this decision has a chilling effect on lawyers' duty to represent their clients zealously and diligently, within the rules, as required by Rule 4-1.3, Rules of Professional Conduct. Lawyers cannot diligently prepare for trial, if they face sanctions for every subpoena they issue to necessary witnesses.

How can lawyers obtain evidence from reluctant witnesses, if trial courts can award extra-legal sanctions (above statutory witness fees) to hostile witnesses, because they articulately complain? There are clear remedies under the Rules for improper or untimely service of subpoenas. They were not followed here.

This decision not only affects lawyers. It impairs "the people's" right to the

assistance of counsel, and access to the Courts, under Article I, Section 21, Florida Constitution. See also Justice Kennedy's dissent in Chambers v. NASCO, supra, at 111 S.Ct. 2145.

Lawyers are necessary to people who have to go to court, particularly with complex cases. "Unskilled persons who attempt to argue their own cases in a modern courtroom are under the most serious handicap imaginable," Justice Kogan's concurring and dissenting opinion In re Amendments to Rules regulating the Florida Bar 1-3.1(a) and Rule of Judicial Admin. 2.065 (Legal Aid), 598 So.2d 41, 57 (Fla. 1992). If lawyers can be sanctioned for every flaw in the system or in the conduct of their cases--even if they are successful in the matter--lawyers will be constrained to take on only the best-paying cases and clients. This would not serve justice, or our Oath of Admission to the Florida Bar:

> I will never reject, from any consideration personal to myself, the cause of the defenseless or oppressed, or delay anyone's cause for lucre or malice. So help me God.

CONCLUSION

The sanctions on appeal were entered without jurisdiction. They addressed no improper conduct. They were entered without following the Rules or due process.

This Court should reaffirm that only it has the "inherent power" to sanction lawyers. This Court should resolve these conflicts, to insure that discipline of the Bar

is uniform, predictable and independent, throughout the State of Florida. This Court should reverse this decision, and require the trial court to follow the rules. As the 2nd DCA stated in Breed v. Nye, supra:

> The County Judge has ample power to insure that the rules are complied with. On the other hand, he is, like all of us, bound by them himself.

CERTIFICATE OF FONT SIZE

I hereby certify that the forgoing Brief was typed in 14-point CG Times typeface, with one-inch margins.

____
John P. Fenner, Esq., FL Bar No. 0762938

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by U.S. Mail to W. Sheri Smallwood, Esq., 1016 Eaton Street, Key West, Florida 33040, on this 5th day of October, 1999.

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