IN THE SUPREME COURT OF THE STATE OF FLORIDA

BARBARA MOAKLEY, Petitioner,	CASE NUMBER: 95,471 3rd DCA CASE NUMBER: 98-398 730 So.2d 285 (Fla. 3DCA 1998)& 730 So.2d 286 (Fla. 3DCA 1999)
v.	
W. SHERI SMALLWOOD, Esq., Respondent	

PETITIONER'S REPLY 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 an appeal of a decision of the Third District Court of Appeals affirming the trial court's post-divorce, final order. The order imposed sanctions on Petitioner's attorney, Margaret A. Broz, Esq., for subpoenaing Respondent as a fact witness. Petitioner adopts the rest of the Preliminary Statement in her Initial Brief for the Merits, with the following additions:

"Court Minutes" will refer to the Court Minutes of the trial court's December 10, 1997 hearing, attached as Appendix 1.

Petitioner begs this Court's indulgence for covering Points I and V, conceded by Respondent in her Answer. Respondent also conceded part of Point III.

Petitioner/Dennis Haber, Esq., has filed his Initial Brief on the Merits in Diaz v. Diaz, Supreme Court Case No. 95,534. Diaz also involves imposing sanctions on a lawyer under the Third DCA's doctrine of "inherent powers". Haber's Brief argues that the Florida Legislature can allocate attorney's fees to opposing counsel.

This is relevant to this case because Fla.Stat. 454 still provides for a Legislative grant of attorney disciplinary power to all Florida courts, "in all matters of order or procedure not in conflict with the constitution of this State."

Article V of the Florida Constitution ousts such disciplinary power from the

Legislature, so <u>it</u> cannot constitutionally delegate such power to other courts.

RE-STATEMENT OF THE CASE AND THE FACTS

Petitioner appeals the opinion of the Third District Court of Appeal in Moakley v. Smallwood, 730 So.2d 285 (Fla. 3DCA 1998) and 730 So.2d 286 (Fla. 3DCA 1999), on rehearing. The case was a post-divorce enforcement action. This decision upheld the trial court's sanctions against Petitioner and her lawyer, Ms. Broz, payable to Respondent, Ms. Smallwood. (Respondent was Former Husband's former counsel, but she had withdrawn, and was subpoenaed 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 violation of any ethical or Disciplinary Rule.

The affirming decision cited the trial court's "inherent power" 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.

The Subpoena Ms. Broz subpoenaed Ms. Smallwood to appear at a December 10, 1997 hearing in Marathon. The subpoena was not served on Ms. Smallwood until December 8, 1997. Service was technically defective, because

the licensed process server served Ms. Smallwood's secretary, instead of her office manager. (Ms. Smallwood had received a copy of the Notice of Hearing for the hearing on December 4, but had previously withdrawn from the case.)

On December 9, 1997, Ms. Smallwood served her **Special Appearance, Motion to Quash, Motion to Strike, Motion for Protective Order, Request for Sanctions, and Request for Fees, Costs, Expenses and Suit Monies,** etc., on Ms. Broz, by fax. Ms. Smallwood's Motion was not accompanied by a Notice of Hearing, and was not set for a separate hearing.

The Lost Note. On December 10, 1997, Ms. Smallwood attended, and testified. Court Minutes state that "Mr. Moakley swears that he does not have [the] Note. **Both attorneys [Ms. Smallwood and Mr. Carew], do not have [the] Note**."

At the hearing, Former Wife amended her Motion to Compel [delivery of the Note]. Court Minutes state that she "Request[ed] Mr. Moakley/atty. Smallwood/Atty. Carew aff[irmatively] stating **no one has Promissory Note, or does not know where it is.** Atty. Broz to do Ord." (The trial court subsequently found and ruled on December 26, 1997 "that **the Note is lost, and there is no existing copy**," and that "Former Wife has been prejudiced by not having the Note.")

Court Minutes also state "$2,452.68 cost requested by Atty. Smallwood

(under advisement)."

The Court Orders Sanctions: On January 28, 1998, seven weeks after the hearing, the trial court granted Ms. Smallwood's Motion to Quash, etc., sanctioning Former Wife and Ms. Broz, without further hearing or notice.

The trial court stated the subpoena did not give sufficient or timely notice, adding:

> **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 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.

STANDARD FOR REVIEW

On Constitutional questions, and interpretations of Rules promulgated by this Court, it is assumed that the standard for review of these pure questions of law, is the same as that for statutory interpretation, Racetrac Petroleum, Inc. v. Delco Oil, Inc., 721 So.2d 376 (Fla. 5DCA 1998), and State Department of Insurance v. Keys Title, 741 So.2d 599 (Fla. 1DCA 1999)–**de novo**.

If this Court wishes to recede from State ex rel Arnold v. Revels, 109 So.2d 1 (Fla. 1959) and Burns v. Huffstetler, 433 So.2d 964 (Fla. 1983)--to decide that Circuit Courts have "inherent," non-delegated power to discipline lawyers, outside of the Rules established by this Court–then the question of whether the trial court followed proper procedures (or what procedures, if any, must be followed) would presumably also be on a de novo basis.

Similarly, the question of what standards of conduct (if any) would have to be breached before the Circuit Court could impose "inherent power" sanctions, would also presumably be decided, de novo.

If this Court decides that: a) the procedures followed by the trial court in this case were adequate, though not complying with Rule of Discipline 3-7.8; and b) Petitioner breached a Disciplinary Rule (or that a breach of such Rules is not necessary for a trial court to exercise its "inherent powers" to discipline lawyers); then, presumably, review by this Court would be mandatory under Rule 3-

3.7(a)(2).

The standard for review would presumably also be the same as under Rule of Discipline 3-7.7(c)(5), which applies to review of Circuit Court Disciplinary proceedings under Rule of Discipline 3-7.8, under 3-7.8(e):

> **Burden**. Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee [or Circuit Court] sought to be reviewed is erroneous, unlawful or unjustified.

SUMMARY OF ARGUMENT

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, supra.

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 doctrine of "inherent powers" frees the trial court from these procedures.

Article V of the Florida Constitution–by taking Bar discipline away from the Legislature and the Circuit Courts--was crucial to help Florida avoid "massive resistance" to racial integration in the 1950's and 1960's.

Aside from contempt, this Court has never ruled since 1959 that Article V permits imposing other sanctions or legal fees on lawyers.

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

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

MS. SMALLWOOD WAS NOT ENTITLED TO FEES AS AN EXPERT OR SKILLED WITNESS.

The attorney issued a subpoena to a fact witness, because her client needed either, the Note, or a finding that the Note 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 that the Note was important to the Former Wife.

Former Husband's former attorney was called neither an expert witness nor a "skilled witness" within the meaning of §92.231 Fla.Stat. (1997), and was not entitled to compensation as either.

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

No Standards of Conduct. 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.

Rule of Discipline 3-1.2 states that this Court has the "inherent power and duty to prescribe standards of conduct for lawyers, to determine what constitutes grounds for the discipline of lawyers, to discipline for cause attorneys..." Trial

courts have no "inherent power" to sanction lawyers outside of this Court's Disciplinary Rules.

No Procedure. Even if Ms. Broz violated a Disciplinary Rule, the trial court did not give her time to prepare a defense. It did not give her another hearing in the seven weeks between the December 10, 1997 hearing, and its January 28, 1998 Order appealed. The trial court totally failed to follow the procedures set forth in Disciplinary Rule of Procedure 3-7.8, or in 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, without any notice that it was going to be heard at that time, the trial court disregarded basic due process.

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

Article V, Section 5(b), Fla. Constitution, provides that "Jurisdiction of the circuit court shall be uniform throughout the State."

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 and zeal, why should they take on any but the best-paying clients?

If only the wealthy can hire lawyers to zealously represent them, how can

the poor or middle-class receive justice? "Access to the courts", without zealous lawyers, is an empty promise.

ARGUMENT

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

The Supreme Court has "Exclusive Jurisdiction". Article V, Section 15, Florida Constitution, adopted in 1986, 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.

Article V abolished the previous "inherent powers" of the Legislature, and the Circuit Courts, to discipline lawyers. State ex rel Arnold v. Revels, supra:

> 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.' The legislature was likewise divested of any legislative control in this field by 23 of Article V.

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

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. [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. [109 So.2d 1, 3]

Historical Context of an Independent Bar. These were not just jurisdictional technicalities. Article V was part of Florida's epic struggle for an independent judiciary, and for an independent, integrated Bar.

When Florida adopted Article V in 1956, Brown v. Board of Education of

Topeka, Shawnee Co., Kansas, 347 U.S. 483 (1954) was only two years old. Top legal authorities from Virginia, Alabama, Mississippi and other southern states were planning their strategy of "massive resistance" in the courts, to racial integration.

In 1956, the predecessor to Rule of Discipline 3-4.7 (as now) provided:

> Violation of the oath taken by an attorney to support the constitutions of the United States and the State of Florida [which required segregated schools in 1956] is ground for disciplinary action. Membership in, alliance with, or support of any organization, group or party advocating or dedicated to the overthrow of the government by violence, or by any means in violation of the Constitution of the United States or constitution of this state shall be a violation of the oath.

Article V was enacted years before reapportionment and the Federal Voting Rights Act of 1967. Allowing the Legislature and the Circuit Courts to control attorney discipline could have been dangerous. Then, it was not impossible to imagine the Legislature, or a Judge, declaring or finding that the National Association for the Advancement of Colored People was "allied with" the Communist Party. (In the 1950's, the Communist Party was generally assumed to be dedicated to the overthrow of the government, by unconstitutional means.) Then, the NAACP's lawyers could have been disciplined for challenging Jim Crow.

The State of Florida still owes much to lawyers who fought in the 1940s and

1950s, for a unified, integrated, independent Bar, under Article V. Our independence from the Legislature and the lower courts, helped Governor LeRoy Collins and others, bring Florida into the 20th Century in race relations. We are not perfect, but Florida had less trauma–and more justice--than other states.

As this Court states in the Preamble to the Rules of Professional Conduct:

> It is a lawyer's duty, when necessary, to challenge the rectitude of official action....An independent legal profession is an important force in preserving government under law, for abuse to legal authority is more readily challenged by a profession whose members are not dependent on the executive and legislative branches of government for the right to practice.

Exemption for Contempt. This Court later allowed other courts the "inherent power" to punish by contempt minor attorney misconduct--"lesser infractions" not requiring suspension or disbarment: 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).

Burns v. Huffstetler, supra, restates 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).

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

There was no finding of contempt against Ms. Broz in the case at bar, however. Her 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.

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....

This Court Delegated Its Exclusive Jurisdiction over Attorney Discipline.

Disciplinary Rule 3-3.1 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 court.

3-3.5 delegates disciplinary power to the Circuit Court "**under these Rules**

of Discipline". These Rules are the disciplinary procedures in Rule 3-7.8, in Canon 3(D) of the Code of Judicial Conduct, and in the Florida Standards for Imposing Lawyer Sanctions. The trial court followed none of these Rules.

As conceded by Respondent in her Answer Brief, the decisions of the Third and Fourth DCA's, giving trial courts "inherent powers" to discipline lawyers, create a parallel and unconstitutional regime of attorney discipline.

Pantori v. Stephenson, 384 So.2d 1357, 1358-9 (Fla. 5DCA 1980) restates the correct rule:

> 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).

Recent Supreme Court Cases. Aside from contempt, this Court has never clearly ruled that imposing attorney's fees on the losing lawyer did not infringe on this Court's exclusive jurisdiction. Although Whitten v. Progressive Casualty Insurance Co., 410 So.2d 501 (Fla. 1982) held that former Fla. Stat. 57.105, imposing fees on the losing party for failure to raise a justiciable issue of law or fact, was Constitutional in 1982, Fla. Stat. 57.105 did not provide that these fees could be imposed on the party's lawyer until 1986, in Laws of Fla. 86-160.

Similarly, this Court exercised its preemptive rule-making power in 1992, in Timmons v. Combs, 608 So.2d 1 (Fla. 1992), to supercede Florida Statutes on Offers of Judgement.

The Florida Legislature, in enacting "tort reform", Laws of Fla., 99-225, also deferred to this Court's Constitutional rule-making and disciplinary powers:

> should any court...enter a final judgment concluding or declaring that any provision of this act improperly encroaches upon the authority of the Florida Supreme Court to determine the rules of practice and procedure in Florida courts....any such provision [is intended to] be construed as a request for rule change pursuant to s.2, Art. 5 of the State Constitution and not as a mandatory legislative directive. [Section 34, Laws of Fla. 99-225]

Inherent Powers of the Federal Courts. The United States Supreme Court has (by a 5-4 decision) allowed federal courts to sanction lawyers under their "inherent powers", Chambers v. NASCO, INC, 501 U.S. 32, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991). Unlike our trail courts, however, each federal court admits to practice all lawyers who practice before it. Federal courts also do not have our Article V, Florida Constitution, or our history.

The Trial Court's Sanctions were Disciplinary Sanctions. The trial court's sanctions are the same as "sanctions" under subsections 2.8(a) and 2.8(b), Florida Standards for Imposing Lawyer Sanctions–restitution and assessment of costs. See also Levin, Middlebrooks, Mabie, et al. v. U.S. Fire Insurance Co., quoted, supra. William I. Weston, in "Court-Ordered Sanctions of Attorneys: A Concept that

Duplicates the Role of Attorney Disciplinary Procedures, 94 Dickinson L. Rev. 897, 915 (1990), also concludes that court-ordered sanctions are disciplinary sanctions.

II. ISSUING THE SUBPOENA, WAS NOT IMPROPER. THE DECISION ARBITRARILY EXPANDS EVEN THE "INHERENT POWERS" DESCRIBED IN SANCHEZ v. SANCHEZ, et al.
MS. SMALLWOOD WAS NOT ENTITLED TO FEES AS AN EXPERT OR SKILLED WITNESS.

The Appealed Decision Expanded the "Inherent Powers" Doctrine of Sanchez, supra, to a Subpoena Issued Without a "Reasonable Explanation".

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 merit sanctions under the "rarely applicable...inequitable conduct doctrine of Bitterman v. Bitterman, 714 So.2d 356 (Fla. 1998). The trial court in Bitterman did not award any fees or other sanctions against the lawyers in that case, however.

Respondent's sole claimed statutory justification, to award Ms. Smallwood's legal fees, is §92.231 Fla.Stat. The Third DCA apparently rejected this argument in its decision below.

Because Ms. Smallwood was not called as an "expert witness" and does not claim that she was so, she refers to herself as a "**skilled witness**." Notwithstanding Ms. Smallwood's undoubted skill as an advocate and as an attorney, she was not a

“skilled witness” at this hearing.

Black’s Law Dictionary (Revised Fourth Edition, 1968) defines “skilled witness” as:

> [O]ne possessing knowledge and experience as to a particular subject which is not acquired by ordinary persons [citation omitted]. Such witness is allowed to give evidence on matters of opinion and abstract fact.

The Florida Supreme Court, in Fred Howland, Inc. v Morris, 196 So. 472, 475, 143 Fla. 189 (Fla. 1940), quoting *Corpus Juris*, defines a “skilled witness” as:

> a witness, of special knowledge or skill on a subject outside of the ordinary realm of human experience may be permitted to stay his inference from facts observed by him as to matters connected with his speciality....such witness is frequently termed an expert, but this is inaccurate, for the skilled witness testifies as to the result of his own observation and occupies the same position as any other witness except that within certain lines he possesses a superior knowledge which enables him to understand....what he has observed, although he may also be competent to testify as an expert on hypothetically stated facts.

Ms. Smallwood was not qualified or called as an expert witness, nor was she qualified or called as “skilled witness.” She was called only as a fact witness. She was only asked if she had the Note in her possession, or if she knew where the Note was. Answering this question required no special knowledge or expertise. It required no opinion, superior knowledge or inference. Ms. Smallwood is a skilled attorney and advocate, but she was not asked to testify as to the law, or as a lawyer.

In Kendall Racquetball Investments, Ltd. v. Green Companies, Inc. of Fla.,

657 So.2d 1187, 1188 (Fla. 3DCA 1995), the Third DCA rejected testimony of an "omnibus expert", an experienced trial attorney, on the need for other experts and their fees, quoting Powell v. Barnes, 629 So.2d 185 (Fla. 5DCA 1993):"That evidence must come from witnesses qualified in the areas concerned." The only expertise requested of Ms. Smallwood was that of a file clerk, with knowledge of what was in the Files.

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

What Are the Substantive Standards for Exercising Inherent Powers? In this case, the action sanctioned, violated no ethical, disciplinary or professionalism rule, but "inherent powers" provide no standards or guidelines to a trial court. Will every judge have a different standard for sanctions? Without objective rules, judges, through no fault of their own, will quickly move past arbitrariness, to caprice.

This Court and the Bar have labored over the Rules for many years. Lack of standards for disciplining lawyers–or having as many standards as there are judges–is inappropriate. Bickerman and Smith, writing on the Roman Republic, in The Columbia History of the World, Harper & Row, 1972, speak of the uniformity of legal results throughout the Roman World:

> By such determination in many exemplary cases, they made the meaning of the law predictable and the same for all. This rivals the

> political union of the Mediterranean world, as the greatest achievement of the Roman Republic.

Moreover, under "inherent powers," lawyers do not know what actions may be sanctioned, or where the line will be drawn, until after the fact. This may have an in terrorem effect on attorneys' advocacy. This Court, in the Preamble to the Rules of Professional Conduct, stated that one of a lawyer's functions is to "**zealously assert the client's position under the rules of the adversary system**." How can you be zealous, or "diligent"–Rule 4-1.3–if Disciplinary Rules are not definite? How can you have a "adversary **system**", at all?

Alexander Hamilton, writing of the US Constitution's prohibition against **ex post facto** laws, in The Federalist, No. LXXXIV, stated:

> The creation of crimes after the commission of the fact, or in other words, the subjecting of men to punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny.

If each judge has his own, different standard, sanctions will be inherently arbitrary. See, Justice Kennedy's dissenting opinion (joined by three other Justices) in Chambers v. NASCO, INC, supra, at 2145.

Lack of Procedural Due Process. Carnival Cruise Lines and Mase v. Beverly, 24 FLW D2154 (Fla. 1DCA, September 16, 1999) reversed sanctions against a lawyer, holding contempt to be the only way to discipline him, outside of

the Disciplinary Rules and Procedures:

> 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]

Even lawyers are entitled to due process in their discipline, In Re: Rufalo, 390 U.S. 544 (1975). Petitioner got very little in this case, because--in contrast to the careful procedures of Bar discipline, or Circuit Court discipline under Rule 3-7.8--the trial court held only one hearing on sanctions, on December 10, 1997, the next day after Respondent served her Motion for Sanctions. (The hearing was set for another matter.) Ms. Broz had no chance to prepare a defense, or summon witnesses in her defense.

The trial court then waited seven weeks to grant the Motion for Sanctions, without a transcript of the hearing. 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. Disciplinary Rule 3-7.8 requires the hearing to before another judge, and the prosecution to be by the State Attorney.

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]

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, and Breed v. Nye, 263 So.2d 252, 253 (Fla. 2DCA 1977).

Giving a lawyer less than one day to prepare a defense, before taking away her property, is also a violation of fundamental due process.

Rule of Discipline 3-7.8(e) also allows for mandatory review of Circuit Court disciplinary proceedings by this Court, under Rule 3-7.7. In contrast, to Petitioner's knowledge, this Court has not yet taken the inherent-power, lawyer-sanction case of Smallwood v. Perez, 717 So.2d 347 (Fla. 3DCA 1998), for its discretionary review.

If appeal to this Court of "inherent power" sanctions is only through discretionary review, few circuit courts would bother to attempt discipline through the Disciplinary Rules. It would be far too simple, and less subject to this Court's review, to use their "inherent powers". This Court would then have ceded away some of its Constitutional jurisdiction to review lawyer discipline.

"Summary justice" for erring lawyers, without delay or cumbersome procedure, is emotionally and politically attractive. Florida has a long history with

summary justice, however. This history includes Lincoln's suspension of **habeas corpus** in "The War", lynchings and riots. Florida adopted Article V and the rest of our Constitution, to promote the rule of settled, predictable and orderly law.

Elaborate Constitutional safeguards are <u>inconvenient</u> and time-consuming. That is their nature. That is why we have constitutions.

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

Article V, Section 5(b), Fla. Constitution, provides that "**Jurisdiction of the circuit court shall be uniform throughout the State**."

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

The Third DCA's decisions have a chilling effect on our duty to represent our clients zealously and diligently, within the rules, as required by Rule 4-1.3, Rules of Professional Conduct. We cannot diligently prepare for trial, if we face sanctions for every subpoena we issue to necessary witnesses.

How can we obtain evidence from reluctant witnesses, if trial courts award extra-legal sanctions (above statutory witness fees) to hostile witnesses, because they articulately complain? How can we diligently represent clients who cannot pay for possible sanctions?

This Court stated, in the Preamble to the Rules of Professional Responsibility:

> A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance.

If lawyers can be sanctioned for every flaw in the system, or in the conduct of their cases--even if they are successful overall--lawyers will be tempted to take on only the best-paying cases and clients, or to never "push the envelope" for a client. This would not serve justice, the public, 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.

We have to maintain our independence, for our clients' sake. As Frank R. Rosiny, wrote, on behalf of small law firms, in the New York Law Journal on April 20, 1990:

> There is an important functional difference between a system which threatens to penalize a client and one which threatens his lawyer for actions undertaken in an adversarial context. If only the client is put at risk, he can determine for himself (with the advice and assistance of counsel) whether his interest in the litigation warrants the exposure; but, if the lawyer is put at substantial risk, **the ultimate danger is that the client may never be fully informed of his rights**.

Rosiny continues that the chilling effect of arbitrary lawyer sanctions would probably not appear in reported cases, but would sink into the "viscera" of counsel for the unwealthy, made timid by fear of sanctions.

We should not be tempted, by fear of arbitrary sanctions, to compromise our duty of loyalty to our clients. We must be better than that. We took an Oath.

CONCLUSION

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

This Court should reaffirm that only it has the "inherent power" to sanction lawyers, to insure that discipline of the Bar remains uniform, predictable and independent, throughout the State of Florida–for the sake of our clients.

This Court should reverse this decision, and require the trial court to follow this Court's Rules.

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 ___ day of December, 1999.

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