IN THE SUPREME COURT OF FLORIDA

Supreme Court Case No.: SC01-736

The Florida Bar File Nos. 2000-51, 031(11D)

2000-70, 361(11D)

THE FLORIDA BAR,

Complainant/ Appellee,

v.

BARTLEY CHARLES MILLER,

Respondent/ Appellant,

INITIAL BRIEF OF RESPONDENT/APPELLANT BARTLEY CHARLES MILLER

EDMUND M. ARISTONE, JR., ESQUIRE
Attorney for Bartley Charles Miller
Florida Bar No.:0076422
1151 North Atlantic Boulevard, # 11C
Fort Lauderdale, FL 33304
Telephone: 954-566-1717

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JURISDICTION

The Court has jurisdiction over this appeal pursuant to Rule 3-1.2, 3-3.1 and 3-7.7 of the Supreme Court of Florida in that Appellant Bartley C. Miller, appeals the report of referee the Honorable Arthur Rothenberg.

STATEMENT OF THE CASE AND FACTS

This case involves attorney Bartley C. Miller's (hereinafter referred to as "Miller") good faith belief and interpretation of the extremely technical and ever evolving legal procedures in employment discrimination litigation. In late January 1998, the Equal Employment Opportunity Commission (hereinafter referred to as "EEOC") issued a Right to Sue Letter that it declared was inadvertently sent to Miller's client Dr. Roberta Santini. The EEOC within weeks of issuing the invalid

letter advised Miller's, then associate Heidi Freidman, to disregard the letter and that a valid and complete Right to Sue Letter would be forthcoming. (Testimony of Shari Levine, transcript P. 113, lines 3-22) Attorney Friedman handled all of Miller's EEOC complaints from start until receipt of the Right to Sue Letter (Id. at Page 109, lines 19-25 and testimony of Bartley C. Miller, Page 128, lines 8-25) The EEOC issued the second valid Right to Sue Letter on March 2, 1998. (Id.) Miller pursuant to Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), et. seq. had 90 days to file suit upon receipt of the EEOC letter. Miller's law associates drafted and prepared the lawsuit for employment discrimination and same was calendered by his staff to file the lawsuit within 90 days of the March 2, 1998 letter. (Id. at P. 114 lines 8-20 and testimony of Bartley C. Miller, p. 131, lines 23-25 ad P. 132, lines 1-25) However, the lawsuit was filed on May 28, 1998 several days past the first invalid and incomplete letter issued by the EEOC but within the time requirements of the valid and legally acceptable second Right to Sue Letter.

Miller's involvement in the case did not begin until the lawsuit was filed in the United States District Court for the Southern District of Florida. Within weeks of the

lawsuit being filed Miller left his firm and joined another law firm. Dr. Santini approximately one (1) month later requested Miller to take over her case and Miller agreed. After Miller's departure from his original law firm, the file was held by the prior law firm and Miller was unaware and did not have the first invalid Right to Sue Letter (Testimony of Bartley C. Miller, transcript at P. 134, lines 9-18 and page 138, lines 23 - 25 and page 139, lines 1-18)

The Defendant in the employment discrimination case was the Cleveland Clinic Florida (hereinafter referred to as "CLINIC"). The Clinic filed the standard answer and affirmative defenses in employment law cases. (Transcript P. 37, lines 21-25 and page 38, lines 1-4) One of the defenses raised by the Clinic was Plaintiff's failure to timely file her lawsuit after receipt of the first invalid EEOC Right to Sue Letter.

The EEOC, after determining it issued the first Right to Sue Letter in error, issued and forwarded a second and legally valid Right to Sue Letter to all parties including the Clinic. (Testimony of Jim Colon, P. 71, lines 1-8 and P. 72 lines 10-15) The Clinic never submitted a request to produce to Dr. Santini, never subpoenaed the records from the EEOC or filed any discovery requests to Dr. Santini as to why the EEOC

issued two (2) Right to Sue Letters. (Transcript P. 17, lines 2-9) Local Rule 26.1A of the United States District Court for the Southern District of Florida governing discovery disclosure opted out of Fed. R. Civ. P. 26 which requires any party to disclose documents that pertain to the pleadings at issue.(Testimony of Bartley C. Miller, Transcript P. 180, lines 3-25) S. D. FLA. L. R. 26.1A states "the disclosure requirements imposed by Rule 26(a)(1)-(4), Fed. R. Civ. P., and the early discovery moratorium imposed by Rule 26(d), Fed. R. Civ. P., **shall not apply** to civil proceedings in this Court." (Emphasis Added) Therefore, Miller was under no obligation to come forward with information that his client had received the first Right to Sue Letter. (Id. at P. 179, lines 5-20) More importantly, the first letter was not considered valid by the EEOC and thus, was not material to the case and a lawsuit could not have been filed based on the first invalid Right to Sue Letter (Testimony of Jim Colon at Transcript P. 73, lines 21-25 and P. 74, line 10 and testimony of Fred Behul at Transcript P. 82, lines 5-25, P. 84, lines 16-25 and P. 85, lines 1-15).

Jim Colon from the EEOC testified that a review of the file by the EEOC revealed the January 1998 Right to Sue Letter was not complete and thus, the reason the EEOC

issued the second Right to Sue Letter in March 1998 which it considered to be controlling (Testimony of Jim Colon, transcript P. 71, lines 5-7 and P. 72, lines 6-14). Mr. Colon testified Dr. Santini had 90 days from the date of the second Right to Sue Letter to file her lawsuit (Id. at P. 73, lines 21-25). Fred Behul from the Broward County Human Rights Division that investigated Dr. Santini's claim for the EEOC, testified that the first Right to Sue Letter was a nullity and Dr. Santini could not have filed her lawsuit with the invalid January 1998 Right to Sue Letter issued by the EEOC. (Testimony of Behul, transcript P. 85, lines 2-15, P. 86, lines 1-5) The Clinic moved for summary judgment in February 1999 asking the Court to dismiss Plaintiff's federal claims because Plaintiff failed to file her complaint within 90 days of the invalid January 1998 EEOC letter. (Testimony of Bartley Miller, transcript P. 135, lines 1-25 and P. 136, lines 1-25) Miller filed a response to the Summary Judgment in which he made no misrepresentations about the invalid Right to Sue Letter. (Id. at transcript P. 155, lines 3-16) In fact, Miller never admitted nor denied his client had received the first invalid letter. Miller argued the invalid Right to Sue Letter was improperly delivered to Dr. Santini since it was delivered to her mother's residence and not to Dr. Santini's residence

(Id. at, Transcript P. 155, lines 13-16, P. 158, lines 2-14, P. 166, lines 7-12) The issue of the EEOC issuing an invalid Right to Sue Letter and same being delivered to another address other than where the party resided had not been decided by the Eleventh Circuit Court of Appeal and thus, there were was no legal precedent. (Id. at., transcript P. 157, lines 3-10).

Miller references the invalid Right to Sue Letter throughout his response memorandum of law (Id. at, transcript P. 159, lines 5-25 and P. 160, lines 1-18) The Clinic in its reply memorandum pointed out to the trial court that Dr. Santini did not contest the undisputed fact that she had received the first invalid Right to Sue Letter. (Id. at, transcript P. 166, line 14-25 and P. 167, lines 1-25).

The trial court held two (2) hearings on the Clinic’s motion for summary judgment. Miller filed the affidavit of Heidi Friedman in which she prepared and stated she had only received one Right to Sue Letter from the EEOC. (Id. at P. 162, lines 23-25) The affidavit did not state Dr. Santini had forwarded the first invalid Right to Sue Letter to her. The purpose of Ms. Friedman’s affidavit was to establish the EEOC did not mail her a copy of the invalid Right to Sue Letter as was mailed to the Clinic’s attorney. (Testimony of Bartley C. Miller, transcript P.

135, lines 1-25 and P. 136, lines 1-25) When Miller met with Ms. Friedman to discuss the matter, Ms. Friedman stated "I never received it" when referring to the January 1998 Right to Sue Letter. (Id. at P. 139, lines 1-14). At the beginning of the first hearing, the Clinic abandoned their defense that receipt by counsel triggers the 90 day filing requirements. (Id. at P. 164, lines 12-25 and P. 165, lines 1-25). At the second follow-up hearing, Miller abandoned the issue of whether Dr. Santini received the first Right to Sue Letter and continued with other valid legal arguments.

SUMMARY OF ARGUMENT

Miller did not violate the Rules of Professional Conduct governing lawyers. At the time, Miller made his legal arguments, he had a good faith belief that his arguments were sound and within reason. Both the EEOC and the Broward County Human Rights Division held the same legal opinion as did Miller regarding the January 1998 invalid Right to Sue Letter. The legal arguments advanced by Miller were very technical but within the limits of the law at the time they were made.

Miller had no legal or moral obligation to come forward with immaterial and irrelevant information regarding the

invalid January 1998 Right to Sue Letter. There is no duty imposed upon a lawyer to supply his opposing counsel with the proof that party needs to carry its legal burden.

The sanctions recommended by the referee are erroneous and unsupported not only by the facts and circumstances but by the case law setting forth the standard for similar acts of misconduct. The standards for imposing sanctions should the court find Miller acted inappropriately would be either a public reprimand or admonishment. Miller’s actions, if taken as inappropriate, do not give rise to the sanctions recommended by the referee. Irrespective of Miller’s good faith belief and the correctness of his technical argument, he took remedial steps before any irreparable harm was done on the merits of the motion and the merits of the case itself.

The referee’s findings of fact and recommended sanctions were prepared and submitted by counsel for The Florida Bar. Miller was never provided the opportunity to contest or otherwise respond to the proposed order submitted by The Florida Bar. The law is well settled that a trial court is not allowed to relinquish its obligations to preparing sensitive orders to opposing counsel. In the present case, the referee committed reversible error by

relinquishing his obligation of preparing his findings of facts and recommendations to counsel for The Florida Bar.

I. WHETHER THE FLORIDA BAR PRESENTED CLEAR AND CONVINCING EVIDENCE THAT ATTORNEY BARTLEY MILLER VIOLATED THE RULES OF PROFESSIONAL CONDUCT GOVERNING ATTORNEYS.

Miller did not violate Rules 4-3.3(a)(1),(A lawyer shall not knowingly make a false statement of material fact or law to a tribunal); 4-3.4(a)(A lawyer shall not unlawfully obstruct another party's access to evidence or otherwise unlawfully alter, destroy, or conceal a document to other material that the lawyer knows or reasonably should know is relevant to a pending proceeding; nor counsel or assist a witness to testify falsely) and 4-8.4(c) (A Lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation of the Rules of Professional Conduct. The Florida Bar failed to carry its heavy burden of proving by clear and convincing evidence that Miller violated the above Rules. The Florida Bar failed to provide any witnesses at trial. Miller on the other hand presented the testimony Jim Colon from the EEOC that the first Right to Sue Letter was not valid and Dr. Santini

could not have filed her lawsuit based on that letter. Miller presented testimony of Fred Behul from the Broward County Human Rights Division and Fair Practices Employment Agency of the EEOC that investigated Dr. Santini's Charge of Discrimination. Mr. Behul testified that the January 1998 Right to Sue Letter was not valid and that only the second letter dated March 2, 1998 provided Miller the jurisdiction to file his lawsuit on behalf of his client in federal court.

The legal arguments advanced by Miller during the summary judgment proceedings were highly technical but were well within the law as it was at the time. There is no duty to come forward absent a proper discovery request, to supply an adverse party with the proof that party needs to carry its burden. For example, if a party knows of a witness to a collision that is adverse to him and no discovery request is made, the non-moving party may properly defend against the summary judgment motion by asserting that the movant has failed to carry his burden. He is under no duty to gratuitously supply that witness to his adversary. That is the factual scenario in this case and Miller should not be sanctioned.

A complete review of Miller's response memorandum reveals he never denied Dr. Santini's receipt of the invalid January 1998 Right to Sue Letter. In fact, several times

in the response Miller admits Santini received the first Right to Sue Letter. Miller never hid any evidence. Miller is the one who subpoenaed Ms. Friedman to the hearing. Although Miller objected to some questions Ms. Friedman was asked by the Clinic's counsel, that is what litigation/trial attorneys do. Miller never told Ms. Friedman before, during or after the hearing not to tell the truth. Ms. Friedman told the truth and thus, there was no irreparable harm.

At the time Miller made his arguments to the Court, he had a well founded belief that his legal position was well taken. The EEOC and Broward County Human Rights Division itself believed the January 1998 Right to Sue Letter was a nullity and not valid and thus not material to the case. Given those facts, Miller was entitled to believe and did believe the January 1998 letter had no legal effect. The Magistrate's ruling on the merits does not affect what Miller, the EEOC and Broward County Human Rights Division reasonably believed at the time. The federal and state discrimination laws are very technical and evolving. The employment discrimination laws and procedures are extremely complex, contradictory and confusing. Miller should not be sanctioned because a court did not agree with his interpretation of the law as it stood that time.

The Florida Bar's Standards for Imposing Lawyer Sanctions, 6.12 provides for suspension if material information has been withheld, and no remedial action has been taken. Although as noted, Miller maintains that at the time of his actions he honestly believed no information was improperly withheld, remedial action was taken before any irreparable harm was done. The Florida Bar failed to present evidence to contradict this fact. Despite the fact that the Magistrate made some crucial errors in his sanctions Order (e.g. asserting that a discovery request had been made for the document at issue, when in fact no such request was made; assuming that the Rules required disclosure when in fact they did not; and failing to understand Miller's distinction between delivery and receipt), Miller took remedial action to totally eliminate the question of Dr. Santini's receipt of the undated right to sue letter and its subsequent fax transmission to Heidi Friedman.

After all the pleadings were filed on the Clinic's Motion for Summary Judgment, the Magistrate held two hearings. At the first hearing on May 21, 1999, Heidi Friedman testified that Dr. Santini had faxed the undated right to sue letter to her on February 2, 1998. Thus, the matter was fully disclosed at that point, before any ruling on the Motion for Summary Judgment. At the June 1, 1999

hearing, Miller totally abandoned any claim regarding Dr. Santini's receipt of the undated letter.

Thus, irrespective of Miller's belief in the correctness of his procedural position, he took remedial steps before any irreparable harm was done on the merits of the Motion, and the merits of the case itself. As a result, Standard 6.12 which calls for suspension if no remedial action is taken does not apply and a lesser sanction, if any, should be applied.

The critical act of remedial action as well as several other important facts serve to distinguish this case from The Florida Bar v. Cox, 794 So.2d 1279 (Fla. 2001) cited by the Bar to the referee. Ms. Cox was a federal prosecutor who called a crucial witness during trial and had the witness identify herself with a fictitious name given to her by Customs; this, despite a direct and unequivocal pre-trial Order directing the government to disclose her true name. The defense was thus deprived of the Constitutional right of confrontation, and the opportunity to cross-examine the witness about numerous items which substantially affected her credibility. The defense also made numerous strategic moves during the trial as a direct result of the prosecutor's subterfuge. When Cox's misdeeds were discovered, the Court felt it had no alternative but to grant a mistrial and to

ultimately dismiss the indictment on double jeopardy grounds. The judicial system was thus totally deprived of the opportunity to try the defendant in a significant criminal case, and to have a jury decide the case. The Florida Supreme Court, in ordering a one year suspension for Ms. Cox, pointed out the higher duty of prosecutors because of their unique powers and responsibilities, embodied in Rule 4-3.8 entitled "Special responsibilities of a prosecutor." As a direct result of the prosecutor's actions, "the actual result, dismissal with prejudice, was a significant adverse effect on the legal proceeding." Cox, supra, at 1283. In the case at bar, Miller's actions did not have a permanent effect on the proceedings. The only effect was to delay the ultimate disposition of the Motion for Summary Judgment, which was granted after Miller abandoned the issue of receipt by Dr. Santini.

II. WHETHER THE REFEREE'S RECOMMENDATION OF A TWO (2) YEAR SUSPENSION IS APPROPRIATE IN LIGHT OF THE FACTS, CIRCUMSTANCES AND MITIGATING FACTORS.

The standards for Imposing Sanctions include:

> Public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

At worst, that is what happened here: an interference or potential interference with a legal proceeding. Standard 6.24 also bears note:

> Admonishment is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes little or no injury to a party, or causes little or no actual or potential interference with a legal proceeding.

The bar also supplied the Court with Standards 7.1 and 7.2, but neglected to mention 7.3, which states:

> Public reprimand is appropriate when a

> lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

And 7.4, which states:

> Admonishment is appropriate when a lawyer is negligent in determining whether the lawyer's conduct violates a duty owed as a professional, and causes little or no actual or potential injury to a client, the public or the legal system.

Standard 7.4 seems particularly appropriate and appears to fit the facts here. Given that Miller took a technical view justified by the Rules, at most he may have been negligent in determining whether he should have taken the stance he did. In the final analysis, his actions caused little injury.

Even if the Court were to find that Miller's conduct was

intentional (as opposed to negligent, or technically correct, albeit imprudent) the cases that deal with similar conduct without the overlay of additional violations call for lesser sanctions than were recommended by the referee. The Cox one-year suspension involving a federal prosecutor with a higher duty who suborned perjury and caused the severe damage of a dismissal of a criminal case, seems to represent the outer limits of discipline for cases involving false statements or testimony. But Cox is unusual, given the stricter standard of accountability for prosecutors, and the unconscionable result of a serious criminal case being dismissed as a direct result of her actions. Miller neither gave nor suborned such testimony, was not a prosecutor, and caused no irreparable damage. His actions related to representations in pleadings, and failing to disclose a document which he believed he had no duty to disclose. The document itself proved to be totally irrelevant to both Plaintiff and Defendant.

The following cases, involving intentional conduct, offer relevant guidelines, and are far more representative of the range of penalties applicable to such conduct.

In The Florida Bar v. Tobin, 674 So.2d 127 (Fla. 1996), Mr. Tobin represented a client in an action against an insurance company. A final judgment was entered for Plaintiff, and the Defendant deposited money into the court

registry. Pursuant to court order, a portion of the funds were withdrawn from the court registry to satisfy legal fees. Subsequently, Tobin's associate hand delivered a motion to the court seeking the release of the remaining funds. Although a lienor was claiming an interest in the settlement proceeds generated from the case, the associate, at Tobin's direction, in an *ex parte* proceeding, falsely represented to the court that the motion for the release of the remaining funds was unopposed. Based upon that representation, the court released the balance of the funds to Tobin's associate. The Defendant was not notified of the release of the funds and did not receive the proposed order releasing the funds until after it was signed. Upon motion by Defendant, the court required Tobin and his client to return the proceeds to the court registry. Tobin had released the money to his client, knowing that Defendant had scheduled an emergency hearing for return of the money for the next day. When Tobin failed to return the improperly withdrawn funds, the Defendant filed a Motion to Show Cause against Tobin and a Motion for Sanctions. Based upon the above, the Bar filed a complaint against Tobin. The referee found Tobin guilty of violating Rule 4-3.3(d) for failing in an *ex parte* proceeding to inform the tribunal of all material facts known to him that would enable the tribunal to make an informed decision.

The referee recommended a **forty-five day suspension**. In determining that forty-five days was an appropriate suspension for failure to inform the tribunal of all material facts known to him that would enable the tribunal to make an informed decision, and for knowingly disobeying an obligation under the tribunal, the Court considered Tobin's prior discipline. He had previously been reprimanded publicly on one occasion, and privately on another. He had also been practicing for over 40 years, and his substantial experience in the practice of law was an aggravating factor. Miller's conduct was far less significant, and caused for less harm. Any discipline should be calculated downward from that imposed on Tobin.

In <u>The Florida Bar v. Kravitz</u>, 694 So.2d 725 (Fla. 1997), the Respondent made an "<u>intentional</u> misrepresentation to the court" on the material issue of who was the manager of a business and responsible for disobeying an injunction. Thereafter, he submitted an order vacating the contempt and falsely represented to the court in an accompanying letter that opposing counsel did not oppose entry of the order. He also lied about whether he had money in his trust account to settle the case. He also tried to extort money from his client. All those affirmative intentional misrepresentations resulted in a 30 day suspension, and an order requiring Respondent to complete the Bar's Practice

and Professionalism Enhancement Program.

In The Florida Bar v. Anderson, 538 So.2d 852 (Fla. 1989) two attorneys were disciplined for making outright "patent" factual misrepresentations[1] in an appellate brief, with the less culpable attorney receiving a public reprimand, and lead counsel being suspended for 30 days.

In The Florida Bar v. Mc Lawhorn, 535 So. 2d 602 (Fla. 1988) the Respondent made "false statements" in a pleading as to the ownership of property in issue. The Respondent had a record of prior discipline. He was publicly reprimanded and ordered to take a CLE ethics course.

In The Florida Bar v. Sax, 530 So. 2d 284 (Fla. 1988) the Respondent was publicly reprimanded for submitting a notarized pleading which contained a factual statement which Respondent "knew or should have known... was not true." He also signed the pleading outside the notary's presence, after the notary had affixed the jurat to the document.

In The Florida Bar v. Wright, 520 So. 2d 269 (Fla. 1988) the Respondent was asked in discovery to reveal any real property sales contracts in which he had an interest. He failed to disclose two such contracts. He was publicly reprimanded.

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[1] See underlying case of Hutchins v. Hutchins, 501 So. 2d 722 (Fla. App. 5th Dist. 1987) for court finding of "patent misrepresentation."

In The Florida Bar v. Hagglund, 372 So, 2d 76 (Fla. 1979) the Respondent failed to inform his client of a conflict of interest and filed an affidavit in a lawsuit against his former client, which he "knew or should have known" was untrue. A public reprimand was ordered.

In The Florida Bar v. Pearce, 356 So. 2d 317 (Fla. 1978) the Respondent was publicly reprimanded after a finding that he participated in plans for witnesses to testify falsely.

In The Florida Bar v. Brooks, 336 So. 2d 359 (Fla. 1976) the Respondent was publicly reprimanded following a conditional guilty plea for testifying falsely under oath at a coroner's inquest.

The foregoing cases amply demonstrate the appropriate range of penalties for **intentionally** making false statements. At most, Miller's actions were negligent (if wrongful at all) and any discipline imposed should be at the lowest end of the continuum, based on the standards set by the Supreme Court in the above cited cases. That is, he should either be reprimanded or admonished to be more careful in the future.

There are a number of mitigating circumstances that should be taken into account in Miller's case. The Florida Standards for Imposing Lawyer Sanctions provide as follows:

9.3 MITIGATION

> 9.31 Definition. Mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be imposed.

The Standards enumerate a number of factors, many of which are applicable here. A brief explanation will be given following recitation of the applicable factor:

> 9.32 Factors which may be considered in mitigation. Mitigating factors include:
>
> (a) **absence of a prior disciplinary record**;

Miller has no prior record of discipline. That should be contrasted with the cases cited by both the Bar and the Respondent, where most of the attorneys had records of prior discipline.

* * * *

> (d) **Timely good faith effort to make restitution or to rectify consequences of misconduct**;

Miller abandoned the position about receipt of the undated letter prior to the final Summary Judgment hearing. Thus the damage, if any, was totally rectified before any adverse result ensued.

* * * *

(g) **character or reputation**;

Witnesses who work for the government and who worked with Miller testified to his impeccable character and reputation for truthfulness, honesty, and integrity. This should bear strongly on the ultimate result in this matter.

* * * *

(k) **imposition of other penalties or sanction**;

Miller received a severe financial sanction from the Magistrate. The Magistrate imposed a fine in the amount of $20,000 as sanctions payable to the Clinic for their attorneys' fees and costs in preparing for and attending the hearings, and ordered Miller to attend 5 hours of CLE, which he has already completed. The Defendant in the underlying case was thus made whole for its fees and expenses related to Miller's actions. This too, should bear strong emphasis in determining the result here.

(l) **remorse**;

Miller has exhibited great remorse over his actions which have brought him to this most unfortunate low point in his career. He testified to what this has done to him emotionally and professionally, and about his great regret for the consequences of the action he chose to take.

III. WHETHER THE REFEREE COMMITTED ERROR IN REQUESTING COUNSEL FOR THE FLORIDA BAR TO DRAFT THE PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ADOPTING SAME ALMOST VERBATIM WITHOUT ALLOWING RESPONDENT/APPELLANT THE OPPORTUNITY TO RESPOND.

The Referee's Findings of Fact and Recommendation of a two (2) year suspension was prepared by and submitted by counsel for The Florida Bar. Respondent, Miller was not provided an opportunity to challenge the submission. Miller was never provided the opportunity to respond to the proposed order submitted by the bar. In essence, the referee assigned his duties of determining the findings of fact and recommended sanctions to counsel for the Florida Bar. The law is well settled in this state and in the Eleventh Circuit Court of Appeal that a Judge's delegation of drafting sensitive and dispositve orders to counsel is overreaching and in exaggeration of the attorney preparing the proposed order. Judge Jay Skelley Wright when characterizing judicial opinions drafted by opposing lawyers was quoted by the Court in Chudasama v. Mazda Motor Corporation, 123 F.3d 1353, 1373, n. 46 (11th Cir. 1997) as

stating they are "not worth the paper they are written on."

In Corporate Management Advisors v. Boghos, 756 So.2d 246 (Fla. 5th DCA 2000)the Appellate Court addressed the issue of a trial court executing proposed findings of fact and conclusions of law as unacceptable and reversed the case to the trial court to issue and prepare its own conclusions of law and fact. Similarly, in White v. White, 686 So.2d 762 (Fla. 5th DCA 1997), the Court addressed a similar issue as presented in our case and wrote,

> "It is the [trial] court's unique responsibility to make the decision on the various issues of the case based on the pleadings before it and its view of the evidence presented. The Court does not fulfill this responsibility by merely choosing the better of proposed judgment or the better option or options contained in competing proposed judgments presented by the attorneys. **Often the attorneys, without appropriate guiding instructions, will make findings of fact and even rulings of law that the court, without such prompting, would never have been considered. The judge, in reviewing the proposed judgment sometimes several weeks or even months after the trial..., may conclude that because the judgment sounds right (even though the judge cannot remember everything that took place at trial) the proposed judgment should be signed**." (Emphasis Added)

Applying the above legal precedent to the facts at issue, the referee's report should be vacated as same was not prepared by a neutral party as required under the bar rule proceedings. In essence, The Florida Bar prosecuted and issued its own order, conclusions of law and suspension.

This is patiently unfair to Miller.

CONCLUSION

The Federal Magistrate who issued the initial order granting the Summary Judgment and who referred this matter to The Florida Bar made some crucial errors and erroneous assumptions in his findings which directly affected his conclusions. After the Summary Judgment hearings, the Magistrate never gave Miller a separate hearing on the sanctions issue. Thus Miller never had the opportunity to correct the record.

Based on the foregoing, Miller submits that no disciplinary should be taken and that the costs judgment entered by the referee be reversed in total. Alternatively, should this Court conclude that sanctions were warranted, they should be at the lowest end of the spectrum of the cases cited by the Respondent/ Appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by mail this _____ day of September, 2002 to: VIVIAN M. REYES, ESQ., Bar Counsel, The Florida Bar, 444 Brickel Avenue, Suite M-100, Miami, Florida 33131-2404; and John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway,

Tallahassee, Florida 32399-2300.

Respectfully Submitted,

EDMUND M. ARISTONE, JR., ESQUIRE
Attorney for Bartley Charles Miller
1151 North Atlantic Boulevard, #
11C
Fort Lauderdale, FL 33304
Telephone: 954-566-1717

By:________________________________
__
EDMUND M. ARISTONE, JR., ESQ.
Florida Bar No.: 0076422

CERTIFICATE OF TYPE SIZE AND STYLE

_____The typed matter in this Initial Brief is proportionally spaced and is in 12 point Courier New type.

____
EDMUND M. ARISTONE, JR., ESQ.