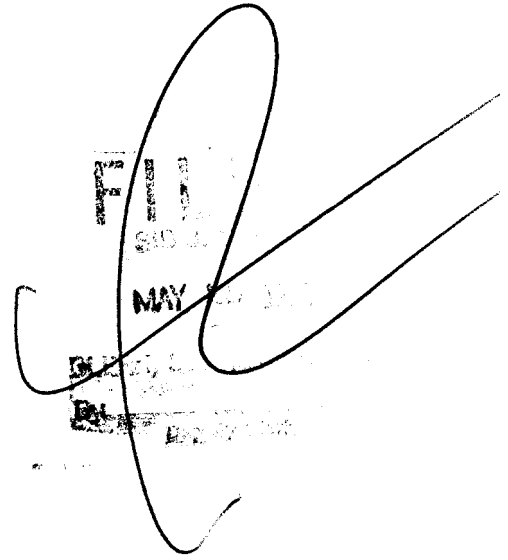


IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,380
[TFB Case No. 89-30,584 (19)]

THE FLORIDA BAR,)
)
 Complainant,)
)
 -VS-)
)
 ANDREW T. COUTANT,)
)
 Respondent.)



PETITION FOR REVIEW

ANDREW T. COUTANT, P.A.

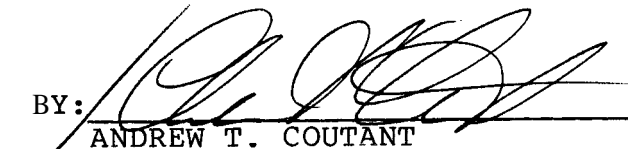
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TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS.	i
STATEMENT OF FACTS.	1
ISSUE ONE	2
CERTIFICATE OF SERVICE.	8

TABLE OF CITATIONS

PAGE

Mahan v. Parliament Ins. Co.

382 So.2d 402 (1980) 6

STATEMENT OF FACTS

The Respondent, ANDREW T. COUTANT, is appealing the findings of the Referee, the Honorable Walter N. Colbath, Jr., who in his finding of fact and recommendation to the Court, did find and determine that the Respondent had failed to maintain effective communication with the complaining witness, Deborah Potter, by failing to return her calls, despite numerous attempts by Ms. Potter to effectuate contact.

At the hearing before Judge Colbath, Ms. Potter testified that she would call weekly in attempts to find out the status of her case and, upon reexamination, called daily in a vain attempt to get information from the undersigned attorney as to her case.

Following the hearing, Judge Colbath ruled that Respondent failed to make contact, despite numerous attempts by Ms. Potter, and was in violation of Rules of Disciplinary Procedure, and following argument, ordered and directed that the Respondent be suspended for a period of thirty days.

Following that ruling, the Respondent filed a Motion for Rehearing, based upon additional evidence not introduced at trial, which consisted of phone message books, and filed two affidavits in support of said motion, setting forth and establishing that Deborah Potter in fact, did not call on a weekly basis or on a daily basis, but did only call on one occasion during the period of time in question.

Following receipt of the Motion for Rehearing and supporting affidavits, the Honorable Judge Colbath, entered an Order denying said Motion, without benefit of hearing or further argument.

This appeal then ensued.

ISSUE ONE

That the Referee hearing this cause erred in failing to grant the Respondent a rehearing as to the issue of the Respondent's failure to return phone calls and remain in communication with the client following the Respondent's Motion for Rehearing with supporting affidavits.

The basis for the complaint by Deborah Potter, was that she had made numerous attempts by phone to contact the Respondent, despite her numerous attempts, failed to have any contact with the Respondent.

At the grievance level, **Ms. Potter** testified before the Grievance Committee on April 12th, 1989. Her initial testimony was quite different from that presented before the Referee.

At the Grievance Committee hearing held the 12th day of April, 1989, the complaining witness testified:

Question: After Mr. Coutant's letter to you in June of 24, 1988, did you have any telephone communication with him?

Answer: None whatsoever.

Question: Any further written communication?

Answer: Nothing.

Question: Here anything from anybody on his staff?

Answer: No. I contacted his staff several times and asked his secretary to have him phone me and never heard from him.

Question: About how many times?

Answer: I started to keep a record. I probably contacted him maybe ten to fifteen times.

Question: And that's since June?

Answer: This is since this all began. Just different times that I had. Everytime I have called him he never returned my phone calls.

Question: O.k., this letter you wrote at the end of September, did your phone calls after that letter...did your phone calls after that letter increase, or decrease, or did they stay the same?

Answer: After the letter in September to him, I tried probably four or five times, then I gave up and complained to the Florida Bar. Line 9, pg. 5 to line 5 pg. 6.

On page seven, Ms. Potter responds to questions by Mr. Block, a member of the committee.

Mr. Block: Do you know the status of the case?

Answer: Absolutely not. The last thing I received was this, and as far as I know there is just depositions still being taken.

Mr. Block: Was there a case filed that you know?

Witness: I don't know anything. All I know is every time I contacted, I never got any answer. Lines 14-20, pg. 7.

Yet on page eight, the witness states that in response to a question from Mr. McGunegle:

Mr. McGunegle: So as far as you know, if suit has been filed, and there is a case here, you don't know whether you have got a trial coming up next week or if it has been dismissed.

Answer: I don't know anything and don't know where to go from here. I have had no contact with this attorney, he doesn't return phone calls, all I am receiving is alot of legal papers I don't really understand.

Mr. McGunegle: You said alot of. You mean just that one?

Witness: This and the previous papers. This is the only one that I received in the past months. You have the documentation there, this is the only thing I received and this is after I wrote to The Florida Bar. Pg. 8, line 24 to pg. 9, line 13.

Finally, Ms. Potter stated the response to questions if she made an appointment of anything, she testified that:

"Every time I spoke to the secretary, I asked if

he would be in and if he could return my call, and she said that he would be in touch with me. He never returned the calls.

Mr. Walker: But you never made an appointment to see him with his secretary?

Witness: No.

Mr. Walker: Why not?

Witness: I felt if he didn't return my calls, he wouldn't see me either... Line 4-13, pg. 14.

At the time this cause was presented by the Bar before the Referee, on February 6th, 1990, Ms. Potter's testimony had continued to evolve from her initial statement that she had made several calls to Respondent's office. In response to the question of Mr. McGunegle,

"Mr. McGunegle: What efforts between June 24th, 1988 and the date of that letter did you undertake to contact Mr. Coutant?

Answer: I had continually called his office and was told that he would return my call.

Question: About how many times a week?

Answer: Several times a week, four or five times. I would call and they would say he would call me back, but I didn't get a return call.

Question: This was during a three month period?

Answer: Yes, sir,

Line 14-24, pg. 7 of the transcript of proceedings before the Honorable Walter M. Colbath, Jr.

Upon further questions, she testified that:

Question: Subsequent to your September 27th, 1988, letter, what further communication did you have from Mr. Coutant?

Answer: None whatsoever.

Question: What attempts did you make to contact him?

Answer I phoned and I wrote that letter, then I notified the Bar about it.

Question: You wrote the letter of September 27th, 1988?

Answer: mmm

Question: And after that time, about how many times and how often did you telephone his office?

Answer: I probably only contacted him a couple times after that then I went to the Bar.
Pg. 7, line 14 - pg. 8 line 24.

On cross-examination, the witness testified in response to the following question,

Question: Now, then, I think you also noted that you called several times a week, each week, and then you said four or five times a week. Do you recall which is correct, the several or four or five times?

Answer: Four or five times. Line 22, pg. 11 through line 3, pg. 12.

This testimony is incredulous when compared to her prior testimony before the Grievance Committee and is in direct conflict with her prior testimony, before the Grievance Committee in which she testified that she called at first several times, then maybe ten to fifteen times. This testimony both before the Grievance Committee and before Judge Colbath, was under oath and therefore, it is painfully obvious that Ms. Potter has perjured herself, to the surprise and detriment of the Respondent.

It is apparent that this testimony was inflammatory, designed to injure and damage your Respondent at any cost, regardless of the truth or falsity of the statements.

Based upon that testimony, and the prior testimony, the Respondent filed a Motion for Rehearing and attached thereto, the affidavits of Norma Russo, his secretary and Bonnie Strom, which

affidavits re attached and made a part hereof by reference, together with the Motion for Rehearing. In those affidavits, it is unequivocally stated, that the telephone records maintained by this office is a normal course of business, that both secretaries went through the phone records, and out of a total of 2,800 calls received by this office during that period of time, Ms. Potter called on only one occasion.

Thereafter, despite the Motion for Rehearing, the affidavits in support thereof, and reference to Ms. Potter's direct conflict in her own testimony, the Referee summarily denied the Respondent's Motion for Rehearing.

The disparity between Ms. Potter's alleged several calls to fifteen calls to finally calls three or four times a week during a three month period, become so enormous, it defies comprehension, especially in light of the truth of the matter, in which the Respondent's office received only one call during that time, as borne out by the affidavits in support of the Motion for Rehearing .

It is respectfully submitted, that to deny the rehearing in light of the perjured testimony, was in error, and under Rule 1.530, Rules of Civil Procedure, a rehearing should have been granted when, "if perjury was committed by crucial witness for prevailing party, a new trial would be ordered." Mahan v. Parliament Ins. Co., 382 So.2d 402 (1980).

Simultaneous with this brief, Respondent is also filing his Motion to Supplement Record, submitting copies of notices of hearings sent out by Judge Hershey's office to Ms. Potter, correspondence from the Respondent to Ms. Potter and her reply, in

which it is set out and established that Ms. Potter failed to appear for final hearing involving this very case, again on the grounds that she did not receive notice of the final hearing, which notice was sent out by both the Honorable Stewart Hershey's office as well as the office of the Respondent.

WHEREFORE, it is respectfully petitioned this Honorable Court enter its Order remanding this cause to the Referee for further proceedings and a new trial in light of the perjured testimony of the complaining witness.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a copy of the foregoing was furnished to DAVID G. MCGUNEGLE, Bar Counsel, The Florida Bar, 880 N. Orange Avenue, Suite 200, Orlando, Florida 32801, and JOHN T. BERRY, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 23 day of May, 1990.

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