

**JUDICIAL COUNCIL OF THE SIXTH CIRCUIT
COMPLAINT OF JUDICIAL CONDUCT OR DISABILITY**

MAIL THIS FORM TO: **CIRCUIT EXECUTIVE OF THE SIXTH CIRCUIT
503 U.S. POST OFFICE & COURTHOUSE
CINCINNATI, OHIO 45202**

**MARK ENVELOPE "JUDICIAL MISCONDUCT COMPLAINT" OR JUDICIAL DISABILITY COMPLAINT."
DO NOT PUT THE NAME OF THE JUDGE OR MAGISTRATE ON THE ENVELOPE.**

SEE RULE 2 FOR THE NUMBER OF COPIES REQUIRED.

1. **Complainant's Name:** Lester Swartz
Address: P.O. Box 4612
Deerfield Beach, Florida 33442-4612
Daytime telephone: (561) 392-1761

2. **Judge or Magistrate complained about:**
Name: U.S. Magistrate Vernelis K. Armstrong
Court: US District Court for the Northern District of Ohio

3. **Does this complaint concern the behavior of the judge or magistrate in a particular lawsuit or lawsuits?**
 Yes **No**

If "yes" give the following information about each lawsuit
(use reverse side if there is more than one):

Court: US Dist., Court for the Northern Dist. of Ohio, Western Di
Docket number: 3:96CV7796

Are (were) you a party or lawyer in the lawsuit?

Party **Lawyer** **Neither**

If a party, give the following information:

Lawyer's Name: Pro-se
Address: _____

Telephone: () _____

Docket number(s) of any appeals of above case(s) to the Sixth Circuit Court of Appeals: none

4. **Have you filed any lawsuits against the judge or magistrate?**
 Yes **No**

If "yes" give the following information about each lawsuit
(use the reverse side if there is more than one):

Court: _____

Docket Number: _____

Present status of suit: _____

Your Lawyer's Name: _____

Address: _____

Telephone: () _____

Court to which any appeal has been taken: _____

Docket number of the appeal: _____

Present status of the appeal: _____

5. On separate sheets of paper, not larger than the paper this form is printed on, describe the conduct or the evidence of disability that is the subject of this complaint. See rule 2(b) and rule 2(d). Do not use more than 5 pages (5 sides). Most complaints do not require that much.

6. You should either

(1) check the first box below and sign this form in the presence of a notary public; or

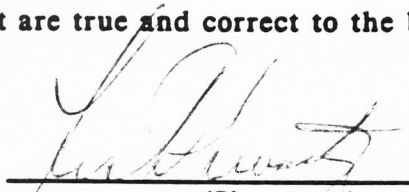
(2) check the second box and sign the form. You do not need a notary public if you check the second box.

I swear (affirm) that --

I declare under penalty of perjury that --

(1) I have read rules 1 and 2 of the Rules of the Sixth Circuit Governing Complaints of Judicial Misconduct or Disability, and

(2) The statements made in this complaint are true and correct to the best of my knowledge.



(Signature)

Executed on 9/15/97
(Date)

Sworn and subscribed
to before me _____
(Date)

(Notary Public)
My commission expires:

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

COMPLAINT OF JUDICIAL MISCONDUCT

COMPLAINANT:

Lester Swartz
P.O. Box 4612
Deerfield Beach, Florida 33442-4612
(561) 392-1761

RESPONDENT:

U.S. Magistrate Vernelis K. Armstrong
U.S. District Court for the Northern District of Ohio
Western Division

FACTUAL BACKGROUND

This complaint is brought pursuant to 28 U.S.C. § 372© against U.S. Magistrate Vernelis K. Armstrong of the United States District Court for the Northern District of Ohio, Western Division, and as grounds complainant would show:

1. Complainant filed an action against several lawyers, judges and a malpractice insurance carrier in the United States District Court for the Northern District of Ohio, Western Division, Case No. 3:96CV7796. The case was assigned to Judge David A. Katz who, absent consent of this complainant, subsequently ordered that the case be referred to United States Magistrate Vernelis K. Armstrong for hearing and determination of all pre-trial issues and the filing of a Report and Recommendation.
2. Certain defendants, by and through their counsels (hereinafter referred to the "bench and bar group") filed motions for summary judgments and attached to those said motions affidavits by the relevant defendants in support of their respective motions for summary judgments.
3. As a basis for this complaint and in the interests of brevity, in particular was the motion for summary judgment filed on May 21, 1997 by the defendant Home Insurance Company. In support of that said motion the Home attached an affidavit by Attorney M. Donald Carmin, a copy of both are attached hereto as Exhibit A. On pages 5 & 6 of Exhibit A the Home argued that they "[c]annot be held vicariously liable for any acts or omissions of the firm of Eastman & Smith and its employee Attorney Carmin" because Carmin and the Eastman firm were independent contractors. (Also see paragraph 3 on page 8 of Exhibit A.) Then in paragraph 4 on page 8 of Exhibit A, Carmin stated "[t]hat after reviewing Checklist C106 per Revenue Ruling 87-41, I answered no to each and every one of the twenty factors ...".
4. On June 3, 1997 complainant fired back a memorandum in opposition to the Home's motion for summary judgment and Carmin's affidavit and strongly attacked the same. Complainant attached to his memorandum an IRS publication labeled "Who is an Employee", a copy of complainant's memorandum and IRS publication attached thereto is attached hereto as Exhibit B. Complainant explained to the Magistrate that: a) Carmin and the Eastman firm had to be agents of the Home and not independent contractors or employees; b) that the Home's independent contractor argument was knowingly misleading, false, fraudulent, and/or made in bad-faith

according to 3 O Jur 3d 18, Agency § 4 and the IRS publication attached to Exhibit B (pages 22-26); c) that according to Exhibit B, in all good faith there was no way that Carmin could have answered no to each and every one of the twenty IRS factors , and further, d) alleged as such, that Carmin, the Eastman & Smith Firm, the Home and all of the latters' respective counsels had knowingly perpetrated a fraud upon the court.

5. On June 17th, 1997 the Home motioned for withdrawal and substitution of the affidavit and did, with the Magistrate's permission knowingly substitute the original affidavit by Carmin with another affidavit by Carmin, a copy of that affidavit is attached hereto as Exhibit C.

6. Relevant to this complaint, on June 21, 1997 the complainant lodged an attorney misconduct grievance complaint against all of the defendants and their respective counsels for their combination and participation in submission of misleading, false, fraudulent and/or bad-faith affidavits and for their frauds perpetrated upon the court. (Docket No. 73)

7. On June 26, 1997 the complainant filed a memorandum in opposition to Defendant Home's motion for withdrawal and substitution of Carmin's affidavit stating that this affidavit also was knowingly misleading, false, fraudulent, and/or made in bad-faith a copy of the same is attached hereto as Exhibit D.

8. On July 1, 1997 the Magistrate filed her Notice of Filing of Magistrate's Report and Recommendations, recommending that the Court grant all of the motions for summary judgment and/or the motion to dismiss.

9. In the Magistrate's report and recommendations to Judge Katz the Magistrate stated "[t]his Court is without jurisdiction to investigate and discipline attorneys and [the complainant's] Attorney Misconduct Grievance (Docket No. 73) should be Dismissed."

10. On July 10, 1997 the complainant filed a motion to disqualify the respondent and filed an affidavit of prejudice. The motion was subsequently denied as moot by Judge Katz on July 17, 1997.

11. On July 13, 1997 complainant timely filed his objections to the respondent's report and recommendations to Judge Katz.

ALLEGATIONS OF JUDICIAL MISCONDUCT AGAINST THE RESPONDENT UNDER 372©

12. First, complainant alleges Magistrate Armstrong knew that the affidavit attached to the Home's motion for summary judgment and the affidavit substituted for the former were misleading, false, fraudulent and/or were made in bad faith based on the following:

a. The independent contractor argument starting on page 5 of Exhibit A, was misleading, false, fraudulent and/or made in bad faith based upon:

- i. 6 O Jur 3d 656 § 126 states "...the rule of law applicable to the authority of an agent are applicable to the relation of attorney and client."

ii. Moreover, it states in 3 O Jur 3d 18, Agency § 4 that:

"... If power of control over the work is reserved, the actor is either an agent or a servant, and to make him s an agent it is only necessary that the principal have the power to control; the mere fact that the principal does not exercise control over his agent, but chooses to leave details of the latter's discretion, does not alter the relation of the parties, or make the agent an independent contractor." (bold added)

iii. In paragraph 4 on page 8 of Exhibit A Carmin stated that he "answered no to each and every one of the twenty factors This statement too was and is also knowingly misleading, false, fraudulent and made in bad faith because Carmin could not have possibly in all good-faith have answered no to each and every one of those factors. The "twenty factors" is the legal standard that determines an employer/employee status. Rev. Rule. 87-41 that Carmin alludes to in his obvious **bad-faith affidavit** reflects this by describing the factors "as an aid to determining whether an individual is an employee under the common law rules." (emphasis in original). Complainant showed the respondent that on p. 24, ¶ 4 of Exhibit B it plainly states:

4. The "twenty factors" must be used with extreme caution.

a. They are not the legal standard that determines employee/independent contractor status. As noted, that legal standard is the common law of agency."
(all emphasis added)

iv. The 20 factors are set forth on pages 25 and 26 of Exhibit B. Complainant vehemently stated that Carmin in all good-faith in order to determine whether or not he was an employee of the Home could not possibly have answered no to the following factors regarding the relationship; (1) does the employer have the right to give instructions; (11) does the employer require oral or written reports; (12) does the employer pay by the hour, week or month; (13) does the employer pay for business and/or traveling expenses; (14) can the employee realize a profit or loss; (19) does the employer have the right to discharge; (20) does the employee have the right to terminate or quit.

13. Complainant alleged to the respondent that by so doing, the bench and bar group, singularly and in concert, directly and indirectly, engaged and participated in unethical and unlawful conduct constituting a plan, scheme, and unlawful conspiracy, pursuant to which they knowingly, willfully, intentionally, recklessly and maliciously have engaged in acts and/or transactions and/or courses of conduct which operate as fraud and deceit upon the plaintiffs, the Court, and others. By engaging in the conduct complained of herein, the bench and bar group knowingly and in reckless disregard for the truth: a) as said, employed devices, schemes, and artifices to defraud, e.g., the known false or bad-faith affidavits; b) made untrue statements of material facts or omitted to state material facts necessary in order to make the statements made, in the light of the circumstances

under which they were made, not misleading; and, c) failed and neglected to refrain from engaging in such acts despite their affirmative and mandatory duties as officers of the Court to do so. Such said acts, practices, and incessant courses of unethical and unlawful conduct engaged in by the defendants and their respective counsels allegedly constitute fraud and deceit upon this Court, the plaintiffs, and others. Such conduct by the bench and bar group, most of whom are officers of the court constitutes fraud upon the court as is addressed in 7 Moore's Federal Practice 60.33 which states: "...for, while an attorney should represent his client with singular loyalty, that loyalty obviously does not demand that he act dishonestly or fraudulently; on the contrary his loyalty to the court, as an officer thereof, demands integrity and honest dealings with the court. And when he departs from that standard in the conduct of a case **he perpetrates a fraud upon the court.**" (emphasis added) See *Southerland v. Irons* (CA6th), 628 F.2d 978.

14. Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court. *H.K. Porter Co. Inc. v. Goodyear Tire & Rubber Co.*, 536 F.2d, 1115,1119 (6th Cir. 1976) citing *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2nd Cir. 1972); see Restatement, Judgments § 126 comment c (Supp. 1948). An attorney is under a continuing duty to review pleadings and filings. see *Herrod v. Jupiter Transportation Co.*, 858 F.2d 332, 336 (6th Cir.1988). In *Demjanjuk v. Petrovski*, 10 F.3d 338, 348 (6th Cir. 1993) the Court said that the Special Master stated correctly that it would be error "to exclude from the definition of fraud on the court intentional, fraudulent nondisclosure during discovery [or as here pretrial practice]". The Special Master also set forth the elements of fraud upon the court as consisting of conduct; 1) on the part of an officer of the court; 2) that is directed to the judicial machinery; 3) that is intentionally false, wilfully blind to the truth, or is in reckless disregard for the truth; 4) that is a positive averment or is concealment when one is under duty to disclose; and, 5) that deceives the court.

15. By engaging in the conduct complained of above and contained herein, the bench and bar group violated one or more, if not all of the following Disciplinary Rules of Ohio adopted by the District Court: a) DR 1-102 (A)(1), (2), (3), (4), (5); b) DR 1-103(A), (B); c) DR 2 - 110(B)(2); d) DR 4 - 101(2),(3); e) DR 6 - 102(A); f) DR 7 - 101(A)(1),(2),(3); (B)(1), (2); DR 7-102(A)(1), (2), (3),(4), (5),(6), (7), (8); (B) (1), (2).

16. An act or omission of an attorney admitted to practice before the Court, committed individually or in concert with any other person or persons, that violates the Code of Professional Responsibility adopted by the Court, shall constitute misconduct and shall be grounds for discipline, whether or not the act or omission occurred in the course of an attorney client relationship.

17. Local Rule 1:5.2 states that "[w]henver a grievance shall be filed with the Clerk ... the Clerk shall forthwith determine whether such individual has been admitted to practice before this Court and shall forward such grievance... any accompanying documentation, and information as to the status of such individual in this Court to the Committee on Complaints and Policy Compliance. The Chairperson of the Committee shall immediately issue an order to such individual to appear before the Committee to show cause why he or she should not be subjected to discipline as the Court should deem proper."

18. The Magistrate failed and neglected: a) to diligently discharge her administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials in violation of Canon 3(B)(1) of her Code of Judicial Conduct; b) to encourage her staff and court officials subject to her direction and control to observe the standards of fidelity and diligence that apply to her in violation of Canon 3(B)(2); and, c) to take or initiate appropriate measures against a judge or lawyer for unprofessional conduct of which the judge may become aware in violation Canon 3(B)(3). By the respondent failing and neglecting so to do, she has also violated other Canons of her Code of Judicial Conduct, including but not limited to Canons 1; 2(A) and (B); 3(A)(1) and 3(C)(1)(a).

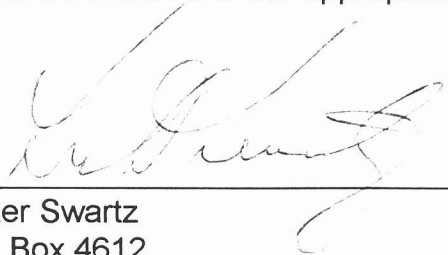
19. The failure of a judge of the United States to duly act or nonfeasance as aforescribed is cognizable under the 1980 Act, plainly does invoke and implicate the disciplinary statute, and does constitute conduct prejudicial to the effective administration of the business of the courts as envisioned by the statute. This was discussed at length by the National Commission on Judicial Discipline and Removal ("Commission") which stated:

"[b]y their terms, the 1980 Act's application is limited to situations in which 1) the judge or judicial officer has "engaged in conduct"; and 2) if the conduct is serious to be "prejudicial to the effective and expeditious administration of the business of the courts. The dictionary definition of "conduct" refers to the synonym "behavior", which in turn is defined as the manner in which one "act(s), react(s), function(s), or perform(s). One manner in which a person can react, function, or perform in response to a given situation, is not to act. Accordingly, inaction, at least in common parlance, qualifies for a form of behavior or "conduct."

20. Complainant further alleges that the respondent did wilfully and knowingly, inter alia.: a) obstruct justice; b) engage in official misconduct; c) engage in conduct prejudicial to the effective and expeditious administration of the business of the courts; d) use her office to obtain special treatment for friends, i.e., her fellow lawyers and judges; and, e) use her office to misprision known felonies and to further conceal known unlawful and unethical acts by the bench and bar group.

CONCLUSION

For all of the foregoing reasons, complainant requests that appropriate action be taken against U.S. Magistrate Vernelis Armstrong under 28 U.S.C. § 372(c) and further, that this entire matter be referred to the appropriate prosecutorial agencies.



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Dated