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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

DAVID H. THOMAS,

Respondent.

_____/

Case No. 75,683
TFB No. 89-10,379(20A)

THE FLORIDA BAR'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF CROSS PETITION FOR REVIEW

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SYMBOLS AND REFERENCES

In this Brief, the Appellant, The Florida Bar, will be referred to as "The Florida Bar" or "The Bar". The Appellee, David H. Thomas, will be referred to as "the Respondent". "C" will denote the Complaint. "RR" will denote the Report of Referee in the instant case. "TR" will denote the transcript of Referee proceedings on September 21, 1990 in the instant case. "TR2" will denote the Referee Hearing held on July 20, 1990 in the instant case. "GT" will denote the transcript of the grievance committee proceedings in Case No. 89-10,379(20A), held on April 28, 1989. "RB" denotes Brief of Petitioner (Respondent) on the merits.

Complainant's Exhibits will be denoted as "Exhibit" with the appropriate number of the exhibit at the Referee proceeding.

STATEMENT OF THE FACTS AND OF THE CASE

Sometime in April, 1988, Henry DeHaan contacted Attorney Hill to have him review a proposed partnership agreement that he was considering entering into with Marianne Lehmann, Respondent's wife. (TR p.22, L.18-25). Mr. DeHaan subsequently entered into the partnership. In early June, 1988, Mr. DeHaan advised Attorney Robert Hill that Mr. DeHaan had been locked out of the partnership construction business office, that his books and records had been seized, and that a van used in the business had been repossessed along with various tools and personal property of Mr. DeHaan. During a follow-up appointment between the DeHaans and Attorney Hill, Mr. Hill was advised by the DeHaans that they wished to file a grievance against Respondent. At that time Attorney Hill provided the DeHaans with the name, address, and phone number of The Florida Bar disciplinary office in Tampa. He did not assist them in drafting that grievance, and did not review it for sufficiency prior to its being filed. (RR p.6; TR p.27, L.13-22; TR p.28, L.14-18). On a complaint form dated June 11, 1988, received by The Florida Bar on June 14, 1988, Sue Ann DeHaan filed a grievance against the Respondent. In that grievance, it was alleged that Respondent used money out of a business account held jointly with the DeHaans to repay his own personal loan, lied to the DeHaans on many occasions, took the

business van which was in Respondent's wife's name and told the DeHaans he had no idea what had happened to it, and in addition, that Mrs. DeHaan had worked for Respondent and Mrs. Lehmann as a secretary, and that they had refused to pay her for the last pay period. (Exhibit 1).

By letter dated June 20, 1988, Robert Hill advised Respondent that he had been retained to represent the DeHaans regarding an action against Respondent and Marianne Lehmann, by reason of their illegal eviction, their conversion of various items of personal property, and the failure to pay wages due to Mrs. DeHaan. It was indicated in the demand letter that litigation could be avoided if the DeHaans were immediately allowed to remove all their personal property from the office, if personal property which had been removed from the office that belonged to them would be returned, and if all property of the DeHaans located in the van, as well as property of the DeHaans' employees, would also be returned. In addition, it was demanded that Mrs. DeHaan be paid her unpaid wages of $310.00. (Exhibit 11). On June 23, 1988, after receiving the demand letter from Attorney Hill, Respondent telephoned Mr. Hill and angrily threatened that "if you sue, I'll make you sorry you took this case." (RR p.5; TR p.50, L.12-25). By letter dated June 29, 1988, and addressed to Mr. Hill, Respondent represented that Ms. DeHaan had slandered and libeled him in the community,

misappropriated at least $5,000.00 from the partnership with Respondent's wife, and Respondent suggested that the matter could be resolved in its entirety by payment of $7,500.00. He went on to state that since that alternative was "as remote as the sun rising in the west" he would file multiple suits against the DeHaans, would file actions against all contracts in which the DeHaans might be a party, and would immediately initiate a grievance with the licensing authority in reference to Mr. DeHaan's general contractor privilege in Florida. He concluded that he looked forward to long term litigation with Mr. Hill's clients and trusted that Mr. Hill could retire on the fees that he would be receiving from the DeHaans. (Exhibit 4). Respondent had a certified copy of Mr. DeHaan's high school transcript which Respondent believed showed that Mr. DeHaan had falsified his educational background. (TR p.138, L.2-5). Attorney Hill subsequently filed suit against Marianne Lehmann and Respondent on behalf of his clients Henry DeHaan and Sue DeHaan. A portion of the DeHaans' verified complaint charged Respondent with civil theft of a check, but after it was learned that the proceeds of the check had been deposited into Lehmann's bank account, Respondent was removed as a defendant with respect to that issue. (RR p.4).

On or about October 7, 1988, Respondent and Marianne Lehmann filed suit against Mr. Hill and the DeHaans alleging interference

with the Respondent's and Lehmann's business relationships, libel per se for filing a false grievance, and malicious prosecution for bringing the civil theft action. (Exhibit 5; 7). Marianne Lehmann also filed a grievance against Robert Hill with The Florida Bar.

On October 27, 1988, the Chairman of the Twentieth Judicial Circuit Grievance Committee "A" signed a Notice of No Probable Cause and Letter of Admonishment in the Complaint against Respondent, David H. Thomas, which had been filed in June, 1988. (TR2 p.32, L.19-24; Exhibit 1).

A hearing was held in the civil suit against the DeHaans and Attorney Hill on Attorney Hill's Motion to Dismiss the civil suit because Respondent had brought it as an independent suit rather than filing a compulsory counterclaim in the suit brought by the DeHaans. The Complaint against the DeHaans was dismissed without prejudice, but the Complaint against Attorney Hill was not dismissed. After the hearing, Respondent advised Attorney Hill that if Hill would drop the civil suit he had brought on behalf of the DeHaans, Respondent believed he could get Marianne Lehmann to drop the grievance she had filed against Mr.Hill, or that he believed his wife would drop the grievance. (TR p.45, L. 14-16; TR p.46, L.12-19). Respondent also stated that if a settlement were reached (in the civil suit), he would like Mr. Hill to ask the DeHaans to drop the Bar grievance against Respondent. (RR p.6).

Based on Respondent's having named Robert Hill in the suit brought against the DeHaans, a Florida Bar complaint was opened and the matter forwarded to Twentieth Judicial Circuit Grievance Committee "A". On April 28, 1989, the complaint was considered by the grievance committee. Just prior to the beginning of the proceedings, outside the hearing room, Respondent suggested to Attorney Hill, a witness about to appear before the committee, that if Mr. Hill's testimony were not too damaging, Respondent would dismiss the lawsuit pending against Attorney Hill. (RR pg.6; TR p.41; TR p.42, L.3-9; TR p.43, L.1-4; TR p.50, L.17-21; TR p.51, L.7-10). The suit against Attorney Hill was not voluntarily dismissed by the Respondent, even though he did no discovery, nor did he file any further pleadings in the action. It was eventually dismissed for lack of prosecution. (RR p.6).

Because Attorney Hill had been named by Respondent in the suit against the DeHaans, Attorney Hill felt compelled to withdraw from representation and it was necessary for the DeHaans to acquire other counsel. (RR p.6; TR p.38, L.1-19).

On September 22, 1990, a final hearing was held in Supreme Court Case No. 75,683, The Florida Bar v. David H. Thomas, Respondent. Following receipt of evidence, the Referee recommended that Respondent be found guilty of violating the following Rules Regulating The Florida Bar: Rule 4-3.1 (for bringing a frivolous action by naming Attorney Hill as a

co-defendant) (RR p.13,17); Rule 4-8.4(d) (conduct prejudicial to the administration of justice), based on Respondent's conduct and statements relative to bringing the five (5) count suit against Robert Hill, as well as for his attempts at settling the suit and pending grievance matters (RR p.15,17); Rule 4-3.2 (failure to expedite proceedings, based on his failure to dismiss the suit against Robert Hill. (RR, p.16,18). The Referee recommended that Respondent receive a private reprimand by the Board of Governors, be placed on probation for a period of one (1) year with a requirement that he take and pass the Multi-State Professional Responsibility examination, as well as that he attend and complete twenty (20) hours of continuing legal education credits in the area of civil procedure. (RR, p.18-19).

Respondent submitted a Petition for Review in the instant case by certified mail, certificate of service dated November 28, 1990. The petition was filed on December 4, 1990. On December 5, 1990, The Florida Bar filed a Cross Petition for Review of Referee's Report, seeking review of the recommendation of discipline. As of January 11, 1990, Respondent had not filed a brief in support of his petition.

SUMMARY OF THE ARGUMENT

A Referee's findings of fact are presumed to be correct and must be upheld unless clearly erroneous. In the instant case, the findings of fact are supported by competent and substantial evidence and are not contrary to the evidence in any material respect. The Referee is in a unique position to assess the credibility of witnesses, and his judgment regarding credibility should not be overturned absent clear and convincing evidence that his judgment is incorrect. No such evidence exists in the instant case.

A "private reprimand" (admonishment) is not an appropriate discipline for Respondent's abuse of the legal system by bringing a frivolous action to punish an attorney for representing clients against the Respondent and his wife, and his attempts to use a frivolous law suit to interfere with justice in both a civil suit and in a grievance committee proceeding. Respondent should be suspended for not less than ninety (90) days.

ARGUMENT

ISSUES:

WHETHER A PRIVATE REPRIMAND (ADMONISHMENT) IS AN INADEQUATE DISCIPLINE FOR A PATTERN OF ATTEMPTING TO INTERFERE WITH JUSTICE AND FILING A FRIVOLOUS, RETALIATORY LAWSUIT.

WHETHER THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY SUBSTANTIAL, COMPETENT EVIDENCE, AND THEREFORE MUST BE PRESUMED CORRECT AND UPHELD

In a review of a Report of Referee in a disciplinary proceeding, the burden is on the party seeking review to demonstrate that the Report of Referee sought to be reviewed is erroneous, unlawful, or unjustified. The Florida Bar IN RE Inglis, 471 So.2d 38, 40 (Fla. 1985); The Florida Bar v. McKenzie, 557 So.2d, 31 (Fla. 1990); Rule 3-7.7(c)(5), Rules Regulating The Florida Bar. A Referee's findings of fact must be accepted unless they are not supported by competent, substantial evidence in the record. Inglis, 471 So.2d at 41. The record is replete with competent and substantial evidence to support the Referee's findings of fact. The Referee found that Respondent abused the legal system for personal reasons (RR p.15), and that he was motivated by a desire to retaliate against the DeHaans and to get leverage relative to the DeHaans' grievance, as well as their civil suit against the Respondent. (RR p. 14). That conclusion is clearly supported by the evidence and testimony before the Referee.

Robert Hill, Esquire, testified that on April 28, 1989, just

prior to a grievance committee proceeding on a grievance complaint filed by the DeHaans against the Respondent, Respondent suggested to Attorney Hill, a witness in those proceedings, that if the testimony was not too damaging, he would dismiss the lawsuit pending against Hill. (TR p. 50, L.17-21; TR p.51, L.7-10; TR p.42, L.3-9; TR p.43, L.1-4; TR p.41). Although the testimony did not indicate that Respondent specifically requested that Attorney Hill alter his testimony (TR p.50, L.9-18; TR p.51, L.3-10), given the context in which the statement was made, a reasonable conclusion could be drawn that Respondent intended to influence Mr. Hill's testimony. That conclusion is strengthened by Respondent's overall conduct.

By letter dated June 20, 1988, Respondent was advised by Robert Hill that Mr. Hill had been retained to represent the DeHaans in a potential action against Respondent and his wife, Marianne Lehmann, for the DeHaans' illegal eviction, for conversion of various items of personal property belonging to the DeHaans, and a failure to pay wages due to Mrs. DeHaan. (Exhibit 11). Respondent's reaction to that letter was a phone call to Mr. Hill on June 23, 1988, during which Respondent angrily threatened that if Mr. Hill took the case for the DeHaans, Respondent would make him sorry. (RR p.5).

During the final hearing before the Referee, Respondent sought to establish through cross examination that he was not

making a threat, but perhaps advising Respondent that if he represented the DeHaans, Attorney Hill would be sorry because he would not get paid, and that in fact Mr. Hill did regret representing the DeHaans because he did not get paid for the representation. (TR p.53, L.8-21). That interpretation of the meaning of Mr. Thomas' statements when they were made is not credible and was apparently rejected by the Referee. In Respondent's letter to Hill dated June 29, 1988, just six (6) days after the phone call, he wrote "I look forward to long term litigation with your clients and trust that you can retire on the fees that you will receive from them." (Exhibit 4).

In defending an allegation that Respondent's threat to report Mr. DeHaan to licensing authorities was a threat to gain a pecuniary advantage, Respondent testified that he knew the DeHaans did not have money, and therefore, the letter could not possibly be construed to be a threat to gain a pecuniary advantage. (TR 175, L.7-13). Yet in the letter dated June 29, 1988, and addressed to Mr. Hill, Respondent had indicated that the matter could be settled in its entirety by payment from Mr. and Mrs. DeHaan to Respondent's wife of $7,500.00. (Exhibit 4). This indicates that Respondent did not consider the DeHaans to be insolvent defendants. In the lengthy proceedings, Respondent provided more than enough evidence for the Referee to make an asessment of Respondent's credibility.

Another opportunity to assess Respondent's credibility was provided by the following: at the final hearing Respondent argued that prosecuting him for allegedly filing a frivolous action was a violation of his equal protection rights. Respondent presented the Referee with a list of cases in which a civil court found that a frivolous action had been filed. Respondent stated each of these attorneys had filed a frivolous action but "to my (Respondent's) knowledge" no action was taken by The Bar against those attorneys. The Referee asked Respondent how he could know that, to which Respondent replied, "I make that representation to you." The Referee asked "And is that because you examined it", to which Respondent answered "I spoke with the attorney. I cannot produce the attorneys, Your Honor, I just simply make that representation to the Court." (TR p.3-4). On cross examination, Respondent was asked if he had talked to each and every attorney. He admitted "No, I talked with some of these lawyers and I was prepared to represent to the Court exactly which ones I had talked with." (TR 144, L.20-25). When pressed further and asked whether he could advise Bar counsel in which cases he contacted the lawyers, he said no. When Bar counsel asked what he would learn if some of the attorneys in question were contacted, Respondent said "that I called their office and talked to either them or a secretary in their office." (TR p.145, L.13-23).

A further opportunity to assess the Respondent's testimony

was afforded by the following: In a Referee level Motion hearing on July 20, 1990 in the instant case, Respondent was objecting to the allegation he had violated Rule 4-1.1, Rules Regulating The Florida Bar (competence). He advised the Court that the complaint (the civil suit against Hill and the DeHaans) was not incompetent, and that "this complaint has withstood the test of time." (TR2 p.18, L.1-5). At the final hearing, when Respondent's previous statements on the record that the complaint was not incompetent and had withstood the test of time were being addressed, Respondent was asked in what respect the complaint had withstood the test of time. Respondent said he believed that there had been a transcription error because he was talking about himself, not the complaint - he said that <u>he</u> had stood the test of time. Respondent was reconciling the facts that the complaint against the DeHaans had been dismissed for failure to bring it as a compulsory counterclaim, and that the complaint against Hill was not pursued and was eventually dismissed for lack of record activity, with his "test of time" claim. Respondent also suggested to the Referee that he had been talking so rapidly that the transcription ended up "complaint" rather than whatever he might have said. (TR p.139, L.9 - p.141, L.8). Interestingly, the sentence "withstood the test of time" was followed in the motion hearing transcript by Respondent's statement that "the complaint is better adjudicated in a court of law rather than a

Bar disciplinary proceeding." (TR2, p.18, L.4-7). For the Referee to find explanations given by Respondent not credible is certainly understandable.

There is also additional evidence which supports a finding that Respondent attempted to interfere with justice. After a hearing on a Motion to Dismiss the civil suit against the DeHaans, Respondent told Attorney Hill that if Mr. Hill would drop the civil suit (against Respondent and his wife), Respondent believed his wife would drop a complaint she had filed with The Florida Bar against Attorney Hill. He also said to Mr. Hill that if a settlement were reached, he would like Attorney Hill to ask the DeHaans to drop the grievance against him. (RR p.6; TR p. 44; TR p.45, L.14-16; TR p.46, L.12-19).

Before October 7, 1988, Respondent filed the civil suit against the DeHaans and in that complaint named Attorney Hill as a defendant. In Count II of the civil suit, Respondent alleged that on June 11, 1988, Sue Ann DeHaan, with the active aid, counsel, and participation of Robert Hill, had delivered a letter (complaint) to The Florida Bar, and that the statements were written by Sue Ann DeHaan with the active aid, counsel, and participation of Respondent with the knowledge that the statements were false. (Exhibit 5, Count II). Substantial competent evidence supports the Referee's conclusion that Count II of the suit, as it refers to Attorney Hill, was frivolous.

(RR p.17). On April 28, 1989, Respondent testified before a grievance committee that he sued Attorney Hill for counseling and conspiring to file a grievance. (RR p.8; GT p.29, L. 18-22). However, Respondent also testified that he did not know what had occurred in the meeting between the DeHaans and Attorney Hill. (RR p.10; GT p.31). The suit against Attorney Hill was clearly retaliatory.

According to Respondent's testimony, he named Mr. Hill, along with the DeHaans, in a suit because Attorney Hill had "counseled, participated, and conspired" in filing a grievance against Respondent. (GT p.29, L.5-6). Respondent claims that he knew that Attorney Hill had conspired to file a grievance, and to name Respondent in the civil suit in spite of knowing that the information in the complaints was false - this is simply not credible. On April 28, 1989, Respondent testified to the grievance committee that Ms. DeHaan had told him that Attorney Hill counseled her (GT, p.29, L.18-22), but he did not indicate that she said there was any conspiracy. He had no evidence to suggest that Attorney Hill had done anything other than tell Mrs. DeHaan the procedure for filing a grievance with The Florida Bar.

At the committee level, Respondent also alleged that his basis for naming Mr. Hill in the civil law suit was that Mr. Hill had filed the suit although Mr. Hill had facts before him to show that the civil theft charge had no merit. (GT p.29). The Referee

found this defense by Respondent was not reasonable, credible, and was meaningless (RR p.13-14), since Respondent did not know what occurred when Mr. Hill met with the DeHaans. (RR p.14; GT p.30, L.23 - p.24, L.4). When testifying before the Referee, Respondent did try to eliminate this lack of knowledge. At the Referee proceeding, Respondent for the first time in the grievance proceedings claimed that Henry DeHaan advised him that Mr. Hill, Mrs. DeHaan, and Henry DeHaan sat together and drafted the complaint, and deciding to join together because they wanted money out of the Respondent. (TR p.115, L.5-25). He testified at the Referee hearing that this had occurred prior to the time that Respondent filed the civil complaint in which Mr. Hill was named as a defendant. (TR p.16, L.-19-24). Respondent added that Mr. Hill knew that Respondent did not take money from the DeHaans, and that all they wanted out of the Respondent was money. Respondent claimed Mr. DeHaan had told Respondent that he was tired of it. (TR p.17, L.4-10). Henry DeHaan did not testify at the final hearing, and Respondent indicated that he had been unable to locate him. Interestingly, the civil suit against the DeHaans and Robert Hill was filed on or before October 7, 1988. (See Exhibit 7). For Respondent to have named Hill in the civil suit based on the alleged statement of Henry DeHaan, that statement would have had to occur prior to October 7, 1988 when the civil suit was filed. However, at the grievance

committee hearing on April 28, 1989, Respondent stated that Mrs. DeHaan told him of Mr. Hill's counsel, and did not mention Mr. DeHaan's alleged statement. Respondent said that he did not know what occurred at the meeting with Attorney Hill. (GT p.30, L.23-25; GT p.31, L.1-4). In fact, on April 28, 1989 Respondent even stated to the committee that he did not believe Mr. Hill to be a liar, but rather to be an honorable man. (GT p.31, L.8-12). That comment is inconsistent with his later claim that prior to the filing of the civil complaint, and therefore prior to the grievance committee proceeding, Respondent had been informed that Mr. Hill had knowingly conspired with Henry DeHaan to file a false complaint to obtain money and had consequently sued Attorney Hill.

The Referee's finding that Respondent filed a frivolous complaint, with the intent to use it for leverage, is further supported by Respondent's conduct with respect to that complaint. The Respondent clearly had no intention of going forward with this suit against Attorney Hill. (RR p.16). Respondent did no discovery, and the case was eventually dismissed for lack of prosecution on about February 12, 1989. (TR p.100, L.5-13; TR p.101, L.1-25). Respondent allowed the case to hang over Mr. Hill's head until it was dismissed by the Court.

Respondent notes that no judicial officer or panel, in an adversary proceeding, found Count II of Respondent's law suit

to be frivolous. (RB p.8). The Referee considered this argument rejected it, and made an independent determination of whether Count II of the complaint was frivolous, even though no court of law had previously ruled it to be so. (TR p.6, L.11-22). Respondent further points out that Mr. Porter's testimony was replete with an inability to state any portion of the complaint was frivolous. (RB p.6). Attorney Porter testified that he did not know the legal definition of frivolous, but that his definition is "without merit." He testified that at least Count II was without merit...without a legal or factual basis. (TR p.108, L.21-109, L.3). His testimony was presented to the Referee. The Referee found the action to be frivolous. He did not state that his sole basis was the testimony of Attorney Porter.

At the Referee hearing, Respondent also stated that the suit brought against Mr. Hill "was clearly and concisely" because of Mr. Hill's participation in his clients' filing of the Bar grievance. (TR p.63, L.1-4). He had argued before the grievance committee that the DeHaans' and Mr. Hill's immunity from suit was destroyed because they revealed the proceeding outside the committee long before Respondent did. (GT p.22, L.1-5). Further, Respondent claimed that he believed Mr. Hill promoted and was aware of and cognizance of the fact that Mrs. DeHaan carried the matter into the public domain. (GT p.24,

L.21-24),...that he aided, counseled, guided and instructed her to do so. (GT p.33, L.21-25). However, Respondent presented no evidence to support his claim that Attorney Hill had waived his immunity. As an alternative, or perhaps supplemental argument, Respondent claimed at the Referee hearing that at the time Respondent sued the DeHaans and Robert Hill, he had a good faith belief that there was a basis for attacking the status of the law regarding absolute privilege as it applied to complainants in Bar matters, and that he fully intended to challenge the immunity privilege. (TR p.130, L.20-25; TR p.131, L.1-12). Respondent's testimony belies this claim. The claimed intent to challenge Hill's absolute immunity had not been advanced to the grievance committee, and Respondent could not offer the benefit of any research, or even a legal theory for his position, during the Referee proceedings. (RR, p.115). Respondent also argued that complainants in Florida Bar matters have no immunity to waive (TR p.164, L.14-15), but that he had anticipated the trial court would dismiss on the basis of absolute immunity. (TR 165, L.8-12). Respondent claimed that he had been doing research on immunity and qualified immunity for ten (10) to twelve (12) years, and had updated his research before filing the civil complaint. (TR p.162, L.21-25). In spite of this alleged research, Respondent was unaware of cases which were directly on point. His claim of an intent to challenge the law was simply

not credible.

The discipline recommended by the Referee in the instant case is insufficient for the misconduct of the Respondent. In The Florida Bar v. Rosenberg, 387 So.2d 935, 936 (Fla. 1980), this Court approved a Referee's recommendation of a public reprimand. Rosenberg had initiated four (4) different appeals during the course of litigation, then either voluntarily dismissed the appeals or allowed them to be dismissed for failure to pay the filing fee. He was found guilty of violating DR 7-102(a)(1) (asserting a position, conducting a defense, delaying a trial, or taking other action on behalf of his client when he knew or when it was obvious that such action would serve merely to harass or maliciously injure another). He was also found to have violated DR 7-106(C)(7) (intentionally violating an established rule of procedure).

In the instant case, the Respondent named an opposing attorney in a frivolous complaint to retaliate against that attorney for representing clients who initiated an action against the Respondent and his wife. He had threatened that he would make the attorney sorry if he took the case, and he followed through on that threat. He then tried to use his suit as leverage to get the opposing attorney to not give "too damaging" testimony at a Florida Bar grievance proceeding (apparently the civil suit had already been dismissed without prejudice for lack

of record activity). He suggested that his wife might drop a Bar grievance against the opposing attorney if the civil suit were dropped.

Respondent's conduct caused Attorney Hill to withdraw from representing his clients based upon conflict of interest (TR p.38, L.1-19), thereby denying the DeHaans the counsel of their choice. Further, his actions compelled Attorney Hill to seek representation in the civil case through his malpractice carrier. Clearly Respondent's misconduct was even more egregious that which warranted a public reprimand in Rosenberg.

Respondent's conduct evidences a flagrant attempt to use threats and a frivolous action to prevent civil complaints against himself and his wife from being properly litigated in the civil courts. He has also attempted to interfere in the disciplinary process, to influence testimony, and to prevent the Bar from examining his conduct. Respondent's repeated misconduct, and his lack of candor, demonstrate that he does not hesitate to interfere with justice and has no respect for the Rules Regulating The Florida Bar. Respondent's misconduct has, in addition, resulted in frivolous litigation. An overburdened legal system should not have to tolerate unnecessary, retaliatory, and frivolous litigation.

Respondent claims that the Referee exhibited prejudice sufficient for reversal when he characterized testimony at the

final hearing as "sort of like a robbery trial." (RB p.12). The Referee was commenting on an objection to a witness answering the question "what would cause you to believe it was a threat?", referring to a statement "I will make you sorry." Respondent objected to the question, saying it asked for pure mental operation. His objection was sustained. (TR p.30, L.10 p.32, L.15). The Referee noted that allowing the witness to comment would be like allowing a defendant in a robbery trial to comment on what a defendant meant when he pulled a gun and said this is it. Given that the Referee's primary judicial responsibility is hearing criminal cases, it is natural for him to make an analogy to criminal law. It does not evidence prejudice, nor constitute prejudicial error. Respondent complains about the Referee's observations that a Referee in a Bar proceeding is not bound by the technical rules of evidence. The Referee's comment that there is no right to confront witnesses was given as an example of the Court not being bound by those evidentiary rules. The point the Referee was addressing was whether a witness could answer the question "... do you have anything further you wish to say to the Court with respect to the suit that Mr. Thomas filed against you, or his contacts related to that suit?" (TR p.47, L.21 - p.49, L.4). The witnesses' response was "No. I think we have covered everything." (TR p.49, L.6-9). The Referee was making a general observation about procedural rules. There is no

basis in these comments for discounting the Report of Referee becaused of alleged bias or error.

Further, Respondent objects because the Referee allegedly found no error that The Florida Bar would not provide copies of documents it intended to introduce after being requested for same; he says the error was compounded when the Referee permitted counsel to examine Respondent on the transcript it failed to provide to the Respondent. (RB p.13). The alleged refusal to provide copies of documents it would introduce is not evidenced by the record and did not occur. Admittedly, Mr. Thomas was impeached using grievance committee transcripts. At the Referee proceeding, when asked if a portion could be read into the record, he said he had no objection. (TR p.129, L.10-11, L.24-25, p.133, L.4-7). In fact, when the transcript of the April 28, 1989 grievance committee hearing was introduced into evidence, Respondent said "I want the truth to come out. I have no objection to this document." (TR p.134, L.20, p.135, L.8).

Respondent has objected to being found guilty of violating Rule 4-3.2, Rules Regulating The Florida Bar (failure to expedite litigation) because he had no notice of what he was to defend. The Florida Bar does not oppose striking the finding that this rule was violated, but notes that does not preclude the Referee from taking the underlying conduct into account.

In the instant case, Respondent not only filed a frivolous

action in violation of Rule 4-3.1, Rules Regulating The Florida Bar, but in addition failed to expedite litigation, and engaged in conduct prejudicial to the administration of justice, contrary to Rule 4-8.4(d). The misconduct is far too serious, the pattern too persistent and too often repeated, for the private reprimand recommended by the Referee to be sufficient. Conduct such as Respondent's brings the legal profession into disrepute and must cause concern for his ability and/or willingness to practice law honestly and ethically. This concern is heightened by the Referee finding significant portions of his testimony at the Referee level to not be credible. His conduct warrants at least a short term suspension.

Rule 6.32 (improper communications with individuals in the legal system), indicates a suspension is appropriate when a lawyer engages in communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of a legal proceeding.

Rule 9.22 - includes the following aggravating factors which are exhibited by Respondent's conduct: dishonest or selfish motive, a pattern of misconduct, multiple offenses, refusal to acknowledge wrongful nature of conduct, and substantial experience in the practice of law. Respondent has been a

practicing attorney since December, 1975. (RR, p.18). Respondent does not have a prior disciplinary record, which is noted as mitigation under Rule 9.32.

The Florida Bar requests that Respondent receive a ninety (90) day suspension, to be followed by a one (1) year period of probation with the requirement that during that time, Respondent take and pass the Multi-State test for professional responsibility, as well as attend and complete twenty (20) hours of continuing legal education credits in the area of civil procedure.

CONCLUSION

A ninety (90) day suspension is the appropriate discipline for filing a retaliatory, frivolous action against a fellow member of the Bar. Respondent's pattern of misconduct, repeated attempts to interfere with justice, and continuing failure to recognize the wrongful nature of his acts makes an admonishment for minor misconduct an inappropriate discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing THE FLORIDA BAR'S ANSWER BRIEF AND INITIAL BRIEF IN SUPPORT OF CROSS PETITION FOR REVIEW has been delivered by Certified Mail, Return Receipt Requested, No. P 300-206-644 to Post Office Box 367, Ft. Myers, Florida, 33920-0367, this 26 day of March, 1991.

Respectfully submitted,

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