047

IN THE SUPREME COURT

OF THE STATE OF FLORIDA

DAVID H. THOMAS,
PETITIONER

v.

THE FLORIDA BAR
RESPONDENT

CASE NO. 75,683

BRIEF OF PETITIONER ON THE MERITS

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STATEMENT OF THE CASE AND OF THE FACTS

THIS IS AN APPLEAL FROM THE REPORT OF REFEREE AND RECOMMENDATIONS AS TO DISCIPLINARY MEASURES.

ON APRIL 28, 1990, THE TWENTIETH JUDICIAL CIRCUIT GRIEVANCE COMMITTEE A FOUND PROBABLE CAUSE FOR FURTHER DISCIPLINARY PROCEEDINGS WITH RESPECT TO THE FOLLOWING ALLEGED VIOLATIONS:

1. RULE 4-1.16(a)(1), FAILURE TO WITHDRAW WHEN REPRESENTATION WILL RESULT IN A VIOLATION OF THE RULES OF PROFESSIONAL CONDUCT;
2. RULE 4-3.1, BRINGING A FRIVOLOUS ACTION;
3. RULE 4-8.4(a), VIOLATING THE RULES OF PROFESSIONAL CONDUCT THROUGH THE ACTIONS OF ANOTHER;
4. RULE 4-8.4(d), CONDUCT PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

A FINAL HEARING WAS CONDUCTED BEFORE THE REFEREE ON SEPTEMBER 21, 1990. AT HEARING, THE BAR WITHDREW THE THIRD ALLEGATION LISTED ABOVE, AND ASSERTED TWO ADDITIONAL VIOLATIONS:

5. RULE 4-1.1, COMPETENCE;
6. RULE 4-3.2, FAILING TO EXPEDITE PROCEDINGS.

PURSUANT TO THIS COURT'S APPOINTMENT OF THE REFEREE, HEARINGS WERE CONDUCTED ACCORDING TO THE RULES OF DISCIPLINE AS FOLLOWS: PRE-TRIAL CONFERENCE WERE HELD ON JULY 22, 1990, AND AUGUST 31, 1990. FINAL HEARING WAS HELD ON SEPTEMBER 22, 1990.

THE REFEREE FOUND PETITIONER GUILTY OF COUNT 2, COUNT 4, AND COUNT 6 OF THE ALLEGATIONS AND NOT GUILTY OF COUNT 1, COUNT 3, AND COUNT 5.

BASED UPON HIS FINDINGS, THE REFEREE RECOMMENDED THAT PETITIONER BE PRIVATELY REPRIMANDED BY THE BOARD OF GOVERNORS AS PROVIDED BY RULE 3-5.1(a), RULES REGULATING THE FLORIDA BAR, AND THAT PETITIONER BE PLACED ON PROBATION FOR A PERIOD OF ONE YEAR WITH CONDITIONS THAT PETITIONER TAKE AND PASS THE MULLTI-STATE TEST FOR PROFESSISSONAL RESPONSIBILITY, AS WELL AS ATTEND AND COMPLETE 20 HOURS OF CONTINUING LEGAL EDUCATION CREDITS IN THE AREA OF CIVIL PROCEDURE.

FROM THESE FINDINGS AND RECOMMENDATIONS, PETITIONER FILED HIS PETITION FOR REVIEW.

SUMMARY OF ARGUMENT

THERE IS NO CRIME HERE WORTHY OF DISCIPLINE, ONLY CLEARLY EXHIBITED PREJUDICE BY THE REFEREE, A DISREGARD OF DUE PROCESS AND PROCEDURAL SAFEGUARDS AS WELL AS ERRONEOUS FINDINGS OF FACT AND MISAPPLICATION OF THE PREVAILING LAW

ARGUMENT

THE REFEREE'S FINDINGS AND RECOMMENDATIONS ARE CONTRARY TO LAW.

THAT THE REFEREE'S FINDINGS AND RECOMMENDATIONS THAT THE PETITIONER'S COMPLAINT IS FRIVOLOUS ARE CONTRARY TO LAW, PETITIONER FINDS SOLACE IN XEROX CORPORATION v. SHARFI, 502 SO. 2d 1003 (FLA. APP., 5 DIST, 1987). THEREIN THE COURT FOUND THAT "A FRIVOLOUS ACTION IS NOT MERELY ONE THAT IS LIKELY TO BE UNSUCCFESSFUL. INSTEAD, LIKE A FRIVOLOUS APPEAL: IT IS ONE THAT IS SO READILY RECOGNIZABLE AS DEVOID OF MERIT ON THE FACE OF THE RECORD THAT THERE IS LITTLE, IF ANY, PROSPECT THAT IT CAN SUCCEED. IT MUST BE ONE SO CLEARLY UNTENABLE, OR THE INSUFFICIENCY OF WHICH IS SO MANIFEST ON A BARE INSPECTION OF THE RECORD THAT ITS CHARACTER MAY BE DETERMINED WITHOUT ARGUMENT OR RESEARCH." FURTHER PETITIONER WOULD REFER THE COURT TO WHITTEN v. PROGRESSIVE CASUALTY INS. CO. , 410 SO. 2d 501 (FLA. 1982), ALLEN v. ESTATE OF DUTTEN, 384 SO. 2d 171 (FLA 5TH DCA), REV. DEVIED, 392 SO. 2d 1371 (FLA. 1980) FOR THE SETTLED STATE OF THE LAW AS TO FRIVOLOUS ACTIONS.

IT IS WITHOUT QUESTION THAT THE FLORIDA BAR HAS FAILED TO PROVE BY CLEAR AND CONVINCING EVIDENCE THAT PETITIONER'S COMPLAINT WAS FRIVOLOUS.

THAT AN ACTION IS FRIVOLOUS, THE COMPLAINANT MUST PROVE BY CLEAR AND CONVINCING EVIDENCE. THIS HONORABLE COURT HAS DEFINED THE CLEAR AND CONVINCING TEST AS BEING LESS THAN THE REASONABLE DOUBT STANDARD IN CRIMINAL CASES BUT MORE THAN THE PREPONDERANCE TEST IN CIVIL CASES. THE FLORIDA BAR v. RAYMAN, 238 SO. 2d 594, 598 (FLA. 1970). PETITIONER WOULD REFER THE COURT THE THE FLORIDA BAR v. MCCAIN, 361 SO. 2d 700, THE FLORIDA BAR v. QUICK, 279 SO. 2d 4 (1973), IN ADDITION TO RAYMAN, AS BEING THE SETTLED STATE OF THE LAW AS TO QUANTUM OF PROOF. IT IS INTERESTING TO NOTE THIS HONORABLE COURT'S LANGUAGE IN QUICK WHEREIN IS STATED, "DISCIPLINARY ACTIONS WHILE NOT FULLY CRIMINAL IN CHARACTER, ARE PENAL PROCEEDINGS THE RESULT OF WHICH MAY PERMANENTLY CRIPPLE AN ATTORNEY'S REPUTATION AND STANDING IN THE COMMUNITY." PETITIONER SHALL LEAVE FOR ANOTHER DAY AND ANOTHER TIME THAT THE QUANTUM OF PROOF IS NOT BEYOND A REASONABLE DOUBT, WHEN THE POTENTIAL EFFECT ON ONE WHOSE ENTIRE LIFE HAS BEEN CENTERED ON THE LAW CAN BE MORE PROFOUND THAN A CRIMINAL CONVICTION TO A LAY PERSON.

PETITIONER WOULD NOW TURN TO AN APPLICATION OF THE RULE OF LAW TO THE PROCEEDINGS BEFORE THE REFEREE.

MENTION HERE MUST BE MADE THAT NO JUDICIAL OFFICER OR PANEL, IN AN ADVERSARIAL PROCEEDING, FOUND COUNT TWO OF PETITIONER'S MULTI-COUNT SUIT HEREIN COMPLAINED OF TO BE FRIVILOUS. THERE WERE MOTIONS FILED, BUT NOT RULED UPON BY THE TRIAL COURT, NOR DID THE TRIAL COURT DISMISS ON ITS OWN MOTION . THE COMPLAINING ATTORNEY CLEARLY ADMITTED

THERE THERE HAD BEEN NO SUBSTANTATIVE RULING ON THE MERIT OF THE CLAIM (TRANSCRIPT, P. 85, LINE 7) .

FURTHER, THE ONLY WITNESS BROUGHT FORWARD BY THE FLORIDA BAR TO PRESENT EXPERT OR ANY EVIDENCE OF A FRIVOLOUS ACTION WAS ATTORNEY JOHN TERRENCE PORTER.

COINCIDENTALLY, MR. PORTER WAS ALSO THE DEFENSE ATTORNEY FOR THE COMPLAINING ATTORNEY. WHEN SPECIFICALLY ASKED BY LEARNED COUSEL FOR THE FLORIDA BAR AS TO "WHETHER OR NOT YOU FORMED AN OPINION ON WHETHER THAT LAWSUIT WAS IMPROPERLY BROUGHT?" (TRANSCRIPT, P. 99, LINE 1 AND 2), MR. PORTER STATED, " I CAN'T TELL YOU ONE WAY OR OTHER."

CLEARLY AND UNEQUIOVOCALLY, MR. PORTER, WHEN ASKED "SO YOU COULDN'T TESTIFY THAT THIS WAS A FRIVOLOUS COMPLAINT" STATED "NO" (TRANSCRIPT, PAGE 106, LINES 19, 20, AND 21, EMPHASIS ADDED.) MR. PORTER'S TESTIMONY IS REPLETE WITH AN INABILITY TO STATE ANY PORTION OF THE LAWSUIT IN QUESTION TO BE FRIVOLOUS. MR. PORTER DID NOT KNOW THE DEFINITION OF A FRIVOLOUS ACTION IN FLORIDA. MR. PORTER IS A WELL RESPECTED ATTORNEY IN LEE COUNTY AND HE WAS THE FLORIDA BAR'S ONLY WITNESS ON THE QUESTION OF FRIVOLOUS. PETITIONER RESPECTFULLY STATES THAT THE REFEREE'S FINDING THAT THE PETITIONER'S COMPLAINT, WHICH IS THE BASIS OF THE GRIEVANCE, IS FRIVOLOUS IS DEVOID OF MERIT ON THE FACE OF THE RECORD. PETITIONER FURTHER RESPECTUFLLY STATES THAT THERE IS AN ABSENCE OF CLEAR AND CONVINCING EVIDENCE THE COMPLAINT WAS FRIVOLOUS FOR THE REFEREE TO BASE HIS DECISION. AND, FURTHER,

THERE IS NOTHING IN THE RECORD TO PERMIT THE REFEREE TO FIND PETITIONER'S COMPLAINT DEVOID OF MERIT ON ITS FACE.

THE FLORIDA BAR'S OWN RULES AT 4-3.1, ADVOCATE, CONTAINS AS A COMMENT, " THE FILING OF AN ACTION OR DEFENSE OR SIMILAR ACTION TAKEN FOR A CLIENT IS NOT FRIVOLOUS MERELY BECAUSE THE FACTS HAVE NOT FIRST BEEN FULLY SUBSTANTIATED OR BECAUSE THE LAWYER EXPECTS TO DEVELOP VITAL EVIDENCE ONLY BY DISCOVERY. SUCH ACTION IS NOT FRIVOLOUS EVEN THOUGH THE LAWYER BELIEVES THAT THE CLIENTS' POSITION ULTIMATELY WILL NOT PREVAIL." RESPONDENT WOULD SUGGEST TO THIS HONORABLE COURT THAT WITH THIS ADDITIONAL BURDEN THAT THIS COURT HAS IMPOSED, THE FLORIDA BAR HAS FAILED IN EVERY RESPECT TO MAKE ITS CASE FOR DISCIPLINE HEREIN, AND THE REFEREE WAS WITHOUT SUFFICIENT FACTS TO IMPOSE THE HARSH PUNISHMENT HEREIN IMPOSED.

THE REFEREE'S FINDINGS ARE CONTRARY TO THE EVIDENCE ADDUCED AT THE FINAL HEARING

THAT THE REFEREE'S FINDINGS ARE CONTRARY TO THE EVIDENCE ADDUCED AT THE FINAL HEARING, PETITIONER SUBMITS THE FOLLOWING. ON PAGE 2 OF THE REPORT OF REFEREE, THE HONORABLE JUDGE LOGALBO STATED THAT A PRIOR BUSINESS RELATIONSHIP BETWEEN PETITIONER, HIS WIFE AND SUE ANN DEHAAN WAS CENTRAL TO THIS DISCIPLINARY PROCEEDING. NOT ONLY WAS THERE NO EVIDENCE OF PETITIONER'S INVOLVEMENT IN THE BUSINESS RELATIONSHIP, PETITIONER WAS NOT SO INVOLVED. IF THIS ERROR IS

CENTRAL TO THE DISCIPLINARY PROCEEDING, PETITIONER SUBMITS THAT SAME SHOULD HERE BE DISMISSED. IN THE EVENT THAT THIS IS NOT SUFFICIENT FOR DISMISSAL, PETITIONER PROCEEDS. THE REPORT OF THE REFEREE IS FILLED WITH INCORRECT DATES WHICH HAVE A TENDENCY TO CONFUSE THE READER, BUT PETITIONER DOES NOT SUBMIT THAT THIS IS ERROR SUFFICIENT FOR DISMISSAL. THE DATE ERRORS ARE, HOWEVER, INDICATIVE OF A BUSY JURIST WITH A FULL CALENDAR WHO COULD NOT, PERHAPS, DEVOTE ADEQUATE TIME TO THIS CASE.

THERE ARE, HOWEVER, GRIEVOUS ERRORS OF FACT WHICH CLEARLY AND UNEQUIVOCALLY SUPPORT A DISMISSAL OF THE GRIEVANCE. REFERENCE IS MADE BY THE REFEREE TO A PURPORTED CONVERSATION THAT PETITIONER HAD WITH MR. ROBERT HILL IMMEDIATELY PRIOR TO THE COMMITTEE HEARING ON THE GRIEVANCE PRESENTLY BEFORE THIS COURT. AT PAGE 6 OF THE REPORT OF REFEREE IT IS STATED, "DURING THAT CONVERSATION, PETITIONER (PETITIONER) SAID THAT IF HILL'S TESTIMONY WAS NOT TOO DAMAGING TO HIM, HE WOULD DISMISS THE LAWSUIT PENDING AGAINST HILL." RESPONDENT FINDS NOT ONLY THAT THIS STATEMENT IS INCORRECT, BUT HIGHLY OFFENSIVE WHEN, IN FACT, MR. HILL STATED ON PAGE 87 OF THE TRANSCRIPT "I DON'T RECALL WHAT STATEMENTS YOU MADE." FURTHER, AT PAGE 51 OF THE TRANSCRIPT OF THE FINAL HEARING, MR. HILL AGAIN STATES "I'M NOT SAYING THAT YOU ASKED ME TO CHANGE ANY SPECIFIC ITEM OF MY TESTIMONY AT THAT HEARING. WHAT I'M SAYING IS TO THE BEST OF MY RECOLLECITON - AS I SAID, I DON'T RECALL EXACTLY WHAT WAS SAID - ONLY THE EFFECT CREATED IN MY MIND WAS THAT IF I DID NOT MAKE THE TESTIMOMY TOO DAMAGING THAT

YOU WOULD CONSIDER - YOU WOULD DISMISS THE LAWSUIT. " STILL LATER, "I DON'T RECALL THE EXACT WORDS." AT PAGE 50 OF THE TRANSCRIPT OF THE FINAL HEARING AT LINES 17 AND 18, MR. HILL STATED CLEARLY AND UNEQUIVOCALLY, "YOU DIDN'T ASK ME TO ALTER MY TESTIMONY. NO SIR, YOU DIDN'T ASK ME TO ALTER MY TESTIMONY." (EMPHASIS ADDED)

FURTHER, PETITIONER WOULD BESEECH THE COURT TO EXAMINE, CAREFULLY, THE ENTIRE TESTIMONY OF MR. HILL. SPECIFICALLY, THE PURPORTED CONVERSATION THAT ATTEMPTS TO CHARGE PETITIONER WITH SUBORNATION OF PERJURY. THAT TESTIMONY SAW ITS FIRST LIGHT OF DAY AT THE FINAL HEARING. MR. HILL WEAKLY DEFENDS THIS BY STATING, "I WASN'T ASKED ABOUT IT." LEARNED COUNSEL FOR THE FLORIDA BAR WAS AT THE COMMITTEE HEARING IN QUESTION, EXAMINED MR. HILL, AND STATES AT PAGE 47 OF THE TRANSCRIPT OF FINAL HEARING TO MR. HILL, "YOU HAVE ANYTHING FURTHER YOU WISH TO STATE TO THE COURT WITH RESPECT TO THE SUIT THAT MR. THOMAS FILED AGAINST YOU OR HIS CONTACTS RELATED TO THAT SUIT?" APPARENTLY, THE FLORIDA BAR BELIEVES IT TO BE QUITE ACCEPTABLE TO FIND THE RULES OF PROCEDURE IN DISCIPLINARY PROCEEDINGS TO BE SUFFICENTLY BROAD TO ASK THE QUESTION AT FINAL HEARING, BUT NOT INQUIRE AT THE COMMITTEE HEARING. CERTAINLY THE ACTUAL TESTIMONY OF MR. HILL CONCERNING ANY CONVERSATION FLIES IN THE FACE OF REFEREE'S FINDING OF FACT ON THIS POINT.

FURTHER, MUCH ADO WAS MADE BY THE REFEREE CONCERNING A PURPORTED TELEPHONE CONVERSATION BETWEEN THE PETITIONER AND MR. ROBERT HILL ON JUNE 23, 1988 WHEREIN IT WAS ALLEGED THAT PETITIONER TOLD

ATTORNEY HILL THAT HE "WOULD BE SORRY" THAT HE (HILL) TOOK THE CASE. IN CONSIDERATION OF THIS PURPORTED TELEPHONE CONVERSATION, IT SEEMS APPROPRIATE TO CONSIDER THE ONLY WRITTEN COMMUNICATION BETWEEN THE PARTIES. SPECIFICALLY, THE ONLY DOCUMENTATION EXISTING BETWEEN MR. HILL AND PETITIONER DURING THAT TIME WAS A LETTER DATED JUNE 29, 1988 FROM PETITIONER TO MR. HILL. MR. HILL "THOUGHT IT WAS A - BASICALLY A PRELUDE TO A COUNTERCLAIM IN A DISPUTE OF A CIVIL ACTION" AT PAGE 83, LINES 12 AND 13 OF THE TRANSCRIPT OF FINAL HEARING. ALSO AT LINES 19, 20, AND 21 WHEN ASKED, "YOU DIDN'T FEEL PERSONALLY AFFRONTED BY MY CORRESPONDENCE, DID YOU?" MR. HILL ANSWERED, "NOT BY THAT LETTER, NO, SIR."

FURTHER, YET, IN A CONVERSATION FOLLOWING A HEARING THAT DID NOT PROCEED FAVORABLE TO REPONDENT, MR. HILL STATES REPEATEDLY ON PAGE 86 OF THE TRANSCRIPT OF THE FINAL HEARING THAT PETITIONER MADE NO THREAT, THAT THERE WAS NOTHING UNUSUAL FROM PETITIONER AND THAT MR. HILL WAS NOT OFFENDED. IT SEEMS INCONSISTENT THAT PETITIONER WOULD TELL MR. HILL IN A TELEPHONE CONVERSATION THAT HE WOULD BE SORRY FOLLOWING A SUIT LETTER AND NOT MAKE ANY SUCH STATEMENTS FOLLOWING UNFAVORABLE HEARINGS, SETTLEMENT NEGOTIATIONS AND A GRIEVANCE HEARING.IN ANY EVENT, PETITIONER WOULE SUBMIT TO THE COURT THAT THE WORDS "WOULD BE SORRY" ARE INSUFFICIENT UPON WHICH TO BASE DISCIPLINARY ACTION.

THE TOTALITY OF CIRCUMSTANCES HERETOFORE RELATED COMPELS PETITIONER TO THE CONCLUSION THAT NO COMMENT WAS MADE TO MR. ROBERT HILL THAT HE WOULD BE SORRY AND SHOULD NOT BE PERMITTED AS A BASIS FOR DISCIPLINE. IT IS, TOO, APPARENT THAT THE CONVERSATIONS AND CORRESPONDENCE BETWEEN MR. HILL AND PETITIONER WERE NO MORE THAN SPIRITED DEBATE BETWEEN LAWYERS, BOTH OF WHOM OBVIOUSLY BECAME PERSONALLY INVOLVED. CERTAINLY, NOT COMMENDABLE TO EITHER ATTORNEY, BUT CERTAINLY NOT SUBJECT TO DISCIPLINE.

FURTHER FACTUAL ERROR SUFFICIENT TO REQUIRE DISMISSAL OF THIS GRIEIVANCE TURNS ON A CONVERSATION BETWEEN PETITIOINER AND ATTORNEY ROBERT HILL ON SEPTEMBER 25, 1988. PARENTHETICALLY, PETITIONER WAS LED TO BELIEVE IN LAW SCHOOL THAT SETTLEMENT NEGOTIATIONS, WHICH THIS CONVERSATION WAS, WERE INADMISSIBLE. PERHAPS, AGAIN, ATTORNEYS ARE NOT PRIVELEGED TO POSSESS THE SAME RIGHTS AS OTHERS. IN ANY EVENT, THE ONLY EVIDENCE ELICITED BY THE FLORIDA BAR CONCERNING THE ALLEGATION THAT PETITIONER ATTEMPTED TO SUBVERT THE SYSTEM OF JUSTICE WAS FROM MR. ROBERT HILL. MR. HILL, HOWEVER, WAS A POOR WITNESS, FOR ALL HE COULD SAY AT PAGE 56, LINES 8,9, AND 10 OF THE TRANSCRIPT OF FINAL HEARING, WAS "WE NEGOTIATED - DISCUSSED SETTLEMENT NEGOTIATIONS. IT WAS BACK AND FORTH, AS TO WHO ORIGINATED A SPECIFIC OFFER, I REALLY CAN'T RECALL." IT CAN HARDLY BE A BASIS FOR DISCIPLINE WHEN THE FLORIDA BAR'S ONLY WITNESS ON POINT HAS NO KNOWLEDGE. AGAIN, PETITIONER SUBMITS, THE EVIDENCE FALLS MISERABLY SHORT OF ANY BASIS FOR THE REFEREE TO RECOMMEND DISCIPLINE.

THE REFEREE ERRRED AND EXHIBITED PREJUDICE SUFFICIENT FOR REVERSAL WHEN HE CHARACTERIZED TESTIMONY AT THE FINAL HEARING AS BEING SORT OF LIKE A ROBBERY TRIAL.

THAT THE REFEREE EXHIBITED PREJUDICE, THIS COURT IS REFERRED TO THE TRANSCRIPT OF FINAL HEARING, PAGE 32, LINES 13, 14, AND 15. THE REFEREE THEREIN CHARACTERIZED TESTIMONY AS "...SORT OF LIKE A ROBBERY TRIAL. WELL WHAT DID HE MEAN WHEN HE PULLED A GUN ON YOU AND SAID THIS IS IT." PETITIONER UNDERSTANDS THAT THE REFEREE'S PRIMARY RESPONSIBILITY IN THE SYSTEM OF JUSTICE IS THE CRIMINAL DOCKET, BUT OBJECTS MOST STRENUOUSLY TO AN ANALOGY OF A PURPORTED CONVERSATION TO A "ROBBERY". IT IS SUFFICIENT PREJUDICIAL ERROR, PETITIONER ASSERTS, TO WARRANT A DISMISSAL OF THIS PROCEDING, TAXING ALL COSTS TO THE FLORIDA BAR.

THE REFEREE ERRED IN HIS ANALYSIS AND APPLICATIONS OF THE RULES OF PROCEDURE.

PETITIONER SUGGESTS TO THIS COURT THAT THE REFEREE IGNORED AND ERRONIOUSLY APPLIED THE PROCEDURAL RULES TO PETITIONER'S DETRIMENT SUFFICIENT TO WARRANT DISMISSAL.

THAT AS WAS SAID BY THE REFEREE AT PAGES 48 AND 49 OF THE TRANSCRIPT OF THE FINAL HEARING, "WELL, THIS TRIAL BY REFEREE IS NOT BOUND BY TECHNICAL RULES OF EVIDENCE. HEARSAY EVIDENCE IS ADMISSIBLE, AND FURTHER, THERE IS NO RIGHT TO CONFRONT THE WITNESS FACE TO FACE". PETITIONER CAN ONLY WONDER ALOUD TO THIS COURT. HAVE THE CONSTITUTION AND PROCEDURAL RULES BEEN ABROGATED AS TO LAWYERS EVEN THROUGH THEY "MAY PERMANENTLY CRIPPLE AN ATTORNEY'S REPUTATION AND STANDING IN THE COMMUNITY." THIS COURT HAS DECLARED DISCIPLINARY PROCEEDINGS TO BE "PENAL" IN NATURE. CAN IT DO NO LESS THAN TO PERMIT A LAWYER ALL OF THE SAFEGUARDS THAT THE WORD "PENAL" REQUIRES? THESE SAFEGUARDS WERE CERTAINLY NOT EFFECTED AT THE FINAL HEARING WHEREIN PETITIONER WAS THE FOCUS.

FURTHER, THE REFEREE IGNORED THE RULES OF PROCEDURE WHEN HE SANCTIONED THE ACTIONS OF THE FLORIDA BAR CONCERNING THE TRANSCRIPT OF THE GRIEVANCE PROCEEDING BEFORE THE LOCAL COMMITTEE. THE REFEREE FOUND NO ERROR THAT THE FLORIDA BAR WOULD NOT PROVIDE COPIES OF DOCUMENTS IT INTENDED TO INTRODUCE AFTER HAVING BEEN REQUESTED FOR SAME. THIS ERROR WAS COMPOUNDED WHEN THE REFEREE PERMITTED COUNSEL FOR THE FLORIDA BAR TO EXAMINE PETITIONER ON THE TRANSCRIPT WHICH IT FAILED TO PROVIDE TO PETITIONER. AND FURTHER STILL, THE REFEREE ERRED IN PERMITTING THIS VIOLATION OF THE RULES OF PROCEDURE TO BECOME PART OF THE BASIS FOR HIS RECOMMENDATION FOR THE DISCIPLINE OF THE PETITIONER.

PETITIONER SUGGESTS TO THIS COURT THAT IT WAS PROCEDURAL ERROR FOR THE REFEREE TO PLACE THE FLORIDA BAR IN THE POSITION OF A DISCOVERY TOOL FOR A PARTY LITIGANT. THE REFEREE ERRONEOUSLY, IN PETITIONER'S VIEW, BASES, IN PART, HIS RECOMMENDATION FOR DISCIPLINE ON THE FACT THAT PETITIONER WAS NOT DISPOSED TO REVEAL THE EXTENT OF HIS CASE AGAINST MR. HILL AT THE LOCAL COMMITTEE HEARING. IN THAT THE CASE MR. HILL FILED AGAINST PETITIONER AND THE CASE PETITIONER FILED AGAINST MR. HILL AND HIS CLIENTS WERE STILL PENDING, PETITIONER SUGGESTS THAT THE COMMITTEE HEARING WAS AN IMPROPER FORUM FOR HIM TO BE COMPELLED TO DISCLOSE THE ENTIRETY OF HIS CASE. THE REFEREE WOULD PERMIT THE FLORIDA BAR TO IMPOSE ITSELF IN DISCOVERY WHEN THE ATTORNEY, MR. HILL, HAD, IN FACT, FAILED TO DISCOVER.

IN FURTHERANCE OF THE HERETOFORE REFERENCED PROCEDURAL ERROR, THE REFEREE WOULD RECOMMEND DISCIPLINE OF PETITIONER FOR WHAT HE, THE REFEREE, FOUND TO BE INCONSISTENT TESTIMONY OF PETITIONER. IN FACT, PETITIONER'S TESTIMONY WAS ENTIRELY CONSISTENT. AT THE LOCAL COMMITTEE HEARING, PETITIONER TESTIFIED THAT MRS. DEHAAN, MR. HILL'S CLIENT, APPEARED AT HIS OFFICE DOOR, WITH A POLICE OFFICER, WAVING A PIECE OF PAPER, STATING THAT SHE HAD SPOKEN WITH HER ATTORNEY AND THAT THEY WERE GOING TO "THE BAR" WITH PETITIONER. FURTHER, AT THE FINAL HEARING, PETITIONER TESTIFIED THAT HE HAD BEEN APPROACHED BY MR. DEHAAN, MR. HILL'S CLIENT, AND LATER CALLED BY MR. DEHAAN STATING THAT HE, HIS WIFE AND THEIR ATTORNEY HAD WORKED TOGETHER TO CREATE THE GRIEVANCE AGAINST PETITIONER.

IT MUST BE REMEMBERED THAT THE FINAL HEARING CAME AFTER THE LITIGATION HAD TERMINATED WITH THE REASONABLE PROSPECT THAT IT WOULD NOT AGAIN SURFACE. ANY FAIR READING OF THE REFEREE'S FINDINGS IN THIS RESPECT WOULD PLACE PETITIOINER IN A TOTALLY UNTENABLE POSITION IN RESPECT TO THE LITIGATION AND IS ERRONEOUS AND NOT A REASONABLE BASIS FOR DISCIPLINE.

PETITIONER SUGGESTS PROCEDURAL ERROR SUFFICIENT FOR DISMISSAL WHEN THE RERE REE STATES: "AT HEARING, THE BAR WITHDREW THE THIRD ALLEGATION LISTED ABOVE AND ASSERTED TWO ADDITIONAL VIOLATIONS ...." THE ESSENCE OF DUE PROCESS IS NOTICE AND AN OPPORTUNITY TO BE HEARD. PETITIONER SHALL NOT BURDEN THE COURT WITH DECADES OF PRECEDENT TO SUPPORT THIS RULE OF LAW, FOR IT HAS BECOME SO MUCH A PART OF THE BODY OF OUR LAW IT APPEARS QUITE UNNECESSARY. FOR SOME TWO AND ONE HALF YEARS, PETITIONER HAD BEEN ENGAGED IN CONTINUING CONTROVERSY WITH THE FLORIDA BAR TO UNDERSTAND THE CHARGES, AND THEN TO HAVE ONE CHARGE WITHDRAWN AND TWO NEW ONES ADDED, IS WITHOUT QUESTION, ERROR, PARTICULARY WHEN A FINDING OF GUILT WAS MADE AS TO ONE OF THE TWO ALLEGATIONS ASSERTED AT FINAL HEARING. THE WORDS OF THIS HONORABLE COURT IN QUICK RETURN TO MIND THAT THESE PROCEDINGS ARE PENAL IN NATURE AND MAY PERMANENTLY CRIPPLE AN ATTORNEY IN HIS COMMUNITY AND IN HIS PRACTICE. SURELY, THESE WORDS ARE NOT HOLLOW, THAT IN THESE PROCEDINGS, THIS HONORABLE COURT CAN AGAIN BREATH LIFE AND MEANING INTO THEM AND DISMISS THIS GRIEVANCE AND RETURN IT TO THE DEPTHS FROM WHICH IT CAME.

ANY FAIR READING OF THE FLORIDA BAR v. STILLMAN , 401 SO. 2d, 1306 IS CONTRARY TO THAT FOR WHICH THE REFEREE CITED. CLEARLY, THE CASE PERMITS THE REFEREE TO CONSIDER THE ADDITIONAL CHARGES BROUGHT BY THE FLORIDA BAR, BUT, NOWHERE DOES THE CASE PERMIT THE REFEREE TO DISREGARD NOTICE. PETITIONER SUGGESTS TO THIS COURT THAT THE NOTICE CONCEPT OF DUE PRPOCESS IS STILL AVAILABLE TO FLORIDA ATTORNEYS, AND CAN ONLY HOPE THAT THIS COURT WILL REESTABLISH THAT FLORIDA ATTORNEYS ARE ENTITLED TO ALL THE RIGHTS OF OTHER CITIZENS AND OVERRULE STILLMAN TO THE EXTENT THAT THE CASE PERMITS THE BAR TO COME INTO COURT WITH ITS SHOTGUN IN HOPES THAT IT CAN HIT THE ATTORNEY SOMEWHERE. NOWHERE IN JURISPRUDENCE, EXCEPT HERE, MAY AN INDIVIDUAL BE SUBJECTED TO GREVIOUS HARM WITHOUT PREVIOUS TO THE PROCEEDING BEING MADE AWARE OF THAT WHICH HE IS CALLED UPON TO DEFEND.

PETITIONER SUGGESTS FURTHER PROCEDURAL ERROR SUFFICIENT FOR DISMISSAL WHEN THE REFEREE, IN PART, BASES HIS DECISION FOR DISCIPLINE ON PETITIONER'S FAILURE TO DISCOVER, FAILURE TO AMEND, AND DISMISSAL FOR LACK OF PROSECUTION. PETITIONER FINDS IT INCONSISTENT AND ERROR TO DISCIPLINE ONE ATTORNEY FOR FAILURE TO DISCOVER AND DECLINES TO DO THE SAME TO THE OTHER THREE ATTORNEYS IN THE MATTER FOR THE SAME. FURTHER, PETITIONER WAS PREPARED TO TRY HIS LAWSUIT, FOR HE, UNLIKE THE OTHER ATTORNEYS WAS FULLY COGNIZANT OF THE FACTS, THE LAW AND HAD PREPARED HIS CASE PRIOR TO FILING SUIT.

FURTHER, IT IS ERROR, PETITIONER SUBMITS, TO BASE DISCIPLINE ON A FAILURE TO AMEND WHEN, AS HERE, THE DEFENDANTS HAVE LEFT OR FLED THE JURISDICTION PROVIDING NO FORWARDING ADDRESS TO THE COURT, THE POSTAL AUTHORITIES OR THEIR ATTORNEY. FURTHER, CAN ONE NOT SIMPLY GROW TIRED OF FIGHTING AFTER ALMOST THREE YEARS OF NON PRODUCTIVE EXPENDITURE OF TIME AND RESOURCES .

ONE HAS TO BUT PULL THE TRIAL FILE OF THIS ACTION TO FIND THAT, IN FACT, NOT ONLY WAS PETITIONER'S ACTION DISMISSED, MR. HILL'S WAS, AS WELL, DISMISSED FOR A FAILURE TO PROSECUTE. PETITIONER SUBMITS THAT IT IS BOTH INCONSISTENT, AND ERROR FOR THE REFEREE TO RECOMMEND DISCIPLINE OF ONE ATTONREY AND NOT THE OTHER, FOR THE IDENTICAL ACTION, OR PERHAPS, INACTION, IN THE SAME CASE IN THE SAME JURISDICTION. AND, AGAIN, CAN ONE NOT SIMPLY GROW TIRED OF FIGHTING AFTER ALMOST THREE YEARS OF NON PRODUCTIVE EXPENDITURE OF TIME AND RESOURCES.

THE REFEREE ERRED IN HIS RECOMMENDATION

OF DISCIPLINE AS THERE IS NO "CRIME."

PETITIONER FINDS IT EXTREMELY DIFFICULT TO ADDRESS THE PROPOSITION THAT THE PUNISHMENT, HEREIN, DOES NOT FIT THE "CRIME" BECAUSE OF THE STAR CHAMBER SECRECY THAT HAS AND CONTINUES TO EXIST ON THE PART OF THE FLORIDA BAR. HOW MANY COMPLAINTS HAVE BEEN MADE AGAINST FLORIDA LAWYERS FOR FILING FRIVOLOUS COMPLAINTS THAT NEVER

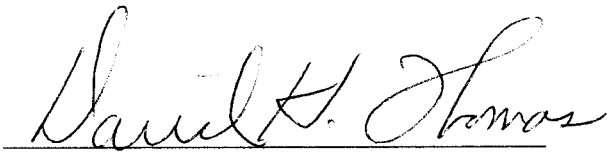
REACHED THIS STAGE? BY WHAT CRITERIA DOES THE FLORIDA BAR DECIDE WHICH CASES TO REFER TO LOCAL COMMITTEES FOR DISPOSITION? PETITIONER IS CLEARLY AWARE THAT A GRIEVANCE WAS FILED AGAINST MR. HILL, WHICH THE REFEREE MAKES BUT PASSING MENTION, ALLEGING, AMONG OTHER THINGS, THAT HIS COMPLAINT WAS FRIVOLOUS, THAT, IN FACT HE "SHOWED A LACK OF INTEREST IN PURSUING", THAT HE FAILED TO ENGAGE IN ANY DISCOVERY, THAT ULTIMATELY HIS SUIT WAS DISMISSED FOR WANT OF PROSECUTION. THIS GRIEVANCE WAS DISPOSED OF BY THE FLORIDA BAR WITHOUT THE TAKING OF TESTIMONY OR HEARING THE COMPLAINANT. PETITIONER WONDERS HOW MANY HUNDREDS, OR THOUSANDS, MAY EXIST, BUT WILL NEVER SEE THE LIGHT OF DAY. THE INTERNAL PROCEDURES OF THE FLORIDA BAR CRY OUT FOR REVIEW AND PUBLICATION. IT HAS OFTEN BEEN SAID, PERHAPS WITH SOME MERIT, THAT THE FLORIDA BAR IS INCAPABLE OF DISCIPLINING ITSELF.

THAT THERE IS NO ACTION BY THE PETITIONER THAT IS SUBJECT TO DISCIPLINE, THIS COURT IS REFERRED TO THE FLORIDA BAR re AMENDMENTS TO THE RULES REGULATING THE FLORIDA BAR, 558 SO. 2d 1008 (1990) WHEREIN IS STRONGLY INDICATED THAT LAWYERS WHO ARE ACCUSED OF MISCONDUCT MAY NOW SEEK ALL LEGAL REDRESS AVAILABLE UNDER FLORIDA LAW.

IN SHORT, THERE IS NO CRIME. DISMISSAL, PETITIONER SUGGESTS, IS THE PROPER REMEDY HERE, DUE TO AN OBVIOUS ABSENCE OF DUE PROCESS, PREJUDICIAL ERROR ON THE PART OF THE REFEREE IN HIS ANALOGY OF THIS PROCEEDING TO A "ROBBERY", AND ERRONEOUS FINDINGS AND ERRONEOUS APPLICATION OF THE LAW TO THE FACTS.

PETITIONER PERCEIVES A CHILLING EFFECT IF THE BAR IS PERMITTED TO INTERPOSE ITS JUDGMENT ON ATTORNEYS' PLEADINGS IN A DISCIPLINARY PROCEEDING RATHER THAN PERMIT A COURT OF LAW TO PRONOUNCE ITS JUDGMENT. PERHAPS THIS IS ONE METHOD TO STEM THE TIDE OF LITIGATION, BUT IT IS TOTALLY UNACCEPTABLE.

RESPECTFULLY SUBMITTED,



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CONCLUSION

FOR THE FOREGOING REASONS, SPECIFICALLY THAT THE REFEREE CLEARLY EXHIBITED PREJUDICE, DISREGARDED DUE PROCESS AND PROCEDURAL SAFEGUARDS, ERRED IN HIS FINDING OF FACT AND MISAPPLIED THE PREVAILING LAW, PETITIONER, DAVID H. THOMAS, RESPECTFULLY ASKS THIS COURT TO REVERSE THE FINDINGS AND DECLINE TO ACCEPT THE RECOMMENDATIONS OF THE REFEREE AND DISMISS THE UNDERLYING GRIEVANCE AS BEING WITHOUT MERIT.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THE ABOVE AND FOREGOING HAS BEEN FURNISHED TO THOMAS E. DEBERG, ESQUIRE, THE FLORIDA BAR, SUITE C-49, TAMPA AIRPORT, MARIOTT HOTEL, TAMPA, FLORIDA 33607, BY REGULAR UNITED STATES MAIL THIS THE 16Th DAY OF JANUARY, 1991.

David H. Thomas

DAVID H. THOMAS