IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PHILLIP R. WASSERMAN,

Respondent.

_____/

Case Nos. 83,818 and 84,814

THE FLORIDA BAR'S ANSWER BRIEF AND CROSS-INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

SYMBOLS AND REFERENCES

In this brief, The Florida Bar, Complainant, will be referred to as "The Florida Bar" or "The Bar". The Respondent, Phillip R. Wasserman, will be referred to as "Respondent".

"TR", Volumes I and II, will refer to the transcript of the final hearing before the referee in the disciplinary case styled The Florida Bar v. Phillip R. Wasserman, Supreme Court Case Nos. 83,818 and 84,814, held on April 20, 1995. "DT" will refer to the transcript of the disciplinary hearing in Case Nos. 83,813 and 84,814, held on May 1, 1995.

"RR" will refer to the Report of Referee in Supreme Court Case Nos. 83,818 and 84,814, dated June 26, 1995.

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee. "DH Exh." will refer to exhibits presented by The Florida Bar at the disciplinary hearing.

"Rule" or "Rules" will refer to The Rules Regulating The Florida Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

"IB" will refer to the Respondent's Initial Brief filed in this cause.

STATEMENT OF THE FACTS AND OF THE CASE

The Florida Bar supplements the facts contained in Respondent's Initial Brief as follows:

The Florida Bar charged Respondent with ethical violations in three separate one-count complaints. Final hearing on all three complaints was conducted on April 20, 1995, and May 1, 1995, before The Honorable J. Rogers Padgett, Referee. A disciplinary hearing was also conducted before Judge Padgett on May 1, 1995.

The referee issued his Report of Referee on June 26, 1995, wherein he made the following recommendations to this Court: that Respondent be found guilty of violating Rule 3-4.3 and Rule 4-3.5(c), Rules Regulating The Florida Bar, in Case No. 83,818; that Respondent be found not guilty of all violations alleged in Case No. 84,438; and that Respondent be found guilty of violating Rule 3-4.3 and Rule 4-8.4(a) in Case No. 84,814 (RR, p. 2). The Bar is not challenging the referee's findings of fact or conclusions of law in any of these cases.

The referee recommended the following sanctions: As to Case No. 83,818, that Respondent receive a sixty (60) day suspension; as to Case No. 84,814, that the Respondent receive a six (6) month suspension (RR, p. 2). It is The Florida Bar's position that a six-month suspension would be the appropriate sanction for

Respondent's misconduct in Case No. 83,818, considering the serious nature of the Respondent's misconduct and the Respondent's prior disciplinary record.

The facts surrounding the Respondent's misconduct as presented during the final hearing are as follows:

Case No. 83,818

Respondent appeared before The Honorable Bonnie S. Newton, Circuit Judge for the Sixth Judicial Circuit, on August 23, 1993, in two (2) custody hearings (TR, Vol I, pp. 49, 109).

Respondent was approximately ten (10) to fifteen (15) minutes late in arriving for the first hearing (TR, Vol I, pp. 95, 111). Upon his arrival in the courtroom and learning that the hearing had commenced in his absence, the Respondent immediately began loudly reprimanding the Court for starting the hearing without him (TR, Vol. I, pp. 50, 95). In order to accommodate the Respondent's late arrival, Judge Newton granted the Respondent extra time to cross-examine witnesses, even allowing a repetition of testimony (TR, Vol. I, p. 50).

Upon conclusion of the hearing, Judge Newton made a ruling granting temporary custody of the minor children to the grandparents rather than to Respondent's client. Judge Newton testified before the Referee that she felt it was in the best

interest of the children at that time to grant temporary custody to the grandparents (TR, Vol.I, p. 51). At this point, the Respondent became visibly upset that the Judge had not granted temporary custody to his client and continued to argue, even after Judge Newton had announced her ruling (TR, Vol. I, pp. 51, 75).

The second hearing, in which the Respondent represented the father in a contested child custody matter, commenced immediately thereafter. After hearing argument of both counsel lasting approximately fifteen (15) minutes, Judge Newton made a ruling unfavorable to Respondent's client (TR, Vol I, pp. 113-115). After the Respondent protested the Court's decision, Judge Newton allowed both parties to present testimony of witnesses, even though the presentation of such testimony would cause the hearing to exceed its allotted time, thus delaying the start of the next scheduled hearing (TR, Vol. I, pp. 78, 114-115). After the presentation of this testimony, Judge Newton upheld her previous ruling and granted temporary custody to the mother rather than to Respondent's client (TR, Vol. I, pp. 51-52, 116).

When Judge Newton announced her decision on temporary placement of the minor children, the Respondent instantly began a verbal tirade upon the Court. Respondent stood and shouted his criticism, gesturing and waving his arms in the air, banging on the

table or podium, shouting that the Judge's decision was absolutely wrong, screaming that the Court was unfair, and that no one would obey the Judge's order (TR, Vol. I, pp. 52-53, 96; RR, p. 1).

At one point, the Respondent put his hands behind his back and challenged Judge Newton to arrest him and put him in jail (TR, Vol. I, pp. 96, 122, 158). When Judge Newton advised the Respondent that his actions could result in his being found in contempt, the Respondent shouted that she could hold him in contempt if she wanted to because, "I think you are contemptuous, this Court is contemptuous" (TR, Vol I, pp. 52-53, 135).

Respondent's conduct during this hearing was so disruptive that the bailiff became concerned for the safety of the Court and called for a second bailiff as a back-up (TR, Vol I, pp. 97, 103-104). Respondent's verbal diatribe upon the Court continued even after the second bailiff had arrived (TR, Vol. I, pp. 104-105).

Upon exiting Judge Newton's courtroom, Respondent informed the opposing counsel, James P. Kennedy, Esquire, that he would instruct his client to disobey Judge Newton's order to turn the children over to the custody of the mother. When he made this statement, all parties were present, and Respondent's client was standing right next to him (TR, Vol. I, pp. 80, 126; Vol. II, p. 152).

Mr. Kennedy immediately went back into the courtroom with the Respondent following closely behind (TR, Vol. I, p. 98). Although the next hearing was already in progress, Judge Newton allowed Mr. Kennedy to interrupt the proceedings. Mr. Kennedy then advised the Court that the Respondent had just informed him that he was instructing his client not to comply with the Court's order (TR, Vol. I, pp.80-81, 98, 119). Judge Newton then asked the Respondent whether he had made such a statement to Mr. Kennedy, and the Respondent confirmed that he had done so (TR, Vol. I, pp. 80-81, 98). Judge Newton admonished the Respondent that he was giving his client bad advice, and instructed Mr. Kennedy to file the appropriate documents if Respondent's client refused to abide by the Court's order (TR, Vol I, pp. 80, 127).

Later that day, the parties communicated among themselves regarding Judge Newton's ruling, and the children were subsequently turned over to the custody of the mother as ordered (TR, Vol. I, pp. 87, 128-129). Therefore, Mr. Kennedy never filed a Motion for Contempt against the Respondent (TR, Vol I, p. 87).

Although the Respondent met with Judge Newton privately at a later date to inquire if the Judge felt it necessary to recuse herself in future cases where the Respondent was counsel for one of the parties and admitted that his behavior at the August 23, 1993

hearing may have been inappropriate, he never actually apologized to Judge Newton (TR, Vol. I, pp. 65, 125, 140-142).

Case No. 84,814

A witness subpoena duces tecum was issued, but apparently not personally served, requiring the Respondent to appear at a hearing before The Honorable John C. Lenderman on April 14, 1994. Pursuant to the subpoena, the Respondent was required to produce a former client's file which was in his possession, and which he had previously failed to voluntarily produce to the client's successor counsel, N. David Karones, Esquire (TR, Vol. II, p. 216).

The Respondent failed to appear for the scheduled hearing on April 14, 1994, or to produce the subpoenaed documents. The Respondent testified before the referee that he did not discover the subpoena until after the hearing had been conducted (TR, Vol II, p. 255).

The Respondent telephoned Judge Lenderman's judicial assistant, Cynthia Decker, at approximately 2:40 p.m. on April 14, 1994, to find out what had happened at the hearing (TR, Vol. II, p. 168). Ms. Decker advised the Respondent that Judge Lenderman had issued an Order to Show Cause due to his failure to appear or to produce the subpoenaed file. When Ms. Decker made this statement, the Respondent became very upset, informed Ms. Decker that he was

going to file a judicial complaint against Judge Lenderman (TR, Vol. II, p. 260), and demanded to immediately speak with the Judge (TR, Vol II, p. 169).

Since Judge Lenderman was on the bench conducting another hearing at that time, Ms. Decker transmitted a message to him via his computer E-mail system that the Respondent was on the telephone, very upset, demanding to speak with him regarding the Show Cause Order (TR, Vol II, pp. 169,192-193).

Judge Lenderman advised Ms. Decker that he could not speak with the Respondent since he was conducting a hearing, and because such communication would be ex parte (TR, Vol. II, pp. 169, 192-193). The Judge suggested that the Respondent set a hearing on the matter (TR, Vol. II, p. 169).

Ms. Decker testified before the Referee that when she advised the Respondent that Judge Lenderman could not accept his telephone call, the Respondent became extremely irate and shouted, "you little mother-fucker; you and that judge, that mother-fucking son-of-a-bitch." Respondent also cursed Mr. Korones (counsel on the case who had issued the subpoena) shouting, "God damn Korones". Ms. Decker further testified that she then asked the Respondent, "What did you say?" The Respondent replied, "You heard me." Ms.

Decker then told the Respondent that she did not have to listen to that and hung up the telephone (TR, Vol. II, pp. 170-171).

Ms. Decker testified that she was so upset over the telephone conversation with the Respondent that she was unable to continue answering the telephone or talking with other people that day, and left the office at approximately 3:15 that afternoon (TR, Vol. II, p. 171). Later that evening, she relayed to Judge Lenderman the content of her telephone conversation with the Respondent, including the profane language directed at her and at the Judge (TR, Vol. I, p. 194).

Judge Lenderman was concerned over the incident to such an extent that he telephoned the Chief Judge at home that evening to inform him of the Respondent's telephone conversation with Ms. Decker, and to request guidance as to the proper course of action (TR, Vol. II, p. 196).

Judge Lenderman had issued his Order to Show Cause on the Respondent's failure to respond to the subpoena duces tecum on April 14, 1994. The next day, he discussed the matter with the court counsel and began drafting an Amended Order to Show Cause which would include Respondent's behavior during the telephone conversation with his judicial assistant (TR, Vol. II, pp. 196-197).

The following day, April 15, 1994, the Respondent sent Judge Lenderman a letter wherein he stated that he was going to immediately file a judicial complaint against the Judge, and referred to Judge Lenderman as "a shame to the bench" (TFB Exh. #1; TR, Vol. II, p. 232).

An Amended Order to Show Cause was issued against the Respondent, and Respondent was subsequently tried before The Honorable B. J. Driver, Circuit Judge, on charges of indirect criminal contempt. In his Order of Judgment of Contempt and Sentence for Indirect Criminal Contempt issued on September 9, 1994, Judge Driver found Respondent not guilty of willfully failing to appear pursuant to the subpoena duces tecum, since there was a doubt as to whether or not the Respondent authorized service of the subpoena upon his secretarial assistants, and since the statutes governing service of process are to be strictly construed (TFB Exh. #2).

Judge Driver found the Respondent guilty of Indirect Criminal Contempt for his actions in using profane language during his telephone conversation with Judge Lenderman's judicial assistant. Judge Driver further found that the Respondent's conduct was "calculated to and did result in degrading the dignity and authority of the Court and was intended to demean and degrade the

dignity and respect for the office of circuit judge". Judge Driver also noted that the Respondent had failed to show any reasonable excuse for such conduct (TFB Exh. #2).

As a result of the indirect criminal contempt conviction, Respondent was sentenced to thirty (30) days in the Pinellas County Jail, with the last twenty (20) days suspended upon the condition that the Respondent successfully complete a course in ethics as approved by The Florida Bar (TFB, Exh. #2). Respondent subsequently appealed his criminal conviction, and that appeal is currently pending before the Second District Court of Appeal (TR, Vol. II, p. 163).

In his Report of Referee, the referee noted as an aggravating factor that the Respondent attempted to get some "mileage" out of the indirect criminal contempt charge and conviction (RR, p. 3). The incident had been publicized, and the Respondent received a letter apparently from persons unhappy with Judge Lenderman's ruling in an unrelated matter. The writers of the letter referred to Judge Lenderman as "the scum that gives respectable judges a bad name" and encouraged the Respondent to "kick ass" (DH, TFB Exh. #1). Upon receiving this letter, the Respondent passed out copies to his office staff, had the letter attractively framed, and placed

it in a conspicuous place in his client reception area (DT, pp. 72-74; RR, p. 3).

The Respondent has failed to apologize to Judge Lenderman or Ms. Decker for his inappropriate and outrageous conduct on April 14, 1994.

SUMMARY OF THE ARGUMENT

In Case No. 83,818, the referee recommended that the Respondent be found guilty of violating Rule 3-4.3 and 4-3.5(c), Rules Regulating The Florida Bar. In this case, the referee recommended that the Respondent receive a sixty (60) day suspension for misconduct wherein the Respondent, while attending a hearing, lost his temper after an adverse ruling by the judge. The Respondent shouted his criticism, banged on the table or podium, challenged the judge to hold him in contempt, displayed his arms as if to be handcuffed, and challenged the judge to put him in jail. The Respondent displayed such anger that the bailiff, fearing for the safety of the court, summoned the assistance of a second bailiff to restore order (TR, Vol. I, pp.52-53, 61-62, 96-97; RR, p. 1). Immediately thereafter, outside the hearing room, in the presence of both parties, Respondent stated that he would advise his client to disobey the Court's order (TR, Vol. I, pp. 80-81, 86, 98).

The Florida Bar recommends that this Court reject the referee's recommended sanction and impose a six-month suspension . It is the Bar's position that such sanction is clearly warranted, based upon the serious nature of the Respondent's misconduct; the Respondent's extensive prior discipline; and the Respondent's

failure to demonstrate any remorse for his actions or to appreciate the wrongfulness of his conduct.

In Case No. 84,814, the referee recommended that the Respondent be found guilty of violating Rules 3-4.3 and 4-8.4(a) for misconduct wherein the Respondent telephoned a judge's judicial assistant and, after learning that the judge had issued a show cause order to Respondent for his failure to appear at a hearing, said to the judicial assistant, "You little mother-fucker; you and that judge, that mother-fucking son-of-a-bitch" (TR, Vol. II, pp. 170-173, 194; RR, p. 2). The Respondent was subsequently tried and adjudicated guilty on a charge of indirect criminal contempt based on this incident (TFB Exh. #2). The Respondent was also sentenced to thirty (30) days incarceration in the Pinellas County Jail, and is currently appealing his conviction before the Second District Court of Appeal.

The Florida Bar requests that this Court uphold the referee's findings of fact, conclusions of law, and recommended sanctions in Case No. 84,814, and suspend the Respondent for six months, to run consecutive to the suspension imposed in Case No. 83,818.

I. A six-month suspension is the appropriate discipline for Respondent's misconduct in Case No. 83,818.

The referee recommended to this Court that the Respondent be suspended for sixty (60) days for his misconduct in Case No. 83,813. It is the Bar's position that a six-month suspension would be the more appropriate sanction when consideration is given to the very serious nature of Respondent's misconduct, the potential injury to the parties and the judicial system, and the Respondent's prior disciplinary record.

The Respondent argues that his conduct in Judge Newton's courtroom, although inappropriate, was somehow understandable and justifiable since the offensive conduct was committed during an emotionally charged custody hearing during the "heat of battle" when the Respondent was having a "bad day in court," (IB, p. 11) and because the Respondent felt that Judge Newton's rulings were unusual and potentially improper (IB, p. 7).

The Respondent also maintains that a public reprimand is the most severe sanction administered by this Court in like situations (IB, p. 8), and that the appropriate sanction would be an admonishment for minor misconduct (IB, p. 12).

It is the Bar's position that becoming emotionally involved in a case or disagreeing with the Court's ruling is never a

justification for a member of the Bar to demonstrate improper and inappropriate behavior in the courtroom, especially to the extent demonstrated by the Respondent.

This Court has announced many times that a lawyer is an officer of the courts and, as such, is an essential component of the administration of justice. The Florida Bar v. Calhoun, 102 So. 2d 604, 608 (Fla. 1958).

This Court has also held that while a judge as a public official is neither sacrosanct nor immune to public criticism of his conduct in office, the administration of the judicial process as an institution of government is a sacred proceeding. Any conduct of a lawyer which brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties. Id. at 608.

Moreover, conduct such as that exhibited by the Respondent has a potentially negative effect on the parties involved in the litigation, especially in an "emotionally charged" situation such as a child custody issue. Judge Newton recognized this fact and the detrimental consequences of Respondent's outrageous behavior in her courtroom when she testified before the referee that the Respondent's conduct was not only totally disruptive, but:

". . . Worse in my opinion than the disruption itself was the fact that he was not helping the parents adjust to what needed to be done for the benefit of the children. ... I was gravely concerned about the long-term progress of that case because of his actions. (TR, Vol. I, pp. 54-55).

Judge Newton also recognized that the Respondent's misconduct was so flagrant and so outrageous that she took the extraordinary step of memorializing that misconduct in her Order on Motion for Temporary Custody. Judge Newton stated in paragraph nine as follows:

"While having no bearing or effect upon the ruling herein, it is necessary that the Court include specific findings regarding the conduct of Petitioner's counsel, Phillip R. Wasserman, prior to, during, and following the hearing . . ."

" While Mr. Wasserman's conduct raises obvious concerns about compliance with the Rules Regulating The Florida Bar . . . the Court is primarily concerned with the impact counsel's actions may have on the pending litigation. The above-described conduct actively and unduly contributes to the hostility of the parents and may cause violations of Orders, thereby adversely affecting the best interest of the children of the parties." (TFB Exh. #1, p. 2).

Judge Newton also did what a judge is ethically expected to do when an attorney acts as the Respondent did. Judge Newton contacted The Florida Bar, which led to the Bar's investigation, the grievance committee's probable cause finding, and ultimately the

Referee's recommendation of suspension which is presently before this Court.

The Respondent asserts that his actions were somehow mitigated because his client did not actually disobey the Court's order. The Respondent also asserts that he never advised his client to disobey Judge Newton's order; that he merely informed the opposing counsel that he was going to advise his client to disobey. This position is disingenuous at best, when one considers that the Respondent's client was standing next to him at the time he so informed opposing counsel, clearly within earshot of the Respondent's statements.

The fact that the parents worked out their problems regarding temporary custody of the minor children without the lawyers present and subsequently complied with Judge Newton's order in no way mitigates the Respondent's misconduct. The record herein indicates that Respondent's client decided to obey Judge Newton's order despite the Respondent's improper advice, not through any effort on the part of the Respondent (TR, Vol I, pp. 153-154).

The Respondent contends that the referee failed to give proper consideration to the setting in which the misconduct occurred (IB, p. 8). It is the Bar's position that the referee properly expressed disinterest in the underlying facts of the case which gave rise to the Respondent's misconduct. Appropriate remedies

were available to the Respondent if he felt that the judge's ruling was improper or unlawful. Rather than utilize those remedies, the Respondent chose to demean and impugn the integrity of the Court(TR, Vol I, pp. 97, 103-104).

Respondent also insists that his misconduct is mitigated by his remorse, demonstrated by the fact that he admitted to the referee during the final hearing (almost two years after the inappropriate conduct occurred) that his behavior in Judge Newton's courtroom was inappropriate, and that he would not take the same course of action again. Respondent also maintains in mitigation that he apologized to Judge Newton, in a "round about" and "cautious" manner (TR, Vol. I, pp. 125, 140).

However, Judge Newton testified before the referee as follows:

> "He never straightforwardly said,'I'm really sorry, Judge, I learned that I shouldn't have done that." I don't feel he ever really apologized. He's skirted the issues." (TR, Vol I, p. 65).

What the Respondent apparently perceives to be his "round about" and "cautious" apology was a conversation he had with Judge Newton several weeks after the incident. In that conversation, the Respondent merely inquired as to whether the Judge felt it necessary to recuse herself from future cases in which he was counsel for one of the parties (TR, Vol. I, p. 124).

During the final hearing, Respondent also made the illogical representation that the reason he did not immediately apologize to Judge Newton was so that such apology could not be "used against him in a Bar complaint" which he anticipated Judge Newton might file (TR, Vol. I, p. 125).

Respondent's position that his misconduct warrants an admonishment is also not supported by the Rules Regulating The Florida Bar. Rule 3-5.1(b)(1)(C) provides that:

> "In the absence of unusual circumstances misconduct shall not be regarded as minor if any of the following conditions exist:(C) the respondent has been publicly disciplined in the past 5 years."

The Respondent is ineligible to receive an admonishment for his misconduct in Case No. 83,818 since he has previously been publicly disciplined as follows:

> Case No. 73,477: By order of this Court dated January 11, 1990, the Respondent received a public reprimand for charging a clearly excessive fee, failing to competently handle a legal matter, failing to act with reasonable diligence when representing a client, and failing to promptly deliver funds and render a full accounting to his client.
>
> Case No. 77,327: By order of this Court dated March 5, 1992, the Respondent received a public reprimand and was placed on probation for twelve (12) months for failing to comply with the Rules Regulating Trust Accounting.
>
> TFB No. 91-10,996(6A): On April 2, 1993, the Respondent received an admonishment for failing to diligently communicate with opposing counsel, failing to protect his

client's interest, and engaging in conduct prejudicial to the administration of justice.

Case No. 82,842: By order of this Court dated April 20, 1995, the Respondent was suspended for sixty (60) days for charging a prohibited fee and representing a client when such representation resulted in a violation of the Rules of Professional Conduct or law (RR, p. 3).

Respondent also contends that in cases involving the disruption of a tribunal or criticism of the judiciary similar to that in the instant case, the most severe sanction imposed by this Court is a public reprimand. In his Initial Brief, the Respondent cites several cases to support his position.

In review of those cases reveals that none of the accused attorneys' misconduct in the cases cited by the Respondent is even remotely similar to the Respondent's misconduct herein. All of the cases cited by the Respondent can be distinguished from the instant case in that they deal with ethical violations which are far less egregious than that of the Respondent; deal with attorneys who demonstrated remorse subsequent to their misconduct; or deal with attorneys who had no prior disciplinary history.

In The Florida Bar v. Pascoe, 526 So. 2d 912, 916 (Fla. 1988), the respondent received a public reprimand and was placed on three-years probation with the provision that he pass the ethics portion of the Bar exam. Among other things, Pascoe filed a Motion for

Reduction of Sentence on behalf of a client who was poor and Black wherein he implied that his client had received unequal treatment because of his race and socioeconomic status and that justice was for sale. In a subsequent letter to the chief judge, Pascoe explained that he had the utmost respect for the judges in question, and that his intention was only to point out what he believed to be an unequal sentence. Unlike the Respondent herein, Pascoe also publicly apologized to the judges for his improper allegations.

In The Florida Bar in re Shimek, 284 So. 2d 284 (Fla. 1973), the respondent made allegations in a memorandum filed with the Federal District Court that the state trial judge had avoided the performance of his sworn duty, when such allegations were unsubstantiated, and implied that the decisions of a judge with a prosecutorial background were tainted.

Shimek complied with the District Court's order that he make a public apology to the judiciary of the State of Florida, and was admonished not to repeat such conduct.

In The Florida Bar v. Flynn, 512 So. 2d 18 1 (Fla. 1987), the respondent received a public reprimand for his conduct in writing letters to the Bar and a grievance committee wherein he accused a judge of improper conduct and stated his intentions to file a

judicial grievance and civil rights action because the judge had suggested to Flynn's client that she file a Bar grievance against him.

In The Florida Bar v. Weinberger, 397 So. 2d 661 (Fla. 1981), the respondent, newly admitted to practice law, represented himself in two civil suits arising from termination of his employment. After suffering adverse rulings in those cases, he filed various pleadings and made public statements denigrating the courts and the administration of justice. After the trial, Weinberger wrote two formal letters of apology to the judges involved in the matter. Weinberger received a public reprimand.

In The Florida Bar v. Clark, 528 So. 2d 369 (Fla. 1988), the respondent advanced frivolous claims and, while appearing as plaintiff's counsel, alleged in a hearing that a circuit judge was a participant in a RICO conspiracy with the defendants. He filed a pleading against the trial judge and the Eleventh Circuit Court of Dade County in which he alleged that the judges were corruptly influenced in the due administration of justice by the private defendants. Clark received a public reprimand.

In The Florida Bar v. Tidwell, 550 So. 2d 449 (Fla. 1989), after receiving an adverse ruling from a circuit court judge, the respondent filed a complaint in United States District Court

wherein he alleged that the trial judge had unfairly disposed of the case and made unsubstantiated allegations against the judge. Tidwell received a public reprimand.

Thus, the Respondent's misconduct herein is distinguished from all of the cases cited in Respondent's Initial Brief in that the unethical conduct in each instance was much less egregious than that of the Respondent. In every instance, the improper allegations were made in letters or pleadings; in most instances, the accused attorneys publicly apologized for their improper conduct; and unlike the Respondent, the accused attorneys did not have prior discipline. In spite of these mitigating factors, those attorneys received the relatively harsh sanction of a public reprimand.

None of the cases cited by the Respondent involved conduct as flagrantly disrespectful as that exhibited by the Respondent. None of the cases cited involved an attorney wildly gesturing and shouting at a judge during a hearing, challenging the Court to find them in contempt or to put them in jail, advising a client to disobey a Court order, or disrupting the proceedings to the degree that a bailiff had to be summoned to restore order.

Additionally, the Respondent never apologized to Judge Newton for his outrageous and improper behavior, and has given no plausible excuse for not doing so.

Moreover, this Court has previously suspended an attorney for behavior in the courtroom considered to be disruptive. The accused attorney was required to appear in court on a Monday morning. In a telephone conversation on Friday evening, he informed the judge that he was ill. The judge advised the attorney that if he failed to appear in court, he would have to present a valid medical excuse. The attorney, wearing bedclothes, arrived for the hearing in an ambulance and was wheeled into the courtroom on a stretcher. The Florida Bar v. Burns, 392 So. 2d 1325 (Fla. 1981).

The Florida Standards for Imposing Lawyer Sanctions also support the Bar's position that suspension is the appropriate sanction for the Respondent's misconduct in the instant case.

Standard 6.22 provides that:

> "Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury to potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

Standard 7.2 provides that:

> "Suspension is the appropriate sanction when a lawyer knowingly 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.

The Respondent attempts to mitigate his misconduct by claiming that his behavior was the result of a heavy caseload, or the details of the litigation, or because he is a theatrical, aggressive litigator with a loud voice and a confrontational style (TR, Vol. I, pp. 23-32, 82-85, 90, 136-137; DT, p. 86; RR, p. 3) However, the Respondent's behavior in Judge Newton's courtroom goes well beyond what might be expected of an aggressive litigator. He was out of control and showed absolutely no respect to the judge, the opposing counsel, the parties to the litigation, or to the tribunal.

The Respondent also fails to appreciate the wrongfulness of his conduct. He attempts to blame everyone but himself for his numerous disciplinary problems. All the judges are out to get him; he is a "marked man" (DT, pp. 50-51); Judge Newton files an inordinate number of Bar complaints (DT, pp.50,80); Judge Lenderman has "targeted" him (DT, pp. 52-53); "thanks to the Bar", he has received considerable negative publicity (DT, pp. 58-59); and the Bar selectively prosecutes him (DT, p.97).

The Respondent continues to demonstrate that he has no respect for the judicial system or his responsibilities as a member of the Bar and an officer of the court.

As noted above, the Respondent was recently disciplined by this Court for charging a prohibited fee and practicing law after he had received a suspension notice. He did so because he felt that the Bar had no right to suspend him.

Testimony was presented at the disciplinary hearing, and the referee correctly recognized as an aggravating factor, that the Respondent tries to capitalize on his bouts with the courts and The Florida Bar (RR, p. 3).

The Respondent hosts a local radio talk show called "In Contempt of Court". The Respondent admitted at the disciplinary hearing that he participated in a demonstration commercial for the radio station which airs the show wherein a woman sounding like a judge shouts at him that he is in contempt of court(DT, p. 54). Although the Respondent denies that the commercial depicts Judge Newton, the similarity between the commercial and the incident giving rise to the instant case is quite obvious.

Moreover, the Respondent proudly framed and displayed a letter in his client reception area which refers to a circuit judge as "scum" (DT, pp. 55, 72-75).

In this proceeding, the Respondent implied that both Judge Lenderman and his judicial assistant are liars (TR, Vol. II, p. 264). Respondent also sent a letter to Judge Lenderman in which he referred to the judge as "a shame to the judiciary" (TR, Vol. II, pp. 232-233).

Additionally, the Respondent has substantial experience in the practice of law (He was admitted to The Florida Bar) and is an experienced practitioner who should, by this point in his career, be cognizant of proper decorum in the courtroom. He has engaged in a pattern of misconduct, and has already been disciplined four (4) other times for ethical violations.

It is well recognized that a guideline for imposing sanctions for attorney misconduct that the discipline must be "sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation". The Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983).

The Respondent has previously received a public reprimand, another public reprimand, probation, an admonishment, and a sixty-day suspension. Yet, he continues to mock the judicial system, to show absolutely no respect for his profession, and refuses to recognize the wrongfulness of his conduct. Since the previous discipline imposed by this Court has apparently been insufficient

to encourage his rehabilitation, the harsher sanction of a lengthy suspension is clearly warranted under the guidelines defined in Lord.

Moreover, this Court has consistently held that in rendering discipline for attorney misconduct, the accused attorney's previous disciplinary history may be considered, and the discipline increased where appropriate. Also, cumulative misconduct of a similar nature such as that demonstrated by the Respondent, should warrant an even more severe discipline than might dissimilar conduct. The Florida Bar v. Bern, 425 So. 2d 526, 528 (Fla. 1982); The Florida Bar v. Lawless, 640 So. 2d 1098, 1101 (Fla. 1991).

Finally, discipline for an attorney's ethical violations must be severe enough to deter others who might be prone or tempted to become involved in like violations. Lord at 986.

If this Respondent does not receive an appropriate suspension for his outrageous and insulting conduct toward Judge Newton and the judicial system, it would imply to other attorneys that such behavior is no big deal, that it is somehow excusable because an attorney has an aggressive style, or that such behavior could be justified since it occurred during "a bad day in court".

Clearly, the evidence presented in the record herein, the applicable Standards, the relevant case law, the aggravating

factors, the Respondent's cumulative misconduct, and the Respondent's extensive prior discipline support the Bar's request that in Case No. 83, 818, the Respondent be suspended from the practice of law for no less than six (6) months.

II. The referee's findings of fact, conclusions of law, and recommended sanctions in Case No. 84,814 are supported by clear and convincing evidence in the record and should be upheld.

As to Case No. 84,818, the referee found the Respondent guilty of violating Rule 3-4.3 (misconduct not otherwise specified) and Rule 4-8.4(a) (violating the Rules of Professional Conduct) (RR, p. 2). The referee also stated that had this Court not interpreted Rule 4-8.4(d) in such a manner as to probably not include the circumstances of this case, he would also have found the Respondent guilty of conduct prejudicial to the administration of justice (RR, p. 2).

In his Initial Brief, the Respondent argues that the referee's findings are erroneous because Respondent's statements to Ms. Decker do not offend the language of Rule 3-4.3. He also claims that there is no authority for this Court to impose discipline under Rule 3-4.3, since it is not a Rule of Professional Conduct(IB, p. 13-14).

The referee's findings of fact in attorney disciplinary proceedings are presumed correct unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar v. Vannier, 498 So. 2d 896, 898 (Fla. 1986).

Where the referee's findings are supported by competent, substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. The Florida Bar v. Garland, 651 So. 2d 1182, 1184 (Fla. 1995).

Rule 3-4.3 entitled "Misconduct and Minor Misconduct" states that "The commission by a lawyer of any act that is unlawful or contrary to honesty and justice ... may constitute a cause for discipline". The Respondent contends that since his misconduct in cursing at a judicial assistant was not unlawful or contrary to honesty and justice, it therefore does not violate Rule 3-4.3.

This presumption ignores the evidence in this case. The Respondent was tried and adjudicated guilty of indirect criminal contempt for the very misconduct which is the subject of this case (TFB Exh. #2), conduct which the trial court found to be unlawful, and at the very least, conduct which is contrary to justice.

Even if the Respondent's conviction for indirect criminal contempt were to be reversed by the appellate court, the Bar is not precluded from pursuing discipline for the very same conduct. In Garland, this Court stated:

> "Disciplinary proceedings are not concerned with the issues addressed in criminal or civil proceedings. Rather, disciplinary proceedings are concerned with violations of ethical responsibilities imposed on an attorney as a member of The Florida Bar. (relying on The

Florida Bar v. Swickle, 489 So. 2d 901, 905 (Fla. 1991). Garland at 1183.

Additionally, the referee made the following observations relating to the Respondent's honesty:

> "Respondent's theory of defense, that Ms. Decker concocted the facts regarding the words said by respondent or, alternately, that if respondent said the words he may have said them after thinking the phone had been hung up (but probably didn't because no one in his office heard him say them), is an insult to the intelligence of any reasonable person familiar with the circumstances. I feel this defense manifests a serious lack of a sense of the importance of truth and forthrightness in legal proceedings." (RR, p. 3). (Emphasis added).

Additionally, this Court has previously imposed discipline for violation of Rule 3-4.3 in numerous opinions, including The Florida Bar v. Stillman, 606 So. 2d 360 (Fla. 1992); The Florida Bar v. Williams, 604 So. 2d 447 (Fla. 1992); and The Florida Bar v. Anderson, 594 So. 2d 302 (Fla. 1992); The Florida Bar v. Pearce, 631 So. 2d 1092 (Fla. 1994); and The Florida Bar v. Davis, 657 So. 2d 1135 (Fla. 1995).

In The Florida Bar v. Helinger, 620 So. 2d 993, (Fla. 1993) the respondent was found guilty of violating Rules 3-4.3 and 4-8.4(b) after a criminal conviction for repeatedly making obscene telephone calls over a five-year period. Helinger was suspended for two years and placed on probation thereafter.

Likewise, in The Florida Bar v. Adams, 641 So. 2d 399 (Fla. 1994), the respondent was found guilty of violating Rules 3-4.3 and 4-8.4(a), among other violations. Adams sent a letter to the opposing counsel in a civil suit wherein he falsely accused her and other attorneys of suborning perjury, and later reiterated the same, baseless allegations against the attorneys during a hearing. Adams was suspended for ninety days.

The Respondent also incorrectly contends that since, in his opinion, he cannot be disciplined under Rule 3-4.3, he may not be found to have violated Rule 4-8.4(a), which provides that "A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another."

This argument ignores the fact that the Respondent's misconduct herein has been found to constitute a criminal act, and that the referee found the Respondent demonstrated a "serious lack of the importance of truth an forthrightness" during the disciplinary proceedings. Thus, the Respondent's misconduct clearly falls under the conduct prohibited by Rule 3-4.3 and Rule 4-8.4(a).

Furthermore, Rule 3-4.3 provides that:

> "The standards of professional conduct to be observed by members of the bar are not limited to the observation of rules and avoidance of prohibited acts, and the enumeration herein of certain categories of misconduct as constituting grounds for discipline shall not be deemed to be all-inclusive nor shall the failure to specify any particular act of misconduct be construed as tolerance thereof." (emphasis added).

Clearly, Rule 3-4.3 is intended to encompass conduct beyond that specifically set out in any of the various Rules Regulating The Florida Bar. As such, the Respondent's behavior in his telephone conversation with Ms. Decker, his actions in displaying a letter in his client waiting area which referred to a circuit judge as "scum" (DT, pp. 55, 72-75), and in his disrespectful and demeaning letter to Judge Lenderman in which he referred to the judge as "a shame to the judiciary" (TR, Vol. II, pp. 232-233) constitute the very type of unprofessional conduct envisioned by Rule 3-4.3.

Respondent also cites The Florida Bar v. Taylor, 648 So. 2d 709 (Fla. 1995) as support for his contention that this Court is precluded from disciplining him under Rules 3-4.3 and 4-8.4(a). The Taylor court found that the Bar disciplinary rules did not grant it the authority to discipline an attorney for Taylor's violations absent a finding of fraudulent or dishonest conduct.

Taylor is distinguished from the instant case, however, in that Taylor's misconduct involved his willful failure to pay child

support, a **civil** contempt. The Respondent herein committed **criminal** contempt, an important distinction. The Taylor court specifically addressed this issue and held that:

> "This Court will not hesitate to discipline attorneys under Rules Regulating The Florida Bar 4-8.4 (obstruction of justice), who are held in criminal contempt of court or who have clearly a dishonest or fraudulent act." Id. at 710. (Court's emphasis)

Finally, the Respondent also claims that any profane comments he may have made to Ms. Decker represent speech protected by the First Amendment to the United States Constitution, and Article I, Section 4 of the Constitution of the State of Florida (IB, p. 15).

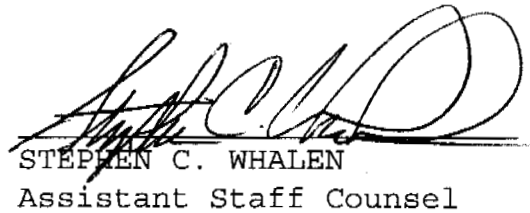
This argument is also without merit. In The Florida Bar v. Shimek, *supra*, this Court held that the First Amendment does not preclude the disciplining of an attorney under the Rules Regulating The Florida Bar for accusations that attorney makes against the judiciary. Shimek at 689.

By virtue of the foregoing, the referee properly found the Respondent guilty of violating Rules 3-4.3 and 4-8.4(a), Rules Regulating The Florida Bar. The referee's findings of fact and conclusions of law, and recommended discipline in Case No. 84,818 are supported by clear and convincing evidence in the record and should be upheld.

CONCLUSION

The Florida Bar respectfully requests that this Court uphold the referee's findings of fact and recommendations of guilt in Case No. 83,818 and Case No. 84,814. The Florida Bar also requests that this Court uphold the referee's recommended sanction of a six-month suspension in Case No. 84,814, but reject the referee's recommended sanction of a sixty-day suspension in Case No. 83,818. The Bar recommends that this Court impose a six-month suspension for the Respondent's misconduct in Case No. 83,818, with such suspension to run consecutive to the six-month suspension imposed in Case No. 84,814.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven (7) copies of The Florida Bar's Answer Brief and Cross Initial Brief has been furnished by Airborne Express to Sid J. White, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. Mail to Scott K. Tozian, Esq., Counsel for Respondent, at Smith & Tozian, 109 N. Brush Street, Tampa, FL 33602-4159; and a copy by regular U. S. Mail to John T. Berry, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 2nd day of November, 1995.

Stephen C. Whalen
Assistant Staff Counsel