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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO 84,495
[TFB Case No 94-31,375 (09E)

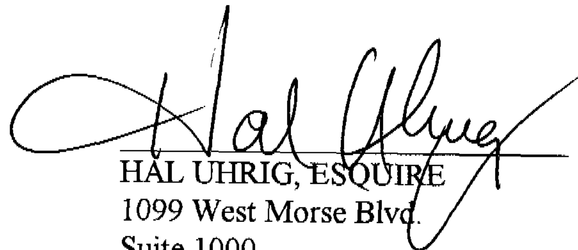
v.

HAROLD G. UHRIG,

Respondent.

______________________/

APPELLANT'S INITIAL BRIEF



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2. The Referee erred in relying upon Exhibit 10 attached to The Bar's final written memorandum as this was an unauthorized and improper augmentation of the record, where the evidence was closed, and there was no opportunity to cross examine or contest the information contained therein. Respondent was denied his constitutional rights of due process by Bar counsel and the Referee. 12

3. The Referee erred in finding from the admissible evidence that Dr. Carerra was a member of the class protected by the Rule. His finding that Dr. Carrera be "deemed a member of the class contemplated by the Rule", because he was, as a contestant in a family law proceeding, "always a party/potential litigant," departs from the essential requirements of law. 14

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PRELIMINARY STATEMENT

The Appellant, Harold G. Uhrig, was the Respondent before the Referee proceeding and the Appellee is The Florida Bar. In the Appellant's brief the Appellant will be referred to as "appellant," or "Respondent." Appellee will be referred to as "appellee." "The Bar," or The Florida Bar." References to the record on appeal will be to the individual exhibits, documents and transcripts of proceedings that make up the record on appeal. The documents referenced are either the transcripts of the two hearings before the Referee, one on December 19, 1994 and one on February 16, 1995, or the Exhibits of The Bar, stipulated to before the Referee on February 16, 1995. They will be identified and referred to by page number.

STATEMENT OF THE CASE AND FACTS

In February of 1994, Maritza Torres, former wife of Carlos Carrera, M.D. came to see the Respondent. She complained of actions by her former husband with regard to the payment of child support obligations, inappropriate communications with the minor children of the parties, and communications with her that she found offensive. (These letters are attached to the VERIFIED PETITION TO DOMESTICATE FOREIGN JUDGMENT AND TO MODIFY JUDGMENT OF DIVORCE NISI", which is included in the record on appeal as Bar Exhibit 7.) Since neither party continued to reside in the State of Massachusetts, the state that had rendered the decree, she had asked that the judgment be domesticated in Florida, her home state and the home state of the children, and that the judgment be modified and enforced. At the time, Respondent had available to him not only a lengthy sworn deposition previously given by Dr. Carrera, but also previous involvement in the original dissolution of marriage, and the family history.

In response to this information, Respondent authored a letter, dated March 7, 1994 (in the record as Bar Exhibit 4), directed to Dr. Carrera. There was no evidence that this letter was not posted to Dr. Carrera, prior to March 23, 1994, when a copy may have been delivered to him, together with the above referenced petition to domesticate and modify. Prior litigation concerning the marriage of these parties had been confined to the state of Massachusetts. Florida had **never** had personal jurisdiction over Dr. Carrera, and he had **never** resided in the State of Florida. No litigation was pending in the State of Massachussets in 1994. When the letter was drafted, no action had been filed in this or any other state. There was no evidence that any litigation was filed prior to the letter being posted to Dr. Carrera. When it was sent, it is uncontroverted that he had not yet submitted

himself to the jurisdiction of the Florida Courts. Respondent contends that Dr. Carrera had not yet become a **"litigant"** against Mrs. Torres, in the Florida action, at the time of the conduct complained of by The Florida Bar.

The contents of this letter speak for themselves, and it is the **construction** of Rule 4-8.4(d), Rules of Professional Conduct, and the **application** of that construction to this piece of correspondence that lies at the heart of this disciplinary action. The Florida Bar contends that the above Rule proscribes conduct by a member of The Bar, which, in connection with the practice of law, **"humiliates," "disparages"** or **"discriminates"** against a class of persons described within the Rule, **"on any basis."** Respondent contends that Dr. Carrera was **not a member of the class** described by the Rule on the date that the letter was drafted, and further that the Rule does **not** proscribe the conduct **"on any basis."** but rather on the basis of those **criteria listed** within the Rule, and on any **other similar basis**, discernable by **reference to the categories listed** within the Rule. Respondent claims that the rule of ejusdem generis must be applied to the construction of this rule in order to avoid an absurd result.

On October 13, 1994, Stephen Grimes, Chief Justice of the Florida Supreme Court signed an untitled instrument, designating The Honorable Randall G. McDonald, Chief Judge of the Tenth Judicial Circuit, to appoint a Referee to preside over the instant disciplinary action. On October 17, 1994, Chief Judge McDonald sent a letter to Sid White, as Clerk of the Florida Supreme Court, assigning Judge J. Tim Strickland as the Referee in this case. On October 18, 1994, the Respondent filed a pleading styled as a Motion to Dismiss, challenging the appointment of Judge Strickland on jurisdictional and venue grounds, and asked for the case to be reassigned in accord with the Rules of Discipline. That Motion was heard by Judge Strickland on December 19, 1994, and the Motion was

denied. The point was preserved for appeal at that hearing and the transcript of that proceeding was filed with the Referee, and made a part of the record on appeal.

Respondent set a Second Motion To Dismiss And For Judgment On The Pleadings, for hearing before the Referee on February 16, 1995. At that hearing, the parties stipulated to the entire factual basis for the trial and stipulated that the Referee should make his determination based upon the stipulations and the record agreed to on February 16, 1995.

STIPULATIONS :

Before the Referee, the Respondent, in an effort to avoid an apparently unnecessary evidentiary hearing, relieved the counsel for The Bar of his evidentiary burden of going forward, as to a number of specific points. [See transcript of proceedings of February 16, 1995, pages 35-43.] It was stipulated that:

1. Respondent sent the letter dated March 7, 1994 to Dr. Carrera.

2. Dr. Carrera received the letter.

3. Dr. Carrera felt disparaged or humiliated by the letter.

4. Respondent was familiar with the text of Rule 4-8.4(d), Rules of Professional Conduct, as amended and in effect on March 7, 1994.

5. The Exhibits previously identified by counsel for The Bar would be admitted into evidence, without predicate and without objection. [transcript of February 16, 1995, pages 41-43.] This applied to Bar Exhibits One (1) through Seven (7).

WAIVER:

After the parties stipulated to the above facts, and the admission into evidence of The Bar's seven Exhibits, **the evidence was closed**, and the Referee set the times within which the parties were

to provide their closing memoranda and arguments. At page 43 of the transcript of the February 16, 1995 hearing, after the Bar's seven Exhibits, Bar counsel said, beginning at line 13,

> **"And those are the exhibits that were considered by the Referee today. Is that list complete and correct, as far as you can determine?"**

Respondent replied at line 18, **"I think that will work."**

Bar counsel concluded at line 19, **"Okay. And that's the end."**

Unfortunately, that was **not** the end. In "THE FLORIDA BAR ARGUMENTS IN SUPPORT OF ITS CASE AGAINST THE RESPONDENT AND RECOMMENDATION FOR DISCIPLINE," counsel for The Bar, **without leave** of the Referee, **without consent** of the Respondent, and **without legal authority** to do so, attached and made reference to four (4) additional Exhibits. Respondent, in his "RESPONDENT'S ARGUMENTS IN SUPPORT OF HIS POSITION IN DEFENSE OF THE COMPLAINT BY THE FLORIDA BAR", waived objection to unauthorized Exhibits, numbered eight (8), nine (9) and eleven (11). **Use of Exhibit ten (10) was not waived.**

OBJECTION:

Respondent preserved his objection to Bar Exhibit 10, an exhibit created after the close of the evidence, and bolstered by other documents not produced at the hearing before the Referee. These documents were offered as proof of the date that Dr. Carrera received the offending letter, and were argued as evidence that he was therefore a **"litigant"** at the time of the alleged offensive conduct by the Respondent. It is clear that the Referee's report relied upon this Exhibit 10, and the argument directed to it, in reaching the finding as to the date of delivery. Clearly, this finding that Dr. Carrera was a **"litigant"** was reached as a result of this inadmissible exhibit. Consideration of Bar Exhibit 10 by the Referee constituted a clear denial of procedural due process. This "evidence" would

have been inadmissible at a hearing, where an objection might have been ruled upon. It remained inadmissible when submitted after the hearing, as a part of The Bar's "argument." It was not subject to cross-examination, voir dire, challenge or rebuttal. It served as the foundation for the Referee's conclusion that Dr. Carrera had been brought within the ambit of a "litigant," and thus within the class of persons intended to be protected by the Rule. Even though the Referee impermissibly expanded the Rule to include **"party/potential litigants,"** his conclusion that Dr. Carrera was served for the first time with the letter on March 24, 1994, together with the pleadings in the domestic case clearly provided support for his conclusion that the Dr. was a **"litigant."** This issue, decided properly, would have been dispositive in favor of Respondent.

SUMMARY:

Almost all of the relevant and material **facts** in this case are the subject of stipulation, and are not in dispute. Findings #1, #2, #3, and #5 in the Report of Referee were facts agreed upon by the parties. Finding #4 was arrived at in part by reference to Bar Exhibit 10, to which Respondent objects. The objection is that to the extent that the Referee's finding suggests that the letter was **first** delivered to Dr. Carrera on March 24, 1994, **along with the Summons,** that distinction appears to have influenced the Referee to conclude that Dr. Carrera was a **"litigant,"** and therefore a member of the class described within the rule. The first of the two issues identified by the Referee for resolution is this issue of membership in the class. According to the Referee, this issue is to be determined by whether or not Dr. Carrera was a **"litigant"** at the time of the complained of conduct. This is a mixed question of law and fact. While the determination by the Referee as to factual matters should be afforded the presumption of correctness, Respondent respectfully submits that such is **not** the case as to the **questions of law.** The law is the law, and the Supreme Court is certainly free to

declare the law, unfettered by any presumptions to the contrary. The Referee observed that, **"considering the ongoing nature of family law proceedings, he was always a party/potential litigant. As such, he would further be deemed a member of the class contemplated by the Rule."** The Rule makes no mention of **"party/potential litigants,"** or other actors within our legal system beyond the specific list afforded by the Rule. The Court should apply the rules of construction to this Rule, and declare that the Rule means exactly what it says, not what the Referee would **"deem"** it to mean.

The other issue before the Court is far more substantive as it relates to future conduct by the Respondent and other members of the Bar who may take instruction from the ruling in this case. This is, in fact, a case where The Bar is seeking to use this Rule to enforce **"political correctness."** The construction and application of the term **"on any basis,"** will determine whether members of The Bar are foreclosed from what would otherwise be their First Amendment right to make derogatory comment based upon **conduct** that they find to be approbate. An attorney member of the Florida Bar has the right to be direct, rude or sarcastic in his or her expression of ideas or observations about others, when the observation is directed to their **conduct** or **attitude,** rather than to a **status** or **characteristic** such as religion, ethnicity, race, disability, physical characteristics, gender, etc. If The Florida Supreme Court finds that the phrase **"on any basis"** really means "on **every** basis," then we will need new rules to permit prosecutors to inform juries of conduct by criminal defendants. Certainly, it **"disparages"** a criminal defendant to tell people about the bad things he is alleged to have done. The execution of an Information or an Indictment is conduct within the practice of law, that will disparage or humiliate a **"litigant"**. The tort attorney attempting to influence a jury with information concerning a defendant **"litigant's"** intentional or negligent conduct will most surely

"disparage" the defendant/**"litigant,"** if the attorney does his or her job. The family lawyer who seeks an injunction on behalf of an abused spouse and/or the spouse's children will surely **"disparage"** the offending spouse. When counsel for The Florida Bar files a complaint against a member of The Bar for alleged misconduct, the allegations in that complaint surely **"disparage"** the member. A Referee's report, finding a member guilty of misconduct is **an action** taken by the Referee in connection with the practice of law, **that disparages** a member who is a **litigant** in the disciplinary action. A sentencing judge in a capital murder case, explaining the reasons for imposing a death sentence, will, of necessity, **disparage** the convicted **litigant,** making reference to his past conduct. If Rule 4-8.4(d) really means **"on any basis,"** then we cannot square the obligations of lawyers to effectively discharge their responsibilities, with a mandate to be "politically correct," to be "nice," to be "polite," to be "professional," to be "unoffensive," and to avoid disparagement. The Bar will need a "Standing Committee on Analogies and Adjectives" to which members of The Bar may submit, in advance, their proposed comments, intended to be delivered either orally or by written instrument.

The Referee found that the correspondence was not directed to settlement of the issues, but was rather directed in its length and breadth singularly to the embarrassment, humiliation and disparagement of Dr. Carrera. The Rule does not provide that if it is directed to "settlement," that conduct, otherwise humiliating or disparaging, is then excused. The Rule is silent as to conduct that is directed to the **"embarrassment"** of an individual. If the Rule is intended to restrict the exercise of First Amendment rights of members of The Florida Bar so as to improve their public image, to require them to be mindful of the Queen's English, and to be courteous in all situations, then it ought not to restrict that only to the players in a litigation setting. If it is directed to conduct **"prejudicial to the administration of justice,"** then the Rule is properly directed to **status** and **characteristic**

oriented classifications, like those listed as examples within the Rule. That will ensure that all classes of people can expect to be treated with equal respect and dignity before the Court. Respondent submits that letters directed singularly to individuals, not generally published, directed to their past conduct and attitudes, whether disparaging, humiliating or otherwise, appear to be of a genre' not contemplated by the Rule. The Bar and the Referee are in apparent agreement that **no** communication, directed to **anyone** who remains **potentially** a litigant, or potentially another litigation actor (juror, etc.), may disparage that person, **on any basis whatsoever, including their misconduct**, without running afoul of Rule 4-8.4(d). Respondent asserts that this was **not** the intention of The Florida Supreme Court in its promulgation of this Rule. This Court is in the unique position to declare the intent of this Rule, notwithstanding the interpretations offered by either the Respondent or The Bar, and without affording any presumption of correctness to the construction adopted by the Referee.

SUMMARY OF ARGUMENT

The Referee committed fundamental error in denying Respondent's first motion to dismiss. The Referee was not properly appointed and was without jurisdiction to preside in this case. The Referee further denied the Respondent constitutional procedural due process by ignoring Respondent's objection to an evidentiary exhibit, created and filed with The Bar's argument after the close of the evidence, under circumstances where the Respondent was denied the opportunity to cross-examine, voir dire, challenge or rebut the improper supplementation of the evidence. The Referee erred in his interpretation of Rule 4-8.4(d) by impermissibly expanding the class of persons intended to be protected by the Rule and by misconstruing the term **"on any basis,"** to mean on **every** basis, without application of the rule of ejusdem generis.

Point 1:

The Referee erred in denying Respondent's first motion to dismiss. The Chief Justice was not empowered by Rule 3-7.6(a) to delegate to the Chief Judge of the Tenth Judicial Circuit the power to appoint a Circuit Judge from that circuit, to preside over a disciplinary action **outside** the Chief Judge's circuit. Venue in this case is situate in Orange County, Florida, in the Ninth Judicial Circuit. The Referee misconstrued the above Rule in order to avoid offending the Chief Justice.

Point 2:

The Referee violated Respondent's constitutional rights of procedural due process. The Referee had insisted that "all of the evidence that would be produced at a hearing is stipulated before the Court today" [Transcript of February 16, 1995 proceedings, page 35, lines 24-25], and had warned that he did not want later, to "have some Court rule that it wasn't properly admitted or a

certain item was not before the Court properly for consideration" [Transcript of February 16, 1995 at page 36, lines 6-8]. He nevertheless based part of his findings on Bar Exhibit 10, to which Respondent had strongly objected [See RESPONDENT'S ARGUMENT IN SUPPORT OF HIS POSITION IN DEFENSE OF THE COMPLAINT OF THE FLORIDA BAR, pages 1-6]. The Referee's finding #4 specifically cites to Bar Exhibit 10 as part of the basis for that finding [page 2 of Report of Referee].

Point 3:

The Referee impermissibly expanded the application of the Rule to include not only **"litigants"** but also **"party/potential litigants."** The determination that Dr. Carrera was a member of the class sought to be protected by the Rule was based in part upon the Referee's improper consideration of the objectionable material in Exhibit 10, and in part by a blatant misconstruction of the plain meaning of the Rule, which mentions neither "parties" nor "potential litigants."

Point 4:

The Referee impermissibly expanded the classes of status or characteristics sought to be protected by the Rule by finding that the term **"on any basis"** really meant "on **every** basis." Rules, like statutes, should be construed by first affording the words their plain and ordinary meaning, unless the words are defined in the statute (or rule). Unless the rule of construction of <u>ejusdem generis</u> is applied, and reference made to the categories listed in the Rule, an absurd result will obtain. The Referee interpreted the Rule so as to rewrite it, and to expand its application, exceeding his authority as Referee.

ARGUMENT

Point 1:

The Referee erred in the denial of Respondent's first Motion To Dismiss. The Chief Justice was without authority, under Rule 3-7.6, Rules of Discipline, to delegate to a Chief Judge of a circuit the power to appoint a Referee, for duty outside his circuit, in a Bar disciplinary proceeding.

On December 19, 1994, a hearing was held before Referee Judge J. Tim Strickland, raising the jurisdiction and venue issues. Respondent took and continues to take the position that the appointment of Judge Strickland was not in compliance with Rule 3-7.6 of the Rules of Discipline. Respondent asks this Court to review pages 1 through 35 of the transcript of that hearing. The argument of The Bar is basically that "we've always done it this way," [see December 19, 1994 transcript, page 11, lines 13-21]. The Referee expresses his **"concern"** is that **"the chief justice himself, in signing the order, cites Rule 3-7.6(a) as his authority, and he himself has chosen the terminology that Chief Judge Randall McDonald is designated to appoint a referee for the court in the above manner,"** [see December 19, 1994 transcript, page 19, lines 5-11]. He is concerned about offending the Chief Justice by ruling that the appointment was outside the procedure prescribed by the Rule. The Referee noted at page 15, lines 15-17, that, **"I think on the surface without reflection that Mr. Uhrig's position sounds correct."** Having said that, he goes on to torture the intent of the rule so as to justify the action taken by the Chief Justice. Respondent believes that the argument presented to the Referee on December 19, 1994 with regard to this point is correct

as a matter of law. Respondent relies upon the argument made at that hearing and asks this Court to find that the Referee was improperly appointed and was without jurisdiction to hear this matter.

Point 2:

The Referee erred in relying upon Bar Exhibit 10, attached to The Bar's final written memorandum, as this was an unauthorized and improper augmentation of the record, where the evidence was closed, and there was no opportunity to cross examine or contest the information contained therein. Respondent was denied his constitutional rights of due process and confrontation by Bar counsel and the Referee.

This point was raised before the referee even issued his report. In the "RESPONDENT'S ARGUMENTS IN SUPPORT OF HIS POSITION IN DEFENSE OF THE COMPLAINT OF THE FLORIDA BAR", in pages one (1) through six (6), Respondent sets out the state of the evidence and his argument for the exclusion of Bar Exhibit 10 from consideration by the Referee. Since there was no way to obtain an evidentiary ruling on this point, Respondent offered alternatively an argument-based response to this exhibit in his written memorandum, but reserved his objection to Exhibit 10 on page 6, line 6. Finding #4 of the Referee specifically cites to Bar Exhibit 10 as support for his finding.

It is **fundamental** that hearsay evidence is inadmissible into evidence before the trier of fact. The concepts of **due process require** that in an adversarial system, evidence may be tested by an opposing party. Here the violation is even more insidious. There was no attempt to place Bar Exhibit 10 into evidence at the hearing before the Referee. It would have been impossible to do so since it had not yet been created. **After** the parties agreed to stipulate to the evidence in the cause, and **after** the seven Bar exhibits had been identified in the record on the instructions of the Referee, The Bar

asked Dr. Carrera to put his version of the facts into an **"affidavit"** and to forward it to Mr. Torres, as Bar counsel. Mr. Torres then, **without motion** to reopen the evidence, **without leave** of the Referee, **without consent** of Respondent, **without providing any evidentiary predicate, without affording** the Respondent any opportunity to be heard in opposition to the admission of the exhibit, simply **supplemented the evidence** by sending it to the Referee, along with three other unauthorized exhibits and his written closing argument. Respondent was **not able** to object to the jurist appointed as Referee, before the exhibit was published to him. There was no forum in which to make the objection that it was inadmissible as rank hearsay. Respondent was **not afforded** an opportunity to cross-examine Dr. Carrera on his "affidavit." Respondent was **not permitted** to voir dire the circumstances under which the documents attached to the "affidavit" were obtained or authenticated. Respondent was **not given** the opportunity to offer evidence in opposition to the inferences sought to be derived from this improper exhibit. The evidence was closed by agreement of both the parties and the Referee on February 16, 1995. At a trial, should one have been scheduled, Respondent could have not only cross-examined the witness, but called witnesses to challenge and rebut the testimony. Here The Bar engaged in **trial by ambush,** and denied Respondent his constitutional **due process right of confrontation** of witnesses. The Referee, having specifically advised the parties that he wanted **all** exhibits to be marked before the Court Reporter before the parties left on February 16, 1995, should have known, on his own motion, to reject this exhibit. The Referee, having voiced his concern that a reviewing court might **"rule that it wasn't properly admitted or a certain item was not before the court properly for consideration"** [page 36, lines 6-8 of February 16, 1995 transcript], should have promptly announced that the exhibit was inadmissible and that it would not be taken into account in his deliberations. Instead, in the face of an objection that occupied the first

five (5) pages of Respondent's written closing argument, the Referee **cited** to this exhibit as support for his fourth (4th) finding. For this reason alone, the Referee's determination that Dr. Carrera was a **"litigant"** for purposes of this disciplinary proceeding should be reversed. The Referee states on page 2 of his Report that, **"[t]he referee concludes upon the facts that at the time Dr. Carrera received the letter with the Summons, he was a litigant."**[emphasis added] The **only** evidence by which the Referee could have concluded that Dr. Carrera received the letter **"served with the Summons"** was by reference to Bar Exhibit 10.

Point 3:

The Referee erred in finding, from the admissible evidence, that Dr. Carrera was a member of the class protected by the Rule. His ruling, that Dr. Carrera be "deemed a member of the class contemplated by the Rule", because he was, as a party in a family law proceeding, "always a party/potential litigant", represented an unauthorized expansion of the plain meaning of the Rule.

"It is a fundamental principal of statutory construction that where the language of a statute is plain and unambiguous, there is no occasion for judicial interpretation." See **Forsythe v. Longboat Key Beach Erosion, 604 So.2d 542, 544 (Fla. 1992).** Respondent respectfully submits that a similar principal of construction applies to Rules promulgated by the Florida Supreme Court. While we are not dealing with two separate branches of government, it should be a principle that where the language of a rule is plain and unambiguous, there is no need for interpretation by a lower court, or indeed a judicial referee. In **Savona v. Prudential Ins. Co. of America, 648 So.2d 705 (Fla. 1995)**, this Court stated that **"when the language of a statute is**

clear and unambiguous, as is the case here, the statute must be given its plain and ordinary meaning." Certainly, rules reviewed and promulgated by this Court are entitled to the same treatment by our lower courts. Similarly, in **Holly v. Auld, 450 So.2d 217 (Fla. 1984),** this Court reminded us that when the language of a statute **"conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction; the statute must be given its plain and obvious meaning."** In the Holly case, Justice McDonald cited to **American Bankers Life Assurance Company of Florida v. Williams, 212 So.2d 777 (Fla. 1DCA 1968)**, that

> **"courts of this state are without power to construe an unambiguous statute in a way which would extend, modify, or limit, its express terms or its reasonable and obvious implications."**

While clearly the Supreme Court has the power to amend its own Rules, and there is no separation of powers conflict afoot, the lower courts have no power to extend, modify, or limit the express terms and reasonable and obvious implications of Rules promulgated by this Court.

In **Green v. State, 604 So.2d 471, 472 (Fla. 1992)**, Justice McDonald not only repeated the fact that it is a **"fundamental tenet of statutory construction"** to **"give statutory language its plain and ordinary meaning."** but he reminded us that **"the plain and ordinary meaning of the word can be ascertained by reference to a dictionary."** This Court has often cited to Black's Law Dictionary as authoritative. Black's defines the term **"litigant"** as follows:

> **"A party to a lawsuit; one engaged in litigation; usually spoken of as active parties, not as nominal ones."**

It would be an impermissible extension and modification of the clear and unambiguous term selected by the Supreme Court to **"deem"** an individual to be a **"litigant,"** because the referee

believes him to be a **"party/potential; litigant."** The Supreme Court **could have** adopted a Rule that included **"parties"** and **"potential litigants"**. Note that in Rule 4-8.4(d), Rules of Professional Conduct, the language chosen by this Court to define the class of persons protected by the Rule, this Court said, **"litigants, jurors, witnesses, court personnel, or other lawyers."** In the Rules of Judicial Conduct, jurists are required to be patient, dignified and courteous to a defined class of individuals. There this Court chose a more expansive definition of the class, "litigants, jurors, witnesses, lawyers, **and others with whom the judge shall deal in an official capacity."**[emphasis added]. In Rule 4-8.4(d) this Court **could have** chosen to include, in place of **"court personnel"**, a more expansive group such as **"all others with whom the attorney shall deal, while involved in the practice of law."** This Court chose not to use this more expansive language. The term **"litigant"** is a term of art that does **not** apply to **"former litigants."** It does not apply to **"future litigants"**. It does not apply to **"potential litigants."** It does not apply to **"previous," "recent," "soon-to-be,"** or **"used-to-be" "litigants."** It applies to the **active** parties to an **active** lawsuit.

The evidence is clear that at the time the offending letter was written, the only litigation between Dr. Carrera and his former wife had taken place in the State of Massachusetts. That litigation had resulted in a Final Judgment. Neither of the parties lived in Massachusetts. Dr. Carrera had **never** lived in the State of Florida. Dr. Carrera had **never** submitted himself to the jurisdiction of the courts of the State of Florida. Dr. Carrera had **never** filed a pleading in any lawsuit in the State of Florida. The State of Florida had **no personal jurisdiction** over Dr. Carrera. There was **no** modification, enforcement or other action **pending** in the then-final dissolution action, by which either of these people had subpoena power over the other. **Neither** had attorneys of record, or had filed pro se pleadings against the other. **When the letter was written, giving the term "litigant" its plain and**

ordinary meaning, discerned by reference to Black's Law Dictionary, Dr. Carrera was not yet a "litigant." As there was no dispute that he failed to meet the definition of the others described in the Rule, it is clear that he was **not a member of the class** described by the plain and clear language chosen by this Court in the promulgation of Rule 4-8.4(d). The ruling by the Referee, to the effect that people involved in family law proceedings remain **"potential litigants"** and that **"as such, he would be further deemed a member of the class contemplated by the Rule,"** does violence to the tenet of construction cited above and often cited by this Court and the various Courts of Appeal. The Referee may believe that the Rule would be more convenient if it included **"parties"** and **"potential litigants."** The power to make that adjustment, however, is vested exclusively with the Florida Supreme Court, not with Referees, Circuit Court judges or judges of the District Courts of Appeal. This principle was clearly stated by this Court in **Hoffman v. Jones, 280 So.2d 431,432 (Fla. 1973),** where Justice Adkins addressed the decision of the Fourth District Court of Appeals to essentially overrule the prior rulings of the Florida Supreme Court, regarding whether Florida should be governed by principles of contributory negligence or comparative negligence. Justice Adkins cited with approval to language from the dissenting opinion at the District level,

> **"[I]f and when a change is to be wrought by the judiciary, it should be at the hands of the Supreme Court rather than the District Court of Appeal...".**

That same lesson applies here. Where the Supreme Court has elected to describe a class of persons in a specific, clear, and limiting way, any expansion of that class should be adopted by the Supreme Court, not by a Referee who **"deems"** the rule to be more workable if it includes a broader class.

Respondent respectfully suggests that his argument on the issue of the term **"litigant"** and

the definition of the class contemplated by the Rule as set out in his written closing argument, on pages 11-13 and 22-23, supplements the argument offered herein.

Point 4:

The Referee erred in interpreting and construing Rule 4-8.4(d) to prohibit conduct in connection with the practice of law that disparages "on any basis", without reference to the status oriented criteria described by the list of examples set out in the Rule.

The construction of the section of the Rule that begins with **"on any basis"** and concludes with **"or physical characteristic,"** is truly at the heart of this disciplinary action. This Rule implicates a restriction on the constitutional rights of free speech of lawyers who are members of an integrated bar. This Court cited to <u>**Gentile v. State Bar of Nevada**</u>**, 111 S. Ct. 2720, 2743; 115 L.Ed2d 888 (1991)** for the proposition that,

> **"[l]awyers, because of their unique role in administering justice, in some instances are subject to ethical constraints that can burden their constitutional rights of free speech,"**

In <u>**Gentile**</u>, the United States Supreme Court went on to say that when a regulation implicates lawyers' First Amendment rights, a court must balance those rights against the state's legitimate interest in regulating the activity in question. Restrictions, the high court said, are only constitutional if they are designed to protect the integrity and fairness of a state's judicial system and if they impose only narrow and necessary limitations on lawyers' speech. This Court was obviously mindful of this restriction on limiting lawyers' First Amendment rights, since it deigned to quote it in the very opinion that adopted Rule 4-8.4(d). After then quoting the proposed amendment offered by The Florida Bar and sixty of its members, this Court stated,

"The proposal seeks to ensure the fair administration of justice and to preserve the public's confidence in our judicial system. A judicial system cannot survive without public confidence in its evenhanded administration of justice. As officers of the court, lawyers involved in the system have a significant impact upon the public's perception of the system's objectivity. A system of justice that tolerates expressions of bias by lawyers cannot maintain public confidence in the discharge of its responsibilities to assure equal justice."

Recognizing that the list of categories included within the proposed amendment by The Florida Bar might not encompass **every** situation in which a lawyers law practice related conduct offended someone under circumstances that might undermine public confidence in the evenhanded administration of justice, this Court revised the proposed rule to include the phrase **"on any basis, including, but not limited to."** The Court, in doing this, did **not** retreat from it expression as to the public policy underpinning the rule. The Supreme Court did **not** make a finding, distinguishing the holding of the United States Supreme Court, to the effect that restrictions on lawyers' First Amendment rights were constitutional only if designed to protect the integrity and fairness of the judicial system. This Court did needed to be expanded to include restrictions necessary to insure politically correct and polite communications between lawyers and those with whom they might correspond.

Three fundamental tenets of construction apply to this case, and the interpretation of this Rule. The **first,** already discussed above, is that words should be given their plain and ordinary meaning where the terms are not defined by the authoring body. The **second** is that statutes, and Rules, should be construed so as **not** to produce an **absurd result**. **Third,** and finally, this Court has

many times made reference to the construction tool known as "**ejusdem generis.**" Used together, these tenets of construction clearly demonstrate that Respondent did **not** violate the clear and unambiguous proscription of Rule 4-8.4(d).

The Referee framed the second legal issue to be determined as, "**was the respondent's conduct in sending the letter in violation of the Rule within the context of the meaning of the Rule's phrase 'on any basis'.**" Starting from that framework, the Referee first found that the correspondence was "**not directed to settlement of the issues.**" This finding was gratuitous and unnecessary. It added no light to the controversy. The Rule makes no reference to communications "**directed to settlement,**" as though there was some exemption from the operation of the Rule if that appeared to be the intent. The Referee then went on to find that the correspondence had been "**directed in its length and breadth singularly to the embarrassment, humiliation and disparagement of Dr. Carrera, a litigant in a modification proceeding.**" Although the inclusion of the word "**embarrassment**" brings nothing of value to the discussion, this finding does conclude that the alleged conduct (drafting and sending the letter) was done to knowingly, or through callous indifference, humiliate or disparage Dr. Carrera. It also repeats the earlier discussed finding that he was "**a litigant in a modification proceeding.**" Recalling that the parties had stipulated that Dr. Carrera felt humiliated or disparaged by the content of the letter, the critical part of this finding is the conclusion that there has been a violation "**within the context of the Rule's phrase 'on any basis.'**"

The Referee has once again engaged in an impermissible expansion of the Rule as promulgated by the Florida Supreme Court. He has interpreted the Rule to mean "on **every** basis." This Court went to some length in its opinion, rendered together with the Rule now under discussion, to declare the public policy reason for the enactment of the amendment to the rule. If the Court had

intended to mean on **"every"** basis, it needed only to put a period after the word **"basis,"**and dispense with the list of suspect criteria. If the Rule intended any and every basis, then the exemplary list that followed represents an absurd and superfluous redundancy. The language of the Rule so construed **violates two of the tenets** of construction. It does not afford the language the interpretation of its **plain and ordinary meaning**. It will lead to an **absurd result**. By application of the this tenet, the tool of ejusdem generis, the Rule can be afforded its plain and ordinary meaning, and can be construed so as not to produce an absurd result.

In **Soverino v. State, 356 So.2d 269 (Fla. 1978),** this Court dealt with a construction of section 784.07, Florida Statutes. The statute provided that **"the term 'law enforcement officer' includes, but is not limited to, any sheriff, deputy sheriff, municipal police officer, highway patrol officer, beverage enforcement agent"** and other enumerated specific examples of law enforcement officers. The Defendant, appealing his conviction for battery on a law enforcement officer, had asserted that the statute gave the prosecutor the discretion of determining who was or was not a **"law enforcement officer,"** thus allowing him to enhance the penalty to the defendant. The Florida Supreme Court rejected that assertion, noting at page 272 that,

> **"Under the well established doctrine of ejusdem generis, where general words follow the enumeration of particular classes of persons, the general words will be construed as applicable only to persons of the same general nature or class as those enumerated, unless the intention to the contrary is clearly shown."**

This Court went on to say that ,

> **"[t]his rule of statutory construction is based on the principle that if the legislature had intended the general words to be used in their unrestricted sense,**

they would not have made mention of the particular classes."[citing to 82 C.J.S. Statutes 332, pp. 658-660 (1953)].

In **In Re Florida Board of Bar Examiners, 183 So.2d 688 (Fla. 1966)** this Court found that the term "**larceny**" used in Article VI, Section 5, of the Florida Constitution of 1885 did not include the offense of "**petit larceny,**" so as to disqualify someone previously convicted of "**petit larceny**" from consideration for membership in The Florida Bar. This Court found that the other offenses listed in the constitutional section were all **felonies.** Applying the doctrine of ejusdem generis to the construction of this provision, the Court found that the intent was to include only offenses of felonious import, and that this limitation to the term "**larceny**" had the effect of striking "**petit larceny**" from the list of disqualifying offenses. A similar result was obtained by this Court in **State v. Florida Development Commission, 211 So.2d 8 (Fla. 1968)**. There, the Florida Development Commission sought to issue building revenue bonds. The Commission apparently relied upon the use of the word "**authorities**" recited in the act which authorizes issuance of revenue bonds. This Court applied the doctrine of ejusdem generis and determined that the term "**authorities**" was commingled with "**counties, school boards, districts and municipalities.**" The Supreme Court concluded that each of these other entities on the list were **local** in nature. Since the Florida Development Commission was a **state** agency or "**authority,**" it could not be included within the context of the act and was held to be without the authority to issue the revenue bonds. In **Green v. State,** supra , this Court made a similar finding in deciding that common gloves were not included within the meaning of the statutory terms "**tools,**" "**machines**" **or** "**implements.**" Applying the maxim of ejusdem generis, this Court repeated that ,

"**where an enumeration of specific things is followed by some more**

general word, the general word will usually be construed to refer to things of the same kind or species as those specifically enumerated."[at page 472].

In Houck v. State, **634 So.2d 180 (Fla. 5th DCA 1994)**, citing to Black's Law Dictionary, held again that **"general words are not to be construed in their widest extent, but are to be held as applying only to persons or things of the same kind or class as those specifically mentioned."**

In order to apply the doctrine (or "maxim," or "principle," if you will) of ejusdem generis, it is necessary to look to the list of specific criteria to discern the nature of the class intended. Bar Exhibit #2 is the composite exhibit, including the briefs and other documentation, provided to the Supreme Court as part of the amendatory process concerning this rule. Without going into great detail regarding these materials, some reflection is necessary. In the "BRIEF IN SUPPORT OF PROPOSED RULES 4-8.4 AND 4-8.7," filed by The Florida Bar, the authors of the brief spent considerable time discussing the First Amendment implications. The references were uniformly to **"the State's interest in the fair administration of justice,"** to the limitations of the courts in abridging lawyers' freedom of speech except in narrow circumstances, **"expressions of bias against such persons based upon factors listed in the proposed rule,"** and to the fact that a system of justice, in order to maintain public confidence, **"cannot tolerate expressions by its officers of bias against race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation or age.' "** On July 1, 1993 the Bar filed its Motion For Rehearing or Clarification in "The Florida Bar Re: Amendments To Rules Regulating The Florid Bar". Paragraph 15, on page 7 of that Motion says, "Included in the court's version of 4-8.4(d) is language intending to proscribe discriminatory conduct **"on any basis."** The Bar recognizes the court's commentary wherein it

stated,

> **" 'The proscription extends to any characteristic or status that is not relevant to the proof of any legal or factual issue in dispute.' "**

While Respondent has been unable to locate this language in the Court's commentary, he hopes that the brief accurately reported the Court's instruction.

Respondent urges that this Court, in amending Rule 4-8.4(d), Rules of Professional Conduct, intended to make only such restriction of lawyers' First Amendment rights as was necessary to ensure public confidence in our system of administration of justice. Respondent urges this Court to announce that it intended to proscribe only such conduct as would, in fact, be prejudicial to the administration of justice. Respondent asserts that in order for the language of the Rule not to produce an absurd result, it must be read to mean that the term **"on any basis"** refers, under the doctrine of ejusdem generis, to mean **"any basis"** similar in quality and kind to the twelve (12) factors or criteria listed within the Rule. The Rule must be intended to prohibit members of The Bar, while engaged in litigation, from engaging in conduct, including communication, which has the effect of humiliating, disparaging or discriminating against others involved in that litigation, on the basis of a **"characteristic or status."** People should not be belittled because of who they are. People should all come to the Courthouse, secure in the belief that they will receive equal and fair treatment from the judicial participants, including attorneys, as officers of the court, regardless of the ethnic or racial roots, regardless of the gender, religion, physical characteristics or other status that they happen to occupy.

The Rule, Respondent would argue was **never** intended to restrict the free speech rights of lawyers to make comment, however disparaging or humiliating, based upon an individual's **conduct**.

Certainly conduct is a **"basis."** Therefore, a rule that proscribes disparagement **"on any basis"** necessarily includes a proscription against disparagement based upon conduct. If that is what **"on any basis"** means, then that construction produces an absurd result. Every prosecutor who drafts an Information or Indictment against a criminal defendant is engaged in **"conduct in connection with the practice of law."** He is engaged in conduct which is disparaging to the defendant. The filing of the Information makes the Defendant a **"litigant."** If Rule 4-8.4(d) is so construed as the Referee proposes to construe it against Respondent, then **every prosecutor** in the state who signs an Information or Indictment, or delivers an opening or closing statement in a criminal trial, **is guilty** of violating this rule. Every tort lawyer who files a complaint against an individual, who by service of the Summons and Complaint becomes a **"litigant,"** has likely disparaged the defendant with allegations of either negligence or intentional misconduct. This conduct, done "in connection with the practice of law," must run afoul of the Rule as construed by the Referee. **Every family lawyer** who drafts a petition for protection from domestic violence against an abusive spouse, or a complaint against a parent accused of sexually abusing a child, **has** most surely **disparaged** that parent or spouse. The lawyer's conduct was "in connection with the practice of law," and the person disparaged is either a **"litigant"** or in the Referee's parlance, a **"party/potential litigant."** When **Carlos Torres,** Esquire drafted the Complaint against the Respondent in this very case, **he accused** Respondent of **unethical conduct**. Certainly this was **disparaging.** When the **Referee** rendered his Report, finding Respondent **guilty of unethical conduct** for violation of Rule 4-8.4(d), and suggesting punishment, it was **disparaging and humiliating.** It was done to a **"litigant"** and it was done "in connection with the practice of law." If Rule 4-8.4(d) is read in its most expansive interpretation, then all of this conduct described above is **a violation.** Clearly, this was **not the**

intent of the Florida Supreme Court. Clearly, such an interpretation represents an **absurd result**. There is **nothing** in the Rule that says "we mean 'any basis' **except**" the conduct described above.

The answer is really quite simple. The Rule is directed to conduct, including communication directed to a **"status"** or **"characteristic"** of an individual, that defines who they are, not how they have acted. There is **no prohibition** against disparaging individuals who are not among the limited class of persons described within the Rule. There is **no separate Rule** that requires lawyers to exercise their otherwise unabridged First Amendment rights so as to be **unoffensive, courteous, polite, or otherwise politically correct.** There is **no prohibition** against the use of biting sarcasm. There is **no prohibition** against making derogatory observations about another's **conduct.** There is **nothing** that says you have to tell an individual that you have become aware of their defalcation of funds, if you prefer to simply call them a "thief." There is **no Rule** requiring that a lawyer stick to the Queen's English to mention an individual's proclivity for prevarication when that lawyers yearns to simply call the individual a **"liar."** There is no approved list of analogies or adjectives to which lawyers are bound to make reference before exercising their First Amendment rights to reflect openly on another's shortcomings of performance. While it is inappropriate to call a physically disabled person a **"cripple,"** it is not prohibited to call that same person a **"jerk"** or much worse, if that statement represents a comment on how the individual has behaved. Prosecutors refer to criminal defendants as everything from child abusers to murderers. Domestic lawyers and judges may refer to parents who refuse to pay their support as **"deadbeats"** or worse. Unflattering analogies and sarcasm can be effective tools in bringing approbate action to an individual's attention. This Rule, promulgated by this Court, was never intended to address these kinds of communications. The Rule was never intended to be used by The Florida Bar as a weapon to compel conformity by Bar

members, with The Bar's spin on appropriate levels of acrimony in communications between lawyers and others.

The letter to Dr. Carrera, dated March 7, 1994, may have been offensive to Dr. Carrera. It did not make reference to any characteristic or status that would have led him to believe that Respondent, as an officer of the Court, held some status-oriented bias against him. It was not a communication that suggested that, because of any status or characteristic, he would be treated differently than other participants in litigation. It was not prejudicial to the administration of justice. It was within the Respondent's rights of free speech as guaranteed by the First Amendment to the United States Constitution. It was not violative of Rule 4-8.4(d) of the Rules of Professional Conduct. The Referee's misconstruction and misinterpretation of the Rule failed to afford the language of the Rule its plain and ordinary meaning. The failure to apply the doctrine of ejusdem generis to the construction of the phrase "on any basis" led to a legally incorrect and absurd result. This Court should announce the correct interpretation of the Rule, and reverse the finding of guilt as announced by the Referee in his Report.

CONCLUSIONS

The Referee departed from the essential requirements of law, by denying the Motion To Dismiss. The Chief Judge of the Tenth Judicial Circuit was without authority to appoint a circuit judge of that circuit to act as a Referee in a case where venue lay in Orange County, Florida. The Referee should have required that a new Referee be appointed consistent with the Rules of Discipline.

The Referee departed from the essential requirements of law by considering, over objection, the impermissible supplementation of the evidence, after the close of the evidence. The action of The Florida Bar in creating, and filing as an evidentiary exhibit, material which the Respondent has no opportunity to cross examine, voir dire, object to or rebut was a fundamental violation of Respondent's right of due process. The Referee's specific reference to this legally inadmissible supplementation in his finding makes it clear that his decision was directly affected by this exhibit.

The Referee departed from the essential requirements of law by usurping the authority of the Florida Supreme Court to amend it duly promulgated and adopted Rules. By expanding the class of persons described as protected under Rule 4-8.4(d) to include "party/potential litigants", the Referee effectively amended the Rule to include a more expansive class. While the Referee is certainly free to provide his input and suggestions to the Supreme Court regarding the scope of the class that he believes ought to be protected, he was without authority to simply amend the Rule by misconstruction of its clear terms.

The Referee departed from the essential requirements of law by misconstruing ther term "on any basis", without consideration of the doctrine of ejusdem generis. By failing to apply this principal of construction, the Referee has construed the term "on any basis" to be the functional equivalent of

"on **every** basis". If the Supreme Court had intended such a construction, it could easily have drafted the Rule to say so. This impermissible expansion of the class of characteristics upon which one is protected from disparaging communication, must, if evenly applied, lead to an absurd result. Every Information filed by a prosecutor, describing criminal activity by a Defendant (litigant) would run afoul of this rule. Almost every opening and closing statement of an attorney in a trial for an alleged intentional tort, would include disparaging comment on the defendant's **conduct**. This Court has always been mindful of the balancing of First Amendment interests when drafting rules that are necessary to ensure the fair and proper administration of justice. The list of characteristics included by the Court in the Rule were clearly intended to be illustrative of the type of characteristic that ought not to be disparaged in order for all who come before the Court to trust that they are treated fairly. It would be an impermissible infringement on the First Amendment rights of attorneys to enforce this Rule so as to prevent comment on **conduct.** The Referee has inscribed upon the Rule a requirement that communications by lawyers meet some standard of civility and politeness that is to be measured after the fact by someone else's sense of propriety. In this regard, the finding of the Referee has in fact amended the clear and unambiguous language of the Rule, to prohibit any and all comment, found to be "disparaging", whether directed to someone's ethnicity, or toward their approbate conduct on a particular occasion. While it may be nice to be nice, this was never the intent of Rule 4-8.4(d).

The Referee erred in his procedural administration of the evidence and in his application of the rules of law to this case. This Court should reverse.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of this has been transmitted to be filed with the Supreme Court, with copies to the Referee, The Honorable J. Tim Strickland, Circuit Judge, P.O. Box 9000- Drawer J1118, Bartow, Florida 33830; Carlos Torres, Esquire, Bar Counsel, 880 N. Orange Ave., Suite 200, Orlando, Florida 32801, and to John T. Berry, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, by U.S. Mail, this 29th day of August, 1995.

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