047

IN THE SUPREME COURT OF FLORIDA

FILED
SID J. WHITE
OCT 16 1995
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

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

v.

HAROLD G. UHRIG,

Respondent.
_____/

AMENDED REPLY BRIEF

HAL UHRIG, ESQUIRE
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(407) 628-1200
Fla Bar # 196256
Respondent

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REPLY TO THE BAR'S STATEMENT OF THE CASE

Bar Counsel claims that "respondent agreed to waive venue and have the final hearing in Bartow rather than in Orlando" (T. 12/19/94 p.p. 42-43). This is a misrepresentation of the record. The Referee had denied Respondent's motion to dismiss based upon the issue of jurisdiction, venue and improper delegation. On pages 29 -35 Respondent preserved the issue for appeal. On page 34, the Referee indicated, "We certainly do have a record now." The Referee on page 19, lines 5-11, expressed concern that he was being asked to sit in judgment of an action taken by the Chief Justice. The Referee had previously, on page 15, lines 15-17, indicated that **"on the surface without reflection that Mr. Uhrig's position sounds correct."** By pages 42-43 of the transcript of the December 19, 1994 proceedings, the place where Mr. Torres says Respondent "waived venue," Judge Strickland had already ruled, and Respondent was seeking to accommodate the Referee who had said, "it would be much harder for me to get to Orange County timewise" for the next hearing.

Bar counsel also says that "respondent stipulated to the factual allegations contained in The Bar's complaint (T. 2/16/95 p.p. 10-13)." Again, a reference to the transcript will reveal that this is **not** exactly what happened. The Court is urged to read the text on these few pages. Respondent stipulated to some very specific facts. He **did not** "stipulate to the factual allegations contained in The Bar's complaint." The point of this discussion and stipulation was to make it unnecessary to transport Dr. Carrera across the country to tell the Referee what **his reaction** had been to the receipt of the letter. A review of the transcript on the pages cited by Bar counsel and the following page (p. 14) does **not** reflect that the Respondent generally or globally "stipulated to the factual allegations contained in the bar's complaint."

REPLY TO THE BAR'S STATEMENT OF THE FACTS

The record is clear as to what Respondent did and did not stipulate to. Respondent stands by his statement of the facts, in his initial brief.

REPLY TO THE BAR'S SUMMARY OF THE ARGUMENT

Bar counsel, begins his summary of the argument by reflection on a 1994 complaint that was resolved in favor of the Respondent. He says the committee had reached the "opinion" that a

previous letter "contained unnecessarily hostile and demeaning language directed toward the opposing party in a legal matter." The Bar's counsel obviously concluded that the committee's opinion that the letter was "unnecessarily hostile and demeaning", was not synonymous with conduct that would be violative of the rule. It is not the province of The Florida Bar, or its Committees, to determine what conduct it will or will not "tolerate." Their job is to effectively police the membership to ensure that they act in conformity with the rules promulgated by this Court.

Bar counsel incorrectly asserts that the respondent "now seeks to justify his conduct by attacking the validity of rule 4-8.4(d)." Respondent is in total agreement with the rule, and agrees that the Court should be ever vigilant to abuses that cause members of the public to lose faith in the even handed administration of justice. Since the rule was primarily directed to that evil, and not the fear of The Bar that its members may not always practice with sufficient civility to meet their standards of political correctness, the Respondent does not seek to "justify" his conduct. Respondent's position is that his conduct was outside the proscription of the rule.

The Bar observes that Respondent has offered "no evidence to show the referee abused his discretion in denying the first motion to dismiss and in considering B-Ex. 10." Respondent asks the Court to look to the record of the **evidence** that was in fact presented and the **argument** that was offered to the Referee. This Court promulgated Rule 3-7.6(a), empowering the Chief Justice to delegate to a chief judge of a judicial circuit the power to appoint referees **for duty in the chief judge's circuit**. This Court likewise promulgated Rule 3-7.6(d), dealing with venue and the location of the trial of actions. These subsection designations deal with related but separate topics. The fact that no one has previously raised the issue of delegation does not render the issue moot, or invalid. If this Court concludes as Referee Strickland first did on page 15, lines 15-19 that "Mr. Uhrig's position sounds correct," then Mr. Torres should not demand some further offer of "evidence."

The issue of the reliance on B-10 is astonishing. Bar counsel says, "the parties submitted their evidence with their written closing arguments." **Bar counsel may have submitted evidence with his closing argument,** but it was without invitation, without authority, without consent, and without legal justification. Bar counsel's statement concerning this at the bottom of page 5 and top of page

6 suggests that there was some sort of understanding that the evidence stipulated on February 16, 1995 was only **part** of the evidence to be considered and that additional evidence was to be submitted by the parties when and if they came across any, without notice to the opposing party, without an opportunity to object on any evidentiary basis, without the opportunity to confront, voir dire or cross examine any such evidence and without the opportunity to rebut such evidence. The record **is absolutely clear** that the Referee wanted **all** of the evidence stipulated to on February 16, 1995. The record is **absolutely clear** that the parties were forgoing a final evidentiary hearing, their right to call witnesses on their behalf, and the opportunity to produce further evidence as a part of the factual stipulation on February 16, 1995. Bar counsel has not made reference to a single word in the record that would support his claim that there was any authority for any supplementation of the evidence. The fact that The Bar had not bothered to develop all of the evidence it might have presented, before agreeing to stipulate on February 16, 1995 is no excuse for a violation of procedural due process.

The argument that Dr. Carrera "was also a litigant in the sense that the Massachusetts court continued to exercise jurisdiction over him in the domestic relations matter" simply tortures logic. There was no evidence of any pending matter in the State of Massachusetts. At the time the letter was written: (a) there was no matter in controversy before any court in the United States; (b) the State of Florida could not have exercised personal jurisdiction over Dr. Carrera, who had never resided in the State of Florida; (c) the Massachussets decree had not been domesticated as a Florida decree; and (d) the Respondent's client, Maritza Torres, had no subpoena power over Dr. Torres, nor he over her because there was no case in controversy filed in any state of competent jurisdiction. At the time it was delivered, Dr. Carrera had not submitted himself to the jurisdiction of the courts of the State of Florida. This court chose not to afford the protections of Rule 4-8.4(d) to "possible litigants", "potential litigants", future litigants", "inchoate litigants", "previous litigants" or others.

Bar counsel further declares that respondent has failed to show "that rule 4-8.4(d) is unconstitutional or vague." Respondent agrees. The rule, as written, is clear and unambiguous if applied using time honored rules of construction, applying normal meaning to words used, and interpreted so as not to produce an absurd result. If this rule is applied so as to prohibit fair comment,

no matter how acerbic or sarcastic, on the **conduct** of judicial participants, then it would be **applied** unconstitutionally.

REPLY TO THE BAR'S ARGUMENT

POINT I

It was error to deny the first motion to dismiss .

There is no dispute that a referee, like a circuit judge in any judicial proceeding, has the authority to rule on motions. The case cited by Bar counsel for this proposition deals with a motion that is within the sound **discretion** of the referee. In Florida Bar v. Vernell, a motion to continue, was denied by the Referee, not only because it was untimely filed, but also because there was no necessity to justify the delay. The motion before the Referee in the case at bar has nothing to do with "sound discretion." The motion to dismiss required an application of the **law**. Under this circumstance the Referee had both the "authority" and the **obligation** to make a ruling on the law. He had no "discretion" to restructure the rule so as not to offend the Chief Justice.

Respondent's motion was not directed only to the issue of **venue.** In order to promote a speedy resolution of the case, after the Referee had ruled against the first motion to dismiss, Respondent agreed to have the hearing on the second scheduled motion to dismiss (the February 16, 1995 hearing) in Bartow to accommodate the Referee. There was **never** a waiver of the right to insist that a final hearing be held in the correct venue. The election to stipulate to a factual basis for the Referee's consideration made a final hearing unnecessary, but in no way affected the preservation of the objection to the appointment procedure.

The Bar's reference to Rule 3-3.1 as a cure all for the problems raised in Respondent's first motion to dismiss is without merit. Section 3-3. is entitled "JURISDICTION TO ENFORCE RULES." Rule 3-3.1 **does** indeed provide that the various actors in the disciplinary process "shall have **such** jurisdiction and powers as are necessary to conduct the **proper** and speedy disposition of any investigation or cause..." This rule, intended to ensure investigative and subpoena power within the context of the disciplinary process, was never intended to supersede more specific rules promulgated by the Court. If Rule 3-3.1 is to be interpreted as suggested by Bar counsel, then there

is no need for Rule 3-7.6(a). The limitation found there upon the Chief Justice when, he elects to "delegate" to a chief judge his own power "to appoint" a referee, is in direct contradiction to the interpretation urged by Bar counsel. The limitation of a chief judge, to whom the power "to appoint referees" has been "delegated" by the Chief Justice (that is to appoint referees **only** "for duty in the chief judge's circuit") has no meaning if the interpretation urged by Bar counsel is adopted. It may be true that the Chief Justice is empowered, himself, to appoint referees to try disciplinary cases anywhere in the state. **He could have, but he did not in this case.** In this case, the Chief Justice utilized the alternate procedure of **delegating** the appointment authority to a chief judge. The chief judge receives the reduced authority permitted under the rule, to appoint referees only for duty in the chief judge's circuit. When the Chief Justice elects to **delegate** his appointment authority, he must delegate it to the chief judge of the circuit where proper venue lies. In this case, that would have been either Orange County where the Respondent practices law, or Seminole County where Respondent lives. There is nothing confusing or inconsistent about the rule as drafted. In the instant case, the rule simply was not properly adhered to. It has often been the judicial task of the courts to examine the legal justification for practices that have become a tradition in their observance, only to determine that the practice was legally flawed. In **this** case, whether by inadvertence or tradition, the procedure utilized by the Chief Justice in delegating his appointment authority to the chief judge of a circuit other than the one in which venue lay, was a legally flawed procedure. With all deference to the Chief Justice and the Supreme Court, it is neither improper nor "senseless" for a member of The Florida Bar to take exception to the procedure, if in good faith, it appears that the procedure is incorrect.

The agreement to have the hearing on the second motion to dismiss in Bartow, to accommodate the Referee in the interest of moving the case along, and the subsequent stipulation by both parties to have the matter resolved by the Referee upon stipulated facts, does not in any way constitute a waiver of either the venue argument or the objection to the improper appointment of Judge Strickland as referee following the improper delegation of the appointment authority to Judge McDonald by Justice Grimes.

POINT II

The Referee erred, as a matter of law, in considering Bar Exhibit Number 10.

Of all of the positions taken by The Bar in this proceeding, this point, while perhaps not the most important, is the most astonishing in light of the record. Since Bar counsel has already drawn the attention of the Court to the transcript of the February 16, 1995 hearing, beginning on page 36, and on through page 40, for the proposition that the evidence was not closed and that he was entitled to submit new exhibits with his argument, let's indeed look at this transcript. Let's begin if we might, however, a page earlier on page 35. There, the Referee said,

"**If we're going to have you submit to the Court written argument with attached law, then I want to be sure that all the evidence that would be produced at a hearing is stipulated before the Court today. If it is not, then, I've either got to have the hearing for purposes of having that evidence presented and admitted, or not.**" The Referee went on, "**And I don't want us to go off and have some Court rule that it wasn't properly admitted or a certain item was not before the Court properly for consideration, et cetera.**"

The Referee could not have more clearly indicated that **all** of the evidence was going to be stipulated to before the Court and that the evidence was closed. At this point Mr. Torres addressed the Referee,

"Your Honor, if I may? **All of the documentary evidence that I intended to introduce at the final hearing is in front of me right now, and I'm ready to introduce it to Your Honor at this point in time.**"

As partially quoted in his Answer Brief, Mr. Torres then advised the Referee that,

"**as far as the evidence that I was planning to introduce through the testimony of witnesses, I don't have that evidence available to me at this point in time.**"

From his Answer Brief, Mr. Torres seems to suggest that this statement to the Referee forms his reasonable basis for believing that he could later submit an affidavit from Dr. Carrera. This Court need read only a few more lines to understand why this position is untenable. Immediately following this last statement by Bar counsel, Respondent asked what burden he had not been relieved of;

"**The one witness that I would like to make sure the referee in this matter hears the testimony of is that person who is a member of the committee that drafted the rules. However, having said that, I have to admit, too, I can introduce that evidence through an affidavit or a sworn statement of some sort.**"

The **only** witness that Mr. Torres indicated a concern about was a committee member who could

testify about his understanding about the intent of the rule. At page 37, line 5 to page 38, line 10, the Referee addressed the unlikely probative value of such a witness, whether live or otherwise. Mr. Torres then requested a brief recess (page 38, line 11). On page 39, lines 9-11, the referee advised he "would like the Bar to submit its argument in law and, maybe, 20 days for Respondent to come back with its argument in law." Note that there was no invitation for the parties, or either of them to submit more **evidence**. At line 16 of page 39, the Referee advised counsel, "Once we stipulate the evidence, we can pick a time certain..." Note the Referee made no reference about there being any evidence other than that stipulated to. Finally, beginning at page 39, line 25 and carrying over to page 40, line 3 the referee made his point crystal clear, "**Well, gentlemen, if you want to stipulate with our court reporter here- and I want all evidentiary exhibits.**" The Referee had just instructed counsel to stipulate **all evidentiary exhibits.** The Referee then instructed Bar counsel to submit **those same stipulated exhibits** with its argument so the Referee would not have to act as evidence custodian for the exhibits until the argument was submitted. There was no invitation or authorization for either party to augment the record with evidence not stipulated to between them.

The issue of "confrontation" is similarly misunderstood by Bar counsel. It was not the loss to "face-to-face" confrontation that Respondent complains of. It was the right to confront, cross examine, rebut and thereby measure the **evidence.** Bar counsel also overstates the rule regarding hearsay evidence. In The Florida Bar v. Richardson , the Court rejected all of Mr. Richardson's claims summarily. One of those claims had been improper admission of hearsay evidence in the form of a copy of a letter and a motion filed in a federal claim. The motion would have been a proper subject of judicial notice, and the letter may well have been hearsay in form, but designed to supplement or explain other direct evidence. **That,** of course, is the test in administrative proceedings. Quasi-judicial administrative proceedings do not require adherence to the strict rules set out in Chapter 90, Florida Statutes (see Florida Evidence, Ehrhardt, Section 103.1), but basic principles of due process still apply. Hearsay is **only** admissible to support or explain other **direct** evidence. Bar Exhibit 10 was not directed to the supplementation or explanation of any direct evidence stipulated to by the parties. Moreover, even in quasi-judicial administrative proceedings,

a party is entitled to cross examine any and all evidence introduced against him (see Jennings v. Dade County, 589 So.2d 1337 (Fla. 3rd DCA 1991), rev. den. 598 So.2d 75 (Fla. 1992). In this case, the evidence was closed. The affidavit used by The Bar in supplementation of the evidence was not subject to cross examination, and Respondent was not afforded the opportunity to submit hearsay evidence in opposition to the affidavit, as there was no forum in which to introduce such evidence.

It was not the obligation of the Respondent to redress misconduct by Bar counsel by seeking "a live hearing," that both parties had already eschewed in favor of a stipulated record. The fact that Respondent "had ample opportunity" to engage in approbate conduct by improperly supplementing the record did not make such an option any more ethical. Instead, Respondent properly objected.

POINT III

Dr. Carrera was not a member of the class protected by Rule 4-8.4(d).

The **conduct** upon which The Bar seeks discipline against the Respondent is the drafting and mailing or delivery of a letter to Dr. Carrera. It is without contradiction that at the time the letter was drafted and delivered for service by hand delivery to Dr. Carrera, that he was not yet a "litigant" in any action. The **conduct** which raises the ire of The Bar is the content of the subject letter composed on March 7, 1995. Since "The Bar submits that Dr. Carrera was a litigant at the time he received the letter because it was served on him with the summons," the Bar's bright line test makes him a "litigant" when he was served. Although admittedly hyper-technical, and **not** the primary ground upon which Respondent seeks to have this matter resolved, Dr. Carrera would not have been a "litigant" at the time the letter was authored by Respondent. The letter was clearly authored eleven days before any pleadings to domesticate were filed in Orange County, Florida. There is no clear and convincing evidence in the record as to when Respondent last saw the letter before it was included in a package for Dr. Carrera or whether it had been previously posted to him by regular mail. By the time it was delivered to him on March 24, 1994, Respondent's **conduct** had concluded.

Respondent does not rely alone on this distinction or time line. Dr. Carrera could not become a "litigant" in Florida until such time as Florida had personal jurisdiction over him. There is no evidence that he ever resided in the State of Florida or had ever submitted himself to the jurisdiction

of the courts here. He had been party to a dissolution in the State of Massachusetts which had been finally resolved by a final decree. There was no action pending in the State of Massachusetts. He had no subpoena power over his former wife , Maritza Torres. She had no subpoena power over him. He was free to travel anywhere in the world without fear that he would be subject to the sanction of some court for failure to be available. He could have ignored the summons and complaint from Florida with impunity. He could have successfully attacked the authority of the Florida courts to exercise personal jurisdiction over him (had he done so he would have become a "litigant".) He could elect to submit himself to the jurisdiction of the Florida courts, as he in fact did. By filing an answer to the former wife's complaint, he **became a litigant**.

Bar counsel argues that "in the context of The Rules Regulating the Florida Bar, the word 'litigant' includes not only persons or legal entities already involved in actual litigation but also those reasonably expected to litigate in court." In a society with a divorce rate expected to exceed 50%, every person who ever marries could be "reasonably expected to litigate in court" in the future. Does that make every person who is married a "litigant" pursuant to the terms of the rule? This Court has always been careful to say what it means and mean what it says. If the Florida Supreme Court had intended for Rule 4-4.8(d) to include "potential litigants", "probable litigants", "adversaries", "opposing parties", or "possible litigants", it could easily have said so.

The Bar attempts to argue, and the Referee appears to agree, that family law cases are somehow different because they lack finality. Whatever jurisdiction the State of Massachusetts might have reserved over Dr. Carerra certainly did not serve to make him a "litigant" in Florida. In family law cases, a supplemental complaint for modification is a separate action. It is subject to the rules of pleading. Such a complaint requires an answer before it is "at issue" and ready to be tried. Every final judgment is subject to enforcement, but that is not the same as continuing the role of "litigant" for the participants beyond the final judgment. Where subsequent substantial changes of circumstances confer upon a court the right to entertain a new action to modify an existing judgment, **then** old adversaries may again become "litigants." "Litigants" are subject to being called before the Court for motion practice. "Litigants" are subject to being deposed, or subpoenaed to produce documents

and things by an adverse party. Dr Carrera was **not** subject to those constraints until he submitted to the jurisdiction of the Court.

The word "litigant" was used by the Court in the drafting of the rule to include one of a distinctive group (including jurors, witnesses and opposing attorneys) involved in the **litigation** process. If the Court had intended to include every possible actor in the area of the practice of law (including title clerks, paralegals, process servers, clients, other parties to contracts, mediators and so forth) it could easily have said so.

POINT IV

The referee misconstrued Rule 4-8.4(d)

Bar counsel has referred Respondent to the recorded opinion of this Court in adopting the subject rule for the site of "certain" language. In that opinion, this Court cited with approval from Gentile v. State Bar of Nevada, 111 S. Ct. 2720, 2743, wherein the United States Supreme Court noted that ,

"[w]hen 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." Id. at ___. 111 S.Ct. At 2745. Restrictions are **constitutional if** they are designed to **protect the integrity and fairness** of the state's judicial system **and** if they **impose only narrow and necessary limitations** on lawyers' speech."

This Court indicated that the purpose of the rule was to prohibit expressions of "bias" in connection with the practice of law, in that such conduct would undermine confidence in an evenhanded administration of justice. The rule was not promulgated as a general requirement that all lawyers "be nice." The commentary to the rule underscores, this point. The commentary says, "[t]he proscription extends to **any characteristic or status** that is not relevant to the proof of any legal or factual issue in dispute." The list of characteristics and status descriptions included within the rule could not anticipate **every** possible characteristic or status class which might in the future arise. Therefore, this Court included the phrase "on any basis, including but not limited to" as a means of providing exemplars and guidance as to the **sort** of characteristics or status that were **not** to be the subject of disparaging, humiliating or discriminatory conduct or comment. Comment directed toward

approbate conduct will **not** have the effect of undermining public confidence in the administration of justice. It does **not** suggest that anyone is less likely to secure the benefits of a fair justice system because of who they are, or some characteristic they exhibit.

If applied as Bar counsel urges, to apply to **every basis**, including fair comment (however acerbic) directed to conduct, then we may live in a kinder, gentler world, where everyone is polite, and nice, and non-confrontive, but the regulation so applied will not pass constitutional muster as **"designed to protect the integrity and fairness of a state's judicial system"** and the regulation will not be deemed to **"impose only narrow and necessary limitations on lawyers' speech."**

The facts in The Florida Bar v. Clark, cited by Bar counsel are distinguishable. There the attorney made "false and unsubstantiated charges against the judiciary." The observations directed towards Dr. Carrera were not "false." They were harsh characterizations of conduct in which he was engaging. The statements were not "unsubstantiated" either. Dr. Carrera had indeed begun paying his child support directly to his children, with a note that this was **their** money and **not their mother's**, and suggesting that they should get their mother (who now would have no child support) to help them with a little budget and perhaps help them set up a savings account in which to deposit the money donated by their generous dad. (Hence the "Daddy Warbucks" analogy) He had reduced his child support payments, without the benefit of Court consent. Dr. Carerra had given a deposition in which he had admitted to taking Prozac that had not been prescribed for him. He had also previously confirmed his adultery in the original divorce proceedings. While the observations about his double standards and his poor judgment in parenting decisions were uncomplimentary, they were neither false nor unsubstantiated. Bar counsel was aware of the letters and the deposition.

Respondent's letter of March 7, 1995 consists of five pages. On page one, the phrase **"Poor baby!"** is used sarcastically. There is also an observation (confirmed by Dr. Carrera) that he had not worked while in medical school but that his wife **had** worked. This was followed by the sarcastic remark that Dr. Carrera was lucky not have had to choose between starvation and leaving medical school, because his former wife worked to put him through. These remarks hardly qualified as "an attack." It was an accurate, if critical observation. Page two finds the sarcastic reminder that he was

fortunate **"that your love survived the hard times but could not sustain the good times."** The observation was neither false nor unsubstantiated. It certainly did not attack any **status or characteristic.** Since Dr. Carrera had been so pointedly critical of Respondent's client, the issue of a double standard was raised by reminding him of his confessed open adultery. He was also reminded of physical abuse perpetrated against his former wife. Facetiously, he was asked if that was an example he would have his own children emulate. Again, this was harsh comment on his conduct and his attitude. The reference to his taking Prozac that had been prescribed for someone else was to underscore the hypocrisy of his sending literature to his former wife, suggesting that allowing their son to deliver a drink to a guest in their home was tantamount to creating a criminal or alcoholic. This statement was neither false nor unsubstantiated. Another offending line was, "This is not **your** money, which you are free to play 'Daddy Warbucks' with. It is Maritza's entitlement to use as **she sees fit, for the needs of the children**." There was nothing untrue, false or unsubstantiated about the remark. Neither was the later line on that page that,

"there is absolutely no excuse for attempting to rob your children of their childhood, in the name of teaching them responsibility, by attempting to explain to them the social underpinnings of child support theory (and doing it very badly I might add). The children do **not own this support**, their mother does. It is **not their income**, and to tell them that, only to learn to the contrary later is to give them an unreasonable and unfulfilled expectation. Nice job Dad!"

Dr. Carrera may well have felt disparaged by these observations. Respondent respectfully submits that Rule 4-8.4(d) was not directed to this type of communication.

Dr. Carrera was also advised that "your handling of the 'bartender' episode was at least as sophomoric as your handling of the child support was uninformed and arrogant." This was biting and acerbic comment to be sure, but not designed to attack the former husband based upon a status or characteristic. It was designed to upbraid him **for bad conduct.** Further on, Respondent selected an analogy that offended The Bar's sense of political correctness. Respondent said,

"Opinions are like body odor. Everyone has one, and different people find some more appealing than others. Your opinion is that allowing your son to help his mother at a party in their home is 'outrageous', 'irresponsible', 'probably illegal', and 'outright abusive'. Your opinion, like some body odors, is not found to be especially appealing."

The letter **does not tell Dr. Carrera that he has a bad body odor. The letter tells him that he has a disagreeable opinion.** The Bar finds the *analogy* offensive. It was not cleared with a "Standing Committee of The Florida Bar on Acceptable Analogies And Adjectives." Respondent submits that this language, directed to Dr. Carrera, while probably offensive to him, was **not** of the quality the Court intended to prohibit when it promulgated Rule 4-8.4(d).

The Bar alleges that Respondent "implied" that the doctor divorced his first wife after he no longer needed her to support him while he was attending school and married the Respondent's client so that she could support him while he was in medical school. That is a reasonable inference. It is **not** a violation of Rule 4-8.4(d). The bar alleges that respondent "implied" that the doctor had set a bad example for his children by carrying on an openly adulterous relationship while still married to the Respondent's client. Respondent **observed** the fact of the relationship. Respondent submits that this conduct would not constitute a "good example." In any event, it is not a violation of Rule 4-8.4(d). Paragraph 9 claims that Respondent "accused" the doctor of taking Prozac without a prescription. More accurately Respondent **reminded** the doctor that he had engaged in this conduct and that he had admitted to it under oath. It is an accusation based upon a solid belief in its accuracy. It is **not** a violation of Rule 4-8.4(d). In Paragraph 10 of the Bar complaint Bar counsel alleges that the "purpose" of the letter was to do various things, including to "humiliate" and/or to "disparage." The "purpose" of the letter was never stipulated to before the Referee. Even if the purpose had been in part to embarrass or disparage, it was not based upon any status or characteristic of the doctor. It was directed solely to his **conduct**.

POINT V

The Referees' recommendation is inappropriate.

Certainly this is the least important aspect of this case to the Respondent. If the Supreme Court finds from the examination of the record that Respondent was properly found guilty of a violation of Rule 4-8.4(d) for conduct contrary to the administration of justice for writing a letter to Dr. Carrera in a sarcastic, confrontive and offensive tone, then the recommended penalty is not of the greatest import. If respondent's First Amendment rights are actually so abridged by the subject rule

that it is now determined to be impermissible to exercise those rights so as to offensively criticize the conduct of adverse parties, then the loss from that finding dwarfs the consequences of the proposed discipline. Respondent will not belabor the point of the discipline recommended by the referee. It is not a harsh penalty as penalties go.

CONCLUSION

The rule permitting the Chief Justice of the Florida Supreme Court to either appoint referees or to delegate his appointive power to the chief judge of a circuit to appoint referee for duty in that circuit is clear and unambiguous on its face. When the Chief Justice elected to delegate his appointive power rather than to exercise it himself, he was empowered by the rule to delegate only such power as would permit the chief judge to appoint a referee to serve within the circuit. The Chief Justice erred in delegating the appointive power to the chief judge of a circuit other than the circuit of proper venue. This improper appointment, once objected to, should have resulted in the motion to dismiss being granted or treated as a motion for reappointment in accord with the rule. The refusal of the Referee to grant the motion constituted a departure from the essential requirements of law.

The Referee clearly directed the counsel in this case to stipulate to **all** evidentiary exhibits before the court reporter on February 16, 1995, and effectively closed the evidence at that time. It was improper for Bar counsel to proceed after that to produce additional evidence, and then submit it to the Referee together with his closing argument, with no opportunity for objection, cross examination, or rebuttal. It was a violation of the Respondent's procedural due process rights to permit the consideration of this exhibit, and its consideration under the circumstances (and in light of the timely objection) constituted a departure from the essential requirements of law.

The term "litigant" has a very specific meaning. The fact that this meaning does not reconcile with The Bar's theory of this case, is insufficient justification to expand its meaning to accommodate that theory. The Referee exceeded his authority by effectively amending the rule by expanding the meaning of the term "litigant" to include "possible litigant", "probable litigant", "potential litigant", "future litigant", "former litigant" and so on. The Court, in drafting the rule intentionally limited the class of people sought to be protected by the application of this rule.

The counsel for The Florida Bar never addresses the concept of the applicability of the rule of construction called "ejusdem generis." That is because they had no good response to it. Clearly, Rule 4-8.4(d) includes a list of exemplary characteristics and status categories from which a member of The Bar, and by which the Courts or referees might be guided in determining whether another status or characteristic should be governed by the rule. The term "any basis" simply must be construed to bear some relationship to the list provided, or the list is totally unnecessary. If the rule is interpreted to mean on **every** basis, then any comment directed to the conduct of another party which is later found to be humiliating or disparaging will run afoul of the rule. As explained in the initial brief filed herein, and as argued before the Referee, this will lead to absurd results in some cases. This, of course, violates still another time honored rule of construction. The rule should be applied as suggested by the U.S. Supreme Court, to carefully balance the First Amendment rights of lawyers against the legitimate interests of the state in protecting the **integrity and fairness** of its judicial system. The U.S. Supreme Court made no mention of the civility among the actors. The Court also reminded us, and **this** Court cited with approval, the admonition that regulations that infringe upon such First Amendment rights should be drawn narrowly and impose only **"necessary limitations"** upon such free speech. It is "necessary" to maintain the confidence in a judicial system to prohibit open expressions of "bias" that could lead to the impression that some one or some group does not have the same access to our system as others, because of some status they occupy or characteristic they display through no fault of their own. It is thus necessary and entirely appropriate to proscribe conduct which disparages, humiliates or discriminates against individuals involved in the judicial process on account of the various characteristics or status categories listed in the rule, and **any other similar** characteristics or status categories. **It is not necessary to the protection of the integrity and fairness of the judicial system that everyone be "nice", "civil", "unoffensive", "politically correct", "non-abusive", or that they refrain from the use of sarcasm, harsh criticism or observation, or biting analogy. It is primarily upon this ground that the Respondent urges the Court to find that the Referee erred, not in his exercise of discretion, but rather in his interpretation of this Court's intention in the promulgation of Rule 4-8.4(d).**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been delivered by U.S. Mail to Mr. John Harkness, Jr., Executive Director, The Florida bar, 650 Appalachee Parkway, Tallahassee, Florida 32399; to John T. Berry, Esquire, Staff Counsel, The Florida Bar, 650 Appalachee Pkwy., Tallahassee, Florida 32399, and to Carlos E. Torres, Esquire, Bar Counsel, The Florida Bar, 880 North Orange Avenue, Ste. 200, Orlando, Florida 32801, this 17th day of October, 1995.

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