IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HENRY J. MARTOCCI,

Respondent.
_____/

Case No. 88,180
[TFB Case No. 96-30,098 (18C)]

THE FLORIDA BAR'S INITIAL BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The transcript of the final hearing held on November 8, 1996, shall be referred to as "T", followed by the cited page number(s).

The Report of Referee dated December 5, 1996, will be referred to as "RR", followed by the referenced page number(s).

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The testimony of Dr. William Edward Riebsame before the Eighteenth Judicial Circuit Grievance Committee "C" on February 26, 1996 shall be referred to as Bar Ex. 1,_____ followed by the cited page number(s).

Regarding formal complaint allegations admitted by respondent, respondent's answers to such allegations will be referred to as Ans.___, followed by the paragraph number of respondent's Answer. Regarding respondent's admissions to the bar's Request for Admissions, such admissions will be referred to as Adm.___, followed by the paragraph number of respondent's Response to Request for Admissions.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

In this brief, the profanities "Fuck you/me" and "Asshole" and any derivations thereof shall be referred to as "F--- you/me" and "A--hole", respectively.

STATEMENT OF THE CASE

On February 26, 1996, the Eighteenth Judicial Circuit Grievance Committee "C" found probable cause against respondent for violating Rules Regulating The Florida Bar 4-8.4(c) for engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; and 4-8.4(d) for engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

The bar's complaint was filed on May 31, 1996. On June 20, 1996, The Honorable Cynthia G. Angelos, Circuit Judge, was appointed as referee in this matter. The parties stipulated to having all proceedings conducted before Judge Angelos in Martin County, Florida, and the final evidentiary hearing was set for November 8, 1996.

Respondent submitted his answers to the bar's complaint on June 25, 1996. On June 27, 1996, the bar served written interrogatories on respondent and served Requests for Admission

on respondent on July 2, 1996. Respondent served his Response to Request for Admissions and Answers to Interrogatories on July 31, 1996. On October 17, 1996 and October 31, 1996, respectively, Eric M. Turner and Frances R. Brown filed notices of appearance as co-bar counsel.

A pretrial telephone conference was conducted on October 29, 1996 and the final evidentiary hearing was held on November 8, 1996. The referee requested the parties each submit proposed referee reports for her consideration. The findings of fact in the reports prepared by the bar and respondent were substantially similar. The referee submitted her report on December 5, 1996. Although the referee found that respondent had engaged in the conduct described in the findings of fact, she also found several mitigating factors. It was the referee's finding that it had not been proven by clear and convincing evidence that respondent's conduct rose to a level of a violation of Rules 4-8.4(c) and 4-8.4(d).

The Board of Governors of The Florida Bar considered the Report of Referee at its January, 1997 meeting and voted to seek review of the referee's conclusion that respondent was not guilty of violating Rules 4-8.4(c) and 4-8.4(d). The bar served its Petition for Review on January 24, 1997. This Initial Brief is submitted in support of the bar's petition.

STATEMENT OF THE FACTS

In April, 1995 respondent represented the former wife in Newman v. Newman, Case No. 90-02457-FD-J, Eighteenth Judicial Circuit, Brevard County, Florida, concerning child custody and support issues [Ans. 1; Adm. 3]. Attorney J. Scott Lanford represented the former husband [Ans. 1; Adm. 3]. Mr. Lanford scheduled the deposition of Dr. Bonnie Slade, Ph.D., a licensed psychologist, for April 24, 1995 at 8:45 a.m. at Dr. Slade's office in Palm Bay, Florida, concerning the Newman case [Ans. 2; Adm. 41. Mr. Lanford also faxed to respondent's office on Saturday, April 22, 1995, a day when respondent's office was closed, a notice of the taking of the deposition of a Dr. Whitacre at Mr. Lanford's office at 6:30 p.m. on the following Monday evening, April 24, 1995 [T, pp. 27, 58, 121].

On the morning of April 24, 1995, both Mr. Lanford and respondent were present for Dr. Slade's deposition and respondent's client and her new husband were also in attendance [Ans. 2; Adm. 41. Dr. Slade's deposition was reported by Stephanie McGraw, Registered Professional Reporter [Ans. 3; Adm. 51. Ms. McGraw used stenographic notes and a tape recorder to report Dr. Slade's deposition which lasted approximately 15 minutes [Ans. 3; Adm. 5]. After Dr. Slade indicated that she had to terminate the deposition, it was determined her deposition

would be continued at a later time. [Ans. 4; Adm. 6]. After Dr. Slade left the deposition room, Mr. Lanford informed respondent of Dr. Whitacre's deposition scheduled for that evening [Ans. 4; Adm. 8]. Mr. Lanford told respondent, "6:30 in my office. Be there. Thank you" [Ans. 4; Adm. 8; T, p. 117]. Mr. Lanford and respondent then left the deposition room [Ans. 4; Adm. 91.

Outside the deposition room, respondent approached Mr. Lanford and uttered an obscenity, "F--- you" [Ans. 5; Adm. 10]. Mr. Lanford responded, "I'm sorry, what did you say?" and respondent stated, "A--hole," whereupon Mr. Lanford said to respondent, "Say it again", and respondent uttered "A--hole" again [Adm. 11; T, p. 122]. The court reporter's tape recorder registered portions of this confrontation between respondent and Mr. Lanford. The tape recorder did not pick up the words "F--- you" but did pick up respondent's utterance of the term "A--hole" on several occasions [Ans. 5; Bar Ex. 73. Dr. William Edward Riebsame, a psychologist working in the same office as Dr. Slade, testified before the grievance committee that he had witnessed the confrontation in the hallway of Dr. Slade's office between the two attorneys, that respondent said something like "you are a f---ing a--hole," and that during the confrontation, respondent either pushed or pointed into Mr. Lanford's chest [Bar Ex. 1, p. 661.

When the court reporter, Ms. McGraw, and Mr. Lanford were in the parking lot subsequent to Dr. Slade's deposition, respondent called out to Mr. Lanford, "Hey looney, when did you send the subpoena" or "Hey looney, when did you get the subpoena", or words to that effect [T, pp. 32, 86, 123-1241. The bar charged respondent with violating R. Regulating Fla. Bar 4-8.4(d) for knowingly using language to disparage and/or humiliate another lawyer.

Ms. McGraw testified that just before the Whitacre deposition began on the evening of April 24, 1995, respondent pointed his finger at her and said to his client, "I'm going to get that woman if it's the last thing I do" [T, pp. 70-711. Also during the Whitacre deposition taken on the evening of April 24, 1995, respondent objected to Ms. McGraw's presence as the court reporter [Ans. 7; T, p. 102]. Respondent stated on the record of the Whitacre deposition his contention that Ms. McGraw and Mr. Lanford had completely fabricated a purported portion of the Slade deposition taken earlier that morning [Ans. 71. He stated on the record during the Whitacre deposition that he had never made the statement "F--- you", or words to that effect earlier that day [Ans. 8]. Respondent further stated on the record during Dr. Whitacre's deposition that Ms. McGraw had notarized what he believed to be a "partially false and fraudulent transcript of statements never made" [Ans. 7; Adm. 16; Bar Ex.

2]. At the final hearing, respondent testified that he was referring to statements never made during the course of the deposition but which were included in the Slade transcript as prepared by the court reporter [T, pp. 110-11].

On April 26, 1995, respondent filed in the Newman case Petitioner's Supplemental Objections to the Filing or Use of the Deposition of Bonnie Slade, Ph.D. [Adm. 18]. In that document, at paragraph four, respondent stated that a portion of the transcript of the deposition of Bonnie Slade, Ph.D., namely lines 13 through 20 on page 17, was "falsely, fraudulently and maliciously fabricated by the court reporter acting in concert with counsel for the Former Husband" [Adm. 19; Bar Ex. 3]. At the final hearing, respondent testified that he was referring to the court reporter having included in the Slade transcript those matters which occurred after the deposition had concluded [T, pp. 110-111]. Respondent testified that he believed Mr. Lanford advised the court reporter, Ms. McGraw, to include the comments made between the two attorneys after the termination of the Slade deposition in the transcript which was to be presented to the trial court [T, pp. 102-104].

Respondent, in his grievance filed against Mr. Lanford, represented that at no time on April 24, 1995, either in the deposition room or outside thereof, did he utter the obscenities

reflected on page 17, lines 13-20, of Dr. Slade's transcript [T, p. 1001. Further, prior to the grievance committee hearing in this matter, respondent denied saying "A--hole" to Mr. Lanford on April 24, 1995, although the tape recording made by the court reporter, Stephanie McGraw, reflects respondent said that word at least twice [Ans. 10; Adm. 21; T, pp. 111-114]. Respondent acknowledged that he said "F--- You" to Mr. Lanford [Ans. 10; Adm. 22; T, p. 951 . Respondent testified during the final hearing that he meant to convey that such language had not taken place during the deposition but thereafter [T, pp. 100-101, 111-1121.

Respondent directed disparaging remarks to opposing counsel, Mr. Lanford [Ans. 11], and accused a court reporter of fabricating a transcript and engaging in an improper notarization [Ans. 121. Also, respondent accused an attorney of conspiring with a court reporter to fabricate a transcript [Ans. 131. Respondent maintained prior to and at the final hearing that the court reporter and Mr. Lanford combined efforts to create an impression that the profane language he used had been spoken during the deposition of Dr. Slade when it had been spoken after the deposition and that Ms. McGraw could not have heard him tell Mr. Lanford "F--- You" or have obtained it from the tape recording so she must have obtained it from a conversation with Mr. Lanford [Adm. 10; T, pp. 103-104]. At the time respondent

submitted his written objection to the Slade transcript in the Newman case, he had not heard the audio tape of the Slade deposition and had no proof to substantiate his allegations that the court reporter had fabricated testimony [T, pp. 108-109, 111]. The bar charged that respondent's unsubstantiated accusations against Ms. McGraw and Mr. Lanford constituted conduct prejudicial to the administration of justice under R. Regulating Fla. Bar 4-8.4(d) because his remarks were rendered in court documents and were intended to disparage or humiliate the court reporter and a fellow member of the bar. The bar also charged respondent with making a misrepresentation to the bar in violation of R. Regulating Fla. Bar 4-8.4(c) when he denied uttering a disparaging remark where an audio device recorded him doing so on two occasions. Respondent denied that allegation and the referee did not find respondent had violated Rule 4-8.4(c).

Respondent testified that at the time he made the comments to Mr. Lanford and took action, he was under stress because of a medical condition and the late scheduled deposition conflicted with time he needed to spend with his girlfriend's sick mother [T, pp. 120-121]. The referee found these to be mitigating factors. Respondent also testified that Mr. Lanford accused him of being a liar and conspiring with his client to deny return of the children to Mr. Newman [T, pp. 105-107]. In reviewing the circumstances of respondent's actions, the referee also found

that Mr. Lanford's conduct was a mitigating factor. The referee specifically stated that she did not condone respondent's actions in this case. However, it was the referee's recommendation, based upon the totality of the circumstances and the mitigating factors present, that respondent be found not guilty of violating the rules charged in the bar's complaint.

SUMMARY OF THE ARGUMENT

The bar seeks to challenge the referee's conclusion that respondent's use of the obscenities, "F--- you" and "A--hole", directed toward opposing counsel, and his subsequent actions against the court reporter and opposing counsel, did not violate Rules 4-8.4(c) and 4-8.4(d). The facts are not in dispute and explicitly show that respondent said the obscenities to opposing counsel after a deposition had concluded in a litigated civil case. Respondent's inappropriate language and the subsequent publishing of his opinion that the court reporter and opposing counsel conspired to fabricate a deposition transcript constituted a breach of Rule 4-8.4(d). Such conduct was clearly intended to disparage and humiliate another attorney and a court reporter and as such, undermines the public's perception of the officers in our system of justice and, thereby, prejudices the administration of justice. Further, it is apparent from the evidence and testimony presented at the final hearing that respondent initially denied to the parties concerned and to the grievance committee that he used any expletives during his confrontation with opposing counsel, despite at least a portion of the comments being reflected in the court reporter's tape recording. Respondent's actions in that regard constituted a misrepresentation and a violation of Rule 4-8.4(c).

While the referee found there were some mitigating factors present in this case, they were not sufficient to negate a finding of misconduct. The bar submits that as an officer of the court, respondent was obligated to maintain the highest level of integrity and professionalism regardless of the surrounding circumstances. At best, respondent's angry outburst and use of profane language to another attorney was unbecoming of a member of the bar; at worst, such conduct evidences respondent's lack of self-control and a complete disregard for his Oath of Admission. This kind of unprofessional and inappropriate behavior should not be tolerated by any court or other members of the bar.

Prior to the referee's recommendation of a not guilty finding, the bar presented arguments as to the proper discipline in this case. The bar submits that case law and the Florida Standards for Imposing Lawyer Sanctions support a public reprimand. Respondent has taken little responsibility for his actions and instead seeks to have opposing counsel and personal circumstances shoulder the blame. He refused to take responsibility for accusing the court reporter of fabricating testimony. A public reprimand is necessary to show other members of the bar that use of profane language in the practice of law is not acceptable behavior and making unfounded accusations of fraud against court personnel (a court reporter) should not be tolerated. In addition, due to respondent's apparent lack of

self-control, the bar submits that respondent's referral to an anger/stress management program is warranted.

ARGUMENT

POINT I

THE REFEREE REACHED ERRONEOUS CONCLUSIONS FROM THE FINDINGS OF FACT AND EVIDENCE PRESENTED THEREBY CAUSING AN INCORRECT AND INADEQUATE FINDING OF NOT GUILTY.

It is undisputed that respondent confronted attorney J. Scott Lanford after a deposition had concluded in a litigated civil case, Newman v. Newman. The exchange went as follows:

> Both attorneys left the room and Respondent approached Mr. Lanford from the rear, put his hand on his shoulder and said to him "F--- You", whereupon Mr. Lanford responded "I'm sorry, what did you say?", and Respondent responded "A-- hole", whereupon Mr. Lanford said to Respondent "Say it again.", and Respondent uttered "A-- hole" again. The court reporter had allowed her tape recorder to continue, but did not pick up the word "F--- You." The tape recorder did, however, pick up the term "A-- hole." [RR, p. 2].

It is clear from the testimony presented at the final hearing that respondent was angry with Mr. Lanford because of the late deposition notice and from prior interactions between the attorneys in the Newman case [T, pp. 43-45, 58, 106-107, 114-118]. Reluctantly, respondent eventually acknowledged that he confronted Mr. Lanford with the obscenities, "F--- you" and "A-- hole". However, respondent is not apologetic toward Mr. Lanford based on his perception of Mr. Lanford's actions in the "highly contested" Newman case. Respondent apparently does not consider

calling a fellow attorney an "A--hole" and telling him "F--- You" to be unprofessional [T, pp. 105-1081. Rather, respondent only appears to be sorry that he was unable to control himself on that day [T, pp. 105, 108].

The referee found that Mr. Lanford's conduct was a mitigating factor [RR, p. 41, although it is not clearly specified what actions or statements by Mr. Lanford the referee believed may have contributed to respondent's angry outburst and use of obscenities. Also in mitigation, the referee pointed to respondent's physical and mental health [RR, p. 41. However, respondent testified that his medical condition began in or around October, 1994 and was under control by the end of 1994 and that his confrontation with Mr. Lanford occurred toward the end of April, 1995 [T, pp. 120-121]. Further, respondent did not specify the mental health problem he suffered. He was merely upset at Mr. Lanford for scheduling a deposition with little notice as it conflicted with the time he wanted to spend with his girlfriend's sick mother [T, p. 121; RR, p. 3]. The bar would point out that although under the Florida Standards for Imposing Lawyer Sanctions an attorney's personal or emotional problems is a mitigating factor [Standard 9.23(c)], the conduct of opposing counsel is not. While these circumstances may be sufficient to mitigate the level of discipline to be imposed, they do not negate respondent's misconduct, particularly where the referee

found respondent had engaged in the conduct as charged by the bar. This holds true in other similar attorney discipline actions.

In The Florida Bar v. Wasserman, 675 So. 2d 103 (Fla. 1996), the attorney was disciplined in two separate cases for his personal behavior. In one case, the attorney's angry outburst in a court proceeding included shouting criticisms at the judge, waving his arms and banging on a table. The attorney also stated his intent to advise his client to defy the court's order. After considering as mitigation that the attorney admitted his conduct was inappropriate and indicated he would not behave in that manner again, the referee recommended that the attorney be given a 60 day suspension in that case. In the second case, after receiving an unfavorable response over the telephone from a judge's assistant, the attorney said to the assistant, "YOU little motherf-----; you and that judge, that motherf------ son of a b-----." The referee recommended a six month suspension in that case. On appeal in the first case, the attorney maintained that because his outburst had occurred during an emotionally charged custody case, his behavior should be considered "minor misconduct". This Court found that even though the attorney's conduct occurred during a heated custody battle, the egregious behavior was not minor misconduct particularly in light of the attorney's prior disciplinary history. The Court ordered a six

month suspension in the first case which was to run consecutively with the six month suspension in the second case.

In a federal case, Carroll v. Jauues, 926 F.Supp. 1282 (E.D. Tex.), an attorney was being sued by a former client. During a deposition of the attorney, he used an abusive tone and shouted profanities at the plaintiff's counsel. The court found there was no adequate basis to sanction the attorney under the Federal Rules of Civil Procedure so it used its inherent power to regulate the conduct of parties before it. The court found the attorney's language toward the plaintiff's counsel to be "extremely offensive and abusive." The attorney used harassment, extreme fatigue and hypoglycemia as defenses. The court rejected these defenses but considered such in mitigation. As a deterrence to further abusive conduct, the court fined the attorney a total of $7,000 which included $500 for each time he insulted the plaintiff's counsel with specific profanities, $1,000 for threatening the plaintiff's counsel with bodily harm, and $1,000 for each time the attorney used a string of profanities.

What is also important to consider in this case, which the referee did not adequately assess, is that respondent initially denied using the obscene language toward Mr. Lanford. At the beginning of Dr. Whitacre's deposition on the evening of April

24, 1995, respondent stated his objection to the court reporter's presence and stated that she had "notarized what I contend to be and will ultimately prove to be a partially false and fraudulent transcript of statements never made." [Bar Ex. 2; RR, p. 31. When Mr. Lanford inquired of respondent whether he had said "F--- you" earlier that day, respondent stated "Never made." [Bar Ex. 2]. In Petitioner's Supplemental Objections to the Filing or Use of the Deposition of Bonnie Slade, Ph.D. filed by respondent in the Newman case on or about April 26, 1995, respondent stated his contention:

> . . . a portion of the transcript, namely lines 1.3 through 20 on page 17 of the transcript have been falsely, fraudulently and maliciously fabricated by the court reporter acting in concert with counsel for the Former Husband. Furthermore, certain indications in the transcript did not occur and certain statements were not made at the times set forth in the transcript. [Bar Ex. 3; RR, p. 3].

In a letter to the court reporter, Ms. McGraw, dated May 16, 1995, the respondent stated, with regard to Dr. Slade's deposition, "you and I each know to a degree of moral certainty that the purported dialogue between Scott Lanford and I as shown on lines 13 through 20 of page 17 of the transcript of the Slade deposition simply did not take place" [Bar Ex. 6]. In the grievance respondent filed against Mr. Lanford, respondent represented that at no time on April 24, 1995, either in the deposition room or outside thereof, did he utter the obscenities

"F--- Me" or "A--hole" as reflected on page 17, lines 13-20, of Dr. Slade's transcript [Bar Ex. 8; T, p. 100]. The referee's report, at page 3, regarding respondent's grievance against Mr. Lanford, is incorrect in that the report states that in his grievance respondent represented that at no time on April 24, 1995, either in the deposition room or outside thereof, did he utter the term "F--- Me." However, respondent never made that distinction [Bar Ex. 81. Rather, in his written documents to the grievance committee, respondent represented that the entire dialogue set forth in the Slade transcript never took place. Further, during the grievance committee hearing in this matter, respondent never clarified to the committee what profanities he used. Respondent admitted during the final hearing that he may have given the committee the impression that he never called Mr. Landford "A--hole" [T, pp. 111-113]. It is apparent that respondent did not fully acknowledge or clarify his use of the language "F--- you" and "A--hole" directed to Mr. Lanford until after the grievance committee found probable cause against him [Ans. 5; Adm. 11]. Respondent testified at the final hearing that in his initial denials he meant to convey that his use of the language "F--- you" and A--hole" did not take place during the course of the Slade deposition [T, pp. 97, 101, 110-112, 123, 127]. However, respondent waited until the referee proceedings to attempt to clarify his intentions [Ans. 8, 9 13; Adm. 12, 15, 19-21, 23, 25]. Clearly, respondent's denials to the grievance

committee and others of his use of the obscenities directed toward Mr. Lanford constitute a misrepresentation and support a finding of guilt as to Rule 4-8.4(c).

The other issue on which the referee reached incomplete or erroneous conclusions concerns respondent's actions toward Mr. Lanford and the court reporter, Ms. McGraw, subsequent to the confrontation on April 24, 1995. On the record at the deposition of Dr. Whitacre the evening of April 24, 1995, respondent stated his contention that Mr. Lanford and Ms. McGraw had completely fabricated portions of a transcript of the Slade deposition taken earlier in the day [Bar Ex. 2]. Respondent also called into question, on the record, Ms. McGraw's impartiality [Bar Ex. 2]. Further, respondent published in a court document filed in the Newman case his opinion that Mr. Lanford and Ms. McGraw had acted in concert to fabricate the transcript of Dr. Slade's deposition [Bar Ex. 3]. It was respondent's supposition that Mr. Lanford had a conversation with Ms. McGraw in which he told her what to put in the transcript regarding respondent's confrontation with Mr. Lanford after the Slade deposition [T, pp. 103-104]. Respondent had not heard such a conversation between Ms. McGraw and Mr. Lanford nor had he even listened to the audio tape made by the court reporter prior to making such a bold accusation that Mr. Lanford and Ms. McGraw had fabricated the transcript [T, pp. 104, 108-109]. Respondent's accusations of a conspiracy between

Mr. Lanford and Ms. McGraw had no basis in fact nor did respondent attempt to verify his accusations prior to publishing them in the Newman case. Further, the evidence ultimately showed that what Ms. McGraw recorded had, in fact, transpired, i.e. respondent used obscene language toward Mr. Lanford. Accordingly, respondent's publication that portions of the Slade transcript were complete fabrications was a misrepresentation in violation of Rule 4-8.4(c). In another disciplinary matter, an attorney's baseless accusations against others subjected him to discipline. In The Florida Bar v. Adams, 641 So. 2d 399 (Fla. 1994), the attorney issued a letter setting forth accusations against several attorneys and all members of The Florida Bar. With respect to two attorneys involved in a client's suit against a hospital and a doctor, the attorney accused them of suborning perjury. The referee found that not only was the accusation false, but also found that there was absolutely no evidence from which the attorney could have reasonably suspected that type of conduct. The referee recommended a public reprimand, probation for a period of six months, and a general evaluation by a licensed psychologist. The Court, however, found that a public reprimand would not be sufficient to induce the attorney to "reassess his behavior and to protect the public and legal profession from his unfounded threats and allegations." The attorney received a 90 day suspension, a one year period of

probation and an evaluation by a licensed and bar approved mental health counselor.

The bar also questions what purpose respondent had in publishing his opinions against Mr. Lanford and Ms. McGraw, which had no basis in fact. Also, what purpose could respondent have had for calling Mr. Lanford a "looney" in front of Ms. McGraw subsequent to Dr. Slade's deposition, and stating to Ms. McGraw in his client's presence that, "I'm going to get that woman if it's the last thing I do" [RR, p. 3]? It is obvious respondent was angry with Mr. Lanford and Ms. McGraw and the only purpose for respondent's profanity, name-calling and inappropriate remarks was to disparage, embarrass and humiliate the court reporter and a fellow member of the bar. Such conduct violates Rule 4-8.4(d). The Court has held that Rule 4-8.4(d) requires attorneys to refrain from knowingly humiliating litigants on any basis whatsoever, The Florida Bar v. Uhris, 666 So. 2d 887 (Fla. 1996). The rule also prohibits disparagement towards court personnel or other lawyers. In the Uhrig case, the attorney mailed an insulting and unprofessional letter to a client's former husband regarding a child support matter. The Court found that the attorney's letter, which compared the litigant's opinions to body odor, to be devoid of any purpose other than humiliation and disparagement. The attorney was found guilty of violating Rule 4-8.4(d) and was given a public reprimand. Unlike

the instant matter, the attorney in Uhrig acknowledged his letter caused the litigant to feel disparaged, offended and humiliated. Respondent is plainly not apologetic toward Ms. McGraw and Mr. Lanford as he apparently attributes their own actions as the cause of his disparaging behavior toward them [T, pp. 103-1071. Respondent has not acknowledged that his conduct may have made Ms. McGraw and Mr. Lanford feel disparaged, embarrassed or humiliated. Rather, respondent only cites some personal embarrassment for losing control of himself [T, pp. 105, 107-108, 116].

Certainly, attorneys are only human and can get angry and lose control. However, respondent has engaged in a pattern of offensive and disparaging behavior as reflected by the referee's findings of fact. The referee even indicated she did not condone respondent's behavior. Even considering the mitigating factors found by the referee, which are questionable at best, the fact that respondent engaged in such unprofessional conduct has not changed. Clearly, under the circumstances of this case, the referee's finding that respondent's actions did not rise to the level of a violation of Rules 4-8.4(c) and 4-8.4(d) is erroneous and her recommendation of not guilty is not warranted.

POINT II

THE APPROPRIATE DISCIPLINE FOR RESPONDENT'S MISCONDUCT IS A PUBLIC REPRIMAND, PAYMENT OF THE BAR'S COSTS AND RESPONDENT'S REFERRAL TO A STRESS/ANGER MANAGEMENT PROGRAM.

In consideration of the circumstances of this case, the relevant case law and the Florida Standards for Imposing Lawyer Sanctions, respondent should receive a public reprimand. He should also be required to participate in a stress/anger management program and pay the bar's costs in prosecuting this disciplinary matter. In addition to the Uhrig case cited herein, The Florida Bar v. Perlmutter, 582 So. 2d 616 (Fla. 1991) supports the imposition of a public reprimand as discipline in this case. In the Perlmutter case, the attorney entered into a conditional guilty plea for consent judgment in exchange for a public reprimand. The attorney admitted he violated Rule 4-8.4(d) by threatening to retaliate against citizens who filed grievances with The Florida Bar, and by making threats without any independent knowledge or investigation of the facts. The attorney also violated the Oath of Admission by failing to abstain from all offensive personality by engaging in "vituperative correspondence on behalf of a client, and, while doing so, by advancing allegations prejudicial to the honor or reputation of a party." [At p. 617].

Standard 5.13 of the Florida Standards for Imposing Lawyer Sanctions states that a public reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, fraud, deceit, or misrepresentation and that adversely reflects on the lawyer's fitness to practice law. As described above, respondent misrepresented to the court and to the grievance committee that his profane language directed toward Mr. Lanford, and recorded by the court reporter, did not occur. Under Standard 7.3, a public reprimand is appropriate when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system. At best, respondent failed to recognize that his offensive language was unprofessional; at worst, respondent's actions were intended to disparage and humiliate another attorney and a court reporter and as such, undermine the public's perception of the officers in our system of justice.

In mitigation, under Standard 9.23(c), respondent may have had personal or emotional problems at the time of his misconduct, although the referee did not clearly deliniate such problems. The mitigating factor of remoteness of prior offenses, under Standard 9.23(m), is relevant because respondents only other discipline occurred over 14 years ago. In aggravation, Standard 9.22(f) is met by respondent's submission of false evidence,

false statements, or other deceptive practices during the disciplinary process. During the grievance committee process, respondent either denied using profanity to Mr. Lanford, represented that the dialogue recorded by the court reporter never transpired and/or failed to correct the grievance committee's conceptions of what language he actually used with Mr. Lanford. Standard 9.22(g) is met by respondent's refusal to acknowledge the wrongful nature of his conduct [T, pp. 103-108, 113-115, 119-124, 129-130]. In addition, respondent has substantial experience in the practice of law, pursuant to Standard 9.22(i), having been a member of The Florida Bar for 19 years and having been admitted to the practice of law in New York in 1956. In other words, respondent should have known better than to engage in such offensive and unprofessional conduct as he did in this case.

There are three purposes of lawyer discipline: protection of the public, punishment of the accused attorney and deterrence of other like-minded lawyers, The Florida Bar v. Dubbeld, 594 So. 2d 735 (Fla. 1992). The bar submits that a public reprimand, respondent's referral to a stress/anger management program and his payment of the bar's costs would accomplish these purposes. Such discipline would put other members of the bar on notice that the use of profane language and disparaging remarks towards court personnel or other lawyers will not be tolerated. Should "A--

hole" be a common word to be used by everybody as respondent believes it is [T, p. 113]? Is it a word that one can interchange with the word "jerk" as respondent wants us to believe [T, p. 113]? Should it be accepted that attorneys have lost another degree of civility [T, p. 113]? It has been quite clearly demonstrated in recent years that the public's perception of attorneys in general is that of extreme unprofessionalism. Attorneys who swear at each other, at court personnel or litigants only serve as support for the public's perceptions. If respondent's saying to another member of the bar "F--- you" and calling him "A--hole" and "looney" are to be considered acceptable and not violations of the ethical rules governing attorney conduct, then what is to be considered unacceptable behavior? Should telling an officer of the court "F--- you" be acceptable language because such language may be of common use by "shock jocks" [T, p. 119]? If such conduct is not a disciplinable offense, and attorneys are not required to maintain some level of self-control and professionalism, then attorneys are free to disparage whomever they please on any basis and for any reason. This renders Rule 4-8.4(d) without purpose or use. Attorneys should be required to adhere to a higher standard and should adhere to their oath to abstain from all offensive personality.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's conclusions and finding of not guilty and instead, based on the findings of fact and evidence presented, find respondent guilty of violating rules 4-8.4(c) and 4-8.4(d) and as discipline impose at least a public reprimand, respondent's referral to a stress/anger management program, and payment of the bar's costs which total $2,326.84.

Respectfully submitted,

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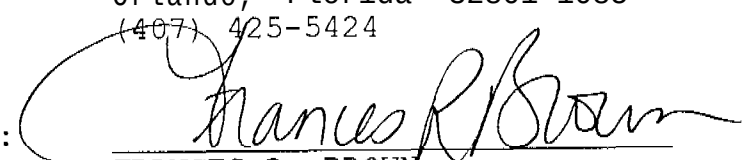
By: 

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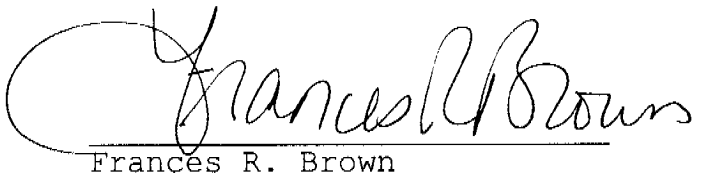
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Initial Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to James Dressler, Counsel for Respondent, 110 Dixie Lane, Cocoa Beach, Florida, 32931-3542; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 24th day of February, 1997.

Respectfully submitted,



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