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IN THE SUPREME COURT  
STATE OF FLORIDA

Case No. 94,433

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THE FLORIDA BAR,

*Complainant,*

vs.

MICHAEL DEAN RAY,

*Respondent.*

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AMICUS CURIAE BRIEF

OF

AMERICAN IMMIGRATION LAWYER'S ASSOCIATION, SOUTH FLORIDA CHAPTER

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ON REVIEW OF REPORT OF REFEREE

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**REFERENCE TABLE FOR**  
**ALL ABBREVIATIONS USED IN THIS BRIEF**

The transcript of the Final Hearing before the Referee is in three parts which are referred to in this brief by the symbols:

**TR1-** for the transcript of proceedings held June 17, 1999;

**TR2-** for the transcript of proceedings held August 2, 1999;

The Report of the Referee is referred to by the symbol **ROR** followed by the appropriate page number.

Exhibits introduced and admitted in evidence by The Florida Bar were marked with numbers designated as **EX.** followed by the appropriate number; while exhibits introduced and admitted in evidence by Respondent were marked with letters designated as **EX.** followed by the appropriate letter.

**AILA** refers to American Immigration Lawyers Association.

Mr. Ray refers to Respondent, Michael Dean Ray.

CERTIFICATE OF **FONT** SIZE

Counsel certifies the size and style of type used in this brief is 12 point Courier New, a font that is not proportionately spaced.

STATEMENT OF THE CASE AND OF THE FACTS

A Referee for The Supreme Court of Florida found that in three letters to the Chief Immigration Judge, Michael Dean Ray ("Mr. Ray") made statements he either knew to be false or stated with reckless disregard to the truth or falsity concerning the qualifications or integrity of a subordinate immigration judge. The Report of Referee concluded that Mr. Ray's words violated Rule 4.8-2(a).<sup>1</sup>

Rule 4-8.2(a) provides: 'A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, mediator, arbitrator, adjudicatory officer, public legal officer, juror or member of the venire, or candidate for election or appointment to judicial or legal office.'

STATEMENT OF THE FACTS

***Mr. Ray's Background***

Mr. Ray was admitted to practice law in Florida in 1978; according to findings in The Report of Referee, he never has been disciplined by The Florida Bar. Since May of 1999, Mr. Ray has served as the elected president of the 400-member South Florida Chapter of the American Immigration Lawyers Association ("**AILA**"). However, no statements, allegations, or actions at issue were made in Mr. Ray's capacity as President of **AILA's** South Florida Chapter.

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<sup>1</sup>R. Regulating Fla. Bar

Furthermore, **AILA** takes no position with respect to the propriety or truth of Mr. Ray's statements, allegations or actions.

**Complaint Procedure: Immigration Judges and the Chief Immigration Judge**

United States immigration judges are neither confirmed by the Senate nor elected by the public. Therefore, they are not within the jurisdiction of the Judicial Qualifications Commission. United States Immigration judges are selected by and serve at the pleasure of the Attorney General of the United States. The Code of Federal Regulations mandates: "The Chief Immigration judge shall be responsible for the general supervision, direction, and scheduling of the Immigration Judges . . . [and] evaluation of the performance of Immigration Courts, making appropriate reports and inspections, and taking corrective action where indicated." 8 C.F.R. § 3.9. When choosing to complain about an immigration judge, rightly or wrongly, the immigration bar is to complain directly to the Chief Immigration Judge. **TR2-58** Philip J. Montante, Jr. is an immigration judge who from April, 1990 through July of 1997 presided in Miami, Florida. **TR1-34**

**Content of First Letter: Mr. Ray's February 23, 1996 Letter**

On February 23, 1996, Mr. Ray wrote a ten-page letter to Chief Immigration Judge Michael Creppy, *inter alia*, to complain about what, in his mind, amounted to Judge Montante's denial of fair hearings to his clients. EX. 1



***Content of Second Letter: Mr. Ray's November 14, 1996 Letter***

On November 14, 1996, Mr. Ray wrote to Chief Judge Creppy requesting an emergency **recusal** of Judge Montante. EX. 2

***Content of Third Letter: Mr. Ray's August 19, 1997 Letter***

On August 19, 1997, Mr. Ray wrote to Chief Judge Creppy in connection with Mr. Ray's previous communications regarding Judge Montante. **EX. 3**

DISPOSITION BY THE REFEREE

The Referee for The Supreme Court of Florida found that Mr. Ray violated Rule **4.8-2(a)** through the contents of his three letters. The Referee recommended Mr. Ray receive a public reprimand and that The Florida Bar be awarded costs. ROR-4-6

SUMMARY OF ARGUMENT

The Referee should not have found a violation of Rule **4-8.2(a)**, and the Referee therefore erred in recommending guilt. The Referee should have found that Mr. Ray made private statements regarding Judge Montante intended as part of a confidential dispute mechanism and that the statements in no way caused public confidence in the judiciary to be undermined or interfered with the administration of justice. Although a matter of first impression, an examination of applicable Rule **4-8.2(a)** shows that the rule's real purpose was to narrowly prevent statements by a lawyer that would undermine public confidence in the administration of justice.

## ARGUMENT

I. THE REFEREE SHOULD HAVE FOUND MR. BAY NOT GUILTY BECAUSE THE REFEREE FAILED TO FIND THAT MR. RAY'S STATEMENTS WERE MADE PUBLICLY OR INTERFERED WITH THE ADMINISTRATION OF JUSTICE.

When choosing to complain about an immigration judge such as Judge Montante, rightly or wrongly, the immigration bar is to complain directly to the Chief Immigration Judge. Furthermore, in Mr. Ray's opinion, Mr. Ray was obligated to inform the Chief Immigration Judge of what he believed were untrue statements of Judge Montante. Rule 4-.83(b) of the Rules of Professional Conduct dictates that "[a] lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority." Therefore, if Mr. Ray believed Judge Montante lied, the appropriate person for him to contact was Chief Immigration Judge Creppy.

When Mr. Ray did contact Chief Immigration Judge Creppy regarding Judge Montante, he believed his statements were private and were only for the eyes of Chief Immigration Judge Creppy. Accordingly, when viewing the statements made by Mr. Ray, the Referee should have viewed the statements as being part of a confidential dispute mechanism and that the statements were not meant to be seen by anyone other than Chief Immigration Judge **Creppy**. If the Referee were to view the statements as such, the Referee should have found Mr. Ray not guilty because Rule **4-8.2(a)**

was not intended to cover all false statements made by an attorney. Rule 4-8.2(a) was only intended to cover false statements which undermined public confidence in the judiciary.

**A. Rule 4-8.2(a) is designed to protect the judiciary from unfair public criticism.**

Rule 4-8.2(a) allows the Supreme Court of Florida to protect the Bench from being publicly criticized unfairly by attorneys. Implicit in the protection given by the Supreme Court is that the public criticism is a type of assault. See The Florida Bar in re Shimek, 284 So 2d 686, 690 (Fla. 1973) ("The conclusion which we here reach takes cognizance of the proposition that a judge as a public official is neither sacrosanct nor immune to public criticism of his conduct in office.") (emphasis added). Although bona fide public criticism is permitted, the Supreme Court is free to protect the Bench from such criticisms which "are aimed at the destruction of public confidence in the judicial system as such." See Id. (emphasis added). Mr. Ray's criticisms of Judge Montante were not aimed with the purpose of destroying public confidence in the judiciary system. Rather, Mr. Ray privately criticized Judge Montante and Chief Immigration Judge Creppy.<sup>2</sup>

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Cases cited by the Referee for the Supreme Court of Florida in its report are distinguishable. In The Florida Bar v. Clark, 528 So. 2d 369 (Fla. 1988), the referee determined violation based on comments made in a hearing and in a filing, both accessible to public viewing. In The Florida Bar v. Weinberger, 397 So. 2d 661 (Fla. 1981) and The Florida Bar v. Nunes, 734 So.2d 393 (Fla.

B. The Referee for the Supreme Court of Florida did not show that Mr. Ray's statements undermined the administration of justice.

Not all false and scandalous accusations directed at the judiciary by an attorney are covered by Rule 4-8.2(a) of the Rule Regulating The Florida Bar. See *Id.* ("However, when the likely *impairment of the administration of justice* is the *direct* product of false and scandalous accusations then the rule is otherwise.) (emphasis added). The Referee for the Supreme Court of Florida made no finding that Mr. Ray's statements regarding Judge Montante would lead directly to an impairment in the administration of justice. Therefore, since the Referee did not show that the statements made by Mr. Ray would lead to **an** impairment in the administration of justice, there should be no finding of a violation of Rule 4-8.2(a).

CONCLUSION

The Report of the Referee should be rejected by The Supreme Court of Florida, Mr. Ray engaged in private criticism of the judiciary intended as part of a confidential dispute mechanism and the statements said to be in violation were not shown to impair the administration of justice. Furthermore, if Mr. Ray is found to be in violation, a chilling effect will take hold of the only

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1999), the referee sanctioned the attorney for making public statements. In The Florida Bar v. Flynn, 512 So. 2d 180 (Fla. 1987), although attorney's statements against judiciary were made in grievance to The Florida Bar, referee's finding was based on conditional plea resulting from multiple violations.

mechanism available to the immigration bar to voice private criticism of the immigration judiciary. The future criticism affected, if Mr. Ray is found guilty, will be for the purpose of improving the judiciary and not undermining public confidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing was sent by U.S. Express Mail to the Clerk of The Supreme Court of Florida, 500 S. Duval Street, Tallahassee, Florida 32399 and that a true and correct copy was caused to be served by regular mail this 13<sup>th</sup> day of January, 2000, to:

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