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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL DEAN RAY,

Respondent.
_____/

Supreme Court Case No. SC94433

ON PETITION FOR REVIEW

ANSWER BRIEF OF THE FLORIDA BAR AND RESPONSE TO AMICI CURIAE

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INTRODUCTION

For the purpose of this brief, The Florida Bar will be referred to as "The Florida Bar", "the Bar" or "Florida Bar". Michael Dean Ray will be referred to as "respondent", "Michael Ray" or "Mr. Ray".

Abbreviations utilized in this brief are as follows:

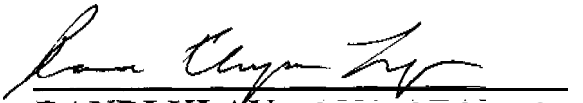
TR1 - for the transcript of proceedings held June 17, 1999;

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

TR3- for the transcript of proceedings held August 4, and 10, 1999; all followed by the appropriate page number.

Respondent's February 23, 1996 letter will be referred to as (A. 1) in that it is attached as the first document in the Appendix included with this brief. Respondent's November 14, 1996 letter will be referred to as (A.2) in that it is attached as the second document in the Appendix included with this brief and respondent's letter dated August 19, 1997 will be referred to as (A.3) in that it is attached as the third document in the Appendix included with this brief.

I HEREBY CERTIFY that this brief is typed in Times New Roman, 14 Point type.



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STATEMENT OF THE CASE AND OF THE: FACTS

On December 2, 1998, The Florida Bar filed its complaint charging the respondent with misconduct which arose from six (6) distinct statements made by the respondent in three (3) separate letters. These statements concerned Immigration Judge Philip J. Montante. All three letters were sent to Chief Immigration Judge Michael Creppy. (A. 1-3) The offending language is set forth below:

The February 23, 1996 letter (A. 1):

a. "...Judge Montante's cowardly deceit..." (page 2)

b. "...Montante's shameless lies..." (page 3)

c. "Does Judge Montante expand his concealment of evidence with cunning and guile and tampering of the official record?" (page 3)

The first two castigations, as explained by the respondent in the letter concern his analysis of the following events. On April 15, 1994, The Daily Business Review published an article reporting that an attornev representing Judge Montante in matters unrelated to this respondent stated that the judge had granted asylum to numerous Haitians. Information obtained by the respondent revealed that one Haitian had been granted asylum. (A. 1) As a result, the respondent deemed the judge cowardly, deceitful and a shameless liar in the February 23, 1996

letter.

The third offending statement in that letter resulted from the respondent's inability to locate "all records of a pending hearing...from the Miami EOIR computer." (EOIR stands for Executive Office for Immigration Review) (TRl-37) The respondent alleged in the letter that a clerk had told him that Judge Montante had the file in chambers and that he could not see it. Thereafter, according to the respondent, "we discovered that the hearing did appear on the central computer for EOIR, if not on the Miami EOIR computer!" (A. 1) That Judge Montante was responsible for the non-appearance of the file in the computer and the respondent deduced and accused Judge Montante of tampering with the official record in a cunning and guileful effort at concealment of evidence.

The November 14, 1996 letter (A.2):

> Montante's trial conduct toward Kolner and me (and who knows how many other attorneys afraid to speak up?) is just one more discouraging example of judicial railroads, kangaroo courts, lynchings, inquisitions, Salem Witch Trials, Star Chambers, and Nazi Justice rearing their heads like a plague in humankind's struggle upward through history. (page 1)

The foregoing reproach arose two weeks after the respondent had appeared before Judge Montante on behalf of Paul Ajuwa, a Nigerian. During a hearing the judge would not entertain the respondent's ore tenus motion to recuse, and ordered

the respondent to be removed from the courtroom. After explaining the events of November 1, 1996 in the November 14, 1996 letter the respondent described the judge's trial conduct as an example of Nazi Justice, lynchings, judicial railroads, kangaroo courts, Inquisitions, Salem Witch Trials and Star Chambers. (A.2)

The August 19, 1997 letter (A.3):

a. "...craven mendacity of Judge Phillip Montante..." (page 4)

b. "...cowardly liar..." (page 4)

The foregoing two statements by Mr. Ray in his August 19, 1997 letter likewise concern his attribution of the statement of another individual regarding the quantity of asylums granted by Judge Montante to Haitians. (A.3)

The respondent was charged with a violation of Rule 4-8.2(a) of the Rules Regulating The Florida Bar, which provides, in pertinent part, that a lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard to its truth or falsity concerning the qualifications or integrity of a judge.

A final hearing was held before the Honorable Gerald Hubbart on June 17, 1999; August 2, 1999 and August 4, 1999.

The Florida Bar presented the Honorable Philip J. Montante, Jr. as its only witness. Judge Montante has been a member of The Florida Bar for twenty nine (29) years, (TR1-30) He is also a member of the New York and Washington, D.C.

Bars, the Fifth Circuit Court of Appeals, the Eleventh Circuit Court of Appeals, United States Tax Court, United States Court of Customs and Patent Appeals and the United States Supreme Court. (TR1-3 1) Judge Montante has served as an immigration judge since 1990. The judge presided in Miami until 1997 and thereafter in Buffalo, New York. (TR1-34) Michael Ray appeared before Judge Montante for the first time in 1990 or 199 1. (TRl-44) The judge was familiar with the three letters drafted by Michael Ray. (TR1-35) Judge Montante addressed the contents of pertinent parts of two of the letters by testifying that he never advised any employee of the Daily Business review that he had granted asylum to numerous Haitians. (TR1-36) He had seen the April 15, 1994 article in the Daily Business Review. (TR1-52) John McCluskey represented him in the matter of Ira Kurzban versus Philip Montante. (TR1-57) He did not recall a conversation with John McCluskey concerning the granting of asylums to Haitians. (TRl-59) At the time of the final hearing the judge did not specifically recollect statistics on the granting of asylums. (TRl-60)

Judge Montante testified that he had not tampered with the Miami EOTR computer. (TR1-37) He was only familiar with the e-mail aspect of the computer. (TR 1-81)

During Judge Montante's testimony The Florida Bar introduced and played

a tape recording of the November 1, 1996 hearing discussed in Mr. Ray's November 15, 1996 letter. (TRl-39) The proceeding on November 1, 1996 was a master calendar hearing or preliminary hearing which is akin to an arraignment in criminal court. (TR1-40) The judge testified that he sometimes grants continuances to attorneys appearing at a master calendar hearing. He defers to attorneys as officers of the court concerning their request for more time and usually gives it to them. (TR1-69) The judge stated that unless otherwise permitted by the judge, written motions are required. (TRl -74) The judge explained that he did not operate his courtroom like a judicial railroad, kangaroo court, lynching, inquisition, Salem witch trial or Nazi justice since the proceedings were conducted with fundamental due process in mind. He judges every case only on its merits. (TR1-63) He does consider background evidence of country conditions to which the United States seeks to return an asylum seeker. He added that Mr. Kolner would attempt to introduce cartoons into evidence, which the judge did not consider background material. (TR1-64) During the November 1, 1996 hearing Judge Montante thought it best to call guards for safety and security concerns since things appeared to be getting out of hand. (TR1-41) There would not have been a ruling on the merits had the proceeding taken place in an orderly fashion. (TR1-43)

The judge additionally testified to the impugning of his integrity as a result

of the pertinent statements in the respondent's three letters. He found it very upsetting to have to deny allegations which are atrocious and never had to endure such an incident in his life. Further, he has not seen such things happen in the years that he practiced as a judge. (TR1-42)

The Florida Bar rested at the conclusion of Judge Montante's testimony. (TR1-86) Thereafter, the respondent's motion for a directed verdict was denied. (TR1-87; TR2-6)

Attorney, Ira J. Kurzban appeared on behalf of the respondent. (TR2-14) Tra Kurzban has been a member of The Florida Bar for twenty three (23) years. (TR2-15) He is also a member of the California Bar, the Fifth Circuit Court of Appeals, the Eleventh Circuit Court of Appeals, the Northern District of California, Southern District of Florida and the United States Supreme Court. Mr. Kurzban has litigated over fifty (50) or sixty (60) cases that are reported in the Federal Reporters and the Supreme Court Reporter. (TR2-15) The witness has authored a treatise used by immigration lawyers and judges. (TR2-16)

Mr. Kurzban stated that the respondent is very highly regarded as a lawyer and that he is considered to be very honest, truthful, competent and zealous, (TR2-24) He testified that you can file a motion to recuse an immigration judge and that there is no process to appeal that decision until the end of the case. (TR2-30) The

practice is different than in state and federal Court. (TR2-3 1) The witness was asked whether he had ever known Judge Montante to lie. He advised the referee that he had entered into a settlement agreement in an unrelated matter which provided that he could not make any disparaging statements against the judge. The witness pointed out that he was under subpoena, (TR2-40) He had not filed a motion for protective order. (TR2-60) The referee ordered the witness to respond and he answered in the affirmative. (TR2-41) He said that the judge lied about Mr. Kurzban's conduct when stating that he was unprepared to represent his client and by accusing him of presenting false testimony. He also added that the judge had savagely cross-examined his client. (TR2-43)

Mr. Kurzban did not have any knowledge concerning Mr. Ray's accusation that Judge Montante had tampered with the Miami EOIR computer in the matter referenced, (TR2-50,63) Thereafter, Mr. Kurzban stated that in another case in which he appeared before Judge Montante, the judge kept turning on and off a machine which records testimony when there was testimony and statements being made for the record and therefore the judge was creating the record on his own. (TR2-5 1) The mechanical device used for transcription of the record is different than the Miami EOIR computer. (TR2-64)

Mr. Kurzban additionally testified to his belief that in certain cases involving

Haitians with certain lawyers, Judge Montante did not conduct himself like a judge, He stated it was not anything like a courtroom but he might not have expressed it as Nazi justice. (TR2-53) He was not, however, present at the November 1, 1996 hearing to which Mr. Ray referred in his November 15, 1996 letter. (TR2-61) He said that the only procedure the Immigration Service provides if a lawyer has a problem with an immigration judge is to file a letter to the chief immigration judge. (TR2-58) Mr. Kurzban concluded his testimony by admitting that Judge Montante was not one of his favorite people. (TR2-59)

Michael Ray testified that he is a member of The Florida Bar, the Fifth and Eleventh Circuit Court of Appeals, the United States Supreme Court and the United States Court of Appeal for Military Justice. He is also president of the four hundred (400) member South Florida Chapter of the American Immigration Lawyer's Association and the liaison between the chapter and the immigration courts in Miami. (TR2-67) Mr. Ray appeared before Judge Montante four (4) or five (5) times. (TR2-70) Mr. Ray also testified that he appeared before Judge Montante two (2) or three (3) times. (TR3-266) The judge granted asylum to one of the respondent's clients, a Tiananmen Square protester from China. (TR2-7 1) The judge denied all other client's asylum, mostly Haitians, in the four (4) or five (5) appearances. (TR2-73) Michael Ray wrote the February 23, 1996 letter

because there was bloodshed in Haiti and the judge would not consider evidence of the conditions. (TR2-78) The judge would retaliate and say that they had made faces when they had not, that they had not filed motions to recuse when they had, that he would not address the results of the Freedom of Information lawsuit. He further stated that the judge would attack them after he had appeared only once before him. (TR2-79) The judge would not accept declarations into evidence but would only thank him for the information. The letters were about the wholesale denial of justice and the retaliation by the judge, who according to Mr. Ray claimed through his attorney that he had granted asylum to numerous Haitians. A resulting lawsuit by the respondent caused the expenditure of $25,000 by the immigration court. (TR2-80)

Mr. Ray explained that Judge Montante's "cowardly deceit" was the fact that the judge had not granted numerous Haitians asylum as was stated by his lawyer, but in fact, had only granted one. (TR2-87; TR3-224-225) According to Mr. Ray it became Judge Montante's responsibility at some point in time to disassociate himself from the statement that his lawyer made. (TR2-88; TR3-225-227) Mr. Ray testified that his statement in his February 26, 1996 letter which says "after the Miami Review story exposing him as a cowardly liar" was his characterizing the Review story as one that refers to the judge as a cowardly liar. (TR3-228) Mr. Ray

said that no where in the article does it say that the judge "left a lie out there." (TR3-240) Mr. Ray had filed a Freedom of Information Act Request for a copy of every asylum granted to Haitians during the previous five (5) years by Judge Montante. The respondent continued to represent Haitians in front of Judge Montante and continued to move to recuse him. (TR2-96) All motions to recuse were denied with one exception. The judge stated that he did not have a bias against Haitians or their attorneys. (TR2- 106) Mr. Ray wrote several letters to Chief Immigration Judge Creppy complaining about Judge Montante's reaction to the making of motions to recuse. Judge Creppy sent his assistant chief j udge and lawyer to Miami for an afternoon to discuss specific problems. Mr. Ray wrote two letters on April 19, 1994 to Judge Montante and to his attorney John W. McLuskey demanding retractions of statements. Mr. Ray received a letter dated April 27, 1994 from Mr. McLuskey advising that comments made by Mr. Ray to the Daily Business Review were legally actionable and requesting that Mr. Ray write a retracting letter to the Review. (TR2-97;TR3-175)

During the meeting with the assistant chief judge and Mr. Ray he discussed with them a file that Judge Montante had in chambers for about a year and a half. According to Mr. Ray, in that same case the judge had falsely stated that the chief judge had admonished Mr. Ray. Additionally, that was the same file that Mr. Ray

made the statement or question about concealment or tampering of evidence. All records related to the case disappeared. Two days after the meeting the judge ruled on the motion to recuse. (TR2- 109; TR3- 170)

One of the reasons the respondent wrote the November 14, 1996 letter is because he was afraid he would be arrested as retaliation by Judge Montante after the November 1, I 996 hearing regarding Paul Ajuwa. (TR2- 119) Paul Ajuwa is Nigerian. (TR3-286) Mr. Ray testified that Judge Montante's statement on November 1, 1996 "Okay, gentlemen, would you please voluntarily remove yourselves from the courtroom please, would you please leave the courtroom., ." was not an order to leave. (TR3-294) Mr. Ray testified that he only filed a Notice of Filing Exhibits that he had used previously in other cases. (TR3-242) He had filed motions to recuse in other cases but did not use those because he did not have time to get an affidavit from his client. He chose to use his time to prepare the notice of filing exhibits because it did not take much time. He did not file a written motion to continue since he understood that the law of recusal did not allow a judge to entertain other motions and he did not want to waive his client's right to seek recusal. (TR3-243) Judge Montante ruled on December 17, 1996 denying the motion for recusal made in the Paul Ajuwa case. (TR3- 18 1) Mr. Ray stated that the order contained many misrepresentations of fact and law and lies. (TR3-185-

194; 196- 198) Mr. Ray said it was possible that on June 17, 1996 which was a Tuesday, Judge Montante might not have seen Mr. Ray's written motion to recuse, which was filed on Friday, December 13, 1996. (TR3-293) Mr. Ray did not have the time or money to file an interlocutory appeal on the Ajuwa case but could write several letters to Judge Creppy containing historical references because he didn't see them as two separate things. (TR3-246) Mr. Ray has filed interlocutory appeals on a recusal issue. The Board of Immigration Appeals rejected it. (TR3-287) Mr. Ray looked up all of the historical terms in his November 14, 1996 letter and consulted with his associates, Neil Kolner, other lawyers in his office, clerks and other people he knew. (TR3-262) Mr. Ray was very deliberate in the use of those terms. He was not in a rage. (TR3-263) A direct appeal was filed on behalf of Mr. Ajuwa by Mr. Ray's office and they were probably compensated. (TR3-254) No issue was raised on direct appeal regarding Judge Montante's refusal to recuse himself since it was not relevant because another judge concluded the case. (TR3-252)

Mr. Ray said Nazi justice was sending his Haitian clients back to a situation where it's likely they would die in violation of the law, refusing to consider evidence, refusal to follow the law and recuse himself, incorrect legal rulings, failure to admit relevant evidence and lack of due process to his clients. (TR2-119;

126-127) Mr. Ray testified that he does not normally write letters with language like the one in his November 14, 1996 letter. (TR2-136) Mr. Ray said he spoke to many attorneys who had similar experiences with Judge Montante. There are twenty (20) or thirty (30) lawyers who represent Haitians and all have had similar problems with the judge. (TR2- 137) Mr. Ray testified that his November 14, 1996 letter was written not only on his behalf but on other people's behalves. (TR3-269) The letter was also written for the four hundred (400) members in his organization. (TR3-270) He did not get anyone else's signature since the facts that are specifically stated did not pertain to everyone else's case. (TR3-27 1) The letter was written on behalf of his client Paul Ajuwa. (TR3-272)

Mr. Ray believes that a judicial railroad means a procedure whereby the result seems to be a foregone conclusion to the detriment of the client and in contravention of whatever evidence may be presented. Kangaroo court is the sort where the outcome is a foregone conclusion and the presentation does not matter (TR2- 139) Tt is also a sham legal proceeding in which a person's rights are totally disregarded. (TR3-252) Mr. Ray testified that on November 1, 1996 Mr. Ajuwa's rights were totally disregarded since he was told that if his lawyer left the case would proceed in absentia, that he was priced out of court after being told he needed to hire new counsel, when his lawyers were taken out of the courtroom he

feared for his life and that he was going to be deported back to **Nigeria** and **maybe** die, when his motion to recuse was not entertained by the judge. (TR3-253-255) Mr. Ray stated that was the way it was before Judge Montante. Mr. Ray did not use those descriptive terms to refer only to the November 1, 1996 hearing but to describe the pattern and practice in Judge Montante's courtroom. (TR2- 139; TR3-165) According to Mr. Ray if his client already had his relatives murdered and his house burned down because of political activities and two hundred and seventy five (275) pages of evidence is excluded and he's deported back to Haiti he's likely to be lynched figuratively and literally. An inquisition was a trial where innocent people were tried and convicted of acts that they had not committed and sentenced to death. Mr. Ray believed that the situation in Haiti historically paralleled the inquisitions. Salem witch trials were the same thing. (TR2-140-141) Star Chambers were procedures to protect the royalty and the kings and that prevented people seeking justice and were used to retaliate against political enemies Mr. Ray believed that was occurring in Judge Montante's courtroom. (TR2- 142)

Mr. Ray testified that there were fifty thousand (50,000) Jews in France that were murdered during Nazi Germany and it was largely due to the fact that the courts and the judges went along with this practice without objections, unlike Denmark and Italy. Deportation to Haiti in the 1990's was similar to Nazi

Germany, according to Mr. Ray. (TR2-144) Mr. Ray also testified that he was not saying that his clients were going to be put in gas ovens or concentration camps. (TR3-288) Mr. Ray testified that there was not any due process in Nazi Germany to the people that were sent to death camps as far as he knew. (TR3-256) Mr. Ray did not know for a fact whether any of the people sent to gas chambers in Nazi Germany had an opportunity to appear before a judge. He further testified that some of the people who were sent to gas chambers may have had an opportunity to have lawyers file something called a Notice of Filing Exhibits on their behalf, but he doubted it. (TR3-254,259,260,261) Mr. Ray did not know which judicial forum those individuals used to file their documents. (TR3-258) Mr. Ray felt it was his duty as a human and as a lawyer to complain about things to Judge Montante's superior. (TR2-146) Mr. Ray believed he would have been subject to discipline for failing to report misconduct of an immigration judge. (TR2- 147)

Mr. Ray wrote the August 19, 1997 letter to Judge Creppy for several reasons. One was to demand a retraction from the chiefjudge of false statements that the chiefjudge made in his July 18, 1997 letter to Mr. Ray. (TR3-215) Another reason was because Judge Creppy had copied twenty eight (28) persons, including every immigration judge on that letter. (TR3-2 19) A further reason was to have Judge Montante removed from all of Mr. Ray's cases. (TR3-221)

Mr. Ray testified that he would write the February 23, 1996; November 14, 1996; and August 19, 1997 letters to Judge Creppy again. He feels proud that he did what he believed was his duty to do and achieve for his clients. (TR3-264) Mr. Ray testified that the first two statements in his February 23, 1996 letter concerning Judge Montante's deceit and the statement in his August 19, 1997 letter concerning Judge Montante's deceit arose from the same incident. That incident was Mr. Ray's belief that Judge Montante should have corrected a misstatement made to the press by the judge's attorney. Mr. Ray recalled receiving three (3) letters dated April 15, 1996; June 2, 1997; July 18, 1997 from Judge Creppy stating that he found no misconduct on the part of any immigration judge. (TR3-276-278) Mr. Ray repeated the accusation because he did not think that Judge Creppy was right and that he had a duty to forward complaints to the Office of Professional Responsibility. (TR3-280)

Mr. Ray testified that it's perfectly normal and logical to stand up in court between cases and ask the judge to call your case, when one had not been called in order. (TR3-284)

Judge Montante was recalled by The Florida Bar as a rebuttal witness. He testified that he recalled the first case in which Ira Kurzban appeared before him. (TR3-299) He reviewed a transcript of Mr. Kurzban's testimony in the case sub

judge and said that Mr. Kurzban testified falsely at the Board of Immigration Appeals had reassigned the case to another judge, but found no basis under the law to require disqualification. (TR3-300-305) In that appeal Mr. Kurzban did not raise a contention that the judge was creating his own record by shutting the tape machine on and off. The judge also testified that Mr. Kurzban's accusation that he turned the tape on and off to create a record was false. (TR3-3 18) The judge testified in regard to Mr. Kurzban's conduct before him. In a written letter of admonishment dated July 6, 1990 he stated that Mr. Kurzban conducted himself in an unethical and unprofessional manner, (TR3-3 10)

On August 10, 1999 the referee found the respondent guilty as charged. The referee issued oral findings. He found that the letters contained accusations which are utterly false and at a minimum were made with reckless disregard for the truth. (TR3-3 8 1) The referee found that one of the "lies" told by Judge Montante was not made by him. He stated:

> "I don't know how you could possibly call someone a liar for a statement they never made."
>
> (TR3-3 82)

Further, the referee relied on the tape recording of the November 1, 1996 hearing. He heard no evidence, and indeed quite to the contrary, that Judge Montante was not guilty of any deceit, cowardly or otherwise and no competent

evidence that he engaged in any shameless lies. (TR3-382) The referee also found that the question concerning Judge Montante tampering with the record was false and made with reckless disregard for its truth. The referee ruled that the November 14, 1996 letter was occasioned by the hearing of November 1, 1996 and the examples given in the letter concerning judicial railroad, etc. referred to the November 1, 1996 hearing. (TR3-383) After listening to the tape and reading the transcript of that hearing the referee said:

> [T]here was nothing -- nothing -- that transpired in that hearing that would justify such outrageously false accusations. And I am just utterly appalled that this kind of language would be used against anybody on evidence that barely even qualifies as sketchy,
>
> (TR3-3 84)

A public reprimand was recommended and The Florida Bar was awarded costs.

(TR3-3 84)

SUMMARY OF ARGUMENT

The instant matter concerns the respondent's acts of making false statements in letters to the chief immigration judge concerning a sitting immigration judge. The statements charged by the Bar and found by the referee to be false concern the respondent's belief that a representation concerning the judges' record made by another individual should have been corrected by the judge. As a result the respondent stated that the judge was "cowardly, a liar, deceitful and possessed craven mendacity." The second category of false statements concerned the respondent's accusation that the judge had tampered with the Miami immigration computer since the respondent believed the judge had the file in chambers and it took too long to set a hearing. The last category of false statements concerned the respondent's description of the judges conduct as akin to Nazi justice, lynchings, judicial railroads, kangaroo courts, inquisitions, Salem witch trials and star chambers, during a particular hearing. A tape recording of that hearing was played at the final hearing of this matter and revealed that the respondent was unprepared and belligerent and that his client's due process rights were protected by the judge, despite the respondent's antics. The three categories of statements were proven to be false on their face.

The respondent in his brief attempts to paint himself as a hero who set out to expose the hypocrisy and wrongful conduct of the judge. He urges this court to

allow the First Amendment and law concerning defamation to shield him. It is the position of The Florida Bar that the Florida Supreme Court has spoken on this issue and will not countenance lawyers making false accusations against the judiciary for the sake of personal aggrandizement.

ISSUES ON APPEAL

I

WHETHER THE REFEREE CORRECTLY DENIED RAY'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT FAILED TO REVEAL THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT

II

WHETHER THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE (RESTATED)

III

WHETHER THE REFEREE PROPERLY FOUND THAT MICHAEL DEAN RAY VIOLATED RULE 4-8.2(a) OF THE RULES REGULATING THE FLORIDA BAR (RESTATED)

IV

WHETHER THE REFEREE'S IMPOSITION OF A PUBLIC REPRIMAND WAS CORRECT (RESTATED)

V

RESPONSE TO AMICI CURIAE

ARGUMENT

I

THE REFEREE CORRECTLY DENIED RAY'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT FAILED TO REVEAL THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT

Summary judgment is appropriate where there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. Deauville Operating Corp. v. Town and Beach Plumbing Co., 123 So. 2d 353 (Fla. 3rd DCA 1960) It is applicable where all parties are in agreement concerning the material and critical issues of fact. Keller v. Penovich, 262 So. 2d 243 (Fla. 4th DCA 1972) Although Florida's Rules of Civil Procedure permit the filing of an affidavit with the motion for summary judgment, it is not mandated. Florida Rules of Civil Procedure 1.5 1 O(a). Nevertheless, the burden is on the moving party to show that there is no genuine issue of material fact. 276 So. 2d 866 (Fla 4th DCA 1969); Remington v. L.P. Gunson and Co., 125 So. 2d 885 (Fla. 2nd DCA 1961). Such showing may be made by the offer of sworn testimony. Goswick v. Mittleman, 177 So. 2d 253 (Fla. 1965). In the case sub judice the respondent filed his motion without any affidavit or offer of testimony and contended that no factual dispute existed. In response, The Florida Bar filed its

response in opposition together with the affidavit of the Honorable Philip Montante. Judge Montante denied that he was cowardly, deceitful, a liar and conducted his courtroom in the manner attributed in Mr. Ray's November 14, 1996 letter. The affidavit was filed despite the fact that the non moving party is not required to file counter affidavits to defeat summary judgment. The National Exhibition Company v. Ball, 139 So. 2d 489 (Fla. 2nd DCA 1962)

As a result the referee correctly found the existence of material disputed facts. The finding is further supported by the referee's ultimate finding of guilt against the respondent.

ARGUMENT

II

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE (RESTATED)

It is well established that a referee's findings of fact in an attorney disciplinary case are presumed correct and will be upheld on appeal unless clearly erroneous and lacking in evidentiary support. The Florida Bar v. Winderman, 614 So. 2d 484 (Fla. 1993). The respondent has been unable to establish that such has occurred in the case at hand.

The respondent begins his argument by attacking the fmdings of fact as "a verbatim repetition of the complaint of The Florida Bar". He further states that the report of referee is deficient since it does not discuss testimony, evidence or the record. Rule 3-7.6(k) of the Rules Regulating The Florida Bar sets forth the required contents of the report. The report shall include findings of fact, recommendations of guilt, recommendations as to discipline, a statement of prior discipline and a statement of costs. The instant referee report met all requirements and more. In addition to the report, at the final hearing the referee orally made findings and gave explanations for said findings encompassing, three and one half (3-1/2) pages of transcript. The respondent's suggestion of a "rubber stamp"

process is belied by the referee's oral transmittal of his thought processes. In The Florida Bar v. Cramer, 678 So. 2d 1278 (Fla. 1996) this court held that the referee did not improperly adopt the Bar's proposed findings which were based on oral findings by the referee. There the referee like the referee in this matter directed that Bar counsel prepare the findings. (TR3-385)

The crux of the respondent's argument is that the referee failed to find in his favor based on the respondent's version of events. The simple set of facts charged by The Florida Bar has been muddied by the respondent. The Bar will simplify them. In two of the three letters written by the respondent he stated that Judge Montante was deceitful, a cowardly liar and exhibited craven mendacity since the judge did not proactively correct a statement purportedly made to the press by another individual. It is undisputed that the statement which bothered Mr. Ray concerning whether Judge Montante had granted asylum to numerous Haitians was made by someone other than the judge. As the referee so aptly stated:

> "I don't know how you could possibly call someone a liar for a statement they never made."
>
> (TR3-382)

The answer is Michael Dean Ray could, and did, despite knowing and admitting that the judge had never made the statement. The accusation by Michael Dean Ray was false on its face. The referee correctly found based on the

competent testimony of both Michael Dean Ray and Judge Montante that Mr. Ray's statements calling the judge a liar were false.

Michael Dean Ray was most certainly aware of the recklessness and falsity of his statement when he wrote yet a second letter on August 19, 1997 to Judge Creppy making the same allegations. At that point in time Judge Creppy had written Mr. Ray thrice telling him that he found no misconduct on the part of any immigration judge. (TR3-276-278)[1]

The second matter concerned Mr. Ray's accusation that the judge had tampered with the Miami EIOR computer. There was absolutely no testimony to support this horrific allegation. Rather, Mr. Ray testified that a file had been in the judge's chambers for an excessive period of time and since the matter did not appear in the computer the judge "must have" been the culprit. (TR2-109;TR3-170) This outrageous contention was not supported by the respondent or his sole witness. On the contrary, Judge Montante denied the allegation and testified that the extent of his acumen with the computer system was the use of the e-mail feature. (TR1-37,81) Thus, based on the competent, substantial evidence presented the referee found Mr. Ray's statement to be false or made with reckless

[1] The respondent complained about the conduct of several other immigration judges, in addition to Judge Montante.

disregard for the truth or falsity.

Last, a hearing was held before Judge Montante in the matter of Paul Ajuwa. The original taped proceeding was admitted into evidence and heard by the referee. (TR1-39) Mr. Ray's appearance before Judge Montante unfolded as the manifestation of every judge's worst nightmare. Mr. Ray represented a Nigerian individual. Mr. Ray appeared in court without a written motion to continue or motion to recuse but with a hybrid document, entitled a Notice of Filing Exhibits. At the outset the respondent sought to orally recuse the judge. Mr. Ray demanded that his unwritten motion to recuse be heard and failed to move for a continuance. The judge futilely attempted to reason with Mr. Ray in an effort to move forward with the proceedings. Mr. Ray refused and argued. Thereafter, the judge requested that Mr. Ray leave the courtroom. He refused. Guards were called. In Mr. Ray's absence his client was given a six (6) month continuance and advised to seek new counsel. Two (2) weeks after the hearing the respondent wrote his November 14, 1996 letter with the following:

> Montante's trial conduct toward Kolner and me (and who knows how many other attorneys afraid to speak up?) is just one more discouraging example of j udicial railroads, kangaroo courts, lynchings, inquisitions, Salem Witch Trials, Star Chambers, and Nazi Justice rearing their heads like a plague in humankind's struggle upward through history. (page 1)

The referee found that the respondent intended those statements to refer to the November 1, 1996 hearing. (TR3-383) In fact, Mr. Ray testified that the letter was written on behalf of his client Paul Ajuwa. (TR3-372) Curiously, Mr. Ray stated that although he was the drafter of the letter, in his individual capacity and on behalf of his client that the letter was in actuality written on behalf of the four hundred (400) member local chapter of The American Immigration Lawyer's Association. (TR3-270) Yet none of those individuals signed the letter. Even more curious is Mr. Ray's attempt to argue that his onerous attributions concerned all of his dealings with Judge Montante. That statement is quite strange in light of Mr. Ray's testimony that he had appeared either two (2), three (3), four (4) or five (5) times before Judge Montante and in the first appearance the judge had granted asylum to his client, a Tiananmen Square protester. (TR2-7 1) Giving the respondent the benefit of the doubt, his appearances before Judge Montante totaled five (5). One concerned Paul Ajuwa, one concerned a granting of asylum and three concerned other clients. There was not specific testimony as to the disposition of those cases, Thus, oddly enough the respondent's pervasive vilification of Judge Montante resulted from these minute dealings.

Judge Montante's testimony and the tape of the hearing competently established that his courtroom on November 1, 1996 in the case of Paul Ajuwa was

not conducted as described by Mr. Ray. Mr. Ray's attested to description of the proceeding, as lacking due process and replete with foregone conclusions without any regard to the rule of law is not borne out by the record. Rather, it was Mr. Ray who arrived in court unprepared, having failed to file either written motions to recuse or continue and argued to the court to the degree that armed guards were called. All of the foregoing grand standing was at the potential sacrifice of his client. Yet despite Mr. Ray's conduct the judge spoke gently and soothingly to Mr. Ray's client, took no adverse action and continued the matter to several months in the future.

Mr. Ray's testimony as to his perception of Nazi Germany or justice, a description which he attributed to Judge Montante's trial conduct on November 1, 1996 is stunning, as evidenced by the following:

> BY MS. LAZARUS:
> Q. Do you know for a fact whether or not any of the people that were sent to gas chambers had an opportunity to retain counsel?
>
> A. Not that I'm aware of.
>
> Q. Are you aware of whether or not people that were sent to gas chambers in Nazi Germany had an opportunity to have lawyers let's say file something called a Notice of Filing Exhibits on their behalf?
>
> A. They may have. I don't know, but I doubt it.

Q. You think they may have?

A. Some of them may have.

Q. May have had an opportunity to have lawyers file Notice of Filing Exhibits before they were sent to has chambers?

MR. KOLNER: Your Honor, I think the Bar counsel had made her point. I would object.

THE REFEREE: Overruled.

THE WITNESS: As I said, some of them may have, although I doubt it, I don't know -- excuse me -- I don't know for a fact. That's why I'm saying they may have.

BY MS. LAZARUS:

Q. Well, I'm real curious as to the ones that you think may have. What judicial forum was it that those people may have appeared before?

A. I don't know. I'm trying to answer your question as honestly as I can, and if 1 don't know for a fact, I can't tell you something that I don't know.

Q. But you just made the statement before this Referee that those people may have had an opportunity to file a Notice of Filing Exhibits just like Mr. Ajuwa did?

MR. KOLNER: Your Honor, I'm going to object. This is now argumentative.

THE REFEREE: Overruled.

THE WITNESS: All I can do is -- I don't know how else to answer it other than to repeat what --

BY MS. LAZARUS:

Q. Mr. Ray, you made the statement about Nazi justice, so you would know --

MR. KOLNER: This is several times where the witness is attempting to answer the question, and Bar counsel interrupts, and I would object to that procedure, and I would ask that she be instructed not to do that.

THE REFEREE: Finish answering.

THE WITNESS: As I stated, I doubt that they had such procedures available, although I wasn't there in each case, and it is possible that some of them may, so to answer truthfully, I have to answer that way.

THE WITNESS: I can't give you examples and dates and times because I don't know them, but I think -- if I may finish --

Q- Go ahead.

A. I think that my answer explains to you what I'm saying and why.

Q. I just need to ask you again where you get the notion that there was anyone that had an opportunity to have a lawyer to file something on their behalf before they were herded to gas chambers or they were sent to gas camps?

A. I don't have such a notion.

MR. KOLNER: Objection, your Honor, I don't think we're talking about herding people to gas chambers or sending them to death camps.

MS. LAZARUS: Oh, yes, we are.

THE REFEREE: Overruled.

> THE WITNESS: I really don't have that notion. As I stated it's possible that some of them may have, and therefore, 1 have to answer that way because I've sworn to tell the truth, and I don't know how else, you know, to explain that.
>
> (TR3-257-260)

The referee concluded that Mr. Ray had no basis in fact to accuse Judge Montante of being a Nazi, among other things. The referee found that the statements were false. He stated:

> I have read the transcript and I have listened to the tape, and there was nothing -- nothing -- that transpired in that hearing that would justify such outrageously false accusations, And I am just utterly appalled that this kind of language would be used against anybody on evidence that barely even qualifies as sketchy.
>
> (TR3-384)

Mr. Ray argues that the referee improperly excluded proffered testimony and evidence. Mr. Ray repeatedly sought to introduce irrelevant evidence, Many of these introductions concerned political situations in Haiti and the respondent's attempts to offer this information to Judge Montante. The referee properly excluded all irrelevant evidence as it had no bearing on the statements charged by the Bar. The charged language concerned a statement to the press, tampering with the court computer and a November 1, 1996 hearing concerning a Nigerian individual. There is no nexus between the charged statements and the evidence and

testimony proffered and properly excluded. Only relevant evidence is admissible. Further, a referee in a Bar discipline case can consider any evidence he or she deems relevant to resolving a factual question. The Florida Bar v. Clement, 662 So. 2d 690 (Fla. 1995); The Florida Bar v. Rood, 620 So. 2d 1252 (Fla. 1993).

ARGUMENT

III

THE REFEREE PROPERLY FOUND THAT MICHAEL DEAN RAY VIOLATED RULE 4-8.2(a) OF THE RULES REGULATING THE FLORIDA BAR (RESTATED)

In order for an attorney to be found guilty of violating Rule 4-8.2(a) of the Rules Regulating The Florida Bar, the Bar must establish that a lawyer made 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. As previously set forth in Argument II the Bar established and the referee found that Michael Dean Ray knew his statements were false or made with reckless disregard for their truth or falsity since they were false on their face. Judge Montante never made a statement to the Daily Business Review regarding the judge's asylum record. (TR2-87-88) He knew that he had no direct evidence that Judge Montante had tampered with the computer record. (TR2-109) He knew based on his own definitions of procedures devoid of due process that on November 1, 1996 Paul Ajuwa was provided with a fair hearing and a continuance despite the antics and unpreparedness of his attorney, the respondent.

The respondent misapprehends the issue when he professes that the First

Amendment forbids punishing him under Rule 4-8.2(a) of the Rules Regulating The Florida Bar. The Bar did not seek to punish the respondent for speaking the truth. Rather, the Bar charged and the referee found that the respondent knew his statements were false or made with reckless disregard as to their truth or falsity.

Also, the respondent further attempts to confuse the issue when asserting that lawyers have been protected for truthful criticism of the bench. In this matter the Florida Bar at no time asserted that attorneys are prevented from truthfully criticizing the judiciary. In The Florida Bar v. Clark, 528 So. 2d 369 (Fla. 1988) this court addressed that issue and stated:

> We likewise reject respondent's assertion that by charging him with a violation of Rule 8- 1 02(B)[2], the Bar is preventing him from discharging his ethical duty to advise the public of judicial wrongdoing. Respondent is being sanctioned, not for exercising his right to criticize the judiciary but for making false and unsubstantiated charges against the judiciary.
>
> id at, 372

Interestingly, the respondent reasserted his "criticism" calling Judge Montante a cowardly liar and possessing craven mendacity in his August 19, 1997 letter despite having received three (3) letters from Judge Creppy finding the

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[2] Footnote supplied. Disciplinary Rule S-l 02(B) of Florida's Code of Responsibility provides (a lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer).

"criticism" without any basis.

The respondent opines that "a state may not punish a person because he holds certain beliefs". (Respondent's Amended Initial Brief, page 43). Respondent's argument misses the mark. First, The Florida Bar is not "the state". It is an official arm of the Florida Supreme Court which regulates attorneys. Second, the statements in question made by the respondent are not "his beliefs". They are false accusations against a judge. A lawyer may be prosecuted for making false statements and loses his first amendment protection.

> Finally, we reject Wasserman's contention that his statements to the judicial assistant are protected by the First Amendment to the United States Constitution and article I, section 4 of the Florida Constitution. It is clear that the right to free speech under the federal and Florida Constitutions does not preclude the disciplining of a lawyer for speech directed at the judiciary. In re Shimek, 284 So. 2d 686 (Fla. 1973)
>
> The Florida Bar v. Wasserman, 675 So. 2d 103 (Fla. 1996)

ARGUMENT

IV

THE REFEREE'S IMPOSITION OF A PUBLIC REPRIMAND WAS CORRECT (RESTATED)

The respondent concludes without presentation of any authority that the discipline imposed is "clearly off the mark". (Respondent's Amended Initial Brief, page 50) The referee relied on the following applicable authority to arrive at his recommendation. In The Florida Bar v. Clark, 528 So, 2d 369 (Fla. 1988) that attorney pursued frivolous claims in appealing a traffic ticket case to the United States Supreme Court. He also accused a named circuit court judge and other judges of the Eleventh Judicial Circuit of engaging in racketeering activity due to adverse rulings and ex-parte communications, Like the instant case, the accusations were false. Mr. Clark was publicly reprimanded. In The Florida Bar v. Nunes, 734 So. 2d 393 (Fla. 1999) that attorney made false accusations against his opposition by contending that they had corruptly caused the loss of two (2) court files and made false statements that the judge had incompetently executed an order. As a result of other misconduct and prior discipline Mr. Nunes was suspended for three (3) years.

In The Florida Bar v. Flynn, 5 12 So. 2d 180 (Fla. 1987) this court held that

making false accusations against a judge warrants a public reprimand. Mr. Flynn unlike Mr. Ray, agreed to accept a public reprimand after submitting a guilty plea. In The Florida Bar v. Weinberger, 397 So. 2d 661 (Fla. 198 1) that attorney made public statements denigrating the courts and the administration of justice. Mr. Weinberger apologized and showed remorse and was publicly reprimanded. Tn sharp contrast, Mr. Ray has not apologized and has shown no remorse. On the contrary, he seeks accolades and sees himself as a whistle blower deserving of praise. It is evident that the process and the referee's findings are completely lost on him. They were not, however, lost on Mr. Weinberger.

Last, the referee found Standard 7.2 of The Florida Standards for Imposing Lawyer Sanctions applicable. It provides:

> Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional, and causes injury or potential injury to a client, the public, or the legal system.

Aggravating Factors 9.22(g) and (i) were also found applicable. No mitigating factors were found.

Clearly, based on the foregoing authorities and standards the referee's recommendation of a public reprimand does not "miss the mark".

ARGUMENT

V

RESPONSE TO AMICI CURIAE

Amicus on behalf of the South Florida Chapter of American Immigration Lawyer's Association cites no authority for the proposition that "the immigration bar is to complain directly to the chief immigration judge". (Brief of South Florida Chapter American Immigration Lawyers Association, page 9) In fact, Judge Montante, an administrative law judge and member of The Florida Bar is subject to the jurisdiction of The Florida Bar. Had Mr. Ray truly believed that he was duty bound to expose a corrupt judge a complaint would have been filed with The Florida Bar. Instead, the respondent chose to write to Judge Creppy and make statements concerning Judge Montante that are false on their face since the judge did not rule as Mr. Ray requested or succumb to Mr. Ray's outrageous antics and failure to competently represent his client Paul Ajuwa by following the law and rules of procedure.

It is astonishing that these organizations would submit a brief to this court in support of a lawyer who accuses a judge of being a Nazi when it is the respondent who deserves reproach. More stunning is their support of an attorney who could testify to the preposterous position that victims of gas chambers in Nazi Germany

may have had an opportunity to seek counsel or file documents prior to their naked and hairless eradication in showers filled with deadly gas. The Florida Bar is not responsible for the respondent's warped version of reality and history. By the same token, the respondent deserves no protection for false statements about a judge simply because he complained to the judge's superior.

The Florida Bar supports reporting misconduct of judges and its members as reflected by the existence of Rule 4-8.3(a) and (b) of the Rules Regulating The Florida Bar which provide:

> (a) Reporting Misconduct of Other Lawyers. A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.
>
> (b) Reporting Misconduct of Judges. 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.

Tn fact, The Florida Bar's support is further evidenced by its mandate to its members to report misconduct or be faced with the potential of discipline. Furthermore, an individual who files a grievance with The Florida Bar, and makes no public announcement of the complaint is afforded absolute immunity from a

defamation action by the complained against attorney. Tobkin v. Jarboe, 7 10 So. 2d 975 (Fla. 1998).

Amicus also states that Mr. Ray believed his statements to be private, yet does not cite to the transcription of Mr. Ray's testimony at trial as support. Mr. Ray never testified that he believed his statements to be private. On the contrary it appears that he discussed his letters with everyone in sight. (TR3-262) (Brief of South Florida Chapter American Immigration Lawyers Association, page 9). It is inappropriate for this argument to be made on behalf of Mr. Ray without any record support. Acton v. Fort Lauderdale Hospital. Inc., 4 18 So. 2d 1099 (Fla. 1 st DCA 1982)

The Bar does not agree that Mr. Ray's criticisms were "not aimed with the purpose of destroying public confidence in the judiciary system." (Brief of South Florida Chapter American Immigration Lawyers Association, page 10). That was precisely the intent as evidenced by the fact that Mr. Ray republished the very same accusations in his August 19, 1997 letter as he had initially stated on February 23, 1996, after Judge Creppy wrote him three (3) times finding no impropriety. It was clear that Judge Creppy found the accusations baseless, yet Michael Dean Ray forged on in his attempt to eviscerate Judge Montante's judicial integrity. In reality Mr. Ray would go to any lengths since the judge would not rule in his favor and

Mr. Ray rejected the proper legal route, Had he done so, the opposition would have had a fair opportunity to rebut Mr. Ray's contention. Instead, he chose to unilaterally attack Judge Montante in furtherance of his attempts to get the judge recused from hearing his clients' matters. (TR3-2 19) Mr. Ray testified that he wrote letters since the judge would not consider background evidence of bloodshed in Haiti. (TR2-78)

The position taken by the National Chapter of American Immigration Lawyer's Association that Mr. Ray's statements were negligent, ill advised or lacking in good taste is inconsistent with Mr. Ray's position taken at trial. (Brief of American Immigration Lawyer's Association (AILA), page 4) Amicus Curiae should not be permitted to create a position which is different than the litigant with which they align themselves. Mr. Ray's position was that his calculated statements were true. He never stated that he was negligent or ill advised. On the contrary, he consulted with numerous people before composing his letters and consulted with reference materials. (TR3-262;263)

As Mr. Ray is a member of The Florida Bar, he is subject to their jurisdiction. American Immigration Lawyer's Association's argument that Mr. Ray's misconduct should be reviewed under federal regulations is perfectly acceptable and can certainly coincide with the disciplinary measure imposed

herein. (Brief of American Immigration Lawyer's Association, page 8).

American Immigration Lawyer's Association discussion of defamation standards is inapplicable and irrelevant. The respondent was charged and found to be guilty of professional misconduct, not defamation, The interests protected in civil litigation and by The Florida Bar are not identical. They do not coincide.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the report of referee should be upheld.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of this Answer Brief of The Florida Bar and Response to Amici Curiae was forwarded Via Airborne Express to THOMAS D. HALL, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to NEIL D. KOLNER, attorney for respondent, at 124 South Miami Avenue, Liberty Building, Miami, Florida 33 130-1605, and to Amicus attorney, TAMMY FOX-ISICOFF, at Bander, Fox-Isicoff & Associates, American Immigration Lawyers Association, South Florida Chapter, 444 Brickell Avenue, Suite 300, Miami, Florida 33 13 1-6593; JONATHAN P. ROSE, ESQ., National Amicus Curiae Committee, American Immigration Lawyers Association, Penthouse I, 155 South Miami Avenue, Miami, Florida 233 130-1609; and to ROBERT PAUW, ESQ., Gibbs, Houston, & Pauw, Chair, National Amicus Curiae Committee, American Immigration Lawyers Association, Suite 12 10, 1111 Third Avenue, Seattle, Washington 98 10 1 on this 25 day of July, 2000.

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APPENDIX

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