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THOMAS D. HALL
MAY 1 2 2000
CLERK, SUPREME COURT

6/5

IN THE SUPREME COURT
STATE OF FLORIDA

CASE No. 94,433

THE FLORIDA BAR,

Complainant,

VS.

MICHAEL DEAN RAY,

Respondent.

AMENDED INITIAL BRIEF OF MICHAEL DEAN RAY

ON REVIEW OF REPORT OF REFEREE

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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;

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

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.

Finally, some exhibits which were offered but *not* admitted in evidence were marked and are designated as **EX.A-__for ID,** with the appropriate number.

AILA refers to American Immigration Lawyers Association.

EOIR refers to Executive Office for Immigration Review.

FOIA refers to Freedom of Information Act.

INS refers to Immigration and Naturalization Service.

Ray refers to Respondent, Michael Dean Ray.

TFB refers to The Florida Bar.

STATEMENT OF THE CASE AND OF THE FACTS

STATEMENT OF THE CASE

The Florida Bar alleged that in **three letters to the Chief Immigration Judge** Michael Dean Ray made six 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 Florida Bar's seven paragraph Complaint of Minor Misconduct concluded that Michael Ray's **83** words violated Rule 4.8-2(a).[1]

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."(emphasis added).

Michael Ray admitted when reporting misconduct of an immigration judge he had made the statements in his letters to the Chief Immigration Judge, but denied that he knew the statements to be false or that he stated them with reckless disregard for the truth or falsity. Ray's letters complained that contrary to law in Haitian political asylum cases Immigration Judge Philip J. Montante, Jr. neither considered background evidence on country conditions in Haiti, nor recused himself when Ray's clients filed motions detailing their fears that the judge would not be fair.

[1] R. Regulating Fla. Bar.

***STATEMENT* OF THE FACTS**

Background

Following the **1991** coup d'état of Haiti's first democratically elected president in nearly two centuries, the explosive political climate caused thousands of **Haitians** to flee their homeland and seek asylum in the United States. Ultimately, after perhaps the worst violence and most egregious human rights abuses in years, United Nations peacekeeping troops intervened in Haiti. At that time, the United States Department of State reported to Congress about Haiti's human rights situation:

> Haiti underwent profound changes in **1994. An illegal military regime,** which had assumed power after ousting President Jean-Bertrand Aristide in a ***1991*** coup, **retained firm control of the military.** During this time,the level of **human rights abuses escalated.** . . . The human rights abuses during these 9 months of the de facto regime included **political and extrajudicial killings by the security *forces* and their allies; disappearances; and politically motivated rapes, beatings and other mistreatment of citizens, both in and out of prisons.**
> **. . . In the 5-month period . . .** the ICM [United Nations/Organization of American States International Civilian Mission] recorded 340 **cases of extrajudicial killings and suspicious deaths. . . . 131 cases of disappearances or "seizures"** from January through June. . . The de facto **authorities tolerated and condoned widespread physical abuse of detainees creating a climate of impunity which resulted in some particularly vicious activities. . . . soldiers and other armed persons frequently entered private homes for illegal purposes .** . . In addition, gangsters violently raided entire neighborhoods of Port-au-Prince taking advantage of their ties to police and the general climate of impunity to steal and rape. . . . **One estimate by human rights organizations places the number of internally displaced Haitians in 1994 at 300,000.**

Country Reports on Human Rights Practices for 1994, U.S. Department of State, 104th Cong., 1st Sess., at 420-430 (Jt. Comm. Print 1995) (emphasis added). **See: APPENDIX A-1**

Respondent Michael Dean Ray was admitted to practice law in Florida in 1978; he never has been disciplined by The Florida Bar nor any Court. Since May, 1999, he serves as the elected president of the 400-member South Florida Chapter of the American Immigration Lawyers Association ("AILA"); and for the preceding five or six years served as liaison between his AILA Chapter and the Immigration Courts in Miami. For five years Mr. Ray served as Southern Regional Vice-President of the National Lawyers Guild and co-chair of their National Law Student Asylum Project for the past six years. **TR2-67-68**

In his immigration practice Michael Ray has represented many Haitian asylum-seekers who fled bloody violence only to face deportation by the United States Immigration and Naturalization Service. On a pro *bono* basis to bolster his Haitian clients' asylum claims, Michael Ray requested names of interviewed Haitians the United States State Department reported had not been mistreated after they were "repatriated" to Haiti. Under the Freedom of Information Act both the United States district and Eleventh Circuit courts ordered the State Department to release those names to Michael Ray. The Supreme Court of the United States rejected the State Department's national security claim, but ruled the names need not be disclosed since the State Department already reported that the Haitians were not mistreated. **TR3-232-234**[2]

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[2] *Ray v. United States Department of Justice, 725* F.Supp. 502 (S.D. Fla 1989), *aff'd, 908* F.2d 1549 (11'" Cir. 1990) *rev'd in part sub nom. Dep't of State v. Ray, 502 U.S. 164, 112* S.Ct. 541 (1991). Michael Ray was even required to pay the State Department's printing costs of $2,900. **TR3-234**

People who arrive in the United States without proper documentation are brought before the U.S. Department of Justice Executive Office for Immigration Review ("EOIR"). In these proceedings called Immigration Court, U.S. Immigration and Naturalization Service ("INS") attorneys pursue deportation or exclusion of these people before officers of the EOIR, now called immigration judges.[3]

Immigration* Judges *and the* Chief *Immigration Judge

United States immigration judges are neither confirmed by the Senate, nor elected, and thus, **they are** not **within the jurisdiction of the Judicial Qualifications Commission.** They are selected by and serve at the pleasure of the Attorney General of the United States.[4] 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 (emphasis added). This is how to complain about Immigration Judges. **TR2-58**

In Immigration Court, individuals have the right to seek relief from deportation or exclusion, including asylum in the United States, 8 C.F.R. § 208.1 *et* seq..

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[3] Immigration judges were "special inquiry officers" not "judges" until Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub.L. No.104-208, § 371(a). See: 110 Stat. 3009, 645-646 (8 U.S.C. 1101(b)(4)).

[4] Id. ("The term 'immigration judge' means an attorney whom the Attorney General appoints as an administrative judge within the Executive Office of Immigration Review.. ..") (emphasis added).

Philip J. Montante, Jr. is an immigration judge who from April, 1990 through July of 1997 presided in Miami, Florida, and has transferred to Buffalo, New York. **TR1-34** Judge Montante refused to grant asylum to all Michael Ray's black Haitian clients whose cases he decided even though all "had a strong claim like relatives being killed or their houses being burned down because of their political activities". **TR2-134,140** Judge Montante always rejected their attempts to introduce evidence in support of their claims on the human rights conditions in Haiti, like the United States Department of State *Country Reports on Human Rights Practices* quoted above. **TR2-73,140**

Controlling law compels **"The evaluation of [an asylum-**seeker's] **application requires consideration of all presently available background evidence on conditions in Haiti,** since the implications of future deportation must be weighted." *Molaire v. Smith,"* 743 F.Supp. 839, 850 (S.D. Fla. 1990)(emphasis added). **TR2-76,78,79,141** Indeed, Judge Montante did not admit any of the 275 pages of documents offered to support the asylum claim of Ray's client Sergo Vilce. **TR2-73** Judge Montante ruled that the "evidence is remote in time" even though federal regulations provide that when a past "pattern and practice" of persecution is shown, then an asylum applicant need not show he would be singled out for future persecution. See: 8 C.F.R. 208.13(2)(i) **TR2-79,80** Judge Montante did not "allow declarations into evidence... because he said they weren't sworn to" and when it was pointed out that a Federal

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[5] Ray asked the Referee to take judicial notice pursuant to § 90.201, and 90.202(2) Fla. Stat.. **TR2-82**

Statute allows declarations to be used in place of affidavits [28 U.S.C. § **1746, APPENDIX A-21** Judge Montante would say "thank you for that information but I'm keeping it out anyway". **TR2-80** There are 20 to 30 other lawyers in Miami who represent Haitians who had similar problems with Judge Montante. **TR2-137; TR3-269,289**

The beginning of the troubles

On April 15, 1994, The *Daily* Business *Review* published an article, **"Immigration judge, lawyer in ongoing, ugly feud; For more than three years, hostility in and out of court"** about a defamation lawsuit against Judge Montante by distinguished immigration lawyer and nationally known lecturer, author, and immigrants' rights advocate, Ira Kurzban, Esq..[6] **EX.A APPENDIX *A-3***

That April 15, 1994, *Daily Business Review* story stated: "Intimations by the other side that Montante, 48, is prejudiced against Haitians are 'complete and absolute nonsense,' [Montante's lawyer John] McCluskey said. His client, he added, has granted asylum to numerous Haitians." **EX.A APPENDIX *A-3***

The *Daily Business Review* article quoted Michael Ray: "Judge Montante does not consider evidence in asylum cases that he's required to consider" and the article also stated that "Montante,

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[6] Mr. Kurzban was the first recipient of the Tobias Simon Pro *Bono* Award given by the Chief Justice of the Florida Supreme Court; he litigated some 50-60 cases in the Federal and Supreme Court Reporters, argued three cases in the Supreme Court of the United States, authored *Kurzban's Immigration Law Sourcebook: A comprehensive Outline and Reference Tool,* (6th ed. American Immigration Law Foundation 1998); taught at University of Miami School of Law and Nova Southeastern Law School for 16 years, lectured at the Harvard and Yale Law Schools, and the United States Court of Appeals Second Circuit Conference. **TR2-15-18**

through his attorney's office called Kolner and Ray 'chronic troublemakers' who are 'part of Kurzban's group."' EX.A., A9.

Michael Ray deemed the "chronic troublemakers" declaration false and defamatory, so four days later, Ray wrote letters to Judge Montante and lawyer John McCluskey demanding retraction of the "false, defamatory and damaging" statements..' **TR2-96-97 EX.C.** Neither Judge Montante nor his lawyer retracted the statement which Ray deemed defamatory; and neither retracted nor corrected the assertion that Judge Montante had granted asylum to numerous Haitians. **TR2-85,86,97,100 EX.A-2 for ID**

Rather than retracting the statement that Ray was a "chronic troublemaker[]", attributed to Montante's lawyer, John McCluskey wrote Ray a "threatening letter" on Judge Montante's behalf on April 27, 1994 warning Ray that to state that Judge Montante does not consider evidence in asylum cases was governed by the Rules of Professional Conduct and otherwise actionable. **TR2-97,100**[8]

How many Haitians did* Montante *grant asylum? "Numerous"* equals *one!

On behalf of one of his black Haitian clients' for whom Judge

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[7] Pursuant to 770.01 Fla.Stat.(1993) See: **APPENDIX A-4**

[8] The Referee admitted this letter, **TR2-99,** then disallowed it. **TR2-102; EX.A-2 for I.D.** Ray proffered the letter as proof that either Ray's statement about Judge Montante was true - as Ray maintains - or that the McCluskey letter is part of a pattern of deceit about which Ray complained to Chief Judge Creppy **TR2-101-102**

[9] The Daily Business Review reported about her case: "Last month Montante waited only seven minutes before deporting one of [Law Office of Michael D. Ray's] Haitian clients in absentia. The client arrived three minutes after being deported, barely after the judge stepped from the bench. Though Montante had three hours blocked out for the hearing, he refused [her lawyer's] appeals to return to court." **EX.A at A-9 APPENDIX A-3**

Montante refused to grant asylum, Michael Ray filed a Freedom of Information Act ("FOIA") request with the Immigration Court (EOIR) to **learn** how many Haitians Judge Montante ***had*** granted asylum. After the EOIR refused to disclose the number, and after a year of litigation, U.S. District Judge Wilkie D. Ferguson, Jr. ordered EOIR to provide Ray the information. **The truth is that when the *Daily Business* Review published that Judge Montante had granted "numerous" Haitians asylum, he had granted only one! TR2-105**[10] The Review wrote a follow-up article, "Immigration lawyers get evidence against judge". **EX.1, at 2**

Haitian clients **seek *Judge Montante's recusal - motions denied***

Accordingly, Michael Ray's Haitian clients whose cases fell before Judge Montante continued to file motions for recusal, based in part on the **false** statement attributed to Judge Montante's lawyer about Montante's asylum record and the non-retracted statements Ray considered false and defamatory. In recusalmotions Haitians also alleged fears that they, too, may not receive a fair hearing before Judge Montante **TR2-96** because he would not consider required background evidence in asylum cases. **TR2-78** Judge Montante denied all recusal motions filed by Ray's Haitian clients[11] **TR2-106** never addressing the contents of the April *15,* 1994 *Daily Business Review* article, the FOIA request, or the lawsuit required to obtain the truth about Judge Montante's Haitian asylum record. **TR2-86,TR2-107** Instead, Judge Montante's orders denying recusal contained

[10] The court ordered EOIR to pay costs and attorney fees.

[11] He once recused, *sua sponte*, without explanation. **TR1-67**

attacks on Respondent's character. **EX.H** at 3-9[12]

Ray's February 23, 1996 letter concerned due process denials

Michael Ray wrote a ten-page letter to Chief Immigration Judge Michael Creppy, *inter alia,* to complain about Judge Montante's denial of fair hearings to his Haitian clients, so his **"clients wouldn't be sent back to die and that's what was going on in Haiti." TR2-80 EX.1**

Respondent's February 23, 1996 letter also complained about other problems, apart from Judge Montante.[13] Specifically, Ray requested that Chief Judge Creppy ensure that four Miami Judges Ray

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[12] For example, one order contained the **false** statement that Ray "referred to the President of the United States, Bill Clinton, and the Attorney General, Janet Reno, as racists". **EX.H at** 4 Another order stated **falsely** that Ray failed to file a written motion that Judge Montante had given him 30 days to file; in fact, Ray had filed the motion. **TR3-208-211**

[13] Respondent's February 23, 1996 letter was styled "Re: Retaliation by the Miami Immigration Court must stop". There is no dispute that Michael Ray's February 23, 1996 letter included the following ***language,*** as The Florida Bar's Complaint of Minor Misconduct ("TFB Complaint") alleges:

> The Review bannered this exposé of **Judge *Montante's cowardly deceit*** and defamation with the headline, "Immigration lawyers get evidence against judge", (Bartalk column) and reported: "In an ongoing feud between Miami immigration lawyers and immigration judge Philip J. Montante, score one for the lawyers.

TFB Complaint, ¶ 3(a), **EX.1,** at 2;

> The Daily Business *Review* headlined another story about Judge ***Montante's*** shameless **lies** to conceal what certainly appeared to be his hardhearted, unethical and immoral bias on the bench in an article entitled, "Magistrate says Justice should pay; Feds resisted efforts to release court data". TFB Complaint, ¶ 3(b), **EX.1,** at 3;

> ***Does Judge Montante expand his concealment of evidence with cunning and guile and tampering with the official record?*** TFB Complaint, ¶ 3(c), **EX.1,** at 3.

wrote about stopped retaliating against Ray, and that the judges:

> 1. give a fair hearing by not constantly turning off the tape recorder;
> 2. allow attorneys to state objections for the record and permit them to make appropriate motions as constitutional due process requires;
> 3. stop misconstruing [Ray's] legal arguments against their rulings or conduct as an attack upon their integrity; and
> 4. stop the resulting retaliation. **EX.1,** at 9

As a direct result of the February 23, 1996 letter, Chief Judge Creppy wrote at least three letters to Respondent **EX.F** and sent his legal counsel, William Joyce, and Assistant Chief Judge Brian O'Leary to Miami to meet with Ray and the Miami liaison Judge to discuss the problems outlined in Ray's February 23, 1996 letter. **TR2-97 EX.F** At this April 10, 1996 meeting, Chief Judge Creppy wrote there was a "healthy exchange of views on both sides". **EX.F**

This meeting spawned by Ray's February 23, 1996 letter resolved three of Ray's four major complaints set forth in his February 23, 1996 letter.[14] One specific issue raised in that April 10, 1996 meeting concerned Ray's Haitian client's motion to recuse Judge Montante pending for one and one-half years without decision. Ray's letter questioned whether Judge Montante "expand[ed] his concealment of evidence with. . . tampering with the official record?", because at Judge Montante's direction, all were barred from viewing that court file kept in his chambers, even counsel of record Michael Ray. **TR2-109** Just two days after that April 10, 1996 meeting, Judge Montante denied the motion for recusal which had

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[14] This proffered testimony of Ray's mental state when he wrote later letters to Judge Creppy was objected to; the Referee sustained, finding it "marginal, marginal evidence." **TR2-152**

been pending since October 13, 1994. **EX.D**

Ray believed Judge Montante had once **again** published false and defamatory statements about him in the judge's June 26, 1996 Order denying a renewed motion for recusal in that same case, and he therefore demanded a retraction. **EX.E** The Order contained the following statements which Ray considered false and defamatory:

> The Court also takes judicial and/or administrative notice of the fact that the United States Chief Immigration Judge has reprimanded and/or admonished counsel in writing because of ongoing unprofessional conduct in the Courtrooms of a number of Judges in the United States Immigration Court in Miami, Florida. **EX.E**

Judge Montante did not retract the statement Respondent alleged was false and defamatory. **TR2-117** Michael Ray even filed a FOIA request with the EOIR to prove this statement by Judge Montante was not true; the response established that the statement was false: no complaints were filed against Michael Ray with the EOIR. **TR3-170-174**

Nigerian hires Ray for* deportation/asylum case *with Judge Montante

A black Nigerian man **hired Ray to defend him in his deportation hearing the night before he was scheduled to appear with Judge Montante. EX.G,¶8** At that "Master Calendar" hearing, Mr. Ray orally asked Judge Montante to recuse himself. Judge Montante refused and told Ray an oral motion to recuse was "not timely filed and that motion should have been filed 14 days prior to the time of the hearing today". EX.4, **at 2** Nevertheless, Judge Montante gave the INS attorney a chance to respond to the oral motion to recuse. EX.4 **at** 3 In fact, oral motions are allowed in Immigration Court pursuant to Title 8 C.F.R. § 3.23(a). **EX.H, at 1**

Michael Ray explained to the judge that a recusal motion must be ruled on before the judge does anything else. EX.4, **at** 3, **TR3-243** Judge Montante told Ray he should have moved for a continuance. However, Ray said he did not "believe the law supports such a position". **EX.4, at 3**

Judge Montante then asked Ray if he were "ready to go forward" **EX.4, at** 4 and "We will then conduct an absentia hearing if you refuse to go forward with this case"; Ray replied, "I didn't say I refused, I said I was not ready". EX.4, **at** 5 Mr. Ray's client was not absent, but was present in the courtroom at all times. Judge Montante asked Mr. Ray to "please leave the courtroom" EX.4, **at** 8 and "If you do not leave, I will have you removed." Ray said his client would leave with him. Judge Montante replied that if Ray's client left he would proceed *in absentia.* EX.4, **at** 9 Ray left the court. Judge Montante then continued the case and told Ray's client he was giving him "a chance to find other counsel" EX.4, **at 12** because "the attorneys who came before me today are not permitted back in this courtroom because of their pattern of conduct of disruptive behavior in this courtroom, and the courtrooms of other judges." **EX.4, at 13**

Ray's November 14, 1996 letter: Emergency recusal *request*

Two weeks later, on November 14, 1996, Ray again wrote to Chief Judge Creppy thanking him for taking Ray's call on November 1, 1996, (the day Judge Montante ejected Ray from the courtroom), and for the opportunity to speak to the Chief's lawyer concerning problems with Judge Montante. **EX.2** In this November 14, 1996

letter, Michael Ray expressed his fear he may be arrested the next day, November 15, 1996, when he was set to appear before Judge Montante. He pleaded once again with the Chief Judge to insure that he would not have to appear before Judge Montante ever again, particularly for the case set the next day. **EX.2, at 4** Ray cited the *Daily* Business *Review* story about Judge Montante's "numerous" Haitian asylum grants and failure to retract the falsehoods and defamation of Ray printed in that story. **EX.2, at** 4

On December 17, 1996 in the cases of Ajuwa (from the November 1, 1996 hearing)and Laroche, Judge Montante denied recusal: "This order is prepared relative to an oral Motion to Recuse presented to this Court by counsel for the Respondent on November 1, 1996." On the same page Judge Montante quoted 8 C.F.R. § 3.23(a) which allows oral motions in Immigration Court. **EX.H at 1**

Judge Montante took "administrative and judicial notice of past misconduct and behavior by counsel(s) for the respondent spanning a period of four to five years", without any specific reference **EX.H at** 3 and even though Ray had only appeared before Judge Montante two or three times. **TR3-268** At the Final Hearing Ray testified to **several falsehoods"** in Judge Montante's December 17,

[15] *E.g.* Ray attempted to evade regulations by making an oral recusal motion; **TR3-184** Ray was guilty of past misconduct and behavior spanning 4-5 years; **TR3-188** Ray referred to Bill Clinton and Attorney General **as** "racist"; **TR3-189** Ray made rude facial gestures and consciously brought third parties into court to act in inappropriate and disruptive manner; **TR3-189** Ray refused to leave courtroom when ordered to do **so; TR3-190** Ray refused to move forward in Ajuwa case; **TR3-191** Ray ignored notions of notice and due process; **TR3-192** Ray resorted to threats of litigation against armed guards and/or Court; **TR3-193** Ray brought someone into courtroom with prohibited electronic recording and/or photo equipment; **TR3-197** and Ray "failed, refused or neglected to file

1996 Order. The Florida Bar did not attempt to rebut Respondent's testimony that each of these statements are false.

Ray's August 19, 1997 letter: Demand for retraction

On August 19, 1997 Respondent wrote to Chief Judge Creppy to "demand a retraction from the Chief Judge of the false statements that he made in his letter to me". **EX.3, TR3-215** The Chief Judge indicated he had sent his previous letter to all Miami Immigration Judges, Director of EOIR, Chief Judge Creppy's lawyer, Miami Court Administrator and EOIR General Counsel. **EX.J at 2.**

At the Final Hearing Michael Ray testified that it was a **false** statement in Chief Judge Creppy's letter to Ray, that Ray had refused to **speak** to Judge Creppy's lawyer, Michael Straus. **TR 3-217** **Ray, in fact, did speak to attorney Straus. TR 3-217** Ray testified it was also a **false** statement "that there have been several occasions where [Ray's] conduct during Immigration proceedings has been inappropriate and disrespectful to both the Court and the process, itself". **TR3-218** Ray's August *19, 1997* letter reiterated the Review story's false report that Judge Montante had granted "numerous" Haitians asylum, describing Judge Montante's concealment of that truth as "craven mendacity" and characterizing the *Review* story as "exposing [Montante] as a cowardly liar." **EX.3, at 4**

Ray wrote his August 19, 1997 letter to the chief judge "in an attempt to salvage my reputation in the eyes of all those to whom [Judge Creppy's] letter was published". **TR3-219.**

It was after Immigration Judge Montante left Miami for

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a written motion to Recuse" in Laroche case. **TR3-197**

Buffalo, New York in August, **1997 TR1-34** that Judge Montante filed a complaint against Michael Ray with The Florida Bar. The Florida Bar Grievance Committee did not consider Judge Montante's complaint established probable cause to suggest Ray violated any Rule of Professional Conduct except the instant charge under Rule 4-8.2(a). Ray's Motion In Limine, 4 **APPENDIX A-6.**

COURSE OF THE PROCEEDINGS

Michael Ray denied that he had violated Rule 4-8.2(a) and set forth **ten defenses** to the Complaint of Minor Misconduct: **1) the statements were all true, and are therefore** absolutely **privileged,** *Garrison v. Louisiana, 379* U.S. 64, 74, (1964) ; **2)** Ray had **a reasonable factual basis** for making the statements, **considering their nature and the context in which they were made,** Ray made the statements with due regard to their truth or falsity, and therefore are absolutely privileged; **3)** Ray's statements **were all made pursuant to his obligation and the mandate codified in the Florida Rules of Professional Conduct, 4-8.3:** "Reporting Misconduct of Judges"", and are therefore privileged; 4) Ray's statements were **made as reports of conduct** of an Immigration Judge who is charged with official duties in connection with the general supervision and direction of the Immigration Courts and the statements were made **in furtherance of his attempts to seek corrective action by**

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[16] Rule **4-8.3** provides: "A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as the judge's fitness for office shall inform the appropriate authority."

the Chief Immigration Judge in fulfillment of the Chief Judge's duties mandatedby Title 8 C.F.R. § 3.9(b)[17]; and therefore, Ray was exercising **the right of petition to a duly accredited representative of the U.S. government, a right protected by the First Amendment'"** See : *Bridges v. California, 314* U.S. 252, 277 (1941)[19]; 5) Ray's statements are absolutely privileged by the U.S. Constitution First Amendment guarantees of freedom of speech and freedom to petition the federal government for redress of grievances; 6) Ray's statements in his August 19, 1997 letter to the Chief Judge **were privileged pursuant to Art. I, § 21, Fla. Const.**[20] **guarantee of access to the courts in that Ray was specifically seeking a prerequisite retraction pursuant to Fla. Stat. § 770.01**[21] **of false and defamatory matter** about him which the

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[17] **See: APPENDIX A-7.**

[18] **See: APPENDIX A-8.**

[19] The U.S. Supreme Court overturned contempt convictions earlier affirmed in California, explaining that an officer in the C.I.O. was **privileged** to send a telegram to the Secretary of Labor **complaining about a judge's "outrageous" decision, and could not be punished: "Moreover, this statement of Bridges was made to the Secretary of Labor who is charged with official duties***the Secretary was entitled to receive all available information.** Indeed, the Supreme Court of California recognized that*****in sending the message to the Secretary, Bridges was exercising the right** *of* **petition to a duly accredited representative of the United States government, a right protected by the First Amendment."** *Id.* *** "For it is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions. And **an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect." Bridges** *v. California,* 314 U.S. 252, 270-71, (footnote omitted, emp.added).

[20] **See: APPENDIX A-9.**

[21] **See: APPENDIX A-4.**

Chief Judge had published to others, and therefore Ray was privileged in seeking "self-help - using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation" Seer *Gertz v. Robert Welch, Inc., 418 U.S.* 323, 344 (1974);[22] 7) Ray's statements are **absolutely privileged by Art. I, § 4, Fla.Const.**[23] **in that the statements were true and published with good motives; 8)** Ray's statements were privileged and made **in order to further and preserve his clients' rights of due process, and legal representation pursuant to the U.S. Constitution First**[24], **Fifth", Sixth**[26], **and Fourteenth Amendments**[27] **and Art. I, § 2 Fla. Const.;**[28] 9) Ray's statements were privileged in that he was then a member of the Board of AILA South Florida Chapter (and now its President-elect)[29] attempting to fulfill the goals of AILA,[30] to promote reforms in the law, facilitate the administration of justice, and to elevate the standard of integrity, honor, and courtesy in the legal profession and in a representative capacity in immigration and nationality

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[22] "The first remedy of any victim of defamation is self-help--using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation." *Id.*

[23] **See: APPENDIX A-10.**

[24] **See: APPENDIX A-8.**

[25] **See: APPENDIX A-11.**

[26] **See: APPENDIX A-12.**

[27] **See: APPENDIX A-13.**

[28] **See: APPENDIX A-14.**

[29] Respondent ascended to President after he filed defenses.

[30] Bylaws of the AILA, Art.I.

matters, and was privileged by Art. 1, § 2, § 6,[31] and § 23[32], Fla. Const., in that to discipline an attorney for informing the Chief Judge about misconduct of his subordinate as Ray perceived it - call a spade a spade without euphemism - would amount to punishment of Ray for compliance with his mandatory duties to "seek improvement in the law, [and] the administration of justice" pursuant to "A Lawyer's Responsibilities" in the Preamble to the Florida Rules of Professional Conduct;[33] and, **10)** Ray's statements are protected from arbitrary interference by Art. **12** of The Universal Declaration of Human Rights[34], which states: "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. . . Everyone has the protection of the law against such interference or attacks"; and Art. **19** of The Universal Declaration of Human Rights, which states: "Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers."

The Florida Bar's Motion to Strike Affirmative Defenses - Granted

The Florida Bar filed a motion to strike all Ray's defenses; but cited only two: truth and the First Amendment. The Florida Bar proclaimed that "the assertion of truth and First Amendment

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[31] *See:* **APPENDIX A-15.**

[32] **See: APPENDIX A-16.**

[33] **See: APPENDIX A-17.**

[34] **See: APPENDIX A-18.**

freedom is misguided"'" and The Florida Bar concluded that "None of the statutes and/or rules cited by respondent, authorize the type of language used by the respondent. . . ".[36]

The Florida Bar's Motion to Strike Affirmative Defenses relied for support on a case where a Kentucky lawyer wrote "scurrilous" language extremely critical of a predecessor judge **in a legal memorandum filed in court.** *Kentucky Bar Ass'n v. Waller, 929* S.W.2d 181 (Ky. 1996).[37]

In Michael Ray's comprehensive response in opposition to The Florida Bar's Motion to Strike Affirmative Defenses, he detailed why the defense of truth had to be permitted: since The Florida Bar charged Michael Ray with making statements which **he knew to be false,** and because in deciding whether to strike affirmative defenses "[t]he rule has been well stated that a motion to strike a defense should not be granted where the defense presents a bona fide question of fact." *A.M. Kidder & Co., v. Delaware Corp.,* 106 So.2d 905, 906 (Fla 1958).[38]

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[35] TFB Motion, **3. See: APPENDIX A-19.**

[36] TFB Motion, **7.** *See:* **APPENDIX A-19.**

[37] Some "bizarre pleadings" the Kentucky Supreme Court found violated standards of conduct included: "Comes defendant, by counsel, and respectfully moves the Honorable Court, much better than that lying incompetent ass-hole it replaced if you graduated from the eighth grade . . ." *Waller*, 929 S.W. **2d** at **181;** "When this old honkey's sight fades, words once near seem far away, the pee runs down his leg in dribbles, his hands tremble and his wracked body aches, all that will remain is a wisp of a smile and a memory of a battle joined - first lost - then won"; "it requires one to identify an ass hole when he sees one". *Waller*, 929 S.W.2d at 182.

[38] Ray's Response to TFB Motion, 8-9, See: **APPENDIX A-20.**

Respondent also demonstrated that The Florida Bar's Motion to Strike Affirmative Defenses had not presented the entire picture about whether the defense of truth is available, because The Florida Bar had ***selectively quoted*** a Corpus Juris Secundum article to **suggest** Ray's defense of truth was "misguided". Two sentences *after* the quotation relied upon by The Florida Bar, that article contained material **supporting** Respondent's defense of truth.[39]

The Referee held a hearing on the Florida Bar's Motion to Strike Affirmative Defenses and without explanation granted **the Florida Bar's Motion to strike the First Amendment and all defenses but three:** Truth (First Defense); reasonable factual basis considering the context (Second Defense); and Absolute Privilege under Art. 1, § 4, Fla. Const. (Seventh Defense).

Ray's Motion for Summary Judgment - Denied

In answer to interrogatories, **The Florida Bar admitted it had no facts for its conclusion that Ray either knew the complained of statements to be false or had made the statements with reckless disregard for the truth.**[40] Accordingly, Michael Ray filed a Motion for Summary Judgment in his favor. **APPENDIX A-21** The Florida Bar

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[39] The C.J.S. article says that **in the context of a disciplinary proceeding against an attorney** "for maliciously slandering the judge before whom he has conducted litigation; **in such a case defendant can only protect himself by showing the truth** of the charges alleged." **7** C.J.S. Attorney & Client, § ***82*** (b) (emphasis added) (page 996).

[40] Each and every fact upon which The Florida Bar relied for its conclusion that Ray knew the complained of statements were false, are: **"Respondent's failure to** advise **the Florida Bar and/or the Grievance Committee of any facts upon which to conclude that those statements were true."** (emphasis added).

bears the burden of proof to support its allegation of misconduct but impermissibly shifted the burden[41] to prove Respondent knew his statements to be false onto Michael Ray to prove he knew the statements to be true!

Besides Ray's three letters, The Florida Bar's only evidence in response to Ray's motion for summary judgment was Judge Montante's conclusory affidavit that Ray's statements "are false".[42] The Referee **denied summary judgment,** with no explanation.

Final Hearing

The Florida Bar presented its *only* witness, Philip J. Montante, Jr., at the Final Hearing; and admitted into evidence the three letters Respondent had written to the Chief Judge consisting of twenty-two (22) pages. The Florida Bar did not call Michael Ray to testify about ***what he knew;*** which is an essential element of the Rule The Florida Bar charged Respondent with violating: "A lawyer shall not make a statement that the **lawyer knows *to be false*** or with reckless disregard as to its truth or falsity. . . ." Rule 4-8.2(a) (emphasis added).

When The Florida Bar asked Judge Montante whether on November 1st, 1996, he operated his "courtroom like a judicial railroad, kangaroo court, lynching, inquisition, Salem witch trial, or Nazi justice?", he answered "No." **TR1-41**

Throughout cross-examination of The Florida Bar's only

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[11] "In a disciplinary proceeding before a referee, the Bar has the burden of proving the allegations of misconduct by clear and convincing evidence." *The Florida Bar v. Marable*, *645 So.* **2d** 438, 44.2 (Fla. 1994).

[42] TFB Response to Summary Judgment, EX.A ¶5, **APPENDIX** *A-22*

witness, Bar counsel repeatedly and continually objected to any question which Bar counsel claimed was not relevant since it did not specifically relate to the Bar's very narrow charge.[43] The Referee sustained 35 of Bar counsel's relevancy objections, thus impeding Ray from establishing through the Bar's only witness that Ray had a reasonable factual basis for the statements in his letters.[44]

Ray's Motion for Directed Verdict - Denied

Ray moved for a directed verdict at the close of The Florida Bar's case since **The Florida Bar failed to establish a *prima facie* case in that it produced no *evidence* of what Ray *knew.*** **TR1-86** To prove a violation of Rule 4-8.2(a), The Florida Bar bore the responsibility of producing evidence to sustain its charge that Ray made statements he "knew to be false" or with reckless disregard for the truth, yet The Florida Bar failed to shoulder that burden.

Nevertheless, **the Referee denied Ray's motion for directed verdict. TR1-87**

Respondent's Defense

In his defense, Ray testified that **all the statements he Made in the letters he believed to** be **true,** and tried to explain the

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[43] **TR1-47-48**

[44] ***E.g.***, the Referee precluded Ray from asking Judge Montante: whether he refused to recuse himself in Ray's Haitian asylum cases; **TR1-68** whether Ray ever asked him to retract any statements; **TR1-61** whether he did retract any statements; **TR1-62** how many Haitian asylum cases he had heard as of April, 1994; **TR1-63;** neither did the Referee allow Ray to show Judge Montante the background evidence he had not considered in the Vilce asylum hearing; ruling it irrelevant to The Florida Bar's charge. **TR1-67**

context within which he made the statements; his letters were complaints to the Chief Judge about Judge Montante. Ray also **called** the leading nationally prominent Immigration practitioner,[45] Ira J. Kurzban, Esq., who testified that in his opinion, and **based upon his personal experience, Ray's statements complained about by The Florida Bar were all true.**[46]

The Referee asked Mr. Kurzban: "Do you think it's worse than Nazi justice, lynch justice?" Mr. Kurzban replied:

> If you're asking my opinion, Judge, **the answer is Mr. Montante, in certain cases involving Haitians with certain lawyers, never conducted himself like a Judge,** and if one expresses that like Nazi justice or would I have expressed it that way, maybe not, but **the reality is it wasn't anything like a courtroom, let me put it that way, and I'm not saying that happened in every case, but it clearly happened in cases involving Haitians and whether they had zealous lawyers representing them.** **TR2-53-54** (emphasis added).

The Referee barred Mr. Kurzban from testifying about: his knowledge of conditions in Haiti during the early 1990s; **TR2-21-23** the consequences of an in absentia hearing; **TR2-27** whether he complained about Judge Montante; **TR2-28-29** whether the conduct Ray described in his letters about Judge Montante was consistent with Mr. Kurzban's knowledge and dealings; **TR2-34** whether it would be fair to say Judge Montante's court was similar to a kangaroo court; **TR2-38,39,45,46,52** Mr. Kurzban's knowledge of Judge Montante's

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[45] *See:* n. 6, at p. 6 *supra*.

[46] In response to the question: "In your view, these letters that Mr. Ray wrote to the Chief Immigration Judge about Montante; specifically the statements that the Bar has complained of in their Complaint of Minor Misconduct, **do you consider those statements to be true?";** Mr. Kurzban testified: "Yes, **is the answer." TR2-52-53** (emphasis added).

treatment of Haitians in his courtroom; **TR2-45** whether Mr. Kurzban complained that Judge Montante had lied on the record; **TR2-57** or whether Mr. Kurzban ever wrote a letter or otherwise complained to the Chief Judge about Judge Montante. **TR2-58**

Ray offered and the Referee received in evidence newspaper articles discussing problems Ray and other lawyers had with Judge Montante; **EX.A, EX.B** letters to Ray from the Chief Immigration Judge; **EX.F, EX.J** a motion to recuse Judge Montante; **EX.I** a declaration under penalty of perjury from Ray's client explaining his fears that he could not receive a fair hearing in front of Judge Montante; **EX.G** Orders of Judge Montante which denied motions for recusal; **EX.H** and the U.S. Department of State Country *Reports on Human Rights Practices for 1994.*[47]

In addition, Ray offered several other documents which the Referee would not admit. These included the Local Operating Procedures for the Office of Immigration Judge in Miami, Florida; **EX.A-1 for ID** a letter from Judge Montante's lawyer to the editor of the *Daily Business Review:* **EX.A-2 for ID** and a response letter from the EOIR answering a FOIA request for any complaints filed against Ray. EX.A-3 **for ID** Ray sought to introduce other background evidence which Judge Montante had refused to consider in support of Haitian asylum claims, the claims for asylum, Judge Montante's orders denying those asylum claims, and notice of appeal, but the Referee would not allow these documents in evidence. **TR2-75**

During the hearing, the Referee urged Respondent's counsel to

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[47] **TR2-131** The Clerk assigned no identifier. **APPENDIX A-1.**

"Try not to clutter up the record with too much exhibits" **TR3-173** and **"If your point is this witness [Judge Montante] is bias that doesn't interest me. I kind of understand that point. You** don't have to beat it to death." **TR1-79** (emphasis added).

The Florida Bar did not even attempt to rebut any of Ray's testimony, and only attempted to rebut the testimony of Ira Kurzban, Esq. with rebuttal testimony of Judge Montante by telephone. Respondent objected because he would not be able to cross-examine the witness with documents, and because the Rules of Judicial Administration do not allow such telephonic testimony without consent of all parties. Fla.R. Jud.Admin. 2.071(d).[48]

The Referee permitted Judge Montante to testify by telephone, **TR3-299-319 but he did not even attempt to rebut a single thing testified to by** Ray, nor provide rebuttal to any document in evidence.

During The Florida Bar's case the Referee said that if Ray wanted to introduce the background evidence on conditions in Haiti Judge Montante had rejected in the Vilce asylum case during Respondent's own case, "you can do that then". **TR1-67** However, when Ray sought to introduce those 275 pages of background evidence rejected by Judge Montante, the Referee refused: "I don't know if its necessary to go into specific cases." **TR2-77** The Referee also refused to allow Ray to answer many questions about the context of

[48] The Rule provides: **"(d) Testimony.** A county or circuit judge may, **with the consent of all the parties,** direct that the testimony of a witness be taken through communication equipment. . . ." (Emphasis added).

his statements."[49]

Respondent's Renewed Motion for Directed Verdict - Denied

At the close of Respondent's case, Michael Ray again requested a directed verdict in writing, **TR3-319-320 APPENDIX A-23** and again, the Referee denied the motion without discussion. **TR3-321**

Before the Referee issued his **ROR, the Florida Bar's Public Information Daily *News Summary*** digest of media coverage of interest to leaders of The Florida Bar reported Palm Beach County Lawyers plan to rate judges, **publicly disseminating** one lawyer's quote criticizing the integrity or qualifications of judges in general:

> Some say there's the phenomenon called "robe fever," which suggests **once a lawyer becomes a judge and puts on that black cloak, his or her whole personality changes."** Natale said, "This project is not to set up some sort of lynching. **But some of these judges don't realize what they are doing. Some of them I would like to have a pre- and post-robing CAT scan done on them."**

County criminal defense lawyers plan a 'state of the bench report' The Palm Beach Post, Sep. 26, 1999, at 1C (emphasis added).

Ray requested that the Referee take judicial notice of this article, and of **the fact that The Florida Bar had disseminated it.** The Florida Bar objected, and the Referee denied Ray's request.

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[49] E.g. 1) why clients filed for asylum **TR2-83,84** *2)* what was going on in Haiti **TR2-83 3)** whether Judge Montante retaliated against Ray **TR2-117 4)** why Ray's clients would die if sent back to Haiti **TR2-121-23 5)** other examples of Judge Montante's "failure to provide fair due process asylum hearings" to Ray's Haitian clients **TR2-148** 6) whether and why Ray thought he might get results by writing the Chief Judge **TR2-152-3 7)** how Ray's clients' rights were violated by Judge Montante **TR3-255-6,** and 8) why Ray wrote his August 19, 1997 to the Chief Judge **TR3-280.**

DISPOSITION BY THE REFEREE

The Referee found that "[A]ll facts are true as stated in the Florida Bar's complaint" **ROR-2** recommended Ray "[R]eceive a public reprimand", **ROR-4** and "that costs be awarded to the Florida Bar." **ROR,** EX.D at 6[50] "The basis for this recommendation has been set forth, in part, in the attached excerpt of my findings at the conclusion of the final hearing on August 10, 1999." **ROR-4**

"I have heard no evidence -- and the evidence indeed is quite to the contrary that Judge Montante was not guilty of any deceit, cowardly or otherwise." **R3-382** "And I am just utterly appalled that this kind of language would be used against anybody on evidence that barely even qualifies as sketchy." **R2-384**

Without any discussion or analysis under the heading "RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED" the Report of the Referee stated:

> I find the following case law to be applicable: *The Florida Bar* v. *Clark,* 528 So.2d 369 (Fla. 1988); *The Florida Bar v. Nunez, 734* So.2d 393 (Fla. 1999); *The Florida* Bar v. *Weinberger,* 397 So.2d 661 (Fla. 1981); and The *Florida* Bar v. *Flynn, 512* So.2d **180** (Fla. 1987).
> I find the following sections of the Florida Standards for Imposing Lawyer discipline to be applicable: Standard 7.2 and Standards 9.2(g)and(i) **.ROR-5**

SUMMARY OF ARGUMENT

1. Since Respondent's motion for summary judgment revealed the absence of any genuine issue of material fact, he was entitled to judgment in his favor; the Referee committed error by denying the motion.

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[50] **APPENDIX A-24.**

The Florida Bar's only evidence in response to Michael Ray's motion for summary judgment was a conclusory affidavit alleging that the words in Ray's statements "are false". However, general allegations in opposition to a motion for summary judgment are insufficient to defeat summary judgment.

2. The Referee's fact findings lack evidentiary support and are clearly erroneous. The findings of fact are only a verbatim repetition of the Complaint of the Florida Bar of Minor Misconduct.

The Referee refused to admit evidence and allow testimony which would have revealed that Ray's speech was protected and that The Florida Bar's charge was unsubstantiated.

The findings of fact neither cite any specific record evidence, nor any testimony for support. **The findings of fact ignore the unrebutted record evidence and the testimony of witnesses** and also appear to conflict with the Referee's own comments.

Since "there is no evidence in the record to support [the referee's] findings, or that the record evidence clearly contradicts the conclusions" the findings of fact are erroneous and should be set aside. *The Florida Ear v. Spann, 682* So.2d 1070, 1073 (Fla. 1996), *quoted in, The Florida Bar v. Vining, 721* So.2d *1164, 1167* (Fla. 1998).

3. The Referee's recommended finding of guilt is unjustified. In order to properly find Respondent guilty of the charge, Ray's permitted defenses had to be found to be unsuccessful. The Referee's Report did not even discuss the defenses. Since Ray's defenses establish that his statements were privileged, and not

made with reckless disregard of the truth, a recommendation that he be found guilty is not justified.

4. The Referee's recommendation of a public reprimand is unlawful. The recommendation of a public reprimand on this record is "clearly off the mark" in view of the Florida Standards for Imposing Lawyers Sanctions and not reasonably supported by existing case law. *The Florida Bar v. Vining, 721* So.2d 1164, 1169 (Fla. 1998). On this record, the Referee's conclusion that Michael Dean Ray be disciplined and taxed with the Florida Bar's costs is unwarranted.

ARGUMENT

I. THE REFEREE ERRED BY DENYING RAY'S MOTION FOR SUMMARY JUDGMENT BECAUSE IT REVEALED THE ABSENCE OF ANY GENUINE ISSUE OF MATERIAL FACT AND THAT RAY WAS ENTITLED TO JUDGMENT IN HIS FAVOR.

The Florida Bar's only evidence in response to Michael Ray's motion for summary judgment was a conclusory affidavit alleging that the words in Ray's statements "are false".[51] Indeed, the affidavit states no facts upon which Philip Montante based his conclusion that the statements "are false".[52]

However, the Florida Supreme Court has long held that general allegations in opposition to a motion for summary judgment are

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[51] The May 19, 1999 conclusory Affidavit of Judge Montante states: "I have reviewed the three letters attached as exhibits A, B, and C to the complaint of The Florida Bar against Michael Dean Ray...." **"The following statements by Mr. Ray concerning me or the manner in which I have conducted my courtroom are false.** They are: [verbatim quotation from Ray's letters as in ¶¶ 3-5 of TFB Complaint]" (emphasis added). **APPENDIX A-22** EX.A.

[52] There are no supporting facts in the Affidavit perhaps because: **1) there are no facts** showing Ray's statements to be false; and, 2) the Affidavit appears to have been drafted by The Florida Bar who never has explained how Ray's statements are false, even in their answers to interrogatories.

insufficient to defeat summary judgment. **"Neither a purely formal denial nor, in every case, general allegations, defeat summary judgment."** *Johnson v. Studstill*, 71 *So.* 2d 251, 252 (Fla. 1954) (emphasis added). Therefore no material facts were in dispute.

> To defeat a motion which is supported by evidence which reveals no genuine issue, **it is not sufficient for the opposing party merely to assert that an issue does exist. If the moving party presents evidence to support the claimed non-existence of a material issue, he will be entitled to a summary judgment unless the opposing party comes forward with some evidence which will change the result-that is, evidence to generate an issue on a material fact.**

Harvey Building, Inc. v. Haley, 175 So.2d 780, 782 (Fla. 1965)(emphasis added).

Accordingly, the Referee erred by denying Respondent's Motion for Summary Judgment, and Respondent ought not to have been required to defend himself in a final hearing.

II. THE REFEREE'S FACT FINDINGS LACK EVIDENTIARY SUPPORT AND ARE CLEARLY ERRONEOUS; REFEREE'S REFUSAL TO ADMIT RAY'S PROFFERED EVIDENCE, REFUSAL TO JUDICIALLY NOTICE THE FLORIDA BAR'S OWN PUBLIC DISSEMINATION OF SIMILAR WORDS CRITICAL OF JUDICIAL MISCONDUCT AND REFUSAL TO PERMIT RAY'S RELEVANT QUESTIONING OF WITNESSES UNDERMINED THE FINDINGS OF FACT.

The findings of fact are only a verbatim repetition of the Complaint of The Florida Bar of Minor Misconduct.[53] Yet during the Final Hearing, the Referee declared that "Any decision I make is based on not just the testimony in evidence, but also the record."

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[53] Under "II. FINDINGS OF FACT, . ." and: "After considering The Florida Bar's complaint this Referee finds that all facts are true as stated in The Florida Bar's complaint to wit:" the **ROR** repeats word for word the text in TFB Complaint. See *and compare:* **ROR-2-4**(¶¶ **1-7)** with TFB Complaint, ¶¶ 1-7. The only conflicts: a misplaced ellipsis is removed from **ROR** ¶3(a); "venire" is misprinted: "Venice" **ROR, ¶ 7.**

TR2-89 However, the Findings of Fact in the **ROR** do not even discuss any testimony or evidence, let alone the record.

This case turns on the Referee's erroneous findings of fact contained in ¶ 6 and ¶ 7.[54] The crux of ¶ 6 is that "Respondent either ***knew those statements*** in his letters dated February 23, ***1996,*** November 14, 1996 and August 19, 1997, as set forth in paragraphs 3, 4, and 5, ***to be false ox stated them with*** **reckless** ***disregard to their truth or falsity."*** (Emphasis added) Paragraph 7 merely concludes that Respondent "is in violation of Rule 4-8.2(a). . . ."

The testimony is unrebutted and unchallenged that Ray knew his statements to be true, and he never entertained any doubts as to their falsity. In a nutshell, Mr. Ray's testimony concerning his letters to Chief Judge Creppy about Judge Montante shows the context:

> I wrote the letter mainly because what was going on in Haiti was bloodshed and people being decapitated, bodies on the street everyday according to our own government.
>
> My clients would apply for asylum before this Judge, and **he would not consider the evidence** as was required to do, and when we would file Motions to Recuse, he would make up things and retaliate against us and say that we made faces and that we called the Attorney General a racist when we never did and that I never filed a Motion to Recuse when I did and I had a stamped copy and things like that, and then, **his lawyer told the Daily Review** newspaper that we were troublemakers and **that this Judge had granted numerous Haitians asylum,** and then, I filed a Freedom of Information Act request to find out how many asylums he had granted Haitians, and they wouldn't answer it and we had to sue, and **we proved he had only granted one** and every time our clients after that moved to recuse

[54] There is no dispute about the findings of fact in ¶¶ 1, and 3-5. Respondent admitted those allegations in his Answer to the Complaint of Minor Misconduct.

him, he would not even address that in the Motions to Recuse.

Instead, he would lash out at us and attack us, and when that story appeared in the Daily Business Review, I believe I had only ever appeared before this Judge one time in my whole life, and he had granted my client asylum, but my associate would appear before him and would continue to insist, as the law requires, that he consider this background evidence as required by Molaire versus Smith and he wouldn't. He consistently refused to. * * *

They're not about phrases and whether there was a witch in the courtroom, etcetera. **They were about the wholesale denial of justice** to my client and the retaliation by this judge who claimed through his lawyer that he granted numerous Haitians asylum and the Immigration Court had to pay us $25,000 to prove that.

If he would have just recused himself and followed the law like the Judicial Code requires, we **wouldn't be here today.** I wouldn't be all these years later taking time out of my practice and my life defending myself. **TR2-78-81** (emphasis added).

***Referee improperly excluded Ray's proffered testimony and* evidence**

The Referee repeatedly excluded relevant testimony and documents which would further reveal that The Florida Bar's charge against Ray is unsubstantiated because Ray believed his statements were true, and Ray specifically challenges the Referee's failure to admit this evidence.""

[55] The record is replete with examples of sustained Florida Bar objections to testimony and evidence surrounding the context of Ray's statements; e.g. background evidence on Haiti; **TR2-77** case law requiring consideration of evidence on country conditions; **TR2-82** why Ray's clients sought asylum; **TR2-83** why Ray's clients would die if sent back to Haiti; **TR2-121-23** what Ray meant by "the implications" in his November 14, 1996 letter; **TR2-123** what Ray's mental state was in writing his Feb. 23, 1996 letter; **TR2-152;** whether and why Ray thought he might get results by writing the Chief Judge **TR2-152-3;** why Ray wrote his August 19, 1997 letter; **TR3-280** whether Judge Montante retaliated against Ray; **TR2-117** other examples of Judge Montante's "failure to provide fair due process asylum hearings to [Ray's] Haitian clients" (Bar counsel objected: "This is just expanding what we charged") **TR2-148** Ray's explanation of his meaning of the words "cowardly liar" **TR3-226-7** Florida Bar counsel objected that "All we're concerned with is the fact that Michael Ray called the

Ray's words are all within legal lexicon,* and *standard usage

Mr. Ray testified at length what he intended to convey in his letter to Chief Judge Creppy when he used the words The Florida Bar complains about.[56]

The words Respondent chose to complain about Philip J. Montante, Jr. to his supervisor, the Chief Immigration Judge, are all words which are part of the English language and the legal lexicon. At the Final Hearing, Ray related his reference "Nazi justice" to a Law Review article entitled, *Nazis in the Courtroom: Lessons from the conduct of lawyers and judges under the laws of the Third Reich and Vichy, France, 61* BROOKLYN L. REV. 1121 (1995), and analogized Judge Montante's conduct to the Nazi judges. **TR2-145**

In fact, The Florida Bar admitted Respondent's request for admissions[57] containing specific definitions from BLACK'S LAW DICTIONARY. Other words which The Florida Bar charged Respondent with

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Judge a cowardly liar." **TR3-229;** the April 27, 1994 "threatening letter" from Judge Montante's lawyer **TR2-97-100 See: Appendix A-5;** relevant questions to Judge Montante: "Has any Haitian client of Mr. Ray's ever sought to recuse you from considering their case?" Bar counsel's relevancy objection was: "Judge the Florida Bar has charged very particular statements in those letters. We didn't charge on the entire writing of the letter. There are very particular items. . . ."; **TR1-47-4. See** *also:* n.44, *supra,* at 22; testimony from Ira Kurzban, see: pp. 23-24 *supra,* excluded documents, p. 24, *supra;* denial of a request for judicial notice of Florida Bar news summary, see: p. 26, supra.

[56] *E.g.* "cowardly deceit" **TR2-85-89,92,93 TR3-236-238,279-81** "lies" **TR2-109, TR3-170-71,187-196,204-211,273,274** "kangaroo court" **TR2-139-40 , 146-7, TR3-252-7** "tampering" **TR2-109,114** "lynching" **TR2-140** "judicial railroad" **TR2-138-9** "inquisition" **TR2-140** "craven mendacity" **TR3-216,224-26,238-9** "Nazi justice" **TR2-119-20,123-128,144-146, TR3-256-261,** 288 "Salem witch trials" **TR2-141** "Star Chamber" **TR2-141-144, 146-7.**

[57] **See; APPENDIX A-25**

violating Rule 4-8.2(a), are **words** in regular usage.'"

After the statement charged in ¶ 5(b) was read: "Judge Montante broadened his campaign of retaliation against me after the Miami Review story's exposing him as a cowardly liar. . .", Mr. Ray was asked:

> Q. Now, first of all **when you wrote that statement,** did you make that statement, **did you know it to be false?**
> A. No.
> Q. **Did you make that statement with reckless disregard as to the truth or falsity?**
> A. No, **I did not.**
> . . .
> Q. Now, Mr. Ray, in point of fact, you're not calling Judge Montante a cowardly liar in that sentence; are you?
> A. I'm characterizing The Miami Review story which I believe exposed him as a cowardly liar. **TR2-226-228**

On cross-examination about the phrase "cowardly liar", the answers were the same:

> THE REFEREE: Now, you said that was simply just your, your just repeating what the Miami Review stories had to say about Judge Montante?
>
> THE WITNESS: No, that's not correct. As I tried to explain before, **those were my words, but they're what I believe was a fair characterization of what this story exposed.**
>
> THE REFEREE: So you think The Miami Review stories exposed him as cowardly liar; right?
>
> THE WITNESS: **I do and many other people I talk to believe the same thing.**
>
> THE REFEREE: I'm not interested in what other people might think about your testimony; okay?
>
> THE WITNESS: **Well, that helps me to form the basis for my belief as well. TR2-241-242** (emphasis added).

During the Final Hearing, the Referee demonstrated an

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[58] **See: APPENDIX A-26**

understanding that Respondent had a reasonable factual basis for making the statements "Judge Montante's cowardly deceit" charged in ¶ 3(a); and "Nazi Justice, lynch justice, kangaroo court" as charged in ¶ 4:

> THE REFEREE: So the deceit was [Judge Montante'sl failure to disassociate himself from the statement his lawyer made [that Judge Montante had granted asylum to "numerous" Haitians]; is that right?"
>
> THE WITNESS: Yes. At some point, it became his responsibility. **TR2-91**
>
> THE REFEREE: Well, If I understand your point, Mr. Kolner, it's this. Number one. It's that Mr. Ray **had a good faith belief that any client, any Haitian client that he represented in front of Judge Montante, if their application for asylum was denied, that they would be returned to Haiti and face serious repercussions up to and including death?**
>
> . . .
>
> And because Judge Montante was denying these applications for asylum, therefore, **this rises to the level of Nazi justice, lynch justice, kangaroo court -- that kind of thing;** right?
>
> . . .
>
> THE WITNESS: Well, it wasn't just the denial. It was the process or lack of due process in reaching those decisions, and also --
>
> THE REFEREE: So, **it was the decision, the** results **you** were **obtaining, unfavorable results obviously, plus the conduct of the hearing?**
>
> THE WITNESS: Plus the failure to consider evidence, the failure --
>
> THE REFEREE: Okay, **failure to consider evidence.**
>
> THE WITNESS: Failure to allow Motions to Recuse to even be made to the point of the Judge's misstatement of the rules regarding such motions and the practices allowed.
>
> THE REFEREE: Okay, **so it was incorrect legal rulings, his failure to admit relevant evidence, his final decision --**
>
> THE WITNESS : And his failure to follow the law to

recuse himself. **TR2-125-126** (emphasis added).

The Referee displayed his understanding about "Judge Montante's trial conduct" in Ray's November 14, 1996 letter charged in ¶ 4, that a permissible reading of that paragraph was more expansive than The Florida Bar counsel urged: just Judge Montante's trial conduct on November 1, 1996. **"Well, I think one way of reading that particular paragraph is it may have had reference to other proceedings as well." TR2-130** (emphasis added).

Though his Report is silent about Ray's beliefs, the Referee conceded Ray had a good faith belief his Haitian clients could be killed if deported, when admitting the U.S. Department of State *Country Reports on Human Rights Practices.* "I will admit it solely for the purpose **it tends to support the witness' testimony that he had a good faith belief that if his clients were returned to Haiti, that they would face some unpleasant consequences up to and including death." TR2-131** (emphasis added).

Judge Montante's false statements

In direct conflict with his Report, the Referee explained exactly what the record evidence shows while Ray testified about falsehoods in Judge Montante's Order; some of the grounds Ray relied upon to state the "craven mendacity of Judge Philip Montante" charged in ¶ 5(a): **"Now, this order is dated December 17, 1996, and it does contain the statement that there have been no written motion in that particular case. In point of fact, one had**

been filed some four days previous. . . ."[59] **TR3-211** (emphasis added).

In his testimony, Ray set forth several other false statements of Judge Montante, including those in his orders."'

Ray denied he "appeared **frequently"** before Judge Montante as alleged in ¶ 2 The Florida Bar Complaint (emphasis added). This was a fact in dispute. But when Ray's counsel asked Judge Montante: "How many times did Michael Ray appear before you?", The Florida Bar counsel objected, stating, "It has nothing to do with what is charged by the Bar's complaint." **TR1-50-51** The Referee sustained The Florida Bar's objection.[61]

Michael Ray testified he had probably only ever been before Judge Montante **approximately two or three times in his life** before November **1, 1996. TR3-188,267** Therefore, the only evidence does not support the allegation or the Referee's finding of fact that Michael Ray appeared "frequently"[62] before Judge Montante. Therefore, the Finding of Fact in ¶ 2 is clearly erroneous.

Thus, the Findings of Fact in **ROR** ¶ 2, ¶ 6 and ¶ 7 are not

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[59] **But see: ROR** EX.D. at 4 ("I **see no competent evidence before me to show that Judge Montante was guilty of any mendacity, craven or otherwise, or that he was a liar, cowardly or otherwise,** which was alleged in the August, 1997 letter.")

[60] See: n. *15,* p.13, *supra.*

[61] **Ray asserts this exclusion of testimony as error.** Ray's counsel asked Judge Montante, "Do you know when the next time after 1990 or 1991 Mr. Ray appeared before you?"; The Florida Bar Counsel objected and the Referee sustained. **TR1-51-52**

[62] Frequently: "at frequent or brief intervals; often." Frequent: "2 occurring often; happening repeatedly at brief intervals; 3 constant; habitual." WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 539 (3d College Ed. 4th printing 1988).

Supported by the record, and as shown above, are clearly erroneous.

The Referee's refusal to admit Ray's proffered evidence, refusal to permit Ray's relevant examination of witnesses, and refusal to judicially notice The Florida Bar's own public dissemination of similar words critical of judicial misconduct all undermined the Referee's fact findings. Several of Referee's erroneous evidentiary rulings Ray asserts as error are set forth, *supra,* at p.7, n.8; p. 10, n.14; p. 22 nn.43 & 44; p. 23-24; pp. 25-26, and n.49. The competent, substantial evidence before the Referee, and his own comments contradict the findings of fact in the **ROR,** so this Court may substitute its judgment for that of the Referee. *The Florida Bar v. MacMillan, 600* So.2d 457, 459, (Fla. 1992) ; *The Florida Bar v. Vining, 721* So.2d 1164, 1167 (Fla. 1998).

III. THE REFEREE'S RECOMMENDED FINDING OF GUILT IS UNJUSTIFIED

The Referee's recommended finding of guilt is unjustified. In order to properly find Ray guilty of violating Rule 4-8.2(a), the Referee had to find Ray's three defenses were insufficient: truth; reasonable factual basis considering their nature and context; and absolute privilege afforded by Art 1, § 4, Fla.Const..[63] The ROR did not even cite these defenses. Since Ray's three allowed defenses establish that his statements were privileged, the recommendation that Ray be found guilty is not justified.

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[63] Ray asserts the Referee erred by striking seven of his defenses; the remaining three defenses which the Referee did not strike, he simply ignored. The **ROR** is silent about any defenses.

First Amendment forbids punishing truth under Rule 4-8.2(a)

The Referee disregarded controlling law when he granted The Florida Bar's Motion to strike Ray's Affirmative Defenses. Ray relied on the fact that his statements to the Chief Judge were absolutely privileged[64] by the First Amendment of the United States Constitution for his Fifth Affirmative Defense. The Supreme Court of the United States has clearly expressed that a state may not punish a lawyer for truthful criticism of a judge. In reversing Jim Garrison's criminal libel conviction, Justice Brennan explained:

> Applying the principles of the New York Times [*v.* **Sullivan, 376** U.S. 254, 84 S.Ct. 710 (1964)] case, we hold that the Louisiana statute, as authoritatively interpreted by the Supreme court of Louisiana, incorporates constitutionally invalid standards in the context of criticism of the official conduct of public officials. For **<u>contrary to the New York Times rule which absolutely forbids punishment of truthful criticism,</u>** the statute directs punishment for true statements made with actual malice.

Garrison V. Louisiana, 379 U.S. **64, 77-78** (1964) (emphasis added).

The Referee did not strike Ray's First Defense: that his statements "are all true, and therefore are absolutely privileged. *Garrison V. Louisiana, 379* U.S. **64, 74 . . .**(1964)." But, the **ROR** did not explain why Ray's statements were undeserving of the same protection which the Supreme Court set forth in *Garrison.*

Lawyers have* always *been protected for truthful criticism of bench

As part of their ethical obligations, lawyers have long been under a duty to report to appropriate authorities whenever they

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[64] "Respondent's statements. . . ***are* absolutely privileged by the United States Constitution First Amendment guarantees of freedom of speech and freedom to petition the federal government for redress of grievances.".** (emphasis added) **.See: APPENDIX A-8.**

perceive a judicial officer has violated the conduct and standards demanded of judicial office. In his 1953 leading treatise, Henry S. Drinker summarized a lawyer's obligation to the public includes **"Duty to Further The Choice of Able and Upright Judges and See to The Removal of Those Manifestly Unworthy".** H. Drinker, Legal *Ethics* **60 (1953).** Drinker quoted from Canon 1, analyzing its importance:

> Whenever there is a proper ground for serious complaint of a judicial officer, **it is the right and duty of the lawyer to submit his grievances to the proper authorities. In such cases,** but not otherwise, **such charges should be encouraged and the person making them should be protected.** * * * **"It is as much the duty of the bar to assist in the removal of unfit members of the judicial tribunal, as to assist in securing good judicial appointments."**
>
> **The difficulty in inducing a member of the bar to attack** a corrupt judge **lies in his natural fear of reprisals in case,** through influence, political or otherwise, **the lawyer's efforts prove unsuccessful.** As Emerson said to Justice Holmes when the Justice was a student: "If you shoot at a king, you must kill him."
>
> **No** attack or imputation of dishonesty should, of course ever be made against a judge by a lawyer **unless the judge's conduct is continued and flagrant and is capable of demonstration** by **unassailable evidence. Where, however, such is the case, no fear or favor should deter the bar from proceeding.**

H. Drinker, Legal Ethics **61** (1953)(emphasis added, note omitted).

Prior to 1987, Florida lawyers were governed by the Code of Professional Responsibility[65], and as pertains here, the predecessor of *Model Rule of Professional Conduct* 8.2(a), Canon 8: *A Lawyer Should Assist in Improving the Legal System,* Ethical Consideration EC 8-1, and Disciplinary Rule, DR 8-102 "Statements Concerning Judges and Other Adjudicatory Officers."

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[65] Accordingly, cases before 1987 from the Florida Supreme Court disciplining lawyers for criticizing judges are not dispositive of the instant case under the current Rule.

In the early 1980s, the American Bar Association's Center for Professional Responsibility developed[66] *The Model Rules of Professional Conduct* to replace the three-part *Model Code of Professional Responsibility* which practitioners, disciplinary bodies and courts had found cumbersome and difficult to apply evenly. The Florida Supreme Court completely revised its lawyer discipline structure, adopting Rules Regulating the Florida Bar, effective January 1, 1987;[67] including Rule 4-8.2(a) which exactly tracks the text and comment of *Model Rule of Professional Conduct* 8.2(a):[68]

> The Model Rules of Professional Conduct, like the predecessor Model Code of Professional Responsibility, **prohibit only "false" criticisms of the** judiciary. Although the Code proscribed "knowingly" false statements (DR8-102(B)), **Model Rule 8.2 incorporates the standard of "knowledge or reckless disregard" developed in the libel context in *New York Times v. Sullivan, 376 U.S. 254 (1964).***

Annotated Model Rules of Professional Conduct, 539-540 (3d Ed.) (emphasis added).

The Reporter for the ABA's Special Commission on Evaluation of

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[66] Following debates, discussion and amendments, The *Model Rules of Professional Conduct* were adopted by the ABA House of Delegates, See: *The Legislative History of the Model Rules of Professional Conduct: Their development in the ABA House of Delegates,* American Bar Association (1987).

[67] *The Florida Bar, Re Rules Regulating the Florida Bar,* 494 So.2d 977 (Fla. 1986).

[68] Rule 4-8.2(a) and comment were amended in 1989 and differ from *Model Rule of Professional Conduct* 8.2(a), in that Florida lawyers are now also prohibited from making false statements or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of mediators, arbitrators, iurors, or members of the venire. *The Florida Bar, Re: Amendment to Rules Regulating The Florida Bar, 544* So.2d 193, 195 (1989).

Professional Standards, (which produced the Model Rules) is co-author of a treatise which explains that the new **Model Rule 8.2(a) was enacted in part because the former disciplinary rules were unduly restrictive on lawyer's speech:**

> Lawyers are particularly well placed to assess the conduct of judges and public law officers, as well as that of lawyers. ***Lawyers* should not hesitate to make candid comments about the performance or qualifications of a judge or other official,** to the end that public opinion be well informed. . . . The restrictions [under the previous rules of discipline] were sometime applied far too broadly, however, requiring a lawyer to be deferential, to use "appropriate" language, and to be "certain" of the grounds of adverse comment. . . . Neither such broad restrictions nor such a justification can withstand scrutiny under the First Amendment. Rule 8.2(a) accordingly reduces the restrictions on a lawyer's speech to their appropriate constitutional limits. **Since judges and public law officers are public officials, statements about them cannot be prohibited unless the speaker knows them to be false or** makes **them with "reckless disregard" for the truth. See *New* York Times *v. Sullivan, 376*** U.S. 254 (1964).

G. Hazard & W. Hodes, 2 *The Law of Lawyering: A Handbook on The Model Rules of Professional Conduct* § 8.2:101, 932-33 (2d Ed. Supp. 1998)(emphasis added).

Thus, **this same Constitutional rationale which prohibits punishing truthful speech in the defamation law context,**[69] also prohibits disciplining a lawyer unless it is proved the lawyer knows the speech is false or speaks with reckless disregard for the truth:

> A public official may not recover in libel or slander **unless there is proof that the speaker either**

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[69] *E.g. Nodar v. Galbreath,* 462 So.2d 803, 809 (Fla. 1984)("A **communication made in good faith** on any subject matter **by one having an interest therein, *or* in reference to which he has a duty, is privileged if made to a person having a corresponding interest or duty,** even though it contains matter which would otherwise be actionable. . .")(emphasis added).

> **knew** the **statement was false or spoke with reckless disregard for the truth. This same stringent standard should apply to other potential sanctions (such as discipline) lest robust speech be chilled. Hence Rule 8.2(a) is limited to matters of fact that can be proven false,** as is the case with libel and slander. . . .
> . . . [C]are must be taken lest proper regard for the dignity of courts and the administration of justice turn into overprotection for individual thin-skinned and imperious judges.

G. Hazard & W. Hodes, *Id.* § 8.2:201, 934-35 (emphasis added).

Therefore, The Florida Bar was required to **prove** that Ray knew his statements were false, or made with reckless disregard for the truth or falsity in order to sustain their charges against him. The Florida Bar has not met its burden, and on this record, it cannot.

A State may not punish a person because he holds certain beliefs

The Supreme Court of the United States has reiterated that the First Amendment prohibits punishment of an individual because of their beliefs. The First Amendment **"prohibits** a **State from excluding a person from** a **profession . . . or punishing him solely because . . . he holds certain beliefs."** *Baird v. State Ear of Arizona,* 401 U.S. 1, 6 (1971), *quoted in Ibanez v. Fla. Dep't of Business & Professional Regulation,* 512 U.S. 136, 144 (1994) (emphasis added).

Naturally, if a State can not constitutionally punish a person solely because he ***holds*** certain *beliefs,* then it follows that if that person expresses those same protected beliefs on a privileged occasion[70] - as in a letter of complaint to the Chief Judge - then the *expression* of those protected *beliefs* similarly ought not to be

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[70] **See:** *Nodar v. Galbreath,* n. 69, p. 42 supra.

punished.

This Court recently extended "absolute immunity" to those who lodge complaints against members of The Florida Bar in order to encourage those with legitimate complaints about lawyers to step forward. *Tobkin v. Jarboe*, 710 So.2d 975, 977 (Fla. 1998). That same immunity ought to apply to Ray for his complaints made to Chief Judge Creppy about Judge Montante. If not, then the disturbing reality described in the dissent of Justice Wells, unfortunately will ring true. Consider,

> [T]he **chilling and sometimes devastating effect to an attorney's career and life** of an expressly malicious and false grievance filing made with intent to injure the attorney. . . **malicious grievance filings are actually a fact** of the present practice of law. Such filings can be and have been **used** as **tactical weapons against attorneys to accomplish purposes that have nothing to do with violation of the rules** of professional conduct.

Tobkin, 710 So.2d at 978 (Wells, J. dissenting) (emphasis added).

Here, Michael Ray was simply fulfilling his duty to report misconduct of Judge Montante, and like many whistle-blowers, he has suffered retaliation with the tactical weapon of a grievance filed against him by Judge Montante, to accomplish a purpose that has nothing to do with violation of the Rules of professional conduct. The reason for Ray's complaint to the Chief Judge has been obscured by The Florida Bar's very narrow view of his legitimate speech.

As Justice Harlan explained: "[M]uch linguistic expression serves a dual communicative function: it conveys not only ideas capable of relatively precise, detached explication, but otherwise inexpressible emotions as well. In fact, **words are often chosen as much for their emotive as their cognitive force. We cannot sanction**

the view that the Constitution, while solicitous of the cognitive content of individual speech has little or no regard for that emotive function which practically speaking, may often be the more important element of the overall message sought to be communicated." *Cohen v. California,*[71] 403 U.S. 15, 26 (1971) (Emphasis added).

Therefore, though Michael Ray's words may stir emotion in many who read them, his words enjoy the same constitutional protection as do any other protected expression of beliefs. The stirring of emotions is not prohibited by Rule 4-8.2(a).

Bar has not met burden to prove "Reckless disregard for the truth"

The Supreme Court of the United States has stated that "[A]lthough the concept of 'reckless disregard' 'cannot be fully encompassed in one infallible definition,' *St. Amant v. Thompson, 390* U.S. 727, *730* (1968), we have made clear that the defendant must have made the false publication with a 'high degree of awareness of . . . probable falsity,' *Garrison v. Louisiana, 379* U.S. 64, 74 (1964), or must have 'entertained serious doubts as to the truth of his publication.' St. *Amant*, 390 U.S. at *731" Harte-Hanks Communications, Inc. v. Connaughton, 491* U.S. 657, 667(1989).

Here, the **ROR** neither explains *why* he concludes that Ray's words are false, nor explain how Ray disregarded the truth. There

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[71] On First and Fourteenth Amendment grounds, the Supreme Court reversed a conviction under a California statute which prohibited maliciously and willfully disturbing the peace or quiet of any neighborhood or person by offensive conduct. Paul Cohen had been convicted and sentenced to 30 days' imprisonment for wearing a jacket bearing the words "Fuck the Draft" in the Los Angeles County Courthouse. Id.

is no evidence in this record which establishes that Ray had a high degree of awareness - or *any* awareness - of the probable falsity of his statements.

Ray's statements can be viewed as statements of his opinion relating to matters of public concern: Judge Montante's treatment of Haitian asylum-seekers, and their lawyers. Such opinions, "which do[] not contain a provably false factual connotation will receive full constitutional protection." *Milkovich v. Lorain Journal, Co.*, 497 U.S. 1, 20 (1990).

Taking Ray's words in their context, as we must,[72] there is no basis to conclude Ray did not believe the truth of his statements. The Supreme Court of the United States has emphasized how important is the "context" of statements when it reversed the discipline of a lawyer charged with making a "speech [which] reflected adversely upon Judge Wiig's impartiality and fairness in the conduct of the Smith Act trial and impugned his judicial integrity." *In re Sawyer*, 360 U.S. 622, 624-25 (1959).

But to properly review the case, Justice Brennan stressed, "We examine these points in particular, though of course we **must do so in the context of the whole speech.**"[73] Id. (Emphasis added). Even

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[72] *See : In re Sawyer, 360* U.S. 622, 624-25 (1959).

[73] Justice Brennan explained for the majority: the gist of Ms. Sawyer's speech included "There's no fair trial in the case. They just make up the rules as they go along"; she mentioned "'horrible and shocking' things at the trial; the impossibility of a fair trial; the necessity, if the Government's case were to be proved, of scrapping the rules of evidence; and the creation of new crimes unless the trial were stopped at once." *In re*

the dissenters in *Sawyer* recognized that **"We must indeed have in mind, as the opinion of Mr. Justice BRENNAN reminds us, the entire 'context' of this speech. We must endeavor to understand the complete utterance in its setting, as it sounded and as it was meant to sound** to its auditors in Honokaa, Hawaii, on December 14, 1952."[74] Justice Frankfurter further stated, "Again the remarks about unfairness and the rules that were 'made up' **must be read not in isolation but in context."** Id. 360 U.S., at 661, 79 S.Ct., at 1395 (emphasis added).

Accordingly, the full Supreme Court of the United States has supported the view that before punishing an attorney for speech critical of the judiciary, a careful analysis is required to determine if there is a "reasonable factual basis for making the statements which are complained of, considering their nature and the context in which they were made." Ray's Second Defense.

However, The Florida Bar seeks to punish Ray and the **ROR** recommends Ray be publicly reprimanded without ever even addressing the context of his statements, nor any of Ray's defenses.[75]

Sawyer, 360 U.S., at 630.

[74] *In Re Sawyer, 360* U.S., at *654, 79* S.Ct., at 1392. (Frankfurter, J., joined by Clark, Harlan and Whittaker, JJ., dissenting) (emphasis added).

[75] Neither the Referee nor The Florida Bar care for context. When Ray's counsel asked Ira Kurzban whether Judge Montante's conduct described in Ray's letters was "consistent with your knowledge and dealings with Philip J. Montante, Jr.?" Bar counsel objected: "We can't take a case that's purple and make it green" and stated "the trial conduct was one day, November 1st, 1996. That's the day we're talking about. . , . what we charge and what

The United States Court of Appeals for the Ninth Circuit reversed a disciplinary panel's findings and discipline imposed under a rule similar to 4-8.2(a), where an attorney was *inter alia*, charged with impugning the integrity of the U.S. District Court for the Central District of California. One specific charge was that the attorney had written an "intemperate letter" about a judge: "It is an understatement to characterize the Judge as 'the worst judge in the central district.'".[76]

A panel of judges "presume[d] that these charges [about Judge Keller] are false and that Respondent [Yagman] lacked an objectively reasonable basis for expressing them".[77] But, on appeal, the Ninth Circuit clarified that lawyers are protected from discipline for criticizing judges so long as a reasonable factual basis supports their statements:

Mr. Ray wrote about was Judge Montante's trial conduct on November 1st, 1996 in regard to Paul Ajuwa." **TR2-34-36** The Referee sustained. Bar Counsel did wonder whether "On November 1st, 1996 the day of that hearing were there any nooses, witch burnings, or gas chambers in your courtroom?" **TR1-40**

[76] The "intemperate letter" continued: "It would be fairer to say that he is ignorant, dishonest, ill-tempered, and a bully, and probably is one of the worst judges in the United States. If television cameras ever were permitted in his courtroom, the other federal judges in the Country would be so embarrassed by this buffoon that they would run for cover. . . ." (letter dated June 5, 1991).

Standing Committee on Discipline of the United States District Court for the Central District of California v. Yagman, 55 F.3d 1430, 1434 n.4 (9th Cir. 1995).

[77] *Standing Committee on Discipline v. Yagman,* 856 F.Supp. 1384, 1391 (C.D. Cal. 1994)(emphasis added).

> **Lawyers may freely voice criticisms supported by a reasonable factual basis even if they turn out to be mistaken.** Attorneys who make statements impugning the integrity of a judge are, however, entitled to other First Amendment protections applicable in the defamation context. To begin with, attorneys may only be sanctioned for impugning the integrity of a judge or the court only if their statements are false; truth is an absolute defense. *See Garrison v. Louisiana, 379* U.S. 64 . . . .

Yagman, 55 F.3d at 1438 (emphasis added).

The Ninth Circuit explained "The inquiry focuses on whether the attorney had a reasonable factual basis for making the statements, considering their nature and the context in which they were made." *Yagman, 55* F.3d at 1437. "This inquiry may take into account whether the attorney pursued readily available avenues of investigation." *Id.* at n.13.

Here, Ray *did* pursue several avenues of investigation before making the statements to the Chief Immigration Judge: Ray filed a FOIA request to see whether Judge Montante's Haitian asylum record was misrepresented in the *Daily Business Review;* Ray filed a lawsuit to learn the truth when the EOIR refused to answer; and Ray sought retraction of defamatory and false statements. The Referee neither focused, nor discussed these avenues of investigation which Ray pursued prior to making his statements.

Thus, the **ROR'**s recommended finding of guilt is unjustified.

IV. RECOMMENDATION THAT RAY BE PUBLICLY REPRIMANDED AND TAXED WITH THE BAR'S COSTS IS UNWARRANTED AND UNLAWFUL

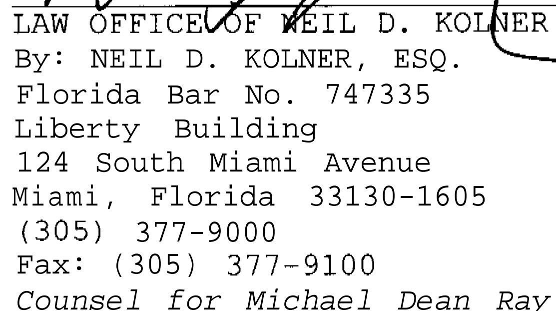
The Referee's recommendation of a public reprimand is unlawful. The recommendation of a public reprimand on this record

is "clearly off the mark" in view of the Florida Standards for Imposing Lawyers Sanctions and not reasonably supported by existing case law. *The Florida Bar v. Vining, 721* So.2d 1164, 1169 (Fla. 1998). On this record, the Referee's conclusion that Ray be disciplined and taxed with the Florida Bar's costs is unwarranted.

CONCLUSION

The Report of the Referee deserves to be rejected. The factual findings lack evidentiary support and are clearly erroneous; the Referee excluded relevant probative evidence and testimony which showed that Ray had not violated Rule 4-8.2(a); the recommended finding of guilt is unjustified; therefore, the recommendation that Ray be publicly reprimanded is unlawful and contrary to the Constitution of Florida, the Constitution of the United States, and the Florida Standards for Imposing Lawyer Sanctions, and Ray deserves reimbursement of his costs. Mr. Ray was a whistle-blower, who was defending his clients, trying to save their lives, and reporting judicial misconduct to the appropriate authority which is every Florida lawyer's duty. Ray merits no punishment. The Florida Bar has disciplined the wrong person.

Respectfully submitted,



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I HEREBY CERTIFY that the original and seven (7) copies of the foregoing (including Appendix) were sent by Priority Mail to The Clerk of The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399 and that a true and correct copy was caused to be served by regular mail this 10th day of May, 2000, to ·

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