ORIGINAL

IN THE SUPREME COURT
STATE OF FLORIDA

CASE No. 94,433

THE FLORIDA BAR,

Complainant,

vs.

MICHAEL DEAN RAY,

Respondent.

REPLY BRIEF OF MICHAEL DEAN RAY

ON REVIEW OF REPORT OF REFEREE

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CERTIFICATE OF FONT SIZE

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

SUMMARY OFARGUMENT

The Florida Bar's Answer Brief (hereafter "TFB brief") suggests that this case is about a lawyer's alleged false statements in letters to the chief immigration judge complaining about his subordinate, Immigration Judge Philip J. Montante, Jr. "for the sake of personal aggrandizement". TFB brief 19, 20. This is absurd. No evidence exists for such charge. Respondent neither made false statements nor did he write these letters "for the sake of personal aggrandizement". Indeed, The Florida Bar never explains how fulfilling a lawyer's duty under Rule 4-8.3 could ever lead to "personal aggrandizement". Quite the contrary is true.

Instead, Ray did believe, and continues to believe what he detailed in his letters to the chief immigration judge that Judge Montante's conduct warranted an investigation and appropriate discipline. Ray's letters recited Montante's pattern of misconduct including:

(i) how he routinely denied due process to black Haitian asylum-seekers; **EX.l, at 2**

(ii) how he refused to admit required evidence of tense and bloody political strife in Haiti in asylum hearings; **EX.1, at 2**

(iii) how he denied well-documented motions for recusal; EX.2, **at 2-4, EX. 3 at 4**

(iv) how he let disinformation of his Haitian asylum record be publicized; **EX. 1, at 2-3, EX.2, at 3-4, EX. 3 at 4**

(v) how he allowed his agents to falsely and publicly impugn Ray's integrity; **EX. 1, at 2-3, EX.2, at 3-4, EX. 3 at 4**

(vi) how he failed to retract those same false statements attributed to him when requested to; **EX. 2 at 3,** and

(vii) how he deliberately misstated facts about Ray in Court orders to retaliate for Ray's letters to the chief immigration judge. **EX. 2 at 3**

Rather than discuss these issues raised in Ray's letters to the chief judge, **The Florida Bar's deceptive Answer Brief** attempts to paint a far different picture of Respondent by **persistently misstating facts** and even by misstating what was the alleged misconduct with which The Florida Bar had charged Ray. The Florida Bar also **distorts Amici's arguments, misstates the law** upon which Amici rely and **misrepresents what Ray's letters to the chief judge were about.**

Therefore, The Florida Bar's Answer Brief fails to truly respond to the profound free speech concerns of national significance in this case. By ignoring these issues in Ray's Brief The Florida Bar does not rebut the fundamental premise that the Referee's Report is flawed and thus, deserves to be rejected. The Referee's Report fails to address the purpose of Ray's letters. Thus, if ratified by this Court, all lawyers will become even more reluctant to complain about judicial misconduct for fear of retaliation.

ARGUMENT

Respondent's letters to the chief immigration judge disclosed the facts upon which he relied for his expressed opinions. Ray expressed those opinions in language The Florida Bar deems

"offending", "onerous attributions" and "pervasive vilification". TFB brief, ***1, 28*** However, unless Ray's words "contain a provably factual false connotation" the U.S. Supreme Court has ruled that "they will receive full constitutional protection". *Milkovich v. Lorain Journal, Co., 497 U.S. 1, 20 (1990).*

Ray's letters, and the words which The Florida Bar contends violate Rule 4-8.2(a) are Ray's opinions based upon disclosed facts. The complained of words are not capable of being proven to be demonstrably false, and therefore, cannot be said to be false or stated with reckless disregard for the truth merely by the Referee's bald conclusions.

The Florida Bar Brief dodges free speech guarantees in this case

The Florida Bar brief fails to squarely face a fundamental legal issue presented by this case: that the Florida and federal Constitutions both preclude punishing Ray for his opinions as thoroughly discussed and analyzed in Ray's Brief, at 38-49. Instead, The Florida Bar's brief never even admits that the First Amendment is of prime importance in this case and uses fewer than two of 45 pages on the First Amendment. TFB brief, 34-36

For example, The Florida Bar's brief incorrectly argues that respondent "misapprehends the issue when he professes that the First Amendment forbids punishing him under Rule 4-8.2 (a)" and "respondent further attempts to confuse the issue when asserting that lawyers have been protected for truthful criticism of the bench" TFB brief, 34-35

The Florida Bar states that "respondent opines that 'a state may not punish a person because he holds certain beliefs"'. TFB

brief, 36 This is not only Respondent's "opinion" but has also been the considered opinion of the Supreme Court of the United States for three decades. *Baird v. State Bar of Arizona, 401* U.S. 1, 6 (1971) as recently reaffirmed in *Ibanez* v. *Fla. Dep't* of *Business & Professional Regulation,* 512 U.S. 136, 144 (1994).

Regarding the First Amendment, The Florida Bar claims that "Respondent's argument misses the mark. First, The Florida Bar is not 'the state'. It is an official arm of the Florida Supreme Court which regulates attorneys." TFB brief, 36. Contrariwise, The Florida Bar ***is*** the state, because the Florida Constitution delegates exclusive jurisdiction to regulate attorneys to the Florida Supreme Court. Fla. Const. Art. V. § 15. Therefore, its arm, The Florida Bar is the state.

The Florida Bar cites The ***Florida Bar v. Wasserman 675*** So.2d **103** (Fla. 1996) in support of its proposition that "A lawyer may be prosecuted for making false statements and loses his first amendment protection." TFB brief, 36 However, The Florida Bar fails to even mention that Wasserman's "statements" were not based upon 22 pages of analysis as here, but rather consisted solely of crude epithets: "You little motherf_____; you and that judge, that motherf_____ son of a b____." ***Wasserman, 675*** So.2d at 104.[1]

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[1] ***Wasserman*** cited ***In Re: Shimek, 284*** So.2d 686 (Fla. 1973) where ***in*** a ***court filing*** a lawyer wrote "the state trial judge avoided the performance of his sworn duty." Id. Shimek was found guilty of violating EC-8-6 and Canon DR8-102B, predecessors of Rule 4-8.2(a). The Court explained:

> The guidelines for criticism require the attorney to **know that his complaint is well-founded and the judge deserving of the criticism.** Judges are subject to fair criticism. . . . The thrust of the statement, when read without explanation, leads to the conclusion that the

In Re Shimek cited *State ex.rel. The Florida Bar v. Calhoon,* 102 So.2d 604 (Fla. 1958), where in an ex parte letter a lawyer threatened to expose, and did falsely expose, that a judge had accepted a $250 bribe in the form of a "Christmas present".[2] That is not at all like Ray's thoughtful letters to the chief judge.

This Court "t[ook] cognizance of the proposition that a judge as a public official is neither sacrosanct nor immune to public criticism of his conduct in office" and proclaimed **"It would be contrary to every democratic theorem to hold that a judge or a court** is **beyond bona fide comments and criticisms which do not exceed the bounds of decency and truth or which are not aimed at the destruction of public confidence in the judicial system as such."** *Id.* at 608 (emphasis added)."

> decision of a state judge with a prosecutorialbackground is tainted. . . . The statement is scurrilous, untrue, irresponsible and completely without foundation in this record. **The far-reaching significance of the theme is to slur and insult. It is calculated to cast a cloud of suspicion upon the entire judiciary of the State of Florida and it is totally unbecoming a member of the Bar.**

The Florida Bar, In *Re: Shimek, 284* So.2d 686, 689 (Fla. 1973) (emphasis added).

[2] Lawyer Calhoon "not only accused but he exploited the charges (which were actually false) in a fashion tantamount to an effort to extort from the Judge a decree favorable to those in whom he was interested, with the companion effort to extort an increase in his own fees." *Calhoon,* 102 So.2d at 609.

[3] Canon 1 of the Rules of Ethics Governing Attorneys read: **"Whenever there is 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."** *Calhoon,* 102 So.2d at 607. (Emphasis added).

Ten *free speech cases* evaded *by The Florida Bar Brief*

The Florida Bar failed to acknowledge binding precedent that "A communication made in good faith . . . is privileged if made to a person having a corresponding interest or duty, even if it would otherwise be actionable" *Nodar v. Galbreath,* **462** So.2d 803, 809 (Fla. 1984).

Nor does the Florida Bar address even *one* of the ten (10) **First Amendment opinions from the U.S. Supreme Court cited in Ray's brief** which are relevant to the proper analysis of this case.[4]

To be considered "false", Ray's statements must neither be "pure opinion" nor otherwise privileged. Ray's statements are privileged as opinion:

> We recognize that **expressions of opinion are privileged** and are protected by our constitutions. . . . Pure opinion occurs when a defendant makes a comment or opinion based on facts which are set forth in the article or which are otherwise known or available to the reader or listener as a member of the public. *** * * [T]he court must examine the statement in its totality and the context in which it was uttered or published. The court must consider all of the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement and consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.**

Hoch v. Rissman, Weisberg, Barrett, 742 So.2d 451, 459-60 (Fla. 5"' DCA 1999) (emphasis added).

Whether statements like Ray's are protected by a constitutional privilege was discussed in *Seropian v. Forman, 652* So.2d 490 (4th DCA 1995), a defamation action against a public

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[4] *E.g. Garrison v. Louisiana,* 379 U.S. 64 (1964) Ray Amended Initial brief, 39.

official where the court found that there was a privilege.[5]

Reaffirming this Court's recognition of Florida's long-standing privilege which speakers and writers enjoy in the political processes, the Fourth District wrote: "One of the recognized occasions for such a privilege involves the discussion or debate on public issues or the 'statement of a citizen to a political authority regarding matters of public concern."' *Nodar* v. *Galbreath,* 462 So.2d 803 at 810 (Fla. 1984). ***Seropian, 652*** So.2d at 497.

The Florida* Bar *transforms a question into an accusation

The Florida Bar's Brief goes so far that it intentionally mutates Ray's careful question: "Does Judge Montante expand his concealment of evidence with cunning and guile and tampering with the official record?" into The Florida Bar's unfounded allegation of "false statements [which] concerned the respondent's accusation that the judge had tampered with the Miami immigration court computer. . . ." TFB brief, 19, 26 and 32 (Emphasis added).

In another equally outrageous accusation, The Florida Bar's brief perverts yet another of Ray's carefully detailed statements of opinion that Montante's trial conduct was "one more discouraging

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[5] The court found:

> **It is clear, however, from context** that none of these other statements are sufficient to support a claim of defamatory falsehood by a public official in that **they are clearly labeled opinions with statements of undisputed facts to support them,** and that none of them was supported by proof of actual malice, i.e. knowing falsity or reckless disregard of whether they were true or false.

Seropian, 652 So.2d at 493 (emphasis added).

example of . . . Nazi Justice. . .” into The Florida Bar's version that “Mr. Ray had no basis in fact to accuse Judge Montante of being a Nazi, among other things." TFB brief at 32 (emphasis added). Later, The Florida Bar repeats this falsehood, "[a] lawyer who accuses a judge of being a Nazi. . . .” TFB brief at 39. The truth is that never has Michael Ray “accuse[d]” Judge Montante of "being a Nazi". It is both inflammatory and a misstatement of reality for The Florida Bar to falsely state that Ray made such an accusation, and such reckless or deliberate statements by The Florida Bar in a brief to the Supreme Court of Florida ought not be allowed. Such misstatements by The Florida Bar are especially inappropriate here when it is The Florida Bar which seeks to punish Respondent for statements which The Florida Bar contends are false or with reckless disregard for the truth.

Context not considered by TFB brief nor by Referee as required

The Referee's findings of fact prepared by The Florida Bar consists only of a verbatim recitation of the complaint of The Florida Bar and are contradicted by the evidence. **The Referee improperly excluded other testimony and documents which would have further established that Ray had a reasonable basis to believe that his statements are true.** See Ray's Initial Brief at 26, n. 49 & **32,** n. 55 The Referee's fact findings and The Florida Bar failed to consider the context within which Ray made his statements. Accordingly, this Court may set aside the fact findings as clearly erroneous.

Ray's statements in his letters to the Chief Judge were privileged.

The Referee failed to consider that Ray's statements were privileged because Ray made his statements in the context of good faith complaint letters to the chief immigration judge. Ray's complaints about Judge Montante alleged serious wrongdoing.

This Court recently removed a circuit judge from office for, *inter alia,* **entering an order improperly implying that two attorneys were guilty of unethical conduct** without allowing an opportunity to respond, **denying a proper motion for recusal and then entering an order improperly and inaccurately criticizing defense counsel** without affording them an opportunity to respond, and **falsely accusing an attorney of attempting to make ex parte contacts with him.** *Inquiry concerning a Judge, In Re: Shea,* 25 Fla. L. Weekly S233 (Fla. March 23, 2000).

Here, Ray lodged similar complaints against Judge Montante in his November 14, 1996 letter to the Chief Immigration Judge: "Judge Montante **falsely and with malice accused counsel Ray in a** written **order: . , .** that the United States Chief Immigration Judge has reprimanded and/or admonished counsel in writing because of ongoing unprofessional conduct. . ." EX.2 at 4, ¶6 (emphasis added).

Summary judgment for Ray was due because no facts were in dispute

A lawyer may be found to have violated Rule 4-8.2(a) *only* if the evidence clearly and convincingly establishes that **the lawyer made statements he or she knew to be false or with reckless disregard for the truth or falsity** concerning the qualifications or integrity of a judge. Because sworn evidence in support of Ray's

summary judgment motion established that **The Florida Bar had no evidence to prove Ray knew his statements to be false or with reckless disregard for the truth or falsity** concerning Judge Montante, the Referee should have granted summary judgment.

The Florida Bar's brief suggests that Ray filed his motion for summary judgment "without any affidavit or offer of testimony and contended that no factual dispute existed." TFB brief, 22. However, Ray did in fact support his motion for summary judgment with **The Florida Bar's own sworn answers to interrogatories which revealed the absence of any material issue of fact.**

Specifically, The Florida Bar's sworn answers astonishingly admitted that it had **no facts to support its claim** that Ray knew his statements to be false.[6] Thus, it is clear that The Florida Bar was required to come forward with counterevidence sufficient to reveal a genuine issue. Instead, The Florida Bar provided only the conclusory Affidavit that Ray's statements "are false". See : **APPENDIX A-22** attached to Ray's Amended Initial Brief. This conclusory statement does not reveal *why* Ray's statements are supposed to be false. Nor does this bare assertion that Ray's statements "are false" rise to the level of sufficient counterevidence to reveal a genuine issue.

'Indeed, The Florida Bar's Interrogatory answer impermissibly attempted to shift its burden of proving the falsity of the statements to Respondent Ray to prove that they were not false: **"Respondent's failure to advise the Florida Bar and/or the Grievance Committee of any facts upon which to conclude that those statements are true."** See : Respondent's Motion for Summary Judgment, 3, and The Florida Bar's Response to First Set of Interrogatories, ¶ 3, attached to Ray's Amended Initial Brief, **APPENDIX A-21**

Very recently, this court spoke about summary judgment procedure in a disciplinary case:

> Significantly, however, in the summary judgment context at issue here, "once [the movant] tenders competent evidence to support his motion . . ., the opposing party must come forward with counterevidence sufficient to reveal a genuine issue. It is not enough for the opposing party merely to assert that an issue does exist." Landers v. Milton, 370 So.2d 368, 370 (emphasis added). . . . Rather it is "incumbent upon [the opposing party] to come forward with competent evidence revealing a genuine issue of fact," Landers, 370 So.2d at 370

The Florida Bar v. *Mogil,* 25 Fla. L. Weekly S562, (Fla. July 13, 2000).

The Florida Bar's generic assertion that Ray's statements "are false" was woefully insufficient to establish that Ray knew his statements to be false. Accordingly, the Referee erred in denying Respondent Ray's motion for summary judgment.

The Florida Bar and the Referee ignore prohibition on aggravation

The Referee's recommendation of a finding of guilt is unjustified because the Report of Referee neither discusses why any of Michael Ray's defenses were unfounded by the evidence presented, nor even acknowledges that Ray presented any defenses. Respondent's defenses included federal and Florida constitutional privilege as well as a Florida lawyer's obligation to report perceived judicial misconduct. The rejection of these defenses without comment resulted in a Report and recommendation of guilt which violates important constitutional guarantees, and the recommendation of a finding of guilt is therefore unfounded.

This Court has clarified that when a lawyer in a disciplinary proceeding persists with a claim of innocence, the Florida

Standards for Imposing Sanctions **preclude** enhancing any recommended penalty with an aggravating factor on the basis that the lawyer refuses to acknowledge the wrongful nature of his or her conduct.

The Florida Bar argues that Respondent deserves a public reprimand because the attorney in the case of The Florida Bar *v. Flynn,* 512 So.2d 180 (Fla. 1987), agreed to accept a public reprimand after submitting a conditional guilty plea in exchange for an agreed measure of discipline.[7] The Florida Bar also relies on *The Florida Bar v. Weinberger, 397* So.2d *661* (Fla. *1981)* where a lawyer after suffering adverse rulings in separate cases filed various pleadings and made public statements denigrating the courts and the administration of justice; including multiple irresponsible and intemperate attacks on the judiciary.

From these two inapplicable cases, The Florida Bar suggests that Ray is deserving of a public reprimand, because it charges that "Mr. Ray has not apologized and has shown no remorse. It is evident that the process and referee's findings are completely lost on [Michael Ray]" TFB brief, 38

The thrust of The Florida Bar's position - that a lawyer deserves an aggravated penalty because he has not apologized or **shown remorse - was recently rejected by this court** in a case

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[7] In Flynn, the lawyer had accused a judge of improper **conduct; i.e.** that the judge had wronged him by making record findings that he had rendered inadequate legal services to his client, and threatened to file a judicial grievance against the judge unless the judge withdrew or altered his findings in this regard. *512* So.2d at 181. Flynn was found to have violated three (3) separate Disciplinary Rules including former 8-102(B) making false accusations against a judge.

involving the very same aggravating Standard, 9.22(g) of the Florida Standards for Imposing Lawyer Sanctions.[8] This Court ruled that an aggravating factor of

> [r]efusal **to acknowledge wrongful nature of conduct does not apply if a respondent attorney denied (and continues to deny) the misconductatissue.** Under similar circumstances, this Court has held that "[i]t was improper for the referee to consider in aggravation the fact that [the subject attorney] refused to acknowledge the wrongful nature of his conduct. [the subject attorney's] claim of innocence cannot be used against him."

The *Florida* Bar v. *Mogil*, 25 Fla. L. Weekly S562, S565 (Fla. July 13, 2000)(emphasis added, citations omitted).

Because the Referee explicitly referred to this prohibited aggravating factor 9.22(g), and failed to consider any mitigating factors,[9] recommendation of a public reprimand is improper. The recommended penalty is therefore unwarranted and unlawful.

The Florida Bar's Brief misstates the arguments of the Amici

Under the guise of a "Response to Amici Curiae", The Florida Bar's Answer Brief misstates, misrepresents and distorts the arguments set forth in the briefs of the Amici.

The Florida Bar brief falsely claims that AILA South Florida cites no authority for the proposition that "the immigration bar is to complain directly to the chief immigration judge." TFB brief, 39. Yet, AILA South Florida cited **both** 8 C.F.R. 3.9(b) and the

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[8] Florida Standards for Imposing Lawyers Sanctions 9.22(g) provides: "Factors which may be considered in aggravation. Aggravating factors include: (g) refusal to acknowledged wrongful nature of conduct".

[9] If disciplined, Ray merits a mitigated sanction for: no prior disciplinary record 9.32(a); no dishonest or selfish motive 9.32(b); and, his exemplary character and reputation 9.32(g).

transcript of testimony of Ira Kurzban, Esq. TR2-58 AILA S.Fla. brief, 7. **Next,** The Florida Bar brief claims:

> It is astonishing that these organizations would submit a brief to this court in support of a lawyer who accuses a judge of being a Nazi. . . . More stunning is their support of an attorney who could testify to the preposterous position that victims of gas chambers in Nazi Germany may have had an opportunity to seek counsel or file documents prior to their naked and hairless eradication in showers filled with deadly gas. The Florida Bar is not responsible for the respondent's warped version of reality and history. TFB brief, 39-40

However, despite The Florida Bar's inflammatory suggestion that Ray took such a "preposterous" position, in fact, it was The Florida Bar counsel who asked Ray whether due process was provided:

> BY MS. LAZARUS: You use the phrase Nazi justice in your letter, Mr. Ray. As far as you know, was there due process in Nazi Germany to the people that were sent to death camps?
>
> MR. RAY: Not **as far as I know.**
>
> . . .
>
> BY MS. LAZARUS: Do you know for a fact whether or not any of the people that were sent to gas chambers had an opportunity to retain counsel?
>
> Mr. **RAY: Not that I'm aware of.**
>
> Q: Are you aware of whether or not people that were sent to gas chambers in Nazi Germany had an opportunity to have lawyers let's say file something called a Notice of Filing Exhibits on their behalf?
>
> A: They may have. I **don't know, but I doubt it.**

TR3-257-58 (emphasis added),

The Florida Bar's brief wrongly argues that AILA National claimed Ray's statements were "negligent, ill advised or lacking in good taste." TFB brief, 42. AILA National did not say that. AILA National's brief stated that it "does not take a position as to the propriety or tone of the statements made by the Respondent, Michael D. Ray". AILA National brief, 9. Instead, AILA National argued that an attorney should not be disciplined "for conduct that is

negligent, ill-advised or even lacking good taste." Id. at 4.

The Florida Bar argues Ray should have complained to it instead

The Florida Bar's brief claims that "had Mr. Ray truly believed that he was duty bound to expose a corrupt judge a complaint would have been filed with The Florida Bar." TFB brief, 39. Yet, The Florida Bar has known of Mr. Ray's complaints since it began this inquiry. So, what has The Florida Bar done about Ray's complaints? Apparently nothing. If the Referee's Report is upheld here, and Ray is disciplined simply for using words of which The Florida Bar expressly disapproves, then will there be incentive for other lawyers to fulfill their duty imposed under Rule 4-8.3?

CONCLUSION

For the foregoing reasons the Report of the Referee deserves to be rejected because its factual findings lack evidentiary support and are clearly erroneous; 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.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing 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 23rd day of August, 2000, to:

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