IN THE SUPREME COURT OF FLORIDA

THE FLORJDA BAR,

Complainant,

v.

HENRY JOHN MARTOCCI,

Respondent.
/

Case No. SC953 15
[TFB Case Nos. 199%32,033 (18B) and 199%32,145 (18B)]

THE FLORTDA BAR'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

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

The transcript of the final hearing held from September 2 1, 1999, through September 23, 1999, shall be referred to as "T," followed by the volume number and the cited page number(s).

The Report of Referee dated October 27, 1999, will be referred to as "ROR," followed by the referenced page number(s).

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

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

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STATEMENT OF THE CASE

On December 7, 1998, the Eighteenth Judicial Circuit Grievance Committee "B" found probable cause against respondent and the Bar filed its formal Complaint on April 14, 1999. The Honorable Cynthia G. Angelos was appointed as referee on April 22, 1999. The final hearing was conducted from September 21-23, 1999. At the final hearing, attorney Thomas H. Yardley entered his appearance as respondent's co-counsel. At the conclusion of the final hearing, the referee orally rendered her findings of fact and recommendations as to guilt and discipline.

On October 25, 1999, the Bar forwarded a motion for extension of time to the Supreme Court of Florida on behalf of the referee requesting additional time for the referee to submit her report in that the 180-day time period had expired. This Court granted the Bar's motion on November 5, 1999, and the referee was given until November 25, 1999, within which to file the required report. The referee issued her report on October 27, 1999, finding respondent guilty of violating R. Regulating Fla. Bar 4-8.4(d) and recommended he receive a public reprimand to be administered by appearance before the Board of Governors of The Florida Bar, a two-year period of conditional probation and that respondent pay the Bar's costs totaling $5,187.62.

On November 19, 1999, respondent forwarded a Petition for Review of

Referee's Report to this Court. The Board of Governors of The Florida Bar considered the referee's report at its December, 1999, meeting and voted not to seek an appeal of the referee's recommendations. On December 9, 1999, respondent moved for an enlargement of time to file his Initial Brief and on December 15, 1999, this Court gave respondent until January 19, 2000, to file his brief. The order specifically stated that this Court would not grant any further extensions of time. On January 20, 2000, respondent sought a second enlargement of time to file his brief, which the Bar opposed, Respondent did not serve his Initial Brief until January 22, 2000, which the Bar moved to strike as being untimely. On February 15, 2000, this Court granted respondent's request for an enlargement of time to file his Initial Brief and allowed him to and including nunc pro tunc, January 27, 2000, in which to file his Initial Brief. On February 15, 2000, this Court denied the Bar's Motion to Strike Respondent's Initial Brief as being untimely.

STATEMENT OF THE FACTS

At the outset, the Bar would note that respondent's Statement of the Case in his Initial Brief contains numerous items not found as fact by the referee and a considerable amount of argument as well as respondent's opinions. For these reasons, the Bar is setting forth the facts as found by the referee.

Respondent represented Francis Berger in a dissolution of marriage/child custody action and a dependency action, Case Nos. 96-03231 and 96-05759, respectively (hereinafter referred to as the "Berger proceedings") (ROR-A2). During the course of the Berger proceedings, respondent made remarks designed to belittle and humiliate the opposing party, Florence Berger, and her attorney, Diana Figueroa (ROR-A2; R-Ex. 1 at pages 99-101; B-Ex. 5 at pages 37-38; and B-Ex. 4 at pages 42, 45, and 46).

Immediately after a hearing in December, 1996, and in the presence of Doris Rago, a realtor, respondent called Mrs. Berger a "nut case" (ROR-A2; T Vol. I p. 91). Respondent also called Mrs. Berger a "nut case" during conversations he had with Dr. Jacqueline Jennette (T Vol. I pp. 34, 36 and 65).

During the deposition of Cynthia Flachmeier (B-Ex. 2), respondent made facial gestures to and stuck out his tongue at Mrs. Berger (ROR-A2; B-Ex. 2 at page 30; T Vol. I pp. 106 and 146; T Vol. II pp. 23 1-232). Respondent also berated

Ms. Figueroa in front of her client, saying that she needed to go back to school, and he made comments that she did not know the law or the rules of procedure (ROR-A2; B-Ex. 4 at pages 45 and 46; B-Ex. 5 at pages 35 and 37-38; R-Ex. l at pages 99 through 101; T Vol. 11 pp. 236 and 245-248).

On or about June 24, 1998, respondent again berated Ms. Figueroa in front of her client. In a courthouse elevator he called her "stupid," an "idiot," and told her to "go back to Puerto Rico" in reference to her law school education (T Vol. 1 pp. 122-125 and 170; T Vol. II p. 240).

During the deposition of Dr. Jeffrey Williamson, respondent grabbed the telephone out of Ms. Figueroa's hand and uttered the expletive "bitch" (ROR-A2; T Vol. I pp. 79 and 128-129; T Vol. II p. 239; T Vol. V p. 537) loudly enough for Pamela Walker, a judicial assistant who was on the other end of the telephone, to hear (T Vol. I p. 79).

On May 8, 1999, during a recess of the court in the Berger proceedings, James Paton, the father of Florence Berger, entered the courtroom. Respondent said, "Here comes the father of the nut case" (ROR-A3; T Vol. I p. 184). Mr. Paton approached respondent and said, "If you have something to say to me, say it to my face, not in front of everyone here in the courtroom" (ROR-A3) to which respondent responded by approaching Mr. Paton (T Vol. 1 p. 184). With his face

only inches away from Mr. Paton's, respondent screamed in Mr. Paton's face and threatened him (ROR-A3; T Vol. I p. 185; T Vol. II pp. 221 and 225). When attorney Diana Figueroa attempted to intervene, respondent told her to "go back to Puerto Rico" (ROR-A3; B-Ex. 3 at page 6; T Vol. I pp. 111 and 186; T Vol. II p. 205; T Vol. III pp. 29 1, 384 and 45 1). Respondent's confrontation with Mr. Paton, a member of the public, ended only when a bailiff entered the courtroom (ROR-A3; T Vol. IV pp. 465-467; R-Ex. 5).

As to Count I, the referee found respondent guilty of violating R. Regulating Fla. Bar 4-8.4(d) for engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice, including knowingly, or through callous indifference, disparaging, humiliating, or discriminating against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic (ROR-A4). With respect to Count II, the referee specifically found that respondent's threatening behavior and derogatory remarks to Mr. Paton violated rule 4-8.4(d) and that respondent's ethnic slur directed to Ms. Figueroa was disparaging and unethical, and as such, violated rule 4-8.4(d) (ROR-A.4).

As discipline, the referee recommended that respondent be publicly

reprimanded by an appearance before the Board of Governors of The Florida Bar, pay the Bar's costs, and be placed on a two-year period of probation which required respondent to contact Florida Lawyers Assistance, Inc., within 30 days of entry of this Court's order approving the recommendation, and arrange for an evaluation for mental health and anger management. If treatment should be recommended, respondent would be required to actively participate in the program offered by Florida Lawyers Assistance, Inc., by signing a rehabilitation contract with that organization incorporating the recommendations from the evaluation. In addition, respondent would also be required to sign the necessary release of information forms permitting the Bar and Florida Lawyers Assistance, Inc., to receive copies of the evaluation and any progress reports, Respondent would have to consent to open communication among the therapists and/or medical services providers for the purpose of providing the Bar with evidence of respondent's compliance with the recommendations. If the evaluation should determine that respondent is in need of anger management counseling, he would have to attend therapy sessions with a licensed therapist for the period of time set forth in the recommendation. Respondent would be required to pay all the associated probation costs.

SUMMARY OF THE ARGUMENT

A referee's findings of fact are presumed to be correct and will be upheld absent a clear showing that the findings are without any support in the record. The Florida Bar v. Summers, 728 So. 2d 739, 741 (Fla. 1999). Herein, the referee's finding of fact are supported by the record which shows that the Bar proved by clear and convincing evidence that respondent disparaged, humiliated and discriminated against a litigant and opposing counsel and that he verbally threatened a witness in the Berger proceedings, Respondent's conduct violated rule 4-8.4(d) as it is prejudicial to administration ofjustice.

An appeal is not a trial de novo and merely arguing that the referee chose to believe one witness over another is insufficient to overturn the referee's findings. The Florida Bar v. Fredericks, 73 1 So. 2d 1249, 125 1 (Fla. 1999). The referee is in the best position to judge credibility and therefore acts as this court's fact finder. The Florida Bar v. Carricarte, 733 So. 2d 975, 978 (Fla. 1999).

After three days of trial, it was found that throughout his representation of Francis Berger, respondent undertook a campaign to intimidate, degrade, humiliate, and embarrass opposing counsel and the opposing party. The Bar met its burden of proof by presenting letters and deposition transcripts containing respondent's disparaging statements. Numerous witnesses testified of respondent's disparaging

behavior. Should those attorneys who take offense to respondent's admittedly gender and ethnic based "sense of humor" or his "raw, New York sense of humor" (T Vol. III p. 406), or who take offense to some of the little things that slip out of respondent's mouth in the heat of the moment, merely obtain a "bit of a thicker skin . , . [or] pick something else to do for a living" (T Vol. VI pp. 705-706)? The Bar would submit no. Attorneys are the care givers and the ethical and moral heartbeat of our communities. "When it becomes acceptable to make life miserable for your opponent. , . when it is acceptable to the court for an attorney to take center stage instead of giving it to the client and his case . . . when common courtesy, good sportsmanship and civility fly out of the window to parts unknown, it is time to stop." [1] Zealous representation of a client does not require contentiousness or combativeness. Lawyers should demonstrate respect for the legal system and for those who serve it. How can the public respect the legal system and lawyers when lawyers show disrespect? Respondent's discriminatory conduct was committed while performing his duties as an attorney in connection with the Berger proceedings. Respondent has ignored the seriousness of his misconduct and has failed to take responsibility for his actions. Rather, he lashes out at everyone else

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[1] Paula Stephenson, "Aspirational Civility," The Briefs, Orange County Bar Association, 79 (November, 1999), 7.

involved in the Berger proceedings who opposed his client's position. An attorney with his years of experience should be aware that such conduct brings into disrespect the profession and the legal system itself. Respondent's course of conduct warrants nothing less than a public reprimand and probation with the requirement that he undergo an evaluation to determine the most appropriate course of action to be taken so as to ensure that such conduct does not continue in the future. The referee's recommendation as to discipline is supported by the case law and the Standards for Imposing Lawyer Sanctions.

ARGUMENT

POXNT I

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY THE RECORD

A referee's findings of fact are presumed to be correct and will be upheld absent a clear showing that the findings are without any support in the record. Summers, supra, at 741. In order to successfully attack a referee's findings, the party seeking review must demonstrate that there is no evidence in the record to support the findings or that the record evidence clearly contradicts the referee's conclusions. Carricarte, supra, at 977. The referee herein set forth in her report citations to the record to support her findings of fact. That she chose to believe some witnesses over respondent is not a sufficient basis to prove that her findings lack support in the record, Fredericks, supra, at 1251. It is also insufficient to merely argue that there is contradictory evidence when there is also competent, substantial evidence in the record to support the referee's findings of fact. The Florida Bar v. Schultz, **712** So. 2d 386, 388 (Fla. 1998). This is because a referee is in the best position to judge credibility and therefore acts as this court's fact finder. Carricarte, supra, at 978. An appeal is not a trial de novo and this Court is precluded from reweighing the evidence and substituting its judgment for that of the referee. The Florida Bar v. Cibula, 725 So. 2d 360, 362 (Fla. 1998).

The record herein includes an abundance of documentary evidence

concerning respondent's behavior toward Ms. Figueroa and Mrs. Berger. Various witnesses testified about respondent's verbal assaults and racial and ethnic insults. Respondent himself admitted to telling Ms. Figueroa to "go back to Puerto Rico" and even admitted at the bench conference before Judge Richardson at the May 8, 1998, hearing in the Berger proceedings that his remark to her was "a form of derogatory statement." (B-Ex. 3 at page 8).

The Bar met the clear and convincing evidentiary standard with respect to the fmding that respondent called Ms. Berger a "nut case." Doris Rago's testimony that respondent called Ms. Berger a "nut case" after a hearing was not unclear nor was she confused about what had transpired. She distinctly recalled that respondent's language toward Mrs. Berger was intimidating (T Vol. I p. 91) and she recalled the term "nut case" without any prompting by counsel (T Vol. I p. 91). She also stated that she had been frightened by respondent's demeanor because he was speaking loudly and he had come within one or two feet of Mrs. Berger and her (T Vol. I pp. 90-91). Ms. Rago's testimony that respondent used the term "nut case" in referring to Mrs. Berger was also supported by the testimony of Dr. Jacqueline Jennette, Dr. Jennette, who holds a master's degree in human relations and management and a doctorate degree in psychology (T Vol. I p. 3 1), clearly recalled that respondent, on more than one occasion, had used the term "nut case" and "crazy" in referring to

Mrs. Berger (T Vol. I pp. 34, 36, 37, 65, 71, 73). Respondent appears to believe his derogatory statements about Mrs. Berger to Dr. Jennette were not prohibited by the Rules Regulating The Florida Bar as Mrs. Berger was not present when the statements were made about her. Whether Mrs. Berger was actually present and heard respondent's insults directed toward her is irrelevant under the requirements of rule 4-8.4(d). The rule simply states that an attorney may not "knowingly, or through callous indifference, disparage . . . litigants [and] witnesses . . . on any basis." Further, the evidence clearly shows that respondent's statements were made about a litigant to a potential witness in the Berger proceedings.

Respondent argues that Dr. Jennette lacked credibility due to the fact that she had filed a grievance against respondent and that Mrs. Berger had hired her services in connection with the dependancy case (T Vol. I p. 50). Clearly the referee evaluated Dr. Jennette's credibility in light of such facts and believed her testimony regarding respondent calling Mrs. Berger a "nut case." Other than his veiled reference to Dr. Jennette's lack of credibility due to the above two facts, respondent does not set forth the reasons he believes Dr. Jennette's testimony was so imprecise or confused that it did not meet the clear and convincing standard. In fact, a review of Dr. Jennette's testimony shows it to be quite clear and precise concerning respondent's repeated use of derogatory language in referring to Mrs. Berger.

Respondent's intimidating and harassing conduct also occurred during the deposition of Cynthia Flachmeier. After he made a statement that "do-do happens," Ms. Figueroa objected to his remarks and his inappropriate facial expressions (B-Ex. 2 at page 30). Ms. Figueroa stated that if respondent's behavior continued, she would stop the deposition. Respondent's reply to Ms. Figueroa was unintelligible to the court reporter. The fact that the court reporter was not able to understand and transcribe respondent's reply to Ms. Figueroa is not clear and convincing evidence that he did not engage in improper behavior. Ms. Figueroa's response to this unintelligible statement was to place on the record that respondent had his mouth open and had made inappropriate suggestions to her which she found offensive (B-Ex. 2 at page 30). Also, what transpired during the deposition was further clarified by the testimony of Mrs. Berger and Ms. Figueroa in the Bar proceeding. Mrs. Berger testified that respondent stuck his tongue out at her and made faces at her, which she reported to Ms. Figueroa (T Vol. I p. 106). In addition, Mrs. Berger testified that respondent whispered to her that she was sick and needed help (T Vol. I p. 106). Ms. Figueroa testified that Mrs. Berger told her respondent had stuck his tongue out at her (T Vol. II pp. 23 1-232). Although at the final hearing respondent argued that he did not engage in such conduct during the deposition, clearly the referee chose to disbelieve him and to believe the testimony of Mrs. Berger and Ms.

Figueroa.

With respect to the encounter between respondent, Ms. Figueroa and Mrs. Berger in the elevator at the courthouse after leaving a hearing in the Berger proceedings, it is true Ms. Figueroa did not testify respondent called her an "idiot" or "stupid." It was Mrs. Berger who testified that respondent used these terms to insult Ms. Figueroa both while they were in the closed elevator and after they had exited the elevator (T Vol. I pp. 122- 124). Ms. Figueroa confirmed that respondent verbally insulted her in the elevator (T Vol. IT pp. 240-241). Mrs. Berger also testified that respondent told Ms. Figueroa that she needed to go back to law school because she did not know what she was doing (T Vol. I p. 123) and Ms. Figueroa testified that respondent implied she did not know what she was doing because she had gone to law school in Puerto Rico (T Vol. II p. 240). There was no conflict in the testimony of these two witnesses. Rather, the witnesses recalled different insults. The testimony of both was clear and convincing that respondent entered the elevator and commenced insulting, intimidating and demeaning Ms. Figueroa in front of her client (T Vol. I pp. 122-126; T Vol. II pp. 240-242).

Concerning respondent's use of the word "bitch" while engaged in a legal matter concerning the deposition of Dr. Jeffrey Williamson, the Bar submits it does not matter whether respondent uttered the profanity during the deposition or

afterwards. Respondent uttered it loudly enough that he was clearly heard by the judicial assistant on the other end of the telephone (T Vol. I pp. 79 and 81), opposing counsel (T Vol. II p. 239) and the opposing party (T Vol. I p. 129). Furthermore, the telephone conversation that was ensuing at the time was part of a legal proceeding. Whether or not the deposition had been terminated is not an issue under the requirements of rule 4-8.4(d). Regardless of the identity of the person to whom respondent was directing his profanity, his use of such language during a legal proceeding, especially given the pattern exhibited by him in this case of demeaning opposing counsel and the opposing party, makes such an utterance not just unprofessional but unethical.

Respondent presents no evidence in his brief to support his argument that the referee failed to consider the testimony from respondent's witnesses who cast aspersions on Ms. Figueroa's credibility and veracity and who supported respondent's reputation for honesty and professional ability. Respondent's parade of witnesses against Ms. Figueroa was an unsuccessful attempt to shift the blame for his conduct. Also, the record clearly showed that the referee considered respondent's reputation for honesty and professional ability, At page four of the report (ROR-A4), the referee stated that she noted for the record that respondent was an "able advocate for his client and has a reputation for such." The findings in

the report of Referee are supported by a record which is replete with statements made by respondent which were designed to belittle and humiliate the opposing party and her attorney (R-Ex. 1 at pages 100- 10 1; B-Ex. 5 at pages 37-38; B-Ex. 4 at pages 42, 45 and 46).

POINT II
RESPONDENT'S CONDUCT WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE

The referee found that respondent engaged in conduct in the connection of the practice of law that was prejudicial to the administration of justice by disparaging, humiliating or discriminating against a litigant, Mrs. Berger, and her counsel, Ms, Figueroa, by threatening and making derogatory statements to them. Respondent argues that such conduct is not prejudicial to the administration of justice.

Respondent contends that the Bar must show his conduct involved dishonesty, fraud, deceit or misrepresentation. Nowhere in the rules or the case law are dishonesty, fraud, deceit or misrepresentation a requirement for finding a violation of rule 4-8.4(d). Respondent's reliance on Berman v. State, 24 Fla. L. Weekly D2684 (Fla. 1st DCA Dec. 1, 1999), The Florida Bar v. Martocci, 699 So. 2d 1357 (Fla. 1997), and The Florida Bar v. Pettie, 424 So. 2d 734 (Fla. 1982), is misplaced, In Berman, the Fourth District Court of Appeals was applying this Court's definition of contempt[2]. Berman, supra, at page 2685. Mr. Berman had pounded his fist and yelled "yessss" upon the reading of the verdict and the trial

[2]Contempt was defined as being any act calculated to embarrass, hinder, or obstruct the administration ofjustice.

court held him in direct criminal contempt. The appellate court found that **Mr.** Berman's conduct did not constitute willful, intentional or substantial interference and/or interruption of the orderly conduct of the court's business sufficient to support a finding of direct criminal contempt, where the trial court had not given any prior warnings or explicit directions not to display reactions to the verdict, Berman, supra, at page 2685. The appellate court went on to indicate that it could not conclude from the record that Mr. Berman's behavior tended to hinder the administration of justice or was calculated to cause harm. Further the appellate court indicated that the trial court's factual finding did not establish beyond a reasonable doubt that Mr. Berman's conduct, though undignified and unprofessional, was disruptive and harmful to the integrity of the court as such to support a finding of direct criminal contempt. The case deals with direct criminal contempt not and with whether Mr. Berman's conduct would support an ethical violation of rule 4-8.4(d).

Respondent's reliance on Pettie, supra, is also misplaced as Pettie concerned an attorney who engaged in criminal activities not involving the practice of law. This Court found that Mr. Pettie's involvement in a criminal conspiracy to import marijuana did not constitute conduct prejudicial to the administration of justice. Herein, all of respondent's actions occurred in the context of his representation of

Mr. Berger in the dissolution and dependancy actions. Rule 4-8.4(d) clearly applies to an attorney's discriminatory conduct in connection with the practice of law. See comments to rule 4-8.4(d), R. Regulating Fla. Bar.

Respondent next argues that his conduct herein should be treated like that in his prior disciplinary case, Martocci, supra, where this **Court** found respondent not guilty of engaging in conduct prejudicial to the administration of justice. Respondent's conduct in that case, which consisted of making demeaning comments to opposing counsel, was an isolated incident that occurred after a deposition in one case. Further respondent's behavior was mitigated by respondent's health and personal problems as well as the conduct of opposing counsel. This Court did caution that respondent's conduct was "patently unprofessional" and it was embarrassed for all Bar members that such "childish and demeaning conduct" could occur in the justice system. This Court went on to state that it hoped that by publishing the offending and demeaning exchange which took place between respondent and opposing counsel it would make attorneys in this state more aware that they have an "obligation to adhere to the highest professional standards of conduct no matter the location or circumstances in which the attorney's services are being rendered." Martocci, supra, at page 1360. It would appear that this Court's warning had no lasting impression on respondent,

Respondent's misconduct here, although similar to his prior unprofessional but not unethical conduct, is more egregious than what occurred in Martocci, supra. Here, there was a clear pattern of ongoing conduct where respondent demeaned and disparaged opposing counsel and the opposing party (ROR-A2). Respondent's smear campaign towards Ms, Figueroa included writing a letter to the chair of the Eighteenth Judicial Circuit Grievance Committee in response to Mr. Paton's grievance in this matter (B-Ex. 6 at page 3), wherein he stated that to his "way of thinking, there is only one thing worse than incompetency and that is a combination of incompetency and arrogance for which Ms. Figueroa in my opinion is a poster girl." He went on to state that the questions she asked during depositions were "sophomoric and [indicated] a total lack of ability or knowledge." Unlike Martocci, supra, there is no evidence here that Ms. Figueroa engaged in any conduct to intentionally antagonize respondent. In addition, respondent's ongoing pattern of unethical conduct extended beyond demeaning the opposing party and opposing counsel. During a loud, heated argument in a courtroom with Mr. Paton, the father of the opposing party, respondent threatened to "kick the living sh--" out of the elderly gentleman or "knock him on his a--" (T Vol. I p. 184; T Vol. II pp. 225 and 249).

The case law supports the referee's recommendation that respondent be found

guilty of violating rule 4-8.4(d). In The Florida Bar v. Nunes, 734 So. 2d 393 (Fla. 1999), an attorney was disciplined for making disparaging remarks about opposing counsel during the course of a civil suit and the subsequent appeal. Mr. Nunes made baseless accusations that opposing counsel stole the court file in the case, had removed documents from another court file in a different case and would soon cause it to disappear as well, and showed disrespect for the county court judges. He made accusations against a judge's integrity that were unfounded and unsupported and, in an appellate brief, stated that opposing counsel believed he would be able to achieve certain results because a female judge had been assigned the case. Similarly to respondent, Mr. Nunes argued that any mistakes he made were simply the result of his overzealous representation of his client. This court suspended Mr. Nunes for three years and required that he complete twenty-five hours of continuing legal education in ethics during his suspension.

In The Florida Bar v. Wasserman, 675 So. 2d 103 (Fla. 1996), the attorney was disciplined for swearing at a judicial assistant over the telephone after she gave him an unfavorable response to a question asked of the judge presiding over the case the attorney was handling. In another incident, Mr. Wasserman lost his temper when the court entered a ruling unfavorable to his client and he challenged the judge to hold him in contempt. Like respondent, Mr. Wasserman admitted his

conduct was inappropriate but unsuccessfully argued that it was justified because of his heavy caseload, the details of the litigation, or as mere "theatrics."

In The Florida Bar v. Adams, 641 So. 2d 399 (Fla. 1994), an attorney was disciplined for making repeated unsubstantiated and unwarranted accusations that opposing counsel had suborned perjury.

Although not Bar disciplinary proceedings, judges have also been disciplined for making improper remarks during judicial proceedings. The case of In re Inquiry Concerning; Wood, 720 So. 2d 506 (Fla. 1998), involved a judge who was publicly reprimanded for making rude and insensitive remarks to pro se litigants in an uncontested dissolution of marriage action over which he was presiding. The judge's comments embarrassed and humiliated the litigants, In another matter, he made comments attacking the character of a party's attorney who had sought a continuance. He made comments in an action that were critical of an insurance company defendant and of the insurance industry as a whole. He also made comments in a case attacking the credibility of a police officer who was involved in an arrest that was being challenged. He refused to recuse himself in a number of cases where such was clearly required. The judge voluntarily agreed to undergo therapy and anger management counseling, In the case of Inquiry Concerning Golden, 645 So. 2d 970 (Fla. 1994), a judge was publicly reprimanded for making

sexist, racial, crude and profane remarks during proceedings over which she was presiding.

POINT III
THE REFEREE PROPERLY PLACED THE BURDEN OF PROOF ON THE FLORIDA BAR

Respondent contends that the referee, by inquiring as to his past disciplinary case during the closing argument herein, improperly placed upon him the burden of proving his innocence. Respondent had agreed that there would be no separate sanction proceeding should the referee recommend a fmding of guilt and his counsel argued case law in support of his innocence and in support of a lesser sanction than that recommended by the Bar in its closing argument (T. Vol. V pp. 676-680). During his closing argument respondent maintained that his statements regarding opposing counsel's lack of legal knowledge in front of her client were not improper because in the "rough and tumble of litigation, you have to accept the fact that . . . we're not playing by the Marquis of Queensberry rules . . . " (T Vol. VI p. 705). However, he acknowledged that his "why-don't-you-go-back-to-Puerto-Rico comment" was improper but stated that it should only warrant minor misconduct and stated that he had never been sanctioned by either the Florida Bar [3] the New York Bar or by any other Bar association (T Vol. VI p. 707). The referee went on to inquire whether respondent construed this Court's holding in Martocci, supra, as an

[3]Respondent received a private reprimand in 1982 in The Florida Bar v. Martocci, TFB Case No. 1982-03,402(1 XB), administered without an appearance before the Board of Governors of The Florida Bar, as a result of charging a client a clearly excessive fee. This case shall hereinafter be referred to as the "private reprimand case."

indication that the conduct therein was appropriate. She assured respondent that nothing in Martocci, supra, would be used against him in any decision herein (T Vol. VI p. 712). The Bar submits that this does not constitute credible evidence that the referee improperly shifted the burden of proof in this matter from the Bar to respondent. Further, it was respondent who advised the referee he had brought with him this Court's decision in Martocci, supra, and provided her with a copy (T Vol. VI pp. 709-710). There is no indication from the record that the referee based her recommendations and findings on anything other than the evidence presented in this case.

POINT TV
A PUBLIC REPRIMAND IS WARRANTED GIVEN THE FACTS AND THE CASE LAW

The Bar submits that the case law and the Standards for Imposing Lawyer Sanctions warrant imposition of a public reprimand. Further, the nature of respondent's conduct warrants a two-year period of probation with an evaluation by Florida Lawyers Assistance, Inc., for possible anger management and/or mental health assistance. Such discipline would best serve to protect the public, which the Bar submits is the most important of the three purposes of lawyer discipline, as well as be fair to respondent and be severe enough to deter other like-minded attorneys from engaging in the same misconduct. Cibula, supra.

In Wasserman, supra, the accused attorney was suspended from the practice of law for a period of six months for engaging in conduct **that was** similar to respondent's In one case, Mr. Wasserman lost his temper after receiving an unfavorable ruling from a judge and shouted criticisms at the judge, waved his arms, banged the table, and stated his intent to advise his client to defy the court's order. In another case, after getting an unfavorable response to a question asked over the telephone of a judicial assistant, the attorney said to the assistant, "You little motherf-----; you and that judge, that motherf----- son of a b----." The attorney was found guilty of indirect criminal contempt for his conduct. The attorney's

theory was that the judicial assistant made up the words said by the attorney or alternatively, that if he said the words, he thought that he had hung up the telephone. The referee found that such a defense "manifests a serious lack of a sense of the importance of truth and forthrightness in legal proceedings." The attorney had two prior public reprimands, an admonishment, and a 60-day suspension.

In The Florida Bar v. Uhrig, 666 So. 2d 887 (Fla. 1996), the attorney was publicly reprimanded by an appearance before the Board of Governors of The Florida Bar for making disparaging remarks to an opposing party in a letter, Mr. Uhrig represented a client regarding a child support issue. He mailed a disparaging letter which included an inflammatory simile comparing the opposing party to body odor. This Court found that the letter was devoid of any purpose other than humiliation and disparagement. Mr. Uhrig was found guilty of violating Rule 4-8.4(d). In mitigation, he had no prior disciplinary history.

In The Florida Bar v. Perlmutter, 582 So. 2d 616 (Fla. 1991), an attorney entered into a conditional guilty plea for consent judgment for a public reprimand where he admitted that he threatened citizens with multiple lawsuits, threatened to retaliate against citizens who filed complaints with the Bar, indulged in vituperative correspondence on behalf of a client, entered into an agreement for payment of an

excessive referral fee, and entered into an agreement for payment of legal fees to a nonlawyer.

The Florida Standards for Imposing Lawyer Sanctions also support the referee's recommendation for a public reprimand. Standard 7.3, Violations of Other Duties Owed as a Professional, calls for a public reprimand when a lawyer negligently engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

The Report of Referee clearly shows the referee took into consideration respondent's arguments as to mitigation. She specifically took note of respondent's reputation in the legal community for being an able advocate for his clients and that the Berger proceedings were particularly difficult cases (ROR-A4). She noted, however, that the difficult nature of the litigation did not justify respondent degrading parties, litigants, and other attorneys nor did it justify intimidating members of the general public with conduct "bordering on criminal" (ROR-A4). The referee also mistakenly believed respondent had no prior disciplinary history. In fact, despite respondent's assertion to the referee that he had "never been sanctioned by . . . the [sic] Florida Bar" (T Vol. VI p. 707), in fact, he received a private reprimand in The Florida Bar v. Martocci, TFB Case No. 1982-03,402(18B), in 1982 for charging a client an excessive fee. Because the

misconduct occurred more than seven years prior to the current misconduct and involved dissimilar conduct, the referee was correct in not considering it to be an aggravating factor.

In aggravation, under Standard 9.22 (c), (g) and (i), respectively, respondent exhibited a clear pattern of misconduct, refused to acknowledge the wrongful nature of his conduct (T Vol. VI pp. 707-708, 712-713), and has substantial experience in the practice of law. Perhaps what was most disturbing, and most illustrative of respondent's attitude, was his exchange with Judge Richardson at the May 8, 1998, hearing in the Berger proceedings where respondent admitted that telling Ms. Figueroa to "go back to Puerto Rico" was a "form of derogatory statement" and that it was "difficult [for him] to break old habits. 1 know we have to try, but old beliefs -- and that no longer are," He then went on to state to Judge Richardson that he admitted what he had said was improper, but not unethical (B-Ex. 3 at page 8). At the final hearing, respondent told the referee that he did not find his statement to Ms. Figueroa that she did not know the law to be particularly offensive although "maybe I'm thicker skinned than most people, but I've had a lot worse said to me" (T Vol. VI pp. 712-7 13). Although zealous advocacy is to be admired and is called for by the rules, there are limits to such zeal, Name-calling is not effective advocacy and attorneys who engage in it do a grave disservice not only to the client, but to the

legal profession as a whole.

CONCLUSION

Respondent's conduct herein is especially egregious given the tenor of the Berger proceedings. Respondent was abusive to those who opposed him, namely Mrs. Berger, Ms. Figueroa, and at least one witness, Dr. Jacqueline Jennette, whom he called a "fool" for becoming involved in the matter (T Vol. I pp. 37 and 39). Dissolution of marriage cases are, by their very nature, emotionally charged and frustrating, especially when there are allegations that the minor children are being sexually abused by one of the parents. However, an officer of the court is, by his or her training, presumed to be capable of dealing with such issues in a manner that does not reduce a legal proceeding to a name-calling street fight. The attorneys are not the triers of fact. That is the judge's responsibility and an attorney's belief in his or her client's position does not justify belittling the opposing party, opposing counsel, or witnesses merely because they disagree with the attorney's viewpoint, Allowing an attorney to use the legal system as a platform to air his or her racial and chauvinistic beliefs tarnishes the image of the legal profession and damages the legal system as a whole. Respondent used threatening behavior, both verbal and physical, to try and gain a tactical advantage over his female opponent. Gender-based name calling, racial slurs and intimidating actions are not acceptable litigation strategies, Respondent has made it a habit to treat people with disrespect and is

proud to be contentious and combative. Respondent's behavior is ethically intolerable and is more befitting that of a barroom brawler or a playground bully than an officer of the court who has sworn to "abstain from all offensive personality." See the Oath of Admission to The Florida Bar.

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and recommendation as to guilt and enter an order of discipline against respondent of a public reprimand administered by respondent's appearance before the Board of Governors of The Florida Bar, a two-year period of probation with the conditions set forth in the referee's report, and payment of the Bar's costs in prosecuting this case which currently total $5,187.62.

Respectfully submitted,

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By: 
FRANCES R. BROWN-LEWIS
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399- 1927; a copy of the foregoing has been furnished by regular U.S. Mail to respondent, Henry John Martocci, 975 Eyster Blvd., Suite 2-1, Rockledge, Florida, 32955-35 11; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 17th day of February, 2000.

Respectfully submitted,

Frances R. Brown-Lewis

Frances R. Brown-Lewis
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

HENRY JOHN MARTOCCT,

Respondent.
/

Case No. 95,3 15
[TFB Case Nos. 199%32,033 (18B) and 1998-32,145 (18B)]

APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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INDEX

I-N THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

HENRY JOHN MARTOCCI,

Respondent.
_____/

Case No. 95,315
[TFB Case Nos. 199832,033 (18B) and 199832,145 (18B)]

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, a hearing was held on September 21, 1999 through September 23, 1999. The pleadings, notices, motions, orders, transcripts and exhibits, all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar - Frances R. Brown-Lewis

For The Respondent - In pro se and Thomas H. Yardley

II. Findings of Fact as to Each Item of Misconduct of Which the Respondent Is Charged: Having heard the testimony of the witnesses, reviewing the evidence, and observing the demeanor of the witnesses, I find that The Florida Bar has shown, through clear and convincing evidence, the following:

As to Count I

A. Respondent represented Francis Berger in a dissolution of marriage and child custody/dependency actions, Case Nos. 96-03231 and 96-05759. During the course of said proceedings, respondent made remarks designed to belittle and humiliate the opposing party, Florence Berger, and her attorney, Diana Figueroa. In making such findings, the referee refers to the June 19, 1998 deposition transcript of Jeffrey Williamson at page 101, line 5 [Respondent Exhibit 1]; the August 13, 1998 deposition transcript of Jeffrey Williamson at page 37, lines 24 and 25, and page 38, line 15 [Bar Exhibit 5]; and the deposition of Robert Rice at page 42, line 11, page 45, lines 23 and 24, and page 46, lines 4, 8, 13 and 20 [Bar Exhibit 4].

B. Based on the testimony of Doris Rago, the referee finds that immediately after a hearing in December 1996, respondent called Mrs. Berger, a party in the proceeding, a "nut case," Further, based on the testimony of Dr. Jacqueline Jennette, respondent called Mrs. Berger, a party in the proceeding, a "nut case."

C. Through the testimony of Florence Berger, Diana Figueroa, as well as the transcript of Cynthia Flachmeier [Bar Exhibit 2], the referee finds that the respondent made facial gestures to and stuck out his tongue at Mrs. Berger. Respondent berated Ms. Figueroa in front of her client, saying that she needed to go back to school, and he made comments that she did not know the law or the rules of procedure.

D. Based on the testimony of Florence Berger and Diana Figueroa, the referee finds that on or about June 24, 1998 respondent again berated Ms. Figueroa in front of her client in a courthouse elevator, in which he called her "stupid" and an "idiot," and told her to "go back to Puerto Rico."

E. Through the testimony of Pamela Walker, a judicial assistant, and the testimony of Diana Figueroa, as well as the admission of the respondent, the referee finds that during the deposition of Dr. Jeffrey Williamson respondent grabbed the telephone out of Ms. Figueroa's hand and yelled a profanity. More specifically, the referee finds that respondent said the word "bitch."

As to Count II

F. Based on the testimony of James Paton, the referee finds that upon Mr. Paton entering the courtroom during a recess of the proceedings on May 8, 1998, Mr. Martocci, the respondent, said, "Here comes the father of the nut case". After which, Mr. Paton approached respondent and said, "If you have something to say to me, say it to my face, not in front of everyone here in the courtroom" to which Mr. Martocci responded by approaching Mr. Paton. With his face inches away from Mr. Paton, respondent screamed in Mr. Paton's face and threatened Mr. Paton. The referee also relies on the testimony of Susan Burr to support her findings in that regard.

G. Through the testimony of Beverly Goering, Doug Tuttle, James Paton, Diana Figueroa, Judge Richardson, and the respondent, the referee finds that when Ms. Figueroa attempted to intervene, respondent told her to "go back to Puerto Rico."

H. The respondent's confrontation, with Mr. Paton, a member of the public, ended only when a bailiff entered the courtroom.

As to both counts:

I. This referee acknowledges, and also specifically finds, that the Berger case is clearly a difficult case and the cause of frustration to all parties involved, including the judges who have presided over the case. However, this referee also acknowledges that the respondent is emotionally involved in the case to the extent, to put it in his words, he "lost control." Mr. Martocci has also indicated during these proceedings that he will not get off the case "no matter what," or words to that effect. This unfortunately evidences the fact that Mr. Martocci does not realize that these are the very cases that he should get out of before problems escalate to the extent that they did in this case and he loses control.

III. Recommendations as to Whether or Not the Respondent Should Be Found Guilty: As to each count of the complaint, I make the following recommendations as to guilt or innocence:

As to Count I

I find the respondent guilty of violating Rule 4-8.4(d) of the Rules Regulating The Florida Bar.

As to Count II

I find that respondent's threatening behavior and derogatory remarks to Mr. Paton violate Rule 4-8.4(d) of the Rules Regulating The Florida Bar. In addition, respondent's ethnic slur directed to Ms. Figueroa was disparaging and unethical, and as such violates Rule 4-8.4(d) of the Rules Regulating The Florida Bar.

IV. Rule Violations Found: 4-8.4(d) for engaging in conduct in connection with the practice of law that is prejudicial to the administration of justice, including to knowingly, or through callous indifference, disparage, humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis, including, but not limited to, on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic.

V. Recommendation as to Disciplinary Measures to Be Applied:

The referee notes for the record that Mr. Martocci is an able advocate for his client and has a reputation for such. However, the fact that respondent was involved in what is clearly a difficult case does not justify the degrading of parties and litigants. It does not justify making disparaging comments to other members of the Bar and does not justify intimidating members of the general public with conduct bordering on criminal.

For almost 50 years we, as lawyers, have agreed to be bound by the Rules Regulating The Florida Bar, and as this court, and courts across the country, advise juries on a daily basis, not one of us has the right to violate the rules we all share.

Accordingly, the referee recommends that the respondent be given a

public reprimand to be administered by the Board of Governors of The Florida Bar, and also recommends a two-year period of probation with the following conditions:

a) Within 30 days of entry of the Supreme **Court** order approving this recommendation, respondent shall contact Florida Lawyers Assistance, Inc. and arrange for an evaluation for mental health and anger management. If treatment is recommended, respondent will participate actively in the program offered by Florida Lawyers Assistance, Inc. by signing a rehabilitation contract with that organization incorporating the recommendations from the evaluation.

b) The respondent shall sign the necessary release of information permitting the Bar and Florida Lawyers Assistance, Inc. to receive copies of the evaluation and any progress reports. Respondent shall consent to open communication among the therapists and/or medical service providers for the purpose of providing the Bar with evidence of respondent's compliance with this recommendation.

c) The respondent shall be responsible for any registration fees and monthly probation monitoring fees. All fees must be paid to the Bar's headquarters in Tallahassee. Failure to pay the same shall be deemed a violation of probation.

d). If the evaluation determines that respondent should be subjected to certain anger management counseling, he shall attend therapy sessions with a licensed therapist for the period of time set forth in the recommendation. It is the respondent's responsibility to ensure that the care provider submits reports to The Florida Bar during the probationary period confirming his compliance and counseling.

VI. Personal History and Past Disciplinary Record: After the finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1)(D), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 62
Date admitted to bar: July 1, 1977
Prior disciplinary convictions and disciplinary measures imposed therein: None

VII. Statement of costs and manner in which costs should be taxed: I find the following costs were reasonably incurred by The Florida Bar.

A.	Grievance Committee Level Costs	
	1. Transcript Costs	$ 0.00
	2. Bar Counsel Travel Costs	$ 53.10
B.	Referee Level Costs	
	1. Transcript Costs	$ 955.13 *
	2. Bar Counsel Travel Costs	$ 498.12
C.	Administrative Costs	$ 750.00
D.	Miscellaneous Costs	
	1. Investigator Costs	$ 448.75
	2. Witness Fees	$2032.12 **
	3. copy costs	$ 73.50
	4. Transcription Copies	$ 376.90
	TOTAL ITEMIZED COSTS (Preliminary)	**$5187.62**

* The full transcript from the September 2 1-23, 1999 final hearing has not been ordered by The Florida Bar at this time so those transcript costs are not included.

** Total witness fees for the September 21-23, 1999 final hearing are not known at this time.

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses together with the foregoing itemized costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 21 day of Oct., 1999.

CYNTHIA G. ANGELOS
Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

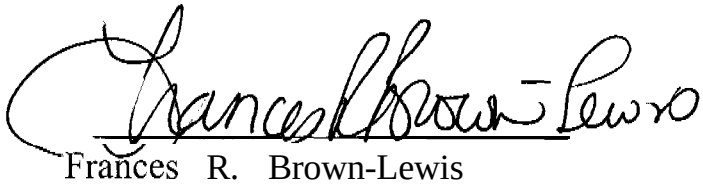
Frances R. Brown-Lewis, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida, 32804-63 14

Henry John Martocci, Respondent, 975 Eyster Blvd., Suite 2- 1, Rockledge, Florida, 32955

John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300

COMPLIANCE WITH RULE 9.21 0(a)(2)

The undersigned hereby certifies that the foregoing brief complies with Fla.R.App.P. 9.2 1 0(a)(2) in that it was prepared using 14 point Times New Roman.



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