IN THE SUPREME COURT OF FLORIDA

CASE NO. 95,3 15
(TFB Case Nos. 98-32,033(1 8B) and
98-32,145(18B)

THE FLORIDA BAR,

Complainant,

vs.

HENRY JOHN MARTOCCT,

Respondent.
_____/

RESPONDENT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar was the complainant before the Referee and will be referred to in this brief as "The Florida Bar" or "Bar",

Henry John Martocci was the Respondent before the Referee and will be referred to in this brief as "Respondent" or "Martocci".

References to the transcript in the proceeding before the Referee will be referred to as (T).

The relevant pleadings cited in this brief will be referred to by the name of the pleading.

STATEMENT ON PRINT SIZE

I hereby certify that size and style of the type used in this Brief was Times New Roman (14 point).

STATEMENT OF THE CASE

The Florida Bar filed its first amended complaint in this matter in two (2) counts, alleging in Count I thereof that Respondent had represented one Francis L. Berger in a dissolution of marriage and child custody action as well as a dependency proceeding in the Eighteenth Judicial Circuit and that attorney Diana Figueroa had represented the wife, Florence Berger in that case.

The Bar alleged that during the course of the proceedings, Respondent had consistently made remarks designed to belittle and humiliate the opposing party, Ms. Berger as well as her attorney.

The Florida Bar alleged that the alleged conduct on the part of the Respondent had constituted conduct in violation of Rule 4-8.4(d) of the disciplinary rules by engaging in conduct in connection with the practice of law that is prejudicial to the administration ofjustice, 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, socio-economic status, employment or physical characteristic.

Tn Count II of its complaint, the Bar alleged that Respondent, during a recess in court proceedings on May 8, 1998 had engaged in a confrontation with one James Paton, the maternal grandfather of the children who were the subject of the dependency proceedings at that hearing and had threatened Mr. Paton with physical harm and that during the course of that incident, Respondent had upon Ms. Figueroa's intervention, informed her that she should "go back to Puerto Rico", the Bar having alleged that such conduct was also in violation of the

provisions of Rule 4-8.4(d) of the disciplinary rules.

Respondent in his answer to the Bar's First Amended Complaint denied all of the allegations contained therein and made certain affirmative allegations with regard to the alleged incidents.

On October 27, 1999 following a three (3) day hearing which had been held on September 2 1, 1999 through September 23, 1999 the Referee issued her report finding that during the course of the proceedings in the Berger matter, Respondent had made remarks designed to belittle and humiliate the opposing party and her attorney.

The Referee acknowledged that the Berger matter was clearly a difficult case and a cause of frustration for all parties involved including the judges who have presided over the case and finally recommended that the Respondent be found guilty of violating Rule 4-8.4(d) of the disciplinary rules by engaging in threatening behavior and derogatory remarks to Mr. Paton and by directing an ethnic slur to Ms. Figueroa and for engaging in conduct in connection with the practice of law that is prejudicial to the administration ofjustice by knowingly or through callous indifference disparaging, humiliating or discriminating against litigants, jurors, witnesses, court personnel or other lawyers on any basis.

The Referee noted that Martocci is an able advocate for his client and has a

reputation for such and indicated that Respondent is sixty-two (62) years of age and had been admitted to the Florida Bar on July 1, 1977 and that no prior disciplinary convictions or disciplinary measures had been imposed upon Respondent.

The Referee recommended that Respondent be given a public reprimand as well as a two (2) year period of probation upon certain conditions including evaluations for mental health and anger management and if treatment is recommended, the act of participation therein by Respondent, the Referee having furthermore found that Respondent should bear the Bar's costs in the preliminary amount of five thousand one hundred eighty seven dollars and sixty-two cents ($5,187.62).

Respondent timely filed a Petition in this Court for review of the Referee's Report and Recommendations.

STATEMENT OF FACTS

The alleged incidents referred to in the Florida Bar's Amended Complaint as well as Respondent's Answer took place during the time while actions were pending involving Florence Berger, one of the complainants as well as Respondent's client, Florence Berger having received a restraining order around March of 1996 at the time that Mr. Berger had left the marital dwelling and he

having filed an action for dissolution of marriage in April of 1996 (T 133).

Thereafter and in July or August of 1996, Florence Berger made allegations to the Department of Children and Families with regard to alleged improper sexual contact between Mr. Berger and their daughter, E. B. (T 139-141), Mrs. Berger having denied initially that she had made such allegations to the department and having stated that she did not recall how the allegations had been reported since it had been almost four (4) years since the allegations but then indicated that she believes that she reported it but that she does not remember the circumstances surrounding said allegations.

Mrs. Berger, testifying before the Referee in this grievance proceeding also indicated that charges of theft had been leveled against Mr. Berger in August of 1996 with the Satellite Beach Police Department and that she had spoken to her then attorney about that matter and that he had told her to contact the police. Ms. Berger on cross examination is asked if it was not she who contacted the police department about a tennis ball machine, tubing, piping, computers and other items and that Mr. Berger had been served at Rockwell causing him to lose his job and she indicates that she did not do all that, the state having at a later time nolle prossed all of the felonies and having accepted a plea of no contest with an adjudication withheld with regard to the tennis ball machine, the state having

originally filed seven (7) felony charges. (T 134-138).

Doris Rago, a real estate broker upon whose testimony the Referee relied with regard to her findings of fact concerning the alleged confrontation at that time, testified that she had been hired by Florence Berger and that Mr. Berger did not have his own listing agent, (T 87-89), the hearing before the court having been with regard to the Court's approval of a contract for sale which had been procured by Ms. Rago with regard to the Berger marital dwelling.

Doris Rago does not remember exactly what Respondent was saying (T 90) but thinks that Respondent had called Florence Berger a nut case, it having been so long ago that she does not remember exactly (T 91).

With regard to the alleged actions of Respondent at the deposition of Cynthia Flachmeir of the Salvation Army Visitation Center, an examination of the deposition transcript thereof (Complainant's Exhibit 2) indicates that the court reporter did not transcribe any alleged statements made by Respondent and complained of by Florence Berger, the only reference to any alleged conduct on the part of Respondent at said deposition having consisted of a self serving statement on the part of Ms. Figueroa on page thirty (30) of the transcript of the Cynthia Flachmeir deposition, to the effect that "I am going to object to Mr. Martocci's inappropriate facial expressions, and also remarks ...".

However, Ms. Figueroa does not indicate at that time just what allegedly inappropriate facial expressions and/or remarks Respondent had been making and the transcript of the deposition does not indicate any such alleged remarks.

Furthermore, there is absolutely nothing in the deposition transcript of Cynthia Flachmeir which indicates that Respondent had berated Ms. Figueroa in front of her client during the course of that deposition in any manner whatsoever including his having allegedly indicated that she had needed to go back to school and that she had not known the law or the rules of procedure.

Furthermore, there is no indication in the testimony of Florence Berger (T 99407) (T 120-180) or in the testimony of Diana Figueroa (T 229-324) which would indicate any specific remarks allegedly made by Respondent during the course of Cynthia Flachmeir's deposition.

With regard to the alleged incident at the deposition of Dr. Jeffrey Williamson concerning the telephone call by Ms. Figueroa to Pamela Walker, who is Judge Richardson's judicial assistant the Referee found that Respondent had grabbed the telephone out of Ms. Figueroa's hand and yelled a profanity more specifically, the word "bitch."

Pamela Walker is asked by Bar counsel if she had ever heard Respondent utter the word "bitch" over the telephone to Pam Walker and Ms. Walker did not

answer the question at which point Bar counsel asked Ms. Walker if she had ever heard Respondent use the word "bitch" over the telephone, Pam Walker having indicated that she had heard his voice in the background and that Respondent had never offered her an apology for uttering the word "bitch" (T 78-80).

On cross examination, Pamela Walker agrees that Respondent had not been speaking to her but that Pam Walker had been talking to Diana Figueroa (T 80).

Ms. Walker was asked if she had in fact terminated the telephone conversation with Ms. Figueroa by having hung up the phone after having told Ms. Figueroa that the Judge was not available and she says that she does not know if she hung up the telephone; she does not remember and has never heard Respondent refer to Pam Walker as a "bitch" (T 80-81).

Diana Figueroa, upon whose testimony the Referee also relied for her findings in this regard testified to the effect that following the deposition of Jeffrey Williamson, she was on the phone with Pam Walker and that the Respondent had wanted to speak to her or the Judge and had grabbed the phone out of her hand and apparently having not been able to talk to the Judge called Pamela Walker a "bitch" and hung up.

Respondent, upon whose alleged admissions the Referee also relied for her findings in this regard, testified to the effect that he had expressed his annoyance

at being unable to speak to Pam Walker at a time after she had spoken to Diana Figueroa about what they were talking about and Pam Walker, he having hung up the phone, and having said the words "son of a bitch" in a low voice and to no one except himself, in frustration at his having been unable to speak to Pamela Walker (T 408-409).

With regard to the alleged confrontation between Respondent and James Paton, the grandfather of the minor children who are the subject of the underlying proceeding Mr. Paton testified to the effect that he had been in the hallway prior to the recess and that he had walked into the courtroom and stayed behind the banister at the department's counsel table waiting for Ms. Figueroa who was allegedly talking at that time to two or three (2 or 3) different attorneys who were present at that table, Mr. Paton having not known who those attorneys were. (T 183- 184).

Mr. Paton then testified to the effect that Respondent and his client were sitting at counsel table on the other side of the courtroom and that Respondent had said "here comes the father of the nut case" whereupon Mr. Paton immediately said to Respondent "if you have something to say, say it to me . . .", Mr. Paton then indicating in his testimony that Respondent had jumped out of his chair with his fists extended and said "I know who you are and I will kick the living shit out of

you and you are nothing but a scrawny runt" and that Respondent had said "I will punch your lights out". (T 184).

Mr. Paton testified to the effect that he had been outside the courtroom and had come back into the courtroom to speak to Ms. Figueroa since he had been sitting in the hallway for seven (7) hours since approximately seven (7) o'clock in the morning (T 189).

Finally, Mr. Paton is asked on cross examination if he is paying his daughter's legal fees and he asks does he have to answer that to which Bar counsel says yes. Mr. Paton is then asked if his payment of legal fees has been in the excess of the sum of thirty thousand dollars ($30,000.00) at which point the Referee again interferes and says that we do not have to get any more out of this witness (T 197-198).

Respondent testified to the effect that he had in fact said to Mr. Paton "get out of my face this is none of your concern it does not concern you this conversation is between my client and I and the matter does not concern you it concerns your daughter and her children and I am not interested in talking to you." (T 416).

Respondent is asked if it is a fact that he threatened physical harm to Mr. Paton and Respondent indicates that that is totally and completely untrue,

indicating that Mr. Paton had approached him in an angry manner and had continued to berate Respondent and Francis Berger when all they were doing was looking at the documents that had been faxed to Judge Richardson by Mr. Paton and that Respondent and Mr. Berger were laughing about the statements contained in those documents (T 4 17).

Susan Burr, an attorney for the Department of Children and Families who was at the May 8, 1998 hearing testified to the effect that she had heard Respondent and Mr. Paton engage in an exchange of words that had escalated to the point that their voices were raised and that Respondent was on the attorneys side of the bar and that Mr. Paton was on the other side. Ms. Burr furthermore testified that Phyllis Riewe came between the two (2) of them and said "Henry, please stop" at which point Respondent immediately stopped his involvement in the confrontation between he and Mr. Paton (T 222).

Susan Burr is asked if she had heard Respondent threaten harm to Mr. Paton and she indicated that she had heard him say that he was going to knock Mr. Paton on his behind although she had already testified that she could not recall what had been said by Mr. Paton or Respondent (T 222-223).

Beverly Goering, a Juvenile Investigator who was present at the hearing on May 8, 1998 testified that she was standing behind the Department of Children

and Families table in the first row and was speaking with Dr. Juanita Baker, a clinical psychologist, she having been chatting with Dr. Baker about unrelated topics; at that point, an elderly man walked up to the same table to her left at which time she did not initially pay much attention but had become aware of a hostile exchange between this gentlemen and Respondent who was sitting at the other counsel table on the other side of the courtroom. Ms. Goering does not know exactly what was said verbatim but had just become aware that the discussion between the two (2) gentlemen was becoming heated at which time she observed the elderly man walk up to the other side of the room behind Respondent. She states that Respondent got up and stood face to face with the man and at some point she recalls an attorney from the department intervening at which time Mr. Paton and Respondent separated from each other (T 109-111).

Ms. Goering testified that at that point following the exchange between Mr. Paton and Respondent, Ms. Figueroa had entered and come in from outside the courtroom, Diana Figueroa having been outside of the courtroom during the entire incident between James Paton and Respondent (T 109-111).

With regard to the Florida Bar's allegation to the effect that Respondent had indicated to Ms. Figueroa "go back to Puerto Rico", Respondent has admitted in the past both at the time of the incident in question on May 8, 1998 before Judge

Richardson as well as at the hearing before the Referee that he had indicated to Diana Figueroa "why don't you go back to Puerto Rico", Respondent having indicated that this remark had not been intended by him to consist of any racial import or to have been a reference to Ms. Figueroa's Hispanic background but rather that Respondent had made such a comment in attempting to indicate that Ms. Figueroa had not known what she had been talking about and had not known any facts concerning the confrontation between Mr. Paton and Respondent, she having been outside of the courtroom during the entire incident.

With regard to the credibility of Florence Berger, Respondent requested that the Referee make a ruling as to the admissibility of the psychological evaluations performed by Dr. Williamson as to which evaluations he had issued reports (T 172-174).

Respondent, arguing in favor of the admissibility of those documents indicated that Dr. Williamson had stated that Ms. Berger has the ability not only to manufacture allegations but to see events as greater than they are and to see everyone as causing her harm and to have a complex to the effect that everyone is against her and to the effect that Ms. Berger fails to see her own role in causing disturbances and in failing to observe her own conduct, Dr. Williamson having indicated that the allegations of abuse made by Ms. Berger against Mr. Berger

were the result of a highly contaminated fiction and that Ms. Berger had spoken to fifty or sixty (50 or 60) different individuals and had had the children speak to those individuals consisting of friends, neighbors, relatives and other individuals and that this idea had become a central focal point of the children's lives, Dr. Williamson having stated his opinion in the Berger matter to the effect that Ms. Berger will never be able to give this up but has a fixation that she may or may not believe now but that it is totally damaging to the children. Respondent furthermore indicates in argument that Judge Lober had indicated after the testimony of Ms. Berger that her testimony was totally incredible and that Ms. Berger was either delusional or obsessed or totally vindictive (T 172- 174). (Court's Exhibits "A" & "B" psychological evaluations)

The Florida Bar through counsel objects to the introduction of the reports of Dr. Williamson and Bob Rice, the Family Court Evaluator as being privileged, the Referee sustaining the objection (T 344-345).

With regard to the credibility of Diana Figueroa, Honorable Jere E. Lober testified to the effect that he had entered an Order on April 8, 1999 (Respondent's Exhibit's 8) denying Ms. Berger's motion to disqualify him from participation in the proceedings underlying this grievance proceeding but recusing himself upon a finding to the effect that Diana Figueroa as counsel for Florence Berger had lied to

him in an official proceeding.

Judge Lober also indicated that he has known Respondent for a period of time in excess of twenty (20) years and that he has had other cases with Respondent both before and after going on the bench and that Respondent and Judge Lober had litigated against each other while each was in private practice (T 374).

Judge Lober is asked if Respondent has ever lacked candor with him or if he ever had any difficulty with anything that Respondent had told him and Judge Lober indicated “not ever, No, not when we practiced and not while I have been on the bench.“, Judge Lober also indicating that in any case which Respondent is on, he is going to be well prepared and the case is going to be well presented (T 375376).

Judge Richardson indicated his difficulty with his involvement in the case as arising out of his belief that the department had been less then candid in connection with the progress of this case including without limitation the amended pleadings filed therein by the department, Judge Richardson having indicated that the original petition had included the sexual allegations and that those sexual allegations had then been removed from the petition with the case progressing along, a second amended petition having been filed thereafter which became very

frustrating to the court because the second amended petition reintroduced the sexual allegations against the father once again and had not included any allegations against the mother so that she had been totally removed from the petition at that point in time. Judge Richardson asked the department about that as to whether they intended to exclude the mother and the department's attorneys were surprised and did not realize that by amending the petition excluding the mother they were doing just that (T 388-389).

Judge Richardson felt that the department had lost its objectivity in the Berger case and that the department personnel were really siding with the mother and wife in this situation and felt that the children were going to suffer from all of that which he did not think was right and he certainly did not think it was right for a department case worker to berate the guardian ad litem for his comments to the judge in open court so he made that clear on the record (T 390-391), the protective worker for the department having confronted Douglas Tuttle, a practicing attorney who had voluntarily given his time as a guardian ad litem on this case and the worker having berated him about his report to Judge Richardson with regard to visitation overnight by the father with the minor children.

Judge Richardson in his testimony indicated that he had signed an order on a motion to remove the protective investigator where he denied the motion

because it was an executive decision but had expressed his views with regard to the conduct of the protective investigator (T 393-394). (Respondent's Exhibit 9) Shortly thereafter, the department requested that Judge Richardson disqualify himself in the case which he did (T 396).

Judge Richardson admitted having become very angry during the course of this case and admits having expressed his anger at everyone in the case including the Respondent, the department's protective supervisor as well as other persons, Judge Richardson having stated that this was an unusual case, he recalling having said to the department on June 3, 1998 "I can't wait to see how you are going to prove this" and that he had not intended to prejudge the case in anyway at that point (T 398-399).

Judge Richardson is asked if this is the type of case which would have tested the patience of any individual that was involved and he said it certainly had tested his (T 399).

Judge Warren Burk indicates that he has known the Respondent for a period of time in excess of twenty (20) years and that they had met in the mid seventies (70's) when each had offices in the Cape Royal Building; Judge Burk is asked how he would categorize Respondent's presentations in court and his representation of clients and the judge responds to the effect that Respondent is an

extremely zealous advocate.

Judge Burk has had difficulties with Diana Figueroa's lack of candor on certain occasions and has from time to time double checked things that Diana Figueroa has told him but agrees that Respondent's conduct while aggressive and very zealous is also very direct and forthright and very honest (T 438).

No less than nine (9) attorneys including four (4) female attorneys testified on behalf of Respondent during the course of the proceedings before the Referee.

According to their testimony, each of them practices extensively in the area of family and marital law and has been practicing law in the State of Florida and more specifically in Brevard County, Florida for periods of time ranging from ten (10) years to forty-three (43) years (T 503-504) (T 5 12) (T 550) (T 555-556) (T 561) (T 565-566) (T 587-588) (T 600) (T 609-612).

These attorneys have known Respondent for many years, going back to the mid 1970's when Respondent was first admitted to the Florida Bar (T 504) (T 5 13) (T 555-556) (T 551-552) (T 561) (T 586-587) (T 501) (T 600) (T 609-612).

Each of these attorneys is knowledgeable with regard to the reputation of Respondent not only for his ability as an attorney which the Referee acknowledged but furthermore for truth, veracity and honesty, which attributes the Referee did not mention or consider, these attorneys having indicated that

Respondent has a very good reputation for truth, honesty and veracity among members of the Brevard County Bar and that he is truthful both with attorneys as well as the courts and that no one of them had ever seen Respondent or known him to have engaged in any unethical behavior, one of the female attorneys in fact having indicated that he had acted as a mentor towards her and that she had had occasion to call him at various times in order to seek his advice and that he had always done so willingly and without reservation. (T 504-505) (T 513-514) (T 55 1-554) (T 555-557) (T 553-555) (T 586-587) (T 591) (T 600-603) (T 609-612).

Each of these attorneys also testified that he or she is familiar with the reputation of Diana Figueroa for truth and veracity in the legal community of Brevard County, Florida and that her reputation in that regard is extremely poor to say the least, these attorneys having testified for example that Ms. Figueroa has a reputation for being dishonest (T 505-506) and as not being truthful and being dishonest (T 5 15) and as being emotional and erratic (T 558) and as stretching the truth and being untruthful (T 565) and as having made false statements during the course of litigation (T 566) and as being a lawyer who practices unethically and whose word can not be taken with everything in which she is involved being required to be in writing (T 614-6 15).

According to Respondent, the incident between he and James Paton was just

a verbal altercation; no threats were made either by Respondent or by Mr. Paton and no physical altercation whatsoever ever developed between the two (2) men or on the part of either one of them. (T 524-525)

Respondent acknowledges snapping off a comment to Ms. Figueroa because she had been outside the courtroom and had come in when she knew nothing about what had taken place and had started interfering and Respondent indicated "why don't you go back to Puerto Rico" and he is sorry that he said it; Respondent apologized to her immediately before Judge Richardson and admitted that he had lost his cool and should not have done so and it was wrong and there is no question about it; Respondent regrets the incident because it has taken up everybody's time including his own and it has sidetracked Respondent on other litigation matters that are pending and has been very time consuming; it has been time consuming for the Referee and it has been time consuming for Bar counsel and for everybody else involved in it. (T 526)

Upon being asked if there is anything particular about the case that really frustrates him, Respondent states that the Berger case is frustrating because we should be advocates for our clients but should be counselors as well and should be careful of the children involved and not allow the clients to become wrapped up so much in winning and losing that the children are injured emotionally. (T 527)

Respondent had determined from the onset that the allegations made by Ms. Berger against Mr. Berger were false; Mr. Berger had as a condition of Respondent's continuing to represent him, sat for a polygraph examination and that is what Respondent does in all such type cases whether it is a man or a woman that makes such allegations or against whom such allegations are made. (T 527-528)

During the continuation of the Berger case, Judge Richardson's ruling of May 8, 1998 which was approximately twenty-six or twenty-seven (26 or 27) months after the case had started was the first glimmer of the fact that the court was beginning to understand the false nature of the allegations; Mr. Berger had not had visitation with his children other than at the department or at the salvation army for roughly eighteen to twenty (18 to 20) months and there had been all sorts of psychological reports at that time indicating that the allegations were basically a sham, untruthful and manufactured or fabricated; then because of the amendment by the department and the continuation sought by Ms. Figueroa and her client it took until December of 1998 to bring that dependency case to trial; then on February 5, 1999 after ten (10) days of trial Judge Lober dismissed the allegations against Mr. Berger; however he continued to get from Ms. Berger additional claims beginning with the very next weekend upon which Mr. Berger visited with

the children. (T 529)

The allegations just went on and on and on and over that three and one half (3 ½) years, it had become very frustrating in dealing with this; these are the worst allegations that could be made against a man and it is a terrible thing; Respondent had asked Ms. Figueroa several times to have her client sit for a polygraph and she would not do it; Respondent understands that Ms. Berger has a right not to sit for a polygraph but when the evidence mounts, it is time for the attorneys to stop being advocates and start becoming counselors; it is just cruel what has been done to these children; they were three and one-half (3 ½) and one and one-half (1 ½) years of age at the time that it started and they are now seven (7) and five (5); they have grown up with all of this nonsense around them and being pumped by people over these matters. (T 529-530)

Respondent has been practicing law since 1965 and this is all he has ever done; Respondent was in the real estate business before that with his father and his uncle who was also an attorney but is now deceased; there have been lawyers in the family both male and female going back three (3) generations. Respondent is asked if he has some sort of a gender based animus towards women which Respondent denies but agrees that there are lawyers who are women whom he does not like and that there are lawyers who are men that he does not like and his

dislikes have nothing whatsoever to do with gender. (T 533-534)

With regard to the allegations that he belittled Florence Berger, he did attempt to have the court find her not to be credible and Judge Lober found her not to be credible; Mrs. Berger when this was started found out that Mr. Berger was keeping company and became so incensed with that that she determined **that** he should just collapse and give her whatever she wanted and that she would make all of the decisions and that if he did not agree, she would get him; since that time it **has** been a process of criminal charges, sex abuse charges and one thing after another and Respondent was required to attack Mrs. Berger's credibility in order to advance the position of his client. (T 535-536)

Respondent might add that he was successful in making the allegations about her credibility because Doug Tuttle, the guardian ad litem and Bob Rice, the Family Court Evaluator and Jeffrey Williamson, PH.D. a clinical psychologist came about the belief that she had manufactured the allegations and that is why after twenty-six (26) months, Mrs. Berger hired Dr. Jacqueline Jennette. (T 536-537)

With regard to the Pam Walker incident, Diana Figueroa handed Respondent the telephone and when he put his ear to the phone it was dead; Respondent put the phone down and said to no one in particular "son of a bitch"

because he was frustrated at not being able to talk with Pam Walker on the phone. Respondent admits referring to Diana Figueroa as a "bush leaguer" since the argument that she was making was so basically incorrect, Judge Richardson having later informed her of that, both verbally and in a written order it being just basic that either attorney can speak to any witness at any time as long as the witness wants to talk to him or her. (T 538)

Respondent did not call Diana a bitch and did not call Florence a bitch and did not call Pam Walker a bitch. Jennifer Taylor's boss is Hernan Castro, Esq., who is Hispanic; Respondent thinks Hernan is a terrific guy and that Tino Gonzalez who is also Hispanic is a terrific guy; he does not hate Hispanics or women. (T 539-540)

At the conclusion of the testimony before the Referee, Respondent contended in closing argument that the only allegations that the Bar has made that has any truth whatsoever is that he had said to Ms. Figueroa during a recess in the hearing before Judge Richardson on May 8, 1998 "why don't you go back to Puerto Rico", Respondent contending that he had been frustrated since Ms. Figueroa had been outside of the courtroom and had not witnessed the verbal altercation between Respondent and Mr. Paton and had entered the courtroom thereafter and interfered in the conversation which she had known nothing about;

Respondent denied that there had been any intention on his part of a racial connotation although he admits that his choice of words had been unfortunate and inappropriate; Respondent apologized to Ms. Figueroa immediately before Judge Richardson. (T 70 1-704).

Respondent stated that the evidence had shown that nothing had taken place between he and Mr. Paton other than an verbal altercation and that he had not threatened Mr. Paton in anyway (T 70 1-704). Respondent furthermore contended that Mr. Paton had approached Respondent first and had started the argument.

The Referee asked Respondent if he had recalled her factual findings in the Lanford matter to which question Respondent stated that the Referee had found that both Respondent's and Mr. Lanford's conduct had been unprofessional but that it did not rise to a violation of the rules of ethics prohibiting conduct prejudicial to the administration of justice or conduct involving dishonesty, fraud, deceit or misrepresentation; the Referee then reviewed the Florida Supreme Court Decision in the Lanford matter whereupon Respondent contended that his understanding of the law is that the Referee is not to consider cases where the Respondent had been found to have been not guilty since there has not been a prior disciplinary action taken against Respondent; the Referee states her belief to the effect that the Supreme Court had assigned her to this case as a result of her

having heard the Lanford matter.

SUMMARY OF ARGUMENT

Respondent contends that the Referee's findings as set forth in her report are lacking in evidentiary support and are clearly erroneous, the Bar having the burden of proving by clear and convincing evidence that the attorney who is the subject of the proceeding is guilty of one or more specific rule violations. The Florida Bar vs. Weiss, 586 So 2d 105 1 (Fla 199 1); The Florida Bar vs. Hooper, **509** So 2d 289 (Fla 1987).

Respondent furthermore contends that the testimony given in support of the Florida Bar's allegations do not meet the test of "clear and convincing evidence" which requires that the evidence must be found to be credible with the facts as to which the witnesses testified having been distinctly remembered by them, the testimony being required to be precise and explicit with the witnesses lacking in confusion as to the facts in issue Slomowitz vs. Walker, 429 So 2d 797 (Fla 4th DCA 1983).

Additionally, Respondent contends **that** the making of demeaning comments to opposing counsel or that counsel's client while perhaps being unprofessional do not rise to the level of a violation of the ethical rules prohibiting conduct prejudicial to the administration of justice, particularly in light of the nature of the

proceedings during the course of the pendency of which proceedings the comments were made, assuming arguendo that the comments were in fact made. The Florida Bar vs. Martocci, 699 So 2d 1357 (Fla 1997).

Additionally, Respondent contends that the Referee improperly transferred the burden of proof in this grievance proceeding to the Respondent, in opposition to law. The Florida Bar vs. Weiss, supra; The Florida Bar vs. Hooper, supra.

Finally, Respondent contends that the punishment accorded him in the Referee's report is not in accordance with the Florida Standards for imposing lawyer sanctions, the Referee having failed to consider in mitigation of the alleged offenses, the absence of a prior disciplinary record, the absence of a dishonest or selfish motive as well as the character and reputation of Respondent. Standard 9.32(a)(b)(g) Lawyer Sanction Standards. It is the contention of Respondent that an admonishment or private reprimand if any punishment be proper, would be in keeping with the purposes of lawyer sanctions.

ARGUMENT

POINT I ON APPEAL

THE REFEREE'S FINDINGS AS SET FORTH IN HER REPORT ARE LACKING IN EVIDENTIARY SUPPORT AND ARE CLEARLY ERRONEOUS.

It is the contention of Respondent that the findings of the Referee as well as

the finding of the Referee to the effect that Respondent had engaged in conduct in connection with the practice of law that was prejudicial to the administration of justice were neither correct as a matter of law nor supported by clear and convincing evidence.

"Adopting the definition of clear and convincing evidence" as set forth in Slomowitz vs. Walker, 429 So 2d 797 (Fla 4th DCA 1983) the evidence of the witnesses in this proceeding do not meet that test which requires that the evidence must be credible, the facts as to which the witnesses testified being required to be distinctly remembered and the testimony being required to be precise and explicit with the witnesses lacking in confusion as to the facts in issue.

Doris Rago, who was Ms. Berger's listing real estate broker testified before the Referee to the effect that she did not remember exactly what Respondent said to Ms. Berger (T 90). She thinks that Respondent called Florence Berger a "nut case" but it has been so long ago that she does not remember exactly (T 91). She was not aware of where the Respondent was in the courthouse corridor and again stated that she did not remember what had been said by Respondent to Florence Berger (T 92-94).

Clearly, the facts as to which Doris Rago had testified were neither precise nor explicit and had not been remembered by her.

Furthermore, while Dr. Jennette contends that Respondent made statements referring to Florence Berger as a "nut case" before, during and after her deposition, Dr. Jennette also testified that Respondent had simply asked her if she had seen the testing by Dr. Jeffrey Williamson and the reports issued by Dr. Williamson as well as Robert Rice, the Family Court Evaluator (T 36). Dr. Jennette contends that Respondent went on to describe things that were in the reports (T 37) and testified furthermore to the effect that she had not become involved in the case for the purpose of delaying Judge Richardson's granting of overnight visitation rights with the Berger children to Mr. Berger but then admits writing a letter to Judge Richardson concerning that matter, since there was a hearing coming up on May 8, 1998 in order to determine whether Mr. Berger was to have visitation or not (T 5 1).

Dr. Jennette agrees that Florence Berger had not been present during the deposition and had not heard any of the alleged telephone conversations between Dr. Jennette and Respondent at anytime after the deposition (T 67-68).

Dr. Jennette agrees that it would have been helpful to her to have read Dr. Williamson's reports prior to her deposition and agrees that there was nothing improper concerning the questions asked of her by Respondent concerning Dr. Williamson's reports or that Dr. Williamson had found Florence to be depressed

(T 72). Dr. Jennette also agrees that there was nothing improper about Respondents indicating to her Dr. Williamson's contentions that Florence Berger was depressed and dangerous and in need of medication (T 73-74).

Furthermore, Dr. Jennette admits that there is no transcript of her deposition (T 74).

Finally, Dr. Jennette admits having filed a grievance against Respondent with the Florida Bar but denies that the grievance had been dismissed and then admits that the Bar had found no probable cause for the grievance (T 50) and for the first time in her testimony admits that she had been hired by Florence Berger in April of 1998 just prior to the hearing of May 8, 1998 (T 50).

Clearly, the testimony of Jacqueline Jennette does not meet the test of clear and convincing evidence.

With regard to the alleged incident during the deposition of Cynthia Flachmeir, an examination of the deposition transcript (Complainant's Exhibit 2) indicates a total lack of any statements or comments made by Respondent to Diana Figueroa or to Florence Berger or to counsel for the department or to counsel for Ms. Flachmeir which could in anyway whatsoever be construed as being improper or unethical or even unprofessional, the only reference to any alleged conduct at that deposition on the part of Respondent being set forth on page 30 at line 15

thereof at which point Ms. Figueroa stated that Respondent has his mouth opened and is making comments and facial gestures. However, there is no indication whatsoever in that deposition transcript as to what comments if any Respondent had been making which were improper and there was no reference at that time by Ms. Figueroa or anyone else present that Mr. Martocci was sticking out his tongue.

Certainly, if Respondent had been sticking out his tongue at Ms. Berger or anyone else, Ms. Figueroa would have said so.

Furthermore, there is no indication in the testimony of Florence Berger (T 99- 107) (T 120- 1 SO) or in the testimony of Diana Figueroa (T 229-324) which would indicate any specific remarks allegedly made by Respondent during the course of Cynthia Flachmeir's deposition.

Accordingly, the testimony of Florence Berger and Diana Figueroa as well as the documentary evidence consisting of the transcript of the Cynthia Flachmeir deposition does not meet the test of clear and convincing evidence which is complainant's burden in a grievance proceeding.

Furthermore, with regard to the alleged elevator incident, Ms. Figueroa did not testify to any alleged statements made by Respondent to the effect that she was "stupid" or an "idiot" or that Respondent had told her to "go back to Puerto Rico"

Additionally, Florence Berger's testimony was in conflict with the testimony of Ms. Figueroa's although the two (2) women were apparently standing next to each other on the elevator.

With regard to the alleged incident during the deposition of Dr. Jeffrey Williamson on August 13, 1998 the testimony of Pamela Walker as well as Diana Figueroa does not meet the test of clear and convincing evidence, the deposition transcript (Complainant's Exhibit 5) indicating that at the time of **the** alleged incident in question the deposition of Dr. Williamson had been terminated. (Emphasis supplied)

Furthermore, Pamela Walker who is Judge Richardson's judicial assistant testified to the effect that she had heard Respondent's voice in the background while she had been on the telephone with Ms. Figueroa and had allegedly heard Respondent in the background use the word "bitch" (T 78-80). However, Ms. Walker agreed that she had been speaking on the telephone to Diana Figueroa and not to Respondent (T 80) and does not remember and has never heard Respondent refer to her as a "bitch" (T 80-81).

Accordingly, the testimony with regard to this matter does not meet the test of clear and convincing evidence.

Additionally, Respondent would contend **that** the Referee should have

considered and that this Court should consider the testimony of the several attorneys who testified as to Ms. Figueroa's reputation for truth and veracity in the legal community as being untruthful and dishonest, with Ms. Figueroa also known to be very emotional and erratic, Tino Gonzales, an attorney with a Hispanic background having in fact testified that Ms. Figueroa's reputation as an attorney is for stretching the truth (T 505) (T 515) (T 558) (T 565).

Attorney Thomas Deans testified that Ms. Figueroa does not have a good reputation for truth and veracity and that in his opinion, she has made false statements during the course of litigation in which he has been involved with her (T 566).

Respondent acknowledges that in a Bar grievance proceeding, a Referee's findings of fact carry with them a presumption of correctness and that those findings are to be upheld on review unless they are clearly erroneous or lacking in evidentiary support. The Florida Bar vs. McClure, 575 So 2d 176 (Fla 199 1); The Florida Bar vs. McKenzie, 442 So 2d 934 (Fla 1983).

Respondent contends that in the case at bar, the Referee's findings of fact are clearly erroneous and lacking in evidentiary support utilizing the proper test of clear and convincing evidence. The Florida Bar vs. McLawhorn, 505 So 2d 1338 (Fla 1987).

ARGUMENT

POINT II ON APPEAL

THE REFEREE'S FINDINGS OF FACT AND CONCLUSIONS ARE INCORRECT AS A MATTER OF LAW, THERE BEING NO RECORD BASIS FOR THE DETERMINATION TO THE EFFECT THAT ANY OF THE ALLEGED CONDUCT ON THE PART OF RESPONDENT WAS PREJUDICIAL TO THE ADMINISTRATION OF JUSTICE.

The Referee, in her report entered in this proceeding on October 27, 1999 found Respondent guilty of having violated the provisions of Rule 4-8.4(d) of the Rules Regulating the Florida Bar by having engaged in conduct in connection with the practice of law that was prejudicial to the administration of justice, apparently by having disparaged, humiliated or discriminated against a litigant, namely Florence Berger as well as her counsel, namely Diana Figueroa in having made allegedly unprofessional statements to those persons and furthermore by having allegedly engaged in threatening behavior and derogatory remarks to one James Paton and by having directed an alleged ethnic slur to Ms. Figueroa, the Referee having found those violations to have been unethical.

Assuming arguendo that Respondent did in fact conduct himself in the manner as indicated in the Referee's report which is denied, said conduct does not consist of conduct which is prejudicial to the administration of justice, there furthermore having been no finding and no proofs in the record or even an attempt

thereat to indicate that any of the alleged conduct on the part of Respondent had involved dishonesty, fraud, deceit or misrepresentation. Berman vs. State, 24 F. L. W. (D2684) 12/1/99; The Florida Bar vs. Martocci, 699 So 2d 1357 (Fla 1997); The Florida Bar vs. Pettie, 424 So 2d 734 (Fla 1982).

In the Berman case, the Fourth District Court of Appeal in reversing a judgment of direct criminal contempt against an attorney held that conduct prejudicial to the administration ofjustice was equivalent to conduct calculated to hinder, embarrass, delay or obstruct justice, counsel for a criminal defendant having pounded his fist and yelled "yessss" upon the reading of a not guilty verdict against his client on a first degree murder charge.

In the case of The Florida Bar vs. Pettie, supra this court held that the participation by an attorney in a criminal conspiracy to import marijuana did not violate the disciplinary rule prohibiting conduct prejudicial to the administration of justice and did not violate the disciplinary rule prohibiting conduct involving dishonesty where the activities in the criminal conspiracy, although illegal, did not approach lying, cheating, defrauding or untrustworthiness.

In the case of The Florida Bar vs. Martocci, supra the Referee who is the same Referee as in the case at bar found that this Respondent's unprofessional conduct in making demeaning comments to opposing counsel did not rise to the

level of a violation of the ethical rules prohibiting conduct prejudicial to the administration of justice, Complainant the Florida Bar having alleged a violation by this Respondent of the provisions of Rule 4-8.4(d) of the Rules of Professional Conduct, the Referee's findings in the case at bar indicating a violation by this Respondent of the same rule and Bar counsel being the same individual in each case.

Accordingly, this same Referee with regard to the same type alleged conduct on the part of this Respondent in the case of The Florida Bar vs. Martocci, supra (1997) found this Respondent not guilty of the offense charged.

This court upon Complainant's request for review denied the Florida Bar's petition and approved the Referee's report, which had determined that this Respondent's unprofessional conduct had not risen to the level of a violation of the ethical rule prohibiting conduct prejudicial to the administration of justice.

Consistency requires that this court now determine that the conduct allegedly engaged in by this same Respondent in the case at bar does not rise to the level of conduct prejudicial to the administration of justice, it being obvious that this court has created a distinction or in fact that there exists a distinction between "unprofessional conduct" and "unethical conduct".

This conclusion is moreover the only proper and just conclusion in the case

at bar particularly in light of the conduct of opposing counsel as well as all other participants in the Berger case underlying this grievance proceeding and in light of the serious frustration indicated by both Judge Lober and Judge Richardson in dealing with the allegations and the parties and other participants in the Berger case and in light of the extremely protracted nature of the proceedings in the Berger case which at the time of the hearing before the Referee were ongoing for a period of time somewhat in excess of three and one-half (3 ½) years.

It is respectfully submitted that Respondent having been involved in that cause for that period of time in excess of three and one-half (3 ½) years through all of the allegations against his client which had been determined to be unfounded was locked into a proceeding with extremely emotional consequences.

Respondent recognizes that an attorney should have a somewhat detached attitude towards the litigation with which he is involved; fortunately, there remain attorneys who are committed to their clients and to the children involved in these proceedings and to justice and are not so detached that they have no feelings for the participants or the children involved.

The Referee in her report indicated that this Respondent had stated during the proceedings that he would not get off the case, “no matter what” or words to that effect and that that indicated that Respondent did not realize that he should

have gotten out of the case.

The words "to that effect" referred to by the Referee were in actuality to the effect that Mr. Berger owed Respondent approximately fifty thousand dollars ($50,000.00) in connection with his representation of Mr. Berger and that Respondent was in for the ride and was not getting out (T 460).

Upon being asked why he had not moved to withdraw, Respondent stated that he had not done so "because these children must be protected."

The Referee's findings and determination to the effect that Respondent is guilty of conduct prejudicial to the administration ofjustice is not only clearly erroneous and unsupported by clear and convincing evidence but is incorrect as a matter of law.

ARGUMENT

POINT III ON APPEAL

THE REFEREE IMPROPERLY TRANSFERRED THE BURDEN OF PROOF IN THIS GRIEVANCE PROCEEDING TO THE RESPONDENT, IN OPPOSITION TO LAW.

Complainant, The Florida Bar has the burden of proving by clear and convincing evidence that an attorney is guilty of a specific rule violation. The Florida Bar vs. Weiss, supra The Florida Bar vs. Hooper, supra.

Following the conclusion of the hearing before the Referee in the case at bar

and during the course of closing argument, the Referee asked Respondent if he had recalled her factual findings in the Lanford matter, referring to that matter which resulted in this Court's opinion in the case of The Florida Bar vs. Martocci, 699 So 2d 1357 (Fla 1997).

Respondent stated that he understood that the Referee had found in that matter that while the conduct of Respondent as well as Mr. Lanford had been improper, Respondent's conduct did not rise to the level of a violation of the ethical rule prohibiting conduct prejudicial to the administration of justice, Respondent also contending at that time that his understanding of the law was and is to the effect that the Referee is not to consider cases where the Respondent had been held not guilty since there had not been a prior disciplinary action taken against Respondent and the Referee having stated her belief that this Court had assigned her to the instant case as a result of her having heard the Lanford matter.

The record clearly indicates that these statements were made by the Referee prior to the announcement of her guilty finding in the case at bar with regard to Respondent's alleged conduct.

Accordingly, it is clear that the Referee utilized the prior conduct of Respondent which had not resulted in a finding of guilt, in connection with her determination in the case at bar to the effect that Respondent was guilty of the

same type conduct.

Furthermore, it is clear from the record that the Referee had brought a copy of her report in the Lanford matter from Palm Beach County to Brevard County where the hearing was conducted.

This clearly evidences a pre-determination by the Referee in her mind to the effect that Respondent was going to be required to disprove his guilt in the case at bar.

Furthermore, during the course of the proceedings in the case at bar, the Referee repeatedly cut off Respondent in his cross examination of the various witnesses, (T 53-56) (T 62-63) (T 144- 145) (T 148- 149) (T 166- 167) (T 187- 188) (T 197- 198) (T 272-273) (T 277), at one point the Referee having directed a complaining witness, namely Florence Berger to a specific portion of a deposition transcript in helping her to answer a question.

Furthermore, the Referee improperly placed the burden of proving his innocence of the charges against him upon the Respondent in opposition to law.

ARGUMENT

POINT IV ON APPEAL

THE PUNISHMENT PROVIDED FOR BY THE REFEREE IN HER REPORT IS EXCESSIVE AND NOT IN ACCORDANCE WITH THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS OR THE PURPOSES OF ATTORNEY DISCIPLINE.

Respondent contends that the punishment accorded him in the Referee's report is not in accordance with the Florida Standards for imposing lawyer sanctions, the Referee having failed to consider in mitigation of the alleged offenses, the absence of a prior disciplinary record, the absence of a dishonest or selfish motive as well as the character and reputation of Respondent. Standard 9.32(a)(b)(g) Lawyer Sanctions Standards. It is the contention of Respondent that an admonishment or private reprimand if any punishment be proper, would be in keeping with the purposes of lawyer sanctions.

In deciding an appropriate sanction for an attorneys misconduct, the discipline must serve three (3) purposes, the first that it be fair to society the second that it be fair to the attorney and the third being that it must sufficiently deter other attorneys from similar misconduct. The Florida Bar vs. Cibula, 725 So 2d 360 (Fla 1998); The Florida Bar vs. Wasserman, 654 So 2d 905 (Fla 1995); The Florida Bar vs. Pearce, 63 1 So 2d 1092 (Fla 1994).

Each of the above cases which provided for short term suspensions from the practice of law of the attorneys involved revolved about conduct on the part of each attorney which consisted of dishonest conduct as well as misrepresentations to the court or criminal activity, these matters being of an extreme nature which clearly require the imposition of a severe penalty.

However, the Lawyer Sanction Standards provide for the factors to be considered in imposing sanctions depending upon the nature of the alleged conduct on the part of the attorney and provide furthermore for the consideration by the Referee and ultimately of this Court of certain factors in aggravation and mitigation of the offense.

The Referee's report does not specifically set forth any facts with regard to any specific aggravating or mitigating factors in the case at bar, although the Referee does acknowledge that the Berger case was a difficult case for all concerned including the Judges involved therein and that Respondent has a reputation for being an able attorney in representing his clients.

However, while the Referee's report indicates that no prior disciplinary action had been taken against Respondent who had been admitted to the practice of law in the State of Florida in 1977 the Referee did not acknowledge that Respondent had in actuality been practicing law prior to 1977 in the State of New York since 1965 and that accordingly, Respondent had not had any disciplinary action taken against him during that entire thirty-four (34) year period, Respondent having testified that no disciplinary action had ever taken against him in any jurisdiction.

Moreover, the Referee failed to consider the total absence of a dishonest or

selfish motive on the part of Respondent and failed to consider the character and reputation of Respondent in connection with the practice of law, nine (9) attorneys practicing in Brevard County, Florida including four (4) female attorneys having testified that Respondent has an excellent reputation for honesty, credibility and truthfulness. Furthermore, Judge Lober and Judge Burk each testified **that** neither of them had had any difficulty whatsoever over a period of time in excess of twenty (20) years with any conduct on the part of Respondent and that neither of them had any question at anytime concerning the credibility, honesty and truthfulness of Respondent, each of them as well as each of the attorneys having testified that while Respondent was extremely aggressive, he was also very honest and forthright as well as amenable to any reasonable request for consideration made by a fellow attorney, one (1) female attorney having even testified **that** Respondent had on several occasions acted as a mentor to her which is clearly inconsistent with gender bias. Standard 9.32(a)(b)(g).

With regard to the mitigating factors, Respondent has waived and does **waive** any consideration by this court of the failure of the Referee to consider any physical or emotional difficulties on the part of Respondent at the time of the hearing or at the time of the alleged incidents in question and waives any consideration by this court of any such factors for reasons of privacy as well as for

the reason that Respondent has made and does make no contention with regard to any of the alleged incidents in question as having been caused by physical or emotional difficulties on the part of Respondent.

Respondent also contends that the Referee while acknowledging the difficulty of the Berger case, did not for whatever reason have an appreciation of the nature of the Berger proceedings and did not give sufficient consideration to the difficulties experienced by all concerned therewith, including the Judges who had sat in that case.

Respondent contends that if any punishment be held proper by this court, the same would be in the nature of an admonishment or private reprimand, there being no aggravating factors set forth by the Referee in her report and an admonishment or private reprimand being in keeping with purposes of lawyer discipline.

CONCLUSION

Respondent contends that in the case at bar, the Referee's findings of fact are clearly erroneous and lacking in evidentiary support utilizing the proper test of clear and convincing evidence. The Florida Bar vs. McLawhorn, 505 So 2d 1338 (Fla 1987).

The Referee's findings and determination to the effect that Respondent is

guilty of conduct prejudicial to the administration of justice is not only clearly erroneous and unsupported by clear and convincing evidence but is incorrect as a matter of law. The Florida Bar vs. Martocci, 699 So 2d 1357 (Fla 1997).

Furthermore, the Referee improperly placed the burden of proving his innocence of the charges against him upon the Respondent in opposition to law. The Florida Bar vs. Weiss 586 so 2d 105 l (Fla 199 1); The Florida Bar vs. Hooper, 509 So 2d 239 (Fla 1987).

Respondent contends that if any punishment be held proper by this court, the same would be in the nature of an admonishment or private reprimand, there being no aggravating factors set forth by the Referee in her report and an admonishment or private reprimand being in keeping with purposes of lawyer discipline. The Florida Bar vs. Cibula, 725 So 2d 360 (Fla 1998); Standard 9.32(a)b)(g) Lawyers Sanction Standards.

Respectfully submitted

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original has been furnished to the Supreme Court, 500 South Duval Street, Tallahassee, FL 32399-1927, and a true and

correct copy of the foregoing has been furnished by US Mail to Frances R. Brown-Lewis, Esq., 1200 Edgewater Drive, Orlando, FL 32804-63 14, this 22 day of January, 2000.

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