IN THE SUPREME COURT OF FLORIDA

CASE NO.SC95831

MICHAEL LEE VON ZAMFT,

Respondent,

vs.

THE FLORIDA BAR,

Complainant.

RESPONDENT'S INITIAL BRIEF

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CERTIFICATE OF TYPE SIZE AND STYLE

The size and style of type used in this brief are: Courier New Font; 10 characters per inch.

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SYMBOLS AND REFERENCES

The parties will be referred to by name.

The transcript will be referred to by "T.".

STATEMENT OF THE CASE AND OF THE FACTS

The Bar filed a complaint against Mr. Von Zamft charging violations of Rules 4-8.4.(d) and 4-3.5.(a) of the Rules Regulating The Florida Bar. A final hearing was held before the Referee.

The Bar called Mr. Von Zamft.

Mr. Von Zamft holds Bachelor's and Law degrees from the University of Miami. He graduated from law school in 1973 (T.114).

He has worked in the State Attorney's Office since 1995. He presently is in the organized crime/public corruption/racketeering unit.

He was an assistant public defender for eight years, trying felony cases and later capital cases. He was in charge of training for two and a half years (T.114-115).

He entered private practice in 1981 (T.114). He went to the State Attorney's Office in 1995 (T.115).

He was in the legal division of the State Attorney's Office. Those attorneys give advice on appeals, argue motions in complicated cases, and are available when other assistant state attorneys have questions. He then helped dispose of one hundred felony cases (T.116). Since then he has been trying cases and has been in charge of training (T.116-117).

Mr. Von Zamft has been active in Bar matters. He helped create the Criminal Law Section of the Florida Bar. He was the Chairman of the Criminal Law Section.

He has lectured numerous times for the Florida Bar, for the Florida Public Defender's Association, and for the Florida Prosecuting Attorneys Association (T.117). He was one of the founders of the Prosecutors/Public Defenders Training Program that is held annually at the University of Florida(T.117-118).

He is familiar with *State v. Dennis*, the University of Miami murder case. It was a double homicide involving a murder of a football player. He was not involved in the case (T.25).

Flora Seff was the lead prosecutor. The defense attorney was Ron Guralnick. Judge Victoria Platzer was the judge (T.25).

He and Judge Platzer were friends. They had dated three years earlier (T.25-26). He and Judge Platzer had an informal agreement that he would not appear before her (T.26).

He had a conversation with Ms. Seff about the *Dennis* case on May 5, 1998. A verdict had been returned in another murder case (*Lugo*). Mr. Guralnick had been trying it since January (T.27). It was a very complicated, very difficult, very heinous murder case in which the defendant was charged and convicted of the robbery, kidnaping, torture and murder of two people.

He asked Ms. Seff when the *Dennis* case would be tried. Ms. Seff said it was set for July, 1998. That was a problem since Mr.

Guralnick had been in the *Lugo* trial for four months. Mr. Von Zamft said that Mr. Guralnick could not be ready to try another capital case so soon. The second, sentencing phase in *Lugo* was coming up. Ms. Seff said that was a problem and that Mr. Guralnick had no assistance (T.29-30). Mr. Von Zamft knew that Mr. Guralnick had a good two months of work ahead of him in *Lugo* (T.21).

Ms. Seff said that Mr. Guralnick agreed that the trial should be put off (T.30). Mr. Von Zamft asked Ms. Seff if she would like him to speak to the judge about the matter. She said that she would. He did not tell Mr. Guralnick that he was going to speak to the judge (T.35).

Judge Platzer invited Mr. Von Zamft to lunch on May 11, 1998. If he had known that Mr. Guralnick had announced that he was ready, or had insisted that he would be ready, he would not have communicated with Judge Platzer about the matter. If he thought they were not in agreement, he would not have spoken to the judge at all about it (T.35).

Mr. Von Zamft told Judge Platzer that if the case went to trial in July, as scheduled, the potential of a reversal was great. She did not need to have her first capital case reversed. It would not be good for her (T.37-38). His intent was to have the judge grant a continuance in order that both sides would be able to try the case fairly (T.38). He thought Ms. Seff was concerned about the case being reversed. A prosecutor is concerned about obtaining

a conviction and upholding it on appeal. If defense counsel is not ready and cannot proceed properly it is the prosecution's obligation to prevent that from occurring. There is no need to waste a judge's time by trying a case two or three times, especially a complicated murder case because a defense attorney is not ready (T.38). He did not tell Judge Platzer that he had spoken to Ms. Seff (T.41).

Mr. Von Zamft and Judge Platzer had had conversations about law, general advise, etc. (T.42). One conversation concerned reversals. Judge Platzer had said that the attorneys in front of her probably should give her better advice to avoid reversals, so she could make correct decisions. Knowing that, and with his knowledge of what was going on, his view of capital cases that he had tried, and his relationship with her, he talked about a trial that was coming up and did not think that she should make a mistake and try it then (T.43).

Judge Platzer continued the case on May 13 (T.43).

Michael Band from the State Attorney's Office called Mr. Von Zamft and Ms. Seff into his office (T.44). He reprimanded them because of their communication with the judge. They should not have done it. Mr. Band was their superior (T.44-45).

When Ms. Seff mentioned to him that she was concerned that Mr. Guralnick was unprepared for trial she said that they had agreed that they needed more time (T.118).

He believed that he was trying to help the justice system and prevent a miscarriage of justice (T.118). It was simply a matter of scheduling to him. If Ms. Seff had told him that Mr. Guralnick opposed a continuance, he absolutely would not have said anything to Judge Platzer (T.119).

On re-direct, he repeated that he would not have said anything to Judge Platzer if he knew that Mr. Guralnick did not agree to a continuance (T.120).

He spoke to Judge Platzer because of his interest in justice, and his interest in insuring that both sides received a fair trial. He also thought that Judge Platzer's first capital case should not start out with a problem. He went there as Michael Von Zamft. He spoke to Judge Platzer as a friend, not as a prosecutor or because Ms. Seff asked him to do so (T.122-123).

Mr. Von Zamft thought he was helping the judge (T.124).

Judge Victoria Platzer testified. She has been Circuit Judge since 1995 (T.45).

She recalled having lunch with Mr. Von Zamft on May 11, 1998. Pam England, a mutual friend, was also present. She and Mr. Von Zamft were friends then (T.48). They had dated (T.49). They stopped dating in late 1995 (T.49). She recused herself on all of Mr. Von Zamft's cases (T.49).

During lunch, Mr. Von Zamft said that he had to talk to her about one of her cases. She asked him not to (T.49). He said he

just needed to say something to her and she said no. It was in a light manner because she assumed that he would stop once she said that. He then said that she was making a mistake by forcing the attorneys to go to trial. The defense was not ready. It had not taken depositions. She was inviting a reversal (T.49-50).

She told him no, don't, because she did not want him to talk about any case. There was no impending emergency that required Mr. Von Zamft to speak to her about the case (T.50).

A hearing was held on May 13, 1998. It was a status hearing (T.51). Ms. Seff, and two other prosecutors were present. Ms. Seff reiterated what Mr. Von Zamft had said to her which was that she was making a mistake by forcing the defense to go to trial because it was not ready, it had not taken depositions, and suggested to her that she was making a mistake. She thought that something was fishy because Ms. Seff's comments were almost verbatim to Mr. Von Zamft's. There was a comment about camp that struck her in the wrong way. There was also a rumor going around the State Attorney's Office that she was forcing the case to trial because her kids were in camp (T.52-53). That was just one of her considerations as far as specially setting the case. Nonetheless, it was just too much of a rehearsed script and too similar to what Mr. Von Zamft had said as well (T.53).

Mr. Guralnick was kind of wishy-washy at the hearing. He said that he could be ready. He knew that Judge Platzer had made all

these plans and as a courtesy to the court he would be ready but, if she wanted to give him a continuance – – he basically joined in the request for a continuance. That is why she granted the continuance (T.53). He said that he had taken all the major witnesses' statements and that he would be ready for a July trial if that had to come to pass (T.53).

She granted the continuance not because the State told her that Mr. Guralnick needed more time, but because Mr. Guralnick told her he wanted more time if she would give it to him. He had just been in a major death penalty case for a very long period of time, so she granted the request for continuance (T.54).

She asked Ms. Seff to come back into chambers after the hearing. There was no court reporter. It was just the two of them. She asked Ms. Seff how she would feel if she sent her ex-boyfriend to tell her how to handle a case (T.54). She just threw it out there because she had such a bad feeling about Ms. Seff having done that that she was personally offended by it. She assumed that Ms. Seff would say I don't know what you're talking about and it really didn't matter, but she did not. She said that she did not know that Judge Platzer had dated Mr. Von Zamft. She said that she thought that Judge Platzer and Mr. Von Zamft were just friends. She did not want Judge Platzer to make a mistake (T.54-55).

Judge Platzer recused herself *sua sponte* on May 14, 1998. She

did so because it was a death penalty case. Those cases are treated differently from other cases. She was not going to take a chance with there being any appearance of impropriety in the case and at that point she felt that there was. This was predicated upon her conversation with Mr. Von Zamft and with Ms. Seff's comfortable feeling in sending Mr. Von Zamft to talk to her (T.55).

If Mr. Von Zamft had spoken to her of his own volition she would have ignored it. Mr. Von Zamft likes to give opinions on lots of things. That was the nature of their relationship. He just did that. They did not discuss pending cases. They did discuss rulings after she made them. She ran stuff by him since they were friends as she does with colleagues as well. But she would have just ignored it (T.56).

Mr. Von Zamft had never discussed a case that was pending that had an issue which she had to decide. She had to decide whether or not to grant a continuance in the *Dennis* case.

She talked with some judges who are friends, including some appellate judges. They advised her to recuse herself and say nothing. She was very uncomfortable with that because she had read about cases with prosecutorial misconduct and she was concerned about whether this even touched on prosecutorial misconduct. She had the legal unit do some research for her and scheduled a hearing on May 28, 1998. She reviewed the information and felt that it was her obligation as the judge on the case to disclose it and let the

chips fall where they may. Ms. Seff did not appear (T.57). Anita Gay, another prosecutor in *Dennis*, and Michael Band were there (T.58).

Mr. Band said it wasn't appropriate, that Mr. Von Zamft had not only violated whatever rules he may have violated, but worse yet, had infringed on their friendship. She suggested to Mr. Band that he handle it appropriately, whatever he found the appropriate punishment was. She told Mr. Band that as long as she knew that he was going to do something about it she did not feel that she needed to do anything more(T.58).

Mr. Guralnick was offended and suggested that it was not for the State to say whether or not he was ready for trial, and that for strategic reasons he may have elected to go to trial at the time that it was specially set (T.58).

The Bar moved Exhibit 1 into evidence. It is a letter which Mr. Band sent to her after the May 28 hearing setting out what he had done (T.59-60).

On cross-examination, Judge Platzer testified that the letter was written on the State Attorney's stationary by Mr. Von Zamft's supervisor, Mr. Band. He had come to court on May 28, 1998 to try to rectify the situation (T.60). The letter states that it was an in-house matter and that they would take care of it (T.60-61). Mr. Band thanked her for permitting the State Attorney's Office to handle it in-house. Both she and the State Attorney's Office

thought that it was not a matter that should be communicated to The Florida Bar (T.61).

It was Mr. Guralnick who communicated with the Bar (T.63). Mr. Guralnick had been retained to represent Mr. Dennis as private counsel. Mr. Guralnick also filed a motion to dismiss the double homicide indictment on the ground that Mr. Von Zamft had made his passing comment to her (T.63-64).

Pamela England was present when Mr. Von Zamft made the comment to her about continuing the trial. They were at a table in a restaurant. Ms. England had her baby with her. Mr. Von Zamft did not hesitate and whisper in her ear. He was communicating with her about many subjects (T.64). She and Mr. Von Zamft were together at least an hour and a half that day, perhaps longer, because it was his birthday (T.64-65). They talked about her vacation, her family, and a variety of subjects. Mr. Von Zamft's statement about the continuance was just one of many subjects. His comment was very quick. Her absolute impression absolutely was that Mr. Von Zamft made the statement in an attempt to do something positive rather than something negative, that he was attempting to help (T.66). She did not think he was doing anything to sabotage the case (T.66). She did not take Mr. Von Zamft's comment as an attempt to impede and hinder the administration of justice (T.67). In fact, it was just the opposite. He was attempting to do something that might be to its benefit (T.67).

In all likelihood, Mr. Von Zamft mentioned that Mr. Guralnick had been in trial for four months in a murder case and that the penalty, the sentencing phase, was approaching (T.67-68). But she does not remember (T.68).

Mr. Von Zamft did not press the issue. He did not mention it again. There was no importuning on his part after the sixty second comment (T.68).

She was not concerned about Mr. Von Zamft's comment because it did not affect her. She did not pay attention to what he said. He was not going to influence her at all (T.68).

Mr. Von Zamft never mentioned the evidence in the case. He never discussed the prosecution's case or its theory or the defense's theories. He simply said that the matter should be continued, which was a scheduling matter (T.69).

He did not disparage Mr. Guralnick. He simply said that Mr. Guralnick was not ready for trial (T.69).

Respondent's Exhibit 1, the transcript of May 13, 1998 hearing, was introduced (T.69-70).

Mr. Guralnick told her that he preferred a continuance so she granted a continuance. She granted the continuance because Mr. Guralnick said he wanted it. It had nothing to do with what Mr. Von Zamft or Ms. Seff said (T.76). Mr. Von Zamft's statement had no impact whatsoever on the administration of justice in the *Dennis* case (T.76-77). The only thing that persuaded her to grant the

motion was Mr. Guralnick's statement that he was under time pressure and constraints and that it would be better for him and nice if the Dennis case could be continued(T.77).

A hearing was held on May 28, 1998. Mr. Guralnick was there. Mr. Von Zamft was not. She informed the parties of the reason for her recusal. She thought it was absolutely necessary as the trial judge in a murder case that her reason be on the record (T.77-78). She said to Mr. Guralnick "and then, you said of course I would like more time referring that he, you, Guralnick said you wanted more time and that was basically the reason why she granted the continuance" (T.78).

Although Mr. Guralnick had said that he could have been ready, the statements he made on May 13, 1998, certainly showed that he was posturing to obtain a continuance. She granted the continuance based simply on his representations to her of the problems he had (T.79).

Mr. Guralnick filed a motion to dismiss the double homicide on June 19, 1998, about seven days after he filed the Bar complaint. She had continued the trial to September 8, 1998 on May 13, 1998 (T.80-81). She did not announce the recusal and the reason for it until May 28, 1998 (T.81).

She did not disclose the conversation that she had with Mr. Von Zamft because she wasn't even really thinking about it at that point. Then, Mr. Guralnick said, he would like more time if she

would give him more time, but he understood that she had specially set the trial. Predicated upon that and Ms. Seff's strong feelings about having to have a second chair and putting on the record that she had never tried a death penalty case and putting on the record that I had never tried a death penalty case and she apparently had concerns about that as well and that Ms. Brill, another prosecutor was going to in Orlando with Mr. Band on another murder case, she granted the continuance (T.87). On re-cross, it was brought out that, on p.12, she asked Mr. Guralnick if he had anything else and he said no. He never refuted the fact that he needed more time. She confronted him with it and he said of course he would like more time (T.88-89). Mr. Guralnick never said that he was ready for trial and that he did not want the trial continued (T.89-90). On page 10, Mr. Guralnick stated that he wanted to try the case on September 8, 1998 (T.90).

Jerald Kogan, the former Chief Justice of this Court, testified. He presently is the President of the Alliance For Ethical government in Miami-Dade County (T.92). The Alliance is a group of business people, professional people, clergy and educators who have formed an alliance for the purpose of restoring ethical government to Miami-Dade County (T.92).

He was a justice of the Supreme Court of Florida for twelve years. He served as Chief Justice. In those capacities he sat on many Bar cases that the Supreme Court reviewed (T.98). While

sitting on the Supreme Court he was involved in committees and activities concerning the ethical conduct of attorneys, in the broad sense (T.93-94). He was the Chairman of the Gender Bias Study Commission which concerned the ethical responsibilities of persons within the justice system as to their attitudes and conduct towards women. He also reviewed the activities of the Ethnic and Racial Bias Commission concerning the ethical responsibilities of members of the Bar towards minority groups, both racial and ethnic, while a member of the Supreme Court. He and the other Justices approved the disciplinary rules and regulations governing the members of The Florida Bar (T.94).

He has known Mr. Von Zamft for about twenty-five years (T.94). He met Mr. Von Zamft when he appeared before him when he was a circuit judge. He also knew Mr. Von Zamft when he was in the Public Defender's Office. He also knows Mr. Von Zamft as a colleague. They have taught together in the Prosecutor-Public Defender Workshop at the University of Florida for many years. He also knows Mr. Von Zamft as a friend (T.94-95).

He knows Mr. Von Zamft's reputation for truthfulness and integrity among lawyers. It is excellent. He is a truthful person. In his opinion, and from what he has heard from others, Mr. Von Zamft's integrity is the highest.

He is familiar with the allegations against Mr. Von Zamft. Assuming that Mr. Von Zamft had a conversation with Judge Platzer

about a case that was before her, a capital case, and assuming that he suggested to her that she should grant a continuance of the trial because defense counsel was involved in another capital case which had not yet concluded, and that the attorney would not be ready for the capital trial before Judge Platzer, and that if a continuance were not granted that the conviction, if obtained, might be set aside at some later date because of the ineffectiveness of defense counsel, his opinion is that Mr. Von Zamft's statements to Judge Platzer did not constitute a violation of the ethical rules of The Florida Bar because the statements certainly did not go to the merits of the case (T.95-96). The statements went to scheduling.

His opinion is that Mr. Von Zamft's comments generally were not prejudicial to the administration of justice. He, as circuit judge, would appreciate an attorney who told him that particular information so that he would not be wasting the system's time in trying a case that eventually would be reversed and sent back for a new trial (T.97).

On cross-examination he testified that the relationship between Judge Platzer and Mr. Von Zamft did not change his opinion. If anything, it would probably strengthen his opinion. Mr. Von Zamft was trying to advise a friend that there could be a problem. If there were a conviction it might have to be retried if a continuance was not granted (T.98).

Judge Leonard Glick testified. He has been a circuit court judge since 1991. He has sat in the criminal division the entire time (T.112).

He has known Mr. Von Zamft since 1974 when he (Judge Glick) went to the Major Crimes Unit of the State Attorney's Office (T.112). Mr. Von Zamft was an attorney in the Public Defender's Office. He has known Mr. Von Zamft for years as a public defender and private attorney. Mr. Von Zamft has appeared before him as an assistant state attorney (T.112).

Mr. Von Zamft's reputation for truthfulness, integrity and veracity in the legal community is very good. One can take his word to the bank. It is not necessary to put things in writing with Mr. Von Zamft. A handshake is fine. He never had a reason to question Mr. Von Zamft's word and neither has anybody that he knows (T.113).

The Referee found Mr. Von Zamft guilty and recommended a published admonishment (R.R.1-5).

Mr. Von Zamft will refer to specific passages of the Report in the Argument portion of this brief.

This Petition for Review followed.

POINTS ON REVIEW

I

RULE 4-8.4(d) OF THE RULES REGULATING THE FLORIDA BAR IS UNCONSTITUTIONAL BECAUSE IT IS VOID FOR VAGUENESS AND OVERBROAD.

II

THE REFEREE ERRED IN FINDING MR. VON ZAMFT GUILTY OF VIOLATING RULE 4-8.4.(D) OF THE RULES REGULATING THE FLORIDA BAR.

III

THE REFEREE ERRED IN FINDING MR. VON ZAMFT GUILTY OF A VIOLATING RULE 4-3.5(a) OF THE RULES REGULATING THE FLORIDA BAR.

IV

THE REFEREE ERRED IN RECOMMENDING THAT A PUBLISHED ADMONISHMENT BE ISSUED TO MR. VON ZAMFT. A PUBLISHED ADMONISHMENT DOES NOT EXIST.

V

MR. VON ZAMFT SHOULD NOT BE REQUIRED TO PAY COSTS. HE OFFERED TO SETTLE THE CASE BY ACCEPTING AN ADMONISHMENT. THE BAR REFUSED.

SUMMARY OF THE ARGUMENT

I

Rule 4-8.4.(d) is unconstitutionally void for vagueness and overbroad. It provides no ascertainable standard of guilt. It permits the Bar and Referee to select that which it desires to prosecute and hear without giving notice to attorneys.

II

The Referee erred in finding Mr. Von Zamft guilty of violating Rule 4-8.4.(d). The uncontradicted evidence and the finding of the Referee were that Mr. Von Zamft intended to enhance the administration of justice.

III

The Referee erred in finding Mr. Von Zamft guilty of violating Rule 4-3.5.(a). Subsection (a) concerns conduct, not communications. Subsection (b) concerns communications. A lawyer is permitted to communicate with a judge on a scheduling matter.

IV

The Referee erred in recommending a published admonishment. There is no such discipline. The Court should order an admonishment.

V

Mr. Von Zamft should not be required to pay the Bar's costs. He offered to settle the case by accepting an admonishment. The Bar refused. The Referee recommended an admonishment.

INTRODUCTION

"'This case is not unlike that old adage or homily that "no good deed goes unpunished."'" *The Florida Bar v. Barcus*, 697 So.2d 71, 75 (Fla. 1997).

Mr. Von Zamft's intentions were pure and his comments noble. His punishment is this.

ARGUMENT

I

RULE 4-8.4.(d) OF THE RULES REGULATING THE FLORIDA BAR IS UNCONSTITUTIONAL BECAUSE IT IS VOID FOR VAGUENESS AND OVERBROAD.

Bar proceedings are: : ". . . quasi-criminal in nature. . . ." *The Florida Bar v. Vernell*, 721 SO.2d 705, 707 (Fla. 1998).

The facial constitutionality of a statute or rule of procedure may be raised for the first time on appeal because: "'a conviction for the violation of a facially invalid statute would constitute fundamental error.' . . . ." *Trushin v. State*, 425 So.2d 1126, 1129 (Fla. 1982)

Rule 4-8.4.(d) of the Rules Regulating The Florida Bar is void for vagueness. The Rule, *inter alia*, provides that: "A lawyer shall not: . . .(d) engage in conduct in connection with the practice of law that is prejudicial to the administration of justice. . . ." The term "conduct . . . prejudicial to the administration of justice" is nowhere defined.

It is fundamental that a penal statute must be precise:

> "'. . . Whether the words of the Florida statute are sufficiently explicit to inform those who are subject to its provisions what conduct on their part will render them liable to its penalties is the test by which the statute must stand or fall, because . . . "a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." (*State v. Buchanan*, 191 So.2d 33, 34-35 (Fla.

1966))

It is equally fundamental that:

> "Statutes criminal in character must be strictly construed . . . In its application to penal and criminal statutes, the due process requirement of definiteness is of especial importance. If such statutes, in defining criminal offenses, omit certain necessary and essential provisions which serve to impress the acts committed as being wrongful and criminal, the courts are not at liberty to supply the deficiencies or undertake to make the statutes definite and certain. . . ." (*Id.*, at 36)

Buchanan declared unconstitutional former Statute 72.40(2)(a), which prohibited a lawyer from charging more than a "reasonable" fee in an adoption matter. The defendant-attorney was accused of charging more than a reasonable fee in an adoption.

This Court held the statute void for vagueness:

> ". . . As apt today as when pronounced is the observation . . . 'It would certainly be dangerous if the Legislature could set a net large enough to catch all possible offenders and leave it to the courts to step inside and say who could be rightfully detained and who should be set at large. This would, to some extent, substitute the Judicial for the Legislative Department of the Government.'
>
> We simply say that the statutory section in question is too vague and indeterminent to establish for guidance of attorneys an ascertainable standard of guilt. Accordingly, we find that section 72.40(2)(a), Florida Statute F.S.A., is void, in that attorneys prosecuted and convicted under it will be deprived of their organic right of due process of law. . . ." (*Id.*, at 37)

Roque v. State, 664 So.2d 928 (Fla. 1995), held the Florida Commercial Bribery Statute unconstitutional. The defendant was the credit manager for a company. He extended credit to organizations seeking to finance construction equipment. Another man worked with

the defendant in locating suitable candidates for loans and was paid a commission by the defendant's company. The state alleged that the defendant entered into an unauthorized side agreement with the other man in which the other man paid the defendant between thirty-three percent and forty percent of each commission as a "payback".

Florida Statute 838.15(1) prohibited the solicitation, acceptance or agreement to accept a benefit "with intent to violate a statutory or common law duty to which that person is subject. . . ."

This Court unanimously held the statute unconstitutionally vague:

> ". . . Few workers in Florida, however, are aware that they owe such a 'common law duty' to their employers and fewer still could define the dimensions of that duty. In fact, substantial legal research would be required by many employees to determine their obligations under the law.
>
> > By the terms of this act every . . . employee . . . is required to determine at his peril what specific acts are authorized by law and what are not authorized by law. Honest and intelligent men may reasonably have contrary views as to whether or not a specific act . . . is or is not authorized by law and, therefore, the violation or non-violation of this statute may reasonably depend upon which view the court or a jury may agree with.
>
> . . . The statute 'is too vague to give men of common intelligence sufficient warning of what is corrupt and outlawed.' . . .
>
> Further, by its plain language the statute proscribes every violation of an employee's statutory or

common law duty, no matter how trivial or obscure, whether it results in harm or not. A head waiter giving preferential treatment to a big tipper or a sales person on commission giving special service to a well-healed customer could be subject to criminal prosecution under the plain language of the statute. Because of the statute's indiscriminent sweep, individual prosecutors must decide – – based on their own subjective opinions – – which violations are sufficiently substantial to warrant full-blown criminal prosecution.

> While some discretion is inherent in prosecutorial decision-making, it cannot be without bounds. The crime defined by the statute . . . is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute, as a crime, the most insignificant of transgressions or, at worst, to misuse the judicial process. . . .

Section 838.15 invites arbitrary application of the law." (*Id.*, at 929-930)

Cuda v. State, 639 So.2d 22 (Fla. 1994), declared unconstitutional Florida Statute 415.111(5), which provided that:

> "A person who knowingly or wilfully exploits an aged person or disabled adult by the improper or illegal use or management of the funds, assets, property, power of attorney, or guardianship of such aged person or disabled adult for profit, commits a felony of the third degree. . . ."

This Court determined that:

> ". . . there are no other statutes in the instant case to lend meaning to the vague language employed in section 415.111(5). As in *Locklin*, this statute purports to criminalize any 'illegal' act in using or managing the funds of aged person. Further, section 415.111(5) also suffers from the same constitutional infirmities noted by this Court in *Locklin*. The statute violates due process because it is too vague to give notice. Furthermore, 'the determination of a standard of guilt is left to be supplied by the courts or juries,' which is 'an unconstitutional delegation of legislative power.'. . .

." (639 So.2d at 24)

State v. Jenkins, 469 So.2d 733 (Fla. 1985), held unconstitutional former Florida Statute 839.25(1)(a), which prohibited official misconduct defined as follows:

> "839.25 Official Misconduct. -
>
> (1) 'Official misconduct' means the commission of one of the following acts by a public servant, with corrupt intent to obtain a benefit for himself or another or to cause unlawful harm to another;
>
> (a) Knowingly refraining, or causing another to refrain from performing a duty imposed upon him by law. . . ."

This Court held that:

> "The district court, in finding subsection (a) to be unconstitutional, relied upon our decision in *State v. DeLeo* . . . in which we struck down section 839.25(1)(c) . . . as unconstitutional on the ground that it was susceptible to the same type of arbitrary application. That subsection defined official misconduct as '[k]nowingly violating, or causing another to violate, any statute or lawfully adopted regulation or rule relating to his office.' In striking subsection (c), this Court stated:
>
> > 'Official Misconduct' under subsection (c) is keyed into the violation of any statute, rule or regulation, pertaining to the office of the accused, whether they contain criminal penalties themselves or not, and no matter how minor or trivial.

356 So.2d at 308. We concluded by finding:

> The crime defined by the statute, knowing violations of any statute, rule or regulation for an improper motive, is simply too open-ended to limit prosecutorial discretion in any reasonable way. The statute could be used, at best, to prosecute as a crime, the most insignificant of transgressions or, at worst,

> to misuse the judicial process for political purposes. We find it susceptible to arbitrary application because of its 'catch-all' nature.
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> * * *
>
> . . . We agree that subsection (a) suffers the same vulnerability to arbitrary application and find that it impermissibly allows the imposition of criminal sanctions for the failure to perform duties imposed by statute, rules, or regulations that may themselves impose either a lesser penalty or no penalty at all. We note that agency rules and regulations . . . have the effect of law . . . and, therefore, violation of any agency rule or regulation could be grounds for the imposition of criminal sanctions under subsection (a). We conclude that subsection (a), as it is presently written, is unconstitutionally vague and susceptible to arbitrary application. . . ." (*Id.*, at 734)

State v. Wershow, 343 So.2d 605 (Fla. 1977), held unconstitutional former Florida Statute 839.11, which, *inter alia*, provided that:

> "839.11 Extortion and Malpractice Generally. – – Any officer of this state . . . who is guilty of any malpractice in office not otherwise especially provided for, shall be guilty of a misdemeanor of the first degree. . . ."

The defendants were charged under this statute of approving or voting to approve the purchase of new voting machines without taking competitive bids or having the chairman of the county commission certify that the situation required an exception, for failing to keep and maintain adequate records, and other similar acts.

This Court concluded that:

> ". . . the subject statute is so vague and overbroad that it is not amenable to . . . saving construction

> unless the court is willing to invade the province of the Legislature and virtually rewrite it. Under our constitutional system, courts cannot legislate . . .

Any doubt is resolved in favor of the accused:

> "When construing a penal statute against an attack of vagueness, where there is doubt, the doubt should be resolved in favor of the citizen and against the state. Criminal statutes are to be strictly construed according to the letter thereof. . . ." (*Id.*, at 608)

This Court once again explained that:

> ". . . It is unconstitutionally impermissible for the Legislature to use such vague and broad language that a person of common intelligence must speculate about its meaning and be subjected to arrest and punishment if the guess is wrong. . . ." (*Ibid*)

What is conduct prejudicial to the administration of justice?

If a lawyer compliments a judge on a ruling in a case and the lawyer might have a case before the judge in the distant future, is the lawyer's comment prejudicial to the administration of justice?

If a lawyer and a judge have been friends for thirty five years, and each was the best man in the other's wedding, and the lawyer gives the judge and his wife a twenty fifth wedding anniversary gift, and the lawyer might have a case before the judge in the distant future, is that conduct prejudicial to the administration of justice?

If a lawyer contributes to a judge's election campaign, and the lawyer might have a matter before the judge in the distant future, is that conduct prejudicial to the administration of justice?

If a lawyer is an alumna of one school and a judge is an alumna of another school, and the two schools are sports rivals, and the two have a bet on the schools' annual football game, lunch, and the lawyer's school loses and she buys the judge lunch, is that conduct prejudicial to the administration of justice?

The vagueness and lack of standards of Rule 4-8.4(d) is perfectly illustrated by this case. Chief Justice Kogan expressed the opinion that Mr. Von Zamft's statements to Judge Platzer did not constitute a violation of the Rule. The Referee found that the statements did.

Moreover, the Referee's reasoning is most curious. He found that Mr. Von Zamft persisted in expressing his opinion about a continuance of the case, even though Judge Platzer asked him to stop. Persistence, of course, is no violation of the Rule. Mr. Von Zamft spoke to Judge Platzer only about scheduling. The Referee also found that the result was a recusal of the trial judge. How is that prejudicial to the administration of justice? Judges are fungible. The recusal occurred *after* Judge Platzer granted the continuance predicated *solely* upon Mr. Guralnick's request. Finally, the Referee found that Mr. Von Zamft's statements provided fodder (although clearly without merit) for Mr. Guralnick at later appeals stages following a conviction of his client. First, there is no evidence that any such issue was raised on appeal. This is shear speculation. Second, the Referee himself

recognized that any such use would be clearly without merit. Third, there is nothing in the record that even hints at the result of the *Dennis* trial.

This Court must declare Rule 4-8.4(d) unconstitutional on its face.

II

THE REFEREE ERRED IN FINDING MR. VON ZAMFT GUILTY OF VIOLATING RULE 4-8.4.(D) OF THE RULES REGULATING THE FLORIDA BAR.

It is fundamental that the Bar has the burden of proving the allegations of misconduct by clear and convincing evidence. *The Florida Bar v. Marable*, 645 So.2d 438, 442 (Fla. 1994); *The Florida Bar v. Rayman*, 238 So.2d 594, 596-597 (Fla. 1970).

The record is devoid of any evidence that Mr. Von Zamft intended to engage in conduct prejudicial to the administration of justice or that he did engage in conduct prejudicial to the administration of justice.

Mr. Von Zamft testified that he told Judge Platzer that if the *Dennis* case went to trial in July, 1998 as scheduled, the potential of a reversal was great. She did not need to have her first capital case reversed. It would not be good for her (T.37-38). His intent was to have the judge grant a continuance in order that both sides would be able to try the case fairly (T.38). There is no need to waste a judge's time by trying a case two and three times, especially a complicated murder case, because a defense attorney is not ready (T.38).

Mr. Von Zamft and Judge Platzer had had conversations about law, general advice, etc. (T.42). One conversation concerned reversals. Judge Platzer had said that she thought that the

attorneys in front of her probably should give her better advice to avoid reversals, so she could make correct decisions. Knowing that, and with his knowledge of what was going on, his view of capital cases that he had tried, and his relationship with her, Mr. Von Zamft expressed the view that he did not think that she should make a mistake and try it then (T.43).

Ms. Seff had told him that she and Mr. Guralnick had talked and that they had both agreed that they needed more time (T.118). He was trying to help the justice system and prevent a miscarriage of justice (T.118). It was simply a matter of scheduling. If Ms. Seff had told him that Mr. Guralnick opposed a continuance, he absolutely would not have said anything to Judge Platzer (T.119).

He spoke to Judge Platzer because of his interest in justice and his interest in insuring that both sides receive a fair trial. He also thought that Judge Platzer's first capital case should not start out with a problem. He thought he was helping the judge (T.124).

Judge Platzer testified that she continued the trial *because Mr. Guralnick told her that he wanted more time if she would give it to him*. He had just been in a major death penalty case for a very long period of time, so she granted the request for a continuance (T.54).

Her absolute impression was that Mr. Von Zamft made the statement in an attempt to do something positive rather than

something negative. He was attempting to help (T.66). She did not think he was doing anything to sabotage the case (T.66). *She did not take Mr. Von Zamft's comment as an attempt to impede and hinder the administration of justice* (T.67). In fact, it was just the opposite. *He was attempting to do something that might be to its benefit* (T.67).

She was not concerned about Mr. Von Zamft's comment because it did not affect her. She did not pay any attention to what he said. He was not going to influence her at all (T.68-69).

Mr. Von Zamft never mentioned the evidence in the case. He never discussed the prosecution's case or its theory, or the defenses theories. He simply said that the matter should be continued. This was a scheduling matter (T.69).

Judge Platzer granted the continuance because Mr. Guralnick said he wanted it. It had nothing to do with what Mr. Von Zamft or Ms. Seff said (T.76). *Mr. Von Zamft's statement to her had no impact whatsoever on the administration of justice in the Dennis case* (T.76-77).

A hearing was held two days later on the motion to continue. The *only* thing that persuaded her to grant the motion was Mr. Guralnick's statement that he was under time pressure and constraints and that it would be better for him and nice if the *Dennis* case could be continued because of his time constraints (T.77). *She granted the continuance based simply upon Mr.*

Guralnick's representations to her of the problems he had (T.79).

Former Chief Justice Kogan testified that he is familiar with the allegations against Mr. Von Zamft. Assuming that Mr. Von Zamft had a conversation with Judge Platzer about a capital case that was before her, and assuming that Mr. Von Zamft suggested to her that she should grant a continuance of the trial because defense counsel was involved in another capital trial which had not yet concluded, and assuming that defense counsel would not be ready for the capital trial before Judge Platzer, and assuming that if a continuance were not granted that the conviction, if obtained, might be set aside as some later date because of the ineffectiveness of defense counsel, his opinion is that Mr. Von Zamft's statements to Judge Platzer did not constitute a violation of the ethical rules of the Florida Bar because the statements did not go to the merits of the case (T.95-96). The statements concerned scheduling. Certainly, they did not go to the merits of the case (T.96-97).

His opinion is that Mr. Von Zamft's statements generally were not prejudicial to the administration of justice. He, as a circuit judge, would appreciate an attorney who told him that particular information in order that he would not be wasting the system's time in trying a case that eventually would be reversed and sent back for a new trial (T.97).

On cross-examination, he testified that the relationship

between Judge Platzer and Mr. Von Zamft did not change his opinion. If anything, it would probably strengthen his opinion. Mr. Von Zamft was trying to advise a friend that there could be a problem. If there were a conviction it might have to be retried if a continuance was not granted (T.98).

The Referee noted that:

> ". . . Respondent . . . testified that he would not have spoken to the trial judge if he did not think that both attorneys wanted the continuance . . . and that he was trying to help the trial judge avoid a potential retrial of this, her first capital case.
>
> The trial judge invited the Respondent to lunch on May the 11th along with another individual to celebrate the Respondent's birthday. At that luncheon the Respondent said he wanted to tell her something about the Labrant (sic) case. The trial judge immediately advised him not to do so; the Respondent persisted saying that he needed to; the Respondent testified that if the trial judge had asked him not to say anything he did not hear it, and that if she had said not to talk about it he would not have . . . the trial judge testified that she told him again not to discuss the case; and the Respondent then continued to advise her that it would be in her best interest and everyone elses' best interest to continue the case to avoid a possible Rule 3.850 problem because defense counsel Guralnick could not possibly be ready . . .
>
> * * *
>
> The Respondent argues that his attempt to obtain a continuance was a scheduling matter, not prohibited by the rules, as opposed to something affecting the merits of the case. Further, that his intent was to assist the court in avoiding a potential retrial, and therefore he did not have the mens rea which he alleges is required for acts prejudicial to the administration of justice. Respondent emphasizes that he had no self interest in the matter and was attempting to do the right thing. He testified that he was 'trying to help the system and prevent a miscarriage of justice'.

> The referee heard testimony, live and proffered, from judges and a representative of the State Attorney's Office as to the outstanding reputation of the Respondent and that he had a reputation for being ethical. In addition, former Justice Jerald Kogan testified (surprisingly without objection of the Bar) that in his opinion the Respondent's conversation with the trial judge did not go to the merits of the case and therefore was not in violation of the rules and was not prejudicial to the administration of justice. He further supported the other witnesses as to the Respondent's reputation for being truthful and of having the highest integrity." (R.R. _____)

The Referee's Recommendation provided that:

> "If Respondent is to be believed, it was his good intentions however, were misplaced and showed a lack of good judgment. The Respondent placed the Judge in a potential compromising position were there could have been an 'appearance' of impropriety and undue influence. The Judge, much to her credit, was forced to follow the prudent course of recusing herself.
>
> * * *
>
> Rule 4-8.4(d):
>
> The Referee, by clear and convincing evidence finds that the respondent is guilty of the violation of the above rule which provides that a lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice . . . In the instant case, even though admonished by the trial judge, twice, the Respondent persisted in expressing his opinions concerning a continuation of the case. The result was a recusal of the trial judge and fodder (although clearly without merit) for the defense counsel at later appeals stages following the conviction of his client." (R.R. 3-4)

The Referee's finding is error.

The uncontradicted testimony was that Mr. Von Zamft attempted to help the administration of justice.

The Referee went far afield. First, what difference does it

make that Mr. Von Zamft persisted in talking to Judge Platzer about this scheduling matter? Second, that Judge Platzer recused herself is immaterial. She had already granted a continuance predicated solely upon Mr. Guralnick's request. Moreover, Judges are fungible. Certainly the Referee did not mean that one trial judge was better than the other. Third, no fodder was given to defense counsel. The Referee's conclusion was shear speculation. Additionally, there is nothing in the record that says that defense counsel used it. Finally, the Referee himself found that this fodder was clearly without merit.

This Court must reverse the Referee's finding that Mr. Von Zamft violated Rule 4-8.4(d).

III

THE REFEREE ERRED IN FINDING MR. VON ZAMFT GUILTY OF VIOLATING RULE 4-3.5.(a) OF THE RULES REGULATING THE FLORIDA BAR.

Rule 4-3.5.(a) provides that:

> "(a) **Influencing Decision Maker.** A lawyer shall not seek to influence a judge, juror, prospective juror, or other decision maker *except as permitted by law or the rules of court*." (Emphasis Added)

Rule 4-3.5.(b) provides that:

> "(b) **Communication with Judge or Official.** In an adversary proceeding a lawyer shall not communicate or cause another to communicate *as to the merits of the cause* with a judge or an official before whom the proceeding is pending. . . ." (Emphasis Added)

It is plain that subsection (a) refers to conduct and

subsection (b) refers to communication. There is no other reasonable reading of the two subsections.

The Referee found:

> ". . . While the Respondent professes that his intention was meritorious, attempting to assist the judge and to avoid a miscarriage of justice, and *while it is true that the communication was not intended to go to the merits of the case*, subsection (a) of Rule 4-315(sic) makes no exception concerning the merits of the case. . . The matter should not have been broached with the trial court judge under these circumstances without both the State Attorney's Office and defense counsel, Mr. Guralnick being present. As set forth In Re McCafferty, 549 P.2nd 666 (Or. 1976) the court stated that 'it is immaterial whether the communication is an intentional or a negligent violation of the rule' (page 668) when there is misconduct that the rule is designed to prevent." (R.R. ____) (Emphasis Added)

First, the Referee misread the Rule.

Second, the Referee conceded that: ". . . it is true that the communication was not intended to go to the merits of the case. . . ." (R.R. 4).

Third, the Referee erred in relying upon *In Re McCaffrey*, 549 P.2d 666 (Or. 1976). There, the lawyer wrote a letter to a represented adverse party. The Supreme Court of Oregon held that a negligent violation of the Rule is subject to disciplinary action of the breach is apt to cause the harm the rules sought to prevent. 549 P.2d at 668. It further held that the purpose of the Rule was to prevent a person from being deprived of counsel's advice by bypassing retained counsel. It was only then that the Supreme Court of Oregon held that it was immaterial whether the direct

communication is an intentional or negligent violation of the Rule. Here, Mr. Von Zamft's communication with Judge Platzer related only to scheduling. The difference between *McCaffrey* and this situation is total.

The Referee should have looked to Florida law. In order to find that an attorney has acted with dishonesty, deceit, misrepresentation, or fraud, the necessary element of intent must be proven by clear and convincing evidence. *The Florida Bar v. Cramer*, 643 So.2d 1069, 1070 (Fla. 1994), *The Florida Bar v. Lanford*, 691 So.2d 480, 480-481 (Fla. 1997); *The Florida Bar v. Fredericks*, 7311 So.2d 1249, 1252 (Fla. 1999). The same requirement must hold in this case.

This Court must reverse the finding that Mr. Von Zamft violated Rule 4-3.5.(a).

IV

THE REFEREE ERRED IN RECOMMENDING THAT A PUBLISHED ADMONISHMENT BE ISSUED TO MR. VON ZAMFT. A PUBLISHED ADMONISHMENT DOES NOT EXIST.

Rule 3-5.1.(a) of the Rules Regulating The Florida Bar provides that: ". . . A memorandum of an admonishment shall thereafter be made a part of the record of proceeding."

The Referee held and recommended that:

> ". . . An admonishment would likely suffice with respect to this Respondent to prevent his further violation of the Rules of Professional Conduct, provided,

> however, that it should be published in order to emphasize the concern of a court with similar violations and all lawyer misconduct." (R.R. ____)

There simply is no provision for a published admonishment.

The Referee overlooked the last sentence of Rule 3-5.1.(a) which provides that a memorandum of administration of an admonishment shall be made a part of the record of the proceeding. He confused the memorandum with publication.

The referee made a similar mistake in *The Florida Bar v. Musleh*, 453 So.2d 794 (Fla. 1984). There, the referee recommended that the attorney be found guilty and suspended for six months, with automatic reinstatement. This Court held that:

> ". . . In reviewing the recommended discipline . . . we find the referee overlooked Rule 11.10(4) of The Florida Bar Integration Rule in recommending automatic reinstatement at the end of a six-months' suspension. Rule 11.10(4) requires proof of rehabilitation for reinstatement of any suspension of more than ninety days." (*Id.*, at 797)

Accordingly, this Court ordered that the attorney be suspended for ninety days with automatic reinstatement. *Id.*, at 798.

This case warrants the same relief. This Court simply should order an admonishment.

V

MR. VON ZAMFT SHOULD NOT BE REQUIRED TO PAY COSTS. HE OFFERED TO SETTLE THE CASE BY ACCEPTING AN ADMONISHMENT. THE BAR REFUSED.

Mr. Von Zamft offered to accept an admonishment and to take an ethics course (Appendix). The Bar refused.

The Referee recommended an admonishment.

It would be most unfair to require Mr. Von Zamft to pay the Bar's costs under these circumstances.

CONCLUSION

This Court must declare Rule 4-8.4.(d) of the Rules Regulating The Florida Bar unconstitutional, must reverse the findings of guilt, must order simply a suspension, and must order that Mr. Von Zamft pay no costs.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Respondent's Initial Brief** was mailed to **GREGG D. WENZEL**, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 this 10th day of July 2000.

By: _____
Louis M. Jepeway, Jr.