IN THE SUPREME COURT OF FLORIDA

CASE NO.SC95831

MICHAEL LEE VON ZAMFT,

Respondent,

vs.

THE FLORIDA BAR,

Complainant.

RESPONDENT'S REPLY BRIEF

JEPEWAY AND JEPEWAY, P.A.
407 Biscayne Building
19 West Flagler Street
Miami, Florida 33130
Tele.: (305)377-2356
Fla. Bar No. 113699

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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); *In re Ruffalo*, 390 U.S. 544, 88 S.Ct. 1222 (1968). Nothing the Bar says changes that.

The Bar cites several criminal cases in which statutes were upheld. Those statutes were far more specific than Rule 4-8.4.(d). The vagueness of the Rule is similar to the vagueness of the statutes in the cases Mr. Von Zamft cited in his Initial Brief.

The best evidence of the vagueness of the Rule was the testimony of former Chief Justice Jerald Kogan. His opinion was that Mr. Von Zamft's communication with Judge Platzer violated no Rule, because it involved only scheduling (T.95-96).

The Bar, at p.6, refers to Mr. Von Zamft's communication as conduct. It was not. The overbreadth of the Rule is illustrated by this case. It is inconceivable that the Rule was intended to apply to Mr. Von Zamft's communication with Judge Platzer about scheduling.

The Bar cites decisions from other jurisdictions in support of its argument that the Rule is constitutional. They provide little support.

In *In Re Jones*, 534 A.2d 336 (D.C.App. 1987), the attorney twice failed to respond to a complaint. The rule was very clear.

In *State v. Nelson*, 504 P.2d 211 (Kan. 1972), the attorney made a statement that was published in a newspaper highly critical of the judiciary generally. The complaint was dismissed.

In *Commission for Lawyer Discipline v. Benton*, 980 S.W.2d 425 (Tex. 1998), the attorney had represented the plaintiffs in a personal injury matter. The jury found the defendant liable but awarded no damages. The attorney wrote a scathing letter to all members of the jury. The letter accused them of corruption and indifference. He violated the Texas rule which provided:

> "After discharge of the jury from further consideration of a matter with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury that are *calculated* merely to harass or embarrass the juror or to influence his actions in future jury service." (Emphasis Added)

There is no such qualifying language in Rule 4-8.4(b).

In *Howell v. Texas*, 559 S.W.2d 432 (Tex. Civ. App. 1977), the attorney refused to answer a judge's question after being informed that he would be held in contempt if he persisted in his refusal.

In *Miss. Com'sn of Jud. Perform. v. Russell*, 691 So.2d 929 (Miss. 1997), the judge released prisoners without jurisdiction or authority. The relevant Rule was a model of clarity compared to the Rule here:

> "*Willful* misconduct in office of necessity is conduct prejudicial to the administration of justice that brings judicial office into this repute. . . ." (Emphasis

Added)

There is no such qualifying language in Rule 4-8.4(d).

In *State ex rel. Okl. Bar v. Bourne*, 880 P.2d 360 (Okl. 1994), the attorney obtained judgments in excess of that which was owed, he did not always verify service of process, and one of the owners of his client has been serving the summons and petitions. The complaint was dismissed.

In *In Re McCully*, 942 P.2d 327 (Utah 1997), the rule prohibited: "conduct prejudicial to the administration of justice which brings a judicial office into disrepute". The judge, in her official capacity, permitted a litigant to submit a sworn affidavit signed by her and containing her opinions and conclusions on the ultimate issue in a pending judicial proceeding.

All of these cases involve situations far more serious than Mr. Von Zamft's communication with Judge Platzer about a scheduling matter.

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.

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.

Ms. Seff told him that she and Mr. Guralnick had talked and that they 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 (T.38). He thought that he was helping the judge (T.124).

Judge Platzer 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, its theory, or the defense's 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. His opinion was 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;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).

The communication involved only scheduling. No word was spoken about the merits.

The Referee conceded that Mr. Von Zamft acted with good intentions (R.R. 3). The Referee found only that Mr. Von Zamft: ". . . placed the judge in a *potential* compromising position where there *could* have been an 'appearance' of impropriety and undue influence. . . ." (R.R. 3-4) (Emphasis Added). That was not the case. The communication involved only scheduling. This communication was permitted. Canon 3.B.(7)(a) of the Code of Judicial Conduct permits *ex parte* communications about scheduling. Respectfully, the Referee traveled deeply into speculation.

The Referee found that Mr. Von Zamft's statements to the trial judge resulted in her recusal and: ". . . fodder (although clearly without merit) for the defense counsel at later appeals stages following the conviction of his client." (R.R. 3-4).

That Judge Platzer recused herself is immaterial. She had already granted a continuance predicated solely upon Mr. Guralnick's request. Second, no fodder for appeal was given to defense counsel. There is nothing in the record that even hints that defense counsel used it on appeal. And, of course, the

Referee himself found that this fodder clearly was without merit.

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

The Bar simply is mistaken, at p.11, in its view of Mr. Von Zamft's position. It is not that since his advice was correct there was no violation. Rather, it is that he did not engage in conduct prejudicial to the administration of justice. The communication concerned only scheduling.

The Bar cites several cases from other jurisdictions which hold that a lawyer's correct, but improper, advice warranted discipline. They simply are inapposite.

In *Matter of Keiler*, 380 A.2d 119 (D.C. 1977), the attorney chose his partner as arbitrator in a proceeding. He did not inform the other side. He committed fraud on the judicial system. *Id.*, at 125.

In *State v. Calhoon*, 102 So.2d 604 (Fla. 1958), the attorney lied to another about a bribe that had to be paid to a judge. He then accused the judge of dishonesty. This Court properly held that the attorney's conduct: ". . . strikes at the very heart of our judicial system, the honesty and integrity of a judge. . . ." *Id.*, at 609.

In *Matter of Bemis*, 938 P.2d 1120 (Ariz. 1997), the attorney attempted to hold *ex parte* meetings with two judges concerning the merits of pending litigation. He also submitted a proposed order

that was sarcastic and contained statements outside the scope of the Court's verbal order.

In *In Re Thompson*, 940 P.2d 510 (Or. 1997), the attorney engaged in an *ex parte* communication with a judge about the merits of a case pending before the judge.

In *Disciplinary Counsel v. Ferreri*, 727 N.E.2d 908 (Ohio 2000), a juvenile court judge made an unannounced visit to the office of the legal administrator of the Department of Children and Family Services. They, in a confrontational manner, discussed the judge's earlier unreturned phone call and his request that the legal administrator's Department terminate its opposition to the transfer and consolidation of certain cases in the judge's court. The judge then met with the legal administrator's superior and complained that she had not returned phone calls. The judge also asked the superior to deal promptly with the consolidation situation. The Department was a party in some of the cases that were subject to the motion to consolidate.

The facts of these cases fail even to approach Mr. Von Zamft's situation.

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.

The Bar erroneously asserts that Rule 4-3.5.(a) must be read in isolation from Rule 4-3.5.(b). However, subsection (a) refers to conduct and subsection (b) refers to communication.

Moreover, subsection (a) provides that a lawyer shall not seek to influence a judge except as permitted by law or the rules of Court. Subsection (b) provides that a lawyer shall not communicate with a judge in an adversary proceeding as to the merits of the cause. Thus, Mr. Von Zamft's communication as to scheduling was permitted. Cannon 3.B.(7)(a) of the Code of Judicial Conduct permits *ex parte* communications about scheduling. Subsection (a) cannot prohibit that which subsection (b) and Cannon 3.B.(7)(a) permit. Indeed, if the two subsections do not prohibit different activities, why have them?

Mr. Von Zamft's only intent was to have the judge grant a continuance in order that both sides would be able to try the case fairly (T.38). The Referee conceded that ". . . it is true that the communication was not intended to go to the merits of the case . . . ." (R.R. 4). The Bar's attempt to make something sinister of this fails.

Reliance upon *In Re McCaffrey*, 549 P.2d 666 (Or. 1976), is misplaced. There, the lawyer wrote a letter to an adverse party represented by counsel. The Court held that a negligent violation of the Rule is subject to disciplinary action if the breach is apt to cause the harm the Rules sought to prevent. The purpose of the

Rule was to prevent a person from being deprived of counsel's advice by bypassing counsel. It was only then that the Court held that it was immaterial whether the direct communication was intentional or negligent. Here, Mr. Von Zamft's communication with Judge Platzer related only to scheduling.

In situations involving 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*, 731 So.2d 1249, 1252 (Fla. 1999). Mr. Von Zamft's lack of *mens rea* is plain.

The Bar makes an egregious misstatement at p.15. It states that Judge Platzer thought that she was obligated to report Mr. Von Zamft to the Bar. Judge Platzer thought that the matter should *not* be communicated to the Bar (T.61). Mr. Guralnick communicated with the Bar (T.63).

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.

The Referee and the Bar erroneously equate the existence of the memorandum of admonishment of Rule 3-5.1.(a) with publication. There is no provision for the publication of an admonishment.

The Bar asserts that publication of an admonishment is not precluded. However, neither is imprisonment prohibited. The failure to prohibit a punishment hardly means that it is permitted.

The intent of the admonishment was to warn Mr. Von Zamft about similar future conduct. The admonishment need not be published to achieve that purpose.

Publication is not permitted and can serve only to embarrass and humiliate Mr. Von Zamft. That the Referee recommended publication does not expand his power or that of this Court.

The Bar's silence concerning *The Florida Bar v. Musleh*, 453 So.2d 794 (Fla. 1984), is deafening.

This Court must order an unpublished 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. The Bar refused.

The Referee recommended an admonishment.

Rule 3-7.6(o) provides:

> "(3) *Assessment of Bar Costs*. When the bar is successful, in whole or in part, the referee may assess the bar's costs against the respondent *unless it is shown that the costs of the bar were unnecessary*. . . ." (Emphasis Added)

What is more unnecessary than the costs of a proceeding whose result was identical to that which Mr. Von Zamft offered?

Additionally, Rule 1.442 of the Florida Rules of Civil Procedure permit the consideration of offers of settlement in assessing costs. The purpose is to encourage settlement and discourage litigation. This Court must consider the Bar's unreasonable and unnecessary rejection of Mr. Von Zamft's settlement offer in determining costs.

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 an unpublished admonishment, and must order that Mr. Von Zamft pay no costs.

JEPEWAY AND JEPEWAY, P.A.
19 West Flagler Street
Suite 407
Miami, Florida 33130
Tele.: (305)377-2356

By: _____
Louis M. Jepeway, Jr.
Fla. Bar No. 113699

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Respondent's Reply Brief** was mailed to **GREGG D. WENZEL**, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 this 27th day of September 2000.

By: _____
Louis M. Jepeway, Jr.