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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

JEFFREY CHARLES REGAN,

Respondent.

_______________________________/

Case No.: SC20-1693

The Florida Bar File
No. 2021-00, 002 (4B)

THE FLORIDA BAR'S
INITIAL BRIEF

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PRELIMINARY STATEMENT

A. Abbreviated Names

Jeffrey Charles Regan, the Respondent, will be referred to as Mr. Regan or the Respondent. The Florida Bar will be referred to as the Bar.

B. Citations to the Record

References to the first Amended Report of Referee will be cited as (ROR 2 p.**).

References to the second Amended Report of Referee will be cited as (ROR 3 p.**).

References to specific pleadings will be made by Tab number in the Amended Index of Record, and with further information when the document is large. (Tab-**).

The transcript of the final hearing will be cited as (T-**).

The Bar's exhibits will be cited as (TFB-Ex-*) with specific reference to the transcript page number when needed.

NATURE OF THE CASE

The Bar seeks review of the Second Amended Report of Referee in this disciplinary proceeding in which Jeffery Regan is the Respondent. (ROR 3). This case concerns two abusive emails that Mr. Regan sent to opposing counsel twenty hours apart in a civil case. The trial judge sanctioned Mr. Regan for this conduct and reported it to the Bar.

After the Bar filed the Complaint in this disciplinary proceeding, it entered into a conditional agreement with Mr. Regan for a diversion to a practice and professionalism enhancement program. The Referee's first report adopted this agreement, but this Court disapproved the first report, stating that the Court would agree to the imposition of a public reprimand. (Tab 14).

Mr. Regan did not agree to the imposition of a public reprimand and the case proceeded to a hearing. Following that hearing, the Referee entered a first amended report of referee that recommended findings of guilt for violations of Rule 4-8.4(d) and 3-4.2. (ROR 2). The Referee again recommended a diversion to a practice and professionalism enhancement program.

When the Bar filed for rehearing pointing out that the Referee could not recommend a diversionary program in that procedural context, the Referee

issued a second amended report of referee changing the recommendation of guilt to not guilty on all violations. (Tab 25; ROR 3 p. 18).

This second amended report contains the same analysis of the recommended sanction as did the first amended report. (ROR 3). It continues to recommend a diversionary program, which still is not procedurally appropriate under Rule 3-5.3(h)(2); a finding of not guilty cannot support the imposition of a sanction.

It is quite obvious that the Referee does not wish to recommend a public reprimand. There are significant mitigating circumstances in this case. The Bar seeks review maintaining that the findings of guilt should be reinstated and that a public reprimand, as already proposed by this Court, is warranted as an appropriate sanction to deter lawyers from the all too tempting practice of sending profane and abusive emails in the course of litigation.

Mr. Regan has filed a notice indicating that he intends to request a cross-review.

STATEMENT OF THE CASE AND FACTS

A. Statement of the Facts

Mr. Regan was admitted to the Bar in 1984. (T. 87). He is a business and construction trial lawyer. (T. 87). In 2005, he became board certified in construction law. (T. 91). In 2008, he became board certified in business litigation. (T. 92). This is his first disciplinary proceeding.

The Underlying Construction Defect Litigation

The underlying case was a complex condominium construction defect case in which Mr. Regan represented the plaintiff. (T. 112). The claims involved exceeded $60 million dollars and arose from construction defects in a 38-story, waterfront condominium in Jacksonville. (ROR 3 p. 5). The case involved about 35 different defendants. (T. 114). This was one of the most complex cases many of the attorneys on the case had handled. Mr. Regan opined, that it was probably one of the most complex construction defect cases in North Florida. (T. 79, 112).

The case was filed in 2013, and designated complex in 2016. (T. 117-118). In November 2019, the Moyer Law Firm from St. Petersburg, Florida, replaced prior counsel for the representation of one of the defendants, Sterling Dula. (T. 119-20). Hannah Tyson, an associate with the Moyer Law Firm, who was licensed in 2015, became Mr. Regan's new point of contact

for Sterling Dula. (T. 120). Mr. Regan believed she was lead counsel for Sterling Dula. (T. 145). At the time, the trial was scheduled for March 2020 and discovery was nearly complete. (T. 120-121). The attorneys had already taken most of the depositions, including the depositions of corporative representatives for Sterling Dula. (T. 115).

A status conference was set for January 2020 in front of Judge Katie Dearing. Before the status conference, Sterling Dula's counsel filed twenty-seven motions in limine, multiple partial motions for summary judgment, and one full motion for summary judgment. (T. 128). At the status conference, Judge Dearing announced that a March 2020 trial was impossible. She reset the trial for a date that was more than a year later, July 2021. (T. 129).

As part of the new set of deadlines, the parties agreed to set a deadline to object, on the grounds of authenticity or hearsay, to the admission of voluminous deposition exhibits that were already marked and used in depositions. (T. 132-33). The deadline was set for June 19, 2020. (T. 137). Just before midnight on June 19, Sterling Dula filed objections to 90% the exhibits used in the previously completed depositions, including some of its own records. (T. 137-38). Mr. Regan was unsure why Sterling Dula was objecting to their own documents. (T. 139).

The Emails

About two hours later, on June 20, 2020, at 1:43 AM, Mr. Regan sent an email to Ms. Tyson. (R-Ex. 2). The email stated:

> *It appears from your objections to deposition exhibits that Sterling Dula objects to basic documents that should not be objectionable. We will not settle with you under any circumstances unless you want to tender $[redacted] dollars. You need the exhibits ore [sic] than we do. You are way over your head in this case! Get ready for a battle!*

(R-Ex. 2).

On that same day at 10:40 PM, 20 hours after he sent the first email, Mr. Regan sent another email to Ms. Tyson. (R-Ex. 2). This email stated:

> *Hannah:*
> *From my observation, you are way over your head on this case. This is a serious $50 million dollar case at minimum and involves very complicated engineering issues and construction issues. I have so far written you off to being new in the case, but realize now you have no construction experience and that you are f***ing up our case with frivolous objections, motions and tactics. We will not tolerate this! We are going to come at you personally very soon! You have no idea what you are doing! You have never tried a four to six week complex trial for sure. That is obvious. Who triggers the red lights of child's play here! You!! This is a serious case, we are going to try it, and your client who was delegated screen and railing design is not going to escape liability! Your objections to depo exhibits just extended the trial at least a week, and cost your insurance a**holes at least a million dollars. So be it. We are trying this case! You will lose! You will regret your obstructionism! Every obstructionist move you take I will bury you! I have tried big cases for 37 years. Get ready to get buried!*

(R-Ex 2.). These emails were sent only to Ms. Tyson. (T. 79-80, 154, 217).

The Motion for Sanctions, the Resulting Apology, and Judge Dearing's Ruling

Several days after he sent the pair of emails, attorney Kellie Caggiano with the Moyer Law Firm served Mr. Regan with a Motion for Sanctions and Civility based on the emails. (ROR 3 p. 12). The motion was e-filed at 5:01 PM on June 23, 2020. (R-Ex. 2). In the motion, Ms. Caggiano quoted both emails and stated that Ms. Tyson was an associate attorney who was not lead on the case. The motion sought sanctions against Mr. Regan as a result of his emails. (ROR 3 p. 12).

After reading the motion for sanctions, about four hours later at 8:52 PM, Mr. Regan sent Ms. Tyson an email stating:

> *Hannah:*
> *I just saw your motion. Please let me know when you are available to talk briefly tomorrow. I want to personally apologize to you. I was not appropriate and those who know me well know that I strive to be professional. Just let me know when is best. I will not take up much of your time. All counsel in this case have been reasonably cooperative with one another and I want to make the effort to reestablish that cooperation with you. Good evening. Thank you.*

(R-Ex. 5 p. 3). Oddly , Mr. Regan's email was sent only to Ms. Tyson even though Ms. Caggiano was the attorney who signed the motion for sanctions. (R-Ex. 2). Nowhere in his apology does Mr. Regan mention that he

accidentally sent the second email, although he would later claim that was the case.

Ms. Caggiano replied and thanked Mr. Regan for his acknowledgement of the issue. But, she let him know that the sanctions hearing would not be canceled. (R-Ex. A p. 2). She also requested that Mr. Regan direct all emails to the service emails provided for the case and copied on her response. She noted that this was previously requested. Mr. Regan replied stating:

> *Thank you for your response. I was not trying to avoid the setting of a hearing. I was just trying to do the right thing and apologize personally. I understand.*

(R-Ex. 5 p. 1).

In response to the motion for sanctions, Mr. Regan filed a written response on July 3, 2020, apologizing to Ms. Tyson. (ROR 3 p. 12). His response stated, in part:

> *In my 37 years of practice, I have never authored or sent such vile correspondence. This correspondence was unprofessional, undignified, rude, and outlandish. There is absolutely no place in the practice of law for such correspondence. Everything in this email is wrong, horrifying, unjustified and unwarranted. It is an embarrassment to me and my profession.*

(R-Ex. 2). For the first time, Mr. Regan claimed he did not realize that he had actually sent the email. (R-Ex. 2).

The sanction hearing was very short. (T. 166-67). Judge Dearing told Mr. Regan she had reported the issue to the Bar because she felt she had to as a judge. (T. 173). In her order granting sanctions, Judge Dearing found Mr. Regan to be remorseful, apologetic, and appropriately embarrassed. (ROR 3 p. 13) (R-Ex. 2). Judge Dearing also characterized the language directed at opposing counsel to be "simply beyond the pale, and contrary to the rules and standards of conduct by which our profession is governed." (R-Ex. 2). Three things troubled Judge Dearing: (1) the "vitriolic emails" were sent to an associate, not the lead attorney, criticizing her for asserting objections, (2) the personal nature of the attacks in the second email are "disturbing and uncalled for in a professional setting," and (3) the timing of the two emails compounded the problem and complicated Mr. Regan's statement that he did not realize he sent the second email. (R-Ex. 2).

Judge Dearing continued:

> *Surely Mr. Regan did not send two emails without realizing it. As it speaks in the singular, perhaps the apology set forth in the response is only directed toward the second email, implying that the first is appropriate. They are similar, though the second is obviously more offensive and objectionable; but neither upholds the standards of professionalism expected of members of the Bar.*

(R-Ex. 2).

Ultimately, Judge Dearing granted Sterling Dula's motion. (R-Ex. 2). She assessed costs associated with the motion against Mr. Regan and any costs with recording any deposition where Sterling Dula's counsel takes an active role. (R-Ex. 2). Additionally, she ordered Mr. Regan to send communications to the designated email addresses and certify that he reviewed the Florida Bar's publication on best practices for electronic communication within 30 days. (R-Ex. 2).

Mr. Regan attended an ethics class between the sanctions hearing and the final hearing in this case. (T. 179).

B. <u>The proceedings in this disciplinary case</u>

The Bar filed its Complaint against Mr. Regan on November 17, 2020. (Tab 1). Mr. Regan filed his answer on December 11, 2020. (Tab 8). In his Answer, Mr. Regan admitted that he sent the emails to Ms. Tyson. He took full responsibility for the communications and stated he was upset and unfortunately expressed his anger in emails that were unrelated to Ms. Tyson or the underlying litigation. He further admitted that Judge Dearing described the emails as simply beyond the pale, and contrary to the rules and standards of conduct. (Tab 8). He did not allege that he had sent either email by accident.

The first report of referee

On January 22, 2021, Mr. Regan and the Bar agreed to a Conditional Agreement for Diversion to a Practice and Professionalism Enhancement Program ("Conditional Agreement"). (Tab 9). The Referee adopted the Conditional Agreement on January 29, 2021. (Tab 11). The Referee recommended that Mr. Regan be diverted to a practice and professionalism enhancement program, to be completed within 6 months.

On March 18, 2021, this Court issued an order disapproving of the recommended sanction and instead stated that it would impose a public reprimand along with payment of the Bar's costs. (Tab 14). This Court further stated that if the parties did not agree to this Court's terms, then the matter should be scheduled for a hearing before the referee and an amended report should be filed within ninety days. Mr. Regan elected for the matter to proceed to a hearing.

The final hearing

The Referee held a final hearing on May 21, 2021. (T. 1-252). There was some confusion about the purpose for the hearing. (T. 4-10). Namely,

the parties disputed whether this Court had already found that there was a rule violation.[1] (T. 6).

Originally, the hearing was only supposed to be on matters concerning the sanction. (T. 4). The Bar's counsel contended that this Court had already found that there was a rule violation. (T. 6). The Bar's counsel maintained that there were no facts in dispute. (T. 6). Mr. Regan's counsel argued that this Court did not tell the Referee that he had to find a violation of a rule. (T. 8). Essentially, Mr. Regan's counsel wanted "a trial de novo." (T. 8).

The Referee heard arguments on competing motions: a motion for judgment on the pleadings filed by the Bar and on Mr. Regan's oral motion to dismiss. (T. 4-61). The Referee denied both motions. (T. 36, 61-64).

Then there was confusion about procedurally what remained to be proven. Mr. Regan's counsel maintained that the hearing was a final hearing and it was not going to be rescheduled. (T. 53). The Referee noted Bar's counsel position was that everything was in the pleadings and that the parties had stipulated to the conduct. (T. 53-54). He asked the parties to see if they

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[1] The Respondent has filed a cross-review that may address procedural issues. The Bar will discuss those matters, as needed, in its reply/cross-answer brief.

could reach a consensus about rule violations. (T. 61). The parties agreed 3-4.2 and 4-8.4(d) were at issue. (T. 61).

The Referee believed that Mr. Regan was admitting to violations of those rules. (T. 62-63). Mr. Regan's counsel clarified that they were not admitting to any rule violations, rather they were trying to narrow the scope of the rules at issue. (T. 63). Counsel for the Bar maintained that he was there for a final hearing on recommended discipline, not a guilt phase hearing. (T. 64). The Bar moved to suspend the trial, stating, in part, that there were witnesses it wanted to call. (T. 65). The Referee questioned the purpose of other witnesses. (T. 65). After Mr. Regan's counsel agreed that he had no objection to the facts set forth in the complaint, and the exhibits were in evidence, the Bar presented no additional evidence. (T. 73-74). The Referee instructed Mr. Regan to call his first witness. (T. 74).

Mr. Regan introduced the testimony of five witnesses: Michael DeCandio, John Gillum, David Willis, Fred Atwood, and Mr. Regan, and introduced five exhibits. The Referee heard a mixture of fact testimony and character testimony from Mr. Gillum, Mr. DeCandio, Mr. Atwood, and Mr. Willis. (ROR 3 p. 16). Most of the testimony from the witnesses was mitigation testimony. Each witness was involved in the underlying litigation. Their character testimony was relatively the same. None of the witnesses

believed the emails had any negative effect on the handling, fairness, prosecution, or defense of the matter. (T. 81, 154, 205-06). No witness perceived any risk of future unprofessional conduct. (T. 82, 156, 218, 205-06). Their testimony is summarized in the two amended reports of referee. (ROR 3 pp. 16-18).

The first amended report of referee

The first amended report of referee was filed on June 14, 2021. The Referee recommended that Mr. Regan be found guilty of violating Rule 4-8.4(d), and 3-4.2; The Creed of Professionalism, and The Professionalism Expectations, Expectations 2.3, 5.1, 5.2, and 5.3. (ROR 2 p. 18). The Referee found nine mitigating factors. (ROR 2 p. 18-21). The Referee found one aggravating factor.

The Referee again recommended Mr. Regan be diverted to a practice and professionalism enhancement program. (ROR 2 p. 22). He found the emails to be nothing more than minor misconduct, even though he recommended that Mr. Regan be found guilty of violating Rule 4-8.4(d) and Rule 3-4.2. (ROR 2 p. 23).

The Bar filed a Motion for Clarification and Rehearing, explaining that the Referee could not recommend a diversion once he had made findings of fact and recommended that Mr. Regan be found guilty of violating Rule 4-

8.4(d). (Tab 22). The Bar cited Rule 3-5.3(h)(2), which provides that a respondent may be diverted to a practice and professionalism enhancement program if, after submission of evidence, but before a finding of guilt, the referee determines the conduct is not more serious than minor misconduct. Accordingly, the Referee's recommended sanction conflicted with his recommendation on guilt.

The second amended report of referee

On July 12, 2021, without a hearing, the Referee filed a second amended report of referee – his third report in this case. The Referee recommended Mr. Regan be found not guilty of all violations. (ROR 3 p. 18).

The Referee clarified that the amended report was "filed to correct the findings and recommendations . . . to coincide with the original intent of the [Referee] after receiving the evidence and arguments of the parties and in conformance with the [Referee's] original intent." (ROR 3 p. 3). The Referee noted that the previous report had a "procedural mistake" that was corrected in the new report. (ROR 3 p. 3). That procedural mistake was that, based on the evidence presented and the testimony he heard, he had found Mr. Regan guilty of violating Rule 4-8.4(d), but still did not want to impose a harsher sanction than diversion to a practice and professionalism enhancement program.

The Referee further explained:

> *The emails in question certainly do not disparage others "on account of race, ethnicity, gender, religion, national origin, disability, marital status, sexual orientation, age, socioeconomic status, employment, or physical characteristic." Respondent's emails, particularly the second email, are certainly unprofessional and not in keeping with professional expectations or members of the Florida Bar.*
>
> *…*
>
> *The first email, standing alone, is unprofessional in tone but not a violation of Rule 4-8.4(d). The second email does have expletives directed at Ms. Tyson and suggests she will regret her obstructionist tactics in court.*

(ROR 3 p. 18-19).

The Referee found Mr. Regan not guilty even though he sent "expletives directed" at a young, female attorney. Despite recommending a finding of not guilty on the violations, the Referee did not remove his findings on the mitigating and aggravating factors or his analysis of the proper sanction. (ROR 3 pp. 4-18).

The Referee again found that Mr. Regan's emails would not amount to more than minor misconduct under Rule 3-5.1(b). (ROR 3 p. 25). And the Referee again recommended that the minor misconduct matter be diverted pursuant to Rule 3-5.3(b). (ROR 3 p. 26).

In addition to challenging some of the recommendations of not guilty, the Bar challenges the recommended sanction and seeks a public reprimand.

C. <u>The Aggravating and Mitigating Factors</u>.

The Referee found nine mitigating factors: absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, timely good faith effort to rectify the consequences of misconduct, full and free disclosure to the bar or cooperative attitude toward the proceedings, character or reputation, interim rehabilitation, imposition of other penalties or sanctions, and remorse. (ROR 3 p. 21-23). The Referee found one aggravating factor: substantial experience in the practice of law. (ROR 3 p. 23).

The Bar is not disputing the finding of these factors, but does believe that some factors have limited weight in determining a proper sanction. Thus, the Bar will discuss the application of these factors in its argument.

SUMMARY OF THE ARGUMENT

The Oath of Admission that all lawyers swear to uphold pledges fairness, integrity, and civility to opposing parties in all written and oral communications. Mr. Regan's email communications to Ms. Tyson are simply none of those things. Mr. Regan sent two separate emails to Ms. Tyson while under the impression that Ms. Tyson was an inexperienced construction lawyer. The emails were sent twenty hours apart and launched threats and personal attacks to a young, female associate attorney because of objections she filed. As an attorney with a substantial amount of experience, Mr. Regan knew the proper procedural mechanisms to challenge those objections. He chose, instead, to become abusive.

He should have apologized for his first email, sent in the wee hours of the morning, when he had time to appreciate what he had done the following morning. Instead, twenty hours later he sent a second email that was profane as well as abusive. He offered his apology only days later after receiving a motion to impose sanctions for this misbehavior. The emails alone are clear and convincing evidence that Mr. Regan violated Rule 4-8.4(d) and Rule 3-4.2.

There was competent, substantial evidence to support the Referee's first amended report finding that these emails did violate Rule 4-8.4(d) and

Rule 3-4.2. The Referee obviously wanted the recommendation on the findings of guilt to square with his desire to impose the lesser sanction of a diversion to a practice and professionalism enhancement program. His amended report is outcome-based, not fact-based.

This Court will need to decide for itself the appropriate sanction for this case. There is no standard that specifically addresses Mr. Regan's misconduct. This Court, however has the inherent, constitutional authority to discipline lawyers for misconduct. Art. V, §15, Fla. Const. There appears to be no published case law in Florida addressing email unprofessionalism, as compared to unprofessionalism that occurs in person or in pleadings. While there is no opinion, this Court has approved a consent judgment in a recent case that is similar. A published opinion announcing the sanction in this case will begin the development of case law and lead to the creation of a more specific standard addressing this type of misconduct, which the Oath has only recently come to address.

While there are many mitigating factors in this case and the Bar does not contend that Mr. Regan needs a rehabilitative sanction at this point, the three purposes for sanctions include protecting society and the administration of justice. They also include deterring the future misconduct of other lawyers.

This Court needs to make a clear pronouncement that profane and abusive emails are not a substitute for the remedies provided by the rules of procedure, and that the ease and speed of email communication is a reason for increased diligence upon the part of officers of the court, not an excuse for misconduct. It needs to plainly explain that lawyers who engage in the practice of sending profane and abusive emails to opposing counsel risk a substantial sanction. The Bar suggests a public reprimand is a sufficient sanction to fulfill these purposes.

THE DECISION-MAKING PROCESS IN A DISCIPLINARY PROCEEDING AND THE STANDARD OF REVIEW

This is an original proceeding filed under this Court's exclusive jurisdiction to "to regulate the admission of persons to the practice of law and the discipline of persons admitted." Art. V, §15, Fla. Const. "Standards of review" used to evaluate a trial court's final judgment do not apply here.

Nevertheless, it is still useful to begin a review of the referee's report with a consideration of the decision-making process and the applicable rules governing this Court's ultimate determination on the issues presented in a disciplinary proceeding.

1. Findings of Fact

As this Court explained in *The Florida Bar v. Picon*, 205 So. 3d 759, 764 (Fla. 2016): "This Court's review of a referee's findings of fact is limited. If a referee's findings of fact are supported by competent, substantial evidence in the record, this Court will not reweigh the evidence and substitute its judgment for that of the referee. *The Florida Bar v. Frederick*, 756 So. 2d 79, 86 (Fla. 2000)." *See also The Florida Bar v. Schwartz*, 284 So. 3d 393, 396 (Fla. 2019); *The Florida Bar v. Parrish*, 241 So. 3d 66, 72 (Fla. 2018); *The Florida Bar v. Vining*, 721 So. 2d 1164, 1167 (Fla. 1998); *The Florida*

Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla. 1998); *The Florida Bar v. Spann*, 682 So. 2d 1070, 1073 (Fla. 1996).

2. Recommendation of Discipline

The Referee's recommendation of discipline is subjected to greater review by this Court because of this Court's ultimate responsibility to make that decision:

> In reviewing a referee's recommended discipline, this Court's scope of review is broader than that afforded to the referee's findings of fact because, ultimately, it is the Court's responsibility to order the appropriate sanction. *See The Florida Bar v. Picon*, 205 So. 3d 759, 765 (Fla. 2016) (citing *The Florida Bar v. Anderson*, 538 So. 2d 852, 854 (Fla. 1989)). At the same time, this Court will generally not second-guess the referee's recommended discipline, as long as it has a reasonable basis in existing case law and the standards. *See The Florida Bar v. Alters*, 260 So. 3d 72, 83 (Fla. 2018); *The Florida Bar v. De La Torre*, 994 So. 2d 1032 (Fla. 2008).

The Florida Bar v. Altman, 294 So. 3d 844, 847 (Fla. 2020).

It is also important to consider that this Court has given notice to the members of the Bar that it is moving toward harsher sanctions than in the past. *See The Florida Bar v. Rosenberg*, 169 So. 3d 1155, 1162 (Fla. 2015). In *Rosenberg*, this Court explained that since the decision in *The Florida Bar v. Bloom*, 632 So. 2d 1016 (Fla. 1994), the Court has moved toward imposing

stricter sanctions for unethical and unprofessional conduct. *See also Altman* at 847. As a result, case law prior to 2015 needs to be examined carefully to make certain that the application of sanctions in these earlier cases comports with current standards.

3. Consideration of Mitigating and Aggravating Factors – Both as Findings of Fact and as a Mixed Question of Law and Fact during the Decision to Select the Appropriate Sanction.

A Referee's findings on mitigating and aggravating factors are treated essentially like any other finding of fact:

> [A] referee's findings of fact carry a presumption of correctness that should be upheld unless clearly erroneous or without support in the record. *See The Florida Bar v. Summers*, 728 So. 2d 739, 741 (Fla. 1999). This standard applies in reviewing a referee's findings of mitigation and aggravation. *See, e.g., The Florida Bar v. Wolis*, 783 So. 2d 1057, 1059 (Fla. 2001); *The Florida Bar v. Hecker*, 475 So. 2d 1240, 1242 (Fla. 1985).

The Florida Bar v. Arcia, 848 So. 2d 296, 299 (Fla. 2003).

"[A] referee's findings of mitigation and aggravation carry a presumption of correctness and will be upheld unless clearly erroneous or without support in the record." *The Florida Bar v. Germain*, 957 So. 2d 613, 621 (Fla. 2007). The burden of demonstrating that the findings in aggravation or mitigation are clearly erroneous lies with the party challenging the findings. *See The Florida Bar v. Glick*, 693 So. 2d 550, 552 (Fla. 1997)

(holding that the burden of disproving a referee's findings of fact or recommendations as to guilt is upon the party challenging those findings). *The Florida Bar v. Marcellus*, 249 So. 3d 538, 544 (Fla. 2018).

Once the factors of mitigation and aggravation are found to exist, they are applied to “justify” an increase or a decrease in the “degree of discipline to be imposed.” *Florida Standards 3.2(a), 3.3(a).* This process of balancing the positive and negative factors is a mixed question of fact and law. It is part of the ultimate decision to impose a sanction. “With regard to legal conclusions and recommendations of a referee, this Court's scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment.” *The Florida Bar v. Inglis*, 471 So. 2d 38, 41 (Fla. 1985).

ARGUMENT

I. The emails speak for themselves and are clear and convincing evidence of violations of Rules 4-8.4(d) and 3-4.2.

In 2011, this Court added the following to the Oath that all lawyers swear to uphold:

> *To opposing parties and their counsel, I pledge fairness, integrity, and civility, not only in court, but also in all written and oral communications.*

In re Oath of Admission to the Florida Bar, 73 So. 3d 149, 150 (Fla. 2011).

A violation of this sworn duty is enforced by Rule 4-8.4(d):

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

It is further enforced by Rule 3-4.2, which says:

> The commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline whether the act is committed in the courts of the lawyer's relations as a lawyer or otherwise, whether committed within Florida or outside the state of Florida, and whether the act is a felony or misdemeanor.

Mr. Regan himself admits that he sent two abusive emails to opposing counsel. (T. 160). He acknowledged that this correspondence is "vile,"

"unprofessional, undignified, rude, and outlandish." (R-Ex. 2). He admits that "[e]verything in <u>this email</u> is wrong, horrifying, unjustified and unwarranted." (emphasis added). Judge Dearing characterized the emails as "vitriolic," and the second email specifically was "disturbing and uncalled for in a professional setting." (R-Ex. 2). As Judge Dearing pointed out, Mr. Regan's response to the motion for sanctions and previous apologies were seemingly only directed at the second email.

Mr. Regan sent both emails to a young, female attorney. The Bar does not dispute that Mr. Regan probably did not know that Ms. Tyson was an associate. However, Mr. Regan recognized that he was sending these emails to opposing counsel that he believed to be "way over [her] head" in the case and had no experience in construction law. Mr. Regan had also seen Ms. Tyson in-person at deposition in December 2019 – he undoubtedly realized that Ms. Tyson was a young, female attorney then. Succinctly put, Mr. Regan felt strongly that his young, female opposing counsel was inexperienced and overwhelmed by such a large case and instead of addressing opposing counsel's objections on the merits, decided to take matters into his own hands and send profane and abusive emails to try to get his way.

As a lawyer with a substantial amount of experience, there is no doubt Mr. Regan knew, or at least could have researched, the appropriate procedural mechanism to address Ms. Tyson's objections and any alleged obstructionist tactics. Instead, he resorted to sending profane and abusive emails that launched personal attacks to a young, female associate to get his way. His intimidation tactics did not work.

The Bar questions whether Mr. Regan would have used such profane and abusive language towards a young, male attorney. It seems highly unlikely that Mr. Regan would have sent emails like this to an older, male partner. It may even be unlikely that Mr. Regan would have sent an older, female partner emails like this. Members of the Bar, young and old, without regard to gender or sexual orientation deserve the same amount of civility. Just because Mr. Regan believed Ms. Tyson to be a young, inexperienced, female lawyer does not mean that he did not owe her any less respect than an older, experienced, male lawyer.

The Bar recognizes that the concept of "conduct contrary to justice" should be narrowly construed because Rule 3-4.2 involves a sanction. Likewise, "justice" should be defined in this context as an objective term and not as what seems fair to one individual. "Contrary" is defined as "being so

different as to be at opposite extremes," or "being not in conformity with what is usual or expected."[2]

Objectively, "justice" cannot be an individual assessment of right or wrong. For lawyers, who swear not only to treat opposing counsel with fairness, integrity, and civility, but also to uphold the constitution and the respect of courts, a good objective definition is "the establishment or determination of rights according to the rules of law or equity"[3]

Combined, the conduct that should be prohibited by Rule 3-4.2 is conduct that is the extreme opposite of, and plainly not in conformity with what is the usual and expected conduct of lawyers engaged in the establishment or determination of rights according to the rules of law or equity.

The Bar submits that Mr. Regan's conduct in this case fits this definition. There were multiple procedural routes Mr. Regan could have utilized in addressing his grievances with Ms. Tyson's alleged frivolous objections and obstructionist tactics. These procedures exist for these exact issues. Instead, he used intimidation tactics in the form of profane and abusive emails that he sent to opposing counsel. The just, impartial, and fair

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[2] *Contrary*, (https://www.merriam-webster.com/dictionary/contrary).
[3] *Justice*, (https://www.merriam-webster.com/dictionary/justice).

thing to do would have been to utilize the procedures allowed under the rules of procedure to address any concerns he had with Ms. Tyson's objections. Mr. Regan's emails cannot be compatible with justice, they can only be contrary.

The trial court's imposition of sanctions also demonstrates that Mr. Regan's conduct was contrary to justice. When sanctions are imposed, not for delay, but rather for attorney misconduct, they are generally imposed only when the attorney's conduct rises to an extreme level. Judge Dearing considered Mr. Regan's conduct to be so unpalatable that sanctions were necessary. It would be illogical if the imposition of sanctions, especially where they are imposed because a lawyer's conduct is highly unprofessional and uncivil, would not be considered as strong evidence that a lawyer's conduct was outside the acceptable range of the usual and expected conduct of lawyers engaged in the establishment or determination of rights according to the rules of law or equity. The sanctions imposed in the underlying case are strong evidence that Mr. Regan violated Rule 3-4.2.

During his testimony before the Referee, Mr. Regan resurrected his claim before Judge Dearing that he sent the second email by accident. The Referee did not make any express finding that Mr. Regan accidentally sent the second email. The Referee only notes that Mr. Regan believed that he

shut his computer and did not send the email and he did not realize he had sent the email until he received the motion for sanctions. (ROR 3 p. 11-12). By the final report, the Referee appears to believe that both were sent on purpose.

The second email was sent twenty hours after he admits he sent the first email. Presumably, Mr. Regan had time to clear his head by then, and one would expect this email to be the apology rather than a profane rant. It is unclear if his claim of accident is only directed at the second email or both emails – given that his explanations varied over time and he had not answered the Bar's complaint claiming either email was an accident after Judge Dearing had been skeptical of that claim. It is also unclear whether he is claiming that he remembers not sending it (and did not mention that in his apologetic email to Ms. Tyson), or whether he does not remember one way or the other because he was emotionally exhausted and drinking.

Mr. Regan sent the first email, which told opposing counsel, in part:

- "You are way over your head in this case! Get ready for a battle!"

He appears to admit that he sent the first email knowingly. At the hearing, he told the Referee that he "sat down at [his] computer and [he] just fired off [the first] e-mail[.]" (T. 178).

In the second email, he told opposing counsel:

- "I have so far written you off to being new in this case, but realize now you have no construction experience and that you are f***ing up our case with frivolous objections, motions and tactics."
- "We are going to come at you personally very soon!"
- "You have no idea what you are doing!"
- "Who triggers the red lights of child's play here! You!"
- "Your objections to depo exhibits just extended the trial at least a week, and cost your insurance a**holes at least a million dollars."
- "You will lose! You will regret your obstructionism!"
- "Every obstructionist move you take I will bury you!"
- "Get ready to get buried!"

It is the combination of these two emails, sent twenty hours apart and to a young, female associate that are the substance of the violation here. The Bar submits that Mr. Regan was callously indifferent to the disparaging comments that he made towards Ms. Tyson. Although he may not have realized that Ms. Tyson was an associate, he had to realize that Ms. Tyson was a young, female attorney. He had seen Ms. Tyson in-person months before. Further, Mr. Regan's conduct was contrary to justice; a motion for sanctions was granted and sanctions were assessed against him.

Admittedly, the sanction for this violation is a very difficult question in this case. But the difficulty in selecting a proper sanction was not a basis for the Referee to simply retract his findings of guilt. His findings of fact in both reports were substantially similar. In the first report he recommended findings of guilt for the violations of Rule 4-8.4(d) and Rule 3-4.2.[4] The facts of the case did not change. The Referee's legal conclusion is what changed. The first amended Report of Referee was supported by competent substantial evidence; the second amended Report of Referee simply is not.

II. A diversionary program was not an authorized sanction under the recommendations of guilt in either report.

A. The First Amended Report

In the first amended report, the Referee made findings of fact and recommended Mr. Regan be found guilty of violating Rule 4-8.4(d) and Rule 3-4.2. (ROR2 p. 18). But then the Referee recommended Mr. Regan be diverted to a practice and professionalism enhancement program, as he had in January 2021, when this Court rejected the recommendations in the first report. (ROR2 p. 21-22)(Tab 14).

[4] The Bar is not seeking findings of guilt on The Creed of Professionalism, and the Professionalism expectations, Expectations 2.3, 5.1, 5.2, and 5.3. Whether those documents support findings of guilt on their own or whether their violation is merely evidence of a rule violation can wait for another day. The circumstances of this case do not warrant more than the two clear violations of the Rules of Professional Conduct.

The problem with this recommendation is that it is not authorized under the rules. Rule 3-5.3(h)(2), Diversion at Trial Level, provides:

> (h)(2) After Submission of Evidence
>
> A referee may recommend diversion of a disciplinary case to a practice and professionalism enhancement program if, after submission of evidence, but before a finding of guilt, the referee determines that, if proven the conduct alleged to have been committed by the respondent is not more serious than minor misconduct.

(emphasis added).

Clearly, the Referee had correctly determined that the evidence presented supported a finding that Mr. Regan violated Rule 4-8.4(d) and Rule 3-4.2. But he did not want to recommend any of the sanctions that were available options for that recommendation of guilt.

Accordingly, the Bar moved for clarification and rehearing. (Tab 22).

B. The Second Amended Report

The Referee granted this motion by issuing a second amended report of referee. But this report – the report now on review – contains almost exactly the same findings of fact as the first report of referee. Instead of changing his recommended sanction, the Referee changed his legal conclusion. The Referee's second amended report found Mr. Regan not guilty of violating any rule. The Referee explained that the emails did not disparage others on account of any protected class – even though both

emails were sent to a young, female attorney – and both emails were unprofessional and did not keep with the professional expectation of members of the Bar. The Referee noted that the first email, standing alone, was not a violation of Rule 4-8.4(d). However, the second email contained expletives directed at Ms. Tyson, a young, female attorney, and suggested she would regret her obstructionist tactics. The Referee found that though the second email was like other correspondence in the cases the Bar cited, it was "much less egregious." (ROR 3 p. 18-19).

After a recommendation of not guilty, a referee's task is concluded. It is not necessary for the referee to make the findings and recommendations related to a sanction. Indeed, without a recommendation of guilt, there is nothing to which the Standards and case law can apply.

Nevertheless, the Referee still recommended a sanction for Mr. Regan. Unsurprisingly, the Referee returned for a third time to his desire to impose a diversion to a practice and professionalism enhancement program.

The Referee justifies the limited changes he made to his report on the theory that he was correcting a procedural mistake. But that "procedural" mistake was that the Referee could not recommend his desired sanction with the findings of fact and recommendation of guilt that he had already made.

The Referee's unauthorized recommendation of a sanction is flawed from inception because it is based on a recommendation that this Court find Mr. Regan not guilty. This Court simply needs to do its own analysis of the appropriate sanction in this case based on the evidence in the record.

III. Despite the mitigating circumstances in this case, a public reprimand is needed to deter this form of unprofessional misconduct, which has been brought to us by the speed of the internet.

Although the Bar submits that the Referee's analysis – finding Mr. Regan not guilty and then recommending diversion – is legally wrong, the Bar fully understands his struggle to recommend a sanction. This is a case where this Court needs to send a strong message to members of the Bar to deter violations of professionalism occurring in today's use of emails and text messages between and among lawyers. But Mr. Regan himself presents this Court with a sympathetic respondent who deserves a lighter punishment than lawyers who repeatedly send abusive emails and use this lack of professionalism as a tactic in litigation.

To be clear, the Bar hopes this Court will send a strong message on this subject, but it also recognizes that this Court should fully consider Mr. Regan's mitigating circumstances.

A. The Standards

The Bar acknowledges that no specific standard was identified or relied on at the final hearing. For the violations arising from the new sentence added to the Oath in 2011, there currently is no standard that squarely applies to the violations. But this Court has the inherent, constitutional authority to discipline misconduct in the absence of a standard. Hopefully, the sanction in this case can lead to the creation of a more specific standard for violations stemming from the new provision in the Oath.

However, one Standard is at least useful in this case; it recommends a public reprimand:

> **6.2 ABUSE OF THE LEGAL PROCESS**
>
> Absent aggravating or mitigating circumstances, and on application of the factors to be considered in imposing sanctions, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists:
>
> …
>
> (c) Public Reprimand. Public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule and causes injury or potential injury to a client or other party or causes interference or potential interference with a legal proceeding.

Mr. Regan sent both emails to opposing counsel, who is a young, female attorney, while under the influence of personal stresses and alcohol.

The emails speak for themselves and are profane and abusive. The emails are highly unprofessional, launch personal attacks, and make threats. The first email was sent on purpose, and the intent behind the second may be unclear, but this standard for negligent conduct provides some guidance. Ms. Tyson suffered no permanent injury from this conduct, but it required an embarrassing public hearing before a judge and would have caused at least temporary emotional injury to any lawyer. The misconduct clearly caused an interference with the proceeding to the extent that it required a hearing before the trial judge. This conduct under tort law certainly approaches intentional infliction of emotional distress. These actions support a public reprimand under subsection (c) of this Standard.

B. <u>The Aggravating and Mitigating Factors</u>

The Bar recognizes that the competent substantial evidence supports the findings on the mitigating factors. Some of them probably warrant more weight than others in the balance against Mr. Regan's years of experience. But, to be clear, it is these mitigating factors that cause the Bar to seek only a public reprimand. Lawyers who engage in this conduct as a tactic, on a repetitive basis, or with little remorse, should run the risk of a suspension.

- Absence of Dishonest or Selfish Motive

The Referee found no evidence of Mr. Regan attempting to gain an advantage in the underlying proceedings or that he was motivated by any self-interest. (ROR 3 p. 21). The emails were sent in response to opposing counsel's objections to deposition exhibits and contained profane and abusive language directed at opposing counsel for filing the objections. (R-Ex. 2). With his experience, Mr. Regan clearly knew the proper procedures to challenge the opposing party's objections, but this inappropriate mechanism was not used for selfish reasons or to be dishonest.

- Personal or Emotional Problems

The Bar does not dispute that Mr. Regan was suffering from personal or emotional problems when he sent the emails. He was dealing with the after effects of his son's postponed wedding due to COVID-19. (T. 144). His now daughter-in-law's family and his family were having serious disagreements over the postponed wedding. (T. 144). The dispute involved very personal, cultural, and emotional family issues. (T. 144-45). Alcohol was probably not a good solution for his emotional problems, and it undoubtedly contributed rhetorical content to these emails. (T. 193).

- <u>Timely Good Faith Effort to Rectify the Consequences of Misconduct</u>

The Referee found that Mr. Regan "immediately" attempted to make a personal apology upon the filing of the motion for sanctions. (ROR 3 p. 21). The Bar submits that an immediate email would be more impressive if it had been sent before lunch the next day (and the second email never occurred). His apology was delayed until almost four hours after he was served the motion for sanctions.

- <u>Full and Free Disclosure to the Bar or Cooperative Attitude Toward the Proceedings</u>

The Bar does not dispute that Mr. Regan had a cooperative attitude during the proceedings and made full and free disclosures to the Bar.

- <u>Character or Reputation</u>

The Bar does not dispute that Mr. Regan presented ample evidence of his character and reputation.

- <u>Interim Rehabilitation</u>

The Referee finds that Mr. Regan demonstrated humility and self-reflection during the proceedings. This is more of a finding of remorse than rehabilitation. But Mr. Regan had complied with Judge Dearing's remedial measures and that is evidence of interim rehabilitation.

- Imposition of Other Penalties or Sanctions

The Bar does not dispute that the Motion for Sanctions for Incivility was granted by Judge Dearing or that Judge Dearing imposed sanctions for Mr. Regan's actions.

- Remorse

The Bar does not dispute that Mr. Regan has been remorseful. However, the Bar points out that Mr. Regan's remorsefulness has mostly been directed at the second email, with part of his claim for mitigation being that he accidentally sent the second email. At the hearing, Mr. Regan conceded that he sent the emails. (T. 160). Judge Dearing also noted that Mr. Regan's apologies were seemingly only directed at the second email. (R-Ex. 2).

- Substantial Experience in the Practice of Law

The Referee found Mr. Regan's substantial experience in the practice of law to be an aggravating factor. Mr. Regan is a seasoned attorney who was admitted to the practice of law in 1984. (T. 87). He holds two board certifications. (T. 91-92).

The Balance of these Factors.

Mr. Regan and the Referee believe the balance of these factors should even override a finding of guilt in this case. But the Bar submits that the

three purposes of sanctions require the public reprimand initially suggested by this Court.

In 1970, this Court explained the three purposes of lawyer discipline in *The Florida Bar v. Pahules*, 233 So. 2d 130, 132 (Fla. 1970):

1. The judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty.

2. The judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation.

3. The judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The Bar is not suggesting that the public should be deprived of the services of this qualified lawyer. But we protect society, as a profession, by helping people resolve their disputes without violence or avoidable anger under a system of justice that is based on the rule of law. It is not fair to society or to the administration of justice to allow the officers of this court who are the face of the rule of law to engage in profane and demeaning conduct while resolving their client's disputes.

How to be fair to Mr. Regan in this case is not an easy question. Mr. Regan has shown remorse and other sanctions have been imposed on him. However, the Bar submits that Mr. Regan's conduct does warrant a sanction. The Bar has already demonstrated its willingness to provide a minimum sanction to him.

But the problem in this case is that minimizing the sanction for Mr. Regan, maximizes the likelihood that other lawyers will not be deterred from this conduct. There was a time when lawyers had to dictate their diatribes onto recordings that were transcribed by legal assistants. The passage of time associated with that process – and the common sense of legal assistants who talked lawyers out of engaging in ill-advised behavior – prevented this abuse from being common then.

But now there is no filter on the language of a lawyer who has a send button on the computer screen waiting to deliver the diatribe with the speed of light. For better or worse, today we need to deter this conduct with greater sanctions because the internet has eliminated the buffer of a good legal assistant.

The Bar submits that a public reprimand is necessary in light of the three purposes of sanctions because purposes one and three outweigh what

even the Bar may wish could be the sanction if it only needed to consider the one purpose of disciplining Mr. Regan.

The Case Law

The Bar provided several cases that it believed would be useful in determining whether its proposed sanction of public reprimand was in the appropriate range for the sanction in this case.[5] The Referee distinguished all of the cases that the Bar suggested. And the Bar recognizes that there really are no Florida cases dealing specifically with this type of abuse by email or text message. But these abuses are at least similar to abusive tactics at depositions and other in-person misconduct. *See The Florida Bar v. Ratiner*, 46 So. 3d 35 (Fla. 2010) (holding that where an attorney ran around the table toward opposing counsel, lambasted opposing counsel over the deposition table, tore up evidence stickers and flicked it at opposing counsel warranted a suspension from the practice of law for 60 days, a public

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[5] *See In re* Panetta, 127 A.D. 3d 99 (N.Y. App. Div. 2015) (holding that where an attorney makes accusations of dishonesty and launches personal attacks at a foreperson via email a public censure was the proper sanction, not a private sanction); *Yetiv v. Commission for Lawyer* Discipline, No. 14-17-00666-cv, 2019 WL1186822 (Tx. Ct. App. 2019) (holding that an attorney who threatened opposing counsel via email with a grievance in an attempt to force them to withdraw their arguments on the merits of the underlying case a four-month suspension was appropriate); *Att'y Grievance Comm'm v. Markey*, 230 A.3d 942 (Md. 2020) (holding that where attorneys were making racist, misogynistic, xenophobic, and homophobic statements to each other via email were disbarred effective immediately).

reprimand, and a period of probation); *The Florida Bar v. Abramson*, 3 So. 3d 964 (Fla. 2009) (holding that an attorney's discourteous and disrespectful behavior towards a judge during jury selection, including asking the jurors if they felt the attorney or the judge were at fault warranted a 91 day suspension from the practice of law).

One reason the case law is limited is that the new provision to the Oath of Admission was only added in 2011. Because the provision is a recent addition, there has been insufficient time to develop a body of case law interpreting how it applies in the context of digital misconduct.

Recently, this Court approved a consent judgment of Mr. Allen Libow. *The Florida Bar v. Libow,* No. SC21-805, 2021 WL 2376382 (Fla. June 10, 2021). Mr. Libow sent unprofessional emails to opposing counsel during the underlying family law proceedings, accusing them of misconduct. The judge presiding over the matter, Judge Ticktin, was alerted to the communications and verbally warned Mr. Libow to refrain from sending similar emails. Mr. Libow moved to disqualify Judge Ticktin. In his motion, he made disparaging comments about Judge Ticktin. Additionally, in a suit against a client for fees, Mr. Libow's manner of litigation was vexatious and his conduct towards opposing counsel – who was his former law partner – was unprofessional. There were significant mitigating circumstances. Most

notably, Mr. Libow was dealing with severe stress associated with his own alimony and child support obligations and he had recently experienced severe medical conditions resulting in two near fatal strokes and a cancer diagnosis. He had also handled many pro bono matters for the indigent and had provided pro bono services to his local synagogue. Mr. Libow entered a consent judgment, which imposed a public reprimand, a Florida Lawyers Assistance, Inc. evaluation and strict adherence to any recommendations made, and attendance at The Florida Bar Professionalism Workshop. This Court entered an order approving of Mr. Libow's consent judgment.

In the absence of Florida cases, some out-of-state cases provide useful examples and illustrate a helpful range of sanctions.

In *In re Panetta*, 127 A.D. 3d 99 (N.Y. App. Div. 2015), an attorney sent an email to the foreperson from a jury trial he conducted four years before. *Id.* at 100. The substance of the email contained accusations that the foreperson lied and made personal attacks. *Id.* at 101. In the disciplinary proceeding, the court considered the isolated nature of the respondent's conduct, the stressors in the respondent's personal life, favorable character testimony, and the respondent's expression of regret and remorse. *Id.* at 102. The court disaffirmed the report of the special referee to remit the

matter to a private sanction and instead imposed a public censure for his conduct. *Id.*

In *Yetiv v. Commission for Lawyer* Discipline, No. 14-17-00666-cv, 2019 WL1186822 (Tx. Ct. App. 2019), an attorney sent an email to opposing counsel threatening to file a grievance against him unless he announced in court that he had no factual or legal basis for his allegations in the underlying case. Additionally, the email included threats, like "[t]hink about it carefully," and "[c]hoose wisely." The email was brought to the trial court's attention and the trial court ultimately sanctioned the attorney for sending the email. *Id.* at *2. In the disciplinary proceeding, the attorney claimed that the email was a trial tactic. *Id.* The court found that the use of criminal or disciplinary process solely to coerce a party in a private matter improperly suggests that a lawyer can manipulate the criminal process for personal gains and manipulate the legal system for personal advantage. *Id.* at *8. The court affirmed the trial court's judgment, which suspended the attorney from the practice of law for four months, probated the suspension, and ordered him to pay attorney's fees. *Id.* at *1.

In *Attorney Grievance Commission v. Markey*, 230 A.3d 942, 944-45 (Md. 2020), a Veterans Law Judge and an Attorney-Advisor at the Board of Veterans' Appeals and three other board members exchanged emails, for

almost seven years, containing "many racist, misogynic [sic], xenophobic, and homophobic statements." The court found, in part, that their conduct was contrary to the lawyer's oath and gave the appearance that fairness and decency did not animate those charged with the important public service of practicing law. *Id.* at 965. Both attorneys were suspended indefinitely. *Id.*

A statement from this Court that profane and abusive emails are not a substitute for the remedies provided by the rules of procedure, and that lawyers who engage in this practice – especially when they do not issue truly immediate retractions and cease the behavior after a single email – should expect to receive a public reprimand is a statement that is needed today. This is an appropriate case in which to issue that warning.

CONCLUSION

This Court should reject the Referee's recommendation of not guilty findings for the Rule 4.8-4(d) and Rule 3-4.2 violations and find the Respondent guilty of those violations. It should reject the recommendation of the Referee for a diversion to a practice and professionalism enhancement program because that recommendation is unauthorized. It should impose a sanction sufficient to deter this conduct in the future. The Bar suggests a public reprimand. The Court should impose the costs recommended by the Referee.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of September, 2021, the foregoing was filed and served via the State of Florida's E-Filing Portal to:

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