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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
REPLY and CROSS-ANSWER BRIEF

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PRELIMINARY STATEMENT

Mr. Regan's Cross-Review Initial Brief/Answer Brief will be cited as (AB. p.*).

REPLY ARGUMENT

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

A. Mr. Regan's discussion of procedures prior to the filing of the complaint.

Mr. Regan's brief frequently discusses his perception of irregularities occurring prior to the filing of the complaint. This case was commenced by a judicial referral. The Bar does not contend that the procedures used for judicial referrals have been ideal in the past. On October 21, 2021, this Court issued its decision in *In re: Amendment to Rules Regulating the Florida Bar-Rule 3-7.18*, SC21-653. That decision established a new rule to address judicial referrals – Rule 3-7.18. The Bar is optimistic this rule will resolve the controversies that have existed concerning judicial referrals.

In this case, however, these procedural issues occurred prior to the filing of the complaint. Mr. Regan did not request that this proceeding be dismissed or stayed to allow for a different process before the Board of Governors. Instead, he answered the complaint admitting that the emails had been sent. (Tab-8). He then entered into a conditional agreement for diversion, which this Court rejected. (Tabs-9, 14). On remand to the Referee, the matter simply went forward to a final hearing.

Mr. Regan cannot contend that there was no probable cause for this proceeding after this Court reviewed the complaint, his answer, and the ROR accepting the conditional plea – which collectively explained this case in considerable detail – and then rejected his plea. He cannot contend that he was surprised about the evidence at the hearing or the claim that he violated Rule 4-8.4(d). His procedural complaints are not a basis for this Court to take any special action in this case.

B. The mistaken reference to the text of Rule 3-4.3.

Mr. Regan is entirely correct that the quotation on page 25 of the initial brief is the text of Rule 3-4.3. The undersigned somehow managed to cut-and-paste the wrong text when drafting the brief and did not later catch the error. The actual text of Rule 3-4.2 is: "Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline."

This Court should disregard the argument made on pages 26-28 of the initial brief because it is based on that error. In light of that mistake, this reply brief will not provide additional argument based on the actual text of Rule 3-4.2.

C. The Bar is not charging a violation of the Oath; Rule 4-8.4(d) is the rule that encompasses the worst breaches of the pledge added to the Oath in 2011.

Mr. Regan argues extensively that the Bar is raising a new violation of the Oath that was not alleged in the complaint. The Bar did not allege a violation of the Oath, and it is not its intention to do so now.

The point the Bar is making is that this Court added "the pledge of fairness, integrity, and civility" "to opposing counsel" in 2011 for a reason. Although Mr. Regan argues that he took the Oath in 1984 and he has not been one of the "new lawyers" who have taken the enhanced Oath, (AB18), there is no question that the current Oath applies to all current members of the Bar. Mr. Regan was not "grandfathered" into a lesser standard of civility.

The Bar explained in its initial brief that this pledge of civility is enforced through Rule 4-8.4(d). (IB25). The Bar recognizes that the Oath is aspirational in nature; not every act that flunks the pledge in the Oath is a matter warranting disciplinary action.

But when the act of incivility reaches the level where the lawyer is disparaging, humiliating, or discriminating against another lawyer during the course of litigation, either knowingly or with callous indifference, then the conduct violates the Rule 4-8.4(d). The Bar is arguing that this Court needs to sanction violations of Rule 4-8.4(d) more seriously today than in the past

because this Court's goal of improving the level of civility within the Bar will not improve merely because young lawyers take a pledge of civility once. The Court needs to enforce the Rule in the context of outrageous emails between adversaries in litigation because this new weapon of aggression has become far too tempting as an option for lawyers who wish to use verbal threats as a litigation strategy.

D. The Referee was correct the first time when he concluded his findings of fact supported a violation of Rule 4-8.4(d).

Mr. Regan claims the violation of Rule 4-8.4(d) was not proven for five reasons. First, while he "does not condone the contents of his emails," he does not think the content disparages, humiliates, or discriminates against Ms. Tyson. In each email he says she is "way over her head" in this case. In the second email, (R-Ex. 2), he tells "Hannah" that she has "no idea what you are doing;" that she is "f***king up our case." He claims she is involved in "child's play." He threatens her, stating: "We are going to come at you personally very soon!" "Every obstructionist move you take I will bury you!"

"Disparage" is to describe someone as weak, bad, or unimportant.[1] "Humiliate" is to make someone feel ashamed or embarrassed."[2]

Second, Mr. Regan argues you can only be humiliated or disparaged in public or in communications shared with third parties. (AB28). While it is undoubtedly worse to humiliate or disparage someone in public – as a tactic to intimidate an adversary, it actually can be more effective if done privately.

Third, Mr. Regan claims there is no proof in the record that he knew he was sending emails to a young, inexperienced female lawyer or that he was treating her differently due to her age or gender. (AB28). He called her "Hannah." He speaks of her inexperience, his own 37 years of experience, and describes her actions as "child's play." He had attended a deposition with her and talked to her afterwards. (T121).

But even if he was not discriminating against her because she was a young woman, he was humiliating her and disparaging her. When the Referee changed his mind in the final Report, he claimed he did so because the emails did not "disparage" "on account of race, ethnicity…." (ROR3 p.

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[1] *Disparage*, https://www.merriam-webster.com/dictionary/disparage, (last visited Dec. 6, 2021).

[2] *Humiliate*, https://www.merriam-webster.com/dictionary/humiliate, (last visited Dec. 6 2021).

18). But the Rule says it applies to disparagement **"on any basis, including, but not limited to, on account of race, ethnicity…."** The Referee simply misread the Rule when changing his recommendation.

Fourth, Mr. Regan claims that the conduct was not prejudicial to the administration of justice and the Referee so found. (AB24)(ROR3 p. 20). But the findings of fact accurately explain that Ms. Tyson's client was compelled to file a motion for sanctions, which had merit. The trial court had to conduct an evidentiary hearing, and the lawyers in the case became witnesses at that hearing. (ROR3 p. 12-13). The trial judge had to make findings and impose a sanction. Mr. Regan's conduct used up judicial resources on a totally avoidable and unpleasant hearing. While it appears true that this event did not thereafter cause additional prejudice to the administration of this particular case, it nevertheless did cause the prejudice associated with the sanction hearing.

Moreover, the Bar would submit that the Rule, in using the word "including" in subsection (d), is explaining that this type of disparagement or humiliation, done knowingly or with callous indifference, is regarded as conduct that falls within the definition of conduct that is prejudicial to the administration of justice. In other words, that such conduct is inherently prejudicial. The practice of law is designed and intended to address the

public's disputes without such conduct, and the use of such conduct interferes with the administration of justice.

But here, there was actual evidence of the prejudice caused by the hearing. Frankly, if there were evidence that the prejudice continued in the later stages of this case, the Bar would be seeking a sanction greater than a public reprimand.

Fifth, Mr. Regan claims he has a First Amendment right to disparage Ms. Tyson in this fashion. He cites to a U.S. Supreme Court case holding a bar rule restricting extrajudicial statements to the press to be unconstitutional. *See Gentile v. State Bar of Nevada*, 111 S. Ct. 2720, 2721, 501 U.S. 1030, 1030 (1991).

He also cites to *The Florida Bar v. Sayler*, 721 So. 2d 1152 (Fla. 1998) for the proposition that the conduct must be knowing without quoting this Court's discussion of the First Amendment's role in a case like this:

> The First Amendment does not protect those who make harassing or threatening remarks about the judiciary or opposing counsel. *See Florida Bar v. Wasserman*, 675 So.2d 103, 104–05 (Fla. 1996). Under Rule of Professional Conduct 4–8.4(d), lawyers are required to refrain from knowingly disparaging or humiliating other lawyers. *See Florida Bar v. Uhrig*, 666 So. 2d 887, 888 (Fla. 1996).

Id. at 1155. Mr. Sayler sent a letter to a female lawyer in a very contested workers compensation case. The letter contained a somewhat veiled threat through the attachment of a news article about a murder. Mr. Sayler received a public reprimand and probation in 1998 for violations including Rule 3-4.3 and Rule 4-8.4(d).

While Mr. Regan's threat did not imply he might kill Ms. Tyson, it very directly stated a threat that he would soon come at her personally. The *Sayler* case strongly supports the Bar's position in this case. *See also, The Florida Bar v. Buckle*, 771 So. 2d 1131 (Fla. 2000)(public reprimand for letter, attaching religious materials, sent to victim of crime).

Mr. Regan also relies on *The Florida Bar v. Martocci*, 699 So. 2d 1357 (Fla. 1997) where Mr. Martocci avoided discipline when he responded immediately with vulgarity to the very unprofessional conduct of his opponent during live discovery. Of course, a few years later, Mr. Martocci was disciplined for conduct that did violate Rule 4-8.4(d). *See The Florida Bar v. Martocci*, 791 So. 2d 1074 (Fla. 2001). The Bar would submit that the first case is somewhat different because it involved immediate decisions concerning a face-to-face

confrontation. The second case likely would have received an even greater sanction after 2011.

Finally, Mr. Regan argues that the Referee did not find that he intended to send the second letter. (AB29). As discussed in the initial brief, after the complaint pointed out that Judge Dearing did not accept his theory that the second email was sent accidently, (Tab-1), Mr. Regan's answer claimed many things, but it did not claim the email was sent by accident. (Tab-8). Because there was confusion about whether the hearing was the final hearing, in lieu of live witnesses, the Bar introduced the answer as evidence. Both versions of the ROR reflect that Mr. Regan testified that he thought he merely saved the second email and did not send it. (ROR2 p.11); (ROR3 p. 11). But the Referee never actually found that it was sent accidentally. Even when the Referee changed his recommendation of guilt, he did not claim that he was doing this because he overlooked the fact that the email was sent by accident. His explanation was that it did not disparage or humiliate Ms. Tyson in front of her colleagues. (ROR3 p. 20). That explanation is just legally incorrect because the email could disparage or humiliate without being served on the other attorneys.

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

Mr. Regan's answer to this point on review does not state that he actually agrees with the Bar. But his argument on pages 34 to 37 of the answer brief does agree with the Bar. As to the second report, he states: "in view of the recommended finding of not guilty, diversion is not applicable." (AB35). He suggests that it should be viewed as an alternative recommendation in the event this Court disagrees with the finding of not guilty. But, as explained in the next section of this brief, that recommendation would still be unauthorized on a finding of guilt. (AB37). The Referee certainly does not say that his intent is to provide an alternative sanction. Frankly, given how the Referee edited the Report without a hearing, the Bar wonders if this section was left in the document by mistake.

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.

Diversion is not an available sanction in this context.

Mr. Regan concludes his argument on the appropriate sanction by suggesting that, if this Court finds a violation, it should accept the Referee's recommendation of diversion. (AB45). The reason the Referee revised his

report is that the rules do not provide for "diversion" at the end of a case where a finding of guilt has occurred. *See* Rule 3-5.3(h)(2).

If this Court concludes that Mr. Regan violated Rule 4-8.4(d) or Rule 3-4.2, the two types of discipline that can be imposed are an admonishment under Rule 3.5.1(a) or a public reprimand under Rule 3-5.1(d). If appropriate, this Court could impose a condition of probation along with either an admonishment or a public reprimand under Rule 3-5.1(c). The Bar is not maintaining that Mr. Regan would require supervision by a member of the Bar or reporting to any designated agency. Judge Dearing has already required that Mr. Regan attend a professionalism class on email communications, but some other course of study could be considered by this Court. *See* Rule 3-5.1(c)(1 & 4). The Bar continues to suggest that this conduct – while it does not require rehabilitation or even a non-rehabilitative suspension – does warrant a public reprimand that will serve as a very valuable deterrent to such conduct by Mr. Regan and other lawyers in the future.

<u>The Bar is not challenging the Referee's correct decision that the rejection of the conditional plea agreement did not determine guilt.</u>

Mr. Regan suggests that Bar is contesting the Referee's decision that this Court's rejection of the plea agreement did not determine guilt. (AB42).

Although Bar counsel at the hearing had misunderstood the effect of this Court's order, the Bar agrees that this Court gave Mr. Regan the option of a public reprimand as a new or revised conditional plea agreement and Mr. Regan did not accept that offer. That simply returned the case to its original status with the Bar needing to prove the violation.

Mr. Regan suggests that the Bar is asking for a public reprimand because this Court suggested that a public reprimand might be an appropriate sanction. (AB41). There is admittedly some truth in that suggestion. But when this Court made that recommendation, (1) the complaint alleging the facts in detail, (2) the answer admitting much of the complaint and raising Mr. Regan's defenses, and (3) the initial Report of Referee, adopting the parties' conditional agreement and providing further explanation, were all in this Court's case file. Because of the confusion about the nature of the final hearing, the Bar did not have witnesses present to testify at the final hearing. But with the cooperation of Mr. Regan, the Bar proved its case by introducing the pleadings and exhibits into evidence. Thus, the evidence concerning the emails and the context behind them when this Court issued its earlier order was similar to the evidence today. This Court's assessment of the matter now is likely to be similar to its assessment earlier.

The Case Law

Mr. Regan argues that the cases discussed by the Bar concerning the sanction are distinguishable. But the Bar never really suggested that they could serve as spot-on precedent.

Like *The Florida Bar v. Ratiner*, 46 So. 3d 35, 40 (Fla. 2010), there is "no case directly on point with the misconduct set forth in the Bar's complaint." Mr. Ratiner was very aggressive in person at a deposition and had been previously referred for diversion. The conduct here is less serious. But this Court imposed a public reprimand, a 60-day suspension, and two years' probation in that case – noting in footnote 4 that it would serve as a valuable deterrent. For the less serious conduct here, which occurred ten years after *Ratiner*, the Bar is only suggesting a public reprimand.

Likewise, in *The Florida Bar v. Abramson*, 3 So. 3d 964, 969 (Fla. 2009) , the lawyer's in-court behavior with a jury present was "egregious." He had prior conduct issues. But he was given a rehabilitative suspension of 91-days by this Court even though footnote one reflects that he had recently been elected a judge and may have additional consequences resulting from his new status. Mr. Regan's emails were also egregious, but the conduct does not warrant a suspension even under today's more stringent standards. The conduct does warrant a public reprimand.

Mr. Regan attempts to distinguish *In re Panetta*, 127 A.D. 3d 99, 101 (N.Y. App. Div. 2015), which involves a lawyer sending a four-year delayed letter to a juror. The letter is egregious and contains at least the indirect threat that the juror should "get attacked." The court found the letter "was designed to harass [the juror], and [Mr. Panetta's] conduct adversely reflects on his fitness as a lawyer." *Id.* at 102. Mr. Panetta was "publicly censured for his professional misconduct."

By way of comparison, Mr. Regan's case involves a communication to opposing counsel when that counsel was making it more difficult for Mr. Regan to prosecute his case. The egregious communication was not delayed for years. It was timed to be a threat that could have strategic value, rather than to be an unusual rant about past events. But the remaining facts are somewhat similar, and this New York case at least suggests that a public reprimand would be appropriate here.

Finally, in *Yetiv v. Commission for Lawyer Discipline*, 2019 WL 1186822, at *1 (Tx. Ct. App. 2019), Mr. Yetiv was a lawyer whose company was a party in a lawsuit. He had raised advice of counsel as defense and threatened to file a disciplinary grievance against opposing counsel unless that counsel withdrew an argument made in court. The facts are worse in this Texas case, but the lawyer received a four-month suspension. Here,

Mr. Regan threatened to come at his opposing counsel "personally." Mr. Regan argues that *Yetiv* involved "extortion." But in Mr. Regan's case, it is clear that he was trying to frighten opposing counsel to convince her to drop her client's objections to evidence when Mr. Regan found those objections upsetting. *Yetiv* would seem to support more than an admonishment in this Florida case.

Mr. Regan claims that a sanction is not necessary to protect the public. (AB43). In its initial brief, the Bar clearly stated that it is not trying to deprive the public of Mr. Regan's services. (IB41). But both the public and this Court do have an interest in having lawyers embrace fully the Rule of Law, as the proper, legal dispute resolution method. Lawyers cannot substitute internet aggression for the Rule of Law, even though internet aggression is now endemic in our society. This is true because the primary role of lawyers is to resolve the public's upsetting and stressful disputes so that the public itself will not resort to violence or avoidable anger. Lawyers simply cannot succumb to the very tactics that our legal system was created to prevent.

The Bar fully recognizes that this case is not an easy case in which to select an appropriate sanction, but it submits the deterrent effect of this case on all the lawyers tempted to hit the send button without reflecting on their

obligations to the Rules of Professional Responsibility outweighs the competing factors.

CROSS-REVIEW ARGUMENT

Mr. Regan brief states it includes an initial brief on cross review. The Nature of the Case claims that he is seeking review of the recommendation of diversion and the award of costs. (AB2) But the Bar itself raised the recommendation of diversion as an error in the main appeal. Mr. Regan and the Bar agree that diversion was not properly recommended by the Referee. Thus, the Bar will not address this issue as if it were a cross review issue.

And Mr. Regan's brief uses the word "costs" only once on page 9 in the statement of facts after mentioning costs twice in the Nature of the Case. Mr. Regan's brief does not have a section described as the section on cross review, and it does not contain issues described as issues on cross-review.

The Bar is not certain whether an answer on cross review is necessary or even appropriate, but it will briefly address costs because Mr. Regan may actually be entitled to some relief depending on the outcome of this case even though he did not brief the issue.

I. If the Court accepts the Referee's recommendation on guilt, the recommendation on cost may be affected.

Although Mr. Regan may not wish to pay the $2252.75 in costs recommended by the Referee in the Second Amended Report of Referee, (ROR 3 p. 25), he does not make any argument that the recommendation

was made in error. Because the Bar is maintaining that the Referee's recommendation to find Mr. Regan not guilty of the violation of Rule 4-8.4(d) is unsupportable under the clear and convincing evidence and that this Court should find him guilty, it asked this Court to award its costs in its initial brief.

The costs in this case include the standard administrative cost of $1250 under Rule 3-7.6(q)(1)(I), $54 in investigative costs, and $948.75 in court reporter fees. Thus, the costs themselves do not appear excessive or unauthorized. The recommended amount would not be an abuse of discretion by the Referee if recommended in a more typical Report of Referee.

Although unargued by Mr. Regan, costs are normally awarded to the Bar when it is successful "in whole or in part." The Bar was not successful on the issue of guilt in the recommendation of the Referee, but oddly it was "successful" on the sanction because the Referee is recommending a sanction, albeit one that the Bar maintains is inappropriate.

If this Court finds that Mr. Regan is actually not guilty of any violation, this Court should use its own discretion and not rely upon the Referee's recommendation when deciding the issue of costs. Under those circumstances, the Court would be within its discretion to reduce the costs

or even deny costs. If this Court finds Mr. Regan guilty of a violation of Rule 4-8.4(d) or Rule 3-4.2, it should award the recommended costs.

Respectfully submitted,

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CERTIFICATE OF TYPE SIZE & STYLE

I certify that this document complies with the applicable font and word count limit requirements of Florida Rule of Appellate Procedure 9.045. The font is 14-point Arial. The word count is 3812. The portion of this brief submitted in reply contains 3329 words. It has been calculated by the word-processing system and excludes the content authorized to be excluded under the rule.

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