IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

COMPLAINANT,

VS.

MONTGOMERY BLAIR SIBLEY,

RESPONDENT.

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CASE: SC06-1387

TFB File No. 2005-00,557(2B)
TFB File No. 2003-00,597(2B)

RESPONDENT'S SECOND AMENDED INITIAL BRIEF

MONTGOMERY BLAIR SIBLEY
In Proper Per
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STATEMENT OF THE CASE AND OF THE FACTS

I. INTRODUCTION

On August 5, 2002, after hearings stretching back two years to October 24, 2000, Judge Maxine Cohen Lando of the Florida Circuit Court for the 11th Judicial Circuit, in and for Miami-Dade County, Florida, entered an order in Case No.: 94-18177 FC 19 on child support directing Respondent to pay $100,000 in back child support and thereafter $4,000/month and giving Respondent until January 1, 2003, to purge that contempt or face incarceration.[1]

Second, in another appeal, Florida Third District Court of Appeal Judges Cope, Gersten and Green entered an order sanctioning Respondent. It is from this order that the second count of the instant Complaint arises. Again, that order

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[1] A copy of that order is attached as Exhibit "A" to the Complaint in this matter. The order of August 5, 2002, was adopted *verbatim* by Judge Lando from a proposed order submitted by counsel for Barbara Sibley, the former wife in that action. Notwithstanding that Respondent had until **January 1, 2003,** to purge the contempt amount, at a hearing held on **November 22, 2002**, Judge Lando, without notice of her intent to incarcerate Respondent and refusing to allow Respondent to be fully heard, ordered Respondent to commenced a sentence of indefinite incarceration in the Miami-Dade County Department of Corrections which ultimately ran until February 7, 2003, for civil contempt due to failure to pay child support. Notably, Judge Lando had already issued her writ of bodily attachment the day before the hearing, apparently having already made up her mind to incarcerate Respondent prior to the hearing. A copy of that order is also attached as Exhibit "A" to the Complaint in this matter.

contains numerous misstatements of facts in order to arrive at its apparently pre-ordained conclusion.

Thus, the sole facts upon which the instant Complaint rests are one circuit court order and one district court order.

II. BACKGROUND

Respondent's divorce action was commenced on August 12, 1994, by his Former Wife when she filed a petition for dissolution of marriage upon which a final judgment of dissolution was granted on September 20, 1994. On July 27, 2000, an "Emergency Motion for Temporary Primary Physical Residence of the Minor Children and To Allow Minor Children To Be Enrolled in Private Schools and Prohibiting the Removal of the Children to Washington D.C." After numerous delays, Judge Lando finally set for conclusion the hearing on the "Emergency Motion" for September 24, 25 and 26, 2001 – over 1½ years later. During that time, Respondent was only allowed to see his children for seven days.[2]

In January, 2002, Respondent's Ex-Wife filed two motions for contempt relating to enforcement of the marital settlement agreement between the parties

[2] On December 15, 2001 – Five Hundred Six (506) days after the filing of the "Emergency Motion", Judge Lando finally entered her Order on Emergency Motion for Temporary Custody of the Minor children. Noteworthy is that the order entered by Judge Lando was identical to the proposed order submitted by Respondent's Ex-Wife's Counsel.

relating to child support.

On June 4, 5, 6, 7, 2002, Judge Lando held and then adjourned until July 1, 2002, the trial on the pending motions related to final child custody, support and modification of Respondent's obligations under the Marital Settlement Agreement.

At the conclusions of the hearings on July 1, 2002, Judge Lando – without making her intentions known on the record – ordered counsel to submit proposed orders and written closing arguments by July 19, 2002. A copy of the submission by Respondent's Ex-Wife's counsel are attached as Exhibit "A" to the Appendix.

On August 5, 2002, some 692 days after the commencement of the hearings which formed the basis for Judge Lando's rulings on the motion to transfer custody and contempt, Judge Lando signed Respondent's Ex-Wife's proposed order granting Respondent's Ex-Wife's motion for contempt. A copy of that order is attached as Exhibits "A" to the Complaint.[3]

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[3] **Most conspicuously, a comparison of Exhibit "A" hereto and with Exhibit "A" of the Complaint reveal that they are identical: as such, it is plain that Judge Lando entered *verbatim*, the proposed order of Respondent's Ex-Wife's Counsel on the contempt motion.**

Judge Lando adopted Respondent's Ex-Wife's counsel's findings *verbatim* and ordered Respondent (i) to pay $100,000 for past due child support and (ii) remain current on his child support of $4,000 per month. Next, Judge Lando found that the Respondent "at all times from May 2000 had the present financial ability to pay but willfully or intentionally failed and refused to do so and wilfully violated the Order of this Court." On August 27, 2002, Respondent filed his notice of appeal of the above orders. That appeal was been assigned Case No.: 3D02-2308 by the Third District Court of Appeal.

Notwithstanding that Respondent was given until **January 1, 2003**, to pay the ordered $275,000, Judge Lando incarcerated Respondent for "indirect contempt" on **November 22, 2002**, upon her finding that Respondent "continues to 1) have the ability to pay the past due child support (of $100,000), and 2) that he is willfully refusing to pay his child support obligation."[4]

The following day, November 23, 2003, Respondent filed a notice of appeal with the Florida Third District Court of Appeal of the November 22, 2002, Family Court order which was assigned Case No. 3D02-3171. On December 23, 2003, two judges of the Florida Third District Court of Appeals – Alan R. Schwartz and

[4] Patently, this action by Judge Lando was to put the "squeeze" on Respondent given the pending Thanksgiving and Christmas holidays and his four year old son's upcoming December birthday.

Mario P. Goderich – entered the majority opinion in *Sibley v. Sibley*, Case No. 3D02-3171, 833 So.2d 847 (Fla. 3d DCA 2002) affirming Respondent's incarceration "for indirect contempt," holding remarkably that (i) "the record shows substantial assets, although admittedly not in the purge amount, in his [Respondent's] own name" and (ii) Respondent "may command, simply by asking, the payment of the purge amount through his very wealthy father. . ."[5]

Subsequently, Respondent took another appeal to the Third District Court of Appeal which was assigned Case No.: 3D03-2083. The second count of the instant Complaint arises from a portion of the opinion in that matter. On November 12, 2004, Father made a motion for rehearing challenging the panel to cite even one case brought before it in which Father was deemed to have filed –either by the Court or Respondent – a frivolous, abusive or incomprehensible pleading.

[5] In the dissenting opinion the Honorable Judge Cope, pointed out that the holding of the majority that Respondent's "very wealth father" can pay was issued by the majority based on the "`tipsy coachman' doctrine, or `right for the wrong reason' rule" for which there was **no** factual support in the record. Notably, though this appeal of Judge Lando's orders resulted in a *de facto* reversal of the conclusion that Respondent willfully failed to pay child support, the Florida Bar omits this appeal from its Complaint.

Notably, in denying the motion for rehearing, the panel was unable and/or refused to so do.

III. COURSE OF PROCEEDINGS BELOW

A. THE DISCIPLINARY COMMITTEE HEARINGS

On November 22, 2002, Judge Lando – who apparently couldn't wait to report her premature incarceration of Petitioner to the Florida Bar – wrote a letter to the Florida Bar reporting her "finding" of contempt of Respondent – **five weeks before the January 1, 2003, deadline to purge the terms of her August 5, 2002, order**. As a result, the Florida Bar assigned that complaint TFB File No. 2005-00,557(2B) alleging failure to pay child support.[6]

The Second Count of the Complaint which alleges a violation of Rule 4-3.1 (Meritorious Claims) arose from the Complaint of Respondent's Former Wife's attorney filed with the Florida Bar in early December 2004 arising from the November 4, 2004 opinion in *Sibley v. Sibley*, 885 So.2d 980 (3rd DCA 2004) in

[6] Delaying the matter apparently to allow the process to be the punishment – and with full knowledge that the State of Maryland would not admit Respondent to practice as long as there was a disciplinary proceeding pending in Florida – it was not until (i) November 5, 2005 when the Grievance Committee found probable cause and (ii) July 12, 2006, that the Florida Bar filed the instant complaint – a delay of One Thousand Three Hundred Twenty Eight (**1,328**) days from Judge Lando's contrived complaint to filing of the first count of the instant Complaint on TFB File No. 2005-00,557(2B).

which the Court found that Respondent was "a source of vexatious and meritless litigation." That matter was assigned TFB File No. 2003-00,597(2B).[7]

B. THE LEON COUNTY REFEREE

Continuing the pattern of using the nuisances of procedure to inflict punishment through process prior to adjudication, Justice Lewis of this Court in an order dated July 27, 2006, referred the matter to the Circuit Court of Leon County for assignment of a Referee.[8]

On July 15, 2006, Respondent served and filed his Notice of Depositions Duces Tecum and of Production from Non-Parties" seeking the depositions of the judges who had issued the order upon which solely the Florida Bar sought discipline.[9]

On September 15, 2006, Respondent filed his (i) Answers and Affirmative

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[7] Again, making the process the punishment, it was not until (i) December 1, 2005 that the Grievance Committee found probable cause and (ii) July 12, 2006, that the Florida Bar filed the instant complaint – a delay of Six Three Hundred Fifteen (**615**) days from the complaint to filing of the second count of the Complaint arising from TFB File No. 2003-00,597(2B).

[8] This "assignment" was done without an *iota* of facts in the Complaint supporting venue in Leon County and was plainly incompetent under Rule 3-7.6(d).

[9] Judges Gerald B. Cope, Jr., David M. Gersten, Melvia B. Green, Mario P. Goderich, of Third District Court of Appeal, Alan R. Schwartz, Former Judge Third District Court of Appeal and Maxine Cohen Lando, Judge, 11th Judicial

Defenses to the Complaint, (ii) his "First Omnibus Motion" seeking, *inter alia*, a change in venue and (iii) motion to compel production of documents previously requested from the Florida Bar.

On September 20, 2006, notwithstanding the pending motion to change venue, the Referee entered his order denying Respondent's "First Request for Issuance of Subpoenas Duces Tecum" seeking the depositions of the afore-mentioned judges. On September 26, 2006, Respondent promptly filed his "Motion to Re-Consider Order Denying Respondent's First Request for Issuance of Subpoena Duces Tecum".

On October 3, 2006, as the Florida Bar couldn't not raise a single argument in opposition to the motion to transfer venue and thus did not object, the Referee granted Respondent's motion to change venue to Miami-Dade County, the only permissible venue under Rule 3-7.6(d). Accordingly, this matter was improperly delayed seventy-five (75) days.

C. THE MIAMI-DADE COUNTY REFEREE

Pursuant to Justice Lewis' order of October 4, 2006, this matter was then transferred to Miami-Dade County. The appointment of the Honorable Orlando A. Prescott as the successor-Referee was made on October 11, 2006, by 11th Circuit

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Circuit.

Chief Judge Farina. According to this Court's order of October 4th, the Referee was ordered to (i) conduct a case management conference within sixty (60) days, to wit, **December 10, 2006**, and (ii) to issue his Report by **April 9, 2007.**[10]

On September 1, 2006, the Florida Bar moved to strike Respondent's Affirmative Defenses. On December 15, 2006, without affording Respondent an opportunity to be heard in opposition, the Referee granted the motion and – commencing a pattern and practice of the Referee – signed the Florida Bar's proposed order **without** prior comment by Respondent on that order.

Eventually, the Referee set the requisite Case Management Conference to "establish a schedule for the proceedings" for January 23, 2007 – notably Forty Five (45) days after this Court's order requiring such a hearing by December 10, 2006. At the conclusion of the January 23, 2007, hearing, the Referee requested further briefing on Respondent's First Request for Issuance of Subpoenas Duces Tecum filed on September 16, 2006. Full briefing was accomplished by the parties and non-parties as ordered by February 15, 2007.

Either prior to or after the hearing on January 23rd, the Referee – despite asking the parties to submit an agreed-as-to-form order of his rulings at that hearing

[10] Putting the initial resolution of this matter at One Thousand Six Hundred (**1,600**) days since the initial complaint by Judge Lando.

– entered the Florida Bar's proposed orders: ! Denying Respondent's Motion to Compel production; ! Denying Respondent's Motion for More Definite Statement; and ! Granting the Florida Bar's Motion for Partial Summary Judgment (though he denied the motion orally during the hearing).

After consultation between the parties, they submitted the agreed-as-to-form order which the Referee entered on January 29, 2007. Notably, accurately reflecting what transpired at the hearing, the Florida Bar's Motion for Partial Summary Judgment was denied.[11]

Of perhaps determinative status of this appeal, on **January 31, 2007**, Respondent filed his "Second Request for Issuance of Subpoenas Duces Tecum" seeking the deposition of Joanne E. Sargent, Counsel, Third District Court of Appeals.[12]

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[11] Hence, despite this Court's order requiring compliance with Rule 3-7.6(c) by **December 10, 2006**, as of **January 29, 2007**, the Referee had – in what should be an affront to this Court's authority – ignored without (i) giving explanation or (ii) seeking leave to delay his obligations to resolve the initial matters within the requisite Sixty (60) days.

[12] Her testimony was relevant to the matters at hand to demonstrate the open hostility of the Florida judiciary to Respondent and serve as a basis to impeach the various orders which were the sole accusations against Respondent made by "persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy". *Wolff v. McDonnell* 418 U.S. 539, 595 (1974) (Douglas, dissenting). A copy of the letter from Joanne E. Sargent which demonstrates the hostility and bias of the Third District Court of Appeals in support of that request is attached as Exhibit "B"

On March 27, 2007, the Referee in an *ex parte* communication contacted Mr. Min to request Mr. Min to draft a motion to the Florida Supreme Court to enlarge time to finish the Report due on April 9, 2007.[13] Though specifically requested by Respondent to detail the nature of that *ex parte* discussion pursuant to *The Florida Bar v. Mason*, 334 So.2d 1,7 (Fla. 1976)[14], the Referee refused to disclose the sum and substance of that *ex parte* communication.[15]

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to the Appendix. Significantly, ***the Referee <u>never</u> troubled himself to rule upon this the Second Request and to this day it remains outstanding.***

[13] Notably, on March 8, 2007, shepard of the Referee's obligations that the Florida Bar plainly sees its role, counsel for the Florida Bar wrote the Referee requesting an order to set a final hearing date. A copy of the March 8, 2007, letter from Barnaby Min is attached as Exhibit "C" to the Appendix. The Referee ignored this letter. On March 19, 2007, Mr. Min continued his secretarial duties for the Referee reminding him <u>again</u> that the Referee had failed to discharge this Court's order to set a final hearing. A copy of the March 19, 2007, letter from Barnaby Min is attached as Exhibit "D" to the Appendix. (Note that the date on the cover letter is wrong).

[14] "We are unimpressed with respondent's argument that the punishment is too severe, particularly in view of respondent's willful failure to disclose the *ex parte* communications after being asked to do so by opposing counsel." *Id.* at 7.

[15] Notably however, when contacted by Respondent making the same demand, Mr. Min stated "I was contacted by Judge Prescott's assistant to submit a proposed Motion for Enlargement of Time." *A priori* this is not an entirely accurate representation by Mr. Min as the substance of the *ex parte* communication obviously had to be quite a bit more than that as Mr. Min's draft *for the Referee* of the motion to enlarge time including the language as to the "good cause" for the delay. Therefore, the *ex parte* communication between the Referee and Mr. Min was necessarily quite a bit more than has been disclosed.

After receipt on March 28th by the Referee of Respondent's "Motion to Dismiss or, Alternatively, Respondent's Fourth Affidavit and Motion to Disqualify", the Referee in a burst of judicial attention without apparent forethought to this matter entered orders (i) clarifying his prior orders which had both **granted** and **denied** the Florida Bar's motion for summary judgment and (ii) denying Respondent First Request for Issuance of Subpoenas Duces Tecum[16].

Additionally, on March 28th, the Referee entered a "Notice of Final Hearing" setting April 16, 2007, at 1:00 p.m. for the putative, out-of-time and void Final Hearing. A copy of that "Notice Setting Final Hearing" is attached to the Appendix as Exhibit "E" to the Appendix.[17]

Upon receipt of the "Notice for Final Hearing" on April 5, 2007, Respondent

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[16] Though, as noted above, ignoring Respondent Second Request for Issuance of Subpoenas Duces Tecum.

[17] Notably, (i) there was no certificate of service on the "Notice", thereby violating the applicable rules and (ii) the envelope in which the order was sent did not contain any stamp and thus is of uncertain mailing date. Moreover, notwithstanding the Referee had faxed orders to Respondent on various occasions, the Referee decided it was appropriate to let Respondent – who lives in Maryland – know of the hearing date by U.S. mail. Additionally, the "Notice" failed to indicate the number of days for the hearing – not surprising as that issue was never raised or addressed at the January 23st status hearing and indeed was incapable of being resolved as Respondent still had discovery requests outstanding. Finally, the Referee never checked with Respondent as to his availability for that hearing on April 16th.

immediately made a motion to continue the trial for two weeks or, alternatively, appear by telephone hearing for the yet-to-be held requisite Case Management Conference. The basis for the continuation request of two weeks was that Respondent was (and still is) involved in a very-high profile case with issues both legal and of national security concerns the discharge of which required his professional attentions to his client in Washington, D.C., during the last two weeks of April.

Accordingly, on April 10, 2007[18], the Referee made a factually unsupported motion to enlarge, seeking Forty-Five (45) days, to finish the matter – though the Referee did not believe it was necessary for him to explain how he did not have time to finish this matter though given notice on October 11, 2006, that he had to finish this matter by April 9, 2007.[19] A copy of that motion is attached as Exhibit "G" to the Appendix. Significantly, in that motion the Referee makes conclusory factual statements that Respondent specifically challenges as to their validity.

On April 12, 2007, though having (i) failed to hold the requisite Case

[18] On April 10th, Mr. Min again reminded the Referee that the April 9th deadline had come and gone, and suggested a motion for enlargement of time to file the Report might be politic. A copy of that April 9, 2007, letter is attached as Exhibit "F" to the Appendix.

[19] This Court granted that motion gratuitously converting it to a motion to enlarge time without giving Respondent a chance to reply.

Management Conference, (ii) ignored this Court's April 9th deadline to finish the final hearing and (iii) belatedly asked for and received a Forty Five (45) extension from this Court to finish the matter, the Referee *refused* Respondent's "Motion to Continue Final Hearing", for two weeks and refused to permit Respondent to appear by telephone pursuant to Florida Rules of Judicial Administration, Rule 2.071(c) on April 16th. A copy of that order is attached as Exhibit "H" to the Appendix.

On April 16, 2007, without permitting Respondent to appear by telephone, the Referee conducted and concluded this matter at an *ex parte* hearing with Mr. Min thereby trying Respondent *in absentia*. Respondent, due to the nature of his professional obligations, was unable to attend without abandoning his professional obligations to his client in Washington, D.C.

On or about April 20, 2007, Respondent and the Florida Bar submitted proposed Reports. On June 28, 2007 – adopting verbatim except for an increase of the term of suspension recommended by the Florida Bar from two (2) to three (3) years the Florida Bar's proposed Report and failing to include a single fact or conclusion proposed by Respondent – the Referee *putatively* issued his Report, though – continuing a pattern of passive-aggressive behavior towards Respondent – failed to serve it upon Respondent.

Given that the putative Report contained factual representations by the Referee which were demonstrably false and included an *ad hominem* attack on Respondent.[20]

On July 31, 2007, Respondent timely filed his "Petition for Review" despite the acknowledged improper attempts by the Referee and this Court to fore-shorten the time for that filing by (i) not properly serving Respondent and (ii) *ex cathedra* ignoring the requirements of Florida Bar Rule 3-7.7(c)(1).

SUMMARY OF ARGUMENT

The errors in procedure in this matter, singularly and collectively, are of such magnitude that given the age of this matter, the only remedy is dismissal of the Complaint against Respondent. In particular, (i) this matter is a "quasi-criminal" matter and thus to be accorded the substantial procedural rights attendant thereto, (ii) the failure to permit Respondent to call witness and obtain documents violated the Fifth and Sixth Amendments, (iii) the refusal to continue the Final Hearing was

[20] Respondent sought from this Court a subpoena *duces tecum ad testificatum* directed to the Referee given that Referee misrepresented facts in the Report when he stated "The undersigned attempted to schedule a mutually convenient time for the final hearing and left messages for the Respondent to determine what his schedule was. As of the filing of this report, none of those messages have been returned." (Report, p.2). This blatant prevarication can be established through telephone records and oral examination of the Referee regarding this as to exactly when he "left messages" and Respondent's alleged failure to return them. As this Court knows, that request for discovery was denied by this Court.

an egregious abuse of discretion by the Referee, (iv) the Referee *verbatim* adoption of the Florida Bar's proposed order and his striking of all Respondent's affirmative defenses was plain error and (v) the Referee's behavior removed the label of "fair and impartial" from him and thus denied Respondent such a tribunal.

The substantive errors are just as plain. Simply put, Respondent did not fail to pay child support – he was unable as the record clearly establishes and such order (i) was not issued by a competent court and (ii) in all events was overturned on appeal. Likewise, Respondent did not violate Rule 4-3.1 as none of his filings were "frivolous" and the cited court order to that end fails to even mention that phrase.

Accordingly, this Court must now (i) recognize that Respondent is blameless and has been harmed long enough by the Florida Courts' vindictive and false accusations against Respondent and (ii) thus dismiss this Complaint with prejudice.

ARGUMENT

I. STANDARD OF REVIEW

Pursuant to Florida Bar Rule 3-7.7 (c)(5) *Burden* "Upon review, the burden shall be upon the party seeking review to demonstrate that a report of a referee

sought to be reviewed is erroneous, unlawful, or unjustified."

However, "A referee's recommendations as to discipline are subject to broader review by this Court than the referee's findings of fact, but we have said that the referee's recommendations come to this Court with a presumption of correctness. *Florida Bar v. Roberts*, 626 So.2d 658, 659 (Fla.1993). We continue to recognize this standard of review but also recognize that the responsibility for the discipline of lawyers is ultimately the duty of this Court." *The Florida Bar v. Forrester*, 656 So.2d 1273, 1275 (Fla. 1995).

II. PROCEDURAL ERRORS

A. RULE 3-7.7(F) VIOLATES FLORIDA AND FEDERAL LAW

The procedural rights attendant upon this disciplinary proceeding are determined by the nature of this proceeding. This Court has re-defined the nature of these proceedings as "a quasi-judicial administrative proceeding." Rule 3-7.7(f)(1). This Court by so doing has violated both Florida and Federal law thereby denying to Respondent his fundamental procedural rights.

1. THE FLORIDA LAW

In the seminal case on this question of what procedural rights are to be accorded in a disciplinary proceedings, this Court – when faced with an amendment to the Florida Bar Rules which would permit discipline if an attorney invoked his

Fifth Amendment right to refuse to answer questions regarding affiliation with the Communist Party – set and recognized nature of disciplinary hearings and the procedural due process necessarily attendant upon them.[21]:

Notably, when the Rules of the Florida Bar were amended to make the drastic change from the "long established" rule that "the investigation and trial of a lawyer for unprofessional conduct must be a judicial proceeding" to a proceeding that was "a quasi-judicial administrative proceeding", this Court failed to explain or distinguish it's radical shift from the standard in *Petition for Revision of, or Amendment to, Integration Rule of Florida Bar* – presumably because it would be intellectually inconvenient to do so.[22] Accordingly, this Court now faced with this

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[21] "Adoption of the rule as proposed would, in our opinion, jeopardize rights secured by Section 12, Declaration of Rights, Constitution of Florida, F.S.A., as well as the guaranties embraced in the Fifth Amendment to the Federal Constitution. The proposed rule in whatever form approved should contemplate the **proper exercise of every safeguard wrapped in these provisions of organic law**; they may not always be obvious on the surface, however, the **importance of adhering to the doctrine long established by this court that the investigation and trial of a lawyer for unprofessional conduct must be a judicial proceeding**, in the manner provided by law or rule of this court, cannot be overemphasized." *Petition for Revision of, or Amendment to, Integration Rule of Florida Bar,* 103 So.2d 873, 875 (Fla. 1956). (Emphasis added).

[22] Indeed, in the seven times that *Petition for Revision of, or Amendment to, Integration Rule of Florida Bar* has been cited in Florida Jurisprudence, not once has the *prima facie* conflict between its holding defining the process as "a judicial proceeding" and this Court's *furtive* change to "a quasi-judicial administrative proceeding" been reconciled. Moreover, by this serendipitous change, this Court

challenge to the lowering of the standard must reconcile these differences or admit that the change of disciplinary proceeding to "a quasi-judicial administrative proceeding" was improper.

2. THE FEDERAL LAW

Regardless of what this inferior Court may deem the law to be under Florida jurisprudence, this Court is prisoner to the Supreme law of this land.[23] United

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has invaded the province of the "organic law" of this State – something it is powerless to do and is a bold usurpation of power never delegated to this branch by the People. *Accord*: *State v. Palm Beach County*, 89 So.2d 607, 612 (Fla. 1956)(". . . that the people in their wisdom wrote the 1930 restriction into the organic law. It is not for us to question their wisdom.); *Advisory Opinion to Atty. Gen. Funding for Criminal Justice,* 639 So.2d 972, 973 (Fla. 1994)("The single-subject requirement is a rule of restraint. It is designed to insulate Florida's organic law from precipitous and cataclysmic change."); *Ray v. Mortham*, 42 So.2d 1276, 1290 (Fla. 1999)("[It is] the will of the people to make a change in their organic law, as expressed through their vote on the initiative ballot, and the importance of giving effect to the change in law which was actually voted on by the people, rather than some judicially crafted change.") Yet here, by "judicially crafted change" coupled with the usurped benefit of ignoring *stare decisis*, this Court has changed the organic law removing the "safeguard[s] wrapped in these provisions of organic law."

[23] "Nonetheless, if federal law has preempted state law, either expressly or impliedly, the Supremacy Clause requires state law to yield." *State of Florida v. Stepansky*, 761 So.2d 1027, 1031 (Fla. 2000). "Upon the State courts, equally with the courts of the Federal system, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States, whenever those rights are involved in any suit or proceedings before them. Consequently, it is the duty of State Supreme Courts to follow the guidelines announced by the Supreme Court of the United States in construing Federal Constitutional rights." *State v. Dixon*, 283 So.2d 1, 23 (Fla. 1973)(Boyd, dissent, footnotes omitted).

States Constitution, Article VI, clause 2.[24]

Accordingly, Respondent takes exception to the characterization of Florida attorney disciplinary proceedings as "a quasi-judicial administrative proceeding" under Rule 3-7.7(f)(1).

The characterization of the United States Supreme Court clearly prevails over this inferior Court's characterization. As the superior court has stated: "Disbarment, designed to protect the public, is a punishment or penalty imposed on the lawyer. *Ex*

Parte Garland, 4 Wall. 333, 380, 18 L.Ed. 366; *Spevack v. Klein*, 385 U.S. 511, 515. He is accordingly entitled to procedural due process, which includes fair notice of the charge. *See In re Oliver*, 333 U.S. 257, 273. . . .These are adversary proceedings of a quasi-criminal nature. *Cf. In re Gault*, 387 U.S. 1, 33." *In re Ruffalo*, 390 U.S. 544, 550-551 (1968). Accordingly, notwithstanding any Florida Rule or pronouncement by this inferior Court,, the proceedings must not trespass

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Accord: Irvin v. Dowd, 359 U.S. 394, 404 (1959)("the obligation which rests upon 'the state courts, equally with the courts of the Union, . . . to guard, enforce, and protect every right granted or secured by the constitution of the United States").

[24] "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; **and the judges in every state shall be bound thereby**, anything in the Constitution or laws of any State to the contrary notwithstanding." (Emphasis added).

upon those rights guaranteed to Respondent under the U.S. Constitution.[25]

Here, Respondent – an "out-of-state lawyer" – has and continues to raise "unpopular federal claims" in the Florida courts – when only he can for (i) lack of local counsel willing to incur the wrath of a demonstrably vindictive Florida judiciary[26] and (ii) the natural ability to persevere regardless of personal cost imposed by a Florida judicial resolution system which is "fair" in name only.

Accordingly, Respondent is entitled to those procedural rights secured by the federal Constitution notwithstanding this inferior Court's pronouncements to the contrary and upon these rights this Court must publically resolve Respondent's claims to procedural violations which require dismissal of this matter.

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[25] Moreover, the significance of attorneys in our society cannot be ignored either. In an 8-1 decision, the Supreme Court recognized:

> The lawyer's role in the national economy is not the only reason that the opportunity to practice law should be considered a "fundamental right." We believe that the legal profession has a noncommercial role and duty that reinforce the view that the practice of law falls within the ambit of the Privileges and Immunities Clause. Out-of-state lawyers may -- and often do -- represent persons who raise unpopular federal claims. In some cases, representation by nonresident counsel may be the only means available for the vindication of federal rights. The lawyer who champions unpopular causes surely is as important to the "maintenance or well being of the Union," as was the shrimp fisherman in *Toomer* or the pipeline worker in *Hicklin*.

Supreme Court of New Hampshire v. Piper, 470 U.S. 274 (1985).

B. THE DELAY IN RESOLUTION DENIED DUE PROCESS TO RESPONDENT

While it is doubtlessly true that: "The constitutional right to a speedy trial in criminal cases has no application to civil proceedings"[27], the United States Supreme Court had held that: "Disbarment, designed to protect the public, is a punishment or penalty imposed on the. . . .**These are adversary proceedings of a quasi-criminal nature**." *In re Ruffalo*, 390 U.S. 544, 550-551 (1968). Accordingly, some aspect of speedy trial rights must attach to such this disciplinary proceeding. Indeed, while the constitutional right to speedy trial in attorney disciplinary proceedings has never been expressly addressed, analogous situations abound compelling this Court to recognize the delay here has frustrated the assertion of Respondent's rights and damaged him immeasurably.[28]

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[26] See Exhibit "B" to the Appendix hereto.

[27] *Julian v. Lee*, 473 So.2d 736, 739 (Fla. 5th DCA 1985); see also Amend. V I, U.S. Const.

[28] "Many of the same considerations that impel judicial protection of **the right to a "speedy trial" in criminal cases or implementation of civil decrees with all deliberate speed are <u>not</u> inapposite in agency deliberations**. Those situations generally involve protection of constitutional rights, but delay in the resolution of administrative proceedings can also deprive regulated entities, their competitors or the public of rights and economic opportunities without the due process the Constitution requires." *MCI Telecommunications Corp. v. F. C. C.*, 627 F.2d 322, 341 (D.C. Cir. 1980)(Footnotes omitted, emphasis added.) *Accord*:

Here, the allegations were brought to the Florida Bar's attention in December 2002. Now, some One Thousand Six Hundred (1600) days or Four and One Half (4 ½) years later, this matter is still pending against Respondent.[29]

Respondent has both a Florida and federal "constitutional right to be brought to trial within a reasonable time." The State of Florida has an obligation imposed on it that "justice shall be administered without sale, denial or delay".[30] Can this Court publically say that a Sixteen Hundred (1600) day delay in adjudication is discharging that burden? Respondent explicitly challenges this Court to so declare at least to the end of letting the public know each Judge's position on the meaning of Article I, § 21 for the edification of the voters in the next election cycle.

Dickey v. Florida, 398 U.S. 30, 54 (1970) (Brennan, J., concurring; citation omitted)("Society's interest in avoiding undue delay in criminal trials stems from a general presumption that governmental delay is unfair: "Despite the difficulties of proving, or disproving, actual harm in most cases, it seems that inherent in prosecutorial delay is 'potential substantial prejudice' . . . ."); *Smith v. Illinois Bell Tel. Co.*, 270 U.S. 587, 591 (1926) ("(p)roperty may be as effectively taken by long-continued and unreasonable delay in putting an end to confiscatory rates as by an express affirmance of them.").

[29] As Justice Anstead noted in *State v. Salzero*, 714 So.2d 445, 448 (Fla. 1998): "We deal here with a question that goes to the very nature and purpose of the speedy trial rule and to the basic principles of advocacy in an adversary system of criminal justice. **Petitioner had a constitutional right to be brought to trial within a reasonable time.** The rule of 180 days provides a practical way to effectuate the constitutional right."

[30] Florida Constitution, Article I, § 21. Access to courts.

Moreover, Respondent has been significantly harmed by the delay.[31] Accordingly, for delay in resolving this matter, this matter must be dismissed.

C. THE REFUSAL TO PERMIT RESPONDENT TO CALL WITNESSES

"We have the view, and so hold, that under such circumstances due process requires both notice to the lawyer involved and reasonable opportunity to be heard in person and through witnesses if he desires to explain the circumstances of the offense and otherwise mitigate the disciplinary penalty." *The Florida Bar v. Fussell*, 179 So.2d 852, 854 (Fla. 1965).

Regardless, this Court has held that: "In addition to the authority to hear this evidence provided by the Florida Evidence Code, a referee in a bar-discipline case can consider any evidence he or she deems relevant to resolving a factual question." *The Florida Bar v. Clement*, 662 So.2d 690,f/n #3 (Fla. 1995).

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[31] Factual issues have become clouded due the passage of time. Documents are no longer available. On a professional level, the pending bar complaint against Respondent has caused Respondent to repeatedly lose clients who did not want to invest their legal matters with an attorney who may be disbarred. Moreover, the State of Maryland has refused to admit Respondent to practice as long as the Florida Bar proceedings continue. Last, lost to the gowned-ones is the stress that this constant Damocles sword hanging over Respondent's head for over four years this proceeding represents. To further delay is simply to continue to punish Respondent without a hearing implicate the Eighth Amendment's cruel and unusual prohibition.

However, Respondent expressly challenges this holding as the superior federal law prohibits this court from allowing disciplinary proceedings which trespass upon those rights guaranteed to Respondent under the U.S. Constitution. Those rights includes the right under the Sixth Amendment to "be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense." Thus, notwithstanding any Florida law to the contrary, under the supremacy clause of the United States Constitution, the Acts of Reconstruction and the Sixth and Fourteenth Amendments, Respondent has the right to confront his accusers before suffering any "punishment or penalty imposed" upon him.[32]

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[32] The United States Supreme Court held that "(i)n almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses." *Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Likewise, in *Greene v. McElroy*, 360 U.S. 474, 496 (1959), the court found that cross-examination and confrontation must be permitted whenever "governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings" was one of the "immutable' principles of our jurisprudence."

Most significantly, in *Ex Parte Burr*, 22 U.S. 529, 530 (1824), the Court was presented with a motion for mandamus to the Circuit Court for the District of Columbia, to restore Mr. Burr to his place of attorney at the bar of that Court. In detailing the level of proof necessary to remove an attorney from the practice of law, the Court held: "In the case at bar, the proceedings were supposed to be irregular, because **Mr. Burr was put to answer charges *not* made on oath**. That the charges, in a regular complaint against an attorney, ought not to be received and acted on, **unless made on oath**, is admitted. It is a course of proceeding which is recommended by considerations, too obvious to require that

Here, The Florida Bar failed to present charges under oath or permit Respondent to "be confronted with the witnesses against him", and as such, the charges must be summarily dismissed under *Ex Parte Burr*'s requirement. Moreover, Respondent was denied an opportunity to call witnesses in his defense, *i.e.*, Judge Lando, the six Third District Court of Appeal Judges and their legal counsel, Joanne Sargent.

Thus, it bordered upon the intellectually dishonest for the first Referee to cite *United States v. Morgan*, 313 U.S. 409 (1941) for the proposition that Respondent should be denied depositions of the complaining witnesses as requested when the history of that case clearly establishes that Respondent falls within the exception to the general rule cited in *United States v. Morgan*.[33].

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they should be urged." (Emphasis added).

[33] The *Morgan* line of cases arose from the validity of an order of the Secretary of Agriculture fixing maximum rates to be charged by market agencies at the Kansas City Stockyards. *Packers and Stockyards Act 1921*, 7 U.S.C. §§ 181 – 229. In the first case, *Morgan v. United States*, 298 U.S. 468 (1936), the contention that the plaintiffs had not been accorded the hearing which the statute made a prerequisite to a valid order was at issue. The district court had struck from plaintiffs' complaints the allegations that the Secretary had made the order without having heard or read the evidence and without having heard or considered the arguments submitted, and that his sole information with respect to the proceeding was derived from consultation with employees in the Department of Agriculture. *United States v. Morgan*, 304 U.S. 1, 14 (1938). The Supreme Court concluded that first case by stating "that it was error to strike these allegations, that the **defendant should be**

required to answer them, and that the question whether plaintiffs had a proper hearing should be determined." *Id.* (Emphasis added).

Hence, finding that the Secretary of Agriculture sat in a similar position to that of a judge required fundamental due process, the Supreme Court went on to order that the Secretary answer question under oath concerning the nature of the actions he took in his judicial capacity so that the plaintiffs' allegations could be properly considered. "The defendants should be required to answer these allegations, and the question whether plaintiffs had a proper hearing should be determined." *Morgan v. United States*, 298 U.S. 468, 482.

Subsequently, "after the remand, the bills were amended and interrogatories were directed to the Secretary which he answered. The court received the evidence which had been introduced at its previous hearing, together with additional testimony bearing upon the nature of the hearing accorded by the Secretary. **This evidence embraced the testimony of the Secretary and of several of his assistants**. The district court rendered an opinion, with findings of fact and conclusions of law, holding that the hearing before the Secretary was adequate and, on the merits, that his order was lawful. On this appeal, plaintiffs again contend (1) that the Secretary's order was made without the hearing required by the statute; and (2) that the order was arbitrary and unsupported by substantial evidence." *United States v. Morgan*, 304 U.S. 1, 14. (Emphasis added).

After reviewing the testimony of the Secretary, the Supreme Court found that there was a failure to accord due process holding:

> The maintenance of proper standards on the part of administrative agencies in the performance of their quasi judicial functions is of the highest importance and in no way cripples or embarrasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest. For, as we said at the outset, if these multiplying agencies deemed to be necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, **they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic**

Here, Respondent is alleging – and is collaborated by the dissent in *Sibley v. Sibley*, 833 So.2d 847(Fla.App. 3 Dist. 2002) – that the judicial actors who entered the orders upon which the two counts of the complaint are based were not relying upon the record before them. Moreover, that the Third District Court of Appeal judges – just as the Secretary in *Morgan* – could not have made their determination that Respondent's cases were "meritless" in the cases which they were not empaneled to decide.

Accordingly, the trilogy of *Morgan* cases clearly establishes the exception to the general rule which prohibits the deposition of judges: where the facts upon which they relied are at issue.[34]

> **concepts of fair play**. **As the hearing was fatally defective, the order of the Secretary was invalid.**

United States v. Morgan, 304 U.S. 1, 22. (Emphasis added).

[34] Florida likewise recognizes this exception. In *Stein v. Professional Center, S.A.*, 666 So.2d 264, 266 (Fla.App. 3 Dist. 1996) the court held:

> We recognize that under the case law there are certain discrete occasions where a trial judge may be subpoenaed to testify as to certain relevant facts in a case, such as (1) a criminal defendant's demeanor during trial when a subsequent issue arises in post-conviction proceedings as to the defendant's mental competence to stand trial; or (2) the terms of an oral settlement agreement made before the judge when that agreement was never memorialized on the record because the proceedings were not transcribed by a court

Here, Respondent is not seeking the "meaning" of the subject orders, but instead the "relevant facts" relied upon by the judges in each of the cases the Complainant is relying upon to maintain that Respondent behaved in a manner which violated the cited Bar Rules. If, as Respondent maintains with authority, those judges relied upon evidence (i) "which was not introduced as such" and/or (ii) "which should not legally influence the conclusion", then due process has been denied and no finding of an ethical breach can be premises upon such discredited orders.

Additionally, the right to confront and cross examine is particularly relevant when the complaining witnesses – here the judges and their legal counsel – can be demonstrated to be made by "persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy".[35]

> reporter. These cases, relied on by the respondent, have no application to this case because the petitioner is not being subpoenaed to give testimony as to certain relevant facts in the case; instead, the petitioner is being subpoenaed to give testimony as to the meaning of a prior order which she entered in the case, and, under the established case law, such testimony is impermissible.

[35] This point is made indelible – and thus binding upon this inferior Court – in *Greene v. McElroy*, 360 U.S. 474, 496-497 (1959), where the Court stated:

> Certain principles have remained relatively immutable in our jurisprudence. One of these is that, where governmental action

Here, this Court would sanction the extreme harm to Respondent by government action of suspension or disbarment by judges demonstrably "motivated by malice, vindictiveness, intolerance, prejudice, or jealousy" without requiring those individuals to swear to their charges or permit Respondent to cross-examine them all the while shielding their judicial acts from **any** sort of scrutiny under the (i) *per curiam* affirmance without written decision policy and (ii) the defense of judicial immunity to any claim against a judge.

Hence, the failure to (i) permit Respondent to take discovery or call as witnesses the subject judges and (ii) acknowledge and rule upon the request to take Joanne Sargent's deposition rises to a level of Sixth Amendment constitutional deprivation requiring dismissal of the charges against Respondent.

> seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence, it is even more important where the evidence consists of the testimony of individuals whose memory might be faulty or who, in fact, might be perjurers or persons motivated by malice, vindictiveness, intolerance, prejudice, or jealousy. We have formalized these protections in the requirements of confrontation and cross-examination. . . . This Court has been zealous to protect these rights from erosion. It has spoken out not only in criminal cases . . . , but also in all types of cases where administrative and regulatory actions were under scrutiny.

D. THE REFEREE'S ABUSE OF DISCRETION VIOLATED DUE PROCESS

It was a plain abuse of discretion[36] for the Referee to refuse to continue the putative "Final Hearing" for two weeks to accommodate Respondent's pre-existing professional obligations. Accordingly, this matter ought to be dismissed for that abuse of discretion and the continued harm that further delay would cause to Respondent by remanding this to a new Referee for further hearings.

Clearly, the Referee ignored this Court's orders on the timely resolution of this matter. Thus, while granting to himself the *ex cathedra* right to do whatever he pleased, Respondent – who sought only a Fourteen (14) day delay in a matter that was Sixteen Hundred (1600) days old – could not be afforded that minimal courtesy.

Here, (i) Respondent had not sought a continuance before, (ii) no "injustice"

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[36] "A motion for continuance is addressed to the sound judicial discretion of the trial court and absent abuse of that discretion the court's decision will not be reversed on appeal." *Ziegler v. Klein*, 590 So.2d 1066, 1067 (Fla. 4th DCA 1991). "Factors to be considered in determining whether the trial court abused its discretion in denying the motion for continuance include whether the denial of the continuance creates an injustice for the movant; whether the cause of the request for continuance was unforeseeable by the movant and not the result of dilatory practices; and whether the opposing party would suffer any prejudice or inconvenience as a result of a continuance." *Fleming v. Fleming*, 710 So.2d 601, 603 (Fla.App. 4 Dist. 1998). *Accord*: *United States v. Flynt*, 756 F.2d 1352, 1359 (9th Cir.) (Flynt), *amended*, 764 F.2d 675 (9th Cir.1985).

would be created by delaying the final hearing two weeks, (iii) Respondent's continuance request was "unforeseeable" as the Referee did not give notice to Respondent of the final hearing until ten (10) days before the hearing and failed to indicate the length of the hearing, (iv) Respondent engaged in no dilatory practices but promptly and timely filed each document and (v) no "prejudice or inconvenience" would be suffered by a two-week delay.

Moreover, and most significantly, by refusing to continue the Final hearing two weeks, the Referee forced upon Respondent a "Hobson's Choice" of attending the hearing or breaching his professional obligations to a client who was in constant need of them during a significant point in her criminal and civil proceedings in Washington D.C.[37]

[37] In the District of Columbia, Respondent represents Deborah Jeanne Palfrey, a/k/a the "D.C. Madam" who (i) was indicted in a matter assigned Criminal Case Number: 07-046-GK and (ii) has had all her assets seized in a civil forfeiture matter in Case No.:1:06-CV-01710-GK. During the time frame of mid-April 2007, Respondent was faced with (i) an injunction against him personally regarding records he held and (ii) preparing the documents for the transition of her criminal appointed attorney to a new attorney and dealing with issues arising under the federal Confidential Information Procedures Act, which cannot be further detailed here. Additionally, significant issues regarding communications with the White House Counsel's office were on-going during this time. These, and other matters that Respondent is unable to disclose at this time, precluded Respondent from disappearing to Miami for a hearing of indeterminate length during the last two weeks of April without breaching his obligations to his client and the Court which had entered a temporary injunction against him.

Additionally, at the hearing on January 23rd, the Referee failed[38] to discharge his obligations pursuant to Rule 3-7.6(c) which states:

> Within 60 days of the order assigning the case to the referee, the referee shall conduct a pretrial conference. The purpose of the conference is to set a schedule for the proceedings, including discovery deadlines and a final hearing date. The referee shall enter a written order in the proceedings reflecting the schedule determined at the conference.

Instead, Respondent is ambushed on April 5th by an order to appear for the putative "Final Hearing" absent notice of (i) who the witnesses of the Complainant will be and (ii) who he may call in his defense. Plainly, this Court cannot condone such behavior and conclude that "due process" was accorded Respondent here.

As such, it was an abuse of discretion to require Respondent to drop everything – including his personal child care responsibilities – and rush off to Miami for the Referee's putative[39] final hearing.

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[38] Again, the Referee at the January 23rd hearing **failed** to: (i) Set a schedule for the proceedings; (ii) Set discovery deadlines; (iii) Set a final hearing date; or (iv) Enter a "written order "reflecting the schedule determined at the conference" (notably because no such schedule was determined at the conference).

[39] "Putative" is the correct adjective here as (i) the Case Management hearing had never been completed and (ii) the Referee had never ruled upon Respondent's Second Request for Issuance of Subpoena Duces Tecum.

Last, it is worthy of note that Respondent sought leave to appear by telephone for the yet-to-be concluded requisite Case Management Conference on April 16th, but the Referee refused that request by ignoring it.

E. THE DENIAL OF DOCUMENTARY DISCOVERY

On August 10, 2006, Respondent served upon Complainant a request to produce. On August 14, 2006, Complainant served its response. Respondent promptly file a motion to compel production of the documents requested. On January 23, 2007, the Referee denied Respondent's motion to compel.[40]

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[40] A review of Respondent's Requests 1, 2, 5 and 6, reveal that at the very least, each may " lead to the discovery of admissible evidence". Briefly stated:

> Request #1: *All documents related every instance when Complainant has disciplined a member for the Florida Bar for violation of Rule 4-8.4(h) of the Rules Regulating the Florida Bar* – The selective prosecution of Respondent by Complainant is a central affirmative defense in this matter and as such the relevance of the disposition of similarly situated respondents is relevant. *Cf. Bordenkircher v. Hayes*, 434 U.S. 357 (1978).
>
> Request #2: *All documents related every instance when Complainant has disciplined a member for the Florida Bar for violation of Rule 4-3.1 of the Rules Regulating the Florida Bar* – see #1 above.
>
> Request #5: *All documents related to reports detailing the number of complaints processed by Complainant for each of the last three years* – Plainly, Respondent has a right to have "justice shall be administered without sale, denial or delay". The time of processing complaints by the Complainant thus is relevant to a determination of whether Respondent's rights to "justice without delay" have been violated by

As noted in *Greene, supra*, ". . .where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue. While this is important in the case of documentary evidence . . ." Here, the denial to Respondent of the sought-after documentary evidence also denied to Respondent fundamental due process.[41]

The requests are particularly relevant as (i) there is no reported decision sanctioning an attorney as Respondent is sought to be sanction here for alleged "frivolous" filings and (ii) since the amendment in 1995 to the Florida Bar Rules to include Rule 4-8.4(h), there has been no reported sanctioning of an attorney for violating this Rule. Accordingly, how the Florida Bar has treated other similarly situated attorneys is clearly relevant to Respondent's claims herein.

Accordingly, for the denial of access to relevant documentary evidence, Respondent was denied due process and this matter must be dismissed.

Complainant.

Request #6: *All documents related to reports detailing the length of time to process complaints by Complainant for each of the last three years* – see #5 above.

[41] *Accord: Wardius v. Oregon*, 412 U.S. 470, 474 (1973)("Although the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . it does speak to the balance of forces between the accused

F. STRIKING OF AFFIRMATIVE DEFENSES

In Respondent's Answer to the Complaint, Respondent raised Nineteen (19) affirmative defenses, all of which were struck by the Referee in his order of January 29, 2007, without elaboration.

That order was in error for two procedural reasons. First, in part, Rule 1.110(d) states that "In pleading to a preceding pleading a party shall set forth affirmatively . . .and any other matter constituting an avoidance or affirmative defense." Likewise, Rule 1.140(b) states "Every defense in law or fact to a claim for relief in a pleading shall be asserted in the responsive pleading, if one is required, but the following defenses may be made by motion at the option of the pleader". Here, rather than file a motion to dismiss, Respondent has properly filed his defenses in law or fact in his responsive pleading.

Second, the Florida Bar's legal and factual arguments addressed to the affirmative defenses are premature pending discovery of both parties so that these matters may be properly adjudicated. For example, in response to Respondent's Second Affirmative Defense of duress, the Florida Bar maintains "Respondent was not acting under duress". How can that conclusion be made prior to any factual

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and his accuser.")

findings?[42]

Thus, the order granting of the motion to strike affirmative defenses clear error by the Referee.

G. VERBATIM ADOPTION OF BAR'S PROPOSED ORDER

A review of the proposed "Report" from the Florida Bar and the "Report" eventually signed and submitted by the Referee reveal that they are *de facto* and *de jure* identical.[43]

The U.S. Supreme court noted in *Anderson v. City of Bessemer*, 470 U.S. 564, 572 (1985):

> We, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties, particularly when those findings have taken the form of conclusory statements unsupported by citation to

[42] Likewise, the Florida Bar maintains in response to the affirmative defense of unclean hands that "The Florida Bar never conveyed any information, through words, admissions, conduct, acts, acquiescence or all combined to Respondent in a willful, culpable or negligent manner . . ." Upon this factual assertion the Florida Bar seeks to strike Respondent's affirmative defense? Patently, that is absurd until after those facts related to unclean hands have been established.

[43] This Court in *Perlow v. Berg-Perlow*, 875 So.2d 383, 390 (Fla. 2004) noted that: "Based on the foregoing, we conclude that the trial judge erred in this case by entering as the final judgment the proposed final judgment prepared by the wife's attorney without giving the husband an opportunity to comment or object."

> the record. *See, e.g., United States v. El Paso Natural Gas Co.*, 376 U.S. 651, 656-657 (1964); *United States v. Marine Bancorporation*, 418 U.S. 602, 615, n. 13 (1974). We are also aware of the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact when they have already been informed that the judge has decided in their favor.

As a result, the proceedings before the Referee were violative of the right to an impartial tribunal and as such this Court must reject the Report of the Referee.

H. RESPONDENT WAS ENTITLED TO A JURY TRIAL

In his Answer, Respondent demanded "a trial by jury of each issues raised by the pleadings and so triable", or, alternatively, an advisory jury.

Clearly, criminal defendants have a fundamental right to jury trial and infringement of right is fundamental error. *See: Dumas v. State*, 439 So.2d 246, 253 n. 8 (Fla. 3d DCA 1983) *review denied*, 462 So.2d 1105 (Fla.1985). Given that this is a "quasi-criminal" proceeding, the novel question arises as to whether Respondent was similarly entitled to a jury trial as he requested.[44]

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[44] As this Court stated in *In re Forfeiture of 1978 Chevrolet Van*, 493 So.2d 433, 435 (Fla.1986) the right to a jury trial "is not limited strictly to those specific proceedings in which it existed before the adoption of our constitution, but should

As such, in this similar quasi-criminal matter, Respondent was entitled to a jury trial on the claims in the Complaint.

I. FAIR AND IMPARTIAL TRIBUNAL

Last, indisputably Respondent is entitled under the Fifth Amendment to the "absolute right" to an impartial and competent tribunal[45]. "The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process." *Marshall v. Jerrico,* 446 U.S. 238, 242 (1980).

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be extended to proceedings of like nature as they may arise." Indeed, in an analogous situation, this Court found the right to jury trial existed. "She asserts that a proceeding under the 1828 Bastardy Act was clearly **quasi-criminal in nature** and that a paternity proceeding is now strictly an equitable civil action to which the constitutional right of a jury trial does not extend. We disagree." *B.J.Y. v. M.A.*, 617 So.2d 1061, 1063 (Fla. 1993).

[45] "Our legal system is based on the principle that an **independent, fair and competent** judiciary will interpret and apply the laws that govern us. . . . The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law." Preamble, Code of Judicial Conduct, Adopted September 29, 1994, effective January 1, 1995 (643 So. 2d 1037)(As amended through January 5, 2006 (918 So. 2d 949)(Emphasis added.)

Here, based upon the behavior of the Referees behavior[46] in this case, the Referees cannot be considered fair and impartial in this matter. Accordingly, for denial of a competent and impartial magistrate, Respondent demands the Report be rejected and that this matter be dismissed.

III. SUBSTANTIVE DUE PROCESS ERRORS – RULE 4-8.4(H)

The first count of the Complaint alleges that Respondent violated Rule 4-8.4(h) by failing to pay child support. That Rule states that a lawyer shall not: "willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation".

Here, for the below reasons, the allegations of the Complaint and upon the law that this Court is bound to notice – as Respondent is expressly requesting

[46] Among other matters described herein, (i) by entering the Order of August 7, 2006, without affording Respondent a chance to be heard in opposition – which would have included among other issues that it was arguably federal contempt of court for the Referee to proceed at that point in time – the Referee indulged in prohibited judicial behavior – deciding a matter before hearing both sides, (ii) the Referee's apparent attempt to cover-up the failure to abide by the thirty (30) day ruling requirement by the Referee, apparently manipulating the record to avoid an undesirable result for him personally and professionally as it appears the Referee has done so here, (iii) the Referee simply signing any proposed order the Florida Bar presents to him without any real understanding or concern for the issues presented, (iv) in an egregious example of *ex parte* communications, the Referee and the attorney for the Florida Bar have engaged in *ex parte* communications and (v) the Referee has ignored the express order of this Court to timely conduct a Case Management Conference and final hearing to Respondent prejudice by forcing him to make motions to disqualify thus inflaming a judge's sense of un-reviewableness.

pursuant to §90.201(1) – that the orders were not based upon any record evidence and that Respondent, lacking the ability to pay, did not "wilfully refuse" to pay child support obligations.

A. THE AUGUST 5, 2002 CONTEMPT ORDER WAS NOT BASED UPON RECORD EVIDENCE

This Court cannot ignore that the August 5, 2002 contempt order was not based upon record evidence and, as it was a *verbatim* adoption of a proposed order, it must be rejected as a basis for any action as detailed in Part III.G, "Verbatim Adoption of Bar's Proposed Order", *supra.*

1. *SIBLEY V. SIBLEY*, 833 SO.2D 847 (FLA.APP. 3 DIST. 2002)

Though not an exhibit to the instant Complaint, in response to the Complaint, Respondent has raised the decision in *Sibley v. Sibley,* 833 So.2d 847 (Fla.App. 3 Dist. 2002) as evidence that Respondent did not violate Rule 4-8.4(h) as recognized by the dissent written by Judge Cope in that matter. Similarly, the majority opinion written by Judges Schwartz and Goderich which affirmed Judge Lando's decision is so full of factual errors that Judge Cope was compelled to point them out in his dissent. As a result, Respondent cannot be said to have violated Rule 4-8.4(h) upon the result obtained in *Sibley v. Sibley,* 833 So.2d 847 (Fla.App. 3 Dist. 2002).

Moreover, this Court must take notice of the decision in *Sibley v. Sibley,* 833

So.2d 847, n. 2 (Fla.App. 3 Dist. 2002), which plainly holds that "Notwithstanding that the [Respondent] has adamantly refused to reveal many of his financial records – which in itself raises a strong presumption against him, *City of Miami v. Rantanen*, 645 So. 2d 4 (Fla. 1st DCA 1994) – the record shows substantial assets, although admittedly not in the purge amount, in his own name."[47]

Accordingly, Count I's allegation that "Respondent violated Rules 4-8.4(h) of the Rules Regulating the Florida Bar" cannot be premised upon the trial court's orders attached to the Complaint as those orders were expressly overruled on appeal. Additionally, Rule 4-8.4(h) states that a lawyer shall not: "willfully refuse, as determined by a court of competent jurisdiction, to timely pay a child support obligation". Here, the court which entered the order was not competent to do so when the order was entered. That order of Judge Lando was incompetent as she was without authority to proceed in Case No.: 94-18177 FC 19 after the filing of by Respondent of his affidavit and motion for disqualification on August 20, 2002, pursuant Florida Statute §38.10 and Judge Lando's failure to rule upon that affidavit pursuant to Florida Rules of .Judicial Administration, Rule 2.160.

[47] Indeed, in his dissent, Judge Cope pointed out: "The incarceration order in this case was entered precisely on the theory that the former husband does have $100,000 in assets in his personal possession with which to satisfy the purge amount. The majority opinion concedes that the record does not adequately support the trial court's view of the matter." *Id.* at 850.

Accordingly, Judge Lando was not competent to issue the subject order which is Exhibit "A" to the Complaint.

As such, Respondent did not "willfully" refuse to pay a child support obligation as he did not have the ability to pay such obligation and that determination was not made by a competent court.

2. THE AUGUST 5, 2002 CONTEMPT ORDER DOES NOT DEMONSTRATE RESPONDENT HAD THE ABILITY TO PAY

A review of the findings of fact in the Contempt Orders establish that it fails to make the requisite findings of fact and as such depart from the essential requirements of law in this regard.

Florida Family Law Rules of Procedure, Rule 12.615 – "Civil Contempt in Support Matters" requires that such an order must (i) "contain a recital of the facts on which these findings are based" and (ii) contain "separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding". Thus, in order to be competent under this Rule, an incarcerative order must contain facts that the contemptor at all times relevant had the ability to pay the court ordered amounts and at present has the ability to pay the purge amounts.

In the Contempt Order, Judge Lando – through Mother's counsel – made the

conclusory finding that Respondent "at all times from May, 2000 had the present financial ability to pay", the required "recital of facts" simply does not support such a finding. Indeed, the recited facts inexorably point to just the opposite conclusion.[48] Hence, there was no factual basis upon which Judge Lando relied in order to make that conclusion that Respondent failed to pay child support.

Moreover, in the Contempt Order, Judge Lando fails to make the requisite "separate affirmative finding that the contemnor has the present ability to comply with the purge and the factual basis for that finding." Again, faced with the proof of a negative, Respondent can now only point to the Contempt Order and ask: where is the factual basis for the finding of present ability to pay? Where is the recitation

[48] As for year 2002, Judge Lando finds that Respondent's gross income is $37,500 annually from his employment as general manager of his Respondent's company which translates to gross income of $3,125/month – far in excess of the $4000/month that Judge Lando finds Respondent has had the present ability to pay since May 2000 just under the Support Order. Indeed, even taking the out of context statement that Respondent's Law Practice has taken in $17,000 so far this year , that amount still if added to the other income of Respondent's would not permit payment of $4,000/month and leave Respondent with funds upon which to live and support his fourth child. *Accord: Bickett v. Bickett*, 579 So. 2d 149 (3rd DCA 1991)(Court must assure that husband has funds remaining on which to live.) As for the years 2000 and 2001, Judge Lando makes no "recital of facts" that Respondent had the ability to pay $4,000/month during those years. Simply stated, the Support Contempt Order is devoid of any such "recital of facts" in that regard and hence Judge Lando's conclusion to that end must be examined for a basis in fact prior to its acceptance as a basis for sanctioning Respondent.

of assets or income that Respondent possesses that could be used to pay the $100,000 in support arrearage and the $4,000/month traveling forward? Simply stated, there was none. Indeed, as stated above, Respondent's income did not begin to be available to meet such past and future obligations. Hence, Respondent's income cannot be used as a basis for a finding based on the record that he has the "ability to pay"such amounts and thus Respondent did "willfully refuse" to pay a child support obligation as required by Rule 4-8.4(h).[49]

In sum, the Support Contempt Order is facially deficient of both the requisite findings of fact that (i) Respondent had had at all material times the ability to pay the support of $4,000/month and (ii) that he had the ability to pay both the ordered arrearage of $100,000 and the monthly support figure of $4,000 going forward.

B. THE NOVEMBER 22, 2002 CONTEMPT ORDER WAS NOT BASED UPON RECORD EVIDENCE

Last, Judge Lando entered on November 22, 2002, the Commitment Order which first concludes by incorporating "those previous factual and legal findings"

[49] Alternatively, such a factual finding could be premised upon assets owned by Respondent. Here again, no such finding of assets presently held by Respondent that could be used to pay the past and future support obligations is recited in the order: indeed, the only findings in this regard show a consistent negative net worth of Respondent throughout this matter's long history. Accordingly, Judge Lando must be questioned upon what factual basis she relied upon to determine that Respondent had assets from which he could pay the $100,000 in child support.

that Respondent "has wilfully refused to pay any child support . . .".

Then, Judge Lando continues that Respondent has "substantial personal assets, jointly held with his present wife, which are easily liquidated into cash . . . these include sterling silver and art, which could have been sold and have not been. The Court notes that Mr. Sibley has retained private counsel, ordered and paid for court reporters and transcripts, transportation and other litigation costs, including litigation that has been termed frivolous in Federal Court."[50] Plainly, such a conclusion has no basis in the record.

As such, Respondent did not "wilfully refuse to pay child support" in violation of Rule 4-8.4(h).

IV. SUBSTANTIVE DUE PROCESS ERRORS – RULE 4-3.1

As for Count II, Complainant claims that as a result of the opinion in *Sibley v. Sibley*, 885 So.2d 980 (Fla. 3rd DCA 2004)(a copy of which is attached to the Complaint) serves as a basis for alleging a violation of Rules 4-3.1 which states "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is **not frivolous**,

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[50] This last assertion of "frivolousness" is so patently false as to raise the question of whether indeed Respondent received anything like due process from the courts of this state.

which includes a good faith argument for an extension, modification, or reversal of existing law."

A. RESPONDENT FILED NO FRIVOLOUS MATTERS

What is barred is the bringing of a proceeding which is "frivolous". Noteworthy, the Comments to Rule 4-3.1 state in part: "The action is frivolous, however, if the lawyer is unable either to make a good faith argument on the merits of the action taken or to support the action taken by a good faith argument for an extension, modification, or reversal of existing law."

Here, a review of the decision in *Sibley v. Sibley*, 885 So.2d 980 reveals that the word "frivolous" is **never** employed by the court as it relates to Respondent. Indeed, the court on four occasions uses the word "frivolous" in four cited cases to describe the sort of pleading that warrant sanctions. Hence, the failure of the Third District Court of Appeal to describe – as honestly the court could not – Respondent's pleadings as "frivolous", precludes a finding that Respondent violated Rules 4-3.1.

The sum total of facts recited by Judges Cope, Gersten and Green in *Sibley v. Sibley*, 885 So.2d 980 to justify the sanction imposed upon Respondent was grounded in three areas.

First, an un-cited, undated, out of context quote attributed to Respondent in

a letter to his former wife.[51]

Second, after listing Respondent's twenty-five matters filed in this Court, the panel simply concludes – without citation to any of the decisions in those matters – that "the former husband's subsequent pro se proceedings in this court have been found to have no merit. As is shown by this appeal, the former husband has repeatedly tried to re-litigate matters decided in earlier proceedings, without any legitimate basis to do so."[52]

The basis for the denial in every single instance in the Third District was upon a decision on the merits and not a dismissal for lack of jurisdiction or for frivolous filings. Perforce, a review of those twenty-five matters reveals that in all but three of

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[51] Besides the lack of notice of utilization of such quote as discussed *infra*, the *ad hominem* attempt by the panel to impute an improper motive to Respondent is irrelevant to considerations here. Regardless of the subjective intent of a litigant in pursuing litigation, it can only be the objective consideration of the frivolousness of the pleadings that must be utilized to determine whether sanctions should be imposed. To hold otherwise opens the door for a court to subjectively impute to a litigant *mala fides* and, notwithstanding objectively non-frivolous pleadings, make the determination that such intent justifies barring the courthouse door to a litigant.

[52] Additionally, Judges Cope, Gersten and Green failed to note that in not one of the twenty-five appeals were sanctions imposed upon Respondent by the various panels under Rules of Florida Appellate Procedure, Rule 9.410 which authorizes the court to "impose sanctions for any violation of these rules, or for the filing of any proceeding, motion, brief, or other paper that is frivolous or in bad faith." *Ipso facto*, none of the twenty-five appellate matters of Respondent were "frivolous or in bad faith". If the judges of this court had any reason to make such a finding in any of Respondent's twenty-five matters, they most certainly would have. This, they

them, the decision of the panels were *per curiam* without written opinion. Hence for this panel to speculate upon the "merits" of those appeals is an *ex post facto* exercise undertaken towards a conclusion where no conclusion can be made.[53]

As to the second statement – "As is shown by this appeal, the former husband has repeatedly tried to re-litigate matters decided in earlier proceedings, without any legitimate basis to do so" – the panel's conclusory statement is simply wrong.[54]

Finally, the twelve actions in federal court cited by the panel were of no moment in Judges Cope, Gersten and Green's determination of the sanction imposed by them.

In two of them Respondent made significant federal law.[55] Moreover, such

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never did.

[53] "In rendering the decree for the plaintiff, the chancellor stated that he relied on the *per curiam* decision of *Hoffman v. Drennen*, Fla.1956, 88 So.2d 624. This was a decision without opinion affirming a decree. We are of the view that **such a decision does not establish any point of law; and there is no presumption that the affirmance was on the merits**." *Schooley v. Judd*, 149 So.2d 587, 590 (Fla.App. 2 Dist. 1963)(Emphasis added).

[54] In fact, in the panel's decision of November 3, 2004, there is only <u>one</u> reference to an attempt by Respondent to "re-litigate matters decided in earlier proceedings"– the March 4, 2003, order of the circuit court.

[55] In *Sibley v. Schwartz*, Case No.: 01-3746-Civ-King, *affirmed*, No. 01-16571 (11th Cir. 2001),the Eleventh Circuit held for the first time in this circuit that

federal litigation can not serve as the basis for sanctions in Florida State court. Do so hold would impinge on Respondent's right to access federal courts recognized in *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964).[56] As such, Judges Cope, Gersten and Green's conclusion that "The former husband has served as an unending source of vexatious and meritless litigation" is without basis in fact. As such, Judges Cope, Gersten and Green plainly (i) misstated the facts and (ii) found Respondent's appeal "meritless"[57] in cases in which they did not sit or of which

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"[a]lthough absolute judicial immunity shields state court judges from suits seeking damages for acts taken in their judicial capacity, 'judicial immunity is not a bar to prospective injunctive relief' in 42 U.S.C. § 1983 suits against judicial officers acting in their judicial capacity." Additionally, in *Sibley v. Lando*, Case No.: 03-21885-Civ-Huck, *rev.* No. 03-14910 (11th Cir. 2004), the 11th Circuit, **reversed** holding "For the foregoing reasons we find that the district court (1) erred when it applied the *Rooker-Feldman* doctrine as a jurisdictional bar to Sibley's claims; (2) abused its discretion when it abstained from hearing Sibley's claims under the *Younger* doctrine."

[56] "Petitioners being properly in the federal court had a right granted by Congress to have the court decide the issues they resented, and to appeal to the Court of Appeals from the District Court's dismissal. . . . The legal effect of such a coerced dismissal on their appeal is not now before us, but the propriety of a state court's punishment of a federal-court litigant for pursuing his right to federal-court remedies is. **That right was granted by Congress and cannot be taken away by the State. The Texas courts were without power to take away this federal right by contempt proceedings or otherwise**." (Emphasis added).

[57] In in *BE&K Construction Co. v. NLRB*, 536 U.S. 516, 532 (2002), the Court addressed the concept of "merit" stating: "Nor does the text of the First Amendment speak in terms of successful petitioning—it speaks simply of "the right of the people . . . to petition the Government for a redress of grievances." Second,

they had no knowledge.

Plainly, there is no factual basis to sanction Respondent for his legal actions cited by the Florida Third District Court of Appeal.

V. CONCLUSION

Beyond the procedural and substantive grounds detailed *supra*, the result of adopting the Report of the Referee would so offend the right to petition enshrined in the First Amendment by punishing Respondent for doing nothing more than properly petitioning for redress of his significant, non-frivolous grievances as has heretofore justified the taking-up of arms to redress such abuses[58].

Accused by judges insulated from review by Florida's equal protection-violating appellate system who are authorized to act maliciously and corruptly[59] without consequence and shielded from the engine-of-truth which is examination

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even unsuccessful but reasonably based suits advance some First Amendment interests. . . Moreover, the ability to lawfully prosecute even unsuccessful suits adds legitimacy to the court system as a designated alternative to force."

[58] "But when a long train of abuses and usurpations, pursuing invariably the same Object evinces a design to reduce them under absolute Despotism, it is their right, it is their duty, to throw off such Government, and to provide new Guards for their future security." Declaration of Independence.

[59] *Pierson v. Ray*, 386 U.S. 547, 554 (1967)("immunity applies even when the judge is accused of acting maliciously and corruptly.")

under oath by Respondent, no government in these fifty (50) states has been granted such power to destroy a man's career upon such insipid process. Indeed, that is why the Sixth Amendment was imposed upon this State by the Fourteenth Amendment.

WHEREFORE, rather than being condemned, Respondent should be lauded for his diligent and faithful adherence to the ideal of a lawyer who refuses to allow injustice to cross his path unchallenged.

CERTIFICATE OF COMPLIANCE AND SERVICE

I HEREBY CERTIFY that this brief complies with the font requirements of Florida Rules of Appellate Procedure, Rule 9.210(a)(2) and a true and correct copy of the foregoing was served by U.S. Mail this October 15, 2007, upon Barnaby L. Min, The Florida Bar, 444 Brickell Avenue, Suite M100, Miami, Florida 33131, Kenneth L. Marvin, Director of Lawyer Regulation, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 and Brian D. Burgoon, Designated Reviewer, 999 Peachtree Street Northeast, Suite 2300, Atlanta, GA 30309.

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By:_____

Montgomery Blair Sibley
Fla. Bar No.: 725730

APPENDIX

A copy of those submissions by Respondent's Ex-Wife's counsel are attached as Exhibit "A" to the Appendix

A copy of the letter from Joanne E. Sargent which demonstrates the hostility and bias of the Third District Court of Appeals in support of that request is attached as Exhibit "B" to the Appendix

A copy of the March 8, 2007, letter from Barnaby Min is attached as Exhibit "C" to the Appendix

A copy of the March 19, 2007,, letter from Barnaby Min is attached as Exhibit "D" to the Appendix. (Note that the date on the cover letter is wrong).

A copy of that "Notice Setting Final Hearing" is attached to the Appendix as Exhibit "E" to the Appendix.

A copy of that April 10, 2007, letter is attached as Exhibit "F" to the Appendix

A copy of that motion is attached as Exhibit "G" to the Appendix.

A copy of that order is attached as Exhibit "H" to the Appendix.