**IN THE SUPREME COURT OF FLORIDA**

THE FLORIDA BAR,

Complainant,

v.

ROBERT JOSEPH RATINER,

Respondent.

_____/

Supreme Court Case
No. SC08-689

The Florida Bar File
No. 2008-70,084(11E)

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**ON PETITION FOR REVIEW**

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# INITIAL AND ANSWER BRIEF OF THE FLORIDA BAR


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## PRELIMINARY STATEMENT

The Florida Bar utilized the same designations as set forth in the respondent's Preliminary Statement with the following additions:

The Report of Referee dated November 12, 2008 will be referred to as RR and page number as well as A-1 of the appendix and page number.

## STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar accepts the respondent's statement of the case and of the facts with the following additions.

Subsequent to the respondent's filing of his Petition for Review, The Florida Bar filed its Cross Petition for Review in support of the referee's "Plan B" recommendation of discipline.

At the final hearing, the Florida Bar introduced the following exhibits in aggravation:

> TFB Ex. 2- Affidavit of the court reporter, Audree Burg dated September 5, 2008. (TT, 6, 8)
>
> TFB Ex. 3- Affidavit of the deponent, Deborah Naylor dated September 12, 2008. (TT, 8, 17)
>
> TFB Ex. 4- Page 182 of deposition dated May 16, 2007 of Deborah Naylor in which Mr. Ratiner says "I wish the witness would quit scratching her crotch while I was talking to her". (TT, 19)
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> TFB Ex. 5- Page 148 of deposition dated May 17, 2007 of Deborah Naylor in which Mr. Ratiner says "I'm going to torture this woman". (TT, 19)
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> TFB Ex. 6- DVD excerpt of deposition dated August 2005 of Thomas Borek. (TT, 20)
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> TFB Ex. 7- DVD excerpts of deposition dated May 2007 of Deborah Naylor. (TT, 22)
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> TFB Ex. 8- Composite of diversion documents concerning Robert Ratiner including Ratiner's attendance at The Florida Bar's Anger Management Workshop on March 15, 2007. (TT, 23, 26)

## SUMMARY OF THE ARGUMENT

Robert Ratiner has been terrorizing lawyers and others connected with the legal community for years with explosive outbursts, intimidating behavior and insults. In the instant case, this referee was presented with a multitude of misconduct, in the substantive case and with evidence of aggravation. The respondent screamed in depositions, attacked a fellow lawyer in a deposition, promised to torture a witness, accused a deponent of scratching her crotch, danced and sang vulgarities to opposing counsel and a deponent, among other things.

The referee believing the respondent's cumulative conduct to be egregious, together with the respondent's lack of remorse and inability to change, recommended disbarment. Recognizing the lack of precedent of a case of this type, he recommended an alternative disposition of a two (2) year suspension together with several conditions.

Both the Bar and respondent have appealed the disciplinary recommendation. The Bar supports the recommendation of a two (2) year suspension with conditions based on the referee's findings. The respondent has minimized his misconduct and dwelled on his lack of a disciplinary history in an effort to persuade this Court that only a public reprimand is warranted.

The respondent also takes issue with the evidence considered in aggravation, some of which was considered by the grievance committee. It is the Bar's

position, however, that the province of the grievance committee and the province of the referee is different. The grievance committee is concerned with a determination of probable cause. The referee is concerned with recommending discipline, in a case like this one in which summary judgment was granted. The referee may consider any relevant evidence in arriving at that recommendation. The respondent must establish an abuse of discretion. He has failed in that regard.

Respondent has also taken the position that the referee did not consider the evidence he presented in mitigation. That contention is belied by the plain language of the Report of Referee.

Last, the respondent maintains that the referee's requirement that all of the respondent's future depositions are videotaped is impermissible. The Bar, however, asserts that any probationary conditions can best be addressed if and when the respondent is reinstated.

## ISSUES ON APPEAL

**I**

**(On Initial and Answer Brief)**

**WHETHER A TWO (2) YEAR SUSPENSION IS THE APPROPRIATE DISCIPLINE FOR AN ATTORNEY WHO HAS HABITUALLY TERRORIZED ATTORNEYS AND OTHERS WITH EXPLOSIVE BEHAVIOR. (Restated)**

**II**

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**THE REFEREE PROPERLY CONSIDERED MITIGATING EVIDENCE. (Restated)**

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**(On Answer Brief)**

**THE REFEREE PROPERLY CONSIDERED CERTAIN MATTERS AS AGGRAVATION. (Restated)**

**IV**

**(On Answer Brief)**

**THE LENGTH OF THE TERM REQUIRING FUTURE DEPOSITIONS BE VIDEOTAPED WITH CO-COUNSEL PRESENT MAY BE DETERMINED IF AND WHEN THE RESPONDENT IS REINSTATED.**
**(Restated)**

## ARGUMENT

### I

### (On Initial and Answer Brief)

### A TWO (2) YEAR SUSPENSION IS THE APPROPRIATE DISCIPLINE FOR AN ATTORNEY WHO HAS HABITUALLY TERRORIZED ATTORNEYS AND OTHERS WITH EXPLOSIVE BEHAVIOR. (Restated)

As a result of the misconduct alleged in the Bar's complaint, together with other aggravating evidence, the referee recommended disbarment. In a most pragmatic approach, the referee recognized that the existing case law does not provide precedent for the type of scenario existing herein or that the case law is far too lenient for the misconduct. As a result, the referee recommended a "Plan B" which provided for a two (2) year suspension together with three conditions. They are:

> 1. Mental Health Counseling to address anger management. There is no need for an evaluation. He did one already. He needs to go straight to counseling. Copies of the video clips admitted into evidence must be shown to the mental health counselor. The counseling needs to specifically address how not to "rise to the bait."
>
> 2. Any future deposition, that Mr. Ratiner, as an attorney, participates in or attends for any reason, must be video taped. I would consider requiring him to have co-counsel present at any deposition in which he participated as an attorney.

3. Letters of apology to Ms. Naylor, all court reporters involved in the Naylor deposition, and the videographer.

The Florida Bar supports "Plan B".

The referee, like The Florida Bar, was stymied by the existing case law. The referee asserted the following in his report:

> [I]f a lawyer robs a bank of $25.00 they are disbarred. If, in a deposition, a lawyer robs a person of their dignity, then what? Maybe a persons' sacred honor is just as important as their money.
>
> (RR, 31-32; A-1, 31-32)

Respondent argues that disbarment should not be imposed since he has not been disciplined previously. The referee, however, has analogized the robbing of money to the robbing of dignity. In cases of theft of funds, this Court has consistently disbarred attorneys with no prior disciplinary history. The Florida Bar v. Brownstein, 953 So.2d 502 (Fla. 2007); The Florida Bar v. Travis, 765 So.2d 689 (Fla. 2000).

In The Florida Bar v. Dove, 985 So.2d 1001 (Fla. 2008) that attorney's misconduct concerned the welfare of a child. In Judge Lewis' dissent he noted that the mitigation presented did not exceed the type of mitigation found insufficient to overcome egregious ethical violations such as in misappropriation cases. He concluded that it was irrelevant that those decisions involved material wealth and Dove involved a child. "A child is far more valuable than mere chattels or real

property". Dove, at 1027. Judge Reynolds made a similar analogy when he stated that a person's sacred honor is just as important as their money and the robbing of dignity is as worthy of disbarment as the robbing of money.

This case presents this Honorable Court with the opportunity to put the members of The Florida Bar on notice that if they consistently conduct themselves as did Mr. Ratiner, they will face disbarment. With that precedent available, the Bar's ability to seek stiffer sanctions for heinous and habitual breaches in professionalism will have support and send a loud message to the legal community.

Respondent has minimized the misconduct alleged and proven by The Florida Bar in its complaint as well as ignoring the evidence in aggravation. In respondent's amended initial brief respondent's explosive reaction after opposing counsel attempted to place an exhibit sticker on his laptop computer is described as [having] "briefly interrupted the deposition", (Pg. 18), "respondent's animated shredding of an exhibit sticker", "a brief colloquy" (Pg. 19).

Rather, the referee found that the incident occurred as follows:

> Mr. Ratiner erupted when the opposing attorney sought to place an exhibit sticker on his personal laptop computer. Earlier in that day Mr. Ratiner sought to and did place an exhibit sticker on the deponent's personal laptop computer. (5-17-07 Naylor Deposition, p. 40, lines 9-24). There was not any outburst from opposing counsel. Neither opposing counsel nor the deponent stood up and threatened to "defend their computer with their life", as Mr. Ratiner later would. Here, Mr. Ratiner grabbed the arm of the attorney, began to charge around the table - - only to be restrained by God only knows what.[4] Mr. Ratiner maintains

> that Ms. Naylor doesn't look like she is afraid in the video. Her composure speaks for itself. Mr. Ratiner's own expert attempted to calm him down and stated, "take a Xanax". (The Florida Bar's Exhibit 1).[5] The court reporter cried out "I cannot work like this." If Ms. Naylor was not afraid, she should have been. Then, not to be deterred, Mr. Ratiner embarked on a verbal tirade, while balling up the exhibit sticker and flicking it at opposing counsel. Then, while leaning forcefully over the table, and in a moment of pure psychological projection, Mr. Ratiner announced to Mr. Sherouse "You are going to go before the Board (sic) Ethics Committee on this one, son. We are going to quit the deposition right now so you can rethink what you are doing." (5-17-07 Naylor Deposition, p. 155, lines 13-17).
>
> [4] Dr. Haupt testified that he did not restrain Mr. Ratiner at any point during the entire deposition. (FH-TR p. 41.lines 1-3) Judge Donner's Order references that Mr. Ratiner was "…apparently held back by his expert consultant." (Paragraph 4 of Respondent's Exhibit 3).
> [5] This comment is not found in the transcript of the May 17, 2008 deposition of Deborah Naylor. However, it is clearly heard in the DVD video of the deposition.

(RR, 15; A-1, 15)

The referee devoted a separate section of his report to the reaction of the court reporter - - the most neutral person in the room - - to the incident. It is entitled "I cannot work like this". (RR, 11-12; A-1, 11-12). Judge Reynolds found Ms. Burg to be a seasoned court reporter who described her one (1) day in Mr. Ratiner's presence as the "most memorable" of her career. She described Mr. Ratiner's behavior as "unacceptable, unprofessional and frightening". Ms. Burg feared for her personal safety, as a result of Mr. Ratiner's behavior.

Thus, the respondent's portrayal of this incident is a far cry from the "minor blip" which he described in his brief. Judge Reynolds went so far as to say that Ms. Burg's description of this deposition as the most memorable of her career, is the one to which we should listen.

Interestingly, the act which caused Mr. Ratiner to erupt was opposing counsel's desire to place an exhibit sticker on Mr. Ratiner's laptop computer. The imbalance and outrageousness of Mr. Ratiner's conduct can be weighed against the same occurrence earlier that day when Mr. Ratiner sought to and did place an exhibit sticker on the deponent's personal laptop computer. The referee pointed out that neither Mr. Ratiner's adversary nor the deponent "stood up and threatened to defend their computer with their life, grabbed the attorney's arm or began to charge around the table". (RR, 15; A-1, 15) [1]

The referee designated another section of his report to Mr. Ratiner's statement that he would torture the deponent, Ms. Naylor. It is entitled, "I Am Going To Torture This Woman". (RR, 12; A-1, 12). The respondent kept his word. The referee observed Ms. Naylor's demeanor during several points of the five (5) day deposition. He found that she appeared to be "educated, polite, and [a] very patient witness". (RR, 11; A-1, 11). The Bar submitted Ms. Naylor's affidavit

[1] The referee stated that opposing counsel could have handled the situation concerning placing a sticker on Mr. Ratiner's laptop differently. The referee unequivocally stated, however, that none of opposing counsel's conduct justified or excused Mr. Ratiner's behavior on that day or any other. (RR, 18; A-1, 18)

dated September 12, 2008 in which she described her experience being deposed by Mr. Ratiner as follows:

- Unlike anything I have ever experienced in the 18 years I have been working in the legal industry.
- I have never been so mistreated by anyone in my life.
- Mr. Ratiner was rude, abusive, sexually vulgar and degrading with his behavior towards me and his actions would be an embarrassment to anyone.
- This was by far the worst experience of my life both personal and professional.

The referee was clearly struck by the gravity of those statements when he stated "For any witness to describe their experience with a member of The Florida Bar as set forth above is incomprehensible to me". (RR, 11; A-1, 11)

This Court echoed Judge Reynolds sentiments when it agreed that the public's perception of lawyers is affected when lawyers intentionally harass or torment women. The Florida Bar v. Schreiber, 631 So.2d 1081 (Fla. 1994).

The respondent's endeavor to "torture this woman", the deponent, included making the following comment, "I wish the witness would quit scratching her crotch…" (RR, 9, A-1, 9). Although the respondent claimed to have made this comment to his consultant, the referee made the credibility determination that he did not believe Mr. Ratiner. The referee relied on a statement made by Mr. Ratiner at that final hearing; that being that specific instructions were given at the

deposition that anything within earshot would be on the record. The referee concluded that had the statement been intended to be privately heard, it would have been made quietly. Further, according to the referee, had Mr. Ratiner's intentions been misunderstood, he could have asked the court reporter to strike the statement or explain on the record that this vulgar comment was not intended for public consumption. Instead, Mr. Ratiner only noted that Ms. Naylor was not in the room. Nevertheless, Ms. Naylor stated and the referee found, that Ms. Naylor did hear the comment. She stated:

> "…I walked out of the room. From this location I heard Mr. Ratiner make some comment about my 'crotch.' I was embarrassed, offended and upset by this remark. I immediately walked away and went to a nearby lunch room. While standing there, I was approached by Mr. Ratiner's consultant who said 'I am so sorry, I am so very sorry, I am so sorry.'
>
> (RR, 10; A-1, 10)

The referee noted that Mr. Ratiner was given several chances to explain himself and the comment. When asked by Bar Counsel why he simply didn't state on the record that the comment was part of a private conversation, Mr. Ratiner stated:

> "Sir, I should have. Ma'am, I should have. I certaintly - - I don't think that would have mattered. I don't think that would have cleared up anything. Yeah, it would have been better I guess. The real question is why didn't I speak softer or not - -."
>
> (RR, 10; A-1, 10)

Despite the respondent's claims of remorse, the referee noted in his report, the respondent's inability to recognize, even at the point of the final hearing, that his conduct was wrong and worthy of profound apologies.

> The point Mr. Ratiner doesn't get about the crotch comment is that the 'real question' is not why didn't he speak softer or not, but rather why he did not immediately apologize on the record and in person to everyone present. The comment was meant to embarrass, humiliate and demoralize. I cannot imagine that it did not achieve its goal.
>
> (RR, 10; A-1, 10)

Mr. Ratiner's final harassing and tormenting action toward Ms. Naylor occurred at the end of the deposition. Mr. Ratiner danced and sang "you are so screwed" repeatedly, while laughing in front of Ms. Naylor and opposing counsel. (RR, 24; A-1, 24)

The referee, like the presiding judge in the underlying Dupont action, had observed excerpts of other depositions in which Mr. Ratiner participated. Both concluded that aggressiveness during depositions had been an ongoing problem for this respondent. The referee described the deposition of Mr. Borek, as set forth below:

> In August of 2005, during the deposition of Mr. Borek, Mr. Ratiner became enraged. Instead of simply objecting to the question, or insisting on contacting the Judge, Mr. Ratiner pontificated about the methodology of opposing counsel's questioning. When opposing counsel calmly and quietly asked for a yes or no answer, Mr. Ratiner bellowed at the top of his lungs "I don't care what you

> want to hear." (E.S.) In response to opposing counsel's suggestion of a break, Mr. Ratiner began to accuse continued opposing counsel of "pointing" at his wife and himself. Mr. Ratiner, then threatened to get affidavits from the other people in the room when opposing counsel responded, "I didn't point at anyone…."
>
> (RR, 23; A-1, 23)

Another unprofessional action which formed the basis for the referee's recommendation of discipline was Mr. Ratiner's comment concerning opposing counsel and his wife being childless. He said, "It takes balls to have children". Judge Reynolds stated, "This supremely personal attack on one's adversary, in the presence of the deponent, epitomizes a lack of professionalism and civility". (RR, 23; A-1, 23)

An additional consideration by the referee when arriving at a disciplinary recommendation was a grievance committee recommendation of diversion dated September 14, 2006 which resulted in the respondent's attendance at The Florida Bar's Anger Management Workshop. There were several facets of the diversion recommendation which disturbed the referee. First, the referee found that the only insight gained by the respondent was his belief that his attendance was related to his status as a small firm practitioner since no one from a big firm was in attendance. The referee found that the respondent failed to recognize a need to change due to his "out of control" conduct. Second, the referee discussed the matters which gave rise to the recommendation. In a matter before a Broward

County judge in 2002, Mr. Ratiner became abusive during depositions and was scolded by the judge. Nevertheless, Mr. Ratiner continued to be abusive and the judge appointed a Special Master. Rather than acknowledging his bad behavior, Mr. Ratiner blamed the judge and accused him of being out of control.

The other matter which gave rise to the diversion recommendation involved the respondent once again severely crossing a most personal line, as he did with the comment to his adversary about being childless and the vulgar comment to Ms. Naylor. Mr. Ratiner verbally attacked a fellow attorney at a children's basketball game. Thereafter, Mr. Ratiner continued the attack by photographing that attorney, who ultimately was forced to seek a Petition for Temporary Injunction. This Court has held that all personal behavior by lawyers are subject to discipline.

> In a sense, 'an attorney is an attorney, is an attorney', much as the military officer remains 'an officer and a gentlemen' at all time.
>
> The Florida Bar v. Bennett,
> 276 So.2d 481 (Fla. 1973)

Here, Mr. Ratiner's behavior was not purely of a personal nature. The attack of Mr. Nosich arose from Mr. Ratiner's belief that a motion filed in court by Mr. Nosich was objectionable.

Last, Mr. Ratiner attended The Florida Bar's Anger Management Workshop two (2) months before the Naylor deposition. TFB Ex. 8. Clearly, the course had no effect.

The referee described Mr. Ratiner's approach to taking a deposition as warfare filled with aggression, intimidation and insults giving the civil discovery process a bad name. The referee also noted that each time Mr. Ratiner does something outrageous, instead of recognizing his own misconduct he accuses the other lawyer of something equally outrageous. Given Mr. Ratiner's eighteen years as a practicing attorney, the conduct, according to the referee, is unforgivable. (RR, 19-20; A-1, 19-20).

In combination with the egregiousness of the misconduct is the respondent's lack of remorse and inability to recognize that a change is needed. The referee stated:

> Mr. Ratiner, however, does not seek forgiveness or offer apologies for his behavior. He claims that the opposing attorney orchestrated a plot to bait him into his conduct. Talk about personal responsibility. When you continue to "rise to the bait" year after year, miserable deposition after miserable deposition something is really wrong. There is no excuse that Mr. Ratiner offered that comes close to excusing his conduct in the presence of Ms. Naylor, the court reporter, and the videographer. I really expected to hear profuse apologies, acknowledgment of mistakes and offers of propitiation. This is what worries me. This is the foundation of my recommendation of disbarment. Without a change of attitude, there is nothing to rehabilitate. It gets worse.
>
> (RR, 21-22; A-1, 21-22)

At the conclusion of the final hearing, the referee said he thought that disbarment was the appropriate disposition but had not yet made a final decision.

He reasoned that disbarment was appropriate as a result of the cumulative misconduct, "together with respondent's terminal inability to modify his conduct" (RR, 28; A-1, 28).

Despite the referee's pronouncement, the respondent confronted Bar Counsel in the referee's presence. The referee stated in his report that the respondent's behavior at that moment was consistent with his conduct toward Ms. Naylor, Mr. Borek, Judge Eade and Mr. Nosich. Mr. Ratiner, according to the referee, did not hear what was said and would never change. (RR, 28-29; A-1, 28-29).

In his report, the referee refers to The Florida Bar v. Martocci, 699 So.2d 1357 (Fla. 1997), The Florida Bar v. Martocci, 791 So.2d 1074 (Fla. 2001), The Florida Bar v. Morgan, 938 So.2d 496 (Fla. 2006). It is clear that the referee's difficulty in making a disciplinary recommendation is due to the lack of any applicable precedent. There has not been any case similar to this one, in which an attorney received a long term suspension or disbarment without a prior disciplinary record. There is a conclusion that can be drawn from the very words used by the referee to describe Mr. Ratiner and his conduct. They are, "aggressive", "rude", "belligerent", "sexually vulgar", "embarrass", "humiliate", "lack of professionalism and civility". Perhaps those who encountered Mr. Ratiner were simply too frightened to file grievances given his propensity toward violent

outbursts and retaliatory conduct. Perhaps time after time each opponent was relieved to be done with their "Ratiner experience" and wanted to move on.

Interestingly, inasmuch as this Court has dealt harshly with attorneys like Martocci and Abramson who misbehaved in open court, it is the unbridled behavior outside of a courtroom which should be dealt with more harshly due to its insidious effect. It is the type of misconduct experienced by a deponent like Ms. Naylor, who describes her encounter with this respondent as the "worst experience of my life both personal and professional" which causes the deepest damage to the image of the profession.

Subsequent to the referee's decision, this Court suspended attorney Abramson for ninety one (91) days. The Florida Bar v. Abramson, 3 So.3d 964 (Fla. 2009). There the attorney disrespected a judge during a jury selection. Abramson had received two (2) public reprimands and had been placed on probation previously. This case is much worse. Mr. Ratiner has engaged in a multitude of misconduct. He was abusive during depositions in 2002, causing Judge Eade to appoint a special master. He was abusive during the Borek deposition in 2005. He confronted attorney Nosich in 2006 and then harassed him by taking photos. Despite attending an anger management workshop two (2) months prior to the Naylor deposition, Mr. Ratiner's misconduct reached its crescendo in May of 2007. During the five (5) day deposition of Ms. Naylor he

admittedly tortured the witness by tormenting her, espousing vulgarities and physically intimidating her. He exploded at opposing counsel to the degree that the court reporter feared for her own safety and Mr. Ratiner's consultant told him to "take a xanax". Despite that appalling conduct, Mr. Ratiner believed he did no wrong. The referee found an absence of remorse.

Abramson, supra and its progeny consistently find that a ninety one (91) day suspension is appropriate for bad behavior with the existence of prior discipline. Given the unique facts of this case, the cumulative nature and egregiousness of the misconduct - - together with the public perception - ninety one (91) days is too lenient. "The imposition of discipline is not a robotic application of those standards." The Florida Bar v. Dove, 985 So.2d 1001, 1009 (Fla. 2008). This Court will uphold a referee's recommendation of discipline if it has a reasonable basis in case law and in the Florida Standards for Imposing Lawyer Sanctions. Dove, supra.

Florida Standard for Imposing Lawyer Sanctions 7.2 provides:

> Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

Unquestionably, Mr. Ratiner's conduct was unprofessional and he did cause injury to the public and the legal system.

The Florida Standards for Imposing Lawyer Sanctions do provide guidance. The case law, however, does not.

Further, this Court has consistently held that it deals more severely with cumulative misconduct than with isolated misconduct. The Florida Bar v. Wolfe, 759 So.2d 639 (Fla. 2000).

This case presents this Court with the opportunity, with its broader scope of review as to discipline, to harshly sanction a habitually errant lawyer. In so doing, this referee's extensive findings and analysis' will not be second guessed. The Florida Bar v. Brown, 905 So.2d 76 (Fla. 2005).

> As to discipline, we note that the referee in Bar proceeding again occupies a favored vantage point for assessing key considerations-such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse, and rehabilitation (or potential for rehabilitation).
>
> The Florida Bar v. Lecznar,
> 690 So.2d 1284 (Fla. 1997)

It is abundantly clear that Judge Reynolds did assess the factors referenced in Lecznar, supra. He found no remorse and no potential for rehabilitation.

The purpose of attorney discipline is that it protects the public from unethical conduct and has a deterrent effect while still being fair to the attorney. The Florida Bar v. Neu, 597 So.2d 266 (Fla. 1992). A two (2) year suspension, together with the conditions stated by Judge Reynolds, will protect the public and

the Bench and Bar from Mr. Ratiner, it will alert the Bar and the public concerning conduct which will not be tolerated, and give Mr. Ratiner an opportunity to rehabilitate himself.

## ARGUMENT

## II

## (On Answer Brief)

## THE REFEREE PROPERLY CONSIDERED MITIGATING EVIDENCE. (Restated)

The respondent incorrectly states that the referee failed to consider mitigating factors and that his report is devoid of any comment on mitigation. (Respondent's Amended Initial Brief, page 21).

On page thirty three (33) of the report of referee it stated:

> Factors considered in Mitigation:
>
> 9.32(a) - absence of a prior disciplinary record;
> 9.32(b) - absence of a dishonest motive, however, absence of a selfish motive specifically not included as a mitigating factor;
> 9.32(c) - emotional problems; and
> Other- excluding his lack of professional behavior, Mr. Ratiner appears to have an intelligent understanding of the law, as well as, the facts surrounding the various cases he is prosecuting on behalf of his clients. He believes strongly in the justness of his cause.

Clearly, the referee gave much thought to mitigation when referring to Standard 9.32(b) of Florida's Standards for Imposing Lawyer Sanctions. He noted that the respondent did not have a dishonest motive, yet had a selfish motive. Further, the referee included his own mitigating factor by acknowledging the

respondent's intelligent understanding of the law and belief in his cause. The Florida Bar v. Karten, 829 So.2d 883 (Fla. 2002).

A referee must consider and weigh the mitigating and aggravating circumstances and make appropriate conclusions. The Florida Bar v. Smith, 650 So.2d 980 (Fla. 1995); The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997). The referee clearly considered all evidence offered in this case and found as he did.

The respondent argues that since the Bar did not present evidence to refute character testimony, the referee must find it as a mitigating factor. "The fact that there is some evidence in the record to support a finding that a mitigating factor might apply does not mean that the referee should have necessarily found it applicable". The Florida Bar v. Herman, 1 So.3d 173 (Fla. 2009).

The character testimony presented was from the respondent's law partner and his consultant on the Dupont cases. Although there is no basis to contend that respondent's partner was not credible, surely his bias and interest in the discipline imposed cannot be ignored. As to the consultant, Dr. Haupt, the referee designated an entire section of his report to that witness entitled "With Friends Like This". There the referee wryly remarked on the witness' belief that "Dupont was behind the Bar complaint" and that it is appropriate for a lawyer to struggle with a witness. The referee concluded that Dr. Haupt did not do anything to help keep the situation

under control. (RR, 22; A-1, 22). Thus, the referee's basis for not relying on Dr. Haupt's testimony concerning the respondent's character is evident.

The respondent also maintains that the referee should have found remorse as a mitigating factor. The respondent has neither argued nor established that the referee's findings were unsupported by competent, substantial evidence. A referee's failure to find that an aggravating factor or mitigating factor applies is due the same deference as other findings of fact. The Florida Bar v. Germain, 957 So.2d 613 (Fla. 2007).

It is apparent that the referee felt very strongly about this issue. Not only did he fail to find a lack of remorse but as an aggravating factor the referee found that the respondent refused to acknowledge the wrongful nature of his conduct. Standard 9.22(g) (RR, 33; A-1, 33). In the four (4) hours that the respondent testified, the only evidence of remorse was a statement that he was sorry for his reaction. (Respondent's Amended Initial Brief, page 24; TT, 169). To properly evaluate that testimony it must be read in its entirety. In reality, the respondent regrets not having been able to move more quickly to enable him to strike Mr. Sherouse.

> By Mr. Ratiner: That was a reaction. I'm sorry I reacted that way, but I'm very glad I reacted that way because quite frankly the - - it could have been worse.
>
> By Ms. Lazarus: How could it have been worse?

> By Mr. Ratiner: I don't know. I don't know if I would have the speed to strike at him. Thank God I didn't.
>
> (TT, 169, lines 12-17)

The respondent was likewise not remorseful about the "crotch" comment. Instead he justified it and was proud of making the witness squirm. He said:

> There were times when she was kind of fussing a little bit with her lap. I have no problem with that, frankly. It's better for a video depo when she's squirming, so to speak. It looks like she's uncomfortable.
>
> (TT, 141)

The referee commented throughout his report on the respondent's lack of remorse. It is not surprising given the excerpts set forth above. Further, the respondent failed to present any evidence to the referee of apologies to any of the multitude of people that he tormented or offended; namely, Judge Eade, Mr. Nosich, Mr. Sherouse, Ms. Burg or Ms. Naylor. There is no evidence of "true remorse" in this record. The Florida Bar v. Germain, 957 So.2d 613, 621 (Fla. 2007).

The respondent seems to maintain that the referee failed to consider the respondent's absence of a dishonest or selfish motive in mitigation. In fact, the referee specifically stated in his report that he considered the absence of a dishonest motive, but not the absence of a selfish motive. The respondent then argues that none of the rule violations have an element of selfishness. The respondent misses the entire mark of this case. The respondent is chiefly

concerned with himself and what he can accomplish to the exclusion of the effect on anyone else. He wants to win at any cost. That conduct is the hallmark of selfishness.

The referee considered this case so severe that it merited disbarment. He stated:

> My recommendation of disbarment stems from the multiple acts of misconduct and the severity of each act. The egregiousness of the misconduct and the lack of professionalism exhibited by the respondent are only outweighed by the fact that Mr. Ratiner fails to recognize either. I carefully listened to and observed the respondent's demeanor during his testimony, which exceeded four (4) hours. Not once did the respondent express remorse for <u>any</u> of his multiple acts of misconduct (Footnote omitted). Rather, in each instance blame was either placed on the deponent, the adverse party, the opposing attorney, the court or the Bar. The record is replete with Mr. Ratiner's views that he believes his conduct is justified.
>
> (RR, 7; A-1, 7)

It is apparent that in the referee's estimation the mitigation did not serve to reduce the recommended sanction.

## ARGUMENT

## III

## (On Answer Brief)

### THE REFEREE PROPERLY CONSIDERED CERTAIN MATTERS AS AGGRAVATION. (Restated)

The respondent argues that the referee may not consider evidence reviewed by the grievance committee. The Bar presented evidence with regard to the imposition of discipline, after summary judgment was granted in good part, in favor of the Bar. A referee may consider any evidence relevant to that determination. In fact, it is his obligation to do so. The Florida Bar v. Jasperson, 625 So.2d 459 (Fla. 1993). The respondent must establish an abuse of discretion by the referee regarding the admissibility of evidence. The Florida Bar v. O'Connor, 945 So.2d 1113 (Fla. 2006). Certainly, the respondent's outrageous behavior toward Ms. Naylor as evidenced by multiple DVD excerpts of the deposition submitted to the referee, promising to torment her, commenting about her crotch, dancing and singing vulgarities as well as being the cause of the worst experience of her life was relevant to discipline. The respondent's behavior toward Mr. Sherouse when he commented "that it takes balls to have children" in the course of litigating a case was likewise relevant. The respondent's conduct giving rise to a diversion recommendation was equally relevant. The respondent has

failed to establish that the referee abused his discretion when admitting the evidence of which respondent complains.

Moreover, the job of the referee, at this juncture was to impose discipline. Rule 3-7.6(m)(1)(c) of The Rules Regulating The Florida Bar. The role of the grievance committee was to determine probable cause. The Florida Bar v. Trazenfeld, 833 So.2d 734 (Fla. 2002). Those roles are mutually exclusive.

Further, respondent argues that the referee is precluded from considering a prior diversionary recommendation. In The Florida Bar v. Germain, 957 So.2d 613 (Fla. 2007) this Court considered a previous diversion recommendation when imposing discipline.

## ARGUMENT

## IV

## (On Answer Brief)

## THE LENGTH OF THE TERM REQUIRING FUTURE DEPOSITIONS BE VIDEOTAPED WITH CO-COUNSEL PRESENT MAY BE DETERMINED IF AND WHEN THE RESPONDENT IS REINSTATED. (Restated)

The referee recommended that upon respondent's reinstatement all future depositions must be videotaped and that co-counsel may need to be present. The referee can determine the appropriate time period for these conditions if and when the respondent is reinstated. Since these conditions are directly tied to the respondent's misconduct and needed, it is the respondent who must bear the cost of the videotaping, not the client.

In The Florida Bar v. Feige, 937 So.2d 605 (Fla. 2006) this Court imposed probationary conditions on the respondent which included an analysis by the Bar's Law Office Management Assistance Service (LOMAS). Mr. Feige was required to pay all fees and expenses associated with that analysis. Mr. Ratiner should be ordered to likewise pay for the conditions that were necessitated by his misconduct.

## CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that "Plan B" in the referee's report in case number SC08-689 recommending a two year suspension together with conditions be approved.

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and 7 copies of The Florida Bar's Initial and Answer Brief was sent by Federal Express Priority Overnight Mail, Tracking Number 809685807023, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was sent by e-mail and regular mail to Kevin P. Tynan, Attorney for the Respondent, at his record Bar address, Richardson & Tynan, P.L.C., 8142 North University Drive, Tamarac, Florida 33321, and to Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this ____ day of July 2009.

_____
**RANDI KLAYMAN LAZARUS**
**Bar Counsel**

## CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Initial and Answer Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

_____
**RANDI KLAYMAN LAZARUS**
**Bar Counsel**

## INDEX TO APPENDIX