IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

DANIEL EDGAR TROPP,

Respondent,

_____/

SUPREME COURT CASE No.SC11-45

T.F.B. F No. 2010-70,301(11F)

AMENDED BRIEF OF RESPONDENT

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STATEMENT OF THE CASE

This is an appeal from the August 1, 2011 Amended Report of Referee recommending that Daniel E. Tropp "be found guilty of violating the following Rules Regulating the Florida Bar: Rules 4-3.1 (Meritorious Claims and Contentions); 4-3.3(a) (Candor Toward the Tribunal); 4-8.2(a) (Impugning Qualifications and Integrity of Judges or Other Officers); 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); and 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) of the Rules of professional Conduct." Amended Report, page 6, sec. III.

The Respondent further appeals the Referee's, County Court Judge Andrea R. Wolfson's recommendation that Daniel Tropp " be found guilty of misconduct justifying that he be disciplined by (A) Public Reprimand; (B) Respondent shall submit to any evaluation that Florida lawyers' Assistance (FLA) deems appropriate and that he "shall enter into any rehabilitative contract deemed necessary by such evaluation. Should a rehabilitative contract be recommended, Respondent shall be placed on probation for a period that is commensurate with the rehabilitative contract

(but shall not exceed three years)" ; and (C) "Payment of The Florida bar's costs in these proceedings ". (Amended Report, P. 7-8, sec. V).

The crux of the Bar's allegations against Tropp is that he "knowingly made allegations in his Fourth Motion [to disqualify] (TFB's Exhibit " A") that lack candor, are without merit and wrongfully impugn Judge Firtel". Complaint ¶¶ 9-14. Specifically, the Complaint alleges:

> Respondent's Fourth Motion is predicated upon Judge Firtel's prejudice. ***It alleges that Judge Firtel and Chames had improper ex parte discussions*** about the amount of Respondent's support payments, outside of Respondent's presence, In August 2009. The Fourth Motion *also states that Baron had no recollection of any amounts being discussed during a meeting where he was present*".

Complaint ¶¶ 9 (emphasis supplied).

The Bar's Complaint claimed "Judge Firtel presided over the Respondent's divorce proceedings initiated in 2001", that "Judge Firtel presided over the post-dissolution litigation concerning Respondent's support payments"…" during which time respondent was represented by Richard Baron ("Baron"), and Egozi [Tropp's former wife] was represented by Deborah Chames" ("Chames").

Complaint, ¶¶ 3-6. (bracket added for clarification)

The Bar's Complaint further alleges that:

> "a discussion regarding the amount Respondent's monthly payments did take place in Judge Firtel's chambers in August

> 2009. During an open hearing at which time Respondent was present, Judge Firtel summoned Chames and Baron to his chambers to discuss Respondent's support payments. *Respondent did not request to be present at the in-chambers meeting*. Respondent's attorney did attend the meeting".
>
> Complaint ¶¶ 10. (emphasis added)

This disciplinary action was initiated as a result of Judge Firtel's official letter attaching a copy of his September 1, 2009 order for the Bar's review as stated in the Bar's complaint:

> "Also on September 1, 2009, Judge Firtel issued an order Granting Fourth Verified Motion to Disqualify. Although the Order states that the Fourth Motion is legally sufficient, it refers the matter to The Florida Bar". Complaint, ¶¶ 8.

This was consistent with Judge Firtel's September 1, 2009 Order which specifically stated:

> The Court has reviewed the Motion and finds that the Motion is legally sufficient and therefore disqualifies itself from further consideration of this case, ***Notwithstanding, this conclusion, the Court is not permitted to comment on the truthfulness or lack of truthfulness of the allegations; however, the former Husband/petitioner, Daniel Tropp is an attorney who has an obligation to be candid at all times with the Court and based upon the allegations he made in his motion, the Court is referring the matter to the Florida Bar***".
>
> (TFB's Exhibit "B"). (emphasis Added)

The Respondent has at all times denied that he ever "allege(s) that Judge Firtel and Chames had improper ex parte discussions", that he ever uttered any allegation that an ex-parte communication occurred , either implicitly

or explicitly, or that he was dishonest, untruthful or made any misrepresentations to the court. (Respondent's Answer-pleading, Appendix A, and Appendix B TR. p. 92-95).

On July 21, 2011, the final hearing before the Referee was concluded within two and half hours. (Appendix B TR. P.1) The Referee announced its ruling at the end of the trial and ratified its Findings of Fact and Conclusions of Law in its Amended Report of Referee on August 1, 2011. (Appendix C). The Referee concluded that "Respondent was represented by Richard Baron ("Baron"), and Egozi was represented by Deborah Chames ("Chames") (Appendix C, p. 2, sec. II. B.) Also, the Court found that "Respondent and baron acterd as co-counsel in the handling of post dissolution proceedings, and at all times material herein, Respondent was acin his capacity as a lawyer as well as party litigant". (Appendix C, P. 3) The Amended Report states that "This Fourth Motion, and the allegations contained therein form the basis of the present disciplinary proceeding" (Appendix C, p.3) and that the Fourth Motion "alleged that Judge Firtel and Chames had improper ex parte discussions about the amount of Respondent's support payments, outside of Respondent's presence in August 2009". (Appendix C, p. 4) Furthermore, "the evidence presented at the final hearing established that this in-chambers

meeting took place during a recess of a hearing at which Respondent, Mr. Baron and Ms. Chames were all present" and that "Mr. Baron informed Respondent of same". (Appendix C, p.4) Moreover, the Amended Report states that "Respondent's failure to state that Baron was present at this meeting constitutes a misrepresentation by omission, designed to mislead the court. *There was no objective reasonable basis for making the allegation of an ex parte meeting because Respondent knew that Baron was present in chambers during the meeting*". (Appendix C, p. 5) (emphasis supplied).

The Referee's reasoning in its conclusions were evidenced when it stated "what your responsibilities were are really irrelevant to the court, but when you act as co-counsel, that means to the Court or to anybody involved, that communications can occur to either of the individuals, and that would never be considered legally an ex-parte communication. It would only be ex-parte if the attorney or the client were not present". (Appendix B, TR. P.99, L. 19) and "So anyone who objectively reads this document is only left to believe that your contention is that Judge Firtel had an ex-parte communication in your case". (Appendix B, TR. P. 101, L. 4).

This analysis is consistent with Bar Counsel's contention at trial that "case law doesn't accept this subjective standard. The standard is actually an objectively reasonable basis for believing what [he] said to be true. There cannot be an objectively reasonable basis here because , at all times, Richard Baron was in the case, was not allowed out of the case, despite their best efforts to make that happen, and he was present at that meeting". (Appendix B, TR. P. 79, L. 8)

In regard to findings of guilt as to Rule 4-8.2, impugning the qualifications and integrity of Judges and other officers, the court stated that "once again, this reeks of ex-parte, The Florida Bar Exhibit 1, even though those words are not used". (Appendix B, TR. P. 103, L. 14). "In addition, the Court finds the fact that you accused Judge Firtel of being, quote, predisposed, also goes to the violation of this rule".

The Referee's Recommended discipline by public reprimand (Appendix B, P. 7 and that "Respondent shall submit to any evaluation that Florida lawyer's Assistance, Inc (FLA) deems appropriate. Respondent shall enter into any rehabilitative contract deemed necessary by such evaluation". (Appendix C, P.7) The Court reasoned that "The Florida Bar was recommending what they feel to be , perhaps, the lowest-type sanction

that they have seen consistently throughout the Courts". (Appendix B, TR. 121). Moreover, the Court pointed out "when I mention that there have been some red flags during the course of this case, it's certainly not to say that [Tropp] have not conducted yourself professionally or as a perfect gentleman, as you have done here today in court". (Appendix B, TR. P. 121, L. 21). There had never been any mention or allegation whatsoever in any proceedings relevant to this case, by either the Bar or the Complainant, Judge Firtel, that could have prepared the Respondent to contemplate the sanction to undergo "any evaluation that Florida Lawyer's Assistance (FLA) deems appropriate" or by any other physician or expert.

STATEMENT OF THE FACTS.

The Referee's findings and conclusions were based significantly, if not entirely, upon the weight of the evidence from the testimony of Richard Baron concerning communications between himself and Tropp. Specifically, the court's findings give considerable weight to the assertion that Mr. Baron told Tropp that he was present during the in-chambers meeting and regarding the substance of the discussions. Mr. Baron's attempt to invoke any attorney/client privilege was overruled despite the

fact that Respondent never received any summons for Mr. Baron before or during the trial (appendix B, TR. P. . However, a copy of the summons dated as the same date of the trial was subsequently provided upon request from the Respondent after the final hearing. (Appendix D).

However, Mr. Baron testified when asked if he recalls discussing the substance of the in chambers discussion admitted that "I think you were there, but could I sit here and swear to the Court under oath that I have a specific recollection, I do not" (Appendix B, TR. P. 51, L. 13) and "I don't have an independent, specific recollection as I sit here today that when I walked out of the courtroom, you were there and we had a discussion. I believe that's what happened. But can I swear that I have a clear recollection, I do not" (Appendix B TR. P. 52 L. 7) Mr. baron further admitted that "what I don't remember is that – what I do remember also is that there was some point where I didn't remember the amount of money that the Judge had written down" and further admitted that "Like I said, I have hundreds of cases, many discussions in chambers with Judges and I wasn't sure of the amount". (Appendix B, TR. P. 54 L. 9-19)

Next, the record is clear that , at all relevant times in the Family Court proceeding, Tropp was acting as his own counsel in regard to the financial matters which consisted of not only determination of Arrears, if any, but involved his seeking modification and the provision of credits and offsets in accordance with his Marital Settlement Agreement. Mr. Baron entered into the case in regard to Custody Issues only wherein Tropp was trying to enforce his timesharing orders and sought modification for additional timesharing rights. Mr. Baron clarified this fact by entering his Limited Notice of Appearance as to Custody Issues Only before the filing of the Fourth Motion. (Appendix E) Moreover, Tropp's Former Wife was representing herself on custody issues and Deborah Chames had entered a limited notice of appearance on financial issues only upon the conclusion of all custody issues on or about April 9, 2009. (Appendix F)

In fact, most of the post-dissolution litigation was initiated by Tropp in 2007 wherein he filed his notice of appearance before the Honorable Judge Bailey who had closed post-judgment proceedings on or about (Appendix G).

In order to dispel any potential unfounded allegations, Tropp voluntarily entered into a three (3) year contract with FLA in 2007 and after completing same, voluntarily entered into a second contract. At all times relevant to the entire course of the family law proceedings and to this disciplinary action, Tropp had voluntarily submitted himself to FLA requirements and random testing without a single incident. Moreover, Tropp had been evaluated by two (2) FLA approved and recommended specialist Dr. Seely and Dr. Eustace , both of whom found that Tropp had complied with all requests and protocol. Notwithstanding, the Bar Counsel surpised Tropp during Final hearing by presenting a confidential Agreed order that was never filed with the court (TFB's exhibit 7). Bar Counsel was unaware of how she ever received a copy of said confidential and sensitive order. (Appendix H) Also, Bar Counsel admitted that "[she] had conversations with Michael Cohen (Director of FLA) I think I know what he thinks would be appropriate" (appendix B, P. 117 L. 17). At all times relevant, Tropp was suppose to have been protected by the confidentiality and privilege protections afforded by the Bar and FLA and never waived same.

Finally, the Respondent filed three verified Motions to Disqualify which set forth detailed reasons and specifics regarding the grounds seeking recusal. (appendix I). The reasons and grounds were never contested or refuted by any party to the proceedings and detail legitimate grounds beyond the in chambers meetings. Moreover, the Respondent filed an appeal seeking a writ of prohibition two (2) days prior to date Judge Firtel granted the Fourth Motion and Tropp proffers that Judge Firtel was compelled to grant the recusal as opposed to the inference that Tropp abused process by desperately fabricating an allegation concerning an ex parte discussion.

III. Summary of Argument

1. The Referee's Findings of Fact are Factually erroneous, Unjustified and Inconsistent.

2. The Referee's Recommendations as to Guilt are erroneous, Unjustified and Unlawful.

3. The "Fourth Motion" alleged Predisposition and not "improper ex parte communication".

4. Respondent never alleged Judge Firtel had "an improper ex-parte communication" , *but in defense of this disciplinary action,* Tropp pleads Truth as

his Defense since the undisputed communications were in fact "Improper" and "Ex-parte" by definition.

5. The Findings of Guilt as to Rules 4-3.1 (Meritorious Claims and Contentions); 4-3.3(a) (candor Toward tribunal) 4.8.4(c) and 4-8.4(d) were not intended to create or infringe upon a civil cause of action or affect a case substantively and are intended to apply to a lawyer acting in his fiduciary capacity toward a client.

6. The Referee's Recommendation as to Disciplinary Measures are erroneous, unlawful and unjustified.

IV. ARGUMENT.

a. THE REFERREE'S FINDINGS OF FACT ARE FACTUALLY ERRONEOUS, UNJUSTIFIED AND INCONSISTENT WITH THE DOCKET ACTIVITY.

There are material findings of fact in the Amended report of the Referee that are directly inconsistent with the record proceedings. First, the facts of the post-dissolution case in question clearly reflect that Richard Baron, Esq. was not merely representing the respondent in whole but rather was acting under a limited appearance as "co-counsel" in regard to custody issues that had already been resolved during the relevant time period. Next, the first Verified Motion to Disqualify was based on prejudice and did not claim Judge Firtel was "biased". Also, the second motion was not denied as legally insufficient on August 21, 2009,

but rather, the first motion to disqualify dated August 7, 2009 was denied on the basis that it was legally insufficient *and untimely*.

Furthermore, the fourth motion to disqualify never "alleged that Judge Firtel and Chames had improper ex-parte discussion". Rather, it alleged that the Judge pre-judged or was predisposed in his findings as the grounds for recusal, in part, and had been further based on comments and attitudes made by the former wife and her new husband among other matters incorporated as grounds which were never refuted or challenged by the former wife or her counsel.

The facts in evidence adduced at the final hearing never indicated that this in-chambers meeting took place during a recess of a hearing. By all accounts, the transcript of the proceedings clearly and repeatedly establish that Mr. Baron could not remember most, if any, of the details surrounding the relevant events that transpired. Moreover, Mr. Baron specifically admitted that he did not "remember telling him what happened" although he did later claim that it would been his practice to inform me. (See page 26 line 2 of the record proceedings).

(b) THE REFERREE'S RECOMMENDATION AS TO GUILT ARE ERRONEOUS, UNJUSTIFIED AND UNLAWFUL.

Whether a motion is legally sufficient is a question of law that is reviewed by an appellate court *de novo*. *See* Arbelaez v. State, 898 So. 2d 25 (Fla. 2005).

Ruling on a disqualification motion "is not a question of how the judge feels; it is a question of what feeling resides in the [movant's] mind and the basis for such feeling". Wargo v Wargo, 669 So. 2d 1123, 1124 (Fla. 4th DCA 1996) (quoting State ex. Rel. Brown v Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). "When a judge has looked beyond the mere legal sufficiency of a suggestion of prejudice and has attempted to refute the charges of impartiality, he or she has then exceeded the proper scope of his [or her] inquiry and on that basis alone established grounds for his [or her] disqualification". Bundy v. Rudd, 366 So. 2d 440, 442 (Fla. 1978) cited in Stelzer and Stelzer vs. Chin, No. 3D08-1776 (Fla. 3DCA 2008).

The Florida Supreme Court has held that "whether the motion is legally sufficient is a question of law". Gore v. State, 964 So. 2d 1257 (Fla. 2007) and "whether the motion is legally sufficient is a question of law". Id. In determining whether the motion is legally sufficiency of a motion to disqualify, the court asks "whether the facts alleged , ***which must be assumed to be true***, would cause the movant to have a well founded fear that he or she will not receive a fair trial at the hands of that judge" *emphasis added*. Id. (citing Fla.R.Jud.Admin. 2.330(d)(1)). Judge Firtel "inappropriately passes on the truth of the facts asserted" *See* Scholz v Hauser, 657 So.2d 950 (Fla. 5th DCA 1995). "By doing so [the Judge] has

interjected himself into the litigation and has assumed the role of adversary. **This alone is a basis for disqualification**". (emphasis added) *See* Bundy v Rudd, 366 So. 2d 440 (Fla. 1978).

The Florida Supreme Court has recently held : "A motion to disqualify is governed substantively by section 38.10, Florida Statutes, and procedurally by Florida Rule of Judicial Administration 2.330" Lynch State, 2 So. 3d 47 (Fla. Nov. 6, 2008). "The disqualification procedure is designed to assure the appearance and reality of impartial adjudication ***while avoiding the undesirable situation which could be presented by inquiry into the existence of an actual prejudice on the part of the trial judge***. (*Emphasis added*.) Breakstone v. Mackenzie, 561 So. 2d 1164, 1168 (Fla. 3DCA 1989). "Ultimately, questions of judicial disqualification must be viewed in the context of those principles which were eloquently set forth by Justice Terrell in State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613, 615 (1939)" *citing* Hayslip v Douglas, 400 So.2d 553 (Fla. App. 4DCA 1981):

"Every litigant is entitled to nothing less than cold neutrality of an impartial judge. It is the duty of Courts to scrupulously guard this right and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought in question***. The exercise of any other policy tends to discredit***

the judiciary and shadow the administration of Justice. (emphasis added) Hayslip at 557.

The Florida Bar has initiated and insists on maintaining this quasi-judicial disciplinary inquiry to determine the truth of matters asserted as Tropp's basis for fearing he would not receive a fair trial as a litigant/ party.

c. The "Fourth Motion" alleged Predisposition and not "improper ex parte communication"

The Florida Bar's Complaint against Tropp primary focus is that the "Fourth Motion To Disqualify alleges that Judge Firtel and Chames had improper ex parte discussions about the amount of Respondent's support payments" (Par. 9) and "Respondent thus knowingly made allegations in his Fourth Motion that lack candor, are without merit and wrongfully impugn Judge Firtel". (par. 13).

This assertion is factually incorrect. Tropp ***never*** stated that an "improper ex parte discussions" nor has he ever mentioned or used the word "'ex parte discussions" . Moreover, Tropp's subjective fear of not having a cold, neutral and impartial Judge was explicitly predicated on ***predisposition*** on amount "he's going to order which was said and done in his chambers outside of my presence and involving the financial issues herein. The record assumes that the respondent and Mr. Baron had or would have had clear and unambiguous communications with the

undersigned which, unfortunately, was not the case. If Mr. Baron had clarified the matter when he finally spoke to the undersigned and established that he was present and clearly recalled the events, there would have been no reason for the undersigned to have just stated this fact while maintaining the exact grounds for recusal based on pre-judging a matter. It would had led to the same result. While a trial judge may form mental impressions and opinions during the course of hearing evidence in a case, the ***judge is not permitted to pre-judge the case***" (emphasis added) quoting Kates v Seidenman, Case No. 4D03-4658 (Fla. 4th DCA 2004); citing Leslie v Leslie, 840 So. 2d 1097, 1098 9Fla. 4th DCA 2003); (citing Barnett v. Barnett, 727 So. 2d 311 312 (Fla. 2d DCA 1999). "Thus, remarks may have signaled a ***predisposition*** rather than an impression formed after reviewing the evidence" (emphasis added) Wargo at 1125. "A judge may form mental impressions and opinions during the course of presentation of evidence, as long as [he] does not ***prejudge*** the case".(emphasis added) Brown v Pate, 577 So. 2d 645, 647 (Fla. 1stDCA 1991).

d. Respondent never alleged Judge Firtel had "an improper ex-parte communication" *, but in defense of this disciplinary action,* Tropp pleads Truth as his Defense since the undisputed communications were in fact "Improper" and "Ex-parte" by definition. .

"The purpose of the prohibition against ex parte communications is to prevent the communicating side from gaining an unfair advantage in the litigation". Herring v Retail Credit Co., 266 S.C. 455, 224 S.E.2d 663 (1976). "The advantage is created, of course, because the communication may influence the judge on an important decision without the absent party being able to rebut or qualify the communication as it is being made and with knowledge of the exact form in which it is made. The violation is particularly acute because the calculated secretiveness of such communication strongly suggests their inaccuracy." In Re Burrows, 291 Or. 135, 629 P.2d 820, 22 A.L.R. 4th 906 (1981). Moreover, "unless the judge promptly reveals or repudiates the communication, the circumstances suggest a receptive and thus prejudicially receptive state of mind in the judge". Craven v United States, 276 U.S. 627 (1928). "For such reasons, ex-parte communications by a lawyer with a judge about the merits of a pending matter are prohibited by the 1908 Canon [3], by DR-7-11-(B) of the 1969 Code and by 1983 Model Rule 3.5(b). See 22 A.L.R.4th 906 (1983)". "A Judge may not communicate ex parte, either in person or in writing, with a lawyer who is representing a party in a proceedings in the absence of opposing counsel or the opposing party if he or she is appearing pro se". See e.g.., In re Roster, 648 S.E. 2d 837 (N.C. 2007). "An ex parte communication is one that excludes any party who is legally entitled to be present or notified of the communication and given an opportunity to respond".

See Leslie W. Abramson, *The Judicial Ethics of ex Parte and Other Communication*, 37 Hous.L.Rev 1343 (2000). Pursuant to Rule 2.9, a judge must "initiate, permit or consider ex parte communications" or 'consider other communications made to the judge outside the presence of the parties or their lawyers concerning a pending or impending matter". 'The other party should not have to bear the risk of factual oversights or inadvertent negative impressions that might easily be corrected by the chance to present counter arguments." Rose v State, 601 So. 2d 1181 (Fla. 1992).

Therefore, "to the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge". ABA Model Code of Judicial Conduct, Rule 2.9.,cmt [1]. "Whenever the presence of a party or notice to a party is required, the party's lawyer must be given notice or, if the party is appearing pro se, then notice must be given to the party" Id., Rule 2.9 Comment [2] "A judge should treat pro se party as he or she would treat a party's lawyer and may not communicate ex parte with opposing counsel in the pro se party's absence". See Strothers v Strothers, 567 N.E.2d 222 (Mass. App. Ct. 1991(Judge committed reversible error in divorce case where wife appeared pro se and judge asked husband and wife to leave courtroom and discussed with husband's lawyer the amount husband could afford to pay in child support). "For a judge to merely

listen to another person involved in a pending litigation is a violation" In re Complaint Against White, 651 N.W.2d 551 (Neb 2002). "Judge publicly reprimanded for engaging in ex parte communications with father's attorney in child custody proceeding, failing to disclose ex parte communication and refusing to disqualify himself". Miss Comm'n on Jud. Performance v. Britton, 936 So. 2d 898 (Miss 2006).

"Judge publicly reprimanded , in apart, for engaging in and failing to disclose ex parte communications with father's lawyer in child custody proceedings; the combination of all of the facts indicate that a reasonable person would have doubted respondent's impartiality" In Re K.L.W., 131 S.W.3d 400 (Mo.Ct.App.2004). "Ex parte communications between child's former parents and family court commissioner and handwritten notes on former foster parent's letters, if placed there by commissioner, would cause reasonable layman to question propriety of communication and commissioner's actions and to conclude that there was at least an appearance of impropriety" Disc. Counsel v. Medley, 756 N.E.2d 104 (Ohio 2001).

e. The Findings of Guilt as to Rules 4-3.1 (Meritorious Claims and Contentions); 4-3.3(a) (candor Toward tribunal) 4.8.4(c) and 4-8.4(d) were not intended to create or infringe upon a civil cause of action or affect a case substantively and are intended to apply to a lawyer acting in his fiduciary capacity toward a client.

Tropp certainly does not expect favorable treatment as a party litigant because of the fact that he is a lawyer and by the same token requests that he not receive less favorable treatment and punishment as a party representing himself *because* he is a lawyer. "A lawyer-litigant has the same right to proceed pro se as any other individual litigant and are held to the same procedural and substantive standards as litigants with lawyers". Koger v. Weber, 455 N.Y.S.2d 935 (Sup.Ct. 1982). *See also* Strothers v Strothers, 567 N.E.2d 222 (Mass.App.Ct.1991) (judge committed reversible error in divorce case where wife appeared pro se and judge asked husband and wife to leave courtroom and discussed with husband's lawyer the amount husband could afford to pay in child support). "A Judge may violate Rule 2.9 by initiating ex parte communications with a party's representative ***if that individual's role is unclear***. (emphasis added) In Re Disqualification of Williams, 657 N.E.2d 1352 (Ohio 1993) (Judge violated canon where there was no indication that judge spoke to was unclear). Rule 2.9(A)(4) permits a judge to confer with the parties and their lawyers in order to settle a matter, if a judge's participation in settlement negotiations becomes too extensive, the judge may be disqualified from the proceedings. See ,e.g. Collins v. Dixie Transport, Inc., 543 So. 2d 160 (Miss. 1989).

"The dangers here are those of overreaching a momentarily un-counseled client, as well as disrupting the trust and confidence between a claimant and the originally chosen lawyer if the settlement does not end the representation". For those reasons, such contact is universally prohibited". See generally Annot., 26 A.L.R.4th 102 (1983); Gulf Oil Co. v. Barnard, 452 U.S. 89 (1981). "Ex parte communications may indicate partiality since, by definition, they involve one party to the exclusion of another". Annotated Model Code '"For a Judge to merely listen to another person involved in a pending litigation is a violation of Rule 2.9" Miss. Comm'n on jud. Performance v. Chinn, 611 So.2d 849 (Miss. 1992).

f. The Referee's Recommendation as to Disciplinary Measures to be Applied as listed in category B are erroneous, unlawful and unjustified.

The fact is that the former wife has, to date, presented fourteen "emergency" motions intended to frustrate the father's timesharing agreement all of which have been dismissed without any substantiation. Numerous experts have been appointed, at the respondent's expense, with each expert finding in favor of the undersigned. In order to avert any further attempts, the respondent has ***voluntarily*** entered into a three (3) year contract with Florida Lawyer's Assistance on or about December of 2006 and has even voluntarily renewed same in 2009 which remains in effect. In fact, the undersigned and his former wife entered into a confidentiality agreement at the start of all post-dissolution litigation that

specifically intended on keeping said matters confidential in order to protect the undersigned from possible impunity from the Florida Bar. To date, the undersigned has submitted to approximately 152 drug and alcohol detection tests and four hair follicle tests for the purposes establishing and documenting his sobriety in order to refute any potential claims or worries from his former wife. This recommendation exceeds the scope of the Florida bar's complaint and/or Judge Firtel's order/complaint and is in direct violation of confidentiality protections under 3-7(o). Furthermore, the blanket referral to have F.L.A consider 'any rehabilitative contract deemed necessary" not only would subject the respondent to further public humiliation, but it would potentially create substantive requirements that would affect the already turbulent nature of the family/custody proceedings. Moreover, it is not substantiated by credible evidence and alludes to an instance wherein the respondent's cell phone, which had been malfunctioning unintentionally disconnected with the Referee during a hearing. The undersigned filed a motion profusely apologizing for the unfortunate event and the court specifically indicated that the matter not be mentioned again.

For the above aforementioned, the Respondent herein addresses why the recommended sanctions are inappropriate and why a more severe sanction, such as suspension, would not be appropriate.

Wherefore, for the above and foregoing reasons Daniel Tropp, Respondent, prays that this most Honorable Court afford him the substantive and procedural protections mandated by the Judicial Cannons and statutes concerning disqualification and prohibition of the instant exact inquiry. The Respondent would never expect to have more favorable treatment because of his profession under the circumstance, but asks only that he not be imposed *less* protections under the law that would further affect him by placing him in disrepute as a branded liar detrimentally affecting him substantively as a father, an ex-husband and as a person.

IV. Standard of Review

A referee's findings of fact in attorney disciplinary proceedings are reviewed under a clearly erroneous standard. *E.g., The Florida Bar v. Della-Donna*, 583 So. 2d 307, 310 (Fla. 1989). However, a referee's conclusions of law are not given the same presumption of correctness afforded to a referee's findings of fact. *The Florida Bar v. Trazenfeld,* 833 So. 2d 734, 736 (Fla. 2002). A party contesting the findings and conclusions of the Referee carries the burden of demonstrating that there is no evidence in the record to support those findings or that the record evidence clearly contradicts the

conclusions." See The Florida Bar v. Jordan, 705 So. 2d 1387, 1390 (Fla. 1998). In *Florida Bar v. Hooper*, 509 So. 2d 289 (Fla. 1987), the Court wrote, "this Court's review of a referee's finding of fact is not in the nature of a trial *de novo* in which the Court must be satisfied that the evidence is clear and convincing." *Id.* at 290. In reviewing a referee's recommendation for discipline, the scope of review for the Supreme Court is broader than the scope of review for a referee's findings of fact, as it is the Supreme Court's ultimate responsibility to order the appropriate sanction. *Florida Bar v. McFall*, 863 So.2d 3030 (Fla. 2003). The Court will not second-guess the referee's recommended discipline if it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions, and competent substantial evidence in the record below. Id.; *Florida Bar v. Jordan,* 705 so.2d 1387 (Fla. 1998). The trial court's disqualification is relevant to this Court's review and certainly deserve consideration. The attorney disciplinary proceedings should not trespass upon those fundamental.

V. CERTIFICATE OF SERVICE

I Hereby Certify that a true and correct copy of this Motion was sent by US mail to Bar Counsel Jennifer R. Falcone Moore, Esq. at 444 Brickell Avenue Suite M-11 Miami, FL. 33131 and to the Honorable Judge Andrea R. Wolfson, Referee 1351 NW 12 street Suite 402 Miami, FL. 33125 by mail on this 22nd day of May 2012.

VI. CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this brief was prepared using Times New Roman 14-point type, a font that is proportionately spaced and that complies with the font requirements of Florida Rule of Appellate Procedure 9.210(a)(2).**I**

Respectfully submitted,

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