**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)

# RESPONDENT'S REPLY BRIEF

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### I. THE STANDARD OF REVIEW ON GUILT.

The standard of review is "if a referee's findings of fact and conclusions concerning guilt are supported by competent, substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee". However, "implicit in this standard is the requirement that the referee's factual findings must be sufficient under the applicable rules to support the recommendations of guilt". Fla. Bar v Spear, 887 So.2d 1242, 1245 (Fla. 2004). Also, "a referee's conclusions of law are not given the same presumption of correctness afforded to a referee's finding of fact". Florida Bar vs. Trazenfield,, 833 So. 2d 734 (Fla. 2002) . "In a disciplinary proceeding before a referee, the Bar has the burden of proving the allegations of misconduct by clear and convincing evidence". Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).

### II. Insufficient evidence to support finding of Rule 4-3.1 guilt due to clear and convincing basis in law and fact that was not frivolous for the comment, and included a good faith argument based on existing law.

The " subject matter of the complaint pending before this Referee is Respondent's 4th amended motion to recuse and the veracity of the statements contained therein". (*See Bar's Motion in Limine attached as appendix 1).* The Referee's report states '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 objectively reasonable basis for making the allegation of an ex parte meeting because Respondent knew that baron was present in chambers during the meeting". Referee's Report p. 5. The Bar's answer states that "These statements, taken together clearly describe an ex-parte conversation between the Judge and Chames. The Fact that the word 'ex-parte" does not appear in that paragraph does not change the inherent characterization of same".

**Rule 4-3.1 Meritorious Claims and Contention** consists of more than its header and the evidence in this case does not comport to guilt when the Rule is read in its entirety.

> 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, which includes a good faith argument for an extension, modification or reversal of existing law*. A lawyer for the defendant in a criminal proceeding, *or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established*. (emphasis added)

**Comment -** The action is frivolous, however, if the client desires to have the action taken primarily for the purpose of harassing or maliciously injuring a person or 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*.(emphasis added)

The 4th motion consisted of other grounds for disqualification that were uncontested in said motion *and* on several other numerous uncontested grounds "with full incorporation of his three previous motions to disqualify listing facts and

Law in support thereof". The first Motion was filed on the noticed hearing date of August 7, 2009 after the parties agreed to continue the hearing until September 1, 2009 since the former wife agreed to settle all her outstanding issues in lieu of the motion which still had not been filed or presented to the court for entry. There was no "recess" after the continuation and the respondent submitted and the motion right after the hearing was continued. The problem that ensued was that the former wife was willing to dismiss her case in its entirety but seemed to be non-cognizant and unwilling to negotiate or discuss resolution on Respondent's modified support amount. Moreover, the court did not rule on the first motion until 14 days after submission on August 21, 2009, on grounds that it was untimely and legally insufficient. The Respondent amended the initial motion on 8/13/2009 ($2^{nd}$) , on 8/25/2009 ($3^{rd}$) , with the same and additional grounds for purposes of perfecting his appeal seeking prohibition filed on 8/27/2009 . The facts as alleged in all motions for disqualification are deemed true as a matter of law and were never contested by any party.

There is clear and convincing undisputed evidence the ground for recusal at issue was based on anything other than predisposition. This is on the face of the motion and supported by existing case-law on this exact subject, since the Judge announced an amount of future support payments without ever hearing the merits

of the Respondent's petition for modification. The Respondent never considered or was ever cognizant about the notion of impugning the integrity of a judge by attacking *the method, or how and where* the prejudged announcement of what amount to a suggested final verdict in a modification case that Respondent could not set for hearing.

**III. Rule 4-3.3. , when read in its entirety, does not apply.**

It seems the only section that the Bar deems relevant in Rule 4-3.3 is subsection (a)(1) which states :

> **Candor Toward the Tribunal. False Evidence**; **Duty to Disclose** A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal;

However, the comments , when read together with a reading of the Rule in its entirety, was clearly intended to punish an advocate for offering false evidence on behalf of a client. Further, the comment heading **Representations by a Lawyer** sheds light on the Rules applicability to the personal and pro se nature of this case which states in relevant part:

An advocate is responsible for pleadings and other documents prepared for litigation, but is usually not required to have personal knowledge of matters asserted therein, for litigation documents ordinarily present assertions by the client, or by someone on the client's behalf, and not assertions by the lawyer.

**Compare Rule 4-3.1.** *However, an assertion purporting to be on the lawyers own knowledge , as in an affidavit by the lawyer or in a statement in open court, may properly be made only when the lawyer knows the assertion is true or believes it to be true on the basis of a reasonable diligent inquiry*. (emphasis added)

Next, the last comment for this Rule headed-**EX PARTE PROCEEDINGS** states, in relevant part: The Judge has an affirmative responsibility to accord the absent party just consideration.

The subsection **Rule 4-3.3 (b) EXTENT OF LAWYER'S DUTIES** negates the Bar's misapplied focus regarding the Respondent's "attempts to limit Baron's participation" or that "the court specifically refused to grant [Baron's] motion to withdraw". Surely, the Respondent could not be denied his constitutional statutory right to represent himself and he wasn't. The Referee's report and the Family case docket clearly show Respondent was handling the financially based litigation for at least 3 months prior to this event and right after the conclusion of the custody-related issues months 4 months prior to the events leading to this case. **Rule 4.1.6**. further clarifies the flaw in the Bar's reasoning since the Rule specifically addresses the ramifications of Mr. Baron's notice of limited representation on custody issues filed on August 2009 and motion to withdraw filed on 8/13/2009, which would have legally precluded, and protected him, from further representing the respondent or having any obligations in regard to the subsequent financially- based proceedings , despite the Judge's deferring the granting the motion to withdraw.

**IV. Rule 4-8.2 Judicial and Legal Officials. (a) Impugning Qualifications and Integrity of Judges or Other Officers:**

A lawyer shall not *make a statement* that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of the a judge ,… (emphasis added).

The Record is devoid of any " Statement" of an "ex parte communication" as alleged and the Bar's reliance on "the inherent characterization of same" , in and of itself, evidences the lack of clear and convincing evidence to support a finding of guilt. There is no evidence or precedent to support a "reckless disregard" finding under the facts and circumstances, nor is there any competent or substantial evidence that the motion in any way impugns the integrity of the court , especially since the it granted, uncontested and deemed true as a matter of law.

**V. Neither subsection ( c) or (d) of Rule 4-8.4 apply to a finding of guilt, and certainly not to both.**

**Rule 4-8.4( c)** states that a lawyer shall not:

(c ) engage in conduct involving dishonesty, fraud , deceit or misrepresentation…

> **Comment-** Many kinds of illegal conduct reflect adversely on fitness to practice law…However, some kinds of offense carry no such implication Traditionally, the distinction was drawn in terms of offenses involving "moral turpitude"… , (*relevant portions)*

> **Rule 4-8.4( d):** engage in conduct in connection with the practice of law that is prejudicial to the administration of justice, *including to knowingly, or through callous indifference, disparage , humiliate, or discriminate against litigants, jurors, witnesses, court personnel, or other lawyers on any basis,* including, but not limited to, on account of race, …(*relevant portions*).

> **Comment-** Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice…The proscription extends to any characteristic or status that is *not relevant to the proof of any legal or factual issue in dispute.*

A key element in this analyses centers upon the correct meaning of what an ex-parte communication is. This consideration is a critical question of law within this Court's province and a major flaw in the Bar's reasoning. The Bar oversimplifies and misuses its correct definition and proposes it simply is a "communication between counsel and the court when the opposing counsel is not present" based on Black's law dictionary, 9th Edition at 316 (2009). This is erroneous. *Black's* further defines "Ex parte" as a:

> "judicial proceeding, order, injunction, etc., is said to be ex parte when it is taken or granted at the instance and for the benefit of one party only, *and without notice to, or contestation by, any person adversely interested*. In its primary sense ex parte, as applied to an application in a judicial proceeding, means that it is made by a person who is not a party to the proceeding, *but who has an interest in the matter which entitles him to make the application*. In its more usual sense, ex parte means that an application is made by one party to a proceeding in the absence of the other. ..*It would not be called "ex parte" if he properly noticed of it, and chose not to appear to oppose it*. (emphasis added)

Apparently, the term "ex parte" is not defined within the Florida Statutes or the Rules of Civil procedure. However, the Florida Family Law Glossary of common Terms and Definitions defines Ex Parte as :

> "communication with the Judge by only one party. In order for a judge to speak with either party, *the other party must have been properly notified and have an opportunity to be heard.* If you have something you wish to tell the judge , you should ask for a hearing or file information in the Clerk's of court's office, with certification that a copy was sent to the other party. (emphasis added)( copy of Family Rules Forms attached as appendix #2.)

Further, Canon 3(B)(7) of the Codes of Judicial Conduct mentions ex-parte and states:

> A Judge shall not initiate , permit, or consider ex parte communications, or consider other communications made to the *judge outside of the presence of the parties concerning a pending or impending proceeding* except that:
>
> (a) where circumstances require ex parte communications for scheduling , administrative purposes, or emergencies that *do not deal with substantive matters or issues on the merits are authorized,* provided:
>
> (i) the judge reasonable believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and
>
> (ii) the judge makes provision promptly to *notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.(*emphasis added*).*

The Bar asserts in its answer brief that "since the Respondent's counsel of record, Mr. Baron, was present for the discussion, it was not , as a matter of fact and law, an ex-parte communication.". p.19 Contrary to the Bar's assertion that "even in the cases cited by Respondent to support his contention, each case holds that an ex parte communication occurs when the party or his counsel is not present". The Respondent, in fact, cited several cases all along the lines of "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 communications,* 37 Hous.L.Rev 1343 (2000).

**VI. "Impossible to call someone a liar for a statement they never made".**

In The Florida Bar v. Ray, 797 So.2d 556, 558 (2001) the court mentioned the above quotation made by the referee in that case. It is true that an objective standard has been applied in previous discipline actions involving misrepresentations, but they mostly, if not entirely, involved lawyers representing harmed clients, involved comments in open court, outright lies that were admitted in either non-disqualification related pleadings or letters sent to a Judge as in Ray. The Referee's findings of guilt are clearly erroneous and without support since, throughout these proceedings, they are completely devoid of any consideration of the existing mandatory procedures under Fla. R. Jud. Admin. 2.160, the statutory requirements of F.S. section 38.10, and the ethical requirements of Fla. Code. Jud. Conduct 3E(10).

It seems the Bar has taken the position that any and all of these mandatory rules concerning a motion for disqualification do not apply for lawyers, and especially for pro se litigant/attorney's. Worse, this proceeding shows that any privileged communications between a pro se counsel and his attorney has no bearing or worth in a disciplinary hearing during the course of an impending litigation . The Bar asserts that this Honorable court has absolute authority and responsibility for disciplining an attorney who makes false statements in a *pleading* submitted to the court" (emphasis added) and that "'any ruling to the contrary would be antithetical

to protecting the integrity of the legal proceedings". However, Judge Firtel had the option to deny the fourth motion as he did the previous three, but granted the Fourth Motion only a day following the Respondent filing an appeal to enforce the motion with the 3rd DCA. One can only wonder what could have happened if Judge Firtel denied the 4th motion and simultaneously reported Respondent to the Bar with the same indifference to existing canons concerning denial of allegations, with the 3rd DCA ruling on the matter concurrently with the Bar's proceeding to collaterally absolve the Judge and deem the Respondent a lawyer. Certainly, Judge Firtel could have applied Canon 3 F. **Remittal of Disqualification** or denied the 4th motion, or the opposing party could have challenged the grounds. The Bar asserts Respondent is guilty in regard to "the administration of justice" since he caused the matter to be reheard by the successor judge. The counter is the high probability of a post-final appeal on the merits alone , had the motion been denied, with a likely reversal and remand to , probably a successor Judge. Surely, this would have caused even more delay, chaos interim appeal, more Judicial labor, only with much less character- assassination damage to the Respondent's reputation which has already been annihilated by the publications of the Referee's report throughout the internet search pages.

**VII. Mr. Baron's Statements between himself and the Respondent were certainly unclear and in conformity with what Respondent wrote in his 4th motion regarding his lack of recollection and is not clear and convincing.**

The error compounded by the Bar's rigid misuse of the meaning of "ex parte" seems to center upon privileged communications between Richard Baron and Respondent which were deciphered at trial before the referee about 18 months after their occurrence. The Bar states "the only testimony in the record regarding this meeting came from Mr. Baron who testified and unequivocally and without impeachment that the meeting took place during a recess in a court proceeding". Certainly, there would be no evidence of guilt to support the Bar's "inherent characterization" without the interpretation of what Rich Baron said or meant. However, the trial transcript is replete with pages of Mr. Baron being vague, ambiguous, and having limited, if not any, memory of what , when, where, or how any discussions took place between himself and Respondent, if ever. The meaning of "clear and convincing " was explained by this Honorable Court In re Davey, 645 So. 2d 398 (Fla. 1994):

> "'the facts to which witnesses testify must be distinctly remembered; the details in connection with the transaction must be narrated exactly and in order; the testimony must be clear, direct and weighty; and the witnesses must be lacking in confusion as to the facts in issue" citing Slomowitz v Walker, 429 So. 2d 797 (Fla. 4th DCA 1983).

## VIII. STANDARD ON SANCTIONS.

The standard for sanctions is that " this court will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw". Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997 ) Further, " due process requires that the attorney be permitted to explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed". Florida Bar v. Cruz, 490 So. 2d 48,49(Fla. 1986). Also, a Bar disciplinary action must serve three purposes; the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorney's from similar misconduct. Florida Bar v. Lawless, 640 So. 2d 1098, 1100 (Fla. 1994).

## IX. THE FACTS AND CASE LAW DO NOT SUPPORT THE RECOMMENDED SANCTIONS .

It is true that the Bar proposed a consent order on or about May 31, 2010 seeking an admission of guilt to all charges, a public reprimand and a F.L.A evaluation, but it was rejected. This all occurred months before the Respondent ever met or presented himself before the Referee. However, the Bar agreed to have F.L.A., as long as they would agree, defer its evaluation to Dr. Richard Seely who's opinions concerning one's fitness to practice their profession have consistently been requested and accepted by the Physician's Recovery Network, The Florida Bar and the Florida Board of Bar Examiners. (*Proffered* as app. # 3).

This was logical since Mr. Cohen is not a physician and its in-house evaluator is a psychologist , Dr. Weinstein, rather than a foremost expert psychiatrist , who has already approved of the existent protocols in effect since 2006. The Director of F.L.A. agreed to defer evaluation to Dr. Seely on condition he would have a release signed .(*proffered* as appendix #4) The Respondent voluntarily submitted to full evaluation before and reports were automatically provided to the Bar. (*proffered* as appendix #5).

The Bar's has submitted a host of cases it says supports the sanctions because of similarity to this case. The Bar's cases, when carefully analyzed, do not carry the weight assigned to them. Fla. Bar v. Ray, 797 So. 2d 556 (Fla.2001) , involves an attorney/client relationship wherein counsel wrote several letters with "outrageously false accusations" attacking an immigration judge's veracity, integrity and fairness. Found Guilty on Rule 4-8.2(a) only and public reprimand.

Fla. Bar v. Clark, 528 So.2d 369 (Fla. 1988), lawyer (1) files several frivolous appeals over $100 ticket and, (2) while representing a client at an preliminary injunction hearing alleges Judge of the 11th Circuit "active participant in RICO conspiracy with defendants" and (3) files a Complaint-Class Action against Judge and the entire 11th Circuit alleging all the judges "corruptly influenced" and "engaging in a pattern of racketeering activity in violation of RICO statute".

Public Reprimand only. In Fla Bar v. Carter, 410 So.2d 920 ( Fla. 1982), complicated intrafamily dispute over family property involving 3 lawyers. 1 lawyer files motion to recuse in representing client which he admitted were derogatory and went beyond legal grounds for disqualification and he refused to surrender funds to client. Guilty on conduct prejudicial to administration Rule and rule over Trust Fund and Fees only. Public Reprimand. In Florida Bar v. Kleinfeld, 648 So. 2d 698 (Fla. 1995), lawyer fails twice to appear for trial for client causing dismissal, then fails to appear for show cause. She files affidavit claiming the contempt proceeding judge called her attorney by phone "prior to his withdrawal of [her] defense" and "threatened to dismiss attorney's unrelated cases". *Judge and* Attorney testified unequivocally that no such phone call ever took place. Unclear if recusal was granted or denied. As for fabrication-Guilty of 2 counts- 4-8.49d) and 4-3.3(a)(1) and 3 year suspension. In The Florida Bar in re Shimek, 284 So. 2d 686 (Fla. 1973) (not a Bar provided case) an attorney representing client filed motion to dismiss attacking a trial judge statements that was "scurrilous, untrue, irresponsible and completely without foundation in this record" with a "theme to slur and insult" . Result- admonishment following apology to judge.

The analyses of all the Bar's cases underscores their differences from this case and none warranted guilt findings of 5 counts or a blanket F.L.A evaluation "of any kind" for conduct having no bearing on drugs or alcohol.

## CONCLUSION.

For the foregoing reasons, the Amended report of Referee should be rejected

## 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 this 12TH day of July, 2012.

## 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).

Respectfully submitted,

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