

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BERNARD MARC MOGIL,

Respondent.

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Supreme Court Case

No. 94,861

The Florida Bar File

No. 99-00772-02

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On Petition for Review

of  
the Referee's Report  
in a Disciplinary  
Proceeding.

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**INITIAL BRIEF OF RESPONDENT**

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**TABLE OF CONTENTS**

TABLE OF AUTHORITIES.....iii

INTRODUCTION.....vi

STATEMENT OF THE CASE AND FACTS.....1

SUMMARY OF THE ARGUMENT.....17

ARGUMENT

Summary judgment was improper because it denied Respondent an opportunity to show that the foreign disciplinary judgment should not be accepted as conclusive proof of guilt.....20

Respondent’s NY disciplinary order should not constitute conclusive proof of guilt in this proceeding based upon a lack of due process, insufficient proof, and fundamental fairness.....21

The Referee’s Report should not be upheld because it does not set forth factual findings supported by clear and convincing evidence of misconduct.....24

The Referee’s finding of guilt of a violation of Rule 4-8.4(d) is without any factual basis or evidentiary support and is, therefore, clearly erroneous.....26

The Referee’s finding of guilt of a violation of Rule 4-8.4(c) cannot be sustained in the absence of a specific finding of intent that is supported by clear and convincing evidence.....27

The Referee’s recommendation of discipline should be rejected because it is based upon consideration of aggravating factors that are not applicable to this case. ....29

The Referee’s recommendation of disbarment should be rejected based upon

consideration of case law, together with the nature of the acts and  
substantial mitigation in this case.....31

CONCLUSION.....40

CERTIFICATE OF SERVICE.....41

## TABLE OF AUTHORITIES

CASES	PAGE
<u>In re: Capoccia</u>	
59 NY2d 549, 466 NYS2d 268, 453 NE 2d 497 (1983) .....	23
<u>The Florida Bar v. Carricarte</u>	
733 So. 2d 975 (Fla. 1999) .....	35, 36
<u>The Florida Bar v. Cibula</u>	
725 So. 2d 360 (Fla. 1998) .....	37
<u>The Florida Bar v. Corbin</u>	
701 So. 2d 334 (Fla. 1997).....	31
<u>In re Davey</u>	
645 So. 2d 398 (Fla. 1994).....	28, 29
<u>The Florida Bar v. Friedman</u>	
646 So. 2d 188 (Fla. 1994) .....	20, 21
<u>The Florida Bar v. Graham</u>	
662 So. 2d 1242, 1244 (Fla. 1995) .....	34, 38, 40
<u>The Florida Bar v. Hirsch</u>	
342 So. 2d 970, 971 (Fla. 1977) .....	34
<u>The Florida Bar v. Lipman</u>	
497 So. 2d 1165 (Fla. 1986) .....	31
<u>The Florida Bar v. Marable</u>	
645 So. 2d 438 (Fla. 1994) .....	24, 29
<u>The Florida Bar v. Martocci</u>	
699 So. 2d 1357 (Fla. 1997) .....	35
<u>The Florida Bar v. McCain</u>	
361 So. 2d 700 (Fla. 1978) .....	27
<u>The Florida Bar v. Rayman</u>	
238 So. 2d 594 (Fla. 1970) .....	23, 25
<u>The Florida Bar v. Vining</u>	
707 So. 2d 670 (Fla. 1998) .....	23
<u>The Florida Bar v. Wagner</u>	
212 So. 2d 770 (Fla. 1968) .....	25
<u>The Florida Bar v. Weaver</u>	
356 So. 2d 797 (Fla. 178) .....	32
<u>The Florida Bar v. Wilkes</u>	
179 So. 2d 193 (Fla. 1965) .....	20, 21

**OTHER AUTHORITIES**

**STANDARDS FOR IMPOSING LAWYER SANCTIONS**

Standard 9.22 (f) .....3, 30  
Standard 9.22 (g) .....3, 30  
Standard 9.22 (j) .....3, 31  
Standard 9.32 (a) .....3  
Standard 9.32 (h) .....3  
Standard 9.3 (a) .....38  
Standard 9.3 (g) .....38  
Standard 9.3 (k) .....38

**RULES REGULATING THE FLORIDA BAR**

**RULES OF PROFESSIONAL CONDUCT**

Rule 4-8.4 (c) .....1, 2, 3, 18, 29  
Rule 4-8.4 (d) .....1, 2, 3, 18, 26, 27

**RULES OF DISCIPLINE**

Rule 3-4.6 .....3, 17, 20, 21, 23  
Rule 3-7.2 (j) .....1

**RULES OF THE SUPREME COURT RELATING TO ADMISSIONS TO THE FLORIDA BAR**

Rule 2-27 .....33

**CODE OF PROFESSIONAL RESPONSIBILITY**

**DISCIPLINARY RULE**

Rule 1-102(A)(4) .....1, 27  
Rule 1-102(A)(8) .....1, 10, 11, 26

**INTEGRATION RULE**

Rule 11.02(6) .....20

**NEW YORK**

**McKinney’s Jud Conf Rule**

22 NYCRR § 7000.6(i)(1).....24  
CLS Sup Ct Rule §691.11[22NYCRR §691.11].....6, 33

## INTRODUCTION

In this brief, BERNARD MARC MOGIL is referred to as either “Respondent” or “Mogil”; The Florida Bar will be referred to as either the “Complainant” or the “Bar”; Counsel for The Florida Bar will be referred to as “Bar Counsel”; Thomas F. Liotti will be referred to as “Liotti”; the State of New York Commission on Judicial Conduct will be referred to as “Commission” or “NYCJC”; the proceedings against Respondent as a Judge of the County Court before the Commission will be referred to as “judicial removal proceeding”; the proceedings against Respondent before the State of New York, Grievance Committee for the Ninth Judicial District will be referred to as “NY disciplinary proceeding”; the referee in the NY disciplinary proceeding will be referred to as “NY referee”; the opinion and order issued December 16, 1998 by the Supreme Court of the State of New York, Appellate Division, Second Judicial Department in the NY disciplinary proceeding will be referred to as “NY disciplinary order”; the Criminal Courts Bar Association will be referred to as “CCBA”; and other parties and/or witnesses will be referred to by their respective names or surnames for clarity.

Abbreviations utilized in this brief are as follows:

“TR” refers to the Transcript of Proceedings before the Referee in The Florida Bar disciplinary proceeding held June 21, 1999.

“RR” refers to the Report of Referee dated June 30, 1999.

“APP” refers to Appendix to Respondent’s Initial Brief, attached hereto. All items included in this Appendix were submitted to the Referee as an “Respondent’s Submittals”.

“NYCJC TR” refers to Transcript of Proceedings before the State of New York, Commission on Judicial Conduct, in the judicial removal proceeding designated as page and volume.

“NYCJC EX” refers to exhibit introduced by the State of New York, Commission on Judicial Conduct, in the judicial removal proceeding.

“NYCJC REX” refers to exhibit introduced by Respondent in the judicial removal proceeding.

STATEMENT OF THE CASE

Respondent was admitted to the Florida Bar in 1974 (RR at 3) and the New York Bar in 1975 (NY disciplinary order). Respondent practiced law in New York until 1986 when he was elected to a six-year term as a Judge of the District Court (NYCJC TR 117; I). In 1990, Respondent was elected as a Judge of the Nassau County Court. He remained a County Court Judge until judicial removal proceedings resulted in his removal in 1996. (APP A: Findings at 1-2). Thereafter, Respondent practiced law in New York until his interim suspension (APP A: Findings at 1-2) and subsequent disbarment in NY disciplinary proceedings that were based upon the findings and evidence presented in the judicial removal proceedings. (NY disciplinary order).

1

This Florida disciplinary proceeding commenced on February 10, 1999 with the filing of a complaint against Respondent which alleges as its basis the NY disciplinary order.

<sup>2</sup> The Bar's complaint charges Respondent with violating Rules 4-8.4 (c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and 4-8.4 (d) (conduct in

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The NY disbarment order found Respondent guilty of violating Disciplinary Rules 1-102(A)(8) (conduct adversely reflecting on fitness to practice law) and 1-102 (A) (4) (conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Code of Responsibility. (NY disciplinary order).

<sup>2</sup> In addition, the Bar's complaint states that Respondent failed to voluntarily file a copy of the NY disciplinary order with the Supreme Court of Florida within thirty (30) days, contrary to Rule 3-7.2(j), Rules Regulating The Florida Bar. However, the Referee's report references only the NY disciplinary order and does not contain any finding of fact or guilt based upon a failure to file. Since there is no finding of failure to file, this assertion is not a subject of appeal.

connection with the practice of law that is prejudicial to the administration of justice) of the Rules of Discipline of The Florida Bar.

A Referee was appointed on February 24, 1999.

On March 15, 1999, Respondent, appearing pro se, answered the Bar's Complaint and Request for Admissions by admitting certain portions of the allegations. Respondent provided an explanation for those portions that he denied. Specifically, Respondent acknowledged the genuineness of the NY disciplinary order, but denied the "truth or veracity of any of the alleged facts or conclusions therein. (Respondent's answer to the Bar's Request for Admissions).

The Bar filed a Motion for Partial Summary Judgment asserting both that there were no issues of fact or law and that partial summary judgment should be granted as to issues of fact and violation of the rules based upon Respondent's responses to the Bar's Complaint and Requests for Admissions. Respondent filed a response in opposition to the Bar's motion.

A hearing on the Bar's Motion for Partial Summary Judgment was held before the Referee on May 17, 1999. Both Respondent and Bar Counsel appeared at this hearing. By order dated May 19, 1999, the Referee granted the Bar's motion

for summary judgment as to violations of The Rules Regulating The Florida Bar.

A final hearing for determination of discipline was held before the Referee on June 21, 1999. Respondent did not appear at this hearing.

On June 30, 1999, the Referee executed the Report of Referee which reaffirms summary judgment as a basis for finding Respondent guilty of a violation of Rules 4-8.4(c) and (d), Rules Regulating The Florida Bar. (RR at 1). In addition, the Referee's report reaffirms the ruling that Respondent's NY disciplinary order constitutes conclusive proof of misconduct in this disciplinary proceeding pursuant to Rule 3-4.6, Rules Regulating The Florida Bar. (RR at 2).

The referee recommended disbarment from the practice of law in Florida, with leave to reapply in five years, as a disciplinary sanction. In recommending discipline, the Referee considered the following aggravating factors:

Standard 9.22(f) submission of false evidence, false statements or other deceptive practices during the disciplinary process.

Standard 9.22(g) refusal to acknowledge wrongful nature of conduct.

Standard 9.22(j) substantial experience in the practice of law. (RR 3)

In addition, the following factors were considered in mitigation:

Standard 9.32(a) absence of a prior disciplinary record.

Standard 9.32(h) physical or mental disability or impairment. (RR 4)

On July 14, 1999, counsel entered an appearance on behalf of Respondent and delivered to the Referee a Motion for Rehearing of the referee's report. Respondent's motion for rehearing confirmed that Bar counsel did not object to the granting of the motion and the reopening of this case for further proceedings before the referee.

Notwithstanding the fact that Respondent's motion for rehearing was not opposed by the Bar, by order dated July 26, 1999, the Referee denied the motion without a hearing.

The Report of Referee was considered and approved by the Board of Governors of The Florida Bar at its August 1999 meeting.

Respondent petitioned for review of the Referee's findings, recommendations, both as to guilt and discipline, and rulings, specifically the granting of the Bar's Motion for Partial Summary Judgment.

In addition, Respondent filed a Motion for Leave to Supplement the Record. By order dated September 17, 1999, this Court granted Respondent's motion and directed Respondent to file the transcripts of the judicial removal proceeding to

supplement the record in this case. On September 24, 1999, Respondent's counsel forwarded to this Court the transcript of the judicial removal proceeding, together with the exhibits referenced therein.

## STATEMENT OF FACTS

The NY disciplinary proceeding which resulted in the NY disciplinary order is based upon the findings and evidence presented in the judicial removal proceeding. The NY disciplinary proceeding was instituted as a result of a complaint filed by Liotti (APP B: Answer at Par. 6), the principal witness against Respondent in the judicial removal proceedings.

The NY referee ruled that collateral estoppel applied. As a result, Respondent was precluded from presenting evidence disputing the factual charges in the NY disciplinary proceeding which were identical to findings of the NYCJC.

<sup>3</sup> The collateral estoppel ruling specifically stated that Respondent was “barred from litigating in any fashion the factual allegations contained in petitioner’s charges”.

(APP B: Answer at 11-12; APP C: Affirmation at 1). Notwithstanding Respondent’s

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<sup>3</sup> The petition filed in the NY disciplinary proceeding sets forth six charges of misconduct: Charge One pertains to communications sent to Liotti, most of which were sent anonymously by facsimile. Charge Two pertains to a four-page statement entitled “13 Suggestions for ‘Confrontational’ or Intentionally Offensive Criminal Defense Attorneys” which was prepared by Respondent and distributed at a Bar association dinner. Charges Three through Six pertain to statements made and testimony given by Petitioner concerning these matters during the investigation by the NYCJC. (NY disciplinary order).

denial of the charges, he acknowledged that he was bound by the findings of the NYCJC because of the collateral estoppel ruling of the NY referee. (APP C: Affirmation at 1). The NY disciplinary proceeding concluded with the opinion and order issued December 16, 1998 disbarring Respondent indefinitely from the practice of law in New York.

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The instant disciplinary proceeding is based upon Respondent's NY disciplinary order and is, therefore, likewise based upon the same acts that were found to warrant Respondent's removal as a judge of the County Court.

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Testimony and evidence were presented in the judicial removal proceeding which established the antagonistic relationship between Respondent and Liotti. Respondent is a member of the Conservative Party, who was endorsed as a judge by the Republican Party (NYCJC TR 127, I). Liotti testified that he is an outspoken individual who was highly critical of Respondent (NYCJC TR 558, III).

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<sup>4</sup> A disbarred attorney in New York may apply for reinstatement after seven years. CLS Sup Ct Rule §691.11 [22 NYCRR §691.11] However, New York reinstatement proceedings are far less arduous than The Florida Bar readmission proceedings. For example, a disbarred lawyer in New York is not required to pass the New York State Bar examination as part of the reinstatement process; whereas a disbarred lawyer in Florida is required to comply with **all** rules governing admission to The Florida Bar, including passing The Florida Bar exam.

<sup>5</sup> The transcript of proceedings in the judicial removal proceeding, together with the annexed exhibits, represents the evidentiary basis for the findings of the NYCJC. Although the Referee did not consider these items in this disciplinary proceeding, they are part of this record on appeal based upon this Court's order granting Respondent's Motion to Supplement the Record.

Prior to 1991, Respondent and Liotti had a good relationship (NYCJC TR 722, IV). Both Respondent and Liotti confirm that their differences began in 1991 when Liotti, who was in charge of the speaker's program of the Criminal Courts Bar Association of Nassau County, invited attorney William Kunstler to speak at its meeting. (NYCJC TR 559, III; 723-727, IV; 1014; VI). Respondent was opposed to Mr. Kunstler's views and objected to the invitation. (NYCJC TR 727; IV) Thereafter, Respondent and Liotti exchanged a number of critical letters. (NYCJC EX 10-21).

In June 1993 Liotti began a one-year term as became President of the CCBA (NYCJC TR 583; III). Respondent was critical of Liotti's policies and practices as President and suspended his membership in CCBA. (NYCJC TR 1014-1015, VI) In December 1993 Liotti sent letters to Respondent's administrative superiors criticizing his fitness to serve as a County Judge (NYCJC EX 22; NYCJC REX R).

On January 4, 1994, Liotti spoke at the induction ceremony for newly elected Nassau County Court Judges (NYCJC TR at 568, III). Liotti's remarks included 13 points on how to avoid being a bad judge. In his remarks, Liotti made reference to Respondent, without specifically identifying him, for a license plate that read

“Guilty” (NYCJC TR at 570-571, III; NYCJC EX 49). In testifying before the Commission, Respondent acknowledged that for a period of 16 weeks, his wife drove a car with the license plate “Guilty.” (NYCJC TR at 1393, VIII).

Liotti testified that during the period January 15, 1994 through May 2, 1994, he received eight anonymous communications which caused him “some degree of apprehension” (NYCJC TR at 571-580 III; NYCJC EX 32-42):

Anonymous Letter sent on or about January 14, 1994 (NYCJC EX 33)

Anonymous communication sent by facsimile on or about January 29, 1994 (NYCJC EX 34)

Anonymous communication sent by facsimile on or about March 3, 1994 (NYCJC EX 35)

Anonymous letter with business card, envelope containing: pills, a leprechaun decal and the phone number of the Central Intelligence Agency sent in or about mid-March 1994 (NYCJC EX 36-40)

Anonymous letter sent in or about late March 1994 (NYCJC EX 41)

Anonymous communication sent by facsimile on or about May 2, 1994 (NYCJC EX 42)

During the period August 18, 1994 and mid-September 1994, Liotti testified that he received three additional anonymous communications (NYCJC TR at 590-595, III; NYCJC EX 32-42) and that he became “more and more fearful” (NYCJC TR at 590-

595, III; EX 43-45).

Anonymous communication sent by facsimile on or about August 18, 1994  
(NYCJC EX 43)

Anonymous communication sent by facsimile on or about September 1994  
(NYCJC EX 44)

Anonymous communication sent in September 1994 consisting of street maps  
marked with Liotti's office and home (NYCJC EX 45A)

Liotti admitted that he never reported his concerns or made any claim of  
harassment to any law enforcement agency (NYCJC TR at 764, 765, 767, 770, 773,  
794-795, IV).

<sup>6</sup> Liotti directed his secretary to keep these communications in a file in his office.  
(NYCJC TR at 596, III).

Respondent denied sending any anonymous communications to Liotti.  
(NYCJC TR at 1012, 1018-1019, 1029-1036, 1054, 1062-1063, VI).

<sup>7</sup> Circumstantial evidence was presented in the judicial removal proceeding to

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<sup>6</sup> Liotti's testimony confirms that in June 1994 he met with a postal office  
supervisor in a debriefing session in another case and mentioned the anonymous  
communications to the supervisor. He thereafter had some telephone calls and made  
a complaint to the Commission. (NYCJC TR at 790-796, IV).

<sup>7</sup> Respondent acknowledged sending a fax relating to the Wyatt Earp movie to  
his secretary through Liotti's office, but denied that the fax that he sent contained

support the assertion that Respondent sent the anonymous communications to Liotti. (NYCJC TR at 12, I).

Although Respondent denied sending any anonymous communications to Liotti, he acknowledged that he faxed two written communications to Liotti. The first was the signed “RSVP” communication sent by facsimile on or about June 16, 1994 (NYCJC EX 23); the second was a movie advertisement with a handwritten message to Bonnie Nohs sent by facsimile on or about June 24, 1994 (NYCJC EX 27).

8

Charge One of the NY disciplinary order is based upon the communications sent to Liotti (NYCJC EX 23, 26, 27, 32-45A) which were attributed to Respondent and found to be violative of Disciplinary Rule 1-102(A)(8) (22 NYCRR 1200.3[a][8] (conduct adversely reflecting on fitness to practice law).

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“Don’t say I didn’t warn you” (NYCJC TR 1054,1060).

<sup>8</sup> Respondent explained that this communication was sent to Liotti’s office with the intention that it would be transmitted to Nohs. (NYCJC TR at 1058-1059). Nohs does printing work for the CCBA (NYCJC TR at 486). Although Liotti’s secretary advised that she refused to forward the communication to Nohs (NYCJC TR at 217), Nohs testified that it was faxed by Liotti’s office and not by Respondent (NYCJC TR at 497).

Charge Two of the NY disciplinary order is based upon a written statement prepared by Respondent which was made available for distribution at the CCBA installation dinner on June 23, 1994. This statement is entitled “13 Suggestions for ‘Confrontational’ or Intentionally Offensive Criminal Defense Attorneys” includes “assertions warning attorneys of the potential consequences of filing complaints against or otherwise offending Judges.” (NYCJC EX 28; NY disciplinary order).

The written statement declares “PERSONAL AND UNOFFICIAL” at the beginning and declares at the end:

The speaker does not purport to represent the judiciary in general whatsoever in these remarks; the views expressed are entirely personal. Additionally, those cautions discussing specific unprofessional or unwise conduct are HYPOTHETICAL, and do not apply to any member of this association, nor to any other attorney, either living or dead”. (NYCJC EX 28).

Respondent testified that the written statement was prepared in a “roast atmosphere” (NYCJC TR 1615, IX). He further confirmed that although Liotti was not specifically mentioned, Liotti and other attorneys inspired some of the passages. (NYCJC TR at 1391, VIII; 1048-1049, VI; 1461-1462, 1464, 1468, 1490, 1492, 1494-97, 1499, 1504, 1406, 1508-1510, IX).

Respondent’s written statement was found to be violative of Disciplinary

Rule 1-102(A)(8) (22 NYCRR 1200.3[a][8] (conduct adversely reflecting on fitness to practice law).

Charge Three is based upon statements made by Respondent in October 1994 to the Nassau County Police Department and in a letter to the Commission dated November 8, 1994 (NYCJC EX 30) that he never communicated with the President (NYCJC TR 127-28, I; 366-367, 371-373; II) and that someone had communicated with the President in his name. (NYCJC TR 160, I; 367-368, II) In his communication with the police, Respondent suggested Liotti as a possible suspect.

Charges Four through Six are all based upon Respondent's testimony before the Commission on January 24, 1995 (NYCJC EX 24) with regard to three areas:

The first area involves Respondent's testimony in which he asserts that he had not communicated with the White House by e-mail, that he did not send the President an e-mail message, that he did not know how the White House had his own name and home address, that he did not know why the President sent him a letter, and that some other person communicated to the President in his name (EX 30, pp 10-11; EX 24, 99 273-276, 279, II).

The second area of testimony involved Respondent's communications with Bonnie Nohs at a Bar dinner on June 23, 1994 concerning a movie recommendation as well as the subsequent facsimile of the movie advertisement to Ms. Nohs, including Respondent's intentions and explanation of the circumstances surrounding its transmittal. Respondent denied that he testified falsely (NYCJC TR 1079; VI)

The third area concerned Respondent's statements with regard to Liotti's knowledge that he was taking Prozac and that he had caught Liotti in chambers, alone, standing next to his flight suit that is kept in chambers; that Liotti had unzipped the top to uncover the medical alert tag and that Liotti had read the tag which indicated that Respondent used Prozac. (NYCJC TR at 1083; VI)

Respondent presented 17 character witnesses, including four judges, whose testimony confirmed Respondent's good character and his reputation for truth and honesty. Some of these witnesses had knowledge of and testified to the bad character of Liotti.

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<sup>9</sup> Detective Robert Tedesco testified that he was conducting an investigation of harassing letters and packages that Judge Mogil had received and that during this meeting Respondent gave him the letter that he had received from the President, stating that he had not sent any letter to the President (NYCJC TR 366-367, II);

Vincent R Balletta, Jr., a Justice of the Supreme Court, Appellate Division, Second Department, testified that Respondent's reputation for truth and honesty "is unblemished as far as I know. I have never heard anybody tell me that they questioned his honesty or his integrity, and I certainly don't." (NYCJC TR at 1344, VIII).

M. Arthur Eiberson, Presiding Judge, District Court, Nassau County, testified that Respondent's reputation for truth and honesty is, "Of the highest", "excellent." (NYCJC TR at 967, V).

Zelda Jonas, a Nassau County Court Judge, testified that respondent's reputation for truth and honesty was "excellent." (NYCJC TR at 1137, VII).

Arthur D. Spatt, a Judge of the United States District Judge, and a former Associate Justice of the Appellate Division, Second Department, testified that Respondent's reputation for truth and honesty was "excellent." (NYCJC TR at 1229-1231, VIII).

Victor Myron Ort, Chief Clerk of County Court testified that Respondent's reputation for truth and honesty is "an outstanding one." (NYCJC TR at 876, IV)

Claudia Schultz, an attorney who practiced in Nassau County for about 15

years testified that she did not know specifically about Respondent's reputation for truth and honesty, but had not heard anything bad. She added that she thought that it is "routinely thought to be a pleasure to appear in Judge Mogil's part" (NYCJC TR at 934-936, V). She also said that it was a "rather universal opinion" that Liotti is "a sleazy guy," and "can certainly be dishonest." (NYCJC TR at 940, V).

Jerri Krevoff, a senior court reporter in Nassau County Court for 22 ½ years, testified that Respondent's reputation for truth and honesty is "excellent." (NYCJC TR at 951- 952, V).

Ira J. Raab, an attorney, testified that he did not know Respondent's reputation for truth and honesty, but has not ever heard anything bad about him. (NYCJC TR at 976, V).

Anchelle Pearl, a Rabbi, testified that Respondent's reputation for truth and honesty was "absolutely, the highest"; "absolutely fine, good reputation." (NYCJC TR at 994, V).

Robert Owen Gray, a consultant for Nassau County Board of Supervisors testified that respondent's reputation for truth and honesty is "100 percent good quality" and "you can live by his word and I've done it many times" (NYCJC TR

at 1006-1007, VI). He further testified that Liotti's reputation for truth and honesty was "Not a very good one, sir . . . I would say it's negative". (NYCJC TR at 1008, VI).

Nathan Dennis Sansberrie, a Nassau County District Attorney, testified that Respondent's reputation for truth and honesty is "excellent". (NYCJC TR at 1039, VI). He further testified that Liotti's reputation for truth and honesty was "Not that good." (NYCJC TR at 1040, VI).

Fred Klein, Chief of Major Offense Bureau of the Nassau County District Attorney's Office, testified that Respondent's reputation for truth and honesty was "excellent." (NYCJC TR at 1086,1087, VII). He further testified that Liotti's reputation for truth and honesty "on the whole is pretty poor". (NYCJC TR at 1087, VII).

John O'Leary, receiver of taxes in the Town of Oyster Bay, Nassau County and Vice-Chairman of the New York State Conservative Party, testified that Respondent's reputation for truth and honesty is "the best, the finest" and further testified that Liotti's reputation for truth and honest was "Very, very bad". (NYCJC TR at 1140, VII).

Harry H. Kutner, an attorney who was formerly a U.S. Marine and New York State Parkway patrolman, testified that Respondent's reputation for truth and honesty was "excellent". (NYCJC TR at 1143, VII). He further testified that Liotti's reputation for truth and honesty was "not good." (NYCJC TR at 1144, VII).

Diane Gaines, who works with Women's Opportunity Resource Center, testified that Respondent's reputation for truth and honesty is "that the judge is a very honest man. He's sincere and he's committed to helping people less fortunate" (NYCJC TR at 1146, VII).

Elliot F. Bloom, an attorney in Nassau County testified that Respondent "is a truthful and honest person." (NYCJC TR at 1149, VII).

Rosemary Kelly Guiliano, executive director of the Education Assistance Corporation, testified that Respondent "has a phenomenal reputation with the people that I have been associated with in the courts, both in Probation and in the people who run the courts and the people who are employed at EAC". (NYCJC TR at 1278, VIII).

The Commission did not present any adverse witness testimony.

## **SUMMARY OF ARGUMENT**

Respondent is a member of The Florida Bar and was both an attorney and a judge in New York. Respondent was the subject of judicial removal proceedings which resulted in adverse findings and ultimately his removal from judicial office. The evidentiary standard that is applicable to judicial removal proceedings in New York is preponderance of the evidence.

Disciplinary proceedings were thereafter instituted in New York for the same acts that resulted in Respondent's removal from judicial office. Collateral estoppel was ruled applicable to these disciplinary proceedings as a legal basis to preclude Respondent from challenging any of the findings made in the judicial removal proceedings. Respondent was disbarred. The evidentiary standard that is applicable to disciplinary proceedings in New York is, likewise, preponderance of the evidence.

This disciplinary proceeding was thereafter instituted and is based solely upon Respondent's NY disbarment order. Notwithstanding Respondent's objections to summary judgment and his denial of guilt of the misconduct, the Referee considered Rule 3-4.6, Rules Regulating The Florida Bar, to require summary judgment as to the findings of fact and guilt.

Respondent asserts that this was error. Respondent's NY disciplinary order should not constitute conclusive proof of guilt in this proceeding because the evidentiary standard and collateral estoppel ruling that were applicable in the foreign disciplinary proceedings are inconsistent with Florida law. To give conclusive effect to a foreign disciplinary order under these circumstances is fundamentally unfair.

In accordance with due process, Respondent should have been provided with an opportunity to present his defense to the allegations of misconduct. Further, the Referee should have examined the evidentiary record that is the basis for the NY disciplinary order to determine whether the allegations are supported by the more stringent standard of clear and convincing evidence, which is the evidentiary standard in this jurisdiction. In the absence of a finding of clear and convincing evidence of misconduct, there can be no finding of guilt.

Notwithstanding this position, Respondent further asserts that the Referee's report is deficient in that there is no factual or evidentiary support for any finding that Respondent violated Rule 4-8.4(d) and that there is no finding by the Referee or evidentiary support as to intent with regard to Rule 4-8.4(c). In addition, the Referee's disciplinary recommendation is improperly based upon consideration of aggravating

factors that are factually inapplicable in this case. Accordingly, the Referee's report is both clearly erroneous and lacking in evidentiary support; it should be rejected.

Assuming, *arguendo*, that the Referee's findings of fact and recommendations of guilt are upheld, Respondent would urge this Court to reject the Referee's recommendation of disbarment as clearly excessive and order no additional attorney discipline, based upon consideration of case law as well as the nature of the acts and mitigating factors. Alternatively, should the Court determine to impose a disciplinary sanction, Respondent would urge the Court to consider a suspension from the practice of law for ninety (90) days or less, with automatic reinstatement.

## **ARGUMENT**

### **SUMMARY JUDGMENT WAS IMPROPER BECAUSE IT DENIED RESPONDENT AN OPPORTUNITY TO SHOW THAT THE FOREIGN DISCIPLINARY JUDGMENT SHOULD NOT BE ACCEPTED AS CONCLUSIVE PROOF OF GUILT**

Case law establishes that Rule 3-4.6, Rules Regulating The Florida Bar, does not require acceptance of a foreign disciplinary judgment as conclusive proof of guilt in Florida disciplinary proceedings. In The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965), the Supreme Court considered the effect of a foreign disciplinary judgment pursuant to Rule 11.02(6) of the Integration Rule of The Florida Bar which preceded Rule 3-4.6, Rules Regulating The Florida Bar. The Court held that although a foreign judgment constitutes proof of guilt, Florida can elect not to be bound by the foreign judgment where the accused attorney shows that the “proceeding in the foreign state was so deficient . . . that there was such a paucity of proof, or that there was some other grave reason which would make it unjust to accept the foreign judgment as conclusive proof.” Wilkes at 198.

The Wilkes holding was subsequently reaffirmed in The Florida Bar v. Friedman, 646 So.2d 188 (Fla. 1994). In Wilkes, the Supreme Court stated:

[W]e will initially accept a foreign jurisdiction’s adjudication of guilt as conclusive proof of guilt of the misconduct charged. The burden then rests with the accused attorney to demonstrate why the foreign judgment is not valid or why Florida should not accept it and impose sanctions based thereon. [Emphasis added]

Friedman at 190.

In the instant case, the Referee was under the misapprehension that he was required to accept the NY disciplinary order as conclusive proof of guilt pursuant to Rule 3-4.6,

Rules Regulating The Florida Bar (TR 9,10). As a result, summary judgment was granted, notwithstanding the objections raised by Respondent.

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The Referee's granting of summary judgment based upon Rule 3-4.6 denied Respondent an opportunity to demonstrate why the NY disciplinary order should not be given conclusive effect in this proceeding. This was clearly error. The referee should not have granted summary judgment. Instead, consistent with the holdings of Wilkes and Friedman, the referee should have considered the record of proceedings in the foreign jurisdiction and permitted Respondent an opportunity to demonstrate why Florida should not be bound by the foreign disciplinary order.

**RESPONDENT'S NY DISCIPLINARY ORDER SHOULD NOT  
CONSTITUTE CONCLUSIVE PROOF OF GUILT IN THIS  
PROCEEDING BASED UPON A LACK OF DUE PROCESS,  
INSUFFICIENT PROOF, AND FUNDAMENTAL FAIRNESS**

There are compelling reasons not to accept the NY disciplinary order as conclusive proof of guilt in this proceeding based upon the factors established in Wilkes.

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Judgment.

<sup>10</sup> See Respondent's Response to Complainant's Motion for Partial Summary

The first reason is a lack of due process. Respondent was denied an opportunity to present any evidence in the NY disciplinary proceeding to refute the allegations of misconduct based upon the collateral estoppel ruling which precluded relitigation of the Commission's findings. Respondent argued that the collateral estoppel ruling resulted in a denial of due process because when he testified in the judicial removal proceeding, he "did not have a reasonable expectation that adverse issue determinations against him by the Commission would preclude him from relitigation of certain key issues in a subsequent disciplinary proceedings." (APP D: Memorandum at 12)

<sup>11</sup>.

Although Respondent did not prevail under New York law with regard to collateral estoppel, Florida is different. Unlike New York, Florida case law does not support the application of collateral estoppel in a disciplinary proceeding to preclude reconsideration of issues that were the subject of litigation in another

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<sup>11</sup> Likewise, when Respondent testified in the judicial removal proceeding, he did not have any reasonable basis to expect that adverse issue determinations made in that proceeding would become a final adjudication of his guilt in this disciplinary proceeding based upon the application of 3-4.6, Rules Regulating The Florida Bar.

forum. In Florida disciplinary proceedings, a referee may consider any relevant evidence, including a judgment or trial transcript from a civil proceeding involving the same facts as the disciplinary proceeding. The Florida Bar v. Vining, 707 So.2d 670 (Fla. 1998). However, a respondent cannot be precluded from denying the allegations and presenting evidence in rebuttal. Vining at 672 fn. 10.

Based upon Florida law, it would be a denial of due process in this proceeding to give conclusive effect to a disciplinary judgment rendered in foreign disciplinary forum which, as a matter of law, precluded Respondent from presenting any defense to the allegations of misconduct.

The second reason is the significant difference in the standard of proof applicable to disciplinary proceedings in the two jurisdictions. Florida requires charges of misconduct to be established by the more stringent standard of clear and convincing evidence. The Florida Bar v. Rayman, 238 So.2d 594 596 (Fla. 1970). New York, however, considers disciplinary proceedings to be civil in nature and has specifically rejected the “clear and convincing” standard. New York requires only “fair preponderance of the evidence” as the standard of proof. In re: Capoccia, 59 NY2d 549, 466 NYS2d 268, 453 NE 2d 497 (1983).

In this case, Respondent's NY disciplinary order is based upon the findings and record of his judicial removal proceeding which, in accordance with the law of that forum, was established by a preponderance of the evidence.

<sup>12</sup> Therefore, Respondent's NY disciplinary order should not be given conclusive effect because it is based upon findings that as a matter of law do not meet the evidentiary standard in Florida disciplinary proceedings.

Finally, it is fundamentally unfair to permit findings based upon a lower evidentiary standard in Florida, e.g. a civil judgment, to be considered only as relevant evidence in Florida disciplinary proceedings, while allowing findings of a foreign disciplinary agency that are based upon a lower evidentiary standard to have conclusive effect. Fairness would require that findings and judgments from foreign jurisdictions are never given conclusive effect if they are based upon a lesser evidentiary standard.

**THE REFEREE'S REPORT SHOULD NOT BE UPHELD  
BECAUSE IT DOES NOT SET FORTH FACTUAL  
FINDINGS SUPPORTED BY CLEAR AND CONVINCING  
EVIDENCE OF MISCONDUCT**

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<sup>12</sup> Judicial removal proceedings in New York are also based upon the civil standard of preponderance of evidence. McKinney's Jud Conf Rule 7000.6(i)(1)[22 NYCRR § 7000.6(i)(1).

It is well established that a referee's findings should be upheld unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994); The Florida Bar v. Wagner, 212 So.2d 770 (Fla. 1968); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). The Bar has the burden to present clear and convincing evidence to establish that the code of conduct governing lawyers has been breached. The Florida Bar v. Rayman, 238 So.2d 594 (1970); The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978).

In this disciplinary proceeding, the Bar presented Respondent's NY disciplinary order as evidence in support of discipline. The referee only considered Respondent's NY disciplinary order, which he then incorporated by reference as findings of fact in his report of referee. However, the NY disciplinary order represents the findings of a foreign disciplinary agency which in this instance is, itself, based upon the findings of still another foreign forum, the NYCJC. The evidentiary standard in both of these foreign forums is preponderance of the evidence.

Accordingly, there is no clear and convincing evidence of misconduct in the record that was considered by the Referee to support any finding of guilt. The NY

disciplinary order merely confirms that Respondent was disciplined in a foreign jurisdiction based upon evidence which met the evidentiary standard within that jurisdiction; i.e., preponderance of the evidence. The NY disciplinary order does not constitute, or establish the existence of, any clear and convincing evidence.

Since the referee's findings are not based upon a finding of misconduct based upon the referee's consideration of clear and convincing evidence, the report should be rejected.

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THE REFEREE'S FINDING OF GUILT OF A VIOLATION OF  
RULE 4-8.4(d) IS WITHOUT ANY FACTUAL BASIS OR  
EVIDENTIARY SUPPORT AND IS, THEREFORE,  
CLEARLY ERRONEOUS

In the NY disciplinary proceeding, Respondent was found guilty of violating Disciplinary Rule 1-102(A)(8)(22NYCRR 1200.3[a][8] (conduct adversely reflecting on fitness to practice law) of the Code of Professional Responsibility based upon the communications described in Charges One and Two of the disciplinary petition.

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<sup>13</sup> The referee did not consider the testimony and evidence presented in the judicial removal proceeding which is the evidentiary basis of the NY disciplinary proceeding and order. The record of this proceeding was supplemented to include these items.

However, the Code of Professional was superceded in Florida by the Rules of Professional Conduct Responsibility and there is no corresponding rule within the Rules of Professional Conduct.

In the absence of any corresponding rule, the Bar charged Respondent with a significantly different provision: Rule 4-8.4(d), Rules Regulating The Florida Bar.

This rule states, in pertinent part:

**A lawyer** shall not engage in conduct **in connection with the practice of law** that is prejudicial to the administration of justice . . . [Emphasis added]

The commentary to Rule 4-8.4(d) emphasizes the intended scope of the rule:

Subdivision (d) of this rule proscribes conduct that is prejudicial to the administration of justice. Such proscription includes the prohibition against discriminatory conduct committed by a **lawyer while performing duties in connection with the practice of law**. . . [Emphasis added]

The NY disciplinary order, however, neither charges Respondent with a violation of this rule, nor sets forth any factual basis that would support this particular charge. In fact, none of the acts that are referenced in the NY disciplinary order involve any activity even remotely related to the practice of law. Further, these acts were found to have occurred while Respondent was a judge,

rather than at a time when he practiced law.

Accordingly, the referee's report that finds Respondent guilty of a violation of Rule 4-8.4(d) is without any factual basis or evidentiary support. The referee's report is, therefore, clearly erroneous and should be rejected.

**THE REFEREE'S FINDING OF GUILT OF A VIOLATION OF  
RULE 4-8.4(c) CANNOT BE SUSTAINED, ABSENT A  
SPECIFIC FINDING OF INTENT THAT IS SUPPORTED BY  
CLEAR AND CONVINCING EVIDENCE.**

The NY disciplinary order finds Respondent guilty of violating Disciplinary Rule 1-102(A)(4)(22NYCRR 1200.3[a][4] (conduct involving dishonesty, fraud, deceit, or misrepresentation) based upon the false statements and testimony described in Charges Three through Six of the disciplinary petition. The findings of lack of candor relate to statements made and testimony given by Respondent during the course of the investigation by the Commission in the judicial removal proceeding. These statements, however, were made by Respondent in the context of denying the allegations of misconduct.

Interestingly, this Court has been presented with findings of lack of candor of a judge in judicial removal proceedings based upon the judge's testimony before the Commission. In re Davey, 645 So.2d 398 (Fla. 1994). In Davey, the Judicial

Qualifications Commission specifically found that the judge’s testimony was “not to be worthy of belief”, that the judge “lied under oath to the Commission,” and the judge “has compounded his original misconduct by appearing before the Commission to explain his conduct through testimony that the Commission finds to be false in material respects.” Davey at 407.

Notwithstanding these findings, the Supreme Court rejected the lack of candor findings based upon the Commission’s failure to show by clear and convincing evidence that the judge had deliberately testified untruthfully. In discussing lack of candor in this context, the Court held that:

Simply because a judge refuses to admit wrongdoing or express remorse before the Commission . . . does not mean that the judge exhibited lack of candor. Every judge who believes himself or herself truly innocent of misconduct has a right – indeed, an obligation to express that innocence to the Commission, for the Commission above all is interested in seeking the truth. Id. at 405.

\* \* \* \*

[L]ack of candor must be knowing and willful. . . . It is not enough that the Commission finds a particular judge’s version of events unworthy of belief, or finds the testimony of another witness more credible or logical. If such were the case, then every judge who unsuccessfully defends against a charge of misconduct would be open to a charge of lack of candor. Rather than showing simply that a judge made an inaccurate or false statement under oath, the Commission must affirmatively show that the judge made a false statement that he or she did not believe to be true.

. . . The statement must concern a material issue in the case. Id. at 406-407.

There is no finding made by the referee in this case, or evidentiary support in the record considered by the referee (NY disciplinary order), that would support a finding that Respondent **knowingly** and **willfully** made a false statement that he did not believe to be true concerning a material issue.

<sup>14</sup> Accordingly, in the absence of a specific finding of intent, supported by clear and convincing evidence, there is no proper basis to find a violation of Rule 4-8.4(c) of the Rules Regulating The Florida Bar.

THE REFEREE’S RECOMMENDATION OF DISCIPLINE  
SHOULD BE REJECTED BECAUSE IT IS BASED UPON  
CONSIDERATION OF AGGRAVATING FACTORS THAT  
ARE NOT APPLICABLE TO THIS CASE

The Referee’s report confirms that in recommending discipline the Referee considered three aggravating factors, none of which are applicable to this case. (RR at 3)

Standard 9.22(f) (submission of false evidence, false statements or other

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<sup>14</sup> In addition, with regard to proof of intent based upon circumstantial evidence, this Court has held that “in order to be legally sufficient evidence of guilt, circumstantial evidence must be inconsistent with any reasonable hypothesis of innocence.” Marable at 442.

deceptive practices during the disciplinary process) does not apply. First, there is no allegation or evidence of the submission of any false statements or deceptive practices by Respondent during any disciplinary process, either in Florida or New York. Second, the false statements that are the subject of the NY disciplinary order refer to statements made and testimony given by Respondent to the New York State Commission on Judicial Conduct during the judicial removal proceeding. This Commission is not involved in the process of attorney discipline.

Standard 9.22(g)(refusal to acknowledge wrongful nature of conduct) does not apply. Respondent denied the allegations which were the subject of the judicial removal proceedings. Respondent initially denied these same allegations in the NY disciplinary proceeding. However, because of the collateral estoppel ruling, Respondent was precluded from relitigating these allegations in the NY disciplinary proceeding. He has, nevertheless, acknowledged the adverse findings. Respondent denied the same allegations in this proceeding, but has acknowledged the adverse findings, his removal and disbarment.

Florida law recognizes that a respondent's denial of guilt cannot be considered an aggravating factor. An attorney's claim of innocence cannot be used

against him in determining discipline. The Florida Bar v Corbin, 701 So.2d 334 (Fla. 1997). Accordingly, a referee cannot base a recommendation of disbarment on a respondent's refusal to acknowledge guilt and show remorse. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986).

[I]t is improper for the referee to base the severity of a recommended punishment on an attorney's refusal to admitted alleged misconduct or on 'lack of remorse' presumed from such refusal. Id. at 1168.

Standard 9.22(j) (substantial experience in the practice of law) does not apply. The acts that are the subject of the NY disciplinary order involve personal behavior that do not, in any way, involve the practice of law or representation of clients. Accordingly, Respondent's experience in the practice of law is irrelevant to the charged misconduct and the referee's reliance upon the extent of Respondent's legal experience as an aggravating factor is improper.

The Referee has based his disciplinary recommendations upon aggravating factors that do not apply. The report of referee is, therefore, clearly erroneous and should be rejected by this Court.

DISBARMENT IS NOT WARRANTED AS A DISCIPLINARY  
SANCTION BASED UPON THE NATURE OF THE  
CONDUCT AND SUBSTANTIAL MITIGATION

The Supreme Court is not bound by a referee's recommendation for discipline. The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). This Court should reject the referee's recommendation of disbarment as a disciplinary sanction in this case based upon its Draconian effect as well as consideration of both the nature of the acts and the substantial mitigation.

This disciplinary proceeding is based solely upon Respondent's NY disciplinary order which arises from the same acts that were found to warrant Respondent's removal as a judge. In recommending discipline, the Bar Counsel stated:

Mr. Mogil was a county judge sitting in Nassau County, Long Island, New York. He was removed from the bench in New York and then disciplined by the New York Bar.

The discipline imposed on him in New York was disbarment. The nature of the conduct that he was found to have been guilty of in New York is basically - - involved a personal vendetta that he became involved in with an attorney who was practicing before him by the name of Liotti.

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The opinion recounts a number of somewhat bizarre circumstances. There was some threatening faxes, anonymous faxes, strange communications, some name calling and so forth.

The New York Bar determined that he was just not fit to sit as a judge or to practice law in New York. That he was interfering with the administration of justice in New York, and so he was removed and disbarred.

Of course, The Florida Bar is seeking reciprocal discipline. We are here today seeking disbarment in Florida. (TR at 3,4).

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<sup>15</sup> Liotti acknowledged that in September 1993, Respondent decided to recuse himself as a judge from all cases with Liotti or members of his firm. (NYCJC TR 746), Accordingly, Liotti was not "practicing" before Respondent during the period in question.

Although the Bar stated that it was seeking disbarment as “reciprocal discipline”, Florida does not have reciprocal discipline (or reciprocal admission) with New York or any other state. Moreover, there is a substantial difference between disbarment in New York and disbarment in Florida: disbarment in New York requires reinstatement;

<sup>16</sup> whereas disbarment in Florida requires a more stringent process of readmission.

<sup>17</sup> A Florida disbarment, therefore, would have an even more Draconian effect upon Respondent than the discipline ordered by New York, the foreign jurisdiction upon which the Florida disbarment is based. This is clearly inequitable.

Disbarment is not justified as a disciplinary sanction for the type of acts which were the subject of the judicial removal proceeding.

Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings. It is reserved. . . for those who should not be permitted to associate with the honorable members of a great profession. The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla. 1977)

In The Florida Bar v. Graham, 662 So.2d 1242, 1244 (Fla. 1995), this Court

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<sup>16</sup> A disbarred attorney in New York may apply for reinstatement after seven years. Reinstatement requires an application, passage of the Multistate Professional Responsibility Examination and investigation by the Committee on Character and Fitness. CLS Sup Ct Rule §691.11 [22 NYCRR §691.11]

<sup>17</sup> Disbarred attorneys in readmission proceedings are required comply with all rules governing admission to The Florida Bar, including passing The Florida Bar examination. In addition, the application fee is substantial sum; currently \$5000. Rule 2-27, Rules of the Supreme Court Relating To Admissions to The Florida Bar.

considered the imposition of attorney discipline against Graham, a respondent/former judge, based upon the same acts which led to Graham's removal from judicial office. The disciplinary proceeding in Graham was based upon a 15-count Bar Complaint which charged Graham with displaying an attitude and activities before the Judicial Qualifications Commission that were found to be "disruptive, scandalous, improper and contemptuous". Some of the 13 remaining counts of the Bar's Complaint included allegations that Graham:

[A]ccused an assistant public defender and a defendant of deliberately falsifying a transcript when he had no foundation for doing so . . . . improperly berated an attorney for being improperly dressed for court and required the attorney to wear another coat into court which was several sizes too small . . . erroneously accused the state attorney and another judge of improper ex parte communications . . made disparaging and insulting remarks about attorneys in a newspaper interview. *Id.* at 1245 fn. 1.

The Supreme Court upheld a referee's recommendation to dismiss the disciplinary proceeding in Graham, rejecting the Bar's position that "any misconduct that is sufficient to remove a judge from office is also serious enough to warrant discipline as an attorney." In dismissing the proceeding, the Court specifically considered the nature of the acts, i.e., that Graham had been removed for violations of the Code of Judicial Conduct and for abuses of judicial power, but that he was not

“dishonest or venal or guilty of moral turpitude”. Id. at 1245. However, in addition to exhibiting behavior described as “disruptive, scandalous, improper and contemptuous”, certainly many of Graham’s actions that resulted in his removal as a judge may be characterized as “offensive, harassing and vindictive”, as was the communications that resulted in Respondent’s removal as a judge. Why then should Graham not be disciplined and Respondent disbarred?

Similarly, discipline was not imposed in a case involving offensive conduct by an attorney while engaged in the practice of law. The conduct in The Florida Bar v. Martocci, 699 So.2d 1357 (Fla. 1997) involved making demeaning comments to opposing counsel, such as “f--- you, “a—hole”, and hey , looney \*\*\*”. Id. at 1359. Although the referee did not condone respondent’s acts, the referee found that the conduct did not rise to the level of a violation based upon clear and convincing evidence. One of the factors the referee cited as most important in reaching this conclusion was the conduct of the opposing counsel. Martocci at 1360. If Martocci was not disciplined based, in part, upon provocation, why then should Respondent, who alleged substantial deliberate provocation, be disbarred?

Moreover, The Florida Bar v. Carricarte, 733 So.2d 975 (Fla. 1999), the Supreme Court considered appropriate discipline for an attorney who engaged in a bizarre course of conduct after his termination as in-house counsel for a family-owned company. This conduct specifically included Carricarte’s faxing a number of “strange and threatening” messages as well as carrying and flaunting a gun and making death threats against his brother, the Complainant, and his family. One message stated: stated:

‘Yesterday, I played at Louie’s grave. This morning, in the dark on my knees, I recited the prayers for the dead, made peace with God and prepared for Armageddon.’ Carricarte at 979.

Carricarte was suspended for ninety (90) days, and placed on probation for three (3) years with a requirement that he submit to a mental examination.

<sup>19</sup> If Carricarte was not disbarred for bizarre conduct, including “strange and threatening” messages and **death threats**, why should Respondent be disbarred?

Further, disbarment is not justified in this case, even if this Court upholds the

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<sup>18</sup> NY disbarment order.

<sup>19</sup> Carricarte was found guilty of several violations of the Rules of Professional Conduct based upon misconduct which included disclosure of trade secrets, and threatening to sell or reveal the companies’ database unless he was given a portion of funds in trust.

referee's finding of guilt and determines that discipline is warranted for conduct involving lack of candor regarding statements made or testimony given by Respondent to the NYCJC. In this regard, it is important to consider that the statements and testimony in question occurred during the course of an investigation of Respondent, personally, in which he emphatically denied wrongdoing. Respondent did not make the statements in the context of representation of a client.

The Supreme Court has recognized that the context in which a misrepresentation is made is relevant factor in determining appropriate discipline. In The Florida Bar v. Cibula, 725 So.2d 360 (Fla. 1998), the respondent was suspended from the practice of law for 91 days, in the absence of any mitigating factors, for intentionally misrepresenting his income at hearings pertaining to his alimony obligations. In suspending Cibula for 91 days, this Court noted that dissolution proceedings are emotional and that all of the attorney's transgressions occurred during the course of his dissolution proceedings.

Why then should Cibula be suspended for 91 days for intentional misrepresentations made in a legal proceeding and Respondent disbarred for statements made during the course of an investigation of allegations involving his

character and fitness to remain a judge which was personal in nature and, no doubt, emotionally charged?

Disbarment is also not warranted in this case considering the significant mitigating factors:

Absence of a prior disciplinary record:

<sup>20</sup> Respondent has no prior discipline. With the exception of the instant matter involving his removal as a judge and the resulting NY disciplinary order, Respondent's career as both an attorney and a jurist has been unblemished.

Character or reputation:

<sup>21</sup> The testimony of the 17 witnesses, including four judges, in the judicial removal proceeding established that Respondent has an excellent character and reputation.

Remoteness of offense: The acts that are the subject of this proceeding occurred during a one-year period, between 1994 and 1995, more than four (4) years ago.

Imposition of other penalties or sanctions:

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<sup>20</sup> Standard 9.3(a), Florida Standards for Imposing Lawyer Sanctions

<sup>21</sup> Standard 9.3(g), Florida Standards for Imposing Lawyer Sanctions

<sup>22</sup> Removal from judicial office (judicial discipline) is recognized by the Supreme Court as justification not to impose additional discipline as an attorney. Graham at 1245 .

The Referee's recommendation of disbarment should be rejected as clearly excessive. Even if the Referee's findings of fact and guilt are upheld, Respondent would urge the Court to follow Graham and consider the imposition of other sanctions, such as judicial discipline and disbarment in New York, as a sufficient basis to impose no additional discipline. Should the Court find additional discipline to be warranted, Respondent respectfully suggests that consideration be given to a suspension from the practice of law for ninety days or less as a final disciplinary order.

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<sup>22</sup> Standard 9.3(k), Florida Standards for Imposing Lawyer Sanctions

## CONCLUSION

Respondent has consistently denied the allegations of misconduct that are the basis for his NY disbarment order. It was error for the Referee to consider Respondent's NY disciplinary order as the sole basis for summary judgment or as a basis for findings of fact and recommendations as to guilt. It was error for the Referee to preclude Respondent from presenting evidence in support of his denial of the allegations of misconduct. The Referee's report does not find, nor is it based upon, clear and convincing evidence justifying a recommendation for disbarment or any discipline. Accordingly, the referee's report should be rejected and these proceedings dismissed.

Even if the Referee's findings of fact and recommendation as to guilt are upheld, Respondent respectfully requests that this Court reject the Referee's recommendation of disbarment as a disciplinary sanction. In lieu of disbarment, Respondent suggests an order directing that no additional discipline is warranted based upon Graham, the nature of acts and mitigation. Alternatively, if the Court determines to impose discipline, Respondent requests consideration of a suspension from the practice of law for ninety days or less, with automatic reinstatement, as a final order of discipline.



Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the Initial Brief of Respondent was sent to Debbie Causseaux, Acting Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 and that a true and correct copy was sent by to Donald M. Spangler, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to John A. Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, this \_\_\_day of November, 1999.

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Co-Counsel for Respondent

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

BERNARD MARC MOGIL,

Respondent.

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Supreme Court Case  
No. 94,861

The Florida Bar File

No. 99-00772-02

APPENDIX

Respondent’s Proposed Findings and Conclusions (“Proposed Findings”) . . . . . A

Answer to Petition (“Answer”) . . . . . B

Attorney’s Affirmation (“Affirmation”). . . . . C

Respondent’s Memorandum of Law (“Memorandum”) . . . . . D