IN THE SUPREME COURT OF FLORIDA

Case No.: SC09-1953
TFB NO.: 2007-11,274 (13D)

THE FLORIDA BAR

Complainant/Petitioner

vs.

MICHAEL VINCENT LAURATO

Respondent/Cross-Petitioner

CROSS-PETITIONER'S ANSWER/INITIAL BRIEF

MICHAEL LAURATO, ESQUIRE
Florida Bar No: 181447
AUSTIN & LAURATO, P.A.
1902 West Cass Street
Tampa, Florida 33606
Telephone: (813)258-0624
Facsímile: (813)258-4625
mlaurato@austinlaurato.com
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a.

Findings of Fact and Recommendations of Guilt

Where the Referee's findings are supported by competent substantial evidence, the Court is "precluded from reweighing the evidence and substituting its judgment for that of the referee." *Florida Bar v. MacMillan, 600 So. 2d 457, 459 (Fla. 1992).* To successfully challenge a referee's factual findings in an attorney disciplinary proceeding, a party must show that there is a lack of evidence in the record to support the findings or that the record clearly contradicts the referee's conclusions. *The Florida Bar v. Head, 27 So.3d 1 (Fla. 2010).* This burden is not met merely by pointing to contradictory evidence in the record, when there is substantial competent evidence in the record supporting the referee's findings. *Id.* Likewise, a referee's recommendations of guilt are presumed correct and should be upheld unless clearly erroneous or without support in the record. *The Florida Bar v. Pellegrini, 714 So.2d 448, 451 (Fla. 1998).*

b.

Recommendation as to Discipline

Although a referee's recommendation as to discipline is persuasive, this Court has the ultimate responsibility to impose an appropriate sanction.

The Florida Bar v. Solomon, 711 So.2d 1141, 1146 (Fla. 1998). The Court's scope of review is broader than when reviewing a referee's findings of fact and conclusions of guilt. With regards to attorney discipline, it is ultimately this Court's task to determine the appropriate sanction; however, a referee's recommendation will be followed if reasonably supported by existing case law. *The Florida Bar v. Centurion, 801 So.2d 858, 862 (Fla. 2000).* Generally speaking, the Court will not second-guess the referee's recommended discipline in an attorney disciplinary proceeding, as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. *The Florida Bar v. Head, 27 So.3d 1 (Fla. 2010).* With respect to recommending discipline, as in determining whether ethical violations exist, the referee in a Bar proceeding occupies a favored vantage point for assessing key considerations--such as a respondent's degree of culpability. *The Florida Bar v. Lecznar, 690 So.2d 1284, 1288 (Fla. 1997).*

c.

Taxation of Costs

The assessment of costs in a disciplinary proceeding is within the referee's discretion and will not be reversed absent an abuse of that discretion. *The Florida Bar. v. Miele, 605 So.2d 866, 868 (Fla. 1992).* In

exercising this discretion and assessing costs, the referee has discretion in the imposition of costs and should consider the fact that the responding attorney has been acquitted on some of the counts. *The Florida Bar v. Davis, 419 So.2d 325 (Fla. 1982).* Unless the record suggests that the costs were unnecessary, excessive, or improperly authenticated, there is no abuse of discretion. *The Florida Bar v. Kassier, 730 So.2d 1273 (Fla. 1998).*

PRELIMINARY STATEMENT

Respondent prepared this Answer Brief in accordance with *Rule 9.210(c), Florida Rules of Appellate Procedure*. Pursuant to *Rule 9.210(a)(5) and (c)* and *Rule 3-7.7(c)(3)*, this brief constitutes an "answer brief/initial brief" on cross-appeal and, accordingly, is limited to 85 pages and includes issues in the cross-appeal that are presented for review, and argument in support of those issues. Pursuant to *Rule 3-7.7(f), Rules Regulating the Florida Bar*, the Florida Rules of Appellate Procedure are applicable to this petition and cross-petition for review of a disciplinary proceeding.

In this Answer Brief, the Complainant will be referred to as "Complainant," "The Florida Bar," or "Bar." The Respondent will be referred to as "Respondent" or "Laurato."

References to the Record on Review shall be designated by the symbol "R," followed by a description of the document, followed by the number associated with the document on the referee's Index of Record. (e.g., R. Complaint, 1).

References to any transcript of the proceedings or any relevant deposition testimony shall be designated by the symbol "T," followed by a

description of the hearing/deposition, followed by the page number. (e.g., T, Sanctions Hearing, 43).

References to the Complaint's Initial Brief shall be designated as "I. Br." followed by the appropriate page number. (e.g., I. Br., 3).

References to supplemented portions of the record shall be designated by the symbol "SR," followed by a description of the document, followed by the page number of the citation within that document, if applicable. (e.g. SR. Notice of Finding of Probable Cause, 2).

Reference to documentary exhibits introduced by The Florida Bar at the final hearing and transmitted by the referee will be referred to by the designation "Florida Bar Exhibit," followed by the number associated with that exhibit as it was introduced at the final hearing. (e.g. Florida Bar Exhibit 2).

STATEMENT OF THE CASE AND FACTS

A.

PROCEDURAL BACKGROUND

On March 15, 2007, Barbara Crocker filed an inquiry/complaint form with The Florida Bar against the respondent. (SR., Complaint/Inquiry, 1). The inquiry/complaint was received by The Florida Bar on March 19, 2007. (SR., Complaint/Inquiry, 1). Ms. Crocker's employer, NAFFCO, was a plaintiff in a civil action initiated in the Circuit Court of Hillsborough County against respondent, as a defendant, alleging the respondent failed to pay approximately $3,500.00 after NAFFCO installed wooden shutters in a home owned by the respondent. (T., 03/16/2010 Transcript of Proceedings, pp. 44, 47). Ms. Crocker initiated the inquiry/complaint while the civil dispute between her employer and the respondent was pending. (SR., Complaint/Inquiry, 1).

The inquiry/complaint alleged that the respondent lied to a process server attempting to serve his wife for deposition and that the respondent "made several lies during the lawsuit." (SR., Complaint/Inquiry, 1). The substance of this second allegation consisted of Ms. Crocker's interpretation and dissection of one sentence of eight words, from the context of a paragraph-long answer, within a multiple-page discussion of construction

lien issues, from a 136 page deposition surrounding a construction lien dispute. (SR., Complaint/Inquiry 2). Those eight words, taken from their depositional context, were: "Never been sued once for breach of contract." (SR., Complaint/Inquiry 2). The question posed at the deposition, to which a five sentence response was given and to which the above-quoted language is included, inquired: "And, that's your position, that you're entitled to keep the shutters and get all your money back?" (T. 10/16/2006 Deposition of Michael Laurato, p. 106).

During the civil litigation, both NAFFCO and the respondent were represented by counsel. (T., 3/16/2010 Transcript of Proceedings, pp. 79-80). From the outset of the civil litigation, NAFFCO's counsel sent a letter threatening to turn respondent in to The Florida Bar. (T., 3/16/2010 Transcript of Proceedings, p. 80) Throughout the litigation, NAFFCO's counsel repeatedly verbally threatened grievances against respondent and his counsel for different reasons, including simply raising defenses in suit. (T., 3/16/2010 Transcript of Proceedings, pp. 80, 118). Ultimately, respondent's counsel withdrew from the representation, because of NAFFCO's counsel's repeated threats of Bar grievances and improper litigation tactics, forcing respondent to retain other counsel. (T., 3/16/2010 Transcript of Proceedings, pp. 83-84). Respondent was represented by counsel

throughout the NAFFCO suit and never acted as his own counsel. (T., 3/16/2010 Transcript of Proceedings, p. 47).

Prior to any finding of probable cause, the respondent was a witness in a Bar proceeding against another lawyer, styled The Florida Bar v. Levine, SC07-1274.[1] (T., 11/14/2007 Deposition of Michael Laurato, p. 1). On November 14, 2007, the videotaped deposition for trial of the respondent in that matter was taken. (T., 11/14/2007 Deposition of Michael Laurato, p. 1). The respondent was called as a witness for the lawyer. (T., 11/14/2007 Deposition of Michael Laurato, p. 1). During that deposition, Bar counsel cross-examined respondent and, in an attempt to impeach him and gain an advantage in those proceedings against the other lawyer, Bar Counsel disclosed the allegations of the NAFFCO complaint, although no probable cause had yet been found by the grievance committee. (T., 11/14/2007 Deposition of Michael Laurato, pp. 23-24; SR., 05/08/08 Notice of Finding of Probable Cause, 1). During that deposition, Bar counsel also attempted to impeach the respondent with prior Bar related issues for which no probable cause had been found. (T., 11/14/2007 Deposition of Michael Laurato, p. 22). The public disclosure of this information by The Florida Bar acted as an extra-judicial, *de facto*, public reprimand of the respondent for conduct he

[1] No relation to Howard J. Levine, who was a witness at the final hearing in the proceedings in this matter.

was ultimately acquitted for and for which, in other cases, no probable cause had previously been found. Specifically, The Florida Bar proceeded as follows as to the process server allegation:

> Q: In the Celebrity Carpets and Interiors versus Michael Laurato, did opposing counsel file a motion for sanctions against you for lying to a process server?
> A: I believe he may have filed a motion for sanctions, yes.
> Q: Do you recall the allegations in that motion?
> A: No.
> Q: You don't recall that it was alleged that when the process server came to serve your wife, you told the process server that she was not in town?
> A: That never happened.
> Q: What do you mean? What never happened?
> A: I believe the motion was filed, but there was no communication between me and the process server.
> Q: So the process server's affidavit indicating that you told him that your wife didn't live in town was a lie?
> [Objection Omitted]
> A: But in any event, I can tell you like I believe I told the Bar, that there was no conversation between me and the process server. As a matter of fact, at that time that he alleges the conversation happened, I was in a room in a spinning class with about 12 other people, so--but I believe that will be an issue for another day.
> (T., 11/14/2007 Deposition of Michael Laurato, pp. 23-24).

On May 8, 2008, the grievance committee first found probable cause for further disciplinary proceedings for the violation of *Rule 4-8.4(a)* (conduct involving dishonesty) and *Rule 4-8.4(d)*(conduct prejudicial to the administration of justice). (SR., 05/08/08 Notice of Finding of Probable Cause, 1). Thereafter, on July 21, 2008, a corrected notice of finding of

probable cause for further disciplinary proceedings was filed for the violation of *Rule 4-8.4(c)*(conduct involving dishonesty) and *Rule 4-8.4(d)*(conduct prejudicial to the administration of justice). (SR., 07/21/08 Corrected Notice of Finding of Probable Cause, 1). The record of the proceedings before the grievance committee was then referred to staff counsel for the drafting and filing of a formal complaint pursuant to Rule 3-7.4(l)(bar counsel shall promptly prepare a formal complaint). (SR., 07/21/08 Corrected Notice of Finding of Probable Cause, 1).

Four hundred and fifty five days later, on October 19, 2009, The Florida Bar filed a two count complaint against the respondent based on Ms. Crocker's inquiry/complaint. (R., Complaint, 1). Count I of the complaint alleged violations of *Rule 4-8.4(c)* and *Rule 4-8.4(d)* based on false statements respondent allegedly made in the early morning hours of January 16, 2007 to a process server attempting to serve his wife for a deposition in the NAFFCO case. (R., Complaint, 1). Count II of the complaint alleged violations of *Rule 4-8.4(c)* and *Rule 4-8.4(d)* based on the respondent deposition testimony taken from its context, that the respondent had "[n]ever been sued once for breach of contract." (R., Complaint, 1). On November 10, 2009, the respondent answered The Florida Bar's complaint and denied the allegations. (R., Respondent's Answer, 4).

On March 16, 2010, a final hearing was conducted. (T., 3/16/2010 Transcript of Proceedings, p. 130). At the final hearing, The Florida Bar called three witnesses: Gary Sprague, Karina Jauregui Laurato, and the respondent. (T., 3/16/2010 Transcript of Proceedings, p. 3). All Bar witnesses, other than the respondent, provided testimony only as to Count I. (T., 3/16/2010 Transcript of Proceedings, pp. 19-42, 53-64). In its interrogatory responses, The Florida Bar listed both the court reporter and counsel for NAFFCO, both of whom were present at the deposition, as contextual witnesses to the deposition testimony. (R., 12/17/09 Complaint's Answers to Interrogatories, 8). The Florida Bar failed to call either of these witnesses at the final hearing. (T., 3/16/2010 Transcript of Proceedings, p. 3). The Florida Bar introduced 14 exhibits into evidence in total, 11 during its case-in-chief and 3 in rebuttal. (T., 3/16/2010 Transcript of Proceedings, 39, 41, 144). Included in the exhibits admitted by The Florida Bar was the relevant deposition transcript from the NAFFCO suit and court documents from other litigation. (T., 3/16/2010 Transcript of Proceedings, p. 41; Florida Bar Exhibit 3). On that point, The Florida Bar introduced two small claims court statements of claim, one county court complaint, and a county court counterclaim, together with court documents associated with those

lawsuits. (T., 3/16/2010 Transcript of Proceedings, p. 41; Florida Bar Exhibits 4-11).

The respondent presented the testimony of six witnesses, including the respondent. (T., 3/16/2010 Transcript of Proceedings, pp. 3-4). Among the witnesses called by the respondent was his counsel in the NAFFCO matter, Howard Levine, who was present at the NAFFCO deposition. (T., 3/16/2010 Transcript of Proceedings, p. 89). The respondent introduced three exhibits, none of which are pertinent to the issues raised on this review. Thereafter, following brief closing remarks, the final hearing was adjourned. (T., 3/16/2010 Transcript of Proceedings, p. 173).

The matter was thereafter reset on May 24, 2010 for the sanctions portion of the presentation. (R., Notice of Sanctions Hearing, 26). During the sanction's phase of the proceedings, the respondent called four witnesses, including two members of The Florida Bar and a client for which the respondent had performed *pro bono* work. (T. 05/24/2010 Transcript of Sanctions Hearing, p. 3). The respondent also testified as to the issues surrounding the appropriate discipline, if any, to be imposed. (T. 05/24/2010 Transcript of Sanctions Hearing, p. 3).

The Referee's Final Report and Recommendations was filed with this Court on July 6, 2010. (R., Report of Referee, 30). The Referee

recommended acquittal of the respondent of all allegations regarding the process server, Mr. Sprague, contained in Count I of The Florida Bar's complaint. (R., Report of Referee, 30). The Referee recommended that respondent be found guilty of violation of both *Rule 4-8.4(c)* and *Rule 4-8.4(d)* regarding the NAFFCO deposition testimony contained in Count II of The Florida Bar's Complaint. (R., Report of Referee, 30). As to discipline, the referee recommended a public reprimand to be administered by the referee. (R., Supplemental Report of Referee, 31).

The Florida Bar filed a Motion to Assess Costs. (R., Motion to Assess Costs and Statement of Costs, 27). The Bar's motion stated that the costs listed do not include "investigation" costs associated with Count I, for which the respondent was acquitted. (R., Motion to Assess Costs and Statement of Costs, 27). The Motion to Assess Costs was accompanied by a "Statement of Costs," which contained an aggregated "block" charge for "Court Reporter's Fees and Transcripts" in the amount of $2,602.60 and an aggregated "block" charge in the amount of $149.84, generically listed, as "travel" expense. (R., Motion to Assess Costs and Statement of Costs, 27). The Florida Bar's Motion to Assess Costs failed to attach any invoices or other documentation from any court reporter to authenticate either the amount sought or the transcript ordered. (R., Motion to Assess Costs and

Statement of Costs, 27). The Florida Bar's motion to assess costs failed to attach or otherwise delineate the method in which the travel expenses were incurred and/or computed. (R., Motion to Assess Costs and Statement of Costs, 27). The motion was not sworn to and no affidavit of costs supplemented the motion. (R., Motion to Assess Costs and Statement of Costs, 27).

The respondent filed a response to the Bar's motion to assess costs, challenging the necessity, excessiveness, and authenticity of the Bar's "block" costs and requesting the referee to exercise his rule-based discretion to not tax certain claimed costs. (R., Respondent's Response to Motion to Assess Costs, 28). The response demonstrated that certain costs alleged to have been excluded from the Bar's calculation, were, in fact, included. (R., Respondent's Response to Motion to Assess Costs, 28). The response further requested that the Bar provide an Affidavit of Costs, which would breakdown the costs rather than providing lump sum figures. (R., Respondent's Response to Motion to Assess Costs, 28). In that fashion, the response asserted, the respondent would be able to fully evaluate the costs as to necessity, excessiveness, and authentication and be able to present an argument to the referee as to the propriety of any cost award. (R., Respondent's Response to Motion to Assess Costs, 28). The Florida Bar

filed a reply and refused any further breakdown of the costs or production of any documents to authenticate the costs. (R., Complainant's Reply to Response to Motion to Assess Costs, 29). The referee's report awarded the Bar $4,002.44 in costs, which included all of the costs the Bar initially sought and those which the Bar was not seeking, relating to Count I. (R., Supplemental Report of Referee, 31).

The Florida Bar has petitioned for review of the referee's recommended discipline, urging that a public reprimand is without a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. The respondent has cross-petitioned for review of the referee's recommended findings of fact and recommendations of guilt as to Count II, the recommended discipline, and the taxation of costs.

B.

REFEREE'S REPORT AS TO COUNT II (DEPOSITION)

1.

Findings of Fact

In order to review the propriety of the referee's findings of fact with regard to Count II, it is necessary to set them out fully:

> Respondent testified under oath at a deposition in Celebrity Carpets d/b/a Naffco v. Michael V. Laurato, Case Number 05-2728 F, in the Circuit Court of the Thirteenth Judicial Circuit, Hillsborough County, Florida. During respondent's deposition he testified that he had

"[n]ever been sued once for breach of contract." At the time, however, respondent had in fact been sued more than once for breach of contract. Respondent does not dispute that he denied ever having been sued in contract, however, he asserts that the Bar cannot prove that he intended to make a false statement when he testified, and further alleges that his statement was not responsive to any question but was rather offered in a narrative fashion toward the end of a lengthy deposition.

At trial, respondent was asked "[p]rior to giving your deposition in this case, had you ever been sued for breach of contract?" and he replied "[w]ith the documents you have here, the answer to that question is no." He was then asked "[w]hat is the factual answer to that question" and he replied "[w]ith the documents that I have before me, the answer is no." Finally, he was asked "[t]o the best of your recollection, had you ever been sued for breach of contract...[p]rior to October of 2006" and he replied "[b]ased on the documents again that you have there, the answer to that question is no." The attorney for the Bar then clarified that he was not asking him to interpret the documents but asking him to give his best answer based on his recollection as he sat there day, whether or not he had been sued for breach of contract prior to 2006. Respondent testified "...[i]f I had been sued for breach of contract, which I do not believe that I have outside of the documents which you have presented here...I don't believe that I have...and to my recollection, the answer to that question is no."

Respondent's attorney asked him if he recalled the deposition testimony where he said he had never been sued in a breach of contract action. With regard to that question, respondent testified that during the deposition he said that he had "never been sued for breach of contract" because he believed he was being asked only whether or not he had ever been sued for breach of contract regarding construction lien matters. At trial, respondent stated that opposing counsel in that case never confronted him with or referenced four lawsuits that were subsequently the basis of the motion for sanctions in the instant case. Respondent testified that those cases were not referenced and "[t]hat was clearly not the context of this entire discussion." Respondent's counsel then named each of the four cases which are the subject of this claim and asked respondent what the

basis was for each. For two of the cases, Acys and Arrow Imaging, respondent claimed they were both "open accounts." For All Languages by Mentani, Inc., he claimed it was an account stated. For the final case, Laurato v. ZOM Residential Services, Inc., he claimed that was action [*sic*.] that he brought against the owner of his rental home for breach of contract in an attempt to "get out of the lease because they refused to fix the roof." He then acknowledged that there was a counterclaim filed against him in that action. However, he testified that he was not "thinking about any of these lawsuits" during the deposition because he "was intending to refer to construction disputes and other issues in the case..."

....

Having reviewed the file and having heard all of the evidence, I recommend that Respondent be found guilty of violating Rule 4-8.4(c) and (d), Rules Regulating the Florida Bar. The Florida Bar did meet their burden of proof of clear and convincing evidence that respondent's testimony under oath at a deposition in a civil action was false, in violation of Florida Rules Regulating the Florida Bar, Rule 4-8(c) and (d). [Citation omitted]. The evidence at trial established that Respondent's misconduct in this case was knowing and deliberate. [Citation omitted]. Respondent's deposition has few direct answers and most answers were contradictory even within the same answer. Some answers were sarcastic, flippant, and argumentative and nonresponsive. Responses were often irrelevant, illogical, and nonsensical and even included name calling. *Specifically, with regard to the question posed at deposition as to whether or not respondent had ever been sued for breach of contract, I find Respondent's statement to be unresponsive and puffery.* In the deposition,Respondent cites to construction case examples and then does not respond *to the question*. Instead, Respondent provided a long narrative of unresponsive answers. Furthermore, Respondent testified at trial that he still does not believe that he has ever been sued for breach of contract (prior to his 2006 deposition). In light of all the evidence, I find that Bar has met its burden of clear and convincing evidence as to Count II.

(R., Report of Referee, 30)(emphasis added).

The Relevant Context of the NAFFCO Deposition

The central issue of the NAFFCO suit involved a construction issue. (T. 10/16/2006 Deposition of Michael Laurato, pp. 1-136). Accordingly, the deposition, in large part, focused on respondent's prior dealings with construction contracts and renovation projects. (T. 10/16/2006 Deposition of Michael Laurato, pp. 1-136). Against this larger construction context, the deposition testimony directly before and directly after the relevant testimony provided as follows:

Q: Now, do you, sir, in your legal practice, do *construction disputes?*
A: Have I or do I?
Q: Do you?
A: Do I? No.
Q: *Liens and that sort of thing?*
A: Do I? No.
Q: Real estate title work?
A: No. I've sued on *construction liens?*
Q: I'm sorry. You've sued on what now?
A: *Construction liens.*
Q: *Construction liens?*
A: That's right.
Q: What do you mean you've sued on *construction liens?*
A: I've sued to foreclose on *construction liens.*
Q: On behalf of whom, clients?
A: Both sides.
Q: That would be here in Hillsborough County Circuit Court?
A: No. Most people don't file [suits to foreclose *construction*] *liens* in circuit court, especially this amount.
Q: So where would those actions [to foreclose on *construction liens*]--if I wanted to go look at those lawsuits that you

filed on behalf of clients involving *construction liens*, where would I look?

A: The County Court. That's another reason. This has just been a sweat job. It's the equivalent of a hold-up in an alley. That's all this is. Tim Baker saw me pull up in a Bentley, tried to hit me at $10,800. When I didn't go for that, he agreed on whatever I could to get me to sign the contract. Then he didn't perform. And then after that, it's just been a sweat job. It's been a stick-up in an alley. I'm going to put a lien on your house. Change the affidavit to say whatever it is I need to say to get me into court. Filed a $3,600 lawsuit in circuit court in an attempt to sweat somebody, and I don't appreciate that on a reputation basis.

Q: And it's your position that you're entitled to keep the shutters and get all your money back?

A: No, that's not my position. My position is he never should have installed the shutters. And since he did, he should have to eat them. And I think he should have been honest, because I always fulfill my legal obligations. *Never been sued once for breach of contract*. And I want to tell you that I enter into thousands of transactions a year.

Q: What kind of transactions do you enter into, sir?

A: All kinds.

Q: What kinds?

A: I buy cars. I buy property. You see the property that I have. It's like everybody else. I do business with hundreds of people through my businesses, through my law practice, my personal entity. *I've renovated properties. Never had a problem. Paid.* I would have paid this. I would have paid the 7100 bucks.

Q: I think you testified earlier *that you've had a lot of experience with renovating properties* where people have run late on their promises.

A: No.

Q: They've always been on time?

A: No. It's just a precaution. Of course people are late, but it's just a precaution that I take, given not only my experience and what I've heard, things that I've heard.

(T. 10/16/2006 Deposition of Michael Laurato, p. 104-107)(emphasis added).

3.

Evidence of Context At Final Hearing

The Florida Bar called no witnesses that were present at the NAFFCO deposition, despite having listed the court reporter and NAFFCO's defense counsel as witnesses in the interrogatory responses. (T., 3/16/2010 Transcript of Proceedings, p. 3; R., Complainant's Notice of Serving Responses to Interrogatories, 8). The only evidence of the proper context of the answers provided during the deposition was provided by Howard Levine, respondent's counsel in the NAFFCO case and who was present during the deposition, and respondent himself. (T., 3/16/2010 Transcript of Proceedings, pp. 89-92; T., 3/16/2010 Transcript of Proceedings, pp. 121-129). There was no other evidence of context, in the record.

a.

Howard Levine's Testimony of Context of NAFFCO Deposition

At the time of the deposition in the NAFFCO case, respondent was represented by Howard Levine, Esq. (T., Transcript of Proceedings, p. 79). Mr. Levine attended the deposition telephonically. (T., Transcript of Proceedings, p. 89). Mr. Levine testified before the referee as follows:

Q: Mr. Levine, were you present at Mr. Laurato's deposition?
A: I was telephonically present.
Q: Okay. And do you recall that deposition?
A: Very well.
...
Q: What was the general tone of that deposition, if you can describe it?
A: *Contentious on both sides.*
Q: *Did you hear Mr. Laurato testify that he had not been sued for breach of contract?*
A: *Yes. I subsequently read parts of the deposition.*
Q: You have read that, okay. When he said that, did you think he was testifying falsely, that he was being untruthful when he said that?
A: *No*.
Q: I mean, do you think that today?
A: *No. I think that the context of this statement after being pressed about--with the same accusatory tone...[.] I think the spirit of the comment was the same and that is should have been evident that it was a figurative comment*. And, if it wasn't, I think--and my feeling is, if I'm taking the deposition or anybody I know, if one wants to make a record or someone being untruthful is a deposition, that you would...ask them if they really mean to say what they say.

In the context of that deposition where for hours, there were so many things that Michael was saying...and speaking *metaphorically* about...[.] *Michael was making a clear point...[.]* He felt they forced the shutters on him at that point. He was making that point. He said, I have never been sued for breach of contract. I took that to mean that he doesn't not honor his contracts. If he is going to raise an issue, it is because he believes he has a valid defense. If they [NAFFCO's counsel] didn't think that, my opinion was that they could have inquired further especially in view of the fact that [NAFFCO's counsel] had said so many times that Michael was aware that he couldn't wait to bring up all the times that Michael was sued in the lawsuit.

It would have been *unthinkable* to me that Michael would try to *convey the impression that he had never been sued, and to have that intended to be taken in a literal way*.

(T., 3/16/2010 Transcript of Proceedings, pp. 89-92)(emphasis added).

This contextual testimony was unrebutted in the record.

b.

Respondent's Contextual Testimony and Denial of Ever Being Sued More than Once for Breach of Contract

The only other witness to testify as to the context of the NAFFCO deposition was the respondent. The undisputed relevant testimony was as follows:

A: ...The context of this entire dispute given the previous [deposition] pages has been my construction lien experience, whether I have ever had any problems previously in a deposition with any contractors, whether I had any contracting experience.

And the point I was intending to make here was simply that I had never had this problem on any type of construction before. I think that was apparent from the entire context of the case.

Q: After you said on Page 106, "I always fulfill my legal obligations. I have never been sued once for breach of contract." At any point, subsequent to that, did counsel for NAFFCO show you, confront you with or reference the four lawsuits that were subsequently referenced in the motion for sanctions in the Bar's case?
A: No. That was clearly not the context of this entire discussion.
Q: My question is, did they ask you about those suits and give you a chance to address those four suits?
A: No, sir, they did not.
Q: Okay. And did--

A: Mr. Tozian, if I could just give it the proper context, I think you have to read Page 106 and go on to Page 107. It says, "I renovated"--
[Objection omitted]

...

Q: Okay. At the time that you were testifying on Page 106, you had never been sued for breach of contract, were you thinking about the residential lease suit that was ongoing?

A: No. That lawsuit wasn't ongoing at the time that I testified. But no, I wasn't thinking about any of these lawsuits because I was intending to refer to construction disputes and other issues in the case, what I believe to be the lack of merits of their case in a very contentious case.

(T., 3/16/2010 Transcript of Proceedings, pp. 121-127).

No other witness testified about the context of the deposition and no other evidence of the proper context of the deposition testimony was received in evidence.

In addition, during the final hearing, the respondent was questioned, by Bar Counsel, about whether he had been sued, more than once for breach of contract. The record reveals the following colloquy:

Q: Okay. Prior to giving your deposition in this case, had you ever been sued for breach of contract?
A: With the documents that you have here, the answer to that question is no.
Q: What is the factual answer to that question?
A: With the documents that I have before me, the answer is no.
Q: To the best of your recollection, had you ever been sued for breach of contract?
A: From today back, yes.
Q: Prior to October of 2006?

A: Based on the documents again that you have there, the answer to that question is no.
Q: Sir, to clarify, I'm not asking you to interpret documents. I'm asking you to give me your best answer based on your recollection as you sit here today.
A: From what date to what date?
Q: Prior to 2006 from the creation of the universe?
A: You can understand, Mr. Lovell, how I'm a bit paranoid by how my statements have been hung onto, and I would have to defer, if I had been sued for breach of contract, which I do not believe that I have outside of the documents you have presented here, I would have to defer to the court records. And I really don't feel comfortable given the use of my statements in depositions giving you an affirmative answer about whether I had been or hadn't been. I don't believe that I have. If you have documents to the contrary, I would like to take a look at them, but I haven't seen any. And to my recollection, the answer to that question is no.
Q: Okay.
...
Q: I have no further questions.

(T., 3/16/2010 Transcript of Proceedings, pp. 48-49).

Thereafter, the Bar introduced court documents relative to four court actions. (R., Report of Referee, 30). The first was a hand written small claims action for account stated by All Languages by Mentani, Inc. against Michael V. Laurato, Esq. for "his law firm Austin & Laurato." (T., 3/16/2010 Transcript of Proceedings, p. 127; Florida Bar, Exhibit 4). As to this cause of action, the Bar also introduced an "assignment of the cause of action" executed by the claimant, which unequivocally established the cause of action was an action to "collect on an invoice" for account stated, as

opposed to breach of contract. (Florida Bar Exhibit 5). The Bar introduced the judicial ratification of the parties' stipulation and assignment as to this claim. (Florida Bar Exhibit 6).

The Bar next introduced county court documents related to the case of Acsys, Inc. v. Michael Laurato d/b/a Law office of Michael Laurato (a non-existent entity). (T., 3/16/2010 Transcript of Proceedings, p. 127; Florida Bar Exhibit 3). The face of the complaint alleges three counts: 1) Open account; 2) Account Stated; 3) Services Rendered. (Florida Bar Exhibit 7).

Next, the Bar introduced a hand written small claims action where Arrow Imaging Solutions, Inc., sued defendant "Austin & Laurato" to collect monies owed, again in the nature of account stated or open account. (Florida Bar Exhibit 10). Finally, the Bar introduced county court documents in the case of Michael V. Laurato v. ZOM Residential Services, where the respondent actually was the plaintiff and the defendant countersued in response to the respondent's suit. (Florida Bar Exhibit 11).

It was upon this record that the referee recommended that the respondent be found guilty of violating *Rule 4-8.4(c)* and *Rule 4-8.4(d).*

ISSUES ON REVIEW

1. Whether the referee's recommendation of guilt for violation of *Rule 4-8.4(d)* as to Count II had any basis in the record or was clearly erroneous, where the express language of *Rule 4-8.4(d)* requires that misconduct be *in connection with the practice of law* and when the record unequivocally established that any alleged misconduct was not in connection with the practice of law.

2. Whether the referee's findings of fact supporting his recommendation of guilt for violation of *Rule 4-8.4(c)* to wit: that "*Specifically, with regard to the question posed at deposition as to whether or not respondent had ever been sued for breach of contract, I find Respondent's statement to be unresponsive and puffery*," had any basis in the record or was clearly erroneous, when the relevant deposition transcript unequivocally demonstrated that respondent was never posed, at any point, during the NAFFCO deposition, the question as to whether or not respondent had ever been sued for breach of contract.

3. Whether the referee's findings of facts supporting his recommendation of guilt as *Rule 4-8.4(c),* to wit: that *"At the time [of the NAFFCO deposition], however, respondent had in fact been sued more than once for breach of contract[;] Respondent does not dispute that he denied*

ever having been sued in contract," had any basis in the record or was clearly erroneous, when the court documents received into evidence in the record unequivocally established that the "respondent" had not, in fact, been "sued more than once "for breach of contract" and where the record revealed that the responded specifically denied, without any countervailing evidence in the record, ever being sued more than once for breach of contract.

4. Whether the referee's findings of fact and recommendation of guilt as to Count II, to wit: that *"The evidence at trial established that Respondent's misconduct in this case was knowing and deliberate,"* had any basis in the record or was clearly erroneous, where the undisputed contextual testimony established that the point of the respondent's deposition was to convey the notion that he had never been involved in any construction disputes of the NAFFCO nature previously and a plain reading of the deposition transcript reveals that even defense counsel understood the context of the testimony to be in the context of "renovating properties."

5. Assuming the referee's recommendation of guilt is upheld, whether the referee's recommended discipline of a public reprimand has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions, when the alleged misconduct is a purely private, causes no actual or potential injury to any person, does not reflect adversely on the

lawyer's fitness to practice law, does not involve the practice of law, the Bar has engaged in an unreasonable delay of four hundred and fifty days between the finding of probable cause and the filing of complaint, one Count of which results in an acquittal, prior to any finding of probable cause the Bar disclosed the complaint against the respondent in order to gain an advantage in another proceeding which operated as the functional equivalent of a extra-judicial public reprimand, and where the record demonstrated that the complaint was initiated for an improper purpose.

6. Assuming the referee's recommendation of guilt is upheld, whether the referee abused his discretion when he taxed costs not sought by the Bar, costs that were not authenticated in any manner, and by failing to require the Bar to delineate and authenticate the costs so that the respondent could meaningfully seek to have the referee exercise his discretion not to tax certain costs, particularly those associated with the process server allegations, which resulted in the vast majority of the costs and for which the respondent was, ultimately, acquitted.

SUMMARY OF ARGUMENT

Rule 4-8.4(d) specifically requires that any misconduct be *in connection with the practice of law*. The express language of *Rule 4-8.4(d)* "applies only when a lawyer engages in misconduct while employed in a legal capacity." The referee's recommendation of guilt as to Count II for a violation of *Rule 4-8.4(d)* cannot be sustained, because it is clearly erroneous and the record unequivocally demonstrates that respondent was not employed in a legal capacity at the time of the alleged misconduct in Count II. The referee's recommendation of guilt as to *Rule 4-8.4(d)* is both clearly erroneous and lacked any evidence supporting evidence in the record.

Rule 4-8.4(c) requires record evidence of a knowing and deliberate false statement. The referee's finding of fact is based, in large measure--as it must--, on the clearly erroneous conclusion that the a specific question was posed to the respondent as to whether or not he had been sued for breach of contract. This finding is clearly contradicted by the record and, specifically, the NAFFCO deposition transcript. A plain reading of the 136 pages of the NAFFCO deposition transcript unequivocally demonstrates that respondent was *never* posed any question about whether or not he has ever been sued, much less, for breach of contract. Thus, the referee's finding of fact

necessary to support a knowing and deliberate falsehood is clearly erroneous and lacking in record evidence.

In addition, the record unequivocally established the context under which all parties, including NAFFCO's counsel, were operating under. The live testimony established that the clear import of the respondent's deposition statements and the proper context of those statements. The undisputed record evidence established that it would be "unthinkable" that the respondent's deposition statements were to be taken in a strictly literal way to intend that he had never been sued. The record further unequivocally established from a plain reading of the NAFFCO deposition transcript that even NAFFCO's counsel understood respondent's challenged deposition statements to be in the context of suits involving "renovating property," not any lawsuit. Thus, the referee's findings of fact, as to the context of the deposition statements, were without any record support and were clearly erroneous.

The referee then corroborates his finding of intent by concluding that the NAFFCO deposition contained "few direct answers and most answers were contradictory even within the same answer." However, this finding is not sustainable, as a matter of record. A review of the 136 page NAFFCO deposition contradicts this finding explicitly; most of the answers are direct

and there are very few contradictory answers, much less, within the same answer. While the record reveals some informality or contentiousness on some of the questions and answers, the record demonstrates that the referee's remarks in this regard are gratuitous, in that they have no bearing on the relevant deposition discourse or a determination of the proper context of the relevant deposition testimony and, in fact, negate, as a matter of record, the intent necessary to establish a rule violation.

Insofar as the referee based his recommendations of guilt on the respondent's testimony during some other time other than at the NAFFCO deposition, this was not supported by the record and clearly erroneous, because the complaint charged the respondent only with false statements during the NAFFCO deposition, not during the Bar proceeding.

Finally, even taking the respondent's statements out of context and giving them their literal meaning, the statements were technically true, as a matter of record. The record failed to contain any evidence that the respondent had ever been sued more than once for breach of contract and any finding to the contrary is clearly erroneous and lacking in record support. The record unequivocally revealed that the respondent denied any knowledge of ever being sued for breach of contract prior to the NAFFCO deposition. A literal interpretation of the court documents unequivocally

demonstrated the following: a small claims suit for open account (a cause of action distinct from breach of contract) against Austin & Laurato (an entity distinct from respondent); a small claims suit for account stated (a cause of action distinct from a breach of contract) alleging Michael Laurato "for his firm Austin & Laurato" (an entity distinct from the respondent); a county court claim for account stated, open account, and services rendered (all causes of action distinct from breach of contract) against Michael Laurato d/b/a The Law Office of Michael Laurato (a non-existent entity); and, a county court action where the respondent was the plaintiff and sued for his landlord breach of contract, who then countersued (a distinct legal concept from initiating a suit).

If the Bar is insistent on literal construction, then literally speaking, actions for open account and account stated are not actions for breach of contract and a counterclaim is not the equivalent of an initiating complaint. In addition, literally speaking, the respondent was not technically sued for breach of contract, but distinct legal entities (and one non-existent one) were. The record unequivocally reveals suits against several entities involving open account, account stated, and services rendered. In the landlord tenant action, the respondent, literally, sued his landlord, who countersued--a legally distinct concept. The record is completely devoid of

any evidence indicating that the respondent (in his *propia persona*) was ever "sued more than once" for breach of contract. Thus, the referee's finding that the respondent was, in fact, sued more than once for breach of contract is lacking in record evidence and contradicted by the record.

On the matter of discipline, no discipline is warranted, because, for the reasons stated above, the record was devoid of any competent substantial evidence of misconduct. Alternatively, no discipline is warranted, given that the Florida Bar has already effected upon the respondent the functional equivalent of a public reprimand, even for conduct for which no probable cause was found or for which the respondent was acquitted. The Bar's unreasonable delay of four hundred and fifty five days compounded the effect of the Bar's improper conduct. The respondent has no prior history of discipline and the conduct was purely private. No actual or potential harm resulted to any party and the respondent was not engaged in the practice of law and the complaint was improperly motivated in the first instance. The Bar's recommendation of a 60 day suspension is not supported by the case law or lawyer standards and is based on the misapprehension that respondent's conduct was *in connection with the practice of law*, which it was not. Even if the referee's findings are upheld, no discipline is warranted.

On the matter of costs, the record is completely devoid of any evidence establishing the Bar's costs as necessary, not excessive, or properly authenticated. The Bar completely failed, once the costs were properly challenged, to provide any authentication, proof of necessity, or proof of reasonableness. The record is completely devoid of any invoice or proof of payment from any reporting firm for transcription of any deposition or hearing. The record is, likewise, completely devoid, of any mileage log or parking receipts to justify travel expenses claim. There is no sworn testimony, in affidavit form or otherwise, from the Bar attesting to the costs either the reasonableness or necessity of the costs.

It is an abuse of discretion to tax costs against a party where, once challenged, the record is completely devoid of any evidence of authentication, necessity, or reasonableness. It is further an abuse of discretion to award costs based on a "block" aggregated costs statement, because there is no meaningful way for a respondent to challenge "block" billed costs so that the referee can exercise his rule-based discretion to disallow certain costs as unnecessary, excessive, or unauthenticated.

ARGUMENT

A.

Conduct was Not In Connection with the Practice of Law; *Rule 4-8.4(d)* Violation Cannot be Sustained.

Rule 4-8.4(d), Rules Regulating the Florida Bar expressly provides that a lawyer shall not engage in conduct *in connection with the practice of law* that is prejudicial to the administration of justice. This emphasized language was added by this Court in 1994 in recognition of the principle that *Rule 4-8.4(d)* "must be limited in its application to situations involving the practice of law." *In re: Amendments to Rules Regulating the Florida Bar, 624 So.2d 720 (Fla. 1993).* Consistent with this amendatory language, this Court has subsequently refused to extend the reach of *Rule 4-8.4(d)* to all lawyer conduct, specifically holding that the Rule applies "only when a lawyer engages in misconduct while employed in a legal capacity." *The Florida Bar v. Brake, 767 So.2d 1163, 1168 (Fla. 2000).*

The record was completely devoid of any evidence that Laurato was employed in a legal capacity during any of the allegations surrounding Count II of the complaint. In fact, the record contradicted this conclusion and established that Laurato was the client, who had employed legal counsel to represent him as a defendant in a civil action. (T., 3/16/2010 Transcript of

Proceedings, p. 47). Accordingly, the referee erred in finding that Laurato violated *Rule 4-8.4(d)*.

B.

Record Lacked any Evidence of a Deliberate and Knowing False Statement; The Referee's Findings As to the Question Posed Were Clearly Erroneous; The Circumstantial Evidence Relied Upon by the Referee was Legally Insufficient; Even Out of Context, The Respondent's Statements Were Literally True; A Rule 4-8.4(c) Cannot be Sustained.

1.

Standard for Rule 4-8.4(c) Violation

It is well established that to sustain a referee's finding "that an attorney acted with dishonesty, misrepresentation, deceit, or fraud," there must be competent substantial evidence to show the necessary element of intent. *Florida Bar v. Lanford, 691 So.2d 480, 481 (Fla. 1992).* A Rule 4-8.4(c) violation can only occur when the attorney knows that he or she is making a false statement. Specifically, this Court has explained that intent is established if the attorney's conduct was "deliberate and *knowing*." *The Florida Bar v. Barley, 831 So.2d 163, 169 (Fla. 2002)(emphasis added).* On the matter of intent, it is not enough for the referee to find that a particular respondent's version of events is unworthy of belief, or the testimony of another witness more credible or logical. *Inquiry Concerning A Judge, Davey 645 So.2d 398 (Fla. 1994).* There must be substantial

competent evidence in the record showing more than an inaccurate or false statement; there must be an affirmative showing that the respondent made a statement he or she did not believe to be true. *Id.* Otherwise, every respondent who unsuccessfully defends against any charge would be open to a charge of dishonesty. *Id.*

Intent, for purposes of *Rule 4-8.4(c)*, is required to be shown *at the time* the alleged misconduct occurred. *The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).* It is improper, and a referee's finding of intent will not be sustained, based on any finding of intent in subsequent conduct. *Id, at 443.*

Moreover, if a referee's findings on intent are based upon circumstantial evidence, the evidence "must be inconsistent with any reasonable hypothesis of innocence" in order to be sustained. *Id.* In the context of a *Rule 4-8.4(c)* violation, a referee's reliance on circumstantial evidence of intent is not supported by competent substantial evidence in the record, where there is direct testimony that constitutes a reasonable hypothesis of innocence. *Id.*

2.

<u>The Record is Lacking In Any Evidence Supporting Intent; The Relevant Deposition Testimony Reveals the Appropriate Context and that All Parties Understood the Proper Context of the Answer</u>

Review of the record reveals that there is no competent substantial evidence to support the referee's findings of fact and recommendations of guilt at to the *Rule 4-8.4(c)* violation. Indeed, the referee's findings of fact and recommendations of guilt are either not present in the record or specifically contradicted by the record.

The only evidence of contextual intent of the one sentence, stripped from its context, was from Howard Levine and the respondent. Mr. Levine was present and heard the testimony. (T., 3/16/2010 Transcript of Proceedings, p. 89). The respondent, of course, provided the only other testimony of the intent and context of the deposition statement. (T., 3/16/2010 Transcript of Proceedings, pp. 121-129). Although the Bar listed NAFFCO's defense counsel and the court reporter as contextual witnesses in its interrogatory answers, the Bar failed to call any of these witnesses to rebut the direct testimony of either Mr. Levine or the respondent. (T., 3/16/2010 Transcript of Proceedings, p. 3; R., Complainant's Notice of Serving Responses to Interrogatories, 8). The Bar offered no conflicting or contrary evidence which arguably presented a different view of the events during the deposition and there was none in the record. (T., 3/16/2010 Transcript of Proceedings, p. 3).

On this point, the record was clear. Mr. Levine unequivocally testified, without any countervailing evidence, that the respondent was speaking metaphorically during the relevant portion of the NAFFCO deposition and that, for those present, it would be "unthinkable" that the respondent was attempting to convey that he had never been sued or for anyone present to literally interpret his statements in that manner. (T., 3/16/2010 Transcript of Proceedings, pp. 89-92).

And, in fact, the deposition transcript reveals exactly that--with the respondent referring to the litigation in colloquial and metaphorical terms such as a "stick up in an alley." (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, p. 104-107). Literally speaking, the respondent was not robbed in an alley, but was attempting, unequivocally to express his displeasure with the motivations for the suit in a figurative manner. Mr. Levine established that it was in this figurative context that the respondent's statements had to be judged. (T., 3/16/2010 Transcript of Proceedings, pp. 89-92). As Mr. Levine put it, for those present at the deposition, the "spirit" of the respondent's comments, during that portion of the deposition, was "evident" and the respondent was speaking "figuratively." (T., 3/16/2010 Transcript of Proceedings, pp. 89-92). Again, the Bar offered no conflicting evidence on this point.

Similarly, the respondent testified unequivocally, on multiple occasions, that the "context of the entire [deposition] discussion" was clearly not in the nature of not having ever been sued, but not having ever been involved in any disputes over construction issues. (T., 3/16/2010 Transcript of Proceedings, pp. 121-127). Indeed, within in this discussion, the deposition reveals that NAFFCO's counsel even commented on this context during a follow-up question: "I think you testified earlier *that you've had a lot of experience with renovating properties* where people have run late on their promises." (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, p. 107). Thus, the face of the deposition reveals that NAFFCO's counsel understood the context of the comments, by its very question, to be referring to prior testimony regarding construction disputes regarding renovating property. (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, p. 107). The record provides complete support for respondent's explanation that the one sentence, removed from a multiple sentence answer, during the course of a multiple page discourse was taken out of context during the Bar proceeding.

The referee was not permitted to ignore the only testimony in the record as to the proper context of the respondent's statements. Moreover, the referee's findings of fact are clearly erroneous and contradicted by the

record. To support his finding that the respondent was intentionally dishonest, the referee asserts that, during the deposition, the respondent was specifically posed a question as to whether or not he has been sued for breach of contract and that the respondent's response was that he had never been sued for breach of contract was false. (R. Report of Referee, 30). The referee's finding on this point is simply not present anywhere in the record. Review of the entire 136 page deposition in the NAFFCO matter reveals that the respondent was never posed that question or, even one, remotely similar. (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, pp. 1-136). In fact, during the relevant portion of the deposition, NAFFCO's counsel, never asks any clarifying question, such as, "Are you saying you have never been sued for anytime for breach of contract?" (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, p. 104-107). While perhaps not to the referee judging the context of the question-and-answer session from the cold deposition pages years later, the record unequivocally established that to all parties present at the deposition the proper context of the statement was "evident." (T., 3/16/2010 Transcript of Proceedings, pp. 89-92). The referee simply had *no* contradictory evidence in the record, much less substantial competent evidence, upon which he based his conclusion that the proper context of the respondent's statements were

anything other than what Mr. Levine and the respondent said they were, as reasonably corroborated by the text of the deposition transcript itself.

In determining to discount the direct testimony of context by Mr. Levine, the respondent, and on the face of the deposition, the referee emphasizes the tone and tenor of "most" of the respondent's answers in the NAFFCO deposition. (R., Report of Referee, 30). The referee's conclusion that there are "few" direct answers is contradicted by the 136 page NAFFCO deposition, where, many answers are, in fact, direct. (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, pp. 1-136). While mistakenly indicating that the respondent was directly posed the question as to whether he had ever been sued for breach of contract during the NAFFCO deposition, the referee indicates that the respondent's response was "puffery." (R., Report of Referee, 30). However, the record reveals that the relevant question, itself, was argumentative and sarcastic: "And it's your position that you're entitled to keep the shutters and get all your money back?" (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, p. 106).

In any event, deference to the trier of facts' observation of a witness' demeanor is not compelling, or binding upon this Court upon review, when a type-written page is being judged rather than live testimony. *The Florida*

Bar v. Marable, 645 So.2d 438 (Fla. 1994). In addition, when there is direct testimony that provides a reasonable explanation that is inconsistent with any circumstantial evidence of guilt, such as tone and tenor, the circumstantial evidence is legally insufficient to sustain the referee's finding of intent. *Id.*

In the purview of a deposition context, the referee was not free to insert a contextual background of his choosing, particularly when that contextual background is unsupported by the record. The record established that the literal context urged by the Bar, was "unthinkable" for those present at the deposition. (T., 3/16/2010 Transcript of Proceedings, p. 91). In fact, the record established that NAFFCO's lawyers had prior knowledge of all the suits offered into evidence by the Bar and "alluded to how much fun" they were going to have with that information at respondent's deposition, (T., 3/16/2010 Transcript of Proceedings, p. 85). It is truly unthinkable that an adversarial lawyer, who, first, expressed the outspoken desire to "have fun" with the respondent about prior lawsuits during a deposition, and, then, when lawsuits are mentioned at that very deposition, fails to ask any questions about those suits, but instead returned the discussion to prior testimony in the deposition about the respondent's activities "renovating property." (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael

Laurato, p. 106-107). The only conclusion to be drawn from this record--and the record lacks any evidence for another conclusion--was that respondent's litigation history was "clearly not the context of this entire discussion," at that point of the deposition. (T., 03/26/2010 Transcript of Proceedings, p. 126).

Where the proffered context of a party's statement is reasonably apparent from other portions of the testimony, there is no competent substantial evidence of intent sufficient to establish a dishonesty violation. This Court, in *In Re Frank, 753 So.2d 1128 (Fla. 2000)* addressed a similar factual scenario and rejected a dishonesty finding. Although this Court was required to apply a different rule-based standard[2] than the stricter *Rule 4-8.4(c)* standard for intentional dishonesty, this Court was called upon to judge the context of Judge Frank's statements, under oath, ostensibly asserting that, "I will tell you, I have studiously stayed away from Stacy's [his daughter's] divorce litigation." *Id.* Like the referee here, the Commission there, concluded that, as a matter of fact, Judge Frank had not literally "stayed away" from the divorce litigation, based on multiple contradictory facts, such as loaning his daughter funds to retain counsel in

[2] *In re Frank* required this Court to review certain statements under a "misleading" standard. In contrast, Rule 4-8.4(c) permits discipline to be imposed only for conduct that is intentionally dishonest, fraudulent, deceitful, or involves a knowing misrepresentation.

the divorce litigation, consulting another appellate judge about retention of that counsel, and conduct the Commission described as "intense[] and interested" parental involvement in his daughter's "hotly contested" divorce litigation. *Id.*

This Court reversed the Commission's finding that Judge Frank had violated the Canons of Judicial Conduct when his statement was considered in the total context of his testimony. *Id.* When viewed against the greater context of the entire line of questioning, this Court held that the fact that his response (i.e., "I will tell, I have studiously stayed away from Stacey's divorce litigation) could be reasonably interpreted in proper context to indicate that Judge Frank had not studied particular issues *of the case* (as opposed to the entire case) and that he could not discuss the substance of those issues, precluded the Commission from concluding Judge Frank was guilty of misrepresentation. *Id.*

If the comments in *Frank* were reasonably susceptible to an alternative interpretation that precluded a finding of guilt under a similar rule, the conversational and informal comments, here, *a fortiori*, are susceptible to reasonable interpretation that are limited by the context of construction and renovation issues prevalent throughout the deposition. (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, pp. 1-

136). While the evidence may show that the respondent uttered certain words, the evidence unequivocally indicated, both on the face of the deposition, and from the testimony of the people present, that the construction dispute context was not only a reasonable alternative, but both the "clear" and "evident" context. (T., 3/16/2010 Transcript of Proceedings, pp. 89-92). The referee's findings are further contradicted by the record and unsupported by application of the case law, given that the deposition transcript fails to demonstrate any question posed to the respondent regarding whether he has ever been sued before. (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, pp. 1-136). The fact that the respondent was never asked a direct question such as "have you ever been sued before" precludes a finding of guilt, in and of itself.

The respondent was unable to find any prior case authority where a referee's guilt determination in a factually analogous situation has been upheld (i.e., a lawyer's private words being taken from a larger context and applied strictly against him to prove dishonesty). The two most analogous cases are *In Re Frank, 753 So.2d 1128 (Fla. 2000)* and *The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994)*. In both, the referee's recommendation of guilt was rejected, despite the presence of facts demonstrating the ostensive falsity of the statements. In *Frank*, the referee's recommendation

of guilt was rejected based solely on Judge Frank's assertion that there was a misunderstanding as to what he was referring to when he testified that "he studiously stayed away from" his daughter's divorce case; what Judge Frank said he meant to say, and when taken in the context of the discussion, was that he stayed away from study of the finer points of law in the case and that he was prohibited from speaking about them. *In Re Frank, 753 So.2d 1128 (Fla. 2000)*

The *Marable* referee's recommendation was rejected on Marable's simple explanation that he was "kidding," after he was secretly recorded by an undercover officer, in a solicitation of burglary sting, saying "Get her address, you can break in and steal them." *The Florida Bar v. Marable, 645 So.2d 438 (Fla. 1994).* The referee's suggestion that Marable's "tone" of voice on the tape was inconsistent with "kidding," was likewise rejected, because "kidding" can be accomplished in a "deadpan" fashion. *Id.* It is suggested that the results in those two cases are binding on the court in this one and that referee's recommendation of guilt cannot stand.

3.

Regardless of Intent, Statement Was Literally True, Even Taken From Its Context; The Record Lacked Any Evidence that The Respondent (*in propia persona*) Had Been Sue More than Once for Breach of Contract

The Bar attempted to demonstrate, and the referee ultimately concluded, that Respondent's statements were false, because either the respondent, in his capacity as an officer of his firm, or his law firm has been sued previously, for any matter. (R., Report of Referee, 30; I.Br., p. 1). While the respondent, in his capacity as an officer of the firm, or his law firm, may have, in fact, been sued previously, the record is devoid of any substantial competent evidence indicating that the respondent, in his *propia persona*, has been sued more than once for *breach of contract.* If the Bar is seeking to hold a deponent in a civil case to strict literalism in its interpretation of deposition testimony, the same strictly literalist approach is equally applicable to the Bar's evidence.

First, it is settled that, under the law, an "open account" is a separate and distinct cause of action from an action on a "contract." An obligation does not become an "open account" simply because the amount due under a contract requires calculation. *H&H Design Builders, Inc. v. Travelers' Indemnity Company, 639 So.2d 69, 700 (Fla. 5th DCA 1994).* Likewise, an action for "open account" does not include express contracts or other obligations that have been reduced to writing. *Id.* Open account is an "unsettled debt arising from items of work and labor, with the expectation of further transactions subject to future settlements and adjustment." *Farley v.*

Chase Bank, U.S.A, N.A, 37 So.3d 936 (Fla. 4th DCA 2010). In order to state a valid cause of action for open account, the claimant must attach an "itemized" copy of the account. *Id.*

Likewise, actions for "account stated" and "open account" are two distinct causes of action requiring different burdens of proof. *S. Motor Co. of Dade County v. Accountable Constr. Co., 707 So.2d 909, 912 (Fla. 3d DCA 1998).* Like "open account," an action for "account stated" is a distinct and separate cause of action from one on the contract and is not based on the various items making up the account, such as written instruments or oral agreements. *Whittingham v. Stanton, 58 So.2d 489 (Fla. 1912).* Consequently, it is unnecessary to even plead the original cause of indebtedness, such as a contract, in an action for "account stated." *Id.* In an action for "account stated," the plaintiff need not rely upon the original contract. *Id.*

In addition, Florida law distinguishes the concepts of a "complaint," which is required to initiate a civil action, and a "counterclaim," which is, by its very definition, dependant upon the prior existence of a complaint. *Rule 1.040, Florida Rules of Civil Procedure* provides that "[t]here shall be one form of action to be known as a civil action." *Rule 1.050, Florida Rules of Civil Procedure* provides that "[e]very action of a civil nature shall be

deemed commenced when the complaint...is filed." *Rule 1.170, Florida Rules of Civil Procedure* permits a counterclaim "provided it arises out of the transaction or occurrence that is the subject matter of the opposing party's" complaint. Thus, the Rules of Civil Procedure do not appropriately recognize a counterclaim as an initiating pleading for breach of contract and distinguish a counterclaim from the initiating complaint required to initiate a suit against someone.

As for legal entities, Florida law specifically recognizes that partnerships, corporations, professional associations, and persons doing business as (d/b/a) a fictitious name are distinct legal entities, which can sue or be sued in their own right. It goes without saying that, as a matter of statutory fact, these recognized legal entities are distinct legal entities from the people who operate them. *See, e.g., Molenda v. Hoeschst Celanese Corp., 60 F.Supp.2d 1294 (S.D. Fla. 1999)(noting that concept of "separateness" is a basic part of the corporate form).*

Against these legal standards, there was a complete lack of record evidence supporting the referee's finding that the respondent, as opposed to legal entities of which he may have been a member, had, in fact, been sued more than once for breach of contract. as opposed to some other cause of action.

The documents offered into evidence by the Bar on the All Languages by Mentani, Inc. vs. Michael Laurato demonstrate on their face that this is a cause of action for collection of an invoice or open account for an unsettled debt of the firm "Austin & Laurato." (Florida Bar Exhibit 4). The assignment of the debt attached to the Bar's exhibit clearly indicated that All Languages brought suit to collect on an unpaid "invoice." (Florida Bar Exhibit 5). This suit does not constitute a suit for breach of contract and there is no competent substantial evidence to indicate that this was a suit for the respondent's personal breach of contract, as opposed to one by his firm, Austin & Laurato. (Florida Bar Exhibit 4). Indeed, the face of the hand written statement of claim expressly indicates that the action is seeking relief from the respondent's firm, "Austin & Laurato." (Florida Bar Exhibit 4).

The second civil action relied upon by the Bar and the referee is Acsys, Inc. v. Michael Laurato d/b/a The Law Office of Michael Laurato. (Florida Bar Exhibit 7). From its face, this complaint states causes of action for open account, account stated, and services rendered--there is no allegation whatsoever for breach of contract. (Florida Bar Exhibit 7). In addition, The Law Office of Michael Laurato is a non-existent legal entity and cannot accurately be said to be the respondent, in *propia persona*. The record also does not establish that this is a suit for "breach of contract"

against the respondent. (Florida Bar Exhibit 7). In fact, the suit is expressly *not* based on breach of contract. (Florida Bar Exhibit 7).

The third civil action relied upon by the Bar and the referee is Arrow Imaging Solutions, Inc. v. Austin & Laurato. (Florida Bar Exhibit 10). Like the other two, this is clearly not an action for breach of contract and can only be interpreted as an action for account stated or open account. (Florida Bar Exhibit 10). The record is likewise clear that Austin & Laurato, the named defendant in the action, is a distinct legal entity from the respondent. (Florida Bar Exhibit 10). The record does not establish that this is a suit for breach of contract against the respondent; rather, the record clearly establishes that this is a suit for open account against Austin & Laurato. (Florida Bar Exhibit 10).

The fourth and final suit relied upon by the Bar and the referee is Michael Vincent Laurato v. Zom Residential. (Florida Bar Exhibit 11). The record unequivocally establishes that the respondent initiated the suit by filing a complaint for breach of contract and the defendant, ZOM, counterclaimed in the nature of set-off for the amounts claimed by the plaintiff. (Florida Bar Exhibit 11). First, the record establishes that the respondent was the one who sued for breach of contract, not vice-versa. (Florida Bar Exhibit 11). It cannot reasonably be said on this record that the

defendant sued the respondent for breach of contract, when the record clearly reflects that its was the respondent who, first, sued Zom, who then, at very best, "countersued" the respondent. (Florida Bar Exhibit 11). It is inapposite for the Bar to assert that a suit brought by the respondent constitutes a suit against him. (Florida Bar Exhibit 11).

Even out of context, the referee's finding that the respondent had been sued more than once for breach of contract was not only unsupported by the record, but was contradicted by a literal reading of it. At best, and upon literal interpretation, the record demonstrates that distinct legal entities were sued for matters other than breach of contract and the respondent brought a suit for breach of contract.

4.

Finding of rhetoric contradicts intent element and indicates an intent not to be taken seriously; A lawyer, as a private citizen, engaged in a purely private controversy, unconnected with the practice of law, has a First Amendment Right to use rhetorical hyperbole, to express his personal distaste; the referee improperly used protected speech as evidence of wrongful intent.

A lawyer--simply because he or she is a lawyer--does not check First Amendment rights at the door to admission to The Florida Bar. *See, e.g., Gibson v. The Florida Bar, 798 F.2d 1564 (11th Cir. 1986); Lathrop v. Donohue, 367U.S. 820 (1961).* This is particularly the case, when the lawyer is engaged in purely private conduct, unconnected with the practice

of law. At the heart of the First Amendment is the recognition that the "freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc. 466 U.S. 485, 503-504, (S. Ct. 1984).* Rhetorical hyperbole, verbal abuse, name calling, ridicule, jest, satirical statements and parody are all acceptable forms of protected forms of First Amendment expression by a private citizen, acting in a private capacity, even one who is professionally licensed as a lawyer. As the Supreme Court has noted in the First Amendment context, protected speech in various public disputes very often takes the form of "rhetorical hyperbole" used to convey a "vigorous epithet" by a protestor who considers his adversary's position "extremely unreasonable." *Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990).*

This is particularly the case when the subject of the criticism is said to have "placed himself" in the "controversy or combat," because, in such circumstances, the emergence of rhetorical hyperbole is most likely. *See, Ollman v. Evan, 750 F.2d 970, 1002 (D.C.Cir. 1984)(concurring opinion of Judge Bork).* In judging the intent of statements such as those attributed to the respondent in the NAFFCO deposition, "one of the most important considerations is whether the person alleging [the false statement] has in

some real sense placed himself in an arena where he should expect to be jostled and bumped[--][t]he individual who deliberately enters that arena must expect that the debate will sometimes be rough and personal." *Id. at 1002.* The First Amendment demands a "hide that is tough." *Id. at 1005.* It is well-settled that the First Amendment protects "vehement, caustic, and sometimes unpleasantly sharp attacks." *Id.*

In the realm of a highly-charged dispute, a statement that would appear in isolation to be fact has been held to be protected speech when viewed in "totality in the context in which it was uttered or published." *Information Control Corp. v. Genesis One Computer Corp., 611 F.2d 781, 784 (9th Cir. 1980).* When rhetorical hyperbole, nonsense, or even name calling is at issue, courts have endorsed a more broad "consideration of the totality of the circumstances in which the statement occurs and which determine both its meaning and the extent to which making it actionable [because of its falsity] would burden freedom of speech." *Owens, at 997.* In considering the entire context, the recipient audience is one important factor to be considered. *Information Control Corp, at 784.* When considered in proper context, some statements are so obviously figurative or nonsensical that no sensible person would take them seriously. *Ford v. Rowland, 562 So.2d 731 (Fla. 5th DCA 1990).*

The record below revealed this complaint stemmed from the highly-charged atmosphere of a contentious civil suit, where the plaintiff's counsel made it a point, from the outset to use the civil litigation, at each phase, as a mechanism to bring both personal and professional disgrace to the respondent. Mr. Levine, counsel for the respondent in the civil case below, testified, without contradiction, that the "first letter" from opposing counsel in the civil litigation contained a "threat of a Bar complaint." (T., 3/16/2010 Transcript of Proceedings, p. 80). The threats of a Bar complaint continued throughout the litigation. (T., 3/16/2010 Transcript of Proceedings, p. 118). The record revealed that the defense strategy from the outset of the civil litigation was not aimed primarily at collecting the minor balance allegedly owed, but to "have a field day with" a "fancy attorney [respondent]." (T., 3/16/2010 Transcript of Proceedings, pp. 89-92). The record established that NAFFCO's counsel peppered the respondent's counsel with emails referencing "Napoleon and the War of 1812." (T., 3/16/2010 Transcript of Proceedings, p. 83). Court hearings, according to the record below, during the NAFFCO case, rarely addressed the substantive legal issues, because NAFFCO's counsel chose, instead, to use the hearings as "rant" sessions to the Circuit Court judge, in front of whom the respondent practiced, about how it is unacceptable for "anybody who is an attorney making a lot of

money" to defend a $3,500 claim. (T., 3/16/2010 Transcript of Proceedings, p. 85). Counsel regularly made comments about not being able to wait to "get [his] hands on [respondent's] Bentley" or "home." (T., 3/16/2010 Transcript of Proceedings, p. 84). The plaintiff's theory of the NAFFCO case was respondent was "a prominent attorney," and because he was an "attorney" it was "unprofessional and unethical" to contest a bill. (T., 3/16/2010 Transcript of Proceedings, p. 118). The only adequate description of the tactics during the litigation and during the applicable deposition, was as a complete "ad hominem approach to the litigation." (T., 3/16/2010 Transcript of Proceedings, p. 87). The record further established, without countervailing evidence, that the complainant invoked disciplinary rules as a procedural weapon in a civil dispute and, then, failed to present the matter to the trial court, who was in the best position to judge the deposition conduct. (T., 3/16/2010 Transcript of Proceedings, p. 80, 118). The Bar presented no evidence to contradict this undisputed testimony at the hearing.

Insofar as the referee, or the Bar (I.Br., p. 1), considered the respondent's perceived sarcasm, puffery, or flippancy during the deposition as evidence of a knowing and deliberate false statement, this is not permitted by the First Amendment as an appropriate basis to impose discipline against a lawyer acting in his private capacity. The record established that

NAFFCO's counsel's conduct had a chilling effect on respondent's choice of counsel and choice of defense (i.e., Mr. Levine believed he had meritorious defenses to the plaintiff's claim, but withdrew after the persistent and bombastic attacks of NAFFCO's counsel to include this complaint).

Simply, Bar proceedings and discipline based on the "sarcastic" or "flippant" manner in which the respondent voiced his displeasure to these tactics has an unacceptable chilling effect on First Amendment rights. The respondent was permitted to use sarcasm or other rhetorical devices as fair criticism of his adversary or an expression of distaste for his adversaries cause. This is particularly the case, given the overall context of the litigation and the deposition, itself, which while revealing sarcastic answers also reveals sarcastic questions, regarding his adversary's legal position in the case. (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, p. 106).

The record further reveals that any of the referee's "personality" issues during the deposition did not effect the orderly conduct of the deposition or otherwise interrupt the deposition so that it could not be concluded. (Florida Bar Exhibit 3; T. 10/16/2006 Deposition of Michael Laurato, pp. 1-136). The formal complaint filed in the matter did not seek discipline based on the sarcastic or evasive manner in which the respondent answered questions at

the deposition and, therefore, it is inappropriate for the referee to recommend guilt or impose discipline based on that uncharged conduct. (R., Complaint, 1).

In the final analysis of the record and irrespective of any First Amendment issues, the referee's inclusion of rhetorical speech devices as a basis for his recommendation of guilt as to Count II fundamentally undermines, as a matter of record, his finding as to intent. Rhetorical and figurative language devices, such as "sarcasm," are by definition, an inapposite characterization of something or someone in order to express dissatisfaction. A "sarcastic" remark often means the exact opposite of what is said and that is, generally, intended to mock, chide, or deride. In spoken words, "sarcasm" is oftentimes accompanied by a verbal tone in which it is obvious from the context that the speaker does not mean what he or she actually said. From the referee's reading of the deposition, it was clear to the referee that the respondent was not intending for his comments to be taken literally, but sarcastically. Thus, the referee's finding that the respondent acted intentionally is, in fact, contradicted by the both the record and the referee's finding of the use of rhetorical devices throughout the deposition by the respondent. Simply, the record does not refute all reasonable hypotheses of innocence.

C.

ASSUMING THE REFEREE'S RECOMMENDATIONS AS TO GUILT ARE AFFIRMED *IN TOTO*; NO DISCIPLINE IS APPROPRIATE UNDER THE CIRCUMSTANCES; THE BAR'S RECOMMENDATION OF A 60 DAY SUSPENSION IS NOT JUSTIFIED BY CASE AUTHORITY OR RULE, IN ANY EVENT

On the matter of discipline, the referee found that the respondent had a previously unblemished disciplinary record, provided many[3] hours of gratuitous services to the citizens of Florida, and has been held in high ethical and professional esteem as an accomplished and respected civil litigator among his peers, to include trial adversaries.[4] (R., Supplemental Report of Referee, 31). The referee recommended a public reprimand. (R., Supplemental Report of Referee, 31).

1.

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[3] Bar records introduced and received into evidence at the final hearing established that the respondent has been credited with, on average, of approximately 200 hours of yearly pro bono service for the three previous reporting years. (T., 05/24/2010 Sanctions Hearing Transcript, p. 24)

[4] Two of the respondent's adversaries testified during the sanctions portion of the proceedings. A Board Certified Civil Trial Lawyer, who has opposed the respondent in trial since 2000 testified to respondent's reputation for professionalism, ethics, and legal skill. The former president of the Hillsborough County Bar Association and member of its peer review committee also testified to respondent's reputation in the community, professionalism, and skill as an "excellent" lawyer. During the sanctions hearing, the respondent's curriculum vitae was admitted into evidence, listing his accomplishments.

No Discipline is Warranted Under the Circumstances; The Bar has already extra-judicially imposed punishment

Of course, if the referee's findings of fact and recommendation as to guilt are not sustained on review, no discipline is appropriate. However, even in the event the referee's recommendation is upheld, no discipline is warranted, under the circumstances, because this case presents a situation where the Bar has "inflicted" upon the respondent, although innocent of the most serious allegations brought by the Bar, the "agonizing ordeal" of having to live under a cloud of uncertainties, suspicions, and accusations for a period well in excess of that which the rules were designed to tolerate. *The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).* This Court has held that the responsibility for exercising diligence in prosecution of disciplinary proceedings against attorneys rests with the Bar, and when it fails in this regard, the penalizing incidents which an accused lawyer suffers from unjust delays might well supplant more formal judgments as a form of discipline, even though the record shows that the conduct of the lawyer merits discipline. *The Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970).*

The record reflects that this is just such an exceptional case, because the record reflects the Bar intentionally violated the confidentiality rules to gain an advantage in another matter and then delayed over four hundred days before filing a formal complaint. The end result of this conduct was

that the respondent was subjected to the extra-judicial, lengthy, public reprimand and for conduct that the referee, below, acquitted him of or for which, in other matters, no probable cause was found.

Rule 3-7.1(a)(1), Rules Regulating the Florida Bar provides that all pending investigation into disciplinary matters at the initial investigatory and grievance level shall be treated as confidential. Thus, when Bar counsel, on November 14, 2007 and prior to any determination of probable cause by the grievance committee, disclosed to the public the allegations which ultimately made up Count I of this matter in an attempt to impeach the respondent and gain an advantage over another lawyer, *Rule 3-7.1(a)(1)* was violated. Compounding this violation, the respondent was ultimately acquitted by the referee of allegations used to impeach the respondent by Bar Counsel during the deposition. (R., Report of Referee, 30).

Rule 3-7.4(l), Rules Regulating the Florida Bar provides that if a grievance committee finds probable cause, bar counsel assigned to the committee shall "promptly" prepare a formal complaint. This Court has instructed that the purpose of the "promptness" requirement of the Rule obviously relates to the fact that this Court alone can issue a public reprimand. *See, The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).* Internal time guidelines adopted by staff processing disciplinary

investigations have been in existence for a substantial number of years and those guidelines set 120 days for the filing of a formal complaint after a finding of probable cause. *Special Commission on Lawyer Regulation Report and Recommendation, 2006.* In 2006, the Bar's Special Commission on Lawyer Regulation proposed that the filing of a formal complaint be done "30 days after the finding of probable cause." *Id.* While there is little other authority on what constitutes "prompt" filing of the complaint after a filing of probable cause, reasonable minds could not differ that the four hundred and fifty five days that elapsed in this case from the finding of probable cause until the filing of the complaint is, at the very least, "antithetical to the spirit and intent" of Rule 3-7.4(l)'s promptness requirement. *The Florida Bar v. Rubin, 362 So.2d 12 (Fla. 1978).*

The Florida Standards For Imposing Lawyer Sanctions also have long recognized that "unreasonable delay in disciplinary proceedings" as an acceptable mitigation standard. *Standard 9.32(i), Florida Standards for Imposing Lawyer Sanctions (Factors Which May Be Considered in Mitigation).* A public reprimand is a form of public discipline which declares the conduct of the lawyer improper, but does not limit the lawyer's right to practice. *Standard 2.5, Florida Standards for Imposing Lawyer Sanctions.*

Under the facts of this case, the Bar's violation of the rules of confidentiality to disclose these allegations for impeachment, as well as other "no probable cause" allegations in unrelated matters, coupled with the 450 day delay, effectively supplanted the referee's July 2010 recommendation of a public reprimand and made it *nunc pro tunc* to November of 2007. During that period of time, the respondent, although acquitted of the allegations disclosed, has had to, nevertheless, live under the agonizing ordeal of suspicions and accusations from his colleagues and clients, who judged him guilty by the Bar's accusations in that November 2007 deposition. The November 2007 deposition was not only read by the respondent in that action, who previously held the respondent in high esteem and had asked him to be a character witness for him, but also by his counsel, the court reporter, videographer, and ultimately the referee in that proceeding.[5]

By its conduct, the Bar has effectively and unilaterally imposed upon the respondent a *de facto* punishment more severe than any discipline warranted by the case authority or lawyer sanction standards. And, the Bar imposed that discipline in furtherance of its own ends to obtain a guilty recommendation in another proceeding and on a count for which the referee

[5] The public Bar trial in the *Levine* proceeding was also widely followed and reported on by the local media.

in this case also acquitted the respondent. In the process, the Bar violated its own rules of confidentiality and the failure of the Bar to promptly file its formal complaint only exacerbated the effect of the unauthorized disclosure. It is respectfully submitted that no further discipline is warranted for this private conduct, unconnected with the practice of law, assuming the referee's recommendations are upheld after review.

Another reason that no discipline is warranted is based on the improper taint associated with the original complaint/inquiry. The record in this action unequivocally established that the complaint process below was initiated for purely private conduct, unconnected with the practice of law, by an adversary, who sought to use the Bar proceeding as a procedural weapon to gain an advantage in a civil matter. The undisputed evidence before the referee was the Bar grievance was a "set-up of sorts" to gain an advantage in a civil matter that was the exact "blueprint" for the Bar's charges against the respondent. (T., 03/16/2010 Transcript of Proceedings, p. 14).

In 2006, The Florida Bar's Special Commission on Lawyer Regulation issued a report and recommendation which addressed complaints prompted by civil litigants against lawyers, in there private capacity. *Special Commission on Lawyer Regulation Report and Recommendation, 2006.* The goals of the Commission were to increase the speed with which matters are

evaluated and the fairness of the lawyer discipline system. The Commission condemned the sort of complaint brought in this case:

> The Commission recognizes that some adversaries and individuals not in privity with a lawyer file complaints concerning the lawyers conduct with the intent to gain an advantage in the dispute. Using the disciplinary process in such a manner is *clearly improper and repugnant* to the concept of fairness. *Special Commission on Lawyer Regulation Report and Recommendation, 2006, p. 11. (Emphasis added).*

The Preamble to The Rules Regulating the Florida Bar further warns against permitting the misuse of the disciplinary proceedings for private gain:

> The rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the rules can be subverted when they are invoked by opposing parties as procedural weapons. *Preamble, Rules Regulating the Florida Bar.*

This Court has embraced these maxims. In *The Florida Bar v. Nesmith, 642 So.2d 1357, 1358 (Fla. 1994),* this Court determined that civil disputes unrelated to the practice of law "are best resolved by the courts than through a disciplinary proceeding." In *Moakley v. Smallwood, 826 So.2d 221 (Fla. 2002),* this court affirmed that, even in cases involving attorney conduct, trial courts are often in the best position to strike an "appropriate balance" between "condemning as unprofessional or unethical litigation tactics undertaken solely for bad faith purposes, while ensuring that

attorneys will not be deterred from pursuing lawful claims, issues, or defenses on behalf of their clients or from their obligation as an advocate to zealously assert the clients' interest." The record in this case demonstrates that NAFFCO's counsel's improper threats and ultimate complaint actually procured a result this Court has cautioned to avoid: the improper conduct resulted in respondent's counsel withdrawing from the representation, despite his belief in the existence of a meritorious defense. (T., 03/16/2010 Transcript of Proceedings, pp. 83-84).

At its core, this grievance was initiated by the complainant as a procedural weapon in a civil suit to add pressure to an attorney to pay a personal debt and forego meritorious defenses. The record below established this fact, without contradiction from any witness or document from the Bar. This Court has previously cautioned the Bar for allowing the grievance process to become a substitute for civil proceedings and civil remedies. *The Florida Bar v. Cook, 567 So.2d 1379 (Fla. 1990).* Disciplinary proceedings are not designed to redress private grievances. *The Florida Bar v. Della-Donna, 583 So.2d 307 (Fla. 1989).*

To impose discipline in this case, where the record contained un-contradicted evidence that the initial complaint was filed for a clearly improper purpose and where the record indicated that the Bar's formal

complaint was merely a "blueprint" of the improperly motivated complaint, is to skew and subvert the very purpose and nature of disciplinary proceedings.

Florida Bar Exhibit 2 and the Levine deposition demonstrates how the Bar became an arm of NAFFCO's counsel oppressive and improper tactics. Florida Bar Exhibit 2 is an excerpt of the deposition of Karina Jauregui Laurato, the respondent's wife, in the NAFFCO case. (Florida Bar Exhibit 2). The record unequivocally revealed that there was no legitimate purpose for conducting the deposition of respondent's wife in the NAFFCO case.[6] The respondent was not married to Ms. Jaurequi Laurato at the time of the NAFFCO contract or the shutter installation. (T. 03/16/2010 Transcript of Proceedings, p. 92). She had *no* knowledge of any matter relevant to the NAFFCO suit. (T. 03/16/2010 Transcript of Proceedings, p. 92). Yet, despite this lack of knowledge, NAFFCO's counsel brought her in for deposition to inquire strictly about personal matters, intimate to her person and her marriage, such as her health and the birth of her child, that could have no bearing whatsoever on a contract dispute. (Florida Bar Exhibit 2). The purpose of deposing the respondent's wife in the NAFFCO matter was

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[6] *Rule 1.310(d), Fla.R.Civ.P.* provides that a deposition is properly terminated when the examination is unduly annoying, embarrassing, or oppressive or where the examination is being conducted in bad faith.

to gain intimate personal details about respondent's personal life to continue the aims of making the civil suit an unnecessarily personal "field day." (T., 03/16/2010 Transcript of Proceedings, p. 82). Based on this improper NAFFCO deposition, the Bar then attempted to use these intimately private details of the marriage, between husband and wife and concerning their children, as proof of private misconduct against the respondent. (T., Transcript of Proceedings, pp. 53-56). The Bar actually called the respondent's wife as a witness against him as to the Count of which the respondent was acquitted. (T., Transcript of Proceedings, pp. 3, 53-56). Thus, the campaign of personal degradation sought by NAFFCO, in the civil suit, was furthered by the Bar, when it picked up NAFFCO's torch. Indeed, the Bar used name-calling in closing arguing that respondent was not worthy of belief, because, if believed, he would be the "biggest cad" for "abandoning" with his wife and children, as a father and husband. (T., Transcript of Proceedings, pp. 148-149).

It is respectfully suggested that neither the Bar, nor this Court can place its imprimatur on an improperly motivated complaint by imposing guilt or any discipline upon the attorney. Again, the disciplinary process, improperly motivated from the outset, has supplanted more formal pronouncements as a form of discipline, particularly in light of the fact that

respondent was acquitted of the core of the Bar's complaint. In addition, the referee's recommended discipline cannot stand, because it was based on the mistaken conclusion that the respondent's conduct was in connection with the practice of law. The conduct was not and the *Rule 4-8.4(d)* violation, which is associated with the imposition harsher discipline, is not supported by the record, case authority, or lawyer sanction standards.

2.

The 60 Day Suspension Sought by the Bar is Not Supported by Case Law or the Standards for Imposing Lawyer Sanctions

The Bar has petitioned seeking review of the referee's recommendation of public discipline. The Bar seeks a 60 day suspension. (I.Br., p. 8). The main approach taken by the Bar in its attempt to convince the Court that a 60 day suspension is warranted by the misconduct found by the referee is to relate the respondent's misconduct to that which was performed in connection with the practice of law, that resulted in violations of duties owed to clients, the legal system as an advocate, or other duties owed as professional to the court, a client, or adversary. Those issues, however, are not implicated in this proceeding, because the respondent's conduct was not in connection with the practice of law or his representing of a client. The misconduct, here, if taken as true, involves, at best, a minor failure to maintain personal integrity, unassociated with the practice of law

and during a contentious deposition, where the respondent was a defendant, who was represented by counsel. This Court has recognized that misconduct not connected with the practice of law is to be evaluated differently and may warrant less severe sanctions than misconduct committed in the course of the practice of law. *The Florida Bar v. Baker, 810 So.2d 876 (Fla. 2002).*

To be clear, the primary basis for the referee's imposition of discipline and the Bar's request for a 60 day suspension is one sentence removed from context in a 136 page deposition in a construction lien dispute that had no effect on the outcome of any material matter in the case, and, therefore, could not--and the record reflects, did not--disrupt either the deposition or the judicial proceeding. Against this conduct, the Bar urges that a 60 day suspension is warranted by the case authority and standards for imposing lawyer sanctions. (I.Br., p. 8). To the contrary, both the case authority and standards for imposing lawyer sanctions do not warrant a suspension.

Standard 5.0 provides for the appropriate sanctions to be administered in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation. *Standard 5.0, Florida Standards for the Imposing Lawyer Sanctions.* *Standard 5.12* provides that suspension, absent aggravating or mitigating circumstances, is only appropriate when a lawyer knowingly engages in criminal conduct and that seriously adversely reflects

on the lawyer's fitness to practice law. *Standard 5.12, Florida Standards for the Imposing of Lawyer Sanctions.* Suspension is clearly not a sanction supported under the lawyer sanction standards and the Bar is unable to demonstrate such to overturn the referee's recommended discipline of a public reprimand.

Indeed, *Standard 5.13* provides that a public reprimand is appropriate when a lawyer knowingly engages in any other conduct that involves dishonesty, absent mitigating circumstances. *Standard 5.13, Florida Standards for the Imposing of Lawyer Sanctions.* But, this case involves mitigating circumstances. In its initial brief, the Bar has accepted the mitigating factors found by the referee. (I.Br. p. 7). Also, in its initial brief, the Bar has conceded--as it rightfully should-- that the conduct involved in this proceeding is not as "extended" or "serious" as the misconduct found in the case authority it relies upon. (I.Br. 9).

Nevertheless, the cases which the Bar relies upon, and where a suspension was imposed, are readily distinguishable. Respondent's conduct is not analogous to lying twice under oath, coupled with a pattern of previous conduct of attempting to evade court-ordered alimony (including prior contempt orders), for personal financial gain, and with a prior disciplinary record involving a public reprimand, as was the case in *The*

Florida Bar v. Chibula, 725 So.2d 360 (Fla. 1999). Likewise, *The Florida Bar v. Baker, 819 So.2d 876 (Fla. 2002)* is inapplicable, because it involved an attorney's "criminal act" of forging several legal documents and corrupting a notary. There has been no allegation that the respondent committed any criminal acts, the equivalent of forging documents, which brought the 91 day suspension in *Baker*. On this record, the respondent, at best, used a poor choice of words to express contempt for his adversary, with whom he had a contentious disagreement.

The Florida Bar v. Germain, 957 So.2d 613 (Fla. 2007), again, involved a previously disciplined, mentally-ill attorney, who, in two separate cases, filed frivolous pleadings, lied under oath, accused a judge of illegality, and, who, *inter alia,* falsely accused another attorney in successive court pleadings of "killing an elderly client." As is readily apparent, this case involves conduct completely dissimilar to any of the conduct found to violate a rule in the proceeding below. The Bar, however, has essentially conceded this point in its initial brief. (I.Br., p. 9). Again, in *The Florida Bar v. Rothstein, 835 So.2d 241 (Fla. 2003),* other case relied upon by the Bar, this Court noted that the misconduct rose to an "extremely serious level," not commensurate, in any fashion, with the misconduct alleged, here. The Florida Bar has, likewise, conceded in its initial brief that *The Florida*

Bar v. Ratiner, *The Florida Bar v. Tobkin*, and *The Florida Bar v. Morgan*, all involved more egregious conduct than that found by the referee here, and that each attorney in each of those cases had received prior discipline. (I.Br. 9). Therefore, those cases are not specifically addressed.

If any discipline is warranted, an admonishment is the only discipline that can be justified under the existing case authority and lawyer sanction standards. This case presents private conduct, unconnected with the practice of law, that did not result in any harm to any party. The respondent has an unblemished disciplinary history and a good reputation. (R., Supplemental Report of Referee, 31).

D.

THE RECORD IS DEVOID OF ANY COMPETENT SUBSTANTIAL EVIDENCE TO SUPPORT A COST AWARD; COSTS ARE NOT PROPERLY AWARDED ABSENT AUTHENTICATION

Rule 3-7.6(q)(2), Rules Regulating the Florida Bar provides the referee with discretion to either award or disallow certain of the Bar's costs.[7] *Rule 3-7.6(q)(3), Rules Regulating the Florida Bar* expressly provides that

[7] Of course, the respondent does not consent to the assessment of costs in the event the referee's report is overturned. In that case, the respondent will concede that no costs are warranted under Rule 3-7.6(q)(4), although there was no justiciable issue of fact or law surrounding the process server count for which the respondent was acquitted by the referee. The Bar was informed throughout the entirety of the proceedings that respondent was in a spinning class with in excess of 10 alibi witnesses at the time the process server alleged to have encountered the respondent.

the referee may assess the Bar's costs against the respondent, *unless* it is shown that the costs of the bar were unnecessary, excessive, or improperly authenticated.

In the instant case, it was impossible to show that the Bar's costs were unnecessary, excessive, or improperly authenticated, because all the Bar filed was a statement of costs with the following "block" costs[8]:

> Florida Bar Counsel Expenses (Travel) 149.00
> Court Reporter's Fees and Transcripts 2,602.60
> (R, Motion to Assess Costs and Statement of Costs, 27)

In light of the respondent's acquittal on the substantial count of the complaint and the Bar's assertion that it was not seeking "investigative" costs associated with that Count, the respondent challenged the Bar's Statement of Costs and requested that the Bar authenticate its costs and establish the necessity and excessiveness. (R, Motion to Assess Costs and Statement of Costs, 27; R., Response to Motion to Assess Costs, 28). The Bar refused and failed to submit any invoice or further detail of the costs claimed. (R., Reply to Response to Motion to Assess Costs, 29). The referee awarded the Bar all costs it claimed, despite the lack of substantial competent evidence in the record to either authenticate or establish any prong of *Rule 3-7.6(q)(3).*

[8] The Bar's Statement of Costs also contained an Administrative Cost of $1,250 pursuant to Rule 3-7.6(q)(1)(I), which is not challenged in this cost section, assuming the referee's recommendation is upheld.

(R., Supplemental Report of Referee, 31). This failure expressly precluded the respondent from meaningfully seeking the exercise of the referee's rule-based discretion to disallow certain costs as unnecessary, excessive, or unauthenticated. This was clear error.

Similarly to Bar proceedings, in civil actions, it is generally the burden of the moving party to show that all requested costs were reasonably necessary either to defend or prosecute the case at the time the action precipitating the cost was taken. *In re Amendments to Unif. Guidelines for Taxation of Costs, 915 So.2d 612 (Fla. 2005).* Once costs claimed are contested, the party moving for costs is obligated to support their motion for taxation of costs by substantial, competent evidence. *Neimark v. Abramson, 403 So.2d 1057 (Fla. 3d DCA 1981); Powell v. Barnes, 629 So.2d 185 (Fla. 5th DCA 1993).* Substantial, competent evidence is required, because the term "costs," presupposes that the prevailing party on appeal has sustained a loss of funds or incurred an expense by virtue of the appellate process for which it is entitled to reimbursement by the losing party. *Lone Star Industries, Inc. v. Liberty Mut. Ins. Co., 688 So.2d 950 (Fla. 3d DCA 1997).* Orders awarding costs to the prevailing party, which simply grant the sums recited by the moving party, are improper. *Sims v. Barnes, 289 So.2d 753 (Fla. 1st DCA 1974).* Prior to awarding costs, the lower tribunal making the

assessment must determine that the amounts set forth are necessary and reasonable. *American Medical Intern., Inc. v. Scheller, 484 So.2d 593 (Fla. 4th DCA 1985).* As is indicated by Bar rule, a determination of whether costs are necessary and reasonable must be exercised in the light of competent evidence contained in the record. *Id.* When it comes to costs, unsupported statements of counsel are not evidence. *Bon Secours-Maria Manor Nursing Care Center, Inc. v. Seaman, 959 So.2d 774 (Fla. 2d DCA 2007).* When a cost order is appealed and the record is devoid of competent substantial evidence to support the order, the appellate court must reverse the award without remand. *Rodriguez v. Campbell, 720 So.2d 266, 268 (Fla. 4th DCA 1998).*

It is submitted that if the Bar is able to authenticate costs, after challenge, without detailing the court reporting charges incurred or otherwise submitting a sworn affidavit, *Rule 3-7.6(q)(3)* will be rendered meaningless. Respondents, like the respondent in this case, will be rendered without recourse to request the referee to exercise discretion to disallow certain costs. Here, the Bar's Motion to Assess costs conceded that some "investigatory"[9] costs are properly not taxable as unnecessary in that they relate to the acquittal. (R., Motion to Assess Costs and Statement of Costs,

[9] It is unclear of what investigatory costs the Bar is alluding to in reference to Count I.

28). The Bar, however, is not rule-vested with unfettered discretion to unilaterally determine which of its costs are necessary and which are unnecessary. By rule, the referee is vested with that discretion and a respondent is provided an opportunity to challenge costs. Accordingly, the respondent has the rule-based right to demonstrate to the referee that *all*--not just the ones unilaterally determined by the Bar--of the costs incurred as to Count I were unnecessary and, as such, the referee should exercise his discretion and disallow those costs. The Bar's "block" billing of costs prohibited that scrutiny. The Bar's "block" statement of costs does not constitute competent substantial evidence sufficient to authenticate costs or allow meaningful challenge.

Substantial notions of due process and the orderly adjudication of cost matters also require reversal. Authentication of costs by the "take my word for it" method is contrary to all recognized notions of cost adjudication in civil matters and repulsive to the adjudicative process. The referee erred when he assessed costs that were not properly authenticated, as required by rule. The record clearly establishes that the costs assessed were not properly authenticated and included some unnecessary costs associated with Count I for which the respondent was acquitted.

CONCLUSION

For the foregoing reasons, the referee's findings of fact, recommendations of guilt, recommended discipline, and assessment of costs should be rejected. No discipline is warranted under the circumstances of the case, in any event.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT the foregoing Cross-Petition for Review of Referee's Report has been furnished via regular U.S. Mail to Troy Matthew Lovell, Bar Counsel, The Florida Bar, 4200 George J. Bean Parkway, Suite 2580, Tampa, Florida 33607-1496; and via regular U.S. Mail to Kenneth Lawrence Marvin, Staff Counsel, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300, this ___ day of September, 2010.

_____

MICHAEL VINCENT LAURATO
Florida Bar No.: 181447
AUSTIN & LAURATO, P.A.
1902 W. Cass Street
Tampa, Florida 33606
(813)258-0624
(813)258-4625 Facsimile
mlaurato@austinlaurato.com
PRO SE

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY THAT this petition complies with the font requirements of Rule 9.100(l), Florida Rules of Appellate Procedure, and uses Times New Roman 14-point font, a font that is proportionately spaced.

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Michael Vincent Laurato