IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

JAMES M. POTTS, SR.,

Respondent.

_____/

Supreme Court Case
No. SC19-42

The Florida Bar File
No. 2017-50,892(17D)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

Pursuant to the undersigned being duly appointed as Referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On January 11, 2019, The Florida Bar filed its Complaint against Respondent. The undersigned was appointed to preside as Referee in this proceeding pursuant to the Supreme Court's January 11, 2019 Order and the January 15, 2019 Order from the Honorable Krista Marx, Chief Judge of the Fifteenth Judicial Circuit of Florida. On April 25, 2019, a final hearing was held in this matter. The Florida Bar was represented by Linda Ivelisse Gonzalez, Esq., and James M. Potts, Sr. (hereinafter "Respondent" or "Potts") was represented by Kevin P. Tynan, Esq. All properly filed items including pleadings, transcribed recorded testimony, exhibits in evidence

and the Report of Referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

This Referee finds, by clear and convincing evidence, that:

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and Disciplinary Rules of the Supreme Court of Florida.

B. Narrative Summary of Case.

1. Charges, Burden Of Proof, And Evidence

The Florida Bar filed a two-count complaint against Respondent arising from his conduct in representing a group of homeowners in a condominium dispute. (Ind. #2).[1] The complaint was filed after the Seventeenth Judicial Circuit Grievance Committee "D" (hereinafter "Grievance Committee") found probable cause of certain violations of The Rules Regulating the Florida Bar.

Count I of the complaint alleges that, between May 6 and May 9, 2017, Respondent sent a series of unprofessional and disparaging emails and text messages to Ruben Vicente (hereinafter "Vicente"), a member of the homeowners' board whose interests were not aligned with those of Respondent's clients.

[1] All references to "Ind." refer to the Index included with this Report.

Count II alleges that Respondent engaged in dishonest conduct in two ways. One relates to Respondent's failure to advise Vicente and The Bar that Vicente was sent a different version of Respondent's response to Vicente's complaint than the final version Respondent sent to The Bar. The other was that Respondent made misrepresentations under oath to the Grievance Committee when he testified before them on January 10, 2018. The alleged misrepresentations related to language in an email sent by Respondent which Vicente took as an invitation for a physical fight.

At this stage of the proceedings, The Bar must prove the allegations in its complaint by clear and convincing evidence. *Florida Bar v. Niles*, 644 So. 2d 504, 506 (Fla. 1994)("In a referee trial of a prosecution for professional misconduct, The Bar has the burden of proving its accusations by clear and convincing evidence.") Clear and convincing evidence is evidence that is precise, explicit, lacking in confusion, and of such weight that it produces a firm belief or conviction, without hesitation, about the matter in issue. *In re Standard Jury Instructions In Civil Cases-Report No. 09-01 (Reorganization of the Civil Jury Instructions)*, 35 So. 3d 666, 726 (Fla. 2010).

In reaching my decision, I carefully considered the testimony from the witnesses presented by The Florida Bar (Respondent and Vicente) and by the Respondent (Respondent and Michael C. Greenberg, Esq.), as well as all of the evidence (Ind. #22 and #25) introduced at the final hearing.

2. Factual Findings

a) COUNT I

As of May 2017, Respondent had been an attorney for approximately 4 ½ years, and had recently left a firm to open a solo practice. (Ind. #21 – FHTR pp. 119-122)[2] Respondent had been retained by a group of homeowners at Heritage Condominium including Joanne Aristilde, the Secretary of the Board of Directors of the Heritage Condominium Association. (Ind. #18) Vicente, who was not one of Respondent's clients, served as Treasurer of the Board from about May 2016 through May 2017. (Ind. #18; Ind. #21 - FHTR pp. 17-18)

On May 9, 2017, a homeowners' election at Heritage Condominium was scheduled to take place. (Ind. #21 - FHTR p. 58) On or about May 6, 2017, believing that Vicente had taken actions adverse to his clients including canceling the election, Respondent began to send Vicente a series of emails and texts.

In an email dated May 6, 2017, at 4:25 p.m., Respondent wrote, in part:

> Please be advised that you are not permitted to cancel the election, regardless of whether you have an election monitor. You would be wise to hire an attorney, because **I guarantee you are facing serious exposure to civil liability and, depending on how the investigators decide to address your unmitigated ineptitude and patent disregard for nearly every relevant law, possible criminal sanctions**. Hide behind **those idiots** at Image, I mean Imagining, or Pro Imagine, whatever they are called

[2] All references to FHTR are to the Final Hearing Transcript, found at Index #21.

> this week …hide behind them all you want. **You can't hide from law enforcement, you can't hide from the State Attorney looking for you when you are in contempt of court, and you especially can't hide from me.** I refuse to make threats because I don't need to make threats. **I have a law license,** a pile of evidence, a dozen suffering clients, and the full force of Chapter 718 on my side. **You will never see me coming and won't know what hit you when you realize what you've brought upon yourself.** That goes for you and Milagros, as well as the **clown fraudsters** you insist on keeping as Management. **Take some time this weekend to commune with the Lord, because you will need all the help you can get.** If you have any questions, you know where to find me.

(Emphasis added)(Ind. #22 - Bar Tr. Ex. #1)[3]

At the April 25, 2019 final hearing before me, Vicente credibly testified that he felt this email was "a verbal threat bordering on physical." (Ind. #21, FHTR p. 27)

In a second email dated May 6, 2017, at 5:01 p.m., Respondent wrote, in part:

> Also, I love how you tout your accomplishments in in [sic] running the Association in one email, talking about negotiating water bills and 40-year inspections, yet claim to have no knowledge of who is running your election or whether there is a monitor, or why Imagineering Pros hasn't responded to official State inquiries. It's comical, but for all the wrong reasons. Make up your mind: are you the **blithering ignoramus** who has dropped the ball on the election and want it cancelled, or are you the brilliant hero who does so much good for the Association?

(Emphasis added)(Ind. #22 – Bar Tr. Ex. #1)

[3] All references to Bar Tr. Ex. refer to Bar Trial Exhibits, found at Index #23.

At the final hearing, Vicente credibly testified that he felt that this email was intended "to cast doubt in [his] mind as to where [he] stood in the process" that was at issue. (Ind. #21 - FHTR p. 30).

In a third email dated May 6, 2017, at 8:58 p.m., Respondent wrote, in part, "The day of reckoning is nigh my friend." (Ind. #22 – Bar Tr. Ex. #1) Vicente credibly testified at the final hearing that, in context with other messages that had been sent, this was an "allusion" to the fact that Respondent would have the State of Florida come down on him, and that he would be in legal trouble and charged with some kind of "criminal situation." (Ind. #21 - FHTR p. 32)

On May 8, 2017, between 9:18 p.m. through 11:02 p.m., Respondent sent a series of text messages to Vicente. The texts requested an explanation for the cancellation of an election scheduled for the next day, and urged Vicente to resign. (Ind. #22 – Bar Tr. Ex. #1)

Respondent then called Vicente at 11:11 p.m.; Vicente did not answer. (Ind. #22 – Bar Tr. Ex. #1)

The next morning, on May 9, 2017, at 8:45 a.m., Respondent sent another text message to Vicente writing, in part, "The **idiotic email** sent last night by the management you hired was not signed by them and did not have anyone from the Board's signatures. What a **bunch of illiterate cowards**." (Emphasis added) (Ind. #22 – Bar Tr. Ex. #1)

At 9:33 a.m. the same day, Vicente responded in a text message to Respondent stating, in part, "Your harassment and threats via texts and phone calls, even past 11pm last night, is (sic) unacceptable. You are to refrain from contacting me directly ever again. This behavior is unauthorized and is to stop immediately." (Ind. #22 – Bar Tr. Ex. #1)

On or about May 9, 2017, Respondent sent another email to Vicente, as follows:

> You are so ignorant of the fundamentals of community management, and your feeble attempts at defending yourself, in light of overwhelming evidence that you have engaged in mismanagement and have enabled wholesale fraud to take place, are hilarious. You are so obtuse, you don't know how little you know.
>
> Where are the bank records, Ruben? What are you hiding? What is Imagination Proper hiding? You seek to cast blame at Joane for demanding transparency, yet fail to realize that she is joined by nearly HALF OF THE ENTIRE ASSOCIATION against you. **Why don't you man up, answer your phone, or at least prove me wrong with evidence that that [sic] the terrible things I say about you are false? Why don't you pick on me? Why don't you call me out for being wrong about you and Milagros and Imagine Pops?** I'll tell you why: because I have proof of your gross negligence and unethical behavior**. I have the State of Florida on my side preparing to throw down** and make sure you never so much as put your name on another ballot.
>
> By the way, what ever happened to you not running? You told a senior level Investigator with the DBPR that you weren't running? **Does that make you a liar as well as an ignorant coward**?

> I suggest you put some effort into your own defense and try to find a lawyer in your price range to help you answer for your misdeeds. **If you are innocent like you say, <u>why not come to the parking area at 2 so we can discuss this like real adults. If I were being accused of being a cheating moron by a loudmouth attorney, you'd better believe I would meet those accusations head on. But then again, I'm not a coward</u>** and I have an understanding of the protections afforded to unit owners under Florida law.
>
> As for your specious and unfounded gripes against Joane and our group, we won't dignify them with a response. You simply are not worth the time. Good day.

(Emphasis added)(Ind. #22 – Bar Tr. Ex. #1)

The election was scheduled to be held at 2:00 p.m. in the parking area referred to in the email (Ind. #21 - FHTR p. 58) Vicente did not attend the election. (Ind. #21 - FHTR p. 36)

At the final hearing, Vicente credibly testified that the above email was "probably one of the most intimidating emails that I received. It was a direct threat to pick on me, to call me out, to tell me that the State of Florida was on his side in preparing to throw down, and then inviting me to the parking lot." (Ind. #21 - FHTR p. 35) Vicente further testified that he did not attend the election because he felt that he "was not in a safe situation to attend that election." (Ind. #21 - FHTR p. 36)

Respondent copied several people on the emails, including future board members, some of Respondent's clients, and other members of the Board of Directors (Ind. #22 – Bar Tr. Ex. #1; Ind. #21 - FHTR pp. 28, 140). In Vicente's

initial complaint to The Bar about Respondent, he noted that one of Respondent's clients had "copied some of Mr. Potts (sic) harassing verbage (sic) in her emails." (Ind. #22 – Bar Tr. Ex. #1)

On July 24, 2017, Respondent emailed Vicente a copy of what purported to be his response to Vicente's complaint to The Bar (hereinafter the "July Letter").[4]

In the July Letter, Respondent unequivocally stated that he did not regret any of his actions other than his unanswered 11:00 p.m. phone call to Vicente, and continued to call Vicente "inept," "ignorant," and "possibly a thief." (Ind. #22 – Bar Tr. Ex. #3)

In his formal response to The Bar dated August 2, 2017 (hereinafter the "August Response"), Respondent still did not acknowledge that the messages he sent to Vicente were in any way unprofessional. (Ind. #22 – Bar Tr. Ex. #2) Rather, he stated "I deny any claims of harassment or intimidation." (*Id*.). He also said that he "had not undertaken to insult Mr. Vicente," but then went on to detail why he had called Vicente ignorant and inept. (*Id*.)

On January 10, 2018, when testifying before the Grievance Committee about the messages, Respondent for the first time stated that he recognized that his conduct in sending the May messages was "unbecoming" and "unprofessional" (Ind. #2 –

[4] Further details about the July Letter and the August Response are contained below.

TFB Ex. #4, GCTR p. 21),[5] and that he "shouldn't have worded the emails in such a way." (Ind. #2 – TFB Ex. #4, GCTR p. 23) He continued to assert that his behavior should not be classified as harassment, however. (Ind. #2 – TFB Ex. #4, GCTR p. 30) He also opined that "maybe it is more understandable if things get heated" when a person to whom vitriol is directed is a corporate officer, and that he had thought of Vicente as a corporate treasurer rather than as a *pro se* litigant. (Ind. #2 – TFB Ex. #4, GCTR p. 34)

After the Grievance Committee hearing, The Florida Bar filed its Complaint against Respondent. Respondent, through his attorney, then filed an Answer in which he admitted having sent the emails, texts, and letters at issue, but denied that any of his actions rose to the level of a violation of the Rules Regulating The Florida Bar. (Ind. #8)

At the final hearing before me on April 25, 2019, Respondent testified repeatedly that he now understood that his behavior was unprofessional. When pointedly asked, however, he testified as follows:

> **The intent was not to harass, and I maintain that**.
>
> Now, if you're asking me if they, to a layperson or to a reasonable person, if they would be perceived as being strongly worded or unprofessional, then I would agree. **But it was never my intent to harass or to be**

[5] All references to TFB Ex. are to exhibits of The Florida Bar attached to its Complaint. All references to GCTR are to the Grievance Committee Transcript, found at Index #2, TFB Ex. 4.

unprofessional.

> Now, at the time when those emails were sent, and I've admitted, this, I was heated. I was in a – I guess an agitated state, but more on – **I was kind of indignant on behalf of my clients who for a long time had been trying to right the ship, so to speak.**

(Emphasis added) (Ind. #21 - FHTR pp. 71-72)

Further, when asked at the end of his testimony what lessons he had learned from the disciplinary process, Respondent stated:

> Well, with the benefit of older and more seasoned attorneys that I've consulted with and that I've just discussed kind of this conundrum and maybe a little bit kind of just complaining about a bar complaint, they said, what did you say, let me see it. And they've gone over it. **It's like, it's a little bit strong. Yeah, you sound like a jerk.**
>
> And as a lawyer, I don't want to be known as the sound-like-a jerk guy. I don't – it's – that's not the reputation that I'm trying to gain. That's not a good representation of me, myself as a lawyer, my family, my family name, my children. That's not who I am. And it was a heated moment of indiscretion and hotheadedness that if I could it over again, obviously, I mean, with a bit of hindsight would have done it completely differently.

(Emphasis added) (Ind. #21 - FHTR pp. 177-178)

In closing argument, Respondent, through his attorney, continued to argue that his actions, while unprofessional, did not rise to the level of professional misconduct warranting a finding that Respondent had violated any Rules Regulating The Florida Bar. (Ind. #21 - FHTR p. 270)

I find that there is little question that the emails and texts sent by Respondent to Vicente were patently unprofessional and prejudiced the administration of justice by exacerbating the already difficult relationship between Respondent's clients and the other members of the Board. I find that Respondent's use of offensive language and threats of criminal and administrative action served no purpose other than to humiliate, intimidate, and harass Vicente, and in fact did so. I further find that Respondent's references to his superior understanding of the law are particularly egregious abuses of his position as an attorney. In sending these messages, I find by clear and convincing evidence that Respondent not only violated the Rules Regulating The Florida Bar but also violated his oath as an attorney which states, in pertinent part:

"I do solemnly swear:

> [6]"To opposing parties and their counsel, I pledge fairness, integrity, and **civility,** not only in court, but also in all **written** and oral communications;
>
> "I will **abstain from all offensive personality** and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged;

(Emphasis added).

[6] Amended September 12, 2011 to add civility pledge.

In addition, by copying his clients and others on these bullying and antagonistic messages, I find that Respondent caused additional harm to the legal system by seemingly normalizing disparaging communications in front of members of the public. Indeed, Vicente commented that one of Respondent's clients copied his inappropriate tone after reading Respondent's messages. (Ind. #22 – Bar Tr. Ex. #1) "In corresponding with persons involved in legal proceedings, lawyers must be vigilant not to abuse the privilege afforded them as officers of the court." *The Florida Bar v. Buckle*, 771 So. 2d 1131, 1134 (Fla. 2000). Attorneys must be ever mindful of the influence they wield as members of our profession.

I further find disturbing Respondent's continued failure to recognize that the emails he sent to Vicente were in fact harassing, intimidating and in violation of the professional standards of The Florida Bar - even during the Referee hearing. To be clear: calling someone names such as "clown fraudster," "blithering ignoramous," "cheating moron," and "ignorant coward," in and of itself, constitutes harassment. There is no substantial purpose to such language other than to embarrass, delay or burden a third person.

Similarly, to an objectively reasonable person, harassment and intimidation includes telling someone any one of the following:

- "You are facing serious exposure to civil liability and, depending on how the investigators decide to address your unmitigated ineptitude and patent disregard for nearly every relevant law, possible criminal sanctions;" or

- "You can't hide from law enforcement, you can't hide from the State Attorney looking for you when you are in contempt of court, and you especially can't hide from me;" or

- "You will never see me coming and won't know what hit you when you realize what you've brought upon yourself;" or

- "Take some time this weekend to commune with the Lord, because you will need all the help you can get;" or

- "The day of reckoning is nigh my friend;" or

- "I have the State of Florida on my side preparing to throw down;" or

- "If you are innocent like you say, why not come to the parking area at 2 so we can discuss this like real adults. If I were being accused of being a cheating moron by a loudmouth attorney, you'd better believe I would meet those accusations head on."

Such discourse is far beyond being "a little bit strong" and "sounding like a jerk." (Ind. #21 - FHTR p. 177) Undeniably, it has no place in professional legal practice and is plainly prejudicial to the administration of justice.

I further find that Respondent's repeated references to criminal sanctions, the State Attorney, and the State of Florida were made for the sole purpose of gaining an advantage in the civil homeowner's dispute between his clients and the other members of the Board. Parsing the language of the messages does not change their unethical intention. Respondent was obviously attempting to improperly influence

Vicente with respect to the election. "Such misconduct by its very nature causes harm to the legal system." *The Florida Bar v. Knowles*, 64 So. 3d 1195 (Fla. 2011).

The context of such ugly language is irrelevant. It does not matter if Respondent believed that Vicente was a corporate officer, or that Respondent was indignant on behalf of his clients. It is simply never professional for an attorney to write or say these kinds of things to anyone under any circumstances. "[T]he Rule[s] require that practitioners refrain from knowingly humiliating litigants on any basis whatsoever." *Florida Bar v. Uhrig*, 666 So. 2d 887, 888 (Fla. 1996). Indeed, while not warranting the same type of sanctions as violations of the Rules regulating The Florida Bar, the Professionalism Expectations of The Florida Bar unambiguously warn against an attorney taking on his client's ill will. *See Professionalism Expectations*, The Florida Bar (2015):

> 7.4 A lawyer should not permit a client's ill will toward an adversary, witness, or tribunal to become that of the lawyer.
>
> 7.5 A lawyer must counsel a client against using tactics designed: (a) to hinder or improperly delay a legal process; or (b) to embarrass, harass, intimidate, improperly burden, or oppress an adversary, party or any other person and should withdraw from representation if the client insists on such tactics.

b) COUNT II

(1) Failure To Advise Of Two Letters

On May 17, 2017, Vicente filed a complaint against Respondent with The Florida Bar. In the complaint, Vicente attached the messages noted above, and

referenced Respondent's "harrasement (sic) and intimidating practices." (Ind. #22 – Bar Tr. Ex. #1)

On July 24, 2017, Respondent emailed a PDF copy of the July Letter to Vicente but not to The Florida Bar. (Ind. #22 – Bar Tr. Ex. #3) The July Letter was attached to an email to "Ruben Vicente" from Potts@pottslegacylaw.com. (Ind. #22 – Bar Tr. Ex. #4) The email was time-stamped 7/27/17 at 7:26 PM. Other than what appears to be an envelope-like return address, the email contained no other message or information.

The PDF of the July Letter was entitled "RESPONSE" and gave the appearance of being Respondent's response to The Florida Bar. It was addressed to:

> Ms. Heidi E. Brewer, Bar Counsel
> 651 Jefferson St.
> Tallahassee, FL 32399-2300

The July Letter included a "Certificate of Disclosure" signed by Respondent with a signature date of July 20, 2017, but the letter itself was not signed. (Ind. #22 – Bar Tr. Ex. #3). At the final hearing, Vicente credibly testified that he believed that the July Letter was Respondent's actual response to The Bar's complaint. (Ind. #21 - FHTR p. 45-46).

On August 2, 2017, Respondent mailed the August Response to The Bar via the United States Postal Service. (Ind. #22 – Bar Tr. Ex. #2) The August Response was different from the July Letter which had been sent to Vicente. Respondent did

not provide a copy of the August Response to Vicente, despite Bar rules requiring him to do so. (Ind. #21 - FHTR p. 231-232)

On August 8, 2017, the Bar sent the August Response to Vicente with a cover letter that reads, in pertinent part, "Enclosed you will find Mr. James M. Potts Sr.'s response to your complaint, which does not reflect a copy being mailed to you." (Ind. #25) The letter was cc'd to Respondent. Vicente testified that he first learned of the August Response when it was forwarded to him by The Bar (Ind. #21 - FHTR pp. 43, 64). The Bar first received the July Letter as an attachment to Vicente's August 22, 2017 rebuttal to Respondent's response. (Ind. #22 – Bar Tr. Ex. 3)

The July Letter from Respondent contained the following language which was not included in the August Response:

> The phone call at 11:00pm was placed on the eve of a much-anticipated annual membership meeting and election. I admit to placing the call and make no excuse other than the fact that I was still at my office trying to formulate a plan for the following day's election (which had been cancelled by management at 6pm that day) and lost track of time. **This is not my practice and this isolated event is the only such instance and one which I regret.**
>
> ***
>
> **Aside from the phone call at 11pm. [sic] I do not regret any of my conduct or any of the action [sic] I have taken with respect to Mr. Vicente. None of the allegations I have made against him are unfounded and each one can be verified independently. I have asserted that Mr. Vicente is ignorant and inept. [sic] and**

> **possibly a thief. These assertions are not threats and are not meant to intimidate. I still believe Mr. Vicente is ignorant and inept, and the evidence supports these allegations.**

(Emphasis added)((Ind. #22 – Bar Tr. Ex. #3; Ind. #21 - FHTR p. 48)

The August Response contained the following language, which was not included in the July Letter:

> The phone call at 11:00pm (sic) was placed on the eve of the much-anticipated annual membership meeting and election. I placed the call while I was still at my office trying to formulate a plan for the following day's election (which had been cancelled by the Board and management earlier that day). **I regret any inconvenience the late call may have caused.**

***

> Although I have used strong language in my emails, I have not undertaken to insult Mr. Vicente. **I have asserted that Mr. Vicente is ignorant and inept. My "ignoramus" observation is based on Mr. Vicente's "lack of knowledge or experience" with respect to condominium law, evidenced by his outright refusal to comply with lawful records inspection requests made by unit owners and State regulators.**
>
> **I have also told Mr. Vicente that he is inept, based on the fact that he is unskilled at managing Association funds** – an assertion supported by the fact that Mr. Vicente himself has failed to pay thousands of dollars in maintenance for his own unit and has paid himself from the Association's coffers. In the course of my representation of nearly a dozen unit owners at Heritage Condominium, I have seen the consequences of Mr.

> Vicente's lack of knowledge of condominium law and lack of skill in handling the Association's funds.

Emphasis added. (Ind. #22 – Bar Tr. Ex. #2; Ind. #21 - FHTR p. 48).

Before both the Grievance Committee and this Referee, Respondent contended that he "inadvertently" emailed the PDF of the July Letter to Vicente. He maintained that the July Letter was a draft of the final version that he had meant to send that night to attorney Michael Greenberg (hereinafter "Greenberg"), a friend of his who happened to be a former Bar Counsel. According to Respondent, Greenberg agreed to meet Respondent at his office to review and assist him with the response later that night. Respondent claims that he scanned the pages into Adobe PDF, and also printed the response for Greenberg (Ind. #21 - FHTR pp. 86-88; 168-171).

Greenberg credibly testified that he agreed to meet with Respondent and review his response, but that he could not remember that meeting (Ind. #21 - FHTR pp. 112, 115-16). He also testified that he received the July Letter via email sometime in July of 2017, but could not recall the exact date or circumstances (Ind. #21 - FHTR pp. 114-15).

Respondent testified at the final hearing that he first realized that the July Letter was emailed to Vicente when he saw it as an attachment to Vicente's rebuttal to The Bar. (Ind. #21 - FHTR pp. 50-51; 88-90; 171-173). Respondent further testified that, having never had a bar complaint previously, he did not believe that it was necessary for him to notify either Vicente or The Bar of how he had

inadvertently sent the July Letter to Vicente. He stated that he believed that because the August Response was the only version which he had signed, his "intent" that the August Response was the final version was "very clear." (Ind. #21 - FHTR pp. 172-173). He also testified that he believed his testimony about the two letters was the same before both the Referee and the Grievance Committee. (*Id*.)

There is no question that, pursuant to Bar rules, Respondent should have either sent the same letter to both the Bar and Vicente or, having sent a different version to Vicente, should have informed both parties about the different versions. The issue before me, however, is whether The Bar has proven, by clear and convincing evidence, that Respondent engaged in dishonest conduct: 1) "by allowing Vicente to believe that he had in fact provided the July 24, 2017 response to The Bar when in fact he had not;" and 2) "when he failed to inform The Bar that he had sent Vicente a different response on July 24, 2017." (Ind. #2)

While I am in agreement with the Grievance Committee's finding that there exists probable cause of Respondent's dishonest conduct, I find that The Bar has not proven either allegation by clear and convincing evidence. Although there is no direct corroboration for Respondent's version of events, I do not have a firm belief, without hesitation, that The Bar's version of events is correct. Based in part on Respondent's demeanor and testimony, I find it is possible that Respondent inadvertently sent the July Letter to Vicente instead of Greenberg. I base this finding

in part on what I see as a lack of a material difference in the tone or type of allegations made against Vicente in both of the letters. In both letters, Respondent calls Vicente "inept" and "ignorant." While he specifies that he does not regret his actions in the July Letter, his detailed reasons for continuing to call Vicente inept and ignorant in the August Response convey the same sentiment. I see no reason why Respondent would have thought that one version of the letter was more likely to intimidate Vicente than the other. *See generally The Florida Bar v. Bariton*, 583 So. 2d 334, 335 (Fla. 1991)(Finding insufficient evidence to support a Bar violation when different versions of letters were sent to complainant and Bar, but the differences were not material and Respondent did not claim that the two versions were the same).

Moreover, I do not find the fact that the letter was sent in PDF versus an editable version to be definitive. There are any number of innocent reasons why Respondent might have intended to send the letter to Greenberg in PDF form rather than an editable version, and, having observed Respondent's testimony, I find him to be credible on this point.

In addition, I find credible Respondent's testimony that, having never dealt with a Bar complaint before, once he realized The Bar had received both letters, he did not see a reason to reach out to either Vicente or The Bar to clarify matters. I also

find credible that he believed the August Response was his formal response as that was the only version which he had signed and actually mailed to The Bar.

Despite finding that The Bar has not sustained its burden, I reiterate my concern about Respondent's failure to recognize the significance of his actions. Nearly three months after the May messages were sent, Respondent continued to disparage Vicente and in no way took responsibility for his unprofessionalism. Respondent did so even after he met with Greenberg, a former Bar counsel, to discuss his response to The Bar. While I do not find Respondent's conduct in failing to disclose the difference in the two letters to be dishonest, I find the continued name-calling and failure to hold himself accountable in both letters to corroborate and aggravate the findings I made with respect to Count I.

(2) <u>False Testimony Re: Invitation To Fight</u>

As noted above, on May 9, 2017, Respondent sent an email to Vicente, which read, in part:

> If you are innocent like you say, **<u>why not come to the parking area at 2 so we can discuss this like real adults. If I were being accused of being a cheating moron by a loudmouth attorney, you'd better believe I would meet those accusations head on. But then again, I'm not a coward</u>** and I have an understanding of the protections afforded to unit owners under Florida law.

(Emphasis added)(Ind. #22 – Bar Tr. Ex. #1)

As previously noted, the election which was at issue was scheduled to take place at 2:00 p.m. in the parking area of Heritage Condominium.

As also referenced above, at the final hearing Vicente credibly testified that he did not attend the election because, based on the emails he had been receiving from Respondent, he felt it was not a "safe situation" for him to do so. (Ind. #21 - FHTR p. 36). Vicente credibly claimed he interpreted the above email as a threat and believed that there would be a physical confrontation (Ind. #21 - FHTR pp. 35, 43, 62).

During the January 10, 2018 hearing before the Grievance Committee, Respondent stated as follows:

> When I said to meet me, come down to the parking lot like a man or be a grownup and meet me in the parking lot at two, I wasn't trying to go to fists to cuffs, that was precisely the location which was designated on the ballot where the election was to take place, the parking lot.

(Ind. #2 – TFB Ex. #4, GCTR p. 34)

At the final hearing before me, Respondent testified extensively about whether he intended to invite Vicente to engage in a physical fight with him, and whether his testimony before the Grievance Committee was false. (Ind. #21 - FHTR pp. 72-83) He adamantly denied intending to be inviting Vicente to fight in the parking lot. His comments about the email were much more extensive than those he gave before the Grievance Committee. He talked about how he does not fight and

is not a violent person. (Ind. #21 - FHTR pp. 72-73, 78). He noted that at 2:00 p.m. in the parking lot, an election was going to be held and that he knew "…: that there are [going to be] many people there over a dozen, and that it was being filmed, and that that film was [going to be] submitted to the Secretary of State." (Ind. #2 – TFB Ex. #4, GCTR p. 73)

I had the opportunity to observe the demeanor of Respondent during his testimony on this issue at the final hearing, and found him to be credible. I find that his subjective intent in making the statements about the parking lot was not an invitation for a physical fight but, rather, to encourage a meeting – no doubt verbally heated, but not physically violent -- with Vicente. I further find that Respondent's subjective intent in making the statements is what is pertinent for determining whether or not he was dishonest before the Grievance Committee. Even under an objective standard, although Vicente testified that he did not attend the election because of concerns for his safety, I find that the fact that Respondent's email was an invitation to meet at the location of the disputed election, at a time when a public, monitored election was to take place, mitigates against a finding that Respondent's statement was an invitation for a physical fight.

Based on the limited testimony heard by the Grievance Committee, their finding of probable cause of dishonesty was understandable. Having seen and heard Respondent's lengthy testimony at the final hearing, however, I do not find that The

Bar has proven by clear and convincing evidence that Respondent was dishonest in his testimony before the Grievance Committee.

Once again, however, although not finding sufficient evidence to sustain Count II, I must comment on the completely unacceptable tone and tactics evident in this email sent by Respondent. The invitation to the parking lot was a particularly offensive example of Respondent's harassment and intimidation towards Vicente. Respondent may not have intended to pick a physical fight with Vicente, but Vicente nonetheless did not attend the election because he was concerned for his safety. Although I do not find Respondent was dishonest with respect to the parking lot email, I find that it corroborates Respondent's violations of the Rules Regulating the Florida Bar in Count I.

In summary, while I do not find The Bar met its burden in proving that Respondent engaged in conduct involving dishonesty as alleged in Count II, I do find overwhelming evidence of Respondent's violation of Rules and the oath for the conduct alleged in Count I. The May messages, combined with Respondent's continued disparaging remarks in the July Letter and the August Response, are prime examples of the type of discourteous, unprofessional conduct that the Florida Supreme Court has repeatedly warned will not be tolerated. Respondent's failure to hold himself fully accountable at every stage of the proceedings, including at the

Referee hearing, evidences a concerning lack of awareness of appropriate attorney conduct. As the Supreme Court commented in a case involving similarly disrespectful and abusive comments, "We should be and are embarrassed and ashamed for all bar members that such childish and demeaning conduct takes place in the justice system." *The Florida Bar v. Martocci*, 699 So. 2d 1357, 1360 (Fla. 1997).

III. RECOMMENDATIONS AS TO GUILT

As to Count I, for the reasons detailed above, I recommend that Respondent be found guilty by clear and convincing evidence of violating the following Rules Regulating The Florida Bar:

- 3-4.2 [Violation of the Rules of Professional Conduct as adopted by the rules governing The Florida Bar is a cause for discipline.];
- 3-4.3 [The commission by a lawyer of any act that is unlawful or contrary to honesty and justice may constitute a cause for discipline….];
- 4-3.4(g) [A lawyer shall not present, participate in presenting, or threaten to present criminal charges solely to obtain an advantage in a civil matter.];
- 4-4.4(a) [In representing a client, a lawyer may not use means that have no substantial purpose other than to embarrass, delay or burden a third person….];

- 4-8.4(a) [A lawyer shall not violate or attempt to violate the Rules of Professional Conduct ….]; and
- 4-8.4(d) [A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice….].

I do not recommend that Respondent be found guilty by clear and convincing evidence of violating any Rules Regulating The Florida Bar as to Count II.

IV. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Bar v. Norkin, 132 So. 3d 77 (Fla. 2013): Norkin received a 2-year suspension and a public reprimand for relentless unethical and unprofessional behavior toward judges and opposing counsel.

The Florida Bar v. Ratiner, 46 So. 3d 35 (Fla. 2010): In *Ratiner*, the Florida Supreme Court imposed a public reprimand, a 60-day suspension and two years of probation on an attorney who had been a member of The Bar for approximately 20 years, for lambasting opposing counsel during a deposition, running at opposing counsel, and tearing up and then flicking an evidence sticker at opposing counsel. The attorney had a history of abusive conduct going back a number of years, including an episode that led to a Grievance Committee report of diversion from the year prior to the conduct which led to the current sanctions. The attorney failed to

recognize the wrongdoing of his actions. The Supreme Court imposed the 60-day suspension after the Referee had recommended disbarment

The Florida Bar v. Sayler, 721 So. 2d 1152 (Fla. 1998): In *Sayler*, the attorney sent a letter to opposing counsel which included newspaper articles about the recent murder of an attorney who worked the same kind of cases as the one at issue. Opposing counsel had previously complained that she felt Sayler was stalking her and that she was in fear of him. The Supreme Court approved the referee's finding that Sayler was guilty of violating rules 3-4.3 (acts contrary to honesty and justice); 4-4.4 (committing acts which have no substantial purpose other than to embarrass delay or burden a third person; and 4-8.4(d) (prohibiting attorneys from engaging in conduct prejudicial to the administration of justice). The Supreme Court approved the referee's recommendation that Sayler be publicly reprimanded, placed on six months' probation, and, at his own expense, complete the Bar's Practice and Professionalism Enhancement Program and undergo a psychological evaluation through Florida Lawyers Assistance, Inc.

The Florida Bar v. Buckle, 771 So. 2d 1131 (Fla. 2000): In *Buckle*, an attorney sent a letter to a crime victim and attached various religious materials to the letter. In aggravation, the referee found that the attorney had substantial experience, a pattern of misconduct as he was alleged to have done the same thing to another victim in another case, and a refusal to acknowledge the wrongful nature of his

conduct. The referee recommended that Buckle be suspended for thirty days and placed on probation for two years. In light of several cases involving similar conduct, the Supreme Court found that the appropriate sanction was a public reprimand.

The Florida Bar v. Uhrig, 666 So. 2d 887 (Fla. 1996): In *Uhrig*, the Supreme Court imposed a public reprimand where an attorney sent a humiliating, embarrassing, and disparaging letter to his client's ex-husband.

The Florida Bar v. Martocci, 791 So. 2d 1074 (Fla. 2001): In this case, Martocci, an experienced lawyer, received a public reprimand and two years' probation for making unethical, disparaging, and profane remarks belittling and humiliating both the opposing party and counsel in divorce proceedings. The Referee found that Martocci called the opposing party names such as "nut case" and "stupid idiot," and made disparaging racial comments as well. He told opposing counsel that she did not know the law or the rules of procedure and that she needed to go back to school. He made faces and stuck out his tongue at both the opposing party and her attorney. The Referee also found that, in open court, Martocci threatened to beat up the opposing party's father. Although Martocci argued that he had shown remorse, the Referee found that he refused to acknowledge the wrongful nature of his conduct. Approximately five years prior, The Florida Bar had charged Martocci with similar misconduct, but the Supreme Court upheld a

Referee's finding that The Bar had not proven violations of the professional misconduct rules. Because of this finding, Martocci was considered to have no disciplinary history in the instant case. The Supreme Court specifically found that Martocci's behavior was more egregious than that in *Buckle* or *Uhrig* because Martocci engaged in a consistent pattern of unethical misconduct. *Id*. At 1078.

The Florida Bar v. Mitchell, 46 So. 3d 1003 (Fla. 2010) (unpublished), Florida Bar Suspension File 200910487 (https://www.floridabar.org/public/acap/disc-docs/?icn=200910487&member=12860); and *The Florida Bar v. Mooney*, 49 So. 3d 748 (Fla. 2010) (unpublished), Florida Bar Suspension File 200910745 (https://www.floridabar.org/public/acap/discdocs/?icn=200910745&member=508217): In cases that received wide-spread publicity, Mitchell and Mooney engaged in what can only be described as an email war, with truly horrendous insults being exchanged between them.[7] Consent judgments were ultimately entered against each of them, both of which were approved by the Supreme Court. Both Mitchell and Mooney were experienced attorneys, and both consented to judgments in more than one case. Both attorneys admitted in multiple cases to using disparaging, humiliating and discriminatory language. Mitchell's misconduct also included one case in which he was found to have been dishonest. Mooney received a public

[7] Mitchell's insults included disparaging references to Mooney's special needs child; Mooney's included calling Mitchell a "scum sucking, bottom feeding loser lawyer" who should "go back to his double-wide trailer."

reprimand and was ordered to attend a Professionalism workshop. Mitchell was sanctioned with a 10-day suspension and attendance at an Anger Management workshop.

V. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

7.0 OTHER DUTIES OWED AS A PROFESSIONAL

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

VI. AGGRAVATING AND MITIGATING FACTORS

I considered the following factors prior to recommending discipline:

9.2 AGGRAVATION

9.22 (g): Refusal to acknowledge wrongful nature of conduct: I find Respondent's continued failure to recognize that his actions constituted harassment and were clear violations of The Bar Rules to be an aggravating factor. As noted, although Respondent admitted his actions were unprofessional before both the Grievance Committee and before me, when pressed, he continued to maintain that his behavior did not constitute harassment. This alone I find to be sufficient evidence of his refusal to acknowledge the wrongfulness of his conduct. In addition, Respondent also argued that his misconduct did not rise to the level of a bar

violation. While Respondent certainly has the right to defend himself, I find his position to be troublesome. Respondent himself testified that older, seasoned attorneys told him that his language was "a little bit strong" and made him "sound like a jerk." (Ind. #21 - FHTR p. 177) He did not say that they told him that his behavior was a violation of Bar rules and Professionalism Standards. My concern is that, without being sent an unequivocal message that his actions were not within the standards of ethical conduct and professionalism expected of members of The Bar, there is a high potential of recidivism by Respondent.

Based on the record before me, I do not find sufficient evidence supporting any additional aggravating factors.

9.3 MITIGATION

9.32(a): Absence of prior disciplinary record: I find the fact that Respondent has no prior, contemporaneous, or later complaints against him to be a mitigating factor.

9.32(f): Inexperience in the practice of law: I find that the fact that Respondent had been practicing less than five years and was a solo practitioner at the time of the misconduct to be a mitigating factor.

Based on the record before me, I do not find sufficient evidence supporting any additional mitigating factors.

VII. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

In this case, based upon a finding of guilt as to both counts in its complaint, The Florida Bar recommended a 60-day suspension, a public reprimand, and two years' probation with certain conditions. Although the misconduct in *Ratiner* did not include dishonesty as alleged in Count II of the complaint, The Bar based its recommendation "strictly" on what it argued was the similarity between the instant case and *Ratiner*, where the discipline imposed was consistent with The Bar's recommendation in this case. (Ind. #21 – FHTR p. 296)

Respondent argued that his conduct, while unprofessional, did not violate the Rules Regulating The Florida Bar, and even if it did, warranted diversion.

I first note that I am recommending that discipline be imposed only for misconduct alleged in Count I of The Bar's complaint. In imposing a sanction, the Referee is to consider the following factors: "a) the duty violated; b) the lawyer's mental state; c) the potential or actual injury caused by the lawyer's misconduct; and d) the existence of aggravating and mitigating factors." *Fla. Stds. Imposing Law. Sancs*. 3.0.

I find that Respondent's conduct and his history are distinguishable from *Ratiner*. Both Ratiner and Respondent engaged in conduct which others found intimidating, and both engaged in conduct in front of members of the public. In *Ratiner*, however, the attorney was a long-time member of The Bar who had a

history of abusive conduct and had a prior complaint against him which had resulted in diversion. Here, Respondent had been practicing less than four years and has had no complaints against him before or since the one currently at issue. Further, Ratiner's misconduct included not just inappropriate communications but also a physical confrontation of the attorney running at opposing counsel and throwing a torn-up evidence sticker; this case did not involve any physical conflict.

I find this case to be more similar to *Martocci*, where the discipline imposed was a public reprimand and two years' probation with conditions. As in *Martocci*, Respondent's misconduct included name-calling, derision about legal knowledge, and language that was seen by others as an invitation to a physical fight. As with the Respondent, Martocci was considered to have no prior disciplinary history. In both Respondent's case and in *Martocci*, although the attorneys claimed to have shown remorse, both were found to have refused to acknowledge the wrongful nature of their conduct. In aggravation, Martocci was much more experienced than Respondent, his misconduct included insulting a judicial assistant, and it appears to have taken place over a much longer period of time.

I also find this case to be similar to the other four cases cited in which the Florida Supreme Court approved a public reprimand and probation with conditions: *Saylor*, 721 So. 2d 1152 (attorney sent articles about murder to opposing counsel); *Buckle*, 771 So. 2d 1131 (experienced attorney sent inappropriate religious materials

to opposing counsel in two cases); *Uhrig*, 666 So. 2d 887 (attorney sent a disparaging letter to client's ex-husband); and *Mooney*, 49 So. 3d 748 (attorney who agreed to a consent judgment for sending over-the-top disparaging emails in two cases).

There are two factors that I find make Respondent's conduct more serious than that in the public reprimand cases noted above, however. For one, Respondent copied his emails to a group of people who were influenced by the poor example he set, a situation that was not present in any of the cases I find similar to Respondent's. I find this significant because when lay people think that it is proper for lawyers to act the way Respondent did, the entire legal system loses credibility.

Second, and more seriously, Respondent's conduct took place not only after the Florida Supreme Court added the civility pledge to the Oath, but also after The Florida Bar instituted its Professionalism Expectations in 2015. Indeed, Respondent became an attorney in 2013, which meant his initial Oath of attorney included the civility pledge. The civility language was added to the Oath by the Supreme Court due to "extensive unprofessional conduct by some members of The Florida Bar." *The Florida Bar v. Norkin*, 132 So. 3d 77, 92 (Fla. 2013).

As for the Professionalism Expectations, although not directly at issue here as Respondent is charged with violating Rules that carry sanctions, the fact that they so clearly prohibit Respondent's conduct is at least persuasive. Further, in more recent years the Supreme Court has noted that it has imposed even more severe discipline

for unethical and unprofessional conduct than in the past. *The Florida Bar v. Parrish*, 241 So. 3d 66, 80 (Fla. 2018).

Nonetheless, in this case, I do not believe that Respondent's conduct warrants suspension. Respondent is an inexperienced attorney whose misconduct took place in one case, over a relatively short period of time. The Supreme Court has historically viewed cumulative misconduct more seriously than isolated instances of misconduct. *The Florida Bar v. Walkden*, 950 So. 2d 407, 410 (Fla. 2007). Almost all of the cases cited above included either long-term misconduct or misconduct in more than one case, and all involved experienced attorneys. Having observed Respondent before me, I believe his future as a productive member of our profession can be accomplished without a suspension of his practice.

I do find, however, that Respondent's conduct warrants a public response as well as probation with stringent conditions, including anger management counseling, professionalism education, and an apology letter. The public, Respondent's fellow bar members, as well as Respondent need to hear the unequivocal message that name-calling, threats, bullying, and otherwise inappropriate communications are unprofessional, unethical and unacceptable in the legal profession. I agree with the Supreme Court's holding in a similar case

involving inappropriate communications by attorneys:

> It is our hope that by publishing this opinion and thereby making public the offending and demeaning exchanges between these particular attorneys, that the entire bar will benefit and realize an attorney's obligation to adhere to the highest professional standards of conduct no matter the location or circumstances in which an attorney's services are being rendered.

The Florida Bar v. Martocci, 699 So. 2d at 1360 (Fla. 1997).

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. a public reprimand;

B. Two (2) years of probation with the following conditions:

(1) Within thirty (30) days of the Supreme Court's Order in the instant case, Respondent will make an appointment with Florida Lawyers Assistance, Inc. (FLA).

(2) Respondent will undergo a full FLA evaluation, including an evaluation for anger management, and will comply with all treatment recommendations.

(3) Within two (2) years of the Supreme Court's Order in the instant case, Respondent will complete five (5) continuing legal education credits in professionalism and ethics. These credits are in addition to any other continuing legal education credits required by The Florida Bar.

(4) Within two (2) years of the Supreme Court's Order in the instant case, Respondent will complete an Anger Management Course approved by The Florida Bar. This course is to be in addition to any other continuing legal education credits required by The Florida Bar.

(5) Within ninety (90) days of the Supreme Court's Order, Respondent is to prepare an apology letter to Vicente. The letter is to be a minimum of 1,500 words, and shall include an explanation as to 1) how his behavior constitutes harassment and intimidation, and is more than simply strong language; 2) how his behavior is antithetical to the conduct expected of attorneys and the legal system, and 3) how the public should expect attorneys to behave. It should also include as an attachment this Referee's Report and any further orders of the Supreme Court relating to this matter.

   i. Within ninety (90) days of the Supreme Court's order, the letter is to be sent to Linda Ivelisse Gonzalez, Esq., or another designated attorney representing The Florida Bar, who shall ensure the letter meets the standards laid out herein.

   ii. Upon approval by The Florida Bar, Respondent is to mail the letter, via regular mail and email, to Vicente. In

addition, Respondent is to copy, via regular mail and email, each of his clients in this matter as well as all current and former members of the Board of Directors of the Heritage Condominium Association from May 2017 to the present.

iii. Proof of mailing, via regular mail and email, shall be sent to counsel for The Florida Bar.

(6) All the foregoing shall be at Respondent's expense.

C. Respondent will pay The Florida Bar's costs in these proceedings.

VIII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following:

Personal History of Respondent:

Age: 36

Date admitted to The Bar: November 4, 2013

Prior Discipline: None

IX. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Costs	$1,250.00
Court Reporter Costs	$3,305.00
Bar Counsel Travel Costs	$139.28
TOTAL	**$4,694.28**

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be deemed delinquent 30 days after the judgment in this case becomes final unless paid in full or otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 26th day of August, 2019.

/s/ *Carolyn Bell*.
Honorable Carolyn Ruth Bell, Referee
Daniel T.K. Hurley Courthouse
205 North Dixie Highway
West Palm Beach, FL 33401

Original To:

Clerk of the Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, FL 32399-1927

Conformed Copies to:

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