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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. 66,642

v.

RICHARD G. NEWHOUSE,

Respondent.

BRIEF OF THE FLORIDA BAR

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PREFACE

For purposes of this brief, The Florida Bar will be referred to as "The Florida Bar" and Richard G. Newhouse will be referred to as "Respondent." The following abbreviations will be utilized:

T - Transcript of final hearing held on September 6, 1985, to be followed by appropriate page number.

TR - Transcript of hearing held on November 15, 1985.

TFB EX - Exhibit of The Florida Bar admitted into evidence at final hearing on September 6, 1985, to be followed by appropriate exhibit number.

RR - Report of Referee

SRR - Supplement to Report of Referee

STATEMENT OF THE CASE

This is an attorney disciplinary proceeding conducted under the appropriate provisions of The Florida Bar Integration Rule. The Supreme Court of Florida has jurisdiction over attorney discipline. Article V, §15, Florida Constitution, and Florida Bar Integration Rule, article XI, Rule 11.09.

A five-count formal complaint was filed against the Respondent on February 28, 1985. On March 7, 1986, the Honorable Robert V. Parker was appointed Referee by the Supreme Court of Florida. This cause came on for hearing on the merits on September 6, 1985.

On November 5, 1985, the Referee issued his initial report wherein he found the Respondent guilty of Counts IV and V and not guilty of Counts I, II and III of the complaint. On November 15, 1985, this cause came on for hearing on the discipline to be imposed. On December 13, 1985, the Referee issued his Supplement to Report of Referee recommending a public reprimand for Respondent's violations.

This brief is being submitted in response to this Court's June 13, 1986, Order requesting briefs as to the Referee's recommended discipline.

ISSUE PRESENTED FOR REVIEW

I. WHETHER THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

STATEMENT OF THE FACTS

Respondent was plaintiffs' counsel in a personal injury case, styled Karen Thompson and Allen Thompson, her husband v. Michael Louis Macharavitz, et al, Defendants, Case No. 82-13699 (CK), in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida.

The Florida Bar filed a five (5) count complaint against the Respondent concerning his conduct in said case. The Referee found Respondent not guilty of the first three (3) counts of the complaint. Count IV concerned Respondent, in his closing argument stating to the jury: "I have a responsibility, also, a legal and moral one. I already had one client commit suicide and it is a terrible feeling" (TFB EX. I, P. 24).

The Referee's findings of fact concerning Count IV were as follows:

> 1. Respondent Newhouse, in his closing argument in the Karen Thompson personal injury case stated:
>
> "I have a responsibility, also, a legal and moral one. I already had one client commit suicide and it is a terrible feeling." (Par. 26 of complaint; admitted in Answer).
>
> 2. Attorney DiSalvo testified the above statement put him in a state of shock. He moved for a mistrial as creating such prejudice that it could not be cured (TR-103 and 104). Judge Purdy reserved ruling on the motion, admonishing respondent that his rebuttal would be cut short even without objection, should he attempt any further such play for sympathy. (P. 25 of BE-"J")

3. I have reviewed the transcript of Mr. Newhouse's jury argument (BE-"J" pp. 5-30) and Mr. DiSalvo's closing jury argument (BE-I") and find nothing in Mr. DiSalvo's argument to justify presenting such a shocking and prejudicial argument when there is no evidence to suggest that Karen Thompson is suicidal or that she will do away with herself if the jury doesn't find in her favor.

Juror Donald Weadon stated that this argument had a bad or chilling effect on him--he had never heard such a statement made before, even though he had served on numerous State and Federal juries previous to the Karen Thompson trial. (Tr-33 and 34).

4. Attorney misconduct in oral arguments to juries has unfortunately become all too common in Florida. The Third District Court of Appeals has suggested in future cases of prosecutorial misconduct that it would, in addition to the remedy of reversal, invoke relevent procedures of The Florida Bar. See Jackson v. State, 421 So.2d 15, at p. 17 (Fla. 3rd DCA 1982) (prosecutor called defense counsel a "cheap-shot artist" and inquired of jurors whether they would purchase a used car from him). The Supreme Court has also held that in appropriate cases, it is proper to refer cases of overzealousness or misconduct of prosecutor or defense counsel to the Bar for disciplinary investigation. State v. Murray, 443 So.2d 955, (FLA. 1984) (prosecutor argued defendant knows law; thinks he can twist it to his advantage and lie in court, and avoid prison).

While most of the reported cases are criminal and criticize overzealousness in arguments in a criminal context the same principles should apply to civil cases. All too often, we hear of plaintiff's counsel, e.g. being referred to as a "bad apple in the barrel" or plaintiff's counsel as "ambulance chasers" and the like. While reversal for mistrial is often an appropriate remedy, the cost and effort of a wasted trial goes down the drain so that reversal and mistrial are quite often as inadequate as the same remedies in a criminal trial. Perhaps

> many of us in the system have heard so much improper argument, name calling and unreasonable allusion to irrelevent facts not in evidence that it has dulled our senses. But it had not dulled Juror Donald Weadon's senses and his dismay at the impropriety of such a remark impells the undersigned referee to the same conclusion, that respondent's allusion to another client's suicide could not reasonably have been believed by respondent to be either relevant or supported by admissible evidence. (RR., pp. 4-5).

The Referee recommended Respondent be found guilty of violating Disciplinary Rule 7-106(C)(1) (in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence) of the Code of Professional Responsibility concerning Count IV (RR, p. 7).

The Referee found Respondent guilty of violating Disciplinary Rule 7-108(D) (after dismissal of the jury in a case of which he is connected, a lawyer shall not communicate with or cause another to communicate with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge, in which event he shall scrupulously follow the procedure described and provided for in EC 7-29 hereof) concerning Count V of the complaint. The Referee's findings of fact as to Count V of the complaint are as follows:

1. After dismissal of the jury in the Karen Thompson case, respondent contacted members of the jury without obtaining leave of the trial judge as required in Rule 1.431 (g), Fla. R. Civ. P. (Par. 31 of complaint; admitted in Answer).

2. Walter Rusk, alternate juror in the Thompson case was telephoned by Mr. Newhouse subsequent to the trial. Respondent asked him a lot of questions about the trial, how he felt about it. (TR - 24, 25). He thought it unethical for respondent to have contacted him in this manner (TR-25) but described Newhouse's demeanor as "amicable" and denies that he was harassed. (TR-29).

3. Donald Weadon, a juror, had a lengthy conversation which was initiated by respondent (TR-30), who asked this juror specific questions as to why his client lost, as to the nature of the jurors' deliberations and how they arrived at their verdict (TR-31). Weadon has served many times as a juror but this is the first time he has been contacted by an attorney (TR-32) and thought there was something wrong with his being called in this manner (TR-33).

4. Ann Serpico, foreman of the Karen Thompson jury was telephoned by respondent several weeks after the trial had ended (TR-87). She was upset by the experience and didn't think she should have to tell respondent about the discussions and deliberations in the jury room (TR-88). She disliked the idea that she could be reached and questioned by one of the lawyers and as a result of this experience she probably would not want to serve again as a juror (TR-89). It was she who called Judge Purdy's office to complain. (TR-89)

5. Respondent stated his reason for telephoning the jurors was to determine if there was a ground for objecting to the verdict and also to educate himself (TR-159). He admits knowing from research completed prior to calling the jurors that the disciplinary rules did not permit him to contact them without prior notice alleging specific grounds, which grounds he knew he didn't have (TR-161). I find that respondent has thus admitted to a knowing and deliberate violation of Disciplinary Rule 7-108(D) and Rule 1.431(g), RCP.

6. Respondent asserts as an affirmative defense in his answer that the above disciplinary rules and rules of civil procedure violate his constitutional right of free speech under the United States and Florida Constitutions, also the equal protection provisions of the Fifth and Fourteenth Amendments to the United States Constitution and also the due process provisions of the Fifth Amendment of the United States Constitution and Section Nine of the Florida Constitution.

It is my finding that the cited rules do not violate respondent's rights for the following reasons:

(a) Cases cited by respondent in his memorandum of law dated October 11, 1985, are not very helpful in resolving the issue here. Lovell v. Griffin 303 U.S. 444 (1938), held a municipal ordinance violative of petitioner's First and Fourteenth Amendment rights to freely exercise his religious rights where petitioner was prohibited from distributing any handbooks or circulars including religious tracts without permission first obtained from the City Manager. The Court also held that the ordinance was facially invalid as a censorship of the press. (303 U.S. at p. 451).

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) also is cited for the proposition that professional codes may conflict with constitutional guarantees. However, Goldfarb is disposed of not on constitutional grounds but on "Sherman Anti-Trust Act" grounds. It was held that the publication of County Bar Association fee schudles which were not purely advisory constituted a form of price fixing in the sale of title examination services.

Virginia State Board of Pharmacy v. Virginia Consumer's Council, Inc., 425 U.S. 748 (1976), comes closer to the mark and invalidated, on First Amendment grounds a Virginia Statute which made it unprofessional for licensed pharmacists to advertise any price for prescription drugs. The Court held that the right to advertise prices was a First Amendment right enjoyed not solely by the advertisers but was also a protection enjoyed by the plaintiffs as recipients of that information. While recognizing that the state

had an interest in maintaining a high degree of professionalism on the part of licensed pharmacists, total ban on advertising was held to be not sufficiently shown, as a reasonable exercise of such state interest.

Bates v. State Bar of Arizona, 433 U.S. 350 (1977), involved a violation of a state bar disciplinary rule banning advertising on the part of lawyers and was disposed of on First Amendment grounds. The court held that the disciplinary rule would not be used to bar the publication of a truthful (and not false or misleading) advertisement stating the availability and terms of routine legal services. The flow of such information could not be restrained by the mandate of the First Amendment.

(b) The Bar asserts that there is a compelling state interest in support of Disciplinary Rule 7-108(D) which protects and safe-guards the integrity of the jury system. The Supreme Court of Florida by promulgating this rule has not interfered with free flow of price information and availability of professional services such as was proscribed the U. S. Supreme Court in the Goldfarb, Board of Pharmacy and Bates cases. The Third District, in discussing this rule has observed:

"***It is difficult enough in our modern complex society, to secure good jurors. It will be even more difficult if jurors are to be subjected to Harassment, investigation and interrogation subsequent to each time they perform their public duty." (Pix Shoes of Miami, Inc., v. Howard, 201 So.2d 80 (Fla. 3rd DCA 1967)

See also Brassel v. Brethauer, 305 So.2d 217 (Fla. 4th DCA 1974), which directed the trial court to enforce the terms of Ethical Consideration 7-29 and Canon 7 prior to initiation of an interview with jurors.

(c) I find that DR 7-108(D) promotes a legitimate state interest which is to protect and safeguard the integrity of the jury system. The best argument for the wisdom of the rule was given by Ann Serpico who thought it "Scary" that she could be reached and interrogated so easily after a trial and doesn't want to be on a jury again because of the experience. (TR-89)

(d) I find against respondent on his "Due Process" claims. The Civil Rule (RCP 1.431 (g)) and the Canon and its supporting Ethical Consideration (EC7-29) contain a well defined procedure for hearing and a judicial determination of the scope of any juror interviews. Respondent freely admits he did not follow these procedures because he knew he did not have the required grounds to file the required motion (TR-161).

Respondent further asserts: that because the rule applies only to prohibit attorneys from exercising their right of free speech the rule thus violates the "Equal Protection Clause" of the Fourteenth Amendment. In Railway Express Agency v. People of the State of New York, 336 U.S. 463, 69 S. Ct. 463 (1949) it was pointed out that differences of treatment under law should not be approved because of any differences unrelated to the legislative purpose (69 S. Ct. at p. 468). The "legislative purpose" by the Integration Rule and Bar Canons is to regulate the practice of law and improve the administration of justice. Thus the "legislation" (DR 7-108(D)) regulates that class of persons (attorneys) that the Supreme Court is empowered to regulate, treats all in identical fashion, and creates no individious distinctions or suspect classifications. I recommend that the rule be found constitutionally valid.

As neither party sought review of the Report of Referee, the findings of fact are deemed conclusive pursuant to Florida Bar Integration Rule, article XI, Rule 11.09(5). The only issue to be determined is the appropriateness of the Referee's recommendation of a public reprimand.

At the grievance level of these proceedings, the respondent filed a request that these proceedings be made public information (See Appendix 1).

SUMMARY OF ARGUMENT

I. THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

The Referee found that Respondent intentionally violated Disciplinary Rule 7-108(D), EC 7-29 and Rule 1.431(g), Fla. R. Civ. P. (SRR, p. 1) regarding Count V of the Complaint. Respondent admits researching grounds for interviewing jurors and knew that he did not have sufficient grounds. (T. 161) Respondent admitted he knew the proper procedures to request a juror interview but he ignored it because he believed he did not have the proper grounds. (T. 160-162). There can be no doubt that such a premeditated act of misconduct warrants at least a public reprimand. See The Florida Bar v. Peterson, 418 So.2d 246 (Fla. 1982), State v. Laubengayer, 666 P.2d 727 (Kan. 1983), State v. Socolofsky, 666 P.2d 725 (Kan. 1983).

In Pix Shoes of Miami, Inc. v. Howarth, 201 So.2d 80 (Fla. 3rd DCA 1967), the Court stated:

> The code of ethics provides that counsel should not accost a juror following a trial, unless "he has reason to believe that ground" for a challenge of the verdict exists and then only after notice to the trial judge and opposing counsel of such intentions, and any such interview should be limited in the scope of its inquiry. (citation omitted) Id., at 82

The court in Pix also explained the effect on jurors if the rule was not followed. "It is difficult enough, in our modern complex society, to secure good jurors. It will be even more difficult if jurors are to be subjected to harassment, investigation and interrogation subsequent to each time they perform their public duty." Id at 83.

The Pix Court's prediction has become a reality in the instant case. Anna Serpico, forewoman of the jury, was contacted by Respondent by telephone at her home. Anna Serpico, after this incident, does not wish to serve as a juror again. She was very disturbed about being accessible to attorneys after the trial. She was under the impression that what transpires in the jury room is private. (T. 86 - 90, 93). Respondent improperly questioned Mrs. Serpico about the discussions and deliberations of the jury. (T. 88).

Walter Rusk, an alternate juror, testified that Respondent called him after the case was over and asked him a lot of questions about the trial, how he felt Judge Purdy (the presiding Judge) conducted the case, how he felt the case came out, what the jurors discussed and what the jurors thought about the case. (T. 24-25).

Donald Weadon, another Juror, testified that Respondent called him after the trial was over in which Respondent asked about the jury deliberations, how the verdict

was reached and whether or not Mr. Weadon felt the Judge had been unfair to Respondent. (T. 30-32).

The Referee's findings of fact stressed Respondent's knowing and intentional violation of Disciplinary Rule 7-108(1). (RR, p. 5, SRR, pp. 1-2). Accordingly, the misconduct committed by Respondent in Count V in and of itself warrants a public reprimand.

Additionally, Respondent was found guilty of Count IV, wherein in his closing argument Respondent uttered the following statement, "I have a responsibility, also a legal and moral one. I already had one client commit suicide and its a terrible feeling." (The Florida Bar Ex. I, p. 24).

The Referee found Respondent guilty of violating Disciplinary Rule 7-106(C)(1) (in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence).

The Referee found that Respondent's statements "were of an inflammatory nature, highly prejudicial in character and which Respondent must have known were irrelevent to the case and which were unsupported by any evidence in the record." (RR, P. 7).

Respondent alleged that this remark in closing was a fair comment. (T - 203). However, the Referee found otherwise. See, RR, par. 3 as to Count IV.

Similar statements have been held improper and prejudicial. See Seshadri v. Morales, 412 So.2d 39 (Fla. 3rd DCA 1982), Martin v. State Farm Mutual Auto Insurance Company, 392 So.2d 11 (Fla. 5th DCA 1980), State v. Murray, 443 So.2d 955 (Fla. 1984), Eastern Steamship Lines v. Martial, 380 So.2d 1070 (Fla. 3rd DCA 1980), Thompson v. State, 318 So.2d (Fla. 4th DCA 3975), Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984).

This Court deals more severely with cumulative misconduct that with isolated instances of misconduct. The Florida Bar v. Baron, 392 So.2d 1318, 1320-1321 (Fla.1981). In this cause there are two cumulative acts of misconduct.

Neither party has filed a petition for review concerning the Referee's findings of fact and pursuant to Florida Bar Integration Rule, article XI, Rule 11.09(F), said findings of fact shall be deemed conclusive.

The Florida Bar submits that in light of Respondent's deliberate violation of Disciplinary Rule 7-108(D) and his violation of Disciplinary Rule 7-106(C)(1), discipline in this cause should be at least a public reprimand as evidenced by the cases cited in this brief.

ARGUMENT

I. THE REFEREE'S RECOMMENDATION OF A PUBLIC REPRIMAND IS APPROPRIATE AND SHOULD BE UPHELD BY THIS COURT.

The Referee found that Respondent intentionally violated Disciplinary Rule 7-108(D), EC 7-29 and Rule 1.43(g), Fla. R. Civ. P. (SRR, p. 1) regarding Count V of the Complaint. Respondent admits researching grounds for interviewing jurors and knew that he did not have sufficient grounds. (T. 161) Respondent admitted he knew the proper procedures to request a juror interview but he ignored it because he believed he did not have the proper grounds. (T. 160-162) There can be no doubt that such a premeditated act of misconduct warrants at least a public reprimand.

A public reprimand is not uncommon in situations such as this. Pix Shoes of Miami, Inc. v. Howarth, 201 So.2d 80 (Fla. 3rd DCA 1967).

> The code of ethics provides that counsel should not accost a juror following a trial, unless "he has reason to believe that ground" for a challenge of the verdict exists and then only after notice to the trial judge and opposing counsel of such intentions, and any such interview should be limited in the scope of its inquiry. (citation omitted) Id., at 82.

The court in Pix also explained the effect on jurors if the rule was not followed. "It is difficult enough, in our modern complex society, to secure good jurors. It will be even more difficult if jurors are to be subjected to harassment, investigation and interrogation subsequent to each time they perform their public duty." Id at 83

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Walter Rusk, an alternate juror, testified that Respondent called him after the case was over and asked him a lot of questions about the trial, how he felt Judge Purdy (the presiding Judge) conducted the case, how he felt the case came out, what the jurors discussed about the case and what the jurors thought about the case. (T. 24-25)

Donald Weadon, another juror, testified that Respondent called him after the trial was over in which Respondent asked about the jury deliberations, how the verdict was reached and whether or not Mr. Weadon felt the Judge had been unfair to him (T. 30-32).

In his recommendations as to disciplinary measures in his supplement to Report of Referee, the Referee stated the following as to Count V of the Complaint:

> I. I consider the violation to be more serious in nature. This violation resulted from a fully-formed intention on behalf of respondent to ciolate DR 7-108(D), EC 7-29 and Rule 1.43(g), Fla. R. Civ. P. and thus requires more serious treatment in the opinion of the undersigned referee. Respondent at the hearing on September 6, 1985, admitted he knew from prior research that the disciplinary rules did not permit him to contact the jurors after the trial without prior notice alleging specific grounds, which grounds he knew he didn't have. (TR-161)
>
> The only case in Florida which appears to be closely analogous is The Florida Bar v. Peterson, 418 So.2d 246 (Fla. 1982) which involved a communication by a plaintiff's attorney with two jurors during a luncheon recess of the trial. The nature and extent of the communication was unclear and the Court found that the evidence failed to demonstrate that Peterson did what he did with the intent of gaining any unfair advance in the case. The Trial Judge declared a mistrial. The Supreme Court approved sanctions including a public reprimand, one year's probation and a requirement that Peterson pass the ethics portion of the bar examination. (418 So.2d at p. 247)
>
> In a sister state, the Supreme Court of Kansas administered a public reprimand against a prosecutor who wrote trial jurors an anonymous "sour grapes" letter after an acquittal. State v. Laubengayer, 666 p. 2d 727 (Kan. Sup. Ct. 1983)

> Respondent's conduct was not of a neglectful or benign nature, in which a private reprimand would ordinarily be sufficient. The misconduct involved deliberateness and intent and it is therefore submitted that a public reprimand published in Southern Reporter is necessary to punish the breach of ethics of which respondent has been found guilty.
> (SRR, pp 1-2).

In Brassell v. Brethauer, 305 So.2d 217 (Fla. 4th DCA 1974), the Court stated:

> It used to be common practice for counsel to interview jurors at the end of a trial, both to find out "what went wrong" and for the general education of counsel. However, in 1966 upon petition of the Florida Bar the Supreme Court of Florida amended Canon 23 (the predecessor of Canon 7) so as to terminate indiscriminate interviewing of jurors by requiring that a lawyer have "reason to believe" and that he file notice of his intention to interview. In Re Canon of Ethics Governing Attorneys, Fla. 1966, 186 So.2d 509. It is interesting to note that the rule proposed by the Florida Bar did not contain the provision requiring the filing of written notice prior to any interview. That provision was gratuitously added by the Supreme Court. See Opinion 66-47, Selected Opinions of the Committee on Professional Ethics of The Florida Bar, 1959-1967. It seems clear that the purpose of the amendment was to preserve the right to interview jurors only where such interview is justified by facts that indicate the verdict is faulty.
> Id, at 219-220.

In State v. Socolofsky, 666, P2d 725 (Kan. 1983), Respondent was guilty of mailing a newspaper article to jurors after they were discharged from the case he was prosecuting. The article stated that the defendant had pled

guilty to a lesser offense after the jury acquitted him. Respondent, in that case, received a public reprimand.

Accordingly, the misconduct committed by Respondent in Count V in and of itself warrants a public reprimand.

Additionally, Respondent was found guilty of Count IV, wherein in his closing argument Respondent uttered the following statement, "I have a responsibility, also a legal and moral one. I already had one client commit suicide and its a terrible feeling". (The Florida Bar Ex. I, P. 24)

The Referee found Respondent guilty of violating Disciplinary Rule 7-106(C)(1) (in appearing in his professional capacity before a tribunal, a lawyer shall not state or allude to any matter that he has no reasonable basis to believe is relevant to the case or that will not be supported by admissible evidence.)

The Referee found that Respondent's statements "were of an inflammatory nature, highly prejudicial in character and which Respondent must have known were irrelevent to the case and which were unsupported by any evidence in the record." (RR, P. 7)

Respondent alleged that this remark in closing was a fair comment. (T - 203) However, the Referee stated in his findings of fact:

> I have reviewed the transcript of Mr. Newhouse's jury argument (BE - "J" pp. 5-30) and Mr. DiSalvo's closing argument (BE - I ") and find nothing in Mr. DiSalvo's argument to justify presenting such a shocking and prejudicial argument when there is no evidence to suggest that Karen Thompson is suicidal or that she will do away with herself if the jury doesn't find in her favor. (RR, P. 4)

Juror Donald Weadon testified that he was upset by Respondent's statement and that it had a bad or chilling effect upon him (T 33-34). Juror Anna Serpico testified that Respondent's comment "floored" her (T 90). Scott DiSalvo, defense counsel, testified that he "found the comment to be shocking". (T - 104)

In Seshadri v. Morales, 412 So.2d 39 (Fla. 3rd DCA 1982), counsel commented about the "value of human life and value of an innocent baby" Id., at 40. The court granted a new trial due to the inappropriateness and prejudicial effect of said statements.

In Martin v. State Farm Mutual Auto Insurance Company, 392 So.2d 11 (Fla. 5th DCA 1980), defense counsel in closing argument stated, "(b)ut if you give her an award, then every time she spends those dollars, she's going to think about this case, and I submit that that's just too much for her to bear." Id., at 13. In reversing the judgment and remanding the case for a new trial the court stated, "(t)he callousness of some of these remarks is

unworthy of a member of the bar". Id, at 13. While these cases are mostly criminal in nature the Supreme Court has held that it is proper to refer cases of overzealousness or misconduct of prosecution or defense counsel to the Bar for disciplinary investigation, State v. Murray, 443 So.2d 955, (Fla. 1984), (RR p. 4).

In Eastern Steamship Lines v. Martial, 380 So.2d 1070 (Fla. 3rd DCA 1980), the court reversed a judgment because plaintiff's attorney commented about an unrelated tragedy in plaintiff's past. The law was succinctly stated in Thompson v. State, 318 So.2d 549 (Fla. 4th DCA 1975), "(I)t is well settled that a prosecutor must confine his closing argument to evidence in the record and must not make comments which could not be reasonably inferred from that evidence," (citation omitted). Id., at 551.

The court in Ryan v. State, 457 So.2d 1084 (Fla. 4th DCA 1984) stated, (a)rguments which beseech the jury to convict a defendant for any reason except guilty are highly prejudicial and are strongly discouraged." Id., at 1089.

There is no doubt that Respondent's comment had a chilling effect upon the jurors. The referee found that Respondent's allusion to another client's suicide could not reasonably have been believed by Respondent to be either relevant or supported by admissible evidence. (RR, p. 5)

Although Respondent did violate Disciplinary Rule 7-106(C)(1) regarding Count IV, the Referee found his conduct to be occasioned by an emotional overzealousness on the part of the Respondent. (SRR, p. 1). The Referee also stated that a private reprimand would have been appropriate to correct the deviation if that had been the only instance of misconduct. (SRR p.1).

This Court deals more severely with cumulative misconduct that with isolated instances of misconduct. The Florida Bar v. Baron, 392 So.2d 1319, 1320-1321 (Fla. 1981). In this cause, there are two cumulative acts of misconduct.

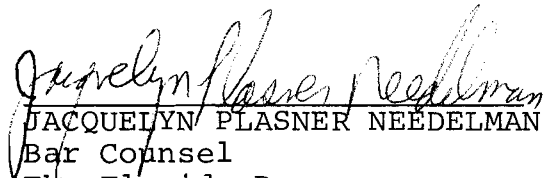
Neither party has filed a petition for review concerning the Referee's findings of fact and pursuant to Florida Bar Integration Rule, article XI, Rule 11.09(F), said findings of fact shall be deemed conclusive.

The Florida Bar submits that in light of Respondent's deliberate violation of Disciplinary Rule 7-108(D) and his violation of Disciplinary Rule 7-106(C)(1), discipline in this cause should be at least a public reprimand as evidenced by the cases cited in this brief.

CONCLUSION

The Florida Bar respectfully requests this Honorable Court to uphold the Referee's findings of fact and approve the discipline of a public reprimand that was recommended by the Referee and have execution issue against the Respondent in the amount of $1,106.47 for the costs incurred by The Florida Bar in this proceeding.

Respectfully submitted,



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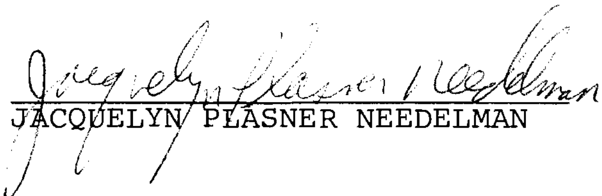
CEERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Brief of The Florida Bar was furnished to Morris S. Finkel, attorney for Respondent, 3352 Northeast 34th Street, Fort Lauderdale, Florida 33308, on this 8th day of August, 1986, via regular United States mail; and a copy to John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Florida 32301-8226.



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