IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

RICHARD G. NEWHOUSE.

Respondent.

Case No.: 66,642
(Florida Bar Case No.: 17A84F20)

REPORT OF REFEREE

I. Summary of Proceedings. Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, hearings were held on September 6, 1985. The pleadings, Notices, Motions, Orders and Exhibits all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case. Pursuant to agreement of the parties a separate hearing will be held to determine appropriate discipline to be recommended by the referee: The exhibits in evidence and the transcript will be retained by the undersigned referee until after the hearing on disciplinary measures and the recommendations as to discipline will be forwarded with the trial transcript and evidentiary exhibits.

The following attorneys appeared as counsel:

For The Florida Bar: Jacquelyn Plasner Needelman
Bar Counsel
915 Middle River Dr. No. 602
Ft. Lauderdale, FL 33304

For The Respondent: Richard G. Newhouse (Pro Se)
2120 NE 21st Street
Ft. Lauderdale, FL 33305
After final hearing, appearance
by Abrams & Finkel
3352 NE 34 Street
Ft. Lauderdale, FL 33308

Abbreviation s used: "TR" for transcript of proceedings before the referee on Sept. 6, 1985.

"BE" for lettered exhibit of The Florida Bar.

"RE" for numbered exhibit of the Respondent, Richard G. Newhouse.

II. Findings of Fact as to Each Count. After considering the pleadings and evidence before me, I find:

As to Count I

1. Respondent represented plaintiffs KAREN THOMPSON and her husband in a personal injury suit in the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida, as a result of injuries sustained by KAREN THOMPSON in an automobile accident of Sept. 21, 1981 (par. 2, Count I of Complaint;

admitted in respondent's answer). Respondent filed suit against defendants MICHAEL LOUIS MACKAROVITZ and his insurance carrier, AMERICAN AMBASSADOR CASUALTY COMPANY, who were represented by attorney WAYNE POMEROY, and against defendants, DEBRA MARIE SPEAR and her carrier, FLORIDA FARM BUREAU MUTUAL INSURANCE COMPANY, who were represented by attorney SCOTT DiSALVO. (Count I of Bar Complaint, admitted by respondent in answer).

2. On August 24, 1982, respondent served both defendants with Requests for Production which, among other items, sought production of "Any and all photographs of both vehicles and all persons involved in the incident which is the subject matter of this suit". (Par. 5 of Bar Complaint; admitted in Answer).

3. Attorney Wayne Pomeroy testified that at a hearing on the request for production held before Judge Garrett, that he, Pomeroy, objected on the grounds of "work product" privilege. (TR-44, 47). He stated NEWHOUSE responded by representing to Judge Garrett that he did not have any photos of any of the vehicles, of the scene, and needed whatever photographs we had in order to prosecute the case (TR-47). Attorney Pomeroy argued that undue hardship, which was not asserted in the Request, could not be asserted (orally) at the time of the hearing and Judge Garrett sustained his objections. (TR-45) Later that day in a deposition of the plaintiffs, Pomeroy said the plaintiffs exhibited some 40 odd photographs of the vehicle KAREN THOMPSON was riding in, another 16 or so of the accident scene and perhaps some black and white police photos. (TR-45, 46) (See also RE #1; a composite of numerous photos of vehicles and scene utilized by plaintiffs in the law suit).

Respondent testified he needed photos to enable an accident reconstruction expert to look at them and determine point of impact and angle of the autos prior to collision (TR-165). He testified that he represented to Judge Garrett that "I did not have adequate photographs" to enable the accident reconstruction expert to render an opinion. (TR-165).

Judge Garrett did not testify, the hearing was not reported and there is no independent corroboration of either Mr. Pomeroy's version or Mr. Newhouse's version. (TR-166). I fail to find as a fact that respondent made a representation to Judge Garrett that plaintiffs did not have any photographs of the vehicles or the scene.

4. There was a considerable amount of animosity displayed between the sole witness as to alleged misconduct charged in Count I and the respondent (See generally, Pomeroy's testimony, TR-70 to 82). Respondent testified that he and Pomeroy were not on good terms (TR-176) and stated that Pomeroy's reputation for truth and veracity in the community is that he is a liar. (TR-172). Since this count degenerated to a swearing contest between two lawyers who dislike each other, I am not able to find that by clear and convincing evidence respondent had falsely and deceitfully represented to Judge Garrett that plaintiffs did not have any photos.

As to Count II

1. Attorney Scott DiSalvo, on behalf of defendant, FLORIDA FARM BUREAU, served a Request to Produce on September 14, 1982, which requested that plaintiffs produce any and all statements of defendants. (BE-"B") (par. 14 of complaint; admitted in answer).

2. Respondent Newhouse filed a response to the Request, by hand delivery, on January 10, 1983, which asserted:

"5. No statements of the Defendants have been taken" (BE-"C") (TR-99)

3. Thereafter, respondent filed a Plaintiff's Unilateral

Pre-trial Stipulation dated February 11, 1983, which listed:

"24. Statement of DEBRA M. SPEAR." (BX-"D", p. 4, item 24) (testimony of DiSalvo, TR-99)

4. At a pretrial conference between himself and respondent, Mr. DiSalvo saw the handwritten statement of Debra Spear (TR-100) (BE-"H").

5. Attorney DiSalvo stated neither he or his client had been injured by the omission of the statement from Plaintiff's Response to Request for Production, tht Debra Spear's testimony was rather consistent with the contents of the written statement and does not think that there was any intent on the part of the respondent to secrete the statement. (TR-124).

Respondent testified the omission of the Spear's statement from the Plaintiff's Response to Request for Production (BE-"C") was an unintentional and inadvertent omission (TR-167). One of his secretaries prepared it, he skim read and, as it appeared to be correct, he signed it. The statement was dull and rather uneventful without any important admissions in it and he simply forgot having taken it. (TR-167)

In view of his disclosure of the existence of the statement about 30 days later in the Pre-Trial catalog (BE-"D") and in the light of Mr. DiSalvo's testimony concerning the incident, I find as a fact that the omission was one of simple oversight or neglect and not willful, deliberate or in reckless regard of the truth. This type of oversight or neglect in preparing pleadings is all too common failing in most of us and should not warrant disciplinary action. See The Florida Bar v. Neale, 384 So2d 1264 (Fla. 1980).

As to Count III

1. During the trial of the personal injury case respondent offered into evidence two exhibits, which are statements to plaintiff, KAREN THOMPSON, for child care from her mother, MARGE ARNEST, in the amount of $4,544 (BE-"E") and from plaintiff's brother, HOWARD LOMEN, also for care of plaintiff's children, in the amount of $7,808 (BE-"F") (Pars. 20, 21 and 22 of complaint; admitted in Answer).

2. Attorney DiSalvo took the position at trial that they were just "made up" for the occasion and did not represent real substantive obligations owed by the plaintiff (TR-102). However, he didn't object to their introduction, apparently for tactical reasons---the jury would obviously see though so transparent an attempt to collect money when no attempt would have been made, except for the litigation. (TR-103). Because of the lack of objection there was no real voir diring as to these exhibits or rulings of the trial judge.

However, the uncontradicted testimony of respondent is that Bar Exhibits E and F were typed in respondent's office with his client, Mr. Lomen and Mrs. Arnest present at which time it was decided that the figures shown represented reasonable charges that should be paid by Karen Thompson. Newhouse did not know whether there had been any earlier agreement among the family members on the subject but there was at least an understanding in his office that the plaintiff's brother and mother would be paid. (TR-153 and 154)

With Mr. Newhouse's testimony being unrebutted, I fail to see how he can be found guilty of a dishonest or fraudulent act

in preparing written "bills" to embody the agreements reached in his office or that he dishonestly created fraudulent evidence. Perhaps I have sat too long in a small claims court, but I have never thought that it made any real difference in deciding whether a plaintiff should recover for goods sold or service rendered as to whether he did or did not type up a bill embodying the terms of the parties' oral agreement (except perhaps as to an "Account stated" action). She probably can't afford to pay and may not be called upon to pay theses statements since there was no recovery but if she had recovered, should the defendants have received a windfall as to special damages because the persons caring for the children were relatives? I think the answer to this is no. With the benefit of hindsight's superb vision we might venture the opinion that the introduction of these exhibits was "overkill" and corroborated Mr. DiSalvo's argument that this case was "built up" from a mole hill to a mountain but I find no fraud or falsity attributable to respondent in their preparation.

As to Count IV

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 thought 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 So2d 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 So2d 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 irrel-

event 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.

As to Count V

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 U.S. Constitution and also the due process provisions of the Fifth Amendment of the U.S. 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 issues 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 schedules 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 safeguards 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. Howarth, 201 So2d 80 (Fla. 3rd DCA 1967)

See also Brassell v. Brethauer, 305 So2d 217 (Fla. 4th DCA 1974) which directed the trial court to enforce the terms of Ethical Consideration 7-29 and Canon 7 by requiring counsel to file a notice complying with the terms of 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 interrorated 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 invidious distinctions or suspect classifications. I recommend that the rule be found constitutionally valid.

III. Recommendations as to whether or not the Respondent should be found guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

As to Count I

I recommend that the respondent be found NOT CUILTY with respect to the violation of Disciplinary Rule 1-102 (A) (1), 1-102 (A) (4) and 1-102 (A) (5), as alleged in Count I of the Complaint.

As to Count II

I recommend that the respondent be found NOT GUILTY with respect to the violation of Disciplinary Rules 1-102 (A) (1), 1-102 (A) (4) and 1-102 (A) (5), as alleged in Count II of the Complaint.

As to Count III

I recommend that the respondent be found NOT GUILTY with respect to the violation of Integration Rule, Art. XI, Rule 11.02 (3) (a), and Disciplinary Rules 1-102 (A) (1), 1-102 (A) (4), 1-102 (A) (6) and 7-102 (A) (6), as alleged in Count II of the Complaint.

As to Count IV

I recommend that the respondent be found GUILTY with the respect to the allegation contained in Count IV, violation of Disciplinary Rule 7-106 (C) (1) by arguing before the jury in the Karen Thompson matter, the following statements which 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:

> "***I have a responsibility, also, a legal and moral one. I have already had one client commit suicide." (Par. 26 of Complaint; admitted in Answer) (page 24 of BE-"J", a transcript of the argument)

As to Count V

I recommend that the respondent be found GUILTY with respect to the violation of Disciplinary Rules 1-102 (A) (1) and 7-108 (D) as alleged in Count V of the Complaint.

IV. Recommendations as to Disciplinary measures--these will be furnished to the Court after a further hearing of the parties.

V and VI. Personal History and past Disciplinary Record: To be furnished after a further hearing.

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VII. Statement of Costs: To be furnished after the hearing on disciplinary measures to be recommended.

Dated this 5th day of November, 1985.

ROBERT V. PARKER
Referee

Original to Supreme Court

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IN THE SUPREME COURT OF FLORIDA
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THE FLORIDA BAR,

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Respondent.

SUPPLEMENT
TO
REPORT OF REFEREE

I. Since the report of November 5, 1985, an additional hearing to hear recommendations as to sanctions was held at the courthouse in Ft. Lauderdale on November 15, 1985.

The following attorneys appeared as counsel:

For the Florida Bar: Jacquelyn Plasner Needelman, Esq.
Branch Staff Counsel, By:
David M. Barnovitz, Esq.
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For the Respondent: Richard E. Newhouse
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and
ABRAMS & FINKEL, Attorneys
By: Morris S. Finkel, Esq.
3352 NE 34th Street
Ft. Lauderdale, FL 33308

Abbreviations used: "TR" for transcript of Sept. 6, 1985 hearing.

"TR II" for transcript of Nov. 15, 1985 hearing.

II. Recommendations as to Disciplinary Measures.

As to Count IV

1. The conduct seems to have been occasioned by an emotional overzealousness on the part of respondent. If this were the only count of which he were guilty, it would be my recommendation that a private reprimand would be sufficient to correct the deviation from standards of ethical conduct complained of.

As to Count V

1. I consider the violation to be more serious in nature. This violation resulted from a fully-formed intention on behalf of respondent to violate 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 So2d 246 (Fla. 1982) which involved a coummunication 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 advantage 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 So2d 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 Souther Reporter is necessary to punish the breach of ethics of which respondent has been found guilty.

III. Personal History and Part Disciplinary Record: After a finding of guilty of Counts IV and V and prior to recommending discipline to be recommended pursuant to Rule 11.06 (9)(a)(4), of the Integration Rule, I considered the following personal history and prior disciplinary record of the respondent, to wit:

Richard G. Newhouse

Age: Not in evidence but birth year given as 1947 in 2 Martindate-Hubbell 288(1985 ed.) so age is 38.

Date admitted to the bar: 1975 (TR-90)

Prior disciplinary convictions and disciplinary measures imposed therein: No evidence was offered by the Florida Bar.

Other Personal Data: Following graduation from law school respondent worked for a firm in Pompano Beach for a short time, then worked with a Ft. Lauderdale firm for six months. He went with a Miami firm for a short time then went with another Broward County firm for six months. He then associated himself with Mitchell Pasin, P.A., and specialized in commercial litigation (50%) and personal injury litigation (50%). (TR-91)

After three years with Mitchell Pasin he went on his own for the past four years specializing mostly in personal injury litigation (90%). He is a believer in continuing legal education, has attended approximately 100 days of seminars in ten years of practice, and belongs to the American Trial Lawyers Association (TR II-92).

He has been married to Carolyn Joyce Newhouse for 17 years, who is employed as a legal secretary to another Ft. Lauderdale law firm. (TR II-83,84).

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IV. Statement of costs and manner in which costs should be taxed:

I find that costs in the sum of $ have been incurred by the Florida Bar, which figure included $300 in Administrative Costs at the Grievance Committee level and Referee level. I recommend that the $300 in administrative costs be charged to respondent. I am informed this date (12/11/85) by my judicial assistant that counsel for The Florida Bar and the Respondent will be filing a stipulation agreeing to tax the above-mentioned $300 plus $806.47 against the Respondent for a total of $1,106.47, which sum should be payable after the judgment in this case become final unless waived by the Board of Governors of the The Florida Bar.

Dated this 13th day of December, 1985.

ROBERT W. PARKER
Referee

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Original to Supreme Court

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