IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

ALBERT C. SIMMONS,

Respondent.
_____/

Case No. 76,023

TFB File No. 89-00705-08

REPORT OF THE 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 May 17, 1990, The Florida Bar filed its Complaint against Respondent as well as its Request for Admissions in these proceedings. All of the aforementioned pleadings, responses thereto, exhibits received in evidence, and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. FINDINGS OF FACT

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.

Respondent was retained to represent an individual by the name of C. P. Adkins in a criminal case prior to March, 1989. Mr. Adkins' case was set for trial during the month of April, 1989. Respondent, prior to March 28, 1989, had been provided a list of the venire which would be used to pick the jury for the C. P. Adkins trial.

Respondent, on or about March 28, 1989, made a telephone call to an individual by the name of Linda Barnes. Linda Barnes' name was on the list for the venire which had been provided to Respondent for the C. P Adkins trial. During the course of the telephone conversation between Respondent and Linda Barnes, Respondent informed Ms. Barnes that she was going to be called upon to be part of the venire from which the jury would be picked for his client's case.

Ms. Barnes was not previously aware that she was to be called for jury duty. Respondent told Ms. Barnes that he wanted her on his jury for the C. P. Adkins trial, that he was defending C. P. Adkins, and he did not want her to "get off the jury". Respondent also told Ms. Barnes that he would not request that she be taken off the jury and engaged in a discussion about what she should and should not say if questioned by the State during voir dire.

On March 28, 1989, Assistant State Attorney Joseph Smith and State Attorney Investigator Robert McCallum were contacted by

Myrtis Colson, Protective Services Supervisor, Department of Health and Rehabilitative Services, Trenton. Mrs. Colson said that one of her investigators had telephoned the home of Linda Barnes regarding a Health and Rehabilitative Services case involving that family. When the number of Linda Barnes was dialed by the investigator, an answering machine answered the call and instead of taking a message it began playing recorded messages and conversations back over the telephone to the caller.

Ms. Colson called the number and listened to a conversation between Attorney Albert C. Simmons and Linda Barnes, whereupon Ms. Colson felt she must report it to the Office of the State Attorney immediately, and did so.

At approximately 10:41 a.m. on March 28, 1989, Joe Smith and Robert McCallum called Linda Barnes' telephone number and heard the same recording. At the conclusion of listening to the recording, Robert McCallum then recorded the conversation on a blank cassette tape to be used as evidence. Subsequently, Mr. McCallum and Mr. Smith notified the State Attorney, and requested that he listen to the recording.

On the afternoon of March 28, 1989, representatives of the State Attorney's Office went to the mobile home of Linda Barnes and confiscated the answering machine and tape of the conversation. An interview by the State Attorney's Office investigators was conducted with Linda Barnes in which she confirmed the conversation with Respondent.

III. RECOMMENDATIONS AS TO GUILT

I recommend that Respondent be found guilty of violating Rule 3-4.3 (the commission by a lawyer of any act which is unlawful or contrary to honesty and justice) of the Rules of Discipline, and Rules 4-3.5(d)(1) (a lawyer shall not before the trial of a case with which he or she is connected, communicate or cause another to communicate with anyone he or she knows to be a member of the venire from which the jury will be selected), 4-8.4(a) (a lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another), 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and 4-8.4(d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice) of the Rules of Professional Conduct of The Florida Bar.

This recommendation is based upon my review of all of the evidence presented during the hearings held in this matter, including by stipulation of the parties, the hearing on a proposed Consent Judgment tendered in this case. I have listened to the taped conversation between Respondent and Ms. Barnes (a member of the venire) and have considered Respondent's explanation of his reasons for his actions in this regard. I have reviewed The Florida Bar's Memorandum in Support of Appropriate Discipline and Respondent's letter outlining his position as to mitigating factors which he feels should be considered.

I have taken into account the mitigating circumstances and in particular Respondent's practice of law of approximately 20 years without any serious violations. However, I think that the statements of remorse made by Respondent should be taken with -- somewhat with -- a grain of salt because some of Respondent's explanations are quite frankly rather weak. And while Respondent says he's sorry he did it, his statements that he didn't mean to prejudice the juror are unbelievable. I have reviewed all cases presented by both The Florida Bar and Respondent and have found none to be persuasive on the issue of discipline. The cases cited by The Florida Bar and Respondent deal with situations which are less serious in nature and more readily detectable by the individuals involved than those of Respondent in the case at hand.

Respondent stated that he did not intend any prejudice by his conduct, but the clear inference to be drawn from his conduct is that he did. There is no reason to get a venire list, to research it, identify those people who are clients and friends, make a telephone call to one of them, disclose to that individual the style of the case, which Respondent is involved in, and then tell that person not to get off the venire list.

Then to engage in a conversation of what to say and what not to say if you were being questioned during voir dire gives a clear inference that Respondent wanted a friend on the jury, not the venire. Moreover, Respondent states that he didn't tell Ms. Barnes the facts of the case or try to influence her and yet

when she said are we defending or are we prosecuting, Respondent said we're defending. Respondent was putting Ms. Barnes in a defense related posture and identifying to her the case so that she would know she was supposed to be in a defense oriented posture. Respondent suggests that his actions were just burnout and that it looks worse than it seems and yet in Respondent's discussion with her on the tape, Respondent says, "I'm as serious as a heart attack."

I believe that this is a case where the very heart of the judicial system, its integrity by the participants, has been seriously damaged and is a very egregious violation of the Rules of Professional Conduct. I don't think Respondent can get much worse than calling up a potential venire member and using his friendship to attempt to make sure she doesn't get off the venire, and that if she did get on the venire that she's with him on the defense and to make sure not to say too much to cause her to be excused.

I certainly wouldn't want to be the attorney on the other side, not knowing all that, trying the case. I certainly wouldn't want to lose a case, a good case, and go home, after all my hard efforts, scratching my head, trying to figure out why I lost a real good case, not knowing that it was because a good friend and client of the opposing attorney had been tipped off, before the trial, to be on the jury, and be in the defense corner. I would hate to be in that position.

It is to protect our judicial system from this type of conduct that I believe a one-year suspension is appropriate. A one-year suspension will have the further benefit of requiring the Respondent to prove rehabilitation before he is reinstated, and this is also recommended.

Having considered all of the above, I would probably have recommended disbarment but for Respondent's prior good record and the remorse which he has shown.

IV. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

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

A. A one-year suspension from the practice of law. The suspension should begin 30 days after the Florida Supreme Court order is entered in this case.

B. Proof of rehabilitation before reinstatement.

C. Payment of costs in these proceedings.

V. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(k)(1), I considered the following personal history of Respondent, to wit:

Age: 51 years old

Date admitted to the Bar: June 20, 1969

Prior Discipline: None

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

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

A.	Grievance Committee Level		
	1. Court Reporter Fees		$ 303.90
	2. Bar Counsel Travel		100.00
		Subtotal	$ 403.90
B.	Referee Level		
	1. Administrative Costs		$ 500.00
	2. Court Reporter Fees		302.00
	3. Bar Counsel Travel		268.56
		Subtotal	$1,070.56
		TOTAL	$1,474.46

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 30 day of October, 1990.

GARY G. GRAHAM
County Court Judge/Referee
One Courthouse Square, Room 215
Inverness, Florida 32650-4802

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to SID J. WHITE, Clerk of the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32301, and that a copy was mailed by regular United States Mail

to JOHN T. BERRY, Staff Counsel, c/o JOHN A. BOGGS, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; JOHN V. MCCARTHY, Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300; and ALBERT C. SIMMONS, Respondent, at his record Bar address of Post Office Box 779, Cedar Key, Florida 32625-0779, on this 31 day of October, 1990.

GARY G. GRAHAM, Referee