IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 84,435
[TFB Case No. 94-30,713 (09B)]

v.

MILTON KELNER,

Respondent.
_____/

THE FLORIDA BAR'S ANSWER BRIEF

JOHN F. HARKNESS, JR.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF OTHER AUTHORITIES

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or "the bar".

The transcript of the final hearing held on December 2, 1994, shall be referred to as "T", followed by the cited page number(s).

The transcript of the disciplinary hearing held on April 27, 1995, shall be referred to as "T2", followed by the cited page number(s).

The Report of Referee dated February 13, 1995, will be referred to as "RR", followed by the referenced page number(s).

The Report of Referee dated May 31, 1995, will be referred to as "RR2", followed by the referenced page number(s).

The respondent's initial brief shall be referred to as "RB", followed by the cited page number(s).

STATEMENT OF THE CASE

On August 16, 1994, the Ninth Judicial Circuit Grievance Committee "B" found probable cause against the respondent for violating the following Rules Regulating The Florida Bar: 4-3.1 for bringing or defending a proceeding, or asserting or controverting an issue therein, where there is no basis for doing so and which is frivolous; 4-3.4(e) for in trial, alluding to matters that the lawyer does not reasonably believe are relevant or supported by admissible evidence; 4-3.5(c) for engaging in conduct intended to disrupt a tribunal; and 4-8.4(d) for engaging in conduct that is prejudicial to the administration of justice. The bar filed its formal Complaint against the respondent on September 30, 1994. On October 7, 1994, the respondent submitted his Answer to the bar's Complaint and a Motion To Strike Paragraph 11 Of The Complaint And Motion To Dismiss Complaint.

On October 11, 1994, the Honorable A. Leo Adderly, County Judge, was appointed as referee. The bar served its Responses To Respondent's Motion To Strike Paragraph 11 Of The Complaint And Motion To Dismiss Complaint on October 18, 1994. On October 24, 1994, the bar served written interrogatories on the respondent and on October 26, 1994, the respondent served written

interrogatories on the bar. The respondent filed his answers to the bar's interrogatories on November 1, 1994. On November 2, 1994, the bar served a second set of interrogatories on the respondent. The bar filed its answers to the respondent's interrogatories on November 28, 1994.

On November 28, 1994, John D. Kelner entered a notice of appearance as the respondent's counsel. The final hearing was conducted on December 2, 1994, at the conclusion of which, the referee took the case under advisement. On January 5, 1995, the referee filed a Notice To Produce requesting the parties advise him of the respondent's personal history and past disciplinary record within 30 days. The bar complied with the referee's request on January 11, 1995, and the respondent also submitted a response on January 13, 1995.

On February 13, 1995, the referee issued his report as to his findings of fact. On April 6, 1995, the respondent submitted his written arguments as to the appropriate discipline to be imposed. The bar submitted its written arguments on April 17, 1995. A discipline hearing was conducted on April 27, 1995, during which the referee heard oral arguments as to the

appropriate discipline to be imposed. On May 3, 1995, the respondent submitted a Notice of Filing concerning information he wanted to bring to the referee's attention. The bar also submitted a Notice of Filing on May 17, 1995. On May 31, 1995, the referee issued a second report. The referee recommended the respondent receive a public reprimand, without any period of probation, and that he pay the bar's costs in prosecuting this case. The referee recommended that the respondent be found guilty of R. Regulating Fla. Bar 4-3.1 and 4-3.4(e) and not guilty as to Rules 4-3.5(c) and 4-8.4(d).

The Board of Governors of The Florida Bar considered this case during their July, 1995, meeting. The board voted to accept the referee's findings and recommendations as to discipline. The respondent timely filed a Petition For Review and his initial brief with the Court on August 2, 1995. However, the respondent inadvertently sent copies of his petition and brief to the wrong address for the Orlando branch office of The Florida Bar. Bar counsel at the Orlando branch office was not made aware of the respondent's brief until September 1, 1995. On September 1, 1995, the bar filed a Motion For Extension of Time with the Court requesting that the bar have an additional two weeks in which to

file an answer brief. The respondent consented to the additional time. This answer brief is submitted in response to the respondent's initial brief.

STATEMENT OF THE FACTS

The following facts are taken from the referee's report dated February 13, 1995, unless otherwise noted.

The respondent represented the plaintiff, Ronald Purdy, in a civil action in the Ninth Judicial Circuit, styled Ronald Purdy v. John Tatum, M.D., Case Number 91-5836. Mr. Purdy sued Dr. Tatum for loss of consortium with his wife after Christine Purdy had an affair with Dr. Tatum, her psychiatrist. Based upon her affair with Dr. Tatum, Mrs. Purdy separated from her husband and he filed for divorce against her. Mrs. Purdy filed her own malpractice action against Dr. Tatum which was concluded by a settlement.

Prior to the trial in Ronald Purdy's civil action, the defendant, Dr. John M. Tatum, filed a motion in limine regarding recoverable damages. The motion requested that the evidence before the jury be limited to recoverable damages and that reference to improper damages, which are not properly derivative of a loss of consortium or breach of contract action, be prohibited. The court granted the defendant's motion in limine and instructed the respondent not to elicit any testimony or

evidence with respect to any claims for alienation of affections as defined specifically during the hearing. The court specifically stated that Mr. Purdy's damages were limited to loss of consortium and that he could not recover for his own personal injuries relating to his mental anguish caused by his divorce from Christine Purdy. Mr. Purdy was further prohibited from seeking costs incurred during the divorce. In contravention of the court's order concerning the motion in limine, the respondent made repeated references to the personal injuries his client suffered as a result of the mental anguish caused by Christine Purdy's affair with Dr. Tatum. The respondent's conduct in that regard was indicated in transcript excerpts of the proceedings before the Honorable Joseph P. Baker on October 14-15, 1993, in Orlando, Florida. The trial court strongly advised the respondent to cease that conduct which it considered to be in violation of its previous order on the motion in limine. During the trial, the court gave curative instructions to the jury concerning recoverable damages in Mr. Purdy's action in an attempt to cure any possible damage caused by the respondent's violation of the court's order. Directly after the court's final curative instruction, the respondent continued to violate the court's order in limine by repeatedly asking questions about the

emotional effect on Mr. Purdy caused by his separation from Christine Purdy and his son. The respondent also attempted to offer Dr. Tatum's telephone records into evidence through a completely inappropriate witness. Ultimately, a mistrial resulted in the civil case due to problems caused by the respondent's violation of the court's order in limine.

SUMMARY OF THE ARGUMENT

The respondent disputes the referee's findings of fact as they relate to improper conduct attributed to the respondent. He also objects to the referee's recommendation that the respondent be found guilty of violating R. Regulating Fla. Bar 4-3.1 and 4-3.4(e). During two hearings before the referee, the respondent was able to present his interpretation of the proceedings in the civil action which form the basis of this disciplinary case. However, the referee did not accept the respondent's version of the facts. Despite the respondent's arguments in that regard, there is competent, substantial evidence on the record to support the referee's findings.

The respondent contends that a public reprimand is too harsh a discipline considering the respondent's lack of a prior disciplinary history and other mitigating factors. He suggests that if any discipline is warranted, it should be a "private admonishment" for minor misconduct or other alternatives, such as the diversion program. Admonishments in bar disciplinary proceedings are not private pursuant to the Rules Regulating The Florida Bar and, in any case, the respondent's conduct in this matter is not minor misconduct. The bar contends that the

referee's recommended discipline of a public reprimand is appropriate given the circumstances of this case.

ARGUMENT

POINT I

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE.

The referee found in his report dated February 13, 1995, that the respondent violated a court's order in regard to a motion in limine by making repeated references to the personal injuries his client suffered as a result of the mental anguish caused by the intimate relationship of his client's former wife with the defendant psychiatrist. The referee further found that despite strong warnings from the court, the respondent continued to violate the court's order in limine ultimately resulting in a mistrial, RR p. 2. The respondent disputes those findings by the referee and he also objects to the referee's finding of guilt for violation of R. Regulating Fla. Bar 4-3.1 and 4-3.4(e), RR2 p. 1. However, "in bar disciplinary proceedings, the party seeking to overturn a referee's findings and recommendations of guilt has the burden of showing that the referee's report is clearly erroneous or lacking in evidentiary support." The Florida Bar v. Neu, 597 So. 2d 266 (Fla. 1992). The respondent has not shown the referee's findings and recommendations to be erroneous and

there is, in fact, substantial evidence in the record to support same.

During the final hearing on December 2, 1994, and the discipline hearing on April 27, 1995, the respondent provided various reasons for his conduct during the civil case Ronald Purdy v. John M. Tatum, M.D. . The respondent argued that the difference between loss of consortium and alienation of affections is difficult to distinguish or there is no "clear demarcation", T p. 29, T2 pp. 13-14; that it was a simple disagreement between counsel and the court making it difficult to proceed which resulted in a mistrial, T pp. 42-43; and that the judge's rulings as to the issue of loss of consortium were confusing, T pp. 43-48. The referee heard all of the respondent's arguments and reviewed the transcript submitted into evidence from the civil trial. The referee did not accept the respondent's position and found, from the evidence presented, that the respondent is guilty of the misconduct charged in the bar's Complaint. It should be noted that in making his findings, the referee specifically cited to the exhibits and transcript excerpts in evidence.

The respondent also contends in his initial brief that he did not intentionally violate orders from the civil court and that the referee made no such finding, RB pp. 2, 8. However, it is clear from the referee's report that the respondent intentionally disobeyed the court's order in limine. The trial court's order concerning that issue was clear and specific. When the respondent initially violated the order, he received warnings from the court which, upon repetition, became increasingly stronger. In the course of the three day trial, the court gave curative instructions to the jury in an attempt to cure any possible damage caused by the respondent's violation of the order in limine. Immediately after the court's final curative instruction, the respondent continued to violate the court's order. Although the referee did not specifically use the word "intentional", his findings clearly indicate the respondent's intentional disregard for the orders of the presiding judge. Again, the referee cites to the transcript excerpts from the civil trial which were entered into evidence at the final hearing, RR p. 2.

"Where the referee's findings are supported by competent, substantial evidence, the Supreme Court will not reweigh evidence

and substitute its judgment for that of the referee." The Florida Bar v. Garland, 651 So. 2d 1182 (Fla. 1995). It is apparent that in this case the referee's findings and recommendations are based on the evidence in the record. The referee's findings cannot be shown to be erroneous simply because the respondent disagrees with them. The findings are based on competent, substantial evidence. Therefore, the referee's findings of fact and recommendation of guilt should be upheld by this Court.

POINT II

A PUBLIC REPRIMAND IS THE APPROPRIATE DISCIPLINE GIVEN THE CIRCUMSTANCES OF THIS CASE.

The referee has recommended in this case that the respondent receive a public reprimand, without any period of probation, and that he pay the bar's costs in prosecuting this case. The respondent suggests that if any discipline is to be imposed, that a "private admonishment" and/or diversion to a professional enhancement program would be more appropriate. Private admonishments do not exist as all admonishments for minor misconduct are a matter of public record pursuant to R. Regulating Fla. Bar 3-7.1. Regardless, this case does not warrant an admonishment or the diversion program as the respondent's misconduct is not minor. Rather, the Ninth Judicial Circuit Grievance Committee "B" found probable cause against the respondent, thereby effectively rejecting a finding of minor misconduct.

Attorneys have received serious discipline for violations similar to those the respondent has been found to have committed in this case. In The Florida Bar v. Schaub, 618 So. 2d 202 (Fla.

1993), a state attorney was suspended for 30 days for improperly eliciting irrelevant testimony and inserting personal opinions into questioning during a first-degree murder trial. During the cross-examination of an expert witness, the attorney ignored the trial court's rulings on defense objections and inserted his personal opinions on psychiatry and the insanity defense. He also improperly elicited testimony concerning the average time of confinement for someone committed to a hospital for the criminally insane. The attorney admitted he knew that line of questioning was improper under Florida law. Ultimately, the Florida Supreme Court held that the defendant was denied a fair trial due to the attorney's prosecutorial misconduct which led to the admission of irrelevant and deliberately misleading evidence.

In The Florida Bar v. Richardson, 591 So. 2d 908 (Fla. 1991), the attorney received a 60 day suspension for filing a frivolous and malicious federal court claim. The attorney represented the personal representative during the probate of an estate. The presiding probate judge found the attorney's fees to be excessive and ordered him to reimburse the estate. The attorney filed two appeals which were both denied. He then sought two writs of mandamus from the Florida Supreme Court

seeking to reinstate his second appeal and to compel the probate court to withdraw jurisdiction. Both petitions were denied. Next, the attorney filed a complaint in the U.S. District Court for the District of Columbia alleging that the reimbursement order violated his civil rights because of lack of jurisdiction. Named as some of the defendants in the complaint were the judges and justices of the Second District Court of Appeal and the Supreme Court of Florida. The federal court dismissed the action as frivolous and malicious and imposed sanctions under Rule 11 of the Federal Rules of Civil Procedure. In reviewing the Richardson case, the Court stated:

> Neither the Bar nor this Court wishes to stifle innovative claims by attorneys. Nevertheless, under the rules of professional conduct, the pursuit of imaginative claims is not without limit. The standard embodied in rule 4-3.1, requiring a good-faith argument for the extension, modification, or reversal of existing law, is broad enough to encompass those cases where the claims are the result of innovative theories rather than, as here, an obsessive attempt to relitigate an issue that has failed decisively numerous times. The federal court in this case specifically found this claim to be frivolous and malicious. Although the referee made no explicit finding of bad faith, Richardson's failure to meet the standard embodied in the rule certainly calls into question either the purposes of the law suit or Richardson's overall ability to practice. At pp. 910-911.

Here, as in the Richardson case, there is no specific finding of

bad faith by the respondent. However, the respondent's conduct during the civil trial certainly did not comply with the standards manifested in the Rules Regulating The Florida Bar.

In a case in which the Second District Court of Appeal saw fit to impose its own sanctions for similar conduct, an attorney received a public reprimand, a $250.00 fine, and was ordered to seek continuing legal education credits in the area of appellate practice. Bowden v. State, 614 So. 2d 659 (Fla. 2nd DCA 1993). In that case, the attorney failed to appear in court as ordered or notify the court of any difficulty that might preclude his appearance. The attorney further failed to timely respond to an order of the court instructing him to inform the court of the status of an appeal. The appellate court noted:

> Many of Mr. Smith's deficiencies in the handling of this appeal and in responding appropriately to our orders arise not only from willful disobedience, but also from a lack of experience, a failure to familiarize himself with the basic rules of appellate practice and an apparent belief that judicial orders calling for specific conduct or activity can be ignored or satisfied with something less than that which the order commands. Mr. Smith's failure to comply with the order dated January 12, 1993, however, is a willful violation of a valid order. At. p. 661.

Inexperience and lack of familiarization with the appropriate

rules are not factors in the instant matter. The respondent has been a member of The Florida Bar for 47 years without previously having any disciplinary sanctions imposed against him. Under the Florida Standards For Imposing Lawyer Sanctions, which have been considered by this Court in numerous attorney discipline cases, the respondent's lack of a prior disciplinary history is a mitigating factor [standard 9.32(a)]. The respondent's many years of service to The Florida Bar and his pro bono representation of children over the past ten years are mitigating factors pursuant to standard 9.32(g), "character or reputation." The referee specifically noted in his report dated May 31, 1995, the respondent's guardian ad litem service and the excellent results he obtained for his clients, RR2 p. 2. However, there are also aggravating factors present in this case. Standard 9.22(c), "a pattern of misconduct", is appropriate due to the respondent's repeated violations of the court's order in limine despite repeated judicial warnings. The respondent's 47 years as a member of the bar is also an aggravating factor under standard 9.22(i), "substantial experience in the practice of law." In addition, the respondent has been a Board Certified Civil Trial Lawyer since 1983 which renders his conduct in this case more serious. The respondent should be held to a higher standard than

attorneys who are not Board Certified. The fact that the respondent is certified in civil trial practice and his misconduct occurred during a civil trial, makes this case somewhat more egregious and the respondent's certified status should be an aggravating factor. The respondent's substantial experience and Board Certification require him to abide by the rules and orders of all courts of law. Considering the respondent's knowledge and experience, he should have known his conduct before the civil court was inappropriate by any attorney, never mind one with his level of expertise.

The bar takes particular exception to the respondent's arguments that lack of injury and a "good faith effort to rectify consequences of misconduct", [standard 9.32(d)], are mitigating factors in this case. As a result of the respondent's actions, after three days of trial the presiding judge was forced to release the jury due to a mistrial. Whether the respondent accepts it or not, the resulting mistrial was, in effect, injurious to all parties involved as well as to the legal system. The respondent contends that in order to rectify his misconduct, prior to the retrial in the civil case, he will submit every question concerning loss of consortium for the trial court's

ruling so that there will not be a second mistrial, RB p. 6. The respondent does not repair the damage done by his improper conduct by merely offering to obey future obligations of the court. His misconduct should never have occurred in the first place.

Standard 6.2 "Abuse of the Legal Process" is the appropriate standard at issue in this case. Standard 6.22 states:

> Suspension is appropriate when a lawyer knowingly violates a court order or rule, and causes injury or potential injury to a client or a party, or causes interference or potential interference with a legal proceeding.

It is the bar's position that the respondent intentionally violated a court order or rule which warrants suspension pursuant to the above standard. The bar took into consideration the mitigating factors present in this case when it recommended a public reprimand. Standard 6.23 states:

> Public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

Whether the respondent's conduct was intentional or simply

negligent, discipline is called for in this case. Pursuant to the case law and standards, a suspension appears to be the appropriate discipline. However, due to the respondent's long service with the bar and lack of prior discipline as well as other factors present, the level of discipline is mitigated to a public reprimand. The bar sees no basis for the respondent's statement that a public reprimand will "depreciate" the respondent's capacity as a guardian ad litem, pro bono, for children, RB p. 6. That level of discipline will not adversely affect the respondent's ability to properly represent his clients, nor will it restrict his actions as an advocate for children. A public reprimand will, however, serve to protect the public by providing the information that although the respondent is Board Certified in Civil Trial practice, his conduct in this case did not meet the high standards required of board certified attorneys. The three purposes of attorney discipline are protection of the public, fairness to the attorney to encourage reform and rehabilitation, and deterrence to other attorneys who might be tempted to engage in like violations. The Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983). A public reprimand is not an unduly harsh discipline and it is warranted in this case. It will further serve as notice to the respondent and attorneys of

lesser experience that attempting to force one's position in a legal proceeding despite court directives to the contrary is not acceptable behavior of members of the bar and will not be tolerated of any officer of the court.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will uphold the referee's findings of fact and approve the referee's recommendation of a public reprimand and payment of the bar's costs as the appropriate discipline in this case.

Respectfully submitted,

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ATTORNEY NO. 381586

By: Jan Wichrowski

JAN WICHROWSKI
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief and Appendix have been sent by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to the respondent's counsel, John D. Kelner, 1200 Courthouse Tower, 44 West Flagler Street, Miami, Florida, 33130; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 7th day of September, 1995.

Respectfully submitted,

Jan Wichrowski
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Case No. 84,435
[TFB Case No. 94-30,713 (09B)]

v.

MILTON KELNER,

Respondent.
_____/

APPENDIX TO COMPLAINANT'S ANSWER BRIEF

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INDEX

APPENDIX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs

MILTON KELNER,

Respondent. /

CASE NO. 84,435

REPORT OF REFEREE

Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, a hearing was held on December 2, 1994.

The following attorneys appeared as counsel for the parties:
For the Florida Bar JAN WICHROWSKI
For the Respondent JOHN D. KELNER

PART I

Findings of Fact:

1. That respondent, MILTON KELNER, is and was at all times hereinafter mentioned, a member of The Florida Bar, subject to the jurisdiction of the Supreme Court of Florida and the Rules Regulating The Florida Bar.

2. Respondent, MILTON KELNER, resided and practiced law in Dade County, Florida, at all times material.

3. The respondent represented plaintiff in civil action 91-5836, in the Ninth Judicial Circuit of Florida, Ronald Purdy vs. John Tatum, M.D. The plaintiff sued Dr. Tatum for loss of consortium with his wife after Mrs. Purdy had an affair with Dr. Tatum. Based upon her affair with Dr. Tatum, Mrs. Purdy separated from her husband and he filed for divorce against her. Mrs. Purdy filed a malpractice action against Dr. Tatum which was concluded by a settlement.

4. Prior to trial, the defendant, John M. Tatum, M.D., filed a motion in limine regarding recoverable damages. It requested that the evidence before the jury be limited to recoverable damages, and that reference to improper damages, which were not properly derivative of a loss of consortium or breach of contract action be prohibited. The Florida Bar's Composite Exhibit 1.

5. The court granted defendant's Motion in limine and instructed respondent, MILTON KELNER, not to elicit any testimony or evidence with respect to any claims, for alienation of affections, as defined specifically during the hearing. The court specifically stated that the plaintiff's damages were limited to loss of consortium and that he could not recover for his own personal injuries relating to his mental anguish caused by plaintiff's divorce from Christine Purdy. The plaintiff, Ronald Purdy, was further prohibited from seeking costs incurred during the divorce. The Florida Bar's Composite Exhibit 2 - Excerpt of the Proceedings before the Honorable Joseph P. Baker, October 13, 1993, p.8 lines 14-17, p.11 lines 14-17, p.25 lines 16-20 and p.26 lines 13-14.

6. In contravention of the court's order in regard to the motion in limine, respondent, MILTON KELNER, made repeated references to the personal injuries his client suffered as a result of the mental anguish caused by Christine Purdy's affair with Dr. Tatum. The Florida Bar's Composite Exhibit 2-Excerpt of the Proceedings before the Honorable Joseph P. Baker, October 14, 1993, p.14 lines 3-5, Excerpt of the Proceedings before the Honorable Joseph P. Baker, October 15, 1993, p.6 lines 10-12, and lines 23-24; p.7 lines 7-8 and lines 20-22.

7. The court strongly advised respondent, MILTON KELNER, to cease this conduct which it considered to be in violation of its previous order on the motion in limine. Excerpt of the Proceedings before the Honorable Joseph P. Baker, October 15, 1993, p.8 lines 15-16.

8. The court gave curative instructions to the jury concerning recoverable damages in the plaintiff's action in an attempt to cure any possible damage caused by respondent's violation of his orders. The Florida Bar's Composite Exhibit 2-Excerpt of the Proceedings before The Honorable Joseph P. Baker, October 14, 1993, p.16 lines 11-15; and Excerpt of the Proceedings before the Honorable Joseph P. Baker, October 15, 1993, p.11 line 10 - p.12 line 12.

9. Directly after the court's final curative instruction, the respondent, MILTON KELNER, continued to violate the court's order by repeatedly asking questions which violated the court's order in limine inquiring about the emotional effect upon Mr. Purdy caused by his separation from Christine Purdy and his son, and attempting to offer Dr. Tatum's telephone records into evidence through a completely inappropriate witness. The Florida Bar's Composite Exhibit 2-Excerpt of the Proceedings before the Honorable Joseph P. Baker, October 15, 1993, p.16 lines 1-5, lines 15-16, and lines 21-23.

10. Ultimately a mistrial resulted in this case due to the problems caused by respondent's violation of the court's order in limine. The Florida Bar's Composite Exhibit 2-Excerpt of the Proceedings before the Honorable Joseph P. Baker, October 15, 1993, p.20 line 4 - p.22 line 18.

Dated this 13th day of February, 1995.

A. LEO ADDERLY

Referee

Certificate of Service

I hereby certify that a copy of the above report of referee - part I has been served upon Jan Wichrowski, Bar Counsel, The Florida Bar, 800 North Orange Avenue, Suite 200, Orlando, Florida, 32801; John D. Kelner, Counsel for Respondent, 1200 Courthouse Tower, 44 West Flagler Street, Miami, Florida, 33130; and John A. Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 13th day of February, 1995.

A. LEO ADDERLY

Referee

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, CASE NO. 84,435

Complainant,

vs

MILTON KELNER,

Respondent.
_____/

REPORT OF REFEREE

Summary of Preceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules of Discipline, a hearing was held on April 27, 1995.

The following attorneys appeared as counsel for the parties:
For the Florida Bar JAN WICHROWSKI
For the Respondent JOHN D. KELNER

PART II

I. Recommendation as to Whether or Not the Respondent Should Be Found Guilty:

As to each alleged violation of the complaint I make the following recommendations as to guilt or innocence:

1. That the respondent be found guilty of violating rule 4-3.1, Rules Regulating The Florida Bar for asserting an issue within the proceeding which was without a basis.

2. That the respondent be found guilty of violating rule 4-3.4(e), Rules Regulating The Florida Bar for alluding to matters, in trial, that the lawyer does not reasonably believe relevant or supported by admissible evidence.

3. That the respondent be found innocent of violating rule 4-3.5(c), Rules Regulating The Florida Bar for engaging in conduct intended to disrupt a tribunal.

4. That the respondent be found innocent of violating rule 4-8.4(d), Rules Regulating The Florida Bar for engaging in conduct that is prejudicial to the administration of justice.

II. Recommendation as to Disciplinary Measures to be Applied:

I recomment that the respondent receive a public reprimand without probation, as provided for in rules 3-5.1(c) and 3-5.1(d), Rules Regulating The Florida Bar.

III. Personal History and Past Disciplinary Record:

After finding of guilty and prior to recommending discipline to be recommended pursuant to rule 3-7.6(k)(1)(D), Rules Regulating The Florida Bar, I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 77
Date admitted to Bar: 1939 New York State Bar and a member of the Florida Bar since 1948.
Prior disciplinary convictions and disciplinary measures imposed therein: None
Other personal data: Appointed Guardian Ad Litem Pro Bono in numerous cases; receiving excellent results for his clients.

IV. Statement of Costs and Manner in Which Cost Should be Taxed:

A.	Grievance Committee Level Costs:	
	1. Transcript Costs	$ -0-
	2. Bar Counsel Travel Costs	$ -0-
B.	Referee Level Costs	
	1. Transcript Costs	$356.46
	2. Bar Counsel Travel Costs	$622.88
C.	Administrative Costs	$750.00
D.	Miscellaneous Costs	
	1. Investigator Expenses	$153.35
	2. Copy Costs	$118.84
	TOTAL ITEMIZED COSTS	$2,001.53

It is recommended that the foregoing itemized costs and expenses be charged to the respondent.

Dated this 31st day of May, 1995.

s/ A. LEO ADDERLY
Referee

Certificate of Service

I hereby certify that a copy of the above report of referee - part II has been served upon Jan Wichrowski, Bar Counsel, The Florida Bar, 800 North Orange Avenue, Suite 200, Orlando, Florida, 32801; John D. Kelner, Counsel for Respondent, 1200 Courthouse Tower, 44 West Flagler Street, Miami, Florida, 33130; and John A.Boggs, Director of Lawyer Regulation, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 31st day of May, 1995.

s/ A. LEO ADDERLY
Referee