

**IN THE SUPREME COURT OF FLORIDA  
(Before a Referee)**

**THE FLORIDA BAR,**

**Complainant,**

**Supreme Court Case  
Case No. SC11-1865**

**v.**

**HOWARD MICHAEL SCHEINBERG,**

**The Florida Bar File  
No. 2009-50,474 (17J)**

**Respondent.**

\_\_\_\_\_ /

**REPORT OF REFEREE**

**I. SUMMARY OF PROCEEDINGS**

Pursuant to the undersigned being duly appointed as referee on October 13, 2011 to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, a final hearing was held on March 8, 2012.

All items properly filed including pleadings, recorded testimony (if transcribed), exhibits in evidence and the report of referee constitute the record in this case and are forwarded to the Supreme Court of Florida.

The following attorneys appeared as counsel for the parties:

On behalf of The Florida Bar:

Randi Klayman Lazarus  
The Florida Bar  
1300 Concord Terrace, Suite 130  
Sunrise, FL 33323

On behalf of the Respondent:

Kevin P. Tynan  
8142 N. University Drive  
Tamarac, FL 33321

Randolph Braccialarghe  
c/o Nova Southeastern Law Center  
3305 College Avenue  
Fort Lauderdale, FL 33314

## 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.

1. Narrative Summary of Case.

- a. In or about 2007, the respondent was an assistant state attorney in Broward County, Florida, having served as an assistant state attorney since approximately 1987.
- b. The respondent was the lead state attorney in State of Florida v. Omar Loureiro, a first degree capital murder case.
- c. Former Judge Ana Gardiner was the presiding judge in State of Florida v. Omar Loureiro.
- d. The jury returned a verdict of guilty of first degree capital murder in State of Florida v. Omar Loureiro on March 27, 2007.
- e. The jury recommended the death penalty in State of Florida v. Omar Loureiro on May 20, 2007.

- f. Former Judge Ana Gardiner imposed the death penalty in State of Florida v. Omar Loureiro on August 24, 2007.
- g. Between March 23, 2007 and August 24, 2007, the date that former Judge Gardiner imposed the death penalty in State of Florida v. Omar Loureiro, Gardiner and the respondent communicated with telephone calls and text messages.
- h. Between March 23, 2007 and August 24, 2007, former Judge Gardiner and the respondent had 949 cell phone calls and 471 text messages.
- i. Neither former Judge Gardiner nor the respondent revealed any of their personal contact to the attorneys representing the defendant in State of Florida v. Omar Loureiro.
- j. The undisclosed conduct between former Judge Ana Gardiner and the respondent, contributed to the decision by the State of Florida, through its Broward State Attorney to agree to a new trial in State of Florida v. Omar Loureiro to dispel any public misconception that there was any denial of due process.
- k. State of Florida v. Omar Loureiro was retried.

### **III. RECOMMENDATIONS AS TO GUILT**

Conduct that prejudices our system as a whole is encompassed by Rule 4-8.4(d) of the Rules Regulating The Florida Bar. The Florida Bar v. Frederick, 756 So.2d 79 (Fla. 2000). The prosecutor, Mr. Scheinberg, in a murder case had private communications (1,420) with the presiding judge and told no one. Said conduct was not fair to the defendant. Said conduct was not fair to the defendant's counsel, whose goal it was to protect the rights of his client. Said conduct was not fair to the integrity of the process, when proceedings were required which led to a new trial. Based upon all of the evidence presented to me during the final hearing, I find the Respondent guilty of having violated Rule 4-8.4(d) of the Rules Regulating The Florida Bar. The undisclosed communications between the judge and Respondent prejudiced the system. The communication should have been revealed to opposing counsel and failing to make such a disclosure was also prejudicial to the administration of justice.

### **IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS**

I considered the following Standards to be applicable:

Standard 5.22: Suspension is appropriate when a lawyer in an official or governmental position knowingly fails to follow proper procedures or rules, and causes injury or potential injury to a party or to the integrity of the legal process.

Standard 6.32: Suspension is appropriate when a lawyer engages in

communication with an individual in the legal system when the lawyer knows that such communication is improper, and causes injury or potential injury to a party or causes interference or potential interference with the outcome of the legal proceeding.

Standard 7.2: Suspension is appropriate when a lawyer knowingly engages in conduct that is a violation of a duty owed as a professional and causes injury or potential injury to a client, the public, or the legal system.

## V. CASE LAW

In The Florida Bar v. Mason, 334 So.2d 1 (Fla. 1976), that attorney engaged in improper conduct with Justices of the Supreme Court of Florida and subsequently concealed the fact of communications from opposing counsel. Mason provided a memorandum of law to two Justices in a case in which he represented one of the parties. Mason believed, based on a conversation with one of the Justices that he would not be adverse to receipt of the memorandum since the matter was complicated. Mason claimed his actions were motivated by his desire to assist the Court, although no notice was provided to opposing counsel. The Supreme Court of Florida suspended Mason for 1 year and stated:

The Respondent's conduct was so fundamentally wrong that there is scant precedent. The discipline to be invoked in this case, as is true with all disciplinary cases, must be determined upon its own record. The Florida Bar v. Scott, 197 So.2d 518, 520 (Fla. 1967).

Mason, at 6.

The Court also stated:

In the words of the Court – ‘there can be no temporizing with an offense the commission of which serves to destruct the judicial process.’ Florida Bar v. Raymon, 238 So.2d 594, 598 (Fla. 1970) (dictum). The gravity of the proven offenses, and the Respondent’s refusal to admit the plain fact that he actively concealed his wrongdoing negate the timeworn clichés that ‘he has learned his lesson,’ or ‘that he is unlikely to do it again,’ or that ‘he has already suffered degradation and humiliation in public proceedings.’ These facts, his past good record, and prospects for the future serve only to avoid disbarment.

Mason, at 6.

The improper communications between former Judge Gardiner and Mr. Scheinberg came to the public view when a dinner at a restaurant in which they participated with others was revealed. An investigation and inquiry ensued both by The Florida Bar and in the underlying criminal case concerning Omar Loureiro. Mr. Scheinberg did not reveal to The Florida Bar the additional contact culminating in 1,420 communications since, according to his testimony, he was only asked by the Bar to respond concerning allegations surrounding the dinner. It was only later that the communications were revealed.

Here, Mr. Scheinberg served as a prosecutor in Broward County, Florida in excess of 20 years. Those that testified on his behalf attested to his competence and diligence as a prosecutor. As such, I must consider Mr. Scheinberg’s extensive experience as a prosecutor in evaluating his misconduct. Beginning on

Friday, March 23, 2007 before the jury in a 1<sup>st</sup> degree murder case that Mr. Scheinberg was prosecuting had returned a verdict and August 24, 2007, the date the death penalty was imposed by the presiding judge, he communicated 1,420 times with the presiding judge via text messages and cellular telephone calls. As a result, the State incurred the expense of hiring Attorney Bruce Rogow to investigate and recommend whether a new trial should be granted and, in fact, the State so agreed. Brian Cavanaugh, the successor state attorney and one of Mr. Scheinberg's witnesses, when asked by Bar Counsel on cross-examination "would you agree with me that but for the contact and lack of disclosure, a new trial would not have taken place"? Mr. Cavanaugh responded, "Unfortunately yes". The system was further impacted when a new trial was held.

Mr. Scheinberg presented me with no evidence or testimony of a psychological or medical nature establishing any actual basis for his lapse in judgment and misconduct. Rather, he simply stated that he thought that he was not doing anything wrong since he and former Judge Gardiner never discussed the Louriero case and spoke only of personal matters. Every lawyer is charged with knowledge of our Code of Ethics.

"Thus, every lawyer is responsible for observance of the Rules of Professional Conduct."

Preamble to  
Rules Regulating The Florida Bar

I do note the tremendous toll that these events and the resulting proceedings have taken on Mr. Scheinberg.

Although the respondent presented impressive character witnesses, none served as any guidance for me to understand what the respondent represents as an aberration in his career and of his ethical barometer. In The Florida Bar v. Whitney, 237 So.2d 745 (Fla. 1970) that attorney had also committed very serious misconduct. Whitney, like here, presented many character witnesses. Thirty-two witnesses including two circuit court judges, 10 attorneys, two ministers, a justice of the peace and 17 other reputable individuals testified on his behalf. The Supreme Court of Florida stated:

The evidence of these witnesses as to the good character of the respondent are impressive, but have little relevancy in arriving at a conclusion concerning his guilt or innocence. The charges made in the Complaint and admitted here go to the very heart of a lawyer's qualification to be entrusted with the great responsibilities of his profession and when – as here – there is shown a total disregard, over an extended period of time, of basic concepts of honesty and reliability and a flagrant violation of trusts reposed in him.

Whitney, at 748.

As a prosecutor, a great responsibility was reposed in Mr. Scheinberg. His disregard inadvertent or otherwise, for the sanctity of the legal process must be addressed.

[P]rosecutors are held to the highest standard because of their unique powers and responsibilities. The United States Supreme Court



observed over sixty years ago that a prosecutor has responsibilities beyond that of an advocate, and has a higher duty to assure that justice is served ...

The Florida Bar v. Cox  
794 So.2d 1278 (Fla. 2001)

**VI. 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 the imposition of:

- A. One-year suspension
- B. Payment of The Florida Bar's costs in these proceedings.

**VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD**

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

A. Personal History of Respondent:

Age: 51

Date admitted to the Bar: October 8, 1987

B. Aggravating Factors:

- a) a pattern of misconduct
- b) multiple offenses
- c) substantial experience in the practice of law (admitted 1/23/93)

C. Mitigating Factors:

- a) Absence of a prior disciplinary record

- b) full and free disclosure to disciplinary board or cooperative attitude toward proceedings
- c) character or reputation
- d) remorse

**VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED**

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

Administrative Fee	\$1,250.00
Bar Counsel Costs	\$189.61
Investigative Costs	\$579.60
Copy Costs	\$13.25
Court Reporter Costs	
Appearance 1-19-12	\$105.00
Appearance & Transcript 2-28-12	\$123.50
Final Hearing Appearance 3-8-12	\$450.00
Final Hearing Transcript 3-8-12	<u>\$1,171.00</u>
<b>TOTAL</b>	<b><u>\$3,881.96</u></b>

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

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_.

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Sheree Davis Cunningham, Referee

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to The Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that copies were mailed by regular U.S. Mail to Respondent's Counsel, Randolph Braccialarghe, Esq., at Nova Southeastern Law Center, 3305 College Ave., Fort Lauderdale, FL 33314-7721, to Respondent's Counsel, Kevin P. Tynan, Esq., 8142 N. University Drive, Tamarac, FL 33321; to Kenneth L. Marvin, Staff Counsel, The Florida Bar, 651 E. Jefferson Street, Tallahassee, Florida 32399-2300; and to Randi Klayman Lazarus, Bar Counsel, The Florida Bar, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323; on this \_\_\_\_\_ day of \_\_\_\_\_, 2012.

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Sheree Davis Cunningham, Referee