BEFORE A HEARING OFFICER OF THE SUPREME COURT OF ARIZONA

IN THE MATTER OF A MEMBER OF THE STATE BAR OF ARIZONA,

Ted Duffy,
Bar No. 016907

Respondent.

No. 06-1958

HEARING OFFICER'S REPORT

(Assigned to Hearing Officer 8W, Thomas M. Quigley)

The undersigned hearing officer recommends suspension in this matter based on the findings of fact and conclusions of law as set forth below.

I. PROCEDURAL HISTORY

The State Bar of Arizona filed its complaint in this matter, alleging one count, on June 23, 2008. An answer was filed August 4, 2008. A hearing was held on November 10, 2008. The parties filed proposed findings of fact and conclusions of law on December 17, 2008 and rebuttal to the same on December 26, 2008.

II. FINDINGS OF FACT

1. At all times relevant, Respondent Ted J. Duffy ("Respondent") was a lawyer licensed to practice law in the state of Arizona having been first admitted to practice in Arizona on May 18, 1996. Joint Prehearing Statement ("JPS"), ¶ 1.

COUNT ONE (File No. 06-1958)

2. At all times material hereto, Respondent was a Deputy County Attorney employed by the Maricopa County Attorney's Office in Maricopa County, Arizona. *Id.* ¶ 2.

3. For approximately five months, from April 24, 2006 through November 8, 2006, Respondent prosecuted the defendant, Edwin Martin Jones ("Jones"), in a jury trial in Maricopa County Superior Court. *Id.* ¶ 3.

4. The State alleged that Jones raped a woman while others pistol-whipped her significant other and then fatally shot him in the head. JPS ¶ 4.

5. Jones was indicted and tried for: 1st degree burglary; kidnapping (two

counts); sexual assault (six counts); first degree murder; and armed robbery. Reporter's Transcript of Proceedings ("TR") at p. 140, l. 9 to p. 141, l. 19.

6. The State's theory for each count included accomplice liability, meaning that the act of an accomplice would be sufficient to inculpate Jones for each alleged crime. TR at p. 141, l. 20 to p. 141, l. 19.

7. The State had charged another defendant who, prior to trial, pled guilty of murder and implicated Jones in the factual basis for his plea. TR at p. 144 ls. 6-19.

8. Jones's DNA was found on a seminal stain on the comforter that was on the bed where the rape occurred. TR at p. 145 ls.12-14.

A. Detective Chavez Statement

9. Prior to trial, Jones was interviewed by detectives and an Investigator of the Phoenix Police Department. Ex. 37 at SBA 460.

10. The interview (referred to by the parties and referred to hereafter as the "Chavez Statement") was recorded. Ex. 37 at SBA 462.

11. Jones filed, on August 22, 2006, a motion *in limine*, seeking to preclude portions of the Chavez Statement. Ex. 37 at SBA 460.

12. On August 25, 2006 the trial court ruled that the Chavez Statement was admissible subject to certain exceptions. Ex. 37 at SBA 462.

13. The trial court ordered that references to Jones and alleged accomplice Palofox having met in prison or that Jones spent time in prison "shall be redacted." Ex. 37 at SBA 462.

14. On page 54 of the Chavez Statement, Jones said:

> "EJ: It's not all the time that I kicked it with Palofox. You gotta remember the day I got out was September, was it September 13th, that was a Thursday, and I wasn't even out three months. I talked to Bobby three times the whole time I was out there.
>
> GN: You only saw Bobby three times the whole time you were out there.
>
> EJ: If I'm correct, Yes."

Ex. 38, p. 475.

15. On August 28, 2006, defense counsel sent Respondent an e-mail that

specifically requested that the reference on page 54 of the Chavez Statement be redacted: "Page 54-rest of page starting with 2nd to last EJ as it related directly to when defendant was or was not in custody." Ex. 27 at SBA 343.

16. Respondent refused to redact the referenced portion of the Chavez Statement. Ex. 27 at SBA 345, 347.

17. On September 11, 2006, Respondent played for the jury a version of the Chavez Statement that included rather than redacted the excerpt on page 54 referenced above. Ex. 36 at SBA 457.

18. Defense counsel was forced to object and the trial court was forced to instruct the jury to disregard the portion of the Chavez Statement on page 54 that should have been redacted. Ex. 36 at SBA 457.

19. While Respondent argues that he expected the trial court to rule on specific portions that he and the defense counsel could not agree on, the trial court found that "the Chavez interview statement (page 54) should have initially been redacted by the State." Ex. 36 at SBA 457.

20. At one point in the hearing on this matter, Respondent indicated that he did not know that the improper reference was still in the tape to be played to the jury. TR at p. 196, ls. 11-17.

21. The record contradicts that statement: Respondent clearly made a conscious decision to leave in the reference despite defense counsel pointing out that the reference had been prohibited by the trial judge. Ex. 27.

22. Respondent's main response to this charge at the hearing can be summarized as: it was not Respondent's responsibility to take out material that the trial court had not specifically ordered redacted. TR at p. 219 l. 9 to p. 220 l. 23.

23. However, Respondent repeatedly conceded that he understood the court order to require the State to redact any reference to Jones and Palofox having met in prison or Jones having spent time in prison. TR at p. 218 ls. 6-19.

B. Trujillo Testimony – "Other Crimes"

24. Andrea Trujillo ("Trujillo"), Jones' girlfriend, testified in his defense. JPS ¶ 5.

25. In the jury's presence Respondent asked Trujillo if detectives had questioned her about "other crimes." Complaint, para. 12; Answer, para. 12.

26. Defense counsel was compelled to object to this question. Ex. P at Duffy 2622.

27. On defense counsel's objection, the trial court had to instruct the jury to disregard the reference to "other crimes." Ex. P at Duffy 2622-2623.

28. The trial court found Respondent's question to be improper. Ex. 5 at SBA 0047.

C. DNA-Two Stains, One Analysis

29. At the crime scene, there were two stains on the comforter on the bed where the rape occurred. One stain was in two parts. TR at p. 165 ls. 8-9.

30. The first stain contained no biological material that could be used for DNA testing. TR at p. 165 ls. 10-17.

31. The State originally only tested one part of the second stain. That test revealed DNA from semen that matched Jones. TR at p. 166 ls. 14-19.

32. Shortly before trial, Respondent requested that the State test the second part of the second stain. TR at p. 166 l. 20 to p. 167 l. 2. That test revealed that the second part of the second stain also contained DNA from semen that matched Jones. TR at p. 167 ls. 19-20.

33. The Defense objected to introducing the results of the second analysis. TR at p. 167 ls. 21-24.

34. On May 31, 2006, in the course of Respondent's opening statement, the Court heard argument regarding the admissibility of the second test. Ex. 12 at SBA000175-199.

35. The following exchange with the Court occurred:

[Defense Counsel Mr. Raynak] : And Judge, just so it's clear for the record, they analyzed one semen stain prior to the jury selection. Mr. Duffy has now said they've analyzed more semen stains, which I think is way too late. So I would have him -- certainly no witness comment on the semen stains, other than the one they analyzed.

MR. DUFFY: Analyzed two.

THE COURT: Well, he was -- the second one he says was recently done?

MR. DUFFY: Yes, that's correct.

MR. RAYNAK: Anything recently done is way too late. I assumed he wasn't going to go into that or ask any witness of that. But I think he produced it like a week ago.

MR. DUFFY: Can we defer that?

THE COURT: You have to say "two semen stains" in your opening?

MR. DUFFY: No.

THE COURT: Then don't.

MR. DUFFY: Okay.

THE COURT: And then we'll deal with that issue when we get through the opening.

. . .

MR. DUFFY: Judge, may I make reference to two semen stains, but to just one analysis? Because that's what Mr. Raynak was aware of before.

THE COURT: All right. Any problem with that?

MR. RAYNAK: No.

Ex. 12 at SBA 192 to 194.

36. Respondent then made the following statement to the jury: "The defendant, there was a comforter that was found. There was blood on it. But there were also two semen stains. The defendant's DNA matched those semen stains. And I'll show you in a minute just how powerful[1] that is." Ex. 12 at SBA 211 l. 24 to SBA 212

[1] Characterizing the expected evidence as "powerful" is an example of Respondent's improper argument in opening statement. *E.g. State v. King*, 180 Ariz. 268, 278, 883 P.2d 1024, 1034

l. 3.

37. Respondent argues that he did not violate the court's order because he did not use the word "analysis" or "test" but merely argued that two stains "matched" Jones. TR at p. ls. 2-20; at p. 174 l.11 to p. 175 l. 2.

38. Respondent argues that he had a factual basis for his statement because he expected the State's criminologist to testify that she did not need an analysis of the second part of the second stain in order to opine that the Jones' DNA matched the second part of the second stain. TR at p. 171 l. 21 to p. 173 l. 17; at p. 175 ls. 3-9.]

39. The trial court was forced to instruct the jury that there were two stains but that only one stain matched to Jones. Ex. 46 at SBA 768.

40. The trial court found that Respondent's comment in opening statement that there were two semen stains and that the defendant's DNA matched those semen stains was improper. Ex. 5 at SBA 047.

D. Footprints

41. In his opening statement while referring to certain photographs depicting bloody footprints, Respondent stated: "And some of those footsteps will be footsteps from the perpetrators, one of whom was the defendant, Mr. Jones . . . . [T]he blood tracks here, some of which are from Ms. Perez, some are from the perpetrators such as the defendant." Ex. 12 at SBA 166; *see also* Ex. 12 at SBA 167.

42. There was insufficient physical evidence to connect the footprints to Jones. TR at pp. 110-111; at pp. 155-158.

43. In fact there was no evidence to connect any bloody print to any particular person. Ex. 12 at SBA 182.

44. Respondent argued that his opening statement on this issue was proper because some of the victim's blood had been found in a vehicle owned (or operated) by

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(1994) ("characterization of the evidence" in opening statement is improper, even if it does not create sufficient prejudice to warrant a mistrial).

the other defendant who pled guilty. Therefore, Respondent reasoned: someone had walked through the victim's blood and then gone into the vehicle; that someone was a perpetrator; the State alleged Jones was a perpetrator; therefore the statement was literally true.

> THE COURT: There's -- is there any evidence that any of those footprints match [the Defendant], whether it's his blood or his -- anything?
>
> MR. DUFFY: No. I can't prove that any of those footprints match anyone, except I know that one of the perpetrators' footprints did leave Mr. Medina -- Mr. Aispuro's blood on the back floor mat of Palofox's Suburban. So I do know that one of those sets of footprints is from one of the perpetrators. I do know that. Which one, I don't know. Does it make a difference?
>
> THE COURT: Well, when he's sitting here as a defendant, it does.
>
> MR. DUFFY: I don't think it does, because it's accomplice liability.

Ex. 12 at SBA000182 l.13 to p. 183 l. 2.

45. Respondent knowingly tried to tie footprints to Jones when he knew that such footprints were not matched to Jones. Moreover, Respondent argued that Jones was a perpetrator, and some perpetrator had left blood from the victim in the vehicle, which was improper argument for an opening statement.

46. The trial court was compelled by Respondent's repeated improper arguments in opening statement to reinstruct the jury that "what the lawyers say in opening statements is not evidence nor should it be argument." Ex. 12 at SBA 0200.

E. Boxes on the Bed

47. There were police photos of the sex assault victim's bed, with boxes on it. JPS ¶ 8.

48. Respondent told the jury in his opening statement that the boxes had been put on the bed by the police in order to take photos. JPS ¶ 9.

49. Respondent's statement was false. TR at p. 160 l. 14.

50. Respondent had a good faith belief that his statement was true at the time

he made the statement. TR at p. 160 l. 16 to p. 161 l. 10.

F. Juror Questionnaire-Consensual Sex

51. Jones contended at trial that his semen ended up on the rape victim's bed because Jones and the victim had engaged in consensual sex before the crimes were committed. TR at pp. 109-10; 123-124; 230; 233.

52. The juror selection process included use of a juror questionnaire that referred to, among other things, consensual sex between the defendant and the sex assault victim earlier on the day of the crimes. JPS ¶ 10.

53. The questionnaire itself was not evidence in the trial. JPS ¶ 11.

54. Nevertheless, Respondent stated in his opening statement: "Now, you read in your questionnaires that the sex was consensual. Here's how consensual it was. . . . No consensual sex happens like that. . . . This is what someone looks like after consensual sex at the Maricopa Medical Center at 6:50 a.m." Ex. 40 at SBA531 ls. 1-2.

55. When making the foregoing opening statement, Respondent essentially argued that defendant's consensual sex theory was that the forcible rape that injured the victim was consensual. This hearing officer finds by clear and convincing evidence that Respondent knew that his characterization of the defense theory was not defendant's theory and Respondent knew that his statement was an improper argument for opening statement. Respondent also knew that the juror questionnaire was not in evidence nor was it going to be in evidence. Respondent's sole purpose was to attempt to predispose the jury not to believe the defense that Jones had had consensual sex with victim before someone else had raped her.

G. Fingerprints

56. During his opening statement, Respondent showed the jury a photograph of a soap bottle and said: "Now … this is a soap bottle that they used to wash down, to wipe down the apartment. Here's the top of it. And that's why when the officers checked for prints, they were unable to find four partials that they couldn't match to anyone, but they noticed the place was wiped down for prints." Ex. 40 at SBA 572 l. 1 to SBA 573 l. 6.

57. The trial testimony of the involved officers could support an inference that a portion of the crime scene had been cleaned up. Ex. C at Duffy 4658, 4661(a); Ex. F, at Duffy 4766, 4816-17.

58. Respondent subjectively believed that the evidence would support the conclusion that the crime scene had been wiped down for fingerprints. TR pp. 185-188.

H. Reasonable Doubt

59. In his rebuttal closing argument to the jury, Respondent stated: "The law requires that I not prove this case to you beyond all doubt, but only that you have to feel comfortable in your decision that he is guilty." Ex. 42 at SBA 648.

60. The trial court instructed the jury on reasonable doubt using the standard RAJI (Recommended Arizona Jury Instructions). TR at p. 247.

61. The standard RAJI on reasonable doubt is:

> The State has the burden of proving the defendant guilty beyond a reasonable doubt. This means the State must prove each element of each charge beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In criminal cases such as this, the State's proof must be more powerful than that. It must be beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find [him][her] guilty. If, on the other hand, you think there is a real possibility that [he][she] is not guilty, you must give [him][her] the benefit of the doubt and find [him][her] not guilty.

RAJI Standard Criminal 5b(1), Burden of Proof.

62. Respondent could not have had a reasonable good faith belief that his argument comported with Arizona law. "Firmly convinced" cannot be reasonably equated to "feel comfortable."

I. Improper Statements of Personal Knowledge

63. Respondent repeatedly improperly: 1) stated or implied that he had personal knowledge of the facts in issue by stating "we know, "we can prove;" and 2) expressed an improper opinion as the justness of the case against Jones. Ex. 12 at SBA 168, 169, 173, 201, 202. 203, 204, 210, 212, 213. Respondent admitted he was asserting

personal knowledge of the facts: "Your honor, when I use the word 'we' I mean it as the state. If you'd rather have me say 'the state,' I'll do that."[2] Ex. 12 at SBA 181. *See also*, ex. 12 at SBA 187, 200. Respondent wanted the jury to believe that he had personal knowledge of Jones' guilt.

64. The trial court noted that it addressed the prosecutor's improper assertion of personal knowledge in opening statement by repeating the already given instruction that lawyers' statements are not evidence. Ex. 34 at SBA 446.

65. Respondent told the jury in his rebuttal closing: "Ladies and gentlemen, you've been presented a case that is as strong a case as a prosecutor can present you in a court of law." Ex. 42 at SBA 647.

J. Murder Victim as Drug Dealer

66. In his opening closing argument, Respondent described the murder victim to the jury as follows: "This man was a good man, unlike what [Defense] counsel has tried to say . . . . It's obvious he was not any type of rich drug dealer. This personification of drug dealer is simply the defense attorney's attempt to dehumanize a human being who had a woman and three children to support." Ex. 41 at SBA 592 l. 22 to SBA 593 l. 6.

67. Respondent later argued: "The mistake [the perpetrators] made is they probably had the wrong person, because this person had no money nor any drugs, so his life was totally snuffed out by these thugs for no reason." Ex 41 at SBA 600 ls. 19-22.

68. There was no definitive evidence of whether the victim was, or was not, a drug dealer. However, the issue was certainly raised by the defense. For instance in the Defense's opening statement, defense counsel had stated: "Now, what do the -- what do the police see [in the victims' apartment]? Small amount of white powder -- that wasn't referenced in [the State's] opening -- a razor blade, and a calculator next to it at the apartment." Ex. 23 at SBA 309 ls. 1-4.

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[2] "We" is universally understood to mean "I and others" in the English language.

69. Read in context, the Respondent's argument was that there was no definitive evidence that the victim was a drug dealer and, even if he was, the jury should not be influenced by that "fact." Respondent also argued: (1) "the evidence that you have all points in the direction that he was not a drug dealer"; (2) "[the evidence] substantiates the theory that Benjamin was not a drug dealer . . .", (3) "even if he were [a drug dealer], it's not up to Jones and his gang of thugs to murder him"; and (4) "My point to you is that it's irrelevant if Benjamin sold drugs or not . . . ." Ex 42 at SBA 620 ls. 20-23; SBA 621 ls. 3-4; SBA 642 ls. 6-7.

K. Items from Floor Placed on Bed

70. In his closing argument, Respondent told the jury that "according to [the sex assault victim, boxes] were picked up off the floor, put on top of the bed . . . ." Ex. 41 at SBA 610.

71. The rape victim testified that *she* did not place the boxes on the bed:

> Q. Now, when you went to bed that evening, did you sleep underneath this blue comforter or on top of it?
>
> A. On top of it.
>
> Q. Now again, you can see these boxes here. Were they on your bed when you and your daughter went to sleep there?
>
> A. No.

Ex. J at Duffy 698 l. 12 to DUFFY 699 l. 18. *See also* Ex. M at Duffy 303.

L. "Only One Way" for Evidence to get on the Comforter

72. In his opening closing argument to the jury, Respondent stated: "Everyone will agree, no one will deny, that the DNA found on that comforter belongs to the defendant. And I'll discuss how it got there. And the only way that it could have gotten there was by his raping Blanca on top of that comforter." Ex. 42 at SBA 621 ls. 20-22.

73. While Respondent's argument was not literally true—the State's expert testified that there was no way for her to know how, where or when the semen was

deposited on the comforter, Respondent's argument was consistent with the victim's testimony that she had not had sex with Jones. Ex. I, pages 4379-4384; 4425-4437.

M. The Trujillo Tape

74. On August 16, 2006, Respondent moved the entire Trujillo interview tape in evidence in the presence of the jury and referred to it as the best evidence. Ex. 47 at SBA 836-837.

75. Respondent made the "best evidence" remark gratuitously. Before any objection was made, Respondent went on to state, in front of the jury: "I think the best evidence of it is just to receive it in evidence." Ex. 47 at SBA 837 ls. 1-3.

76. The Trujillo tape contained information that was not admissible. Ex. 33 at SBA 444.

77. The trial court stated that it "agrees that it was improper for the state to seek admission of the entire Trujillo interview by stating before the jury that the tape is the 'best evidence' of the interview. Clearly, the term 'best evidence' was not used in the legal sense. This speaking offer characterized the evidence and forced the defense to address the issue out of the presence of the jury to avoid the appearance of objecting to the 'best evidence'. The Court again instructed the jury to disregard the statement and reiterated that what the lawyers say is not evidence. In addition, the prosecutor conceded that material needed to be redacted. The Court has reviewed the tape and concurs that there is objectionable material on the tape." Ex. 34 at SBA 447.

N. Other Issues with Argument

78. The State Bar asserts that Respondent displayed a city map to the jury during argument that had not been admitted into evidence. Ex. 33 at SBA 444. However, using a demonstrative exhibit is neither ethically nor legally improper. Indeed, courts traditionally have encouraged the use of demonstrative aids so long as such aids are not misleading.

79. Respondent did show the jury a graphic photo of the sex assault victim that was specifically not admitted into evidence. Ex. 33 at SBA 444.

80. However, Respondent's explanation of this error is that it was a mistake as the photo was similar to one that had been admitted and was simply used in error. Ex. 42 at SBA 632 ls. 6-11.

81. The consequences of granting a mistrial or dismissal would have included economic expense to the parties and court system, the toll on human resources and added pain to the victims' and their families. TR at pp. 27-29.

II. CONCLUSIONS OF LAW

Based on the foregoing findings of fact, this hearing officer concludes by clear and convincing evidence that that Respondent violated the following ethical rules:

ER 3.1. Meritorious Claims and Contentions

* * *

A lawyer shall not assert or controvert . . . an issue therein, unless there is a good faith basis in law and fact for doing so that is not frivolous . . . ;

ER 3.3. Candor Toward the Tribunal

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

ER 3.4. Fairness to Opposing Party and Counsel

A lawyer shall not:

* * *

(c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists;

* * *

(e) in trial, allude to any matter that the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence, assert personal knowledge of facts in issue except when testifying as a witness, or state a personal opinion as to the justness of a cause, the credibility of a witness, the culpability of a civil litigant or the guilt or innocence of an accused;

ER 8.4(d)

It is professional misconduct for a lawyer to:

* * *

(d) engage in conduct that is prejudicial to the administration of justice.

1. Respondent knowingly violated the court's order to redact the Chavez Statement.

2. By knowingly failing to redact a reference to Jones having been in prison, Respondent violated ER 3.4 (c).

3. By knowingly causing the recording with a reference to Jones having been in prison to be played to the jury, Respondent violated ER 8.4(d).

4. Respondent intentionally asked Andrea Trujillo about other crimes knowing that such question was improper.

5. By asking Andrea Trujillo if detectives had questioned her about "other crimes" Respondent violated ER 3.4(e).

6. By asking Andrea Trujillo if detectives had questioned her about "other crimes" Respondent violated ER 8.4(d).

7. Respondent intentionally argued that Jones "matched" the DNA in two stains knowing that there was likely not to be admissible evidence of a "match" to the second part of the second sample, and knowing that he had been instructed to refer to just one analysis.

8. By intentionally arguing in opening statement that Jones "matched" the DNA in two stains and by implying to the jury that there was admissible evidence of more than one "match" Respondent violated ER 3.4(c).

9. By intentionally arguing in opening statement that Jones "matched" the DNA in two stains and by implying to the jury that there was admissible evidence of more than one "match" Respondent violated ER 3.4(e).

10. By intentionally arguing in opening statement that Jones "matched" the DNA in two stains and by implying to the jury that there was admissible evidence of

more than one "match" Respondent violated ER 8.4(d).

11. Respondent's statement that the police had placed the boxes on the bed was based on a good faith belief and is not an ethical violation.

12. Respondent intentionally attempted to lead the jury to believe that there was evidence connecting Jones to bloody footprints, knowing that there was no such evidence.

13. By attempting to lead the jury to believe that there was evidence tying Jones to the bloody footprints, Respondent violated ER 3.1.

14. By attempting to lead the jury to believe that there was evidence tying Jones to the bloody footprints, Respondent violated ER 3.4(e).

15. By attempting to lead the jury to believe that there was evidence tying Jones to the bloody footprints, Respondent violated ER 8.4(d).

16. By arguing in opening statement that the bloody footprints were left by perpetrators, and that Jones was a perpetrator, Respondent violated ER 3.4(c).

17. Respondent intentionally referred to the jury questionnaires in opening statement knowing that such questionnaires were not, and would not be, admitted in evidence. Respondent intentionally referred to the jury questionnaires knowing that his comments were improper argument and that he was mischaracterizing the likely Jones' defense of consensual sex between Jones and the rape victim that predated the rape.

18. By referring to the jury questionnaires and arguing that Jones would claim that consensual sex caused the rape victim's injuries, Respondent violated ER 3.1.

19. By referring to the jury questionnaires and arguing that Jones would claim that consensual sex caused the rape victim's injuries, Respondent violated ER 3.4(c).

20. By referring to the jury questionnaires and arguing that Jones would claim that consensual sex caused the rape victim's injuries, Respondent violated ER 3.4(e).

21. By referring to the jury questionnaires and arguing that Jones would claim that consensual sex caused the rape victim's injuries, Respondent violated ER 8.4(d).

22. Although Respondent had a good faith belief that evidence would support

an argument that the crime scene had been, at least partially, cleaned up, Respondent improperly argued to the jury in opening statement that a open soap bottle was "why" the police did not find fingerprints.

23. By arguing to the jury in opening statement that an open soap bottle was "why" the police did not find fingerprints, Respondent violated 3.4(c).

24. Respondent intentionally argued to the jury that reasonable doubt was equated with feeling comfortable with their decision, knowing that his argument was a false statement of Arizona law.

25. By telling the jury in his final argument that reasonable doubt equates to feeling comfortable, Respondent violated ER 3.3(a)(1).

26. By telling the jury in his final argument that reasonable doubt equates to feeling comfortable, Respondent violated ER 8.4(d).

27. Respondent intentionally asserted personal knowledge of facts, and implied that court rules prevented the jury from hearing other incriminating evidence, in violation of ER 3.4 (c) by telling the jury in his final argument: "Ladies and gentlemen, you've been presented a case that is as strong a case as a prosecutor can present you in a court of law."

28. By asserting personal knowledge of facts, Respondent also violated ER 3.4(e).

29. By asserting personal knowledge of facts and implying that other incriminating evidence had been withheld, Respondent also violated ER 8.4(d).

30. Respondent intentionally repeatedly implied that he had personal knowledge of facts and placed the prestige of his office behind prosecution witnesses by stating "we know" and "we can prove" in his opening statements—even after being admonished by the court.

31. By repeatedly improperly arguing his personal knowledge and placing the prestige of his office behind government witnesses in his opening statement, Respondent violated ER 3.4 (c).

32. By repeatedly improperly arguing his personal knowledge and placing the prestige of his office behind government witnesses in his opening statement, Respondent violated ER 3.4 (e).

33. By repeatedly improperly arguing his personal knowledge and placing the prestige of his office behind government witnesses in his opening statement, Respondent violated ER 8.4 (d).

34. By arguing that the murder victim was not a drug dealer, and it should not matter anyway, Respondent engaged in proper argument.

35. Respondent drew a reasonable inference from the evidence when he argued that the perpetrators must have placed the boxes on the bed.

36. Respondent drew a reasonable inference from the evidence when he argued that there was only one way for Jones' semen to have gotten on the comforter.

37. Respondent intentionally offered into evidence the entire Trujillo interview tape knowing that it contained inadmissible evidence and intentionally referred to the tape as the best evidence knowing that he was making an improper argument in the presence of the jury.

38. By offering the Trujillo tape in its entirety and arguing in front of the jury that the tape was the best evidence, Respondent violated ER 3.4(c).

39. By offering the Trujillo tape in its entirety and arguing in front of the jury that the tape was the best evidence, Respondent violated ER 3.4(e).

40. By offering the Trujillo tape in its entirety and arguing in front of the jury that the tape was the best evidence, Respondent violated ER 8.4(d).

41. Respondent did not violate an ethical rule by referring to a map for demonstrative purposes.

42. Respondent did not violate an ethical rule by mistakenly showing a photograph during argument that had not been admitted in evidence.

43. This hearing officer does not find any other ethical violations alleged by the State Bar and not specifically addressed above to have been proven by clear and

convincing evidence.

III. SANCTION

The purpose of lawyer discipline is not to punish the lawyer, but to protect the public and deter future misconduct. *In re Fioramonti*, 176 Ariz. 182, 187, 859 P.2d 1315, 1320 (1993). It is also the objective of lawyer discipline to protect the public, the profession and the administration of justice. *In re Neville*, 147 Ariz. 106, 708 P.2d 1297 (1985). Yet another purpose is to instill public confidence in the bar's integrity. *Matter of Horwitz,* 180 Ariz. 20, 29, 881 P.2d 352, 361 (1994).

In imposing discipline, it is appropriate to consider the facts of the case, the American Bar Association's *Standards for Imposing Lawyer Sanctions ("Standards")* and the proportionality of discipline imposed in analogous cases. *Matter of Bowen*, 178 Ariz. 283, 286, 872 P.2d 1235, 1238 (1994). The *Standards* do not account for multiple charges of misconduct. The ultimate sanction imposed should be at least consistent with the sanction for the most serious instance of misconduct among a number of violations. *Standards*, p. 6; *In re Redeker*, 177 Ariz. 305, 868 P.2d 318 (1994).

A. ABA STANDARDS

This hearing officer finds that *Standard* 6.22 is most applicable to Respondent's conduct at issue here: "Suspension is appropriate when a lawyer knowingly violates a court order or rule, and there is injury or potential injury to a client or a party, or interference or potential interference with a legal proceeding."

In determining an appropriate sanction, the Supreme Court and the Disciplinary Commission consider the duty violated, the lawyer's mental state, the actual or potential injury caused by the misconduct and the existence of aggravating and mitigating factors. *See Peasley*, 208 Ariz. 27, 35, 90 P.3d 764, 772 (2004); *Standard* 3.0.

1. The Duty Violated

Respondent's conduct violated his duty to the legal system. This hearing officer recognizes that Respondent was involved in a long and difficult trial. Trial, by its nature, creates any number of errors and mistakes by even the most diligent counsel. Not every,

or perhaps even most, such errors and mistakes are ethical violations—they are just errors and mistakes. However the record here leads this hearing officer to the conclusion that Respondent carefully considered and deliberately chose to engage in the conduct at issue here. The repeated improper argument in opening statement, even after being admonished by the court, and the improper argument of the burden of proof were carefully calculated "bookends" to Respondent's conduct of the *Jones* trial.

2. The Lawyer's Mental State

Respondent's conduct was intentional. Indeed, Respondent does not attempt to argue otherwise. Instead, Respondent argues that his conduct was proper.

3. The Extent of the Actual or Potential Injury

Respondent's conduct was designed to gain a conviction outside of the court's rules and orders. The trial court was forced to remedy Respondent's conduct with several instructions. Certainly the potential for great harm existed, whether through an improper conviction or a mistrial.

4. The Aggravating and Mitigating Circumstances

The evidence supports the findings of the following aggravating factors:

Standard 9.22(c) (pattern of misconduct);

Standard 9.22(d) (multiple offenses);

Standard 9.22(g) (refusal to acknowledge wrongful nature of conduct);

Standard 9.22(i) (substantial experience in the practice of law).

Of these, this hearing officer give substantial weight to the refusal to acknowledge the wrongfulness of his conduct and the substantial experience in the practice of law.[3] The Respondent had practiced law in either California or Arizona for over 30 years at the time of the events involved here. TR at p. 135. Approximately 20 of those years were practicing criminal law. Respondent's steadfast insistence that his conduct was

[3] While a finding of a patter of misconduct and multiple offenses is technically warranted, this hearing officer accords them little, if any weight. This is more properly viewed as one case in which the Respondent made a calculated decision to obtain a conviction regardless of the rules.

proper is of particular significance in recommending the sanction.

The evidence supports the following mitigating factors:

Standard 9.23(a) (absence of a prior disciplinary record);

Standard 9.23(b) (absence of a dishonest or selfish motive);

Standard 9.23(e) (full and free disclosure to disciplinary board or cooperative attitude toward proceedings).

Each of these mitigating factors is of considerable significance.

B. PROPORTIONALITY

To have an effective system of professional sanctions, there must be internal consistency, and it is appropriate to examine sanctions imposed in cases that are factually similar. *See Peasley*, 208 Ariz. at 35, 90 P.3d at 778 (citing *In re Alcorn*, 202 Ariz. 62, 76, 41 P.3d 600, 614 (2002); *In re Wines*, 135 Ariz. 203, 207, 660 P.2d 454, 458 (1983)). Respondent did not submit any other cases for consideration, and the cases submitted by the State Bar are of insufficient similarity to be helpful.

In re Zawada, 208 Ariz. 232, 92 P.3d 862 (2004), is the case that this hearing officer has considered as most informative to the recommended sanction. As in this case, Zawada was an experienced prosecutor prosecuting a murder case, who engaged in intentional misconduct in an effort to gain a conviction. The Supreme Court ultimately suspended Zawada for six months and a day.

The Court's comments in *Zawada* regarding potential injury ("[t]he more serious the injury, the more severe should be the sanction") and aggravating factors (substantial experience as a prosecutor is a substantial aggravating factor; refusal to recognize wrongful conduct must be considered in fashioning appropriate sanction) apply with great persuasive force in this case *Zawada*, 208 Ariz. at 238-39, ¶¶ 19, 21, 25, 92 P.3d at 868-69.

Here, it is particularly troubling that Respondent's conduct began in opening

statement and continued through rebuttal closing argument.[4]

In the final analysis, the *Standards* provide for a presumptive sanction of suspension. *Zawada* demonstrates the proportionality of a suspension. The aggravating factors are substantial. The mitigating factors justify a shorter rather than longer suspension, but do not justify a censure.

IV. CONCLUSION

This hearing officer recommends a 30-day suspension of Respondent Ted Duffy, to be followed by a one year probation, during which he shall complete not less than 15 hours of continuing legal education addressing ethics, not less than 10 hours of which should focus on trial ethics. Finally, Respondent should be ordered to pay the costs and expenses of this proceeding.

DATED this 24th day of March, 2009.

Thomas M. Quigley
Hearing Officer 8W

Original filed this 24th day of March, 2009 with the Disciplinary Clerk of the Supreme Court.

Copies of the foregoing mailed this 24th day of March, 2009, to:

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[4] This *was* a long trial. The unethical conduct during the introduction of evidence could be characterized as isolated instances were it not for the pattern set in opening statement and argument.