

STATE BAR COURT
REVIEW DEPARTMENT

In the Matter of

RESPONDENT A

A Member of the State Bar

[No. 86-O-18356]

Filed November 26, 1990

SUMMARY

Following a recommendation for dismissal of a disciplinary proceeding charging respondent with alleged improper post-trial communication to jurors in violation of former rule 7-106(D) of the Rules of Professional Conduct, the former volunteer review department found culpability and remanded for further hearing. On remand, the referee heard additional evidence and recommended a private reproof. (Hon. Leland J. Lazarus (retired), Hearing Referee.)

The examiner sought review. On review, the review department adopted the referee's original recommendation of dismissal, holding that the former review department's non-final determination of culpability was not binding upon the current review department. Interpreting former rule 7-106(D) to require a showing of specific intent, the review department concluded, in light of the referee's credibility determinations, that the State Bar had failed to prove by clear and convincing evidence that respondent had the requisite subjective intent to harass or embarrass the jurors or to influence the jurors' actions in future jury service.

COUNSEL FOR PARTIES

For Office of Trials: Andrea T. Wachter

For Respondent: Kurt W. Melchior

HEADNOTES

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In administrative mandamus proceedings where the court is authorized to exercise independent judgment on the evidence, abuse of discretion by the lower tribunal is established if the court

determines that the findings are not supported by the weight of the evidence. Where the court is not authorized to exercise independent judgment, then it must determine whether the findings are supported by substantial evidence in the light of the whole record. In such cases, due process requires that the body deciding the case must at least review a transcript of the evidence. The argument that this standard had been violated on earlier review by the former review department was mooted by the full-time review department's de novo review of the record on a second review after the former review department's remand for further hearing.

[2] **139 Procedure—Miscellaneous**
194 Statutes Outside State Bar Act

State Bar proceedings are sui generis, and are not governed by the principles of administrative mandamus applicable to ordinary administrative proceedings.

[3 a-c] **139 Procedure—Miscellaneous**
166 Independent Review of Record
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The doctrine of law of the case did not preclude the full-time review department from reconsidering a decision of the former, volunteer review department. Due to the non-finality of recommendations of the former State Bar Court review department, law of the case did not apply to them. Upon its independent de novo review, review department was not bound to follow earlier factual determinations made prior to remand. Review department was also free to reconsider prior review department's legal interpretation of rule of professional conduct, given flexibility of law of the case doctrine in California appellate courts.

[4 a-c] **148 Evidence—Witnesses**
166 Independent Review of Record

In evaluating the record on review, the review department is bound to give great deference to the referee's evaluation of the credibility of the witnesses. There is a strong presumption in favor of the referee's findings of fact regarding such credibility.

[5 a-d] **162.11 Proof—State Bar's Burden—Clear and Convincing**
164 Proof of Intent
199 General Issues—Miscellaneous
204.20 Culpability—Intent Requirement
343.00 Rule 5-320(D) [former 7-106(D)]

The difference in wording between the rules governing pretrial and mid-trial contact with jurors, and the rule governing post-trial contact, reflects a difference in the intent of the drafters as to the elements of each rule. In order to establish a violation of the rule governing post-trial contact, the State Bar must prove by clear and convincing evidence that the respondent subjectively had the specific intent to harass or embarrass the jurors or to influence the jurors' actions in future jury service. Where no such subjective intent was established, based on referee's findings as to witnesses' credibility, review department found no violation and dismissed proceeding without addressing question of rule's constitutional validity.

- [6 a, b] **163 Proof of Wilfulness**
 164 Proof of Intent
 204.10 Culpability—Wilfulness Requirement
 204.20 Culpability—Intent Requirement
 There is a distinction between the proof necessary to establish a rule violation where the only intent necessary is the intent to do the act, and the proof necessary to establish culpability of a disciplinary offense which requires proof of specific (i.e., subjective) intent. To prove a “wilful” breach of the Rules of Professional Conduct, it is only necessary to prove that the person charged acted or omitted to act purposely, that is, intended to commit the act. With respect to charges of which subjective intent is an element, however, such intent must be proven convincingly and to a reasonable certainty.
- [7] **193 Constitutional Issues**
 There are marked differences between civil and criminal trials and the corresponding need to restrict free speech in order to assure fairness.
- [8] **193 Constitutional Issues**
 204.90 Culpability—General Substantive Issues
 490.00 Miscellaneous Misconduct
 False statements made with reckless disregard of the truth do not enjoy constitutional protection under the First Amendment. Attorneys may be disciplined for making defamatory or disrespectful statements in pleadings or court papers which have no basis in fact and which are made with conscious disregard of their falsity or with intent to be maliciously contemptuous.
- [9] **169 Standard of Proof or Review—Miscellaneous**
 193 Constitutional Issues
 As a rule, constitutional questions will not be reached if a decision can rest on a different ground.
- [10] **196 ABA Model Code/Rules**
 343.00 Rule 5-320(D) [former 7-106(D)]
 Wording of California rule governing post-trial contact with jurors differs significantly from parallel rules in ABA Model Code and Model Rules.
- [11 a, b] **343.00 Rule 5-320(D) [former 7-106(D)]**
 An attorney who loses a jury trial has the right to contact jurors after the trial and develop facts by way of juror affidavits to impeach their own verdict. Jurors are the obvious, and usually the only, source of available sworn testimony by affidavit which the law requires as a basis for new trial on the ground of juror misconduct. Likewise, attorneys who win jury trials and wish to protect the verdict should not be barred from writing jurors after trial to request notice of any contact by the adverse side. Attorneys have a right to communicate with jurors after the trial, but should strive to avoid unnecessarily causing the jurors to develop ill feelings regarding their jury service.

ADDITIONAL ANALYSIS

Culpability

Not Found

- 343.05 Rule 5-320(D) [former 7-106(D)]

OPINION

PEARLMAN, P.J.:

This case is one of first impression involving an alleged improper posttrial communication to jurors in violation of former rule 7-106(D) of the Rules of Professional Conduct.¹ The referee originally recommended (by decision filed June 28, 1988) that the case be dismissed for lack of proof of culpable intent of the respondent,² holding that neither the communication (a letter), on its face, nor credible testimony established an "intent to harass or embarrass the jurors or influence their action in future jury service." The examiner sought review because the referee had excluded evidence of jurors' reactions to the letter, which the examiner contended were relevant to determining respondent's subjective intent. Respondent's counsel countered with arguments addressing the constitutionality of inhibiting respondent's free speech under the First Amendment.

The prior, volunteer review department, by a seven-to-five vote, reversed the recommendation of dismissal and, upon de novo review, held that the letter on its face violated former rule 7-106(D) without resorting to subjective intent.³ It remanded the matter for hearing and findings on evidence in mitigation and aggravation and for recommendation as to the appropriate discipline. The dissent would have adopted the referee's recommendation of dismissal

"based on deference to the referee who saw and heard the witnesses below and resolved questions of testimonial credibility in Respondent's favor." (Review department decision filed April 18, 1989.)

On remand, the referee heard additional evidence and recommended a private reproof. The examiner sought review. We have conducted our own de novo review of the record, including determination of the central issue of whether subjective intent is relevant to culpability under former rule 7-106(D).⁴ We hold that it is and therefore, based on the detailed findings of the referee, we adopt the referee's original recommendation of dismissal.

BACKGROUND

The two decisions of the retired judge who served as referee in this matter contain detailed findings concerning the circumstances of the incident in question. Respondent was found to be a diligent practitioner with an unblemished reputation and no prior record of discipline. He was admitted to the bar in 1979 at age 30 after working his way through college and law school. He had tried 38 criminal and civil cases prior to the case in question and had not been motivated to write to the jury on any prior occasion. In the civil jury trial that led to this proceeding, he had sought damages for permanent disability of the 18-year-old son of a family friend and, upon losing the trial, felt compelled to

1. Former rule 7-106(D) provided, "After discharge of the jury from further consideration of a case with which the member of the State Bar was connected, the member of the State Bar shall not ask questions of or make comments to a member of that jury that are intended to harass or embarrass the juror or to influence the juror's actions in future jury service." All references to rule 7-106(D) herein are to former rule 7-106(D) in effect through May 26, 1989. Current rule 5-320(D) recodifies rule 7-106(D) with minor modifications not pertinent to the issues raised in this case.

2. The recommended discipline in the decision under review was a private reproof. Had we adopted this recommendation, the respondent would have been entitled to have his name excluded from the publicized summary of the case. Since we conclude the matter should be dismissed, we have accommodated the respondent's request not to identify him by name in our opinion.

3. Among other things, the review department amended findings of fact numbers 7 and 8 of the hearing referee's decision, holding that: "On its face, the letter discloses that the writer, in sending the letter, intended to harass or embarrass the jurors The sole purpose [of the letter] was to make the nine recipients who voted against the Respondent's client feel bad." The majority concluded: "1. The facts in evidence, including the circumstances as to Respondent's conduct in writing his letter to the jurors indicate that his letter could only have been written for the purpose of embarrassing those jurors who voted against his client. 2. Respondent wilfully violated rule 7-106(D)"

4. We have reviewed the entire record, and accordingly, have relied freely on evidence introduced and findings made at the second hearing as well as at the first, on all questions including the key issue of respondent's subjective intent. In citing to the findings below, we refer to the referee's first decision as "Decision 1" and the referee's second decision as "Decision 2".

communicate to the dismissed jury by way of the disputed letter.

The trial judge had given the jurors the customary admonishment during the trial not to discuss the case with anyone and had further instructed them after their verdict was received that they were no longer under an admonishment and were free to discuss the case with anyone including the attorneys. (Decision 1, p. 4.) The foreman of the jury had voted in favor of respondent's client and spoke with respondent after the trial regarding his concerns about the deliberations and serious misconceptions that he thought some of the jurors had about some of the matters referred to at trial. (Decision 1, p. 4.)⁵

After this conversation and after discussing the matter with his wife and secretary, respondent felt it would be appropriate to write the jury a letter to provide the jurors with additional information.⁶ The entire text of the letter (omitting only proper names) was as follows: "Dear Juror: [¶] "I am writing to inform each juror of several things not presented at trial. I normally would let things rest after a jury decision, but not this time.

"1. No workers' compensation insurance coverage is available for [the plaintiff] for this accident. The 'Contractor' was *uninsured* and *unlicensed*.

"2. Under California law an 'Employer' ... must assure the safety of all workers where a peculiar risk or special risk of harm exists.

"3. I compliment the three jurors [naming those who voted in favor of the plaintiff] in their decision making process.

"4. The \$11.50 you received daily was paid by my office and one-third of the cost of your lunch on Friday, June 20, 1986.

"5. An offer to settle was made before trial for the complete sum of \$50,000 from which Medi-Cal would be paid \$25,437, etc. The offer would result in [the plaintiff] receiving \$15,000 for all his injuries and future problems. This decision would be wholly inadequate.

"Best to you all in the future." (Exh. 1, emphasis in original.)

Respondent testified that his motive in writing the letter was to communicate and inform, not to harass or embarrass the jurors. (6/3/88 R.T. pp. 171-172.) He further testified that his purpose in informing the jury that he had received a very low settlement offer was to give good justification for taking up five days of their time to try the case, which ultimately resulted in a defense verdict. (6/2/88 R.T. p. 108.) Jurors in other cases had often asked him that question after the trial was over. He further testified, "in hindsight I wish I had never sent this letter. It was a bad idea and I'll never do it again, scout's honor." (6/2/88 R.T. p. 112.) One of his other reasons for writing the letter was that Proposition 51 was the subject of active campaigning at the time and he perceived some of the advertisements as slanderous towards trial lawyers, characterizing them as being greedy and overreaching and never wanting to help. (6/2/88 R.T. p. 33.) He wanted to communicate to the jurors and let them know he had a lot of good intentions behind doing this trial. (6/2/88 R.T. pp. 33-34.)

5. The parties stipulated that the foreman would testify that he initiated conversations with respondent after the trial and that he was disturbed about the jury's decision-making process. He felt they did not apply the law and that a juror had decided over the weekend to vote for the defendant without indicating why. It was also stipulated that he would testify that respondent expressed disappointment at the result of the trial, but expressed no bitterness or other negative feelings towards the jurors who voted against him. (6/2/88 R.T. p. 144.)

6. The parties stipulated that respondent's wife would testify that he spoke with her about the letter and his intention to inform the jurors of the effects of this accident and of the case

upon his client and that he expressed no anger or resentment about the jurors or the verdict. (6/2/88 R.T. pp. 148-149.) They further stipulated that a freelance secretary who worked for respondent in the evenings would testify: "That he had lost cases before the [instant] case and there was no difference in his manner or attitude after he had lost this case from other cases that he had lost"; that he had asked her opinion of the letter and she had told him that she thought it was informative; and that "she knows that his attitude towards the law is very meticulous, that he follows it by the book and has a deeply committed sense to serve the interest of justice and practices law in that manner." (6/2/88 R.T. pp. 149-150.)

Respondent did not consider that it might be better not to send the letter at all. He testified that he drafted the letter very carefully in order not to make any offensive comments to the jurors about what they had done. (6/2/88 R.T. pp. 49-50.) The referee considered the letter "a one-time act done out of excessive professional zeal, and by a lawyer who became too emotionally involved in his client's case." (Decision 1, p. 6.) Nevertheless, he found that in sending the letter the respondent did not have any culpable intent to humiliate or embarrass the jurors or to influence their actions in future jury service. He concluded that it was an act of indiscretion, but not a disciplinable offense. (Decision 1, pp. 6-7.)

The issue was tried as one involving the question of respondent's subjective intent.⁷ In ascertaining respondent's subjective intent, the referee rejected as irrelevant an offer of testimony of some of the trial jurors as to their individual responses or reactions to respondent's letter, noting that "it is well-established that such subjective intent may only be shown by testimony of statements of the accused, any inferences that may reasonably be drawn from statements made by him, or from his conduct and the surrounding circumstances at the time." (Decision 1, p. 6.) On review of that decision, the majority of the review department deleted findings 9 and 10 of the referee's decision (which found lack of subjective intent) and found that on its face the letter violated the rule (without taking into account the jurors' testimony as to their reactions and irrespective of testimony relating to respondent's actual subjective intent). On remand, the referee heard or accepted written testimony of several jurors who reacted adversely to the letter and several witnesses presented by respondent in mitigation, including three witnesses who were consulted before he sent the letter (the foreman of the

jury, his wife and secretary) and character witnesses. Considering himself bound by our predecessor review department's prior determination of culpability, the referee recommended a private reproof, from which the examiner sought review.

DISCUSSION

1. The Appropriate Standard on Review.

[1a] Respondent cites two cases on the proper standard of review. (*Le Strange v. City of Berkeley* (1962) 210 Cal.App.2d 313 and *Huang v. Board of Directors* (1990) 220 Cal.App.3d 1286.) Both cases applied the substantial evidence test in the context of a review of an administrative decision by writ of mandate. They did not involve independent de novo review on the record. However, *Le Strange* does stand for the proposition that due process requires that "the person or body who decides the case must know, consider and appraise the evidence. [Citations.] The requirements of due process are satisfied, however, if a board member [with quasi-judicial powers] who participates in a decision has read and considered the evidence, or a transcript thereof, even though he was not physically present when the evidence was produced. [Citations.]" (*Le Strange, supra*, 210 Cal.App.2d at p. 325.)⁸ [1b, 2 - see fn. 8]

Respondent argues that this requirement was violated because not all of the members of the former review department read the record before voting to alter the findings. Respondent further argues that the former review department applied the wrong standard of review. [1c] We need not address these contentions; both arguments are mooted by the de novo review conducted by this review department.

7. Unlike the majority of the former review department, the examiner was not of the opinion that the letter itself demonstrated a violation of the rule. At the original hearing she stated: "the letter . . . cannot stand by itself . . . [B]y precluding [the jurors] from testifying to their reactions, we are also basically dismissing the case . . ." (6/2/88 R.T. p. 81.) She acknowledged that the presence of specific intent appeared to be a necessary element to be proved. (6/3/88 R.T. p. 156.)

8. [1b] As the Court of Appeal noted in *Le Strange*, where the court is authorized by law to exercise its independent judg-

ment on the evidence, abuse of discretion (by the lower tribunal) is established if the court determines that the findings are not supported by the weight of the evidence. Where, as in *Le Strange* and *Huang*, the court is not authorized to exercise its independent judgment, then it must determine whether the findings are supported by "substantial evidence in the light of the whole record." (Code Civ. Proc., § 1094.5, subd. (c).) [2] State Bar proceedings are sui generis, and are not governed by the principles of administrative mandamus applicable to ordinary administrative proceedings. (See *Brotsky v. State Bar* (1962) 57 Cal.2d 287, 300-302.)

2. Law of the Case.

[3a] The examiner argues that this review department is precluded by the law of the case doctrine from reconsidering the decision of the former review department. We reject this argument. The doctrine of law of the case has no applicability to trial level decisions in courts of record. The lack of finality of State Bar Court recommendations to the Supreme Court would suggest that the doctrine is inapplicable to the former review department's original minute order.

[3b] While the current posture of the case is a request for review of a recommendation of private reproval, the entire matter is before us for independent de novo review. Since upon de novo consideration of the record following the second hearing, the former review department would not have been bound to follow its own factual determinations on the first review, we are likewise free to evaluate the record below and satisfy ourselves whether, considering the record as a whole, the referee's findings are supported by the weight of the evidence. [4a] In so doing, we are bound to give great deference to the referee's evaluation of the credibility of the witnesses. (See, e.g., *Connor v. State Bar* (1990) 50 Cal.3d 1047, 1055.)

[3c] We also must be free to reconsider the legal determination made by the former review department regarding the proper interpretation of former rule 7-106(D). The examiner herself notes the flexibility of the law of the case doctrine in the California appellate courts. (*Searle v. Allstate Life Ins. Co.* (1985) 38 Cal.3d 425, 434.) This review department would clearly not fulfill its functions if it abdicated responsibility for the interpretation of rule 7-106(D) based on "law of the case."

The issue here is one of first impression in a published court opinion as to the interpretation of the elements necessary to prove culpability of a rule 7-106(D) violation in light of a challenge based on the constitutional right to free speech. On this record, we can recommend discipline only if we conclude, as did the former review department: That rule 7-106(D) is violated merely by a showing that the communication was intentionally sent by the respondent; that the

letter is on its face violative of the rule; and that the rule, as so interpreted, is constitutional. If, on the other hand, we interpret the rule as requiring proof of subjective intent, manifest injustice will occur if we do not reinstate the referee's original recommendation that the matter be dismissed. The former review department's findings clearly are not sufficient to support culpability in the face of the referee's contrary finding, based on testimonial evidence, that the respondent did not in fact act with culpable intent. [4b] A strong presumption must be accorded the referee's findings of fact evaluating the credibility of witnesses. (*Connor v. State Bar, supra*, 50 Cal.3d at p. 1055; *Young v. State Bar* (1990) 50 Cal.3d 1204, 1216; *Garlow v. State Bar* (1982) 30 Cal.3d 912, 916.)

3. Interpretation of Rule 7-106(D).

The text of rule 7-106(D) is set forth in footnote 1, *ante*. In proposing an amendment to that rule (which was not adopted), having the identical intent requirement as the current rule, the State Bar defended its wording of the rule to the Supreme Court in a brief, explaining that the requirement of "intent of harassing or embarrassing" meant: "In order to show professional misconduct, the State Bar will have the burden of showing that the accused attorney has the requisite intent. The proposed rule was not intended to catch within its sweep innocent communications which, although intended by the attorney to be courteous, somehow harass or embarrass the discharged juror." (Brief of the State Bar of California in Response to Request of the Court, In the Matter of the Proposed Amendments to Rule 7-106, Subdivision (D), Rules of Professional Conduct (Sup. Ct. No. Bar Misc. 4206 (March 26, 1980)), p. 54, quoted in respondent's brief at pp. 15-16.)

[5a] Unlike former rule 7-106(D), former rules 7-106(A) through 7-106(C) strictly prohibit communications with members of a jury panel prior to or during the course of a trial. Former rule 7-106(E) and current rule 5-320(E) are also couched differently to proscribe the conduct of an out-of-court investigation of a juror or venireman "of a type likely to influence the state of mind of such venireman or juror in present or future jury service." The difference in wording of the various subsections of the rule clearly

reflects a difference in the intent of the drafters as to the elements of each offense. “[W]hen different language is used in the same connection in different parts of a statute. . . . it is to be presumed the Legislature intended a *different* meaning and effect. [Citations.]” (*Life v. County of Los Angeles* (1990) 218 Cal.App.3d 1287, 1296, emphasis in original, citing *Charles S. v. Board of Education* (1971) 20 Cal.App.3d 83, 95 and *In re Connie M.* (1986) 176 Cal.App.3d 1225, 1240. See also 58 Cal.Jur.3d (rev.) Statutes, § 127, p. 521 and cases cited in fn. 91.) Accordingly, it would appear that in order to establish a violation of rule 7-106(D), the State Bar must prove by clear and convincing evidence that the respondent subjectively had the specific intent to harass or embarrass one or more jurors or to influence the juror’s actions in future jury service.

In contrast, the former review department apparently interpreted rule 7-106(D) as if it were worded identically to rule 7-106(E), i.e., finding culpability based on the “type” of communication and not based on the intent of the member in making the communication. [6a] In her argument to the former review department, the examiner relied on a case which aptly summarizes the distinction between the proof necessary to establish a rule violation where the only intent necessary is the intent to do the act (in this case, to send the letter) and the proof necessary to establish culpability of a disciplinary offense which requires proof of specific (i.e. subjective) intent. (*Zitny v. State Bar* (1966) 64 Cal.2d 787.) In *Zitny*, the member was charged with violation of former rule 9 (commingling) and separately charged with committing acts of moral turpitude and dishonesty, in violation of Business and Professions Code sections 6067, 6068, subdivisions (a), (c), (d), and 6106, by soliciting bribes to obtain zoning changes. The Board of Governors, by a vote of 13 to 2, had recommended disbarment based on findings of fact approving the local committee’s determination of culpability of two counts of soliciting bribes and one count of commingling. The charged solicitation of bribes had also been the subject of a criminal proceeding in which the respondent had been acquitted by a jury.

[6b] The Supreme Court adopted the rule 9 determination, holding that to prove a “wilful” breach of the Rules of Professional Conduct, it was only necessary to prove that “the person charged acted or omitted to act purposely, that is, that he . . . intended . . . to commit the act” (*Zitny v. State Bar, supra*, 64 Cal.2d at p. 792.) With respect to the solicitation charges, however, the court assumed that in order to prove solicitation of bribery, it is necessary to establish the subjective intent of the accused.⁹ Most of the facts were sharply in dispute and the Supreme Court concluded that the undisputed facts were as consistent with *Zitny*’s claimed innocence as his guilt and there was no “persuasive evidence of consciousness of guilt.” (*Id.* at p. 800.) The Supreme Court went on to conclude: “We are unable to determine from our own evaluation of the record that any of the inconsistent testimony is incredible on its face or that the jury’s determination is entitled to less weight than that of the local committee. Since we must resolve all reasonable doubts in favor of the accused, we conclude in the light of all the circumstances that the charges of soliciting bribes have not been ‘sustained by convincing proof and to a reasonable certainty.’ [Citation.]” (*Ibid.*) As a result, the Supreme Court merely issued a public reprimand for wilful violation of rule 9.

An even greater evidentiary problem exists here. Even if we agree that the letter on its face appears likely to embarrass or harass, we have a referee’s finding, based on uncontroverted testimonial evidence, that respondent had no such intent. [4c] We cannot on this record find the testimony inherently incredible, but are bound to give great deference to the determination of the referee who heard and observed the witnesses. (*Connor v. State Bar, supra*, 50 Cal.3d at p. 1055; *Young v. State Bar, supra*, 50 Cal.3d at p. 1216.)

4. The First Amendment Issue.

The First Amendment issues framed by respondent are twofold: (1) whether the rule is facially overbroad, or (2) whether the rule is overbroad as

9. For a discussion of the difference between crimes of general and specific intent see *People v. Hood* (1969) 1 Cal.3d 444,

456-458; *People v. Hopkins* (1983) 149 Cal.App.3d 36, 41.

applied. Two cases cited by respondent deal with the constitutionality of gag rules restricting communications by lawyers with the press during trial. (*Hirschkop v. Snead* (4th Cir. 1979) 594 F.2d 356; *Chicago Council of Lawyers v. Bauer* (7th Cir. 1975) 522 F.2d 242.) [7] Both the *Hirschkop* and *Bauer* decisions note that there are marked differences between civil and criminal trials and the corresponding need to restrict free speech in order to assure fairness. In *Hirschkop*, the court upheld the constitutionality of restrictions on lawyers' free speech in criminal cases, but found the parallel civil rule unconstitutionally overbroad, noting "[t]he dearth of evidence that lawyers' comments taint civil trials." (*Hirschkop v. Snead, supra*, 594 F.2d at p. 373.) In *Bauer*, the court likewise struck as unconstitutional the restrictions on free speech in the rules for civil trials, including public comment during the trial indicating "an opinion as to the merits of the claims or defenses of a party" and a "catchall provision proscribing public comment on '[a]ny other matter reasonably likely to interfere with a fair trial of the action,'" observing that "Its chilling effect is obvious." (*Chicago Council of Lawyers v. Bauer, supra*, 522 F.2d at 259.)

In *Ramirez v. State Bar* (1980) 28 Cal.3d 402, the California Supreme Court, by a four-to-three vote, rejected the argument that an attorney's First Amendment rights precluded discipline for defamatory statements against three state Court of Appeal justices. (*Id.* at p. 411.) The defamatory statements were contained in a brief filed in the United States Court of Appeals for the Ninth Circuit and a subsequent petition for certiorari to the United States Supreme Court. The California Supreme Court imposed a one-year stayed suspension, one year probation and thirty days actual suspension against the attorney for violation of Business and Professions Code sections 6067 and 6068, subdivisions (b), (d) and (f), on the grounds that he falsely maligned the appellate justices in the course of his zealous representation of his clients. [8] The attorney's First Amendment argument was rejected by the Court on the basis that "false statement[s] made with reckless

disregard of the truth, do not enjoy constitutional protection." (*Id.* at p. 411, quoting *Garrison v. Louisiana* (1964) 379 U.S. 64, 75.) In rejecting the First Amendment argument in *Ramirez*, the Court also relied on its prior assertion of jurisdiction to discipline member attorneys for defamatory or disrespectful statements contained in pleadings or other court papers. (*Id.* at pp. 411-413, citing *Hogan v. State Bar* (1951) 36 Cal.2d 807, 810; *Peters v. State Bar* (1933) 219 Cal. 218; *In re Philbrook* (1895) 105 Cal. 471, 477-478.) All of these cases involved statements which were determined to have had no basis in fact and to have been made with "conscious disregard of their . . . falsity," or with "intent to be maliciously contemptuous." (*Ramirez, supra*, 28 Cal.3d at p. 413, quoting *In re Philbrook, supra*, 105 Cal. at p. 478; *Peters v. State Bar, supra*, 219 Cal. at p. 223; see also *Hogan v. State Bar, supra*, 36 Cal.2d at p. 808.)

If we were to uphold the determination of culpability under rule 7-106(D) we would be squarely faced with the constitutional question. [9] However, as a rule, constitutional questions will not be reached if a decision can rest on a different ground. (*In re Snyder* (1985) 472 U.S. 634, 642-643.) In the *Snyder* case, an attorney had been ordered suspended from all courts of the Eighth Circuit for six months for refusal to show continuing respect for the court. The suspension was predicated on his refusal to apologize for a letter that he sent to a District Court judge criticizing the court's handling of attorney's fee payments for indigent appointments under the Criminal Justice Act. The Eighth Circuit characterized his statements as "disrespectful" and "contumacious conduct" disciplinable under Federal Rule of Appellate Procedure 46. (*Id.* at p. 641, quoting *Matter of Snyder* (8th Cir. 1984) 734 F.2d 334, 337.) The United States Supreme Court, in a unanimous decision (Justice Blackmun not participating), found it unnecessary to reach the constitutional issues raised by the petitioner under the First and Fifth Amendments, finding that petitioner's conduct and expressions did not warrant his suspension from

practice. (*In re Snyder, supra*, 472 U.S. at p. 647.)¹⁰ [5b] Likewise, here, since we conclude that the drafters of rule 7-106(D) intended to require proof of subjective intent and respondent had no such intent, we need not reach the constitutional issue posed by respondent.

5. Relevant Case Law.

There are apparently no disciplinary cases construing rule 7-106(D). The parties were requested to address the potential applicability of the holdings in two published disciplinary decisions construing American Bar Association ("ABA") model rule DR 7-108(D) regarding post-trial communication with jurors: *State of Kansas v. Socolofsky* (1983) 233 Kan. 1020, 666 P.2d 725, and *In re Berning* (Ind. 1984) 468 N.E.2d 843.¹¹ [10 - see fn. 11] Both of these cases found violations of rules based on the ABA Model Code, DR 7-108(D). We are persuaded that both of these cases are factually distinguishable from the present case.

Both *Socolofsky* and *Berning* involved prosecutors in criminal cases who were found to have improperly attempted to influence jurors in trying criminal proceedings. In *Socolofsky*, the jury was

called to serve for a five-month term and six or seven of the jurors were on a panel in another criminal case just two days after receiving an improper anonymous letter making the jurors aware that the man they had just acquitted had since pled guilty in an unrelated drug case. In *Berning*, the threatened impact on jurors was not as immediate, but it was much more pointed. The prosecutor specifically told the jurors that "the State had the absolute best possible case it could ever have. . . . the message that I get from your decision as a juror is that I, as the prosecutor in this county, should not file domestic-type crimes at all." In other words, if the jurors served on another domestic crime case they were being preconditioned in advance to convict in order to preserve battered wives' access to the criminal justice system.

In short, in both *Socolofsky* and *Berning* the violation was predicated on a demonstrable intent by the prosecutor to influence the jurors' decisions in favor of the state in future criminal cases. In contrast, no attempt to influence the outcome of future jury service was asserted or evident here.

The recent case of *Lind v. Medevac, Inc.* (1990) 219 Cal.App.3d 516, cited by the examiner, appears to be the only California case that refers to former

10. As the Supreme Court explained: "The letter was addressed to a court employee charged with administrative responsibilities, and concerned a practical matter in the administration of the [Criminal Justice] Act. The Court of Appeals acknowledged that petitioner brought to light concerns about the administration of the plan that had 'merit,' [citation], and the court instituted a study of the administration of the Criminal Justice Act as a result of petitioner's complaint. Officers of the court may appropriately express criticism on such matters. [¶] The record indicates the Court of Appeals was concerned about the tone of the letter; petitioner concedes that the tone of his letter was 'harsh,' and, indeed it can be read as ill-mannered. All persons involved in the judicial process—judges, litigants, witnesses, and court officers—owe a duty of courtesy to all other participants. The necessity for civility in the inherently contentious setting of the adversary process suggests that members of the bar cast criticisms of the system in a professional and civil tone. However, even assuming that the letter exhibited an unlawyerlike rudeness, a single incident of rudeness or lack of professional courtesy—in this context—does not support a finding of contemptuous or contumacious conduct, or a finding that a lawyer is 'not presently fit to practice law in the federal courts.' Nor does it rise to the level of 'conduct

unbecoming a member of the bar' warranting suspension from practice." (*Id.* at pp. 646-647.) On remand, the Eighth Circuit vacated the suspension. (*Matter of Snyder* (8th Cir. 1985) 770 F.2d 743, 744.)

11. [10] The wording of California rule 7-106(D) differs significantly from the parallel rule included in the Model Code adopted by the ABA in 1969 which has been adopted in a majority of the states. ABA Model Code of Professional Responsibility, DR 7-108(D) provides: "After discharge of the jury from further consideration of a case with which the lawyer was connected, the lawyer shall not ask questions of or make comments to a member of that jury *that are calculated merely to harass or embarrass the juror or to influence his actions in future jury service.*" (Emphasis supplied.) In 1983, the ABA replaced the entire Model Code with the Model Rules of Professional Conduct. ABA Model Rules of Professional Conduct, rule 4.4 now provides: "In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person . . ." The unofficial Model Code Comparison indicates that rule 4.4 of the Model Rules was intended to supplant DR 7-108(D) of the Model Code. This change has not been adopted by most states.

rule 7-106(D). It addressed the applicability of former rules 7-106(D) and 7-106(E) to a somewhat different issue than the one before us now. There, the precise issue was not whether there should be professional discipline,¹² but whether sanctions could be imposed by the court for bad faith actions or frivolous tactics as a result of a letter which warned the recently discharged jurors of potential “‘sharp investigation tactics’” that might be used by plaintiffs’ counsel to impeach the jury verdict. (*Id.* at p. 521, quoting letter sent by counsel.) The entire discussion by the court focused on the effect of such a letter on the jury’s present jury service and, more importantly, on the evident intent of the letter’s author to interfere with the right of the plaintiff to seek to impeach the jury verdict in an effort to obtain a new trial. The court held that “the true purpose of the letter was to achieve the chilling result of preventing attempts by the losing side to communicate with jurors after their discharge, in a legitimate effort to determine if juror misconduct existed as grounds for a new trial, and to obtain permitted affidavits concerning any such misconduct.” (*Ibid.*)

[11a] Rather than protecting jurors from posttrial contact, *Lind* reaffirms the proposition that an attorney who loses a jury trial has the right to contact jurors after the trial and develop facts by way of juror affidavits to impeach their own verdict. “They are the obvious, and usually the only, source of available sworn testimony by affidavit, which the law requires as a basis for new trial on the ground of juror misconduct.” (*Id.* at p. 520.) *Lind* also states that an attorney wishing to protect a verdict he won likewise “should not be barred from writing jurors post verdict, thereby requesting that he be notified of any posttrial contact with the jurors by the adverse side; and that he be further allowed either to be present for any interviews granted the adverse side, or to discuss with the juror any telephonic or written communications received from the adverse side.” (*Id.* at p. 522.)

The *Lind* court approved the proper conduct of posttrial investigations into whether any jurors engaged in misconduct even though jurors presumably

would be very indignant at being asked to prove up their own alleged misconduct. It appears to be the unstated premise of the *Lind* decision that the performance of the jurors’ civic responsibility includes the potential of posttrial adversarial contact by the attorneys so long as there is no bad faith purpose in the contact which violates the Rules of Professional Conduct.

Here, respondent’s communication with the jurors was not an exercise of his right to investigate for the purpose of impeaching the jury verdict. Nor was there any finding that the respondent intended to affect the jury in its present or future service. [5c] The sole question was whether respondent intended to harass or embarrass the jurors by sending the letter. The hearing referee found, upon assessing the credibility of the respondent and other witnesses, that respondent did not have such intent. Since we interpret former rule 7-106(D) to require clear and convincing proof of specific intent and the referee was in the best position to evaluate the credibility of the witnesses, we defer to his resolution of their testimony and find no violation of rule 7-106(D).

CONCLUSION

By adopting the referee’s recommendation of dismissal, we, like the referee, by no means condone the conduct of respondent. Some of the jurors were seriously offended by his letter despite his lack of intent to produce such result. Jurors are very important to our system of government in both criminal and civil cases and ought to be treated with respect. [11b] Attorneys have a right to communicate with jurors after the trial, but should strive to avoid unnecessarily causing the jurors to develop ill feelings regarding their jury service.

As observed in *Lind*, “It is common knowledge that it is increasingly difficult to obtain willing citizens to serve as members of a jury. Letters such as the one sent by appellants in the present case . . . will only exacerbate the reluctance of some persons to undertake jury service . . .” (*Lind v. Medevac Inc.*, *supra*,

12. The Court of Appeal in the *Lind* case left it up to the trial judge whether to refer the matter to the State Bar discipline

system. (*Lind v. Medevac, Inc.*, *supra*, 219 Cal.App.3d 516, 523.)

219 Cal.App.3d at p. 521.) The same could be said here. Such a result would be unfortunate. Respondent himself recognizes in hindsight that it was a mistake to send the jury the letter at issue here and has vowed not to act similarly if disappointed in a future jury verdict.

[5d] For the reasons stated above, upon our independent review of the record, including the record on remand, we find no violation of rule 7-106(D) of the Rules of Professional Conduct and therefore adopt the referee's recommendation of dismissal of this proceeding.

We concur:

NORIAN, J.
STOVITZ, J.