IN THE SUPREME COURT OF FLORIDA
BEFORE A REFEREE

THE FLORIDA BAR,

Complainant,

v.

RAY SANDSTROM,

Respondent.

Supreme Court Case No. 77,773

The Florida Bar File No. 89-52,722 (17C)

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS:

The undersigned was appointed as referee to preside in the above referenced disciplinary proceeding by order of this Court dated April 26, 1991. The pleadings, transcript of final hearing and all other documents filed with the undersigned, which are forwarded to the Court with this report, constitute the entire record in this case.

Respondent was represented by Kayo E. Morgan, Esquire. The bar was represented by David M. Barnovitz, Assistant Staff Counsel.

II. FINDINGS OF FACT AS TO EACH ITEM OF MISCONDUCT OF WHICH THE RESPONDENT IS CHABGED:

A. Respondent is, and at all times hereinafter mentioned, was, a member of The Florida Bar subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Heretofore, respondent represented one Robert Arner ("Arner") in connection with a criminal prosecution venued in the Circuit Court of the 17th Judicial Circuit of Florida entitled State of Florida v. Robert Arner, criminal division, case no. 79-1060CF.

C. Arner was charged in the referenced prosecution with murdering his wife, Elinor Arner (hereinafter called "decedent").

D. Following a jury trial in the referenced action, during which trial respondent at all times represented Arner, Arner was convicted of the first degree murder of the decedent.

E. Respondent, in representing Arner, failed to take any pre-trial depositions.

F. Respondent, in representing Arner, failed to conduct a proper investigation as related to evidence available to establish that decedent's death was due to a cause other than Arner's actions.

i. The testimony of the medical experts from the transcript of the Rule 3.850 hearing (bar's Exhibit 3 in evidence) established beyond doubt that the proximate cause of decedent's death was medical malpractice, The jury was not presented with such evidence due to lack of adequate preparation on respondent's part.

ii. Dr. John Marracini, Deputy Chief Medical Examiner of Palm Beach County, reviewed decedent's medical records and the autopsy report. He testified that on March 5, 1978, surgery was performed following a diagnosis of pulmonary emboli (Rule 3.850 hearing, volume I, page 18),* but the surgery was based upon a misdiagnosis by the surgeon because decedent did not have pulmonary emboli (18-19). During the surgery, the spleen was injured. The injury to the spleen was unrelated to the head injury for which Mrs. Arner was originally admitted to the hospital and which injury formed

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* All page references in this paragraph F are to transcript of Rule 3.850 hearing (bar's Exhibit 3, in evidence),

the basis for the charge against the defendant. In the words of Dr. Marracini, the spleen injury "was not the result of a physical assault or anything like that initially" (21). Following the injury to the spleen, decedent was given 25-30 units of blood (22-23). Dr. Marricini testified that decedent should have been re-explored. His testimony concluded as follows:

> Q: So what we have here is a pattern. We have first the misdiagnosis of the pulmonary emboli; is that correct?"
>
> A: Yes.
>
> Q: We then have the surgical intervention which ruptures or lacerates the spleen; correct?
>
> A: Yes.
>
> Q: We then have the woman lying in the hospital bleeding to death based upon what the surgery did to her?
>
> A: Yes, the bleeding was a significant attribute to death.
>
> Q: Did the bleeding and the shock that followed the bleeding cause her death?
>
> A: It was one of two mechanisms occurring on or abut that time; the other being pneumonia.
>
> Q: But for the operation would Elinor Arner have lived?
>
> A: Probably (24-25).

Finally, Dr. Marracini opined that the "failure to recognize the problem of internal bleeding was tantamount to malpractice" (36).

iii. Dr. Mitchell Levy, a board certified general surgeon testified. He, like Dr. Marracini, opined that the diagnosis of pulmonary emboli was in error (40). Dr. Levy stated that the surgeons

should have first performed an arteriogram to determine whether there were clots in the pulmonary arteries which is done in almost any patient undergoing a vena cava ligation which Dr. Levy described as "a major undertaking and is fraught with multiple post operative complications" (41). Decedent's doctors never performed such a test. In addition, Dr. Levy opined that it was inadvisable to perform the ligation without first performing two (2) types of lung scans, but that only one (1) scan was performed (41-42). Dr. Levy found that the spleen was lacerated because of the surgical intervention. There was no spontaneous eruption of the spleen. He characterized the odds of a spontaneous eruption as about "a million to one" (43). He stated that he was "astounded" that the decedent was not re-operated upon after the surgery (46). He opined:

> This lady should have been immediately prepared for surgery, transfused as high as they can get her, taken back to the operating room, re-explored and taken care of whatever injury occurred during the initial procedure (47).

He stated that the surgeons let decedent bleed to death and were guilty of gross negligence (47, 50-52, 59). Dr. Levy explained that had the malpractice not occurred the decedent would have survived the blow to the head (48).

iv The original deputy medical examiner who testified for the state at the murder trial was Dr. Fatteh. He was the final medical expert to testify at the Rule 3.850 hearing. On the basis of his autopsy findings, Dr. Fatteh testified that the diagnosis of pulmonary emboli was not correct (172). He stated that the operation was not justified (172). Dr. Fatteh agreed with Drs. Marricini and Levy that the treatment of the decedent vis a vis the surgical intervention was

gross negligence (179). Dr. Fatteh agreed that the spleen lacerated was a result of the surgery (174-175). Finally, Dr. Fatteh explained that he testified during the murder trial from a medicolegal standpoint (184) but that he was never asked to address what went wrong medically during the case (184).

v. Respondent's approach to the cause of death consisted of nothing more than a phone call between him and Dr. Davis at the Dade County Medical Examiner's Office. The call took place after Dr. Davis was asked to review medical records from Mr. Sandstrom's file. Mr. Sandstrom could not testify that the records were complete. He recalled that they were the records he had received from prior counsel's file. All he knew was that they "related to her hospitalization" (225). Based upon whatever those records were, Dr. Davis, according to respondent, agreed with the findings of Fatteh (226). That one (1) telephone conversation between respondent and Dr. Davis constituted respondent's investigation into the cause of death. There was *not* even a written report from Dr. Davis. There was no deposition or interview of Dr. Fatteh. There were no interviews oF depositions of any of decedent's attending physicians. Even though he concluded that he could not use Dr. Davis as a witness, respondent, nonetheless, listed Dr. Davis as a defense witness ten (10) days prior to trial. When asked to explain, respondent could not (227).

G. Respondent, in representing Arner, failed timely to challenge by pre-trial motion to suppress and failed timely to challenge by objection at trial, testimony and photographs relating to a search of Arner's vehicle which testimony and photographs were prejudicial to Arner's defense.

i. The state attempted to establish that respondent's client had murdered his wife by striking her on the head with a hammer. The hammer was introduced into evidence (trial transcript, vol. VII, page 1156).* It became very important, therefore, that a tool chest was found by the police in the trunk of respondent's client's vehicle. Notwithstanding the damaging inferences that might be drawn from linking the tool chest and hammer, respondent neglected to ascertain the particulars from various of the state's witnesses who were called and who testified concerning the seizure and search of the client's automobile and the photographing of its contents. Kirk B. Watkins was called by the state and testified how he investigated the area where the client's vehicle was found. He explained how he found the hammer (trial transcript, vol. IV, pages 607-608). He explained how the automobile was brought to the police department and how he photographed the vehicle, its interior and its trunk, identifying various photographs that he had taken of such areas of the vehicle (trial transcript, vol. IV, pages 613A-614). The photographs so identified by the witness were admitted into evidence, without objection by respondent (trial transcript, vol. IV, pages 623-625).

ii. Subsequently, the state called as its witness, Officer Lombard and questioned him concerning the entry of the automobile's trunk at which point respondent attempted to make an illegal search argument. Once again, respondent never attempted to take Officer Lombard's deposition. He never made a pre-trial motion to suppress

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* The trial transcript was admitted into evidence as the bar's Exhibit 2.

which is admitted by respondent in his response to the bar's request for admissions. After the photographs were introduced into evidence, respondent attempted to suppress the same on the basis that the search of the vehicle and the photographing thereof constituted an illegal search and seizure (trial transcript, vol. V, pages 821-825). Although the trial judge gave respondent wide latitude and permitted him to pursue the argument (trial transcript, vol. VI, pages 853-866) the trial judge, pointing out that the photographs had already been received in evidence and had even passed the jury, declined to grant respondent's belated application for relief, The court acknowledged that respondent had a proper ground for suppression (trial transcript, vol. VI, page 866) but it was just too late, respondent having failed timely to make a suppression motion or to make a timely objection to the introduction of the photographs.

H. Respondent failed to discover that a fence surrounding the scene of the alleged crime, which fence, injurious to his client's defense and demonstrated to the jury by the state, by photograph, was not erected until over a year after the alleged crime.

i. The crime scene was a golf course. It was important to his client's defense to establish that someone other than Mr. Arner was the assailant. An attempt was made to point the finger at Valerie Wade. The issue of access from Ms. Wade's residence to the crime scene therefore became extremely important. Respondent's client testified that there was immediate and easy access from Ms. Wade's premises to the crime scene. He stated that there was no fence to restrict access at the time of the incident; that there was unimpeded

access to and from Ms. Wade's premises (trial transcript, vol. XXI, pages 3820-3822). Unfortunately for his client, the state introduced into evidence a photograph of a fence surrounding the scene (trial transcript, vol. XV, pages 2817-2818). The state used the photograph, in closing argument, to demonstrate to the jury that Ms. Wade had no access to the crime scene. The prosecutor stated to the jury:

> The stronger suggestion has been made that our lying witness, Valerie Wade, and I use the terminology lying in quotes, is one who could have done it, because Mr. Arner testified that you could go around a fence that wasn't there, or was down, or was less of a fence somehow, and around a creek, or a canal, or some type of construction area, and then across the Diplomat Golf Course through a gate.
>
> I suggest once again you utilize your common sense. Why does a public golf course, or in this case a private golf course have a gate? Because when it's closed, they close the gate and I suggest to you ladies and gentlemen that the Diplomat Golf Course is not open at 2:00 o'clock in the morning or four hours either side of it, so once again you've got to scale the fence, and we've got the photographs of that fence in evidence, and I urge you to study all of the exhibits, to look at every one of them, and see what they prove.
>
> Look at the top of this fence and see if this does not have - and you have to look fairly closely - little strands of barbed wire that the individual crossing that fence is going to have to cover and leave no trace, not a trace, not a stitch of clothing, not anything, and not once but twice would this individual, if it were Valerie Wade, have to do such a feat and, of course, it takes some athletic ability, and you saw her physical condition.
>
> She is not an invalid, but she is certainly no high jump artist, so I suggest to you that any suggestion that Valerie Wade is conceivably the real culprit in this case is absolutely ludicrous, and I think you have heard that term several times during the course of this trial (trial transcript, vol. XXII, pages 4174-4175).

ii. Respondent obviously made no attempt to ascertain the physical layout of the crime scene prior to the trial. Had he done so, he could have, should have and would have found John Hutton who had been superintendent of the crime scene property for the Diplomat since 1957. Mr. Hutton would have testified, as he did at the Rule 3.850 hearing, that the fence demonstrated in the state's photograph was not erected until nearly a year and a half after the incident in question (see Rule 3.850 transcript of hearing, pages 61-70).

I. Respondent failed to present a critical tape recording to impeach a prosecution witness or to recall such witness for such purposes of presenting such tape recording, the existence of which tape recording was known by and available to respondent.

i. Once again, respondent never bothered to take Valerie Wade's deposition prior to trial. The implications attaching to respondent's failure to take Ms. Wade's trial deposition are perhaps best articulated by respondent himself who commented, during the course of his cross examination of Ms. Wade, as follows:

> I can't tell until she is on the stand what she is going to say, and you tell me that you knew that she was going to say? (trial transcript, vol. X, page 1831).

ii. Although respondent made reference to a tape recording to attempt to impeach Ms. Wade during his cross examination of her, he made no attempt, whatever, to introduce the tape during his cross examination or to play the same to the jury. He obviously regarded the tape as an extremely critical piece of evidence emphasizing that the witness' demeanor during the taping could clearly be ascertained from

her tone, etc. on the tape (trial transcript, vol. XVIII, pages 3311-3315). Respondent waited until Ms. Wade was off the stand and made no attempt to introduce the tape until another witness, Leonard Robbins, was called (trial transcript, vol. XVIII, page 3316). Respondent made no effort to recall Valerie Wade for purposes of attempting to get the tape into evidence even though the prosecutor, during the course of his argument against admitting the tape, stated:

> If he wants to get in some affirmative evidence, then he has an affirmative duty to call the witness. It's not proper impeachment and it's not proper affirmative evidence (trial transcript, vol. XVIII, page 3321).

J. Respondent failed to become familiar with or know the physical evidence in the case.

i. Reference has already been made to the scene of the crime and the existence or non-existence of the fence. To further emphasize the fact that respondent was groping his way through the trial with no real understanding or appreciation of the physical evidence in the case, one need only review the colloquy that took place between the trial judge and respondent as follows:

> THE COURT: Do you have anything else, letters, or --
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> MR. SANDSTROM: We haven't got anything, We've got somebody going through a whole stack of stuff up north. I do not know if they are going to find anything. I doubt it. If they do, as soon as I find out about it, I'll tell him (trial transcript, vol. X, pages 1836-1837).

K. As a result of respondent's failures, his client's conviction of murder in the first degree was set aside by the trial court upon the Rule 3.850 application. See the trial court's April 8, 1988 order granting the Rule 3.850 application admitted into evidence as the bar's Exhibit 1.

III. RECOMMENDATIONS AS TO WHETHER OR NOT THE RESPONDENT SHOULD BE FOUND GUILTY:

A. By virtue of his lack of preparation, lack of investigation and his failures as recited in paragraphs A through J, inclusive of my findings of fact, respondent violated Disciplinary Rules 6-101(A)(2) and 6-101(A)(3) of the Code of Professional Responsibility which provide that a lawyer shall not handle a legal matter without preparation adequate in the circumstances and shall not neglect a legal matter entrusted to him.

IV. RECOMMENDATIONS AS TO DISCIPLINARY MEASURES TO BE APPLIED:

I recommend that respondent be suspended from the practice of law for one year.

V. PERSONAL HISTORY:

Respondent is 67 years of age and has been a member of the Florida Bar since February 5, 1951.

VI. STATEMENT AS TO PAST DISCIPLINE:

Respondent received a private reprimand for lack of courtroom demeanor in The Florida Bar File No. 82-03,394.

VII. **STATEMENT AS TO COSTS OF THE PROCEEDING AND**

DATIONS:

t costs of these proceedings were as follow :

Administrative Costs: (Rule 3-7.6(k)(5))	$ 500.00
Court Reporter:	
Status Conference	97.25
Final Hearing	461.25
Copy costs: Three (3) copies of murder trial and three (3) copies of Rule 3-8.50 record - 15,000 copies at $.15/copy	$ 2,250.00
TOTAL	$ 3,308.50

I recommend that such costs be taxed against the respondent.

RENDERED this 7th day of November, 1991 at Miami, Florida.

JOEL H. BROWN, REFEREE

Copies furnished to:

David M. Barnovitz, Bar Counsel
Kayo E. Morgan, Attorney for Respondent