IN THE SUPREME COURT OF FLORIDA

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THE FLORIDA BAR

Complainant,

vs.

BRENT ROSE

Respondent.

Case No. SC00-1792
TFB No. 1999-11,673(6E)

SECOND AMENDED BRIEF IN SUPPORT OF CROSS-PETITION TO REVIEW THE DECISION OF THE REFEREE AND REPLY TO THE BRIEF OF APPELLANT

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SYMBOLS AND REFERENCES

Respondent adopts the excellent "Symbols and References" system suggested by Complainant.

STATEMENT OF THE FACTS AND OF THE CASE

On August 31, 2000, almost four years after the events giving rise to this action occurred, the Appellant ("the Bar") brought a complaint against Respondent ("Rose") for alleged incompetencies occurring during Rose's representation of a criminal defendant. The complaint represented a lengthy laundry list of violations allegedly committed by Rose in the preparation for and conduct of the criminal defendant's trial. Early in the trial, the Bar's prosecutor somewhat described the nature of his prosecution of Rose as an attack on Rose's "slipshod" handling of the case (TR1 187-13), though the prosecutor apparently modified this characterization, and, by the end of the trail, described Rose's handling of the many aspects of the case as "marvelous" (TR2 144-24) and commenting in his closing on the "many good things [Rose had] done in the case." (TR2 146-24) Despite the fact that Rose was able to affirmatively disprove almost all accusations brought against him through non-disputable documentary or other evidence, and despite the fact that the Referee did not find witnesses against Rose to be entirely credible, the Referee found Rose guilty of three violations. (RR 2)

In January, 1997, after several months of preparation, Rose acted as trial counsel for Scott Stuckey, who was accused of capital sexual battery and other charges (TR2 52-23) for allegedly molesting his own minor niece and nephew when

they visited Stuckey in his Florida home. The niece and nephew resided in Ohio at the time of the molestation and at the time of the trial. (TR2 54-21) Prior to the trial, Rose conducted investigation and depositions in preparation for the trial (TR2 53-15 et seq.). The Referee found Rose's handling of the case appropriate and competent in all respects except three: 1) Rose failed to sufficiently interview some potential defense witnesses, 2) Rose failed to report alleged contact between witnesses and jurors to the trial judge, and 3) Rose made an improper comment during voir dire. (RR)

During his preparation for trial, the defendant and his wife supplied Rose with suggested defense witnesses. (TR2 80-25) When he was provided with witnesses, Rose immediately placed the names of the witnesses on witness lists which Rose provided to the prosecutor in the criminal case. (TR 81-12) Rose discussed the impact of these witnesses with Stuckey and his family, and made an initial determination of which witnesses had relevant, admissible evidence to present. Of approximately fifteen witnesses offered by Stuckey (TR2 80-21), Rose determined after analysis (TR2 79-21), that maybe "[t]hree or four" witnesses could be called at trial. Rose discussed the potential testimony of all witnesses with Stuckey and his family many times. (TR2 81-21) Despite the fact that Rose was certain that no witnesses other than those he intended to call had relevant, admissible testimony, Rose asked the Stuckey family to bring all the witnesses to his office. (TR2 82-15)

Rose wanted "to be certain they [the other witnesses] had no testimony [he] could use." (TR2 82-4) Rose described the reason for bringing the witnesses to his office as wanting them to be together to jog each others' memories. (TR2 82-6) Since most of the witnesses lived in Ohio, the Stuckey family could not afford to bring witnesses to Florida for both questioning and trial, so Rose suggested the witnesses be brought in one time for both. (TR2 82-16) Rose thoroughly questioned the witnesses for about an hour and was able to confirm his belief that the witnesses could not offer further testimony. (TR2 83-4) At no point did the Bar or any witness offer any testimony or evidence that would have been relevant or even helpful to Stuckey's defense.[1] The Referee did not identify any evidence that Rose "missed," but only found that Rose should have interviewed the witnesses earlier. (RR)

During the trial, members of the Stuckey family[2] and a friend of the Stuckey family were called by the Bar to describe incidents they witnessed or heard about during the criminal trial. These witnesses described incidents of alleged contact

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[1] The Bar did suggest that Rose could have called witness Carol Connor in Stuckey's defense to describe the layout of the trailer park where Stuckey resided and where the molestation occurred. However, calling this witness would have been a tactical error, in Rose's opinion, since it would have opened the door to critically damning evidence Rose had had excluded *in limine*.(TR2 77-22) On a further note, despite the fact that this damning evidence was excluded on Rose's motion *in limine* in the criminal trial, the Bar charged Rose with allowing the evidence's admission. Of course, the evidence was never admitted, and Rose was acquitted on that count.

[2] Stuckey's wife and mother-in-law, to be specific. Stuckey himself was not called as a witness in the instant case.

between the jurors in the criminal case and members of the molestation victims' family. One witness even said the criminal prosecutor was improperly speaking with jurors. (TR1 158-3) The victims' family members vehemently and unequivocally denied that such contact occurred (TR2 31 et seq. and 45 et seq.), as did the criminal prosecutor. (TR2 199-22) Rose brought a pre-trial motion to allow counsel to contact the jurors from the criminal trial and to call them as witnesses during the instant case. The Referee denied the motion, leaving unanswered the question of whether the jurors would have confirmed or denied that contact occurred. Rose denied that he had been told about any improper juror contact during the criminal trial. Instead, Rose said that he had been told only that the prosecutor in the criminal case was speaking with prosecution witnesses, (TR1 178-3) an action that was not improper. One witness described telling Stuckey about incidents of conduct, and seeing Stuckey make notes about it, then lean over at trial table and say something to Rose. (TR 34-12 to 35-2) Rose admitted the notes into evidence (Respondent's 2) to demonstrate that Stuckey made no note regarding juror contact.[3] Despite the incredible paucity of evidence that any improper contact with jurors occurred during the criminal trial, and

[3] The surprise admission of the notes caused witness Michelle Stuckey to quickly develop a cover story that the notes were in fact pre-trial notes given to Rose by Scott Stuckey, not trial notes that would have reflected contact with jurors, had such occurred. (TR1 120-8) The witness even demanded to be recalled, just to make her point that the notes were pre-trial notes. The content of the notes, however, make it quite obvious that they are Scott Stuckey's contemporaneous trial notes.

despite the fact that the Referee did not find that the contact even occurred (RR), the Referee found Rose guilty of failure to report the contact to the judge.[4]

The last item for which Rose was found guilty was making an improper comment to the jury panel venire. During the criminal trial, Rose asked the venire "Anybody who wants to ask me the question, 'How can you defend child molesters?'" (TR1 182-7) The question was obviously a joke, and it invoked a laugh from the venire . (TR2 137-18) Further, at the instant trial, Rose explained how the comment is extremely illustrative of the preconvictions brought by venire members into the courtroom, especially in child molesting cases. Rose was able to use the joke to explain to the venire that the mere desire to ask him the question, "How can you defend child molesters?" means that they have already concluded that his client is guilty. (TR1 183-7 et seq.)

The Referee recommended a sentence of thirty days suspension and that Rose complete CLE specifically in the area of criminal law as it relates to capital crimes, amongst probation and other sanctions. (RR)

[4] Rose did, interestingly, report improper contact during the criminal trial between *himself and a prosecutor* and jurors. One of the jurors asked Rose where the straws were. No explanation is offered by the Bar as to why Rose would report this very minor contact to the trial judge, yet not report the very serious allegation of contact between jurors and witnesses or prosecutors.

SUMMARY OF THE ARGUMENT

The Referee erred in disallowing Respondent from contacting and calling jurors as witnesses in this cause. These persons were jurors in the trial of the cause from which this disciplinary action arises, and the testimony of these jurors would have proven that no unreported, improper contact occurred between jurors and witnesses, as was alleged by the Bar. Given this testimony, Respondent could have demonstrated that he was never told about any improper contact with jurors, and thus was under no duty to report any such contact.

The Referee erred in determining that Respondent did not sufficiently interview witnesses in order to properly conduct the trial of the cause from which this disciplinary action arises. Rose spent sufficient amounts of time with all witnesses, and even spent time personally interviewing witnesses he was sure could not assist him with his case.

The Referee erred in determining that Respondent, during jury selection in the trial of the cause from which this disciplinary action arises, referred to his client as a "child molester." The comment was only a joke, and effectively instructed the jury that they should not presume Rose's client to be guilty, but should instead listen to all the evidence.

ARGUMENT PRESENTED

I.

Whether the Referee erred in disallowing Respondent from contacting and calling certain persons as witnesses, where these persons were jurors in the trial of the cause from which this disciplinary action arises, and the testimony of these jurors would have proven that no unreported, improper contact occurred between jurors and witnesses, as was alleged by the Bar.

The most significant of the Bar's claims in the case – and the claim for which the majority of the trial of the Bar's complaint was spent – concerned Rose's failure to report alleged contact between the jurors in the criminal trial and witnesses and/or prosecutors. Despite the fact that such conduct almost certainly did not occur[5], the Referee believed that Rose should have reported this non-occurring conduct to the criminal trial judge. Despite the almost certain evidence that Rose was not told about the conduct,[6] the Referee still recommended that Rose be found guilty.

But Rose's claim that the conduct did not occur would have been absolutely solidified by the testimony of the jurors from the criminal trial. To this end, and

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[5] The Referee's Report indicates that he was not convinced that the conduct occurred.

[6] And why should he be told? It didn't happen.

knowing that he was ethically prohibited from contacting jurors, Rule 4-3.5, Rules Regulating the Florida Bar, Rose sought permission of the Referee before questioning jurors on whether improper activities had occurred regarding contact between them and witnesses or prosecutors. Without any of the jurors to act as witnesses, the defense in this cause was unable to call impartial witnesses to solidify its claim that the conduct did not occur. Without impartial witnesses, the defense was left with pitting the testimony of Rose and the victims' family against the testimony of the defendant's friends and family.

The Referee's comment that he is unconvinced that the improper contact occurred appears to make the credibility contest a draw. But this is unlikely. More likely, the Referee believed that, whether the contact occurred, Rose should have reported to the criminal trial judge that he was *told* that improper contact occurred. But this conclusion ignores the fact that Rose argued that he *wasn't* told that the contact occurred. Certainly the fact of whether the contact occurred has bearing on *whether* the contact occurred. Certainly, if it is proven that the contact did not occur, the credibility of those who claim they told Rose that contact occurred is damaged.

"The right to present evidence and call witnesses is perhaps the most important due process right of a party litigant." *LoBue v. Travelers Ins. Co.*, 388 So.2d 1349, 1351 (4th DCA 1980). "Unless it can be shown that the testimony of a proposed witness will unnecessarily duplicate the subject matter of another witness's

testimony, the judge should ordinarily allow the party to call the witness." *Delgardo v. Allstate Ins. Co.*, 731 So.2d 11, 14 (4th DCA 1999). In denying Rose the ability to prove conclusively that the contact between jurors and victims or prosecutors did not occur, and an usual and terrible result has likely occurred: Rose could be convicted and sentenced based upon an event that never even occurred.

II.

Whether the Referee erred in determining that improper contact occurred between jurors and witnesses in the trial of the cause from which this disciplinary action arises.

In this cause, Rose was charged with a long list of improper activities. This list included Rose's alleged failure to attempt to obtain psychiatric records (TR2 146-24) (Rose provided written evidence of his attempt to obtain the records), Rose's alleged failure to obtain handwritten notes written by the victims in the criminal case (TR2 55-10) (Rose either obtained the notes from the prosecutor or had them read into the record when no copier was available), Rose's alleged failure to view a video (TR2 74-17) (Rose described the video), Rose's alleged failure to contact a psychiatrist to review a video (the Bar was able to interview the psychiatrist Rose contacted), Rose's alleged failure to properly file a motion in limine (TR2 76-18) (Rose provided a copy

of the properly filed motion), and others.[7] In each of these instances and other in this cause, Rose was able to provide documentary or other unimpeachable evidence to support the credibility of his statements.

In the case of the allegation of the failure to report improper juror contact, there was no documentary evidence that Rose could provide to support his statement, except the notes of Stuckey himself. Though the notes did not conclusively prove Rose's position, the Bar had absolutely no documentary evidence to dispute Rose's statements.[8] Further, the fact that the Stuckey notes contained no statement regarding juror contact, the Bar's evidence was certainly weakened. Given the great weight of evidence supporting Mr. Rose's position, and given that the Bar's evidence was impeached by the Stuckey notes, the Referee erred in his determination that Rose was told about any improper juror contact and, therefore, had a duty to report such contact.

Though this court is and should be reluctant to overturn the factual determinations of a Referee, where those finding are not supported by competent, substantial evidence, the decision should be overturned. *Florida Bar v. Summers*,

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[7] The Bar's complaint largely follows a motion filed by Stuckey pursuant to Rule 3.850, Fla. R. Cr. Pro. The Referee asked the Bar why this particular 3.850 motion should result in a Bar prosecution (when the thousands of other 3.850 motions brought in this state each year do not). (TR2 145-15) The Bar responded, in part, that this was a capital case. The Referee did not go further to ask what made this capital case different from the dozens of other 3.850 motions filed in other capital cases in this state each year. We still question it.

[8] Nor, for that matter, did the Bar has any "solid" evidence to dispute any statement made by—or fact asserted by—Rose.

728 So.2d 739, 741 (Fla. 1999). In this case, it seems that the Referee's decision is simply unsupported by the record.

III.

Whether the Referee erred in determining that Respondent did not sufficiently interview witnesses in order to properly conduct the trial of the cause from which this disciplinary action arises in that it was demonstrated that the persons the Bar claims Respondent should have interviewed more thoroughly had no testimony that would have made them relevant trial witnesses.

The Referee found that Rose did not sufficiently interview witnesses in this cause. He based this on the fact that Rose did not speak to a small number of witnesses

until the night before the trail. However, no one has delivered any evidence that shows

that any of these witnesses would have had any testimony to offer had Rose have spent

hours with each witness. The record clearly demonstrates that Rose made a proper determination that the witnesses had no admissible evidence to offer. Rose described that he met with the witness for about an hour, and that he asked them all the

questions

he could think of. Had some witness come forward with even a small bit of evidence,

even a bit if evidence that could lead to admissible evidence, but the record discloses nothing other than that Rose was presented with a group of witnesses who had nothing

to offer his case. Further, Rose was already aware that these witness had no evidence to offer, because he had already spoken at length with the Stuckey family about the witness' testimony. Criminal defense attorneys are not required to exhaustively interview witnesses they know to be irrelevant to their cases. The interviews that occurred the night before the trial were obviously nothing more than fail-safe attempts to

ensure that no stone had been left unturned in the defense of Stuckey. And, since the witnesses had already been listed by Rose in defense witness lists, Rose could have called the witnesses without penalty in the Stuckey trial.

IV.

Whether the Referee erred in determining that

Respondent, during jury selection in the trial of the cause from

which this disciplinary action arises, referred to his client as a "child molester."

Rose asked the jury venire, "Anybody who wants to ask me the question, 'How can you defend child molesters?' " The question appears to accuse his own client of child molesting. It does not. As Rose explained to the Referee, the question—actually a joke used to make a point—demonstrates to the venire panel that they should not be asking Rose such a question, but yet it's on their minds.[9] By confronting the panel with their obvious question, Rose was able to immediately demonstrate to prospective jurors that the presumption of innocence is especially important, no matter how terrible the crime. Rose was able to use the joke to show that the defendant wasn't "different" just because of the terrible allegations facing him. Rose explained that jurors hate defense attorneys and defendants from the moment the trial judge reads the charges to the venire in child molestation cases. Defense attorneys must therefore use direct measures to alleviate the jurors' prejudicial beliefs.

The decision to make the joke to the juror was a tactical one. The prosecutor in the criminal case agreed that the joke had been effective—that it had gotten everyone's attention and had gotten a laugh. Tactical or strategic decision of counsel do not justify post conviction relief on the grounds of ineffective assistance of counsel, even if the strategic decision ultimately turns out to be a bad decision. *Gonzalez v. State*, 579 So.2d 145, 146 (3d DCA 1991). Though reasonable trial attorneys may differ as to whether Rose's question was effective, it certainly did not

[9] The question is suggested by *"How can you defend those people?" : the making of a criminal lawyer* by James S. Kunen (McGraw Hill, 1983), in which Kunen writes that defense attorneys must struggle primarily to overcome the public's perception that those accused of crimes are somehow different that the rest of society. This is especially true in child molesting cases.

equate to calling his own client a child molester. Rose, during the criminal trial, specifically went on to explain to the venire that they should *not* presume that Stuckey was a child molester, and that the purpose of the question was to show the panel that Stuckey should not be presumed to be a child molester.

V.

Whether the Referee abused his discretion and was unjustified in recommending a suspension of Respondent and requiring that Respondent associate with co-counsel on capital cases, in that case law does not support such a severe sanction

The Bar argued for—and received—and 30-day suspension of Respondent, along with other sanctions. Despite receiving all its requested sanctions and more from the Referee, the Bar now argues—in derogation of all good faith[10]—for a 91-day suspension.

In this case, Rose's actions, if the Referee is correct in his factual determinations, do not appear to have had severe consequences. Though failing to report juror contact can result in tainting of the jury, something to be avoided at

[10] Respondent recognizes that the change in position results from a Board of Governors vote, and not from any action or decision on the part of the Bar's attorney in the case.

great cost, it appears even from the comments of the Referee that no contact occurred. The Referee appears to determine that, even if no juror contact occurred, Rose should have reported to the judge that there were those who suspected juror contact. Since the Referee appears to determine that no contact occurred, there was no disturbance of the administration of justice; the trial's outcome could not have been affected.

There is no dispute to the evidence that the jury panel laughed at Rose's comment regarding defending child molesters. There is no evidence whatsoever that the panel took the comment seriously. Had such been the case, surely the trial judge would have raised concern, and even intervened. And given that there was no evidence that Rose failed to introduce exculpatory testimony, despite the Referees opinion that he was late in interviewing witnesses, no of Rose's conduct appears to have prejudiced Stuckey's case.

Given that Rose's conduct, even if proven, did not harm the administration of justice, we must remember that lawyer discipline must protect the public from unethical conduct but at the same time not deny the public the services of a qualified attorney. *Bar v. Cox*, (Fla. No. SC96217, 2001). Rose testified during the hearing that he no longer accepts capital cases. Further, the facts of this cause date back to 1996 and early 1997. The Bar has brought no action against Rose related to any facts or actions in the intervening timeframe; rehabilitation is not required or

even indicated.

A sanction of 91 days suspension has only been imposed in cases involving much more egregious conduct. For instance, for the "persistent failure to competently represent … clients and comply with basic rules of civil and appellate procedure,", and in a case involving many affected clients, this court issued a 91-day suspension. *Bar v. Solomon*, 711 So.2d 1141 (Fla. 1998).[11] Sanctions of 91-days are generally only applied to cases where the conduct is severe, such as where an attorney lies to the court to thwart the administration of justice. *Bar v. Kravitz*, 694 So.2d 725 (Fla. 1997). In a case where the attorney misrepresented material facts to the court, submitted false affidavits, and lied to the Bar about his conduct, the sanction was only 90 days suspension. *Bar v. Corbin*, 701 So.2d 334 (Fla. 1997). Where an attorney almost completely abdicated his role as defense counsel, failing to take depositions, failing to investigate, failing to prepare for trial, failing to challenge evidence, failing to impeach witnesses, failing to familiarize himself with evidence, and failing to locate critical evidence, this court imposed a sanction of only 60 days suspension.

A suspension in this case is not warranted. Rose's conduct since the time in question has been exemplary, a fact which can be considered. *Bar v. King*, 174

[11] In the egregious *Solomon* case, this Court also rejected a recommendation that counsel associate with co-counsel on like cases in the future, a sanction imposed in this cause by the Referee, and one which should be rejected here.

So.2d 398 (Fla. 1965). Further, extended delay existed in the cause between the time of the alleged misconduct and the filing of the Bar's case, a factor which the Referee could have considered. *Bar v. Micks*, 628 So.2d 1104 (Fla. 1993). Given that severe harm occurred as a result of Rose's conduct, a suspension is not warranted.

VI.

Whether the Referee erred and was unjustified in recommending that Respondent complete certain CLE hours in the area of capital cases, since it appears that such hours are not offered by any entity in the United States.

The Referee suggested as a condition of probation that Respondent achieve eight CLE hours in the area of capital criminal cases. Respondent doesn't necessarily object to this sanction in principal, given that the allegations against him are sustained, however, a thorough investigation of the CLE offerings throughout the United States demonstrates that no such CLE hours are offered by any entity. Therefore, compliance with the condition is likely impossible, and it should be stricken.

CONCLUSION

WHEREFORE, The Respondent respectfully requests that this Honorable Court disregard the Recommendation of the Referee and discharge the Respondent from the Bar's complaint.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent by United States Mails, postage prepaid this 2nd day of August, 2001 to:

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CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief is submitted in WordPerfect 14 point proportionally spaced Times New Roman font, and the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Antivirus for Windows.

_____
Scott T. Orsini