IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

BRENT ALLEN ROSE

Respondent.
_____/

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

INITIAL BRIEF OF THE FLORIDA BAR

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FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

SYMBOLS AND REFERENCES

In this Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, Brent Allen Rose, will be referred to as "Respondent".

"TR1" will refer to the transcript of the first day of the final hearing before the Referee in Supreme Court Case No. SC00-1792 held on February 9, 2001. "TR2" will refer to the transcript of the second day of the final hearing before the Referee in Supreme Court Case No. SC00-1792 held on February 16, 2001. "SH" will refer to the transcript of the sanctions hearing before the Referee in Supreme Court Case No. SC00-1792 held on March 7, 2001.

"Depo" will refer to the deposition of Cynthia S. Johnson, in Supreme Court Case No. SC00-1792, taken on February 13, 2001.

The Report of Referee dated March 15, 2001 will be referred to as "RR".

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case No. SC00-1792.

"Rule" or "Rules" will refer to the Rules Regulating The Florida Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE

The Florida Bar filed a Complaint in this matter on August 31, 2000. By order dated September 14, 2000, The Honorable Mark R. Wolfe, Circuit Court Judge, in and for the Thirteenth Judicial Circuit, was appointed as Referee in the case.

A final hearing was held in the matter on February 9, 2001 and February 16, 2001. A separate hearing on discipline was held on March 7, 2001. On March 15, 2001, the Referee issued a Report of Referee finding Respondent guilty of violating Rule 4-1.1 (a lawyer shall provide competent representation to a client). (A copy of the Report is attached hereto as Appendix A.) The Referee recommended that Respondent be suspended from the practice of law for thirty (30) days followed by one year of probation, during which he shall complete thirty (30) credit hours of Continuing Legal Education courses, and payment of the Bar's costs.

The Referee's Report was considered by the Board of Governors of The Florida Bar at its meeting which ended March 20, 2001, at which time the Board voted to file a Petition for Review of the Referee's report and request a ninety-one (91) day suspension plus one year of probation and completion of thirty (30) credit hours of Continuing Legal Education Courses. The Florida Bar filed a Petition for Review of the Referee's report with this Court on April 5, 2001. Pursuant to Rule 3-7.7, the

jurisdiction of this Court is invoked.

STATEMENT OF THE FACTS

Respondent was admitted to the practice of law in 1988, and primarily focuses his practice in criminal law. After graduating from law school, Respondent served as an assistant state attorney for approximately seven years. Respondent obtained his board certification in criminal law, and has practiced criminal law for most of his legal career. (TR1 42-44; SH 18, 22).

Respondent represented Scott D. Stuckey in State of Florida v. Scott D. Stuckey, Pinellas County Case No. 96-03479 CFANO. Mr. Stuckey was charged with two counts of capital sexual battery and two counts of lewd and lascivious acts upon a child. (TR2 8, 52). Both children were his relatives. There was no physical evidence of the alleged incidents, which purportedly had taken place early in the lives of the children, and not been revealed until the children were in high school. (TR2, 114).

In preparation for trial, in the summer of 1996, Respondent interviewed several potential witnesses, and flew to Ohio to depose a few, including a police officer, lay witnesses, and counselors, as well as the named victims. (TR2 53, 55). About a month before trial, members of the Stuckey family gave Respondent the names of an additional 15 potential witnesses for the defense, some of them also from Ohio. Respondent indicated that, because most of these witnesses were character witnesses and some were from Ohio, he had decided to interview them in a group the evening

before the trial, which took place in January 1997. (TR2, 80-81, 53). He had the witnesses come to his office. In a group meeting that lasted about 45 minutes to an hour, he asked and answered questions. He then advised the potential witnesses to write down on note pads what they would testify to if called. Respondent told the witnesses that he would collect the notes and review them before trial, but did not do so. (TR1 79-80, 136). Respondent testified that he eventually used only three or four of the 15 witnesses, and had spoken to all but one of those prior to the evening meeting. (TR2, 81-82). He acknowledged that he did not review the notes. (TR2 84). The Referee found that Respondent violated Rule 4-1.1 (competence) by failing to thoroughly interview approximately 15 defense witnesses. (RR 2) .

During the trial, several of the accused's family members and friends advised Respondent that there had been improper contacts between jurors and members of the alleged victim's family. (TR1 34, 97, 100-104, 140, 158-160; Depo 11-14). One of the assistant state attorneys in the case, when asked if the jurors could have overheard her speaking with witnesses, testified that "anything is possible," but that she did not think that happened. (TR2 127, lines 10 - 22). The Referee found that while he was not entirely persuaded that the alleged improper contacts took place, nevertheless Respondent had a duty to report the allegations of jury tampering to the court. (RR 1-2).

Witnesses in the referee proceeding reported that they had told the Respondent

about numerous specific incidents. For example, Michelle Stuckey reported an incident related to her by Alice O'Riley. Ms. O'Riley stated that she observed the mother of the child victims walk up to the table in the cafeteria where jurors were sitting and speak to them briefly. Ms. O'Riley did not know the substance of the conversation. (TR1, 31-33). When she returned to the courtroom, Ms. O'Riley relayed this information to Scott Stuckey, who wrote something down on a notepad, and leaned over and spoke to the Respondent. (TR1 34). Later in the day Ms. O'Riley advised Michelle Stuckey about the incident. (TR1 35). Michelle Stuckey testified that Ms. O'Riley told her about the incident, and she reported it to Respondent. (TR1 96-97, 103).

Cynthia Johnson testified that she heard prosecutors speaking with members of the victim's family and other State witnesses within earshot of (just a few feet away from) jurors who were smoking (Depo 9-10; TR1 137). She heard one of the prosecutors say, "We're going to put him away." (TR1 138, lines 7-9). At that time, she did not tell anyone other than Michelle Stuckey and Karen Ruch (Michelle's mother). (TR1 138). Michelle Stuckey and Karen Ruch also testified that they observed this occurrence and reported it to Respondent. (TR1, 100-103, 158-159). Ms. Ruch testified that she had been told by Martha Miller after the first day of trial that Martha observed jurors talking to members of the victims' family. Mrs. Ruch advised Respondent of this. (TR1 156-157).

Cynthia Johnson also testified that she saw two jurors conversing with Mark Wallace, uncle of the victims and a State witness. (Depo 12-13). Her husband went to get the Respondent, who came to the window and looked out as Mr. Wallace was talking to the jurors. Ms. Johnson believes that Respondent saw the inappropriate contact. (Depo 13-14; TR1 139-141). Mrs. Johnson also testified that her husband and Michelle Stuckey saw Mr. Wallace assisting a female juror into her van, but that she had no personal knowledge about whether Respondent was advised of that contact. (Depo 14-15). All the incidents reportedly occurred prior to a jury verdict. In the referee proceeding, Respondent testified that he was never told that the witnesses were speaking to or around jurors, but rather he was told that the prosecutors were speaking to witnesses. (TR2 87-88).

The Referee also found that Respondent violated Rule 4-1.1 (competence) when he referred to his client as a child molester during jury selection and stated that the reason he represents child molesters is because he gets paid for it. (RR 2). The actual statements by Respondent were:

> 'Anybody who wants to ask me the question, How can you defend child molesters? Anybody who wants to ask that question of me right now?
> . . . .
> Ms. Bledsoe: How do you defend them?
> . . . .
> I get paid. That's the answer. I get paid to do it.'

(TR1 182, lines 7-19).

The Referee also noted that this comment was used by the prosecution in its closing argument, and when it was, Respondent failed to object. (RR 2; TR2 129). The statement in closing argument to which Respondent did not object was the following:

> 'I've got to agree with Mr. Rose on one thing in this entire case. And he told it to you the very first time that he met you, that he, Mr. Rose, represents a child molester. He represents a child molester. And as it is in the United States of America he can do it because he gets paid and he doesn't have to know whether he's a child molester or not. But he spoke the truth when he told you earlier on yesterday that he represents a child molester.'

(TR2 128, lines 2-17).

Respondent also did not object to the following statement by the prosecutor: "The problem is that Mr. Stuckey is being un-American, by God. He's not facing up to his responsibilities and he's not taking responsibility for the actions that he committed against those two victims." (TR2 129, lines 12-19).

During the referee proceedings, Respondent testified that it was appropriate for the State Attorney to comment during the trial "everything that you heard is absolutely one hundred per cent true from these witnesses." (TR2 99-100). He opined that another State argument, that the jury should not let comments by the defense counsel and the presence of friends of the defendant scare them from doing their responsibility, was very appropriate. (TR2 100). During the referee proceedings, Respondent was also asked if it would be appropriate for the State Attorney to

comment on the validity of the evidence and the validity of the testimony. He said yes, and testified that it would not be inappropriate for the State Attorney to say which is the truth and what is a lie. (TR2 93).

Respondent was found not guilty of Rule 4-1.2, regarding scope of representation, and Rule 4-1.4(b)(communication), related to the alleged failure to fully communicate the plea bargain to the client. (RR 2).

At the conclusion of the criminal trial, Scott Stuckey was convicted and sentenced to life with no possibility of parole. He has filed a Rule 3.850 motion for postconviction relief on the grounds of ineffective assistance of counsel. (TR1 64).

SUMMARY OF ARGUMENT

In representing his client on criminal charges of sexual abuse, Respondent failed to live up to the minimum level of competence expected of a criminal lawyer. Scott Stuckey was charged with sexual battery and lewd and lascivious acts upon a child, capital felonies punishable by life imprisonment. Respondent, a board certified criminal lawyer, failed to fully apply his knowledge and skill in defending Mr. Stuckey. Respondent failed to interview witnesses until the night before trial and then interviewed 15 witnesses as a group. His questioning of potential jurors during voir dire implied that his own client was a child molester. He then failed to object when the prosecutor so stated in her closing argument. He failed to report several alleged instances of jury tampering. At the conclusion of the trial, Scott Stuckey was convicted and sentenced to life without possibility of parole.

A 30-day suspension does not sufficiently address the gravity of Respondent's misconduct in this case. This Court should reject the recommendation of the Referee and instead suspend the Respondent from the practice of law for 91 days with proof of rehabilitation required prior to reinstatement. The Court should approve the Referee's recommendation of one year of probation, during which 30 hours of Continuing Legal Education Courses shall be completed.

ARGUMENT

I. THE REFEREE ERRED IN RECOMMENDING A 30-DAY SUSPENSION FOR A LAWYER'S MULTIPLE ACTS OF INCOMPETENCE, INCLUDING FAILURE TO REPORT INCIDENTS OF JURY MISCONDUCT, FAILURE TO INTERVIEW WITNESSES, IMPLYING THAT HIS CLIENT WAS A CHILD MOLESTER, AND FAILING TO OBJECT TO IMPROPER COMMENTS BY THE PROSECUTOR.

In attorney discipline proceedings, "a referee's findings of fact are presumed correct and this Court will not reweigh the evidence and substitute its judgment for that of the referee as long as the findings are not clearly erroneous or lacking in evidentiary support." The Florida Bar v. Beach, 675 So. 2d 106, 108 (Fla. 1996). A referee's legal conclusions, however, are subject to broader review by this Court than are the findings of facts. Id. This Court has broader discretion to review a referee's recommended discipline, because it is this Court's "responsibility to order the appropriate punishment." The Florida Bar v. Niles, 644 So. 2d 504, 506 (Fla. 1994).

A. GIVEN THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT, A 30-DAY SUSPENSION IS AN INSUFFICIENT SANCTION.

A 30-day suspension does not adequately address the seriousness of Respondent's misconduct in handling Scott Stuckey's defense and the substantial potential for harm to his client. Respondent's attitude towards Mr. Stuckey's defense is best illustrated by an incident which occurred early in Mr. Stuckey's trial, during jury selection. Respondent's questioning during voir dire clearly

implied to potential jurors that Scott Stuckey was indeed a child molester, and the only reason Respondent was defending Stuckey was because he was paid to do so. Respondent asked the panel, "Anybody who wants to ask me the question, 'How can you defend child molesters?'" When asked, Respondent replied, "I get paid. That's the answer. I get paid to do it." (TR1 182). Another potential juror asked, "How do you know that he's a child molester until he's proven?" and Respondent replied, "Doesn't even matter whether I know or not.. . ." (TR1 182-83). At the referee hearing, when Bar counsel asked Respondent whether he thought it was appropriate to ask the venire whether anyone wanted to ask "How can you defend child molesters?," Respondent replied "absolutely." (TR1 183-84).

After leaving potential jurors with the clear impression that Stuckey was a child molester, Respondent further compounded his error by allowing the prosecutor to pick up on these remarks in closing argument without making any objection. The prosecutor stated, "I've got to agree with Mr. Rose on one thing in this entire case, and he told it to you the very first time he met you, that he, Mr. Rose, represents a child molester. . . . [h]e spoke the truth when he told you earlier on yesterday that he represents a child molester." (TR1 184-85). The jury, having heard his own attorney imply that Mr. Stuckey was a child molester, and having

heard the prosecutor reinforce that label without objection, convicted him of two counts of capital sexual battery on a child.

Respondent, a board-certified criminal trial attorney, also failed to object to other remarks by the prosecutor. He allowed her to state in closing argument that "Mr. Stuckey is being un-American, by God." (TR2 129). He also failed to object when the prosecutor gave her personal opinion on the credibility of the witnesses's testimony by stating, "everything that you heard is absolutely a hundred percent true from these witnesses." (TR2, p. 99). Nor did Respondent object when the prosecutor attempted to appeal to the fears of the jurors by telling them not to be scared by the group of 15 or 20 friend and family members sitting behind the defendant in the courtroom. "All these people sitting over here. . . sitting behind the defendant--they're trying to scare you, too. . . . But guess what? I know they won't scare you and I know that Mr. Rose won't scare you either. . . ." (TR2, 97-98).

In addition to ignoring objectionable remarks by the prosecutor, Respondent ignored repeated attempts by Michelle Stuckey and others to alert him to possible juror misconduct. Respondent brushed aside Ms. Stuckey's report that Alice O'Riley had seen the victims' mother speaking with jurors in the lunchroom. He showed no concern when Ms. Stuckey and Ms. Ruch came to him to report that they had heard the prosecutors conversing with the victims' family within earshot

(three to four feet) of two jurors during a recess on the first day of trial. Respondent did nothing when Ms. Stuckey and Mr. Johnson brought him to the courthouse window to point out Mark Wallace, the victims' uncle and a prosecution witness, speaking with two jurors. Respondent said he would take care of it and walked away (TR1 140), yet did nothing to report this contact with jurors.

Respondent failed to investigate any of these incidents or report them to the judge. As an experienced criminal attorney, Respondent should have been aware of the well-established rule that any contact with a juror during trial about the pending matter is deemed presumptively prejudicial. See Amazon v. State, 487 So. 2d 8, 11 (Fla. 1986). At a minimum, Respondent should have informed the judge of these incidents so that the judge could have conducted an inquiry into the matter. Rather than reporting the incidents of possible jury tampering, however, Respondent chose to ignore them.

Respondent's incompetence extended to his preparation for Mr. Stuckey's trial. Although Mr. Stuckey gave Respondent a list of 15 potential defense witnesses at least a month before trial, Respondent chose not to interview any of them until the evening before trial (TR1 78-79; TR2 80-81), thereby denying his client the benefit of any potentially exculpatory evidence. Respondent met with the witnesses briefly as a group and did not ask any specific questions. Respondent

simply asked the group if they had any information to offer. Respondent did not even make any effort to collect notes from the witnesses after he instructed them to write down what their testimony would be. (TR1 79-80, 136, 161-62).

B. A 91-DAY SUSPENSION IS THE APPROPRIATE DISCIPLINE IN LIGHT OF THE RELEVANT CASE LAW, THE AGGRAVATING FACTORS, AND THE FLORIDA STANDARDS.

The decisions of this Court, the Florida Standards for Imposing Lawyer Sanctions, and the aggravating factors indicate that at least a 91-day suspension is the appropriate discipline for the misconduct exhibited by Respondent in this case.

In The Florida Bar v. Solomon, 711 So. 2d 1141 (Fla. 1998), this Court imposed a 91-day suspension on an attorney for demonstrating a lack of competence in three cases involving civil matters. Solomon's errors included repeated failure to timely remit filing fees or affidavits of insolvency in appeals. In the first case, this failure resulted in dismissal of his client's appeal of a change of venue order. Id. at 1143. In the second case, Solomon represented a client in a personal injury action. Again, Solomon failed to pay a filing fee or submit proof of indigency when he filed a petition for writ of certiorari seeking to limit discovery of his client's medical history. The district court of appeals ordered him to appear and show cause why he should not be sanctioned. In response, Solomon filed a deficient affidavit of insolvency, resulting in the dismissal of the petition for certiorari. Id. at 1144. In the third case, Solomon filed a complaint in the wrong

county and served only one of the defendants. The trial court granted the defendant's motion for summary judgment and Solomon appealed. The district court of appeals set aside the summary judgment, but noted Solomon's fundamental errors of pleading and procedure, including his failure to allege special damages as required by the Rules of Civil Procedure. Despite the court's warning, Solomon did not amend the complaint to allege special damages. Id. at 1145.

In aggravation, the referee considered Solomon's multiple offenses, a pattern of misconduct; and his refusal to acknowledge the wrongful nature of his conduct. The referee also considered that Solomon was admitted to the Bar in 1983 and had previously received a private reprimand. In mitigation, the referee found an absence of dishonest or selfish motive. Id. The Court approved the recommended sanction of a 91-day suspension.

The Bar submits that the Respondent's errors in the instant case are far more egregious than the errors committed by Solomon. While Solomon failed to remit filing files or meet court deadlines, Respondent's conduct may have deprived his client of a fair trial in a capital felony case. More importantly, the potential for harm created by Respondent's incompetence was far more serious than the harm to Solomon's clients. Respondent's client is serving a life sentence without possibility of parole.

In The Florida Bar v. Lecznar, 690 So. 2d 1284 (Fla. 1997), this Court suspended an attorney for 90 days for failing to name an uninsured motorist insurer as a defendant in his clients' personal injury lawsuits within the statute of limitations. Lecznar also misled his clients about the progress of their claims and failed to inform them that the statute of limitations had run. As a result of Lecznar's incompetence, his clients' lawsuits were dismissed for lack of prosecution. The referee found Lecznar guilty of violating Rule 4-1.1 (competence), Rule 4-1.3 (diligence), Rule 4-1.4(a) (keeping a client reasonably informed), and Rule 4-1.4(b) (explaining a matter to client). In aggravation, the referee considered that Lecznar had previously received a public reprimand for failure to keep a client reasonably informed about the status of a lawsuit. The referee also considered several mitigating factors, including Lecznar's lack of a dishonest or selfish motive, cooperative attitude, remorse, subsequent attempts to rehabilitate his practice, and favorable character testimony.

In Lecznar, the Court disagreed with the referee's recommendation of a public reprimand and instead imposed a 90-day suspension, citing The Florida Bar v. Palmer, 504 So. 2d 752 (Fla. 1987), in which the attorney was suspended for eight months for similar conduct. Palmer neglected to file a personal injury suit on behalf of his client and misrepresented to her that he had done so. The statute of limitations ran, foreclosing the cause of action. Palmer also falsely told his client

that he had settled the case and the settlement check was in the mail. The referee considered Palmer's lack of prior discipline, restitution to his client, and remorse. The Court approved the referee's recommendation of an eight-month suspension. Id.

In The Florida Bar v. Nunes, 679 So. 2d 744 (Fla. 1996), an attorney's incompetence in handling two immigration matters resulted in a 90-day suspension. In the first case, Nunes erroneously advised his clients that their son was eligible for a green card. Nunes knew that the son had a cocaine conviction, however, he failed to explain to his clients that the conviction barred their son from eligibility for permanent residence in the United States. Id. at 745. In the second case, Nunes failed to file the necessary paperwork to stay the pending deportation of his client's son. The referee found that Nunes' representation was clearly incompetent and that both clients were prejudiced by his actions. Id. at 747. Nunes was found guilty of violating Rule 4-1.1 (competence), Rule 4-1.4(b) (explaining a matter to a client), and Rule 4-1.5(a) (excessive fee). Id. at 746. In approving the referee's recommended discipline, the Court considered Nunes's prior disciplinary record consisting of a private reprimand and a public reprimand plus a 10-day suspension. Id. at 747.

The Bar submits that, while the attorneys in Lecznar and Nunes committed serious errors resulting in harm to their clients, Respondent's incompetence

demands a harsher sanction. Respondent's repeated errors in the handling of a capital criminal case may have contributed to his client's conviction and sentence of life imprisonment. Like the attorneys in Solomon and Palmer, Respondent should receive no less than a suspension of 91 days with proof of rehabilitation required prior to reinstatement.

The Florida Standards for Imposing Lawyer Sanctions provide a framework for Bar counsel, referees, and this Court to determine the appropriate sanction in attorney disciplinary cases. Standard 3.0 provides that, in imposing a sanction after a finding of lawyer misconduct, a court should consider (a) the duty violated; (b) the lawyer's mental state; (c) the potential or actual injury caused by the lawyer's misconduct; and (d) the existence of aggravating or mitigating factors.

Respondent in this case violated his duty to provide competent representation to his client. Standard 4.5, Lack of Competence, specifically addresses cases involving a lawyer's failure to provide competent representation to a client. Standard 4.51 provides that, absent aggravating or mitigating circumstances, "[d]isbarment is appropriate when a lawyer's course of conduct demonstrates that the lawyer does not understand the most fundamental legal doctrines or procedures, and the lawyer's conduct causes injury or potential injury to a client." Standard 4.52 provides that, absent aggravating or mitigating circumstances "[s]uspension is appropriate when a lawyer engages in an area of

practice in which the lawyer knowingly lacks competence, and causes injury or potential injury to a client." The Bar submits that Respondent's misconduct in this case comes close to demonstrating the fundamental lack of competence contemplated by Standard 4.51, and clearly warrants a suspension under Standard 4.52. When aggravating factors are taken into account, a rehabilitative suspension is clearly appropriate.

Standard 3.0 also requires consideration of the Respondent's mental state. The record contains no evidence that Respondent's mental state prevented him from representing Mr. Stucky in a competent manner. Nothing in the record can excuse his careless attitude towards the preparation of the case or his fundamental lapses of judgment during trial. Respondent testified that he was taking medication for migraine headaches, however, he stated that neither the migraines nor the medication had any effect on his working schedule, or his ability to concentrate and remember. (TR2, 106-108). The Referee merely found that Respondent lacked a dishonest or selfish motive and did not further address his mental state. In fact, the Referee found very little in the way of mitigation to explain Respondent's lack of competence in defending Mr. Stuckey. Given Respondent's level of skill and experience in criminal law, his careless approach to Mr. Stuckey's case is inexplicable. When Respondent was asked if it became his opinion during the trial that he had a weak case and was going to lose, he replied, "That was not my

opinion during the trial. That was my opinion from the minute I met Mr. Stuckey almost, or at least from the time that I read the police reports or sometime along there." (TR1 180, lines 15-22).

In imposing an appropriate sanction, Standard 3.0 further requires consideration of the potential or actual injury caused by the lawyer's misconduct. The Referee made no findings with regard to the prejudice suffered by Respondent's client Scott Stuckey. However, the potential for injury to Mr. Stuckey is compelling. Mr. Stuckey is now serving a life sentence without possibility of parole. Even if he is successful in overturning his conviction and winning a new trial pursuant to a Rule 3.850 motion for postconviction relief, he will already have spent several years in prison and expended considerable effort and money in obtaining a right to a new trial. Even if eventually found not guilty, Mr. Stuckey has suffered irreparable harm to his reputation as a result of his conviction of capital sexual battery on a child.

Finally, the Standards require the consideration of aggravating or mitigating factors. Standard 9.22 lists several aggravating factors justifying an increase in the degree of discipline to be imposed. However, this list is not exclusive. Standard 9.21 defines aggravating circumstances as "any considerations or factors that may justify an increase in the degree of discipline to be imposed." The Referee found two aggravating factors in the this case:

Standard 9.22(a) Prior discipline. In 1998, Respondent received a public reprimand and two years probation in a guardianship case for trust accounting violations and failure to maintain adequate records of transactions made by the guardian. In 2000, Respondent, in the same case that is the subject of this proceeding, received an admonishment for violation of Rule 3-1.16(d) (failing to protect his client's rights upon termination of representation), for failing to turn over records related to Mr. Stuckey's appeal to subsequent counsel. This latter disciplinary case was considered a **mitigating** factor by the Referee since it imposed discipline for another aspect of the same case.

Standard 9.22(i) Substantial experience in the practice of law. Respondent was admitted to the practice of law in 1988. He worked as an assistant state attorney first in Hillsborough County for five years, and then in Polk County for a year or two. Following his experience as a prosecutor, Respondent practiced criminal defense law with a private firm in Miami and then with his present firm, Orsini and Rose. Respondent was board certified in criminal trial law at the time he undertook Scott Stuckey's representation, and had been practicing in the area of criminal law for most of his career. (TR1 42-44; SH 18, 22).

Given Respondent's substantial experience, not only in the practice of law, but specifically in the practice of criminal law, and the fact that he was certified in the area of criminal trial law, his failure to adequately conduct Mr. Stuckey's

defense is inexplicable and inexcusable. This was not the case of an inexperienced attorney handling his first criminal defense in a capital case. Having worked six to seven years as an assistant state attorney, as well as several years as a criminal defense attorney, Respondent had considerable trial experience and knew, or should have known, how to competently prepare for and try a criminal case. Moreover, Respondent knew, or should have known, the serious nature of the alleged jury misconduct that was pointed out to him and the potential prejudice to his client's case. And, as an experienced criminal trial lawyer, Respondent knew, or should have known, the impact on the jury of implying that his own client was guilty, and then sitting by idly while the prosecutor stated this implication as fact in closing argument. A lawyer with Respondent's experience would clearly know that his actions were improper.

Standard 9.22(d) Multiple offenses. While the Referee did not find multiple offenses to be an aggravating factor, the record is replete with multiple examples of Respondent's errors of judgment. Respondent implied that his own client was a "child molester" during voir dire. He failed to object when, during closing arguments, the prosecutor said, "he spoke the truth when he told you earlier on yesterday that he represents a child molester." Respondent failed to object when the prosecutor stated, "The problem is that Mr. Stuckey is being un-American, by God." Respondent ignored not one, but repeated reports of the victims' family

members speaking with jurors, and prosecutors and family members conversing within a few feet of jurors. Respondent failed to adequately interview defense witnesses. Standing alone, any one of these examples warrants a sanction for lack of competence. Taken together, Respondent's multiple misconduct during the course of representing Mr. Stuckey clearly justifies an increase in the degree of discipline to be imposed.

The Referee also found several mitigating factors in this case: absence of a dishonest or selfish motive; other penalties or sanctions (the fact that Respondent has been reprimanded for failure to turn over records to Mr. Stuckey's subsequent counsel); and testimony of Elizabeth Hittos, one of the prosecutors in Mr. Stuckey's trial, expressing her opinion that Respondent had done a good job at trial. (RR 4). These mitigating factors are outweighed by the significant aggravating factors, including the multiple misconduct found in the instant case.

Respondent repeatedly disregarded the minimum standards of competence in representing a client who faced life imprisonment if convicted. Considering the facts of this case in light of the case law, aggravating factors, and the Florida Standards for Imposing Lawyer Sanctions, a 30-day suspension is an inadequate sanction.

Given the severity of Respondent's misconduct, only a suspension of 91 days or more will satisfy the purposes of discipline as enunciated by this Court:

"the judgment must be fair to society, it must be fair to the attorney, and it must be severe enough to deter other attorneys from similar misconduct." The Florida Bar v. Solomon, 711 So. 2d 1141, 1146 (Fla. 1998).

The Bar submits that Respondent is not capable of practicing at a minimum level of competence and should be required to show his fitness to practice prior to reinstatement to the practice of law following a suspension. Based on the facts presented in the record and in this brief, only a rehabilitative suspension will serve to protect the public, be fair to society and the attorney, and sufficiently deter others from similar misconduct.

CONCLUSION

Respondent, an experienced criminal attorney, failed to interview witnesses until the night before trial, failed to investigate potentially exculpatory evidence, deliberately ignored numerous reports of jury tampering during trial, implied that his own client was a child molester during voir dire, and failed to object when the prosecutor labeled his client as a child molester during closing argument. Respondent's client, Scott Stuckey, was convicted and is currently serving a life sentence without possibility of parole.

When Respondent undertook to defend Scott Stuckey, who faced serious charges of capital sexual battery, he owed Mr. Stuckey at least competent representation. However, Respondent failed to provide even the minimum level of competence required by The Rules Regulating The Florida Bar. A 30-day suspension does not sufficiently address the seriousness of Respondent's misconduct. The Florida Bar respectfully requests this Court to impose a 91-day suspension, and approve the Referee's recommendation of a one-year probation and completion of 30 credit hours of Continuing Legal Education, as the appropriate discipline in this case.

Dated this _____ day of May, 2001.

Respectfully submitted,

_____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number 5061983872 to The Honorable Thomas D. Hall, Clerk, the Supreme Court of Florida, 500 Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. mail to Scott T. Orsini, Esquire, Respondent's counsel at Orsini & Rose Law Firm, P.A., P. O. Box 118, St. Petersburg, FL 33731-0018; and a copy by regular U. S. mail to John Anthony Boggs, Esquire, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of May, 2001.

_____
Thomas Edward DeBerg
Assistant Staff Counsel

CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

Undersigned counsel does hereby certify that this brief is submitted in 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.

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Thomas Edward DeBerg

APPENDIX

Report of Referee dated March 15, 2001