

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC00-1792

TFB No. 1999-11,673(06E)

v.

BRENT ALLEN ROSE, ESQ.

Respondent.

_____ /

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to the Rules Regulating The Florida Bar, hearings were held on February 09, February 16, and March 02, 2001. Any pleadings, notices, motions, orders, transcripts, and exhibits are forwarded to The Supreme Court of Florida with this report and constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Thomas E. DeBerg, Esq.

For The Respondent: Scott T. Orsini, Esq.

II. Findings of Fact as to Each Item of Misconduct With Which the Respondent Is Charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented on below, I find:

The complainant has proven by clear and convincing evidence that Mr. Rose failed to report several incidents of alleged improper contact involving jurors. Although this Court is not entirely persuaded that each alleged incident of improper

contact actually occurred, Mr. Rose had a duty to report the allegations of jury tampering to the trial court after they were brought to his attention, and failed to do so. (Transcript, Day 1, pages 32, 34, 96,97, 100-104, 137, 139-140, 158-160, 175, 179-180; Transcript, Day 2, Pages 87-88, 127; Deposition of Cynthia S. Johnson, pages 8-10, 12, 13.)

Additionally, Mr. Rose violated Rule 4-1.1 in failing to thoroughly interview approximately fifteen defense witnesses. Specifically, Mr. Rose briefly met with the witnesses as a group in his office for approximately 45 minutes on the day before trial. Although Mr. Rose instructed the witnesses to make notes as to the testimony they would provide, he failed to collect those notes. (Transcript, Day 1, pages 59, 69,72, 78-85, 136; Transcript, Day 2, pages 79-84)

Furthermore, Mr. Rose violated Rule 4-1.1 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. The Court also notes that this comment was subsequently used by the prosecution in its closing argument, and the Respondent failed to object at that time. (Transcript, Day 1, pages 181-186; Transcript, Day 2, pages 128-130, 137)

As to the alleged violations of Rule 4-1.2, regarding the scope of representation, this Court finds that Complainant has failed to establish, by clear and convincing evidence, that Respondent violated this Rule.

Finally, as to the alleged violations of Rule 4-1.4(b), regarding communication between Mr. Rose and his clients, complainant has failed to prove by clear and convincing evidence that Mr. Rose is guilty of violating this Rule.

III. Recommendations as to Whether or Not the Respondent should Be Found Guilty: I make the following recommendations as to guilt or innocence:

This Court finds Mr. Rose is guilty of violating Rule 4-1.1 (A lawyer shall provide competent representation to a client).

This Court finds Mr. Rose is not guilty of violating Rule 4-1.2 (A lawyer shall abide by a client's decisions regarding the objectives of representation).

This Court further finds Mr. Rose is not guilty of violating Rule 4-1.4(b) (A lawyer shall explain matters to the extent reasonably necessary to permit the client to make informed decisions regarding the representation).

IV. Recommendation as to Disciplinary Measures to Be Applied:

I recommend the following sanctions:

- a) A thirty day suspension from the practice of law.

- b) One year of probation, during which thirty (30) credit hours of Continuing Legal Education Courses shall be completed. These credits shall include at least a minimum of eight (8) hours of Ethics, eight (8) hours of Trial Advocacy programs, and eight (8) hours of Criminal Law study related to capital offenses.
- c) Payment of the costs of this action.

V. Personal History and Past Disciplinary Record: After the finding of guilty and prior to recommending discipline to be recommended pursuant to Rule 3-7.6(k)(1), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Year of Birth:1963

Date Admitted to Bar: October 27, 1988

Prior Disciplinary convictions and Disciplinary Measures Imposed Therein:

In Florida Supreme Court Case Number SC96285 (TFB 1998-11,497(6E), on March 23, 2000, Respondent received an Admonishment for violation of Rule 4-1.16(d) (failing to protect his client's rights upon termination of representation). Respondent had represented Scott Stuckey on the appeal of the criminal conviction in the case that is the subject of the instant disciplinary proceedings. When discharged by Mr. Stuckey, Respondent did not timely surrender a draft of his Initial Brief to subsequent counsel. He also did not initially refund any portion of the fee which was unearned, but did refund \$2,000 during the disciplinary proceedings.

In Florida Supreme Court Case Number 92,416 (TFB Nos.1997-10,757(6E) and 1998-10,001(6E)), on December 17, 1998, Respondent received a public reprimand and two years probation. In a guardianship case, Respondent failed to maintain adequate records of transactions made by the guardian, and failed to require adequate proof of expenditures by the guardian prior to a disbursement of \$6,830.16 to the guardian. In addition, Respondent failed to maintain adequate trust accounting records, including monthly bank reconciliations, records to account for the expenditures of funds from the trust account. He transferred earned fees from certain client accounts to other client accounts that had negative balances without adequate documentary support for the basis of the transfer, had some shortages of funds in various client accounts, and had other failures to comply with minimum trust accounting regulations. Respondent has successfully

completed the probationary period, which entailed quarterly audits of his trust account by the branch auditor of The Florida Bar. The Court found that Respondent had no prior disciplinary record, had made a good faith effort to make restitution or to rectify consequences of misconduct, there was no direct client injury, and the shortages in the trust account consisted of small sums.

The referee notes that the Respondent is not certified in any area of practice.

Aggravating Factors: Standard 9.22

- (a) Prior discipline.
- (i) Substantial experience in the practice of law.

Mitigating Factors: Standard 9.32

- (b) Absence of a dishonest or selfish motive.
- (k) Other penalties or sanctions, as noted above regarding the appeal of Mr. Stuckey's case.
- (other) Elizabeth Hittos, Esq., a prosecutor in the trial of Scott Stuckey, testified that she had an opportunity to observe Mr. Rose during the trial and that she thought he did a good job. (Transcript, Day 2, pages 116-118).

IV. Statement of Costs and Manner in Which Costs Should Be Taxed: I find the following costs were reasonably incurred by The Florida Bar:

	A. Grievance Committee Level Costs	
511.70	1. Transcript Costs	
	2. Bar Counsel/Branch Staff Counsel Travel Costs . . .	11.78
	B. Referee Level Costs	
2,276.20	1. Transcript Costs/Appearance Fee	
47.09	2. Bar Counsel/Branch Staff Counsel Travel Costs . . .	
	C. Administrative Costs	
	(Rule 3-7.6(o)(1)(I))	750.00
	D. Miscellaneous Costs	

- 306.08
1. Investigator Expenses
 2. Telephone Costs
 3. Witness Fees
 4. Copying Costs

TOTAL ITEMIZED COSTS: \$3,902.85

It is apparent that other costs have or may be incurred. It is recommended that all such costs and expenses, together with the foregoing itemized costs, be charged to the respondent and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this _____ day of _____, 2001.

Mark R. Wolfe, Referee

Copies:

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