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)

THE FLORIDA BAR'S REPLY BRIEF AND ANSWER TO RESPONDENT'S CROSS-PETITION FOR REVIEW

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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.

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.

"IB" will refer to the Initial Brief of The Florida Bar. "RB" will refer to the Respondent's Brief in Support of Cross-Petition.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar reiterates the Statement of Facts presented in its Initial Brief and takes this opportunity to point out several errors in statements of fact in the Respondent's Answer Brief. Respondent cites the record out of context and makes statements of fact which are incomplete and, therefore, potentially misleading.

Respondent attempts to refute his incompetent handling of Scott Stuckey's criminal defense by citing several of Bar counsel's closing remarks out of context. For example, Respondent paraphrases Bar counsel's description of Rose's handling of many aspects of the case as "marvelous." (RB 8). What Bar counsel actually said was, "the problem with this case is that counsel didn't exert his best efforts to defend his client. He **may** have done a marvelous job in some areas, but at very critical points he provided incompetent counsel." (TR2 144-45) (emphasis added). Respondent also quotes Bar counsel as commenting on the "many good things done in the case." (RB 8). The complete statement was, "But I have no idea why this case was handled as it was at those critical points. I'm not suggesting

there weren't many good things done in the case. But those critical points make a difference." (TR2 146-47).

Respondent also misstates the Referee's findings with regard to Respondent's handling of Mr. Stuckey's case. Respondent states that the Referee found his handling of the case appropriate and competent in all respects except three. (RB 9). The Referee made no such statement. What the Referee did find was that Respondent did not violate Rule 4-1.2 (a lawyer shall abide by a client's decisions regarding the objectives of representation), and Rule 4-1.4(b) (a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation). The Referee found three specific examples of incompetence and made no finding that Respondent's overall handling of the case was appropriate or competent. (RR 2).

Respondent misstates the Referee's findings concerning the alleged improper contact involving jurors. Respondent incorrectly states, "despite the fact that the Referee did not find that the contact even occurred, the Referee found Rose guilty of failure to report the contact to the judge." (RB 12). While the Referee acknowledged that he was "not entirely persuaded that each alleged incident of improper contact actually occurred," (RR 1), the Referee did **not** conclude that no improper contact took place. Contrary to Respondent's assertion, the Referee did

not find Respondent guilty of failing to report the contact to the judge. What the Referee found Respondent guilty of was failing to report the allegations of jury tampering to the trial court after they were brought to his attention. (RR 1-2).

Respondent states that his question to the venire, “Anybody who wants to ask me the question, 'How can you defend child molesters?'” was obviously a joke. (RB 12). When the entirety of Respondent's remarks to the venire is considered, the question does not come across as a "joke." When Respondent was asked by a potential juror, "How do you defend them?" he responded “I get paid. That’s the answer. I get paid to do it. Now, that isn't the philosophical answer that I want to -- that I want to leave in your minds. I’m just being completely honest with you.” (TR1 182). In answer to another question from the jury venire, “How do you know that he's a child molester until he’s proven?,” Respondent answered, “Doesn’t even matter whether I know or not. The only thing that matters is whether you all decide.” (TR1 182-83). The prosecutor apparently did not consider Respondent's remarks to be a joke. In closing argument she 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 that he met you, that he, Mr. Rose, represents a child molester. He represents a child molester. And if it is in the United States of America, he can do it because he gets paid to do it. 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." (TR1 184-85). Respondent did not object to this statement. (TR1 186).

SUMMARY OF ARGUMENT

The Referee found the Respondent guilty of incompetence in representing his client, Scott Stuckey, on charges of capital sexual battery. The Referee's findings and conclusions are supported by competent, substantial evidence in the record and should be upheld.

The Referee found that Respondent was incompetent in failing to report several incidents of alleged improper contact involving jurors. The testimony of several witnesses supports the Referee's finding that these alleged incidents were brought to the Respondent's attention during Mr. Stuckey's trial, but he failed to report them to the court. The record also supports the Referee's finding that Respondent was incompetent when he failed to interview 15 potential defenses witnesses until the night before trial, questioned them in a group for approximately 45 minutes, and then failed to collect the notes he asked them to make regarding their potential testimony.

The Referee did not err in ruling that Respondent was guilty of incompetence for implying that his client was a child molester during jury selection, and then,

when asked how he defends child molesters, replying, "I get paid to do it." (TR1 182). Respondent's remarks demonstrate incompetence, as does his failure to object when the prosecutor paraphrased his statements during closing argument to comment on Mr. Stuckey's guilt.

Finally, the Referee correctly disallowed the testimony of jurors during the disciplinary proceeding. Even if the jurors had testified that no improper contact occurred, that testimony would not refute the Referee's conclusion that Respondent was advised of the alleged contacts and failed to report them to the court.

This Court should uphold the findings and conclusions of the Referee. However, the Referee's recommended discipline of a 30-day suspension is insufficient given the seriousness of Respondent's errors and the potential prejudice to his client. This Court should impose a 91-day suspension and one year of probation with the requirement of completing 30 credit hours of Continuing Legal Education.

ARGUMENT

I. EVEN IF RESPONDENT HAD PRESENTED TESTIMONY FROM JURORS THAT THEY DID NOT HAVE IMPROPER CONTACTS DURING TRIAL, THAT EVIDENCE WOULD NOT NEGATE THE REFEREE'S FINDING THAT RESPONDENT WAS ADVISED OF ALLEGED CONTACTS AND FAILED TO REPORT THEM.

Respondent argues that he should have been allowed to call as witnesses the jurors from Mr. Stuckey's trial, and that the Referee erred in not permitting him to do so, stating "the testimony of these jurors would have proven that no unreported, improper contact occurred between jurors and witness, as alleged by the Bar." (RB 14). Respondent contends that if he had the opportunity to show there was no improper contact between jurors and witnesses, then he could not be found incompetent by failing to report such contact to the trial court.

Respondent misses the point. The issue in the disciplinary proceedings was not whether improper contact actually occurred, but rather whether the Respondent was made aware of alleged juror misconduct and failed to take action to protect his client's interests by reporting the alleged incidents to the trial judge. Contrary to Respondent's assertion of "almost certain evidence that Rose was not told about the conduct," (RB 16), the record contains substantial evidence that Respondent was informed of several incidents of alleged juror misconduct. See The Bar's Initial Brief, pages 4-6.

Even if Respondent were able to elicit credible testimony from jurors that they did not have improper contact with witnesses or family members of the defendant, that would not prove that Respondent was not advised that those contacts occurred, and it would not negate the Referee's finding that Respondent was advised of the alleged contacts and did not pursue the matter with the court. On the contrary, even if jurors had denied overhearing the prosecutor speaking to family members of the victim, and had denied a family member had stopped briefly at their table during lunch, or that something improper was said, this testimony would not disprove that Respondent was advised that those events had occurred. Not one juror, nor Mark Wallace, nor the mother of the alleged victims, could have testified regarding what family members related to Respondent.

The Referee did not err in denying the Respondent's request to call the jurors to testify. The Referee correctly identified the issue as whether or not Respondent was notified of alleged misconduct and failed to take action.

II. THE REFEREE DID NOT ERR IN FINDING THAT RESPONDENT FAILED TO REPORT SEVERAL INCIDENTS OF ALLEGED IMPROPER JUROR CONTACTS AFTER THEY WERE BROUGHT TO HIS ATTENTION.

Respondent argues that the Referee erred in finding that improper contact occurred between jurors and witnesses in Mr. Stuckey's trial. Respondent misstates the Referee's finding. The Referee did not find that improper contact occurred between jurors and witnesses. Rather, the Referee found that Respondent failed to report several incidents of alleged improper contact involving jurors. (RR 1). This finding is supported by the record.

A Referee's findings of fact are presumed to be correct and should be upheld unless clearly erroneous or lacking in evidentiary support since the Referee had an opportunity to personally observe the demeanor of the witnesses and to assess their credibility. Florida Bar v. Stalnaker, 485 So. 2d 815, 816 (Fla. 1986). In order to successfully challenge the Referee's findings, Respondent must demonstrate "that there is no evidence in the record to support [the referee's] findings or that the record evidence clearly contradicts the conclusions." Florida Bar v. Spann, 682 So. 2d 1070, 1073 (Fla. 1996). Respondent has not met this burden.

As discussed in the Bar's Initial Brief, numerous witnesses testified that they had brought to the Respondent's attention potentially improper contact, including the defendant's wife, Michelle Stuckey; his mother-in-law, Karen Ruch; and former co-worker, Cynthia Johnson. These incidents included not only direct contact between one individual with others, but also discussions involving family members of the alleged victim that took place within earshot of the jury. (IB 4-6; RR 2). The Referee concluded that Respondent was advised of at least some of these potentially improper contacts, and while the Referee was not sure the contacts actually occurred, he found it incompetent of Respondent not to inquire. The Referee did not find, as Respondent states, that "the conduct almost certainly did not occur." (RB 16). The Referee stated in his Report 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 after they were brought to his attention, and failed to do so." (RR 1-2).

Respondent argues that the Bar had no documentary evidence to dispute his statement that he was not told about the alleged improper contacts between jurors and witnesses during the trial. Respondent is correct. Since the Respondent did not bring the matter to the court's attention, there was no transcript of discussions

on the subject, and the persons who advised Respondent of their concerns did so orally. The Referee heard testimony from those who advised Respondent of the conduct, and also heard Respondent's denials. Respondent sought to bolster his claim he was not told through the testimony of the alleged victim's mother, Linda Wallace, and uncle, Mark Wallace. They denied that specific incidents of improper contact occurred. (TR2 32-33, 45-47). The Referee, in the absence of documentary evidence, ruled based on credibility. As this Court has held, "[o]ur role is not to reweigh the evidence and substitute our view of the credibility of the witnesses for that of the referee." Florida Bar v. Pellegrini, 714 So. 2d 448, 451 (Fla. 1998). The evidence supports the Referee's conclusion that Respondent was told that improper contacts with the jurors had occurred, and that he failed to draw that information to the court's attention.

III. THE REFEREE DID NOT ERR IN FINDING RESPONDENT INCOMPETENT FOR INTERVIEWING 15 POTENTIAL WITNESSES IN A GROUP FOR 45 MINUTES THE EVENING BEFORE TRIAL IN A CAPITAL FELONY CASE.

Respondent argues that the Referee erred in finding that he did not sufficiently interview a "small number" of witnesses until the night before trial. (RB 20). The Referee found that Respondent failed to thoroughly interview approximately 15 witnesses, meeting with them for about 45 minutes the day before trial. The Referee also found that Respondent instructed the witnesses at the meeting to make notes as to the testimony they would provide, but failed to collect those notes. The Referee concluded that Respondent's failure to sufficiently interview defense witnesses constituted incompetence in violation of Rule 4-1.1. (RR 2).

A referee's findings of fact are presumed correct and should be upheld unless clearly erroneous or lacking in evidentiary support. Florida Bar v. Bustamente, 662 So.2d 687, 689 (Fla. 1995). As long as those findings are supported by competent, substantial evidence, this Court will not reweigh the evidence and substitute its judgment for that of the referee. Id. The Referee's findings are supported by the testimony and affidavit of Michele Stuckey (TR1 72, 78-80), and the testimony of the Respondent himself (TR2 79-84). The

Respondent testified that he was provided "most" of the names of the 15 potential witnesses at least a month before trial. (TR2 80-81). Mr. Stuckey and his family believed these potential witnesses had testimony to offer that was relevant to the defense. (TR1 110-11).

Respondent argues that no one has presented evidence that any of the potential witnesses had any relevant testimony to offer. (RB 20-21). Again, Respondent misses the point. The issue is not what the 15 witnesses had to say, but rather the Respondent's failure to sufficiently interview them so that he could ascertain what they might have to offer to assist in his client's defense. Respondent could have requested that the witnesses make notes and send them to him long before the eve of trial, or he could have had them interviewed by investigators or associates well in advance of trial. If the concern was the cost of plane fare, Respondent, or an associate or investigator, could have conducted telephone interviews of the witnesses.

Respondent's statement that the interviews the night before trial were "obviously nothing more than fail-safe attempts to ensure no stone had been left unturned" in Mr. Stuckey's defense is alarming. (RB 21-22). He testified that he questioned the 15 individuals as a group and "nobody had any relevant information that they could give me." (TR2 83). Respondent apparently felt that he could

conduct a "fail-safe" interview of 15 potential witnesses in a group in 45 minutes and ensure that he elicited whatever exculpatory evidence might be available. Respondent did not even collect the notes that he asked the potential witnesses to make. In a capital case, waiting until the night before trial to do a group interview of 15 witnesses or potential witnesses, telling them to make notes of what they have to say, then not even reviewing the notes, is incompetent.

IV. THE REFEREE DID NOT ERR IN FINDING THAT RESPONDENT'S STATEMENT IMPLYING HIS CLIENT WAS A CHILD MOLESTER WAS INCOMPETENT, AS WAS HIS FAILURE TO OBJECT TO THE PROSECUTOR'S USE OF THIS COMMENT DURING CLOSING ARGUMENT.

Respondent contends that his question to the jury venire, "Anybody who wants to ask me the question, 'How can you defend child molesters?'" was a joke and did not equate to calling his client a child molester. While Respondent correctly points out that he did not say "I represent a child molester" in those exact words, his question clearly implies just that. According to the Respondent, his question was suggested by the book, *How Can You Defend Those People?,* in which author James S. Kunen writes that defense attorneys must overcome the perception that those accused of crimes are somehow different than the rest of society. (RB 22 n. 9). Perhaps a discourse on how anyone can be accused of child molesting would have been appropriate. To state, "Anybody who wants to ask me the question, 'How can you defend child molesters?'" was not.

Respondent goes on to note that his remark was a "tactical decision" and therefore would not be a basis for overturning a conviction based on ineffective assistance of counsel. (RB 23). Certainly "tactical decisions" can be so poor that they demonstrate incompetence. Respondent suggests that reasonable attorneys may differ as to whether his question was effective. (RB 23). At least Respondent

does not suggest that reasonable attorneys may differ on whether it was effective not to object when the State Attorney stated in closing that Respondent "spoke the truth when he told you . . . that he represents a child molester." (TR1 185).

Respondent's alleged joke demonstrates incompetence, as does his failure to object to the prosecutor's closing statements repeating the alleged joke. The Referee did not err when he found that Respondent's "joke" violated Rule 4-1.1 (competence).

V. A SUSPENSION IS THE APPROPRIATE SANCTION IN THIS CASE, AND GIVEN THE SERIOUSNESS OF RESPONDENT'S MISCONDUCT, A 91-DAY SUSPENSION IS WARRANTED.

Respondent argues that the Referee abused his discretion and was unjustified in recommending a suspension. Respondent suggests that none of his conduct appears to have prejudiced Scott Stuckey's defense. That is speculation. Respondent did not inquire into the alleged improper jury contacts; he did not thoroughly interview, or have interviewed, 15 potential defense witnesses, and did not collect their notes; he implied that Mr. Stuckey was a child molester during jury selection and then allowed the State to tell the jury that he (Respondent) told the truth when he said his client was a child molester. The jury convicted Mr. Stuckey of capital sexual battery and he is now serving a life sentence. Even if he is successful in overturning his conviction and winning a new trial, Mr. Stuckey will have spent several years in prison, and expended considerable effort and expense in attempting to obtain a new trial.

To bolster his argument that none of his conduct appears to have prejudiced his client's case, Respondent again states that the Referee determined that no improper juror contacts occurred, and therefore, the outcome of the trial could not have been affected. (RB 24-25). As already pointed out, the Referee did not conclude that no such contacts occurred. Rather, the Referee found that

Respondent failed to report several alleged incidents brought to his attention. Respondent also argues there is no evidence the venire panel took his comment regarding defending child molesters seriously--in essence, that the potential jurors would not take "seriously" the defendant's own attorney implying that he was a child molester. Even if the jurors failed to take the first remarks seriously, the impact of the statement was emphasized when the prosecutor repeated several times "he told you he represents a child molester."

Respondent argues that the 91-day suspension sought by The Bar is too severe a sanction for his misconduct. Respondent claims his conduct is less egregious than that of the attorney in Florida Bar v. Solomon, 711 So. 2d 1141 (Fla. 1998). Solomon was found incompetent for failing to remit filing fees, failing to timely submit an appellate brief, filing a complaint in the wrong county, and failing to amend the complaint to allege special damages after a warning from the court. These errors occurred in three cases involving civil matters. The Bar submits that the Respondent's mishandling of Scott Stuckey's capital felony case was far more egregious than the conduct of Solomon. Solomon's errors led to the dismissal of the appeal of a change of venue order, the dismissal of a petition for writ of certiorari relating to a client's medical history, the grant of summary judgment against a client (subsequently overturned), and loss of the opportunity to

plead special damages. There is no suggestion that Solomon's incompetence led to a conviction and sentence of life imprisonment without parole for any of his clients. A 91-day suspension is appropriate for gross incompetence in the representation of Mr. Stuckey who faces spending the rest of his life in prison as a convicted child molester.

Respondent also relies on Florida Bar v. Kravitz, 694 So. 2d 725 (Fla. 1997) and Florida Bar v. Corbin, 701 So. 2d 334 (Fla. 1997), to support his argument that a 91-day suspension is not warranted in his case. Both of these cases are factually dissimilar to the instant case, and therefore, of limited value in determining an appropriate sanction. The attorneys in Kravitz and Corbin were found guilty of misrepresentation to the court, a serious offense, but one very dissimilar to the Respondent's misconduct in this case.

Respondent also discusses (without citing the name of the case), a case in which an attorney "almost completely abdicated his role as defense counsel" and was suspended for 60 days. (RB 26). Respondent is most likely referring to this Court's decision in Florida Bar v. Sandstrom, 609 So. 2d 583 (1992), in which Sandstrom was found guilty of incompetence for deficiencies in defending a client accused of murdering his wife. The client's conviction for first-degree murder was subsequently set aside pursuant to a Rule 3.850 motion based on ineffective

assistance of counsel. Sandstrom failed to properly investigate and present evidence that would have established that the wife's death was caused by medical malpractice, rather than the actions of his client. Sandstrom also failed to conduct sufficient pre-trial discovery and investigation, failed to challenge the admission of certain evidence, and failed to present evidence that would impeach the credibility of a prosecution witness. The Referee recommended a one-year suspension. However, this Court disagreed and suspended Sandstrom for 60 days, considering the record as well as Sandstrom's previous private reprimand. Id. at 584.

Like the Respondent, Sandstrom was guilty of incompetence resulting in prejudice to his client. Respondent has a disciplinary record somewhat more extensive than that of Sandstrom, consisting of a public reprimand plus two years of probation, as well as an admonishment in the same case that is the subject of this proceeding. Given Respondent's gross failures in this case and his disciplinary history, a 91-day suspension is appropriate.

Respondent further argues that the Referee should have considered the extended delay between Respondent's misconduct and the filing of the Bar's case. Respondent represented Mr. Stuckey during 1996 and 1997. The Bar received Mr. Stuckey's grievance against the Respondent on June 9, 1999, and The Bar filed a

complaint against Respondent on August 31, 2000. No "extended delay" occurred in the prosecution of this disciplinary case.

VI. THE REFEREE'S RECOMMENDATION OF THE COMPLETION OF 30 CREDIT HOURS OF CONTINUING LEGAL EDUCATION SHOULD BE APPROVED, WITH THE SUBSTITUTION OF EIGHT CREDIT HOURS IN THE AREA OF CRIMINAL TRIAL PROCEDURE.

Respondent objects to the Referee's requirement that he complete eight of the 30 required credit hours of Continuing Legal Education in the area of criminal law relating to capital offenses, on the basis that no such courses are offered. The Florida Bar has no objection to the substitution of eight credit hours of CLE in the area of criminal trial procedure.

CONCLUSION

The Respondent has not met his burden of demonstrating that the Referee erred in finding him incompetent in several critical aspects of the handling of his client's criminal case. The Referee's findings and conclusions are supported by competent, substantial evidence in the record and should be upheld.

The record supports the Referee's finding that Respondent failed to report several alleged instances of jury tampering that were brought to his attention during trial, that he failed to thoroughly interview 15 potential defense witnesses, and that he referred to his client as a child molester during jury selection and failed to object when the State Attorney in closing stated to the jury that Mr. Rose "spoke the truth when he told you . . . that he represents a child molester."

Given the seriousness of these errors and the potential for harm to his client, as well as the aggravating factors, this Court should impose a suspension of 91 days and approve the Referee's recommendation of a one-year probation with the condition that Respondent complete 30 credit hours of Continuing Legal Education.

Dated this _____ day of July, 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 _____ to The Honorable Thomas D. Hall, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by regular U. S. Mail to Scott T. Orsini, Respondent's counsel at Orsini & Rose Law Firm, P.A., Post Office Box 118, St. Petersburg, FL 33731-0018; and a copy by regular U. S. mail to John Anthony Boggs, Esq., Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of July, 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 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.

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Thomas Edward DeBerg