IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

RICHARD F. RENDINA,

Respondent.
_____/

SUPREME COURT CASE NO: 73,545
The Florida Bar Case No:
88-50,375 (17E)

ANSWER/CROSS PETITION OF RESPONDENT

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PRELIMINARY STATEMENT

For purposes of this brief, the Respondent, Richard Rendina, will be referred to as "Respondent or Rendina", the Complainant, The Florida Bar, will be referred to as "Bar", and "R" will reflect the Record. The following Appendix will contain:

EXHIBIT ONE - Pretrial Order of Referee Moore Limiting the Number of Character Witnesses

EXHIBIT TWO - Pretrial Motion to Exclude Informant Bono's Testimony

EXHIBIT THREE - Florida Bar Complaint

EXHIBIT FOUR - Report of Referee

EXHIBIT FIVE - Motion to Present Evidence in Mitigation

EXHIBIT SIX - Objection to Imposition of Punishment (Variance)

EXHIBIT SEVEN - Transcripts of Sanction Hearing on May 25, 1990

STATEMENT OF THE CASE

On June 12, 1984, Respondent (hereinafter referred to as Rendina) was arrested. (R.562) The State Attorney filed an Information on June 21, 1984, charging Rendina with unlawful compensation under Florida Statute 838.016, alleging that an Assistant Broward State Attorney, Christopher DeBock (hereinafter referred to as DeBock) was corruptly offered, promised or solicited to perform an act within his official discretion, in violation of law. DeBock was the prosecutor in the criminal case, State v. Bono, number 84-6521-CF-10. (R.19)

On September 4, 1984, the State announced ready for trial. Circuit Judge Leroy Moe ruled that the State had not properly completed discovery, found the State unable to proceed, and ordered the prosecution to turn over the May 31, statement of DeBock. (R.555) The statement was then provided to Respondent and DeBock's deposition was set for October 17, 1984. The deposition was later cancelled, on notice of the State, because DeBock announced his intention to exercise his Fifth Amendment Rights. (R.556) On November 7, 1984, nineteen (19) days before speedy trial rule expired, the State petitioned the Circuit Court for an order compelling DeBock to testify. After a hearing on November 13, 1984, presiding Circuit Judge Harry Hinckley (the State had recused Judge Moe upon motion), held that DeBock could not be compelled to testify. (R.557)

On December 13, 1984, the State of Florida filed its original Petition for Writ of Common Law Certiorari in the Fourth District Court of Appeal. (R.557) Rendina then filed a response on the merits of the Petition on February 11, 1985. On March 27,

1985, the Fourth District rendered its opinion granting the Petition for Writ of Common Law Certiorari and State witness DeBock was ordered to testify at Respondent's criminal trial. See State v. Rendina, 467 So.2d 734 (Fla. 4DCA 1985). (R.558-559)

On June 13, 1985 counsel for Mr. DeBock, David Damore, Esquire, filed his notice to invoke discretionary jurisdiction of the Florida Supreme Court under Rule 9.030 of the Florida Rules of Appellate Procedure. The court accepted jurisdiction of the cause on October 21, 1985. DeBock's initial brief was filed on November 21, 1985 and it raised complicated issues of immunity and self incrimination with respect to Florida Bar proceedings. (R.25, R. 593-595) The State filed its answer brief on December 10, 1985. Oral argument was heard on March 4, 1986 and the Supreme Court rendered its original opinion in the case, Florida Supreme Court case number 67,207 on October 30, 1986 (some 2 1/2 years after Rendina's arrest). The Court reversed the Fourth District Court of Appeal in favor of DeBock's position that he ought not be compelled to testify as a State witness in the pending criminal case in Broward Circuit Court. (R.559)

On November 10, 1986, the State of Florida moved for rehearing. The Florida Bar intervened and filed a Motion for Rehearing and leave to appear as Amicus Curiae. The Court granted the Florida Bar's Motion for Leave to Appear as Amicus. (R.559) On January 28, 1987, the Court granted rehearing and the Florida Bar brief was filed in February. DeBock filed his reply brief the following month.

Thereafter, the Court issued a new opinion, dated July 16, 1987, which reversed its original opinion. See DeBock v. State,

512 So.2d 164 (Fla. 1987). (R.560) DeBock's Petition for Rehearing was denied on September 4, 1987 and the United States Supreme Court denied a stay of the proceedings. See 108 S.Ct. 282 (1988).

Proceedings in Broward Circuit Court were had where Respondent entered an Alford Plea pursuant to the case of Alford v. North Carolina, 400 U.S. 25, 91 S.Ct. 160 (1970), in connection with the misdemeanor offense of conspiracy to commit unlawful compensation. (R.562,563) The criminal case was disposed of by order of Court dated October 15, 1987.

On January 11, 1989 (some five (5) years after Respondent's criminal arrest), the Florida Bar filed a two (2) count Complaint and its First Request for Admissions. Respondent timely filed his Answer and Affirmative Defenses, his First Set of Interrogatories and Response to the Bar's Request for Admissions. On March 3, 1989, the Florida Bar filed a reply to Respondent's affirmative defenses and answered Respondent's Interrogatories. Rendina answered the Bar's First Set of Interrogatories the same month.

The Bar sought to depose Mr. DeBock, and the referee, Judge Edward Moore, ordered DeBock to appear and testify at the deposition. Certain immunity, including immunity for perjury and use of prior inconsistent statements, was provided to DeBock by the State Attorney's Office. It should be noted that DeBock had reached a disciplinary disposition of his case with the Florida Bar in June of 1988. A conditional guilty plea for consent judgment was signed by DeBock on June 16, 1988 and he received a thirty (30) day suspension. (R.28, 48)

DeBock testified at the deposition. (R.36) A pretrial order limiting the number of character witnesses which the Respondent intended to call at the hearing was entered by Referee Moore. The order limited Respondent's character witness, specifically, no more than three (3) judges and six (6) attorneys could be called to testify at a final hearing. (See Appendix Exhibit #1) A final hearing was set for July 27, 1989. The final hearing was rescheduled three times for the months of October, December and February, 1990. Due to illness of the Honorable Edward N. Moore, the appointment was terminated and Honorable Edward Swanko was appointed Referee. The final hearing was set in March, 1990 (approximately six (6) years after the alleged acts giving rise to the Florida Bar Complaint).

Prior to trial, the Respondent submitted a Motion to Exclude the testimony of Bar witnesses and Florida Department of Law Enforcement Informant, Thomas Bono. (See Appendix Exhibit #2). This motion was denied. (R.10) The cause proceeded to trial on March 13, 14 and 15 and at the close of all evidence, the Referee granted Respondent's Motion for Directed Verdict on Count Two (II). (R. 708, 709) As to Count One (I), the Court required both parties submit proposed Reports of Referee, which the Bar and Respondent timely filed. (R.727)

The court set a final hearing on May 25, 1990. The purpose of the hearing was to determine the merits of entry of judgment and Imposition of Punishment. The Florida Bar timely submitted a Memorandum of Law in Support of its proposed Report of Referee, a Memorandum as to the Discipline to be Imposed and an Amended Statement of Costs. The Respondent timely submitted <u>three</u>

specific pleadings, Objection to the Florida Bar's Proposed Findings and Report of Referee, Objection to Imposition of Punishment or Disciplinary Action, and a Motion to Present Evidence in Mitigation. The Referee acknowledged Respondent's pleadings, however, he denied all three. The Referee's action, in a most summary fashion, even though Respondent advised the Court that six (6) character witnesses, including judges and lawyers, were under subpoena and present to testify at that time, outright denied Respondent his opportunity to present evidence in mitigation. This action was in direct violation of Referee Moore's pretrial Order dated June 21, 1989. The Honorable Edward Swanko then adopted and executed the Florida Bar's Proposed Findings and Report of Referee. This Report recommended a two (2) year suspension of Respondent from the practice of law.

It should be noted that, during the course of these proceedings, the Board of Governors of The Florida Bar received the statement of Chris DeBock (Appendix 3 of The Florida Bar's Brief), which was a singular piece of evidence, the content of which was rejected by the Referee in his findings. Further, upon reason and belief, the Board of Governor's recommendation was substantially and materially affected by their receipt of this improper communication from counsel for The Florida Bar.

On August 2, 1990, the Florida Bar filed its Petition for Review in this cause and Respondent filed his Cross-Petition for Review on August 20, 1990.

STATEMENT OF THE FACTS

The Florida Bar filed a two (2) count Complaint against the Respondent on January 11, 1989. Count I charged that in the

representation of Thomas Bono, a criminal defendant, the Respondent unlawfully offered or promised to pay monies to Christopher DeBock, the Broward Assistant State Attorney handling the prosecution, in exchange for Bono receiving a reduced criminal sentence. Paragraph seven (7) of the Complaint alleged,

> "[B]ased on the facts stated above, Respondent has committed the crimes of conspiracy to receive or pay unlawful compensation and bribery."

Paragraph eight (8) of the Complaint alleged, based on the above stated facts, (paragraphs one (1) through seven (7)), Respondent has violated Florida Bar Integration Rules, Article XI, Rules, 11.02(3)(a) (commission of an act contrary to honesty, justice or good morals) and 11.02(3)(b) (commission of a crime) and Disciplinary Rules 1-102(a)(3) (a lawyer shall not engage in illegal conduct involving moral turpitude); 1-102(a)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation); 1-102(a)(5) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice); and 1-102(a)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law). (See Appendix Exhibit #3). Count II of the Complaint charged Respondent with an attempt to receive unlawful compensation from Romano and attempted grand theft, which the referee directed a verdict in favor of Respondent at the close of all evidence. (R.708)

I. FLORIDA BAR EVIDENCE

CHRISTOPHER DEBOCK

DeBock testified that he was the Assistant State Attorney handling the criminal case of State v. Thomas Bono, wherein

Richard Rendina represented the Defendant. (R.19,20) He stated that agents of the Florida Department of Law Enforcement took a statement from him in 1984 and he later gave deposition testimony in connection with this Bar proceeding. (R.22) DeBock recalled having some discussions with Rendina regarding the disposition of the Bono case but he had no recollection of Rendina offering to pay money in exchange for giving Bono a lesser sentence. (R. 30, 32, 46, 54, 58, 59) He testified that he never recalled Rendina trying to bribe him. (R.60) On the other hand, he had a vague recollection of Bono trying to offer him money on May 30, 1984 during a meeting at the State Attorneys Office. (R.52)

Further direct examination by Bar counsel elicited that Bono and Rendina met with him at the State Attorneys Office on May 30, 1984. (R.31) The taped conversations indicates what transpired at the meeting. (R.31) He stated that police officers came to his house after work and advised him that he must provide information; otherwise, he would be criminally charged and face the loss of his Bar license and employment. (R.33,34) The atmosphere was totally coercive. (R.34) It was at that time that DeBock, suffering from the shock of the ordeal, related that he had never been in trouble before, he saw his life and career passing before him, he was afraid of going to jail, and, finally, "This, by far, was the most devastating event of my life." (R.34) After the officers left, he started drinking and taking valium which had been left in the house by an ex-girlfriend. He stayed up all night without sleep because of the incident. (R.34)

The next day, May 31, 1984, DeBock went to work and was in court during the morning, according to other attorneys. (R.548-

49, 589) He did not remembers going to work, coming home, or anything about the day, "It was a total black out". (R.35) He testified that he was sure, either consciously or unconsciously, he had blocked out the whole thing. (R.35)

Bar counsel asked DeBock if the statement he gave to Florida Department of Law Enforcement on May 31, 1984 at the State Attorney's Office was an accurate reflection of what he told the agents that day. (R.40) DeBock replied that he did not remember giving the statement or its contents and, given his state of mind and condition, "It was certainly subject to being untruthful". (R.40,41) He stated that he had no recollection of the questions and answers asked in the May 31, 1984 statement. (R.43)

Regarding the disciplinary proceedings he encountered in his Bar case, DeBock said that his attorney advised him to take a thirty (30) day suspension and not fight the matter. (R.48) He would have contested the case except for counsel's advise that a consent judgment would be in his best interest. (R.48)

On cross examination, DeBock testified that he was not criminally charged and because of the passage of time his recollection would have been better six (6) years ago. (R.63,64) He had no recollection of Rendina offering a bribe and his May 31, 1984 statement to the Florida Department of Law Enforcement was possibly untruthful. (R.63-65) Finally, he did not know where that statement could have come from or when he gave it. (R.65) It should be noted that, at the conclusion of DeBock's direct examination testimony, the Referee indicated he would admit the May 31, 1984 statement in evidence as an exception to the hearsay rule under Florida Evidence Code 90.804(1)(c). (R.61)

SUSAN REICH

Ms. Reich testified that she was the court reporter who transcribed DeBock's statement of May 31, 1984. (R.114) She said that the statement truly and accurately reflected the questions and answers asked and answered. (R.114) The only persons present during the taking of the statement were two Florida Department of Law Enforcement investigators. No cross examination of DeBock was conducted. (R.118) No questions were asked of his mental state or the fact of coercion and drug/alcohol influence. The Referee ruled that the May 31, 1984 statement was substantive evidence, not impeachment evidence. (R. 272,273) It was admitted pursuant to Rule 90.804(2)(c) of the Florida Evidence Code. (R.119,120)

RALPH RAY

Ralph Ray was the Chief Assistant State Attorney in the Broward State Attorneys Office during May of 1984. (R.124) He stated that on May 31, 1984, DeBock came to his office and spoke with him. (R.127) Ray testified that DeBock told him that Rendina offered to pay money to DeBock in regard to the handling of the Thomas Bono case. (R.139) Ray said that DeBock had not taken the matter seriously; that DeBock had not accepted Rendina's offer; that during the May 30 meeting DeBock decided not to take the money. (R.130) Further, Ray testified that DeBock said, "He could only imagine he would even consider doing it because, recently, he had gone through a divorce and was emotionally upset". (R.130) Immediately afterward, DeBock's statement was taken by Florida Department of Law Enforcement investigators at noontime and transcribed by Susan Reich. (R.130)

Respondent objected to Ray's testimony and stated that the Bar was trying their entire case predicated on hearsay. (R.127,272) The court admitted Ray's testimony concerning DeBock's conversation with him nevertheless. (R.127-130).

On cross examination, Ray stated that DeBock appeared saddened when he was in his office. (R.133) He states that during the May 30 meeting it was his understanding, based on what Marshall Hall told him and while he listened to the recorded conversation himself, that DeBock made no admission of guilt during the meeting. (R.137)

THOMAS BONO

Thomas Bono hired Rendina to represent him in a drug trafficking case in November 1983. (R.324,325) Bono brought up the idea of bribing and paying off the State Attorney sometime in January 1984. (R.325-326) Bono testified that he would have to testify against five co-defendants and pay the money in order to get probation. (R.328,329) DeBock was alleged to be the recipient of the funds. (R.329) All of this, according to Bono, was arranged prior to his going to Florida Department of Law Enforcement. (R.329-330)

The witness stated that certain monies paid to Rendina were held by bail bondsman Spath as collateral for his bond. (R.333) Bono did not recall specifically. (R.333-336) During March or April 1984, Bono obtained a new lawyer, Don Williams, without Rendina's knowledge, and they went to the authorities. (R.331-332) Various transcripts of tape recordings were presented to witness Bono during his testimony. Bono gave his interpretation of certain tape recorded conversations with Rendina in the law

office during April and May 1984. (R.338-393) Bono stated that he expected to get sentencing consideration for his cooperation with The Florida Department of Law Enforcement. (R.392)

A summary of Bono's testimony indicates the following: The April 27, 1984 call refers to having his charges dropped. (R.338-339) The May 30, 1984 call refers to "...an attorney fee of Fifteen Thousand ($15,000) Dollars", although Ten Thousand ($10,000) Dollars was held as collateral for bond. (R.339-340). The transcript shows that Rendina recommended, "...to go for it, fight it, a 50/50 chance of winning the case". (R.341) A plea hearing could be scheduled the following week, but Bono would have to testify and inform Rendina tomorrow in writing that Bono had reached a firm decision - "[A] decision he would stick with." (R.342) The testimony if presented to the State Attorneys Office, "...would have to be truthful, the factual, truthful scenario which we both know, something favorable to the State". (R.343)

Further transcript evidence shows, "[M]y advice is, when you can get a deal, when you are talking about mandatory minimums, where you're gonna get probation no matter what the costs, testifying and other general matters, its an excellent deal". (R.343) Bono said regarding "other general matters", he assumed Rendina was talking about the money. (R.343) Rendina, according to Bono, said the cops had it out for Bono and, "[T]hey wanted him more than co-defendant McDermott". (R.345) Probation would be difficult because of this. (R.344-345)

Bono continued to inject his conversations with innuendo of bribery. (R.347) Rendina stated that Bono did not have to do

anything. (R.347) Bono replied, "I know, well, if I want to walk". (R.347-348) Bono said, "I am going to have to borrow Fifteen Thousand ($15,000) Dollars for that other schmuck". (R.349) Rendina's reply on the transcript shows "[T]hose are my attorneys fees". (R.350)

Bono's testimony at Repondent's trial indicated that he thought Rendina's attorney's fees had been paid in full. (R.352,353) Other transcript evidence of May 3, 1984 shows that Bono wanted to pay One Hundred Thousand ($100,000) Dollars to get the case dropped. (R.355) Rendina said the judge and State would not voluntarily dismiss it, "[I]f anybody does it, it will be the jury". (R.355)

The May 9, 1984 transcript shows that the deal could not be feasibly worked out according to Rendina. (R.360) Instead, Bono would have to testify truthfully. (R.361) The transcript reveals, "[W]ell, all I can tell you is fight it, you know, go to trial on the damn thing". (R.362)

The May 10, 1984 transcript shows that the alleged bribery deal was impossible. (R.366) Bono either had to change his plea and testify or his trial chances were 50/50; (R.364-367) Rendina would not discuss it further (R.367-369) but stated that his fee was Twenty Five Thousand ($25,000) Dollars at trial. (R.369-370, 389) Bono then testified, "There were several times I did not know whether he was saying he was paying DeBock or all he wanted out of me was another Fifteen - I expressed this opinion to members of the investigating team, that I thought that DeBock was not involved". (R. 371) [Emphasis added.]

The May 16, 1984 transcript proves substantial confusion as to Rendina's understanding of the amount of fees which were actually paid at that time. (R.375,376) Again, Rendina made it clear that the money was his fee and Bono thought none of it was going to DeBock. (377) The money was to be brought in before they went to the prosecutor's office to give a statement. (R.379) Bono asked if anything went wrong, Rendina replied "No, that's mine, it's a separate area". (R.380)

The May 30, 1984 transcript shows that Rendina wanted his fee. (R.383) Debock knew "...nothing about it". (R.384) Bono objected to the amount he was charged by his attorney. (R.385) He then stated, "I believed firmly at this time that the money was not going to DeBock. I remember my feelings on that day precisely". [Emphasis added.] (R.385) The meeting at the State Attorney's Office showed that Bono put the envelope with money on the table. (387) Bono told DeBock to take it. DeBock became angry, terminated the meeting, and walked out of there. (R.388) After the meeting, Rendina said his fee for the trial was Thirty Thousand ($30,000) Dollars and Bono better remember the bond situation. (R.391)

Cross examination of Thomas Bono demonstrated the following: (R.394) Bono was a former police officer and private detective. (R. 394, 395) Bono initiated the bribery scheme with Rendina since a co-defendant, Goodman, had suggested it to him. (R. 396, 407) Rendina was successful in reducing Bono's bond to an amount he could post. (R.400, 401) As to his recollection of matters, Bono stated that his memory would have been better in 1984/1985. (R.401) Rendina had pledged a portion of his fee to cover the

bondsman. (R. 402) Bono was facing a mandatory minimum jail sentence and for him to testify against co-defendants was unacceptable. (R.404-406) Bono went to Attorney Pete Aikens office and obtained Don Williams to work out a deal with the Florida Department of Law Enforcement. (R.408) Bono met with Agents Brown, Pineda and Solowsky and advised that he (Bono) initiated the bribe. (R.411) However, Bono failed to inform the agents that attorney's fees were pledged as collateral for his bond. (R.413) According to him, the agents gave only general instructions - "[G]et Rendina to say DeBock's name in connection with the Fifteen Thousand ($15,000) Dollar bribe, that would be wonderful". (R.414-415)

Bono admitted that Rendina told him that he never transmitted the offer of a bribe to DeBock. (R.415) Further, he stated that on several occasions Rendina advised that the Fifteen Thousand ($15,000) Dollars was attorney's fees. (R.415, 417) Reference was made to Bono's 1984 deposition wherein he stated "I think we all came to the conclusion that the State Attorney was not accepting a bribe."...(R.419) Bono's criminal sentence concluded without an adjudication of guilt. (R.421)

FLORIDA DEPARTMENT OF LAW ENFORCEMENT

Rosemary Pineda was the case agent in charge of the Florida Department of Law Enforcement investigation regarding DeBock, Rendina and Bono. (R.273-28) She stated that tape recorded phone calls were made of certain meetings. (R.274) Respondent objected to the introduction of tapes or transcripts based on the nature of Bono's illegal informant activities (i.e. substantial assistance), which said pretrial Motion to Exclude Testimony was

previously denied. (R.274) All of the tapes were then introduced as evidence. (R.279-284)

During the course of examination by the Bar prosecutor, Pineda was asked to give her opinion as to Respondent's intent or state of mind and characterization of his actions with respect to what Pineda termed a "solicitation of bribery" and "misrepresentation of attorney's fees". (R.303-305) Respondent objected to the improper opinion testimony, which the court overruled. (R.302)

On cross examination, the witness said Bono came to Florida Department of Law Enforcement with his attorney, Don Williams. (R.287) Pineda testified that Bono was the one who originated the idea of paying a bribe and Bono's idea came from other jail cell mates. (R.290)

The witness indicated that she did not recall any dispute between Bono and Rendina about attorney's fees and the collateralization of bond money. (R.291,294,300,301,309) She said that Florida Department of Law Enforcement could not give assistance on Bono's reduced sentence and Bono felt that he was taken advantage of by his attorney. (R.292) As far as the May 30th meeting was concerned, Pineda said that Agent Brown told Bono to keep control of the money and to pass it directly to DeBock. (R.294) She admitted that Rendina did inform Bono on previous occasions that DeBock knew nothing about the money and DeBock did not accept the money which was put on the table on May 30. (R.295,299) Pineda concluded that her recollection of events would have been better in 1984 or 1985. (R.310)

Agent Michael Brown testified that attorney Don Williams brought Bono to their office. (R.70) Bono was instructed to obtain recorded telephone calls with Rendina (R.71) All of the Bar tapes were marked as Exhibits for identification. (R.77-84) There was some confusion as to duplicate tapes, however, the tapes which were most audible and intelligible were marked. (R. 85-86)

On cross examination, Brown testified that he was one of the Florida Department Law Enforcement agents who went to DeBock's home on May 30, 1984. (R.88) He was accompanied by Pineda and prosecutor Marshall Hall. (R.88) The alleged purpose of their visit was to talk about the matters which occurred that afternoon with DeBock, Bono and Rendina. (R.88)

Brown did not know how long Rendina had represented Bono before the alleged bribery scheme. (R.90) Brown indicated that his recollection would surely have been better back in 1984 or 1985. (R.90, 91) The witness said he gave only general instructions to Bono, that "[T]here was a general conversation where money was to be paid and not to be paid. We told him to try to get him in a conversation and discuss that with him. That was the whole purpose of us having an investigation". (R.92)

Brown was familiar with the fact that Bono was facing a mandatory sentence for drug trafficking. (R.93) Brown further testified that the Florida Department of Law Enforcement may have discussed substantial assistance with Bono. On the night of May 30, Brown testified that prosecutor Hall did 99% of the talking to DeBock which he said was "casual conversations". (R.95-96) Brown stated that DeBock denied being offered a bribe, and

leniency as a normal police tactic may have been used with DeBock. (R.97)

The witness recalled that Rendina and Bono went to DeBock's office. (R.98) Bono made comments about having bought DeBock through Rendina, and then he took out money and threw it on the table. (R.98-99) Brown stated that he did not remember what Florida Department of Law Enforcement instructions (reference the money) were to Bono at that time. (R.99-101) Agent Brown admitted that Bono's substantial assistance agreement did not comport with the Florida Statutes, since Rendina was not a co-conspirator, accomplice, accessory, etc. (R.102-104) Finally, Brown said that, regarding the idea of bribery, "I do not think we would have been doing an investigation if we felt it was Mr. Bono's idea". (R.106)

Agent Harry Solowsky testified that he assisted Pineda in the investigation. (R.217) He wired Bono for all of the meetings with Rendina. (R.221) His recollection of events would have been better back in 1984/1985. (R. 224) He merely recalled "general, not the specifics of it". (R.231,235) Phone calls were recorded prior to the meeting with DeBock on May 30, 1984 and Solowsky was present for the statement on May 31, 1984. (R.226-227) Bono initiated all of the calls to Rendina. (R.262,263)

Solowsky stated that Bono told us what he had, that he was facing a mandatory drug sentence, and no inquiry was made regarding background and the appropriateness of using him as an informant. (R.232-33) He did not recall if Bono originated the idea and no mention of a specific Assistant State Attorney was made. (R.234) He did recall that Bono was looking to get out of

his trouble as an end result. (R.247) Solowsky said that he gave the Fifteen Thousand ($15,000) Dollars to Bono. (R.237) Essentially, he felt that, "We thought we should bring it to a head and offer money to the Assistant State Attorney directly, not through an intermediary, like Rendina, and at that particular time, I told him (Bono) to throw it on the table, in front of the State Attorney". [Emphasis added.) (R.237) The witness did not recall Rendina's response, however, he recalled that DeBock asked, "What the hell are you doing?" Solowsky further related that, "We told Bono not to give it to Rendina because we would only have his word, instead, we told Bono to do it in the company of his attorney". (R.239)

The agent stated that he did not recall if Rendina ever advised Bono that he did not discuss or have conversations about a bribe with DeBock. (R.240) He said that even if this were true, "It is a normal thing for someone to say things that could be taken both ways. I just go with the investigation on its normal course". (R.241) Further, law enforcement refused to release the money or lose custody of it, therefore, Bono had to throw it down. (R.242)

Solowsky testified that he did not recall what fee arrangements existed between Bono and Rendina, or the existence of a collateralized bond. (R.244) He admitted there was some discussion on tapes, "I believe I do recall something was discussed or debated, an amount of money, I do not recall the figures". (R.245)

PROSECUTOR MARSHALL HALL AND BONO'S SECOND ATTORNEY DON WILLIAMS

Hall was appointed as prosecutor of the case pursuant to an executive assignment. (R.141) He met DeBock at his home on May 30, 1984 and advised him of criminal charges, administrative charges, loss of his job and possible Florida Bar sanctions. (R.142, 155) "I wanted him to understand the seriousness, so he could make an informed choice as to whether to talk to us," (R.156) and, "I felt sorry for him. He was a young man going through real problems, and second, he did talk to us on that night. He did deny wrongdoing on that night". (R.156) Hall Stated, "We considered Rendina more culpable than DeBock because of his age, his experience, the belief that Rendina initiated that bribe, and fourth, DeBock was having personal troubles with a divorce, which gave him a more vulnerable frame of mind that he might otherwise have had". [Emphasis added.) (R.165) Hall further indicated "Rendina was more mature, he had been a prosecutor and I thought he was older, he was a much more experienced individual in those types of situations". (R.171) Hall indicated that he knew nothing of Bono's fee arrangements or bond matters with Rendina. (R.158)

Prosecutor Hall stated that the facts of this case would have been fresher in his mind back in 1984/1985. (R.162) He acknowledged that DeBock received a thirty (30) day suspension and was granted immunity in any criminal case. (R.163, 164) Hall agreed when Bono offered the money to DeBock that DeBock freaked out, and Rendina said, "Those are my fees". (R.168) There was a trade off of Rendina and DeBock in terms of criminal prosecution.

(R.173) He did admit that Rendina's arrest would harm his good name and hold him up to public ridicule. (R.173) Finally, Hall stated that DeBock did, in fact, give inconsistent statements on May 30 and 31. (R.177-178)

Don Williams testified that he represented Thomas Bono and helped him to cooperate with Florida Department of Law Enforcement. (R.192) Bono's concern was benefitting from his cooperation in terms of a probationary sentence without adjudication. (R.193) Williams observed DeBock's demeanor in court on May 31, 1984. (R.196) He related that DeBock was always cocky and selfish, but on that morning, "Quite frankly, he did not seem anywhere like that. I can remember him being - he would have been off to the left of where I was sitting in the gallery, he was very sullen, he was not even sitting in his chair, kind of hunched down. He was very quiet, not making eye contact with people". (R.195-197) Williams indicated that, throughout the course of his representation of Bono, Bono's main concern was having to testify against co-defendants. (R.201, 203) He stated that co-defendant McDermott was a close friend of Bono's. (R.204)

As to matters of bond, Williams said he knew Bono was having a problem paying his attorney's fees. (R.208) Initially, Williams did not think there was a bribe. (R.208) On the contrary, he thought Rendina was trying to get a higher fee. (R.208) Further, Williams was never fully paid by Bono for his representation. (R.210)

PETER AIKEN

Aiken represented a co-defendant, McDermott, in the Bono drug trafficking case. (R.472) McDermott related that Bono made

allegations of bribery concerning Rendina. (R.473) Aiken spoke with both men and sent Bono to Varon's office (R.473,474) where he then obtained a new lawyer, Don Williams, and began work as an informant for Florida Department of Law Enforcement. (R.474-475) Aiken stated his recollection of events would have been fresher in 1984/1985. (R.473)

Aiken was aware that Bono received straight probation, a fairly significant concession with a mandatory sentence. (R.478) Later, he called Bono as a defense witness at the McDermott trial where Bono was not impeached because of a withheld adjudication. (R.479) Aiken admitted that he did not know about the confusion or agreement with Bono and Rendina over attorney's fees. (R.477)

RICHARD RENDINA

Rendina was called as an adverse witness by The Florida Bar. (R.311) He admitted that he entered an Alford Plea to a misdemeanor offense. (R.311-312) He charged an attorney's fee of Fifteen Thousand ($15,000) Dollars and, subsequent to that, there were other conditions which occurred because of Bono's bond status. (R.314) During the course of representation, there was a great deal of confusion as to the exact payment of the fee. (R.315,317,318)

RESPONDENT'S EVIDENCE

LINDA BONO

Linda Bono, the wife of Thomas Bono, was instrumental in getting money to the bondsman and attorney while her husband was in jail. (R.513) The first time in Rendina's office she paid cash of Five Thousand ($5,000) Dollars but did not remember the amount because of difficulty she and C. Maggie Coffey had in

counting the funds. (R.514) She went to the bondsman but did not recall when or with whom. (R.517) Linda testified that the passage of time had erased her memory. (R.517)

She never discussed money with her husband and she followed his instructions to pay Rendina. (R.518) The Ten Thousand ($10,000) Dollar check was supposed to go in an escrow account, however Linda was not sure. (R.519) Bono testified that she did not tell her husband because she did not understand it. (R.519)

C. MAGGIE COFFEY

C. Maggie Coffey was Respondent's secretary during the Bono case. (R.521) She met Linda Bono, who was upset with her husband's predicament, and Coffey indicated that she assisted her with preliminary bond matters and case organization. (R.522) She drove Linda to the bondsman and certain monies were deposited. (R.523) The exact amount she was not sure, however, for Count one, conspiracy to traffic, Bono was charged a premium. (R.523, 541-542) Coffey said Ten Thousand ($10,000) Dollars was still owed and a check was received for that amount. (R.523) Bono did not want to go to Court while out on bond and he was concerned about jail because he used to be a cop. (R.525, 526) She indicated that Rendina advised her to be careful with this client (R. 526, 527) because Bono wanted to flee the jurisdiction of this Court.

On cross examination, Coffey said she started working with Respondent in 1981 and his bookkeeping and office systems were badly neglected prior to her employment. (R.529, 530) Coffey had previously worked with the State Attorney's Office. (R.530) When a client had a bond problem, depending on the circumstances, she

would coordinate with the bondsman. (R.530) Some confusion existed as to the Three Thousand ($3,000) Dollars or Five Thousand ($5,000) Dollars which went to the bond, but she did not know specifically. (R.532, 533) With trust account matters, she would do banking and deposits at times, which Rendina did not know about. (R.535) When asked why money was received and then returned to the client for bond, she said that it had been so long that she did not recall. (R.537)

WAYNE SPATH

Spath was the bondsman in Fort Lauderdale who wrote Bono's bond. (R.666) Three Thousand ($3,000) Dollars was the premium in addition to collateral pledged by other relatives. (R.667) Spath said the collateral was not sufficient and Rendina pledged Ten Thousand ($10,000) Dollars of his fee. (R.668)

RICHARD RENDINA

Rendina practiced criminal law in Broward County as a prosecutor and defense attorney. (R.601, 602) Prior to this, he was a military lawyer in the Marine Corps, both prosecutorial and defense, and he later served as a judge in the military courts. (R.600) His military career ended with an honorable discharge in 1978 when he began as an Assistant State Attorney. (R.601) In 1982, he ran for the legislature but lost after a close vote. (R.601)

The witness testified that he had no previous complaints filed against him relating to Bar matters. (R.602) Rendina said that his relationship with attorney Peter Aiken was not good and he testified at a grievance hearing against Aiken where a fee of

Seventy Five Thousand ($75,000) Dollars for a criminal case was alleged to be excessive. (R.603, 604)

Rendina represented Bono in November of 1983. (R.605) They met at Pompano Detention Center where Bono was held on a [Half Million ($500,000) Dollar bond]. (R.605) Rendina obtained a substantially reduced bond and Bono's wife went to the bondsmen. (R.606, 607) Attorney's fees were quoted at Fifteen Thousand ($15,000) Dollars and collateral for the bond was approximately Ten to Fifteen Thousand ($10,000 to $15,000) Dollars short. (R.607) Rendina was confused as to exact amount but his attorney's fees were pledged. (R.608) He acknowledged that bond was set on both counts and he made active efforts to get Bono out. (R.611) His secretary assisted Bono's wife with Brandy Bail Bonds. (R.612) The witness stated that he discussed entrapment law with Bono and there was a likelihood of some success in the case. (R. 610) He knew that Bono was a former cop and under no circumstances did Bono want to go to jail. (R. 613) Bono told Rendina that he was going to flee and Respondent indicated that, "His fee was tied up with the bond and he wanted to be paid". (R. 613, 630)

The attorney/client relationship later began to deteriorate. (R.613) Early in 1984, Bono began to suggest the offering of a bribe. (R.613) He felt that paying money would get him, "...out of this thing". (R.614) Rendina ignored the idea stating, "I just poo poo'd it because they were drug traffickers and it was the mentality". (R.614)

Later in the case, Respondent advised Bono of pretrial motions but he would not discuss this. (R.615) Bono insisted on

a bribe. (R.615) Rendina talked the situation over with Attorney Robert Dolman and how he could control it. (R.616) He did not want to report him to the bondsman or court since he felt that he could not ethically do it. (R.616) Rendina discussed the substantial assistance statute and advised Bono that he would have to testify against his co-defendants. (R.617) Bono would not do this. (R.617) Rendina explained that he discussed a disposition of the case with DeBock on various occasions. (R.618) Debock refused probation without testimony. (R.619)

Rendina provided his interpretation of the April and May transcripts. (R.621) On April 27, 1984, Rendina explained that Bono wanted the case dropped without testimony, this was referred to as "that thing" . (R.622) As to the Fifteen Thousand ($15,000) Dollars, "increasing the size of the bag", he stated that Bono was trying to bribe DeBock with more money. (R.623, 624) Rendina felt that Bono might take off and he told him to be there. (R.624) On May 3, 1984, Bono again initiated bribery conversations. (R.625, 626) Rendina told Bono that a motion must be made and Bono should go for it. (R.626, 627) As to the money, he told him to bring it since he wanted his fee paid as soon as possible. (R.627,629) Again, Bono had a problem with giving truthful testimony. (R.628, 630)

The May 3 transcript testimony further revealed that, "Fifteen is a lot of incentive". Rendina explained that the cops vetoed the deal and the prosecutor could not justify a deal for no reason - testimony was required. (R.633) Respondent stressed the importance of a truthful proffer. (R.634) The money amount is clearly indicated as attorney's fees and Respondent said that,

"I never approached any of these officials". (R.634) He indicated that his sole objective was to keep Bono under control. (R.35, 63)

The May 9, 1984 transcript reveals that the whole case could not be worked out. (R.63) The units referred to money and Respondent advised Bono to go to trial. (R.37)

The May 10, 1984, transcript reveals that Bono brings up the bribery matter again. (R.639) Rendina said he would schedule the change of plea with a proffer of testimony, however, Bono must first come in and pay the rest of his attorney's fees. (R.639) The "excuse" referred to was testimony against co-defendants and Respondent indicated that a bribe was impossible. (R.640)

The May 16 transcript reveals that Bono wanted straight probation. (R.644) He indicated that other co-defendants may receive this treatment. (R.644) Bono says he must borrow another fifteen for Debock. (R.45) Respondent acknowledges Bono's prodding and ultimately indicates the "excuse" as the problem (R.645) and paying off the court is out of the question. Rendina said his fee would be Twenty Five Thousand ($25,000) Dollars and Bono would get the best deal possible. (R.646) Respondent admitted that money was a concern -his financial self interest. (R.646) Rendina indicated that all of the money is his fee-nothing to anyone else. (R.647-650)

The May 23 transcript reflects one and one half hours of conversations. (R.674) Bono was distraught, his wife was upset and bond jumping was a serious offense. (R.675) Respondent indicates that he must make arrangements immediately, substantial assistance or go to trial. (R.676) Bono indicates that he will

give the money directly to DeBock and Respondent tells him flatly, "No, that is mine, it is a separate area, its my fee". (R.678) Respondent states that any possible deal to Bono, "...is because, essentially none of the money was yours, you're the least culpable". (R.679) Respondent affirms previous statements about attorney's fees and Bono states, "Rich, do whatever you have to do. "Let's get out of this whole damn deal". (R.680)

The May 30 transcript reveals numerous instances of Rendina clearly stating to Bono that the money was his fees. (R.681, 682) He testified that he never offered or talked or conspired with DeBock to pay any sum of money. (R.682)

On cross examination, Respondent stated that his fees became Twenty Five Thousand ($25,000) Dollars or Thirty Thousand ($30,000) Dollars at a point in time when Bono appeared to create a distinct impression of the possibility that he would flee. (R.687) Confusion was apparent as to the amount of fees tied up in the bond matter. (R.687) The prosecutor later asked questions about the existence of receipts which did exist. (R.691)

At the end of testimony, the referee asks, "The question in my mind would be whether or not, if he is representing a client, and the client kept saying throughout his representation that, 'I've got to get off, I can't go to trial. I don't care what amount of money it will cost me, whatever you can do,' does he, as counsel, withdraw from representing his client, or is he still obligated to his client"? [Emphasis added.] (R.701) Respondent replied, "I have asked lawyers and friends, given them hypotheticals, because I did not want to talk about the specific individual, and all the input that I got from experienced

criminal defense attorneys, remembering, I am just out on my own for a year or so". (R.701) The Respondent further testified that he was advised by other attorneys that, "You cannot do that, you have to control the guy". (R.701) The Court asked, "Why couldn't you have withdrawn and said, 'look, you have made these utterances to me, I earned my fee', and withdrawn"? Respondent stated, "Looking back Judge, maybe I should have, but I did not, and to be candid, he would have taken off and I would be out of monies I had given Mr. Spath. I pledged it". (R.702) The Court said, "It looks like he was setting you up right along. Yes, in fact, he [Bono] said that he knew exactly what to do, and here, you have to suffer the consequences now". [Emphasis added.] (R.702)

EDWARD KAYE, ESQ.

Edward Kaye's substantive testimony established that he represented Respondent in the Broward criminal case. (R.551) During September 1984, the State did not provide Rendina with the May 31 statement of DeBock, in violation of discovery rules. (R.553) DeBock could not later be deposed because he invoked his Fifth Amendment rights based upon advise of counsel. (R.556) The trial court ruled in DeBock's favor. (R.457) Appeals issued to Fourth District and Florida Supreme Court which held that DeBock must testify. (R.557-60)

Kaye advised Rendina to fight the case because of lack of evidence and impeachment of State witnesses. (R.561) Respondent later entered an Alford Plea to a misdemeanor on the day of trial. (R.562) Kaye explained that Respondent entered this plea as a matter of convenience and because of personal pressures.

(R.562) The other main concern was that an Alford plea allowed for Respondent to maintain his innocence, which the Respondent always did. (R.563) He indicated that Respondent's reputation in the community was good. (R.565)

On cross examination, Kaye testified that Rendina voluntarily took the Alford Plea. (R.567) He felt that DeBock was a prosecutor and that on occasions he did not follow the rules. (R.569) Kaye stated that Rendina was tough nosed as a prosecutor. (R.569)

DAVID BOGENSHUTZ, ESQ.

David Bogenshutz's testimony established that he practiced criminal law in Florida since 1971 and was a former partner with Don Williams in the Varon firm. (R.543, 544) Bogenshutz observed Chris DeBock in the courtroom on the morning of May 31, 1984. (R.544-546) DeBock's demeanor was described in this manner: "I saw him sitting on the floor with his back against the wall, with his coat off, and I think his tie was pulled down, and his head was down with his feet sticking straight out behind or to the left as I was looking at the bench or the table where the prosecutor normally sat, and he looked extremely dejected. I think I may have remarked that Chris Debock looked like he just lost his best friend." (R.546) His demeanor and appearance on that day was significantly different from what he came to expect of DeBock. (R.547) In fact, his demeanor was striking. (R.549) As to Rendina's reputation for truth and veracity in the community, the witness said it was good. (R.547)

CHRISTOPHER POLE, ESQ.

Christopher Pole's testimony established that he worked in the State Attorney's office during 1983, 1984. (R.587) He knew Respondent and his family for close to twenty (20) years and both worked as prosecutors in the same office. (R.588)

Pole was aware that DeBock made statements which implicated Rendina in the commission of crime. (R.588) The witness related, "After the statement [(May 31)], I saw Chris on occasion, and I used to play softball with him, and he used to go to the same gym, and he told me that the evening before he had been up all night, and he had taken, I forgot what type of drug, a great deal, a great amount of some type of drugs, and that when he - when he went in that morning, he barely remembers going to work, and that he gave a statement, but does not even remember what he said. (R.589) As I remember, he stated that he read the statement and he told me that what he said there was not accurate. Basically, the statement as a whole was inaccurate and not the truth". (R.590) As far as Rendina's reputation in the community, it was excellent, not only with attorney and judges, but friends and family. (R.590)

DAVID DAMORE, ESQ.

David Damore represented Chris DeBock. (R.592) Damore would not discuss privileged matters however he indicated that "The primary reasons were that I felt that any statement that DeBock would make would be inconsistent with a prior statement he had given back in May - I forgot the year, I believe it was the State Attorney and Florida Department of Law Enforcement. (R.594)

These concerns would potentially manifest in a perjury and inconsistent statement prosecution". (R.594)

On cross examination, the witness unequivocally indicated that DeBock's statement would be inconsistent with a previous statement. (R.596)

THE HONORABLE J. LEONARD FLEET

Judge Fleet gave testimony as to the Respondent's reputation in the legal community. (R.563) He indicated that he practiced for twenty three (23) years as a criminal trial attorney and served on the bench beginning 1983. (R.653) Fleet stated he knew Respondent while he was a defense attorney and Rendina appeared before his bench. (R.654) Rendina was fair, aggressive and hard-headed. (R.657) As a prosecutor, he was hard nosed and did not mislead the Court. (R.655) He stated that Respondent enjoyed a good reputation in the community. (R.655)

Regarding the DeBock case, Fleet testified that he read newspaper reports and heard courthouse scuttlebutt. (R.656) He indicated that if Rendina was involved in these allegations, if true, he was an "unmitigated foolish jackass and I would not think much of him". (R.656) If the allegations were no more than what I heard, I would find it very difficult to believe Rich would be involved in anything like that, it would be absolutely contrary to what I know of Rich from a professional standpoint. (R.657) As to the Alford Plea, "I told him he should litigate it". (R.658)

Fleet knew that DeBock worked out some type of deal. (R.659) He knew and read the Miami and Fort Lauderdale papers which characterized Respondent as less than an honorable person.

(R.659) Rendina told Fleet one of the reasons he took the plea was because he was "totally emotionally beaten". (R.660)

ROBERT DOLMAN, ESQ.

Robert Dolman knew Rendina in that they shared office space during 1983. (R.571) Dolman's practice consisted of personal injury and criminal cases. (R.571) He related that Rendina said he had a jackpot with a client facing a mandatory drug sentence, that his fee was tied up as bond collateral, and that there was a grave concern that this man would skip. (R.574)

Dolman testified that a judge would probably look at a lawyer in a certain way if a Defendant skipped. (R.575) "I remember that Rendina wanted to cover himself since he was having trouble with an out of control client". (R.576)

DANIEL TEDESCO, ESQ.

Daniel Tedesco knew Respondent as a prosecutor where he was considered to be good, consistent, and an aggressive lawyer. (R.583) Both worked in Judge Arthur J. Franza's division and he considered Rendina to be fair. (R.584) Tedesco testified that Respondent has a very good reputation in the community and he has known him "...to take very difficult and, quite frankly, very controversial cases". (R.584)

STATEMENT OF THE ISSUES

I. WHETHER THE REFEREE ERRED IN ADMITTING EVIDENCE IN VIOLATION OF CLEARLY ESTABLISHED EVIDENTIARY PRINCIPLES AND ITS EFFECT UNDERMINED THE FUNDAMENTAL RELIABILITY OF THE PROCEEDING

II. WHETHER THE REFEREE ERRED IN EXCLUDING EVIDENCE AND RESTRICTING ARGUMENT ON MATTERS OF MITIGATION OF PUNISHMENT OR DISCIPLINE

III. WHETHER THE REFEREE ERRED IN IMPOSING DISCIPLINE BASED ON MATTERS NOT CHARGED IN THE COMPLAINT AND AT VARIANCE WITH THE BAR PLEADINGS AND PROOF

IV. WHETHER THE REFEREE ERRED IN FAILING TO EXCLUDE INFORMANT TESTIMONY AND NOT DISMISSING THE CAUSE, OR IN THE ALTERNATIVE, TO PROPERLY CONSIDER EXCESSIVE GOVERNMENTAL INVOLVEMENT IN MITIGATION OF PUNISHMENT

V. WHETHER THE DISCIPLINE IMPOSED, IF ANY, SHOULD BE SUBSTANTIALLY LESS THAN THAT WHICH WAS IMPOSED BY REFEREE

SUMMARY OF ARGUMENT

The referee improperly admitted hearsay and opinion testimony and this denied Respondent his right to a fair trial. DeBock's May 31, 1984 hearsay statement obtained by Florida Department of Law Enforcement and Ray's prejudicial hearsay testimony should not have been considered as substantive evidence. Agent Pineda's improper opinion testimony concerning Respondent's guilt and state of mind and impeachment of his character was prejudicial, and the effect of this inadmissible evidence undermined the fundamental reliability and fairness of the proceeding.

The referee improperly excluded substantial mitigation evidence in violation of established principles of law. Evidence of Debock's thirty (30) day suspension, Respondent's interim rehabilitation, the fact of isolated misconduct and no prior disciplinary record, the Bar's unreasonable delay in proceeding, and exclusion of character evidence prejudiced Respondent's right to a full and fair determination of the appropriate discipline.

The referee specifically found that Respondent did not offer or propose a bribe to anyone and he never approached Assistant State Attorney DeBock. Instead, the referee found that Respondent did not disclose to the authorities, as an officer of the court, the conduct and intentions of his client (Bono) to influence the State Attorney. The referee's imposition of two (2) years suspension was not warranted and the proof at trial was at variance with specific allegations of The Florida Bar's Complaint.

The referee erred in failing to dismiss the cause based on entrapment as a matter of law and violation of Respondent's due process rights. The idea of bribery originated with the client (informant) and was carried to fruition based on Florida Department of Law Enforcement instructions. Respondent maintains that excessive governmental involvement was a proper matter to be considered in mitigation of discipline and the referee's report failed to reflect this.

Discipline must be imposed in a uniform manner which takes into account all factors concerning an attorney's misconduct and evidence in mitigation. Respondent urges this court to consider all aspects of the case, including DeBock's thirty (30) day suspension and his interim rehabilitation over the past six (6) years, and to impose discipline, if any, in accordance with the Lawyers Sanction Standards.

I. THE REFEREE ERRED IN ADMITTING EVIDENCE IN VIOLATION OF CLEARLY ESTABLISHED EVIDENTIARY PRINCIPLES AND ITS EFFECT UNDERMINED THE FUNDAMENTAL RELIABILITY OF THE PROCEEDINGS

In the present case, the referee admitted evidence in clear violation of the Florida Evidence Code. The introduction of this evidence undermined the reliability of the proceeding and denied Respondent his right to fundamental fairness and due process of law in Bar disciplinary proceedings. Therefore, this Court should determine that the evidence was inadmissible and its introduction at trial constituted reversible error.

A. DEBOCK'S MAY 31 HEARSAY STATEMENT TO FLORIDA DEPARTMENT OF LAW ENFORCEMENT WAS IMPROPERLY ADMITTED AS SUBSTANTIVE EVIDENCE

The referee ruled that the May 31, 1984 statement was substantive evidence, not impeachment evidence, pursuant to Rule 90.804(2)(c) of the Florida Evidence Code. (R.119, 120, 272-273) Respondent contends that the admission of DeBock's May 31, 1984 hearsay statement against him was improper and fundamentally unfair.

The Bar maintained that DeBock was "unavailable" as a witness because he had suffered a lack of memory of the subject matter of the statement so as to destroy his effectiveness as a witness during the trial. (R.55) See Florida Evidence Code 90.804(1)(c). The Bar argued that DeBock "...did not remember the facts of what occurred regarding the questions that have been asked of him". (R.55) The Referee ruled in favor of the Bar stating that DeBock had suffered a lack of memory so as to destroy his effectiveness as a witness during the trial. (R.61)

Respondent maintains that the record establishes DeBock testified that he recalled the facts of what occurred regarding

the questions that were asked of him. DeBock testified that he did not recall Rendina trying to bribe him. (R.20) DeBock recalled having some conversations with Rendina regarding the disposition of the Bono case but he had no recollection of Rendina offering to pay money in exchange for giving Bono a lesser sentence. (R.30, 32, 46, 54, 58, 59) He further testified that he had a vague recollection of Bono trying to offer him money on May 30, 1984. (R.52) Therefore, DeBock was an available witness who testified at Respondent's trial.

DeBock denied complicity, or Rendina's complicity, in any criminal act when confronted by Florida Department of Law Enforcement Agents at his home on May 30, 1984. (R.32-34) Ralph Ray's testimony corroborated that DeBock made no admission of guilt during the May 30, 1984 meeting. (R.137) Based on this, the witness was not unavailable and his memory was clear as to the facts that occurred. The only statement DeBock did not recall was his response to questions asked of him by Florida Department of Law Enforcement Agents on May 31, 1984 in the State Attorney's Office.

In order for the statement to be substantive evidence, as an exception to the hearsay rule under 90.804(2)(c), the witness must be unavailable and the statement must be against the witness's interest tending to expose declarant to criminal liability. (R.119) In this case, the witness was neither unavailable nor was the May 31 statement against his interest. A court must look at certain factors in determining what is against declarant's penal interests. The authoritative treatise, McCormick on Evidence, West Pub. 3d Jan. 1984, Chapter 27-279 at

pp. 824-827, is most instructive. Four factors will be addressed.

1. THE TIME ASPECT

> "The characteristics of contemporaneity is implicit. People do not make statements that are disadvantageous to themselves without substantial reason to believe that the statements are true. Reason indicates that the disadvantage must exist at the time the statement is made". McCormick at 825.

In the present case, the statement of May 31 came approximately 24 hours (one day later) after the meeting of Bono, Rendina and DeBock at the State Attorney's Office. Given the coercive nature of the confrontation by Florida Department of Law Enforcement at DeBock's home on the evening of May 30 and the subsequent dosage of valium and alcohol that same evening, the time aspect of DeBock's May 31 statement gives rise to grave concerns (DeBock's reflection and motive to fabricate) about Respondent's right of confrontation and the inherent unreliability of the statement.

2. THE NATURE OF THE STATEMENT

> "A declaration against penal interest must involve substantial exposure to criminal liability. Judicial scrutiny in criminal cases has been more exacting. And, when the statement is offered by the prosecution to inculpate the accused, an even stricter approach is sometimes found: the requirements of the confrontation clause of the Sixth Amendment are said in some judicial opinions to require rejection of any part or related statement not in itself against interest". Id at 826.

In the present case, Bono testified that he firmly believed that the money was not going to DeBock. (R.385) Agent Brown testified Rendina told Bono that a bribe was never discussed with DeBock. Further, "It was a normal thing for someone to say things that could be taken both ways". (R.241) Pineda testified that the May 31 statement would inculpate Rendina, making him

guilty of something, but exculpate DeBock, making him innocent of the same wrongdoing. (R.306) DeBock admitted, given his condition, "It [(the May 31, 1984 statement)] was certainly subject to being untruthful". (R.40, 41) Finally, DeBock testified that he did not know where the statement could have come from or when he gave it and it was possibly untruthful. (R.63-65)

3. THE FACTUAL SETTING

> "It has been held that the fact of custody alone, with its attendant likelihood of motivation by a desire to curry favor with the authorities, bars a finding that the statement was against interest and requires exclusion". Id at 826.

DeBock testified that the atmosphere on May 30, 1984 was totally coercive. (R.34) He saw his life and career passing before him, he was afraid of going to jail and it was the most devastating event of his life. (R.34) On May 31, DeBock went to Ray's office. Pursuant to Florida Department of Law Enforcement interrogation and a strong desire to curry favor with the authorities, he implicated Rendina in a bribery scheme. The coercion from the previous day and other factors (drugs and alcohol), clearly created a factual setting which was not conducive to a truthful statement.

4. MOTIVE: ACTUAL STATE OF MIND OF DECLARANT

> "A reasonable man would not have made the statement unless he believed it to be true. This exception has often been stated as requiring that there has been no motive to falsify. If it appears that declarant had some motive, whether self interest or otherwise, which was likely to lead to misrepresentation of the facts, the statement should be excluded". Id at 827.

In the present case, DeBock had a substantial self interest and motive to falsify the statement on May 31. He testified that

he had taken valium and alcohol the night before and he had not slept. (R.34) DeBock did not remember going to work, coming home, or anything about the day - "It was a total black out". (R.35) Pole's testimony established DeBock had told him he had taken a great amount of some type of drug, that he stayed awake all night, and "...that the statement, as a whole, was inaccurate and not the truth". (R.589, 590) Bogenshutz said that, on the morning of May 31, DeBock was sitting on the floor of the courtroom with his head against the wall. (R.546) Williams testified that DeBock was very quiet, not cocky, and he did not make eye contact with people. (R.195-197) DeBock's attorney, David Damore, testified unequivocally that any truthful testimony would be inconsistent with the May 31 statement. (R.596) Finally, DeBock's statement at Respondent's trial reveals the truth, which was, that the May 31 statement was not truthful. (R.40, 41)

Florida case law is dispositive on the issue concerning statements against interest under 90.804(2)(c). A excellent discussion of the rule in Brinson v. State, 382 So.2d 322 (Fla. 2DCA 1979) illustrates the above. The court stated that the general rule against admission of hearsay statements is that all out of court statements offered for the truth of the matter asserted are inadmissible. See Collins v. State, 65 So.2d 61 (Fla. 1953); Id at 324. The primary purpose of the exclusion of hearsay testimony is that the opposing party has no opportunity to cross-examine the out of court declarant, and is thereby deprived of the opportunity to expose deceit and errors in the statement. Id at 324; 5 J. Wigmore, Evidence, section 1362.

In the case of LeCroy v. State, 533 So.2d 750 (Fla. 1988), the court held that defendant's brother's out of court statement about when he last saw murder victims was not admissible as admission against interest, despite defendant's claim that his brother admitted that he saw victims after defendant last saw victims. Error, if any, in refusing to admit defendant's brother's out of court statement about when he last saw murder victims, which defendant claimed was admission against interest, was clearly harmless where evidence showed that the brother was also indicted and had a role in crimes or attempting to conceal them. F.S.A. 90.804(2)(c). Id at 751 In LeCroy, appellant argued that the trial court erred in refusing to admit hearsay evidence that Jon (brother) told others that he had seen dead bodies before and was the last to see the victims alive. Appellant argued that the statement was against interest within the meaning of section 90.804(2)(c). The court found the statement not to be against the brother's interest and its exclusion from evidence was not error. See Gillis v. State, 518 So.2d 962 (Fla. 3DCA 1988) The rule is generally that a statement made by a co-defendant during police custodial interrogation, inconsistent with his testimony at trial, cannot be introduced as substantive evidence at a trial of the defendant. See 90.804(2)(c) See Andrade v. State, 15 FLW 1849 (fla. 3DCA July 27, 1989) (The trial court held that co-defendant's hearsay statement was not a declaration against penal interest, and was properly excluded); Maugeri v. State, 460 So.2d 975 (Fla. 3DCA 1984)

In the case of Scott v. State, 559 So.2d 272 (Fla. 4DCA 1990), the court held that statements of deputies contained in the audio portion of a videotape played to the jury should have been excluded as inadmissible hearsay, as irrelevant, and posing a substantial danger of unfair prejudice to defendant. See 90.403. Error in admission of this and other evidence was not harmless. Id at 270. In the case at bar, DeBock's May 31 hearsay statement was inadmissible because he was not unavailable as a witness. On the contrary, he testified as to the facts of what occurred, and what did not occur. Second, DeBock's statement given to Florida Department of Law Enforcement on May 31, 1984 was not a "true" statement against interest. DeBock admitted the statement was not truthful, and it is clear from other evidence, that he had substantial self-interest and reason to curry favor with the authorities. His state of mind and condition was drug influenced, and his own testimony revealed that May 31 was "a total black out" to him. Therefore, Respondent had no opportunity to cross examine the unreliable statement of the declarant, and its effect as substantive evidence was clearly prejudicial, in violation of Rules 403, 802, and 804 of the Florida Evidence Code and due process of law.

Further, it should be noted that DeBock's May 31 statement could not be introduced as impeachment evidence as a prior inconsistent statement. The fact that DeBock did not recall or remember the statement was not a sufficient predicate to declare DeBock an adverse witness. Parnell v. State, 500 So.2d 558 (Fla. 4DCA 1987); Smith v. State, 14 FLW 1841 (Fla. 5DCA 1989). Further, the statement was not admissible as substantive evidence

as a statement to police pursuant to interrogation. In Delgado Santos v. State, 497 So.2d 1199 (Fla. 1986) The court held that police interrogation was not former testimony in "other proceedings under the Code and Section 90.801(2)(a) did not apply.

B. RALPH RAY'S TESTIMONY WAS PREJUDICIAL HEARSAY

Counsel for The Florida Bar elicited inadmissible hearsay testimony from witness Ralph Ray in an attempt to prove that Respondent committed the crimes of conspiracy to receive or pay unlawful compensation and bribery, as charged in paragraph seven (7) of the Complaint. In her opening statement, the prosecutor commented that the offense will be proved by clear and convincing evidence. (R.10-12) Respondent maintains that the admission of Ray's hearsay testimony concerning information received from DeBock, specifically, "Rendina offered to DeBock on several occasions, some money with regard to the handling of the case for Rendina, either for him or his client, Thomas Bono", was entirely prejudicial. (R.129) This testimony was objected to. (R.127, 272) Therefore, the Bar's attempt to prove its case of bribery, predicated solely on hearsay testimony, fails to meet the required burden of proof by clear and convincing evidence.

In the case of Baird v. State, 553 So.2d 187 (Fla. 1DCA 1989), the Court held that it was not harmless error to admit a police officer's testimony that he had received information that Defendant operated a major gambling operation. Id at 187. In Baird, Defendant objected to evidence and his Motion for Mistrial was denied after Officer Griffith testified that, "I had received information that Baird was a major gambler and operating a major

gambling operation in the Pensacola area." The Officer testified about the gambling investigation, his involvement in telephone wiretaps, and the above statement in response to State inquiry. Id at 188. The Court concluded that the testimony was obviously hearsay, that it was improperly admitted, and the State failed to carry the burden of showing that the error was harmless. Id at 188. See, Scott v. State, supra at 273 (statements of police officers were hearsay and caused substantial danger of unfair prejudice); Pulliam v. State, 446 So.2d 1172 (Fla. 2DCA 1984) (comments elicited by prosecutor concerning ongoing drug investigation conducted by State were irrelevant and prejudicial to defendant and constituted reversible error where they implied that defendant was involved in collateral investigation); Black v. State, 540 So.2d 498 (Fla. 4 DCA 1989) (police officer testimony which improperly characterized defendant's activities constituted reversible error).

C. AGENT PINEDA'S COMMENTS AS TO RESPONDENT'S STATE OF MIND AND CHARACTERIZATION OF ACTIONS WAS IMPROPER OPINION TESTIMONY AND IMPEACHMENT OF CHARACTER

The prosecutor elicited inadmissible opinion testimony from Agent Pineda. These comments were prejudicial and it improperly impeached Respondent's character. (R.303-305) The record establishes:

> Q. (Prosecutor): Did you have an opinion from listening to the tapes as to what was occurring on the tapes?
>
> Respondent's counsel: Objection, soliciting opinion testimony.
>
> Court: Overruled.
>
> A. Yes.

Q. And what was that?

A. That Mr. Rendina was soliciting money from Bono.

Q. To pay to DeBock?

A. Yes, to pay to DeBock.

Q. And your opinion is based on the totality of all the tapes?

A. Yes.

Q. There were certain times on the tapes that Mr. Rendina made some statements to the effect that, "It's my attorney's fees". Did you think he was really talking about attorney fees?

A. No, I do not think he was. I think he was being cautious. I do not think he was talking about attorney fees.

Q. The last tape regarding the meeting in DeBock's office, you were asked questions that would be fair to say that DeBock sounded surprised. Did he also sound scared to you?

A. Yes.

Q. Do you have an opinion whether or not Rendina sounded scared on the tape?

A. It was my opinion that he sounded irritated.

(R. 302-304)

Case law clearly established this testimony was error. In Spradely v. State, 442 So.2d 1039 (Fla. 2DCA 1983), the court said that a witness cannot offer an opinion as to the guilt or innocence of an accused person. Id at 1043; See, Farley v. State, 324 So.2d 662 (Fla. 4DCA 1975); Hodge v. State, 7 So. 593 (Fla. 1890) (In trial for murder, the testimony of a witness as to his conclusions from, and understanding of, the conduct and intentions of defendant, is properly excluded.) The most recent case, Gianfrancisco v. State, 15 FLW 2450 (Fla. 4DCA Oct. 12,

1990), establishes that it was error for the police officer to testify to witness' and Defendant's relative culpability. The court said, "Police officers, by virtue of their positions, rightfully bring with their testimony an air of authority and legitimacy". Id at 2450.

Florida Evidence Code Section 90.701 provides:

> "If a witness is not testifying as an expert, his testimony about what he perceived may be in the form of inference and opinion when:
>
> (1) The witness cannot readily, and with equal accuracy and adequacy, communicate what he has perceived to the trier of fact without testifying in terms of inference or opinions and his use of inferences or opinions will not mislead the trier of fact to the prejudice of the objecting party.
>
> (2) The opinions and inferences do not require a special knowledge, skill, experience or training".

In the case of Knight v. State, 512 So.2d 922 (Fla. 1987) the court examined lay opinion testimony under Section 701 and found that it was not admissible. Knight failed to establish that witness McGoogin could not have otherwise communicated his perceptions concerning Hutto to the jury. To the contrary, McGoogin adequately explained to the jury that Hutto "...placed his hand on Knight's hand and started pressing the knife against me". In this case, McGoogins perception of the incident was adequately conveyed to the jury, thus, equipping it with information necessary to draw the inference urged by the defense. There was, therefore, no need to resort to testimony concerning McGoogin's interpretation of the situation. Id at 929.

In the case at bar, Agent Pineda adequately communicated her perceptions and police actions to the referee. There was no need to resort to testimony concerning her interpretation of the

situation. Her opinion was improper comment on Respondent's guilt and state of mind. Further, this testimony improperly impeached Respondent's character. In the case of Lockett v. State, 527 So.2d 959 (Fla. 4DCA 1988) the court held that the officer's testimony that defendant's home was a haven for drug sales, a "rock house", or that her back bedroom was used for drug sales, constituted improper impeachment of character and was extremely prejudicial. Id at 960. See, Pulliam v. State, supra at 113. Therefore, Pineda's testimony was harmful error.

D. THE ERRORS IN ADMISSION OF EVIDENCE WERE INDEPENDENTLY AND CUMULATIVELY HARMFUL

Respondent maintains that the above errors were independently and cumulatively harmful. The improper admission of evidence and the prosecutor's reference in closing argument (R.712, 719-23) had a devastating effect upon the fundamental reliability of the proceeding and the Bar's burden of proof of Respondent's guilt was not demonstrated by clear and convincing competent evidence. See, State v. DiGuilo, 491 So.2d 1129 (Fla. 1986).

The inadmissibility of hearsay evidence and the right to confrontation is not a mere technical rule of evidence. The Supreme Court in other states has so found. In Cowan v. Bunting Gilder Co., 49 A.2d 270 (Penn. 1946), the court said the privilege of confronting witnesses, of cross examining them, of refuting them and of having a record of their testimony, is not a "mere technical rule" within statute which exempts workmen's compensation proceedings from adherence to technical Rules of Evidence, but it is a fundamental right. In Englebretson v. Industrial Accident Commission, 151 Pac. Rptr. 421 (Cal. 1915),

the court held that, though Workmen's Compensation Law authorizes the commission to disregard "technical rules" of evidence, an award cannot be made on hearsay testimony; the rule against hearsay not being a technical rule.

In the Kirkland v. State, 185 So.2d 5 (Fla. 2nd DCA 1966), the court said:

> "It is probable that any one of the above errors may not, in and of itself, constitute reversible error, but when considered as a whole, we are satisfied that the ends of justice require a new trial". Id at 7, citing Varnum v. State, 188 So. 346 (Fla. 1939)

In Varnum the court concluded that:

> "When considering each of the above assignments severally and apart, we may safely conclude that any one thereof would not justify a reversal of the judgment appealed from. But when reviewing all the assignments as a unit in light of the entire record as one single reason for a reversal, the conclusion is irresistible that the plaintiff in error failed to receive such a trial as is contemplated by Section 4 of the Declaration of Rights of the Constitution of Florida. We cannot say that justice and right prevailed in the lower court, but think that the issues here involved should be passed upon by another jury. Id at 351.

Respondent maintains that, in the event fundamental error did not occur through the independent admission of evidence, the cumulative effect of these improprieties denied Respondent a fair and impartial trial.

II. THE REFEREE ERRED IN EXCLUDING EVIDENCE AND RESTRICTING ARGUMENT ON MATTERS OF MITIGATION OF PUNISHMENT OR DISCIPLINE

Respondent filed a Motion to Present Evidence in Mitigation of Punishment prior to the sanction hearing on May 25, 1990. (See Appendix Exhibits #5 and #7). Respondent was advised on the day of hearing that no testimony of character witnesses or evidence in mitigation would be allowed. (Hearing p. 6, 26-27).

This action was in direct violation of referee Moore's pretrial order allowing Respondent the opportunity to present six (6) attorney character witnesses and three (3) judges as character witnesses. (See Appendix Exhibit #1). Further, all other evidence in mitigation was summarily denied by the Referee and it was not reflected in the Report. (Hearing p. 26, 27)

The law is clear in Florida that Respondent has a right to present evidence in mitigation of punishment or disciplinary action. The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983) Consideration of mitigating evidence is appropriate at the sanction stage of disciplinary proceeding and is clearly in accordance with Florida Standards for Imposing Lawyer Sanction. The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1990) Mitigating Evidence may be established in various instances under Section 9.32 of the Florida Standards for Imposing Lawyer Sanctions.

A. CHARACTER AND REPUTATION EVIDENCE

Respondent maintains that his reputation in the community and legal profession should have been considered as evidence in mitigation of punishment. In The Florida Bar v. Jahn, 509 So.2d 27 (Fla. 1987), the court said that Jahn's lack of prior disciplinary history, the fact that no clients were injured, that Jahn's misconduct was directly related to his drug addiction and Jahn's exemplary efforts to rid himself of his chemical dependency, should be considered as mitigating the discipline to be imposed. Id at 287.

In The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965), the court said that evidence of church, social, or civic activities

may be offered by an accused attorney to demonstrate moral fitness but lack of evidence thereof may not be considered as negating fitness to practice or moral character; such activities are not requisite either to admission or continuation of practice of law. In The Florida Bar v. Pavick, 504 So.2d 131 (Fla. 197), the court accepted respondent's testimony that he submitted to an "Alford" Plea because of his family. Specifically, the court found that Pavick had no prior disciplinary convictions, that he had been an exemplary father and family man, and that he participated in community activities.

In the present case, Respondent was denied the opportunity to present substantial character witnesses. A proffer was made by counsel that three (3) attorneys who were former presidents of the Broward Criminal Defense Bar were present to testify along with a circuit judge. (See Appendix Exhibit #7, p. 6, 7)

B. UNREASONABLE DELAY IN PROCEEDING

Evidence concerning the Florida Bar's delay in proceeding in the instant case is properly considered as evidence in mitigation. In The Florida Bar v. Guard, 453 So.2d 392 (Fla. 1984), the court was concerned with the referee's delay in hearing the charges and rendering his report. Respondent alleged that the extended period (two years) during which these charges were pending had disrupted his professional and personal life and served to punish him without due process of law. He concluded that the Complaint should be dismissed. The Bar conceded there was excessive delay on the part of the referee, which might be considered in mitigation, but disagreed that the delay was so egregious as to warrant dismissal of the Complaint. The Court

agreed that dismissal of Complaints would totally frustrate the primary purpose of protecting the public from misconduct of attorneys. Further the court stated, "We are satisfied that we can make clear to referees our dissatisfaction with dilatory hearings of discipline cases short of dismissing the Complaints".

> The Court held that, given excessive delay of referee, the Supreme Court could not accept the Bar's recommended punishment of one year, but accepted referee's recommendation of thirty (30) days suspension followed by a probation period of three years for numerous code violations. Id at 393, 394.

In the case of Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986), the court said there is no express statute of limitations governing attorney discipline proceedings; rather, the Florida Bar has reasonable time after it obtains jurisdiction to proceed. The court found that equitable principles of laches could apply; however, this case involved a delay of only three (3) years, from 1981 to 1984, therefore, Respondent failed to show the requisite elements. Id at 1167. See Florida Bar v. McCain, 361 So.2d 700, 705 (court held that the Bar shall have reasonable time after it obtains jurisdiction to proceed. Although acts occurred three years prior, the Bar proceeded promptly).

In the case of Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978), the court held that:

> "Our ultimate judgment as to the disciplinary penalty to be imposed must not only be just to the public but also must be fair to the accused". Cf. State v. Bass, 106 So.2d 77 (Fla. 1958)
>
> "The totality of the circumstances in this cause, which include the inordinate delay caused by the Bar, no previous record of any disciplinary activity and his good behavior subsequent to the charged incident, mandate that the recommendation of disbarment by the referee be rejected and, in lieu of such penalty, respondent be, and is hereby, suspended for one year, beginning March 2, 1978)". Id at 7.

The facts of Papy involve a six year delay. The offenses upon which the Complaint was based occurred in 1970 and 1971. The grievance hearings were held in 1973 and 1974, and the complaint was filed in 1974. Final hearings were not held until almost two (2) years after the Complaint was filed. During the time prior to and after the filing of the charges, Papy had no record of disciplinary activity. The court noted:

> "The Court is committed to the proposition that disciplinary proceedings should be handled with dispatch, without any undue delay. The responsibility for exercising diligence in the prosecution of disciplinary matters lies with the Bar. Inordinate delays are unfair, unjust and may even be prejudicial to the accused attorney." See Florida Bar v. Randolph, 238 So.2d 635 (Fla. 1970) [Emphasis added.]

Respondent maintains that the extended period of time (not 2 or three years, but 7 years - 1984/1991), like the Papy Court, has seriously disrupted his professional and personal life and served to punish him without due process of law. The Florida Bar's delay in this cause was unreasonable and equitable principles of fairness must apply. Specifically, Respondent's Statement of Facts makes clear that almost every Bar witness testified that time had either erased recollection or it would have been better in 1984/85. (R.63, 64, 401, 310, 90, 91, 224, 12, 473) Respondent should have been allowed to present evidence of delay in mitigation of his punishment.

C. ABSENCE OF PRIOR DISCIPLINARY RECORD AND INTERIM REHABILITATION

This is the first time Respondent was charged with ethical violations. (R.02) The Referee's Report does not reflect the fact of any misconduct during the past seven (7) years. See,

Jahn, supra and Papy, supra, (Lack of prior disciplinary record should be considered as evidence in mitigation of discipline to be imposed).

D. DEBOCK'S PUNISHMENT AND UNIFORMITY IN LAWYER SANCTIONS

Christopher DeBock, Esq. entered a conditional plea of guilty and accepted the Bar's recommendation of a thirty (30) day suspension. (R.48) Respondent maintains that uniformity in discipline is essential in promoting proper standards governing attorney conduct. Equal protection of law requires this. In Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980), the court said that discipline assessed against an attorney should not only protect the public interest, but also be fair to the attorney. Id at 642. In DeBock v. State, 512 So.2d 164 (Fla. 1987), the court said, to protect the public, the Bar is mandated to inquire into an attorney's conduct when even the appearance of impropriety exists. For these reasons, the vast weight of judicial authority recognizes that Bar discipline exists to protect the public, and not to punish the lawyer. Id at 167. Therefore, Respondent's punishment, if any, should be considered in light of DeBock's thirty (30) day suspension and the demonstration of rehabilitation over the past seven (7) years.

In summary, Respondent maintains that the referee's denial of the opportunity to present mitigating evidence and restriction of argument on the issues of (1) character evidence, (2) unreasonable delay in proceeding, (3) absence of prior disciplinary record and interim rehabilitation, and (4) DeBock's punishment and uniformity in sanctions, clearly establishes

error, and a substantial reduction in the two (2) year suspension must be ordered.

III. THE REFEREE ERRED IN IMPOSING DISCIPLINE BASED ON MATTERS NOT CHARGED IN THE COMPLAINT AND AT VARIANCE WITH THE BAR PLEADINGS AND PROOF

> The Referee found Respondent guilty of Count I based upon the finding that, "I am not saying that I am finding you guilty of offering or proposing a bribe to anyone, but I am finding you guilty of this serious conduct of a Code violation of professional responsibility that you have as an officer of the Court. I did not say that Respondent approached DeBock". (R.733,734) [Emphasis added.] The Referee specifically stated:
>
> "This is a rule violation. More or less to the effect that, during the course of his representation of Bono I find that there is sufficient evidence to warrant disciplinary action in that he did not disclose, even though he may have had a responsibility as an officer of the Court to his client, I think he had a greater responsibility, as an officer of the Court to disclose to the proper officials the conduct of his client, in that his client wanted him to influence the Assistant State Attorney, Mr. DeBock". (R.729, 730)

Paragraph seven (7) of the Bar Complaint alleged, "Based on the facts above, [(reference was to paragraphs 1-6)], Respondent has committed the crimes of conspiracy to receive or pay unlawful compensation and bribery".

Paragraph eight (8) of the Bar Complaint alleged, "Based upon the above stated facts", Respondent has violated Florida Bar Integration Rule and Disciplinary Rules. (See Appendix Exhibits #3 and #6)

Respondent contends the "above stated facts" in paragraph eight (8) were not proven in paragraphs one (1) through seven (7). The Referee's findings clearly demonstrate that Respondent did not approach DeBock (R.733, 734); that he did not offer or propose to bribe (733, 734); but that Respondent failed to

disclose his client's conduct and intention to influence Assistant State Attorney DeBock". (R.729, 730)

Respondent respectfully argues that punishment was imposed based upon matters not charged in the Complaint. The Referee's findings were based solely upon proof adduced at trial that related only to uncharged matters first raised by the Referee at trial because the specific violation and facts were not plead and charged in the Complaint. The proof and findings are at variance with the charge and factual allegations in support thereof. Due process of law requires that punishment/discipline not be imposed, or in the alternative, it should be substantially mitigated based upon these circumstances.

A pleading which sets forth a claim of relief must set forth a cause of action. Pleadings, 40 Fla. Jur.2d 68; Rule 1.110(b), Fla. Rules of Civil Procedure. Further, a plaintiff must state a case showing a legal liability and it must be more than a grievance. He must plead factual matter sufficient to apprise his adversary of what he may be called upon to answer, so that the court may, on proper challenge, determine its legal effect. 40 Fla. Jur. 68, p. 89. A Complaint must sufficiently allege ultimate facts which, if established by competent evidence, would support a decree granting the relief sought. Factual allegations concerning the basis for the claim must be stated. However, under this rule (Rule 1.110(b)(2), it is still held that allegations of the Complaint must be sufficient to inform a defendant of the nature of the cause against him. Naples Builders Supply co. v. Clutter Construction Corp,. 152 So.2d 478

(Fla. 3DCA 1963); Dawnson v. Blue Cross Association, 293 So.2d 90 (Fla. 1 DCA 1974); Pleadings, 40 Fla. Jur. 2d 69, p.90, 91.

While it is generally held that the plaintiff may have his day in court, this does not mean that all the attributes of orderly pleading are to be swept aside in the quest of that end. The overriding requirement is that claimant's pleading be sufficiently clear and direct to make it unnecessary for the court to be clairvoyant in ascertaining the nature of the claim. Parker v. Panama City, 151 So.2d 469 (Fla. 1 DCA 1963)

The law is so well settled as to require no citation of authority that the issues to be tried are fixed by the pleadings. Once so fixed, the issues may be changed only by (a) stipulation of the parties, (b) consent or acquiescence of the parties, (c) motion and order, or (d) by amendment, express or implied, to conform to the evidence. Rule 1.190, Florida Rules of Civil Procedure. Provident National Bank v. Thunderbird Associates, 362 So.2d 790 (Fla. 1 DCA 1978); First National Bank v. Dent, 350 So.2d 481 (Fla. 1 DCA 1977); Smith v. Mogelvang, 432 So.2d 119 (Fla. 2 DCA 1983).

Two cases deserve mention. In The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), the respondent argued that the referee's finding of guilt was erroneous because it was not based on matters charged in the Complaint, but on an unrelated matter which was first raised by the referee at the hearing. Vernell maintained that the Complaint only charged him with conflict of interest and failure to disclose, yet the referee's recommended discipline was based on his finding that Vernell had advised his clients that he would help vacate their plea if they received a

harsh penalty. Id at 475. Thus, the referee found him guilty of misconduct not charged in the Complaint. The court rejected the argument because the referee's finding was based on allegations of misconduct presented by the Complaint. Id at 475. The Complaint put Vernell on notice of both the charge and the facts underlying that charge. Under such circumstances, respondent cannot be heard to complain that he was never charged in the Complaint. Id at 476. Pertinent portions of the Complaint stated:

> [32.] "On or about the day of the trial on the above mentioned charges, Respondent told Shannon and Martin Thomas that he had a conflict of interest due to his relationship with Phil Johnson, and advised them to plead guilty to the charges against them".
>
> [33.] "Respondent advised Shannon and Martin Thomas that, if the sentence imposed on them was not what they expected, they could probably void the guilty plea by claiming a conflict of interest on Respondent's part". Id at 475, 476.

In the case of Gandy v. Department of Offender Rehabilitation, 351 So.2d 1133 (Fla. 1 DCA 1977), the court held that disciplinary suspension would be quashed in light of procedural problems of due process proportions where the hearing examiner relied on evidence which had been objected to and was outside the scope of the stipulated issues. Id at 1133. The court found that evidence was admitted improperly, and as such, went beyond the scope of the stipulated issues. Further, the court noted:

> "It is axiomatic that neither a hearing examiner nor a court may, in the absence of consent, either express or implied, consider evidence received over objection which is outside the issues and then rely upon that evidence as a basis for his or its ultimate order. Further, when the issues have been narrowed by stipulation and a party thereby lulled into responding to evidence adduced over his objections outside the

issues, such evidence may not be used to his detriment". Id at 1134.

In the case at bar, the Referee considered evidence received over Respondent's objection which was outside the issues framed by the pleadings. The Court relied on that evidence as a basis for its findings and proposed Final Judgment. Respondent concludes that due process compels this Court not to use this variance to Respondent's detriment with respect to judgment and discipline.

IV. THE REFEREE ERRED IN FAILING TO EXCLUDE INFORMANT TESTIMONY AND NOT DISMISSING THE CAUSE, OR IN THE ALTERNATIVE, TO PROPERLY CONSIDER EXCESSIVE GOVERNMENTAL INVOLVEMENT IN MITIGATION OF PUNISHMENT

Bono faced a mandatory minimum drug trafficking sentence under Florida Statute 893.135 (1983). (R.93) The Substantial Assistance Statute 893.135(3)(1983) provided:

> "The State Attorney may move the sentencing court to reduce or suspend the sentence of any person who is convicted of a violation of this section and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, co-conspirators, or principals."

Respondent was, in no way, shape or form, an "accomplice, accessory, coconspirator or principal", in Bono's crime. (R.102-104) The 1984 plea agreement with Bono constituted prosecutorial abuse and was illegal. Campbell v. State, 453 So.2d 525 (Fla. 5 DCA 1984); State v. Werner, 402 So.2d 386 (Fla. 1981).

In State v. Taylor, 411 So.2d 993 (Fla. 4 DCA 1982), the court said:

> "However, as part of the legislative scheme to stem trafficking in drugs, the Legislature authorized trial courts to mitigate a mandatory sentence upon motion by the State Attorney if the convicted person provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories,

> co-conspirators, or principles. Section 893.135(3), Florida Statute (Supp. 1980). No further authority is reposed in the trial court to mitigate a mandatory minimum sentence in trafficking cases". Id at 994.

Specifically, in the case at bar, the bribery idea originated with Bono; Bono's sentence was mitigated for testimony against Rendina, both in a criminal case and Bar proceeding; the mandatory $250,000 fine was waived; and, Bono received probation and withheld adjudication. (R.325, 326, 421)

The above governmental conduct to which The Florida Bar was a party, establishes entrapment as a matter of law and violations of Respondent's due process rights. The record reflects Florida Department of Law Enforcement Agent Solowsky's testimony:

> "We thought we should bring it to a head and offer money to the Assistant State Attorney directly, not through the intermediary, like Rendina, and at that particular time, I told him [Bono] to throw it on the table, in front of the State Attorney." (R.237)

The Florida Supreme Court addressed the question of entrapment in the case of Cruz v. State, 465 So.2d 516 (Fla. 1985). The court said:

> "Entrapment has not occurred as a matter of law where police activity (1) has at its end the interruption of a specific ongoing criminal activity; and (2) utilizes means reasonably tailored to apprehend those involved in the ongoing criminal activity." Id at 522.

The court made it clear that the first prong of the test exists as a check on police virtue, testing, that is, police activities seeking to prosecute crime where no such crime exists but for the police activity engendering the crime. Cruz at 522. Such a legitimate concern seeks to prevent the police from engendering the very crime which they seek to prosecute.

> "Police must fight this war, not engage in the manufacturing of any hostilities." Cruz at 522.

The test's second prong focuses on the technique utilized by the police. The Cruz court quoted the Model Penal Code 2.13 (1962) in formulating a test as to whether police activity is permissible:

> "Consideration...include whether a government agent induces or encourages another person to engage in conduct constituting such offense by either: (a) making knowingly false representations designed to induce the belief that such conduct is not prohibited; or (b) employing methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it." Cruz at 522.

Bono's conduct clearly fails to establish the first prong of the threshold test as announced in Cruz, and it shows that Bono was "virtue testing", as denounced in Cruz, in an effort to obtain a reduced sentence. This conduct fails the second prong of the Cruz test: "Lack of reasonably tailored means to apprehend those involved in ongoing crimes".

In the recent case of Bowser v. State, 14 FLW 2843 (Fla. 2DCA December 22, 1989), the court held that the police activity amounted to entrapment as a matter of law. In Bowser, detectives approached defendant while hitchhiking and attempted to engage him in a drug transaction involving the sale and delivery of a controlled substance. The detectives testified at the hearing on the Motion to Dismiss that they had previous success in developing drug cases from hitchhikers. During the course of defendant's encounter with the police, the officers felt that,

> "[A]n atmosphere or environment existed in the car at that time which led them to believe defendant would be receptive to the object of their desire - a drug transaction". Id at 2843.

While the Cruz decision recognizes that its objective test analysis is not founded on constitutional principles, it does parallel a due process analysis. Cruz, 465 So.2d at 520, n.2 As the Cruz court stated:

> "The objective view is a statement of judicially cognizable considerations worthy of being given as much weight as the subjective view". Cruz, Supra [Emphasis added.]

As the New Jersey Supreme Court pointed out in State v. Molnar, 81 N.W. 475, 410 A.2d 37 (1980),

> "[T]he objective test is utilized to prevent conduct that tends to impugn the integrity of a court. Those matters are such that they are exclusively within the power of a court to determine as a matter of law". Id at 2843. [Emphasis added.]

Respondent also argues that his due process rights were violated through illegal informant activity. Two Florida cases bear close scrutiny. In State v. Glosson, 462 So.2d 1082 (Fla. 1985) the police utilized a confidential informant who received a contingent fee conditioned upon his cooperation and testimony in criminal prosecutions. Specifically, he was to collect his contingent fee out of civil forfeitures. The Supreme Court found that:

> "Wilson had to testify and cooperate in criminal prosecutions in order to receive his contingent fee from the connected civil forfeiture, and criminal convictions could not be obtained in this case without his testimony. We can imagine few situations with more potential for abuse of a defendant's due process right. The informant here had enormous financial incentive not only to make criminal cases but also to color his testimony or even commit perjury in pursuit of the contingent fee. The due process rights of all citizens require us to forbid criminal prosecutions based upon the testimony of vital state witnesses who have what amounts to a financial stake in criminal convictions". Id at 1085.

The second case, Hunter v. State, 531 So.2d 239 (Fla. 4 DCA 1988), involved a substantial assistance agreement under the 1985 edition of F.S. 893.135(3). This provision was for "vertical" substantial assistance only. The Fourth District affirmed the dismissal of charges against Hunter stemming from a drug transaction instigated by an informant where the assistance was "horizontal". Hunter, Id at 242.

> "...The facts of this case are at least as compelling as those relied upon by the Supreme Court in Glosson, and the agreement with Diamond is clearly condemned by the Supreme Court in Glosson as an abuse of governmental power. As in Glosson, the informant here had an invaluable stake in making new cases: his own freedom. In our view such freedom constituted much more of an 'enormous incentive' to 'color his testimony' than the strictly monetary arrangement in Glosson".

The court went further, on page 243, to address specifically the question of horizontal substantial assistance.

> "...We believe the action of the law enforcement officials here, where the informant was authorized to create new criminal activity in order to secure his freedom, rather then merely assist in apprehending those who had already participated in a crime crossed the line drawn by Glosson wherein the informant was paid 'to manufacture, rather than detect, crime'".

The decision in Hunter was handed down after the enactment of the 1987 revision of F.S. 893.135(3), which authorized horizontal substantial assistance. The Fourth District certified, as an issue of great public importance, the question of whether Glosson is violated by an agreement whereby a drug trafficker will receive a substantially reduced sentence in exchange for setting up new drug deals and testifying for the State. See, State v. Embry, 15 FLW 1500 (Fla. 2 DCA June 8, 1990) (informant who initiated and negotiated drug deal with defendant violated due process).

Respondent maintains that the evolving standards of due process in Florida apply, not only in civil and criminal trials, but in Bar proceedings as well. Excessive governmental involvement through informant Bono, who originated the idea and carried the plan to fruition with Florida Department of Law Enforcement, must be considered in mitigation of Respondent's punishment in the present Bar disciplinary action.

V. THE DISCIPLINE IMPOSED, IF ANY, SHOULD BE SUBSTANTIALLY LESS THAN THAT IMPOSED BY THE REFEREE

Respondent's Brief details issues of improper admission of evidence, improper exclusion of mitigating evidence, variance and due process violations with respect to informant Bono acting as agent for the governmental authorities. All of this requires punishment substantially less than the two (2) years recommended by the referee.

The following cases are most instructive and relevant to discipline, if any, in the instant case.

NINETY (90) DAYS OR LESS

The Florida Bar v. Saphirstein, 376 So.2d 7 (Fla. 1979): (Attempting to influence referee's decision in a disciplinary matter and knowingly filing a false response accusing referee of lying is prejudicial to the administration of justice and, as aggravated by a false response to Bar's Complaint, warranted attorney's suspension for sixty (60) days).

The Florida Bar v. Colee, 533 So.2d 767 (Fla. 1988): (Respondent found guilty of "attempting to sell information concerning fraud on the court to another attorney"; the Supreme Court held it was the duty of the lawyer to inform the court as to any fraud, rather than sell the information to the lawyer who lost the case. Respondent suspended for ninety (90) days).

The Florida Bar v. Jackson, 490 So.2d 934 (Fla. 1986): (Referee found respondent lawyer contacted an attorney and requested that his clients be paid $50,000.00 for testimony in a pending case. The Supreme Court approved the referee's recommendation of ninety (90) days suspension after considering respondent's personal history.)

The Florida Bar v. Stoskopf, 513 So.2d 141 (Fla. 1987): (Respondent convicted of six misdemeanors in federal court. The Supreme Court held that misdemeanor convictions in federal court for failing to report financial interest in foreign band account warrant ninety (90) day suspension followed by period of probation.)

The Florida Bar v. Weintraub, 528 So.2d 367 (Fla. 1988): (Supreme Court held attorney's possession and delivery of controlled substance warrants ninety (90) day suspension and two-year probation. Note: This was a second-degree felony to which the respondent admitted guilt.)

The Florida Bar v. Pascoe, 526 So.2d 912 (Fla. 1988): (Supreme Court held placement of advertisement ethically improper; nolo contendere plea to misdemeanor possession of less than 20 grams of marijuana; making of comments concerning federal court action that were interpreted as improper criticism; and failure to timely handle criminal appeal, warrants public reprimand and three years probation.)

NINETY ONE (91) DAY SUSPENSION

The Florida Bar v. Shupack, 525 So.2d 1139 (Fla. 1988); (Supreme Court held fraudulently recording purchaser's mortgage, issued to third parties, before vendor's mortgage, warrants ninety-one day suspension but does not warrant six-month suspension despite prior misconduct, where that misconduct occurs within three months of conduct on which discipline is based, where private practice is entered only a few months prior to difficuties, and where no difficulties occur for five and one-half years.)

The Florida Bar v. Grable, Case No. 72,615: (Supreme Court suspended attorney for ninety-one (91) days for a felony bribery charge, to which respondent pleaded guilty.)

The Florida Bar v. Fischer, 14 FLW 425 (Fla. Sept. 8, 1989): (Supreme Court suspended respondent for ninety-one (91) days for concealing or knowingly failing to disclose that which he was required by law to reveal. Respondent perpetrated fraud upon the court.)

ONE (1) YEAR SUSPENSION

The Florida Bar v. Denker, 479 So.2d 73 (Fla. 1985): (Respondent pleaded guilty to "soliciting a bribe". Respondent was suspended for one year and allowed to continue to represent existing clients.)

The Florida Bar v. Capodilupo, 482 So.2d 1367 (Fla. 1986): (Respondent pleaded guilty to two federal misdemeanors of obstruction of the U.S. Postal System and was sentenced to one year in jail; the Supreme Court affirmed the referee's recommended one-year suspension.

The Florida Bar v. Kaufman, 531 So.2d 152 (Fla. 1988): (Respondent pleaded guilty to two felonies and one misdemeanor; possession of cocaine, methaqualone and marijuana; the Supreme Court upheld a oneyear suspension.)

CONCLUSION

In conclusion, the Respondent contends that the admission of certain evidence denied him a fundamental fair trial; that the nature of the governmental misconduct violated due process of law; that there exists a material variance between the charged misconduct and the facts established by the evidence, which required a finding of not guilty; that it was fundamental error to exclude evidence of mitigation denying the Respondent a full and fair hearing as to appropriate discipline; and, that the discipline in this case, if any, should be substantially less than that recommended by the Referee.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished to Jacquelyn P. Needelman, Bar Counsel, The Florida Bar, Rivergate Plaza, Suite M-100, 444 Brickell Avenue, Miami, FL 33131 this 9th day of November, 1990.

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