SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD F. RENDINA,

Respondent.

SUP. CT. NO: 73,545

CROSS REPLY BRIEF OF RESPONDENT

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PREFACE

For purposes of this Brief, the Respondent, Richard F. Rendina, will be referred to as "Respondent" or "Rendina". The Complainant, The Florida Bar, will be referred to as "The Florida Bar" or "Bar". Certain abbreviations will be utilized:

R - refers to transcript of trial before Referee, the Edward Swanko, on March 13, 14 and 16, 1990;

SR - refers to transcript of the sanction hearing held on May 25, 1990;

AB - refers to the Florida Bar Answer/Reply Brief filed December 26, 1990;

STATEMENT OF THE CASE AND FACTS

The Florida Bar submitted an Answer/Reply Brief which attempts to dispute the Respondent's Statement of Facts and the detailed witness testimony presented in his Cross-Petition. Ironically, The Florida Bar never addressed these facts at the time their initial brief was filed, which essentially was limited to the evidence of tape recorded conversations between Bono and Respondent, and the May 31st statement of Debock and Respondent's Alford plea in the Broward County criminal case. Therefore, it is Respondent's contention that the transcript of the trial before referee Edward Swanko on March 13, 14 and 15, 1990 and the final hearing, the discipline hearing, on May 25, 1990, provides the best evidence, and only evidence which should be considered by this Honorable Court in making its determination of the facts in this case.

In his initial brief, the Respondent carefully and exhaustively demonstrates that a drug trafficking defendant and police officer, Thomas Bono, who was facing a mandatory prison sentence, originated the idea of "setting up" his criminal lawyer in the course of Respondent's representation of this client. Bono hoped to receive probation for his efforts.

The Florida Department of Law Enforcement, with the indispensible assistance and cooperation of the drug trafficking defendant-turned-informant, instructed Bono to "throw down money" in the Broward State Attorney's Office in the presence of the Assistant State Attorney, Debock and the Respondent. This occurred on May 30, 1984 during a status conference with the defendant, Bono and counsel. Both lawyers rejected Bono's proposed illegal conduct and immediately terminated all further plea negotiations with this defendant.

Later that day, May 30, 1984, law enforcement officers and specially appointed prosecutor, Marshall Hall, approached the Assistant State Attorney, Mr. Debock, at his private home, and coercively instructed his cooperation against defense attorney, Rendina. Debock denied both his criminal wrong doing and Rendina's alleged illegal involvement in the above described acts. During the evening of May 30th and into the morning of May 31, 1984, Mr. Debock reflected upon the gravity of the situation he was accused of, "[A]s his life, career and jail were passing before him." (R 33, 34) Debock did not sleep that night, rather, he resorted to heavy dosages of a prescription drug, Valium, and he drank alcohol. Debock went to work the next morning. Various witnesses (Williams and Bogenshutz) who knew Debock as a

prosecutor testified at trial that they observed Debock's unusual demeanor and condition on the morning of May 31, 1984. (R 195-197, 546-549)

On the morning of May 31, 1984, Chief Assistant State Attorney, Ralph Ray, engaged Debock in a discussion in Ray's office about defense attorney Rendina. The transcribed statement of Debock on May 31, 1984, subsequently recanted by DeBock, was the only evidence offered and relied upon by The Florida Bar to prove that Respondent offered or promised to pay money to an official acting in his lawful capacity. (R 711) Other evidence of The Florida Bar merely pertained to conversations that Respondent had with the informant, without the presence of a State Attorney, and only upon initiation of the conversation by informant Bono.

At trial, the referee admitted the May 31, 1984 statement as substantive evidence under an exception to the hearsay rule. This evidence was objected to by Respondent. Debock testified that the statement was, "[C]ertainly subject to being untruthful and not accurate (given his state of mind)." (R 40,41, 63-65) Other testimony showed that Debock also told Assistant State Attorney Christopher Pole, "[T]hat after the statement (May 31), I saw Chris on occasion, and we used to play football and go to the same gym. He told me that the evening before he had been up all night, and he had taken a great amount of some type of drugs, that when he went to work, he barely remembered going, that he gave a statement, but does not remember what he said. Debock stated that he read the statement and he told me that what he (Debock) said was not accurate. Basically, the statement as a

whole was inaccurate and not the truth." (R 590) Even Debock's lawyer, David Damore, testified that, "[T]he primary reasons were that I felt that the statement Debock would make would be inconsistent with a prior statement given in May, with the State Attorney and Florida Department of Law Enforcement. These concerns would potentially manifest in a perjury and inconsistent statement prosecution." (R 594). The Florida Bar presented witnesses who did not recall certain facts because time had erased their memory. (R 63,64,401, 310, 90, 91, 224,473)

The Respondent introduced substantial evidence of a dispute over the amount of attorney fees which were paid by Bono. Certain monies were pledged as attorney fees, and allocated towards the posting of Bono's bond at the beginning of Respondent's representation of Bono. (R 668) Other witnesses testified about the facts and difficulties which were known to them during Rendina's representation of this particular client. (R 574)

At the conclusion of the trial, the referee stated "[I]t looks like he (Bono) was setting you up right along. Yes, in fact, he said that he knew exactly what to do, and here, you have to suffer the consequences now." (R 702) The referee then made the following findings of fact:

> "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 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]

Previous to the above finding of fact, referee Swanko 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 to influence the Assistant State Attorney, Mr. Debock." (R 729, 730) [Emphasis added]

The Florida Bar and Respondent disagreed with the nature of the referee's finding of Repondent's guilt (as to the proof and matters charged in the Bar's complaint) and with the issue of discipline. The referee requested that both parties submit proposed reports. The following month, the Respondent filed a Motion to Set Hearing on the above matter, which the court granted. (See AB Appendix VIII). In his motion, the Respondent requested the opportunity to present argument, both written and oral, on the matter of discipline.

The final hearing, a sanction hearing, was held on May 25, 1990. Respondent submitted specific written pleadings and briefs (memoranda of law) on matters of variance and mitigation evidence. (See Cross Petition, Appendix Exhibits 5 and 6) The Respondent further informed the Court that certain judges and character witnesses were present for the sanction hearing and they wished to testify as to Respondent's character. Contrary to referee Moore's previous ruling which, allowed the Respondent this opportunity to present character evidence, the referee informed Respondent that no evidence would be taken or heard. The referee then executed The Florida Bar's Proposed Report of

Referee recommending a two (2) year suspension of Respondent from the practice of law.

ARGUMENT

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

A. DEBOCK'S MAY 31 HEARSAY STATEMENT WAS INADMISSIBLE AS SUBSTANTIVE EVIDENCE.

The Florida Bar disputes the Respondent's contention of error in the introduction of evidence. It is well settled that a referee's findings of fact should be accorded substantial weight and should not be overturned unless clearly erroneous or lacking in evidentiary support. Rule 3-7.6 (K)(1) of the Rules of Discipline; The Florida Bar v. Hawkins, 444 So.2d 91 (Fla 1984); (See AB p.10)

In the instant case, the witness, Chris Debock, testified at trial as a witness for The Florida Bar. It seems apparent that the Bar elicited facts which were not consistent with its anticipated proof at trial. Specifically, Debock testified that he did not recall the facts of what occurred between Bono and Respondent; that he did not recall Rendina trying to bribe him; that he recalled having some conversations with Rendina regarding the disposition of the Bono case; and, that Debock had a vague recollection of Bono trying to offer him money on May 30, 1984. (R 20,30,32,46,52,54,58,59)

Respondent maintains, contrary to The Florida Bar, AB at page 10 and 11, that Debock was an available witness who testified at trial. The referee's determination that Debock had suffered a lack of memory of the subject matter of his statement

so as to destroy his effectiveness as a witness at trial, was clearly erroneous and lacking in evidentiary support, in light of the above testimony and witness Debock's clear expression that, "[G]iven his state of mind and condition, it (the May 31st statement) was certainly subject to being untruthful." (R 40-41,63-65) Debock's testimony was clear that he did not recall giving the statement, but what he did recall was that the facts and subject matter of the statement were not truthful. The fact that the referee failed to consider all of the testimony sufficient to demonstrate that Debock testified as an available and effective witness, was clearly erroneous and not supported by the evidence.

Second, the referee ruled that the May 31st statement was against the declarant's (Debock) interest, and admissible under Florida Statute 90.804(2)(c). This action constituted an abuse of discretion.

The Florida Bar contends that Debock made admissions against his and Respondent's interests. And, that Debock's statement certainly subjected him (Debock) to liability as he admitted that he agreed to accept monies improperly. (See AB page 12.)

Respondent contends that Debock inculpated Rendina, not himself. The extent to which Debock actually inculpated himself was insignificant in light of law enforcement's express desire to extract statements from Debock which would seriously incriminate Respondent. Law enforcement's purpose in visiting Debock at his home on May 30, 1984 was not so much for Debock to inculpate himself (as the tape of the May 30 meeting in the State Attorney's Office showed Debock to reject any illegal offer), but

to gain information from Debock that Rendina approached him and offered or proposed a bribe to a State Attorney. Debock was, for all intents and purposes, the desired witness for the State. (Refer to Prosecutor Hall's testimony p. 185, 165 [Hall felt Debock was less culpable)]. Therefore, the fact that Debock minimally inculpated and even exculpated himself on May 31 (where certain portions of the May 31 statement actually exculpate Debock and indicate that he refused any proposed offer), pales in significance to the Florida Department of Law Enforcement's real and intended objective, a prosecution of Rendina.

Before a statement can be admitted under Section 90.804(2)(c), the Court must determine the nature of the declarant's interest involved, the extent to which the interest is implicated, the circumstances surrounding the giving of the statement, and the lack of motive or desire to fabricate the statement against interest. In the present case, the referee failed to make a determination and assessment of the above factors. Therefore, the May 31 statement should not be considered reliable. See Brinson v. State, 382 So.2d 322 (Fla. 2DCA 1979); State v. Smith, 15 FLW 59 (Fla. Dec 21, 1990).

In the case of Peninsular Fire Insurance Co. v. Wells, 438 So.2d 4 (Fla. 1DCA 1983), the court held that an out-of-court statement made by vessel's captain that vessel's owner was involved in a drug smuggling conspiracy was not a statement against interest, and thus was inadmissible hearsay. Peninsular claims that the trial court reversibly erred by sustaining Wells' hearsay objection.

The Court said that Statute 90.804(2)(c) encompasses declarations against penal interest. Citing Brinson, at 322. Further, the Court said that "[W]e do not agree that Singleton's statement qualifies as a declaration against penal interest within the meaning of the above provision of the Evidence Code."

> We do not believe that it can be fairly said that a person in declarant Singleton's position would not have made the statement described above unless he believed it to be true. Declarant Singleton had been returned from Texas and was in custody on account of the charge of the theft of the vessel. Why not attempt to distract attention from himself by fabricating a drug smuggling conspiracy with the theft victim as the mastermind? The theory supporting admissibility of declarations against penal interest, i.e., the inherent reliability of such statements by reason of the lack of motivation of the declarant to fabricate, is absent in this case. The preferred testimony was inadmissible hearsay and the trial judge so ruled." Id at 54.

Respondent maintains that the twenty-four (24) hour period from the May 30th Bono/Rendina/Debock meeting (where Debock rejected Bono's offer), the confrontation by law enforcement and coercive threats made to Debock while at his home that same evening, and the period of reflection extending into the morning of May 31, 1984, demonstrates substantial grounds for the inherent unreliability of the statement. At page 13 of the Bar's Answer Brief, the Bar contends at page 13, "[T]he statement made by Debock was close in time to the events and, as it was against his interest, it is illogical to believe he created the statement." Respondent contends that it was close in time to the day before, May 30, where Debock denied that he accepted any offer or that Respondent proposed an offer. Debock's change in testimony on May 31 is completely logical. The Respondent contends that the proponents for the introduction of the statement would have this Court disregard and reject the

requirements of the evidence rules and due process of law; namely, that the statement bear a sufficient indicia of reliability where a witness is found to be unavailable. Second, the declarant's statement should not be subject to the pressures and attendant coercive influences law enforcement created. It can hardly be said that Debock gave this statement of his own free will; rather, his drug-influenced condition and motive to fabricate (inculpate Rendina to distract attention from himself) in order to lessen the seemingly grave consequences he faced, caused him to say what he did.

The Florida Bar asserts, at page 14 of its Answer Brief,

> "[A]dditionally, being confused does not cause one to make up statements which are untrue and against one's own interest. Debock clearly testified that he had no knowledge of the contents of the May 31, 1984 statement. Debock's May 31, 1984, sworn statement was given one day after Thomas Bono tried to give cash in Debock's office at the State Attorney's Office. Debock refused the cash and became upset. Respondent also became upset. One day later, the facts were fresh in Debock's mind."

> Further, the Bar stated, on page 11 of its Answer Brief, "Debock's testimony was clear that he blocked the incident out of his mind (referring to the May 31 statement) and he had no recollection of any of the matters."

Respondent is unable to determine what is The Florida Bar's position as to Debock's state of mind. The allegations contained in pages 11 and 14 are absolutely inconsistent.

The Respondent contends that the facts were not fresh in the mind of Chris Debock on the morning of May 31, 1984. Further, the Respondent disputes the Bar's assertion that, "[B]eing confused does not cause one to make up statements which are untrue and against one's own interest." On the contrary, the testimony has established that certain factors, in addition to

excessive indulgence in drugs and alcohol the night before, lack of sleep, coercive and threatening law enforcement tactics concerning jail, career and life, and Debock's strong desire to remain at liberty, as a practicing attorney, clearly point to the obvious conclusion, not a confused notion, that Debock had substantial self-interest, and there exists an inherent lack of reliability in the accuracy of the subject matter of the May 31 statement. Debock said so himself. (R 40,41,65)

The Florida Bar asserts "[H]ow could he (Debock) have created such facts that were also substantially corroborated by Bono's testimony and the taped conversations between Bono and the Respondent. See AB at p. 13,14. Respondent now cites Bono's specific testimony:

> "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]

Later Bono objected to the amount of attorney's fees, stating:

> "I firmly believed at this time (May 30) that the money was not going to Debock. I remember my feelings on that day precisely." (R 385) {Emphasis Added}

Agent Solowsky's testimony completes the Respondent's point:

> "We thought we should bring it to a head and offer money directly to the Assistant State Attorney directly, not go 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. (R 237) [Emphasis Added]

The cases of LeCroy v. State, 533 So.2d 750 (Fla. 4DCA 1988) and Gillis v. State, 518 So.2d 92 (Fla. 3DCA 1988) are clearly applicable. LeCroy stands for the proposition that the statement

made by a witness was not against the witness's interest. In the present case, Debock's May 31 statement was not reliable, nor was it a "true" statement against interest, as contemplated by the rules. Therefore, it was not admissible as a statement against the declarant's interest. The Gillis case stands for the proposition that a statement made by a co-defendant during police custodial interrogation, inconsistent with his testimony at trial cannot be used as substantive evidence. In the present case, the Bar considered Debock's trial testimony different from that of his May 31 statement and it was not consistent with The Florida Bar's anticipated proof at trial. Therefore, the introduction of the statement as substantive evidence was error.

The Respondent would cite one more case of recent publication where the Florida Supreme Court made certain observations about the Evidence Law:

In the case of State v. Smith, 15 FLW 659 (Fla. December 21, 1990), the court held that prior statements of the witness were not admissible as substantive evidence given during "other proceedings", where statements were made under oath to prosecutor and deputy sheriff in the presence of a court reporter. The facts of Smith follow: Witness, Josette Estes, Smith's stepdaughter, cooperated with the authorities and gave numerous statements to investigators about the homicide. Appellant claimed that Este's testimony should not have been admitted as substantive evidence.

The court said there can be no question that evidence of a prior inconsistent statement offered as impeachment is admissible only for that purpose unless it is independently admissible on

other grounds. Dudley v. State, 545 So.2d 857 (Fla. 1989). Such evidence generally is hearsay and usually does not satisfy the demands of reliability necessary to prove an essential element of a crime or defense. The purpose of admitting into evidence prior inconsistent statements is to test the credibility of a witness whose testimony was "harmful to the interest of the impeaching party." Brumbley, 453 So.2d at 385. That purpose is disserved when hearsay evidence is used as substantive evidence of guilt. Using the guise of impeachment to introduce hearsay testimony as substantive evidence is "little more than a thinly veiled artifice to place before the that which would be otherwise inadmissible." Id at 662. See Kingery v. State, 523 So.2d 119 (Fla. 1DCA 1988) "[I]n the event a witness statement meets the criteria for adverseness, his prior inconsistent statements are admissible for impeachment purposes, but may not be used as substantive evidence."

The Florida Bar cites the case of The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986) for the proposition that a referee is not bound by the technical rules of evidence. This case is inapplicable to the present proceeding since the court in Vannier was persuaded that the hearsay in question was adequately authenticated and its reliability established. Id at 898. Further, the court said:

> "(T)his hearsay evidence is independently corroborated by direct evidence from the Cazares, the State Attorney and lawyers representing other clients as to how Vannier obtained employment and access to information concerning the litigation with the church." Id at 298.

In conclusion, the Respondent maintains that the May 31 hearsay statement of Debock was not established to be reliable,

given the circumstances influencing the statement and Debock's drug-induced state of mind and motive to fabricate, nor was the statement corroborated by independent evidence. The interrogation by Florida Department of Law Enforcement was neither regulated or regularized, and it occurred without the presence and assistance of counsel. Further, the nature of Debock's hearsay statement should not satisfy the demands of reliability necessary to prove an essential element of The Florida Bar's case - unlawful offer or promise by Respondent to an official in his lawful capacity. Therefore, the referee failed to make an adequate assessment and determination of the facts surrounding the value and circumstances of this particular evidence as a condition of admissibility, and, its introduction into evidence prejudicially influenced the referee's determination of guilt and imposition of two (2) years discipline.

B. RALPH RAY'S TESTIMONY WAS PREJUDICIAL HEARSAY.

The Florida Bar argues in its Answer Brief, at page 15,

> "Ralph Ray, Chief Assistant State Attorney, properly testified to statements voluntarily made by Debock to him verbally on May 31, 1984, regarding the fact that Respondent had, on several occasions, offered Debock some money regarding his handling of the Bono case."

The Respondent contends that this testimony is clearly hearsay evidence, and the referee admitted such because of his previous ruling that Debock's May 31 transcribed statement to Florida Department of Law Enforcement was substantive evidence. Again, the court failed to make a determination or assessment of the circumstances surrounding Debock's making of the statement to Ray. Second, the Respondent would point out that Debock's

statement to Ray was not against Debock's penal interest. Rather, the statement was against the penal interest of Respondent.

Ray's testimony was inadmissible as substantive evidence of guilt and it was not independently corroborated. Further and most importantly, Debock's entire trial testimony established that no bribe occurred as the referee found.

In the recent case of State v. Baird, 15 FLW 613 (Fla. November 30, 1990) which reversed the First District Court of Appeal in 553 So.2d 187 (Fla. 1DCA 1989), and cited in Respondent's Cross Petition at page 43, which was filed prior to the Supreme Court decision, the Court said:

> "The hearsay rule does not prevent a witness from testifying as to. What he has heard; it is rather a restriction on the proof of fact through extra judicial statements." Id at 614.

Further, the Court noted.

> "However, we cannot agree that the State has failed to establish that the error was harmless beyond a reasonable doubt under State v. DiGuilio, 491 So.2d 1129 (Fla. 1986). From our review of the record, there is no reasonable probability that the verdict was affected by this testimony." Id at 615.

In the present case, Respondent contends that a review of the record in the case clearly shows that Ray's substantive testimony carried a "reasonable probability" that the referee's verdict was affected by the challenged testimony. Therefore, the referee erred in considering this evidence.

C. AGENT ROSEMARY PINEDA'S TESTIMONY WAS IMPROPERTLY ADMITTED INTO EVIDENCE

The Florida Bar, for the first time, now contends that Agent Pineda was an expert and properly qualified by the Court to testify as an expert. See AB, at page 16. The Respondent

contends that The Florida Bar's argument is ludicrous and unsupported by the evidence.

First, The Florida Bar never offered Pineda as an expert witness in law enforcement. (R 302-304) Second, the referee never determined that Pineda was an expert - much less, what area of law enforcement or investigation under which she would qualify. See Florida Evidence Code, 90.702. Third, The Florida Bar did not elicit Pineda's testimony at the time of trial as an expert witness qualified to give an expert opinion. Therefore, the Respondent contends that further evidentiary error has been demonstrated.

In the case of Mills v. Redwing Carriers, 127 So.2d 453, 456 (Fla. 2DCA 1961) the Court said:

> "The opinion of an expert should be excluded where the facts testified to are a kind that do not require any special knowledge or experience in order to form a conclusion, or are of such character that they may be presumed to be within the common experience of all men moving in ordinary walks of life."

D. HARMFUL ERROR MUST APPLY

The Respondent cannot imagine stronger facts demonstrating harmful evidence error under the applicable caselaw standards. State v. Diguilo, 491 So.2d 1129 (Fla. 1986) The effect of these alleged errors totally undermined the reliability of the proceeding and confidence in the fairness and correctness of the trial's outcome. Respondent cites Finding number five (5) of the referee in his report.

> "Between February 1 and May 31, 1984, Respondent engaged in discussions with his client, Thomas Bono, that gave the impression that the Respondent was attempting to bribe the assistant state attorney on the case." {Emphasis Added}

Finding Six (6) of the report stated:

> "Christopher Debock, the Assistant State Attorney in the case, gave a sworn statement on May 31, 1984 to agents of the Florida Department of Law Enforcement that he had discussions with the Respondent wherein the Respondent's client would receive a favorable sentence in exchange for payment of monies."

Clearly, the inadmissible testimony was reflected in the referee's and was material to the referee's findings of fact and imposition of two (2) years suspension as discipline.

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

The Florida Bar correctly answers that the Respondent filed a Motion to Set Hearing to Determine Appropriate Discipline on April 27, 1990. See Appendix VIII. The referee set this specific hearing, a sanction hearing, on May 25, 1990. The Respondent's Motion referred to the opportunity to present written and oral argument on the matter of discipline to be imposed. The Motion further referred to the fact that a material variance existed between the proof at trial and the charges alleged in The Florida Bar's Complaint.

On the day of the hearing, in accordance with the Respondent's understanding of the referee's action of granting of his Motion to Set Hearing on Discipline, the Respondent submitted specific written pleadings and briefs (memoranda of law) on the matter of variance and mitigation evidence. The Respondent further advised the referee that a certain Broward Circuit Court Judge, The Honorable Mark Speiser, and three attorneys, Bruce Lyons, Hillard Moldoff and Bill Laswell, each of whom had served as past presidents of criminal defense bars, were present to testify as to Respondent's character and the appropriateness of

an attorney's conduct in the circumstances presented in this case. (SR 6-7) The witness testimony was extremely material and relevant to the matter of discipline to be imposed. Given the nature of the referee's findings of the specific violations committed by Respondent, the Respondent contends that mitigation evidence and argument were proper matters to be considered at the sanction stage of the proceeding. This is particularly true where The Florida Bar seeks the most serious discipline of disbarment. The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1990); The Florida Bar v. Lord, 433 So.2d 93 (Fla. 1983). Section 9.32 of the Florida Standards for Imposing Lawyer Sanctions provides specific criteria for establishing mitigation evidence:

> 9.1 Generally, after misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.
>
> 9.32 Factors which may be considered in mitigation: Mitigating factors included:
>
> a. absence of prior disciplinary record;
> b. absence of dishonest or selfish motive;
> c. personal or emotional problems;
> d. timely good faith effort to make restitution or to rectify consequences of misconduct;
> e. full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
> f. inexperience in the practice of law;
> g. character or reputation;
> h. physical or mental disability or impairment;
> i. unreasonable delay in disciplinary proceeding, provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;
> j. interim rehabilitation;
> k. imposition of other penalties or sanctions;
> l. remorse;
> m. remoteness of prior offenses.

Further, the case of The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987) states:

> "[I]n a disbarment proceeding based on conviction of a crime, the proof of conviction and an adjudication of guilt are sufficent to establish a prima facie case for disciplinary action. Due process, however, requires that the accused lawyer shall be given full opportunity to explain the circumstances and otherwise offer testimony in excuse or mitigation of penalty. Id at 1234.

Therefore, it is the Respondent's position that the referee's failure to allow Respondent a full opportunity to present mitigation evidence and argument and the referee's failure to conduct an adequate discipline hearing denied the Respondent his right to an appropriate determination of discipline, in violation of due process of law.

A. CHARACTER AND REPUTATION EVIDENCE

Referee Moore entered an Order permitting character testimony in the cause. See AB Appendix VI, page 43. Due to the complex nature of the facts and testimony presented with respect to Respondent's guilt or innocence for the offense of bribery, the testimony of fact witnesses was mainly presented at Respondent's trial. Given the fact that a Broward Circuit Court Judge and three (3) past presidents of criminal defense bars were present to testify at the May 25, 1990 hearing, the referee abused discretion in denying Respondent this opportunity to present evidence in mitigation as provided in 9.32(g) of the Florida Standards For Lawyer Sanctions, and in excluding character evidence in mitigation of Respondent's guilt. The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965); The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987).

B. UNREASONABLE DELAY IN PROCEEDING

The Florida Bar concedes that it had notice of the alleged attorney misconduct in 1984. Bono agreed to cooperate with the Florida Department of Law Enforcement and "it monitored Respondent's criminal charge until it was resolved with Respondent' plea in this cause." See AB at page 20. The Respondent's requests that this Court take judicial notice of the action of The Florida Bar in 1986 wherein the Bar requested a rehearing of the Florida Supreme Court decision in Debock v. State on October 30, 1986. The Bar further filed a Motion For Leave of Court to Appear as Amicus Curiae. Upon this request, the Court granted rehearing and The Florida Bar filed its brief in February, 1987.

Respondent cites Article XI, Rule 11.02(3) of The Integration Rule which provides:

> (3)(b) If the alleged misconduct constitutes a felony or misdemeanor, The Florida Bar may initiate disciplinary action whether or not the accused attorney has been tried, acquitted or convicted in a court for the alleged criminal offense. [Emphasis added]

The Florida Bar's contention that it was prohibited from proceeding with its case is erroneous. The reason the Bar did not proceed was because of a failure of proof, particularly, its own witness, Debock. Second, no complaint was made before the Grievance Committee, 17 "E" until late 1987 and into 1988 when probable cause was found, some four (4) years after the alleged misconduct in 1984. Third, the complaint was not filed by the Bar until January, 1989. Fourth, the evidence presented to the referee at trial in March, 1990 concerning prosecutor Debock's involvement was none other than the May 31, 1984 statement. What

is clear to Respondent, and hopefully to this Court, is the fact that The Florida Bar's alleged evidence was in their knowledge, possession and control since 1984. The oral testimony of Debock at trial added nothing to the substantive evidence of The Florida Bar's case. In fact, Debock's testimony at trial was unfavorable. Therefore, The Florida Bar's argument that it presented legitimate evidence disproving delay in this cause is totally without merit.

One final point is clear: The Florida Bar alleges in its Brief, at page 20,

> "[P]rior to the disposition of the criminal case, the issue existed in the criminal case regarding immunity to be conferred on witness, Debock. The Florida Bar submits that it would not have proceeded with its case while the Debock immunity issues were pending."

At page 16 of its Answer Brief, The Florida Bar asserts a position which is absolutely inconsistent with the above allegation. Specifically, the Answer Brief alleged:

> "Furthermore, Bono's testimony, Respondent's admissions of inappropriate discussions with Bono and the taped conversations between Bono and the Respondent clearly establish Respondent's guilt in this cause independently of the evidence disputed by Respondent herein." AB page 16.

Therefore, it is the Respondent's position that The Florida Bar's argument is irrational, illogical, and inconsistent, and there is clear evidence of unreasonable delay which prejudiced the Respondent. See, The Florida Bar v. Papy, 358 So.2d 4 (Fla. 1978) [Six year delay; Court said that inordinate delays are unfair, unjust and may even be prejudicial to attorney; recommendation of disbarment by referee rejected and one year suspension ordered.]

C. ABSENCE OF PRIOR DISCIPLINARY RECORD AND INTERIM REHABILITATION

The Report of Referee correctly reflects the Respondent's absence of a prior disciplinary record. The report fails to reflect the Respondent's interim rehabilitation in light of the isolated instance of alleged misconduct. Therefore, the Respondent maintains that the discipline ordered by the referee in his report failed to appropriately reflect the substantial mitigating evidence under 9.32(a) and (j) of the Lawyer Standards.

D. DEBOCK'S DISCIPLINE AND UNIFORMITY IN LAWYER SANCTIONS

The Respondent maintains that the referee's determination of punishment fails to give substantial deference to Debock's thirty (30) day suspension. Although Debock was alleged to have engaged in similar and comparable conduct to that of Respondent, The Florida Bar is seeking disbarment of Respondent. The Respondent maintains that there is substantial need to provide for uniformity in lawyer sanctions, in accordance with the applicable standards and rules regarding discipline. As stated in Debock v. State, 512 So.2d 154 (Fla. 1987):

> "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 67.

Before concluding argument on mitigation, the Respondent distinguishes the case of The Florida Bar v. Seiten, 530 So.2d 298 (Fla. 1988), cited in the Answer Brief which alleges:

> "It is solely in the referee's discretion to make findings of mitigating circumstances. There is nothing in the record that the referee is required to consider as a mitigating factor." AB pages 13, 19.

The Seiten case said that mitigation evidence was put before the referee, who either rejected it or did not consider it sufficient compared with the conduct involved. There is nothing in the record that the referee is required to consider in terms of mitigation, and we are unwilling to re-weigh the evidence submitted. Id at 300.

The Respondent maintains that the case of The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1990) should be applied to the present case. The decision in Eisenberg, January, 1990, came after the earlier decision of Seiten in 1988. The Eisenberg Court said:

> "We agree with Eisenberg's position that consideration of mitigating evidence in appropriate at the sanction stage of a disciplinary proceeding and that consideration of this evidence is clearly in accordance with the Florida Standars for Imposing Laywer Sanctions. Although we agree with Eisenberg's position that referees should consider evidence in mitigation in recommending the appropriate discipline, we disagree with his conclusion that the referee failed to consider the mitigating evidence presented in the preceding". Id at 355. [Emphasis added]

The Respondent maintains that a referee should consider evidence in mitigation, as contemplated by the Lawyer Standards and case law. The Florida Bar's assertion that the matter is discretionary with the referee is erroneous. The referee's report failed to reflect his consideration of mitigation evidence, and the denial of Respondent's argument violates due process of law. Therefore, the referee's determination of punishment must be substantially reduced.

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 Florida Bar argues that the referee's findings of fact are contained in the report. The Respondent refers, in addition to the referee's report, to the clear and unequivocal determination of the referee made at the close of all the evidence, at the time of Respondent's trial. (R 729,730,733,734) The referee's findings state:

> I have taken into evidence the statement of Debock, the demeanor of the witnesses as they testified...I did not say that the Respondent approached Mr. Debock (R 734)
>
> "This was a rule violation, more or less to the effect that during the course of his representation of Mr. 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 and to his client, I think he has 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)
>
> "I am not saying that I am finding you guilty of offering or proposing to bribe anyone, but I am finding you guilty of this serious conduct of a code violation of a professional responsibility that you have as an officer of the court". (R 733)

In her closing argument, counsel for The Florida Bar further referred to the insufficiency of the proof:

> "This is what those two cases stand for. Next, I am handing Your Honor the case of The Florida Bar v. Randall, where an attorney was disbarred for the delivery of a bribe on behalf of his client, and I would point out to Your Honor in the bribery statute, it includes the language, 'offer' and you do not need delivery of a bribe to have bribery in the State of Florida, the 'offer' is sufficient for conviction of bribery. And, I am using these cases, these cases call it bribery, and I feel the evidence has shown criminal bribery, however even if Your Honor feels that we haven't shown all the technical elements, the

misconduct is certainly serious, and there is definitely misconduct here." (R 720) [Emphasis added]

The Florida Bar argues in its Answer/Reply Brief at page 22, "[T]he referee's findings follow in substantial substance The Florida Bar's Complaint in this cause". The Respondent disagrees with this statement, as evidenced by the above findings at the time of trial. The Florida Bar's Complaint charged bribery. Second, the fact that, "Respondent did not disclose his client's conduct and intentions" is of utmost importance. This was not charged in the Complaint. Third, the referee specifically found that Respondent was not guilty of offering or proposing a bribe "that he did not approach Debock". This finding does not prove bribery (the offer to bribe) as charged in the Complaint, and as defined by the prosecutor in her closing argument. (R 720)

The Respondent's position is simple. The Respondent cannot be convicted for an offense of which he was not charged. While testimony of unethical conduct not squarely within the scope of the Bar's accusations is admissible in connection with the charges made, a judgment of guilt cannot be entered unless the violation is charged in the Complaint. While such testimony was admissible with respect to the bribery charge, no judgment of "inappropriate communications" and "failure to disclose a client's conduct and intentions" can be rendered as this was not charged in the Complaint.

The Florida Bar argues two cases, The Florida Bar v. Seiten, 530 So.2d 298 (Fla. 1988) and The Florida Bar v. Stillman, 401 So.2d 130 (Fla. 1981), which are totally distinguishable. In Seiten, the referee found the respondent guilty of all acts charged in The Florida Bar's Complaint. The Florida Bar's cites

Seiten for the proposition that misconduct not charged may be considered as to discipline by the referee. AB at page 22. The facts of Seiten, however, are not applicable to the present case. In the cited case, the attorney was charged with nine (9) separate counts of misconduct. The referee found the accused attorney guilty of all nine counts as charged, and he recommended disbarment. The attorney contended, on appeal, that in addition to the referee's finding on Counts 1-9, the referee erred in not preventing Bar counsel from referring to certain misconduct not charged in the Bar complaint, and in allowing improper evidence into the record. Id at 300.

The Respondent finds the Seiten case inapposite because the attorney was found guilty on all counts and the testimony was properly admitted. Respondent does not dispute the admissibility of evidence, but that he was not found guilty of the charged misconduct. As the Seiten case stated:

> "...[S]o admitting these facts was not error. Second, there is a sound basis in the stipulated facts to support the referee's findings of guilt and no reason to believe the referee considered any of the uncharged incidents in determining guilt". Id at 300.

The Stillman case is distinguishable. The Florida Bar charged Stillman in a two count complaint with grand larceny based upon his criminal conviction and with appropriation of money to his own use. Id at 1307. The referee found the attorney guilty of both counts as charged in the complaint. During the trial, testimony was admitted concerning uncharged misconduct. The court said evidence of unethical conduct was admissible, and if established by clear and convincing evidence, was relevant to the question of respondent's fitness to practice

law, thus, it was properly included in the referee's report. Id at 1307.

Respondent would distinguish Stillman, a 1981 case, in this manner. The accused attorney was found guilty of all acts charged in the complaint; The Respondent was not found guilty of bribery, as charged in the complaint on the other hand, the Respondent maintains that the case of The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), as argued in Respondent's Cross Petition, is highly relevant and appropriate and the principle of variance must be applied in his case.

IV. THE REFEREE ERRED IN FAILING TO PROPERLY CONSIDER EXCESSIVE GOVERNMENTAL INVOLVEMENT IN MITIGATION OF PUNISHMENT

The Florida Bar utilized the Florida Department of Law Enforcement criminal investigation, its agents and testimony, in prosecuting Respondent for the stated ethical violations. The Bar admits that it "monitored Respondent's criminal charge until it was resolved". AB at page 20. The Bar fails to mention that it appeared as Amicus Curiae in the Debock case. Therefore, the Respondent concludes that The Florida Bar was a party to the government action involving the Confidential Informant, Bono, and law enforcement and the criminal prosecution of Rendina.

The Florida Bar concludes that there is no basis to mitigate this case based on the testimony of Bono. AB at page 23. The Respondent contends that there is a substantial basis for finding overreaching government conduct. The evolving standards of due process in Florida apply, not only in civil and criminal trials, but in Bar proceedings as well. Pavlick, supra; Hunter v. State,

531 So.2d 239 (Fla. 4DCA 1988); Cruz v. State, 465 So.2d 516 (Fla. 1985); State v. Glosson, 462 So.2d 1082 (Fla. 1985)

Bono initiated the bribery scheme. (R 394) The Florida Department of Law Enforcement testimony showed the instructions:

> "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 referee observed the following:

> "[I]t looks like he (Bono) was setting you up right along. Yes, in fact, he said that he knew exactly what to do, and here, you have to suffer the consequences now". (R 702)

The Respondent's position is simple. Excessive governmental conduct and involvement is a matter which this Court should consider to be sufficient to mitigate the discipline imposed. Due process of law is a flexible concept, and is, at times, essential to restraining renegade governmental action. This case is no exception. Therefore, the Referee's failure to consider this evidence in his report was error, and the suspension imposed must be substantially reduced.

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

The Florida Bar did not prove bribery. The referee's report shows that Respondent "gave the impression" that a bribe was attempted. The Florida Bar maintains that the Respondent had "inappropriate communications" with informant Bono. The Florida Bar proved that the Respondent "did not disclose as an officer of the court to the proper officials of the fact that his client wanted to influence the Assistant State Attorney". Finally, the

evidence proved that Respondent did not approach Debock, nor did the Respondent offer or propose to bribe the prosecutor.

Based on the above facts, the Respondent maintains that the cases of The Florida Bar v. Grable, No. 72, 615 [Supreme Court suspended attorney for ninety one (91) days for a felony bribery charge, to which Respondent plead guilty]; The Florida Bar v. Fischer, 14 FLW 425 (Fla. 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, a perpetration of fraud upon the court]; and The Florida Bar v. Denker, 479 So.2d 73 (Fla. 1985) [Respondent pled guilty to "solicitation of bribe" and was suspended for one year with condition to continue to represent existing clients], are most applicable to the length of suspension to be imposed, if any.

CONCLUSION

In conclusion, the Respondent maintains that the improper admission of evidence, hearsay and opinion; the improper exclusion of substantial mitigation evidence, including, Debock's 30 day suspension, character testimony, unreasonable delay in proceedings, isolated misconduct, interim rehabilitation and overreaching governmental conduct; as well as the variance issue, mandates that the discipline imposed, if any, should be substantially less than the two (2) year period ordered by the referee or, alternatively, this Honorable Court should remand the caused for a new trial and sanction hearing.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was furnished by mail to Jacquelyn P. Needleman, Bar Counsel, The Florida Bar, Rivergate Plaza, Suite M-100, 444 Brickell Avenue, Miami, FL 33131 this 22 day of January, 1991.

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