IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. 75,347

Florida Bar Case
No. 88-71,375

THE FLORIDA BAR,

Complainant,

vs.

HOWARD GROSS,

Respondent.

ANSWER BRIEF AND APPENDIX OF RESPONDENT, HOWARD GROSS

RHEA P. GROSSMAN, ESQ.
Florida Bar #092640
% CAREY, DWYER, ECKHART,
MASON & SPRING, P.A.
P.O. Box 45088
Miami, Florida 33245-0888
(305) 856-9920

TABLE OF CONTENTS

TABLE OF CITATIONS

Other Authority:

INTRODUCTION

Respondent, HOWARD GROSS, a member of the Florida Bar, files his Answer Brief and Appendix in response to the Order of the Court dated November 29, 1990.

For the purpose of clarity and continuity, Respondent will use the same references and symbols as used by THE FLORIDA BAR with the following additions:

Respondent will be referred to by proper name whenever appropriate;

The symbol "App." followed by a page number will refer to the Appendix attached to Respondent's Answer Brief.

POINT ON APPEAL

WHETHER THE REPORT OF REFEREE AND RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED IS WARRANTED, JUSTIFIED AND SUPPORTED BY THE RECORD, CASE LAW AND IS SUITABLE IN LIGHT OF THE CONDITIONAL PLEA OF GUILTY?

REPLY TO STATEMENT OF THE CASE AND FACTS

A. Statement of the Case:

The Respondent, HOWARD GROSS accepts the procedural statements set forth in the Initial Brief of The Florida Bar at pages 1 through 3,

B. Statement of the Facts:

The Florida Bar has accurately set forth the factual matters in support of the Conditional Plea and Report of Referee. However, HOWARD GROSS would add the following facts in support of his position:

1. HOWARD GROSS executed a written Conditional Guilty Plea and Consent Judgment for Discipline on September 17, 1990 (App.17-22). The agreement, however, was accepted in principle by HOWARD GROSS at the time the initial status conference was held by the Referee in April, 1990. The Conditional Plea does not included an admission of any criminal activity.

2. On July 13, 1990, the Referee filed his report in the matter of HARVEY S. SWICKLE (App.9-16). The Referee's findings indicate that HOWARD GROSS testified in that proceeding and that his testimony was believable, More importantly, the Referee found that the underlying investigation by the Florida Department of Law Enforcement was suspect (App. 12, n.1). The Referee specifically found that Mr. SWICKLE had "misinformed" HOWARD GROSS of the facts (App.14) and that there was "no clear and convincing evidence of

any [criminal] wrongdoing" (App.15).

3. HOWARD GROSS, in the interest of putting this matter to rest and "in the best interest of the public", as found by the Referee (App.2), executed the Conditional Guilty Plea and Consent Judgment for Discipline,

SUMMARY OF THE ARGUMENT

The Report of Referee adopting and approving the Conditional Guilty Plea and Consent Judgment for Discipline is neither erroneous, unlawful nor unjustified, In light of the absence of any finding of criminal activity and the specific findings made by the Referee in the companion case of Harvey S. Swickle, the recommended disciplinary measure is suitable and appropriate and conforms to the philosophy and intent of bar disciplinary proceedings.

ISSUE

THE REPORT OF REFEREE AND RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED IS WARRANTED, JUSTIFIED AND SUPPORTED BY THE RECORD, CASE LAW AND IS SUITABLE IN LIGHT OF THE CONDITIONAL PLEA OF GUILTY

Rule 3-7.6(6), Rules Regulating the Florida Bar provides, in part, that:

> If no review is sought of a report of a referee entered under the rules and filed in the Court, the findings of fact shall be deemed conclusive and the disciplinary measure recommended by the referee shall be the disciplinary measure imposed by the Court, unless the Court directs the parties to submit briefs or oral argument directed to the suitability of the disciplinary measure recommended by the referee....

Neither The Florida Bar nor HOWARD GROSS has sought review of the Referee's Report. The findings of fact are, therefore, deemed conclusive. In the Report of Referee dated October 8, 1990, there are no factual findings to indicate any criminal activity nor any complicity by HOWARD GROSS in the specific activity engaged in by HARVEY S. SWICKLE, for which a recommendation of disbarment was made by the same Referee in his report dated July 13, 1990.

In effect, HOWARD GROSS entered a plea of guilty to using poor judgment in the handling of judicial matters coming before him as a duty judge and failing to disclose his social and financial relationship with HARVEY S. SWICKLE to the Assistant State Attorney assigned to the case on which Mr. SWICKLE contacted him.

The Florida Bar has investigated, reviewed and approved the Conditional Plea of Guilty and Consent Judgment for Discipline. The Referee has heard testimony and evidence relative to the charges against HOWARD GROSS and has adopted the Conditional Plea in his Report of Referee. As pointed out by The Florida Bar, the goals of discipline enunciated in The Florida Bar v. Pahules, 233 So.2d 1130 (Fla. 1970), have been met. Neither The Florida Bar nor HOWARD GROSS has sought review of the Report of Referee. There is nothing in the record before this Court to indicate that the discipline was in any way erroneous, unlawful or unjustified. The Court should therefore enter its judgment approving the Report of Referee and accepting the recommended discipline as warranted and suitable. The Florida Bar v. Younsblood, 153 So.2d 817 (Fla. 1963).

CONCLUSION

Based on the argument, citations of authority, and Rules Regulating the Florida Bar set forth in this Answer Brief, Respondent, HOWARD GROSS, requests that the Report of Referee be approved by this Court without any modification or change to either the findings or the discipline.

Respectfully submitted,

CAREY, DWYER, ECKHART,
MASON & SPRING, P.A.
P.O. Box 45088
Miami, Florida 33245-0888
(305) 856-9920

BY: _____
RHEA P. GROSSMAN
Florida Bar #092640

Counsel for Respondent,
HOWARD GROSS

DATED: January 2, 1991.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded this 2nd day of January, 1991, by U.S. Mail, postage prepaid, to: Warren Jay Stamm, Esq., Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 and John T. Berry, Esq., Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300.

RHEA P. GROSSMAN

IN THE SUPREME COURT OF FLORIDA

Supreme Court Case
No. 75,347

Florida Bar Case
No, 88-71,375

THE FLORIDA BAR,

Complainant,

vs.

HOWARD GROSS,

Respondent.
_____/

A P P E N D I X

TO

ANSWER BRIEF *AND* APPENDIX OF RESPONDENT, HOWARD GROSS

RHEA P. GROSSMAN, ESQ.
Florida Bar #092640
% CAREY, DWYER, ECKHART,
MASON & SPRING, P.A.
P.O. Box 45088
Miami, Florida 33245-0888
(305) 856-9920

INDEX TO APPENDIX

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

HOWARD GROSS,

Respondent.
_____/

Supreme Court Case No. 75,347

The Florida Bar File No. 88-71,735 (11G)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as Referee for the Supreme Court of Florida to conduct disciplinary proceedings pursuant to Rules 3-7.2 and 3-7.9 of the Rules Regulating The Florida Bar, a Final Hearing was held on September 17, 1990 in Fort Lauderdale, Broward County, Florida.

All the Pleadings, Notices, ,Motions, Orders, transcripts and exhibits are forwarded with this Report and constitute the Record of this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Warren Jay Stamm

For The Respondent: Rhea Grossman

After a finding of probable cause at grievance committee level on June 8, 1989, a Complaint was filed with the Supreme Court wherein it was alleged that Respondent violated or attempted to violate the Rules of Professional Conduct, knowingly

App.1

assisted or induced another to do so, did so through the acts of another and engaged in conduct involving dishonesty, fraud, deceit or misrepresentation.

This Referee was appointed to hear this matter and a Final Hearing was scheduled for June 5, 1990.

Said Final Hearing date was reset in that the parties were in the process of negotiating and finalizing a Consent Judgment for Discipline. On September 17, 1990 Respondent tendered to The Florida Bar and to this Court a Conditional Guilty Plea and Consent Judgment for Discipline.

The Consent Judgment provides that as a disciplinary sanction, Respondent agrees to accept a ten (10) day suspension to be issued by the Supreme Court of Florida, effective on the date mandated by order of said Court. Additionally, Respondent agrees to pay all costs reasonably incurred by The Florida Bar in these disciplinary proceedings within thirty (30) days of the entry of the Supreme Court's final order.

Having reviewed the record of these proceedings, I find that Respondent's plea and the position of The Florida Bar as to the terms of discipline are both fair to the Respondent and in the best interest of the public, As such, Respondent's Consent Judgment and the terms of discipline recommended by The Florida Bar are accepted and hereby adopted as the recommendation of this Referee in this matter.

II. Specific Findings of Fact as to Each Item of Misconduct of which the Respondent is charged:

In his Consent Judgment, Respondent admits the allegations contained in The Bar's Complaint as modified which I hereby accept and adopt as the Findings of Fact in this cause, to wit:

1. That Respondent is now aware that pursuant to an investigation by the State Attorney's Office in conjunction with the Florida Supreme Court, Respondent was the subject of an investigation into alleged bribery and conspiracy involving Respondent and attorney Harvey Swickle.

2. The Respondent is now aware that as a result of circumstances surrounding this investigation, the State Attorney's Office, in conjunction with Florida Department of Law Enforcement (FDLE) established a "sting" scenario involving an undercover FDLE officer being placed into the criminal justice system as a defendant.

3. The Respondent is now aware that on October 7, 1987, an FDLE agent (hereinafter referred to as "Zirio") was fictitiously arrested and booked into the Dade County Jail on charges of trafficking cocaine, conspiracy to traffic cocaine and'possession of cocaine.

4. That a bond was set on Zirio of $250,000 per count for a total of $750,000.

5. That at approximately 8:51 p.m. on the evening of October 7, 1987, Respondent received a call from attorney Harvey

Swickle concerning inmate Orlando Zirio.

6. That Respondent is now aware that at the time of this telephone call, attorney Swickle had not been retained to defend Zirio. This was not disclosed to Respondent at the time this telephone conversation took place.

7. That Respondent is now aware that immediately prior to receiving this telephone call, attorney Swickle was advised by undercover FDLE agent Caso, a/k/a Cassal (hereinafter referred to as "Cassal"), that inmate Zirio had been arrested with "about a dozen kilos of cocaine", was 28 years old, had been in the United States only 3 years, was not married and was renting his residence. This was not disclosed to Respondent at the time that the telephone conversation between Respondent and attorney Swickle took place.

8. That at approximately 9:20 p.m., Respondent phoned the Dade County Jail inquiring about the charges, status and bond on inmate Zirio in order to ascertain whether a bond reduction was possible.

9. That at approximately 9:48 p.m., Respondent received a telephone call from attorney Swickle. Said call lasted one minute, nine seconds.

10. That Respondent is now aware that just prior to receipt of this call, at approximately 9:46 p.m., attorney Swickle had been advised by Cassal that he had the requested $20,000 "retainer" to effectuate the bond reduction on inmate Zirio to $200,000 as represented by Swickle.

11. That Respondent is now aware that at approximately 10:30 p.m., attorney Swickle met with Cassal at a Fort Lauderdale Marriot hotel where an undercover hotel room had been set up by FDLE to monitor all telephone and personal conversations with Cassal.

12. That Respondent is now aware that immediately after being advised that Cassal had the money to exchange during the 10:30 p.m. meeting at the Fort Lauderdale Marriot, attorney Swickle phoned Respondent and after Respondent's inquiry of Swickle as to whether or not Zirio now had a lawyer, Swickle advised Respondent that he "has the signed contract" and arrangements were made between Respondent and Swickle to meet the following morning at Respondent's residence.

13. That Respondent is now aware that at no time material hereto was any written documentation exchanged between attorney Swickle and Cassal.

14. That at approximately 10:47 p.m. and 11:02 p.m. respectively, Respondent phoned the Dade County Jail and effectuated the reduction of the bond on inmate Zirio from $750,000 to $200,000 on all counts. Said reduction was based on representations made by Swickle to Respondent coupled with information obtained by Respondent from the Dade County Jail.

15. That at approximately 8:00 a.m. on October 8, 1987, attorney Swickle arrived at Respondent's residence on Miami Beach.

16. After a brief meeting inside Respondent's residence,

attorney Swickle left and was subsequently detained by FDLE.

17. That contemporaneously, Respondent was detained by **FDLE** agents in front of his residence.

18. That incident to **a** search warrant, Respondent cboperated with FDLE.

19. That **FDLE** agents confiscated **$5,000** in cash from a drawer in Respondent's **desk** which Respondent showed to **the FDLE** agents. **It** was subsequently determined by serial number check that said $5,000 **was** part of the $20,000 received by attorney **Swickle** from undercover agent **Cassal.**

20. That Respondent voluntarily turned over to FDLE agents miscellaneous handwritten notes of Respondent's which reflect the fictitious defendant's name, Orlando Zirio, an amount of three to four kilos and the $200,000 bond amount. Respondent was subsequently arrested.

21. Respondent was acquitted by a jury of all criminal charges.

111. Recommendation as to guilt.

In his Consent Judgment, Respondent admits that he violated Rule **4-8.3** (a) (a lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyers honesty, trustworthiness, or fitness as a lawyer in other **respects** shall inform the appropriate professional authority). Further, Respondent admits that he violated Rule **4-8.4(c)** and (d) (engaging in conduct involving dishonesty, fraud, deceit, or

misrepresentation; and engaging in conduct that is prejudicial to the administration of justice). Respondent further admits that such conduct constitutes a violation of the Code of Professional Responsibility and Rules of Professional Conduct. Based upon Respondent's admissions, I recommend that Respondent be found guilty of those Rule violations as cited herein.

IV. Recommendation as to Disciplinary measures to be applied:

I recommend acceptance of Respondent's Conditional Guilty Plea and Consent Judgment for Discipline and the imposition of the following disciplinary terms:

> That Respondent be suspended for a period of ten (10) days effective on the **date** mandated by order of the Supreme Court.
>
> In making this recommendation, I have considered Respondent's lack of prior disciplinary history, as well as the following mitigating factors:
>
> That incident to these Bar proceedings, Respondent has cooperated with The Florida Bar in its investigation of this matter to the extent possible without jeopardizing Respondent's rights as a Respondent and party defendant in the underlying criminal prosecution.

V. Statement of costs and manner in which costs should be taxed:

I find that the following were reasonably incurred by The Florida Bar as costs in these proceedings and should be assessed against Respondent:

Administrative costs:	$500.00
Court reporter expenses:	$527.50

Process service/courier charges:	$ 28.77
TOTAL :	**$1,056.27**

It is recommended that **the foregoing** costs **be assessed against Respondent. It is** further **recommended that** execution **issue without** interest at **a rate of twelve (12%) percent to** accrue on all ***costs*** **not paid within** thirty **(30) days** of entry of the **Supreme Court's** final **order, unless the time for payment** is extended **by the** Board of **Governors** of The **Florida Bar.**

Dated **this** 8th day of October, **1990.**

/S/ ROBERT LANCE ANDREWS

Robert **Lance Andrews, Referee**

A TRUE COPY

Copies furnished to:

Warren Jay Stamm
Rhea Grossman

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,

Complainant,

v.

Harvey S. Swickle,

Respondent.
_____/

Supreme Court Case
No. 75,348

The Florida Bar File
No. 88-70,506(11G)

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant: to the undersigned being duly appointed as referee *to* conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, hearings were held on June 5, 1990 and June 12, 1990. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case,

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Warren J. Stamm

For The Respondent: Nicholas R. Friedman

TI. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As *to* Count I

1. On October 7, 1987, undercover agent Eugene Caso (FDLE), a/k/a Ernesta Cassal (hereinafter referred to as Cassal),

emergency judge. (exh 2, p.13).

4. Respondent then called the home of Dade County Circuit Judge Howard Gross and was on the telephone for one minute and 59 seconds, (exh 4, [G]ross/Swickle chronology 8:43 to 8:51 P.M.; and transcript of June 5, 1990 hearing, p.155-161).

5. At 9:11 P.M., Cassal called respondent at home arid told him that Zirio is roughly 28 years old, has been in the United States three years, is unmarried, has children but they may be in Cuba, has no family here, and is renting his residence. In response to a question as to Zirio's work status, Cassal indicated, "Ah, no, no, he uh, no, he just does work for ah, you know, for my ah , , . ." (exh 2, p.26). Respondent's handwritten notes reflect this information and specifically indicate that Zirio is not working. (exh 5). Cassal reiterated the importance of getting Zirio released soon and that Cassal could get hold of any money that was needed. Respondent stated, "OK, I'm waiting to hear back now, ah, just stay where you are and I'll call you as soon as I hear from my, my guy." (exh 2, p.27). I find that this statement was intended to convey and did convey to Cassal that respondent was able to influence a judge to lower Zirio's bond. This finding is premised on a careful review of the entire transcript of the conversations between Cassal and respondent:, paying particular attention to the messages conveyed beyond the literal meaning of the

words used. In analyzing these conversations, I was aware of the testimony of Manny Barcenas who stated that he had paid respondent $15,000 to bribe a judge to lower Artemio Carrandi's bond. (transcript of June 12, 1990 hearing, p.6-12). I also considered the testimony of Special Agent Supervisor John Coffey who testified that, after arrest, respondent told him he paid Judge Gross $5,000 for assisting in lowering Carrandi's bond. (transcript of June 5, 1990 hearing, p.215-218).

6. At about 9:20 P.M., Judge *Gross* called the Dade County Jail indicating he wanted to reduce a $750,000 bond. (exh 4, [G]ross/Swickle chronology 9:20 P.M.; and exh 2, p.30-31).

7, At 9:25 P.M., respondent called Cassal and stated he could reduce the bond tonight if respondent files an appearance on Ziric's behalf and represents Zirio. Respondent goes on to say, "I need a 20,000 dollar retainer, the bond will be reduced to 200,000 dollars." (exh 2, p.28).

8. Cassal subsequently calls respondent and says, "OK, I've got the twenty." (exh 2, p.32). Respondent immediately calls Judge Gross' home and is on the line for one minute and nine seconds. (exh 4, [G]ross/Swickle chronology 9:48 P.M.).

9. At about 10:30 P.M., respondent meets Cassal in the lobby of Cassal's hotel. During a discussion with Cassal, Cassal indicates he only has $10,000 but should be receiving the other $10,000 within a couple of hours, Respondent calls

Judge Gross from the hotel lobby while Cassal is counting the money. (exh 2, p.35-36). Respondent tells Judge *Gross* he has a signed contract. Judge Gross says, "OK, if you are his lawyer and you tell me those are the facts, I'll reduce the bond accordingly." Respondent then arranges to meet Judge Gross at the Judge's house at about eight the next morning.[1] (exh 2, p.40-41). Respondent then *goes* back tc Cassal and gets $10,000. Respondent says that if there are any problems the money *goes* back and *as* soon *as* we gat back together again we are all finished. (exh 2, p.37).

10. At about 11:00 P.M., Judge Gross lowered Zirio's bond to $200,000. (exh 2, p.44-45). Judge Gross' handwritten notes incorrectly indicate that Zirio was arrested with three to four kilos. (exh 6). Judge Gross testified that respondent told him that Zirio was a key employee, had children, resided here, and had no prior problems with the law. (transcript of June 12, 1.940 hearing, p.61; and exh 12,

---

[1] I am somewhat concerned with the contents of Special Agent Michael Flint's Application and Affidavit for an Order Authorizing the Interception of Wire and Oral Communications. In particular, paragraph 6(a) deals with admittedly unsubstantiated and uncorroborated information from 1977 based on a statement which includes a physical description of respondent which does not match him. (tranecript of June 5, 1990 hearing, p.312-113; 115; 140-142). Paragraph 6(a) states that respondent had close relationships with judges and prosecutors in bade and Broward counties, and with an unnamed United States Senator. By including such information, Mr. Flint seems to be attempting to paint the respondent as a person who intended to conduct unsavory business with judges and prosecutors in Dade and Broward counties and with an unnamed United States Senator. (transcript of June 5, 1990 hearing, p.119-120).

p.249).

11. At 12:05 A.M. on October 8, 1987, respondent meets Cassal at the hotel and picks up an additional $5,000.

12. At about; 6:30 A.M. on October 8, 1987, respondent meets Cassal at tne hotel again to pick up the remaining $5,000 for a total of $20,000, Cassal lets respondent know that Ziric will "vaporize," Respondent indicates that he will file an appearance anyway to follow the bases and make sure there are no problems. (exh 2, p.54). At no time did respondent attempt to advise Judge Gross or anyone else of Zirio's probable disappearance.

13. Respondent met Judge Gross at the Judge's residence at 8:00 A.M. and gave him $6,300 of the cash respondent received from Cassal. Soon thereafter, respondent was arrested and $13,200 of the money received from Cassal was found in respondent's car. Respondent had given the remaining $500 to his wife. Judge Gross testified that the money he received was for repayment of a loan.

III. Recommendations as to whether or not the Respondent should be found guilty: A6 to each count: of the complaint I make the following recommendations as to guilt or innocence:

As *to* Count I

I recommend that the respondent be found guilty arid specifically that he be found guilty of violating the following Integration Rules of The Florida Bar and/or Disciplinary Rules of the Code of Professional

Responsibility, to wit:

Rule 4-3.3(d), Rules of Professional Conduct of The Florida Bar
In an ex parte proceeding a lawyer: shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse,

Rule 4-4.1(a)
In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

In the instant case, respondent informed Judge Gross that Zirio was a key employee. This is true, but respondent failed to tell the Judge that Zirio was probably a key employee of an illegal organization, Respondent was aware of this since his notes indicate Zirio was not working. Respondent also told Judge Cross that he had a signed contract with his client which was untrue.

Rule 4-8.4(e)
A lawyer shall not state or imply an ability to influence improperly a government agency or official.

Respondent was aware that Cassal expected him to influence a judge to reduce Zirio's bond. Respondent intended to convey such an expectation and intended to have Cassal believe that the "retainer" was at least in part to bribe a judge.

Rule 4-8.4(a),(c),(d)

Respondent violated this catchall rule by violating the above mentioned rules.

I specifically find that respondent did not violate the following Rules of Professional Conduct of The Florida Ear:

Rule 4-1.2(d); Rule 4-3.5(a)(b); Rule 4-8.3.[2]

IV. Recommendation as to Disciplinary measures to be applied: I recommend that the respondent be disbarred from the practice of law in Florida.

V. Personal History and Fast Disciplinary Record: After finding of guilt: and prior *to* recommending discipline to be recommended pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record *of* the respondent, to wit:

Age: 48

Date admitted *to* Bar: June 10, 1968

Prior disciplinary convictions and disciplinary measures imposed therein: May 31, 1990; Respondent entered into *a* consent: judgment with The Florida Bar thereby admitting to the issuance of worthless checks from his office account, Respondent was given a public reprimand and placed on two years probation.

VI. Statement of costs and manner in which costs should be taxed: I find the fallowing coats were reasonably incurred b y e Florida Bar.

Administrative costs:	$ 500.00
Witness expenses:	136.20
Court reporter expenses:	2,143.60
Process service/courier expenses:	87.50

[2]I carefully considered the evidence as to whether respondent bribed or attempted to bribe Judge Gross to lower Ziric's bond, Although the evidence shows some very questionable conduct on the part of respondent and Judge Gross, it does not rise to the level of clear and convincing evidence of such wrongdoing.

Bar counsel travel costs:	136.10
Investigation expenses:	494.15
Total	$ 3,497.55

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

Dated this 13th day of July, 1990.

/S/ ROBERT LANCE ANDREWS

Robert Lance Andrews
Referee

A TRUE COPY

Copies to:
Warren J. Stamm, Esq.
Nicholas J. Friedman, Esq.
Staff Counsel, The Florida Bar, Tallahassee, Florida 32301

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

vs.

HOWARD **GROSS,**

Respondent.
_____/

Supreme Court Case
No. 75,347

The Florida Bar File
No. 88-71,735 (11G)

CONDITIONAL GUILTY PLEA AND
CONSENT JUDGMENT FOR DISCIPLINE

Respondent, Howard Gross having been **fully** advised of his procedural rights under the Rules Regulating The Florida **Bar,** hereby tenders this Conditional Guilty Plea and Consent Judgment For Discipline pursuant to Rule 3-7.8(b) of the **Rules** Regulating The **Florida** Bar, and says:

1. Respondent, **Howard** Gross **is, and** at all times hereinafter mentioned **was,** a member **of The Florida Bar,** subject to the jurisdiction and **disciplinary** rules **of the Supreme** Court **of Florida.**

2. That at all times material hereto, Respondent Howard Gross **was a Circuit Court** Judge of **the** Eleventh Judicial Circuit, Dade County, Florida.

3. That this Conditional Guilty Plea **And** Consent Judgment for Discipline (hereinafter "**Consent** Judgment") **relates** to a Complaint filed by The Florida **Bar** against Respondent with the **Supreme** Court of Florida, Supreme Court Case No. 75,187.

4. Pursuant to Rule 3-7.8(b), Rules Regulating The Florida Bar, Respondent tenders this Consent Judgment after the filing of a formal Complaint.

5. Respondent admits that he is guilty of violating the disciplinary rules charged in the Bar's complaint, to wit:

> Rule 4-8.3(a) a lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects shall inform the appropriate professional authority.
>
> Rule 4-8.4 (c) (d) a lawyer shall not:
>
> (c) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;
>
> (d) Engage in conduct that is prejudicial to the administration of justice.

Respondent agrees to accept, as a disciplinary sanction, a ten (10) day suspension to be issued by the Supreme Court of Florida, effective on the date mandated by Order of said Court.

6. That Respondent is now aware that pursuant to an investigation by the State Attorney's Office in conjunction with the Florida Supreme Court, Respondent was the subject of an investigation into alleged bribery and conspiracy involving Respondent and attorney Harvey Swickle.

7. The Respondent is now aware that as a result of

the telephone conversation between Respondent and attorney Swickle took place.

13. That at approximately 9:20 p.m., Respondent phoned the Dade County Jail inquiring about the charges, status and bond on inmate Zirio in order to ascertain whether a bond reduction was possible,

14. That at approximately 9:48 p.m., Respondent received a telephone call from attorney Swickle. Said call lasted one minute, nine seconds.

15. That Respondent is now aware that just prior to receipt of this call, at approximately 9:46 p.m., attorney Swickle had been advised by Cassal that he had the requested $20,000 "retainer" to effectuate the bond reduction on inmate Zirio to $200,000 as represented by Swickle.

16. That Respondent is now aware that at approximately 10:30 p.m., attorney Swickle met with Cassal at a Fort Lauderdale Marriot hotel where an undercover hotel room had been set up by FDLE to monitor all telephone and personal conversations with Cassal.

17. That Respondent is now aware that immediately after being advised that Cassal had the money to exchange during the 10:30 p.m. meeting at the Fort Lauderdale Marriot, attorney Swickle phoned Respondent and after Respondent's inquiry of Swickle as to whether or not Zirio now had a lawyer, Swickle advised Respondent that he "has the signed contract" and arrangements were made between Respondent and Swickle to meet the

following morning at Respondent's residence.

18. That Respondent is now aware that at no time material hereto was any written documentation exchanged between attorney Swickle and Cassal.

19. That at approximately 10:47 p.m. and 11:02 p.m. respectively, Respondent phoned the Dade County Jail and effectuated the reduction of the bond on inmate Zirio from $750,000 to $200,000 on all counts. Said reduction was based on representations made by Swickle to Respondent coupled with information obtained by Respondent from the Dade County Jail.

20. That at approximately 8:00 a.m. on October 8, 1987, attorney Swickle arrived at Respondent's residence on Miami Beach.

21. After a brief meeting inside Respondent's residence, attorney Swickle left and was subsequently detained by FDLE.

22. That contemporaneously, Respondent was detained by FDLE agents in front of his residence.

23. That incident to a search warrant, Respondent cooperated with FDLE.

24. That FDLE agents confiscated $5,000 in cash from a drawer in Respondent's desk which Respondent showed to the FDLE agents. It was subsequently determined by serial number check that said $5,000 was part of the $20,000 received by attorney Swickle from undercover agent Cassal.

25. That Respondent voluntarily turned over to FDLE agents miscellaneous handwritten notes of Respondent's which reflect the

fictitious defendant's name, Orlando Zirio, an amount of three to four kilos and the $200,000 bond amount. Respondent was subsequently arrested.

26. That incident to these Bar proceedings, Respondent has cooperated with The Florida Bar in its investigation of this matter to the extent possible without jeopardizing Respondent's rights as a Respondent and party defendant in the underlying criminal prosecution.

27. Respondent was acquitted by a jury of all criminal charges.

28. Respondent acknowledges that he has been afforded all procedural and substantive due process guarantees regarding these disciplinary proceedings.

29. Respondent also acknowledges that at all times material to the Bar's investigation and proceedings, he has been afforded the competent assistance of counsel.

30. Respondent agrees that he has entered into this Consent Judgment voluntarily and without any threat or fear of coercion.

31. That should the Supreme Court of Florida finally approve this Consent Judgment, Respondent hereby agrees and acknowledges that same will not be the subject of future modification.

32. Respondent agrees to pay all costs reasonably incurred by The Florida Bar in these disciplinary proceedings within thirty days of the entry of the Supreme Court's final order, with interest at the rate of 12% percent to accrue on all costs not

paid within said time, unless time for payment is extended by the Board of Governors.

33. Respondent recognizes that the disciplinary sanction to be imposed will ultimately be determined by the Supreme Court of Florida which will not be bound to follow the recommendations of either The Florida Bar or any Referee who may be appointed in these proceedings.

34. Respondent agrees that in the event that the terms of discipline offered herein are not approved by the Board of Governors of The Florida Bar (or their designee), the Referee, or the Supreme Court, Respondent will have the right to have this matter proceed before a Referee.

Executed this 17 day of September, 1990.

Respectfully submitted,

Howard Gross

Rhea P. Grossman, Esq.
2710 Douglas Road
Miami, Florida 33133-2728

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Supreme Court Case No. 75,347

The Florida Bar File No. 88-72,735 (11G)

THE FLORIDA BAR,

Complainant,

vs.

HOWARD GROSS,

Respondent.

ON PETITION FOR REVIEW

INITIAL BRIEF AND APPENDLX OF RESPONDENT, HOWARD GROSS

RHEA P. GROSSMAN, P.A.
RHEA P. GROSSMAN
2710 Douglas Road
Miami, Florida 33133-2728
(305) 448-6692

Attorney for Respondent,
HOWARD GROSS

TABLE OF CONTENTS

TABLE OF CITATIONS

TABLE OF CITATIONS (continued)

Other Authorities:

INTRODUCTION

This is a brief in support of a Petition for Review of a Referee's Report in a disciplinary proceeding involving the Respondent, HOWARD GROSS. The Petition for Review was initiated by the Respondent.

The complainant, THE FLORIDA BAR, will be referred to as "THE BAR". Respondent will be referred to as either "RESPONDENT" or "GROSS". Other parties and/or witnesses herein will be referred to by their respective surnames for clarity.

The record on appeal, in addition to the pleadings and exhibits, consists of the following:

Proceedings before the Referee dated January 17, 1992 [1], one volume, pages 1 through 144;

Proceedings before the Referee dated February 21, 1992, one volume, pages 1 through 173:

REDACTED testimony and proceedings before the Referee in the matter of The Florida Bar vs. Harvey Swickle taken on June 5, 1990, two volumes, pages 1 through 176;

REDACTED testimony and proceedings before the Referee in the matter of The Florida Bar vs. Harvey Swickle taken on June 12, 1990, one volume, pages 1 through 61;

Deposition of Michael Zier taken February 20, 1992, one volume, pages 1 through 50;

Deposition of Judge Ralph N. Person taken on February 26, 1988, one volume, pages 1 through 52.

---

[1] This Volume was incorrectly dated January 17, 1991 instead of 1992. The hearing was set for January 17, 1992 and the Certificate of Reporter correctly refers to the year as 1992.

Because the record has not been paginated and consecutively numbered, Respondent will fully identify record references in as consistent a manner as possible.

Respondent will present an Appendix which will be designated as "App." followed by the appropriate page number and begins at page 27 of his Initial Brief.

Exhibits presented at the time of the hearing before the Referee will be referred by the exhibit numbers used by the Referee. When possible the exhibits will also be referenced to the page in the transcript of proceedings where the exhibit is identified and accepted into evidence.

POINTS ON APPEAL

I.

WHETHER THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE?

II.

WHETHER THE REFEREE VIOLATED RESPONDENT'S DUE PROCESS RIGHTS WHEN HE BECAME *AN* ADVOCATE AND SOUGHT DISCOVERY MATTERS NOT PRESENTED BY EITHER OF THE PARTIES?

STATEMENT OF THE CASE AND FACTS

A *Course of Proceedings before the Referee:*

On January 22, 1990, The BAR served a one count complaint for discipline dated January 17, 1990, upon the Respondent (App.17-22). Request for admissions were served together with the complaint.

The Respondent, HOWARD GROSS, was charged with violating "Rules 4-8.3 (Reporting professional misconduct) and 4-8.4 (a)(c)(d) (misconduct) of the Rules of Professional Conduct of the Florida Bar." The complaint specified acts of bribery with lawyer HARVEY SWICKLE which occurred on October 7, 1987 and culminated on October 8, 1987. (App.17-22) At the time, The BAR filed a similar complaint against Harvey SWICKLE.

The Supreme Court appointed Robert A. Andrews as referee in both the SWICKLE and GROSS matters.

Respondent filed his Answer and Affirmative Defenses in which he denied all the material allegations of the complaint and denied any misconduct on his part. Respondent denied all substantive allegations presented to him in The BAR'S Request for Admissions.

On April 18, 1990, GROSS and The BAR entered into a joint motion to stay proceedings while the matter of HARVEY SWICKLE proceeded to trial. The Referee filed his Report regarding SWICKLE on July 13, 1990 (App.23-31), which Report was affirmed by the

Supreme Court on November 14, 1991 (App.32-42). [2]/

The BAR and the Respondent entered into a Conditional Guilty Plea and Consent Judgment for Discipline on September 11, 1990. [3]/ This Conditional Guilty Plea was incorporated into the Referee's Report dated October 8, 1990. On May 2, 1991, the Supreme Court disapproved the Referee's Recommendations.

Proceeding on the initial complaint filed January 17, 1990, the matter was set for final hearing on January 17, 1992. On December 23, 1990, Respondent filed a Motion to Supplement his Affirmative Defenses to include the defense of collateral estoppel. This motion was granted.

The BAR and GROSS agreed that The BAR could offer into evidence a redacted transcript (and exhibits) of the final hearing in the SWICKLE matter in lieu of live testimony (Tr.1/17/92, pgs. 4-12). The one exception was the previous testimony of Agent Coffey regarding certain "admissions" made by SWICKLE after his arrest on October 8, 1987 (Tr.1/17/92, pg. 27). Respondent filed a Motion in Limine to prevent this testimony. The motion was denied and the Referee allowed Agent Coffey to testify (Tr.1/17/92, pg.44). At the conclusion of the hearing, Respondent renewed his motion to strike the testimony of Agent Coffey (Tr.2/21/92, pg.87).

The final hearing was concluded on February 21, 1992. However, on January 21, 1992, the Referee served an Order of

---

[2]/ 589 So.2d 901 (Fla. 1991).

[3]/ Even in the Conditional Plea entered into by the Respondent, Respondent denied all the substantive allegations of the Complaint.

Production on the parties requesting certified copies of Respondent's financial filing with the Judicial Qualifications Commission during his tenure on the bench (App.43). On February 10, 1992, Respondent filed an objection to this order. The objection was overruled and the Referee considered this information in making his recommendations (Tr.2/21/92, pgs.170-171).

At the final hearing the Respondent presented the deposition testimony of Michael ZIER a certified public accountant and Judge Ralph N. PERSON as well as his own live testimony and that of various lawyers in the community (Tr.2/21/92, pgs 4-86;127-170).

On April 20, 1992, the Referee entered his Report finding Respondent guilty of violating Rules 4-8.3 and 4-8.4(a) (c)(d) of the Rules of Professional Conduct of the Florida Bar and recommending that the Respondent be disbarred from the practice of law (App.1-16).

The Report of Referee was filed with the Supreme Court on April 30, 1992. The Report was considered by The BAR at the meeting of the board of governors on May 15, 1992. Respondent filed a Petition for Review on May 8, 1992.

B. Statement of the Facts:

In 1987, Respondent, HOWARD GROSS, was a Circuit Judge sitting in the criminal division of the 11th Judicial Circuit in and for Dade County, Florida. On October 7, 1987, Respondent was duty judge (Tr.2/21/92, pg.137). When Respondent came home that evening he received a message that SWICKLE had called him about a

bond for a client (Zirio). Respondent returned the call. SWICKLE told him that he had a client arrested with three to four kilos of cocaine and that the client could make a $200,000 bond. SWICKLE also represented to the Respondent that his client was a family man, the client's employer would put up the bond money because the client is a key employee, and that the client had children. Respondent told SWICKLE that there would be no problem, based on the facts, as long as the client had retained and was represented by SWICKLE or by some other counsel. The Respondent made notes contemporaneously with this first telephone call between him and SWICKLE: (Tr.2/21/92, pg.138-139, App.23).

The Respondent then called the jail to check to see if there was anything unusual with the arrest of Zirio and to see what the charges were. He did not authorize the reduction of the bond at that time since he was waiting to hear from SWICKLE as to who, if anyone, was representing Zirio. (Tr.2/21/92, pgs.140-141).

When SWICKLE called the Respondent and told him that he was representing Zirio, and the Respondent was satisfied that the three charges against Zirio arose out of the one transaction, he called the jail and authorized the reduction of the bond. (Tr.2/21/92, pg.142)

Respondent did not speak to SWICKLE again that evening. The next morning SWICKLE came to Respondent's home. SWICKLE handed Respondent cash and an envelope and said "Here is some of the money I owe you. I will clear everything up that I owe you by the first of the year." Without counting the money or checking the envelope,

the Respondent placed everything into a desk draw in the playroom and proceeded to get into his car to leave when he was arrested. (Tr.2/21/92, pgs.143-145)

SWICKLE had been an old friend of the Respondent and had loaned him monies over the years, dating back to 1976 when SWICKLE and Respondent shared office space. (Tr.2/21/92, pgs.154-155). SWICKLE began paying back these monies in 1986 and the payments were recorded on the document obtained by the agents when Respondent was arrested. (Tr.2/21/92, pgs.164-165)

Subsequent to Respondent's arrest he was informed about a sting operation involving FDLE and the Dade State's Attorney's Office. He then learned of the wiretaps and recorded conversations involving undercover agents and SWICKLE. He was also made aware of the fact that the bond reduction was for a fictious defendant named ZIRIO. The wiretaps include Respondent's telephone calls to the Dade County Jail and one telephone call with SWICKLE inquiring as to his representation of Zirio. (Ex.5 of BAR in Evidence at 1/17/92 hearing)

After a finding of probable cause at the grievance committee level on June 8, 1989, a Complaint was filed with the Supreme Court. A Referee was appointed to hear this matter. Final Hearing was held on January 17, 1992 and continued to February 21, 1992. On April 20, 1992, the Referee signed his Report (App.1-16) which recommended that the Respondent be found guilty of violating Rules 4-8.3 (a) and Rule 4-8.4 (a)(c) and (d) and further recommended that the Respondent be disbarred from the practice of law. The

Respondent seeks review of this Report.

SUMMARY OF THE ARGUMENT

The Referee's findings of fact and recommendation of guilt are clearly erroneous for the following reasons:

(1) The Referee did not require The BAR to prove the charges against the Respondent by clear and convincing evidence;

(2) The Referee improperly shifted the burden of proof to the Respondent;

(3) There is no evidentiary support for the findings of the Referee;

(4) The Referee used the same factual findings to support his recommendation that Respondent be found guilty of two separate items of misconduct without specifying the misconduct.

(5) The Referee did not consider all the evidence on the mistaken belief that the evidence was not relevant to these proceedings.

The Referee became an advocate and, in so doing, violated the Respondent's due process protections.

ISSUES

I.

THE REFEREE'S FINDINGS OF FACT ARE CLEARLY ERRONEOUS AND LACK EVIDENTIARY SUPPORT

The Referee's findings of fact are presumed to be correct and will be upheld unless they are clearly erroneous or lack evidentiary support. *The Florida Bar v. Colclough*, 561 So.2d 1147 (Fla. 1990). So, too, it is the responsibility of this Court to review the record and reject the Referee's Report if his findings of fact and determination of guilt are clearly erroneous or without evidentiary support. The *Florida Bar v. Moran*, 462 So.2d 1089 (Fla. 1985).

In the matter of HOWARD GROSS, the Referee's findings of fact are clearly erroneous and lack evidentiary support.

A. The Referee was clearly erroneous in shifting the burden of proof to the Respondent:

In footnote 8 of the Report of Referee, the Referee states:

> In the Report of Referee in the Florida Bar v. Swickle, I specifically stated "I carefully considered the evidence as to whether respondent bribed or attempted to bribe Judge Gross to lower Zirio's bond. Although the evidence shows some very questionable conduct on the part of the Respondent and Judge Gross, it does not rise to the level of clear and convincing evidence of such wrongdoing."
>
> With this statement in mind, I have now

> determined that through the additional evidence presented in the instant proceeding, the Bar has sufficiently rebutted Judge Gross' assertion that the payment made was a loan and not a bribe.

There was no additional evidence or exhibits presented, other than the matters in mitigation presented by the Respondent...in fact, there was less evidence since the transcript and exhibits from the SWICKLE hearing had been redacted by agreement between the parties. (Tr. 1/17/92, pgs.1-12)

The only **"additional"** evidence presented by The **BAR** was the live testimony of Agent John Coffey who testified to the post arrest statement of SWICKLE. This statement was part of the SWICKLE hearing and had been previously considered by the Referee in determining SWICKLE'S guilt. [4]/ The statement had been redacted from the stipulated transcript and offered separately over the objection of Respondent. [5]/

In this Court's affirmance of the Referee's Report in the SWICKLE matter, [6]/ this Court determined that:

> The cases against Gross and Swickle were separate disciplinary matters arising out of the same set of facts.

This Court approved the findings of the Referee which recommended discipline for SWICKLE for knowingly making false statements to Judge Gross and **"rain-making".** This Court also

---

[4]/ Referee's Report, Rage 4, paragraph **5** (App.26).

[5]/ The use of this statement by the Referee is discussed, *infra.*

[6]/ **589** So.2d 901 (Fla. 1991).

adopted the Referee's finding that "there was not clear and convincing evidence to support a finding that Swickle bribed or attempted to bribe Judge Gross to lower Zirio's bond." 589 So.2d at 907, n.1. [7]/

Now, with the same facts and less evidence, the Referee has determined that there was clear and convincing evidence of a bribe which was not rebutted by the Respondent. [8]/

The BAR has the burden in disciplinary proceedings of proving its charges by clear and convincing evidence. The Florida *Bar v. Hooper*, 509 So.2d 289 (Fla. 1987). It was not up to the Respondent to

---

[7]/ The Respondent amended his affirmative defenses to include the defense of collateral estoppel. Collateral estoppel may apply where two causes of action are different, in which case the judgment in the first suit estops the parties from litigating in the second suit those points in question common to both which were actually adjudicated in the prior litigation. *Seaboard Coastline Railroad v. Industrial Contracting Co.*, 260 So.2d 860 (Fla. 4th DCA 1972). Respondent recognizes that the parties are not identical, but as noted in *Husky Industries, Inc. v. Griffith*, 422 So.2d 996, 999, n.2 (Fla. 5th DCA 1982), although Florida has consistently honored the requirement of mutuality of parties, the doctrine has been rejected by both the federal courts and by those of several states. See, 31 A.L.R. 3rd 1044 (1970). The Referee should be bound by those findings of fact approved by this Court in the SWICKLE matter.

[8]/ The BAR took the position in SWICKLE'S hearing that SWICKLE lied to Respondent and that SWICKLE engaged in rain-making. In fact, The BAR acknowledged and accepted the fact that SWICKLE gave incorrect information to Respondent even in the Complaint filed against the him. Paragraph 24 of the Compalint (App.20) states that "agents also discovered and seized miscellaneous handwritten notes of Respondent which reflect the fictitious defendant's name, Orlando Zirio, an amount of three to four kilos and the $200,000 bond amount." As an exhibit to the Complaint, The Bar attached the Respondent's handwritten notes (App.22). The BAR now wants to take a completely contradictory position and give some strained interpretation to the evidence in order to prove a conspiracy of bribery between SWICKLE and Respondent. The BAR should now be estopped from taking a contrary position.

negate any "inferences" from the charges brought by the Florida Bar as indicated by the Referee at the close of the January 17, 1992 hearing.

> THE REFEREE: Well, let me explain it to you again.
>
> Look, if I am Judge Gross and Swickle appears at my front door on a Saturday morning and says here's some money, that's on thing.
>
> If, in fact, Swickle appears on my door some hours after I have made a decision in a case and hands me some money, the logical inference -- with nothing more -- is that I have accepted a bribe.
>
> Now, the burden shifts to me, if I am Judge Gross, to show or to give a reasonable explanation as to why Swickle appeared at my door and gave me this money. [Tr. 1/17/92, pg 131]

The Referee, believing that Respondent was "guilty of something", fashioned his Report to justify his findings of guilt by shifting the burden of proof to Respondent and ignoring his previous findings in a similar matter. The Referee, believing that the burden had shifted to Respondent based on the inferences arising from the charges, determined guilt when, in his opinion, "The Bar [has] sufficiently rebutted Judge Gross' assertion that the payment made was a loan and not a bribe." (Report of Referee, page 15, n.8)

The Referee's actual finding of "clear and convincing evidence" is found in paragraph 24 of his report, which states:

> Standing alone, the above outlined events would be sufficient to establish evidence of the offer and acceptance of a bribe by the Respondent. By presenting evidence that Judge Gross lowered a bond for an attorney's client

> in an emergency ex parte proceeding and then received a cash payment from that same attorney the very next morning, the Bar has met its burden of proof in establishing a prima facie case. [Referee's Report, pg.10, App.10]

"*Prima facie*" evidence is such as is sufficient to establish a fact, and which if unrebutted remains sufficient for that purpose. . . it does not relieve The Bar from its burden of proof. *State v. Kahler*, 232 So.2d 166 (Fla. 1970). All that the Referee found were two facts, to wit: that (1) Respondent lowered the bond, and, (2) Respondent received a cash payment the next morning. These two facts do not rise to the level of proving by clear and convincing evidence that

> In the present case, Respondent violated the above cited Rules [Rule 4-8.4 (a),(c),(d)] by knowingly accepting a bribe for the lowering of a criminal defendant's bond. [Report of Referee, pg.15, App.15]

especially in light of the fact that it is uncontroverted that the actions of Respondent, as duty judge, in reducing the bond or the amount of the bond were in no way improper and/or illegal. [9]

Whether or not the Referee believes that "some very questionable conduct" occurred, the physical evidence more convincingly indicates that Respondent properly reduced the bond of Zirio based on the information given to him by SWICKLE.

---

[9] In fact, the opposite is true. The deposition testimony of Judge Ralph Person was placed into evidence. Judge Person was the administrative judge in the criminal division at the time of this incident. He stated that based on the information given to Respondent, there was nothing unusual or improper about reducing the bond as duty judge.

The Referee failed to make any specific findings as to his determination of guilt relative to Rule **4-8.3 (a),** Reporting Professional Misconduct. The Referee used the same factual findings to support his recommendation that Respondent be found guilty of the two separate items of misconduct. This is clearly erroneous. *The Florida Bar v. Lancaster,* **448 So.2d 1019, 1023 (Fla. 1984).**

The Referee excluded the testimony of various character witnesses because "none of the testimony presented touched upon the Respondent's reputation during **his** tenure on the bench and is of no help **in** this matter." (Report of Referee, **pg.** 14, paragraph **30)** The Respondent presented testimony of various attorneys who practiced law with and opposite the Respondent before he became a member of the judiciary and since his retirement from the bench. (Tr. **2/21/92,** pgs **4-54)** These proceedings against the Respondent were not to discipline him for any misconduct he may have committed as a judge, but to determine if his conduct while on the bench affects his fitness to practice law at this time.

As noted in *The Florida Bar v. McCain,* 330 So.2d 712, **715** (Fla. **1976)** this Court stated:

> We adopt for Florida the general **rule** that **"misconduct** in . . . a judgeship, reflects upon an attorney's fitness to practice law and is consequently a proper ground for discipline."

The Referee, therefore, erroneously refused to consider the testimony of attorneys relating directly to Respondent's fitness to practice law.

B. The facts relied upon by the Referee lack evidentiary support or are based *on legally insufficient evidence:*

The Referee relies on two specific areas of evidence presented by The Bar in his attempt to substantiate the "inferences of bribery".

(1) The "coded" *language:*

In paragraph 18 of the Referee's Report (App.8), he stated:

> The above outlined conversation between Swickle and Gross is sufficiently cryptic for the finder of fact to conclude that the attainment of "the signed contract" was in fact the parties' code that the funds with which to effectuate the bribery had been secured.

The Referee explains, in footnote 4 following paragraph 18, why he concludes that "the signed contract" was coded language:

> Judge **Gross** has testified that when he asked Swickle whether there was indeed a "signed contract", he was inquiring as to whether Swickle was in fact representing him. This query, Gross argues, was necessary for him to ascertain that the defendant had ties and that someone would be responsible for him. Although this may be a legitimate concern for an emergency judge to take into account when considering a bond reduction, it is unconvincing in this case. Gross either did not inquire about Zirio's obvious lack of ties to the community (no family, no property, no bank accounts) or did not give them any weight in his decision to lower the bond. Thus, **his** explanation for asking Swickle as to whether he had been retained as Zirio's attorney is inapposite.

This finding by the Referee and the reasons given are incompatible with the physical evidence, the testimony and prior

findings of fact. The Respondent testified that he was told that Zirio was "a family man. His employer will put up the bond money. He is a key employee. He has children." (Tr.2/21/92, pg.138) The Respondent also stated that he made notes of the amount of the weight and the bond but did not make notes of his family background because he "wasn't concerned about it, once he [SWICKLE] told [him] about it, but [he] was concerned about the total amount of the weight and the bond." (Tr.2/21/92, pg.140) The Referee's footnoted reason as to why he found the reference to an attorney's retainer agreement to be coded conversation between Respondent and SWICKLE is lacking evidentiary support.

The Referee can "guess" about the content of the telephone calls that were not recorded, but the facts are that The BAR placed into evidence the handwritten notes belonging to GROSS (Exhibit 8, January 17, 1992) which were made contemporaneously with the telephone conversations between him and Swickle. [10]/ The notes show that the information given to GROSS was that Zirio was arrested with 3 to 4 kilo's of cocaine. The BAR also placed Exhibit 9 into evidence which is Respondent's sworn testimony before the grievance committee regarding the information given to him by Swickle concerning what ties Zirio had to the community. This Same testimony was given at the Referee's hearing for Swickle wherein the Referee previously found that:

> At about 11:00 P.M., Judge Gross lowered

---

[10]/ Again it must be pointed out that this exhibit was attached to the Complaint filed against Respondent and the Complaint affirmatively acknowledges its existence (App.20,22).

> Zirio's bond to $200,000, Judge **Gross'** handwritten notes incorrectly indicate the Zirio was arrested with three to four kilos. Judge **Gross** testified that respondent told him that Zirio was a key employee, had children, resided here, and had no prior problems with the law. [Report for Swickle, pg.5, paragraph 10, **App.27]**

Similarly, the transcripts show that at:

> **9:25 P.M. Swickle told Cassal that he needed to file an appearance and represent Zirio;**
>
> 10:45 P.M. he tells Respondent **that he has a** "signed contract" and Respondent replies **"** So they did, this man now has a lawyer. When Swickle responds affirmatively, Respondent says "OK, if you are his lawyer and you tell me those are the facts, I'll reduce **the bond** accordingly";
>
> **6:35 A.M.** the agent tells Swickle that Zirio is "gonna vaporize" and still, Swickle tells him that **"I** will file an appearance **on** his behalf today anyway. Whether **he** shows or not, I'll file the court appearance..."

In light of these actual occurrences, together with the fact **that Swickle never told Respondent that Zirio was to "vaporize" or** that he was only representing Zirio for the bond hearing [11]/, **the** only logical inferences is the one previously made by the Referee in his Report for Swickle. In his recommendations at page 7 (App.29), the Referee found that:

> In the instant case, respondent [SWICKLE] informed Judge **Gross** that Zirio was a key employee. This is true, but respondent failed to tell the Judge that Zirio was probably a key employee of an illegal organization. Respondent was aware of this since his notes indicate Zirio was not working. Respondent also told **Judge** Gross that eh had a signed

---

[11]/ At 10:33 P.M. Swickle tells the agent that "...here's the thing now, ah, so that you understand, assuming the guy's gonna be here, OK, **I** still wanna represent **him,** because **I can** probably get him out **of** the **problem."**

contract with his client which was untrue.

> Respondent [SWICKLE] was aware that Cassal expected him to influence a judge to reduce Zirio's bond. Respondent intended to convey such an expectation and intended to have Cassal believe that the "retainer" was at least in part to bribe a judge.

(2) The Post-Arrest Statement by SWICKLE:

The Referee considered the testimony, over the numero objections of Respondent, of Agent Coffey regarding SWICKLE'S po arrest statement that SWICKLE claimed to have paid Respondent $50 for assisting him in lowering bond in 1986. The Referee determined that this statement was not hearsay since it was coming into evidence to show "in Swickle's mind, when he appeared at 8:00 a.m. at the Gross residence he [Swickle] intended to deliver the bribe money." (Report of Referee, paragraph 8, App.12)

The Referee determined that SWICKLE'S state of mind wa material and relevant to disprove Respondent's statement that th monies received from SWICKLE on the morning of October 8th were t repay a loan and were so acknowledged by SWICKLE at that time. The Referee reasoned that since SWICKLE did not testify at proceeding, The BAR could use the testimony of Agent Coffey concerning the post arrest statement made by SWICKLE to show that SWICKLE had in his mind the payment of a bribe because he had done something similar with Respondent in the past. [12]/ The Referee

---

[12]/ The BAR, however, sought the introduction of this post arrest statement for the purpose of showing a "conspiracy" under the "relaxed rules of evidence" available in these proceedings

further justified the use of the statement by saying that they "have not been considered for the truth of the matters asserted." No matter how the Referee wants to classify this statement, it was used as substantive evidence to negate sworn testimony of the Respondent. In *Williams v. The State of Florida,* 17 FLW D512 (Fla. 3rd DCA Case No. **90-1510,** Opinion filed February 18, **1992)** the court held that **"[t]he** general rule is that a custodial statement made by a codefendant, inconsistent with his [the defendant's] testimony at trial, cannot be used as substantive evidence in the defendant's trial."

In admission of this statement as non-hearsay is a *non* ***sequitur.*** The Referee **has** arrived at an illogical conclusion **that the** admission of SWICKLE'S post arrest, non hearsay, statement through the testimony of Agent Coffey proves what was **"actually"** in SWICKLE'S mind and disproves what SWICKLE verbally told Respondent.

Without the "facts" drawn from the **"coded"** language and the **post** arrest statement, the Referee would have absolutely no evidentiary basis for **his** determination of guilt. However, as argued, neither of these "facts" are supported by the evidence or legally sufficient to be the basis for the Referee's finding that Respondent's guilt was proven by clear and convincing evidence.

(Tr.1/17/92, pgs 28-37).

II.

THE REFEREE VIOLATED RESPONDENT'S DUE PROCESS RIGHTS WHEN HE BECAME AN ADVOCATE AND SOUGHT DISCOVERY MATTERS NOT PRESENTED BY EITHER OF THE PARTIES

At the conclusion of the proceedings held on January 17, 1992 and after The BAR concluded its presentation of evidence, witnesses and exhibits, the Referee served upon each party a sua sponte ORDER FOR PRODUCTION dated January 21, 1992 (App.43). The Order sought the production

> ...for review certified exemplified copies of the Respondent, Howard Gross' Financial Disclosure Forms filed with the Judicial Qualifications Committee and the Secretary of State for each year that he was on the bench. The copies shall be delivered to the Referee on or before February 15, 1991.

On February 10, 1992, Respondent filed an objection to this Order for Production stating that it was an impermissible encroachment into the investigatory powers of The Florida Bar and manifested a lack of impartiality by the trier of fact.

At the conclusion of the proceedings, on February 21, 1992, the referee "sua sponte, placed them [the Financial Disclosure Forms] into evidence ...as a Referee's exhibit." (Tr. 2/21/92, pg. 171) The Referee incorporated this exhibit in his Report in his determination that the "debt" to which the Respondent testified existed between himself and SWICKLE was "suspect". (Paragraph 27 of Report of Referee).

The Rules Regulating the Florida Bar provide that the chief justice shall appoint referees to try disciplinary cases [Rule 3-

7.6(a)]. The proceedings are adversarial [Rule 3-7.6(b)], although neither civil nor criminal but quasijudicial administrative [Rule 3-7.6(e)(1)]. Discovery is available to the parties in accordance with the Florida Rules of Civil Procedure [Rule 3-7.6(e)(2)].

The referee is **not** a party to these proceedings [Rule 3-7.6(d)]. Neither the Florida Rules of Civil Procedure nor the Rules Regulating The Florida Bar give the Referee any authority to take an active role in investigating or proving the charges filed against the Respondent.

The Florida Bar has the burden of proving by clear and convincing evidence that a respondent is guilty of specific rule violations. *The Florida Bar v. Hooper*, 509 So.2d 289 (Fla. 1987). It is the function of the referee to weigh the evidence presented and determine its sufficiency. *The Florida Bar v. Scott*, 566 So.2d 765, 767 (Fla. 1990).

The process of disciplining members of the Florida Bar is somewhat unique in that The Florida Bar is "an official arm of the Court." *The Florida Bar Re Rules Regulating The Florida Bar*, 494 So.2d 977, 979 (1986). In grievance cases, the Supreme Court has delegated to The BAR "the task of preliminary screening and, where necessary, of ferreting out all pertinent facts...When The Florida Bar operates in this capacity, it acts not as an independent agent but as an 'arm of the Court'" [13]/... "serving as an adjunct or administrative

---

[13]/ *The Florida Bar v. McCain*, 330 So.2d 712, 714 (1976).

agency of this Court ..." [14]/

Although the disciplinary proceedings of The Bar are not governed by the Administrative Procedure Act, the procedural aspects of the disciplinary hearings are closely analogous to administrative hearings. The Florida Supreme Court, when reviewing administrative disciplinary procedures, has held that combining the fact-seeking and judicial functions in the same office does not automatically violate due process, *State v. Johnson*, 345 So.2d 1069 (Fla. 1977), since it is contemplated that even in administrative proceedings, the agency that brings a complaint may review and change the findings of a neutral hearing officer if the finding are not supported by competent, substantial evidence or are legally incorrect. §120.57(1)(b)(10), Florida Statutes (1987).

Regardless of the lack of formalities in these types of proceedings, "an impartial decisionmaker is a basic constituent of minimum due process." *Megill* v. *Board of Regents*, 541 F.2d 1073, 1079 (5th Cir. 1976); *Ridgewood Properties, Inc. v. Department of Community Affairs*, 562 So.2d 322 (Fla. 1990).

Pursuant to the applicable Rules Regulating the Florida Bar, The Florida Bar chose to seek disciplinary sanctions against this Respondent for specific violations alleged in the complaint. The Florida Bar investigated the matter and selected its witnesses and its evidence to present to an impartial and neutral referee in support of these allegations of misconduct. The Referee's actions

---

[14]/ *The Florida Bar v. McCain*, 361 So.2d 700, 701 (Fla. 1978).

in conducting his own investigation and seeking production, sua sponte, takes him out of the realm of being an independent arbiter of the facts.

The Referee has even attempted, in footnotes 5 and 7 of his Report, to express his "feelings" of additional misconduct engaged in by the Respondent but not charged by The BAR nor proven by clear and convincing evidence. By "shedding" his cloak as an impartial decision maker, and undertaking the role of prosecutor, the Referee considered matters outside this record. The Referee made the following statement at the end of the hearing on January 17, 1992, wherein he said:

> [At page 128]--THE REFEREE: Well, let me ask you this.
>
> Wasn't part of the testimony -- and I remember it -- that a portion of the money that FDLE gave -- or that Swickle gave to Gross prior to the arrest, a portion of it or at least $1,300 of it represented the split of $2,600 fee from a client that Judge Cross allegedly referred to Swickle. That was part of the defense.
>
> [At page 131]-- On top of that as I understand the previous testimony and the record here before me, a portion of the money that Swickle gave me represented a split of a fee, $1,300 from a client that I had referred -- I, being Judge Gross -- to Harvey Swickle. How do you explain that? [15]/

There is nothing in the redacted transcript or exhibits relating to these monies. Respondent, during his testimony and as a precaution, denied any knowledge of any fee splitting and more particularly denied receiving any monies for recommending Swickle to Howard Feinberg (Tr.2/21/92, pgs. 148-149). The Florida Bar did

[15]/ This is another example of the Referee placing the burden on the Respondent to disprove an unsupported inference.

not specify any act or acts of conduct regarding **"fee-splitting"** in the Complaint against this Respondent. Any "inferences" involving fee splitting that appeared in the proceedings of Swickle occurred well before this Court refused to accept Respondent's plea and returned the matter for hearing and gave The **BAR** an opportunity to amend its complaint. The **BAR** did not seek to amend its pleadings at that time nor after the Referee inquired about **"fee-splitting"** at the end of the hearing on January 17, 1992.

The Supreme Court has, in the past, allowed The BAR to present evidence of unethical conduct, not squarely within the scope of The BAR'S accusatory pleading, but only if the unethical conduct is established by clear and convincing evidence, and then only for the purpose of the discipline to be imposed. *The Florida Bar* V. *Stillman*, **401** So.2d 1306 (Fla. 1981). Nonetheless, the Referee determined that Respondent, in footnote 5 of his Report, accepted an unlawful fee split and, in footnote 7, was guilty of Canon 5(c) of the Code of Judicial Conduct.

CONCLUSION

Based upon the foregoing argument, Respondent, HOWARD GROSS, prays this Court review the Referee's Report in light of the record and determine that the Referee's findings of fact are clearly erroneous and/or lack evidentiary support. Alternatively, Respondent seeks a new evidentiary hearing before an impartial referee.

Respectfully submitted,

RHEA P. GROSSMAN, **P.A.**
2710 Douglas Road
Miami, Florida 33133-2728
(305) **448-6692**

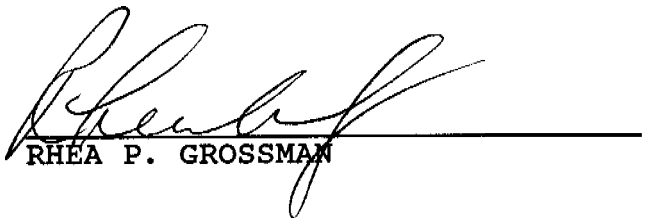
By: 
RHEA P. GROSSMAN
Florida Bar #090640

Attorney for Respondent,
HOWARD GROSS

DATED: June *5*, 1992.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing INITIAL BRIEF AND APPENDIX OF RESPONDENT was furnished this 5th day of June, 1992, by U.S. Mail, postage prepaid, to: David McGunegle, Branch Staff Counsel, The Florida Bar, 880 North Orange Avenue, Ste 200, Orlando, Florida 32801; John A. Boggs, Director of Lawyer Regulation, 650 Apalachee Parkway, Tallahassee, Fl 32399-2300.



RHEA P. GROSSMAN

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

Supreme Court Case No. 75,347

The Florida Bar File No. 88-71,735 (11G)

THE FLORIDA BAR,

Complainant,

vs.

HOWARD GROSS,

Respondent.

ON PETITION FOR REVIEW

APPENDIX

TO

INITIAL BRIEF AND APPENDIX OF RESPONDENT, HOWARD GROSS

RHEA P. GROSSMAN, P.A.
RHEA P. GROSSMAN
2710 Douglas Road
Miami, Florida 33133-2728
(305) 448-6692

Attorney for Respondent,
HOWARD GROSS

TABLE OF CONTENTS TO APPENDIX