IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

FILED
SID J. WHITE
JUN 29 1992
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

THE FLORIDA BAR,

Complainant,

v.

HOWARD GROSS,

Respondent.
_____/

Case No. 75,347
[TFB Case No. 88-71,735 (11G)]

ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this brief, The Florida Bar shall be referred to as the "Bar".

The Report of Referee dated April 20, 1992, shall be referred to as "RR".

The transcript of the final hearing held on January 17, 1992, shall be referred to as "T.I.".

The transcript of the continuation of the final hearing held on February 21, 1992, shall be referred to as "T.II.".

STATEMENT OF THE CASE

The Florida Bar accepts the respondent's statement of the case and therefore will not reiterate it here.

STATEMENT OF THE FACTS

The respondent's statement of the facts contained in his initial brief come primarily from his testimony before the referee at the final hearing. The Bar submits the following statement of the facts derived from the referee's report.

The respondent was the subject of an on-going investigation conducted by the Dade County state Attorney's Office and the Florida Department of Law Enforcement in reference to the alleged bribery of judicial officers. In devising a sting operation, the two agencies placed a fictitious defendant, Orlando Zirio, into the Dade County jail system. Mr. Zirio was charged with trafficking in cocaine, conspiracy to traffic in cocaine and possession of cocaine on October 7, 1987. Undercover Agent Eugene Caso (a.k.a. Ernesto Casal) posed as an agent for wealthy South American principals with recently acquired funds who wished to invest in the South Florida area. Agent Caso sought legal assistance from attorney Alan S. Rosenthal and posed as a representative for these foreign investors. Additionally, Agent Caso sought help for a criminal matter connected with one of his "employees". Mr. Rosenthal referred Agent **Caso** to attorney Harvey S. Swickle regarding the criminal matter.

Previously, on September **24**, 1987, an order had been issued authorizing the implementation of a dialed number recorder, also

known as a "pen register'', and the installation of a trap and trace device on the residential telephones of Mr. Swickle and the respondent. Agent Caso also was equipped with a body bug utilized to record conversations between him and Harvey Swickle. From approximately 3:55 P.M. on October 7, through 6:35 A.M. on October 8, 1987, Agent Caso engaged in numerous conversations with Mr. Swickle. Throughout the course of these conversations, Agent Caso intimated to Mr. Swickle that he was engaged in questionable business with Latin-American clients and he needed to get one of his "runners" released from jail as soon as possible. Agent Caso informed Mr. Swickle that he was unclear as to the actual details of the case, such as the charges against the person in question, which jail he was in, his ties to the community, etc., and purposefully fed the information to Mr. Swickle at a slow pace throughout the course of the evening.

At 5:55 P.M. on October 7, 1987, Agent Caso contacted Mr. Swickle and told him the employee's name was Orlando Zirio and he had been arrested in Dade County with approximately one dozen kilos of cocaine. Agent Caso re-emphasized the urgency of getting Mr. Zirio out of jail immediately. Mr. Swickle responded that because of the amount of cocaine involved, he did not believe the court would set a bond on him until the next morning when he went before a magistrate. He added, however, there was a possibility he could obtain a bond that evening depending on who the emergency judge was. Mr. Swickle then placed a call to the

Broward County Jail. He next called Agent **Caso** and indicated he had been unable to locate Mr. Zirio at the jails. At approximately 7:25 P.M., Mr. Zirio **was** booked into the Dade County Jail by the Florida Marine Patrol and a $250,000.00 standard bond was set. Subsequently, the arresting officer returned to the jail **and** added additional offenses to Mr. Zirio's charges which raised the standard bond to $750,000.00.

At 8:33 P.M., prior to his confirming the identity of the duty judge, Mr. Swickle expressed serious doubts as to getting Mr. Zirio released that night. He feared no emergency judge would agree to reduce the bond that night without a hearing because such an action would look bad in the newspapers. Agent Caso pleaded with Mr. Swickle to do everything he could to facilitate Mr. Zirio's release that evening. In an apparent attempt to determine the feasibility of getting the bond lowered, Mr. Swickle desperately attempted to contact the respondent immediately after his 8:33 P.M. conversation with Agent Caso. Thus, between 8:43 P.M. and 8:55 P.M., Mr. Swickle placed twelve telephone calls to the respondent's residence. Although the substance of the conversations were not recorded, the successive calls placed within an eight minute time span indicated Mr. Swickle was unable to contact the respondent during this particular time.

At 9:11 P.M., Agent **Caso** called Mr. Swickle with further

information on Mr. Zirio and again expressed his need for help in the matter. He further informed Mr. Swickle that his people would have no problem meeting a $200,000.00 bond. Mr. Swickle then told Agent Caso he would call him as soon as he heard from "his guy". Specifically, Mr. Swickle related to Agent Caso, "OK, I've already got a call into him, I'm just waiting to hear back from him now."

At approximately 9:17 P.M., the pen register activity indicated an out-going call placed from the respondent's residence to Mr. Swickle's residence. Said telephone call had a duration of two minutes and forty-three seconds. For various reasons, the conversations emanating from the respondent's telephone were not recorded although the source of the calls was.

Although Mr. Swickle had previously expressed grave doubts as to his ability to get the bond lowered prior to his conversation with the respondent, immediately after speaking with the respondent, Mr. Swickle called Agent Caso at 9:25 P.M. and unequivocally stated "... if I file an appearance on his behalf and represent him, we can have the bond reduced tonight." He assured Agent Caso that the bond would be reduced to $200,000.00.

The sequence of events and the statements made indicated the substance of the 9:17 P.M. conversation necessarily pertained to

the details of Mr. Zirio's arrest and detainment. In fact, the respondent testified on cross-examination during the June 12, 1990, disciplinary hearing in the Harvey Swickle case that he had been informed of the charges against Mr. Zirio by Mr. Swickle just prior to his placing **a** call to Officer Wright at the Dade County Jail facility. The pen register activity confirmed two out-going calls to the Dade County Jail placed at 9:20 P.M. from the respondent's residence.

At 9:46 P.M., Agent Caso telephoned Mr. Swickle and informed him he had the $20,000.00 retainer Mr. Swickle had requested. They made an arrangement to meet at the Marriott Hotel. At 10:33 P.M., Mr. Swickle met Agent **Caso** at the hotel. Agent Caso informed Mr. Swickle he was in possession of $10,000.00 and would soon be receiving the balance. Mr. Swickle expressed concern over the lack of funds and stated this created a problem because he could not have "someone do something unless they know that, that ah, I'm fully represented." Thereafter, Mr. Swickle placed a call to the respondent's residence from the hotel lobby pay telephone at approximately 10:45 P.M. During the conversation, Mr. Swickle advised the respondent he had a signed contract and the respondent stated "OK, if you are his lawyer and **you** tell me those are the facts, I'll reduce the band accordingly." Mr. Swickle then asked the respondent what time he would be arriving at the courthouse and the respondent replied it would be approximately 8:15 in the morning. Mr. Swickle then asked if he

could meet the respondent at his home at 8:00 A.M. the next morning and the respondent agreed.

At 10:47 P.M., the respondent placed a call to the Dade County Jail. He requested to speak with Sergeant Wright and was informed she had left for the evening. He explained the purpose of his call and waited for a return call from the jail to verify his identity. At 11:02 P.M., the respondent was called by Lieutenant Siddiqui from the Dade County Jail. At this time, the respondent instructed the lieutenant to reduce Mr. Zirlo's bond to $200,000.00 on all counts.

At 11:25 P.M., Agent Caso telephoned Mr. Swickle and advised him that he had an additional $5,000.00 and the remaining $5,000.00 would be forthcoming. Mr. Swickle made arrangements to pick up the cash. Although the bond had already been lowered, Mr. Swickle deliberately kept this information from Agent Caso. When Agent Caso expressly asked if the bond had already been reduced, Mr. Swickle replied, "As soon as I get back over there, OK, I call them and they can do it."

After picking up the $5,000.00 at 12:05 A.M. that night, Mr. Swickle told Agent Caso he should call him as soon as the remainder of the money came in and he would pick it up early in the morning. He advised Agent Caso he would pick up the money at or around 7:00 A.M. because he had an 8:00 A.M. appointment.

At 1:00 A.M., Agent **Caso** called Mr. Swickle and advised him the balance had arrived and they arranged to meet at 7:00 A.M. at the hotel. **At** 6:35 A.M., Mr. Swickle arrived and met with Agent Caso and received the remaining funds. Thereafter, at approximately 8:00 A.M., on October **8**, 1987, Mr. Swickle met the respondent in the driveway of the respondent's residence and handed him $5,000.00 in cash and a Nova University envelope containing $1,300.00 with the name J. Feinberg written on it. The respondent testified he took the money, put it in **a** desk drawer in his playroom and proceeded to leave the house. shortly thereafter, the respondent was placed under arrested at his home. The $5,000.00 and the respondent's personal notes were seized. The envelope was overlooked and was later turned over to the authorities by the respondent's criminal defense attorney.

The referee found the respondent had knowingly accepted a bribe from an attorney in exchange for reducing the bond of that attorney's client.

SUMMARY OF THE ARGUMENT

The respondent challenges the referee's findings of fact as being erroneous and not based on the evidence. The Bar submits the respondent has failed to prove the referee's findings were without basis in the record. The findings are clearly and convincingly supported by the evidence. The main thrust of the respondent's argument on this point appears to be that the referee's findings must be wrong simply because he did not accept the respondent's version of the events. Responsibility for fact-finding and resolving evidentiary conflicts rests with the referee because this Court, in its review function, is ill equipped to make these types of determinations. The referee heard the testimony and had the opportunity to examine the demeanor of the witnesses. Obviously, he did not find the respondent to be credible. Further, although this same referee in the companion case involving Mr. Swickle noted in his report filed in that case that based upon the evidence then presented there was no clear and convincing evidence to support finding Mr. Swickle guilty of bribing or attempting to bribe the respondent, additional evidence, not applicable to Mr. Swickle's case, was introduced here. This, combined with the change in focus to examining the respondent's conduct rather than Mr. Swickle's, resulted in the referee finding the respondent had indeed accepted a bribe from Mr. Swickle.

The results of Mr. Swickle's case are not dispositive of the charges here. The doctrine of collateral estoppel does not apply. The respondent was not a party to the prior litigation involving Mr. Swickle and therefore is not bound by the results of that case. Additionally, the issues are different. The charges against both men are basically different sides of the same coin. Although based upon the same events, the charges are different. Making misrepresentations to a judge and convincing a client you can influence one is not the same as accepting a bribe. The Bar submits the difference in focus and relevant evidence submitted led to the different conclusions. There was neither mutuality of the parties nor issues.

The respondent was afforded his full due process rights throughout these proceedings. Pursuant to The Florida Bar v. Stillman, 401 So. 2d 1306 (Fla. 1981), a referee may consider additional evidence of misconduct even if it is the referee who seeks the evidence.

The Bar submits there is no basis far granting the respondent's request for a new evidentiary hearing. He was afforded ample opportunity to present his case and did so. An adverse ruling is not grounds for a trial de novo nor is it grounds for overturning a referee's findings of fact and the recommendation of guilt flowing therefrom. The Bar also submits the recommendation of disbarment is appropriate given the nature

of the respondent's misconduct and its adverse impact on the public's view of the judiciary and the legal system.

ARGUMENT

POINT I

THE **REFEREE'S FINDINGS** OF **FACT ARE** SUPPORTED **BY CLEAR AND CONVINCING EVIDENCE.**

This Court has delegated the responsibility for fact-finding to the referee and, based on well-established principles of law, has determined it will uphold a referee's findings of fact unless they are without support in the evidence or are clearly erroneous. The Florida Bar v. Bajoczky, **558 So. 2d 1022** (Fla. **1990).** It is the referee's duty to resolve conflicts in the evidence and testimony because she or he is in the best position to make such observations first hand and this Court may be bound by a referee's findings in that respect. Bajoczky, supra, and **The** Florida Bar v. Hoffer, **383 So. 2d 639 (Fla. 1980).** A referee's findings enjoy the same presumption of correctness as the judgment of a trier of fact in **a** civil proceeding. See Rule of Discipline **3-7.6(k)(1)**(1) and The Florida Bar v. Hooper, 509 **So.** 2d **289** (Fla. 1987). This Court's responsibility is to review the referee's recommendation as to guilt and impose the appropriate level of discipline. The Florida Bar v. Hirsch, **359** So. 2d **856** (Fla. 1978). The burden falls upon the party questioning the soundness of the referee's findings to prove they are erroneous or without support in the record. It is a heavy burden indeed. The Bar submits the respondent has failed to meet this burden.

A review of the Report of Referee shows it to be thorough and well-reasoned. He found the conversation between the respondent and Mr. Swickle at 10:45 P.M. was sufficiently cryptic for him to conclude that the attainment of a "signed contract" was in fact the parties' code that the funds with which to effectuate the bribery had been secured. In explaining his finding, the referee noted the respondent's failure to inquire about Mr. Zirio's ties to the community and failure to give them any weight in his decision to lower the bond belied the respondent's explanation. Simply put, the referee did not believe the respondent's testimony that when he asked Mr. Swickle about the existence of a signed contract he was merely inquiring as to whether or not Mr. Swickle was now representing Mr. Zirio. The respondent took the position that it was necessary for him to ascertain that the defendant had ties and someone would be responsible for him.

The referee found that, standing alone, the events set forth in his findings of fact were sufficient to establish a prima facie case against the respondent. He found the evidence showed there was an offer and acceptance of a bribe by the respondent. He noted in his report at page ten that the respondent lowered the bond at an emergency ex parte hearing, then met with the same attorney early the next morning and received a cash payment.

The referee found no credibility in the respondent's

testimony that the payment he received from Mr. Swickle was the repayment of an old debt Mr. Swickle had owed him which dated back to 1976 when Mr. Swickle and the respondent shared office space. The only physical evidence of this debt was a piece of paper found in a jumpsuit in the respondent's closet which purportedly listed payments made by Mr. Swickle to the respondent in partial satisfaction of this debt. However, the respondent's criminal defense attorney testified before the referee that the respondent was a meticulous record keeper and he had experienced no difficulty in gathering necessary information for the purpose of having an accountant perform a net worth analysis. Further, all of the payments were made during the course of eleven months and thereafter no further payments were made prior to 1986. The referee also found the respondent never reported this substantial amount of money owed to him by Mr. Swickle as an asset in his financial filings with the Judicial Qualifications Commission. The underlying purpose of making financial filings with the JQC is to publish any possible conflict of interest. Mr. Swickle was a practicing criminal attorney who appeared before the respondent and in fact had received court appointments from the respondent in the past. The referee noted that even if the debt was a reality, the respondent was still in violation of the Code of Judicial Conduct by allowing Mr. Swickle to appear before him without disclosing the relationship.

The referee also found that the testimony of Agent Coffey of

the FDLE concerning Mr. Swickle's post-arrest statements indicated that, in Mr. Swickle's mind, when he appeared at 8:00 A.M. at the respondent's residence he intended to deliver bribe money. The referee further stated that Mr. Swickle's statements standing alone could not confirm a bribe occurred nor could it be used to show the respondent's state of mind.

The referee found significance in the timing of the payment. He believed it was highly unlikely that Mr. Swickle, after having spent a virtually sleepless night travelling all over town, would have felt compelled to meet the respondent and make a partial payment on a fifteen year old debt which had, until that point, remained completely unpaid for ten years. This, coupled with the fact that Mr. Swickle persisted in picking up the final $5,000.00 payment from Agent Caso immediately prior to his 8:00 A.M. meeting with the respondent, cast grievous doubt on the respondent's classification of the 8:00 A.M. payment as a repayment on a loan.

It is interesting to note this referee also presided over The Florida Bar v. Swickle, 589 So. 2d 901 (Fla. 1991). As he states on page eight of that report, (Appendix A-24) the referee found, based upon the evidence and testimony in Mr. Swickle's case, that there was then no clear and convincing evidence Mr. Swickle had bribed or attempted to bribe the respondent. It can be inferred from this statement that the respondent could not

have accepted a bribe where none existed. While the respondent is correct in his initial brief that much of the same evidence presented in Mr. Swickle's case was reintroduced in this matter, there are two important considerations which no doubt gave rise, at least in part, to the referee's finding that the respondent had, in fact, agreed to accept a bribe. First, there was a difference in focus between Mr. Swickle's case and the respondent's case. At Mr. Swickle's trial, the focus was solely on his conduct **and** not the respondent's. The evidence and testimony was viewed in light of proving or disproving Mr. Swickle's misrepresentations to the respondent **so** as to obtain a bond reduction and representations to his client that he could obtain the reduction by improperly influencing a judge. The focus is now different. The referee reviewed the same evidence as before but now with an eye toward the Bar's allegations against the respondent.

Second, additional evidence was introduced. The respondent's former criminal defense attorney, Michael Tarre, testified during the final hearing on February 21, 1992. He was not called as a witness in Mr. Swickle's case. Mr. Tarre's testimony obviously played **a** role in altering the referee's earlier opinion the respondent had not accepted a bribe. He makes an extensive reference to Mr. Tarre's testimony on page eleven of his report. Namely, the referee found, based upon Mr. Tarre's testimony, that the respondent was a meticulous

record-keeper and that the respondent's explanation concerning the $5,000.00 he received from Mr. Swickle being a payment on an old debt was no longer credible. The referee heard the respondent testify he kept the paper listing Mr. Swickle's loan payments in a jumpsuit in his closet because he used this article of clothing as something of a file cabinet where he also kept other miscellaneous items. (T.II., p. 152). Obviously, the referee chose not to believe the respondent's explanation in light of conflicting testimony, from his own witness, that the respondent was a meticulous record-keeper.

Although the respondent makes much of the introduction of Mr. Swickle's post-arrest statement to Special Agent Coffey wherein he implicated the respondent had previous agreed to reduce the bond in another case in exchange for the payment of a financial incentive from Mr. Swickle, a review of the referee's report does not indicate the referee relied heavily on this statement in reaching his findings. In fact, on page thirteen of his report, he specifically states that the statement alone cannot prove a bribe occurred nor can it show the respondent's state of mind. The Bar submits this statement was given the appropriate weight and considered in light of other evidence.

The respondent also argues through the doctrine of collateral estoppel that the referee and this Court should be bound by the findings in Swickle, supra, that there was

insufficient evidence to prove the respondent accepted a bribe from Mr. Swickle to lower the bond. The Bar submits the doctrine of collateral estoppel does not apply here. In Swickle, supra, the respondent was not on trial, The litigation was between the Bar and Mr. Swickle. Although the charges here arise from the same incident, this **case** is between different parties. Collateral estoppel applies when a determination of the same facts being litigated in a separate case between the same two parties is made. The same two parties will be bound by those facts in all future proceedings between them. This Court set forth its continuing adherence to the doctrine of mutuality of parties in Trucking Employees of North Jersey Welfare Fund, Inc. v. Romano, 450 So. 2d 843 (Fla. 1984). **The** principle of estoppel applies where two causes of action are different, **as** here, and operates to prevent the same parties, or their privies, **from** relitigating in a second action issues which were adjudicated in the prior litigation. The doctrine of mutuality of parties holds that strangers to a prior litigation, such as the respondent here, are not bound by the results of that litigation. This doctrine recently has been limited somewhat by this Court's opinion in Zeidwig v. Ward, **548 So.** 2d 209 (Fla. 1989). This Court addressed the narrow issue **as** to whether or not mutuality of the parties is a prerequisite in Florida to the defensive application of the doctrine of collateral estoppel in the criminal-to-civil context. This Court answered the question in the negative and upheld the use of collateral estoppel to prevent

a criminal defendant from relitigating the same issues which had been litigated in his criminal case by bringing a civil action in a new forum against a non-party to the former action. The doctrine of mutuality of parties has also been modified in the area of products liability litigation. See e.g. West v. Kawasaki Motors Manufacturing Corp., U.S.A., 17 FLW 356 (Fla. 3rd DCA 1992). Note this case does not appear to be final and may be pending on rehearing.

In the context of Bar discipline cases, the Bar submits the referee was correct in denying the respondent's assertion of collateral estoppel. The purpose for modifying the doctrine set forth in Zeidwig, supra, is not applicable here. Bar proceedings are quasi-judicial rather than civil proceedings arising out of a prior criminal action. Further, Zeidwig, supra, applies only in the limited context of criminal-to-civil cases where the doctrine is used defensively. There is no mutuality of parties in the respondent's case. The focus in the respondent's case differs from that in Swickle, supra. In Swickle, supra, the focus was on Mr. Swickle. Although the footnote in the referee's report says the evidence was not clear and convincing that Mr. Swickle bribed or attempted to bribe the respondent to lower the bond, and through inference, the respondent did not accept a bribe, the Bar submits this was not discussed in the context of a finding of fact. Rather, it appears to have been more in the nature of an observation made by the referee based upon the evidence presented

at that point. Note it was not in the findings of fact section but rather at the end of the recommendations as to guilt section of the report. (see Appendix) This Court, in its opinion in Swickle, supra, made note of the referee's observation.

As for the referee's failure to give greater weight to the respondent's witnesses who testified on his behalf, the Bas submits the testimony was given its appropriate consideration for what it was, mitigating evidence. Evidence as to an attorney's good character has little relevance in determining his guilt or innocence of the charges against him. The Florida Bar v. Whitney, 237 So. 2d 745 (Fla. 1970). Ironically, it appears the testimony of one of the respondent's witnesses, Michael Tarre, harmed the respondent's position more than it helped.

POINT II

THE REFEREE DID NOT VIOLATE THE RESPONDENT'S DUE PROCESS RIGHTS WHEN HE REQUESTED THE PARTIES PROVIDE HIM WITH ADDITIONAL EVIDENCE.

After the end of the first phase of the final hearing held an January 17, 1992, the referee filed a sua sponte order for production on January 21, 1992. Apparently, after hearing the evidence and testimony presented by the Bar, the referee wanted to review the respondent's financial disclosure forms filed with the Judicial Qualifications Commission in order to determine whether or not the respondent had disclosed the existence of the outstanding loan to Mr. Swickle as required by the Code of Judicial Conduct.

The rules of evidence are relaxed in a Bar proceeding and it is permissible for a referee to receive and make findings on misconduct not alleged in the Bar's complaint. The Florida Bar v. DeSerio, 529 So. 2d 1117 (Fla. 1988). Because Bar proceedings are quasi-judicial rather than criminal or civil, the referee is not bound by the technical rules of evidence. The Florida Bar v. Rendina, 583 So. 2d 314 (Fla. 1991). During a final hearing, it is not at all unusual for a referee to ask witnesses questions. The Bar submits the referee properly utilized his discretion in seeking out additional evidence to answer whatever questions were raised in his mind through the testimony and evidence presented at the hearing. The referee did nothing more here than the

referee did in Stillman, supra, where the referee, on his own volition, submitted a document to a handwriting examiner to determine the veracity of the accused attorney's testimony concerning a signature. The examiner determined the signature had been forged. This information was included by the referee in his report although it was never charged by the Bar in its complaint. This Court upheld the referee's actions.

Additionally, the respondent was afforded his full due process rights. He was provided notice of the alleged rule violations and was given an opportunity to be heard both in person and through witnesses. The Florida Bas v. Richardson, 591 So. 2d 908 (Fla. 1991); The Florida Bar v. Fussell, 179 So. 2d 852 (Fla. 1965). In fact, the final hearing was continued to February 21, 1992, so that the respondent could call an additional witness. (T.I., p. 137). The respondent was not charged with engaging in impermissible fee splitting nor did the referee find him guilty of that additional rule violation in Section III of his report. In fact, in footnote number five at the bottom of page ten, the referee specifically stated that because the Bar did not charge the respondent with this misconduct, he did not give it further consideration although he believed the evidence presented did support such a charge. Under Stillman, supra, the referee was allowed to include this information in his findings even though the Bar did not change it in the complaint.

In his conclusion, the respondent requests this Court, as an alternative to overturning the referee's findings of fact, to order a new evidentiary hearing. It is interesting to note that although the Bar sought the recusal of this referee when it filed it Verified Motion to Recuse Referee on October 24, 1991, which the referee denied on December 6, 1991, the respondent opposed recusing the referee in his Response to Complainant's Verified Motion for Disqualification of Trial Judge dated October 29, 1991. Only now, after an adverse ruling, does the respondent raise the specter of prejudice. In fact, a reading of the referee's footnote in Swickle, supra, could lead one to believe the referee was prejudiced in favor of the respondent.

This Court's review of the referee's findings of fact is not in the nature of a trial de novo in which this Court must re-weigh the evidence and reach its own findings. Hooper, supra. The referee has already determined the Bar has met its burden. The respondent was afforded ample opportunity to present evidence to rebut the Bar's allegations and did so. The Bar submits the respondent is not entitled to a new trial simply because the referee chose not to believe his side of the story. There is no evidence the referee reversed the proof requirement by placing the burden on the respondent to prove his innocence by clear and convincing evidence. When a party proves a prima facie case and the opposing side does not come forward in its case or cannot effectively make a rebuttal, the case stands. The referee found

on page ten of his report the Bar had proved a prima facie case. He obviously found the respondent was unable to sufficiently rebut the Bar's prima facie case. The Bar submits that the referee's findings of fact and recommendation as to guilt should be upheld.

Additionally, his recommendation that the respondent be disbarred should also be upheld. No other discipline would be appropriate where a judge accepts a bribe. See The Florida Bar v. Merckle, 498 So. 2d 1242 (Fla. 1986) where a judge was disbarred for agreeing to alter a sentence after accepting a plea agreement and for engaging in ex parte communications about the case. The accused then made untrue statements concerning his actions to both a JQC investigator and the media. See also the companion case of The Florida Bar v. Leon, 510 So. 2d 873 (Fla. 1987), where a judge was disbarred for engaging in ex parte communications with Judge Merckle through which he improperly secured the alteration of a criminal sentence. Judge Leon also made false statements concerning the incident to the JQC. He was adjudicated guilty on two counts of perjury and one count of official misconduct.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will enter an order approving the referee's findings of fact and recommendation as to guilt and order the respondent disbarred and to pay the costs of these proceedings now total $1,971.21.

Respectfully submitted,

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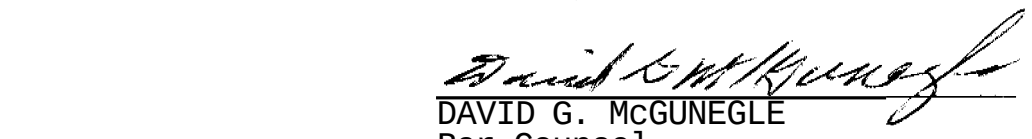

DAVID G. McGUNEGLE
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Answer Brief and Appendix has been furnished **by** Airborne Express overnight mail to Mr. Sid J. White, Clerk of the Court, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, **32399-1927**; a copy **of** the foregoing has been furnished **by** certified mail number P **399 876 154**, return receipt requested, to the respondent's counsel, Ms. Rhea P. Grossman, 2710 Douglas Road, Miami, Florida, 33133-2728; and a **copy** of the foregoing has been furnished **by** regular U.S. mail to Staff Counsel, The Florida Bar, ***650*** Apalachee Parkway, Tallahassee, Florida, **32399-2300**, this 26th day of June, **1992.**

David G. McGunegle

DAVID G. McGUNEGLE
Bar Counsel

APPENDIX

APPENDIX INDEX

IN THE SUPREME COURT OF FMRIDA
(Before a Referee)

The Florida Bar,

Complainant,

vs.

Howard Gross,

Respondent.
_____/

Supreme Court Case
Case No: 75,347

The Florida Bar File
Case No: 88-71,375(11G)

REPORT OF REFEREE

1. 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 January 17, 1992 and February 21, 1992. 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: Rhea P. Grossman

If. 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:

1. Respondent, Howard Gross, was the subject of an ongoing investigation conducted by the Dade State Attorney's Office and the Florida Department *of* Law Enforcement (FDLE) in reference to the alleged bribery of judicial officers.

2. In devising their "sting" operation, the two agencies placed a fictitious defendant (Orlando Zirio) into the Dade

County jail system[1] for cocaine trafficking, conspiracy to traffic in cocaine and possession of cocaine on October 7, 1987. Undercover Agent Eugene Caso (a/k/a Ernesto Casal) posed as an agent for wealthy South American principals with recently acquired funds who wished to invest in the South Florida area, Caso sought legal assistance from Alan S. Rosenthal and posed as a representative for these foreign investors, Additionally, Caso sought help for a criminal matter connected with one of his "employees". Rosenthal referred Caso to Harvey S. Swickle regarding the criminal matter.

3. Previously, on September 24, 1987, Chief Justice Parker Lee McDonald of the Florida Supreme Court issued an Order authorizing the implementation of a dialed number recorder, more commonly known as a "pen register" and the installation *of* a trap and trace device on Harvey Swickle and Respondent Howard Gross' respective residences. Also, Agent Caso was subsequently equipped with a body bug utilized to record conversations between him and Harvey Swickle.

4. From approximately 3:55 p.m. an October 7th through 6:35 a.m. the following morning, Agent Caso engaged in numerous conversations with Harvey Swickle.

5. Throughout the course of these conversations, Caso

[1] In so doing, FDLE clearly violated the provisions of Florida Statute 839.13 which makes it a misdemeanor to falsify any records or papers filed in any judicial proceeding in any court of this state.

intimated *to* Swickle that he was engaged in questionable businesses with Latin American clients and that he needed *to* get one of his "runners" released from jail as soon as possible. However, Caso informed Swickle that he was unclear as to the actual details of the case (i.e., the charges, which jail the employee was *in*, his ties to the community, etc...) and purposefully fed the information to Swickle at a slow pace throughout the course of the evening.

6. At 5:55 p.m. on October 7th, Caso contacted Swickle and told him the Defendant was Orlando Zirio, arrested in Dade County with approximately a dozen kilos of cocaine. Caso reemphasized the urgency of getting the Defendant out *of* jail immediately. Swickle responded as follows: " Well, if he was arrested with that much, they won't set a bond on him until tomorrow morning, he'll have to *go* before a magistrate ...ah, now there's a possibility I might be able to get a bond set on him ah, tonight depending upon who the emergency judge is..."

7. At 6:32 p.m. Swickle then placed a call to the Broward County Jail. Be next called Agent Caso back at 6:35 p.m. and indicated that he had been unable to locate Zirio at the jails,

8. At approximately 7:25 p.m. Orlando Zirio was booked *into* the Dade County Jail by Florida Marine Patrol Officer Michael Florence and a $250,000 standard bond was set. Subsequently, Officer Florence returned to the jail adding additional

offenses to Zirio's charges thereby raising the standard bond to $750,000,

9. At 8:33 p.m., prior to his confirming the identity of the duty judge, Swickle expressed serious doubts as to getting Zirio released that night. He stated, "I don't think he, I can, I can get the emergency judge to reduce that tonight without a hearing, tell ya the reason why, ah, even if I could get him to do it he would look bad in the papers, OK. What they'll do is, they'll put that in, without a hearing, in other words, if, if I get the emergency judge *to* call up tonight and, and reduce the bond, somebody's gonna be asking questions tomorrow morning." Caso then pleaded with Swickle to do everything he could to facilitate Zirio's release that night.

10. In an apparent attempt to determine the feasibility of getting the bond lowered, Swickle desperately attempted to contact Judge *Gross* immediately after his 8:33 p.m. conversation with Caso. Thus, between 8:43 p.m. and 8:55 p.m., twelve telephone calls were placed from Swickle's home phone to Judge Gross' residence.[2]

11. At 9:11 p.m. Caso called Swickle with further information on Zirio and again expressed his need for help in this matter.

[2]The substance of *the* conversations between the Swickle and the Grass residences were not recorded. However, the successive calls placed within an eight-minute time span indicate that Swickle was unable to contact Judge Gross during this particular time period.

He further informed Swickle that his people would have no problem meeting a $200,000 bond. Swickle then told Caso that he would call him as soon as he heard from "his guy". Specifically, Swickle related to Caso, "OK, I've already got a call into him, I'm just waiting to hear back from him now."

12. At approximately 9:17 p.m. pen register activity indicated an outgoing call placed *from* Judge Gross' residence to Swickle's residence. Said phone call had a 2 minute and 43 second duration.[3]

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[3] Again, *this* conversation was not recorded by FDLE as it occurred prior *to* the signing of the Intercept Order by Justice Parker Lee McDonald.

13. While Swickle had previously expressed grave doubts as *to* his ability to get the bond lowered prior to his conversation with Judge Gross, immediately after speaking with Judge Gross, Swickle called Agent Caso at 9:25 p.m. and unequivocally stated, "...if I file an appearance on his behalf and represent him, we can have the bond reduced *tonight."* He assured Caso that the bond would be reduced to $200,000. Swickle stated, "I don't know what your situation is, I need a $20,000 retainer, the bond will be reduced to $200,000." Caso responded that he had $10,000 in his possession and would attempt to get some more money.

14. The sequence of events and the statements made indicate that the substance of the 9:17 p.m. conversation necessarily pertained to the details of Zirio's arrest and detainment. In fact, Judge Gross testified on cross-examination during the June 12, 1990 Disciplinary Hearing on Harvey Swickle that he had been informed of the charges against Zirio by Swickle just prior *to* his placing a call to Officer Wright *at* the Dade

County Jail Facility. Pen register activity confirmed two out going calls to the Dade County Jail placed at 9:20 p.m. from Judge Gross' residence.

15. At 9:46 p.m. Caso telephoned Swickle and informed him that he had the $20,000 retainer. They then made arrangements to meet at the Marriott located at 6650 North Andrews Avenue.

16. At 10:33 p.m. Swickle met Caso at the Marriott and Caso informed Swickle that he was in possession of $10,000 and would soon be receiving the balance. Swickle expressed concern over the lack of funds and stated, [that this] "...creates a problem, because, ahm, my situation is that I can't, I say, I can't have someone do something unless they know that, that ah, I'm fully represented."

17. Upon Swickle having assured himself that Caso had at least $10,000 on his person Swickle placed a call to Judge Gross' residence from the hotel lobby pay phone at approximately 10:45 p.m. The pertinent portion of their conversation proceeded as fallows:

Swickle: Yeah, OK, I've, ah, I've got the signed contract,"

Gross: So they did, this man now has a lawyer.

Swickle: Yes sir.

Gross: OK, if you are his lawyer and you tell me those are the facts, I'll reduce the bond accordingly.

Swickle: Ah, what time you going *to* be in?

Gross: I'll be in, ah, probably eight fifteen.

Swickle: Umm.

Gross: I'll be there all day. I've got that murder trial.

Swickle: That's right. I am, I'm going to be tied up. How about if I meet you in the morning at the house.

Gross: Where here?

Swickle: Yeah.

Gross: Well, I don't care, it doesn't matter.

Swickle: About eight.

Cross: Yeah.

Swickle: OK.

18. 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.[4]

19. Having been apprised of the necessary information, (the acquisition of the bribery money) at 10:47 p.m. Judge Gross placed a call to the Dade County Jail. Gross requested to

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[4] 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,

speak with Sergeant Wright and was informed that she had left for the evening. Judge Gross explained the purpose of his call and waited for a return call from the Jail to verify his identity. At 11:02 p.m. Judge Gross was called by Lieutenant Siddiqui from the Dade County Jail. At this time, Judge Gross instructed the Lieutenant *to* reduce Zirio's bond "...to two hundred thousand, on all counts."

19. At 11:25 p.m. Agent Caso telephoned the Swickle residence and communicated to Swickle that he now had an additional five thousand and that the remaining five thousand would be forthcoming, Swickle made arrangements to pick up the cash. Although the bond had already been lowered, Swickle deliberately kept this information from Caso. When Caso expressly asked if the bond had already been reduced, Swickle replied, "As soon as I get back over there, OK, I'll call them and they they can do it." Thus, it is evident that Swickle was attempting to secure full payment before delivering his part of the deal,

20. After picking up the $5000 at 12:05 a.m. that night, Swickle tells Caso that he should call him as soon as the remainder of the money comes in and that he will pick it up early in the morning. He also states adamantly that he will pick up the money at around 7:00 a.m. as he has an 8:00 o'clock appointment.

20. At 1:00 a.m. Caso telephones Swickle to advise him that the final $5000 has arrived and they arrange to meet at seven

at the hotel.

21. At 6:35 a.m. Swickle arrives at the Marriott and me Caso. Caso delivers the last $5000.

22. At approximately 8:00 a.m. on October 8, 1987 Swickle met: Gross in the driveway of the Gross residence and handed him $5000 in cash and a Nova University envelope containing $1300 with the name J. Feinberg written on it.[5] Gross testified that he took the money, put it in a desk drawer in his playroom and proceeded to leave his house.

23. Shortly thereafter, Respondent Gross was placed under arrest at his home. The $5000 and the Judge's notes were seized. The envelope containing the $1300 was overlooked and was later turned over to the authorities by Gross' criminal defense attorney.

24. 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 a 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.

[5] Testimony at this hearing has established that sometime prior to October 1987 Judge has recommended Harvey Swickle to an old friend, Howard Feinberg, for his son, Jay Feinberg who had been arrested for possession of cocaine. Although the Referee is sufficiently convinced that the $1300 contained in the Nova envelope was given to Respondent Grass as an unlawful fee split these charges have not been brought up by the Bar and are thus not considered.

25. Respondent Gross has testified that the payment he received from Swickle on October 8, 1986, was repayment of an old debt Swickle owed him. According to Gross, the debt was in the amount of $15,000 and dated back to 1976 when Swickle and Gross shared *office* space.

26. For the following reasons, Gross' statement is found implausible, The *only* physical evidence of this debt is a piece of paper found in a jumpsuit in Gross' closet which purportedly listed payments made by Swickle to *Gross* in partial satisfaction of this debt.[6] Oddly enough, however, the payments were all made within the course of eleven months and no payments were made prior to 1986. Thus, for a ten year period, according to Gross, Swickle never made any payments to Gross on this alleged debt.

27. Additionally, Judge Gross never reported this substantial amount of money owed to him by Swickle as an asset in his financial filings with the Judicial Qualifications Committee (JQC). Gross *testified* that *he* never thought about reporting it as it was not a "formal debt". Respondent Gross had also

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[6] Such informal documentation of the alleged Swickle/Gross loan is dubious when viewed in light of Respondent Gross' impeccable financial record keeping. Mr. Tarre, Gross' Criminal Defense Attorney, testified before the Referee that he requested Judge *Gross to* gather all his bank and brokerage statements, cancelled checks and other items from 1980 forward for the purposes of having an accountant perform a net worth analysis. Mr. Tarre stated that the gathering of information *'*...wasn't* difficult, because he was very meticulous in his record keeping. That stuff was easily available. We did not have to write to banks *or* go to banks *to* have duplicates made of anythinq, or brokerage houses."

previously testified that he loved Swickle "as a brother", However, no matter how intimate their relationship was, it could not excuse *Gross'* failure to disclose the financial dealings between himself and Swickle. Swickle was a practicing criminal attorney who appeared frequently before Judge Gross and who had in fact received court appointments from Gross in the past. The underlying purpose of financial filings with the JQC is the publication *of* any possible conflict of interest, As a sitting Circuit Court Judge, Respondent Gross was fully aware *of* the significance of disclosing all possible conflicts, and thus his overt omission of the alleged debt is suspect.[7]

28. According to the Respondent, when Swickle appeared at his house on October 8th to make a payment on their long standing debt he stated, "Here is some *of* the money I owe you. I will clear everything up that I owe you by the first of the year." This testimony, however, is rebutted by Swickle's statements on October 8, 1987, following Swickle and Gross' arrest. Swickle, invoking his Fifth Amendment Right against self-incrimination, did not testify in either of the Bar proceedings. Therefore, the Florida Bar called Agent Coffey

[7] Additionally Canon 5(c) *of* the Code of Judicial Conduct mandates that a judge should refrain from financial dealings which would involve him in frequent transactions with lawyers likely to come before the court. Thus, assuming that the Gross/Swickle debt was a reality, Respondent Gross was still in violation of the Judicial Canons by allowing Swickle to as much as appear before him without disclosing the relationship.

of the FDLE to testify regarding Swickle's post-arrest statements. Swickle's statements to Agent Coffey have not been considered for the truth of the matters asserted. Thus, they have been allowed in solely to show Swickle's state of mind at the time that he made the payment to Gross. Agent Coffey testified that Swickle claimed he had made arrangements *to* lower a bond with *Gross* two times. He claimed to have previously paid Judge Gross $5000 for assisting him in lowering a bond in 1986 in the Carrandi case. Although Gross had not been the sitting duty judge on the Carrandi case, according *to* Swickle, *Gross* had made the arrangements for Judge Mastos to lower the bond. Therefore, in Swickle's mind, when he appeared at 8:00 a.m. at the Gross residence he intended to deliver the bribe money.

Of course, these statements standing alone cannot confirm that a bribe occurred nor can they be used to show Gross' *state* of mind. They simply come in to show that Swickle believed he was paying Gross for lowering the bond in the Zirio case and not for payment on any loan.

29. There *is* also significance in the time that the payment was made. It is highly unlikely that Swickle after having spent a virtually sleepless night running all. over town would have felt compelled to meet Gross and make partial payment on a fifteen year old debt which had at one point remained completely unpaid for ten years. This, coupled with the fact that Swickle persisted in picking up the final $5000 payment

from Agent Caso immediately prior to his 8:00 meeting with Gross, casts grievous doubt on Judge Gross' classification *of* the 8:00 a.m. payment from Swickle as repayment an *a* loan.

30. The Referee has considered the testimony of the various character witnesses which have appeared at this proceeding. However, 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.

31. Having considered the evidence at the conclusion of both the Bar and Respondent's cases in chief, the Referre finds that the burden of clear and convincing evidence has been met by the Bar.

III. Recommendations as to whether or not the Respondent should be found guilty: As *to* each count of the complaint I make *the* following recommendations, upon a showing of clear and convincing evidence, as to guilt or innocence:

I recommend that the respondent be found guilty and 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 4-8.3(a) Reporting Professional Misconduct
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(a)(c)&(d) Misconduct
A lawyer shall not:
(a) Violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do

so through the acts of another;
(c) Engage in conduct involving dishonesty, fraud, deceit, *or* misrepresentation;
(d) Engage in conduct that is prejudicial to the administration of justice.

In the present case, Respondent violated the above cited Rules by knowingly accepting a bribe for the lowering of a criminal defendant's bond.[8]

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 Past 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: 52

Date Admitted to Bar: 1965

Prior disciplinary convictions and disciplinary measures imposed therein: None

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[8] In the Report of Referee in the Florida Bar v. Swickle, I specifically stated "I carefully considered the evidence a9 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.

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

Administrative Costs:	$	500.00
Court Reporter Expenses:	$	959.50
Bar Counsel Travel *Costs:*	$	443.31
Investigation Expenses:	$	68.40
TOTAL	$	1,971.21

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

Dated this 20th day of April, 1993.

ROBERT LANCE ANDREWS, REFEREE

cc:
Warren J. Stamm, Esq.
Rhea P. Grossman, Esq.
Staff Counsel, The Florida Bar, Tallahassee, FL 32301

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

11. 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 Ernesto Cassal (hereinafter referred to **as** Cassal),

arranged to have respondent, Harvey S. Swickle, contact him in reference to a criminal matter requiring legal representation. Cassal intended to convey the image that he was an illegitimate South American businessman such as a money launderer or someone who takes care of businesses for questionable Latin American businessmen.

2. That same day at 5:55 P.M., Cassal telephoned respondent and provided respondent with sketchy information concerning the arrest of Orlando Zirio. Orlando Zirio is the name used by an FDLE agent who was fictitiously arrested and booked into the Dade County Jail on charges of trafficking cocaine, conspiracy to traffic in cccaine, and possession of cocaine. During this conversation, Cassal indicated that Zirio had been arrested with about a dozen kilos of cocaine and he wanted Zirio released as soon as possible. (exhibit [exh] 2, p.12).

3. During a subsequent conversation with respondent, Cassal informed respondent that Zirio's bond had been set at $750,000 and he needed it brought down to about $150,000. (exh 2, p.20). After indicating he could not obtain such a bond reduction that night, respondent stated he might be able to do so depending on whether Zirio had ties to the community. (exh 2, p.23). At that time, Cassal had only indicated that Zirio was a Marielito. (exh 2, p.21). Respondent had indicated in an earlier conversation that he might be able to lower the bond depending on who was the

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 and 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). 1 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 Zirio'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, 1'11 **reduce** the **band 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 to Cassal and gets $10,000. Respondent says that if there are any problems the money *goes* back and as soon as we get 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, 1990 hearing, p.61; and exh 12,

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[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 infornation from 1977 based on a statement which includes a physical description of respondent which does not match him. (transcript of June 5, 1990 hearing, p.112-113; 115; 140-142). Paragraph 6(a) states that respondent had close **relationships** with **judges and** prosecutors **in** Dade 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 the hotel again to pick up the remaining $5,000 for a total of $20,000. Cassal lets respondent know that Zirio 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: As 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 and 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 Gross 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 Bar:

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 Past 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 following costs were reasonably incurred by The Florida Bar.

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

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[2] 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 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 costs be charged to the respondent, and that interest at the statutory rate shall accrue and be payable beginning 30 days after the judgment in this case becomes final unless a waiver is granted by the Board of Governors of The Florida Bar.

Dated this 13th day of July, 1990.

/S/ ROBERT LANCE ANDREWS
Robert Lance Andrews
Referee

A TRUE COPY

Copies to:
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