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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

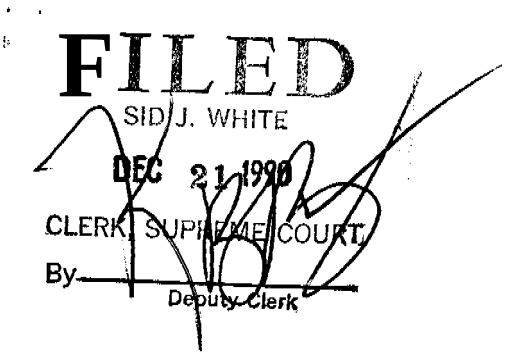
Complainant,

vs.

HOWARD GROSS,

Respondent.
_____/

Supreme Court Case
No. 75,347



INITIAL BRIEF OF COMPLAINANT

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SYMBOLS AND REFERENCES

In its Brief, The Florida Bar will be referred to as either "The Florida Bar" or "The Bar". Howard Gross will be referred to as "Respondent" or "Gross". Other witnesses will be referred to by their respective surnames for clarity.

STATEMENT OF THE CASE

These disciplinary proceedings commenced pursuant to a finding of probable cause at the Grievance Committee level on June 8, 1989. In accordance therewith and pursuant to Rule 3-3.2(a) of the Rules Regulating The Florida Bar, The Florida Bar filed a complaint with the Supreme Court wherein it charged the Respondent with violating the Rules of Professional Conduct, to wit: Rule 4-8.3 (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), Rule 4-8.4(a) (a lawyer shall not 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), Rule 4-8.4 (c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), and Rule 4-8.4 (d) (a lawyer shall not engage in conduct that is prejudicial to the administration of justice).

Respondent filed an Answer, Affirmative Defenses, and a Motion to Strike/Dismiss. The Honorable Robert Andrews was appointed as Referee to hear the matter.

On April 18, 1990, The Florida Bar and the Respondent filed a Joint Motion to Stay Proceedings. The purpose of this joint Motion was to stay the proceedings before the Referee pending resolution of The Florida Bar v. Harvey S. Swickle, Supreme Court

Case No, 75,348. This later case, although a separate and independent proceeding, was connected to the matter sub judice and assigned to the same Referee. The Florida Bar would, therefore, ask that this Honorable Court take judicial notice of the matter of The Florida Bar v. Harvey Swickle, Supreme Court Case no. 75,348. The Florida Bar and the Respondent Gross were in the process of negotiating a conditional guilty plea and consent judgment which was subject to approval of the Board of Governors' and review and approval of the Referee. In order to avoid any prejudice to either of the parties to the consent judgment as a result of the proceedings involving Respondent, Swickle, the parties sought the stay in order to be able to present the Consent Judgment for the Referee's approval subsequent to the trial of Respondent, Harvey Swickle. An Order was entered on April 22, 1990 Staying the Proceedings.

The Florida Bar and Respondent, Howard Gross ultimately entered into a Conditional Guilty Plea and Consent Judgment for Discipline on September 17, 1990. Pursuant to the Consent Judgment, the Respondent admitted certain facts and guilt as to violations of disciplinary rules 4-8.3 (a) and 4-8.4 (c)(d) and agreed to a ten day suspension. A Petition for Approval of Consent Judgment for Discipline was filed by the Florida Bar on September 17, 1990. On October 8, 1990, the Referee submitted his report recommending acceptance of the Respondent's Conditional Guilty Plea and Consent Judgment for Discipline. Neither The Florida Bar nor the Respondent has filed a Petition

for Review.

Pursuant to Rule 3-7.6(c)(6) of the Rules Regulating The Florida Bar, this Honorable Court entered an Order directing the parties to this disciplinary proceeding to submit briefs "directed to the suitability of the disciplinary measure recommended by the Referee." The Florida Bar submits its Brief.

STATEMENT OF THE FACTS

The Florida Bar concedes to the facts as set forth in the Report of Referee and would reiterate as follows:

Prior to the institution of these disciplinary proceedings, the Respondent, Howard Gross was a Circuit Court Judge in the Eleventh Judicial Circuit. Although unaware of it at the time, the Respondent was being investigated by the State Attorney's Office in conjunction with the Florida Supreme Court amongst allegations of bribery and conspiracy involving this Respondent and attorney Harvey Swickle.

In conjunction with the Florida Department of Law Enforcement (FDLE), the State Attorney's Office established a "sting" scenario involving an undercover FDLE officer being placed into the criminal justice system as a defendant. 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 traffick cocaine and possession of cocaine. A bond was set on Zirio of $250,000 per count for a total of $750,000.

That same evening, at approximately 8:51 p.m. Respondent received a call from attorney Harvey Swickle concerning inmate Orlando Zirio. At the time, Respondent was unaware that attorney Swickle had not been retained to defend Zirio. This was not disclosed to Respondent at the time this telephone conversation took place. Respondent was also unaware 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 Stated 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.

At approximately 9:20 p.m. that same evening, 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. At approximately 9:48 p.m., Respondent received a telephone call from attorney Swickle. The Respondent was unaware 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.

Unbeknown to the Respondent, 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. 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. Respondent is now aware that at no time material hereto was any written documentation exchanged between attorney Swickle and Cassal.

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.

At approximately 8:00 a.m. on October 8, 1987, attorney Swickle arrived at Respondent's residence on Miami Beach. After a brief meeting inside Respondent's residence, attorney Swickle left and was subsequently detained by FDLE. Contemporaneously, Respondent was detained by FDLE agents in front of his residence. Incident to a search warrant, Respondent cooperated with FDLE.

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. 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. He was tried and acquitted by a jury of all criminal charges.

SUMMARY OF ARGUMENT

Rule 3-7.9(b) of the Rules Regulating The Florida Bar allow for a Respondent to enter into a consent judgment and conditional guilty plea subsequent to the filing of a formal complaint. Rule 3-7.9(c) provides for final approval by the Supreme Court for any proposed consent judgment more severe than an admonishment. Thus, Rule 3-7.9 provides the authority for The Florida Bar to enter into this Consent Judgment with the Respondent, Howard Gross subject to this Honorable Court's approval.

It is the position of The Florida Bar that the discipline agreed to in this case was just in light of the evidence. As evidenced by the acquittal of Respondent of the criminal charges against him, the evidence against him in the Bar proceedings was deficient in certain key regards. As such, the Respondent's plea and ensuing discipline are both fair to the Respondent and in the best interest of the public.

The Florida Bar would further point out that the stigma attached to suspension is the same whether the suspension is for ten days or ninety days. The Respondent will still have to close down his practice, advise his clients of his suspension, close out his trust accounts and otherwise suffer the adversities attendant to suspension. Clearly, had the suspension been for more than ninety days this would have been a more severe discipline requiring proof of rehabilitation. The evidence, however, did not support the imposition of that level of discipline.

By recommending a ten day suspension, The Florida Bar has satisfied the three criteria for discipline as set forth in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970). First, the judgment is fair to society in that it protects the public from unethical conduct while at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing the penalty. Second, the judgment is fair to the Respondent in that it punishes a breach of ethics while at the same time encouraging rehabilitation. Thirdly, the judgment is severe enough to deter others who might be inclined to become involved in a similar violation.

ARGUMENT

The evidence and totality of the circumstances in this cause support suspension as the appropriate discipline.

Rule 3-7.9(b) of the Rules Regulating The Florida Bar provides the authority by which a Consent Judgment may be entered into between The Florida Bar and a Respondent. Rule 3-7.9(c) conditions acceptance of any consent judgment on the final approval of the Florida Supreme Court. Thus, it is clear that there is authority for entering into such a Consent Judgment subject to the Supreme Court's approval.

It is also clear that the fact that an attorney committed an ethical violation while sitting as a judge does not preclude The Florida Bar from proceeding against him with disciplinary action. Misconduct while holding a judicial office reflects upon one's fitness to practice law and as such is grounds for discipline. See The Florida Bar v. McCain, 330 So.2d 712 (Fla. 1976).

It is the position of The Florida Bar that a ten day suspension is reasonable in light of the evidence against the Respondent. When considering the possibility of entering into a consent judgment, one of the most important factors to consider is the sufficiency of the evidence against the Respondent. Should the evidence be lacking there is a strong likelihood that the Respondent will be found not guilty and no discipline will result. In the case at Bar, there was insufficient evidence against Howard Gross to support a disbarment or suspension for more than ninety days. This is further evidenced by the fact

that the Respondent was acquitted in his criminal trial of charges stemming from the same facts, evidence and testimony on which the Bar proceeded.

In The Florida Bar v. Merckel, 498 So.2d 1242 (Fla. 1986), a circuit court judge was disbarred upon a finding that he had engaged in an ex parte discussion with another judge whereby he had agreed to the prearranged disposition of a case. When this ex parte conversation became public knowledge, the two judges agreed to lie and state that such a conversation had never taken place. In the Merckle case, disbarment was clearly supported by the evidence. The Respondent, a then sitting judge, sentenced a defendant in open court to three years in prison. Later, the same judge called the defendant back and changed the sentence to five years probation and a $5,000 fine. This was done outside the presence of the State Attorney assigned to the case and without any explanation why the charge was made. Subsequently, the Respondent admitted to lying to the Judicial Qualifications Commission during their investigation of him.

The Merckle case is readily distinguishable from the case sub judice in terms of the discipline imposed. In the case at Bar, the Respondent, Howard Gross has made no such admission of unethical conduct. In fact, he consistently denies any wrongdoing on his part. He has supplied an explanation for each appearance of possible impropriety and these explanations remain uncontroverted, for the most part, by other evidence. In short, the evidence that does exist against the Respondent is circumstantial,

In a similar vein, an attorney was disbarred for unethical behavior committed while serving as a Justice of the Supreme Court of Florida. See The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978). In McCain case, the Referee found that the former justice had sought to influence another justice as to a Motion pending before him and also had attempted to influence the decision of a justice in another case. The evidence against the Respondent, McCain was substantial in that testimony was elicited from the two other judges as to their having been approached by McCain in an attempt to get them to rule in a desired manner. No such compelling evidence exists in the present matter which would support the imposition of such strong discipline.

Rule 3-7.6(c)(1) of the Rules Regulating The Florida Bar states that disciplinary proceedings are neither civil nor criminal, but are quasi judicial administrative proceedings. In The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970) the court recognized that a disciplinary proceeding is not a criminal trial. Therefore, the degree of proof necessary to disbar did not have to be beyond a reasonable doubt. Yet, a mere preponderance of the evidence as required in civil proceedings did not seem sufficient to result in disbarment either. The court concluded therefore, that where charges have been denied by reputable members of the Bar, they must be supported by clear and convincing evidence.

In the case at Bar, we have the Respondent, a former judge and heretofore, a reputable member of the Bar, who stands accused of accepting a bribe. The Respondent testified under oath that

he is innocent of any wrongdoing. (See Appendix I, transcript of The Florida Bar v. Harvey Swickle, June 12, 1990, Volume 111, p. 55-124). Harvey Swickle, the Respondent in a separate, but connected case stemming from the same transaction, invokes his Fifth Amendment rights and never testifies as to the alleged act of bribery. (See Appendix 11, transcript of The Florida Bar v. Harvey Swickle, June 5, 1990, Volume I, p. 16-17). There is no other witness who testifies as to any direct knowledge of unethical behavior on the part of the Respondent, Howard Gross. This Honorable Court is requested to take judicial notice of The Florida Bar v. Harvey Swickle, Supreme Court Case No. 75,348. In short, there is no evidence which meets the standard of clear and convincing which would justify a more stringent discipline. As was stated in the Rayman case;

> "As judges and lawyers, it is one of our highest duties to eliminate from our ranks those guilty of *so* serious an offense. Concomitant therewith, however, we have a continuing duty to require charges such as these to be supported by clear and convincing evidence where the charges have been denied by reputable members of the Bar." Rayman, supra, p. *598*

Having addressed the issue of the type of discipline imposed; in light of the evidence, The Florida Bar is of the position that a ten **day** suspension satisfied the purpose of discipline. Whether the suspension is for ten days or ninety days, the stigma attached remains the same. The Respondent, a former judge, will be required to notify his clients of his temporary suspension from the practice of law. He will be required to close his practice and close out his trust accounts.

In short, the Respondent will suffer all the stigma and adversities attendant to suspension, including the public's perception of suspension.

The purpose of discipline is three fold:

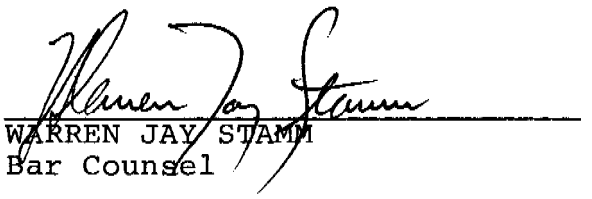
> "First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations." The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970).

In imposing a ten day suspension, the three requirements of imposing discipline as set forth in Pahules will be satisfied.

CONCLUSION

The evidence and totality *of* the circumstances in this cause support suspension or the appropriate discipline.

Respectfully submitted,



WARREN JAY STAMM
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief was served by U.S. Mail upon Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 and true and correct copies were served upon Rhea P. Grossman, Esquire, Attorney for Respondent, 2710 Douglas Road, Miami, Florida 33133-2728, and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 18th day of December, 1990.

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