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

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

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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.

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[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

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[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, 1 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 SWICRLE 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

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[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

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[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.

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[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

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[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 numerous objections of Respondent, of Agent Coffey regarding SWICKLE'S post arrest statement that SWICKLE claimed to have paid Respondent ***$5000*** for assisting him in lowering a 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 was material and relevant to disprove Respondent's statement that the monies received from SWICKLE on the morning of October 8th were to repay a loan and were ***so*** acknowledged by SWICKLE at that time. The Referee reasoned that since SWICKLE did not testify at any 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

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[12]/ The **BAR**, however, sought the introduction of this post arrest statement for the purpose of showing a **"conspiracy"** under the @@relaxedrules 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

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[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

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[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 1281--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 Gross 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

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[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

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