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

REPLY BRIEF 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

Respondent, HOWARD GROSS, will maintain the same symbols and references in his Reply Brief as he utilized in his Initial Brief. The additional symbol "AB." followed by the appropriate page number will reference THE BAR'S Answer Brief.

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 DIBCOVERY MATTERS NOT PRESENTED BY EITHER OF THE PARTIES?

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.

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

REPLY TO ISSUES

I.

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

The Respondent and The Bar are in agreement with the applicable law that 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). The Respondent and The Bar, however, disagree as to whether the Referee's findings of fact in the present matter under review are clearly erroneous and lack evidentiary support.

In defense of the Referee's Recommendations, THE BAR merely parrots the findings and conclusions made by the Referee in his Report (AB.2-8) with no reference to the record (AB.13-17).

First, [1]/ THE BAR argues that the Referee's report was well-reasoned when he concluded that the conversation between RESPONDENT and Swickle 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." (AB.13). THE BAR fails to explain the lack of record

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[1]/ This Reply brief follows the format followed by THE BAR in its Answer Brief which differs from the format utilized by Respondent in his Initial Brief.

evidence to support the Referee's inference. As noted in the Initial Brief (at page 15), the Referee explained why he concluded that "the signed contract" was coded language in footnote 4 of his Report. THE BAR and the Referee have ignored the record evidence relating to background information received by the RESPONDENT from Swickle concerning Zirio, or the fact that Swickle told the agents that he had to "file an appearance on (Zirio's) behalf and represent him" as a prerequisite to a bond reduction. (Referee's Report, page 6, paragraph 13; App. 6; AB.5). Even with the "additional" evidence presented at the RESPONDENT'S hearing, there is nothing in this record which could have changed the previous findings of the Referee in the Swickle matter when he found that RESPONDENT was told "that Zirio was a key employee, had children, resided here, and had no prior problems with the law." [Report for Swickle, pgs.5, paragraph 10, App.27]

The record evidence in this case supports the RESPONDENT'S arguments that there was no "cryptic" language exchanged between himself and Swickle. There is no clear and convincing evidence to support the Referee's inference that the RESPONDENT and Swickle talked in "code".

THE BAR then states that the Referee "found the evidence showed there was an offer and acceptance of a bribe by the respondent." (A.B.13) THE BAR goes no further with this argument. Neither THE BAR nor the Referee could recite any factual or record

support for such a conclusion.

THE BAR next addressed the Referee's determination that the money given to RESPONDENT by Swickle was not for a return of loan. THE BAR'S argument in support of the Referee's findings is based on (1) it was not reasonable to believe Swickle had only begun to pay off the debt in the past 11 months; (2) how and where RESPONDENT kept his record of payments from Swickle was incompatible with his meticulous nature: and (3) it was illogical for Swickle to come by RESPONDENT'S home the next morning merely to pay a debt. THE BAR, as the Referee, could not rely upon these unsubstantiated **"impressions"** to provide clear and convincing evidence in support of the Referee's Report -- so THE BAR concluded that "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."** (AB.14) This **"either/or"** theory does not rise to the level of clear and convincing evidence. THE BAR ignored RESPONDENT'S argument that the Referee's requirement that RESPONDENT disprove the "questionable conduct" of receiving money from Swickle, erroneously shifted the burden of proof to the RESPONDENT rather than hold THE BAR to the burden of proving the charges by clear and convincing evidence.

THE BAR does not address the issue of Swickle's post arrest statements other than to repeat that the referee acknowledged that

it was used to show Swickle's state of mind that he intended to deliver bribe money and not, standing alone, to confirm that a bribe had occurred. (AB.15)

Neither does THE BAR address the Referee's failure 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 BAR attempts to justify the Referee's deliberate exclusion of RESPONDENT'S mitigating witnesses by inaccurately reciting that "the testimony was given its appropriate consideration for what it was..." (AB.20). The Referee did not weigh the testimony or give it appropriate consideration. The Referee just did not consider the testimony under an erroneous assumption that "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; App.14).[2]/

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[2]/ The testimony of Mr. Tarre did not harm the Respondent as THE BAR contends (AB.20). The testimony of Mr. Tarre was used by the Referee as "additional" evidence to justify his revised factual findings and conclusions. Mr. Tarre's testimony indicated that (1) the RESPONDENT'S notes regarding payments from Swickle over the 11 month period of time was tested by the Bureau of Alcohol, Tobacco and Firearms and the entries were made at the time the entries were purported to be made; (2) he had a complete net worth analysis

THE BAR acknowledges that the "additional" evidence relied upon by the Referee was the testimony of Mr. Tarre. Based on this "additional" evidence, THE BAR concludes that the Referee was entitled to re-focus on the conduct of RESPONDENT and draw independent inferences from the evidence (AB.17). The argument (Initial Brief, pg.10) by RESPONDENT, however, complains that the Referee had no additional evidence other than the matters in mitigation presented by the Respondent. If THE BAR chooses to rely upon Mr. Tarre's testimony as "additional" evidence, then, too, THE BAR must consider the testimony of Judge Ralph Person. [3]/ 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 BAR takes exception with RESPONDENT'S reliance on the defense of collateral estoppel. RESPONDENT acknowledges that this

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made of RESPONDENT'S finances, spending habits, savings, check cashing, and use of cash from the date RESPONDENT got on the bench to the time of his arrest; (3) the analysis indicated no wrong doing and these work papers and documents were turned over to IRS without the need for a subpoena and without further contact with the IRS. (T. 2/21/92, pgs. 55-69). Mr. Tarre's testimony was augmented by the deposition of Michael Zier taken on February 20, 1992 and placed into evidence as Exhibit Number #1 for Respondent (T.2/21/92, pg. 54). Mr. Zier was the C.P.A. who did the financial analysis of RESPONDENT'S records. The Referee and THE BAR totally ignored his testimony.

[3]/ Deposition of Judge Ralph Person taken on February 26, 1988 was marked into evidence as Respondent's Exhibit #2 (T.2/21/92, pg. 54).

Court in *Zeidwig v. Ward*, 548 So.2d 209 (Fla. 1989) refused to fully abolish the need for mutuality of parties as a prerequisite to the application of the doctrine of collateral estoppel. Nevertheless, in this instance, THE BAR has proceeded to discipline two lawyers for the same misconduct arising out of the same exact set of facts. The evidence presented at both hearings was the same. When THE BAR could not prove a bribery conspiracy between the two lawyers by clear and convincing evidence, THE BAR then took the position that one of the lawyers was "rainmaking". THE BAR now wants to retract that position and have the same evidence determine the existence of a bribery conspiracy against the second lawyer. The Third District Court of Appeal in *West v.* Kawasaki *Motors Manufacturing Corp.*, 595 so. 2d 92 (1992), in seeking to bring the mutuality rule in line with the majority of states and the federal courts, relies upon *Eisel* v. *Columbia Packing Co.*, 181 F.Supp. 298, 301 (D.Mass. 1960) which states:

> "[I]nquiries should be made as to whether [1] plaintiff had a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time, ...[and]
>
> [2] whether the second defendant has such a factual relationship to the first defendant that it is equitable to plaintiff to give the second defendant the benefit of the first defendant's victory...
>
> While one of the strongest policies in the law is that every man shall have an opportunity to be heard, there is no persuasive public policy for allowing him a second opportunity when he seeks to raise on the second occasion an issue which arose in substantially the same context on the first occasion. . .

RESPONDENT is not seeking the application of collateral estoppel from civil to criminal, or for that matter, from criminal to civil. [4]/ RESPONDENT does believe he is entitled to rely upon the prior factual findings of the Referee and position espoused by THE BAR in a companion case.

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

THE BAR does not fully address the implications of the Referee's interference with the procedural due process of the disciplinary hearing over which he presided.

It must first be noted that the RESPONDENT'S objection to THE BAR'S motion to recuse the referee was based on procedural grounds. THE BAR'S initial motion to have a new Referee appointed was improper and denied by this Court. The subsequent motion for recusal filed before the Referee was likewise procedurally and substantively improper. Nonetheless, the RESPONDENT is not seeking the recusal of the Referee, but only citing the subsequent prejudicial conduct exhibited by the Referee during the proceedings as a basis and justification for a new hearing.

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[4]/ The RESPONDENT was found not guilty in the criminal prosecution brought against him for the crime of bribery.

Second, the RESPONDENT immediately filed an objection to the Referee's sua sponte ORDER FOR PRODUCTION, The objection was filed on February 10, 1992 and specifically stated that RESPONDENT believed the ORDER FOR PRODUCTION was an impermissible encroachment into the investigatory powers of The Florida Bar and manifested a lack of impartiality by the trier of fact.

As pointed out in RESPONDENT'S Initial Brief at page 19, 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).

THE BAR'S reliance on *The Florida Bar v. Stillman*, 401 So.2d 1306 (Fla. 1981) is misplaced. The Supreme Court has, in the past, allowed The BAR and a referee to present and consider 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.

In this instance, the Referee's independent "fact finding" was and is the basis for his determination of guilt as to the charges filed by THE BAR. 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 show 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.

It was not "through the additional evidence presented" by THE **BAR --** it was through the additional evidence obtained by the sole effort of the Referee! The **Referee** clearly stepped out of his role as an independent arbiter of the facts and became an advocate for THE **BAR.**

The RESPONDENT would remind THE **BAR** that he was charged with violating Rules of Professional Conduct of the Florida Bar **4-8.3** (Reporting professional misconduct) and **4-8.4** (a)(c)(d) (misconduct). The complaint specified acts of **bribery** with lawyer Swickle which occurred on October 7, 1987 and culminated on October **8, 1987 (App.17-21).** The RESPONDENT **is** not charged with perjury or making false or untrue statements. Even though the Referee found in his Report relating to Swickle that **"the** evidence shows some very questionable conduct on the part of [Swickle] and [RESPONDENT]" (App.30) **--** RESPONDENT is not charged with **"questionable** conduct". RESPONDENT is charged with bribery. **. .** and the Referee found in that Report that the questionable conduct "does not **rise** to the level of clear and convincing evidence of such **wrongdoing." (App.30)**

CONCLUSION

Based upon the argument set forth in the Initial and Reply Briefs, 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 #092640

Attorney for Respondent,
HOWARD GROSS

DATED: July 6, 1992.

CERTIFICATE OF MAILING

I HEREBY CERTIFY that a true and correct copy of the foregoing REPLY BRIEF OF RESPONDENT was furnished this 6th day of July, 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