IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

vs.

HARVEY S. SWICKLE,

Respondent.

_____________________________/

Supreme Court Case
No. 75,348

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

ANSWER BRIEF OF COMPLAINANT

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SYMBOLS AND REFERENCES

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

Abbreviations utilized in this Brief are as follows: "T" will refer to the transcript of proceedings held June 5 and June 12, 1990. "App" will refer to the appendix. "RR" will refer to the Report of Referee issued July 13, 1990.

STATEMENT OF THE CASE

On June 8, 1989, Eleventh Judicial Circuit Grievance Committee 11G met to consider the complaint of The Florida Bar against Respondent, Harvey Swickle. All parties were duly noticed and in attendance. Respondent had objected to the Notice of Hearing on the grounds of untimeliness, vagueness and to the manner of the proceedings themselves. After argument by respective counsel, the Committee considered and rejected these objections and a full hearing was held. A finding of probable cause was rendered finding that Respondent violated various sections as charged of the Rules of Professional Conduct of The Florida Bar.

Pursuant to the probable cause finding and in accordance with Rule 3-7.4(e) of the Rules of Discipline, The Florida Bar filed a formal complaint with the Supreme Court dated January 17, 1990. This matter proceeded to Final Hearing before the Honorable Robert Andrews as Referee on June 5, 1990. On July 13, 1990, the Referee issued his Report wherein the Referee recommended that the Respondent be found guilty of violating the following Rules of Professional Conduct of the Rules Regulating The Florida Bar, to wit: Rule 4-3.3(d) for failing to inform a tribunal in an ex parte proceeding of all material facts known to him which would enable the tribunal to make an informed decision, whether or not the facts are adverse; Rule 4-4.1(a) for, in the course of representing a client, knowingly making a false statement of material fact or law to a third person; Rule 4-8.4(e) for stating or implying an ability to improperly influence a government agency or official; and Rule

4-8.4(a),(c) and (d) for engaging in conduct resulting in violations of the foregoing rules and engaging in conduct involving fraud deceit or misrepresentation. Based on the Findings of Fact and Recommendations of Guilt, the Referee recommended that Respondent, Harvey Swickle be disbarred.

It is from the foregoing Report of Referee and recommendation of disbarment that the Respondent takes this appeal.

STATEMENT OF THE FACTS

The Florida Bar adopts as its Statement of the Facts those facts as set out in the Report of Referee and would further state as follows:

On October 7, 1987, Florida Department of Law Enforcement (hereinafter "FDLE") undercover agent Eugene Caso (hereinafter "Caso") arranged to have Respondent, Harvey S. Swickle contact him in reference to a criminal matter requiring legal representation. Caso intended to convey the image that he was an illegitimate South American businessman who was engaged in money laundering or someone who takes care of businesses for questionable Latin American businessmen.

That same day at 5:55 p.m., Caso telephoned Respondent and provided him with sketchy information concerning the arrest of Orlando Zirio (hereinafter "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 cocaine, and possession of cocaine. During this conversation, Caso indicated that Zirio had been arrested with about "a dozen kilos of cocaine" and he wanted Zirio released as soon as possible.

During a subsequent conversation, Caso informed Respondent that Zirio's bond had been set at $750,000 and that he needed it brought down to about $150,000. After indicating he could not obtain a bond reduction that night, Respondent stated he might be able to do so depending on whether Zirio had ties to the community.

At that time, Caso had only indicated that Zirio was a "Marielito." Respondent had also indicated in an earlier conversation that he might be able to lower the bond depending on who the emergency judge was that evening.

Respondent then called the home of Dade County Circuit Judge Howard Gross approximately fifteen times within an eight minute period and finally made contact with Judge Gross for 1 minute and 59 seconds.

Later that evening, Caso called Respondent at home and told him that Zirio is roughly 28 years old, has been in the United States approximately 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, Caso indicated that Zirio was not working. Caso was intending to portray Zirio as having little if no ties to the community.

Respondent's handwritten notes reflect this information and specifically indicate that Zirio is not working. Caso reiterated the importance of getting Zirio released that evening and that Caso could get hold of any amount of money that was needed. Respondent then stated that he was waiting to "hear back and from my guy" and for Caso to stay where he was; Respondent would call him as soon as he "heard from his guy."

At about 9:20 p.m., Judge Gross called the Dade County Jail indicating he wanted to reduce a $750,000 bond.

At 9:25 p.m., Respondent called Caso and stated he could reduce the bond that night if Respondent filed an appearance on

Zirio's behalf and represented Zirio. Respondent told Caso he needed a $20,000 dollar "retainer" and the bond would be reduced to $200,000 dollars.

Caso subsequently called Respondent back and told him that he "had the twenty." Respondent then immediately called Judge Gross' home and was on the line for one minute and 9 seconds. At about 10:30 p.m. Respondent met Caso in the lobby of Caso's hotel. During this discussion with Respondent, Caso indicated he only had $10,000 but would be receiving the other $10,000 within a couple of hours. Respondent then called Judge Gross from the hotel lobby while Caso counted the money. The Respondent then told Judge Gross that he had a "signed contract" and Judge Gross replied that "if Respondent was his lawyer and he tells him those are the facts, he will reduce the bond accordingly." Respondent then arranged to meet Judge Gross at the Judge's house at approximately eight o'clock the next morning. Respondent then went back to Caso and was paid $10,000. Respondent then stated that if there were any problems "the money would go back and as soon as you and I get back up together again (to exchange the balance of $10,000), we're all finished."

At approximately 11:00 p.m., Judge Gross lowered Zirio's bond to $200,000. Judge Gross' handwritten notes incorrectly indicate that 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. This is in direct contravention to what Caso had told Respondent.

At approximately 12:05 a.m. on October 8, 1987, Respondent met Caso at the hotel and picked up an additional $5,000.

At approximately 6:30 a.m. on October 8, 1987, Respondent met Caso at the hotel again to pick up the remaining $5,000 for a total of $20,000. At that time, Caso let Respondent know that Zirio would "vaporize" once he was out of jail. Respondent indicated that he would "file an appearance anyway to follow the bases and make sure there were no problems." At no time did Respondent attempt to advise Judge Gross or anyone else of Zirio's probable disappearance.

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 Caso. Soon thereafter, Respondent was arrested and $13,200 of the money received from Caso was found in Respondent's car. Respondent had given the remaining $500 to his wife. Judge Gross testified that the money he received from Respondent was for the repayment of a loan.

Respondent was subsequently arrested. He was tried and acquitted by a jury of the criminal charges. The Bar's proceedings before the Grievance Committee and Referee proceeded independently of the criminal charges.

SUMMARY OF THE ARGUMENT

The Grievance proceedings and trial were conducted in a fair and equitable manner consistent with all applicable rules and rights of due process accorded to Respondent, Harvey Swickle. Further, the Referee's Findings of Fact and Recommendations as to Discipline to be imposed comes to this Court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986).

Respondent maintains that the testimony of Agent Michael Flint of FDLE was both hearsay and unreliable. Respondent also maintains that Agent Flint "acted in the manner of an attorney for the Bar." In Bar disciplinary proceedings, this Court has held that such proceedings are neither civil nor criminal and hearsay is admissible. The Florida Bar v. Dennar, 498 So.2d 896 (Fla. 1986). Further, Agent Flint testified as any other witness for the Bar would. His credibility and demeanor was for the Referee, as trier of fact to weigh, not the defense.

Both Harvey Swickle and Howard Gross were the subject of disciplinary proceedings stemming from the same sequence of events. They were however, two separate and distinct cases. The Florida Bar does not deny that it entered into negotiations for a Conditional Guilty Plea and Consent Judgment for Discipline with Howard Gross. This has no bearing or effect on the proceedings against Respondent, Swickle. The quantum of proof against each of these individuals was disproportionate. The evidence against

Harvey Swickle was overwhelming as established by the evidence and testimony submitted at trial.

What Respondent, Swickle is really trying to argue to this Court is that the discipline recommended to the Referee on the Gross matter should mitigate or excuse the violative acts of Harvey Swickle. Such is not the case.

The fact that Harvey Swickle was acquitted on criminal charges has no bearing on Bar disciplinary proceedings (see Rule 3-4.4 Rules of Discipline). The Referee found Respondent guilty of ethical violations, not criminal conduct. These ethical violations go to the very heart of our disciplinary system.

Any conduct by an attorney which brings the administration of justice into disrepute, demands condemnation and the appropriate penalties. State v. Calhoon, 102 So.2d 604 (Fla. 1958). Disbarment is the appropriate penalty/discipline.

As such, the Findings of Fact and Recommendations as to Disciplinary Measures to be Imposed as recommended by the Referee in his Report to this Court should be upheld.

I.

THE GRIEVANCE AND TRIAL PROCEEDINGS DID NOT VIOLATE ANY RIGHTS OF RESPONDENT AND THEREFORE, THE FINDINGS AND RECOMMENDATION OF THE REFEREE SHOULD BE UPHELD.

Rule 3-7.6(e)(1) of the Rules of Discipline define attorney disciplinary proceedings as quasi-judicial administrative proceedings. Regardless of the definition we give these disciplinary proceedings, they can operate to restrict an attorney's ability to practice law. Where an attorney's conduct has been or may become harmful to the public or profession, such a restriction is the gravamen of disciplinary proceedings.

Pursuant to Rule 3-1.1 of the Rules of Discipline:

> "A license to practice law confers no vested right to the holder thereof, but is a conditional privilege which is revocable for cause."

See Debock v. State, 512 So.2d 164 (Fla. 1987)[1].

A Referee's Findings of Fact and Recommendation as to discipline comes to the Supreme Court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Lipman, 497 So.2d 1165 (Fla. 1986). See also The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978); The Florida Bar v. Hirsh, 359 So.2d 856 (Fla. 1978).

Respondent attempts to cite with authority In Re: Ruffalo, 390 US 544 (1968). Ruffalo was the United States Supreme Court case

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[1]It is true that Debock was not a disciplinary proceeding. However, it is foundational to what Respondent attempts to argue and is a controlling decision in this jurisdiction.

which dealt with the issue of an attorney's due process rights in disbarment proceedings. The court held, in essence, that disbarment is a penalty which entitles an attorney to procedural due process. This include fair notice of the charges against him or her, as well as the opportunity to be heard. See Ruffalo at 550.

Respondent, in his brief to this Honorable Court, submits that Ruffalo should be the controlling case law in the matter sub judice. The Florida Bar readily concedes that Respondent has certain due process rights. This Court has well established on more than one occasion that a Respondent is entitled to notice and a reasonable opportunity to be heard. See The Florida Bar v. Fussell, 179 So.2d 852 (Fla. 1965) and The Florida Bar v. Cruz, 490 So.2d 48 (Fla. 1986).

Respondent, Harvey Swickle has been afforded all procedural due process rights to which he was entitled. He was given notice, an opportunity to be heard, face his accusers and the right to cross examine.

Respondent maintains that he was given inadequate notice of the Grievance Committee hearing and that the charges against him were vague. The Bar takes issue with this contention and argues that, in fact, just the opposite took place.

In The Florida Bar v. Wagner, 175 So.2d 33 (Fla. 1965) this Court held that a lawyer whose conduct was being investigated was entitled to no bill of particulars at the Grievance Committee level. Further, it is the Board of Governors, upon review of the

record, that makes the ultimate decision as to whether probable cause for further proceedings exists and whether a complaint should be filed. Id, at 35.

Respondent received notice of the Grievance Committee proceedings on May 26, 1989 for a June 8, 1989 hearing which set forth those rule violations which the Committee was to consider. This, coupled with the fact that this matter was under investigation by The Florida Bar for some time before it was forwarded to Grievance Committee, establishes that Respondent was fully aware of the scope and nature of the proceedings at all times material hereto. Respondent has failed, and the record does not reflect that any prejudice or harm enured to Respondent at any stage of these proceedings.

Respondent maintains that the testimony of Agent Flint was both hearsay and unreliable. He points to the case of State v. Murrell, 74 So.2d 221 (Fla. 1954) for the proposition that Agent Flint was allowed to "...act in the manner of an attorney for The Bar..." Such is not the case.

Assuming arguendo that Agent Flint's testimony contained some hearsay, this Court has held that in Bar disciplinary proceedings, which are neither civil nor criminal but quasi judicial, hearsay is admissible. The Florida Bar v. Vanier, 498 So.2d 896 (Fla. 1986). As for the reliability of a witness, it is clearly within the province of the Committee and Referee to determine how credible a witnesses' testimony is and to weigh it accordingly. In fact, this is exactly what the Referee did as evidenced in the Report of

Referee (see Appendix I, Report of Referee)[2].

As specifically concerns the Murrell case, Murrell is readily distinguishable from the matter at bar. The testimony which Respondent takes issue with is select portions of that of Special Agent Michael Flint. Agent Flint is, in effect, a police officer whose duties would naturally include the investigation of any illegal and/or criminal activities. As such, no natural animosity should exist between Respondent and FDLE as might exist between a negligence attorney and for example, an adjustor at a private insurance company as was the case in Murrell.

Respondent would further have this Court believe that his prosecution was conducted by Agent Flint when, in fact, this was not the case at all. Rather, Agent Flint testified as any witness might testify in matters being prosecuted by The Florida Bar. Naturally, Respondent is free to make objection to this testimony, and he did. The Florida Bar, however, would again respectfully point out that the weight of the testimony and the witnesses'

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[2]I am somewhat concerned with the contents of Special Agent Michael Flint's Application and Affidavit for an Order Authorizing the Interception of Wire and oral Communications. In particular, paragraph 6(a) deals with admittedly unsubstantiated and uncorroborated information from 1977 based on a statement which includes a physical description of respondent which does not match him. (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, p. 119-120).

credibility is to be determined by the trier of fact and not the defense.

Respondent's final objections to the proceedings below stem from the association between Respondent and former Judge Howard Gross. First, he implies that there was something underhanded about the negotiations between Howard Gross and The Florida Bar and then contends that he was prejudiced by the Consent Judgment that was negotiated and tendered to this Court for approval. See Rule 3-7.9 (c) Rules of Discipline.

Both Respondent and Howard Gross were the subject of disciplinary proceedings stemming from the same sequence of events. They were, however, two separate and distinct cases. Separate complaints were filed against each of these two Respondents. Each were separately represented by counsel and responded separately and distinctly from each other.

The Florida Bar does not deny that it entered into negotiations with Howard Gross. Nor does it deny that they did not include Respondent, Swickle or his counsel in the service of pleadings in the Gross case. The Florida Bar submits to this Court that there is no authority which would compel such notice since, in fact, the Gross and Swickle matters were separate and distinct.

The Florida Bar points to the record in support. The evidence against Respondent, Swickle was overwhelming. It was Swickle who was the primary subject of the wire taps and who makes the violative/unethical statements and engages in the violative conduct. It is precisely for that reason that Respondent is now

objecting that The Florida Bar choose, with the approval of the Referee, to stay the proceedings in the Gross matter until the conclusion of the Swickle case.

The negotiations, consideration and acceptance of the guilty plea by Howard Gross was conditional. Those conditions could not have been completely met until after the conclusion of the Swickle case. It was not until after the conclusion of the Swickle case that the Conditional Guilty Plea And Consent Judgment For Discipline was negotiated, considered and accepted by The Florida Bar and submitted to the Referee.

At all times material hereto, the pleadings, notices and Orders of the Referee in the Gross case were part of the public record. The Florida Bar should not be penalized for Respondent Swickle's inadequacies in the preparation and presentation of his case.

As specifically concerns Respondent's contention that The Florida Bar made misrepresentations in answers to interrogatories or failed to disclose all conditions precedent to a conditional consent judgment with Howard Gross, The Florida Bar would respectfully point to Rule 3-7.9(e) of the Rules of Discipline. This Rule clearly provides that all consent judgments tentatively approved by staff counsel are subject to Board approval. It has already been established that Rule 3-7.9(c) of the Rules of Discipline also conditions a consent judgment for approval by the Florida Supreme Court.

The Florida Bar would further point out that by holding off on

the final negotiations and consideration of the Conditional Guilty Plea And Consent Judgment For Discipline in the Gross case until after the Swickle trial, The Florida Bar was attempting to keep the proceedings from being prejudiced. Since both the Swickle and Gross cases were being heard by the same Referee, clearly it could have been prejudicial for the Bar and the respective Respondents to have made the referee aware of the discipline they found acceptable against one respondent, but not the other. Although the quantum of proof against the two Respondents was different, the fact scenario and sources of evidence were the same.

What Respondent, Swickle is really trying to argue to this Court is that the discipline recommended to the Referee on Howard Gross should mitigate or excuse the violative acts of Harvey Swickle. Such is not the case.

It is the position of The Florida Bar that the discipline recommended in the Gross case should have no bearing on the discipline imposed on Respondent, Harvey Swickle especially in light of the fact that the Swickle case was fully tried before a Referee.

II.

THE EVIDENCE AND PROCEDURES BELOW SUPPORT THE REFEREE'S RECOMMENDATION OF DISBARMENT AS THE APPROPRIATE DISCIPLINE.

While the standard of proof in a criminal proceeding is beyond a reasonable doubt, in a disciplinary proceeding the standard of proof is less stringent. That is to say that the evidence must be clear and convincing. See The Florida Bar v. Rayman, 238 So.2d 594 (Fla. 1970). As such, a finding of guilt may result in disciplinary proceedings despite an acquittal in a criminal proceeding.

It is precisely for the foregoing reason this Court has held that there is no due process violation in those cases resulting in automatic suspension due to felony convictions. See, for example, The Florida Bar v. Craig, 238 So.2d 78 (Fla. 1970) wherein this court stated:

> "The conclusive aspects of the judgment of conviction present no due process problem because the offending lawyer has had a full hearing pursuant to notice in the criminal court under standards of proof more demanding than the conventional preponderance of evidence required that generally applies in disciplinary proceedings." Craig, supra at 80, 81.

While the Craig case deals with the question of automatic suspension pending appeal of a criminal conviction and is distinguishable, therefore, from the matter sub judice, it

nonetheless remains important. Craig clearly stands for the proposition that a finding of guilt in a criminal proceeding is the result under a much more demanding standard than that required in a Bar disciplinary proceeding. This being the case, it is obvious that an acquittal of criminal charges could result in a finding of guilt in a disciplinary proceeding stemming from the same facts. And in the case at bar, it has.

The Florida Bar would also point to Rule 3-4.4 of the Rules of Discipline in support of its position:

> "...whether the alleged misconduct constitutes a felony or misdemeanor, The Florida Bar may initiate disciplinary action regardless of whether the respondent has been tried, acquitted, or convicted in a court for the alleged criminal offense... The acquittal of respondent in a criminal proceeding shall not necessarily be a bar to disciplinary proceedings..."

Based on the law as established in, Rayman and Craig in conjunction with Rule 3-4.4, Respondent's argument that equal treatment should require that the court not look beyond the acquittal in a criminal matter, just as it does not look beyond the conviction, simply is without merit. Respondent attempts to maintain that the disciplinary proceedings should have "mirrored" the criminal proceedings. Such is not the case. The Referee in the subject proceedings was afforded the opportunity to hear and consider evidence and testimony that was not presented in the criminal court proceedings. To wit:

The Referee heard and considered the testimony of John Coffey. Agent Coffey testified that Respondent Swickle, on his own volition

admitted to paying Judge Gross $5,000 to reduce the bond of a criminal defendant at the request of Harvey Swickle. (See transcript pgs. 200-220; Appendix II).

This crucial testimony/evidence was never considered in the criminal proceedings because it was the subject of a Motion to Suppress. After argument on the admissibility of this testimony/evidence, the Referee found the following:

> The Referee:
>
> "First of all, it is an adverse admission by Mr. Swickle. Its reliability is substantiated because it is an admission against, shall we say, penal interest.
>
> Secondly, it is relevant because it shows that he made an admission that at a previous time, he engaged in the same type of conduct with the same judge. That is relevant to show that in the conduct in question, that he engaged in the same conduct.
>
> So I will allow it in. The objection is overruled." (See Transcript p. 199).

The Florida Bar does not refute Respondent's contention that on cross examination by Respondent's counsel of Agent Caso, one can interpret that Respondent's conversations/representations to Agent Caso were innocent. However, one must look to the totality of the evidence, not just isolated "interpretations." The Referee was afforded the opportunity to and did in fact consider the totality of the evidence.

The Referee found Respondent guilty of ethical violations, not criminal conduct. These ethical violations go to the very heart of our system. The Referee found that the Respondent was aware that undercover agent Caso expected him to influence a judge to

reduce Zirio's bond.[3] He further found that the Respondent

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[3]The following is an excerpt of the testimony of Agent Caso:

By Mr. Stamm:

Q. Up until this point in these conversations that you had been having with Mr. Swickle, was it your understanding or was it your intent to actually retain Mr. Swickle's services to represent this individual?

By Mr. Caso:

A. No. The intent of the whole thing was to get the bond reduced. We wanted Mr. Swickle to assist us in getting the bond-- or assist me in getting the bond reduced. (June 5, 1990. Tr. at 174).

By Mr. Stamm:

Q. Mr. Swickle says in the middle of Page 37: "When you get the other ten, you will be processed." You have given him ten thousand dollars at this point?

By Mr. Caso:

A. Correct.

Q. "You can send your bondsman down there. There will be absolutely no problem. If there is any problem, your money goes back."

Had you had any discussion with him prior to that about a refund or return of any monies?

A. No. We had not discussed the return of any monies.

Q. What was your understanding with respect to the context of this conversation?

A. My understanding was that if he didn't accomplish what he was supposed to accomplish, he was going to return the money.

Q. What was it, to your understanding, that he was supposed to do?

A. Reduce the bond that night,not the following day or

anything, but immediately. "We have to get this guy out of jail right now. We have to reduce this bond now."

It was my understanding that if he could not do that then, the money was going to come back.

Q. Further down on page 37, Swickle states:

"You can go down right now and do it. As soon as the bondsman -- as soon as you and I get back up together again, we are all finished."

What was he referring to?

A. Well, I think that's it. "We are through. You engaged me to reduce the bond. If I get the bond reduced, send your bondsman out there. We are all through. We are finished."

Q. Subsequent to that, there are two additional meetings where increments of five thousand dollars are paid, up until the last five thousand being paid around six something.

A. Right.

Q. That brings us up to your conversation which begins on page 53, which is the 6:35 a.m. conversation.

On page 54, at the top, you say -- well, let's go back to the bottom of page 53.

Swickle says, "Is somebody going to contact us about setting up an appointment with him or what?"

Case says, "with this guy?"

Swickle says, "Yes."

At the top of Page 54:

Caso says, "No, we don't have to worry about this guy."

Swickle says, "Why is that?"

Caso says, "My people say that he is going to vaporize -- " Then it is unintelligible: -- isn't going to see him alone."

intended to convey that expectation and that he intended for Caso to believe that the "retainer" was at least in part to bribe a judge. (See Report of Referee, Appendix I). While the Referee did not make a specific finding that a bribe had in fact occurred, he did make a specific finding of a serious offense. As was also stated in The Florida Bar v. Prior, 330 So.2d 697 (Fla. 1976):

> "Members of the Bar must maintain a high standard of conduct. If the law is to be respected, the public must be able to respect the individuals who administer it." Prior, supra at 702.

Clearly, the Referee found Respondent to be seriously lacking in the maintenance of a high standard of conduct. This, coupled with the additional testimony/evidence which was considered by the Referee formed a basis on which the Referee made his Findings of Fact, Findings of Guilt and Recommendation as to Discipline to be Imposed.

This court has established three criteria for determining the proper disciplinary sanction to be imposed against attorneys in disciplinary proceedings. This court has stated that:

> [F]irst, 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

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When you said he was going to vaporize, what did you mean?

A. I mean that he was going to take off.He was going to be a fugitive and he was going to be long gone.

(June 5, 1990 Tr. at 177-180 (see Appendix III)).

> lawyer as a result of undue harshness in imposing 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).

This court has also stated that "... any conduct of a lawyer who brings into scorn and disrepute the administration of justice demands condemnation and the application of appropriate penalties. State v. Calhoon, 102 So.2d 604 (Fla. 1958).

In determining whether disbarment is the appropriate discipline in this case, this Court is asked to keep in mind its previous rulings in The Florida Bar v. Thomson, 271 So.2d 758 (Fla. 1973) and The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). In Thomson, this Court held that not only a wrong, but a corrupt motive must be present to authorize disbarment. In Breed, this Court mandated that while each case should be assessed individually in determining discipline to be imposed, the punishment imposed on other attorneys for similar misconduct should be considered.

Keeping the foregoing in mind, this Honorable Court is asked to consider the following disciplinary cases.

In The Florida Bar v. Morales, 366 So. 2d 431 (Fla. 1978), the Respondent was disbarred where, among other charges, he was found to have attempted to extract a $10,000 "fee" to be used to reach and influence the judge or prosecutor concerning sentencing.

In The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978), an attempt by a sitting judge to use his position to influence the

outcome in a pending matter was found to "cut to the very heart of the judicial system." Because such conduct "eroded the public confidence in the integrity of the judiciary and the bar, thus undermining the entire judicial process," the Respondent is subject to severe punishment. Respondent, McCain was disbarred.

In The Florida Bar v. Rambo, 530 So.2d 926 (Fla. 1988), the respondent was disbarred for delivery of a bribe to a county commissioner on behalf of a client.

In The Florida Bar v. Riccardi, 264 So.2d 5 (Fla. 1972) respondent was disbarred for conviction on the charge of bribery of an Internal Revenue Service Agent with the intent to reduce the tax liability of a third person.

Although Respondent, Swickle was not convicted of bribery, he was found to have intentionally led undercover agent Caso to believe that he would use part of the money given to him to bribe a judge. (See Report of Referee, Appendix I, and June 5, 1990 transcript of proceedings, p. 174-180, Appendix IV).

Also, in The Florida Bar v. Mavrides, 442 So.2d 220 (Fla. 1983) this Court held that the cumulative effect of various violations could warrant disbarment even though each violation standing alone might not.

In accordance with Florida Standards for Imposing Lawyer Sanctions, disbarment is the appropriate sanction for Respondent's conduct. The applicable sections are as follows:

Section 6.1 False statements, fraud, and misrepresentation

Disbarment is appropriate when a lawyer intentionally engages in

conduct which is prejudicial to the administration of justice or which involves dishonesty, fraud, deceit, or misrepresentation to a court.

Section 7.1 Violations of Other Duties Owed as a Professional
Disbarment is appropriate, absent aggravating or mitigating circumstances, when a lawyer intentionally engages in conduct which is a violation of duty owed as a professional with the intent to obtain a benefit for the lawyer or another, and causes serious or potentially serious injury to the client, the public or the legal system.

A lawyer is an officer of the court and as such is an essential component of the administration of justice. State v. Murrell, 74 So.2d 221 (Fla. 1954). Accordingly, any conduct by an attorney which brings the administration of justice into disrepute, demands condemnation and the appropriate penalties. State v. Calhoon, 102 So.2d 604 (Fla. 1958). Disbarment is the appropriate penalty/discipline.

It is fundamental that an attorney, by virtue of his position as an officer of the court, must not participate in any activity or dealing which either would be, or would give the appearance of being contrary to the administration of justice. The essence of Bar disciplinary proceedings is not to resolve the issue of criminality of a respondent, but rather to determine the moral fitness of an attorney to continue in the practice of law. Thus, the focus is on an attorney's prior actions and fitness to continue on in his capacity as an officer of the court. The disciplinary

agency's function is to protect the courts and the public from persons unfit to practice.

The real issue on disbarment proceedings is the public interest and a respondent's right to continue in a profession imbued with public trust. State v. Rendina, 467 So.2d 734 (Fla. 1985); decision approved in DeBock v. State, 512 So.2d 164 (Fla. 1987). Thus, while disbarment is the most severe discipline available, the very nature of Respondent Swickle's misconduct dictates that it is the appropriate discipline.

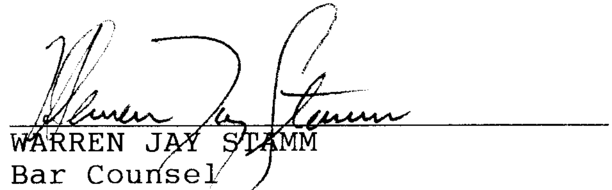
As such, the Findings of Fact, Findings of Guilt and Recommendation as to Discipline as rendered by the Referee should be upheld.

CONCLUSION

Respondent, Harvey Swickle was afforded the due process rights to which he is entitled at all levels of these proceedings. He was provided with both notice and an opportunity to be heard. Any determination as to the weight to be given to testimony against Respondent is to be left solely to the trier of fact. This Honorable Court is not an appropriate forum in which to retry this matter. Furthermore, acquittal in criminal proceedings is not a bar to disciplinary action. Having shown by clear and convincing evidence that Respondent engaged in conduct which violated the Rules of Discipline, conduct which cuts to the very heart of the integrity of our justice system, disbarment is the only appropriate sanction.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief was served by U. S. Mail upon Sid J. White, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927; and a true and correct copy was mailed to Nicholas R. Friedman, Esquire, Attorney for Respondent, 100 North Biscayne Boulevard, 21st Floor, New World Tower, Miami, Florida 33132-2306 this ____ day of March, 1991.



WARREN JAY STAMM
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