

IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,
Complainant,

v.

Harvey S. Swickle,
Respondent.

Supreme Court Case
No. 75,348

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

REPORT OF REFEREE

I. Summary of Proceedings: Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Article XI of the Integration Rule of The Florida Bar, hearings were held on June 5, 1990 and June 12, 1990. The Pleadings, Notices, Motions, Orders, Transcripts and Exhibits all of which are forwarded to The Supreme Court of Florida with this report, constitute the record in this case.

The following attorneys appeared as counsel for the parties:

For The Florida Bar: Warren J. Stamm

For The Respondent: Nicholas R. Friedman

II. Findings of Fact as to Each Item of Misconduct of which the Respondent is charged: After considering all the pleadings and evidence before me, pertinent portions of which are commented upon below, I find:

As to Count I

1. On October 7, 1987, undercover agent Eugene Caso (FDLE), a/k/a Ernesto Cassal (hereinafter referred to as Cassal),

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

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

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

emergency judge. (exh 2, p.13).

4. Respondent then called the home of Dade County Circuit Judge Howard Gross and was on the telephone for one minute and 59 seconds. (exh 4, [G]ross/Swickle chronology 8:43 to 8:51 P.M.; and transcript of June 5, 1990 hearing, p.155-161).

5. At 9:11 P.M., Cassal called respondent at home and told him that Zirio is roughly 28 years old, has been in the United States three years, is unmarried, has children but they may be in Cuba, has no family here, and is renting his residence. In response to a question as to Zirio's work status, Cassal indicated, "Ah, no, no, he uh, no, he just does work for ah, you know, for my ah" (exh 2, p.26). Respondent's handwritten notes reflect this information and specifically indicate that Zirio is not working. (exh 5). Cassal reiterated the importance of getting Zirio released soon and that Cassal could get hold of any money that was needed. Respondent stated, "OK, I'm waiting to hear back now, ah, just stay where you are and I'll call you as soon as I hear from my, my guy." (exh 2, p.27). I find that this statement was intended to convey and did convey to Cassal that respondent was able to influence a judge to lower Zirio's bond. This finding is premised on a careful review of the entire transcript of the conversations between Cassal and respondent, paying particular attention to the messages conveyed beyond the literal meaning of the

words used. In analyzing these conversations, I was aware of the testimony of Manny Barcenas who stated that he had paid respondent \$15,000 to bribe a judge to lower Artemio Carrandi's bond. (transcript of June 12, 1990 hearing, p.6-12). I also considered the testimony of Special Agent Supervisor John Coffey who testified that, after arrest, respondent told him he paid Judge Gross \$5,000 for assisting in lowering Carrandi's bond. (transcript of June 5, 1990 hearing, p.215-218).

6. At about 9:20 P.M., Judge Gross called the Dade County Jail indicating he wanted to reduce a \$750,000 bond. (exh 4, [G]ross/Swickle chronology 9:20 P.M.; and exh 2, p.30-31).

7. At 9:25 P.M., respondent called Cassal and stated he could reduce the bond tonight if respondent files an appearance on Zirio's behalf and represents Zirio. Respondent goes on to say, "I need a 20,000 dollar retainer, the bond will be reduced to 200,000 dollars." (exh 2, p.28).

8. Cassal subsequently calls respondent and says, "OK, I've got the twenty." (exh 2, p.32). Respondent immediately calls Judge Gross' home and is on the line for one minute and nine seconds. (exh 4, [G]ross/Swickle chronology 9:48 P.M.).

9. At about 10:30 P.M., respondent meets Cassal in the lobby of Cassal's hotel. During a discussion with Cassal, Cassal indicates he only has \$10,000 but should be receiving the other \$10,000 within a couple of hours. Respondent calls

Judge Gross from the hotel lobby while Cassal is counting the money. (exh 2, p.35-36). Respondent tells Judge Gross he has a signed contract. Judge Gross says, "OK, if you are his lawyer and you tell me those are the facts, I'll reduce the bond accordingly." Respondent then arranges to meet Judge Gross at the Judge's house at about eight the next morning.¹ (exh 2, p.40-41). Respondent then goes back to Cassal and gets \$10,000. Respondent says that if there are any problems the money goes back and as soon as we get back together again we are all finished. (exh 2, p.37).

10. At about 11:00 P.M., Judge Gross lowered Zirio's bond to \$200,000. (exh 2, p.44-45). Judge Gross' handwritten notes incorrectly indicate that Zirio was arrested with three to four kilos. (exh 6). Judge Gross testified that respondent told him that Zirio was a key employee, had children, resided here, and had no prior problems with the law. (transcript of June 12, 1990 hearing, p.61; and exh 12,

¹I 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 hearing, p.119-120).

p.249).

11. At 12:05 A.M. on October 8, 1987, respondent meets Cassal at the hotel and picks up an additional \$5,000.

12. At about 6:30 A.M. on October 8, 1987, respondent meets Cassal at the hotel again to pick up the remaining \$5,000 for a total of \$20,000. Cassal lets respondent know that Zirio will "vaporize." Respondent indicates that he will file an appearance anyway to follow the bases and make sure there are no problems. (exh 2, p.54). At no time did respondent attempt to advise Judge Gross or anyone else of Zirio's probable disappearance.

13. Respondent met Judge Gross at the Judge's residence at 8:00 A.M. and gave him \$6,300 of the cash respondent received from Cassal. Soon thereafter, respondent was arrested and \$13,200 of the money received from Cassal was found in respondent's car. Respondent had given the remaining \$500 to his wife. Judge Gross testified that the money he received was for repayment of a loan.

III. Recommendations as to whether or not the Respondent should be found guilty: As to each count of the complaint I make the following recommendations as to guilt or innocence:

As to Count I

I recommend that the respondent be found guilty and specifically that he be found guilty of violating the following Integration Rules of The Florida Bar and/or Disciplinary Rules of the Code of Professional

Responsibility, to wit:

Rule 4-3.3(d), Rules of Professional Conduct of The Florida Bar

In an ex parte proceeding a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse.

Rule 4-4.1(a)

In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person.

In the instant case, respondent informed Judge Gross that Zirio was a key employee. This is true, but respondent failed to tell the Judge that Zirio was probably a key employee of an illegal organization. Respondent was aware of this since his notes indicate Zirio was not working. Respondent also told Judge Gross that he had a signed contract with his client which was untrue.

Rule 4-8.4(e)

A lawyer shall not state or imply an ability to influence improperly a government agency or official.

Respondent was aware that Cassal expected him to influence a judge to reduce Zirio's bond. Respondent intended to convey such an expectation and intended to have Cassal believe that the "retainer" was at least in part to bribe a judge.

Rule 4-8.4(a), (c), (d)

Respondent violated this catchall rule by violating the above mentioned rules.

I specifically find that respondent did not violate the following Rules of Professional Conduct of The Florida Bar:

Rule 4-1.2(d); Rule 4-3.5(a)(b); Rule 4-8.3.²

IV. Recommendation as to Disciplinary measures to be applied:

I recommend that the respondent be disbarred from the practice of law in Florida.

V. Personal History and Past Disciplinary Record: After

finding of guilt and prior to recommending discipline to be recommended pursuant to Rule 11.06(9)(a)(4), I considered the following personal history and prior disciplinary record of the respondent, to wit:

Age: 48

Date admitted to Bar: June 10, 1968

Prior disciplinary convictions and disciplinary measures imposed therein: May 31, 1990; Respondent entered into a consent judgment with The Florida Bar thereby admitting to the issuance of worthless checks from his office account. Respondent was given a public reprimand and placed on two years probation.

VI. Statement of costs and manner in which costs should be taxed: I find the following costs were reasonably incurred by The Florida Bar.

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

²I carefully considered the evidence as to whether respondent bribed or attempted to bribe Judge Gross to lower Zirio's bond. Although the evidence shows some very questionable conduct on the part of respondent and Judge Gross, it does not rise to the level of clear and convincing evidence of such wrongdoing.

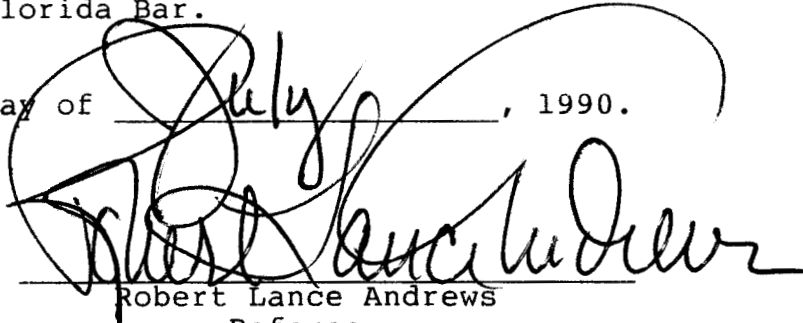
Bar counsel travel costs: 136.10

Investigation expenses: 494.15

Total \$ 3,497.55

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

Dated this 13th day of July, 1990.


Robert Lance Andrews
Referee

Copies to:

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