

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

RICHARD IGNACIO MARTINEZ,

Respondent.

Supreme Court Case
No. SC00-2221

The Florida Bar File
No. 2001-70,438(11D)

The Florida Bar's Answer Brief

VIVIAN MARIA REYES

Bar Counsel
Florida Bar No. 004235
The Florida Bar
444 Brickell Avenue, Suite M-100
Miami, Florida 33131
(305) 377-4445

JOHN ANTHONY BOGGS

Staff Counsel
Florida Bar No. 253847
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

JOHN F. HARKNESS, JR.

Executive Director
Florida Bar No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

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STATEMENT OF THE CASE AND OF THE FACTS

An Information was issued in the case of United States of America v. Richard Martinez, Case No. 99-583-Cr-Seitz, in the United States District Court, Southern District of Florida. That Information stated:

The United States Attorney charges that:

1. On or about April 10, 1991, a federal grand jury of the United States District Court of the Southern District of Florida returned an indictment in the case of United States v. Augusto Guillermo Falcon and Salvador Magluta et al., Case No. 91-6060-Cr-Moreno.
2. On or about May 16, 1991, the Court entered a protective order in the case of United States v. Augusto Guillermo Falcon and Salvador Magluta, Case No. 91-6060-Cr-Moreno. This protective order in pertinent part “enjoined, prohibited, and restrained” the defendants therein, as well as their “agents, ... attorneys, family members, ... and those persons in active concert and participation with them... from selling, transferring, ... distributing, giving away, ... receiving any distributions of proceeds, ... or otherwise participating in the disposal of ... all or part of their interest ... in “certain listed property, including approximately two billion dollars representing “proceeds obtained... from the distribution of controlled substances” by the defendants in Case No. 91-6060-Cr-Moreno, without the prior approval of the Court. This protective order remained in effect on or about March 12, 1996.
3. From on or about October 15, 1991 through on or about March 12, 1996, the defendant, RICHARD MARTINEZ, did corruptly endeavor to influence, obstruct, and impede the due administration of justice in the case of United States v. Augusto Guillermo Falcon and Salvador Magluta et al, Case No. 91-6060-Cr-Moreno, then pending in the United States District Court, for the

Southern District of Florida, in that the defendant Martinez knowingly and willfully received without prior approval of the Court approximately \$1 million in “proceeds obtained ... from the distribution of controlled substances” by Augusto Guillermo Falcon and Salvador Magluta, defendants in Case No. 91-6060-Cr-Moreno, knowing that such funds represented property subject to the protective order entered in Case No. 91-6060-Cr-Moreno; all in violation of Title 18, United States Code, Sections 1503 and 2.

The parties entered into a plea agreement. (Appendix C). Pursuant to that agreement, a plea and sentencing hearing took place before Judge Patricia A. Seitz on July 14, 2000. During the hearing, the Court addressed a number of questions to the Respondent including the following:

THE COURT: Mr. Martinez, why are you pleading guilty?

THE DEFENDANT: For various reasons, your Honor. But one relevant at this point is that I accepted funds from Salvador Magluta knowing of the restraining order.

THE COURT: And knowing of the source of the funds?

THE DEFENDANT: The source of the funds, yes.

(Appendix A, p. 25).

A portion of that hearing was devoted to a proffer of the government’s potential case against the Respondent. The salient facts were presented to the Court by Michael Sullivan, Assistant U.S. Attorney.

Sullivan related that Respondent and Salvador Magluta were married to the

Solis sisters. (Appendix A, p. 26). Magluta and co-defendant Falcon hired Respondent to assist with their defense. During a five year period, Respondent received approximately \$1,000,000.00 in legal fees. (Appendix A, p. 31).

It was clear from Sullivan's proffer that the government had extensive knowledge of Respondent's personal relationship with Magluta and how payments were made to members of the Magluta and Falcon legal team, and the Magluta-Falcon "entourage".¹ (Appendix A, p. 36). Some of the funds were paid by checks made out to the Respondent. (Appendix A, p. 31). Others were part of a scheme to hide the source of funds. That consisted of double endorsements, issuance of the checks to other parties who endorsed the checks which were then delivered to Respondent. (Appendix A, p. 31, 40). Respondent in turn added his endorsement and deposited them in his account. The checks were routed in a manner which concealed the source of the funds. (Appendix A, p. 30).

Magluta's records of payment included Respondent who was identified by a code name. (Appendix A, p. 35). The payment of Respondent and others, included millions of dollars in drug funds which were transported to New York,

¹ Those facts were somewhat moot insofar as Respondent admitted that he knew that the money he received was drug money and was covered by the restraining order. (Appendix A, p. 25). However, the proffer established that his knowledge of Magluta's operations was much more intimate than others who were paid by Magluta/Falcon.

Israel, Colombia, Venezuela and Zurich. (Appendix A, p. 31, 40).

The Bar filed a Motion for Partial Summary Judgment (and an Amended and Second Amended Motion). The Amended Motion for Partial Summary Judgment included as Exhibits the Information, Judgment and Sentence, Plea Agreement and Plea Colloquy. On May 9, 2001, the Referee entered an Order granting the Second Amended Motion for Partial Summary Judgment. The Referee's Order held that Respondent had violated the following rules: Rule 4-8.4(a) (A lawyer shall not violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another); Rule 4-8.4(b) (A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation); Rule 4-8.4(d) (A lawyer shall not engage in conduct in connection with the practice of law that is prejudicial to the administration of justice) of the Rules of Professional Conduct; and Rule 3-4.3 (The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline) and

Rule 3-4.4 (Criminal Misconduct) of the Rules of Discipline.

Respondent did not oppose the entry of the order, except for the finding of Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). See Respondent's Response to the Bar's Second Amended Motion for Partial Summary Judgment.

The Bar moved to exclude testimony of a witness who was scheduled by Respondent to testify as to the factual basis of that plea. The witness was also scheduled to testify in reference to Respondent's character. Respondent's counsel stated that if the Bar was not offering representatives of the U.S. Attorney's office as witnesses, he would agree to the exclusion of witness James Hogan as a fact witness. (T. 6/28/01, pp. 8, 9). The Bar stated that no members of the U.S. Attorney's office would be called. Based on that agreement, the Referee entered the requested order.

At the hearing on mitigation, the Respondent presented the testimony of six character witnesses, and testified in his own behalf. After hearing the evidence presented at the final hearing and the mitigation hearing, the Referee recommended that Respondent be disbarred. In addition to the rule violations specified above, the Referee based his decision on three aggravating factors and five mitigating factors.

Respondent filed a Petition for Review on August 28, 2001 and an Amended Petition on August 29, 2001.

SUMMARY OF ARGUMENT

By not offering any affidavit or competent evidence in opposition to The Bar's Motion for Partial Summary Judgment, Respondent has waived the right to challenge the finding of guilt on the various rule violations. Moreover, Respondent cannot raise the issue of the exclusion of James Hogan as a fact witness, since he stipulated to that exclusion.

Even if Respondent's actions above did not constitute a waiver, applicable law limits respondent's ability to offer such evidence. Case law dictates that in the absence of an *Alford* plea, a respondent cannot offer in mitigation evidence of the circumstances surrounding his plea. To allow him to do so would cause the referee to go behind the conviction and result in a trial de novo.

Having admitted guilt under oath to knowingly and willfully engaging in the criminal conduct of which he stands convicted, a respondent cannot offer in mitigation of a disciplinary sanction arguments of deliberate ignorance of the law, selective prosecution by the government, and broad nature of the applicable criminal statute.

Respondent claims, in his second argument, that the Referee erred by recommending disbarment. This Court has stated that a Referee's recommendation of discipline will be upheld if there is a reasonable basis in case

law or the standards.

The Bar submits that there are a number of cases and standards which directly support the Referee's recommendation of disbarment in this case. Similar cases have resulted in disbarment. Those cases are discussed in detail in the Bar's argument.

The cases also support the principle that findings of aggravation will be treated as factual questions, thereby having a presumption of correctness. This Court also treats as a factual question the Referee's finding that the mitigating factors are not sufficient to overcome the presumption favoring disbarment for a felony. Respondent has not challenged those findings.

The applicable standards set forth in Florida's Standards for Imposing Lawyer Sanctions are 5.11(a)(b)(f), 6.21, and 7.1. Those standards are quoted verbatim in the Argument. They designate disbarment as the proper discipline in view of the facts of this case.

Respondent cites a number of cases on the sole basis that they deal with "obstructive" behavior. The inapplicable nature of those cases is discussed in detail in the Argument.

ARGUMENT

I

IN THE ABSENCE OF AN “ALFORD” PLEA, A RESPONDENT IN A DISCIPLINARY PROCEEDING HAS NO DUE PROCESS RIGHT TO EXPLAIN THE CIRCUMSTANCES SURROUNDING HIS PLEA OF GUILT TO FELONIOUS ACTS. RESPONDENT DOES HAVE THE RIGHT TO PRESENT EVIDENCE IN MITIGATION PRIOR TO THE IMPOSITION OF DISCIPLINE. (Restated)

Initially, this Court should note that Respondent has waived any argument regarding denial of the right to be heard as to the enumerated rule violations. The Bar filed a motion for partial summary judgment which was granted as to Respondent’s guilt of the felony and violation of a number of rules. (See Statement of the Case and Facts, pp. 1-5). Respondent did not oppose any of the asserted rule violations except for Rule 4-8.4(c) (A lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation). Respondent offered no affidavit nor any competent evidence to serve as a denial for the motion. Since Respondent did not provide any evidence in opposition to the motion, his guilt of the felony and related rule violations has been established. Respondent does not challenge the ruling in favor of the Bar on summary judgment in his appeal. Therefore, it was proper on that basis alone, that only mitigating and aggravating evidence be introduced.

Moreover, Respondent stipulated at a hearing on The Florida Bar’s Motion

to Exclude Witnesses to withdrawing his witness James Hogan except as to character. Initially, Respondent had also wanted Mr. Hogan, Respondent's criminal defense attorney, to testify to the facts and circumstances behind Respondent's plea. The following encounter took place before the referee:

MR. WEISS: My client is not arguing that he's innocent, but I think the Court to some degree might find relevant the circumstances behind the plea.

Now, if the Bar is going to stipulate that they're not going to give the Court any input from the U.S. Attorney's Office and they're going to stand pat on the mere documents that they're submitting, I will withdraw Mr. Hogan except as to the character.

THE REFEREE: Let me ask this question, Miss Reyes.

MS. REYES: Yes.

THE REFEREE: Are you intending to call anybody from the U.S. Attorney's Office on that issue? Because the document is very clear --

MS. REYES: No.

THE REFEREE: -- or at least appears to be very clear.

MS. REYES: No. I'm not intending. I never listed any A.U.S.A. and I told Mr. Weiss that I was not intending to call them.

If I didn't, I'll be clear right now. I am not intending to call them.

THE REFEREE: So under those circumstances, Mr. Weiss, if I understand you correctly then, Mr. Hogan will be just a

character witness.

MR. WEISS: That's correct, Your Honor.

(Transcript 6/28/01, p. 8-9).

Assuming arguendo that this Court does not agree that Respondent's actions above constitute a waiver as to the admission of such evidence, Respondent is limited by law from offering such evidence.

Rule 3-7.2(i)(3) of the Rules Regulating The Florida Bar provides that determinations or judgments of guilt of felonies shall constitute conclusive guilt of the offenses(s) charged. Application of this rule to the instant case makes it clear that Respondent must be found guilty of having committed the crime of which he stands convicted. This is not to say that Respondent does not have a right to be heard. He does. However, when the rule is read in light of the applicable case law, it is apparent that the right to be heard is limited.

On July 14, 2000, Respondent tendered a guilty plea before United States District Judge Patricia Seitz in the matter of United States of America v. Richard Ignacio Martinez, to the charge that he did, from October 15, 1991 through March 12, 1996, corruptly obstruct the administration of justice in the case of United States v. Falcon and Magluta, by knowingly and willfully receiving, without prior approval of the court, approximately one million dollars in proceeds obtained from

the distribution of controlled substances by Falcon and Magluta, knowing that the funds represented property subject to a protective order entered by Judge Moreno, the presiding judge in the Falcon and Magluta prosecution, in violation of federal law. (Appendix A, p. 6-7). When asked by the Court the reason why he was pleading guilty, Respondent, under oath, replied as follows:

THE DEFENDANT: For various reasons, your Honor. But one relevant at this point is that I accepted funds from Salvador Magluta knowing of the restraining order.

THE COURT: And knowing of the source of the funds?

THE DEFENDANT: The source of the funds, yes.

(Appendix A, p. 25).

Respondent's guilty plea was clear and unequivocal. It was knowing, willing, and voluntary. It was certainly not an *Alford* plea.² There was no protestation of innocence. To the contrary, there was an admission of knowing and willful felonious misconduct.

The issue in The Florida Bar v. Pavlick, 504 So.2d 1231 (Fla. 1987), was whether an attorney in a disbarment proceeding predicated upon a felony conviction may offer in mitigation evidence of the circumstances surrounding his

² A plea containing a protestation of innocence when a defendant intelligently concludes that his interests require entry of a guilty plea. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

Alford plea. This Court answered in the affirmative finding that doing so *under these circumstances* did not involve a trial de novo because the respondent's version of the underlying case and the reasons for his plea were consistent with his *Alford* plea. Such is not the situation in the instant case. In the matter sub judice, the Respondent, by his own admission under oath, accepted the tainted funds both knowing they were subject to a restraining order and knowing their source. Any presentation of evidence surrounding the facts of the underlying case, whether as to Respondent's mens rea, the culpability of others, or the nature of the offense itself, must necessarily be inconsistent with Respondent's own admissions in his plea colloquy and would cause the Referee to go behind the conviction.

In one of the earliest cases addressing the issue of a respondent's right to present evidence surrounding the circumstances of his adjudication, The Florida Bar v. Evans, 94 So.2d 730 (Fla. 1957), the respondent was permitted to put on evidence of the serious physical illness which precipitated his nolo contendere plea to the criminal charges against him. This ruling is not inconsistent with the Bar's position. Illness is a factor in mitigation under the Florida Standards for Imposing Lawyer Sanctions. Moreover, a plea of nolo contendere is not a plea of guilt.

In The Florida Bar v. Fussell, 179 So.2d 852 (Fla. 1965), the respondent was suspended for a period of three years without opportunity to present *any*

testimony in mitigation of the penalty. This Court held that where disbarment of an attorney is sought, due process requires that the attorney be noticed and provided reasonable opportunity to be heard. The Court noted that while the governing rule provided for a judgment of conviction to stand as conclusive proof of guilt of the offense, it was a rule of evidence and not in and of itself conclusive as to the ultimate disciplinary sanction to be taken. Hence this Court's conclusion that due process requires notice and opportunity to be heard both in person and through witnesses.

It must be noted that Fussell was provided *no* opportunity to be heard prior to his suspension and the issue before the Court was whether the Board of Governors (this case was tried under predecessor governing rules) could impose discipline based on a felony conviction without affording the accused attorney the opportunity to present witnesses and his own testimony in regard to mitigation. Clearly, the answer is it could not. The Bar agrees that respondents enjoy a due process right to be heard in mitigation. In the instant case, the Respondent Martinez was afforded his due process rights. He testified as did numerous character witnesses on his behalf. What the respondent could not do is offer evidence in contradiction of his sworn admission of guilt. To do so would be to go behind the guilty plea and conviction and essentially retry the criminal case.

While the case law allows evidence in mitigation of discipline, it does not allow for retrial of the criminal case.

It is also important to note that Fussell's offering in mitigation consisted, in good part, of evidence that the misconduct did not arise in an attorney-client relationship, no financial injury remained, sanctions had been imposed against the respondent in another forum, and he had family responsibilities which included his earning a living as an attorney. These are mitigating factors which do not negate respondent's conviction. While Fussell also would have offered in evidence that his crime was not grounded in fraud and the offense was a technical one (knowingly making false statements in an application for a home improvement loan), the opinion does not tell us the procedural history of Fussell's criminal conviction. We know only that he was convicted. We do not know if that conviction followed a trial or a plea. We do not know if any protestation of innocence took place before the court. We do not know if Fussell conceded his guilt. Regardless, it is evident from a reading of The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979), that a respondent cannot go behind his criminal conviction and secure a trial de novo before the referee.

Most importantly, later cases including The Florida Bar v. Isis, 552 So.2d 913 (Fla. 1989), The Florida Bar v. Cohen, 583 So. 2d 313 (Fla. 1991), and

Pavlick, supra, clearly stand for the proposition that where there is record evidence that a plea to criminal charges was accompanied by protestations of innocence, a respondent may offer evidence of the underlying criminal case and the reasons for the plea. In Isis, as in the instant case, there was no such protestation of innocence and the respondent was precluded from presenting evidence that his prosecution was the result of a vendetta by an agency which he had successfully defeated in earlier court proceedings. Isis was disbarred.

Respondent argues that the obstruction of justice statute under which he was convicted is a “catch all” which includes far more serious offenses. He then concludes erroneously that the referee erred by treating all felony obstruction charges as equally serious and deserving of disbarment. Respondent would have this Court believe that the Referee acted in a vacuum devoid of any information other than the statute itself. Such is simply not the case. Included in the record before the Referee was the Information charging the Respondent, as well as the plea colloquy. The Referee was fully informed as to the specific acts which the Respondent committed and admitted to and that the Respondent did not admit to nor even stand accused of the examples given by Respondent, i.e., murder or bribery of a witness, suborning of perjury, and others. The Report of Referee clearly states that considered in aggravation was Respondent’s own admission at

the time of his plea that he knowingly and willfully received approximately one million dollars without court approval. The Referee additionally notes that Respondent admitted at the July 6, 2001 final hearing before him to having received \$880,000.00 in attorneys fees. The Referee specifically states in his Report that both times the Respondent admitted knowing that those funds represented property subject to Judge Moreno's protective order and that said monies were obtained from the distribution of controlled substances. (Appendix B, p. 7). Respondent's contention that willful violations of court orders are more typically treated as criminal contempt, even civil contempt, does not warrant response as the simple fact is that Respondent was convicted of a felony, not contempt. Respondent's arguments ignore the fact that he was so convicted, just as he ignores his own sworn admission of knowingly committing those felonious acts of which he stands convicted.

Respondent would like this Court to accept in mitigation of the Referee's disbarment recommendation his most recent spin on his criminal misconduct, to-wit: that the government's prosecution was essentially based on Respondent's familial relationship with Salvatore Magluta and his "willful blindness or deliberate ignorance to the source of the funds being used to pay the legal fees for *all* the lawyers in the case". This contention is put forth despite Respondent's own sworn

admission in federal court to knowingly and willfully receiving funds obtained from the distribution of controlled substances subject to a protective order. Contrary to Respondent's assertion that he was guilty under a theory of willful blindness or deliberate ignorance, respondent pled guilty to accepting the tainted funds knowing of both the restraining order and the source of the funds. (Appendix A, p. 25, 46-47). Clearly, Respondent would like to both have his cake and eat it too.

Finally, Respondent suggests that his prosecution was to serve as a warning to members of the defense bar that attorneys cannot accept fees from criminal defendants without engaging in an investigation into the source of those fees. Respondent's contention is similar in nature to that put forth in the Isis case, supra. This Court has already addressed these types of contentions and stated that in the absence of an *Alford* plea, they will not be considered. It is unnecessary to address the Respondent's remaining arguments as to a lawyer's duty to investigate the source of his fees as to do so would be to go behind the conviction. However, one cannot help but note that Respondent's recurring innuendo that he was selectively prosecuted is akin to the speeder's defense that everyone was doing it. The fact is that Respondent was charged with the crime, pled guilty to knowingly and willfully having committed the crime, and was convicted of the crime. His case was decided on its own facts. He cannot now disavow his admissions.

ARGUMENT

II

RESPONDENT HAS ESTABLISHED NO ERROR REGARDING THE RECOMMENDATION OF DISBARMENT.

As this Court stated in The Florida Bar v. Vining, 761 So.2d 1044, 1048 (Fla. 2000):

The Court's scope of review of a referee's recommended discipline, however, is broader than that afforded to findings of fact because this Court has the ultimate responsibility to determine the appropriate sanction. *See Florida Bar v. Niles*, 644 So.2d 504, 506 (Fla. 1994). Yet, the Court "will not second-guess a referee's recommended discipline so long as that discipline has a reasonable basis in existing case law." *Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997). (Emphasis added).

Respondent's recommended discipline has a reasonable basis in case law and the applicable standards. The Referee will also be upheld when the applicable standards justify the sanction. The Florida Bar v. Wolis, 783 So.2d 1057 (Fla. 2001). Wolis is a case which is also factually similar. Wolis pled guilty to obstruction of justice. Both this Respondent and Wolis violated the law for a selfish motive. Wolis sought to boost the value of his stock by his conduct. The Respondent herein was lured by the financial reward of at least \$880,000.00.³ This Court's holding in Wolis applies here as well; namely that:

³ At the plea hearing, the government estimated the fees at approximately \$1,000,000.00.

This conduct was not only serious but also had the underpinnings of being directed to financial gain. This conduct is especially serious when combined with the felony conviction and certainly warrants disbarment. (At 1060).

Wolis involved similar mitigation and aggravation. The Referee's determination that a "serious" felony had been committed was approved by this Court in connection with the finding that the mitigation, including good character, was not sufficient to warrant a penalty less than the presumed sanction of disbarment. The Referee in this case found that Standard 5.11(b) referring to "serious" criminal misconduct pertained to this case. Five years of misconduct was admitted at the plea hearing. The Referee found that a pattern of misconduct was an aggravating factor.

This Respondent was out of law school for only a few years, and his prior employment had been as an Assistant State Attorney when Magluta offered him a role as part of his defense team. The apparent potential for sharing the enormous wealth of the drug traders was a temptation that Respondent did not resist. By accepting the offer, Respondent engaged in conduct akin to money laundering, violated a court order and impeded justice.

Under these circumstances the Referee properly gave great weight to the aggravating factors. Of particular note is the Referee's recognition of the fact that

Respondent's wrongful conduct took place over a period of five years, from 1991 to 1996. There is no reason to believe that Respondent would have discontinued his conduct at any time, if he had not been caught and prosecuted.

This Court should uphold the Referee's finding that the aggravation outweighed the mitigation in this case.

In Wolis, supra, this Court pointed out that the Referee's findings as to aggravation will be treated as a factual matter and upheld if there is competent substantial evidence. Respondent has not challenged that finding. The Respondent stresses, in particular, the character witnesses. The Referee acknowledged the character testimony, but he concluded that it merely mandated a five year disbarment instead of a longer one.

Mitigation by virtue of character testimony need not be given great weight, especially in view of the Referee's conclusion that the mitigation was outweighed by the crime and aggravating factors. This Court, in a case involving even stronger character testimony, approved disbarment. In The Florida Bar v. Cruz, 490 So.2d 48 (Fla. 1986), the sentencing judge testified as a character witness on behalf of the respondent. The judge questioned whether respondent's guilty plea was a good decision. He stated that he wished the sentence could have been less. The probation officer testified that the respondent was guilty of poor judgment rather

than a crime. Despite the foregoing and testimony of other character witnesses, respondent was disbarred. The character evidence merely resulted in a retroactive disbarment. Cruz' conduct was sufficient to sustain disbarment despite the character witnesses.

The Florida Bar v. Wilson, 643 So.2d 1063 (Fla. 1994) is also very similar in many respects:

The referee recommended that Wilson be found guilty of violating the following Rules Regulating The Florida Bar: rule 3-4.3 (commission of act that is unlawful or contrary to honesty and justice); rule 4-8.4(b) (commission of criminal act that reflects adversely on lawyer's honesty, trustworthiness, or fitness as lawyer); and rule ~~4-~~ 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, ir misrepresentation)... The referee found the following to be mitigating factors in this case: absence of a prior disciplinary record; Wilson's good character and reputation in the community; Wilson had already been sentenced to probation and restitution by the New York court; and Wilson exhibited remorse for his mistakes. The referee also found the following aggravating circumstances to be established: Wilson had a dishonest or selfish motive; there was a pattern of misconduct; the vulnerability of the victim; and Wilson's substantial experience in practice of law. The referee concluded that the aggravating circumstances were more compelling than the mitigating circumstances, and that the substantial character evidence was not sufficient to overcome clear and convincing evidence that Wilson had committed two serious felonies involving theft of public Medicaid money. Accordingly, the referee recommended disbarment, retroactive to the date of Wilson's emergency suspension on December 9, 1992. The referee also recommended that Wilson be granted leave to apply for readmission after five years, provided that he makes full restitution as required by the New York sentence. (At 1064, emphasis supplied).

Note that the Respondent in his brief in this case distorts the Referee's position by claiming that "the Referee's analysis was skewed by his abiding belief that Standard 5.11 required the ultimate sanction of disbarment due to the felonious nature of Petitioner's conviction alone." (Respondent's Brief, p. 38).

In fact, the Referee specifically stated that a felony does not require automatic disbarment:

After reviewing the case law submitted by the parties the Referee notes that disbarment is not mandated for all attorneys who are convicted of a felony. The Florida Bar v. Chosid, 500 So.2d 150 (Fla. 1987); The Florida Bar v. Carbonero, 464 So.2d 549 (Fla. 1985); The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987).

(Appendix B, p. 4).

The Florida Bar v. Silverman, 468 So.2d 229 (Fla. 1985), is also similar.

Silverman was convicted in a federal court of obstruction of justice in violation of 18 USCA 1503. The discipline approved by this Court was disbarment (which he did not contest):

Silverman admitted that this conviction established his violation of Florida Bar Integration Rule, article XI, rule 11.02(3) by the commission of an act contrary to honesty, justice, or good morals, and his violation of disciplinary rules 1-102(A)(3)–(6) by engaging in illegal conduct involving moral turpitude, conduct involving dishonesty, conduct prejudicial to the administration of justice, and conduct that adversely reflected on his fitness to practice law. Silverman agreed to accept disbarment and taxation of costs in this disciplinary proceeding.

This Court added: “After reviewing the facts of this case, we approve the Referee’s Report.”

In The Florida Bar v. Cramer, 678 So.2d 1278 (Fla. 1996), the respondent was disbarred even though he did not have a criminal conviction for participating in a fraudulent scheme. This Court upheld the Referee’s determination that the aggravating factors outweighed the mitigating factors. Mitigating factors included ill health which is not a consideration herein. Mitigation also included a cooperative attitude and an admission of guilt, which was also a finding in this case. Cramer had a prior disciplinary history, although Respondent does not. Respondent’s conduct, accepting illegal payments totaling \$880,000.00 or more over a five year period, is certainly equivalent to one fraudulent scheme combined with prior disciplinary offenses.

The Referee acknowledged that Florida Standards for Imposing Lawyer Sanctions should be applied in the context of mitigating and aggravating factors. Respondent claims that the Referee failed to do so. However, the Referee stated in his report that: “Unlike the cases cited by Respondent the mitigating factors do not outweigh the aggravating factors and disbarment would be the appropriate sanction.” (Appendix B, p. 6).

The applicable standards are 5.11 (a), (b), and (f) which follow:

5.11 Disbarment is appropriate when:

- (a) a lawyer is convicted of a felony under applicable law;
- (b) a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft;
- (f) a lawyer engages in any other intentional conduct involving dishonesty, fraud, deceit, or misrepresentation that seriously adversely reflects on the lawyer's fitness to practice.

The Referee also found that Standards 6.21 and 7.1 mandated disbarment.

Those standards state:

6.21 Disbarment is appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or causes serious or potentially serious interference with a legal proceeding.

7.1 Disbarment is appropriate when a lawyer intentionally engages in conduct that is a violation of a 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 a client, the public, or the legal system.

The foregoing establishes that there is ample case law to support the Referee's recommendation of disbarment. Florida's Standards for Imposing Lawyer Sanctions also support disbarment. Therefore, the Referee's recommendation should be approved.

Among other miscellaneous arguments, Respondent asserts that he

“accepted legal fees in the same fashion as numerous other more experienced attorneys” who were not prosecuted. (Respondent’s Brief, p. 43). That argument, however, pertains to matters which are not material.⁴

Respondent also describes his five year accrual of large fees as “a one-time event” (Respondent’s Brief, p. 39) and relies upon two cases in which Respondent’s conduct consisted of an “isolated” act. (Respondent’s Brief, p. 39). The Bar would submit that Respondent’s conduct was neither “a one-time event” nor an “isolated” act.

Respondent also refers to a number of cases which involve “obstructive” behavior. (Respondent’s Brief, pp. 41-42). Initially, it is apparent that the instant case involves more than obstructive behavior alone. It includes behavior prohibited by law in order to exclude an inordinate benefit from the profit of criminal activity. It includes a selfish and dishonest motive. It includes a pattern of misconduct.

Hence, Respondent’s repeated reliance upon The Florida Bar v. Cox, 794 So.2d 1278 (Fla. 2001) is misplaced. Cox is a case in which the prosecutor sought to conceal the identity of a confidential informant by using her alias during a trial.

⁴ Assuming arguendo materiality and a factual record, Respondent is, nevertheless, in a different position from the other attorneys as a relative of Magluta (by marriage) who socialized with him. The details of their association were discussed at the plea hearing. (Appendix A, p. 26-28).

Respondent learned after the trial that her informant had a criminal record. Cox does not even vaguely pertain to this case. Respondent seems to rely upon Cox and other “obstructive” behavior cases based upon an unstated premise. That premise appears to be that if any other cases involving obstructive behavior resulted in less than disbarment, this case does not merit disbarment.

Obviously, the foregoing premise is seriously defective. Obstructive behavior is only one aspect of this case. Respondent makes no effort to demonstrate factual similarity between the instant case and the cited cases. The Bar has relied upon similar cases in which disbarment has been the sanction.

Respondent also relies upon The Florida Bar v. Pearce, 356 So.2d 317 (Fla. 1978). In Pearce there were admitted discussions among several individuals to prepare a false story for a witness. However this Court summarized the Referee’s Report including this statement: “at the disciplinary hearing, the witnesses’ testimony varied on the extent of Respondent’s participation in the preparation of the false story.” (At 319).

The evidence regarding Pearce was apparently weak, and affected the Referee’s determination that a public reprimand should be imposed. There was no Petition for Review filed and this Court deferred to the Referee.

In The Florida Bar v. Klausner, 721 So.2d 720, 721 (Fla. 1998) upon which

Respondent also relies, this Court stated that “the Bar makes a strong case for disbarment.” However, the Referee recommended a three year suspension.

Therefore, the holding that is central to this case was restated by this Court: “The Referee’s recommendation is reasonably supported by existing case law and, thus, will be upheld.” (Emphasis added).

Obviously, this Court was not deciding that the facts in Klausner required suspension rather than disbarment. The principle applied in Klausner is the same principle which should be applied herein; namely that there is reasonable support in the case law for the Referee’s recommendation of disbarment, and therefore, disbarment should be approved.

CONCLUSION

Respondent has not established the existence of error. The Referee's Report should be approved .

VIVIAN MARIA REYES

Bar Counsel
TFB No. 004235
The Florida Bar
444 Brickell Avenue
Suite M-100
Miami, Florida 33131
Tel: (305) 377-4445

JOHN ANTHONY BOGGS

Staff Counsel
Florida Bar No. 253847
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

JOHN F. HARKNESS, JR.

Executive Director
Florida Bar No. 123390
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(850) 561-5839

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar's Initial Brief was forwarded via Airborne Express, airbill no. 3370020323, to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to G. Richard Strafer, Attorney for Respondent, 2400 South Dixie Highway, Suite 200, Miami, Florida 33133, and Jeffrey S. Weiner, Attorney for Respondent, 9130 South Dadeland Boulevard, Suite 1910, Miami, Florida 33156, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, on this ____ day of November, 2001.

VIVIAN MARIA REYES
Bar Counsel

CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I HEREBY CERTIFY that the Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton AntiVirus for Windows.

VIVIAN MARIA REYES
Bar Counsel

INDEX TO APPENDIX

- A. Transcript of Plea and Sentencing Proceedings had before the Honorable Patricia A. Seitz in the matter of United States of America v. Richard Ignacio Martinez, Case No. 99-583-Cr-Seitz.

- B. Report of Referee in the matter of The Florida Bar v. Richard Ignacio Martinez, Supreme Court Case No. SC00-2221, The Florida Bar File No. 2001-70,438(11D).

- C. Plea agreement tendered by Respondent in the matter of United States of America v. Richard Ignacio Martinez, Case No. 99-583-Cr-Seitz.