IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

CASE NO, 77,958

THE FLORIDA BAR,

Complainant,

v.

JOSE M. INSUA,

Respondent.

ON PETITION FOR REVIEW OF A
REFEREE'S RECOMMENDATION

HON. JEFFREY E. STREITFELD, REFEREE

RESPONDENT'S BRIEF IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF THE CASE AND FACTS

A. Procedural Developments

This **is a** bar disciplinary proceeding in which Jose M. Insua petitions this court for review of the referee's report recommending disbarment. This court **has** jurisdiction pursuant to **Art.** V, §15 of the Florida Constitution.

The Bar's complaint against Insua charged a violation of Rules 4-8.4(b)(commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) and 4-8.4(c)(engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation) of the Rules of Professional Conduct. The essence of the complaint is that Insua was engaged in a conspiracy to import cocaine and entered into **a** plea agreement with the United States of America in which he admitted to his involvement in an illegal conspiracy and also cooperated with the United States as a confidential informant. The referee recommended a finding of guilt only as to the violation of Rule 4-8.4(b).

B. Recommendation Of The Referee

The referee held a disciplinary hearing over the course of two **days. At** the conclusion of the hearing, the referee recommended disbarment, disagreeing with Insua's request for a suspension for five years, with Insua affirmatively waiving any right to contest the length of the suspension. The referee made the following findings:

Finding of Fact: I find Respondent guilty of all allegations contained in the Bar's complaint which I hereby accept and adopt as the findings in the cause in addition to those stated to wit:

That Respondent entered into a plea agreement with the United States Attorney's Office for the Southern District of Florida on February **12,** 1988.

That pursuant to the plea agreement, Respondent agreed to waive indictment and plead guilty to a one count information charging him with conspiracy to import cocaine, in an amount in excess of five kilograms, in violation of Title **21,** United States Code, Section 846.

That pursuant to the plea agreement, Respondent agreed to begin cooperating with the Federal government and their law enforcement agencies.

That Respondent testified as a confidential informant at the trial of United States of America v. Alfredo Duran, Case No. 89-802 beginning on April 11, 1990.

That at the Duran trial, Respondent admitted under oath he had brokered between ten and twelve aircraft knowing that they were going to be used to smuggle narcotics into the United States.

That at the final hearing of this cause, The Florida Bar did prove Respondent's knowing involvement in three or four of these instances. That it was proven that the Respondent at the very least should have known that he was brokering aircraft which were going to be used for drug smuggling in the remaining instances.

That at the Duran trial, Respondent admitted under oath that he participated with a group who successfully imported approximately one to two thousand **pounds** of marijuana into the United States. The Florida Bar did prove Respondent's knowing involvement in that scheme.

The referee recommended that Insua be found guilty of violating Rule 4-8.4(b)(commission of a criminal act that reflects adversely on a lawyer's honesty, trustworthiness, or fitness **as** a lawyer) and not guilty of violating Rule 4-8.4(c)(engaging in conduct involving dishonesty, **fraud,** deceit, or misrepresentation).

The referee announced the following reasons for the recornmended discipline:

Recommendation as to Disciplinary Measures to be Imposed:

I have reviewed the Florida Standards for Imposing Lawyer Sanctions, as well as caselaw presented to me by both parties. It is abundantly clear to me that disbarment is the fitting level of discipline to be imposed. I have not made the foregoing decision lightly. During the course of two days of final hearings on this cause I closely observed the demeanor of the Respondent and carefully scrutinized his testimony. I was left with the distinct impression that Mr. Insua was anything but remorseful for the egregious acts he committed. In fact, at no point did he actually say, "yes, I did these things with full knowledge of my actions and I am sorry." Instead he blamed these acts on his own stupidity and seemed to believe that he deserved recognition for cooperating with the United States government and their agencies. He fails to recognize that his cooperation is but a small price that he must pay for a series of bad acts spanning over at least a three year period of time. Consequently, I do not find that Respondent's cooperation should serve as a mitigating factor.

I had an opportunity to review The Florida Bar v. Pettie, 424 So.2d 734 (Fla. 1983) as well as The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1990). Both cases involved attorneys who had rendered assistance to the government. In Pettie, supra that Respondent was involved in one conspiracy involving five overt acts and turned himself in to the authorities prior to their knowledge of his nefarious conduct. Additionally, there was no evidence of any prior problems with Mr. Pettie's ethical conduct and there was evidence that Mr. Pettie was a well respected lawyer in the community. In Eisenberg, supra that Respondent was involved in various criminal activities in Georgia, Florida and West Virginia and rendered cooperation when his activities were discovered by authorities.

The facts of the case sub judice are much closer to Eisenberg, supra. Mr. Insua was involved in several separate criminal acts, he rendered cooperation once discovered and unlike Mr. Pettie, had various prior problems with his ethical conduct. Although this Respondent was given a sufficient opportunity to present evidence in mitigation, this Referee after reviewing several applicable cases expressed a concern that other than Respondent's Federal Public Defender there was no other evidence presented regarding his good standing in the community as a person and an attorney. After request by Respondent's counsel I afforded Respondent an additional

opportunity to present any further evidence of mitigation. I likewise afforded The Florida Bar an opportunity to present further evidence of aggravation. The evidence presented by The Florida Bar involved several instances of unethical behavior as an attorney soon after Respondent became a member of The Florida Bar one attorney testified that he employed Respondent as an associate in his law firm whose emphasis was in banking matters. The employer discovered that Respondent was running a "ghost practice" out of the office without the knowledge of the partners. Another attorney testified that he shared office space with the Respondent and discovered that Respondent had wrongfully obtained approximately $1,500.00 from a potential client. Upon confrontation Respondent admitted his wrongful behavior and returned $1,100.00. This same attorney testified that Mr. Insua had convinced a secretary to place his name on a brief to the Florida Supreme Court when he had nothing whatsoever to do with the case. The attorney noted the name when the Florida Supreme Court issued its opinion,

As further evidence of aggravation, The Florida Bar presented Respondent's driving record which revealed that he had been cited for driving without any valid driver's license and had failed to appear in court.

In assessing discipline I considered the fact that Respondent became a member of The Florida Bar in 1984. His criminal involvement began in 1985 and ceased in 1988, once intercepted. Testimony regarding his unethical behavior as an attorney included approximately 1985 through 1987, his motor vehicle problems occurred in 1987 and 1988. It is clear to me that Respondent has failed to abide by Federal Law, State Law and the Rules Regulating The Florida Bar. Although I recognize that Respondent is a young man with a new family he does not have the fiber which is demanded by the privilege to practice law.

Consequently, I specifically find the application of Florida Standard for imposing lawyer sanctions 5.11(c) which provides that disbarment is appropriate when a lawyer engages in the sale, distribution or importation of controlled substances. I also find the existence of aggravating factor 9.22(c) a pattern **of** misconduct and 9.22(d) multiple offenses.

C. The Facts

The relevant facts reflect that Insua, as a young attorney **during** the time of **his** first four years of practice, became involved with a number of unsavory characters. In the process of acting as an airplane broker and not as a lawyer,[1/] Insua dealt with individuals who conspired, attempted to, and successfully participated in smuggling contraband into the United States. Insua's involvement was only in leasing airplanes that were eventually **used** by the drug smugglers (T 36). Insua never brought drugs into the United States or caused their importation (T 38), and never bought or sold any drugs (T 40).

In 1988, after little more than three years of membership in The Florida Bar, Insua was visited by federal agents who were investigating drug smuggling by individuals who leased airplanes from him (T 31). Indicating that Insua's life was in danger, the agents solicited Insua's assistance in helping the United States (T 31). Without even the slightest hesitation, Insua agreed to become a cooperating individual (T **32-33),** and his full and complete cooperation continued through the time of the Bar disciplinary hearing (T **50).** During that time, now more than four years since his cooperation began, Jnsua worked undercover, wore recording devices or body bugs more than 100 times, testified at trial and on other occasions, placed his life in danger, went to foreign countries at the direction of the United States, and did things for the government that no one else would do (T 34-35, 41-42). In short, he joined the war on drugs as an active volunteer, because he had no obligation to do so.

1/ Insua's family had been involved in the airplane brokerage business since 1957, when his father left Cuba (T 30). After his father's death in 1983 (T 73), Insua ran the business, **and** continued to broker aviation deals after he became a lawyer, separate and apart from his law practice (T 30-31).

In exchange for his cooperation, Insua agreed to plead guilty to a cocaine importation conspiracy (T 45). That plea agreement was made the subject of much questioning during Insua's testimony as a federal witness in a criminal prosecution brought against another lawyer, Alfredo Duran. Insua's testimony during the Duran trial was the exclusive evidence presented by The Florida Bar in the disciplinary hearing (Complainant's Composite Exhibit 1). During Insua's cross-examination, defense counsel attempted to impeach Insua by obtaining admissions that Insua brokered twelve airplanes which were **used** for **drug** smuggling, that he conspired to find pilots who would fly aircraft shown to have transported marijuana and cocaine, and that he agreed to submit false documents to the Federal Aviation Administration, all during 1985 through early 1988 (T 19-22).

As damaging as those trial admissions seemed, Insua explained during his disciplinary proceedings that his errant conduct was not intentionally or purposely conceived to violate the law, but was instead the outgrowth of his brokering or leasing airplanes to unsavory people (T 36). Unlike the federal trial, where he was a witness who was mercilessly cross-examined, the Bar hearing gave Insua an opportunity to explain precisely what he did to bring himself in league with criminals. Insua did not know, in advance, that these nefarious characters were engaged in drug smuggling (T 43-44), but he certainly should have seen the warning signs (T 44). His poor judgment, when viewed with the perfect vision obtained by hindsight, was inexcusable, and resulted in his becoming a minor player in illegal conduct (T 44-45). His offensive conduct was not in his capacity as a lawyer, but related to his separate airplane brokerage business (T 30-31).

Insua explained, when given the opportunity at the disciplinary hearing, that he never knowingly participated in a drug conspiracy (T 36). He did not give an explanation of his

conduct during his federal testimony, he explained, because he was told simply to answer the cross-examination questions, not qualify his answers, and not be argumentative (T ***66-67).*** Had he known in those early days what he knows now, Insua offered, he certainly would have realized that he was actively assisting drug smugglers in their illicit pursuits (T 55-57). His agreement to plead to a charge of wrongdoing was based on his post-conduct realization that he had done something wrong **and** his determination that he would begin the process of righting that wrong. In all of his questionable conduct, moreover, Insua made no illegal money and merely earned the normal fees due for airplane brokering and leasing (T 48-49). At the time he was aligned with the criminal element, Insua was a beginning practitioner who had no legal experience or mentor guidance (T 46-48). Insua expressed his sorrow and remorse for having failed to abide by the lofty principles which govern the conduct of attorneys,

To be sure, Insua's **lack** of actual knowledge was not a basis for claiming that he did not do anything wrong. **As** the Bar's expert witness, Douglas Williams, testified, a showing that Insua knew or should have known that drugs were involved would be enough to support a conviction (T 90-93). But in this case Insua was not alleged to have been convicted of any crime; the complaint only alleged that he engaged in criminal conduct. The Bar's evidence was limited to proof that Insua admitted to engaging in conduct that was viewed as criminal.

D. <u>Punishment Phase</u>

At the conclusion of the penalty phase, the parties presented their evidence in mitigation or aggravation of punishment. Insua called a number of witnesses, some of whom were lawyers or clients. These witnesses testified that Insua was remorseful (T 119-121, 210, 232) and could be rehabilitated (T **321).** Clients, fully aware of Insua's admitted misdeeds,

were still desirous of Insua providing future representation (T 222, 232). Miguel Caridad, an Assistant Federal Public Defender, was certain that Insua was truly sorry for his conduct and remorseful about his actions (T 119-121). Mr. Caridad believed that Insua was a goad candidate for rehabilitation. Most importantly, Miguel Caridad knew from his intricate knowledge of Insua's cooperation that Insua was a minor participant in the events about which he testified, whose involvement was limited to leasing airplanes (T 119).

The witnesses called by the Bar expressed a very different attitude. One attorney complained that when Insua worked for him soon after graduating from law school, Insua maintained his own client caseload that was not authorized by the firm (T 194-196). That attorney conceded that some of his firm's clients were the very ones who were involved in the illicit conduct which gave rise to Insua becoming a government witness (T 199-200). The attorney denied that Insua provided representation to the attorney's brother in a criminal case (T 198-199).[2/] The attorney conceded that Insua was not untruthful to him (T 206-207).

Another lawyer, Juan Carerra, testified that Insua took a client away from hirn, and that Insua initially denied doing so (T 242-244). When confronted, Carerra claimed that Insua repaid part of the $1,500 initial retainer (T 243-244). While claiming that Insua acted improperly more than *six* years earlier, Carerra conceded that he thought so little about the matter that he never advised the Bar of this perceived impropriety, and explained that Insua may have been overly motivated to retain clients because he was brand new to the practice

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2/ Conveniently, this witness did not offer that his brother was convicted of fraud in a massive federal mail and bank fraud prosecution, but the conviction was vacated for a new trial due to improper joinder. United States v. Castro, 829 F.2d 1038 (11th Cir. 1987), withdrawn in part on other grounds, 837 F.2d 441 (11th Cir. 1988).

of law (T **245).** Carerra also recalled that Insua instructed a secretary to place his name on an appellate brief even though Insua did not work on the appeal (T 246-247). What may well explain Carerra's antagonism toward Insua, however, is that Carerra had at that time been dating the woman who soon thereafter became Insua's wife (T 251).

The Bar also produced Insua's Florida driving record reflecting that Insua's license **had** been suspended in 1987 and that Insua had been ticketed for driving without a license (T **252-254**; Complainant**'s** Exhibit 2).

The referee thereafter concluded that disbarment was the appropriate discipline (T **263).**

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1.

WHETHER THE BAR PRODUCED CLEAR AND CONVINCING EVIDENCE TO SUPPORT THE FINDING THAT RESPONDENT **WAS** GUILTY OF VIOLATING RULE 4-8.4(b)?

2.

WHETHER THE EVIDENCE PRESENTED IN MITIGATION REQUIRES THE IMPOSITION OF **A** LESSER DISCIPLINE?

SUMMARY OF THE ARGUMENT

1. The Bar charged that Insua engaged in criminal conduct related to cocaine importations during 1985 and 1988. For this, the Bar sought Insua's disbarment. **At** a hearing, the Bar proved only that Insua agreed to plead guilty to a drug conspiracy, that Insua cooperated extensively with the government, and that Insua made ambiguous statements during his trial testimony as a government witness acknowledging his involvement in wrongful conduct. The Bar, nevertheless, failed to show by clear and convincing evidence

that Insua committed any drug crime, Insua himself explained that he never participated in any conduct with knowledge that the participants were engaged in or planning a drug transaction. His after the fact knowledge led him to conclude that he was **a** participant in criminal behavior, but he **did** not **do** so knowingly or voluntarily. Insua's testimony was not contradicted by other evidence. On this record, the Bar did not prove its case.

2. The referee should not have recommended disbarment. Insua's conduct, although inexcusable, was mitigated by his youth and inexperience, his minimal involvement, and his tremendous cooperation to the United States of America. Because **Insua** had no prior record of discipline, this court should order Insua's suspension from the practice of law.

ARGUMENT

POINT 1

THE BAR FAILED TO PRODUCE CLEAR AND CONVINCING EVIDENCE THAT RESPONDENT VIOLATED RULE 4-8.4(b).

Jose M. Insua, while a youthful and inexperienced attorney, became involved in an aspect of **his** family airplane and parts business in which he aided drug smugglers by brokering and leasing airplanes. His motivation for doing business with these unsavory characters was not financial, because he made no extraordinary income. It was, the evidence shows, the result of his inexperience and his being drawn in by these corrupt individuals.

The Florida Bar alleged that Insua's conduct violated Rule 4-8.4(b) of the Rules of Discipline, which states that an attorney shall not "[c]ommit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects[.]" The only evidence which the Bar presented to prove this asserted criminal conduct was Insua's agreement to plead guilty to a cocaine conspiracy charge and Insua's trial testimony

as a cooperating government witness that he had in fact assisted others in criminal conduct. **Insua's** admissions, while reflective of his post-conduct realization that he **had** acted in a grievous manner, is a far cry from proof that Insua committed a crime. Without such proof, the Bar failed to prove its case against Insua.

In reviewing a referee's recommendation, this court must accept all findings of fact that are supported by substantial competent evidence. The Florida Bar v. Anderson, 594 So.2d 302 (Fla. 1992). But, before a referee can recommend a finding of guilt, The Florida Bar must prove the disciplinary violations by clear and convincing evidence. The Florida Bar **v.** Seldin, 526 So.2d 41, 43 (Fla. 1988). In this case, since the Bar did not allege or prove that Insua had been convicted of any crime, the Bar must do much more than merely rely on the outcome of a criminal proceeding. Compare The Florida Bar v. Winn, 593 So.2d 1047, 1048 (Fla. 1992)(respondent convicted of federal felonies; court "will not look behind [respondent's] federal convictions."). The Bar was required to prove that Insua committed the charged criminal activity, but it failed to make out a sufficient case. That is because Insua's conduct, while questionable and suspect, was not shown to be criminal. In fact, as Insua explained during his testimony, he recognized that he did some very wrong things, but he did not do them knowingly, intentionally, and with the advance knowledge that he was involved in a contraband smuggling scheme.

Since the Bar charged that Insua engaged in a federal drug conspiracy (Complaint ¶3, 6-8), the Bar was obligated to prove that allegation by clear and convincing evidence. Under federal law, proof sufficient to convict a person of a drug conspiracy requires evidence, not innuendo or suspicion, that the charged conspiracy existed, that the person knew the purpose of the illegal agreement, and that the person voluntarily participated and

joined in that agreement. United States v. Gonzalez, 810 F.2d 1538, 1542 (11th Cir. 1987); United States v. Sullivan, 736 F.2d 1215 (11th Cir. 1985). One's mere presence is insufficient to establish knowing participation in a conspiracy, United States v. Rozen, 600 F.2d 494, 497 (5th Cir. 1979), as is mere association with coconspirators. United States v. Correa-Arroyave, 721 F.2d 792, 796 (11th Cir. 1983).

Federal drug convictions have been reversed for insufficient evidence based on trial proof much more compelling than that presented by The Florida Bar. In United States v. Kelly, **888** F.2d 732 (11th Cir. 1989), the court reversed cocaine convictions based on a finding of insufficient evidence. The evidence in Kelly showed that a criminal defense lawyer, Kelly, was aware of a client's possession of cocaine, that the lawyer had discussions with a client about the possession of cocaine, and that the lawyer even participated in questionable meetings with the client. To his credit, Kelly reiterated on each occasion that he could not get involved in the drug discussions and would not give any advice to his client suggesting that the client move forward with consumating the discussions. In reversing Kelly's drug convictions, this court held that "evidence is insufficient to establish a conspiracy where such evidence is wholly consistent with an obvious and reasonable interpretation, and where little more than conjecture supports the hypothesis of guilt." 888 F.2d at 740.

Certainly, if the evidence in Kelly was not enough to convict a lawyer of knowing involvement in a drug conspiracy, the proof against Insua is simply non-existent, even under the lesser standard of clear and convincing evidence. There certainly is inadequate evidence based merely upon Insua's admissions on cross-examination as a cooperating government witness that he was involved in brokering planes for smugglers, in locating pilots to fly contraband-laden aircraft, and in piirticiputing in an importation of marijuana by leasing a

plane. As Insua explained, he did not now at the time that he was becoming a party to this illegal activity; after all the facts were in, it was retrospectively apparent to him that he was involved in something far greater than he believed or understood at the time. While these events may have been enough to put him on notice of questionable conduct, they were not enough to make him out to be a drug conspirator.

Florida law requires an even stricter evaluation of circumstantial evidence in assessing a finding of criminal culpability. Evidence which suggests guilt but which does not refute every reasonable hypothesis of innocence is not adequate proof to sustain a criminal conviction. State v. Law, 559 So.2d 187 (Fla. 1989)("A motion for judgment of acquittal should be granted in a circumstantial evidence case if the State fails to present evidence from which the jury can exclude every reasonable hypothesis except that of guilt."). Insua's participation in the operative acts alleged in the complaint are not inconsistent with every reasonable hypothesis of innocence. Consequently, the Bar has not discharged its burden of proving that Insua engaged in criminal conduct.

The referee's factual findings are additionally deficient and not supported by the evidence in the record. While it is true that Insua entered into a plea agreement and agreed to plead guilty at some future time to a cocaine conspiracy, there is no evidence in this record that Insua did plead guilty or that he even admitted to having committed a crime.[3/] Respondent did cooperate with government authorities by providing truthful and valuable evidence, but that cooperation does not support the finding of guilt.

3/ As this court is aware, a plea of guilty requires a showing that a crime was committed by a defendant, that the prosecution could establish all elements of the crime, that the defendant waived available defenses, and that the defendant freely and voluntarily entered the plea. See Fla.R.Crim.P. 3.172; F.R.Crim.P. 11. That is a far cry from one's admission to wrongful conduct during cross-exaniination.

Respondent's trial testimony in the Duran case that he procured an airplane for the purpose of smuggling contraband was augmented by his testimony at the disciplinary hearing that he did not know that the airplane was to be used for smuggling (T **36-37).** Yet, the referee never included that very important fact, which renders the referee's findings unsupported by substantial competent evidence. Consequently, this court should not **accept** the referee's findings.

The same applies to the remainder of the referee's factual findings, since those findings are essentially lacking in evidentiary value and are clearly erroneous. Cf. The Florida Bar v. Seldin, 526 So.2d 41, 43 (Fla. 1988)("A special referee's findings of fact are presumed correct and will be upheld unless clearly erroneous and lacking in evidentiary support."). The referee erred when he concluded that Insua's testimony was that he had brokered 10-12 airplanes "knowing that they were going to be used to smuggle narcotics into the United States." Insua only admitted to brokering planes which were subsequently **used** to import drugs **(T 43-44),** but did not know and was not told in advance that drugs were the intended cargo. The referee's failure to acknowledge the actual facts by omitting unequivocal and undisputed facts is unconscionable. While the Bar certainly **did** not accept the tenor of Insua's explanation for his conduct, the Bar offered not a shred of evidence to counter Insua's testimony. Such evidence, if it existed, would have been readily available to the Bar by issuing a subpoena to these so-called conspirators and inquiring of them whether Insua was an involved participant in the smuggling ventures. Yet, inexplicably, the Bar did not do that, opting instead to highlight areas of Insua's cross-examination, taken out of context, and to argue the worst possible interpretation. The referee should not have succumbed to the Bar's limited and erroneous view of the evidence.

Even the referee's finding that Insua "should have known that he was brokering aircraft which were going to be used for drug smuggling" was taken out of context and is inconsistent with the entire record. Insua did acknowledge that, in the light of his cooperation and subsequent experience, he "should have known better" (T 44), and that he "either knew or should have known that some of these acts you were involved with - that same of these airplane leasings were being **used** for drug smuggling" (T 56). But that **is** a musing made in the light of a new day, after learning that all the signs of an illegal transaction were posted around him. Yet, the referee did not place those purported admissions in context, or even explain that Insua's testimony did not reflect his level **of** awareness at the time of his challenged conduct. Most importantly, because Insua did nothing to intentionally or consciously avoid becoming aware of the true facts, his guilty knowledge cannot be inferred. See United States v. Picciandra, 788 F.2d **39** (1st Cir.), cert. denied, **479** U.S. **847,** 107 S. Ct. 166 (1986)("conscious avoidance" instruction proper only if facts give rise to the conclusion that the defendant deliberately refused to acknowledge crucial factsj.

The referee found, in his last finding of fact, that Insua "admitted under oath that he participated with a group who successfully imported approximately one to two thousand pounds of marijuana into the United States." Again, the referee totally ignored Insua's sworn and uncontested testimony that he **did** not know that the airplane was to be used to import marijuana into the United States (T 36). **As** far as he knew, the airplane never came to the United States (T 36-37). He only found out afterward that some of the marijuana entered the United States (T 37-38). The Bar did not contest this testimony, and produced no evidence to dispute Insua's direct denial of prior drug knowledge. Without having **a**

substantial reason to reject Insua's testimony, the referee cannot simply ignore the force of the evidence merely because he disagrees with or does not like the evidence.

The record in this case is capable of a number of varied interpretations, only one of which is reasonable. Insua cannot be found guilty on the basis of evidence which gives the referee "a license to let [his] imagination[] run rampant." United States v. Mora, 598 F.2d 682, 684 (5th Cir. 1979). See United States v. Weischenberg, 604 F.2d 326, 332 (5th Cir. 1979)("It is not enough for it to establish a climate of activity that reeks of something foul."). In this case, the Bar did not prove by clear and convincing evidence that Insua violated Rule 4-8.4(b). The record does not show that Insua committed a criminal act that reflects adversely on his honesty, trustworthiness, or fitness as a lawyer. In view of the lack of substantial, competent evidence to support the referee's findings, this court must vacate the finding of guilt and order that Insua be declared not guilty of the charged disciplinary violation.

POINT 2

EVIDENCE IN MITIGATION REQUIRES IMPOSITION OF A LESSER DISCIPLINE.

The referee recommended Insua's disbarment, even though Insua had no prior history of discipline, had never been accused of criminal or unethical conduct before, was a novice and inexperienced lawyer at the time of the alleged conduct, and had distanced himself from his prior inappropriate conduct by accepting responsibility for his behavior and cooperating fully with the United States of America. These mitigating circumstances are substantial and compelling factors which, when combined with the total circumstances of this case, warrant a non-disbarment disciplinary sanction. Certainly, "the ability to offer leniency in return for cooperation" has been recognized as an "indispensable tool" of justice. United States v.

Ross, 719 F.2d 615, 623 (2d Cir. 1983). Insua's acknowledgement of his misdeeds and his efforts to put himself on the right track are a recognition of "the likelihood that [he] will transgress no more, the hope that he may respond to rehabilitative efforts to assist with a lawful future career, [and] the degree to which he does not deem himself at war with society." United States v. Gravson, 438 U.S. 41, 51 (1978). Most particularly in this case, Insua's continued cooperation demonstrates "a genuine contrition of spirit suggesting a reformed outlook." United States v. Del Toro, 405 F.Supp. 1163, 1165 (S.D.N.Y. 1975).

The referee determined that "disbarment is the fitting level of discipline to be imposed." The referee evaluated a number of factors in coming to that conclusion, stating that it was his "distinct impression that Mr. Insua was anything but remorseful for the egregious acts he committed." The referee, acknowledging that Insua admitted to his conduct but denied having been knowingly and intentionally involved in criminal activity, then totally discounted Insua's substantial cooperation, notwithstanding that Insua placed his life in jeopardy by trying to atone for his grievous conduct. Concluding on this point, the referee did "not find that Respondent's cooperation should serve as a mitigating factor." The referee then continued his recommendation by positing that it was because Insua's involvement in criminal conduct spanned several years and involved multiple acts, that only the most serious discipline was available.

In making his recommendation, the referee departed from prevailing law and ignored common wisdom. This court has previously recognized the role of the disciplinary system in regulating the conduct of attorneys. In The Florida Bar v. Ward, ___ So.2d ___, ___ FLW ___ (Fla., May 14, 1992), this court explained the essence of disciplinary proceedings:

> The single most important concern of this Court in defining and regulating the practice of law is the protection of

> the public from incompetent, unethical, and irresponsible representation. The very nature of the practice of law requires that clients place their lives, their money, and their causes in the hands of their lawyers with a degree of blind trust that is paralleled in very few other economic relationships. Our primary purpose in the disciplinary process is to assure that the public can repose this trust with confidence. The direct violation of this trust by stealing client's money, compounded by lying about it, mandates a punishment commensurate with such abuse.

The Florida Bar v. Dancu, 490 So.2d 40, 41-42 (Fla. 1986).

The violations at issue in this case, while serious and inexcusable, compare quite differently with the type of conduct deemed most offensive when an attorney abuses the trust placed by clients. In this case, especially since Insua's challenged conduct was not done in his capacity as a lawyer, but instead was as **a** part of his family business in the airplane brokering arena, the case for imposing the most severe discipline imaginable is unwarranted. This policy is acknowledged in the Florida Standards for Imposing Lawyers Sanctions. In §1.1, which sets out the purpose of lawyer disciplinary proceedings, the Standards state that the "purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the public, the legal system, and the legal profession properly." Thus, the Standards are focused more directly on a lawyer's professional duties and responsibilities than on a lawyer's personal deficiencies. Section **3.0** sets out the general factors to be considered when imposing sanctions, **and** states:

> In imposing a sanction after a finding of lawyer misconduct, a court should consider the following factors:
>
> (a) the duty violated;
> (b) the lawyer's mental state;
> (c) the potential or actual injury caused by the lawyer's misconduct; and

(d) the existence of aggravating or mitigating factors.

A finding of lawyer misconduct based on violations of duties owed to the public includes "cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation..." Thus, it is clear that the misconduct is directed to criminal conduct in a professional capacity. The same Standards set out a hierarchy of offenses justifying disbarment or a lesser disciplinary sanction. Under §5.11, disbarment is appropriate upon **(a)** conviction of a felony; (b) serious criminal conduct, which includes interference with the administration of justice or dishonesty; (c) "the sale, distribution or importation of controlled substances;" (d) an intentional killing; (e) an attempt or conspiracy to commit the previous offenses; or (f) intentional conduct involving dishonesty "that seriously adversely reflects on the lawyer's fitness to practice." Again, the Standards are focused on egregious conduct of acts which are taken in a professional capacity. In Insua's case, since he had not been proved to have been convicted of a drug crime and did not act in the capacity as a lawyer, no presumption favoring disbarment exists.

This court has had an opportunity to evaluate the standards in connection with numerous instances of unethical lawyer behavior. For example, in The Florida Bar **v.** Ward, this court declined to disbar an errant attorney who misappropriated funds from his law firm's operating account to **pay** personal debts. While the circumstances involved fraud and misappropriation, the stealing did not involve client's money. This court concluded that the "duty violated" was not of such a kind and to such a degree as to warrant the ultimate sanction of disbarment. "Consequently, the appropriate sanction in a given case must take into account whether the duty violated was owed specifically to a client, a **judge,** another

member of the profession, or a member of the public, singly or in combination." Id.

Recently, in The Florida Bar v. Forbes, ___ So.2d ___, 17 FLW S240 (Fla., April 9, 1992), this court approved the disbarment of an attorney who pled guilty to a federal fraud charge which alleged the making of a materially false statement in a construction contract submitted to a bank in an effort to obtain financing. Because of the nature of the fraud, involving $750,000, and the central role which Forbes played in this transaction, this Court concluded that disbarment was appropriate.

In Insua's case, while his conduct is extremely serious, it does not involve his actions as an attorney. Moreover, the conduct took place while Insua was very young and a novice in the legal profession. In fact, again according to the evidence in the record, the egregious conduct occurred in Insua's first four years as a lawyer. During this time, Insua had little mentoring by other lawyers and, according to the record, was hard pressed to obtain clients. His separate aviation brokering business, an outgrowth of his family's business, was distinct from his law practice. That business, moreover, did not generate inordinant profits, but simply allowed Insua reasonable compensation for his efforts. Although the alleged conduct spanned three years, it was not repetitive or multiple instances of misconduct. Instead, it appears that the actions were part of an ongoing series of related events which cannot be characterized as multiple instances of unethical behavior.

The most crucial mitigating factor in this case which supports a lesser discipline than disbarment is Insua's full and forthright voluntary cooperation with the United States of America. When Insua was first contacted by government agents who advised him that his life was in danger, Insua immediately took the high road and began to uncover the criminal conduct that was going on around him. Insua was not first accused of engaging in crime, he

affirmatively told the agents what he knew. And he set out to do something about it.

This court has acknowledged that voluntary cooperation with law enforcement agencies, including risking one's life to help further the interest of justice, **is** a strong **and** compelling factor in determining the quantum of discipline. In The Florida Bar **v.** Pettie, **424** So.2d **734, 738** (Fla. 1982), this Court determined that a suspension from the practice of law - not disbarment - was appropriate in the case of a lawyer who participated in a criminal conspiracy to import marijuana, but who cooperated with law enforcement authorities in an investigation of those activities. In noting the importance of cooperation, this court stated:

> While judgments must be fair *to* society and severe enough to deter others prone to like violations, they must also be "fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation." The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970). The present case is clearly atypical in that respondent voluntarily initiated contact with law enforcement authorities, cooperated with those authorities, suffered severe economic loss, closed his law practice, admitted his wrong, and risked his life to help further the investigation. The referee concluded that while respondent's activities on behalf of law enforcement were commendable, they could not justify mitigation. We hold otherwise and properly take the above-mentioned actions into account in our determination of a just discipline. We conclude that, given the unique facts of the present case, a suspension of one year is appropriate.

The Pettie decision can be distinguished from The Florida Bar v. Sheppard, 518 So.2d 250 (Fla. 1988), in which this court held that an attorney's sale of marijuana far profit **was** sufficient to warrant disbarment. The attorney was the active participant in the **drug** trafficking and was arrested for his crime. His only defense was that what he did "was not morally wrong."

Insua's situation seems to be taken right from the pages of Pettie, Insua **was** not a

profiteer or organizer of criminal activity. His participation was minor, and involved essentially legitimate conduct - leasing airplanes. It was the context in which the aircraft **was** leased that made the conduct criminal. Insua set out to help the government immediately upon being approached by agents, He volunteered his assistance, even though he was not charged with a crime. His assistance was extraordinary, extending from testimony and travel to wearing a wire and working undercover. Insua put much effort into his cooperation, and became a better person because of it, at great risk to himself and his family.

The referee likened Insua's case to that of The Florida Bar v. Eisenberg, 555 So.2d **353** (Fla. 1990), in which this court disbarred an attorney who was convicted of **a** federal felony of conspiring to conceal the proceeds of an illegal marijuana importation. Eisenberg had been indicted for money laundering, and thereafter began a course of cooperation with authorities. After his cooperation **was** completed, Eisenberg received a sentence of two years imprisonment. This court adopted the position of the referee, concluding that Eisenberg's conviction resulted from his involvement in serious drug offenses. Disbarment was the only allowable discipline.

Insua's case does not rise to the level of egregiousness found in Eisenberg. Insua did not abuse his position as a lawyer. He did not have a substantial role in a drug offense. He was not shown to have been convicted of any crime. His cooperation was voluntary and forthright, and came before he was accused of any crime. His cooperation, moreover, was so much compelling as a mitigating factor than his proven offensive conduct could be **urged as** an aggravating factor.

The Florida Standards incorporate a list of relevant mitigating factors, many of which are found in Insua's case. Section 9.1 explains the role of mitigating circumstances:

After misconduct has been established, aggravating and mitigating circumstances may be considered in deciding what sanction to impose.

Section 9.32 delineates a number of relevant factors to consider:

> Factors which may be considered in mitigation. Mitigating factors include:
>
> (a) absence of a prior disciplinary record;
>
> (b) absence of a dishonest or selfish motive;
>
> (c) personal or emotional problems;
>
> (d) timely good faith effort to make restitution or to rectify consequences of misconduct;
>
> (e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings;
>
> (f) inexperience in the practice of law;
>
> (g) character or reputation;
>
> (h) physical or mental disability or impairment;
>
> (i) unreasonable delay in disciplinary proceeding provided that the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from that delay;
>
> (j) interim rehabilitation;
>
> (k) imposition of other penalties or sanctions:
>
> (l) remorse;
>
> (in) remoteness of prior offenses.

In Insua's case, although discounted by the referee, a number of factors suggest that a mitigated punishment is in order. First, Insua had no history of prior discipline. While several witnesses appeared who levelled accusations against Insua, ranging from stealing clients and getting credit for work not performed, their testimony was far from compelling. None of these lawyers thought enough about Insua's alleged misconduct six years earlier to inform the Bar. Each attorney had a personal animus against Insua. One was jilted by his girlfriend who subsequently married Insua. Another was involved in a law firm whose clients were the very people who were involved in the illegal conduct which Insua helped expose. A partner in that same law firm was indicted on federal fraud charges. The accusations, moreover, reflect conduct which supposedly occurred when Insua was an inexperienced lawyer who had no guidance in the ways of professionalism, something at which Insua has worked hard to develop since he has come to accept responsibility for his misdeeds.

None of what formed the basis of the Bar's allegations represented any dishonesty or selfish motivation on Insua's part. §9.32(b). Certainly, Insua had personal problems in the sense that he was struggling to begin a law practice when he was corrupted by the criminal element. §9.32(c). Insua made a timely effort to rectify the consequences of his misconduct. §9.32(d). Even absent a showing of cooperation, this court approved an indefinite suspension for an attorney who had pled guilty to obstruction of justice by submitting false records to a grand jury. The Florida Bar v. Stahl, 500 So.2d 540 (Fla. 1987).

Insua evinced a cooperative attitude toward federal authorities. §9.32(e). Insua was quite inexperienced in the practice of law. §9.32(f). Insua's reputation, while not

superlative, was satisfactory.[4/] A prior employer did not consider Insua to be dishonest (T 206-207), even though the employer terminated Insua's employment. Insua received the additional force of other penalties. §9.32(k). By reason of his cooperation with the government, his life was in danger and his law practice was insubstantial. He will be continuing to function as a government witness for the indefinite future. Insua certainly showed remorse for his conduct. §9.32(l). While the referee wanted Insua to "confess," the fact is that Insua did not act with the mental culpability that the referee believed Insua should acknowledge. Insua demonstrated remorse, as reflected by the testimony of other witnesses, He did not seek an excuse for his misconduct, but certainly explained how he came to become involved in it. That type of admission is the remorse which justifies mitigation. Finally, the other so-called aggravators found by the referee were remote in time. §9.32(m). They should not be used against Insua.

In The Florida Bar v. Clark, 582 So.2d 620 (Fla. 1991), this court approved a 36-month suspension for a lawyer who had been convicted of federal drug offenses - importing 300 pounds of marijuana. The reported decision reflects that the lawyer actually transported the marijuana into the United States aboard his boat. The attorney said nothing about this until a codefendant was apprehended five years later. He only then admitted his involvement. The court found that mitigating circumstances warranted a suspension. Those mitigating factors included the lawyer's lesser role in the criminal enterprise, the fact that he had no prior history of criminal involvement, and the lawyer's substantial personal problems.

4/ The referee disclaimed reliance on the opinion testimony of Donald I. Bierman, who was Insua's adversary in the Duran federal prosecution (T 104-107).

If suspension was appropriate for Clark, then it is certainly proper for Insua. The role Insua played was of lesser culpability than Clark. The cooperation Insua gave was not done by Clark. Unlike the information gleaned from the Clark opinion, Insua was new to the practice of law when he became entangled in illicit conduct. In short, a firm but fair discipline for Insua is a suspension from the practice of law. See The Florida Bar v. Carbonaro, 464 So.2d **549** (Fla. 1985).

In this case, the referee's recommended discipline is too severe. Insua's conduct, his cooperation, and the mitigating circumstances warrant a suspension. See The Florida Bar v. Diamond, 548 So.2d 1107 (Fla. 1989)(character testimony justified suspension for attorney convicted of mail and wire fraud). Insua did not act with any dishonest motive. See The Florida Bar v. Kickliter, 559 So.2d 1123 (Fla. 1990)(misconduct involving dishonesty or selfish motive warrants disbarment). This case does not satisfy the circumstances justifying disbarment, as expressed in The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966):

> [D]isbarment is the extreme measure of discipline that can be imposed on any lawyer, It should be resorted to only in cases where the person charged has detnonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards. To sustain disbarment there must be a showing that the person charged should never be at the bar. It should never be decreed where punishment less severe, such as reprimand, temporary suspension, or fine will accomplish the desired purpose.

Insua can be rehabilitated. He should be given the opportunity to prove his rehabilitation. He should be suspended, or the case remanded for a proper evaluation of the mitigating circumstances.

CONCLUSION

This court should reject the recommended finding of guilt on the basis of insufficient evidence. Alternatively, this court should reject the recommended sanction of disbarment and order a suspension, or remand this case for further consideration of the mitigating circumstances.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that **a** true and correct copy of the foregoing **was** delivered by mail this 4th **day** of June 1992 to Randi K. Lazarus, Esq., Staff Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131; and to **Jeffrey** Streitfeld, Referee, Circuit Judge, at the Broward County Courthouse, 201 S.E. 6th Street, Fort Lauderdale, Florida 33301; and to John **A.** Boggs, Esq., The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300.

By: Benedict P. Kuehne
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