IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

GRAFTON BERNARD WILSON, II

Respondent.
_____/

Case No. 81,463

TFB File No. 93-00416-08A

ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant Grafton B. Wilson, will be referred to as Respondent or as Mr. Wilson throughout this Brief. The Appellee, The Florida Bar, will be referred to as such or as The Bar.

References to the Report of Referee shall be by the symbol RR followed by the appropriate page number.

References to the final hearing before the Referee on September 1, 1993 shall be by the symbol TR followed by the appropriate page number.

References to the exhibits submitted into evidence at the final hearing shall be by the symbol EX followed by the appropriate page number.

References to Respondent's brief shall be by the symbol RB followed by the appropriate page number.

References to Respondent's written closing argument shall be by the symbol RC followed by the appropriate page number.

References to Respondent's deposition testimony entered into evidence at the final hearing will be by the symbol RD1 (deposition of Judge Crenshaw) followed by the appropriate page

number and RD2 - (deposition of Judge Tench) followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

The Florida Bar augments Respondent's statement of the case and facts by the following:

The Referee found that the allegations against the Respondent concern his conduct between 1983 to 1989. RR-1 The Referee made the following factual findings:

Upon consideration of the pleadings, evidence, arguments of counsel, and the numerous letters attesting to Grafton B. Wilson's good character, the hearing examiner finds that Grafton B. Wilson was convicted of grand larceny and conspiracy in the State of New York. The indictment alleged that he, along with others, committed the offense of grand larceny by reporting fictitious and inflated costs to the State of New York so that Greenhurst Health Care Center, a nursing home, and its owners, Anthony and Joseph Liuzzo, could illegally obtain funds from the New York medicaid program. The indictment also alleged that Grafton B. Wilson, along with the other defendants, conspired to report fictitious and inflated costs that they knew would be used by the State of New York to reimburse Greenhurst Health Care Center with public medicaid funds. A jury found Grafton B. Wilson guilty as charged and the judge sentenced him to five years probation on each of the charges to run concurrent. He was ordered to pay restitution of $100,00.00 as a condition of probation and to pay the

probation office $10,000.00 for collection. He has appealed the convictions.

In late 1983 New York advised nursing homes that the State would make future medicaid reimbursements based on costs reported for 1983. It appears that this decision by New York precipitated the initial fraud. In November or December, 1983, Anthony Liuzzo contracted with Grafton B. Wilson and National Health Care, Inc. for management services and computer software for two New York nursing homes. They back dated the agreements to July, 1983. They may have back dated the agreements and reported fictitious expenses to protect future reimbursements or, as the New York prosecutor believes, it may have been a fraudulent operation from the beginning. It makes little difference. The expenses that were reported in 1983 for services from National Health Care, Inc. were false.

After the State of New York began investigating the medicaid reimbursements in 1986, Grafton B. Wilson assisted the Liuzzos to cover up the earlier fraud. His active participation in the cover up eliminates any possibility that he was an innocent party caught up in the Liuzzo's fraudulent scheme. It also confirms that the 1983 expenses were false. There was no reason to create documents in 1986 and 1987 to make it look like the relationship between Wilson and Liuzzo began in March, 1983. Stationary with the National Health Care, Inc. letterhead was purchased in Alachua County, Florida

in 1986. A letter was prepared on this letterhead that contained the purported signature of Grafton B. Wilson. Mr. Wilson denies ordering the letterhead in 1986 or signing a letter on that letterhead dated 1983, but he admits delivering other false documents to the investigator purportedly signed by Grafton B. Wilson. Also, Mr. Wilson was taped during the investigation using an informant. In that conversation he discussed a scholarship agreement that was created in 1986 and predated to December 31, 1983. The money to fund the scholarship agreement was never paid, but it was added to the 1983 costs submitted to the State of New York. The guilty verdicts were based on this evidence and the additional evidence outlined by Mr. Michael T. Kelly, the New York prosecutor.

Mr. Wilson committed these crimes knowingly and intentionally. He is an experienced, intelligent attorney and businessman. He has served as a law enforcement officer and a federal prosecutor. It is not reasonable to believe that he committed these acts by negligence or mistake. And it is not reasonable to believe that he was a victim of a fraudulent scheme conceived and carried out by the Liuzzos with his unwitting participation.

The actual or potential injury caused by Grafton B. Wilson's criminal conduct is hard to assess. Michael T. Kelly, the New York prosecutor, testified that Mr. Wilson's company,

National Health Care, Inc., did not perform any services in return for the money they were paid. He claims that the company was set up only to help the Liuzzos document fictitious costs at their New York nursing homes. He estimates that Grafton B. Wilson received $190,000.00 in medicaid money that he did not earn.

Grafton B. Wilson presented evidence that National Health Care, Inc. was not a shell and that it provided all of the services that were billed to the New York nursing homes. He claims and his accountant verified that he was never paid for some of those services. He estimates his losses at $200,000.00. Also, he points out that National Health Care, Inc. managed a third nursing home in Florida and that there were no improprieties discovered in an audit by the Florida Department of Health and Rehabilitative Services.

Thomas P. Cleary, a former New York prosecutor, explained that New York owed the Liuzzos more money than they received as a result of the fraudulent 1983 figures. This resulted from recent court decisions that have required reimbursement for each year based on the actual cost incurred, rather than the costs incurred in 1983. In some cases the recalculation resulted in New York owing nursing homes millions of dollars.

Based on the evidence presented the referee finds that the injury to the State of New York was $100,000.00. The New York

judge who heard all of the evidence ordered restitution in this amount. There is nothing to suggest that this is an unreasonable conclusion. Grafton B. Wilson has repaid $10,000.00. RR-2, 3, 4, 5.

The Referee also found that Respondent's witnesses who supported him throughout the proceeding did so based upon their personal relationship rather than any understanding of the New York evidence. RR-8.

The Florida Bar augments the Respondent's statement of the case with the following:

Subsequent to the final hearing The Florida Bar filed with the Referee on September 7, 1993 written closing argument outlining its view of the case. In the closing argument The Florida Bar also reviewed the applicable case law, the Florida Standards for Imposing Lawyer Sanctions and the purposes of discipline for professional misconduct as put forth in the case of The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970). On September 14, 1993 the Respondent filed his closing argument and memorandum of law.

SUMMARY OF ARGUMENT

The function of the Referee in a disciplinary matter is to determine the weight and sufficiency of the evidence and based on it, make a recommendation to the Court as to the rules of professional conduct which may have been violated and the discipline to be imposed, which is exactly what took place in this case. The Referee in this case was of no particular mind set, but rather was open to hear the evidence presented and the argument of counsel. While there may exist several minor factual discrepancies in the Referee's report, the report is supported by competent and substantial evidence.

The case law presented to the Court by the Respondent does not support a change from the Referee's recommendation with respect to the disciplinary measures to be applied in this case. The recommended discipline meets the criteria established by the Court as well as the case law and Florida Standards for Imposing Lawyer Sanctions. Disbarment is the appropriate discipline in this case based upon the facts of this case and the Referee's findings and, his recommendation should be upheld.

ARGUMENT I

THE FINDINGS OF FACT CONTAINED WITHIN THE REFEREE'S REPORT SUPPORT HIS RECOMMENDATIONS IN THIS CASE.

The case of The Florida Bar v. Poplack, 599 So. 2d 116, 118 (Fla. 1992) sets forth the standard for review in this case.

> "In reviewing a referee's recommendations for discipline, our scope of review is broader than afforded to findings of facts because it is our responsibility to order the appropriate punishment. The Florida Bar v. Anderson, 538 So. 2d 852, 854 (Fla. 1989). However, a referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v. Lipman, 497 So. 2d 1165, 1168 (Fla. 1968)."

The Court went on to state that "We find it troubling when a member of the Bar is guilty of misrepresentation or dishonesty, both of which are synonymous for lying." Poplack, 599 So. 2d at 118.

The Respondent's two prong argument to the Court begins with the assertion that the Report of the Referee contains clearly erroneous findings of fact. The Respondent does not challenge his violation of the Rules of Professional conduct.

In response to Respondent's concerns regarding the Referee's findings of fact the following information maybe of some assistance to the Court. Regarding the use of an

informant, Mr. Michael T. Kelly testified that "one of my investigators had tape recorded Mr. Wilson in conjunction with Anthony Liuzzo and a Walter Flynn, when our investigators went in claiming that they were working for the -- for the Department of Social Services." TR-30. While it is true that the word informant was not used the fact that the prosecutors' office had their investigator tape record the Respondent's conversation while claiming to be someone he was not makes the use of the word informant immaterial. In regard to the 1983 cost report Mr. Kelly testified "so the Comptroller said to them . . . this home opened in 1982 and their cost report was going to be from July 1, 1983, until January 1 of 1984 or December 31 of 1983. So the -- this Walter Flynn told Wilson and Liuzzo that if they could come up with all kinds of extra costs to throw in that cost report, then they could get all kinds of money from the State of New York." TR-34.

The fact that the Referee believes that "the expenses that were reported in 1983 for services from National Health Care, Inc. were false" RR-2, is not inconsistent with page 5 of his report regarding what evidence the Respondent presented it merely means he didn't necessarily believe the Respondent.

Mr. Kelly testified that "during the course of the tape recording we showed that Mr. Wilson formulated documents to hand over to the State to try to show work that he had done which, of course, he hadn't done; and to file those with the

State to try to show that he had done things he had not done." TR-31. ". . . The documents that Mr. Wilson handed over to the State of New York to -- show that he had done certain work were actually printed like in 1986, yet they were dated in 1983 and signed by Grafton Wilson as -- as if they had been done in 1983 . . . ." TR-31. Respondent admits handing over documents to the investigators, TR-179-180 which the Referee has concluded were false.

The Respondent next believes that weight given to his witnesses testimony was in error. It is the Florida Bar's position that the Referee did not discount the Respondent's witnesses testimony but rather viewed it for what it was.

The following is a brief example of the responses elicited from the Respondent's witnesses when questioned about their understanding of his criminal case:

Judge Crenshaw - "I am not familiar enough with that case to let it alter my opinion of Mr. Wilson." RD1-13. "I am not aware of any of the details of the case . . . I don't know any specifics." RD1-13.

Judge Tench - had general knowledge of the allegations made - can't furnish a bill of particulars. RD2-12.

Mr. Rodney Smith - 8th Judicial Circuit District Attorney
"I know it was a New York crime, so I can't tell you exactly what it was. It appeared to be a form of fraud." TR-120
"I think that Cap [Respondent] has made obviously, a great mistake or mistakes." TR-121.

Daniel Lee Eiland - CPA for Respondent testified at Respondent's criminal trial TR-134

Q. What was he (Respondent) convicted of?
A. I am not certain. Would you enlighten me? I understand that they were criminal charges. . . . the allegations were that he took money." TR-135.

Wayland Clifton - Chief of Police, Gainesville, Florida

Q. You are aware of the fact that Mr. Wilson has been convicted of two felony counts from the state of New York?
A. Yes I read the newspaper accounts. TR-145.
Q. What was Mr. Wilson arrested for?
A. As I understand -- and I have only the newspaper accounts, but I understood that it was something to do with Medicaid -- Medicaid fraud.
Q. Do you know how much money was involved?
A. I cannot recollect. TR-146.

Surely the fragmented pieces of information possessed by Respondent's witnesses as to their understanding of Respondent's criminal case cannot supplant the knowledge and insight gained by the Referee who had the opportunity to hear the witnesses and review the evidence presented at the final hearing.

The Respondent is requesting throughout his brief that this Court usurp the role of the Referee and weigh the evidence in this case and re-examine the aggravation and mitigation. The Referee's examination of the evidence led him to the conclusion that the ". . . aggravating circumstances in this case are more compelling than the mitigating circumstances presented by Grafton B. Wilson". RR-8. The Referee heard Respondent's explanation of the facts surrounding his criminal

case and the explanation presented by his witnesses. The Referee also heard the testimony of Mr. Michael T. Kelly, Regional Director of the Special Prosecutor's Office for Medicaid Fraud Control in New York as to his recollection of the facts surrounding Respondent's criminal convictions.

The Referee having considered the case law presented to him, the recommendations of the parties as to appropriate discipline, the purpose of discipline as put forth in this Court's prior orders, the standards for imposing lawyer sanctions, the aggravation and mitigation in this case, and having determined the weight and sufficiency of the evidence recommended that the Respondent be disbarred. It is also the Referee's recommendation that the discipline in this case be retroactive to the date of Respondent's emergency suspension with leave to reapply for admission to The Florida Bar at the end of five years, provided the Respondent has made full restitution as required by his New York sentence. RR-9. This recommendation should be upheld in light of the Referee's findings in this case.

ARGUMENT II

THE REFEREE'S RECOMMENDATION OF DISBARMENT IS APPROPRIATE IN LIGHT OF THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS, THE ESTABLISHED PURPOSES OF DISCIPLINE AND CASE LAW.

The Florida Bar, the Referee and the Respondent all agree that the fact that an attorney is convicted of a felony does not automatically require disbarment. The Florida Bar v. Jahn, 509 So. 2d 285 (Fla. 1987). In response to a statement made by the Respondent "that disbarment is not an automatic presumption." (TR-184) the Referee responded by confirming "Well, I realize that." TR-184. The Referee clarified his understanding by saying "I didn't mean to say it was automatic, but we start out with "That is an appropriate discipline," and so we are working back from that." TR-184 The Referee at the end of the final hearing told the parties that "I'm just having a discussion with you because I am really concerned about my role here and I want to make the best decision I can for the citizens, for the Bar and for you as well, and I want to be fair about it." TR-185.

The Respondent relies on the following cases for the proposition that he should not be disbarred based upon the mitigating factors present within his case:

The Florida Bar v. Jahn, 509 So. 2d 285 (Fla. 1987) what distinguishes Jahn is that his "misconduct was directly related

to his drug addiction and Jahn's exemplary efforts to rid himself of his chemical dependency should be considered as mitigating the discipline to be imposed." Id. at 287. There was no evidence introduced at the final hearing that the Respondent was impaired.

The Florida Bar v. Fertig, 521 So. 2d 1213 (Fla. 1989) The Referee in Fertig recommended a twelve month suspension. The Florida Bar petitioned for a 90 day suspension based upon "the amount of time since the illegal acts occurred (the conspiracy ran from 1978 to 1983) and because the referee found Fertig to be rehabilitated." . . . "The Court found that Fertig was relatively new in the practice of law. There was no evidence that he ever imported drugs into the United States and it is possible that initially his involvement in the money laundering scheme may have been unknowing. He was under the domination of his employer, James A. Dalon, who was a knowing participant in the crime." Id. at 1214. These factors are not present in the case before the Court and the Referee did not find based upon the evidence that the Respondent should remain a member of the Bar. The Respondent is a lawyer with 17 years of experience (sentencing memorandum) who was found by the Referee to be an experienced, intelligent attorney and businessman. RR-4. The Respondent was under no one's domination and in fact as Mr. Kelly testified "Without Mr. Wilson, there couldn't have been a conspiracy. Without Mr. Wilson's knowledge and his performing all of the corporate

paperwork and him performing constant, constant acts of cover-ups -- constant, constant acts of giving the State auditors and my investigators phony documentation to try to show that some of this stuff was done -- this probably couldn't have existed." TR-46.

In the case of The Florida Bar v. Chosid, 500 So. 2d 150 (Fla. 1987) the Referee recommended a three year suspension and the Court accepted it. The majority opinion gives very few details or reasons for the decision. In the case before the Court the Referee has recommended disbarment and this should be accepted by the Court.

In discussing Chosid, the Respondent states in his case he did not intentionally seek to set out and participate in a criminal enterprise as did Mr. Chosid. RB-6. The Referee found that the Respondent committed these crimes knowingly and intentionally. RR-4. The Respondent goes on to say that he has not profited by his transactions as did Mr. Chosid. The Referee, after comparing the New York prosecutor's testimony that the Respondent received $190,000 in medicaid money that he did not earn with that of the Respondent that he lost approximately $200,000 (RR-4), concluded that the injury to the State of New York involving Respondent was $100,000. Contrary to Respondent's assertion, he was not ensnared in medicaid fraud litigation but engaged in his criminal activity knowingly and intentionally. RR-4. The Referee found that the

Respondent's "active participation in the cover up eliminates any possibility that he was an innocent party caught up in the Liuzzo's fraudulent scheme." RR-3.

The Respondent relies on the case of The Florida Bar v. Diamond, 548 So. 2d 1107 (Fla. 1989), to support his position that he should not be disbarred. In Diamond the Court found "especially telling the fact that Judge Davis, who sat on Diamond's case, testified in Diamond's behalf." Id. at 1108. The Referee in Diamond based upon Judge Davis' testimony that "he never saw Mr. Diamond as an active participant in an act of fraud . . . ." Id. at 1108, when coupled with other mitigation recommended a three year suspension. The Referee in this case found that "His (Respondent's) active participation in the cover up eliminates any possibility that he was an innocent party caught up in the Liuzzuo's fraudulent scheme." (RR-3) and recommended disbarment.

In The Florida Bar v. Stark, 616 So. 2d 41 (Fla. 1993) the Referee recommended suspension and the Court accepted the recommendation. The Referee in this case has recommended disbarment. RR-9. In The Florida Bar v. McShirley, 573 So. 2d 807 (Fla. 1991) the Referee recommended a three year suspension. The Court in McShirley found of particular importance and significant mitigation that McShirley replaced the converted funds before the Bar initiated any action against him. This along with McShirley's lack of any prior

disciplinary actions, genuine remorse, cooperative attitude towards the disciplinary proceedings and the absence of client harm, makes disbarment inappropriate and unduly harsh." Id. at 809. The case before the Court does not have the mitigation present which existed in McShirley, the Respondent as of the date of the final hearing owes approximately $100,000 to the state of New York. While the Referee found Respondent remorseful he did not believe he was candid with him. RR-6. Based upon Respondent's actions the medicaid system which was set up to help those in need is short a substantial amount of money and has been harmed.

The Respondent claims that the Referee erred in striking the testimony of New York attorney Thomas Cleary that: "an innocent man was convicted" (TR-94) and that this somehow prohibited his line of questioning and explanation of culpability. RB-17. This is a most curious position to take in that the Respondent in his written closing argument to the Referee refers to this quote as "The evidence presented" claiming it to be compelling. RC-10.

Mr. Cleary testified at great length about his understanding of the case and the medicaid system. TR-65-95. Mr. Cleary testified that Respondent didn't receive illegally any funds . . . TR-73 and that "I am convinced of this man's

innocence and -- of the crime that he stands convicted of . . ." TR-80. A reading of Mr. Clearly's testimony clearly shows that he was not restricted to any extent in his testimony.

The Respondent toward the end of the hearing realizing that he had a number of witnesses yet to testify informed the Referee that he had two witnesses excluding the Respondent who had not yet testified. TR-152. The Referee allowed Respondent's counsel to make representations as to what the witnesses would testify to and accepted those representations. TR-153. The Referee obviously accepted the representations of the two individuals along with the other witnesses who testified regarding Respondent's character and reputation when he found Respondent's ". . . character and reputation in the community of Alachua county are impecable." RR-6.

The Respondent help set up and perpetuate a fraud upon the medicaid system in New York which lasted from 1983 to 1989 (RR-7) (TR-40-42) with an absence of approximately a year in 1986. This as the Referee found was not remote in time and constituted multiple offenses and a pattern of misconduct.

The Respondent next attempts to convince this Court that the opinions of individual members of the judiciary, local bar and public officials should be used to supplant the recommendation of the Referee in this case. None of the individuals who testified for the Respondent knew what was

conveyed to the Referee nor did they judge the various parties credibility and demeanor during either the criminal trial or the disciplinary proceeding. The Court should not accept Respondent's arguments on this point as valid.

There has emerged from a review of the Court's decisions a "hierarchy of culpability, similar to the one found in our criminal justice system, which weighs the severity of a lawyer's misconduct in terms of the impact on the lawyer's individual capacity to practice law competently or ethically, and also the impact of the lawyer's misconduct on the professional reputation of the bar as an entity which must preserve the public trust. The Florida Bar v. Ward, 599 So. 2d 650, 652 (Fla. 1992). The Court stated in Ward that "while it has been stated that there is a presumption that disbarment is the appropriate punishment for lawyers who intentionally steal client funds, Schiller, 537 So. 2d at 993, this Court has not applied that presumption in cases where lawyers have stolen money outside a client context." Id. at 651. "The basis for this distinction is the unique fiduciary duty which lawyers, individually and as a profession, owe to their clients." Id. at 652. ". . . when a lawyer steals from someone other than a client, this special "public trust" is not violated to the same extent as if the lawyer had stolen money from his or her clients." Id. at 652. The Court in the case of The Florida Bar v. Anderson, entered several months before Ward held that:

> When a non-lawyer steals from the public, it is a serious evil. When a lawyer commits the same crime, it is doubly evil. Those who have received intensive education in the requirements of the law cast disrepute on the entire legal profession when they willfully cast aside their training and knowingly break the very law about which they have been so thoroughly trained and tested. Accordingly, we find that a lawyer who willfully misappropriates public funds commits a disciplinary offense as serious as misuse of client funds, whether or not the misappropriation is accomplished while acting as an attorney. The Florida Bar v. Anderson, 594 So. 2d 302, 303 (Fla. 1992).

Although in Anderson the Respondent was an executive assistant with the Tampa Housing Authority when the funds were converted the method of the theft should be immaterial. The Respondent according to Mr. Kelly, received approximately $190,000 (TR-44) of the approximately $611,000 (TR-45) which was stolen from Medicaid. The Respondent, pursuant to his felony convictions must pay restitution in the amount of $100,000 and $10,000 in collection charges (TR-3) of which he has paid $10,000.

The Respondent in the case before the Court was sentenced to five years probation, Anderson was sentenced to three years probation and adjudication was withheld. In Anderson, the Court found a lack of a prior disciplinary record, her remorse, and her incomplete act of restitution as the most weighty mitigating factors. However, the Court did not find the mitigation significant enough to mitigate the very serious nature of the offenses she committed. The Florida Bar v. Anderson, 594 So. 2d 302, 304 (Fla. 1992).

A review of the Ward and Anderson cases supports The Florida Bar's position that the theft of public funds by an attorney licensed to practice law in Florida creates a rebuttable presumption that disbarment is the appropriate discipline to be imposed. Weighing the severity of Respondent's misconduct on his capacity to practice law ethically and the impact of his misconduct on the professional reputation of the bar as an entity which must preserve the public trust and in light of this Court's holding in Anderson disbarment is the appropriate discipline in this case.

According to the, Florida Standards For Imposing Lawyer Sanctions: The starting point in determining the proper discipline to be imposed upon a lawyer who has been found guilty of violating the rule or rules of The Florida Bar is to review the Florida Standards for Imposing Lawyer Sanctions. (hereafter Standards).

According to the Standards for Imposing discipline:

3.0 - **Generally**

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.

The duties violated according to the Standards are:

5.0 - Violations of Duties Owed to the Public

5.1 - Failure to Maintain Personal Integrity

Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in 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:

5.11 - Disbarment is appropriate when:

(a) a lawyer is convicted of felony under applicable law; or

(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; or

(e) a lawyer attempts or conspires or solicits another to commit any of the offenses listed in sections (a) - (d); or

(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 law.

Commentary

A lawyer who engages in any of the illegal acts listed above has violated one of the most basic professional obligations to the public, the pledge to maintain personal honesty and integrity. This duty to the public is breached regardless of whether a criminal charge has been brought against the lawyer. In fact, this type of misconduct is so closely related to practice and poses such an immediate threat to the public that the lawyer should be suspended from the practice of law immediately pending a final determination of the ultimate discipline to be imposed (see Standards for Lawyer Discipline, Standard 6.5).

In imposing final discipline in such cases, most courts impose disbarment on lawyers who are convicted of serious felonies. As the court noted in a case where a lawyer was convicted of two counts of federal income tax evasion and one count of subornation of perjury, "we cannot ask the public to voluntarily comply with the legal system if we, as lawyers, reject its fairness and application to ourselves." In the Matter of Grimes, 414 Mich. 483, 326 N.W. 2d 380 (1982). See also: In re Fry, 251 Ga. 247, 305 S. E. 2d 590 (Ga. 1983), conviction of murder; Sixth District Committee of the Virginia State Bar v. Albert C. Hodgson, No. 80-18 (Va. disciplinary Board, 1981), where a lawyer advised a client that he could make arrangements to have her husband killed in lieu of

bringing a child custody suit. Florida's Standards for Imposing Sanctions, s. 3.0, 5.0, 5.1, 5.11 (Fla. Bar Board of Governors 1986)

The potential or actual injury caused by the Respondent's conduct in this case was that large amounts of money were diverted from the Medicaid program.

The existence of aggravating and mitigating factors are present in this case.

According to section 9.21 of the Standards, aggravation or aggravating circumstances are any considerations or factors that may justify an increase in the degree of discipline to be imposed. The following are aggravating factors in this case:

A) dishonest or selfish motive.

B) a pattern of misconduct.

C) multiple offenses.

D) refusal to acknowledge wrongful nature of conduct.

E) vulnerability of victim.

F) substantial experience in the practice of law.

See: RR-6, 7

According to section 9.31 of the Standards mitigation or mitigating circumstances are any considerations or factors that may justify a reduction in the degree of discipline to be

imposed. The Florida Bar believes the following are mitigating factors in this case:

A) absence of a prior disciplinary record.

B) character or reputation.

C) imposition of other penalties or sanctions.

D) remorse.

See RR 6-7

It is the position of The Florida Bar that the Respondent in this case should be disbarred according to the Florida Standards for Imposing Lawyer Sanctions. The aggravating factors outweighed the mitigation present within the case (RR-8) and therefore there is no reason to lessen the recommended discipline of disbarment.

The often cited case of The Florida Bar v. Pahules, 233 So. 2d 130 (Fla. 1970), sets forth the purpose of discipline for professional misconduct.

> "in cases such as these, three purposes must be kept in mind in reaching our conclusion. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the service of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same

> time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations."

Id. at 132.

The three purposes set forth in Pahules can only be met by disbarment in this case.

The Respondent has been found guilty of grand larceny and conspiracy with respect to large sums of Medicaid funds. Society as a whole has been harmed by Respondent's actions which led to his criminal conviction. The disbarment of the Respondent in this case will not deny the public the services of a qualified lawyer. It will, however, protect it from a lawyer who cannot live within the law.

The Respondent in this case deserves the harshest form of discipline. The diversion of large sums of money by the Respondent and his conspirators from those in need within our own society shows a fundamental flaw within the Respondent's character which should exclude him from the practice of law.

The recommendation that Respondent be disbarred will be severe enough to deter others who might be prone to become involved in like violations, a lesser discipline may very well fail to deter behavior similar to Respondent's.

CONCLUSION

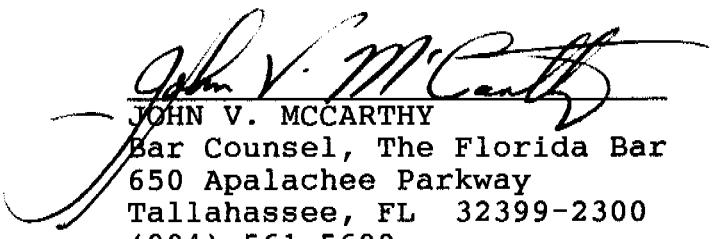
The Referee has reviewed the evidence in this case determining its weight and sufficiency and has made his recommendation to this Court that the Respondent should be disbarred from the practice of law retroactive to the date of his emergency suspension with leave to reapply for admission to The Florida Bar at the end of five years, provided he has made full restitution as required by his New York sentence. RR-9.

The Referee noted that the Respondent "is obviously remorseful for his 'mistakes', even though he has been less than candid in discussing exactly what 'mistakes' he made." RR-6. The Referee took note within his report what he felt were the aggravating and mitigating factors present within this case. The Referee was presented with case law by both parties and has noted his review of it within his report.

The assertion that the Referee was of some particular mind set is not supported by the record as discussed herein and should not be accepted by this court as fact.

Based upon the findings of fact by the Referee the aggravation and mitigation present in this case, the case law and Florida Standards for Imposing Lawyer Sanctions it is The Florida Bar's position that the Referee's recommendations should be accepted by this Court.

Respectfully submitted,



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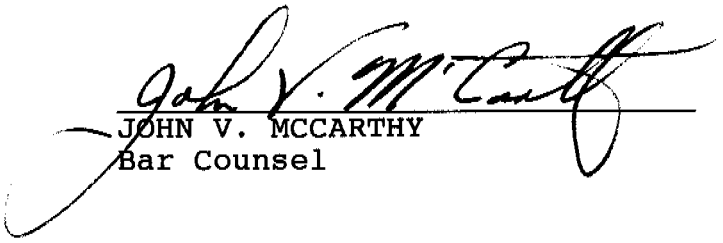
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief regarding Supreme Court Case No. 81,463, TFB File No. 93-00416-08A has been forwarded by regular U. S. mail to Nicholas P. Sardelis, Counsel for Respondent, at his record bar address of 527 S. Washington Blvd., Post Office Box 49221, Sarasota, FL 34236, on this 21st day of December, 1993.



JOHN V. MCCARTHY
Bar Counsel