097
9-18

IN THE SUPREME COURT OF FLORIDA
(BEFORE A REFEREE)

THE FLORIDA BAR,
COMPLAINANT

V.

MIGUEL A. ORTA
RESPONDENT

_____/

SUPREME COURT CASE
NO.85,124

THE FLORIDA BAR FILE
NO. 95-70,081 (11N)

RESPONDENT'S BRIEF

MIGUEL A. ORTA
19931 N.E. 21 ST. AVE
NORTH MIAMI BEACH,
FLORIDA, 33179
TEL: 935-6233
FAX; 933-3711

TABLE OF CONTENTS

TABLE OF CITATIONS

CITATIONS

INTRODUCTION

The respondent, Miguel A. Orta, appeals the Amended Report of Referee dated June 13, 1996 recommending that he be disbarred nunc pro tunc to July 5, 1994.

The respondent was suspended from the Florida Bar for three years on May 19, 1988, after a felony conviction for evasion of income taxes in 1980, 1981, 1982.

In October 1992, the respondent petitioned the Supreme Court for reinstatement. The Honorable Judge Rosemary Usher Jones held the first hearings on the matter on May 25, 1993 and May 27, 1993, approximately seven month after the Petition for Reinstatement had been filed. Subsequent hearings were held on September 17, 1993 and March 2, 1994. None of the delays in the proceedings were caused by the Respondent. The delays were attributed to the Referee's failure to set the matter for hearing, after requests by both parties.

Finally, on July 5, 1994, twenty-one month after the inception of the action, the Referee issued her report

denying reinstatement. Mr. Orta did not appeal the findings and the Supreme Court approved the Report of Referee on September 15, 1994.

On February 7, 1995, the Florida Bar, filed a complaint against the respondent, alleging violations of the rules of professional conduct during the reinstatement proceedings. The Honorable Judge Rosemary Jones did not refer the matter to the Florida Bar for disciplinary action.

It should be noted that although the Bar's complaint was replete with allegations that the respondent's action constituted criminal violations, no state or federal charges have ever been brought against the respondent. The Referee in this case further found that even though Respondent's conduct was unethical it did not rise to the level of a criminal violation.

All of the misconduct charged in the Bar's complaint were for acts occurring in 1992 or prior years. That is, for remote acts which happened at least four years ago.

In a spirit of cooperation with the Florida Bar and at the request of the Florida Bar, the Respondent stipulated to permit the Referee to make her findings regarding this disciplinary action on the transcripts and record of the prior reinstatement proceedings, as well as the parties memoranda of facts and law.

On June 13, 1996 the Referee issued her report finding Mr. Orta guilty as to Counts II, III, IV and V of violating Rule 3-4.3 (Misconduct and Minor Misconduct) of the Standards of Conduct and Rules 4-8.4 (c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation and 4-8.4(d) (engaging in conduct that is prejudicial to the administration of justice) of the Rules of professional Conduct.

As early as February and May 1993, the respondent admitted the wrongdoing alleged in Counts II, III, IV. However, he has maintained that he was not guilty as to Count IV, and not guilty as to one allegation in Count II, alleging that he had mislead the Bar investigator during a pre-hearing interview.

The Respondent was found not guilty as to Counts I and Count VI.

It is conceded that based on the admitted wrongdoing of Mr. Orta, there was clear and convincing evidence to support the determination of guilt. However, the Respondent appeals the Referee's recommendation that he be disbarred.

It is respectfully submitted that a thorough review of the record, the case law and the Standards for Lawyer Sanction fails to support, the Referee's recommendation that the Respondent be disbarred.

A brief review of the facts surrounding the Respondent's wrongdoing is made in an attempt to assist this Court in determining a just and fair discipline.

COUNT 11

As to Count II of the complaint the Referee found that the respondent committed professional misconduct by:

1. failing to list property owned by him in Canada in his answer to interrogatories;
2. failing to list bank accounts in his answer to interrogatories and
3. failing to divulge his Canadian assets to the Florida Bar investigator.

Respondent has at all times during the reinstatement and disciplinary proceedings admitted that he failed to list his

past interest in a Canadian property and Canadian bank accounts in answers to the Bar's interrogatories and questionnaires from the U.S. Probation Office and the Internal Revenue Service.

Although the Respondent failed to list his former foreign assets in the initial interrogatories completed on December 21, 1992, he readily admitted his former holdings in his deposition of May 11, 1993, as well as in his trial testimony on May 27, 1993, (Testimony Miguel A. Orta, P. 286-187, Hearing May 27,1993).

In fact prior to his deposition, respondent cooperated with the Florida Bar's investigation by signing a waiver of privacy and confidentiality with regard to the Canadian assets. He also executed a general release authorizing the Canadian Bank to release all documents to the Florida Bar. (Testimony Miguel A. Orta, P. 267, P. 289, Hearing May 27,1993)

The respondent admits that his failure to list the Canadian assets and bank accounts was wrong and a clear violation of the Code of Professional Responsibility. However,

it does not rise to the level of misbehavior warranting disbarment. It is a factual situation akin to that found in Florida Bar v. Langston, 540 So.2d 118, 1989, Fla, where an attorney was suspended for ninety-one days, after committing perjury in his divorce deposition. Mr.Langston as well as Respondent's corrected their omission within a short period after it was made.

In count two, the Referee found that the Respondent was not truthful about his ownership of the Canadian property when first interviewed by The Florida Bar's investigator. However, the record does not support said finding.

In his testimony the investigator stated that Respondent had advised him that in fact he had an "agree-ement for deed ", in " a ski chalet north of Montreal", which he had already disposed of. (Testimony of Art Gil, P. 35, 36) Sept. 17. 1993)

It is quite evident that no attempt was made to conceal the property, when the location and status were discussed during the interview. It is also elementary knowledge that " an agreement for deed " in fact denotes an ownership interest.

Thus, contrary to the Referee's finding Mr. Orta admitted to the Bar long before "he was caught lying", (Referee's Finding Number 12) that he previously had an interest in a Canadian property. There is no issue that the Respondent had disposed of the property at an economic loss the prior to his application for reinstatement.

COUNT 111

As to Count III of the complaint the Referee found that the Respondent had violated the Code of Professional Conduct by:

1. failing to disclose to the Internal Revenue Service his ownership of property in Canada and the existence of bank accounts, and:
2. failing to disclose on his 1991 income tax return his Canadian bank account even though he was obligated by law to report his assets and accounts, to the I.R.S.

Respondent has admitted that he was wrong in his failure to make full disclosure to the Internal Revenue Service. At the risk of both civil and possible criminal penalties, he demonstrated his remorse by advising the Internal Revenue of his wrongdoing. In 1993, he filed an I.R.S. form 4222, in which he disclosed the previous existence

of the account to the Internal Revenue Service. He complied with the regulations and his legal obligation to disclose. (Testimony of Mr. Orta P. 294, Hearing May 27, 1993)

Respondent's C.P.A., Pelayo Vigil, who was formerly a Special Agent with the Internal Revenue Service Criminal Investigation Division, testified that Mr. Orta has now made full disclosure to the I.R.S. and is complying with all tax laws. (Testimony of Pelayo Vigil, P. 137, 139,140, 141, May 25, 1993)

There is no excuse for the Respondents failure to make full disclosure to the Internal Revenue Service. It was a wrongful act.

However, the Respondent's actions did not cause any prejudice, detriment or loss to the government. The omissions were not made to defraud the I.R.S. of any monies due to them.

Even though, Mr. Orta has subsequently notified the I.R.S., of the prior existence of the bank accounts and assets he has not been prosecuted either civilly or criminally.

The clear and uncontroverted evidence in the record indicates that by the time the I.R.S made the tax assessment against the Respondent there were less than $500 in the bank accounts and the property had been sold. (Composite A-8 Canadian Bank Accounts)

Mr. Bill Martin, Special Agent of the Internal Revenue Service, further corroborated the fact that his agency, had taken ten to twelve (10-12) years in determining Mr. Orta's tax liability for the years 1980, 1981, 1982. The first tax assessment was not made until February 1982, seven month after the sale of the Canadian Property. (Testimony of Mr. Martin, P. 432,433 Hearing May 27, 1993)

The record further show that the funds in the Canadian bank account, during and after February 1992 , were insignificant. The highest account balance since February 1992, was $ 402.25 in one account and $ 88.87 in the second account. By July 1992, both accounts had been inactive, one account had a balance of $ 32.00 Canadian dollars and the other account a balance of $103.00 U.S. dollars. (Composite exhibit A-8, Canadian Bank Records).

The failure to disclose to the I.R.S. the ownership in the Canadian property, and the existence of the bank accounts could not have influenced the I.R.S. decision to take action to obtain monies from the respondent. The undisputed fact is that by the time the Internal Revenue, made their tax assessment, the Canadian property had already been sold and the balances in the Canadian accounts were minimal.

During his suspension form the Bar respondent has paid $43,000 in back taxes owed for the year 1983. (Testimony of Miguel Orta, page, 249, 223, 224, Hearing of May 27, 1993)

It is respectfully submitted that the facts and circumstances surrounding the Respondent's failure to make full disclosures to the Internal Revenue Services warrants a disciplinary action other than disbarment.

COUNT lV

The Referee found Mr. Orta Guilty as to Count IV, indicating:

> Mr. Orta offered to the Referee in the reinstatement hearing and to a bank official arguably different explanations as to the origins of currency in his

> Canadian bank accounts. Therefore, it appears that Mr. Orta was not truthful in at least one of his statements regarding those funds. (Report of Referee Finding Number 17)

It is respectfully submitted, that the Referee's findings in Count IV, are not supported by competent substantial evidence. A referee's finding should be based on clear and convincing evidence and is upheld unless it is clearly erroneous or lacking in evidentiary support. The Florida Bar v. McCain, 361 So. 2d 700 (Fla. 1978).

The Referee's findings were not based on the above standards. She makes her finding on an "arguable" and "apparent" standard. The report clearly indicates that since there exists **"arguably"** different explanations as to the origins of the currency, it **"appears"** that the Respondent was not truthful. However, the respondent has always been truthful and consistent in his testimony regarding the origins of the Canadian funds.

The Referee incorrectly relied on the testimony of Jolande Rene De Cotret, in finding that the respondent was either not truthful in filling out the bank declaration form or in his testimony before the reinstatement referee.

Ms. Jolande Rene De Cotret, the manager of Caisse Populaire Bank in Val David, Canada testified before the reinstatement referee through a court interpreter regarding the completion of a currency transaction report when petitioner made a substantial cash deposit in her bank. (Testimony Jolande Cotret P.339, Hearing of May 27, 1993)

She stated that she had personally translated the form for Mr. Orta from French to English. However, when asked by the referee, how she knew she had translated the form correctly she responded :

"I don't know". (Testimony Jolande Cotret P. 338)

Her admission creates serious doubts as to whether the information in the report was in fact translated accurately and correctly.

At one point when she was asked,

> Q. The information that was placed on the form, where did you get this information from ?

She answered,

> A. From the head office. (Testimony Jolande De Cotret, p. 334, 335, Hearing, May 27, 1993)

Later she testified that the information came from the respondent. (Testimony of Ms. Cotret, p. 336, 337) Her

testimony is undoubtedly contradictory and confusing.

She further testified that she was not present when Mr. Orta deposited the monies (Testimony Ms. Cotret. p. 332) and did not know whether he came alone for the deposit of January 1992. (Testimony Ms. Cotret, p. 333)

The form as completed on January 1992, indicate that the **"source"** of the funds was from "sale of sugar to Honduras". Respondent, as well as his former supervisor, Rafael Montejo consistently testified that the funds deposited were the proceeds from the sale of art.

Based on the these differences the referee suggests that the respondent was either not truthful when the form was completed or during his trial testimony. (Referee's finding number 10)

Besides, the lack of an accurate translation of the form, the referee was confused as to what information was requested in the form. The referee was under the misunderstanding that the form was requesting information **"regarding the purpose of the transaction"** leading to the deposit. (Referee's Finding # 10)

The form did not request such information. The form specifically requested where the monies were coming from, **that is the source or origin of the funds,** not the purpose of the transaction. (Testimony of Ms. Cotret P.334)

Ms. Cotret, clearly indicated,

" I made him sign some forms to know where the money was coming from." (Testimony Ms. Cotret p. 334)

Although Ms. Cotret indicated forms in the plural, only one form was ever produced by the bank.

The form itself in question number 2, request the **"SOURCE OF THE FUNDS""** or origin of the funds. It does not requests **" PURPOSE OF THE TRANSACTION"** as was understood by the referee. Nor does it ask, what the funds were in payment of, or the reason the funds were being deposited.

The respondent, testified that the source of the funds were from Mr. Policastro's doing business with Cuba, "selling them heavy equipment and also dealing in sugar to the government of Cuba". (Mr. Orta's Testimony P. 306, Hearing May 27, 1993)

Both respondent's testimony in his deposition to the bar, as well as his trial testimony, unequivocally indicate that monies deposited in respondent's account was for the payment of the sale of art by Intefica (Respondent's employer) to Mr. Policastro.

That was the purpose of the transaction not the source or origin of the funds.

It should be noted that the testimony of all witnesses, including the bank manager indicate that none of the funds were kept by the respondent. All monies that were deposited were immediately transferred to other entities. There was nothing, illegal with regard to these transactions. Respondent complied with all Canadian bank regulations.

Rafael Montejo, respondent's supervisor at the time of the transactions testified that the funds belonged to their employer Intefica. Intefica had sold valuable arts to an Italian art collector.

Mr. Montejo related that, while employed at Intefica, the respondent was sent to Canada to recover some monies owed Intefica for the sale of art. (Testimony Rafael Montejo, Page

163, 164, Hearing May 27, 1993) Upon respondent's arrival in Canada he became aware that the payment was going to be made in cash. Mr. Montejo, then flew to Canada and met with Mr. Orta and the payor. (Testimony Rafael Montejo, p. 165)

The payment for the art was being made in cash due to the fact that the payor had received a cash payment from the Cuban government. (Testimony Rafael Montejo, p. 167) At respondent's employers request the monies were deposited in h i s account.

The monies were immediately transferred to other entities and individuals, as was requested by respondent's employer. (Testimony Mr. Orta, Mr. Montejo, Ms. Cotret). Respondent did not keep any of the proceeds.

The events support the testimony of Mr. Montejo , when he described the respondent as a "very serious, hard working employee that he could trust even with large amounts of funds." (Testimony of Mr. Montejo, P. 158,161)

It is respectfully submitted that the record fails to support the Referee's finding of guilt as to count four, that

the respondent was not truthful or committed any violation of the code of professional responsibility.

COUNT V

In count five of the Referee correctly found that the Respondent admits that he failed to disclose to the United States Probation Office the existence of his Canadian property and bank accounts, even though information about bank accounts was solicited on financial statements and monthly supplements, he was required to compete.

The respondent has admitted his failure to disclose the information to the probation office. It was wrong and is clearly an ethical violation. Respondent agrees that such conduct should not be tolerated and that discipline is required. However, the facts and circumstances surrounding the improper behavior do not warrant disbarment.

Respondent's failure to disclose to the Probation Department his foreign assets was a mistake which did not cause any prejudice, detriment or loss to the United States government. There were no fines, penalties, restitution due or owing to the Probation Department.

Although the probation department was made aware by the Bar of the omission, no criminal action or other sanctions have been brought against the respondent.

The Referee correctly found that the omissions by the respondent does not constitute a federal offense. Again it is submitted that this violation of the Code of Professional Responsibility does not warrant the extreme penalty of disbarment.

DISCIPLINE

The Referee in this case followed the recommendations of the bar and recommends to this court that the Respondent be given the ultimate penalty in disciplinary proceedings, that is disbarment.

However, the respondent has already been severely punished and sanctioned as a result of his unethical violations. His 1992 Petition for Reinstatement was denied in July 1994. The reinstatement referee based her denial on the same facts that form the basis for this disciplinary

action. It should be noted that the referee did not impose any sanctions other than the denial of reinstatement. She did not enhance the denial by recommending that the respondent be prohibited from seeking reinstatement for a period in excess of one year. That referee, who was in a position to evaluate the witnesses and evaluate the direct testimony and cross examination of the Respondent did not suggest disbarment.

The reinstatement referee did not even recommend that disciplinary proceeding be instituted against the respondent for violations of the Standard of Conduct and Rules of Professional Conduct of the Florida Bar.

The respondent applied for reinstatement in October 1992, the referee delayed the issuing of her findings until July 1994. Almost, a two year delay. As a result of the denial, the respondent was prohibited from seeking reinstatement for another twelve months. Thus, effectively suspending the respondent from the practice of law for three year.

So far the respondent has been suspended for twenty-five month since the reinstatement referee made her findings

and thirty four months, since he sought reinstatement. The respondent was initially suspended for three year in 1988. He has now been effectively suspended for more than eight years. Such severe punishment is not supported by the facts in respondent's case.

In numerous cases a much lighter sanction has been given for conduct more serious or offensive than the charges alleged against the respondent.

Some cases citing sanctions other than disbarment: The Florida Bar v. Lord, 433 So. 2d 983. (Fla. 1983) a six month suspension was warranted for failure to file income tax returns for a period of twenty-two years; The Florida Bar v. Rood. 569 So, 2d 750 (Fla.19901, a one year suspension was deemed proper when an attorney was found guilty of concealing evidence and knowingly preparing false and incomplete interrogaries; The Florida Bar v. Carbonaro, 464 So. 2d 549 (Fla.1985) where respondent was given a three year suspension after a federal conviction for conspiracy to distribute cocaine; The Florida Bar v. Lancaster 448 So. 2d 1019, (Fla. 1984), where this court suspended an attorney for two years for lying to a state attorney investigating stolen property; The Florida Bar v. Colclough, 561 So. 2d. 1247,

(Fla. 1990), in which this court suspended an attorney for six month because the attorney made misrepresentations to the court as well as opposing counsel in a lawsuit.

Other cases where sanctions other than disbarment were ordered include: The Florida Bar v. Langston, 540 So. 2d 118 (Fla. 1989), was given a ninety one day suspension, and compelled to pass the ethics part of the bar exam after having been found guilty by a referee of committing perjury in a deposition; The Florida Bar v. Kennedy, 439 So. 2d 215 (Fla. 1983), respondent was suspended for three years after having been convicted of devising a scheme to obtain money from a bank under false and fraudulent pretenses; Florida Bar v. Pettigrew, 342 So. 2d 734 (Fla. 1983), a one year suspension was found proper after a federal conviction for participating in a conspiracy to import marijuana: The Florida Bar v. Davis, 361 So. 2d 159, (Fla. 1978), a 12 month suspension was ordered after a finding of guilt in using trust account funds for personal use and issuing worthless checks; The Florida Bar v. Garland, 651 So. 2d 1182 (Fla. 1995), where this court reduced a three year suspension recommended by the referee to a two year suspension when an attorney secured the fee charged by " means of intentional misrepresentation

or fraud upon a client" and " falsely advised the grievance committee" of certain facts in the disciplinary proceeding: The Florida Bar v. Schramm, 668 So. 2d 585, (Fla.19961. where a ninety -one day suspension was upheld after an attorney had been found guilty of making a false statement of material fact to a tribunal in two separate cases. Schramm, like the respondent admitted in his pleading that he was guilty of violating ethical rules.

In The Florida bar v. Dancu,490 So. 2d 40 (Fla. 1986). a thirty day suspension was upheld for an attorney for stealing money from a client and then covering it up; The Florida Bar v. Kaufman. 498 So. 2d 939, (Fla. 19861, an attorney suspended for thirty days for forging another attorney's signature to documents filed in the court. As in the present case, the attorney showed remorse and admitted his errors; The Florida Bar v. O'Malley. 534 So. 2d 1159, (Fla. 1988). an attorney found guilty of conversion and " deliberately and unequivocally" lying in a sworn deposition was suspended for three years; The Florida Bar v. Corces, 639 So. 2d 604. (Fla. 1994), although, the bar sought disbarment, this court suspended an attorney for two years for trust account violations, despite previous disciplinary history.

The circumstances justifying the disciplinary sanction of disbarment were articulated in The Florida Bar v. Moore, 194 So. 2D 264 (Fla. 19661, where the Supreme Court stated that :

> Disbarment 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 demonstrated 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,

It is respectfully suggested that a less severe discipline other than disbarment will accomplish the desired purpose of the discipline proceedings. The sanction resulting from a Bar disciplinary proceeding must serve the following purposes: 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 of the services of a qualified lawyer as a result of undue harshness in imposing penalty; second, the penalty must be fair to the respondent, being sufficient to punish a breach of ethics and at the same encourage reformation and rehabilitation and: third, the

penalty must be severe enough to deter other attorneys who might be tempted or prone to become involved in similar activities. Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1994) and Florida Bar v. Wells, 602 So. 2d 1236 (Fla. 1992)

The Respondent suggest that based on the current case law, the circumstances in this case, and the Florida Standards for Imposing Lawyer Sanctions, he should be suspended for a period of three years nunc pro tunc to July 5, 1994, the date of the prior referee's denial of reinstatement. Further, that prior to any reinstatement the Respondent must attend and successfully complete The Florida Bar's ethic school program. In addition the Respondent should be placed on five years probation, after successfully being reinstated.

Under Standard 9.22, Factors to be Considered in Imposing Lawyer Sanctions, the referee found the following aggravating factors: (a) prior disciplinary offenses: (b) dishonest or selfish motive; (c) pattern of misconduct; (d) multiple offenses; (f) submission of false evidence, false statement or other deceptive practices during disciplinary process; and (g) substantial experience in the practice of law.

In, Florida Bar v. Barbara Wolf, 605 So. 2d 461, (Fla. 1992). a factual situation similar to the one at issue the attorney was suspended for twenty-four month, even after this court adopted the referee's finding that Ms. Wolf had engaged in a pattern of misconduct in handling client's trust funds, (Standard 9.31 (c)); showed a lack of candor in her testimony as to the reasons for her improper use of trust funds (Standard 9.31 (f) and a prior disciplinary proceeding (9.31(a)).

Some of the same mitigation factors present in the Wolf case are also found in these proceedings, that is full cooperation (Standard 9.32(e); character and reputation evidence (Standard 9.32(g) and remoteness (Standard 9.32(m).

In, The Florida Bar v. Walker, 672 So. 2d 21, (Fla. 1996). an attorney who was found guilty of making false statements of material fact to the bar in a grievance disciplinary proceeding, was suspended for THIRTY DAYS. This despite the fact that Walker previously had been given a public reprimand and probation for neglect and failing to maintain proper trust account records (aggravating factor 9.31 (a) prior disciplinary record).

Similarly, in Florida Bar v. Charnrock, 661 So. 2d 1207, (Fla. 1995), an attorney who was found to have committed fraud on a court and additionally testified untruthfully in a disciplinary proceeding was placed on suspension for Thirty Days, despite a prior admonishment for minor misconduct (aggravating factor 9.31 (a) prior disciplinary record).

In another case involving prior disciplinary history, The Florida bar v. Greer, 541 So. 2d 1149, (Fla. 1989). an attorney who had previously received a public reprimand followed by one year suspension was given a SIXTY day suspension followed by a two year probation for violating several of the same ethical rules he had been found guilty in the first case (aggravating factor 9.31 (a)). His repeated misconduct were engaging in conduct involving dishonesty, fraud or deceit; engaging in conduct prejudicial to the administration of justice;engaging in practice that adversely reflects on fitness to practice law; and handling a legal matter without adequate preparation.

In, The Florida Bar v. Lawless, 640 So. 2d 1098, (Fla. 1994). an attorney found guilty of engaging in conduct contrary to honesty and justice, engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation

and engaging in conduct prejudicial to the administration of justice was suspended for three years and given a three year probationary period. This despite the fact of a prior disciplinary history consisting of one private reprimand and two public reprimand (aggravating factor 9.31 (a) prior disciplinary record).

In, The Florida Bar v. Schaub, 618 So. 2d 202. (Fla. 19931, an attorney found guilty of violating seven Rules of Professional Conduct, including "making a false statement" of material fact to a tribunal and engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation" was suspended for THIRTY days. Schaub's prosecutorial misconduct denied an accused of a fair trial. The accused was found guilty and sentenced to death due to the presentation of "irrelevant" and deliberately misleading evidence. The attorney refused to acknowledge the wrongful nature of his conduct (aggravating factor 9.31 (g) and substantial experience in the practice of law (aggravating factor 9.31 (i).

Respondent concedes that all of the aggravating factors found by the referee exist in this case except (f) submission of false evidence or other deceptive practices during

disciplinary process. There is no evidence to support said finding. The respondent has never submitted any false evidence or engaged in deceptive practices during any DISCIPLINARY PROCEEDING.

He does admit that he was not truthful in his answers to the bar's December 1992 interrogatories in the REINSTATEMENT PROCEEDINGS.

However, in February 1993, he voluntarily signed confidentially waivers permitting the Canadian Banks to turn over all bank records to the Florida bar. Further, in his May 1993, deposition and sworn testimony before the referee he came clean and admitted his unethical behavior.

The Standards of Imposing Lawyer Sanctions, specifically indicates that the aggravation factor (f) is limited to DISCIPLINAY PROCEEDINGS. Thus, the referee erred in applying this sanction against the respondent.

Under Standard 9.32, Factors to be Considered in Mitigation of Lawyer Sanctions, the referee was correct in finding the following mitigating factors: (e) cooperative

attitude toward proceedings, (j) interim rehabilitation, (1) remorse, and (m) remoteness of prior offense.

Mitigating factors in this action justify a less severe penalty than disbarment or at least that the penalty be retroactive to the respondent's initial suspension. See, Florida Bar v. Wells, 602 So. 2d 1236 (Fla. 1992). where an eighteen month suspension in 1992, was made retroactive to an an initial suspension in 1989. Wells, also had the aggravating factor of a criminal conviction and prior disciplinary record.

In, Florida Bar v. MacMillan, 600 So. 2d 457, (Fla 1992). an attorney who made "intentional misrepresentations" to the court was given a two year suspension, after this court considered (e) cooperative attitude toward the proceedings a significant mitigating factor.

In, Florida Bar v. Macnamara, 6345 So. 2d 166 (Fla. 1994),this court granted a three year suspension, rather than disbarment for an attorney who misappropriated client's funds, after giving great weight to the mitigating factors of cooperative attitude toward proceedings (Standard 9.32 (e)) and remorse (Standard 9.32 (1)). Two factors found by the referee in these proceedings.

However, the referee erred in not considering the following mitigating factors: (d) timely good faith effort to rectify consequences of misconduct, (g) character or reputation, (j) unreasonable delay in disciplinary proceedings provided the respondent did not substantially contribute to the delay and provided further that the respondent has demonstrated specific prejudice resulting from the delay and (k) imposition of other penalties or sanctions.

The respondent did in fact make a timely good faith effort to rectify the consequences of his misconduct as is required under Standard 9.32 (d). In February 1993, two month after the omission in the interrogatories he acknowledged his wrongdoing by specifically executing confidentiality releases for the Florida Bar directed at the Canadian Banks. He also notified the I.R.S. of the omissions in his returns within the Statute of Limitations, opening himself to both criminal and civil penalties.

The respondent further submitted current evidence as to his reputation, which was ignored by the referee and was proof of mitigation under Standard 9.32 (g). Both, Father Roger Holoubek, pastor of St. Lawrence Catholic Church and

Thomas J. Flood, Executive Vice president of Capital Bank, presented uncontroverted affidavits unequivocally stating:

> I would further reiterate that at this time Mr. Orta's reputation for truthfulness an reliability and honesty in the community of St. Lawrence is very good, (Affidavits of Father Roger Holoubek and Thomas Flood dated May 14, 1996)

The referee acknowledged that there had been delays in the disciplinary proceedings. However, she ruled that the respondent had not demonstrated specific prejudice. She therefore, failed to find mitigation under Standard 9.32 (j), unreasonable delay in the disciplinary proceedings.

It is respectfully submitted that the delay has caused specific prejudice to the respondent. The bar became aware of the ethical violations in December 1992. It could have commenced the proceedings at that time. It failed to bring any disciplinary action until February 1995. If it had not waited, the disciplinary proceedings would have been over a long time ago, and the time for the sanctions and punishment against the respondent would have been running. If this court follows the referee's recommendation the respondent would be deprived of the ability to earn his livelihood as an attorney, until after July of 1999. That is eleven years after his

suspension and almost seven years after the bar became aware of the violations.

The referee further disregarded the fact that the respondent had been imposed other penalties and sanctions an was entitled to the benefits of mitigation under Standard 9.32 (k). There is no question that the respondent was punished and sanctioned by the referee in the reinstatement proceedings for the same and identical violations as he is being punished for in these proceedings. The referee denied the respondent's reinstatement and prolonged the respondent's three year suspension to eight years. A quite severe sanction.

The instant case warrants the same penalty handed out in The Florida Bar v. Marcus, 606 So. 2d 1993 (Fla. 19931. Marcus was found guilty of conduct involving dishonesty, fraud and deceit for his involvement in a systematic and repeated misappropriation of client funds. A three year suspension was given after the court found the following mitigating factors: good faith effort to make restitution or to rectify consequences of his misconduct (mitigating factor 9.32 (d); an unreasonable delay in disciplinary proceedings (mitigating factor 9.32 (i) and interim rehabilitation (mitigating factor 9.32 (j),

all factors in favor of this respondent.

The mitigation factors outnumber the aggravating factors. It should be further noted that the referee specifically found that "Mr. Orta's conduct following his May, 1993 deposition shows marked improvement." (Amended Report of Referee p. 12) A very compelling finding in favor of a less severe penalty than disbarment. See, Florida Bar v. Moore, 194 So. 2d 264 (Fla. 1966), where this court established that to sustain disbarment there must be a showing that the person charged should never be at the bar.

CONCLUSION

It is respectfully submitted that based on the foregoing arguments and case law that the respondent be suspended from the practice of law for a period of three years, retroactive to July 5, 1994. Further, that upon proving rehabilitation and being reinstated he would have a probationary period of five years and that he must successfully complete The Florida Bar's ethics school program.

Miguel A. Orta
19931 N.E. 21 Ave.
North Miami Beach,
Florida, 33179

CERTIFICATE OF SERVICE

I HEREBY CERTIFY THAT A TRUE AND CORRECT COPY OF THIS PLEADING WAS MAILED ON THIS 25 DAY OF AUGUST 1996, TO MR. WILLIAM HENDRIX, BAR COUNSEL, SUITE M-100, RIVERGATE PLAZA 444 BRICKELL AVE., MIAMI, FL. 33131.

MIGUEL A. ORTA
19931 N.E. 21 AVE.
NORTH MIAMI BEACH,
FLORIDA, 33179
TEL: 935-6233
FAX: 933-3711