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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

Supreme Court Case
No. 85,124

vs.

The Florida Bar File
No. 95-70,081 (11N)

MIGUEL A. ORTA,

Respondent.

FILED

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SYMBOLS AND REFERENCES

For the purpose of this Answer Brief, The Florida Bar will be referred to as either The Florida Bar or the Bar. Miguel Orta will be referred to as either Respondent or Mr. Orta. Witnesses will be referred to by their full names.

STATEMENT OF THE CASE

Respondent has been felony suspended since May 1988. The criminal matter leading to his conviction involved defrauding the Internal Revenue Service, his law partner and Hialeah Hospital.

In October 1992 Respondent filed his petition for reinstatement (hereinafter the reinstatement case). As a part thereof, the Bar conducted an investigation, during which the Bar discovered substantial evidence of additional acts by Respondent which were illegal, dishonest, fraudulent and deceitful and constituted unethical conduct by Respondent.

The reinstatement case was heard by the Honorable Rosemary Usher Jones, Referee, on May 25, 1993, May 27, 1993, September 17, 1993 and March 2, 1994. The evidence of unethical conduct by Respondent was submitted to the Referee during the hearings. As a result, the Referee issued a Report of Referee, which denied Respondent's petition and found, among other things, that Respondent had ***"continued to engage in fraudulent and deceitful conduct during his period of suspension, including statements made by him under oath to government entities." The Referee, in the Report of Referee, made a number of findings of fact and concluded that Mr. Orta was not fit to resume the practice of law. Mr. Orta correctly states that he did not contest the Report of Referee, which was approved by the Supreme

Court on September 15, 1994.

Subsequent to September 15, 1994, the grievance committee determined that probable cause existed for the Bar to proceed further.¹ The Bar subsequently filed its six count complaint for discipline in February 1995 (hereinafter the discipline case).

By agreement of the parties the records in both the reinstatement case and the discipline case were used by the parties in arguing, and considered by the Referee in deciding, the discipline case.

Each party submitted a written memorandum of fact and law and thereafter, on March 29, 1996, presented oral argument to the Referee. On June 5, 1996, the Referee issued the Report of Referee in the discipline case, as to which Respondent filed his Petition For Review. On June 13, 1996, the Referee issued an Amended Report of Referee,² wherein the Referee found the Respondent guilty of multiple acts of unethical conduct and

¹ Part of the material and evidence that the grievance committee considered was the Referee's factual findings of unethical conduct by Respondent in the reinstatement case.

² The Bar assumes that it is Respondent's intent to petition for review the June 13, 1996 Report of Referee.

recommended that he be disbarred nunc pro tunc to July 5, 1994.³ The Referee also recommended that Respondent's pending Petition for Reinstatement be dismissed. Respondent now appeals the Referee's recommendation that he be disbarred.

STATEMENT OF FACTS

A full recitation of the facts is not necessary in light of Respondent's admission that there was clear and convincing evidence to support the Referee's finding of guilt and the following admissions Respondent made before the Referees in the matters below:

1. Respondent admitted he failed to disclose his interest in real property and bank accounts in Canada in his sworn answers to interrogatories propounded by the Bar.

2. Respondent admitted he failed to disclose his interest in real property and bank accounts in Canada to the Internal Revenue Service.

3. Respondent admitted he failed to disclose his interest in real property and bank accounts in Canada to the United States Probation Office.

³ Respondent concedes at page 4 of his brief that "**there was clear and convincing evidence to support the determination of guilt.**" (Emphasis Added.)

4. Respondent admitted he made a false statement in his 1991 federal income tax return when he stated he had no foreign bank account when he did.⁴

As to Count IV of the Bar's complaint, the Bar submitted the testimony of Ms. Jolande Rene de Cotret of the Caisse Populaire DesJardins de Val David Bank whose testimony supports the Referees' factual findings (in both the reinstatement and discipline cases) that Mr. Orta was not truthful.⁵

The Bar also submitted the testimony of Arthur Gill, a staff investigator of The Florida Bar, who testified that Mr. Orta had not been truthful to him in an initial interview with Mr. Orta about Mr. Orta's ownership in Canadian real property.⁶

SUMMARY OF THE ARGUMENT

The Referee's determination of guilt is both conceded and

⁴ These admissions, in and of themselves, constitute clear and convincing evidence of unethical conduct by Respondent and are more than sufficient to support the Referee's determination that Respondent is guilty of unethical conduct. Respondent has little choice but surrender on the issue of guilt. His retreat to the position that disbarment is too harsh is totally indefensible and without merit.

⁵ See pages 334-339 of the transcript of the May 25, 1993 hearing in the reinstatement case.

⁶ See pages 34-36 of the transcript of the September 17, 1993 hearing in the reinstatement case.

amply supported by the record. Respondent engaged in numerous unethical acts, most of which he admitted.

The Bar proved by clear and convincing evidence that Respondent had engaged in illegal, dishonest, fraudulent and deceitful conduct. The evidence showed that Respondent made false statements under oath in his answers to interrogatories; that Respondent has made false statements in his 1991 income tax return and to Art Gill, an investigator for the Florida Bar. The evidence showed that Respondent made untruthful statements, either to the Referee in the reinstatement case or on Canadian bank declaration forms.

The evidence presented also showed that Respondent failed to disclose assets and bank accounts when required to do so by law. Each of these acts constituted an ethical violation by Respondent.

Respondent admits that the Referee's determination of guilt is supported by clear and convincing evidence and then argues that the Referee's findings of fact relating to his false

statement to Arthur Gill⁷ and regarding the Canadian bank forms⁸ were not supported by competent, substantial evidence.

The Bar's position to Respondent's contradictory positions is two fold. First, Respondent concedes there was clear and convincing evidence for the Referee's determination of guilt. Secondly, the Referee's findings of fact are not clearly erroneous as these two issues are entitled to a presumption of correctness. The Florida Bar v. Saxon, 379 So. 2d 1281, 1283 (Fla. 1980) and The Florida Bar v. Carter, 410 So. 2d 920, 922 (Fla. 1991). The Bar will present no further argument as to these two issues.

As to discipline, Respondent argues that the dismissal of his Petition for Reinstatement, approved by this Court's order of September 15, 1994 is sufficient discipline, in that he has effectively been suspended for approximately eight years and that disbarment is too harsh for his admitted misconduct. The Florida Bar argues that the Referee's recommendation that Respondent be disbarred is the only appropriate discipline in view of

⁷ This relates to the Referee's findings as to Count II of the Bar's Complaint.

⁸ This relates to the Referee's findings as to Count IV of the Bar's Complaint.

Respondent's prior disciplinary record, his pattern of misconduct, and his admission that he is guilty of multiple acts of misconduct, which include fraud, dishonesty and deceit. The Referee's Report should be approved.

ARGUMENTS AND AUTHORITIES

RESPONDENT'S MISCONDUCT INVOLVING FRAUD, DISHONESTY AND DECEIT, COUPLED WITH PRIOR AND CUMULATIVE MISCONDUCT WARRANTS DISBARMENT

RESPONDENT'S CURRENT MISCONDUCT

Respondent argues that he should not be disbarred because (1) the Referee in the reinstatement case did not impose any sanctions, (other than denial of reinstatement), (2) that he has already been disciplined for his current misconduct, and (3) there is case law that supports a lighter sanction for conduct more serious than Respondent's.

Respondent cites no authority for his unique, but legally insufficient, propositions that a Referee in a reinstatement case has an obligation to impose sanctions⁹ and that the Referee's recommendation that his Petition for Reinstatement be dismissed

⁹ Rule 3-7.10 (g) and (k), of the Rules of Discipline provides that the issue before the Referee in a reinstatement case is the fitness of the petitioner to resume the practice of law and that if the Referee finds the petitioner to be unfit to resume the practice of law, the petition shall be dismissed.

is punishment. Respondent was suspended for three years under Rule 3-7.2 of the Rules of Discipline because he committed and was convicted of felonious crimes.¹⁰ During his suspension Respondent committed additional misconduct. That misconduct caused the Referee in the reinstatement case to recommend that Respondent's Petition for Reinstatement be dismissed. While dismissal was certainly a negative consequence for Respondent (entirely of his own making), dismissal cannot in any terms be defined as discipline.

Respondent cites numerous cases in support of his argument that more serious conduct than his resulted in lesser discipline. Each of the cases cited by Respondent is distinguishable in that none involve the seriousness of the misconduct by Respondent (fraud, dishonesty, misrepresentation and deceit), a case involving two prior disciplines, both involving similar misconduct, a pattern of misconduct and cumulative misconduct.

¹⁰ Rule 3-7.2(i)(1) provides that even after Respondent was suspended for three years based on the felony conviction, the Bar, at any time, could have initiated separate disciplinary action (including disbarment) against Respondent based solely on the misconduct resulting in the felony conviction. In the instant disciplinary case, the Bar seeks Respondent's disbarment for acts committed by Respondent during the period of his suspension and as to which to date Respondent has not been disciplined.

The Bar will specifically address only one case cited by Respondent for this proposition, that being The Florida Bar v. Wolf, 605 So. 2d 461 (Fla. 1992), since each of the other cases cited by Respondent in support of lesser discipline are missing one or more of the elements found in Respondent's case, and are thus easily distinguishable.¹¹

In Wolf, supra, the attorney was found guilty of serious misconduct, for which disbarment is usually the appropriate discipline. However, the Referee in Wolf, supra, found that she had only one prior discipline (here there are two), that there had been full cooperation with the Bar (here Respondent only tried to cooperate after he was caught lying, and even then did not fully do so), and that Ms. Wolf suffered from diminished capacity (not present here).

Committing fraud, acting dishonestly, and engaging in deceit, including lying under oath, are some of the most serious breaches of attorney ethics and such misconduct warrants

¹¹ It should be noted that Respondent cites The Florida Bar v. Lawless, 640 So. 2d 1098 (Fla. 1994) as stating that the attorney in question was found guilty of conduct contrary to justice and of engaging in dishonest conduct, neither of which is true. The Referee had recommend finding the attorney not guilty of those charges.

disbarment. The Florida Bar v. Rightmyer, 616 So. 2d 953 (Fla. 1993); Dodd v. The Florida Bar, 118 So. 2d 17 (Fla. 1960);

In The Florida Bar v. Kickliter, 559 So. 2d 1123 (Fla. 1990), the Respondent was disbarred for perpetrating a fraud on the court. In The Florida Bar v. Ryder, 540 So. 2d 121 (Fla. 1989), this Court disbarred the attorney who had been convicted of three counts of perjury for lying to a grand jury. In The Florida Bar v. Merwin, 636 So. 2d 717 (Fla. 1994), the Respondent was disbarred for making false statements to the court and in the disciplinary proceedings. In The Florida Bar v. Roman, 526 So. 2d 60 (Fla. 1988), the attorney was disbarred after filing a false petition with the court in which he manufactured a phony heir to an estate in order to misappropriate funds.

**PRIOR DISCIPLINE AND CUMULATIVE MISCONDUCT
BY RESPONDENT FURTHER SUPPORT THE REFEREE'S
RECOMMENDATION OF DISBARMENT**

The fact that Respondent's unethical conduct is cumulative and he has two instances of prior discipline, one minor misconduct and one suspension also support the Referee's recommendation that Respondent be disbarred. In The Florida Bar v. Cotton, 187 So. 2d 33 (Fla. 1966), the court stated that since "The Respondent should have made extra effort during (the time of suspension) to remain completely above reproach and any other

conduct is inexcusable ... the protection of the public requires his punishment be severe." See also The Florida Bar v. Neely, 587 So. 2d 465 (Fla. 1991) (Extensive prior discipline history, coupled with new serious violations warrant disbarment rather than two 36 months suspensions recommended by the referee); The Florida Bar v. Mavrides, 442 So. 2d 220 (Fla. 1983) (although separate instances of violations of rules, standing alone, would not require disbarment, the cumulative effect of eight violations warrants disbarment); The Florida Bar v. Cooper, 429 So. 2d 1 (Fla. 1983) (involvement in several fraud schemes warrants 20 year disbarment); The Florida Bar v. Davis, 379 So. 2d 942 (Fla. 1980) (Respondent was under a twelve month suspension when he was disbarred for two similar offenses.)

**THE REFEREE GAVE PROPER CONSIDERATION TO
THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS**

The Referee properly considered the Florida Standards for Imposing Lawyer Sanctions in support of the recommendation that Respondent be disbarred and as to aggravating and mitigating circumstances. The Referee was in the best position to observe Respondent's attitude and demeanor and the Referee's findings and recommendations as to the appropriated standards to be applied, including matters in aggravation and mitigation should be


presumed to be correct. The Florida Bar v. Wheeler, 653 So. 2d 391 (Fla. 1995).

However, should this Honorable Court find that additional mitigating circumstances exist, the Bar respectfully submits that the recommendation of retroactive disbarment should be taken as evidence that appropriate mitigation was considered by the Referee, who could have imposed a lengthier discipline. The Florida Bar v. Eisenberg, 555 So. 2d 353 (Fla. 1989). Therefore, additional mitigation of Respondent's sanction should not be entertained by this Honorable Court.

CONCLUSION

The Referee's findings of guilt were admittedly supported by clear and convincing evidence. Respondent committed acts of fraud, dishonesty, misrepresentation and deceit. The sanction of disbarment is appropriate under these circumstances and the Referee's recommendation should be affirmed.

Respectfully submitted,

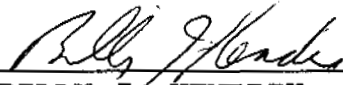

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Answer Brief of The Florida Bar was sent via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and a true and correct copy was mailed to Miguel A. Orta, Respondent at his record Bar address 19931 N.E. 21st Avenue, North Miami Beach, Florida 33179 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 16th day of September, 1996.



BILLY J. HENDRIX
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