IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant/Appellant,

v

CASE NUMBER: 88,217

ALEXANDER N. GRIEF,

Respondent/Appellee.

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Appellant, The Florida Bar, will be referred to as such or as the Bar. The Appellee in these proceedings, Alexander N. Grief, will be referred to as Mr. Grief or as Respondent.

References to the Report of Referee will be by the Symbol RR followed by the appropriate page number. References to the transcript of final hearing on November 22, 1996 will be by the symbol TR followed by the appropriate page number. Exhibits submitted into evidence by the Bar and by Respondent shall be referred to by the symbol BEX or REX respectively followed by the appropriate exhibit number.

STATEMENT OF THE CASE AND OF THE FACTS

The Bar accurately stated the case and the facts in its brief. However, those facts cited by the Bar need to be elaborated on somewhat.

Respondent's conviction, the only misconduct that he has been found guilty of committing, pertained to his submission of five applications during the period April 15, 1990 through August 1990. BEX 1, 2; TR 64, 65. Respondent ceased work on all amnesty cases at the end of calendar year 1992, prior to any criminal investigation being brought to his attention. TR 71, 90.

The Referee found on page eight of her report that she did

> not find by clear and convincing evidence that Respondent was motivated by profit.

The Referee noted numerous mitigating circumstances in her report. Beginning on page eight, she listed some of those items as follows:

> a. Respondent has not heretofore been disciplined for professional misconduct. Respondent has been a member of the Bar since 1977.
>
> b. Respondent has made full and free disclosure to the disciplinary Board and has had a cooperative attitude towards the proceedings. [The Referee had previously noted in paragraph nine on page five that the Bar had volunteered to the Referee that Respondent had fully cooperated throughout these proceedings.]
>
> c. The Respondent's witnesses including a member of the Board of Governors of The Florida Bar, a Vice Chair of a Grievance Committee for The Florida Bar, and persons who have dealt with him in business, and the law, testified in support of his good reputation in the community, not withstanding (sic) the

> charges against him as to his good character and as to their belief that he is not in need of any further discipline and is rehabilitable if not already rehabilitated.
>
> During his presentence interview and during testimony presented, the Respondent expressed remorse and accepted full responsibility for his actions. He was well aware of his misconduct and acknowledged that what he did was wrong.

The Referee also noted other mitigating factors in her report. On page two, the Referee noted that Respondent was born March 9, 1952 (he was 44 at the time of final hearing), that he had two children age 10 and 7 (RR p.2), that his brother, Kenneth, died of AIDS in September 1994 at the age of 34 and that Respondent's family residence was foreclosed on in February 1994 (it was, however, purchased by Respondent's mother). RR 4. She could have also found that he had been married to his wife since October 12, 1980. BEX 4, page 11.

Mr. Grief currently works for a former client, Ali Jaferi, President of U.S. Groceries Texaco Company. Mr. Grief has access to everything Mr. Jaferi owns. TR 46, 47. He also works at a filling station owned by Mr. Jaferi and Respondent's mother. He pumps gas as well as doing various administrative jobs and financial duties as assigned by Mr. Jaferi.

SUMMARY OF ARGUMENT

Mr. Grief argues in this Answer Brief that this Court should adopt the Referee's well-reasoned recommendation that he be suspended for three years for his felony conviction. The Referee cited numerous mitigating circumstances and relied on caselaw

promulgated by this Court in reaching her decision. In The Florida Bar v Lecznar, 690 So.2d 1284 (Fla. 1997), this Court acknowledged that a referee's recommendation as to discipline comes to the Court cloaked with a presumption of correctness and that this Court should not "second-guess" the referee's recommendation if it is consistent with caselaw. The Referee's recommendation is clearly consistent with past decisions by this Court.

The misconduct for which Mr. Grief was convicted occurred during the summer of 1990. He was convicted of one count of conspiracy to file false documents before the Immigration and Naturalization Service. That one count consisted of five filings made during the summer of 1990. Mr. Grief left the conspiracy of his own volition at the end of calendar year 1992. In April 1993, Mr. Grief put a former client in touch with an individual that Mr. Grief had previously met for the purpose of transporting illegal aliens into the United States. Mr. Grief walked away from the conspiracy before it was consummated.

Mr. Grief was sentenced to three years probation, six months of which was to be served under house arrest, and he was fined $3,000.00. Shortly after he was sentenced, Mr. Grief tested positive for cocaine use. The evidence was unrebutted that it occurred on but four occasions during a ten day period not long after his conviction. His probation was not violated as a result of the cocaine use. Mr. Grief argues that this Court should continue to adhere to its policy that "disbarment is the extreme measure of discipline...." that can be imposed. It should only be

ordered in those cases wherein the accused **lawyer** "has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards". The Florida Bar v Moore, 194 So.2d 264, 271 (Fla. 1966). Here, the conduct before the Court is not so egregious that disbarment is appropriate.

Mr. Grief argues that the mitigation present removes this case from one requiring disbarment. Mitigating factors include (1) no prior disciplinary history during Mr. Grief's 19 years practicing law; (2) Mr. Grief's voluntary removal from the criminal conspiracy; (3) Mr. Grief's substantial cooperation with the United States Government, leading to their motion to reduce his sentence below minimum guideline standards; (4) the fact that his sentence involved no incarceration and that his fine was minimal; (5) his wholehearted cooperation with the Bar; (6) his excellent reputation in the community for good character and honesty as attested to by nine individuals, including **a** member of the Board of Governors of The Florida Bar, a past vice chairman of a grievance committee, the chairman of the board of a financial institution and a past client; (7) his remorse and acknowledgement of responsibility for his wrongdoing.

The cases cited by The Florida Bar as support for their argument that Mr. Grief should be disbarred all involve misconduct far more serious than the instant case or they involve **a** lack of significant mitigation.

The Referee's recommendation that Mr. Grief be suspended for three years is appropriate in light of the limited nature of the misconduct, the substantial mitigation present and this Court's previous decisions. Rather than second-guessing the Referee's recommendation, this Court should adopt it and order a three year suspension, nunc pro tunc October 9, 1996.

ARGUMENT

THE MITIGATION PRESENT IN THIS CASE SUPPORTS THE REFEREE'S RECOMMENDATION THAT RESPONDENT RECEIVE A THREE YEAR SUSPENSION FOR HIS FELONY CONVICTION IN THIS MATTER.

On November 22, 1996, final hearing in these proceedings was held before the Honorable Sharon Zeller. The sole issue before the Court was what discipline should be meted (repeatedly referred throughout the transcript of the final hearing as "kneaded") out for Mr. Grief's conviction for conspiracy to defraud the government by filing false documents under the immigration laws. TR 64. That misconduct consisted of Mr. Grief's filing five cases in the period from April 15th through August 1990 which contained false documentation. TR 65, BEX 1, 2. Pursuant to his guilty plea, Mr. Grief is conclusively guilty of those crimes for the purpose of these proceedings. R. Regulating Fla. Bar. 3-7.2(i) (3). Respondent has not been charged with any other misconduct by the Bar.

During final hearing, evidence was taken as to mitigation and aggravation of discipline. As to the former, two witnesses testified on behalf of Respondent and seven other witnesses testified by letter. Respondent testified himself. The Bar submitted six exhibits but presented no live testimony.

Throughout the proceedings before the Referee, the Bar tried to blur the distinction between the misconduct Respondent was guilty of committing, i.e., his felony conviction, and other matters to be considered in aggravation. The former referred to the five cases that Respondent was convicted of wrongfully handling

during the summer of 1990. The latter primarily consisted of several telephone calls Respondent made in April 1993 during which time he brought together an individual who wished to bring illegal aliens into the United States of America and somebody who might accomplish that goal. As to this incident, Mr. Grief was never charged with any crime by the government or with misconduct by the Bar. He testified that his lawyer believed he had an excellent defense to any criminal charges in that matter had they been filed. TR 97. In essence, Mr. Grief walked away from that conspiracy before it was consummated. TR 94, 95.

The second matter in aggravation was Mr. Grief's brief experimentation with cocaine when he was first placed on probation. On four occasions starting on June 24, 1996 and ending on July 2, 1996, Respondent, despondent over the circumstances of his life, used cocaine. TR 99-101. The irony is that he was certain to be caught for his conduct. In fact, he was. Although they had the option to do so, no violation of probation charges were filed against Mr. Grief. He was ordered to seek treatment for drug abuse and was placed on an extensive regimen of drug testing. He has not used cocaine since July 2, 1996. TR 101.

The mitigating factors in this case were substantial. Based on those factors, and after an in depth analysis of the case law relating to felony convictions, this Court's referee recommended that Respondent be disciplined by a three year suspension, **nunc** pro **tunc** October 9, 1996, the effective date of his automatic felony suspension. She further recommended that he be required to

participate in the Florida Lawyer's Assistance program.

While the Bar properly points out that this Court has stated on numerous occasions that it has broad discretion to review a referee's recommended discipline, the Bar, as Appellant, still has the burden of demonstrating that the referee's recommendations are erroneous, unlawful or unjustified. R. Regulating Fla. Bar 3-7.7(c)(5). See also The Florida Bar v Orta, 689 So.2d 270 (Fla. 1997) at page 273 where this Court stated:

> A referee's recommendation on discipline is afforded a presumption of correctness unless a recommendation is clearly erroneous or not supported by the evidence.

In another recent pronouncement on the subject of a referee's recommended discipline, The Florida Bar v Lecznar, 690 So.2d 1284 (Fla. 1997), this Court noted on page 1288 that a referee's recommended discipline comes to the Court cloaked with a presumption of correctness. Specifically, this Court stated:

> As to discipline, we note that the referee in a Bar proceeding again occupies a favored vantage point for assessing key considerations -- such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse and rehabilitation (or potential for rehabilitation). Accordingly, we will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw. (emphasis supplied).

All of the mitigating circumstances listed by this Court in Lecznar as being very important, i.e., (1) cooperation, (2) forthrightness, (3) remorse, and (4) actual or potential rehabilitation, are present in the case at Bar. In addition, the Referee referred to numerous cases supporting her well-reasoned

recommendation.

On page six of her report, the Referee properly started her analysis of the discipline to be imposed with The Florida Bar v Pahules, 233 So.2d 130 (Fla. 1970). The Referee noted that the primary purposes of discipline are set forth by the Supreme Court on page 132 of that opinion. As the Referee observed:

> 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 Referee then stated that she was "convinced by the evidence" that a three year suspension meets the cited purposes of discipline.

That the Referee thoroughly considered the evidence before her was made apparent in her statements immediately prior to citing Pahules. The Referee noted that her deliberations were "arduous at best" and that deciding on an appropriate sanction:

> is not an easy matter as it involves dealing with the complexities of human behavior.

She then went on to quote on page eight of her report, after discussing relevant cases, from this Court's opinion in The Florida Bar v Moore, 194 So.2d 264, 271 (Fla. 1966) to the extent 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.

Suspending Mr. Grief for the maximum time allowed will "accomplish the desired purpose" of discipline.

In The Florida Bar v Hirsch, 342 So.2d 970 (Fla. 1977), the Court observed on p. 971 that disbarment

> occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings.

That analogy is particularly appropriate in the case at Bar. Rather than getting the death penalty, Mr. Grief received no imprisonment for his felony conviction. He was subjected to three years probation, six months of which would be house arrest with work-release privileges. He was fined but $3,000.00. His sentence was partially attributable to the Federal government filing a motion to go below the sentencing guidelines for the imposition of a sentence in Mr. Grief's felony. The fact that the Federal government felt that Mr. Grief's conduct warranted such a lenient sentence should be one of the factors considered by this Court in its deliberations on the sanction to be imposed for Mr. Grief's conviction. The Referee clearly appreciated that fact when she cited on page eight of her report that:

> Mr. Grief was given less than the minimum of the guideline ranges suggested by the Pre-sentence Investigation Report 'as meeting the objectives of punishment, deterrence and the protection of the public'.

The government thought a sentence without jail or substantial fine would deter future misconduct and would protect the public. The sentencing judge agreed. This Court's Referee agreed. Respondent

respectfully suggests that the Supreme Court of Florida should follow the wisdom of the U.S. Attorney, the U.S. District Judge and the Referee when it enters an order of discipline.

The mitigation in this case is substantial. Some of it is specifically listed in the Florida Standards for Imposing Sanctions (hereinafter the Standards). Others are logical factors in mitigation although they are not specifically mentioned in the Standards. Those mitigating circumstances, which are numerous and quite persuasive, convincingly demonstrate that disbarment is inappropriate in the case at Bar. Those factors include:

(1) Absence of a prior disciplinary record. Mr. Grief has practiced law since his admission in 1977 without any prior disciplinary history. Standard 9.32(a);

(2) Mr. Grief voluntarily removed himself from the criminal conspiracy resulting in his conviction before he was aware that a criminal investigation had begun. The last act of misconduct relevant to his conviction occurred during the summer of 1990. The alleged conspiracy to transport illegal aliens into the United States occurred in April 1993. Mr. Grief walked away from that conspiracy before it came to fruition also. TR 95.

(3) Mr. Grief substantially cooperated with the United States Government once they contacted him. His cooperation was so substantial that the Government moved to reduce his sentence below the sentencing guidelines.

(4) The sentence imposed on Mr. Grief involved no incarceration, was of very limited duration (three years probation

with six months house arrest -- with permission to work during the day) and included a very modest $3,000.00 fine. While Respondent does not argue there should be a one on one correlation between a criminal sentence imposed and any discipline meted out by the Supreme Court of Florida, the lack of any incarceration certainly should be a factor for this Court to consider. If the trial court felt no time in jail was necessary to protect the public and to deter others from like misconduct, this Court should be influenced by that decision;

(5) Cooperation with the Bar. Mr. Grief has been extremely candid with The Florida Bar. As indicated by Respondent's Exhibit 2, Mr. Grief advised the Bar of his plea even prior to sentencing and he promptly provided The Florida Bar with a copy of the conviction upon his receipt of it. Mr. Grief expedited these disciplinary proceedings (TR 4) and the Bar stipulated that mitigation in this regard was established. TR 21. Standard 9.32(e);

(6) Mr. Grief's excellent reputation in the community for good character and honesty. Standard 9.32(g). As specifically noted by the Referee in paragraph 7 on page 4 and in paragraph c on page 9 of her report, Mr. Grief presented evidence proving his good reputation in the community in which he lives and practices. The most persuasive testimony, by far, was that given in person by Ali Jaferi, Mr. Grief's present employer and a past client. A true description of Mr. Grief's character was set forth by Mr. Jaferi when he described the circumstances under which he met Mr. Grief in

1988. TR 37-39. Mr. Jaferi, who moved to America in 1985 and became a citizen in 1992, bought a filling station and met Mr. Grief in his capacity as a lawyer for the seller. The seller made a misrepresentation as to the circumstances of the sale and Mr. Jaferi asked Mr. Grief to correct the problem. As Mr. Jaferi testified:

> I went to Alex after that. I said, this is all my life's savings and I need your help. You know, he really helped me on that and straightened out the problem with them. TR 38.

> I liked him a lot, after that time, as a really fair man, I mean, you know, that he was on the other side, and he helped me, and from that day, he was my attorney for my closings and all around. TR 39.

Mr. Jaferi also testified about Mr. Grief's very fair fees (TR 42) and about how much Mr. Grief has helped Mr. Jaferi's friends, relatives and employees with various problems. TR 47, 48. He specifically recited an instance where Mr. Grief assisted Mr. Jaferi's uncle with the purchase of his first home in America. Mr. Jaferi estimated that Mr. Grief put in 25 to 30 hours on that transaction and only charged the uncle $100.00. Mr. Jaferi testified that among his co-workers (he owns 14 filling stations) and friends that:

> They love him. They bring him food. They bring sweet dishes for him. TR 49.

Mr. Grief has continued to work for Mr. Jaferi even after his conviction and his suspension. Mr. Grief has access to all of Mr. Jaferi's business records and to everything that Mr. Jaferi owns.

TR 47.

Mr. Grief's other character witnesses were persuasive also. Richard William Harris, an accountant, testified that he has known Mr. Grief at least 15 years. TR 24. He has done extensive accounting work for Mr. Grief and testified that he has never learned of any material inconsistencies in the information provided to Mr. Harris. TR 26. Any clients that he has referred to Mr. Grief, and clients from Mr. Grief that were referred to Mr. Harris, have all spoken highly of Mr. Grief's services. TR 28. Mr. Harris trusts Mr. Grief, TR 29, and opined that:

> Well, because he [has] done one thing wrong does not make him rotten all the way through. He is a very honest man. TR 30.

As observed by the Referee in her report, witnesses testifying by letter on Mr. Grief's behalf included Peter S. Sachs, a past president of the South Palm Beach County Bar Association and a member of the Board of Governors of The Florida Bar, Howard Greitzer, a past Vice-Chair of a grievance committee, Louis Scholnik, the Chairman of the Board of Colorado Federal Savings Bank, and several other lawyers and non-lawyers in the community. The testimony of these witnesses indicates that Mr. Grief is a good person who engaged in misconduct. That misconduct, however, was an aberration and does not show a lack of good character.

(7) Remorse. Standard 9.32(l). Mr. Grief has accepted responsibility for his misconduct and has acknowledged culpability throughout both his criminal and his Bar proceedings. As was observed in Mr. Grief's Presentence Investigation Report, BEX 4, p.

9,

> Paragraph 38. During the presentence interview conducted by telephone June 26, 1995, the Defendant readily admitted his involvement in the instant offense. He accepted responsibility and expressed remorse about his participation in this scheme.
>
> Paragraph 39. The Defendant at first stated that he was not aware that anything wrong was going on [in paragraph 17 of the PSI it was specifically noted that records reflected that Mr. Grief's co-conspirators contacted him about joining the scheme] with the applications being filed. He stated that during April, 1990, he became aware of the falsification of documentation contained with the applications. He stated down deep in his heart he knew, "I should have gotten out". However, he reported being caught up in the rationale that he was helping people, making easy money, and working with LULAC. He reported that his ego helped lead to his downfall. He rationalized that it was up to the INS to prove that falsified documents were contained in the applications. The Defendant reported, "I know I did something wrong and now I'm going to pay for it."
>
> Paragraph 40. With these statements, the Defendant has demonstrated acceptance of responsibility for the instant offenses.

The Referee also noted on page nine of her report that Mr. Grief "expressed remorse and accepted full responsibility for his actions."

As observed above, the Referee's recommendation that Mr. Grief receive a three year suspension was based on a thorough analysis of the law and on the evidence before her. As this Court stated in Lecznar, supra, at page 1288, this Court should not "second guess" her recommendation in light of its "reasonable basis in existing case law."

The Referee cited numerous cases that support her decision that Respondent should not be disbarred. Among those cases were The Florida Bar v Jahn, 509 So.2d 285 (Fla. 1987), three year suspension for possession of cocaine and delivery of cocaine to a minor notwithstanding his 42 month jail term; The Florida Bar v Stahl, 500 So.2d 540 (Fla. 1987), a three year suspension for delivering false documents to the grand jury; and The Florida Bar v Diamond, 548 So.2d 1107 (Fla. 1989), three year suspension following mail and wire fraud conviction.

The Referee could also have cited as support for her recommendation The Florida Bar v Marcus, 616 So.2d 975 (Fla. 1993) (misappropriation of client funds and misrepresentation to client insurance companies), and The Florida Bar v Smith, 650 So.2d 980 (Fla. 1985) (conviction for tax evasion and false statements to the Federal Election Commission). Both cases resulted in three year suspensions.

Although The Florida Bar readily concedes that disbarment is not mandatory for a felony conviction, see e.g., Jahn, supra, at page 286 ("we.. ..will continue to view each case solely on the merits presented therein.") and The Florida Bar v Pavlick, 504 So.2d 1231 (Fla. 1987) ("minor felony conviction based upon an offered plea for accessory after the fact to a misprision of a felony involving the importation of marijuana warranted only a two year suspension"), by arguing for disbarment in the instant case the Bar seems to be asking this Court to make it virtually automatic after a felony conviction. The Bar asks the Court to

equate the offenses before the Court sub iudice to those involving far, far more serious misconduct and in which disbarment was properly ordered. For example, in The Florida Bar v Bustamante, 662 So.2d 687 (Fla. 1985) this Court accepted the referee's recommendation and disbarred Mr. Bustamante after it was found that he fraudulently induced an insurance company to lend him $725,000.00 and he further induced that company to fraudulently lend $2,600,000.00 to a land developer which resulted in Mr. Bustamante being enriched by an additional $269,000.00. He also used funds "embezzled from a client" to repay interest on the loan.

In addition to the extremely egregious nature of his misconduct, aggravating circumstances involved in Mr. Bustamante's case were (a) his conduct occurred over a five year period (not five months like the case at Bar) and (b) he refused even as late as final hearing before a referee to acknowledge the wrongful nature of his conduct.

Mr. Bustamante was disbarred for five years. It is consistent, almost capricious, to give Mr. Grief the same discipline as that given Mr. Bustamante when Mr. Grief's offenses were far less serious and occurred over a far shorter period of time. The mitigation present, e.g., wholehearted cooperation with the government and The Florida Bar, remorse, and acknowledgement of wrongdoing, dictate a sanction for Mr. Grief far below that given to Mr. Bustamante.

Under no circumstances should Mr. Grief's misconduct be equated to that of Mr. Bustamante. The latter received almost one

million dollars as a result of fraud and embezzled client funds. Their misconduct was different; their sanctions should be different.

The Bar also refers to The Florida Bar v Levine, 571 So.2d 420 (Fla. 1990) as support for disbarment. Mr. Levine, for over one year, assisted his clients "in an investment scheme that defrauded investors." He was ultimately sentenced to two 30-month concurrent prison terms and three years' probations. Mr. Levine's fraudulent scheme resulted in criminal prosecution in two separate states and involved the theft of funds from investors. In disbarring Mr. Levine, the Court specifically noted "that Levine received a more severe sentence...." than one of his co-defendants. That co-defendant was disbarred and the Court obviously considered the fact that not disbarring Mr. Levine would be an inconsistent result. It would be just as inconsistent to disbar Mr. Grief for conduct far less serious and which resulted in no prison term whatsoever. As was true with Bustamante above, Mr. Levine's misconduct was far more serious than that at Bar.

The Florida Bar also relies on The Florida Bar v Calvo, 630 So.2d 548 (Fla. 1994) in its arguments to this Court. In disbarring Mr. Calvo, this Court observed on page 548 that:

> We can conceive of few situations posing more serious harm to a large segment of the public than a fraudulent offering of securities. Such misconduct is certainly comparable to abuse of client trust funds, except that here the number of persons exposed to the risk of harm potentially was in the hundreds or thousands. Securities fraud of the type at issue here risks robbing many everyday citizens of their investments, their

> retirement savings, and their financial security. Calvo and his colleagues fraudulently sold securities that may have been worthless from the moment they were purchased. This is misconduct of a most serious order.

The Bar's reference to The Florida Bar v Isis, 552 So.2d 912 (Fla. 1989) is equally misplaced. Mr. Isis was disbarred for committing organized fraud after having been previously suspended from the practice of law. State ex rel The Florida Bar v Isis, 113 So.2d 227 (Fla. 19591. Mr. Isis pled to conspiracy to commit organized fraud, a secondary felony and the unlawful use of boilerrooms, a third degree felony. He was sentenced to 18 months imprisonment on the fraud charge. His incarceration was to be followed by five years probation and he was fined $10,000.00. In disbarring Mr. Isis, this Court observed that he was "guilty of a serious fraud involving large sums of money." There was no substantial mitigation listed in the Isis case. As was true with the cases cited above, Mr. Isis received a term of incarceration, a factor not relevant here.

Mr. Grief's misconduct was not as serious as that of Mr. Isis, Mr. Grief received no jail time, and Mr. Grief had substantial mitigation. He should not receive the same discipline that Mr. Isis received.

The Bar's references on pages nine and ten of its brief to Mr. Grief's intercepted telephone conversations in April 1993 relate to aggravating factors. Mr. Grief was not charged with and has never been found guilty of illegal conduct regarding the debriefings cited by the Bar. In fact, he walked away from the conspiracy. TR

95.

Mr. Grief's cocaine use was of very short duration, was an isolated episode, and should not be given such weight that it transforms a suspension case into disbarment.

The Florida Bar would have this Court disregard the substantial mitigation presented to the Referee and which obviously influenced her recommendation. The Bar does not contest the validity of the mitigation, it merely argues that it is insufficient to avoid disbarment. First, Respondent would argue that even without mitigation his offense would not warrant disbarment. No analogous cases have been shown the Court in which disbarment has been ordered. Mr. Grief argues further, however, that the extensive and persuasive mitigation present in the case at Bar clearly places his case in the suspension category.

As an example of a case in which this Court has rejected mitigation and ordered disbarment, appellant refers to The Florida Bar Nedick, 603 So.2d 502 (Fla. 1992). Mr. Nedick engaged in tax evasion in 1983 in one partnership, and then after forming another partnership, engaged in tax evasion in 1985 and 1986. This Court found that:

> On six different occasions over a five-year period, Nedick consciously acted to violate the law; and upon the Federal Government's discovery of this violation, he pled guilty and was convicted of tax evasion.

This Court specifically noted on page 503 that Mr. Nedick's misconduct involved "theft"; albeit from the government.

There is no theft in the case at Bar. The nature of the misconduct is certainly a factor for the Court to consider. In the instant case, Mr. Grief enjoyed helping "good people" achieve their dream of living in the best country in the world. TR 103, 104. They were refugees, poor people and others seeking the life that citizens of the United States enjoy. He felt that he was helping people achieve their dreams. His efforts were not geared towards a permanent disposition of their status. He was merely helping them obtain a temporary stay in the United States so that they could apply for "green cards", an opportunity to remain in this country. TR 76.

Mr. Grief did not initiate the scheme that he ultimately found himself engaged in. BEX 4, p. 6. Ultimately, he voluntarily removed himself from it. Although he flirted with a second conspiracy, he withdrew from that conspiracy also.

The mitigation in this case clearly establishes that Mr. Grief is a good person who engaged in some misconduct. The Federal Government recognized that no incarceration was necessary to deter others from like misconduct and to protect the public. Similarly, this Court should recognize that, consistent with the Pahules purposes enunciated by the Court and cited by the Referee, disbarment, the "death penalty" of disciplinary proceedings, is not necessary in the case at Bar. To impose disbarment:

> when there is an expectation of rehabilitation would needlessly blur the distinction between suspension and disbarment.

The Florida Bar v Blessing, 440 So.2d 1275, 1277 (Fla. 1983). Mr. Grief is capable of rehabilitation. A three year suspension is sufficient discipline for his offenses.

The Referee's very well-reasoned decision and recommendations are consistent with the case law and should not be second-guessed by this Court. Lecznar, Id. This Court should uphold the Referee's recommendation that Respondent be suspended for three years nunc pro tunc October 9, 1996.

CONCLUSION

The Referee's recommendation that Respondent be suspended for three years nunc pro tunc October 9, 1996 is well-grounded in case law. The overwhelming mitigation present removes this case from those requiring disbarment. The Referee's report should be adopted without modification.

Respectfully submitted,

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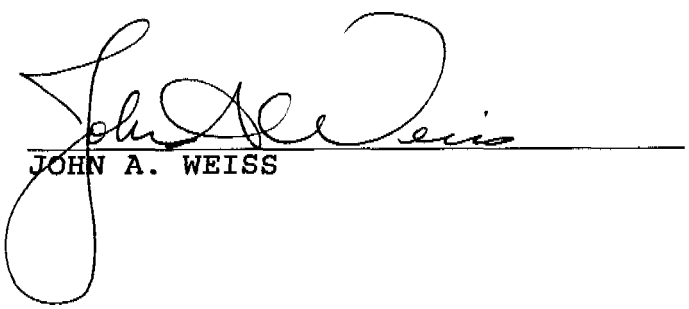
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Brief were mailed to Kevin Tynan, Bar Counsel, The Florida Bar, Cypress Financial Center, Suite 035, 5900 N. Andrews Avenue, Ft. Lauderdale, FL 33309 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 this 9th day of June, 1997.



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