IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR, Complainant-Appellant,	Supreme Court Case No. 88,217
v.	
ALEXANDER NATHANIEL GRIEF Respondent-Appellee.	The Florida Bar File No. 96-51,654(15F-FFC)

THE FLORIDA BAR'S INITIAL BRIEF

KEVIN P. TYNAN, #710822
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue
Suite 835
Fort Lauderdale, FL 33309
(954) 772-2245

JOHN T. BERRY, #217395
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5839

JOHN F. HARKNESS, JR., #I23390
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, FL 32399-2300
(904) 561-5839

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PRELIMINARY

The Florida Bar, Appellant, will be referred to as "the bar" or "The Florida Bar". Alexander N. Grief, Appellee, will be referred to as "respondent". The symbol "RR" will be used to designate the report of referee and the symbol "TT" will be used to designate the transcript of the final hearing held in this matter.

STATEMENT OF CASE AND FACTS

Based upon a guilty plea memorandum executed by the federal government and the respondent, sentence was imposed upon respondent on May 15, 1996 for the commission, by respondent, of a violation of 18 U.S.C. Section 371, a federal felony. On June 7, 1996, the bar filed its notice of determination of guilt and the respondent filed a motion to modify, consented to the imposition of the felony suspension and sought the appointment of a referee to determine the ultimate sanction in this case. The Court, on September 9, 1996, imposed an indefinite suspension and referred the issue of an appropriate sanction to a referee. Ultimately, the Honorable Sharon L. Zeller was appointed to act as referee and the matter proceeded to trial on November 22, 1996.

The parties were in agreement as to the underlying facts of this case and as such there were no issues of fact to be tried. The referee made the following factual determination about the respondent's felony conviction (RR3-4):

> a. From approximately March, 1990 to August, 1990, the respondent operated an immigration consulting business in Las Vegas, Nevada and elsewhere.
>
> b. During this time, the respondent and others assisted aliens to prepare CSS/LULAC applications. The applications were filed

with the INS by respondent or others acting on his behalf.

c. The respondent assisted a large number of aliens to prepare CSS/LULAC applications which he and others caused to be filed at INS Legalization offices around the country.

d. Most of these applications were false in that the alien applications did not meet the continuous residence requirements established by IRCA nor the special requirements established by the Federal Courts in the CSS/LULAC cases to be qualified to file such applications. The respondent knew these applications contained false affidavits, employment letters, postmarked envelopes and other documents which made it appear that the applications were qualified for legalization of their status when, in fact, they were not so qualified.

e. The respondent charged these alien applicants a fee to prepare and file their CSS/LULAC applications with the INS.

f. The respondent specifically admitted that he knowing and intentionally committed the above mentioned acts to which he plead guilty.

g. As part of the plea agreement, the government agreed to forgo bringing federal criminal charges involving an alleged conspiracy to smuggle illegal aliens into the United States in 1993 (Guilty Plea Memorandum, page 5, paragraph 11).

The respondent **was** sentenced for his felonious conduct on May 15, 1996 and **was** placed on probation for three years and was fined in the amount of $3,000.00. RR2. A special condition of his

probation included a six month home detention. Post sentencing, the respondent engaged in significant misconduct. "On July 3, 1996, respondent admitted he used cocaine on three separate dates in June of 1966, and on one date in July of 1996." RR2. What is interesting to note is that after being caught by the probation department on the initial cocaine use, he used cocaine a second time and was caught again. As a result of this illegal cocaine use, the respondent's conditions of probations were modified to include participation in an approved treatment program for drug abuse. RR2.

The referee, after considering all of the testimony, inclusive of character testimony presented by the respondent, entered her recommendation for a three year suspension, nunc pro tunc October 9, 1996 (the date of the Court's order of indefinite suspension) and further recommended that the respondent be placed on Florida Lawyer's Assistance, Inc., probation for the period of his suspension. The Board of Governors of The Florida Bar, at its March 1997 meeting, found the recommended sanction to be to lenient and has authorized this appeal for disbarment.

SUMMARY OF ARGUMENT

This is a serious felony case requiring serious sanction by the Court. The respondent in this case stands convicted of engaging in a five month long immigration fraud scheme, wherein he submitted knowingly false applications to the government which included documentation (birth certificates and other identification credentials) which he knew to have been fraudulently created by a member of the scheme. The respondent also admitted to other egregious criminal activity, The government, as part of its plea agreement, decided not to charge the respondent for conspiracy to smuggle aliens into the country, notwithstanding that the respondent admitted to same. In addition, while on probation, the respondent, after testing positive on a drug screen, admitted to cocaine use on four occasions.

The referee incorrectly found that this serious criminal activity only warranted a three year suspension. At issue in this appeal is whether the mitigation present in this case is sufficient grounds to overcome the presumption of disbarment. In the bar's view it is not. This Court has held that serious felonious misconduct warrants disbarment, even when there is compelling mitigation. See The Florida Bar v. Cohen, 583 So. 2d 313 (Fla. 1991). In this case there is very egregious criminal misconduct

and the mitigation is not very compelling. Accordingly, the bar respectfully requests that this Court enter an order of disbarment.

ARGUMENT

I. WHETHER THE MITIGATION PRESENT IN THIS CASE PROVIDES A SUFFICIENT BASIS TO IMPOSE A THREE YEAR SUSPENSION, RATHER THAN DISBARMENT UNDER THE FACTS OF THIS FELONY CONVICTION.

The only issue in this appeal is whether the mitigation presented at trial provides a sufficient basis to preclude the respondent from being disbarred on the egregious nature of his felonious conduct. It is the bar's position that the Court should exercise its "broad latitude in reviewing a referee's recommendations for discipline" and find that disbarment is the only appropriate sanction for this case. The Florida Bar v. Morrison, 669 So. 2d 1040, 1042 (Fla. 1996).

A) Serious felonies warrant disbarment.

In The Florida Bar v. Bustamante, 662 So. 2d 687 (Fla. 1995), this Court recognized that disbarment, while not automatic, should be the presumed discipline for a felony conviction. Also see Fla. Stds. Imposing Law. Sancs 5.11. This Court, however, has always undertaken to evaluate each case on its own merits. The Florida Bar v. Jahn, 509 so. 2d 285 (Fla. 1987). But the Court has recognized that, while "minor" felony convictions may not

necessarily result in disbarment, 'serious" felonies warrant disbarment. The Florida Bar v. Cohen, 583 so. 2d 313 (Fla. 11991). The example used by the Court to demonstrate this dichotomy was to compare The Florida Bar v. Pavlick, 504 So. 2d 1231 (Fla. 1987) [minor felony conviction based upon an *Alford* plea for accessory after the fact to a misprision of a felony involving the importation of marijuana warranted only a two year suspension] to The Florida Bar v. Isis, 552 So. 2d 912 (Fla. 1989) [conviction for conspiracy to commit organized fraud was a serious felony warranting disbarment]. The Court went on to note that felony arson was also a serious felony warranting disbarment. Cohen t 314.

In the most serious of felony cases disbarment is the appropriate sanction, even in the face of significant mitigation. For example, in Bustamante, the Court was faced with a lawyer who had been found guilty of participating in a "scheme to defraud an insurance company and to obtain money from the insurance company by means of false and fraudulent pretenses". Id. at 688. This scheme included misrepresentations on loan applications and property appraisals, concealment of changes in loan collateral and embezzlement of monies lent under these loans. Id. The Court, in disbarring Bustamante accepted several mitigating factors, as well

as aggravating factors, and found that the mitigation did not overcome the serious nature of the felony. Id. at 689-690.

There are no reported disciplinary cases concerning criminal misconduct in the immigration field. However, there are several significant prosecutions in the securities regulation field, which establish continuing fraudulent patterns, such as the one found in this case, and the Court disbarred the offending lawyer. For example, in The Florida Bar v. Levine, 571 So, 2d 420 (Fla. 1990), the Court was faced with a lawyer convicted in a year long scheme to defraud investors. "Levine's misconduct involved the failure to register agents, the employment of unregistered agents, distribution of unfilled and unapproved sales literature, and fraud in the offer and sale of securities.". Id. at 421. The Court went on to note that Levine was employed as the schemer's lawyer and was not directly participating in the ill gotten gains and that Levine's only compensation for participating in the scheme was the legal fees earned for the work that he performed. Id. The Court determined, however, that this was a "serious offense" and that it warranted disbarment despite the substantial mitigation that was present. Id. Other SEC fraud cases have resulted in the lawyer being disbarred. See for example, Isis; The Florida Bar v. Calvo, 630 So. 2d 548 (Fla. 1994).

The respondent in this case has likewise engaged in a "serious offense". Introduced into evidence as bar exhibit number five was a copy of the government's report of their debriefing interview of the respondent, wherein the respondent detailed his knowledge of the creation of, among other things, fraudulent birth certificates, false identification documents, and altered post marks on envelopes. The debriefing report also revealed that the respondent had knowledge of wholesale immigration fraud for a significant period of time (at least five months) and still continued to file CSSS/LULAC applications with the government, which he knew to contain fraudulent records. THE FLORIDA BAR Exhibit 5. But the most egregious conduct revealed in the debriefing memorandum is the following:

> The first tape played to GRIEF was dated April 28, 1993 and was a conversation between Joe VILLANUEVA and Alex GRIEF. The portion of the discussion that was played was the part in which GRIEF explained to VILLANUEVA that he wished to begin an alien smuggling operation and wanted to know if VILLANUEVA could locate a smuggler to bring the aliens across the border into the United States. THE FLORIDA BAR ex. 5, p.2.

Another taped recorded conversation revealed that:

> GRIEF and VILLANUEVA also discussed KHIMANI and GRIEF's efforts to locate a smuggler who would bring the Pakistani aliens from Belize into Mexico as well as the smuggling fees to

> be charged the smuggled aliens. GRIEF and VILLANUEVA also talked about how much money would be divided among the conspirators. THE FLORIDA BAR ex. 5, p.3.

In addition to the foregoing:

> GRIEF admitted that he had directed VILLANUEVA to have the "smuggler" that VILLANUEVA had contacted bring the alien (a Pakistani) into the United States as a test case to determine if the smuggler was capable of completing the operation. THE FLORIDA BAR ex. 5, p.6

The facts of the respondent's conviction are similar to that of the facts in Levine in that the respondent acted as the lawyer for the schemers by preparing the necessary legal paperwork that made the scheme work. However, the respondent went further in this case in that he attempted to establish and alien smuggling ring. In addition the respondent engaged in criminal misconduct (personal drug use) while on probation. The misconduct in this case falls into the "serious felony" classification and therefore this respondent should be disbarred, absent a showing of overwhelming mitigation.

B) The mitigation does not outweigh this serious felony.

Prior to reaching a decision in a disciplinary case it is important to analyze the mitigation and aggravation that is present and then determine if the mitigation or aggravation warrants a more lenient or a more harsh sanction. The referee in this case found

the following mitigation: no prior discipline, cooperation with the bar, remorse and an otherwise good character and reputation. RR8-9. The bar offers that the following aggravation is present in this case:

a. dishonest or selfish motive;

b. a pattern of misconduct (fraudulent immigration cases were submitted for approximately five months);

c. multiple offense (not only were there multiple fraudulent filings, the respondent took significant steps towards establishing an alien smuggling operation and further engaged in illegal drug offenses after he was placed on probation);

d. substantial experience in the practice of law (admitted in 1977).

It is the bar's position that the aggravation is more significant than the mitigation present in this case. The most telling aggravation is the fact that while the respondent plead to a rather serious felony, the government had ample testimony to charge him with attempting to establish an alien smuggling operation. See THE FLORIDA BAR ex. 5.

This Court has in the past been swayed by overwhelming character testimony. In The Florida Bar v. Smith, 650 So. 2d 980 (Fla. 1995), the Court in choosing not to disbar, found significant

mitigation, but the most compelling had to be the character testimony presented by three former bar presidents, a member of congress, and two state senators. However, two other salient mitigating factors were also present - no violation of a duty owed to a client and an absence of a dishonest or selfish motive. Id. at 981. In yet another felony conviction case, the Court decided on a three year suspension rather than disbarment and stated that:

> . . . we cannot ignore the abundant character testimony from prominent, sober, and reliable witnesses. We find especially telling the fact that Judge Davis, who sat on Diamond's case, testified in Diamond's behalf. The Florida Bar v. Diamond, 548 So. 2d 1107, 1108 (Fla. 1989) .

The respondent, at trial, offered two character witnesses - his accountant who referred clients to the respondent and a former client which is also his current employer. Over the bar's objection, several character reference letters were also submitted into evidence. The character testimony present in this case does not approach the magnitude of the character testimony found in Smith or Diamond and the other mitigating factors found by the referee do not carry much weight.

The Court has not always accepted the mitigation as a compelling reason not to disbar. In rejecting the mitigation in Nedick (no prior discipline, cooperation with the criminal

authorities and the imposition of other penalties) the Court found that the "mitigating factors are outweighed by the seriousness of the offense, its wilful and repetitious nature, and the selfish and deceitful motive behind it." Id. at 503. In Bustamante, the Court decided to disbar and noted that:

> . . . we find Bustamante's case to be much more akin to The Florida Bar v, Wilson, 643 so. 2d 1063 (Fla. 1994) and The Florida Bar v. Nedick, 603 So. 2d 502 (Fla. 1992). In Wilson, the respondent had been convicted of two felony charges for the reporting of fictitious and inflated costs to the State of New York so that a nursing home and its owners could obtain funds from the state Medicaid program. We disbarred the respondent despite substantial mitigating character evidence. In Nedick, we disbarred the respondent for repeatedly joining with others in making and subscribing to false income tax returns and pleading guilty to tax evasion despite the respondent's cooperation with authorities once the behavior was exposed. Bustamante at 690.

It is believed that the respondent will rely not only on the Diamond case, discussed above, but also several other cases wherein a felony convicted lawyer received less than disbarment. The first such case is Jahn and Jahn is easily distinguished in that substantial mitigation was found and the Court commented that:

> The referee, in a thoughtful and cogent report, concluded that Jahn's lack of prior disciplinary history, the fact that no clients were injured, that Jahn's misconduct was directly related to his drug addiction and

> Jahn's exemplary efforts to rid himself of his chemical dependancy should be considered as mitigating the discipline to be imposed.

Id. at 287. In this case, while there is post criminal conviction drug use, there is no evidence that the misconduct is directly related to a drug addiction.

The next case is more difficult to distinguish for there is no discussion of aggravation and mitigation and no discussion of the rationale for why this was a three year suspension case. The Florida Bar v. Stahl, 500 so. 2d 540 (Fla. 1987). Of necessity then, we must concentrate on the nature of the felony and compare it to the case at hand. In Stahl the lawyer was convicted of providing several fraudulent documents to a federal grand jury, which documents were subpoenaed by the grand jury which was trying to establish the true owner of a certain parcel of real estate. Id. at 541. Stahl denied that he had the intent to obstruct justice by supplying this fraudulent documentation, rather he stated that he had to produce it because it was in his file. Id. But in any event it is clear that Stahl committed one bad act and the respondent in this case committed multiple acts of misconduct over a five month period of time. This is similar to the last case relied upon by the respondent. In The Florida Bar v. Golden, 544 so. 2d 1003 (Fla. 1989), the Court found that Golden's misconduct

arose "out of a single isolated incident" wherein he deleted one line from a treating physician's report and then used this altered report in a demand letter.

There are many similarities between this case and Bustamante and Nedick. In all three cases you have significant fraudulent criminal activities that occurred over a significant period of time. In all three cases you have a lawyer who financially benefited from the scheme (albeit the respondent only received legal fees) and were active participants in the submission of fraudulent documents to the government or third party. Bustamante and Nedick were disbarred and this respondent should face a similar fate.

CONCLUSION

This Court has long held that in imposing a disciplinary sanction, the Court "must reach a judgement that is not only fair to society and to the attorney but also severe enough to deter other attorneys from engaging in similar misconduct." Smith at 982. In the bar's view, disbarment is the only sanction that fits the facts of this case and the Court's criteria for imposing lawyer sanction.

WHEREFORE, The Florida Bar respectfully request this Court to reject the referee's sanction recommendation and instead enter an order of disbarment nunc pro tunc October 9, 1996.

Respectfully submitted,

KEVIN P. TYNAN, #710822
Bar Counsel
The Florida Bar
5900 N. Andrews Avenue, #835
Fort Lauderdale, FL 33309
(954) 772-2245

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing initial brief of The Florida Bar has been furnished via regular U.S. to John A. Weiss, attorney for respondent, at 2937 Kerry Forrest Parkway, Suite B2, Tallahassee, FL 32308-6825; and to John A. Boggs, Director of Lawyer Regulation, at The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 on this 24th day of April, 1997.

KEVIN P. TYNAN