IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NO. SC 00-890

TFB No. 2000-71,345(11H)

JORGE LUIS CUETO,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

Undersigned counsel does hereby certify that the Answer Brief of Respondent is submitted in 14 point proportionately spaced Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton AntiVirus for Windows.

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PRELIMINARY STATEMENT

Appellant, THE FLORIDA BAR, will be referred to as such or as the Bar. Respondent, JORGE LUIS CUETO, will be referred to as either Respondent or Mr. Cueto.

References to the transcript of the final hearing will be by the symbol "T." followed by the appropriate page number. Any references to Mr. Cueto's February 17, 2000 sworn statement will be by the symbol "S." followed by the page number. References to the Report of Referee will be by the symbol "RR." followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

This case is a matter of original jurisdiction before this court pursuant to Article V, Section 15 of the Florida Constitution.

On November 20, 2000, The Honorable Amy Steele Donner, this court's Referee in these proceedings, rendered her Report of Referee in which she found Respondent guilty of violating Rules 3-4.3 and 4-8.4(b) of the Rules Regulating The Florida Bar. Judge Donner specifically found Respondent not guilty of violating Rule 4-8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit or misrepresentation).

As the appropriate discipline for Respondent's misconduct, Judge Steele recommended that Respondent be suspended for three years *nunc pro tunc* April 27, 2000, the date on which he was automatically suspended pursuant to his felony conviction.

On December 27, 2000, the Bar served its Petition for Review. In that petition, the Bar stated that it was asking "this Court to review the report of its referee as to the recommended discipline only."

The Bar has not appealed the Referee's findings of fact, conclusions of law, or

the Rules that she found that Respondent had violated and not violated. Accordingly, the only issue before this court is the discipline to be imposed.

There was no dispute about the facts before the Referee. Mr. Cueto admitted all of the allegations in the Bar's amended complaint with the exception of the Rules alleged to have been violated. As noted by the Referee, the only misconduct before her was the Respondent's conviction of one count of Unlawful Compensation, a third degree felony. There was no other misconduct before the Referee. For his offense, Mr. Cueto was sentenced to five years probation, with no incarceration, $431.00 in court costs and was ordered to reimburse Miami-Dade County $15,000.00 for the costs of its investigation. Respondent's plea agreement with the State contained the provision that if all funds were paid prior to the expiration of three years of probation, that probation would be reduced by two years to a three year term.

In her report, the Referee made the following findings of fact:

A. Respondent is and was at all times material herein a member of The Florida Bar, albeit felony suspended by order dated April 4, 2000, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. The Respondent was one of fifteen defendants in a criminal case designated in a multiple count indictment, in the Eleventh Judicial Circuit, in and for Miami-Dade County, Florida, Case No. 99-17765D-Levenson.

C. The Respondent pled guilty to one (1) count of Unlawful Compensation/Reward for Official Behavior as charged in the

> Information filed in this cause. The State has, in furtherance of the plea agreement, filed a nolle prosse on the following seven (7) remaining offenses: Two (2) counts for RICO-Conduct or Participation in an Enterprise through a Pattern of Racketeering Activity, three (3) counts for Bribery, one (1) count for Grand Theft, third degree, and one remaining count of Unlawful Compensation/Reward for Official Behavior.
>
> D. This Complaint is being filed pursuant to Rule 3-7.2(i)(1) and (2) of the Rules of Discipline which authorizes the filing of a complaint with the Florida Supreme Court to initiate disciplinary proceedings based upon a determination of judgment of guilt and without there first having been a separate finding of probable cause.

The Referee correctly observed that because the Bar was filing its complaint pursuant to Rule 3-7.2 (thereby bypassing the grievance committee procedure and with the provision that the conviction is conclusive proof of guilt for the offenses contained within the conviction) that "the only misconduct before this Referee is Respondent's one count of Unlawful Compensation." (A violation of F.S. 838.016)

In Section III of her report, the Referee stated in the first paragraph that:

> I recommend that Respondent be found guilty of violating Rule 3-4.3 (Misconduct and Minor Misconduct) of the Rules of Discipline of The Florida Bar and Rule 4-8.4(b)(A lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects), of the Rules of Professional Conduct.

The Referee also found on page three of her report that:

> In the case before me I have been presented with absolutely no evidence indicating that any of Respondent's cases pertinent to this matter involved fraudulent claims or that any of the compensation paid for his

> clients' claims was unjust. Indeed, not even the criminal charges against Respondent contained any such allegations. Accordingly, I find that Respondent has not violated Rule 4-8.4(c). Pettie, *supra.*

In addition to recommending a three year suspension *nunc pro tunc* April 27, 2000, the Referee recommended that Respondent be assessed the costs of the Bar's proceedings in the amount of $870.00.

The Referee observed in paragraph IV on page five of her report that Respondent cannot be reinstated to practice until his civil rights are restored and until he proves rehabilitation in reinstatement proceedings.

In addition to citing numerous cases that supported her decision, the Referee made the following statement at the end of Section three of her report on page five:

> Finally, I am impressed by the mitigation presented by Respondent. His character witnesses make it clear that until his recent arrest Respondent had an excellent reputation in the community in which he lived and worked. He has no prior disciplinary history. I note that Respondent did not initiate the conduct that led to his conviction, rather, employees of the county approached him when he was a fledgling lawyer. I note further that none of Respondent's clients was adversely affected by his conduct and that there was no evidence indicating any of the claims were fraudulent or that they were overpaid.

The Referee found in Section V of her report that Respondent had been admitted to the Bar on May 8, 1992 and was thirty-three years old. He had no prior disciplinary history.

The date of Respondent's admission to the Bar was significant. As accurately

set forth in the Bar's statement of facts, Respondent was approached by officials of Miami-Dade County in 1993. As the Referee observed, he was a "fledgling" lawyer at the time. In essence, the adjusters told him that if he did not pay them ten percent of the total award (Bar Counsel inadvertently stated on page one of his brief that the arrangement was ten percent of Respondent's fee; in fact, it was ten percent of the total award) that his cases would be placed on a backburner and would not be processed.

As observed by the Referee, there was no evidence in either the criminal proceedings or before the Referee that even hinted that any of the cases in which Respondent paid the ten percent were bogus or in any way fraudulent. There was absolutely no evidence indicating that any of the amounts paid to Respondent's clients was anything other than a just and reasonable payment. Finally, Respondent testified and there is absolutely no evidence rebutting his testimony, that the ten percent paid to the adjusters came entirely out of his fees and that the clients received the total amount to which they were entitled.

Respondent testified on his own behalf at final hearing on this matter. At that hearing, he presented the testimony of three character witnesses and submitted into evidence the testimony of four other witnesses by affidavit.

Mr. Cueto testified that he was first approached by Julio Garcia in 1993,

approximately one year after Mr. Cueto began practice. Mr. Garcia basically told Respondent that his cases would not be settled unless Respondent agreed to pay Garcia and his cohorts ten percent of the gross settlement of any case. Respondent testified that Mr. Garcia stated

> If you don't play ball, if you don't play ball by allowing me to receive 10 percent of the claim, then I will tell you that that claim is going to be denied, the case is going to be placed into litigation and possibly taken to trial; and that this is the way to settle it quickly (T. 27)
>
> ...
>
> he made it seem that that's the way that business was done, that this is the way that the County did business, doing these things when they were working with other attorneys. T. 82.

Mr. Garcia was a supervising adjuster at the time of the contact. T. 102.

Mr. Cueto testified that at the time he entered into the arrangement with Mr. Garcia, he did not think his conduct rose to the level of criminal activity. He thought of it more in terms of improper fee sharing with a nonlawyer. T, 16, 36, 88, 99.

Over the years, Respondent settled approximately thirty-five cases with the county through Mr. Garcia and his cohorts. T, 83. Some of Respondent's claims with the county were denied. T. 86, 109. During his practice, Respondent has handled approximately 2,500 cases and he testified that the income that he derived from his county claim cases was not significant. T. 86, 87.

Respondent testified that he did not report Mr. Garcia's conduct to the police

because he did not believe it was criminal in nature. He also pointed out that it would do no good to go to Mr. Garcia's superiors because Mr. Garcia himself was the supervising adjuster. T, 102.

Respondent's sentence for his offense was five years probation. If he paid the cost of investigation within three years, however, his plea agreement called for his probation being reduced to three years. T, 29.

Respondent also testified that all of his claims were legitimate, that they were serious-injury cases and that they were settled for a reasonable amount. T, 17, 83. Mr. Cueto recognized that he was the only person who was to blame for his misconduct. T, 96.

Respondent presented the testimony of seven witnesses to attest to his good character and in mitigation of discipline. Three of those witnesses testified in person and four others submitted their testimony through affidavit. Five were lawyers and all found Respondent to be a person of good character and who had a good reputation in the legal community.

The first witness, John H. Ruiz, has been practicing law since 1993. He has known Mr. Cueto about twenty years, T. 40, and he testified that until the instant charges arose, he never heard anyone accuse Mr. Cueto of anything improper. T, 44. Mr. Ruiz testified that he did not believe that Mr. Cueto appreciated the seriousness

of his misconduct at the time it was occurring. T. 46. Mr. Ruiz believed that Respondent was capable of rehabilitating his name in the Miami legal community. T. 46.

Andrew Haggard, a highly regarded lawyer in Miami, also testified on Mr. Cueto's behalf. Mr. Haggard has practiced law since 1967. Among his numerous credentials is his service on the Florida State Ethics Commission from 1990 to 1992. He was a vice-chair of the Commission his last year in office. T. 54.

Mr. Haggard has known Respondent for approximately four years. Mr.Haggard met Respondent through George Haggard, his son, and testified that Respondent has served "of counsel" on numerous cases with the firm. All of the cases were legitimate. T. 55, 56. Mr. Haggard testified that he kept track of his lawyers and that Mr. Cueto was a "very good" lawyer. Mr. Haggard described Respondent's professionalism as excellent and he felt that Mr. Cueto was a person with impeccable moral standards. T. 58, 59, 61. Mr. Haggard also testified that Respondent has exhibited remorse for his conduct and has never evinced any excuses for his wrongdoing. T. 61.

Rafael Cruz Alvarez also testified on behalf of Respondent. Mr. Alvarez was admitted to the Bar in 1993 and has known Respondent since they were undergraduates at the University of Miami. They first became close friends when they

were studying for the bar exam in 1992. T. 71. They have been adverse counsel in litigation. T. 72. Mr. Alvarez believes Mr. Cueto to be a "forthright and honest" person. T. 74. He also corroborated Mr. Haggard's testimony that Respondent was remorseful for his misconduct and realized that he exhibited a lack of judgment and that he had to deal with the consequences of his conduct. T. 74.

Respondent also submitted into evidence four affidavits. Jose M. Francisco has been a lawyer for nine years. He has known Mr. Cueto for twelve years. He attested to Mr. Cueto's strong morals and character. He testified that Mr. Cueto has an "excellent reputation for integrity and ethics in the legal community". He also observed that Mr. Cueto regrets his conduct, understands his mistake and Mr. Francisco believes that it will never happen again. He observed that Mr. Cueto is capable of rehabilitation.

David Rodriguez, a lawyer for nine years, also submitted an affidavit on Mr. Cueto's behalf. He has known Mr. Cueto for approximately twelve years and found him to be a person of "strong moral character". Mr. Rodriguez and Mr. Cueto have worked cases together and Mr. Rodriguez finds him to be a lawyer of the utmost professionalism. Mr. Rodriguez also attested to Mr. Cueto's remorse.

Two nonlawyers also submitted affidavits on behalf of Mr. Cueto. Carlos Jose Acosta, Jr., is a former client of Mr. Cueto's. Mr. Acosta found Mr. Cueto to be "a

very capable and ethical lawyer" and testified that he has referred two friends to Mr. Cueto for representation. Eric Silver, a stockbroker in New York City, attended law school with Mr. Cueto and has known him for twelve years. He has remained in close contact with him since their graduation. Mr. Silver believes that Mr. Cueto is a person of great integrity. He attested to Mr. Cueto's remorse for his conduct and he opined that Mr. Cueto would be able to rehabilitate his good name.

The Bar also submitted into evidence the sworn statement that Respondent gave to law enforcement officials on February 17, 2000. Because Respondent was only before the Referee on one count of misconduct, the statement and the incidents described therein could only be considered by the Referee in aggravation of discipline. Respondent was not found guilty of misconduct for any of the actions described in the statement. In essence, however, the statement was nothing more than information elicited by counsel during Respondent's testimony to the Referee.

SUMMARY OF ARGUMENT

Respondent appears before this Court convicted of one count of unlawful compensation, a third degree felony. He was sentenced to five years probation with no incarceration. A specific provision of his probation is that if he pays the cost of investigation, $15,000, within three years, his probation will be reduced by two years.

The only issue before this Court on appeal is the propriety of the Referee's recommendation that Respondent be suspended for three years. This Court has said on numerous occasions that a Referee's recommendation will be upheld unless it is clearly off the mark. *The Florida Bar v. Lecznar*, 690 So.2d 1284 (Fla. 1997). The cases cited by Respondent at final hearing and in this brief conclusively show that the Referee's recommendation that Respondent be suspended for three years is within the realm of reasonableness and, therefore, it should be upheld.

ARGUMENT

POINT I

THE REFEREE PROPERLY RECOMMENDED A THREE YEAR SUSPENSION FOR RESPONDENT'S CONVICTION OF ONE COUNT OF A THIRD-DEGREE FELONY; HER RECOMMENDATION IS SUPPORTED BY PRIOR CASE LAW AND BY THE MITIGATION IN THE RECORD, AND THEREFORE, IT SHOULD BE UPHELD BY THIS COURT.

The only issue before this Court is the propriety of the Referee's recommendation that Respondent receive a three-year suspension for his conviction of one count of Unlawful Compensation, a third degree felony. The Bar has not appealed the Referee's findings of fact or her conclusions of law. The Bar has the burden of proving that the Referee's recommendation is "erroneous, unlawful, or unjustified." Fla. R.Regulating Fla.Bar 3-7.7(c)(5). The Bar has failed to meet its burden and the Referee's recommendation that Respondent be suspended for three years and thereafter until he prove rehabilitation should be upheld.

This Court has stated on many, many occasions that a Referee's recommended discipline will not be reversed as long as there is a basis for the recommendation. For example, in *The Florida Bar v. Lecznar*, 690 So.2d 1284, 1288 (Fla. 1997), this Court

stated:

> we will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing case law.

Similarly, in *The Florida Bar v. Dunagan*, 731 So.2d 1237, 1242 (Fla. 1999), this Court stated:

> the referee's recommendation is presumed correct and will be followed if reasonably supported by existing case law and not "clearly off the mark". The Florida Bar v. Vining, 707 So.2d 670, 673 (Fla. 1998).

The Referee's recommendation that Respondent receive a three-year suspension is reasonably based on existing case law and is not "clearly off the mark." Accordingly, it should be upheld.

It is well-settled law in Florida that a felony conviction does not automatically result in disbarment. See, e.g., *The Florida Bar v. Jahn*, 509 So.2d 285 (Fla. 1987). In *Jahn*, at page 286, in rejecting the Bar's argument that there should be such a rule, the Court stated:

> The bar's second argument is that this Court should adopt an automatic disbarment rule whenever an attorney is convicted of a felony. We reject this suggestion and will continue to view each case solely on the merits presented therein.

Mr. Jahn had been convicted of the first-degree felony of Delivery of Cocaine to a Minor and the third-degree felony of Possession of Cocaine. Based on the mitigation before the Court, Mr. Jahn received a three-year suspension for his offenses.

This Court's policy of looking at each felony conviction case "solely on the merits presented therein..." is a sound policy and should be continued. Where, as here, a lawyer is convicted of one count of a third-degree felony, with no jail time given, he should not receive exactly the same treatment as a lawyer convicted of a first-degree felony. There are gradations of felonies and the discipline imposed on a lawyer convicted of a felony should bear a reasonable nexus to the seriousness of the felony.

In the case at bar, Respondent was convicted of a single count of unlawful compensation to a public employee, a third degree felony. He was not convicted of bribery. He was not convicted of (or even charged with) submitting bogus or fraudulent claims to the county. There is no evidence in the record that contradicts Respondent's testimony that all of his claims were valid and that all of his clients received a reasonable settlement for their claims. T. 17. Simply put, Respondent's conduct does not warrant the "extreme and ultimate" discipline of disbarment.

> We cannot say that the record here establishes that this respondent is one that has been demonstrated within that class of lawyers "unworthy to practice law in this State" as provided in Integration Rule 11.02. Disbarment is the extreme and ultimate penalty in disciplinary proceedings. It occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings.

The Florida Bar v. Hirsch, 342 So.2d 970 (Fla. 1977).

In *The Florida Bar v. Pahules*, 233 So.2d 130, 132 (Fla. 1970), this Court pointed out that the purpose of discipline is threefold: it should be fair to society, it should be fair to the Respondent and it should be severe enough to deter others. The three year suspension recommended by the Referee in this case meets all three purposes. It certainly is harsh enough to deter other lawyers from engaging in similar conduct. A suspension is fair to the Respondent in that it imposes a stern discipline while simultaneously encouraging rehabilitation. Applying the "death penalty" of attorney discipline to a conviction of one count of a third degree felony would not be a sanction falling within the *Pahules* parameters.

Even if the crime for which Respondent was convicted merited disbarment, the mitigation presented to the Referee in this case removed his offense from one warranting such a Draconian measure. The Referee was clearly "impressed by the mitigation presented by Respondent". RR, page 5. As she observed in her report:

> His (the Respondent's seven) character witnesses make it clear that until his recent arrest, Respondent had an excellent reputation in the community in which he lived and worked. He has no prior disciplinary history. I note that Respondent did not initiate the conduct that led to his conviction, rather, employees of the county approached him when he was a fledgling lawyer. I note further that none of Respondent's clients was adversely affected by his conduct and that there was no evidence indicating that any of the claims were fraudulent or that they were overpaid.

Standard 9.32 of the Florida Standards for Imposing Lawyer Sanctions lists various

mitigating factors which may be considered in determining a discipline to be imposed. Many of those factors were evident in the case before the Referee, including:

9.32 (a) Absence of a prior disciplinary record;

9.32 (e) Full and free disclosure to disciplinary board or cooperative attitude toward proceedings;

9.32 (f) Inexperience in the practice of law;

9.32 (g) Character or reputation; and

9.32 (l) Remorse.

Perhaps the most significant mitigation involved here is that Respondent did not initiate the misconduct at bar. Respondent was a brand-new lawyer, practicing for about a year, when he was approached by an adjuster from the county and told that he had to pay to the adjusters ten percent of the total recovery of any of his clients with claims before the county or their cases would be placed in limbo. Respondent, a new lawyer, succumbed (as apparently did numerous other lawyers in Dade County) to the pressure brought by the adjusters. He testified that he did not realize at the time that his conduct was criminal. T. 16, 36, 88. Once in a situation like that, it is difficult to extricate oneself from it. Respondent was not able to do so.

There is a complete absence of evidence in either the criminal proceedings or the Bar proceedings indicating that any of the claims in which unlawful compensation

was paid were in any way fraudulent or bogus. In fact, Respondent testified that all of the claims were proper, and there was no evidence submitted to rebut that claim. T. 17. Indeed, no such evidence could have been elicited because the claims were all valid. Similarly, there is no evidence indicating that any of the money paid to the county on behalf of Respondent's clients was anything but a valid settlement figure.

Other mitigating factors before the Court are Respondent's absence of a prior disciplinary record (he has practiced since May 8, 1992 without any other problems) and his excellent reputation for honesty and legal ability in the community in which he lives and practices. The witnesses' testimony and Respondent's own words make it clear that he sincerely regrets his conduct.

Inherent within the Referee's recommended discipline is her belief that he is capable of rehabilitation. She would not have recommended a suspension otherwise. As this Court stated in *The Florida Bar v. Tauler*, 775 So.2d 944 (Fla. 2000),

> this Court has recognized that the referee "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),"[citing *Lecznar*].

The Referee, who observed the young man before the Court while he testified, and who "occupies a favored vantage point...", opined that disbarment is not warranted for the offenses he committed. Respondent urges the Court to affirm her opinion.

The Referee's position that suspension is the appropriate discipline to be imposed has "a reasonable basis in existing case law." *Lecznar*, p. 1288. The Bar was unable to find any Florida cases on point which show that the Referee's recommendation was "clearly off the mark". *Dunagan, supra.* Indeed, there are none.

While the undersigned could find no cases exactly on point, there are numerous analogous cases in which lawyers received suspensions for similar misconduct, or in many cases, much more serious misconduct. For example, in *The Florida Bar v. Klausner*, 721 So.2d 720 (Fla. 1998), a lawyer received a three-year suspension after pleading *nolo contendere* to felony charges "of scheming to defraud, forgery, and uttering a forged instrument." He subsequently pled no contest to related misdemeanor charges. Adjudication of guilt had been withheld on the felonies, but he was convicted of the misdemeanors, was sentenced to one day in jail and was placed on three years probation.

Mr. Klausner's discipline was the result of his recreating ten old stipulations and forging adverse parties' names on the documents without their knowledge or authorization. He submitted those documents to a judge during two separate hearings. When questioned by the judge about one of the signatures, Mr. Klausner lied to the court. Subsequently, he lied to an investigator from the State Attorney's Office in

regard to four of the documents.

In upholding the Referee's recommendation that Mr. Klausner be suspended for three years, this Court specifically noted that he was

> Sincerely remorseful, is young and relatively inexperienced, has been criminally sanctioned, and has had no prior Bar discipline.

Similarly, Mr. Cueto is sincerely remorseful, young, and relatively inexperienced. Certainly, he was inexperienced when he was first approached by Mr. Garcia.

That The Florida Bar also views matters on the merits of each individual case was made apparent to the Referee at final hearing when she was provided with a copy of the Report of Referee accepting a consent judgment in *The Florida Bar v. Arbuckle-Anderman*, Case No. SC 99-172. Ms. Arbuckle-Anderman pled no contest to one count of Official Misconduct and was placed on probation for three years. Adjudication of guilt was withheld in her case. Ms. Arbuckle-Anderman received a six-month suspension for her misconduct pursuant to an agreement with the Bar.

Similarly, in *The Florida Bar v. Arnold*, 767 So.2d 438 (Fla. 2000), a lawyer received a suspension rather than being disbarred for criminal misconduct. In *Arnold*, the accused lawyer allowed his firm's trust account to be used to launder money obtained from drug-smuggling activities.

In *The Florida Bar v. Tauler*, cited above, the accused lawyer received a three

year suspension after improperly disbursing to herself over $56,000 in trust funds. Mr. Cueto's offense, in which no clients were in any way harmed or even inconvenienced, does not warrant a sterner discipline than that imposed on Ms. Tauler.

Finally, in *The Florida Bar v. Smith*, 650 So.2d 980 (Fla. 1995), a former public official convicted of two felonies received a three year suspension. Mr. Smith was guilty of tax evasion (he failed to report $110,398 in income over a four year period) and submitting a false statement to the Federal Election Commission (he fraudulently stated to the FEC that he paid $10,000 to an individual for consulting services). Mr. Smith was sentenced to three months in prison followed by two years supervised release. Unlike Mr. Smith, Mr. Cueto received no jail time. And, if Mr. Cueto pays his court costs within three years, his probation will be reduced to three years.

Mr. Cueto's offense was no worse than that of lawyers Klausner, Arnold, Arbuckle-Anderman, Tauler or Smith. He should not receive a harsher punishment than they did.

Respondent takes issue with three arguments set forth in the Bar's initial brief: first, that the Referee improperly acquitted Respondent of a violation of Rule 4-8.4(c) (prohibiting conduct involving dishonesty, fraud, deceit and misrepresentation) – a ruling that was not appealed by the Bar and, therefore, one which the Bar cannot take

issue with on appeal; secondly, that there is virtually no distinction between bribery and unlawful compensation; and, finally, that Respondent's conduct warrants disbarment.

The Bar's petition for Review specifically stated that it was only appealing the Referee's recommended discipline. However, the Bar states in its summary of argument that the Referee "improperly found Respondent not guilty of violating Rule 4-8.4(c)". On pages nine and ten of its brief, the Bar argues that the Referee's recommendation was improperly based on her acquittal of Respondent violating Rule 4-8.4(c) and that *The Florida Bar v. Pettie*, 424 So.2d 734 (Fla. 1983) did not apply. Pettie received a two-year suspension after being found to have participated in a drug importation conspiracy. (There was substantial mitigation involved in the case, not the least of which was Respondent's cooperation with law enforcement authorities at the risk of his life). In *Pettie*, the Supreme Court rejected the Bar's position that "engaging in illegal conduct is *ipso facto* the same as engaging in dishonest conduct". *Ibid.*, page 734.

In the case at bar, in finding that the Respondent did not violate Rule 4.8.4(c) the Referee recognized that none of the claims submitted by Respondent to the county were improper, that the amounts paid for those claims were proper, and that the clients suffered no prejudice or harm as a result of Respondent's conduct. There is

no evidence that Respondent lied, cheated or stole money from either the county or from his clients.

The Referee's conclusion that Respondent did not violate Rule 4-8.4(c) is supported by the *Pettie* case, is well-founded in the facts before this Court, and is eminently correct. If the Bar disagreed with that conclusion, it should have appealed it. Since it did not, its arguments that the ruling was improper should be disregarded and, Respondent respectfully submits, this Court must accept it as true.

The Bar would have this Court blur, or entirely eliminate, the distinction between bribery and unlawful compensation. Respondent urges this Court to firmly reject that argument. If there were no distinction between the two offenses, there would not be separate statutes dealing with them. The bribery statute, Section 838.015, prohibits payment "with an intent or purpose to influence the performance or any act or omission...[by] a public servant...". In other words, bribery prohibits payment to a public official in an attempt to get them to do something that they would not normally do. Unlawful compensation, on the other hand, prohibits improper payment for a public servant performing their duties in a proper manner.

In the case at bar, there is absolutely no evidence before this Court that indicates that Mr. Cueto was attempting to get the adjusters to do anything improper in regard to his clients' claims. Rather, Respondent was told that if he did not make

the payments, the adjusters would improperly deny his clients' claims and force him to take to trial cases that normally would be settled.

The Bar cites *State v. Saad*, 429 So.2d 757 (Fla. 3rd DCA 1983), *State v. Lopez*, 522 So.2d 997 (Fla. 3rd DCA 1988) and *State v. Gonzalez*, 528 So.2d 1356 (Fla. 3rd DCA 1988) in support of its argument that Respondent's conduct *possibly* could be have been considered bribery. That is beside the point; Respondent was *not* convicted of bribery. He was convicted of unlawful compensation, a third degree felony and a different offense from bribery.

These proceedings were brought pursuant to Rule 3-7.2(i)(2) of the Rules Regulating The Florida Bar. The only issue before the Court is the discipline to be meted out for Respondent's conviction, and *only* Respondent's conviction. The Bar cannot go outside the four corners of the conviction and argue that, in reality, other crimes had been committed. Because the rule specifically states that the conviction is conclusive proof of guilt, the Respondent is precluded from arguing his innocence. The flip side of the coin, however, is that the Bar is limited to seeking discipline only for the conviction.

Whether Respondent's conduct fits into a neat definition of "corrupt" is not the issue before the Court. Respondent recognizes that his conduct was wrongful. If it were not, he would not be facing discipline from the Bar. The only issue before this

Court is the discipline to be handed down for Respondent's misconduct. The Referee found that the appropriate discipline was a three year suspension. The Bar has shown this Court no case law in Florida disciplinary proceedings showing otherwise. The Referee's decision, therefore, should be upheld.

The only case cited by the Bar that is even similar to the instant case is *The Florida Bar v. Cruz*, 490 So.2d 48 (Fla. 1986). Mr. Cruz was found guilty of bribery. He attempted to bribe a warden to gain improper privileges for an inmate. Mr. Cruz was convicted of two felony counts: one count of conspiracy to bribe and one count of bribery of a United States official. He was sentenced to incarceration for one year.

It appears that not only was Mr. Cruz trying to bribe a governmental official, but he himself was also a governmental official, i.e., the United States Marshall for the Southern District of Florida at the time of his crimes. These distinctions, conviction of two bribery-related felony counts, one year's incarceration, and holding an important governmental position at the time he was trying to bribe another governmental official, make Mr. Cruz's offenses far more egregious than in the case at bar.

It is also significant to note that in the *Cruz* case, the Referee recommended disbarment. In the case before the Court today, the Referee recommended a three year suspension.

The Bar's reliance on *The Florida Bar v. Kickliter*, 559 So.2d 1123 (Fla. 1990) is equally misplaced. Mr. Kickliter was disbarred for deliberately and knowingly perpetrating a fraud upon the court. He forged a deceased client's name to a will. He then compounded his misconduct by having two employees witness his signature, thereby subjecting them to possible criminal prosecution also. He then submitted the will to probate, thereby deceiving the court. He even advised the heirs to the estate to lie, possibly subjecting them to criminal prosecution for perjury. Clearly, Mr. Kickliter's offenses were far more egregious than Mr. Cueto's and therefore, he should receive a sterner discipline.

In arguing that Respondent's character testimony should have been ignored by the judge, the Bar ignores the fact that a lawyer's reputation in the community is specifically listed as a mitigating factor in the standards for imposing discipline. It also ignores the fact that this Court has specifically acknowledged that a Referee has a vantage superior to this Court in evaluating mitigation of discipline. *Lecznar* and *Dunagan, supra.* Both cases cited by the Bar, *The Florida Bar v. Whitney*, 237 So.2d 745 (Fla. 1970) and *The Florida Bar v. Calhoon*, 102 So.2d 604 (Fla. 1958) came down before this Court adopted the Bar's standards for imposing discipline and before this Court's pronouncement in *Dunagan, supra.*

In fact, *Whitney* does not stand for the proposition that a Referee cannot

consider character in determining discipline. The Court's holding in *Whitney* was that good character has "little relevancy in arriving at a conclusion concerning his guilt or innocence." Nothing in *Whitney* says that a Referee cannot consider good character in determining the discipline to be imposed.

Mr. Calhoon was disbarred because he conspired with another lawyer to bribe a judge and to then use the bribe as a threat to compel the judge to enter favorable orders on behalf of Mr. Calhoon's clients. The conduct involved in *Calhoon* was much more serious than in the case at bar.

The Bar alludes to the fact that Respondent did not report his misconduct or that of the crooked adjusters to the police. It did not occur to Respondent that his conduct could be criminal until he was arrested. He thought of it more in terms of sharing fees with nonlawyers. T. 16, 36, 88 and 99. Furthermore, Respondent did not know how high the corruption in the claims office went. Mr. Garcia himself was a supervisor. T. 97, 102. Finally, once involved, Respondent

> realized at that point that I was so far into it that it was just very hard for me to get out. T. 97.

Finally, it must be pointed out that, while Respondent's payoffs occurred over a six year period, it only involved about thirty-five of his 2,500 cases. T. 86. This was not a major part of Respondent's practice.

Respondent does not come before this Court arguing that he has not engaged in serious misconduct. The fact that he is not contesting the Referee's recommendation that he receive the maximum suspension allowable, i.e., three years, makes that evident. He argues, however, that his offenses do not warrant the "ultimate discipline" of disbarment. He is capable of rehabilitation and, therefore, should not be disbarred. His character witnesses so opined, the Referee inherently found that to be true and the Referee's recommendation should be upheld.

CONCLUSION

The Referee's recommendation that Respondent be suspended for three years and thereafter until his civil rights have been restored and until he has proven

rehabilitation is based on existing law and should be upheld. The Bar has not met its burden of demonstrating that her report is clearly erroneous.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Answer were mailed to Randolph M. Brombacher, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 and to John Anthony Boggs, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 on this 2nd day of April, 2001.

John A. Weiss