IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

PATRICIA DEL PINO,

Respondent.
_____/

Supreme Court Case
No. SC05-734

The Florida Bar File
No. 2005-71,194(11K)

ON PETITION FOR REVIEW

ANSWER BRIEF OF THE FLORIDA BAR

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INTRODUCTION

For the purpose of this Answer Brief, The Florida Bar will be referred to as The Florida Bar or the Bar. Patricia del Pino will be referred to as "respondent", "del Pino" or "Ms. del Pino". Other persons will be referred to by their respective surnames.

References to the transcript of the final hearing will be set forth as "TR." and page number. References to the Report of Referee will be set forth as A.1 in the Appendix and page number.

STATEMENT OF THE CASE AND OF THE FACTS

The Florida Bar accepts the respondent's statement of the case and of the facts with the following additions or modifications. The plea agreement in the tax evasion case was introduced by The Florida Bar. In addition to the substantive charge it provided that the amount of tax loss resulting from both charged and uncharged offenses is greater than $70,000, but less than $ 120,000. TR.7. The Florida Bar also introduced the April 22, 2004 plea colloquy in the tax evasion case which contained the factual proffer of the Assistant United States Attorney. TR. 8. It provided:

> During 1998, Patricia del Pino was employed as a partner in the litigation department of the Miami law firm of Steel, Hector & Davis.
>
> Patricia del Pino earned $ 122,052 in 1998.
>
> Patricia del Pino filed for an automatic extension of time. (Form 4868)
>
> Patricia del Pino stated on that form that she owed zero, knowing her salary exceeded $ 120,000.

The plea agreement executed by Ms. del Pino on July 28, 2004 concerning the second federal charge, mail fraud, to which she pled guilty, was admitted into evidence. TR. 10-13. It provided:

> The loss resulting from the offense is $ 130,000.
>
> Patricia del Pino participated in a real estate closing with other individuals, including her husband.

> Del Pino executed a warranty deed not as a grantor, but for homestead purposes.
>
> Del Pino knew that Leana Alvarez (the purported purchaser) did not have the financial resources to buy the property.
>
> Del Pino knew that the property was to remain under the control of herself and her husband.
>
> Del Pino knew that despite the occupancy affidavit signed by Alvarez, it was not and would never be Alvarez' primary residence, but instead would be used by del Pino and her husband as their personal residence.
>
> Notwithstanding that del Pino knew that the closing documents contained the above and other materially false pretenses, representations and promises, she knowingly caused them to be mailed by Federal Express to Chase Mortgage.

The foregoing plea agreement was the subject of the August 25, 2004 plea colloquy, which was introduced as the respondent's second exhibit. TR. 100. After the government's recitation the presiding judge asked Ms. del Pino's attorney, Alan Weisberg, whether he agreed that it was an accurate statement of what had happened. His response, relevant to the respondent's first point on appeal in this matter, is referenced below.

> MR. WEISBERG: Your Honor, we agree it's an accurate statement except there are a couple of minor points which Mr. Perez informed the Court which we believe don't change the elements of the offense.
>
> The minor points are at Line 9 and 10 where it says that the property was to remain under the control of the defendant and her husband, Michael Arias. It was not to remain under the control of the defendant. It was to remain under the control of Michael Arias. She and her husband at the time, Your Honor,

> were separated, were not living together. The only other change would be Line 13 and 12 where it says that such property was to be used by her and her husband, Michael Arias, as her personal residence. At the time they were separated. He had a girlfriend and therefore this defendant, Ms. Del Pino Arias, was not living there as her personal residence.
>
> Other than that, Your Honor, we agree that the factual proffer is correct. We believe these are just minor changes that does not affect in any way the elements of the offense.
>
> Resp.Ex. 2, page 16-17.

The Florida Bar introduced a series of admissions which were gleaned from testimony given by Ms. del Pino in a deposition in the Bar matter on October 12, 2005. TR. 16-27.

> The respondent speculates her net worth to be $ 250,000 in 1999.
>
> Ms. del Pino's husband is indicted in April of 2001 and needed to pay $825,000 in restitution. The focus of the real estate closing that gave rise to the guilty plea was to pay the restitution.
>
> Ms. del Pino fought in her previous relationship.
>
> After Ms. del Pino became engaged to Michael Arias they had an argument during which she bumped him with her car.
>
> While staying in a hotel Ms. del Pino saw Mr. Arias talking to another woman and pushed him in the chest.
>
> Ms. del Pino signed the tax form in her office. Her husband was not present.
>
> Ms. del Pino was separated from her husband from December of 1998 until June of 1999.

Ms. del Pino wrote briefs and did her work. She resigned from Steel, Hector on January 6, 2000. A client wanted her to continue to work on their case, after she left the firm.

Ms. del Pino remains married to Michael Arias.

Ms. del Pino drove during the time that her license was suspended for two years on a limited basis.

Ms. del Pino did not file tax returns from 1995 until 1999.

SUMMARY OF THE ARGUMENT

In the case at bar the attorney pled guilty to tax evasion and mail fraud and argued that personal problems warranted a sanction less than disbarment. The referee ruled that the presumption of disbarment was not overcome. The referee did, however, find that the mitigation evidence warranted allowing the disbarment recommendation to run *nunc pro tunc* from the date of respondent's felony suspension. In light of the referee's concession, the respondent has failed to establish that the referee did not consider that evidence. Moreover, the referee ruled that the aggravating circumstances including multiple offenses, dishonest and selfish motive and experience in the practice of law combined with the underlying felony convictions were not outweighed by any evidence of mitigation.

Respondent also argues that the referee erroneously found that Ms. del Pino would reside in the property which was at the core of the mail fraud charge. The referee's finding was based on competent substantial evidence consisting mainly of the respondent's written guilty plea. Moreover, this finding was not material to the offense and did not impact on the elements of the crime. Further, to so argue constitutes impermissibly "going behind the felony conviction".

POINT I

THE REFEREE'S FINDINGS THAT THE PROPERTY CONVEYED AT THE AVENTURA CLOSING WAS TO REMAIN UNDER THE CONTROL OF RESPONDENT AND HER HUSBAND, MICHAEL ARIAS, AND THAT THE PROPERTY WOULD BE USED BY RESPONDENT AND HER HUSBAND AS THEIR PERSONAL RESIDENCE WAS SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE. (Restated)

The respondent argues that the referee wrongly found that the property which formed the basis for one of respondent's two felony convictions was to remain under the control of respondent and her husband. In fact, it is the respondent who executed a plea agreement which contained that representation and was introduced without objection by The Florida Bar. TR.10-13. The respondent's attorney at the conclusion of the plea colloquy based on the aforementioned plea specifically agreed to the recitation and acknowledged that any minor differences did not change the elements of the offense. TR. 100-101. Moreover, the government at no point agreed with the respondent's criminal defense attorney's distinction. Interestingly, there is not any indication that Ms. del Pino sought to withdraw or modify the plea agreement she now claims contains inaccurate information.

Thus, the referee's finding is in fact supported by competent substantial evidence, which included the respondent's admission as set forth in her plea

agreement and is not erroneous. It is respondent's burden to demonstrate that there is no evidence in the record to support the finding. The Florida Bar v. Roberts, 789 So.2d 284 (Fla. 2001). The respondent has failed to do that.

Beyond the foregoing, the point that the respondent raises is so minor, it is almost not deserving of mention. What is deserving of mention, however, is what the referee found concerning the respondent's guilty plea, as reflected below:

> 1. During a closing, respondent signed a warranty deed, not as a grantor but for the waiver of homestead purposes in favor of the purported purchaser, Liana Alvarez.
>
> 2. Respondent knew when she signed the deed that Liana Alvarez did not have the financial resources to buy the property.
>
> 3. That the property was to remain under the control of the respondent and her husband.
>
> 4. The respondent was fully aware that notwithstanding an occupancy affidavit signed by Liana Alvarez the property was not and would never be Liana Alvarez' primary residence.
>
> 5. Knowing that the closing documents contained the foregoing false representations and others, the respondent caused the document to be mailed which resulted in the issuance of a mortgage loan to Liana Alvarez.
>
> (emphasis supplied)

Respondent claims that the referee incorrectly found that Ms. del Pino gained a personal benefit since she would be living in the residence. (Resp. Brief on Appeal, Page 21). That is not what the referee found. Rather, he concluded that Ms. del Pino's conduct had a dishonest or selfish motive as the transaction

assisted her husband to obtain proceeds in order to pay restitution in a criminal matter. The referee never mentions who would reside in the residence as a basis for a finding of this aggravator. A.1, Pg. 7. In fact, Ms. del Pino did testify that she was aware that the object of the transaction was to obtain funds for her husband's payment of $825,000 in restitution. TR.18-19.

Respondent's argument will fail on another basis. In an attorney disciplinary proceeding, a referee may not "go behind" a conviction. The Florida Bar v. Kandekore, 766 So.2d 1004 (Fla. 2000). This referee was correct in relying on the precise facts to which the respondent pled. To do otherwise, would be error.

POINT II

THE REFEREE'S RECOMMENDATION OF DISBARMENT HAS A REASONABLE BASIS IN EXISTING CASE LAW AND SHOULD BE UPHELD. (Restated)

In reviewing a referee's recommended discipline, this Court's scope of review is more expansive than that afforded to the referee's findings of fact because it is ultimately the Court's responsibility to order the appropriate sanction. The Florida Bar v. Heptner, 887 So.2d 1036, 1041 (Fla. 2004); The Florida Bar v. Anderson, 538 So.2d 852, 854 (Fla. 1989); see also art. V, § 15, Fla. Const. Generally, the Court will not second-guess the referee's recommended discipline as long as it has a reasonable basis in existing case law and The Florida Standards for Imposing Lawyer Sanctions. Heptner, 887 So.2d at 1042; The Florida Bar v. Temmer, 753 So.2d 555, 558 (Fla. 1999).

The burden is on the attorney to overcome the presumption of disbarment that applies when the attorney is convicted of a felony. The Florida Bar v. Arnold, 767 So.2d 438 (Fla. 2000). Here, the respondent pled guilty and was convicted of two (2) separate and unrelated federal felonies, tax evasion and mail fraud. Thus, the presumption has become heftier. Respondent's argument that disbarment is "inappropriate" and "reserved for the most serious of offenses" does not apply given the existence of felony convictions. Rather, disbarment is appropriate given two (2) felony convictions and presumed. The referee specifically found that the

respondent failed to overcome the presumption of disbarment and relied on The Florida Bar v. McKeever, 766 So.2d 992,993 (Fla. 2000). A.1, Pg. 15

Respondent argues that the referee disregarded or minimized evidence of mitigation. The report belies that conclusion. The referee stated:

> I further recommend that the disbarment be *nunc pro tunc* to the date of the automatic suspension given the mitigating factors discussed below.
>
> A.1, Pg. 6

Thus, the referee gave considerable weight to the evidence of mitigation by recommending that any disbarment run from April 22, 2005, the date of the felony suspension, as opposed to the date this Court issues its final decision. That concession is considerable. At this point, the matter has not been fully briefed, as respondent will have an opportunity to file a reply brief and more than a year has passed from the date of the felony suspension bringing respondent a year closer to the potential of seeking readmission.

Furthermore, the referee did not give short shrift to the evidence of aggravation and mitigation presented as demonstrated by the in depth analysis set forth in the seventeen (17) page Report of Referee. A.1 In fact, the referee found that the egregious and multiple nature of the underlying felonious conduct by an experienced member of The Florida Bar, together with the aggravation presented

by The Florida Bar outweighed the evidence of mitigation and warranted disbarment.

The referee relied on The Florida Bar v. Forbes, 596 So.2d 1051 (Fla. 1992) when recommending disbarment. There, that respondent made materially false statements to a bank to influence its actions in granting a loan. The Court acknowledged the existence of the mitigating factors of absence of a prior disciplinary record, full and free disclosure to the disciplinary board and remorse and agreed with the referee that the mitigating factors justified a retroactive disbarment to the date of the felony suspension. Based on the commission and plea to two (2) separate and distinct felonies this referee could have found Forbes, supra inapplicable. Instead, the referee was merciful and remains challenged in this proceeding.

Respondent's reliance on The Florida Bar v. Chosid, 500 So.2d 150 (Fla. 1987) to warrant a three (3) year suspension is misplaced. Respondent argues that she should not be treated more harshly than Chosid since both are tax evaders and Chosid had received a private reprimand. But this respondent should be treated more harshly given the commission of another unrelated felony two (2) years after the first one. Judge Ehrlich aptly stated the following in Chosid:

> His motivation for the crime was pecuniary gain by understating his taxable income. In short, this was stealing from the government… A crime for pecuniary gain, theft by whatever

> name, by a member of The Florida Bar, an officer of the Court, is to be roundly condemned and disbarment is the appropriate response from this Court.
>
> Chosid, at 151.

Respondent urges this Court to rely on The Florida Bar v. Smith, 650 So.2d 980 (Fla. 1995) as a basis to impose a three (3) year suspension. The referee in Smith did not recommend disbarment. Rather, a two (2) year suspension to run *nunc pro tunc* from the date of the felony suspension was recommended. This Court enhanced the discipline and ordered a three (3) year suspension to be effective on the date of the opinion. In the case sub judice the referee recommended disbarment. That recommendation is presumed correct and will be followed so long as it is not "clearly off the mark". The Florida Bar v. Vining, 721 So.2d 1164 (Fla. 1998).

In Smith, supra that respondent was in serious financial difficulty and underpaid his taxes. Ms. del Pino earned $122,052 in 1998 and had a net worth of approximately $250,000. The second charge in the Smith, supra matter concerned election documents said to be ordinarily administrative in nature. Neither of the felony charges pled to by Ms. del Pino were remotely minor or administrative. Respondent, however, seeks to minimize her own misconduct and does not appear to recognize its gravity when arguing that a two (2) year suspension is appropriate, as set forth below on Page 26 of respondent's brief on appeal.

> Any lawyer who might be prone to give faulty estimates on their requests to the IRS for an extension of time to file their returns and who stand silent while their spouse improperly closes a real estate transaction will know that their conduct will result in harsh discipline by this Court.

Respondent's misconduct was far more egregious than "giving a faulty tax estimate". Respondent swore that she owed zero to the government in taxes, despite earning in excess of $122,000 as a partner in Steel, Hector & Davis for that calendar year. Further, respondent did not merely stand silent during an "improper" real estate closing. Respondent participated in a fraud involving multiple misrepresentations to obtain a mortgage. Ms. del Pino's focus was to assist her husband in obtaining funds to pay restitution in yet another fraud. TR. 18-19

Further, in Smith, supra the referee found that although that respondent's acts were selfish, his motives were not. The Court distinguished the Smith, supra case from The Florida Bar v. Nedick, 603 So.2d 502 (Fla. 1992) since in Nedick, supra that attorney's only motive was pecuniary gain.

The referee in this matter gave substantial weight to the aggravating factor of a dishonest or selfish motive and found its existence as to each criminal charge. He stated that the tax evasion offense allowed the respondent to have more money in her pocket over an extended period of time. He further noted the inapplicability

of respondent's emotional or psychological problems to this offense when rejecting an "absence of a dishonest or selfish motive" as a mitigating factor. As to the mail fraud offense, the respondent's actions enabled her husband to unjustly enrich himself to pay off debts. It was part of the scheme to use loan proceeds and/or the property to pay restitution in his health care fraud criminal matter. Despite respondent's protestations regarding that marriage, the fact of the matter was that the respondent remained married and committed to Michael Arias. Notably, both of those felonies resulted in a financial benefit to the respondent.

Respondent also asks this Court to acknowledge that her performance as an attorney was outstanding. Taking respondent's argument to its logical conclusion is difficult. On the one hand, respondent seeks recognition and leniency since the testimony revealed that she was a "superlative" lawyer and was not a threat to her clients. Consequently, the abuse suffered by the respondent in her marriage and her depressed state did not affect her job performance and judgment as a lawyer. Respondent argues that it did, however, affect her judgment with regard to the commission of two (2) felonies which should result in a sanction reduction.

The application of a mitigating factor such as personal or emotional problems cannot be selective. In The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) that respondent misappropriated trust funds and claimed that his substance abuse addiction should mitigate the discipline. Shuminer presented the testimony

of two (2) judges who attested to his competence and diligence. This Court when disbarring Shuminer found that he continued to work effectively during the period in question. Thus, he failed to establish that his addictions rose to a sufficient level of impairment to outweigh the seriousness of his offenses. *See also* The Florida Bar v. Wolfe, 759 So.2d 639 (Fla. 2000). Here, the evidence revealed that the respondent was embroiled in a tumultuous, violent marriage from 1995 until the present. The respondent also admitted to abusing the narcotic Xanax from 1996 until 2001. The respondent committed her crimes in 1999 and in 2001. Despite the marital difficulties and drug abuse, the respondent did not falter in her professional life. TR. 52. If personal issues impacted on her day, she was responsible enough to stay after hours to complete all work. TR. 68. Ms. del Pino testified as follows:

> MR. WEISS: Do you think any of your clients were adversely affected?
>
> MS. DEL PINO: No, to the contrary. I always -- what I did to avoid all the problems that I was having at home was to focus on work to the exclusion of everything else. So that was my scapegoat.

In 2001, when Ms. del Pino committed the second criminal offense, she had voluntarily left Steel, Hector to open a new practice with one of their clients following her. TR. 27. Like, the respondent in Shuminer, Ms. del Pino continued to work effectively during the period in question.

Disbarment was the appropriate finding.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the referee's report should be approved.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Answer Brief was forwarded via regular mail to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to John A. Weiss, Attorney for respondent, at 2937 Kerry Forest Parkway, Suite B-2, Tallahassee, Florida 32309, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399, on this _____ day of May 2006.

_____
RANDI KLAYMAN LAZARUS
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CERTIFICATE OF TYPE, SIZE AND STYLE

I HEREBY CERTIFY that the Answer Brief of The Florida Bar is submitted in 14 point proportionately spaced Times New Roman font in Microsoft Word format.

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RANDI KLAYMAN LAZARUS
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