IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	)	
	)	CASE NO. SC05-734
Complainant,	)	
	)	TFB No. 2005-71,194(11K)
v.	)	
	)	
PATRICIA DEL PINO,	)	
	)	
Respondent,	)	
_____	)	

RESPONDENT'S BRIEF ON APPEAL

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

Undersigned counsel does hereby certify that the Initial Brief on Appeal of The Florida Bar, Complainant, v. Patricia del Pino, Respondent, Case No. SC05-734, TFB No. 2005-71,194(11K)), is submitted in 14-point proportionately spaced Times New Roman font, and that the brief has been sent as an attachment in Word format to an email to the Supreme Court Clerk's office which was scanned and found to be free of viruses, by Norton Anti-Virus for Windows.

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Counsel for Respondent

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PRELIMINARY STATEMENT

Complainant, THE FLORIDA BAR, will be referred to as such or as the Bar. Respondent, PATRICIA DEL PINO, will be referred to as Respondent or Ms. del Pino.

References to the transcript of the final hearing will be by the symbol "TR." followed by the appropriate page number. References to the Report of Referee will be by the symbol "RR." followed by the appropriate page number. All of the Bar's and Respondent's exhibits were designated by number and shall be referred to as such.

JURISDICTIONAL STATEMENT

This is a case of original jurisdiction pursuant to Article V, Section 15, of the Constitution of the State of Florida.

STATEMENT OF THE CASE AND FACTS

These proceedings commenced on May 12, 2005 when The Florida Bar filed its complaint charging Respondent with misconduct as a result of her two felony convictions in the United States District Court, Southern District of Florida. The Honorable Daryl E. Trawick was appointed Referee on May 17, 2005. Final hearing took place on October 19, 2005. The Referee's report was issued on November 29, 2005. The Referee recommended that Ms. del Pino be disbarred.

The Bar's complaint was predicated on the same charges that led to Ms. del Pino's felony conviction suspension on March 22, 2005. That suspension was effective April 22, 2005.

Respondent, Patricia del Pino, was convicted after pleading guilty in federal court to two felonies, tax evasion and mail fraud. She was sentenced to three years probation including ten months house arrest, payment of her tax liabilities to the extent that she was able to do so, 100 hours community service and mental health therapy. The sentencing judge, District Judge Alan S. Gold, rejected the prosecutors' demands that Ms. del Pino be incarcerated for five months followed by five months house arrest. Judge Gold could have sentenced Ms. del Pino to five years incarceration and imposed a $250.000 fine.

Ms. del Pino's conviction for tax evasion was the result of her filing an automatic extension of time to file her 1998 tax return on April 15, 1999. She indicated on the form that her taxable liability was zero when, in fact, as determined years later, it should have been $38,000. Ms. del Pino admitted not filing tax returns until 2001 for tax years 1996, 1997, 1998 and 1999.

Ms. del Pino's mail fraud charge was brought against her several months after she plead guilty to the tax evasion charge. It was a result of her failing to stop a fraudulent real estate transaction involving Michael Arias, her estranged husband, now a convicted felon and a fugitive from justice, for a condominium in

Aventura on October 4, 2001. The closing on that transaction, supposedly conveying property from Mr. Arias to Liana Alvarez, was a sham because, in truth and fact, Mr. Arias was the purchaser.

Ms. del Pino's participation in the transaction was clarified on the Warranty Deed. Specifically, it stated that "Patricia del Pino is signing the Deed only for waiver of homestead rights and is not a grantor in this transaction." Resp. Ex. 1.

There was an issue before the Referee about whether Ms. del Pino was going to live in the condominium and, therefore, was a beneficiary of the transaction. In the proffer to her plea agreement, Bar Ex. 7, there was language to the effect that the condominium would be used by Ms. del Pino and her husband as their personal residence. That language was clarified without objection at the plea colloquy before Judge Gold on August 25, 2004 by Ms. del Pino's defense lawyer. Resp. Ex. 2, p. 16. Counsel pointed out that the condominium was not to remain under Ms. del Pino's control, that she and Mr. Arias were not living together at the time, and that the condominium was to be the residence of Mr. Arias and his girlfriend. Ms. del Pino testified in like manner at final hearing. Tr. 98, 148, 150, 151.

Ms. del Pino received a downward departure on her sentence because of her substantial assistance to the U.S. Attorney's Office in investigating her husband's role in the mail fraud, for immediately informing Mr. Arias' probation officer

when he became a fugitive and for cooperating with the government in their attempts to locate him. Tr. 90, 91.

Ms. del Pino had four character witnesses testify in person on her behalf at the hearing before the Referee below. As additional testimony, she presented letters from five individuals that had been submitted at her sentencing. Resp. Comp. Ex. 11. She also submitted into evidence the following medical reports and records: Resp. Ex. 3, the December 17, 2001 report from Lazaro Garcia, Ph.D., which, in essence, determined her to be a battered spouse; Resp. Ex. 4, medical records showing Mr. Arias' physical abuse of Respondent, including graphic pictures; Resp. Ex. 5, a December 5, 1997 letter from Cindy Mitch, M.D., diagnosing Respondent with severe fatigue, probably secondary to chronic fatigue syndrome; Resp. Ex. 6, a November 5, 1997 letter from Kenneth Ratzan, M.D., discounting three past diagnoses that she had infectious mono and diagnosing Respondent with chronic fatigue syndrome; Resp. Ex. 7, January 1998 medical records from Juan B. Espinosa, M.D., diagnosing severe depression; Resp. Ex. 8, a December 13, 2001 report from Ricardo Castillo, M.D., diagnosing Ms. del Pino with chronic fatigue syndrome, dependent personality disorder, chronicity of condition, marital substance abuse problems, etc.; and Resp. Ex. 9, the December 10, 2001 report from Carolina Montoya, Psy.D., summarizing Ms. del Pino's past psychological treatment.

Respondent's character witnesses' testimony described Ms. del Pino's life before and after she met Mr. Arias. The first witness to testify was Ana Cordero, a practicing lawyer who first met Ms. del Pino shortly before both began attending Georgetown Law School in 1986. The two are very close, e.g., Ms. del Pino was maid of honor at Ms. Cordero's wedding. TR. 34. Ms. Cordero represented Ms. del Pino during her "on-off, on-off" dissolution of marriage proceedings. Ms. Cordero testified that Ms. del Pino became "a different person" after she married Mr. Arias. By the end of the year 2000, Ms. del Pino and Mr. Arias had separated at least six times. She was always "devastated, crying". TR. 37. Ms. Cordero noted that Ms. del Pino had always succeeded and when her marriage failed "she didn't want to admit it . . . ."

Ms. Cordero testified that Ms. del Pino's mental health was definitely adversely affected by her marriage to Mr. Arias. Now that he is out of her life, she is returning to the individual that she used to be. TR. 41, 42.

Joseph Klock, the managing partner of Steel, Hector & Davis when Ms. del Pino was a lawyer there testified about Ms. del Pino's career in his firm. He testified that she first began working as a legal secretary for the firm after her freshman year of law school. She was then given an internship the next year and after she graduated from law school was the first pick for new lawyers in the firm. She became a partner in the firm as a result of a unanimous decision from the

selection committee. TR. 47, 48. Mr. Klock observed that Ms. del Pino "worked harder" than most of the associates that the firm had, that her "ethics were without question . . ." and that she "had very good judgment . . . ." She was sort of a "den mother" for all of the staff, including non-lawyers. TR. 50.

Mr. Klock noted the change in Ms. del Pino when she started seeing Mr. Arias, an individual described by Mr. Klock as a "me Tarzan, you Jane" personality. Mr. Klock noticed about six months before she married "that she was getting to be sort of broken down." TR. 51. She subsequently started coming to the office with sunglasses on to hide the fact that "this guy was rough with her. He manhandled her." After observing that Ms. del Pino was a very loyal person from a tightly-knit family, Mr. Klock opined that it was "hard for her to recognize the fact that this guy was a creep that she never should have married . . . . " TR. 52. He observed that ultimately she went part-time as a result of the "difficult time she was having with Mr. Arias." TR. 53.

Mr. Klock observed that Ms. del Pino went from someone who was very organized with her finances, her work and her life in general (TR. 53), in other words, "someone who had complete control over her life . . ," to basically an uncontrolled life. "She had no control, basically, of what was going on at home." TR. 54. He testified that he would have no reservation about bringing her back into the firm once she was eligible to practice law again. TR. 59.

Karen Castillo corroborated Mr. Klock's testimony. Ms. Castillo has been a paralegal at the firm for 25 years and has known Ms. del Pino since the latter began work as a secretary at the firm. TR. 60, 61. They became fast friends and traveled together, frequently with Ms. Castillo's young daughter. TR. 63, 64.

Ms. Castillo pointed out that Ms. del Pino was very popular at the office. She helped housekeepers, secretaries and runners employed by the firm. TR. 65.

As was true with Mr. Klock, Ms. Castillo saw changes in Ms. del Pino prior to her marriage. TR. 66. Mr. Arias' controlling nature, including calling the office incessantly, interfered with her work and resulted in their having to work until 10:00 or 11:00 at night instead of 7:00 or 8:00 because of his interruptions. TR. 67, 68. Ms. Castillo could not understand how a "strong, powerful-minded woman who was so brilliant" let her beautiful mind fall by the wayside. TR. 69.

Ms. Castillo also testified about the beating that Michael gave Ms. del Pino in Christmas 1997. The episode, memorialized by Respondent's Exhibit 4, left Ms. del Pino in bed several days before she finally went to the hospital. While Ms. Castillo tried to convince Ms. del Pino that she was a victim of domestic abuse, she took him back into the house anyway. TR. 70-72. Ultimately, Ms. del Pino stopped communicating with her friends (TR. 70, 74) and started taking Xanax. She even took Xanax after arguments with Mr. Arias on the phone while at work

just to be able to stop crying and focus on her job. It finally got to the point where she would take four or five Xanax pills and just go to sleep. TR. 75, 76.

Ms. Castillo testified that Ms. del Pino is back to being a functioning member of society, whereas before "she was a dropout of society". TR. 77.

As her last character witness, Respondent called Cathy Hamilton, a dentist in Miami licensed since 1991. Dr. Hamilton and Ms. del Pino are so close that Ms. del Pino was present at the birth of Ms. Hamilton's child.

Dr. Hamilton testified about the controlling nature of Mr. Arias. She told the Referee that prior to Ms. del Pino's marriage, Dr. Hamilton could always reach her either on Ms. del Pino's cell phone or on the office phone. After their marriage, Mr. Arias convinced his bride that she didn't need a cell phone and having her own car was a waste of money. She gave up both. TR. 81, 82.

Dr. Hamilton testified about Ms. del Pino's use of Xanax. Ms. del Pino was "always depressed" or tried to escape reality by working. At times Ms. del Pino was sleeping so much that Dr. Hamilton could not reach her. TR. 83. Ultimately, Ms. del Pino began overusing Xanax, resulting in her giving up on things that were basic in her life and letting go of things that were once important but that did not seem to be important anymore. TR. 84. On one occasion Dr. Hamilton, who could prescribe Xanax, gave Ms. del Pino a prescription for ten Xanax pills. In December 2000, Dr. Hamilton refused to give Ms. del Pino any more Xanax

resulting in a fallout between the two. Dr. Hamilton testified that she would give no more Xanax to her friend because Ms. del Pino needed help, and escape was not the help she needed. TR. 85, 86.

Ms. del Pino was the last witness to testify at the final hearing. She was admitted to The Florida Bar in January 1990, and until she was suspended as a result of her felony conviction on April 22, 2005, she had never been disciplined. TR. 88. She acknowledged pleading guilty to tax evasion and mail fraud and that she was sentenced to three years probation, which included the ten months of house arrest, 200 community service hours, and payment to the IRS of her tax liability in accordance with her ability to pay it. She was facing a maximum sentence of five years and a $250,000 fine. She received a downward departure for cooperating with the government in its investigation against Mr. Arias, and for helping them look for Mr. Arias after he became a fugitive. TR. 90. She is the one who reported his flight to the authorities after he learned that he was going to be charged with wrongdoing as a result of the Aventura closing (the same transaction on which Ms. del Pino was convicted). TR. 91.

Ms. del Pino admitted to the Referee that she wrongfully estimated her tax liability at zero on April 15, 1999 when she filed for an automatic extension for her 1998 tax return. Ultimately, it was determined that her tax liability was $38,000

for that year. She did not file her tax return for 1998, or for 1996, 1997 and 1999, until December 2001. TR. 93.

Respondent also described to the Referee her role in the Aventura closing on October 4, 2001. She acknowledged attending and participating in the transaction, even though she knew that Liana Alvarez, the person who was supposedly buying the property, was not going to be the real owner of the property. Rather, Mr. Arias was going to be the actual owner. TR. 95, 96. The Aventura closing was the result of Mr. Arias' signing an option to purchase the condo for $600,000 when he and Ms. del Pino separated in August 2000. By October 2001, the condominium was worth approximately $1,200,000. Because Mr. Arias had been indicted for Medicare fraud in Pennsylvania in March, 2001, he could not obtain financing. Rather than losing the benefit of the bargain, Mr. Arias arranged for one of his employees to obtain financing to qualify for the loan. TR. 95-98.

Mr. Arias needed Ms. del Pino at the closing to waive any possible homestead rights. While Ms. del Pino prepared no documents for the closing, she did insist that the Warranty Deed contain the following statement: "Patricia del Pino is signing the deed only for waiver of homestead rights and is not a grantor in this transaction." TR. 99, Resp. Ex. 1.

While she acknowledged failing to stop a fraudulent transaction that was taking place, Ms. del Pino denied any intention to live in the property. She

testified that she would not "even walk into that property." TR. 98. On cross-examination, she testified that she knew that Ms. Alvarez did not have the financial sources to pay the property, TR. 149. Ms. del Pino repeated that it was never her intent to benefit from the transaction. TR. 148, 150. It was always understood that Mr. Arias was to live at the condo with his girlfriend and not with Ms. del Pino. TR. 151.

Ms. del Pino learned in October 2001 that she, rather than her husband, had become the subject of a criminal investigation when her payroll records were subpoenaed from the Steel, Hector firm. Almost three years later, in April 2004, she pled guilty to tax fraud. About two months after the plea she learned that she was the subject of a mail fraud investigation resulting from the Aventura October 4, 2001 closing. About one month before her sentencing, she pled to that offense also.

Ms. del Pino had no criminal or Bar disciplinary record before April 2004. Her legal career with Steel, Hector began the summer after her first year at Georgetown University Law Center when she went to work for Steel, Hector as a legal secretary during the summer of 1987. The next summer, she was a "summer associate" at the firm and she was asked to come back as a permanent associate in 1989. She began full-time work in October 1989 and was admitted to the Bar in

January 1990. She became a partner in January 1996, days after wedding on December 30, 1995. TR. 102, 105, 106.

Just two years later, in January 1998, Ms. del Pino began working for the firm on a part-time basis. In January 2000 she left the firm's employ. She stayed on the premises as a sub-lessee working for one particular client until May 2000. TR. 107. She testified that she left the firm partially because of pressure from her husband, and partially because her productivity had "drastically come down after I made partnership and after I got married to my husband." TR. 107, 108.

Ms. del Pino testified that she had always wanted to be a lawyer and that she loved her job. She had never had fewer than 2000 billable hours and she believed that she had worked about 2700 billable hours one year. TR. 108. Immediately after her marriage in December 1995, her billable hours started going down. Basically, she "couldn't cope with a lot of what was doing on in my life…" during that timeframe. She testified that she was sick, was on Xanax, and that her life "was a total mess". While her hours were down, her personal problems did not adversely affect her clients' matters because focusing on work was a way of avoiding the problems she was having at home. TR. 109. Her problems with Mr. Arias were not the only problems that Ms. del Pino was suffering from. In 1994, she started complaining about fatigue and was diagnosed with mono. After several

instances of similar diagnoses Dr. Mitch, her family physician, sent her to experts in December 1997 who diagnosed her with chronic fatigue syndrome. TR. 113.

Mr. Arias, who operated a clinic and who had physicians on his staff, started supplying Ms. del Pino with Xanax shortly after they were married. TR. 124. She was having difficulty accepting that the "perfect world that I thought I was going to be living in" was crumbling. TR. 120. She started abusing Xanax in 1996 and probably continued to abuse it through 2001. TR. 121.

In late 1997, Ms. del Pino was diagnosed with severe depression, resulting in her request to work part-time at the firm. TR. 121, 122.

Ms. del Pino testified at length about her marriage to Mr. Arias. She almost cancelled the wedding during her engagement but did not do so because her "personality was to make everything in my life work". TR. 114. They had severe arguments on the Halloween before their wedding, TR. 115, during their honeymoon in December 1995 and January 1996, TR. 116, and throughout the rest of their marriage. As the marriage went on, the arguments got progressively worse. TR. 117. Mr. Arias convinced her that she did not need a cell phone because she was always going to be with him. He would call her non-stop at work and would abuse her before her co-workers and clients. TR. 117, 118. In December 1997, during a Christmas trip to New York City, Mr. Arias, a six-foot, 2-inch, 230 to 240-lb. individual, beat her up. TR. 122, 124. After the incident, he

returned to Miami but Ms. del Pino stayed in their New York hotel room for three days, sleeping and talking to her friends. Finally, the pain from the beating forced her to go to St. Luke's Hospital in New York City. TR. 124; Resp. Ex. 4.

Mr. Arias has an extensive criminal history. He was convicted of DUI, pled one DUI charge down to Reckless, was indicted in Florida for Medicaid fraud and then was indicted in Pennsylvania for Medicaid fraud. In March 2001, he violated his bond due to cocaine use. TR. 125-127. He is currently indicted for mail fraud relating to the Aventura property, but, because he is a fugitive, that charge is pending.

Ms. del Pino testified that the lowest point in her life began in December 1995 and extended through August 2000, when she and Mr. Arias separated for an extended period of time. That August 2000 separation resulted in her going to bed for three or four months. TR. 128-130. But, when Mr. Arias was arrested in March 2001, after not having communicated with Ms. del Pino since August 2000, he called to ask for her help.

When Mr. Arias got out of jail in April 2004, she allowed him to move back into her life until he fled in July 2004 after learning of his indictment. TR. 139, 140.

Not surprisingly, Ms. del Pino was diagnosed with various illnesses as a result of the 1996 through 2000 events in her life. Dr. Lazaro Garcia diagnosed her

in December 2001 with anxiety disorder, dependent disorder and other illnesses (Resp. Ex. 3). Dr. Castillo diagnosed her with chronic fatigue syndrome among other problems (Resp. Ex. 7). She ceased the use of Xanax in 2000 and has been on and off Prozac since 1998.

Ms. del Pino testified that she put down zero on her request for an extension on April 15, 1999 because her personal life and work life were crumbling as a result of problems with her husband. TR. 141. She would try to do things just to get through the day. While she regretted it, she acknowledged to the Referee that on April 15, 1999, taxes were not her priority. "I just wanted to get an extension in, to make sure that I got it in." She acknowledged that by estimating zero, she did the wrong thing, and she did not try to justify it. She tried to explain, however, that the extension was not an important part of her life at that point in time. TR. 141, 142.

In fact, Ms. del Pino was not paying attention to her personal life at all. Her driver's license was suspended for two years, her car registration was suspended, and her electricity and phone service kept getting cut off because she did not pay her bills. Her secretary actually organized her tax matters, but the task was "so overwhelming for me at the time" that she could not deal with her personal problems and she failed to do so. TR. 142, 143.

She testified that she had money to pay her bills, "that wasn't the point." For example, she could have paid her phone bill. She simply was not paying attention to anything in her personal life. TR. 155.

SUMMARY OF ARGUMENT

Ms. del Pino asks this Court to reject the Referee's recommendation that she be disbarred and to substitute therefor a two-year suspension effective *nunc pro tunc* April 22, 2005. In essence, Ms. del Pino asks this Court to reject the Referee's recommendation because (1) he improperly found that her participation in the Aventura condominium closing was for her personal gain, which the Referee found as a substantially aggravating factor, and (2) the Referee did not give proper weight to the mitigation in the case and to analogous disciplinary cases.

Based only on the language of the proffer attached to her plea agreement, Bar Ex. 7, the Referee found that Ms. del Pino participated in her husband's fraudulent real estate transaction so that the two of them could live in the condominium. By so finding, the Referee concluded that her participation was for her financial benefit.

In fact, the evidence shows that Ms. del Pino's participation in the closing was solely to waive her homestead rights. Resp. Ex. 1. Her lawyer corrected the improper proffer during the plea colloquy before the sentence judge without

objection from the government. Resp. Ex. 2, pp. 16, 17. The Respondent's testimony was consistent with the language on the warranty deed, Resp. Ex. 1, and with her lawyer's proffer. TR. 148, 150, 151.

Other than the proffer, which was corrected, there is no evidence to contradict Respondent's testimony that the condominium was being used solely by her husband and his girlfriend as their joint residence.

Under Point II, Ms. del Pino argues that the Referee's erroneous reliance on his finding that her participation in the Aventura transaction was for her personal gain led him to conclude that the aggravating circumstances in the case outweighed the overwhelming number of mitigating circumstances. By far and away the major mitigation was the severe depression that Respondent was experiencing due to her being a battered spouse. This Court has held that "mental or substance abuse problems cast doubt upon the intentional nature" of an attorney's misconduct causing disbarment to be an excessive discipline. *Florida Bar v. Graham*, 605 So.2d 53 (Fla. 1992).

Respondent submits that the Referee completely disregarded as mitigation the fact that her misconduct had no effect on her clients' cases. The Florida Supreme Court has recognized that "misconduct occurring outside the practice . . ." might be subject to a lesser discipline than would be imposed for conduct

involving a lawyer's practice. *Florida Bar v. Helinger*, 620 So.2d 993, 995 (Fla. 1993); *Florida Bar v. Tunsil*, 503 So.2d 1230, 1231 (Fla. 1986).

There are numerous cases wherein the Court has held that disbarment should be reserved for the most egregious of cases. See, e.g., *Florida Bar v. Summers*, 728 So.2d 739, 742 (Fla. 1999); *Florida Bar v. Kassier*, 711 So.2d 515, 517 (Fla. 1998); *Florida Bar v. Hirsch*, 342 So.2d 970, 971 (Fla. 1977). When Respondent's severe depression, chronic fatigue syndrome, Xanax misuse and her being a battered spouse are factored into the Court's deliberations on the appropriate discipline for her misconduct, Respondent argues that it eliminates the possibility of her being disbarred.

In *Florida Bar v. Smith*, 650 So.2d 980 (Fla. 1995), the respondent, a former congressman, was convicted of tax evasion for failing to report $110,400 in income for tax years 1987-1990 and for a second felony for lying to the Federal Election Commission by reporting that he paid $10,000 from his congressional campaign account for consulting services when no such services had been rendered. Mr. Smith was not disbarred; he received a three-year suspension for conduct that was more serious than Ms. del Pino's. Unlike Ms. del Pino, he deliberately filed false returns with deductions totaling almost $38,000 because he could not afford to pay his tax liability. Ms. del Pino on the other hand was merely seeking extensions of time to file her returns and had the ability to pay her taxes.

Mr. Smith had none of the mitigation present in Ms. del Pino's case. Furthermore, he had a prior disciplinary record.

It would be manifestly unfair for Ms. del Pino to be disbarred for conduct less serious than Mr. Smith's and when the mitigation present is far more substantial than that of the former congressman. The appropriate discipline is a suspension for a shorter period of time.

Ms. del Pino urges this Court to reject the Referee's recommendation for disbarment and to suspend her from the practice of law for two years instead.

POINT I

THE REFEREE IMPROPERLY FOUND 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.

On page 4 of his report, and contrary to competent evidence, the Referee found that "the property conveyed in the Aventura closing, which was the subject of the mail fraud conviction, was to remain under the control of Respondent and her husband, Michael Alvarez [sic]." The Referee also found, contrary to the evidence, that the "property would be used by the Respondent and her husband as their personal residence." In fact, Mr. Arias and his girlfriend, not Ms. del Pino, had been living in the condo and intended to continue living there.

In fact, Ms. del Pino attended the closing only to waive any homestead rights that she might have had as his spouse. It is uncontroverted that the October 4, 2001 deed to the transaction, Resp. Ex. 1, contained language, placed there at Respondent's specific demand, that

> Patricia del Pino is signing the Deed only for waiver of homestead rights and is not a grantor in this transaction.

The Referee's erroneous finding was based on the two-page factual *proffer* attached to Respondent's Plea Agreement on the mail fraud charge. Bar Ex. 7. The first page of that proffer contained, in part, the following language: "The property was to remain under the control of the defendant and her husband, Michael Arias . . ." and that "such property would be used by her and her husband, Michael Arias, as their personal residence."

The above-quoted language in the proffer was amended at Ms. del Pino's August 25, 2004 Plea Colloquy before Judge Gold. Resp. Ex. 2. There, Alan Weisberg, one of Ms. del Pino's defense lawyers, corrected the proffer without objection from the government. Specifically, he pointed out that the property "was not to remain under the control of the defendant" (Resp. Ex. 2, p. 16, lines 24, 25), and that "She and her husband at the time, Your Honor, were separated, were not living together" (Resp. Ex. 2, p. 17, lines 2,3), and that Mr. Arias "had a girlfriend and therefore this defendant, Ms. del Pino Arias, was not living there as her personal residence" (T. 17, lines 7-9).

Ms. del Pino was the only witness that testified at final hearing on this issue. Her testimony was consistent with her lawyer's comments to Judge Gold. TR. 98, 148, 150, 151.

The Referee's error in this regard is extremely significant. Clearly, he was under the misapprehension that Ms. del Pino's failure to stop the transaction was

for her personal benefit, i.e., she was going to live in the condominium with her husband. Such was not the case at all. She was separated from her husband and he was living with a girlfriend. Ms. del Pino had no interest in the transaction whatsoever. In fact, her participation was limited to her waiving her homestead rights.

That the Referee relied on his misapprehension in determining the discipline that he recommended was made evident on page 7 of his report. There, under aggravating factors, he found that "Respondent and her husband were going to be the owners." This was an aggravating factor that must have materially attributed to his recommendation that Respondent be disbarred. It was, however, completely wrong.

POINT II

THE REFEREE'S RECOMMENDATION OF DISBARMENT SHOULD BE REJECTED BECAUSE IT WAS BASED ON HIS FINDING OF AGGRAVATING FACTORS THAT DID NOT EXIST AND BECAUSE HE DID NOT GIVE PROPER WEIGHT TO THE MITIGATION PRESENTED.

The Referee's recommendation that Ms. del Pino be disbarred is inappropriate from three perspectives: (1) it ignores this Court's philosophy that disciplinary proceedings are designed to protect the public from unethical practitioners and that disbarment should be reserved for the most serious of

offenses; (2) the Referee either ignored or did not give proper weight to the mitigating circumstances in this case; and (3) the discipline is disproportionate when considered in light of this Court's discipline in other disciplinary cases.

1. Disbarment is not necessary to protect the public in the case at bar. This Court has repeatedly stated that "disbarment is an extreme form of discipline and should be reserved for the most egregious misconduct." *Florida Bar v. Summers*, 728 So.2d 739, 742 (Fla. 1999). In *Summers* this Court reduced the referee's recommendation of disbarment to a 91-day suspension. *Summers* reaffirmed *Florida Bar v. Kassier*, 711 So.2d 515, 517 (Fla. 1998). There, the Supreme Court stated that "the extreme sanction of disbarment is only to be imposed in those rare cases where rehabilitation is highly improbable." Nobody can reasonably argue that Ms. del Pino's rehabilitation is "highly improbable."

The Court's pronouncements in *Summers* and *Kassier* are consistent with long-standing policy in this Court. For example, in 1977, in *Florida Bar v. Hirsch*, 342 So.2d 970, 971 (Fla. 1977), the Court observed that:

> 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. It is reserved, as the rule provides, for those who should not be permitted to associate with the honorable members of a great profession. *But, in disciplinary proceedings, as in criminal proceedings, the purpose of the law is not only to punish but to reclaim those who violate the rules of the profession or the laws*

> *of the society of which they are a part.* [Emphasis supplied.]

The sentencing judge in Ms. del Pino's criminal case obviously felt that her offenses did not deserve to be on the higher rungs of the ladder of criminal penalties. While he clearly had the option of sending Ms. del Pino to prison, he chose not to do so. Inherent within his sentence is the recognition that Ms. del Pino's conduct and her potential for rehabilitation removed her from the category of criminals whose offenses merited imprisonment, i.e., whose offenses warranted extreme measures of criminal sanctions.

In deliberating on the discipline to be imposed in this case, Ms. del Pino urges this Court to continue to embrace its philosophy, expressed in *Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1992), that the purpose of discipline is threefold:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

The two-year suspension recommended by Respondent to the Referee at final hearing meets all three purposes of discipline. First, it protects the public in that Ms. del Pino must prove rehabilitation before she can be reinstated to practice.

That having been said, there is nothing in the records before this Court that indicates that Ms. del Pino has been a threat to her clients in any manner. In fact, the evidence shows exactly the opposite. She is a superlative lawyer. All of her misconduct occurred outside the practice of law and, therefore, the discipline to be imposed can be reduced. For example, in *Florida Bar v. Helinger*, 620 So.2d 993, 995 (Fla. 1993), the Court noted that:

> Bar discipline exists primarily to protect the public from misconduct that occurs in the course of an attorney's representation of a client.
>
> * * *
>
> This Court likewise has recognized that misconduct occurring outside the practice of law or in which the attorney violates no duty to a client may be subject to lesser discipline. In a case resulting from a criminal conviction, discipline is imposed in addition to the criminal penalty already exacted in the criminal case. Thus, in some cases, a 90-day suspension or less might be the appropriate discipline for a conviction that does not relate to the practice of law or involve fraud or dishonesty.

Helinger is an extension of this Court's holding in *Florida Bar v. Tunsil*, 503 So.2d 1230, 1231 (Fla. 1986). There, the Court held that:

> Although we do not condone such conduct, we perceive a significant distinction between misconduct which does not injure clients or abuse the fiduciary relationship and conduct which does and, thus, goes to the very heart of the confidence which much be maintained in the legal profession.

Ms. del Pino would argue to this Court that *Helinger* and *Tunsil* standing alone, without any of the extensive mitigation involved in this case, warrants a reduction in her discipline below the disbarment recommended by the Referee. Simply put, such a draconian discipline is not necessary to protect the public.

The second element of the *Pahules* trilogy is the imposition of a sanction that is fair to the lawyer. It is manifestly unfair to disbar Ms. del Pino for her offenses. They are the direct result of her severe depression, primarily due to her being married to a physically and emotionally abusive husband. She has never been a threat to her clientele. The sentencing judge recognized that her offenses warranted a sentence that encouraged rehabilitation, i.e., house arrest. She first sought therapy in 1997 and 1998, Resp. Ex. 9 and 10, and continues in therapy to this day. The two-year suspension recommended by Respondent encourages her rehabilitation, will require her to prove fitness to resume the practice of law before she can be reinstated, saves her the opprobrium of being disbarred and gives her a realistically attainable goal to further her therapy.

Disbarring Ms. del Pino will protect the public no more than will suspending her. It merely imposes punitive aspects on her discipline. Specifically, rather than proving rehabilitation in a five- to nine-month proceeding should she be suspended, to be *readmitted* after disbarment requires an 18-month to two-year process which includes the Bar examination and, Respondent would argue to this

Court, would entail $15,000 to $25,000 in costs and fees. Differences between the two proof of rehabilitation proceedings are immense. Disbarring Ms. del Pino for five years and requiring the admission proceeding emphasizes retribution and penalty, rather than reformation and rehabilitation. Such is contrary to this Court's pronouncements in *DeBock v. State*, 512 So.2d 164 (Fla. 1987). There, this Court stated on pages 166 and 167 of its opinion that:

> Bar disciplinary proceedings are remedial, and are designed for the protection of the public and the integrity of the courts . . . . bar discipline exists to protect the public, and not to "punish" the lawyer.

Finally, a two-year suspension rather than disbarment will certainly meet the deterrence aspect of *Pahules*. A two-year suspension is not a slap on the wrist. It is not a cakewalk. It is a serious discipline requiring proof of rehabilitation before reinstatement. Since the sentencing judge felt that the deterrence aspect of criminal penalties could be met by confining Ms. del Pino to house arrest followed by probation rather than sending her to prison, this Court can rest secure in the knowledge that suspension, rather than "the death penalty" of disciplinary proceedings, will have a like deterrent effect. Any lawyers 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.

2. <u>The Referee disregarded or did not give proper weight to the mitigation presented in this case</u>. By far the most significant mitigating factor in these proceedings was the depression stemming from the physical and emotional abuse that Ms. del Pino suffered at the hands of her husband, Michael Arias. The testimony was clear and unrebutted that until Ms. del Pino began her relationship with Mr. Arias, she was a superb and up and coming lawyer for her firm. Until 1996, her work ethic, her relationship with her firm, including both lawyers and non-lawyers, and her personal life were all on an even keel. All of that disintegrated rapidly upon Mr. Arias entering her life. Had Ms. del Pino succumbed to alcohol or drug addiction, and had she entered into a contract with Florida Lawyers Assistance, Inc., her problems would be more easily ascertainable, quantifiable, and recognizable. Such addiction would clearly be grounds for mitigation of discipline. See, e.g., *Florida Bar v. Ceballos*, 832 So.2d 106 (Fla. 2002), *Florida Bar v. Wells*, 602 So.2d 1236 (Fla. 1992), and *Florida Bar v. Larkin*, 420 So.2d 1080, 1081 (Fla. 1982). See also Standard 11.0 of the Florida Standards for Imposing Lawyer Sanctions.

In *Ceballos*, the Court rejected the Bar's demand that a lawyer be disbarred for abandoning his practice, for various trust fund improprieties and for violating the probation imposed in an earlier discipline for neglect of clients' matters. Recognizing Mr. Ceballos' road towards alcohol rehabilitation, the Court felt

suspension was an adequate discipline to protect the public while simultaneously deterring similar conduct in the future.

Of similar ilk is *Florida Bar v. Wells*, supra. Mr. Wells received an 18-month suspension for abandoning his practice, for misusing trust account funds and for criminal charges involving driving under the influence of alcohol and two counts of possession of cocaine and paraphernalia. On page 1239 the Court rejected the Bar's demand for disbarment and stated:

> We find that the instant case is factually similar to our decision in *Florida Bar v. Sommers*, 508 So.2d 342 (Fla. 1987) . . . . Our discipline in *Sommers* focused on the principal concerns of protecting the public, warning other members of the profession about the consequences of similar misconduct, punishing the errant lawyer and *encouraging reformation and rehabilitation*. [Emphasis in original.] *The Florida Bar v. Pahules*, 233 So.2d 130, 132 (Fla. 1970). Similar to *Sommers*, the instant case involved a lawyer suffering the debilitating effects of a substance abuse problem. If the debilitating effect of a substance abuse did not exist in this case, the level of Wells' client neglect would call into serious question his fitness for the practice of law. In determining the appropriate punishment for wells, we find that the severity of his misconduct and past disciplinary record require a tougher sanction than given in *Sommers*. However, in light of our goal of reformation and rehabilitation, we disagree with The Florida Bar that this case warrants disbarment.

The goal of reformation and rehabilitation should not be disregarded in Ms. del Pino's case simply because she was suffering from severe depression as a result of being a battered spouse. While her offenses did not involve alcohol or drug abuse,

they did involve mental problems directly attributable to the abuse she suffered at her husband's hands. Such mental problems should be viewed as mitigation in like manner as substance abuse. This Court seemed to recognize that the two are equivalent in its opinion in *Florida Bar v. Condon*, 632 So.2d 70 (Fla. 1994). There, the Court also rejected the Bar's argument for disbarment and suspended Mr. Condon for misuse of trust funds. On page 72 of its decision, the Court emphasized that:

> However, as in the instant case, disbarment may be excessive discipline when mitigating evidence of mental or substance abuse problems cast doubt upon the intentional nature of the attorney's misconduct [citing *Florida Bar v. Graham*, 605 So.2d 53 (Fla. 1992)].

Ms. del Pino recognizes that the Referee stated that he gave substantial weight to her personal or emotional problems as a mitigating factor. He also said that he gave substantial weight to her prior absence of a disciplinary record, to her full and free cooperation to the United States Attorney's Office and to the Bar, to her character and reputation, to her interim rehabilitation and to her remorse. He then discounted all of that substantial mitigation by saying the aggravating factors outweigh the mitigation in the case. RR. 15.

Respondent submits that the Referee *could not* have given substantial and meaningful weight to her personal and emotional problems if he still recommended disbarment. Those factors alone, particularly when coupled with the fact that her

misconduct did not involve her clientele (a mitigating factor not mentioned by the Referee), mandated his not recommending disbarment.

Perhaps the Referee's erroneous recommendation stemmed from his giving substantial weight to the aggravating factor of dishonest or selfish motive. RR. 6, 7. As discussed in Point I above, the Referee improperly found that Ms. del Pino and Mr. Arias were to be the owners of the Aventura condominium. This mistaken finding on his part might well have led to his giving undue weight to this aggravating factor. Other than a proffer signed by Respondent, which was amended at her plea colloquy, and which was contradicted by her specific, unrebutted testimony at final hearing, there is no evidence to support the Referee's finding of this aggravating factor. Respondent recognizes that she committed a crime by not stopping the fraudulent transaction engineered by Mr. Arias and there is no basis for finding that she benefited from it.

Respondent also takes issue with the Referee's finding on page 6 of his report that her tax evasion allowed her to have more money in her pocket over an extended period of time. While this is a factually accurate statement, it implies that such was Ms. del Pino's motive for putting down "0" as her tax liability on her automatic extension request for calendar year 1998. Her testimony contradicts that finding.

Ms. del Pino testified that she had the money "to pay whatever I owed. That wasn't the point." TR. 155. She testified that, basically, she was not doing anything to take care of her personal obligations during the April 1999 (for that matter, throughout her marriage) timeframe. She had the money to "write a check to pay my phone bill . . . ." TR. 154. She simply could not cope with the demands of her personal life at that time.

For the Referee to find that the motive for Respondent's wrongful statement on her request for an extension was to allow her to have more money in her pocket meant that he disregarded the living hell she was going through at that point in her life. Prior to her marriage to Mr. Arias, she had complete control over her life. As a result of her abuse, she became depressed, began misusing Xanax, first went part-time and then left the job that she loved and, in essence, stopped coping with life.

On April 15, 1999, Ms. del Pino's life was crumbling. She testified to the Referee, taxes "were not my priority." Acknowledging wrongdoing, she pointed out that her life was such that taxes were not "the important part of my life at that point, unfortunately." TR. 141, 142. Nor were other financial matters. Her driver's license was suspended for two years as was her car registration. Her electricity kept on getting cut off because she did not pay her bills. She did not

always have phone service in her house because she did not pay that bill. She just "didn't focus on my personal life, which obviously I regret." TR. 142.

Ms. del Pino tried to deal with her taxes, even to the extent of having her secretary put the files in order for her. She was ultimately going to file the returns, but it was too "overwhelming for me at the time to deal with all my taxes and deal with all my personal problems . . . ." TR. 142, 143. For the Referee to have found that Ms. del Pino's aggravating factors outweighed the mitigation, he would have had to put undue weight on the selfish and dishonest aggravating factor by first wrongfully finding that she benefited from the Aventura condominium transaction and then by emphasizing the fact that her failure to properly state her estimated taxes on her extension request was to put more money in her pocket. He then would have had to disregard the fact that during that period she was suffering from severe depression and chronic fatigue syndrome which perverted her judgment.

3. <u>Disbarment is inappropriate in light of this Court's decisions in analogous cases</u>. Past decisions of this Court must be evaluated in determining the appropriate discipline to be imposed. To do otherwise would allow capriciousness to insert itself into the process.

> To totally ignore these prior actions would allow caprice to substitute for reasoned consideration of the proper discipline

Florida Bar v. Breed, 378 So.2d 783, 785 (Fla. 1980).

Ms. del Pino recognizes that she comes before this Court convicted of two felonies. Her conduct was wrong. She has never denied that. She recognizes that stern discipline is appropriate. The two-year suspension that she recommended to the Referee, however, is such a stern discipline. Disbarment, however, is draconian, stresses punishment rather than reformation and rehabilitation and is not justified under Florida law.

This Court has wisely rejected the philosophy that all felony convictions should result in disbarment. See, e.g., *Florida Bar v. Jahn*, 509 So.2d 285, 286 (Fla. 1987). Inherent within that ruling is the recognition that there is a range of misconduct that can result in felony convictions and that, as noted *Helinger, supra,* Bar discipline has different goals than do criminal sanctions. Obviously, the harsher the criminal penalty the more likely disbarment would be appropriate. Conversely, the lower the criminal penalty the less likely the imposition of disbarment should be. In the case at bar, no prison time was imposed and the longest possible length of Ms. del Pino's supervision by the Court would be three years.

This Court's recognition that the facts behind felony convictions are germane to its deliberation, hence the refusal to adopt the automatic disbarment for felony conviction rule, has been a mainstay of disciplinary proceedings since, at

least, 1957. In *Florida Bar v. Evans*, 94 So.2d 730, 735 (Fla. 1957), admittedly prior to the current Rules of Discipline, this Court stated that:

> In a disbarment proceeding based on conviction of a crime, the proof of conviction and adjudication of guilty are sufficient to establish a prima facie case for disciplinary action. Due process, however, requires that the accused lawyer shall be given full opportunity to explain the circumstances and otherwise offer testimony in excuse or in mitigation of the penalty.

Notwithstanding various rule changes and the many disciplinary orders that have been imposed since the *Evans* case, that statement is as valid in 2006 as it was in 1957. While conviction is conclusive proof of guilt of offenses for the purpose of these disciplinary proceedings, and Ms. del Pino does not deny that she is guilty of the offenses, she still has the right to explain the circumstances that led to her misconduct.

While this Court has correctly noted in the past that tax evasion is the equivalent of stealing from the United States government, there is nothing in the record that indicates that Ms. del Pino had any intent to steal money from the United States. Her conviction for tax evasion stemmed not from her filing false and fraudulent tax returns that deliberately misstated her income in an attempt to cheat on her taxes. Ms. del Pino's misconduct involved filing the request for an extension of time to file her 1998 tax return. On that request she improperly put down her tax liability as "0" when she should have put down approximately

$38,000. That figure, it must be noted, was not determined until several years later.

As Ms. del Pino testified at final hearing, it was always her intent to eventually file an accurate tax return. Simply put, her emotional and mental state at the time she filled the request for extension, however, precluded her from devoting herself to properly gathering and ascertaining her income and tax liability.

Ms. del Pino's second conviction, for participating in a fraudulent closing by her husband, was not for personal gain. Her sole reason for being at that closing was to waive her homestead rights. The specific language on the deed was:

> Patricia del Pino is signing the Deed only for waiver of homestead rights and is not a grantor in this transaction.

Ms. del Pino did not prepare any of the documentation in the transaction. She represented no party, including herself or her husband, at the closing. She was there solely as the wife of her estranged husband, Michael Arias. Notwithstanding the Referee's erroneous conclusion to the contrary, Ms. del Pino had no intention to live in the condominium. In fact, Mr. Arias was going to continue to live there with his girlfriend.

Ms. del Pino recognizes that by failing to stop her husband's fraudulent transaction, she committed wrongdoing. Hence, her plea.

Respondent argued to the Referee, and further argues here, that she should receive a two-year suspension for both felony convictions. She bases her argument on this Court's refusal to disbar the accused lawyer in *Florida Bar v. Smith*, 650 So.2d 980 (Fla. 1995). Mr. Smith, a former congressman from South Florida, was suspended for three years after being convicted of two felonies in 1993. In the first case, he was guilty of felonious tax evasion by failing to report $110,398 in income for the tax years 1987 through 1990. His misrepresentations resulted in his underpaying his income tax for those three years by approximately $38,000 exclusive of interest and penalties. He deliberately lied on his tax returns with the intent to underpay his taxes.

Mr. Smith was also guilty of filing a false statement to the Federal Election Commission (FEC), a felony. That conviction was predicated on his reporting to the FEC that he had paid $10,000 from his congressional campaign account for consulting services when, in fact, no such services had been rendered.

Unlike Ms. del Pino, the judge in Mr. Smith's case saw fit to imprison him for three months and then place him on supervised release.

Mr. Smith was not disbarred notwithstanding the fact that he deliberately and falsely filed three tax returns with the deliberate intent of understating his income tax so he could gain $37,834 in reduced tax liability. He also deliberately lied to the FEC. Ms. del Pino would argue to this Court that her offenses are less

serious; her evasion was putting down "0" as an estimate of her tax liability when seeking an extension of time to file. Rather than cheating on her income taxes, Ms. del Pino was putting off having to deal with them.

Mr. Smith's second offense was also more serious than Ms. del Pino's second offense. Mr. Smith deliberately lied to the FEC. Ms. del Pino failed to stop a fraudulent transaction. Ms. del Pino is not saying her conduct was not wrong nor is she saying that it was not serious. Rather, she is arguing that Mr. Smith's deliberate false statement to the FEC warrants a harsher discipline than hers.

A further factor that shows that Ms. del Pino should receive a lesser discipline than Mr. Smith is that he had a prior disciplinary history, a public reprimand. Interestingly, Mr. Smith's public reprimand involved the same individual, Brian Berman, who was involved in the fictitious consulting services.

Finally, there is no showing that Mr. Smith had the substantial mitigation that was present in Ms. del Pino's case.

After first noting that the Supreme Court has not "hesitated to disbar attorneys" who are convicted of felonies for filing fraudulent income tax returns, the Supreme Court rejected the Bar's cries for Mr. Smith's disbarment. In so doing, the Court noted that its lack of hesitancy to disbar lawyers convicted of tax evasion

> does not mean, however, that the conduct at issue warrants automatic disbarment. As we stated in *The Florida Bar v. Jahn*, 509 So.2d 285, 286 (Fla. 1987), we must "view each case solely on the merits presented therein." For instance, in *The Florida Bar v. Chosid*, 500 So.2d 150 (Fla. 1987), the respondent, as did Smith, pleaded guilty to the felony charge of making and subscribing a false income tax return, but we imposed the sanction of a three-year suspension rather than disbarment.

Just as in the case at bar, The Florida Bar relied in large part on *Florida Bar v. Nedick*, 603 So.2d 502 (Fla. 1992), as support for its argument that Mr. Smith should be disbarred. The Court specifically endorsed the referee's rejection of *Nedick*, however, by quoting him in its opinion:

> Indeed, because The Florida Bar relied so heavily on *Nedick* . . . it must be noted that the conduct in this case differs significantly from *Nedick*. Nedick conspired with his partners to hide cash fees, and his "only motive was for pecuniary gain." [*Nedick*, 603 So.2d at 503.] In contrast, the great bulk of the income at issue in the instant case represented properly deposited checks, not hidden cash receipts, and the failure to report the income resulted from financial pressures and inability to pay, not from a purely selfish desire for pecuniary gain.

Ms. del Pino's conduct was similarly distinguishable from Mr. Nedick's. She had no such "selfish desire for pecuniary gain."

The Court noted that Mr. Smith's case was different from Mr. Nedick's due to:

> financial pressures and inability to pay, not from a purely selfish desire for pecuniary gain.

The distinctions between Ms. del Pino's case and Mr. Nedick's are even greater than that between Mr. Smith and Mr. Nedick. Ms. del Pino's failure to file her tax return timely, and her improper estimation of her tax liability, was not the result of an inability to pay or from financial pressures but from the black fog of depression which controlled her life at the time. Unlike Mr. Nedick, her motive was not "pecuniary gain." Ms. del Pino's mail fraud conviction should not enhance her discipline to disbarment. That conduct, standing alone, would probably result in a short term suspension. See, e.g., *Florida Bar v. Siegal and Canter*, 511 So.2d 995 (Fla. 1987) (90-day suspension for engaging in deliberate scheme to misrepresent facts to senior mortgagee in order to secure full financing for purchase of their law office); *Florida Bar v. Nuckolls*, 521 So.2d 1120 (Fla. 1988) (90-day suspension for involvement in a scheme to perpetuate a fraud on lenders and thereby obtaining 100% financing) and *Florida Bar v. Beneke*, 464 So.2d 548 (Fla. 1985) (public reprimand for failing to inform mortgagee of reduction in purchase price which resulted in the issuance of mortgage in excess of purchase price of property.

Mr. Smith was not disbarred. Neither should Ms. del Pino be disbarred.

The *Chosid* case cited in the *Smith* case involved a lawyer convicted of tax evasion. He received a three-year suspension despite the fact that he had a prior discipline. Ms. del Pino should not receive a harsher sanction that Mr. Chosid's.

The Bar would have Ms. del Pino disbarred for conduct far less serious than that resulting in three-year suspensions in *Florida Bar v. Starke*, 616 So.2d 41 (Fla. 1993), and *Florida Bar v. Pellegrini*, 714 So.2d 448 (Fla. 1998). Both of those cases involved misappropriation of clients' funds, which the Court characterized on page 448 of the *Pellegrini* decision as "one of the most serious offenses a lawyer can commit." [Citations omitted.]

In *Starke*, the accused lawyer had numerous trust account violations. They included stealing approximately $8,500 from one client and using a $7,000 real estate deposit entrusted to him for his personal benefit without the client's consent. An audit of Mr. Starke's account reflects shortages of at least $17,000. Mr. Starke also violated this Court's emergency suspension order.

The Supreme Court refused to agree with the Bar's demand for disbarment. While the Court recognized that the presumption of disbarment existed in the case, they emphasized that "various mitigating factors can rebut this presumption." *Starke*, p. 43; *Florida Bar v. MacMillan*, 600 So.2d 457, 460 (Fla. 1992). The Court found that the mitigation indeed overcame the presumption of disbarment. Specifically, Mr. Starke had no prior disciplinary history (he had practiced law for almost 40 years), he had made full restitution, had shown remorse and presented the testimony of character witnesses who testified that he was a suitable candidate for rehabilitation. With the exception of restitution (Ms. del Pino's tax liability had

not yet been determined at final hearing in this case, but restitution will be made in that regard), all of those factors existed in Ms. del Pino's case.

Mr. Pellegrini also was guilty of misappropriating clients' funds in at least two instances. Mr. Pellegrini also violated his emergency suspension order. Notwithstanding his theft and his not complying with its order of emergency suspension, the Supreme Court found that his misconduct did not warrant disbarment. The Court noted as mitigating factors that Mr. Pellegrini had repaid the monies stolen "in at least one of the cases . . .", that he had no prior disciplinary history and that he had admitted to his trust account violations. Ms. del Pino has far more significant mitigation than that of Mr. Pellegrini. It would be capricious to disbar her while allowing Mr. Pellegrini to avoid disbarment.

Ms. del Pino would point out that the Court did not order disbarment in *Ceballos* and in *Wells*, both discussed above. Neither did it order disbarment in the *Jahn* case for delivery of cocaine to a minor.

Respondent's recommendation of a two-year suspension is supported by the Florida Standards for Imposing Lawyer Sanctions. Specifically, Standard 5.0, Violations of Duties Owed to the Public, subparagraph 5.12, provides:

> Suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and that seriously adversely reflects on the lawyer's fitness to practice law.

Standard 5.11 says that disbarment is "appropriate," as opposed to mandated, whenever a lawyer is convicted of a felony. Standard 5.1 acknowledges that mitigating circumstances are significant when determining discipline to be imposed. Even the Referee acknowledged that there was substantial mitigation involved in the instant proceedings. While he discounted Respondent's position that there was an absence of a dishonest or selfish motive (addressed above), the Referee afforded substantial weight to Respondent's personal or emotional problems (Standard 9.32.c), the full and free disclosure to the Bar and her cooperative attitude during the proceedings (Standard 9.32.e), her excellent reputation (Standard 9.32.g), her interim rehabilitation (Standard 9.32.j) and her remorse (Standard 9.32.l). Notwithstanding these findings, the Referee recommended disbarment.

The cases relied upon by the Referee in his report are all distinguishable. In *Florida Bar v. McKeever*, 766 So.2d 992 (Fla. 2000), the accused lawyer flagrantly misused clients' trust funds; "one of the most serious offenses a lawyer can commit." After acknowledging that "substantial" mitigation could reduce the discipline below the presumption of disbarment, and after noting that there was only "some mitigation," the Court found it "insufficient to lessen the penalty." Ms. del Pino, however, had extensive and substantial mitigation. She should not receive the same discipline as did Mr. McKeever.

Florida Bar v. Forbes, 596 So.2d 1051 (Fla. 1992), involved a lawyer engaged in bank fraud for his personal gain. In an attempt to gain financing Mr. Forbes submitted a fraudulent contract to a bank. It had a false date, a false price and a false description of work. He was sentenced to six months in prison. Clearly, Mr. Forbes' actions were more serious than those by Ms. del Pino.

The last case the Referee cited was *Florida Bar v. Prior,* 330 So.2d 690 (Fla. 1976), which involved a lawyer who was fighting a felony conviction suspension after he was convicted of a felony. It has no applicability to the case at bar. Ms. del Pino did not resist her felony conviction suspension.

The Referee's recommendation of disbarment was based in large part on his misapprehension of the facts surrounding the Aventura closing. For this reason alone, his recommendation should not be accepted. When Ms. del Pino's substantial mitigation is considered in light of the case law, specifically *Smith*, it is apparent that the ultimate sanction, i.e., disbarment, should not be imposed.

CONCLUSION

This Court should not accept the Referee's finding that Respondent participated in the Aventura closing on October 4, 2001 with the intent that the property would be used by her and her husband as their personal residence. This Court should also reject the Referee's finding that the property was to remain

under the control of both Ms. del Pino and Mr. Arias. The only basis for this finding was a proffer that was corrected before the Court and was contrary to the evidence presented to the Referee.

This Court should not accept the Referee's recommendation that Respondent be disbarred. Rather, it should substitute as the appropriate discipline a two-year suspension, *nunc pro tunc* April 22, 2005, the effective date of her felony conviction suspension. The Referee's recommendation should not be accepted because it was predicated on an improperly found aggravating factor, i.e., Ms. del Pino's intent to live in the Aventura condominium and because he did not give proper weight to the substantial mitigation before the Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Brief were hand-delivered to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927, and that copies were sent by U.S. Mail to Randi Klayman Lazarus, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131-2404, and to John Anthony Boggs, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this 27th day of March, 2006.

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John A. Weiss