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 REPLY BRIEF

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

Undersigned counsel does hereby certify that the Respondent's Reply Brief, 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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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, under Section II captioned "Findings of Fact," subparagraph B. captioned "Narrative Summary of the Case," the Referee made the following finding:

> The property was to remain under the control of the Respondent and her husband, . . . and that such property would be used by the Respondent and her husband as their personal residence.

Those findings had no basis in fact. That this erroneous assumption was a significant factor in the Referee's deliberations on discipline is made evident by the Referee's specific mention on page 7 of his report, under "Aggravating Factors," that "in truth and in fact, the Respondent and her husband were going to be the owners." His finding as set forth on page 4, however, was wrong. There is no evidence in the record to support his conclusions that Respondent was to be in control of the property and that Respondent intended to live there.

As argued in Point I of Respondent's brief, pages 19-21, the sole basis for the Referee's erroneous finding regarding control or ownership of the Aventura property was Ms. del Pino's two-page factual proffer attached to her plea agreement on the mail fraud charge. Bar Ex. 7. That language was specifically amended at Ms. del Pino's August 25, 2004 plea colloquy before the presiding judge. Resp. Ex. 2. No prosecutor objected to the clarification that the property "was not to remain under the control of the defendant" and that Respondent and her husband "were separated, were not living together." Resp. Ex. 2, pp. 16, 17. Nor did the prosecutor object to defense counsel's statement that Respondent's husband had a girlfriend and that Ms. del Pino was not living in the condominium as her personal residence. Resp. Ex. 2, p. 17.

The Bar correctly points out that defense counsel stated at the plea colloquy that the minor differences (in the facts) did not change the "elements of the offense." Ms. del Pino has acknowledged being guilty of mail fraud and the elements of that offense were met. Defense counsel's statement, however, materially changed the *factual* predicate to the plea. Ms. del Pino did not attend the October 4, 2001 closing to secure a residence for herself. Ms. del Pino did not attend the closing to benefit herself. She was there because her husband demanded that she attend. She was there solely to waive her homestead rights. Resp. Ex. 1.

The only evidence supporting the Referee's finding that Respondent was to be in control of the condominium and that she would live there was the proffer to the plea. That portion of the proffer was amended without objection.

Because Respondent has, in fact, demonstrated that there was no evidence in the record to support the Referee's finding regarding the condominium remaining under the "control of the Respondent" and that it was to be her "personal residence," this Court must reject this specific finding.

The Bar's argument that Respondent's first point on appeal should fail because she is attempting to go behind her conviction is incorrect. Respondent is acknowledging her guilt. She is insisting, however, that the facts of her misconduct be presented accurately to this Court. She did not attend the closing for self-aggrandizement or for personal benefit. She has the absolute right to explain the circumstances behind her conviction and, to the extent that the Referee has misapprehended those circumstances, she has the absolute right to argue that on appeal. *Florida Bar v. Evans*, 94 So.2d 730 (Fla. 1957).

The Referee's incorrect finding that Ms. del Pino attended the closing with the intent to control the condominium, and his use of that fact as an aggravating factor, were clearly incorrect. His finding in that regard should not be accepted by this Court.

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.

Respondent agrees with the Bar's opening paragraph on page 9 of its Answer Brief that:

> 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. *Florida Bar v. Heptner*, 887 So.2d 1036, 1041 (Fla. 2004); *Florida Bar v. Anderson*, 538 So.2d 852, 854 (Fla. 1989); *see, also,* Article V, Section 15, Fla. Const.

Ms. del Pino asks this Court to exercise the discretion it has given itself and to reject the Referee's *recommended* discipline. She asks this Court to impose, instead, the two-year suspension Ms. del Pino sought below. Respondent argues that this Court should reject the Referee's recommendation because it is not soundly based in existing case law, because the Referee did not place proper weight on her mitigation and because he relied on nonexistent aggravation (i.e., the ownership of the condominium).

Respondent would argue that the *Heptner* case cited in the Bar's quoted language above actually supports Respondent's arguments that she should not be disbarred.

In *Heptner*, the lawyer was disbarred retroactive to his earliest suspension for many, many acts of misconduct. The more serious acts of misconduct were set forth on page 1042 of the opinion:

> First, he engaged in felony criminal conduct with a client, involving the sale and use of cocaine ["Heptner had purchased cocaine from the client over an 18-month period…." p. 1040] Second, he continued to practice law while suspended and, thus, intentionally violated an order of this Court. Third, Heptner has engaged in multiple acts of misconduct over an extended period of time. Case law indicates that such misconduct merits disbarment.

This Court also considered Mr. Heptner's previous disciplinary history. Prior to the Court disbarring him, he had been disciplined on four prior occasions. He received a private reprimand, a public reprimand with 18 months suspension, a 60-day suspension, and a 91-day suspension followed by two years probation after proving rehabilitation and reinstatement proceedings. The Court pointed out that some of Mr. Heptner's previous disciplinary cases involved several clients and the case at bar at that time involved five different clients. His violations stretched out over ten years "while injuring numerous clients." p. 1045.

The Bar would have Ms. del Pino receive exactly the same discipline, including the retroactivity of the effective date of disbarment, as Mr. Heptner. That, notwithstanding the fact that unlike Ms. del Pino Mr. Heptner's offenses occurred over 10 years, involved numerous clients, resulting in injury to some of them, was his fifth offense before the Court, and involved deliberately disobeying orders of the Supreme Court. The biggest difference between Mr. Heptner's case and Ms. del Pino's, however, is the fact that Mr. Heptner for an 18-month period involved one of his clients, to whom he owed the duty to protect, in purchasing and selling cocaine. In other words, he involved a client in felonious conduct.

By no circumstances should Ms. del Pino receive the same discipline as did Mr. Heptner. Her offenses were less serious, fewer in number, occurred over a shorter period of time, and did not involve her clients.

The *Anderson* case, also cited by the Bar, involved two lawyers who

> not only misrepresented the facts to the district court but failed to correct the misrepresentations even when they were brought to [the lawyers'] attention. By their actions, respondents violated their responsibilities as officers of the court. p. 854.

Ms. Anderson made material misrepresentations to a court and received a public reprimand. Mr. McClung engaged in even more serious misconduct and received but a 30-day suspension. This case could well serve as precedent for Ms. del Pino only receiving a public reprimand for her participation in the closing.

Respondent argues to this Court that she has overcome the presumption of disbarment for her felony convictions in like manner as the accused lawyer in *Florida Bar v. Arnold*, 767 So.2d 438 (Fla. 2000). Mr. Arnold was able to convince this Court that he should not be disbarred despite the fact that he pled guilty to a federal felony. The Referee found that Mr. Arnold, in essence, engaged in money laundering by knowingly or deliberately avoiding knowing that proceeds used to purchase a boat were derived from drug smuggling activities. While Mr. Arnold had extremely significant mitigation, the Court took that into consideration and only suspended him for 60 days (he had already served five years' suspension) and did not require him to prove rehabilitation prior to reinstatement. In the case at bar, Respondent's discipline will be harsher than Mr. Arnold's because she will have to prove rehabilitation in reinstatement proceedings. It should be emphasized that none of Mr. Arnold's felonious conduct occurred during a period of incredible emotional stress as the result of spousal abuse and during a period of prolonged depression, chronic fatigue and Xanax abuse.

The Bar argues that the Referee's reliance on *Florida Bar v. Forbes*, 596 So.2d 1051 (Fla. 1992), for his recommendation of disbarment is appropriate. Respondent distinguished the *Forbes* case on page 43 of her Initial Brief. *Forbes* is distinguishable for two reasons: First, unlike Respondent's actions in the

Aventura closing, Mr. Forbes' misrepresentations to the bank were for his own personal benefit. Secondly, the material mitigation present in Ms. del Pino's case was not present in Mr. Forbes' case. The Referee obviously thought *Forbes* was appropriate in Ms. del Pino's case because he erroneously believed that she attended the Aventura closing with her husband with the intent to live in the condominium. (It should also be noted that Mr. Forbes received a six-month prison sentence for his crime while Ms. del Pino was not incarcerated.)

Florida Bar v. Chosid, 500 So.2d 150 (Fla. 1987), discussed on page 11 of the Bar's brief, does, indeed, support a three-year suspension in the case at bar. Mr. Chosid pled to one count of making and subscribing a false income tax return. The unreported income was the result of a drug smuggling operation. He was sentenced to two years in prison. Mr. Chosid had previously been disciplined by the Bar, albeit it was only a private reprimand. There was no showing of any mitigation akin to Ms. del Pino's. Notwithstanding these facts, he was not disbarred. He received a three-year suspension. Respondent, who has no prior disciplinary history and who was not incarcerated, should certainly receive nothing more than Mr. Chosid, who served two years in prison and who had a prior discipline.

The Bar attempts to paint Respondent's offenses as far more serious than those involved in *Florida Bar v. Smith*, 650 So.2d 980 (Fla. 1995). Respondent

discussed the *Smith* case at length on pages 36-39 of her Initial Brief. Mr. Smith received a three-year suspension notwithstanding two felony convictions, including (1) his filing false tax returns for the years 1987 through 1990 and in which he understated his income by over $110,000.00 and (2) lying to the Federal Election Commission regarding a $10,000.00 payment for nonexistent consulting services. Mr. Smith also had a prior discipline. He received a three-year suspension; Ms. del Pino should receive nothing more.

Respondent disagrees with the Referee's finding of a dishonest or selfish motive as to each criminal charge. As to the tax evasion, the Referee noted that the selfish motive was Respondent's ability to have more money in her pocket over an extended period of time. The evidence is unrebutted, however, that Respondent's failure to attend to her personal matters was not the result of her desire for more money. She testified, and it was unrebutted, that she had the wherewithal to pay her taxes. But, just as was true with her electric and telephone bills, which she did not pay although she had the money to do so, her depression and emotional state was such that she simply could not bring herself to attend to such personal financial matters. She recognizes that she should be disciplined for these offenses; she argues, however, that disbarment is overkill.

On page 14 of its Answer Brief the Bar notes that Respondent remains married and "committed" to her husband. The latter is not true. Ms. del Pino is

the one that notified authorities of Mr. Arias' leaving the jurisdiction to avoid arrest and she assisted the government in trying to find him. She received a downward departure of her sentence for helping the government find Mr. Arias. TR. 90-91. She has not seen or spoken to him since July 2004.

The Bar also argues that she should receive no mitigation for her various emotional problems because they did not "affect her job performance and judgment as a lawyer." Such is not the case at all. Ms. del Pino had to go part-time at her job in January 1998 because of the toll her two-year marriage was taking on her. She completely left the job that she loved in January 2000 for the same reason. Although she attempted to practice on her own, in May 2000 she abandoned any such hope.

Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990), is not support for disbarment in the case at bar. Mr. Shuminer stole trust funds from many of his clients. He used some of the stolen funds to buy himself a Jaguar automobile. There was no showing, however, that his alcoholism affected his thought processes, i.e., clouded his judgment during his repeated thefts and the purchase of the car. In the case at bar, Ms. del Pino's emotional health clearly affected her life and decision-making. She left a job that she loved, did not pay her bills, did not attend to her personal matters and basically was the classic abused emotionally

abused wife. (It should also be noted that Mr. Shuminer's misconduct involved injury to his clients; no such factor is evident here.)

The Bar argues on page 15 of its brief that Respondent did not "falter in her professional life." Such is not the case. She left her professional life, first going part-time and then quitting altogether. Fortunately, she recognized that her emotional state was such that she could not continue representing clients with the diligence that the Bar requires of her. While she was able to leave her problems at home when she was at work, for a short period of time, ultimately her abusive husband, her Xanax misuse and her depression forced her to leave the practice that she loved.

The Bar has presented this Court with no cases in which a lawyer was disbarred for crimes that did not result in prison time and in which the conduct was directly related to severe emotional problems, where there was no harm to clients and where the lawyer had no prior disciplinary history.

As argued in her Initial Brief, the mitigation present in this case justifies a suspension rather than disbarment. The Referee gave undue weight to aggravating factors, including his misapprehension that Ms. del Pino was going to live in the condominium involved in the Aventura transaction and he gave insufficient weight

to the mitigation. Rather than being disbarred, Ms. del Pino should be suspended. A two-year suspension is the appropriate discipline.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Reply 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 14th day of June, 2006.

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