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The Florida Bar v. Jorge Luis Cueto

CHIEF JUSTICE: GOOD MORNING. FLORIDA BAR VERSUS CUETO. COUNSEL MAY PROCEED.

THANK YOU, YOUR HONOR. MAY IT PLEASE THE COURT. MY NAME IS JACK WEISS. I REPRESENT THE RESPONDENT JORGE CUETO IN PROCEEDINGS BEFORE THIS COURT. WE HAVE FILED A MOTION FOR REHEARING, AND WE ARE HERE TODAY ON THAT MOTION. IN ESSENCE, WE ARE ASKING THIS COURT TO RECONSIDER ITS ORDER DISBARRING MY CLIENT. IN SO DOING, THE COURT REJECTED THE REFER RE'S RECOMMENDATION THAT MY CLIENT -- THE REFEREE'S RECOMMENDATION THAT MY CLIENT RECEIVE A THREE-YEAR SUSPENSION. BASICALLY IT WAS BASED UPON THIS COURT'S REPEATED PRONOUNCEMENTS THAT A REFEREE'S RECOMMENDED DISCIPLINE WILL BE NOT OVERTURNED, UNLESS IT IS OFF THE MARK OR WORDS TO THAT EFFECT. OUR POSITION, YOUR HONORS, IS THAT THERE WERE AT LEAST EIGHT JUDGMENTS FOR SUSPENSIONS FOR EXACTLY THE SAME CONVICTION, SHOWS THAT THE REFER RE'S RECOMMENDATION WAS NOT CLEARLY -- THAT THE REFEREE'S RECOMMENDATION WAS NOT CLEARLY OFF THE MARK.

YOU DON'T SUGGEST THAT THOSE ARE BINDING ON THIS ON COURT IN THIS CASE.

YOUR HONOR, IT IS NOT BINDING IN THE SENSE THAT YOU MUST OVERTURN CUETO, BUT IT IS A FACTOR THAT I THINK THIS COURT SHOULD CONSIDER. THIS COURT MUST LOOK AT THE FLORIDA BAR. THE FLORIDA BAR IS A AGENCY OF THIS COURT, TO SEE HOW THEY VIEW CASES, YOUR HONOR, AND THE BAR IS SOMEWHAT SCHIZOPHRENIC ON THIS. WE HAVE EXACTLY THE SAME CONVICTION, UNLAWFUL COMPENSATION, ONE COUNT OF THIRD-DEGREE FELONY.

IS THIS THE FIRST ONE OF THESE INSTANCES THAT HAS ACTUALLY BEEN PRESENTED TO US, OTHER THAN ON SOME TYPE OF AN AGREEMENT?

YES, SIR. YES, SIR. THIS IS THE FIRST CASE THAT WENT TO TRIAL, JUSTICE WELLS, AND AS FAR AS I KNOW, IT IS THE ONLY ONE THAT HAS GONE TO TRIAL, BUT I DON'T KNOW THESE THINGS, BECAUSE I DON'T HAVE PRIVTOY WHAT THE BAR IS DOING.

WOULD YOU NOT AGREE THAT THE OFFENSE THAT COMES TO US FOR A DETERMINATION, GOES TO THE VERY HEART OF THE ADVOCACY SYSTEM, AS TO WHETHER IT IS GOING TO BE SOMETHING THAT PEOPLE CAN RELY UPON HAS BEEN DONE IN A HONEST AND FORTHRIGHT WAY BY THE OFFICERS OF THE COURT WHO ARE MEMBERS OF THE FLORIDA BAR?

YES, SIR. EVERY INSTANCE THAT, IS EXACTLY WHAT IT IS, YOUR HONOR. AND FOR THE BAR TO SAY, ON ONE HAND, THIS CONVICTION IS DISBARMENT THAT WE MUST, AS BAR COUNSEL ARGUED AT CLOSING HEARING, PAGE 114 OF THE TRANSCRIPT OF THE FINAL HEARING, WE MUST, WE MUST DISBAR THIS MAN TO SERVE AS A DETERRENT TO OTHER LAWYERS, TO PREVENT THEM FROM DOING THE SAME THING, AND THEN FOUR MONTHS LATER, SAYING, WELL, A 18-MONTH SUSPENSION IS GOOD ENOUGH DETERRENT.

WHAT I AM CONCERNED ABOUT IS WHAT THIS COURT IS GOING TO DO OR HAS DONE, WHEN THE MATTER IS PRESENTED TO THIS COURT FOR A DETERMINATION, OTHER THAN ON THE BASIS OF SOME KIND OF AN AGREEMENT. WHAT, I MEAN, HOW IS THIS COURT GOING TO ENTER A JUDGMENT WHICH WOULD SAY THAT A LAWYER THAT IS ENGAGED IN THIS KIND OF CONDUCT DESERVES TO BE A LAWYER ANY LONGER IN FLORIDA?

JUSTICE WELLS, YOU CANNOT BE MYOPIC ON THESE SORT OF THINGS. YOU CANNOT HAVE TUNNEL VISION. I SUBMIT THAT THIS COURT SHOULD NOT FOCUS EXACTLY AND ONLY ON MR. CUETO'S CASE, BECAUSE THAT WAS A CONTESTED APPEAL, WHILE SAYING AT THE SAME TIME, WE APPROVE, NOW, REMEMBER, THIS COURT APPROVED THE CONSENT JUDGMENTS, SO YOU ALL HAVE RULED ON THESE OTHER CONSENT JUDGMENTS, TOO. YOU HAVE GIVEN THEM YOUR INPRIMITIVE APPROVAL.

I AM GOING TO ASK THE BAR THESE QUESTIONS, THAT WHEN WE APPROVE A 18-MONTH SUSPENSION, WE WERE NOT APPRISED THAT THERE HAD ALREADY BEEN A THREE-YEAR SUSPENSION RECOMMENDED. MAYBE THE OTHER ONES WERE TOO LIGHT. BUT I WOULD LIKE YOU TO ADDRESS THAT, IF I ACCEPT YOUR PROPOSITION THAT WE HAVE SOME RESPONSIBILITY TO DO SOME TYPE OF A PROPORTIONALITY REVIEW, BEING THAT THESE ARE LIKE CASES, CAN YOU ADDRESS THE FACT THAT IT APPEARS THAT YOUR CLIENT, IN TERMS OF THE, BOTH THE PERIOD OF TIME THAT IS OVER A SIX-YEAR PERIOD OF TIME, AND ALTHOUGH THERE MAY HAVE BEEN A SINGLE COUNT CHARGED IN THE CRIMINAL CASE, THAT THERE WERE 35 SEPARATE INSTANCES OF KICKBACKS, WHICH MEANS THAT, OVER A SIX-YEAR PERIOD, THAT THERE WERE NOT JUST FIVE, NOT JUST EIGHT, REPEATEDLY 35, THAT THERE FOR IN BOTH THE TERMS OF DURATION AS WELL AS THE NUMBER, THAT YOUR CLIENT SORT OF LED THE PACK IN THIS, SO THAT IT IS NOT JUST A SINGLE, MAY HAVE BEEN A SINGLE COUNT CHARGED, I DON'T KNOW WHY THEY DIDN'T CHARGE 35 COUNTS, BUT THAT YOU HAVE GOT THOSE MULTIPLE INSTANCES. THAT SEPARATES YOUR CLIENT FROM --

I THINK I HAVE GOT THREE QUESTIONS HERE, JUSTICE PARIENTE, SO IF I MISS ONE OF THEM --

QUALITATIVELY WE ARE TALKING ABOUT A DIFFERENT --

YES. NUMBER ONE, I THINK THIS COURT SHOULD NOT BE PUT IN THE POSITION OF HAVING TO EXAMINE CLOSELY, EVERY SINGLE CONSENT JUDGMENT THAT COMES UP BEFORE YOU, AND FOR THAT REASON THIS COURT MUST TRUST THE FLORIDA BAR TO SHOW SOME DEGREE OF CONSISTENCY IN THE CONSENT JUDGMENTS IT IS SENDING UP HERE. WE DO NOT HAVE THAT CONSISTENCY BEFORE THE COURT TODAY. NUMBER TWO --

I AM SORRY. GO ON AND FINISH ANSWERING THAT QUESTION.

THANK YOU, JUSTICE QUINCE. NUMBER TWO, YOUR HONOR, THE DURATION. WHAT WE HAVE HERE, YOUR HONOR, ARE DIFFERENCES INGRESS NOT DIFFERENCES IN KIND OF AND I SUBMIT THAT SUSPENSIONS RANGING FROM 18 MONTHS TO THREE YEARS ARE DIFFERENCES IN DEGREE. WHEN YOU GO FROM A SUSPENSION TO A DISBARMENT, YOU HAVE GOT A DIFFERENCE IN KIND FOR THE SANCTION.

AND HOW DO WE DEAL WITH THE TWO, IN THIS SITUATION WE, ALSO, HAVE TWO PEOPLE WHO HAVE RESIGNATIONS OF FIVE YEARS. WHAT, DON'T WE LOOK AT THOSE PEOPLE, ALSO, IN DETERMINING WHETHER OR NOT IF WE ARE GOING TO CONSIDER THIS A DISPAR AT TREATMENT, ISN'T HE BASICALLY ON THE SAME FOOTING AS THESE OR TWO PEOPLE.

NO, SIR. NO, MA'AM. NOW, I HAVE COMPLETELY LOST MY TRAIN OF THOUGHT. JUSTICE QUINCE, THOSE TWO AGREED FOR WHATEVER REASON, AND THE RECORD IS SILENT, TO THE RESIGNATIONS FOR CAUSE, WHICH FOR ALL INTENDS INTENTS AND PURPOSES -- FOR ALL INTENTS AND PURPOSES, IS DISBARMENT.

SO WE HAVE TWO OTHER PEOPLE WHO PARTICIPATED IN THIS SCHEME WHO ARE, IN FACT, DISBARRED, ALSO.

WHY DID THE BAR SUDDENLY BECOME SO IN CONSISTSENT? WHY, AFTER JUDGE AMY STEEL RENDERED A SUSPENSION ON JUDGE CUETO'S CASE -- ON JORGE CUETO'S CASE, DID THEY START

TAKING SUSPENSION OF AFTER SUSPENSION AFTER -- SUSPENSION AFTER SUSPENSE EVENINGS AFTER -- AFTER SUSPENSION AFTER SUSPENSION, AND WHY DID THEY THEN SUDDENLY DECIDE DISBARMENT?

YOU SAY 35 AND THE PERIOD OF TIME.

YES.

I AM HAVING THE DIFFICULTY UNDERSTANDING THE STANDING YOUR CLIENT HAS, IN A SITUATION WHERE CLEARLY 35 DICK BACKS OVER A PERIOD OF SIX YEARS THAT, -- 35 KICKBACKS OVER A PERIOD OF SIX YEARS THAT, THIS DOES NOT MERIT DISBARMENT. NOW, ARE YOU ARGUING THAT THIS CONDUCT DOES NOT MERIT DISBARMENT? IS THAT BECAUSE ARE ARGSGLUING.

ABSOLUTELY, YOUR HONOR. ABSOLUTELY.

GO AHEAD AND ADDRESS THAT. I WOULD LIKE TO HEAR YOUR ARGUMENT ON THAT.

FIRST OF ALL, WE DON'T KNOW THAT THERE WERE 35 INSTANCES, YOUR HONOR. THE RECORD SHOWS A RANGE FROM 21-TO-40. MY CLIENT DIDN'T KEEP RECORDS. THE BAR ONLY CHARGED HIM WITH ONE CASE. THE OTHERS CAME OUT ANCILLARY IN AGGRAVATION. WE DON'T KNOW THAT CHARLES APPLE ONLY HAD TEN OR ELEVEN. HE DID IT FOR FIVE OR SIX YEARS, RIGHT UP UNTIL '99, THEN HE ONLY GOT A TWO-YEAR!

NOW YOU ARE COMING BACK. I AM ASKING YOU ABOUT WHETHER OR NOT YOUR CLIENT'S CONDUCT AND WHETHER THERE IS NOT A SUFFICIENT RECORD HERE THAT THIS IS THE KIND OF CONDUCT THAT CLASSICALLY MERITS DISBARMENT. ALL RIGHT. LET'S CHANGE IT FROM 35 OR WHATEVER, TO BETWEEN 21 AND 40. ALL RIGHT. HOW DOES THAT HELP YOUR CLIENT ANY, IF THERE WERE BETWEEN 21 AND 40 SEPARATE CRIMINAL ACTS OF ACCEPTING KICKBACKS IN VIOLATION OF THE CRIMINAL LAW, OVER THIS SIX-YEAR PERIOD? A LAWYER WAS DOING THAT WITH A COUNTY EMPLOYEE. HOW CAN WE ALLOW A LAWYER THAT HAS BEEN DOING THAT, OVER A PERIOD OF SIX YEARS, TO CONTINUE TO PRACTICE LAW IN THE STATE OF FLORIDA?

OKAY. NUMBER ONE, JUSTICE ANSTEAD, WE ONLY HAVE ONE CRIMINAL CASE BEFORE US. THE BAR HAD THE OPTION OF CHARGING THE OTHER CASES, AND IT CHOSE NOT TO DO SO. WE DON'T KNOW HOW ACCURATE THAT FIGURE IS. WE DON'T KNOW THE CIRCUMSTANCES OF THOSE CASES. WE DON'T KNOW IF MY CLIENT DID ANYTHING WRONG IN THOSE OTHER CASES.

IN OTHER WORDS, THE 21 AND 40 OR BETWEEN 21, WE HAVE NO EVIDENCE IN THIS RECORD THAT THERE WERE AT LEAST 21 EPISODES?

MY CLIENT'S STATEMENT THAT HE THINKS THERE WERE 21-TO-41.

SO WE HAVE YOUR CLIENT'S ADMISSION.

WE ARE TALKING ABOUT A THIRD-DEGREE FELONY, ONE INSTANCE IS THE CONDUCT BEFORE THE REFEREE. IF THE OTHER FACTORS ARE AGGRAVATION, THEY STILL DON'T REMOVE IT FROM THE FACT THAT MY CLIENT WAS ONLY CHARGED WITH ONE CASE, AND I DON'T THINK THIS COURT SHOULD AUTOMATICALLY ASSUME, BECAUSE THE BAR ALLUDED TO OTHER INSTANCES IN THE AGGRAVATION PHASE, THAT MY CLIENT IS GUILTY OF 35 OTHER INSTANCES OR 21 OTHER INSTANCES, BUT YOUR HONOR, THE REFEREE SPECIFICALLY FOUND NUMEROUS MITIGATING CIRCUMSTANCES THAT TOOK THIS CASE FROM A DISBARMENT CASE, DOWN TO A SUSPENSION CASE. SHE ELABORATED ON THEM, AND I AM NOT GOING TO REPEAT THAT.

WAS THERE PUT INTO THIS RECORD, AT THE TIME OF THE CASE BEFORE THE REFEREE, ANY

CIRCUMSTANCES OF THESE OTHER CASES?

I THINK ONLY THIS ONE, YOUR HONOR.

IN OTHER WORDS, THAT --

IT WASN'T TESTIFIED AT HEARING.

THERE WAS NO ATTEMPT, BY EITHER THE BAR OR YOUR CLIENT, TO PUT INTO THE RECORD BEFORE THIS REFEREE, THAT THE BAR HAS TREATED OTHER DEFENDANTS, LAWYERS, DIFFERENTLY?

NO, SIR. THERE WAS NO MENTION WHATSOEVER.

THIS WAS ONLY RAISED ON REHEARING HERE, BEFORE THIS COURT, IS THAT CORRECT?

THAT'S RIGHT, BECAUSE THEY ONLY STARTED ACCEPTING THE CONSENT JUDGMENTS AFTER THEY FILED THE PETITION FOR REVIEW AND THE CASE WAS BRIEFED.

I AM CONCERNED ABOUT USING ALL YOUR TIME. WE WILL GIVE THAT YOU CHANCE FOR REBUTTAL.

THANK, YOUR HONOR.

CHIEF JUSTICE: COUNSEL.

GOOD MORNING. MAY IT PLEASE THE COURT. MY NAME IS WILLIAM MULLIGAN. I AM JOINED BY EILEEN SAKARO. WE ARE HERE ON BEHALF OF THE FLORIDA BAR.

WAS THE BAR AWARE THAT THERE WERE MULTIPLE DEFENDANTS WHO HAD ALL BEEN CHARGED IN FEDERAL COURT WITH THE SAME ESSENTIAL CRIMINAL ACT?

YOUR HONOR, THE BAR WAS AWARE THAT THERE WERE A NUMBER OF CASES.

DOES THE BAR, THEN, HAVE A SYSTEM BY WHICH THEY THEN HAVE THOSE ASSIGNED TO ONE BAR COUNSEL, TO EVALUATE AND LOOK AT THOSE? I AM VERY CONCERNED NOT JUST WITH THIS CASE, WITH THIS PRACTICE THAT WE WERE GETTING CONSENT JUDGMENTS AND STIPULATION AFTER STIPULATION, WITHOUT KNOWING THAT THIS WAS ALL PART OF ONE LARGE CRIMINAL INDICTMENT.

YOUR HONOR, THE CASES WERE NOT ASSIGNED TO ONE BAR COUNSEL. THEY WERE ASSIGNED TO A NUMBER OF BAR COUNSELS, ALL IN THE MIAMI OFFICE.

DID ONE HAND KNOW WHAT THE OTHER WAS DOING?

ABSOLUTELY, YOUR HONOR. ABSOLUTELY. WE WERE ALL AWARE OF THE CASE. IT WAS DEEMED OPERATION RISKY BUSINESS BY THE DADE COUNTY STATE ATTORNEYS OFFICE, AND WE ARE ALL AWARE, A FEW ACTUALLY WENT TO THE DADE COUNTY STATE ATTORNEYS OFFICE.

HASN'T THIS COURT BEEN PUT IN A DIFFICULT POSITION, NOW, BECAUSE WHEN IT HAS BEEN DISCLOSED THAT THE BAR HAS AGREED, IN OTHER INSTANCES OF DEFENDANTS WHO APPARENTLY HAVE VIOLATED THE SAME CONDUCT OF, YOU KNOW, OF PENALTIES RANGING FROM DEGREED SUSPENSIONS TO A -- FROM AGREED SUSPENSION TO SAY A WIDE RANGE HERE, CLEARLY DISPAR AT TO A DISBARMENT, THAT WE HAVE FOUND APPROPRIATE IN A NUMBER OF CASES, AND THE PUBLIC, AND IF INDEED THE LAWYERS OF THE STATE OF FLORIDA ARE GOING TO HAVE CONFIDENCE IN THIS DISCIPLINARY SYSTEM, SHOULDN'T THE BAR HAVE AN OBLIGATION,

WHEN THEY SEE, ESPECIALLY WHEN IT IS VERY SPECIFIC, SERVICES THE OFFENSES ARE CONCERNED, TO A SPECIFIC GOVERNMENT ENTITY AND A SPECIFIC GROUP OF LAWYERS, TO BRING THAT TO THIS COURT'S ATTENTION AND TO ATTEMPT TO TREAT THIS IN A RATIONAL WAY, AS FAR AS THE LEVEL OF PUNISHMENT OR SANCTIONS THAT ARE SOUGHT?

YOUR HONOR, THE FLORIDA BAR FEELS EXTREMELY CONFIDENT THAT OUR HANDLING OF ALL OF THESE CASES, THERE ARE 11 THAT HAVE BEEN RESOLVED WITH DISCIPLINE CURRENTLY AND THERE ARE 16 THAT ARE STILL PENDING AT THIS TIME.

SO 27 TOTAL CASES?

TO MY UNDERSTANDING THERE IS 27 AT THIS TIME, AND 16 ARE OBVIOUSLY STILL AT THE STATE ATTORNEYS OFFICE FOR PROSECUTION AT THIS POINT.

WHY WOULD ONE LIKE THIS BE PICKED OUT, IF I UNDERSTAND THE RECORD DISCLOSED THAT THE DEFENDANT HERE, THE LAWYER HERE OFFERED A PLEA IN THIS PARTICULAR CASE, AND THAT THE BAR REFUSED THAT IN THIS PARTICULAR CASE?

YOUR HONOR, MR. WEISS WAS TRYING TO OBTAIN A THREE-YEAR SUSPENSION AT SOME POINT IN THE CASE. OUR OFFICE, THE FLORIDA BAR OFFICE, DID NOT FEEL IT WAS APPROPRIATE TO EXTEND A THREE-YEAR. CERTAINLY HE COULD HAVE TENDERED A RESIGNATION, AND I THINK, YOUR HONOR, IF WE LOOK AT THE DIFFERENCES BETWEEN THE RESPONDENT'S CASE VERSUS THE OTHER CASES THAT ARE BEING REFERENCED, IT BECOMES VERY PARENT THAT -- APPARENT THAT THERE ARE SIGNIFICANT DIFFERENCES.

ARE YOU REPRESENTING THAT THE BAR AT ALL TIMES HAS BEEN AWARE OF THE TOTAL NUMBER OF LAWYERS INVOLVED IN THIS AND HAS BEEN TRYING TO MATCH THE SANCTIONS SOUGHT TO THE CONDUCT, IS THAT --

YES, YOUR HONOR. WE WERE AWARE OF ALL THE CASES.

WHAT IS THE BAR'S, THEN, OVERALL THEORY, IN TERMS OF IN OTHER WORDS, WHAT STANDARDS IS THE BAR APPLYING, WITH REFERENCE TO THE SANCTION SOUGHT AGAINST THE PARTICULAR ATTORNEY? WE GOT 27, 26?

APPROXIMATELY 27.

OKAY. AND SOME OF THEM, LIKE THIS CASE, 21-TO-40 SEPARATE INCIDENTS, AND OTHERS, WHAT, LESSER AMOUNTS?

MUCH, MUCH LESSER.

OKAY. WELL, TELL ME WHAT THE BAR'S OVERALL SCHEME IS, IN THE CASE.

YOUR HONOR, I WOULDN'T TERM IT AS SOME OVERALL SCHEME AS TO HOW WE OPERATE WITH THESE CASES. THEY ARE ALL INDIVIDUAL. NONE OF THESE, THESE DEFENDANTS WERE NOT WORKING AS AN UNIT TOGETHER. THEY MAY HAVE BEEN CHARGED WITH THE SAME VIOLATIONS, BUT THEY WERE NOT WORKING AS A TEAM, SO THEY WERE ALL INDIVIDUAL CASES.

THEY ALL GOT THE SAME CRIMINAL SANCTION.

NOT ALL OF THEM, NO. THEY DID NOT ALL PLEA TO THE SAME CRIMINAL COUNT. BUT YOUR HONOR, THE CASES WERE ALL VIEWED INDIVIDUALLY BUT YET, KNOWING THE PICTURE AS A WHOLE. NOW, OBVIOUSLY MR. --

I THINK WHAT THE COURT IS TRYING TO GET IS FOR THE BAR TO EXPLAIN THE DISPARITY IN THE DISCIPLINES HERE. YOU HAVE ONE THAT SEEMS TO STAND OUT. PLEAS TAKEN IN THE OTHERS, AND THE TWO CASES, WHAT DID THEY HAVE, FIVE? DISBARMENTS?

FIVE-YEAR RESIGNATIONS.

FIVE-YEAR RESIGNATIONS, AND HERE YOU HAVE THIS ONE CASE THAT THE BAR IS INSISTING THAT THIS LAWYER BE DISBARRED, AND THEY ARE ALL CHARGED WITH KICKBACKS AND SCHEMES. SO WHAT IS THE DIFFERENCE? HOW DID YOU COME UPON THAT DECISION?

FIRST OFF --

WHAT ARE THE FACTORS THAT WENT INTO MAKING THAT DETERMINATION? THAT IS WHAT WE ARE TRYING TO GET AT.

FIRST OFF, YOUR HONOR, I WOULD NOTE THAT TWO OF THE CASES ARE TANTAMOUNT TO DISBARMENT AS RESIGNATIONS, SO, REALLY, THREE CASES ARE ON THE SAME PLANE WITH MR. CUETO'S CASE, THREE CASES BEING MR. BATTISTA AND AS WELL MR. FERNANDEZ. NOW, YOUR HONOR, THE BAR'S VIEWS IS NOT DISPARATE AND I WILL STATE Y THERE ARE FIVE CASES THAT RECEIVED 18-MONTH SUSPENSIONS. THAT INVOLVED MR. MARIO CABELLO, GONZALES, ALEXIS ROSARIO, AND IN THOSE CASES THERE WERE ONE TWO SEVEN INCIDENTS WHICH OCCURRED BETWEEN 1995 AND 1996.

ONE OR MORE CRIMINAL INSTANCES, SO IS THE BAR SAYING THAT, IF SOMEONE ACCEPTS AN ILLEGAL KICKBACK ONE TIME, COMMIT AGO CRIME, THAT INTERFERES WITH THE ADMINISTRATION OF JUSTICE THAT, THAT ALONE DOES NOT JUSTIFY DISBARMENT?

YOUR HONOR, I AM NOT SAYING. THAT WHAT I AM SAYING, THOUGH, IS THESE CASES WERE DIFFERENT THAN MR. CUETO'S CASE AND ADDITIONALLY THERE IS SIGNIFICANT MITIGATING EVIDENCE IN EACH CASE AND DIFFERENT CIRCUMSTANCES. FOR INSTANCE IN MR. CUETO'S CASE, THE PATTERN OF MISCONDUCT WAS EXTREME, COMPARED TO THE OTHER CASES. AS I SAID, THERE WAS LIMITED INSTANCES OVER A MUCH, MUCH SMALLER PERIOD OF TIME.

BUT THE REFEREE, YOU SEE I AM CONCERNED BECAUSE THE REFEREE DID RECOMMEND THREE YEARS, AND FOUND SUBSUBSTANTIAL MITIGATION IN MR. -- FOUND SUBSTANTIAL MITIGATION IN MR. CUETO'S CASES. WE WERE NOT AWARE THAT THERE WERE ALL OF THOSE OTHER SITUATIONS WHERE 18 MONTHS WAS BEING ACCEPTED, SAID THAT, NO, YOU HAVE GOT, YOU DO SOMETHING LIKE THIS, AND ESSENTIALLY ONE TIME, THAT IS DISBARMENT, BUT NOW WE HAVE GOT WHAT IS A VERY UNEQUAL APPLICATION, AND REALLY NOT HAVING AN EVALUATION OF, OKAY, FIVE TIMES ISN'T SO BAD, SO IT HAS TO GET UP TO TEN, 15, 20. IS THAT IT?

THAT IS NOT IT, YOUR HONOR. AS THIS COURT IS WELL AWARE HAD, THERE ARE A NUMBER OF FELONY CONVICTION CASES, WHERE DISBARMENT IS NOT INSTITUTED. WHILE IT IS GENERALLY THE BAR'S POSITION THAT, IN A FELONY CONVICTION CASE DISBARMENT IS APPROPRIATE, WE DECIDED, BASED ON OUR INFORMATION, IF YOU LOOK AT THE DIFFERENT CASES, ONLY FIVE OF THEM RECEIVED 18-MONTH SUSPENSIONS, AND THEY WERE OVER MAYBE A ONE OR TWO-YEAR PERIOD OF TIME, NO MORE THAN SEVEN CASES. WE HAVE ONE CASE WHERE IT GOT A TWO-YEAR SUSPENSION. THAT INVOLVED TEN-TO-ELEVEN CASES AND IT OCCURRED OVER '95 TO '96 AND IN ONE INSTANCES, A TOTAL OF TEN OR ELEVEN, AND ONLY ONE INSTANCE IN 1999.

MAYBE THAT IS BECAUSE THEY DIDN'T HAVE A CHANCE TO DEAL WITH THE SAME ADJUSTOR. I DON'T KNOW HOW THAT JUSTIFIES TREATING SOMEONE DIFFERENTLY.

YOUR HONOR, I JUST NOTE A FEW THINGS ABOUT MR., THE RESPONDENT'S CASE. ON DIFFERENT OCCASIONS, FIRST OFF AT THE FINAL HEARING HE HAD INDICATED THAT HE WAS INVOLVED IN

THE 35 INSTANCES ANYWHERE BETWEEN 1993 AND 1999.

HE ADMITTED THAT.

YES.

AND HE AGREED TO PLEA AT ALL TIMES, TO THE THREE YEARS THAT, CORRECT?

HE DID AT SOME POINT EXTEND THE OPTION THAT HE WOULD LIKE TO RECEIVE A THREE-YEAR SUSPENSION, YOUR HONOR. ADDITIONALLY, AT A SWORN STATEMENT WHICH WAS GIVEN DURING THE CRIMINAL INVESTIGATION, FEBRUARY 17 OF 2000, HE NOTED THAT THERE WERE, COULD BE SYSTEMS 41 INSTANCES, SO WHILE COUNSEL MAY SAY AS LOW AS 20, WE HAVE INFORMATION WHERE HE REVEALS IT COULD BE MAYBE AS MANY AS 41 INSTANCES OF KICKBACKS. HE WAS INVOLVED WITH FOUR DIFFERENT ADJUSTORS. NONE OF THE OTHER CASES INVOLVED IN CONSENT JUDGMENTS, KATED A SCHEME WITH A NUMBER OF ADJUSTORS. -- INDICATE ADD SCHEME WITH A NUMBER OF ADJUSTORS -- INDICATED A SCHEME WITH A NUMBER OF ADJUSTORS. HE WAS CLEARLY OFF THE CHAFERMENT THE OTHERS WERE OVER HERE. HE WAS WAIL OFF THE CHART.

WHAT -- HE WAS WAY OFF THE CHART.

WHAT ABOUT THE DISPARATE TREATMENT FROM THE OTHERS?

WE ARE HERE FOR THE DESPERATE TREATMENT FROM THE OTHERS AND THERE WAS NO DISPARATE TREATMENT IN THE OTHERS. IT WAS TANTAMOUNT TO DISBARMENT.

DO YOU KNOW THE CIRCUMSTANCES IN THOSE OTHER CASES?

I DO.

WHAT WERE THEY?

THERE WERE TWO, MR. FERNANDEZ AND MR. BATTISTA, AND MR. BATTISTA PLED TO BRIBERY IN THIS CASE, ONE COUNT OF BRIBERY. I BELIEVE A NUMBER OF INSTANCES WERE AND PRODUCTS MATTLY 13 OR SO. -- WERE APPROXIMATELY 13 OR SO. WE HAVE LEDGER ENTRIES REFLECTING THAT BETWEEN 1995 AND '96, THAT THERE WERE 35.

WAS HE NOT CHARGED WITH UNLAWFUL COMPENSATION?

MR. --

AS I UNDERSTAND IT, ALL THE OTHERS WERE CHARGED WITH ONE COUNT OF UNLAWFUL COMPENSATION. IS THAT CORRECT?

MY UNDERSTANDING IS HE WAS CHARGED NOT, THERE WERE VARYING CHARGES, DEPENDING UPON THE DIFFERENT DEFENDANT. MOST OF THEM PLED TO THE ONE COUNT OF UNLAWFUL COMPENSATION, BUT FOR INSTANCE, MR. BATTISTA, BATTISTA'S CASE, HE PLED TO ONE COUNT OF BRIBERY, WHICH IS A FELONY OF THE THIRD DEGREE ON THE SAME PLANE, PENALIZED, PENALTY-WISE-ASS THE OTHER CASE, OTHER CASES -- PENALTY WEISS, AS THE OTHER CASE, OTHER CASES.

ARE YOU FINISHED WITH ANSWERING JUSTICE ANSTEAD'S QUESTION?

I WILL CONTINUE. I WAS GOING TO MENTION MR. FERNANDEZ AS WELL N HIS CASE, BASICALLY HE HAD AND PROXON -- MR. FERNANDEZ AS WELL. IN HIS CASE, BASICALLY HAD APPROXIMATELY TWELVE KICKBACKS, AND REMEMBER OFTENTIMES WE CAN'T GET IN THE RESPONDENT'S MIND AND KNOW EXACTLY WHY THEY DECIDED. WE MAY HAVE A LOT MORE OUT THERE THAT WE

WEREN'T ABLE TO GET TO. THEY MAY HAVE OCCURRED EARLY IN THE PROCEEDINGS AND WE WEREN'T ABLE TO DETERMINE THE LEVEL OF INVESTIGATION THAT WE DID ON THE OTHER CASES.

LET ME STATE MY CONCERN ABOUT WHAT THE BAR HAS DONE HERE. THAT IS THAT IT STRIKES ME IF WE HAVE A SITUATION IN WHICH THERE IS A FELONY CONVICTION, LIKE USING COCAINE OR SOME TYPE OF FELONY CONVICTION, THAT IS IN A PERSONAL LIFE OR SOMEONE'S PERSONAL LIFE OR SOMETHING SEPARATE FROM THEIR PRACTICE, THAT IS ONE THING. BUT WHEN WE HAVE AN INSTANCE IN WHICH THERE IS CORRUPTION, BOTH OF THE LAWYER AND THE GOVERNMENT THAT GOES TO THE VERY HEART OF OUR SYSTEM OF GOVERNMENT AND OUR JUDICIAL SYSTEM AND OUR CONFIDENCE IN LAWYERS, THAT IS SOMETHING THAT, BEFORE THE BAR MAKES ARRANGEMENTS IN JUST SENDING THESE CONSENT DECREES OVER HERE, THIS COURT NEEDS TO KNOW WHAT THE BASIS OF THOSE CONSENT DECREES ARE, SO THAT WE HAVE SOME WAY TO UNDERSTAND WHAT THE BAR IS DEALING WITH, AS AN ARM, AS THE REGULATORY ARM OF THIS COURT! AND I AM VERY CONCERNED THAT THESE ARE THE TYPE OF OFFENSES THAT NO LAWYER SHOULD BE PRACTICING LAW IN FLORIDA THAT IS ENGAGED IN.

YOUR HONOR, I UNDERSTAND YOUR POSITION ENTIRELY. THE FOCUS THAT WE HAVE AT THIS TIME IS THE DIFFERENCE, THOUGH, BETWEEN MR. CUETO'S CASE AND EVERYBODY ELSE INVOLVED IN THE SITUATION. OBVIOUSLY ALL OF THESE ATTORNEYS WERE INVOLVED IN THESE KICKBACK SCHEMES THERE. IS NOT ONE OF THEM HERE THAT IS BEFORE US, I MEAN THAT IS INVOLVED IN THIS CASE.

I GUESS THAT WHAT YOU ARE SAYING IS MR. CUETO, BECAUSE HE, BECAUSE THE BAR WENT TO HEARING AND STILL HASN'T BEEN ABLE TO TELL US WHY MR. CUETO WAS PICKED OUT AS OPPOSED TO SOMEBODY ELSE WHO, IF THEY HAD GONE TO A HEARING AND TESTIFIED UNDER OATH, THEY, ALSO, WOULD HAVE HAD TO ADMIT TO THEM BEING INVOLVED IN NUMEROUS OF THESE KICKBACKS, SKEEPS, WHAT IS IT THAT WE CAN JUSTIFY, IN TERMS OF SAYING THAT THERE WAS A REASON WHY WE APPROVED CASE AFTER CASE OF A 18-MONTH SUSPENSION, BUT THAT MR. CUETO, IT WASN'T LIKE HE WASN'T WILLING TO PLEAD. IT WASN'T LIKE HE WAS WILLING TO SAY I DID WRONG, TO SAY WHY THIS, THEN, SHOULD BE DISBARRED, OR VICE VERSA, THAT HOW DO WE EXPLAIN, AS JUSTICE WELLS SAYS, HOW DO WE APPROVE, WHEN THERE HAS BEEN A FELONY INVOLVING CORRUPTION, 18-MONTH SUSPENSIONS?

YOUR HONOR, I WOULD NOTE THAT, BEFORE THE CASE, BEFORE IT EVEN CAME TO OUR OFFICE, WE WERE AWARE OF MR. CUETO BEING INVOLVED IN POTENTIALLY 41 INSTANCES. WE --

WHY WEREN'T THOSE CHARGED THEN?

YOUR HONOR, I CAN'T SPEAK FOR THE STATE ATTORNEYS OFFICE.

WHY WASN'T, I THOUGHT THAT, IN TERMS OF THE, WHAT WENT BEFORE JUDGE DONNER, THAT THERE WAS ONLY ONE INSTANCE CHARGED NOT ALL 41.

YOUR HONOR, ALL THE INSTANCES WERE, CAME IN IN AGGRAVATION. THAT IS HOW THE BAR, WE HAVE ONE FELONY CONVICTION IN MR. CUETO'S CASE, AND THE REMAINDER OF THEM CAME IN AS AGGRAVATION.

DID I READ SOMEPLACE IN THE RECORD, THAT THIS LAWYER WAS NOT COOPERATIVE WITH THE BAR? DID I READ THAT, THAT HE WAS LESS COOPERATIVE THAN THE OTHER LAWYERS INVOLVED IN THIS?

YOUR HONOR, IN --

DID I SEE THAT SOMEPLACE IN THE RECORD?

I DON'T BELIEVE, OTHER THAN THE FACT THAT HE CONTESTED THE BAR'S DISCIPLINARY.

SO THAT HAD NOTHING DO WITH IT. THAT DID NOT COME INTO PLAY, THAT HE WAS NOT COOPERATIVE?

WELL, HE ADDITIONALLY FELT THAT HE, DISHONESTY WASN'T AN ISSUE HERE, WHICH WE CLEARLY BELIEVE THAT IT WAS, 1-4-C, WHERE THERE WAS AN ARGUMENT THAT THEY MADE THAT THIS CASE DIDN'T INVOLVE DISHONESTY.

CHIEF JUSTICE: WE HAVE USED YOUR TIME. TO SUM UP THE BAR'S POSITION, THOUGH, DO I UNDERSTAND IT TO BE THAT THE BAR FEELS THIS WAS THE MOST EGREGIOUS OF ALL OF THESE CASES? IS THAT --

ABSOLUTELY. ABSOLUTELY. IT WAS WAY OFF THE CHART.

CHIEF JUSTICE: THANK YOU. YOUR TIME IS UP.

THANK YOU.

CHIEF JUSTICE: COUNSEL. LET'S ASK THE MARSHAL HOW MUCH TIME YOU HAVE LEFT. MR. MARSHAL.

SAY AGAIN.

CHIEF JUSTICE: OKAY.

THANK YOU, SIR. IF I UNDERSTAND THE BAR'S POSITION AND MR. APPLE, WHO HAD 11 INSTANCES EXTENDING RIGHT UP UNTIL HE WAS DISBARRED, ONLY WARRANTS A TWO-YEAR SUSPENSION, BUT MY CLIENT, BECAUSE HE HAD MORE, SHOULD BE DISBARRED, THAT THESE LAWYERS WHO HAD FIVE FIVE-TO-SEVEN INSTANCES OF CORRUPT CONDUCT TO USE THE BAR'S PHRASEOLOGY, THEY ONLY WARRANT 18 MONTHS, SO IT IS NOT WHETHER YOU ARE ACTING CORRUPT. IT IS NOT WHETHER YOU ARE CORRUPTING THE SYSTEM, BUT IT IS WHETHER YOU HAVE DONE IT MORE TYPES THAN THE OTHER GUYS. THAT IS NOT WHERE WE SHOULD BE GOING. I HUMBLBY SUBMIT THE BAR SHOULD BE SEEKING CONSISTENCY.

ALL RIGHT. BUT IF WE ARE NOW IN A SITUATION WHERE, IF THIS COURT KNEW WHAT IT KNOWS TODAY, THIS COURT MAY NOT HAVE SEND THE 18 MONTHS. LET'S JUST ACCEPT, AS YOU READ OUR OPINION, WE TOOK GREAT ISSUE WITH THE FACT THAT THIS WAS NOT A CRIME INVOLVING CORRUPTION. THAT IS WHERE THE REFEREE'S FINDINGS DIFFERED FROM THIS COURT'S, SO WITH THAT, WITH THAT AS A PREMISE, WHAT THEORY OF LAW WOULD SAY THAT, BECAUSE SOMEONE ELSE GOT OFF LIGHT, THAT, BUT SHOULD HAVE GOTTEN A HARSHER PENALTY, NOW YOUR CLIENT BENEFITS BY GETTING A LESSER PENALTY. THAT IS MY PROBLEM, IN OTHER WORDS IT MAY BE THAT WE SHOULDN'T HAVE SEND THE 18 MONTHS. WE MAYBE SHOULD HAVE REQUIRED DISBARMENT PROCEEDINGS FOR ALL OF THESE LAWYERS.

I HATE TO USE THE F WORDS, BUT FUNDAMENTAL FAIRNESS, YOUR HONOR. I DON'T THINK THAT THIS COURT'S DECISIONS IN METING OUT DISCIPLINE, SHOULD BE ARBITRARY AND CAP RISH US.

FAIRNESS TO WHOM?

I AM SORRY?

FAIRNESS TO WHOM?

FAIRNESS TO THE ENTIRE BAR, FAIRNESS TO MY CLIENT, FAIRNESS TO THE PUBLIC. IF THE BAR IS

COMING UP TO THIS COURT ALL OVER THE PLACE, HOW ARE WE, IN THE FUTURE, RESPONDENT'S COUNSEL AND BAR COUNSEL, TO KNOW WHERE TO GO? HOW ARE REFEREES TO KNOW WHERE TO GO, IF A REFEREE IN A FUTURE CASE ONLY HAS A CUETO CASE TO LOOK AT AS THIS COURT'S DECISION, SHE FEELS THAT SHE MUST GO WITH A DISBARMENT, WHEN IN ACTUALITY WE HAVE GOT NUMEROUS INSTANCES WITH SAME MISCONDUCT, WHERE THEY ONLY GOT A SUSPENSION. YES, MA'AM?

SO INSTEAD YOU WOULD HAVE US HAVE AN OPINION OUT THERE THAT SAYS MR. CUETO, WHO PARTICIPATED IN AT LEAST 35 INSTANCES OF A KICKBACK, AND WHO WAS CONVICTED OF AN UNLAWFUL COMPENSATION, OVER A SIX-YEAR PERIOD, WE WOULD HAVE OPINION OUT THERE SAYING THAT ONLY WARRANTS SUSPENSION.

UNDER THE CIRCUMSTANCES, UNDER THE MITIGATION PRESENTED TO THE REFEREE, YES, MA'AM, THAT IS EXACTLY WHAT I AM SUBMITTING.

SO IN THE FUTURE WHAT WE WOULD SEE, INSTEAD OF SOMEONE WHO DOES THIS KIND OF ACTIVITY BEING DISBARRED, PEOPLE WILL SAY, WELL, THEN, THIS ONLY DESERVES A SUSPENSION!

MA'AM, A SUSPENSION ISN'T ONLY A SUSPENSION. A THREE-YEAR SUSPENSION IS A LONG VACATION FROM THE PRACTICE OF LAW. IT REQUIRES PROOF OF REHABILITATION, BEFORE THE LAWYER CAN BE REINSTATED. IT IS REMOVAL FROM THE PRACTICE FOR A MINIMUM OF THREE YEARS, AND PLEASE DON'T LOSE SIGHT --

DISBARMENT GOES HOW LONG?

MINIMUM OF FIVE YEARS, AS OPPOSED TO A MINIMUM OF THREE YEARS.

YES, MA'AM. BUT GETTING BACK IN AS THIS COURT WELL KNOWS, IS ASTRO NO, MA'AMCALLY DIFFERENT ON DISBARMENT -- ASTRONOMICALLY DIFFERENT FROM DISBARMENT, A MINIMUM OF TWO HEARINGS AND APPLICATION TO THE BAR AND THE DIFFERENCE IS NOT A MINIMUM OF TWO YEARS, SO I THINK THE COURT HAS THE RIGHT TO ASK THIS COURT TO BE CONSISTENT, AND I THINK THE BAR HAS THE RIGHT TO ASK THIS COURT TO BE CONSISTENT IN THE DISCIPLINE IT METES OUT.

LET ME ASK YOU THIS -- LET ME ASK YOU THIS. THERE ARE OTHER PEOPLE WHO ARE IN THE PIPELINE TO BE CHARGED IN, INVOLVED IN THE SAME SCHEME.

I ASSUME SO.

SO IN THE FUTURE, THE BAR WOULD THEN BE HAMSTRUNG, TO GIVE THESE PEOPLE, THESE 16 PEOPLE SUSPENSIONS, ALSO, BASED ON THE FACT THAT, IF WE CHANGE MR. CUETO'S, HIS DISBARMENT TO A SUSPENSION, THEN THAT WOULD REALLY END UP BEING THE MAXIMUM PENALTY THAT YOU COULD, OR MAXIMUM DISCIPLINE THAT YOU COULD GIVE TO ANY PERSONS INVOLVED IN THIS SCHEME.

WELL, IT GHOST OTHER WAY, JUSTICE QUINCE.

SO THAT WOULD BE THE EFFECT OF IT?

I THINK, IF I UNDERSTAND YOUR QUESTION, I THINK THE BAR WOULD BE HAMSTRUNG FROM TAKING ANY JUST FROM SUSPENSIONS, IF CUETO WAS UPHELD, THAT THEY WOULD HAVE TO DEMAND DISBARMENT ON THE OTHER 16 AND THEN TRY TO EXPLAIN TO THOSE 16 WHY THE EIGHT BEFORE THEM ONLY GOT SUSPENSIONS.

BUT ON THE OTHER HAND, MY QUESTION TO YOU, REALLY, IS THEY WOULD THEN BE HAMSTRUNG WITH JUST SUSPENSIONS, IF WE, IN FACT, CHANGE THIS CASE TO A SUSPENSION.

YES, MA'AM. IF IT IS A THIRD-DEGREE FELONY, ONE COUNT, ILLEGAL COMPENSATION, UNLAWFUL COMPENSATION, REMEMBER HE WASN'T RECEIVING THE KICKBACK. THERE IS SEVERAL JUSTICES THAT SEEM TO INDICATE THEY THOUGHT HE WAS RECEIVING IT. HE WAS PAYING IT OUT, MAYBE A MINOR DISTINCTION BUT STILL FOR ACCURACY'S SAKE, WE NEED TO BRING IT OUT, AND I WHOLEHEARTEDLY REJECT ANY INTIMATION THAT MY CLIENT WAS ANYTHING BUT COOPERATIVE. HE WAS COOPERATIVE THROUGHOUT AND TENDERED THE THREE-YEAR SUSPENSION A GOOD FIVE OR SIX MONTHS BEFORE WE WENT TO FINAL HEARING. THANK YOU VERY MUCH.

CHIEF JUSTICE: THANK YOU VERY MUCH. THANK YOU BOTH. THE COURT WILL NOW TAKE ITS MORNING 15-MINUTE RECESS BEFORE HEARING THE LAST TWO CASES. WE WILL STAND IN RECESS FOR 15 MINUTES.

MARSHAL: PLEASE RISE.