IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR, Complainant, vs. LANCE E. EISENBERG, Respondent.	Supreme Court Case No. 71,479

INITIAL BRIEF OF RESPONDENT LANCE E. EISENBERG

Lance E. Eisenberg, Pro Se
10710 S.W. 60th Avenue
Miami, Florida 33156
(305) 665-0814

April 26, 1989

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I. STATEMENT OF THE CASE.

Respondent Lance E. Eisenberg files this Brief in support of his Petition for Review of the Referee's Report. Review is sought solely on the recommendation of disbarment. Respondent respectfully submits that the Referee's Report (i) misapplies the applicable legal principles; and (ii) reflects fundamental misunderstandings regarding undisputed matters of fact.

A. Introduction And Background.

Lance E. Eisenberg became a member of the Bar of this Court in 1973. During the twelve years Mr. Eisenberg practiced tax law in Florida, there were no complaints made, nor admonitions or any other adverse actions taken by the Bar, against Mr. Eisenberg (see Report of Referee ("Report")at 4).

This matter arises out of unlawful activity in which Mr. Eisenberg engaged in the middle to late 1970's. During this period Mr. Eisenberg handled banking and other financial transactions which facilitated the operation of a marijuana smuggling operation. Mr. Eisenberg admitted his wrongdoing. Through counsel he initiated disposition discussions with the government long before he was formally charged with a crime. He concluded a plea agreement in 1984. That agreement required Mr. Eisenberg's cooperation with government authorities. Government officials have uniformly agreed that Mr. Eisenberg's cooperation was

extraordinarily valuable and may have placed Mr. Eisenberg in physical danger.

As soon as Mr. Eisenberg's plea agreement was entered, in 1984, Mr. Eisenberg terminated his law practice and sought to resign from the Bar. Although the Bar, and ultimately this Court, declined to formally accept this resignation, Mr. Eisenberg suspended himself from the Bar by voluntarily refusing to pay his annual Bar fees.

B. Disciplinary Proceedings.

When Mr. Eisenberg was sentenced on September 9, 1986, his conviction became official and the Bar commenced disbarment proceedings against him. Mr. Eisenberg did not contest the Bar's charges of guilt. By terminating his practice years before, Mr. Eisenberg accepted the fact that he committed unlawful acts which required him to cease practicing law. Mr. Eisenberg did, however, urge a sanction less severe than disbarment.

This disciplinary action resulted in a hearing on September 20, 1988, before the Honorable Robert W. Tyson, Jr. Judge Tyson's Report, dated November 29, 1988, found Mr. Eisenberg guilty of the charges contained in the Bar's Complaint and Amended Complaint and recommended that Mr. Eisenberg be disbarred. Mr. Eisenberg appeals from the recommendation for disbarment.

II. SUMMARY OF ARGUMENT.

The Referee's recommendation of disbarment should not be followed because it is the product of a misapplication of the governing law and the failure to properly consider undisputed matters of fact. The applicable law requires that the Florida Bar prove that a respondent not only committed a crime, but also that his rehabilitation is highly improbable. The decision on disbarment must also be informed by the consideration of mitigating factors. In this case, the Florida Bar offered no evidence showing that respondent's rehabilitation was improbable; moreover, there was extensive, uncontradicted evidence of mitigating factors of the type previously recognized by this Court. Given this record, a sanction less severe than disbarment is clearly warranted.

III. ARGUMENT.

A. Applicable Legal Principles.

It is by now quite clear that conviction of a drug offense, not to mention a drug-related offense, does not by itself justify disbarment. See, e.g., The Florida Bar v. Pavlick, 504 So.2d 1231, 1235 (Fla. **1987**); The Florida Bar v. Carbonaro, 464 So.2d 549, 551 (Fla. **1985**); The Florida Bar v. Pettie, 424 So.2d 734 (Fla. **1983**). To justify disbarment, the Florida Bar has the burden of proving, by clear and convincing evidence, that a

respondent not only committed a crime, but that his rehabilitation is highly improbable. This Court put it thus in The Florida Bar v. Felder, 425 So.2d 528, 530 (Fla. 1982) (citations omitted):

> 'Disbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable.' * * * '[I]t is appropriate in determining the discipline to be imposed to take into consideration circumstances surrounding the incident, including cooperation and restitution.' * * * There is no showing that the rehabilitation of respondent . . . is highly improbable.

In the determination whether disbarment is justified, due process requires a consideration of mitigating factors. Pavlick, 504 So.2d at 1234. Among the mitigating factors that this Court has considered are:

(1) Did the crime involve a violation of a client's trust? (Carbonaro)

(2) Did the respondent admit his guilt in the criminal case? (compare The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983) with Carbonaro and Pettie)

(3) What was the nature and extent of the respondent's cooperation with the government? (The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985); Pettie)

(4) Was the respondent's safety threatened by virtue of his cooperation? (Pettie)

(5) Did the respondent voluntarily terminate his law practice before he was required to do so? (Pettie; The Florida Bar v. Rosen, 495 So.2d 180, 181 (Fla. 1986)

(6) Has the respondent suffered personal hardship, humiliation, adverse publicity and financial hardship? (Carbonaro)

(7) Has respondent be able to stabilize his financial condition in an effort to meet his obligations? (The Florida Bar v. Blessing, 440 So.2d 1275 (Fla. 1983).

(8) Has the respondent initiated on his own a course of public service? (Carbonaro)

(9) Is there evidence that the respondent suffered from a personality disorder for which he sought and received treatment, and which suggests the crime committed was an isolated act? (Carbonaro; Rosen)

(10) Has respondent a record of other grievance matters with the Bar? (Pettie)

This Court recently restated the very limited circumstances which justify disbarment in Carbonaro, 464 So.2d at 551, quoting The Florida Bar v. Moore, 194 So.2d 264, 271 (Fla. 1966):

> [D]isbarment is the extreme measure of discipline that can be imposed on any lawyer. It should be resorted to only in cases where the person charged has demonstrated an attitude or course of conduct that is wholly inconsistent with approved professional standards. To sustain disbarment there must be a showing that the person charged should never be at the bar. It should never be decreed where punishment less severe, such as reprimand, temporary suspension or fine will accomplish the desired result.

This Court has defined the "desired result" of a disciplinary proceeding as:

> (1) fair to the attorney; (2) just to the public; (3) designed to correct any anti-social tendencies on the part of the convicted attorney; (4) and severe enough to deter similar conduct by other attorneys.

Wilson, 425 So.2d at 3.

As demonstrated below, the Referee failed to apply these legal principles. If he had, Respondent respectfully submits that the vast weight of the undisputed evidence demonstrates that his disbarment is not warranted.[1/]

B. The Referee's Report Applies The Wrong Legal Standard And Ignores The Undisputed Material Facts Which Require A Lesser Sanction.

1. The Report.

The Referee acknowledges that disbarment is "a very severe form of discipline" (Report of Referee ("Report") at 3). Citing Hecker, he goes on to justify his imposition of this sanction on Mr. Eisenberg, stating (id.): "I believe that illegal drug activities are a major blight on our society, nationally, statewide and locally. . . ." The Referee also noted that (id.): (i) "the money laundering activities of the Respondent occurred while he was acting in the capacity of an attorney"; and (ii) "the illegal activities . . . encompassed a period of over four years." In further support of the disbarment recommendation the Referee observed that (id. at 4): "disbarment is appropriate when 'a

[1/] A referee's finding of fact will not be upheld if it is "lacking in evidentiary support." Hecker, 475 So.2d at 1242.

lawyer is convicted of a felony . . .' and when 'the lawyer engages in the sale, distribution or importation of controlled substances.'"

The Referee states (id. at 3) that he gave "serious consideration" to the testimony of the eight witnesses presented by Respondent -- but he neither describes their testimony nor the ten mitigating factors to which their testimony is directed. The Referee does acknowledge (id.) that Mr. Eisenberg entered a guilty plea and cooperated with the government -- but minimizes its significance on three grounds (id. at 4): (i) the degree of cooperation; (ii) the extent of personal danger to which Mr. Eisenberg was subjected (citing Pettie); and (iii) the enigmatic statement that "the reason Respondent approached the government was for the purpose of entering plea negotiations.!!

2. Application Of The Wrong Legal Standard.

The Referee's Report reflects the following legal analysis: Hecker requires disbarment of attorneys convicted of drug offenses; Pettie permits a lesser sanction in such cases, but only where the respondent was subjected to immediate and imminent bodily harm by virtue of his cooperation. Even a cursory comparison of the Report to the applicable legal principles demonstrates the Referee's error.

Hecker does not mandate disbarment for drug crimes. See, e.g., Pavlick; Carbonaro; Pettie.[2/] Pettie does not establish a single exception to disbarment for drug crimes. See, e.g., Pavlick; Carbonaro; Felder.

The Referee makes no finding concerning whether Mr. Eisenberg is rehabilitated -- or if not, whether rehabilitation is highly improbable. And the record reflects no acknowledgment of the Bar's burden of proof or the requirement that disbarment is a permanent sanction which should never be decreed where a less severe punishment will accomplish the desired result.

As the record shows, Bar counsel's case consisted of proving Mr. Eisenberg's conviction and his plea agreement. Those facts are uncontested. The Report reflects no evidence designed to meet the Bar's burden for justifying disbarment -- the Bar offered no evidence on any matter tending to show that Mr. Eisenberg's rehabilitation is highly improbable.

[2/] Contrary to statements contained in the Report, Mr. Eisenberg was not ever charged with, or convicted of, engaging in the sale, distribution or importation of drugs. He was convicted of handling financial transactions which facilitated a marijuana smuggling effort (see pp. 13-14 below). With regard to Mr. Eisenberg's crime, the following exchange between the Court and the prosecutor at Mr. Eisenberg's sentencing is pertinent (the transcript of the sentencing proceeding is Exhibit 1 hereto; Exh. 1 at 31):

> THE COURT: There is no suggestion in this case that Mr. Eisenberg has ever laid his hands on any marijuana or cocaine or drugs of any type.
>
> MR. GAFFNEY: Your Honor, there is absolutely no contention of that by the government, and that should be very clear.

Accord, Transcript of Hearing at 84.

Quite apart from the failure of the Bar's case, Mr. Eisenberg put on eight witnesses who offered unrebutted testimony on all ten mitigating factors identified above. Without explanation, the Referee neither discusses this testimony nor describes his findings on the ten mitigating factors to which the testimony was addressed.

Finally, there appears to be a significant misapprehension by the Referee as to the permanent nature of disbarment. This Court has stated clearly that disbarment must be treated as a permanent sanction. The Florida Bar v. Blessing, 440 So.2d 1275, 1276-77 (Fla. 1983).[3/] Thus, the law requires the Bar to show that Mr. Eisenberg should never be at the bar. See Carbonaro; Moore. The record suggests that the Referee did not so view the sanction (Transcript of Hearing ("Tr." at 22-23):

> THE COURT: Anything further?
>
> Let me ask one other question because there's a slight confusion by the Court. You said the test not to disbar is not --
>
> MR. FRIEDMAN: The test not to disbar and if you look on the last page there it cites a case and it says - no, on the last page of my memo, Your Honor, at the bottom, if a person is someone who is - there's a little quote there that disbarment is used if the person is somebody who

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[3/] In Blessing, the Court said (440 So.2d at 1276-77):

> [The Bar] urges that disbarment is not permanent and that respondent may petition for reinstatement, showing his rehabilitation, after three years. [Citation omitted.] Although [the Bar] is correct in this assertion, to follow it when there is an expectation of rehabilitation would needlessly blur the distinction between suspension and disbarment. The better view is . . . 'To sustain disbarment there must be a showing that the person charged should never be at the bar.'

> should never, ever practice law again if that's the feeling of this Court.
>
> THE COURT: Well, let me ask a question in light of that test. Why is it then that the Florida Bar only disbars for five years unless it's specifically some other time?
>
> MR. FRIEDMAN: Well, they used to have --
>
> THE COURT: I mean, what I'm saying, if it's only for five years, then that test wouldn't seem to be appropriate because a five-year disbarment would indicate that it is not a total unrehabilitable person.
>
> If they said disbarment was unlimited in time without any time mentioned, then I would tend to agree with you. But if they say it's only five years, that seems to be a conflict in your test.
>
> MR. FRIEDMAN: A lot of people have that belief, Your Honor, but that's not the case law and it's not just one case, it's numerous cases.
> * * *

Bar counsel encouraged this view, possibly leading the Referee into error (Tr. at 25):

> MR. GROSS: Your Honor, it is correct that there is no permanent disbarment in the State of Florida, there's no such thing as a permanent disbarment in Florida. * * * It's not impossible to come back in but the fact that someone's disbarred does not mean for the rest of his life he can never hope to become a lawyer again.

See also Tr. at 145-46.

While one cannot determine conclusively the Referee's final view on this issue, Respondent notes that his disbarment was made effective retroactively to the date of his suspension -- a suggestion made by Bar counsel in the course of his argument that disbarment is not permanent (Tr. at 145-46). Respondent submits

that giving retroactive effect to a permanent sanction makes little sense, and therefore this Court should conclude that the Referee made an error of law by assuming that disbarment is not a permanent sanction.

3. The Facts Of This Case Do Not Justify Disbarment.

Respondent respectfully submits that the vast weight of the undisputed evidence shows that he is rehabilitated and that as a result, disbarment is not an appropriate sanction here. At a minimum, however, Respondent submits that there is no basis in the record for finding that his rehabilitation is "highly improbable." Consequently, Respondent should not be disbarred.

Before reviewing the supporting evidence on the ten mitigating factors listed above, this Court's attention is called to the unrebutted testimony of the psychiatrist from whom Mr. Eisenberg sought counsel in the Spring of 1984 until the time of his incarceration, resuming again after his release (Tr. at 44). Dr. Notarius gave the following opinion regarding Mr. Eisenberg's rehabilitation (Tr. at 46):

> *Q.* Do you have an opinion as to whether or not he is a person who could be rehabilitated to hold a position of trust such as an attorney is required to hold?
>
> A. I feel it's already been accomplished.
>
> *Q.* Do you see any danger to either Lance himself or to society if in the future he would be able to be rehabilitated to the practice of law?

A. I do not.

The Court's attention is also invited to the cross examination of Dr. Notarius -- cross examination not by Bar counsel, but by the Referee. As the following exchange shows, even under vigorous questioning, Dr. Notarius did not deviate from his views concerning Mr. Eisenberg's rehabilitation (Tr. at 48-51):

> BY THE COURT:
>
> Q. If a man is able to be rehabilitated, in this case, has been rehabilitated, that's subjective in itself, not so much as objective, isn't it? It's a subjective finding?
>
> A. Any observation of any kind in reality is somewhat subjective but, you know, it says objective is what it can possibly be in our particular art or science.
>
> Q. But even that has degrees, the degree of rehabilitation; is that correct?
>
> A. I think a person is either rehabilitated or not. The degrees -- There's really no degree of rehabilitation. It's like a touch of pregnancy. If he's not rehabilitated, then you can assume that there would be a greater danger of similar kinds of behavior. So, I - I hope I'm being clear enough, Judge. That's kind of difficult to answer.
>
> Q. Well, in the history of man and our associations with him, once they have fallen and sought to be rehabilitated again, many, many have fallen again.
>
> A. Correct.
>
> Q. So, upon reflection back of those people, they weren't really rehabilitated according to your definition.

A. Also, many people have not fallen.

Q. I see. *So,* we never know whether they are rehabilitated or not until they have not fallen?

A. It cannot be absolute, there's no question about that.

Q. And if it's not absolute, again, I ask you, isn't there degrees of rehabilitation?

Let me rephrase it then, if you want to use that type of -- Let me accept your view of it.

What are your views of his chances of falling again?

A. I wouldn't be here if I thought they were significant. I do not.

Q. Can you conceive of a situation that would present him in the future that maybe he would fall again?

A. No. No greater risk -- No degree of significance of greater risk than most other human beings. I mean, we're all subject to temptation.

Q. He has been confronted in the past with situations that many of us have not been. Large amounts of money, international trafficking of cocaine, or of narcotics, marijuana, repeated efforts to perpetuate this type of behavior. I gather from the information, the formal document that I have read before, perhaps in Jamaica, the Bahamas, Colombia and the Cayman Islands, it took a while, over a period of time for these repeated confrontations with multiple people, of monies and intelligence. These you don't run across with very often, this is abnormal confrontations with people. I wonder if he ran across these type people again, because of past associations, and was met with this type of engendering type ideas and business opportunities once he's down and out again with no money in his possession, do we have now a different situation?

A. My feeling that if that were to happen, as I know him now, he'd run like a scared rabbit.

As noted above, to justify disbarment, the Bar must prove, by clear and convincing evidence, that Mr. Eisenberg's rehabilitation is "highly improbable.!' Yet the Bar offered no evidence to rebut Dr. Notarius' opinion. Moreover, as shown below, the evidence on the ten mitigating factors supports a conclusion that Mr. Eisenberg's rehabilitation is complete. We now address those factors seriatim:

(1) Did the crime involve a violation of a client's trust?

Mr. Eisenberg did not plead guilty to, nor has he ever been charged with, a crime involving a violation of a client's trust. The Referee's Report fails to acknowledge this point. Mr. Eisenberg pleaded guilty to two felony counts contained in an Information prepared by the government. A copy of that Information is attached as Exhibit 2 -- neither the Bar nor Mr. Eisenberg's counsel in earlier proceedings have put the Information into the record. There is no suggestion that the prior indictments of Mr. Eisenberg, to which he pleaded not guilty and which were dismissed by the government, alleged violations of a client's trust.

The record is perfectly clear that Mr. Eisenberg took no action -- and has never been charged with taking an action -- that constitutes a violation of a client's trust. Indeed, the record in the criminal proceedings demonstrates that with Mr. Eisenberg, very much like the respondent in Pettie: "The relationship with

[his client - a drug smuggler] began as legitimate representation . . . in civil matters not relating to any criminal conduct. Over a period of time it slowly moved into a situation in which the respondent should have known what he was doing, but chose to wear blinders. It then developed into . . . knowing assistance. . . ." 424 So.2d at 736.

The evidence on this factor suggests that disbarment is not proper here -- Mr. Eisenberg's crime did not involve the violation of a client's trust.

(2) Did the respondent admit his guilt in the criminal case?

Mr. Eisenberg's own testimony demonstrates his efforts, early on in the criminal investigation, to conclude a guilty plea agreement (Tr. at 104-05). The testimony of Mr. Eisenberg's defense lawyer is to the same effect (Tr. at 73-74). This evidence is uncontradicted -- because it is true. Still, to assure this Court of the veracity of Mr. Eisenberg's testimony, we offer the statements of the government in its sentencing memorandum concerning Mr. Eisenberg's efforts to enter an early guilty plea (Exhibit 3 hereto at 6):

> Throughout the period that Eisenberg has been a target of criminal investigations and a defendant, he sought to reach a plea agreement with the United States involving all pending matters. He initiated efforts to resolve the Texas matter in December **1980** and January **1981**. In August of **1982**, after reinstatement of the Texas case, and again during January and February 1983, Eisenberg initiated and engaged in plea negotiations. This effort led to several

meetings in July and August of 1983. No agreement could be reached and Eisenberg was indicted in the Northern District of Georgia. Immediately after the return of this indictment, Eisenberg renewed his efforts to dispose of all matters in which he was a target or a defendant. In July of 1984, an agreement was reached*/ and Eisenberg entered pleas of guilty before this Court to an Information charging violations of 18 **U.S.C.** 371 and **18 U.S.C.** 1952(a)(1) and **(2).**

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*/ While there were several reasons for the length of plea negotiations, the most significant was the government's need to balance the interests of several jurisdictions and investigating agencies.

The evidence on this factor suggests that disbarment is not proper here -- Mr. Eisenberg freely admitted his guilt.

(3) What was the nature and extent of the respondent's cooperation with the government?

On this important consideration, the Referee heard he testimony of three witnesses: Richard D'Estrada, a government attorney for whom Mr. Eisenberg provided information; Martin Baach, one of Mr. Eisenberg's defense attorneys; and Mr. Eisenberg himself. This evidence, which is unchallenged in the record, documents cooperation of an extraordinary nature. Perhaps the best evidence on the nature and extent of cooperation, however, is that of the prosecutors who evaluated Mr. Eisenberg's cooperation for the sentencing judge. To assist this Court we present that evidence below.

The government's presentencing memorandum contained sections evaluating Mr. Eisenberg's assistance to the government and the impact of his cooperation (Exhibit 3 at 9-10). We present excerpts from those sections for the Court's review:

> Agents and Attorneys for the United States have uniformly reported that Eisenberg has cooperated fully. All state that he has genuinely tried to reconstruct events, and has succeeded in doing so in almost every case. He has never concealed or minimized his own role. His review and explanation of financial records and transactions has been detailed and meticulous.
>
> Although the Chester and Firestone cases were disposed of prior to trial, government attorneys in each case spent many days preparing Eisenberg to testify. His assistance during trial preparation interviews has been forthcoming and aggressive. He was thorough in his review of documents, careful not to overstate the facts, and above all, honest and truthful. When he was given tasks in connection with this preparation he was diligent and timely in completing them.
>
> * * *
>
> Eisenberg's plea agreement was reached at the height of the government's overall effort to aggressively attack the problem of money laundering and to dismantle domestic and foreign laundering operations. Eisenberg significantly advanced the degree of understanding of the problem for every government agent and attorney who worked with him and significantly contributed to this overall effort with respect to Columbus Trust.
>
> * * *
>
> We believe that had the trial of Lamar Chester occurred Eisenberg would have significantly assisted in obtaining conviction of all defendants, especially with respect to the counts relating to Chester's financial enterprise. The trial would have been shortened because substantially fewer domestic and foreign financial information would have had to have been introduced. Eisenberg's cooperation was instrumental

> in causing the remaining defendants to enter pleas of guilty, thereby avoiding conviction on the most serious Racketeering counts.
>
> * * *
>
> [In the West Virginia case] [b]oth defendants entered pleas of guilty and received six year sentences. Eisenberg's cooperation was a very significant factor in achieving this result.
>
> * * *
>
> Eisenberg's continuing cooperation is essential with respect to at least 10 of the sixteen individuals referred to . . . above.

At sentencing, the prosecutors repeated and emphasized the value of Mr. Eisenberg's cooperation (Exhibit 1 at pp. 27-29):

> The number of areas in which he has provided cooperation goes well beyond what we anticipated.
>
> In trying to measure the impact of that cooperation, Your Honor, he has assisted in what can be best described as an overall effort by the United States to dismantle domestic and foreign laundering operations.
>
> * * *
>
> To summarize -- well, let me just mention again the other cases area. As I said earlier, his assistance has been essential and has been effective in achieving our goals.
>
> In summary, I would propose an analysis for the Court's consideration of a phrase in our recommendation "significant incarceration up to five years." We say "significant." We specifically chose that word. It does not mean minimal. We are not suggesting minimal. On the other hand, it does not have to mean substantial. It must mean some objective measure taking into account Mr. Eisenberg's criminal activity, but it may also mean some subjective measurement tailored to Mr. Eisenberg, the man who stands before you today, the man who has admitted guilt. None of his other co-defendants did until the last minute. A man who has admitted his role in the criminal activity that he's been involved in.

> His co-defendants had not until the very end. And a man who entered into an agreement to provide honest and truthful and complete information and testimony and did in fact do that beyond what was expected of him and as none of his co-defendants have done in any of the cases in which he's been involved.

The Referee's Report discounts the evidence of Mr. Eisenberg's cooperation. The Referee erred in so doing. Any suggestion that cooperation which does not amount to "going undercover" does not justify mitigating the sanction of disbarment is wrong as a matter of law. Respondent submits that the extent and value of his cooperation goes beyond that provided by the respondents in Pettie and Carbonaro. Subjection to physical danger is not the sine qua non of this element of mitigation. Indeed, cooperation and threat to safety are separate factors.

The evidence on this factor suggests that disbarment is not proper here -- Mr. Eisenberg's cooperation with the government far exceeded what was required and was of enormous value to the government.

(4) Was the respondent's safety threatened by virtue of his cooperation?

There is evidence that Mr. Eisenberg was himself the target of at least one threat of violence and that physical danger was part of the risk he ran (see, e.g., Tr. at 30-31; 75-76). See also Exhibit 1 hereto at p. 39. While this is not a major element in Mr. Eisenberg's presentation to the Referee or this Court, it is not to be minimized. The record reflects that the Bureau of

Prisons took the danger to which Mr. Eisenberg was subject seriously as did the sentencing judge (see Tr. at 31).

The evidence on this factor suggests that disbarment is not proper here.

(5) Did the respondent voluntarily terminate his law practice before he was required to do so?

Respondent's guilty plea agreement with the government was entered in late July 1984. Mr. Eisenberg recognized at once that his law practice should be closed -- even though he knew that the dates for entry of his plea and his actual conviction were far in the future. Mr. Eisenberg retained counsel for advice in closing his practice and, in December 1984, a formal letter of resignation to the Bar was submitted (see Exhibit 4 hereto). The Bar rejected the resignation (see Exhibit 5 hereto) and this Court ultimately sustained the Bar's position (see Exhibit 6 hereto).

Despite the Bar's position, Mr. Eisenberg closed his law practice in early 1985. He then effectively suspended himself by failing to pay his annual Bar dues (Tr. at 120-21). It was not until the fall of 1987 that Mr. Eisenberg was sentenced and his formal conviction justified suspension. By that time Mr. Eisenberg's law practice had been closed for 18 months.

The evidence on this factor suggests that disbarment is not proper here -- Mr. Eisenberg promptly and properly closed his law practice and withdrew from the practice of law.

(6) Has the respondent suffered personal hardship, humiliation, adverse publicity and financial hardship?

The testimony before the Referee documents the following:

-- the end of Mr. Eisenberg's 12-year marriage (Tr. at 93-111);

-- the end of Mr. Eisenberg's legal career;

-- adverse publicity in area newspapers, some of it quite lurid and untrue (Tr. at 118-19);

-- Mr. Eisenberg's criminal guilty plea, conviction and sentencing;

-- Mr. Eisenberg's incarceration (Tr. at 130-31);

-- Mr. Eisenberg's efforts to develop a new expertise (in computer systems analysis) and start a new job;

-- Mr. Eisenberg's separation from his new wife and their infant daughter during his incarceration; and

-- Mr. Eisenberg's difficult financial situation (Tr. at 99).

The evidence on this factor suggests that disbarment is not proper here.

(7) Has respondent been able to stabilize his financial condition in an effort to meet his obligations?

Mr. Gary Weiner, Mr. Eisenberg's present employer, also testified before the Referee (Tr. at p. 64 et seq.). He testified that Mr. Eisenberg is an employee of Computer Data Line ("CDL"), a company which provides computer services to doctors and medical groups. Mr. Eisenberg's job is to find new applications for CDL's computer services (Tr. at 65). Mr. Weiner testified that, based on his performance, Mr. Eisenberg has received a series of raises and now earns a good salary (Tr. at 68).

The record evidence also demonstrates that Mr. Eisenberg is working to pay off his fine and his tax liability (Tr. at 99; 116). With the help of his wife (herself a lawyer) and by refinancing on his home, Mr. Eisenberg has stabilized his domestic financial responsibilities and attended to most of his debts (Tr. at 11.0-12).

The evidence on this factor suggests that disbarment is not proper here.

(8) Has respondent initiated on his ~~own~~ a course of public service?

Shortly after the conclusion of Mr. Eisenberg's plea agreement, he closed his law practice. At about the same time Mr. Eisenberg volunteered his services to a south Florida drug and alcohol rehabilitation center, The Village South. Not only did

Mr. Eisenberg voluntarily commit to a community service program, but he selected a program that works to remedy the impact of drug abuse (Tr. at 97-98).

Matthew Gissen, the Administrator of The Village South, testified on Mr. Eisenberg's behalf (Tr. at 69). Mr. Gissen testified that Mr. Eisenberg spent 2 1/2 years during work for that organization (id. at 71). The record at Mr. Eisenberg's sentencing shows that all that time came before he was incarcerated (see, e.g., Exh. 1 at 12-13).

The evidence on this factor suggests that disbarment is not proper here -- Mr. Eisenberg embarked voluntarily on a long-term community service program.

(9) If there evidence that the respondent suffered from a personality disorder for which he sought and received treatment, and which suggests the crime committed was an isolated act?

The record reflects two very different types of evidence which indicate that Mr. Eisenberg's criminal acts were isolated incidents, unlikely to recur. The witnesses who know Mr. Eisenberg have testified about how different a person he has been since his plea and cooperation. See, e.g., Tr. at 55-56, 78-79. And Dr. Notarius, Mr. Eisenberg's psychiatrist, also testified on this consideration (Tr. at 45; 47):

> Q. Do you have an opinion within a reasonable degree of medical probability as to whether or not that constituted an isolated episode in his wife or whether that is something that is an ongoing matter for him?

A. I believe it to have been an isolated period in his life.

* * *

Q. Doctor, would you characterize what he had a diagnosis as what is referred to as a character or a behavior disorder is the conviction, I mean the things for which he is convicted of?

A. Yes.

With this factor, as with the others, the Bar offered no contradictory evidence. The Referee indicated his skepticism on this matter, suggesting that Mr. Eisenberg may have engaged in a "clever" plot to create the false impression that he has made fundamental changes (see, e.g., Tr. at 53; 94-95). Not only did the witnesses reject this suggestion, but the entire record of Mr. Eisenberg's accomplishments over the past five years demonstrates its flaw.

The Referee's inquiries might have been well-founded if Mr. Eisenberg's claim to "rehabilitation" was based solely, or even largely, on hi5 own testimony that he had "turned over a new leaf." Instead, the evidence of Mr. Eisenberg's rehabilitation reflects numerous concrete acts which, taken over several years, speak directly to his self-sacrifice and his commitment to real change.

-- Well over two years of service at The Village South -- not a promise to do community service;

-- Months and months devoted to cooperation with the government coupled with the unanimous view of the

prosecutors on the value of the results -- not a promise to cooperate in the future;

-- Four years in a successful, new marriage including the birth of a new child in 1987 -- not a plan to marry in the future;

-- Years preparing for, and years actively working at, a new non-legal career, i.e. computer systems analysis -- not a promise to start a new job;

-- Four years of completed, and intense, psychotherapy and plans to continue it -- not a commitment to begin a treatment program.

Respondent submits that his achievements, as opposed to promises, validate the testimony of the witnesses regarding his rehabilitation and demonstrating that his criminal past represents an isolated period. No evidence in the record suggests the contrary.

(10) Has respondent a record of other grievance matters with the Bar?

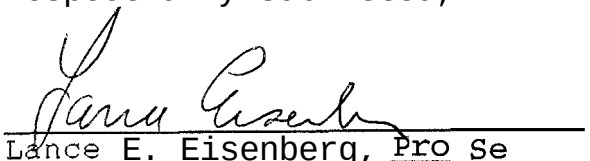
As the Referee's Report states, Mr. Eisenberg has no record of other grievance matters (Report at 4). Indeed the testimony indicates that Mr. Eisenberg was a "gifted" lawyer (see, e.g., Tr. at 79).

The evidence on this factor suggests that disbarment is not proper.

IV. Conclusion.

The Referee did not follow the well-established precedent of this Court for determining whether Mr. Eisenberg should be disbarred. The Bar failed to meet its burden for showing that disbarment is the proper remedy here. Mr. Eisenberg should not be disbarred -- this Court should impose a less stringent sanction.

Respectfully submitted,



Lance E. Eisenberg, Pro Se
10710 S.W. 60th Avenue
Miami, FL 33156
(305) 665-0814

April 26, 1989