IN THE
SUPREME COURT OF FLORIDA

CASE NO. SC96767

THE FLORIDA BAR,

Complainant,

vs.

F. LEE BAILEY,

Respondent.

RESPONDENT'S INITIAL BRIEF

On Review of a Report of a Referee
in a Florida Bar Disciplinary Proceeding

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STATEMENT OF THE CASE

This is an appeal from the July 24, 2000 Amended Report of Referee recommending that F. Lee Bailey "be disbarred from the practice of law in Florida." Amended Report, p. 20.[1]

The Referee, Circuit Court Judge Cynthia A. Ellis, recommended that F. Lee Bailey should be found guilty on six of the seven counts ("Allegations of Misconduct") alleged in the Florida Bar's Complaint. Her recommendation came at the conclusion of a multi-day hearing that centered upon Bailey's handling of various assets of Claude Duboc, a federal defendant for whom Bailey had negotiated a plea agreement in the Northern District of Florida in a case pending before United States District Judge Maurice Paul.

The Agreement included the forfeiture of millions of dollars of foreign assets and properties. However, one asset, 602,000 shares of Biochem Pharma, Inc. stock, was, with the acquiescence of the United States Attorney's Office for the Northern District of Florida, transferred by Duboc to Bailey. The crux of the Bar's allegations against Bailey is the Biochem stock transfer and Bailey's use of the stock.

The Bar's Complaint alleged that the Biochem shares were given to Bailey pursuant to "an oral agreement with the United States Attorney for the Northern

[1] The Amended Report is attached as an Appendix A to this Brief.

District of Florida for the following specific purposes: "(A) To use so much of the Biochem Pharma, Inc. stock as required for the maintenance of certain Duboc owned real and personal property located in Europe, pending the liquidation of such property. (B) To provide a res from which attorneys' fees could be paid after application and approval by Judge Paul. (C) To forfeit to the Untied States so much of the Biochem Pharma, Inc. stock or the proceeds of such stock as thereafter remained to inure to the benefit of Duboc and the United States of America." Complaint, ¶¶ 6 and 27. The Complaint alleged:

> This *oral trust agreement* was announced and ratified by Respondent [Bailey] during a meeting in chambers with Judge Paul on May 17, 1994.

Complaint, ¶¶ 7 and 28 (emphasis supplied).

The Bar's Complaint claimed that Bailey used some of the Biochem stock (which had risen in value) to generate funds for his personal use:

> The expenditures by Respondent of approximately $3.6 million for his law offices, other business interests and payment of personal expenses, funded by the sales and loan proceeds from the Biochem Pharma, Inc. stock, had no nexus to the specific purposes of the entrustment of such stock to Respondent and constitute misappropriations.

Complaint, ¶ 29.

As a result, the Bar alleged Bailey violated various Rules Regulating The Florida Bar (Rule 3-4.3; 4-8.4(b); 4-8.4(c); 5-1.1; 4-1.15(a)). Complaint ¶'s 30-32, Second Allegation of Misconduct.

On January 12, 1996, Judge Paul entered an Order that approved the substitution of new counsel for Duboc, but retained jurisdiction "over Bailey to obtain from him a full accounting of the monies and properties held in trust by him for the United States of America." The Order also required that "[a]ll monies. . . and other assets received by Bailey from or on behalf of Duboc, including the aforementioned shares of Biochem Pharma stock shall be frozen as of the date of this Order and no further disbursement of any of these funds shall be made unless authorized by this Court. Bar Exhibit 1; Appendix C. A second Order, dated January 25, 1996, required Bailey to appear before Judge Paul on February 1, 1996 and "bring with him all shares of stock of Biochem Pharma, Inc., held by him [and] . . . be prepared to make a full accounting as to all assets he received from Claude Duboc. . . ." Bar Exhibit 2; Appendix F.

The Bar alleged that Bailey's personal money market account contained sales and loan proceeds derived from Biochem stock and "[b]y continuing to expend funds from his money market account after service upon and knowledge by the Respondent of the January 12, 1996. . . and January 25, 1996 order[s] of the Court," Bailey

violated Rule 3-4.3, 4-3.4(c) and 4-8.4(d). Complaint, ¶ 43, Third Allegation of Misconduct.

The Fourth Allegation of Misconduct in the Bar's Complaint alleged that Bailey testified falsely that he had not seen the January 12 and 25 Orders until February 2, 1996, thus violating Rules 3-4.3, 4.8.4(b), 4-8.4(c) and Rule 4-3.3(a)(1). Complaint ¶¶ 44-48.

The Fifth Allegation of Misconduct alleged that "[b]y appropriating to his own uses and purposes proceeds derived from the Biochem Pharma, Inc. shares entrusted to him," Bailey's exercise of independent judgment was limited by his own interests; that he acquired a pecuniary interest adverse to his client; and used information to the disadvantage of his client. Rules 4-1.7(b), 4-1.8(a) and (b).

The Bar's sixth count was dismissed.

The Bar's Seventh Allegation of Misconduct involved an *ex parte* letter sent by Bailey to Judge Paul on January 4, 1996, another letter sent on January 21, 1996 and a May 10, 1996 Affidavit filed in proceedings before Judge Paul, all of which related to the Duboc matter and the Biochem stock. The Bar alleged that those submissions were improper under Rules 4-3.5(a), 4-3.5(b), 4-1.6(a), 4-1.8(a), 4-1.8(b) and 4-1.7(b). Complaint, ¶¶ 55-66.

Another Duboc related allegation of misconduct was Bailey's deposit of $730,000 from the sale of certain Japanese stocks held by Duboc into Bailey's non-trust money market account, which was then disbursed from that account to the United States Marshall. The Complaint alleged that transaction violated Rule 4-1.15(a) because the monies were not held in trust. Complaint, ¶¶ 23-26, First Allegation of Misconduct. As to Count I, the Referee found "by clear and convincing evidence that the Respondent. . . failed to set up a separate account. . . and . . . commingl[ed] . . . the $730,000 during the time the funds were held by him in his private account." Appendix A, p. 5, ¶ 8.

As to Count II, the Referee found "by clear and convincing evidence that Respondent misappropriated sales and loan proceeds from the Biochem Pharma, Inc. stock and commingled the sales and loan proceeds with his own funds. . . ." Appendix A, p. 9, ¶ 15.

As to Count III, the Referee found "by clear and convincing evidence" that the Respondent violated certain Rules "by engaging in conduct which is unlawful or contrary to honesty and justice. . . by engaging in criminal misconduct. . . by engaging in conduct constituting dishonesty, fraud, deceit or misrepresentation, and . . .by misusing money held in trust" and by "expending funds from the account after. . . knowledge of the January 12, 1996 order. . . ." Appendix A, p. 10, ¶ ¶ 11-12.

As to Count IV the Referee found "by clear and convincing evidence that the Respondent lied" when he repeatedly said "that he did not see the January 12 and January 25 orders prior to February 2. . . ." Appendix A, p. 13, ¶ 10.

As to Count V, the Referee found "by clear and convincing evidence" that the Respondent used information to the disadvantage of his client. Appendix A, p. 14, ¶ ¶ 10, 13.

As to Count VII, the Referee found "by clear and convincing evidence that there was an improper communication. . ." and that information detrimental to the client was revealed. Appendix A, p. 17, ¶¶ 14-15,

The Referee recommended disbarment. Bailey's Petition for Review seeks reversal of the findings, and rejection of the recommendation of disbarment.

STATEMENT OF THE FACTS

A. THE BIOCHEM PHARMA, INC. STOCK AND DUBOC

Claude Duboc was a Canadian drug dealer who was indicted in the Northern District of Florida and after his arrest was brought to Tallahassee in April, 1994. TR 239-240. He was represented by F. Lee Bailey and Robert Shapiro, a California lawyer, and before Duboc's first appearance they met with Assistant United States Attorneys Gregory Miller, Tom Kirwin and Roy Atchison, and DEA Agent Carl Lilley.

TR 240-241. Some of the discussion was about forfeiture of Duboc's assets, and within the week, Duboc's lawyers indicated to the government their client's willingness to enter into a plea agreement, which would include Duboc forfeiting assets to the United States. TR 242-247. The Duboc assets included "tens of millions of dollars in properties" in France, which required substantial sums to be expended to maintain them in an effort to successfully liquidate them. TR 317. One property was an estate outside of Paris valued at six million dollars, and another near Cannes, valued at twenty-five million dollars. TR 129. The Cannes house had "20 employees on staff." TR 554. Two yachts at a Cannes marina were also worth millions. TR 560-561. Another asset was 602,000 shares of Biochem Pharma, Inc. stock, which was worth about "six and a half million dollars." TR 250-252.[2] Duboc believed the stock would go up in value, and did not want it sold in a block by the government because sale of such a large block would depress the stock. TR 252-253.

There was a suggestion that an asset should be set aside to pay for the expenses and management of the to-be-liquidated properties. AUSA Miller said he was "not sure if I put this on the table first or he [Bailey] brought it up first – but allowing Judge Paul to make a decision as to what a reasonable fee would be in the case; and if the United States, rather than seizing and forfeiting those funds, allowing the Judge to use

[2] The actual value of the stock was $5,891,352. Appendix D, p. 5.

that pool he set aside to manage the property, and to also be used by the court to authorize or pay Mr. Bailey's attorney's fees based on the court's determination of reasonableness." TR 250. Miller continued: "[H]e was authorized to sell only those portions of the stocks that were needed to pay, on a reasonable basis, whatever expenses were being incurred in the management of these properties overseas, which were accruing very large monthly costs for upkeep of these properties. TR 251-252. Miller said: "He [Bailey] agreed to those terms." TR 254.

There was nothing in writing setting forth or confirming Miller's "terms." On May 17, 1994, before Duboc was to enter a guilty plea, Miller, who "was the one representing the government and making statements on behalf of the United States" (TR 256), concluded that a pre-plea meeting with Judge Paul was "imperative" because "Judge Paul was very strict" and that he should "be made aware of the arrangement, because if the judge were not inclined to go along with this and to allow the funds to be used in this manner, it would have caused a serious problem had we attempted to enter this plea agreement. . . ." TR 256-257.

There was no court reporter at the "pre-plea" meeting. There is no transcript of what occurred. Present were AUSA's Miller, Kirwin and Atchison, the United States Attorney Michael Patterson, DEA Agent Carl Lilley, Bailey, and Miami lawyer Edward Shohat, who became, for a time, co-counsel for Duboc. AUSA Miller was

the lead attorney (TR 255-256) and he related that he "had been tipped of by Mr. Bailey that his co-counsel Mr. Shohat was going to ask to have some stock given to him. . . and that he recommended that we oppose that. . . ." TR 258. Mr. Shohat made that request and AUSA Miller related to the Referee what he said he told Judge Paul:

> [I] interjected myself and said that we were opposed to that.
>
> I had mentioned to the court at that specific time that approximately six and a half million dollars in stock had been given to the defense *in trust* by their client to hold and to be used for two purposes.
>
> The stocks are to be held *in trust* to be sold only as needed, and it was explained to the court these stocks were expected to be very valuable, appreciate in value, and the defense would be selling only those portions of the stock as needed to manage and keep up these properties, that no fees were going to be taken out of those stocks by the defense for the purpose of attorney fees or costs, and that the defense had agreed to only apply for their fees and costs associated with representation at the conclusion of the case, and that they were going to be agreeable to letting the court determine on a reasonable basis whether or not they were going to be entitled to those fees that were being claimed.
>
> Both Mr. Shohat and Mr. Bailey agreed to that with the court, acknowledged their acceptance of the understanding of what I had represented, and that was pretty much the

> substance of what was discussed in chambers.
>
> The Judge indicated that he was agreeable to that disposition and the use of the funds as proposed, and we then made arrangements for the court to accept Claude Duboc's plea.

TR 259-260 (emphasis supplied).

AUSA Tom Kirwin, who made notes, said "I know I had a note there about Mr. Shohat and the Japanese stock. I know I had a note about Mr. Bailey, and Mr. Shohat assured the court that they had not taken any fees from the Duboc case yet. I believe I had a note in there concerning the agreement to let them use the funds to market and maintain the houses and pay expenses." TR 149-150. Subsequent to the Bar hearing, Kirwin was deposed in the Court of Claims case brought by Bailey against the United States to secure the return to him of the Biochem assets that Judge Paul ultimately took from Bailey.[3] Kirwin had been unable to find one note at the Bar hearing, but at the Court of Claims deposition the retrieved note prompted this colloquy:

[3] That case, styled *F. Lee Bailey v. United States*, in the United States Court of Federal Claims, No. 96-666C (Judge Horn) is awaiting trial. This Court granted Bailey's Motion to Supplement the Bar Record with the Kirwin and other depositions in that case.

BY MR. HOROWITZ [BAILEY'S COUNSEL]

Q. Okay. Would the – that note, one of the notes on that page concern the hearing in front of Judge Paul.

A. [MR. KIRWIN] Uh-hum.

Q. Is that correct?

A. Uh-hum. It is.

* * *

Q. Okay. So we'll – we'll refer to that as the best record of – of that proceeding.

But – so now in relation to the in-chambers discussion that your notes make reference to –

A. Uh-hum.

Q. — was there a statement by anyone at that meeting that the Biochem Pharma stock was received by Bailey in trust?

A. *I don't remember that the words "in trust" were ever used.*

Kirwin Deposition, Supplemental Record, pp. 266-268 (emphasis supplied). Then United States Attorney Michael Patterson, who was at the May 17, 1994 hearing as "an observer," said that Judge Paul was advised that "some of the property would be available at the end of the case potentially for fees, but that no amount of money was

going to be taken by counsel from Duboc's assets without court approval." TR 485. Patterson's testimony made no mention of a "trust." TR 482-493.

Ed Shohat, co-counsel for Duboc, told the Referee "This trust agreement was spelled out for the Judge." TR 520. Shohat described the off– the– record meeting as brief:

> We went into the Judge's chambers and initially, Mr. Duboc was brought into the chambers; but the Judge, as I recall practically immediately directed the Marshal to take Mr. Duboc out of the chambers, and the rest of us were in the chambers for probably no more than five or ten minutes at the very most.

TR 519. Shohat said Judge Paul was told that Mr. Bailey was going to assist the court by selling assets and that "the stock which was being separated out would be returned at the end of the day and from that asset the Judge would be – a motion would be filed for a reasonable attorney's fee for Mr. Bailey and myself, and possibly Mr. Shapiro. . . ." TR 520.

The risk was all Bailey's:

> [MR. BEVERLY, Bailey's Counsel]
>
> Q. My question is this, Mr. Miller: How did you explain the risk to Mr. Bailey?
>
> A. [AUSA MILLER] I said that that was the only account that we were making available to him,

> that stock fund; that if it went down, he was risking that he was not going to be able to pull out the monies that he needed to manage those properties; and possibly not have the money in that fund to pay his fees.
>
> * * *
>
> Q. Did you ever tell Mr. Bailey that had the stock gone down, had there been insufficient funds with which to pay his fee, that that was a gamble which he was taking and that if he ran out of money that he simply would have to do without a fee?
>
> * * *
>
> A. Essentially yes. Essentially, that's basically what I told Mr. Bailey. . . .

TR 351-352.

The government arranged the transfer of Biochem Pharma, Inc. stock to Bailey. AUSA Roy Atchison, who had been doing forfeiture work for "17 plus years," was asked "how many deals like that have you entered into when you had absolutely no written memorandum of any kind?" He answered "This is the only one involving shares of stock that I recall." TR 451. Atchison prepared the only written document – the letter signed by Duboc transferring the 602,000 shares of Biochem Pharma, Inc. to Bailey's numbered account at Credit Suisse, Geneva, Switzerland:

A. [ATCHISON] Well, I had the letter typed. Claude wrote it, I had it typed, he signed it, and I helped him send it.

* * *

Q. So there was no secret as to A, where the money was going –

A. That's correct.

Q. – And B, what the identity of the account was.

A. That's correct.

TR 437.

Duboc wrote the letter "by hand on a yellow pad for me and I [Atchison] had it typed." TR 409. A copy of the letter is attached as Appendix G. It says simply "as to the shares of Bio Chem send them to the following account," and identifies Bailey's account number.

Q. Mr. Atchison does the word "Trust" or "Trustee" appear in that document at all?

A. No, it does not. That was not in any of the letters.

TR 409.

Bailey did not understand there to be a "trust" agreement.

Bailey knew that he was accountable for the use of the stock to manage and

liquidate Duboc's properties, but since he took the risk of loss of value, he believed he was not restrained from benefitting as to any gain in the stock price.

> Q. [BAR COUNSEL] Mr. Bailey, is it your contention that when you discussed this matter with Mr. Miller and you subsequently received that Biochem stock, that money was transferred to you in fee simple?
>
> A. Yes. Effectively it was.
>
> * * *
>
> Q. It was a done deal why?
>
> A. Because they chose to transfer it in fee simple to a non trust account and they knew it was a non trust account and they never said anything about getting it back.

TR 986.

Bailey recounted what happened at the May 17, 1994 Judge Paul off-the- record pre-plea meeting:

> Q. [BAR COUNSEL] Could you tell the Court what was said at the pre-plea?
>
> A. [BAILEY]: Yes. Very quickly we sat down, I don't believe Judge Paul was there. He came in. . . and he directed that Duboc be taken out. I think the court reporter walked in and he sent her out.
>
> And Greg Miller began to explain that we had a change of plea to be taken, we had

> reached a plea agreement, it had been executed and some forfeitures were going to take place.
>
> * * *
>
> Ed Shohat had already taken a run at the Japanese stock and been turned away. He was told no, no, no. The defense has six million. That's enough.
>
> * * *
>
> And he [Miller]. . . said no, we have given six million dollars to Mr. Bailey and that is enough.
>
> At which point I added, yes and final approval on whatever fees are taken, Judge, will be in your hands, and as of the moment no one has been paid anything out of that fund.

Q. So you acknowledge that you did in fact tell Judge Paul that final approval for fees would be in his hands.

A. I never have deviated from that.

Q. Why would Judge Paul need to approve fees that belong to you?

A. Because the government had been instrumental in transferring them to me and they wanted to create a fiction [in case other counsel wanted a similar transfer]. . . They can say, we don't approve fees, that's all up to the Judge.

TR 992-994. Bailey was asked whether the other witnesses who testified about the

pre-plea meeting were "not telling the truth when they came in here?" Bailey replied:

> A. First of all they're in sharp disagreement. Two of them, I believe never heard the word trust. Third, Mr. [Pete] Fuster [Bailey's pilot who was at the Judge Paul conference], who has taken a polygraph on the matter, didn't hear the word "trust."
>
> * * *
>
> I have not heard Judge Paul say anything, but I assure you the word "trust" was never used that day and I never heard it until I heard it from Greg Miller on January 19 [1996].

TR 995-996.[4]

> Q. Getting back to your position that you owned the Biochem Pharma stock in fee simple absolute, did you ever take the position that you only owned the appreciation of that stock.
>
> A. Absolutely. I owned the appreciation. I was accountable for the original six million and could have been required to pay some of it back if I had become disabled as counsel in any way.
>
> * * *

[4] Judge Paul's testimony was precluded by a protective order. That fact was brought to this court's attention on May 24, 2000, in Bailey's unsuccessful "Emergency Motion for Abatement or Stay" of the Bar hearing that commenced on May 30, 2000.

> [I] was only accountable – and Miller made this plain – for the six million and no more.

TR 1003. Bailey stressed that the government never claimed entitlement to the appreciation until January 1996: "If you thought that any claim of appreciation belonged to anybody and you were a responsible lawyer for the government, I would have expected you to at least say so." TR 1005. The escalation of the Biochem Pharma, Inc. stock ("BCHE") was public knowledge; it traded openly on the NASDAQ. TR 1004.

AUSA Miller did not track the stock. As soon as Duboc plead guilty Miller "turned over the case to Tom Kirwin." TR 260. AUSA Kirwin paid no attention to the stock until "January of '96:"

> Q. [D]id you keep track of what that stock was doing, what kind of performance it was enjoying?
>
> A. [AUSA KIRWIN] No, I assume it was doing good. Mr. Bailey never said he didn't have money to deal with the estates.
>
> Q. Did you ever ask him how the stock was doing?
>
> A. Never did.

TR 218-219. Kirwin knew that Bailey had made arrangements to get a loan "against the value of the stock" and that Bailey "had sold some of the stock" in 1995. TR 218.

Bailey's post-May 1994 efforts to maintain and attempt to liquidate the French properties were in the best interests of both his client, who wanted to cooperate in the hope of favorable treatment from Judge Paul, and the government, which wanted to avoid "the laborious treaty process and all the international paperwork" it would have taken to turn the French properties into cash. TR 417-418. In carrying out his task, Bailey "was doing a terrific job." (TR 559) (Shohat testimony).

Duboc, a demanding client, consulted many lawyers, and in late 1995 changes were in the wind.

B. JANUARY 1996 AND ITS AFTERMATH

In October or November of 1995, Bailey told AUSA Kirwin that an attorney for the Coudert Brothers law firm was coming into the Duboc case. In early January 1996, that firm filed a motion for substitution of counsel, which was set for hearing on January 11, 1996. TR 159-160.

On January 4, 1996, Bailey wrote a letter to Judge Paul relating a conflict on January 11 because of another case, and "taking the liberty of advising your Honor by this letter the nature of my concerns for the welfare of my client – Claude L. Duboc – as he transitions to a new lawyer." Appendix B; Bar Exh. 12. The letter, which was not copied to any one ("I have sent no copies of this letter to anyone, since I believe

its distribution is within your Honor's sound discretion"), is one of the bases of the Bar's Seventh Allegation of Misconduct.

Kirwin attended the January 11, 1996 hearing before Judge Paul. He had just learned that the Coudert Brothers firm had filed an action in Switzerland, freezing Bailey's account that held the Biochem Pharma stock, and Bailey told him that Coudert Brothers alleged the stock belonged to Duboc. TR 163-164. Kirwin told Judge Paul that the funds belonged to the United States, not Duboc, and then a lawyer standing in for Bailey said that "Bailey considered . . . that those stocks were his." TR 164. The substitution was granted, and after a bench conference and conferences among the United States Attorneys, Kirwin reached Bailey in New York "and he [Bailey] told me, in fact, that was his position, that the government had given him that stock and he had the interest in those stocks." TR 167. Kirwin "[t]old him that wasn't our position" (TR 168), and after consultation with Coudert Brothers, they appeared before Judge Paul who, on January 12, 1996 entered an Order that concluded:

> All monies, real and personal property and other assets received by Bailey from or on behalf of Duboc, including the aforementioned shares of Biochem Pharma stock shall be frozen as of the date of this order and no further disbursement of any of

> these funds shall be made unless authorized by this Court.
>
> DONE and ORDERED in Chambers this 12th day of January, 1996.

Appendix C; Bar Exh. 1; TR 167.

Kirwin spoke to Bailey on the 16th, and Bailey went to Tallahassee on the 19th to meet with Greg Miller and Kirwin:

> A. [KIRWIN]: Generally speaking, the discussion was Mr. Bailey saying that we had given him the stock and Mr. Miller saying that we hadn't given him the stock. It was more complex than that but it boiled down to that's what it was.

TR 172. On the following Monday, the government filed an emergency motion for return of the property. TR 174. AUSA David McGee took over the prosecution of that, and subsequent proceedings, before Judge Paul. TR 174.

David McGee had not been involved in the April 1994 discussions with Bailey, but he had been consulted then by AUSA's Miller and Kirwin about the "propriety" of Bailey being given fees from forfeitable assets in light of the "mixed" case law. TR 43-44. McGee went to the library of the U.S. Attorney's office and met with Bailey. He told Bailey:

> We would not set the fees, we would not take a position that he was entitled to fees, that his

> argument was with the Judge, and whatever the Judge did he did, and it would be without the interference of the United States.

TR 47.

On Sunday, January 21, 1996, Bailey faxed Judge Paul a seven-page letter prompted by the January 19, 1996 meeting. He wrote:

> The problem is neither complex nor very difficult but it is probably unique in some respects. The issue presented is this: Did the language or conduct of the parties – Mr. Miller and myself, since no one else was privy to our conversation, create a trust of some sort on April 26, 1994, and if so, what were its terms?

Appendix D; Bar Exh. 17. Bailey explained his understanding that he would have to accept the "downside risk" (Miller had called it a "gamble." TR 353-354) and that "I was entitled to protect myself in any way I saw fit, including a sale of all or part of the shares. Once again, I agreed. There was no talk whatsoever, about the government participating in any appreciation of the value of the stock should I choose to risk holding all or part of it." Bailey continued:

> I viewed that as money held by me as an account in which the United States had an interest, to this extent: after the payment of costs associated with the case, and fees approved by your Honor, any balance of the
>
> $5,891,352 remaining would revert to the

> United States.
>
> * * *
>
> In the reasonable belief that I was entitled to the benefit of my sole management of the investment – always protecting the sum with which I was entrusted – I have made substantial changes of position financially. It would be totally unfair for the government to achieve some retrospective creation of an imagined "trust" of the shares in view of the facts set forth above.

Appendix D, pp. 5-7.

The January 21, 1996 letter is also a subject of the Seventh Allegation of Misconduct, as is the May 10, 1996 Affidavit filed by Bailey in support of a motion to recuse Judge Paul from the contempt proceedings which had been initiated against him, especially because Judge Paul was actually a witness to the critical May 17, 1994 meeting, and. . .

> in view of the fact that *the Court* decided that no court reporter need be present or other record of the proceedings made. Since the court put nothing on the record once counsel entered the courtroom, a strong inference arises that there was nothing of consequence to record; certainly nothing so calamitous as an illegal and unenforceable trust over which the Court was expected to preside.

Appendix E, p. 5; Complaint Exh. 6 (emphasis in original). Judge Paul declined to

recuse himself; a decision that was affirmed on appeal. *United States v. Bailey,* 175 F. 3d 966 (11th Cir. 1999).

Judge Paul had issued an Order on January 25, 1996 ordering Bailey to appear on February 1, 1996 and to "bring with him all shares of stock of Biochem Pharma, Inc. held by him or by others. . . and to produce all bank records. . . pertaining to all assets, or proceeds from the sale/mortgage/pledge/hypothecation thereof, received directly or indirectly, as attorney or agent for Claude Duboc." Appendix F; Bar Exh. 2.

The outgrowth of that hearing was Orders of Contempt directing Bailey "to pay back the money he had taken from the United States and make a complete accounting of all the assets that he had obtained from Mr. Duboc in trust for the United States." TR 62, Bar Exh. 3, 4. Subsequent hearings led to Bailey's incarceration for non-compliance with Judge Paul's orders. "When Bailey did not comply, the district court jailed Bailey for contempt. Bailey was released after 44 days when he substantially complied with the order." *United States v. Bailey,* 175 F. 3d at 968.

Thereafter, Bailey sued the United States in the United States Court of Claims, pursuant to the Tucker Act, 28 U.S.C. § 1491. That breach of contract action, in which Bailey "alleges that the government agreed not to seek forfeiture of this stock, which according to the plaintiff, was transferred to [Bailey's] account 'unconditionally

and in fee simple,'" and that "'there were no discussions of any kind concerning Bailey's serving in any kind of trustee capacity with respect to the stock'" remains pending. *Bailey v. United States*, 40 Fed. Cl. 449, 450 (1998). The government's motion to dismiss that case was denied. While the Court of Claims judge stressed "that this opinion is not a disposition on the merits of the plaintiff's allegations, which raise a number of difficult and sensitive issues," she concluded that Bailey's complaint successfully alleged a breach of contract (*id.*, 40 Fed. Cl. at 461). The Court of Claims discovery depositions of high ranking Justice Department officials and DEA Agent Carl Lilley have been made part of the record in this case. *See* Order of January 18, 2001. Their testimony as to the "trust"claimed by Miller (and Shohat) is set forth below.

1. <u>LINDA SAMUEL</u>

Linda Samuel was, in 1994, Special Counsel in the Department of Justice Asset Forfeiture and Money Laundering Section. August 24, 2000 Deposition of Linda Samuel, p. 7, taken in *Bailey v. United States*, United States Court of Federal Claims, No. 96-666c. She testified that she was contacted in May 1994 by the United States Attorney's Office in Tallahassee and "asked if I would assist them in the foreign

forfeitures." *Id.*, p. 8.

BY MR. HORWITZ:

Q. Did they ever discuss – did any of the assistants [Assistant United States Attorneys] ever discuss Biochem Pharma stock with you at all?

A. Yes.

Q. And in any – with whom did you discuss Biochem Pharma stock, among the Assistant US Attorneys for the Northern District of Florida?

A. With Dave McGee, with Jimmy Hankinson, and with Tom Kirwin.

Q. Was that conversation with all three at once or a series of conversations?

A. Those would be different conversations over a period of years.

Q. In the conversations with Mr. McGee, in which the subject matter of the Biochem Pharma stock was discussed, did Mr. McGee ever say that the stock had been given to Bailey in trust?

A. He never said that.

Q. Did he ever show you any written trust agreements concerning the Biochem Pharma

stock and Mr. Bailey's receipt of the stock?

A. No.

Q. In any of your conversations with Mr. Hankinson, concerning the Biochem Pharma stock, did Mr. Hankinson ever relate that the stock was given to Mr. Bailey in trust?

A. No.

Q. In relation to your conversations with Mr. Kirwin, concerning the Biochem Pharma stock, did Kirwin ever say the stocks were given to Mr. Bailey in trust?

A. No.

Q. Did Kirwin ever say there were any trust documents in relation to the Biochem Pharma stock and Mr. Bailey?

A. No.

Id., pp. 11-13.

2. <u>GERALD MCDOWELL</u>

Gerald McDowell is (and was in October 1994) the Director of the Asset Forfeiture Office of the Department of Justice. He is Linda Samuel's supervisor.

August 24, 2000 Deposition of Gerald McDowell, in *Bailey v. United States*, United

States Court of Federal Claims, No. 96-666c.

Mr. McDowell confirmed that Ms. Samuel told him "that Miller had indicated to Bailey, in words or substance, that if the price of this stock went down that was being given to Bailey, it would be his risk or there would be no other money there to serve the purposes for which he was being given the stock[.]" McDowell Deposition, p. 35. He confirmed that he was never told by anyone in the United States Attorney's Office for the Northern District of Florida that Bailey was given the Biochem Pharma stock in trust, and that there were no documents indicating that the stock had been provided to Bailey in trust. *Id.*, pp. 14, 26.

3. CARL LILLEY

The September 25, 2000 deposition of DEA Agent Carl Lilley in the United States Court of Federal Claims proceeding produced these colloquies with Bailey's Court of Federal Claims counsel:

> Q. In this meeting following the [May 17, 1994] hearing and conversation with Judge Paul, was there any mention by Mr. Miller that Bailey had been given the Biochem Pharma stock in trust?
>
> A. No, I don't think so. I don't recall that.
>
> Q. Did anyone else present for this meeting state in your presence that Bailey was given the

Biochem Pharma stock in trust.

A. No.

Lilley Deposition, p. 136.

> A. So Bailey had to provide a bank account number and Duboc had to sign a letter to the fiduciary or to the bank to transfer that account. So there were discussions along that line the 25th and 26th [of April 1994].
>
> * * *
>
> Q. In those discussions, did anyone suggest that any of the documentation that was being prepared indicated that Bailey was receiving the stock in trust?
>
> A. No, I don't think there was any documentation like that.

Id., p. 149.

4. <u>MARY LEE WARREN</u>

The August 16, 2000 deposition of Mary Lee Warren, Deputy Assistant Attorney General, and her production of and identification of a May 19, 1994 memorandum from P. Michael Patterson, United States Attorney for the Northern District of Florida, addressed the Biochem Pharma stock. Ms. Warren, the supervisor of both Ms. Samuel and Mr. McDowell, was responsible for oversight of the

Department of Justice Asset Forfeiture Money Laundering Section. *Id.*, p. 7. She was a subject of Bailey's May 24, 2000 "Emergency Motion for Abatement or Stay" of the May 30, 2000 Referee hearing. In that Motion to this Court Bailey set forth the facts that Judge Paul had refused to testify, and that the government refused to produce a memorandum to Ms. Warren on the Duboc case. This Court denied Bailey's emergency motion on May 26, 2000. Subsequently, Bailey was able to depose Ms. Warren and obtain the memorandum in the Court of Federal Claims case.

The memorandum to Ms. Warren from the United States Attorney was to "[m]ake you aware of and highlight the Duboc case, which by any measure we believe is the premiere case currently being prosecuted in the United States, when measured by profits, quantity of drugs, and/or sophistication of operation." *Id.*, p. 25. Not a word in the memorandum mentioned a trust (pp. 25-27), nor was a "trust" mentioned in oral conversations with Ms. Warren:

> Q. Did Mr. Patterson. . . or Mr. Miller who was apparently present according to the memo, did they discuss with you the fact that while Mr. Duboc was in custody that the government prepare[d] [sic] a document that caused Duboc to transfer his 602,000 shares of Biochem Pharma stock to Mr. Bailey and at the same time 3.5 million in funds to a DEA account in Panama City?
>
> A. I know nothing of that, no. Just to be

> absolutely clear, I know that there was this stock involved. I don't know what the agreement was, but I certainly don't recallever seeing any documents or having it described to me.

Warren Deposition, pp. 33-34.

Ms. Warren said at her August 2000 deposition that she never knew until "the last couple of days" that the United States Attorney's Office had, in 1994, prepared the transfer documents that caused the Biochem shares to be transferred to Bailey. *Id.*, p. 34.

* * *

Because the Biochem Pharma, Inc. shares, the May 17, 1994 pre-plea conference with Judge Paul, and Bailey's January 1996 letters to Judge Paul are at the heart of the case, and constitute the basis for most of the allegations against Bailey, the Statement of Facts has focused on those events. We address the facts relating to the First Allegation of Misconduct, and Bailey's deposits of the funds obtained *via* loans against, or sales of, the Biochem Pharma, Inc. stock, in the Argument portion of this Brief.

SUMMARY OF ARGUMENT

The heart of The Florida Bar's Complaint against F. Lee Bailey was the claim that he had violated his duties under an "oral trust." There was no such trust. There was no clear and convincing evidence of such a trust. Therefore, the Referee's Report and recommended sanction should be rejected.

In April 1994, the United States, acting through Assistant United States Attorneys for the Northern District of Florida, arranged the transfer of nearly six million dollars of stock to F. Lee Bailey. (App. G). The stock belonged to Bailey's client, Claude Duboc. The government authorized, approved, and typed the transfer authorization letter. TR 409. The letter contained no words of "trust," although the government knew how to create a trust agreement, and in another transfer letter relating to stock in a Hong Kong corporation, used the word "trustee." TR 414.

Bailey's understanding of the arrangement was that he could use the stock as he saw fit to manage and liquidate Duboc's French properties, so that the proceeds of those properties could be forfeited to the government as part of Duboc's plea agreement. If, after accomplishing those tasks, there was money left, United States District Judge Maurice Paul would approve Bailey's fees, and any remaining balance would revert to the United States. (App. D, p. 6; TR 1003). The government

recognized that Bailey was taking a "gamble" (TR 353-354), and if the stock went to zero, Bailey would be bereft of fees.

In January 1996, Duboc decided to change counsel, and the government, which knew that Bailey had sold some of the stock and pledged some as collateral for loans, learned that the stock had appreciated and Bailey believed the appreciation was his because he had taken the risk relating to the stock. The dispute led to a letter written by Bailey to Judge Paul on January 4, 1996, Orders issued by Judge Paul on January 12 and 25, 1996, and a letter from Bailey to Judge Paul on January 21, 1996. Those letters and Orders, Bailey's expenditures of monies, and his testimony before Judge Paul gave rise to some of The Bar's allegations against Bailey; but they, too, are an outgrowth of the "trust" dispute.

One Assistant United States Attorney said he told Judge Paul at a pre-plea conference in May 1994 that the stock had been given "in trust." TR 259-260. Another AUSA, who made the only notes of the meeting, said "I don't remember that the words `in trust' were ever used. (Kirwin Deposition, Supplemental Record, pp. 266-268). Bailey and an employee of his said "trust" was not mentioned. A Duboc co-counsel, who was later discharged, said it was. TR 520. Justice Department supervisory personnel said they were never told by any AUSA that the stock was given "in trust." (Supplemental Record, Deposition of Samuel, p. 11-13; McDowell,

pp. 14, 26; Warren, pp. 25-27, 33-34).

An oral trust agreement requires evidence that is "so clear, strong and unequivocal as to remove every reasonable doubt as to its existence." *Sottile v. Mershon*, 166 So. 2d 481, 483 (Fla. 3d DCA 1964). *See also Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative*, 52 So. 2d 670, 674 (Fla. 1951) (proof should be "clear, positive and unequivocal").

The proof in this case failed the oral trust test and the clear and convincing standard for Bar disciplinary proceedings. The Referee's Report should be rejected.

The Referee also erred in excluding polygraph evidence that confirmed Bailey and his employee were telling the truth about the lack of a trust, and she erred in excluding the expert witness testimony of the former long-time Ethics Director of The Florida Bar, who concluded that Bailey's handling of the stock proceeds, and his letters to Judge Paul, and his testimony before Judge Paul, did not violate the Rules Regulating the Florida Bar. The one allegation admitted by Bailey – that the proceeds of the government-authorized sale of some Japanese stock should have been placed in trust on the way to the government – was a technical violation, and the former Ethics Director's testimony should have been admitted as to that subject, too.

In sum, the evidence presented, and the evidence excluded, require rejection of the Referee's Report and sanction recommendation.

ARGUMENT

I.

THE FINDINGS OF MISCONDUCT AND THE RESULTING RECOMMENDATION OF DISBARMENT MUST BE REJECTED, BECAUSE THERE WAS NO CLEAR AND CONVINCING EVIDENCE THAT A TRUST HAD BEEN CREATED WITH REGARD TO THE BIOCHEM PHARMA STOCK THAT WAS TRANSFERRED TO BAILEY

Allegations of Misconduct 2, 3, 4 and 5 of the Bar's Complaint, and the Referee's findings as to those counts, turn on the existence of a "trust" relationship having been established when the Biochem Pharma, Inc. shares were transferred to Bailey in April 1994. If there was no "trust," Bailey's handling of the Biochem stock and its proceeds did not violate Bar Rules, and his testimony was truthful.

Not a single document supported the creation of a trust.[5]

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[5] We anticipate the Bar will point to Bailey's letter of January 21, 1996 to Judge Paul in which Bailey wrote that he told Shohat he "had in principle agreed to hold the funds in the nature of a trust," and that he "viewed the money held by me as an account in which the United States had an ultimate interest" as written evidence of the existence of a trust agreement. But the Bar would be both misreading and reading too much into these phrases, because Bailey made clear in that letter and in his testimony that the only duty he had was to account for the expenses and get approval for the fees to be paid from the $5,891,352; if there was a remainder, that reverted to the government: "I viewed that as money held by me as an account in which the United States had an ultimate interest, *to this extent: After the payment of costs associated with the case, and fees approved by your Honor, an[y] balance remaining would revert to the United States.*" Appendix D, p. 6 (emphasis supplied). If the stock had gone to zero, Bailey would have been broke. He took the "gamble" (Miller, TR 353-

Faced with that uncontroverted fact, and the indisputable fee simple language of the transfer letter, the Referee used euphemisms: "form of trust" (Appendix A, p. 5 ¶ 3a); "Nature of a trust (*id.* at p. 6, ¶ 3d); "Nature of a trust (*id.* at ¶ 3d); "Nature of a trust" (*id.* at ¶ 3g); "Biochem shares entrusted to him" (*id.* at 13 ¶ 1); "A trust arrangement" (*id.* at 5, ¶ 3c).

We recognize that the Assistant United States Attorneys said that they believed that Bailey was obligated to return the Biochem Pharma, Inc. stock. But the test is not what they thought; it is whether there was "clear and convincing" evidence that Bailey thought there was a trust, and that an oral trust had actually been created.

> "Clear and convincing evidence requires that the evidence found must be credible; the facts to which the witnesses testify must be distinctly remembered; the testimony must be precise and explicit; and the witnesses must be lacking in confusion as to the facts in issue. The evidence must be of such weight that it produces in the mind of the trier of fact a firm belief or conviction, *without hesitancy* as to the truth of the allegations sought to be established."

State v. Mischler, 488 So. 2d 523, 525 (Fla. 1986) (emphasis supplied), *quoting*

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354), and no document supported the contention that Bailey was foreclosed from the upside of the transfer authorized by the government.

Slomowitz v. Walker, 429 So. 2d 797, 800 (Fla. 4th DCA 1983).[6] The Court's application of the *Slomowitz* definition to the sentencing guideline departure requirement of "clear and convincing reasons" used language highly pertinent to the "oral trust" inquiry in this case. In *Mischler* Justice Adkins wrote:

> Accordingly, "clear and convincing reasons" require that the facts supporting the reasons be credible and *proven beyond a reasonable doubt.* The reasons themselves must be of such weight as to produce in the mind of the judge a firm belief or conviction, *without hesitancy*, that the departure is warranted.

State v. Mischler, 488 So. 2d 525 (emphasis supplied).[7]

The "oral trust" standard is similar. In *Sottile v. Mershon*, 166 So. 2d 481 (Fla. 3d DCA 1964), the plaintiff sought to have a trust declared for money paid to an attorney, maintaining "that the money was paid to T.A. Whiteside for a specific purpose under circumstances creating an oral trust agreement. . . ." *Id.* at 482. The

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[6] Although *Mischler's* test has been superseded by statute, and sentencing departures now only require a preponderance of the evidence, the Court's definition of "clear and convincing evidence" is still the applicable standard for explaining the meaning of the term.

[7] The "without hesitancy" definition is consistent with the Florida Standard Jury Instruction 2.03 on reasonable doubt: "if having a conviction it is one which is not stable but one which wavers and vacillates. . . ," and the federal reasonable doubt standard: "Act without hesitation in the most important of your own affairs." *See Eleventh Circuit Pattern Jury Instruction* 3. The point we make is that there is a *very high* quantum of proof required for proof of an oral trust.

circuit court found that an oral trust agreement was not established and the appellate court affirmed, stating the standard:

> In order to demonstrate error upon this record, the appellants would be required to show that the evidence to establish the oral trust was so clear, strong and unequivocal as to remove every reasonable doubt as to its existence. *Lofton v. Sterrett,* 23 Fla. 565, 2 So. 837; *Quinn v. Phipps*, 93 Fla. 805, 113 So. 419, 54 A.L.R. 1173; *Lightfoot v. Rogers*, Fla. 1951, 54 So. 2d 237; *Estey v. Vizor*, Fla. App. 1959, 113 So. 2d 576.

Sottile v. Mershon, 166 So. 2d at 483. *See also Columbia Bank for Cooperatives v. Okeelanta Sugar Cooperative*, 52 So. 2d 670 (Fla. 1951):

> In all cases wherein relief is predicated upon an oral agreement for an express trust in personalty or upon facts which might be contended to establish a constructive or resulting trust, proof of such an agreement or of such facts must be weighed cautiously and should be clear, positive and unequivocal. With reference to an express trust the general rules require at least a clear preponderance of the proof and many courts have held that the parol evidence must be of a conclusive, or well nigh conclusive, character. Of course, in the case of a resulting trust the rule is even stronger and requires proof sufficient to remove from the mind of the Chancellor
>
> every reasonable doubt of the existence of such a trust.

Id., at 674.

No matter how one frames the clear and convincing standard, the evidence in this case does not meet it. The testimony of the Bar's witnesses was not precise and explicit; it was not distinctly remembered, nor was it lacking confusion. The Statement of Facts details the contradictions. *See* pp. 9-29, *supra*. Two witnesses (Miller and Shohat) said Judge Paul was told there was a "trust." Four others (Kirwin, Bailey, Fuster, Lilley) testified that the word "trust" was never used. Others, in supervisory positions within the Justice Department, remembered clearly that they were not told of any trust. (*See* depositions in Supplemental Record). The critical document, prepared by the government (TR 218), contained no indication of a trust: "As to the shares of Biochem send them to the following account: Credit Suisse. . . Account #0267-15427-52." Appendix G.[8]

The Referee was "not swayed by the Respondent's argument that the lack of written agreement supports his position that no trust was established." Appendix A, p. 9, ¶ 14. But the burden was not on Bailey, it was on the Bar to prove, without

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[8] The government knew how to create a trust agreement. See TR 414-417, where AUSA Atchison explains the preparation of Duboc letters to transfer stock of Hong Kong corporations to Bailey, and the fact that "they specifically name that `transfers to be made to my attorney, Mr. F. Lee Bailey, *as my trustee*.'" (TR 414) (emphasis supplied).

hesitation, that an oral trust was established. Bailey's argument is not hinged upon the lack of a written agreement; it is founded upon the fact that the only written agreement *did not* establish a trust and that the Bar's witnesses were all over the lot on whether a "trust" had even been mentioned, and on what was said to Judge Paul. Indeed, any fair reading of the record is that Miller's and Shohat's uses of the word "trust" are completely inconsistent with the other evidence: the note and testimony of Kirwin; the recollections of Lilley, Fuster, Bailey; the silence of Miller, Kirwin and Patterson to the high level Justice Department officials about any "trust," the lack of any interest in the price of the stock by any government official from April 1994 until January 1996.

Nor was the Referee right when she wrote that Bailey's position was not "consistent with the premise that ultimate approval and payment of fees would rest with Judge Paul" and that Bailey "has never denied that approval of fees and expenses would have to be sought from Judge Paul." Appendix A, p. 14, ¶ 7. Bailey's position is consistent because he has never doubted or denied that there would be an accounting and a fee approval *vis a vis* the $5,891,352 transferred value of the Biochem Pharma stock. *See* Appendix D, p. 5; TR 1003. The real question relates

to what would happen if the stock became more valuable. AUSA Miller acknowledged Bailey was assuming a risk:

> A. I said that was the only account that we were making available to him, that stock fund; that if it went down he was risking that he was not going to be able to pull out the monies that he needed to manage those properties; and possibly not have the money in that fund to pay his fees, that they were going to make available to pay his fees.

TR 351. Miller also said he gave Bailey a choice – that cash could be transferred to him – but that Bailey took the stock. TR 351-352. Having taken the risk, Bailey believed he was entitled to the benefit:

> A. [BAILEY]: The first time I was ever informed that the profits were not mine was on January 19, 1996 when Mr. Miller's first tack was to tell me that Claude remembered this was a trust. Not that we had talked about it, but that Claude remembered.
>
> And I said, that's not a very credible source to depend on, and I'll tell you right now its not true. We broke for lunch, and when he came back he said for the first time, he [Miller] said, you know you were given a forfeitable asset.

TR 892-893. Bailey knew, and had every reason to believe, that the stock was not a forfeitable asset because "it could never have been deposited in the Swiss account without creating a serious crime under Swiss law," a fact conveyed to Kirwin in June 1994 (TR 896-897), and because "you may not give money to a defense attorney out of forfeitable assets without the approval of the Deputy Attorney General, and I knew

they didn't have it." TR 897. *See United States v. Monsanto*, 491 U.S. 600, 109 S. Ct. 2657, 105 L. Ed. 2d 512 (1989), in which the Court, addressing the Comprehensive Forfeiture Act of 1984, Title 21 U.S.C. § 853, said "all assets falling within its scope are to be forfeited upon conviction, with no exception existing for the assets used to pay attorney's fees – or anything else, for that matter." *Id.* at 603-604, 109 S. Ct. at 2660-2661.

Here, the government's approval of Duboc's pre-plea transfer of the Biochem stock to Bailey evaded these strictures and gave Bailey an unencumbered interest and the right to consider its appreciated value to be the reward for the risk he accepted when he agreed to maintain, manage and liquidate the forfeitable properties and have Judge Paul approve his fees, assuming the stock did not lose its value.

The Referee's recommendation of disbarment is primarily based upon her finding that Bailey "misappropriated," "commingled" (Appendix A, p. 9, ¶15), improperly "expend[ed]" (*id*. at p. 10 ¶12), and engaged in "self dealing" (i*d*. p. 14 ¶13) with respect to the Biochem Pharma stock. These findings and the drastic sanction recommendation are premised on the "trust" she found was created. That finding was clearly erroneous. There was no "trust." There was no clear and

convincing evidence of a "trust." There was not evidence that would cause one,

without hesitation, to conclude there was a "trust."

Viewed in the light most favorable to The Bar, the evidence reflects, at most, a misunderstanding. Toni Marie (Kennedy) O'Brien, a lawyer who worked with Bailey on the Duboc matter, recalled the moments when Bailey first heard that the government claimed the appreciated value, and that there was a trust. AUSA Atchison called her in December 1995 and she related her subsequent conversation with Bailey:

> A. I said Mr. Atchison just called, he's looking for some account numbers on the Biochem stock, he said that this is a good time to sell it because of substitution of counsel or the upcoming substitution of counsel.
>
> Q. Did Mr. Bailey say anything in response to that?
>
> A. Yes.
>
> Q. What did Mr. Bailey say?
>
> A. Well he got very mad and said, I'm entitled to the upside gain on that stock. He snapped at me. I mean, I felt defensive you know. I felt a – well I didn't say anything different, you know, don't shoot the messenger, I'm just passing it along. And he said, well, you know, I'm entitled to the upside gain. I took
>
> the downside risks, I'm entitled to the appreciation, something to that effect.

O'Brien Deposition, pp. 30-31.[9]

Ms. O'Brien went to the January 19, 1996 meeting at the United States Attorney's Office in Tallahassee. "It turned out the focus of the discussion was, you know, Mr. Bailey versus the government attorneys saying its my stock, its my stock. Umm, and that's the first time that I heard trust come up, that the stock was given to Mr. Bailey in trust." O'Brien Deposition, pp. 86-87.

Even if one credits the government's belief in its "trust" theory, disbarring a lawyer when he had a reasonable basis for a different belief is wrong. The government showed no interest in whether the stock was appreciating; the Assistant United States Attorneys made no effort to confirm, either orally or in writing, their "trust" view, nor did they make any effort to document the basis for their transfer of nearly six million dollars in stock. If Bailey was wrong, on this record, his error does not merit disbarment.

II.

[9] A motion to supplement the record with this Court of Claims deposition has been filed contemporaneously with this Brief. The acceptance of the deposition would be consistent with the Court's Order of January 18, 2001.

THE EXCLUSION OF FAVORABLE POLYGRAPH EVIDENCE AND FAVORABLE EXPERT WITNESS TESTIMONY REQUIRES RECONSIDERATION OF THE FINDINGS AND SANCTION RECOMMENDATION

A. THE POLYGRAPH EVIDENCE

Bailey sought to introduce polygraph examiner testimony establishing that Bailey's pilot, who had been present in Judge Paul's chambers, was not deceptive when he said that he did not hear the word "trust" mentioned by anyone at the May 17, 1994 pre-plea conference. TR 721. Bailey also sought to admit the results of his own polygraph, which established that he was truthful regarding his understanding of the stock transfer to him. The Referee denied admission of the testimony because "in Florida, polygraph testimony is not admissible." TR 724.[10]

Polygraphs have been considered in Bar proceedings. *See The Florida Bar v. Pavlick*, 504 So. 2d 1231, 1233 (Fla. 1987). See also *The Florida Bar v. Sepe*, 380 So. 2d 1040 (Fla. 1980), in which the Florida Bar's Petition for Approval of Conditional Guilty Plea related that polygraphs were taken by the respondent and his accuser, and "neither of them showed reaction indicative of deception." *Id. See also*

[10] She commented that Bailey's polygraph report was tardy, "[s]o I'm inclined just to exclude that on a procedural ground" (TR 723), but it appears that her belief in the inadmissibility of polygraphs is the actual basis for the decision. TR 724.

The Florida Bar v. Rayman, 238 So. 2d 594, 596, n.1 (Fla. 1970).

The Referee refused to follow *Pavlick*, finding it to be distinguishable. TR 724. *Pavlick* turned on whether he was telling the truth when he denied in the Bar proceeding that he was guilty of being an accessory after the fact to a misprision of a felony despite his federal *Alford* plea and adjudication of guilt as to the crime. The polygraph test introduced in the Bar proceeding "bore out Pavlick's testimony" that he did not commit the crime. 504 So. 2d at 1233. The Court held that "due process" supported the referee's decision to admit the polygraph results as "evidence in mitigation." *Id.* at 1234. Here due process requires consideration of the polygraph evidence as to the merits and mitigation.

F. Lee Bailey's career is in the balance. If there was no trust, if Bailey's understanding of the stock transfer arrangement had a reasonable basis, at the least that militates against the sanction. Polygraph evidence is admissible in the federal courts in this circuit. *United States v. Piccinonna*, 885 F.2d 1529 (11th Cir. 1989). The Fourth District Court of Appeal certified the question of polygraph admissibility to this Court in *State v. Santiago*, 679 So. 2d 861 (Fla. 4th DCA 1996).[11] The Fifth District Court of Appeal has approved the use of periodic polygraphs for those on probation

[11] There is no reported subsequent history to *Santiago*. The certified question: "Are the results of polygraph tests inadmissible in evidence as a matter of law?" (679 So. 2d at 863) remains unanswered.

for sex offenses. *Cassamassima v. State*, 657 So. 2d 906 (Fla. 5th DCA 1995) (en banc). The Supreme Court of the United States addressed the polygraph issue in *United States v. Scheffer*, 523 U.S. 303, 118 S. Ct. 1261, 140 L. Ed. 2d 413 (1998), and upheld Military Rule of Evidence 707, prohibiting polygraph evidence in courts-martial. But three justices joined in Justice Kennedy's concurrence:

> I doubt, though, that the rule of per se exclusion is wise, and some later case might present a more compelling case for introduction of the testimony than this one does . . . . And, as Justice Stevens points out, there is much inconsistency between the Government's extensive use of polygraphs to make vital security determinations and the argument it makes here, stressing the inaccuracy of these tests.

Id. at 318, 118 S. Ct. at 1269 (Kennedy, J., concurring). Thus, combined with Justice Stevens' dissent, five justices believe it unwise to *per se* exclude polygraph evidence.

As the Fourth District pointed out in *Santiago*, polygraph evidence has become more accepted. Whatever the ultimate answer may be as to the use of polygraphs in all cases, the denial of its use here violated Bailey's due process right to present evidence in mitigation. *Pavlick*, *supra* p. 45. While we contend that the evidence does not support the Referee's finding of a "trust," if this Court concludes otherwise, the exclusion of the polygraph evidence was error here because the polygraph

evidence could have tipped the "clear and convincing evidence" scale in Bailey's favor. Therefore Bailey is entitled to have this Court consider the favorable polygraph evidence and find that it confirms Bailey's position that the Referee erred in finding that a "trust" had been established.

B. THE ETHICS EXPERT'S TESTIMONY

Bailey also sought the admission of expert testimony from Timothy Chinaris regarding application of the Bar Rules to the alleged Bailey conduct. Chinaris was the Ethics Director of The Florida Bar from 1989 to 1997. Chinaris' testimony was rejected by the Referee because "From this Court's perspective as a Referee, any testimony provided by a lawyer which purports to be expert testimony [on the Rules Regulating the Florida Bar] will provide no assistance to this Court as required by the express mandate of Florida Statute 90.702." TR 616-618.

That cramped view of Section 90.702 foreclosed the Referee from considering Chinaris' "specialized knowledge." In the Referee's mind, all Florida lawyers have knowledge of the Rules, therefore "permit[ting] lawyers to give expert testimony regarding the meaning of the rules regulating the Florida Bar and their application to this case" would have rendered her role "superfluous." TR 617. If the Referee were right, the Florida Bar's "Ethics Hotline" and The Florida Bar's extensive advisory

process are superfluous. By "knowledge, skill, experience and training" Chinaris was qualified to testify concerning the ethical propriety of Bailey's conduct. His Expert Interrogatories Response had been proffered (TR 621, 808-809) and is reproduced in Appendix H to this Brief. He sat through the entire Bar hearing. TR 501-502. No principled basis justified the Referee's grant of "the Bar's ore tenus motion to exclude [Chinaris] from testifying." TR 618-619.

The Chinaris proffer is persuasive. Chinaris' expert opinion addressed each purported violation. It detailed the extensive materials he had reviewed. It stated the reasons why Bailey's use of funds transferred to him was not unethical; why his letters to Judge Paul did not violate the Rules of Professional Conduct, and why the one transgression (Count I, the passage of proceeds from the Japanese stock briefly through Bailey's personal account on its way to the government) was "at most, a technical violation of the trust accounting rules." Appendix H, p. 2, ¶ (iii)(A).

This Court should consider Chinaris' proffered expert interrogatory answers and find that they undermine the Report both as to its findings and recommended sanction.

III.

THE FINDINGS OF FALSE TESTIMONY,

COMMINGLING, DISCLOSURE OF CONFIDENTIAL COMMUNICATIONS, CONFLICT OF INTEREST, AND MISAPPROPRIATION ARE NOT SUPPORTED BY CLEAR AND CONVINCING EVIDENCE, AND THE RECOMMENDATION OF DISBARMENT SHOULD BE REJECTED

The Referee did not like Bailey. She rounded up various historical comments and re-wrote them to say "`The Respondent is a liar.' This Referee concurs." Appendix A, p. 23.

The evidence does not prove Bailey lied about the "trust." And, if there was no "trust," then Bailey cannot be found guilty of misappropriating and commingling the sales and loan proceeds of the Biochem Pharma stock.

The evidence does not prove Bailey lied about the sale of the Japanese stock that had been transferred to him, and its layover in his Barnett Bank account. His candor was unconditional: he acknowledged that "[i]t was to be a conduit for delivery to . . . the U.S. Marshal . . . [a]nd very frankly, I wasn't thinking of the United States as a client at that time. Probably should have put it in a trust account, but I didn't." TR 959.

Nor did the evidence prove that Bailey lied about his knowledge of Judge Paul's orders of January 12 and 25, 1996. The Referee concluded that Bailey's "assertions that he did not see the January 12 and January 25 orders prior to February 2 are patently ludicrous." Appendix A, p. 13, ¶ 10. Bailey's cross-examination explanation

about the orders, how he heard about them, what he knew and thought, is at pages 1078-1082 of the hearing transcript. The Referee's disbelief was based largely on Bailey's January 21, 1996 letter to Judge Paul, which the Referee quoted out of context and concluded: "Of course these assertions [to Judge Paul] could not have been made *unless* the Respondent had seen the January 12 order." Appendix A, p. 12 ¶ 9(d) and (e) (emphasis in original).

Bar counsel's cross-examination led the Referee to err:

> Q. [BAR COUNSEL]: Well Mr. Kirwin must have told you at some time. It's in your letter to Judge Paul on the 21st.
>
> A. No, not in my letter to Judge Paul on the 21st. Have you read the first paragraph of that letter?
>
> Q. You read footnote 1, Mr. Bailey. You read it in court. It will stand for that.
>
> A. Does it not say that "on January 16 your order came to my attention"? Doesn't say I read it.
>
> Q. Mr. Bailey, *does it also say that Mr. Kirwin told you* that you had to freeze everything?
>
> A. *No.*
>
> Q. That's not what footnote 1 says?
>
> A. No.

Q. Okay. We'll let the letter speak for itself.

TR 1091-1092 (emphasis supplied). The letter is at Appendix D. It is as Bailey stated; it does not say he saw the order, and footnote 1 says that he thought the order that he had heard about "*was the product of my telephonic offer* to AUSA Kirwin on Friday January 12 . . . to `freeze everything' until we could meet with you and solicit your direction." Appendix D, p. 1, n. 1 (emphasis supplied).

Bailey also explained that there was nothing in the January 25, 1996 Order prohibiting distribution of the proceeds of a loan made against the shares for which he was personally liable (TR 939), and that from January 12 through January 24 "no Duboc money was spent." TR 1113. The money expended from January 25 to February 26 from Bailey's personal account was not covered by the January 25 Order, which Bailey accurately said "does not freeze my account." TR 1114. *See* Appendix F, the January 25, 1996 Order. It does not freeze anything.

The Referee's distaste for Bailey's January 4 and 21, 1996 letters to Judge Paul (Appendix B and D) was sharp: "All this was done with the ludicrous presumption that the Respondent's opinion, as to the potentially displaced attorney, would be of any relevance or benefit to anyone." Appendix A, p. 17, ¶ 13(e). But Bailey sought to help, not hinder, his client. And how could he have "compromised his client" (Appendix A, p. 15, ¶ 10) by telling Judge Paul what he already knew in May 1994:

that Duboc was a wealthy drug dealer who chose to cooperate because it was his only option, given the strength of the case against him? The January 4, 1996 letter should not have been an *ex parte* communication. But that transgression, and Bailey's entitlement to defend himself in his January 21 1996 letter contesting the government's "trust" theory, do not create grounds for disbarment.

Indeed, this whole case comes back to the "trust." The Bar's Complaint is founded on the Bar's belief that Bailey had been given the Biochem Pharma, Inc. stock in trust. The Referee's findings, conclusions, and recommendations are constructed on the same premise.

Because that premise lacks clear and convincing evidentiary support, the Referee's Report must be rejected.

CONCLUSION

For the foregoing reasons, the Amended Report of Referee should be rejected. If any of F. Lee Bailey's actions constituted misconduct, the sanction should not interfere with Bailey's ability to practice law, given his reasonable belief that his actions were consistent with his agreements with his client and the government.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was forwarded by FedEx to the following counsel of record this 20th day of February, 2001:

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This brief is typed using a Times New Roman 14-point font, in accordance with Rule 9.210, Fla.R.App.P.

BRUCE ROGOW

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