IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant-Appellee,

v.

STEVEN EDWARD COHEN,

Respondent-Appellant.
_____/

Case No. SC03-2041

The Florida Bar File No. 2004-50,550(17J)

THE FLORIDA BAR'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Throughout this Answer Brief, The Florida Bar will refer to specific parts of the record as follows: The Amended Report of Referee will be designated as ARR ___ (indicating the referenced page number). The transcript of the final hearing will be designated as TR___, (indicating the referenced page number).

STATEMENT OF THE CASE AND OF THE FACTS

On or about April 15, 2003, Steven Edward Cohen (hereinafter "Respondent"), entered into a plea agreement in the case styled United States of America v. Steven Edward Cohen, Case No. 03-60076-Cr-Marra, in the United States District Court for the Southern District of Florida. Pursuant to such plea agreement, Respondent agreed to plead guilty to one count of Conspiracy to structure cash transactions with one or more domestic financial institutions in order to evade reporting requirements, in violation of Title 18 United States Code Section 371. This is a federal felony. Predicted upon this plea, The Florida Bar filed its complaint against Respondent on November 12, 2003. The Referee conducted the final hearing on April 22, 2004, and issued his Report of Referee on May 27, 2004, and an Amended Report of Referee on June 9, 2004, (amended only as to an omission of a line of text at the bottom of page 13 of the original Report of Referee, an addition of a Rule, and the change of date on the final page). At the conclusion of the hearing, the Referee recommended that Respondent be disbarred from the practice of law for a minimum period of five (5) years. (ARR 1). Respondent appeals that finding.

The Referee found Respondent guilty of the following rule violations: R. Regulating Fla. Bar 3-4.3; R. Regulating Fla. Bar 4-8.1(a); R. Regulating

Fla. Bar 4-8.4(a); R. Regulating Fla. Bar 4-8.4(b); R. Regulating Fla. Bar 4-8.4(d). (ARR 11-12). In recommending disbarment, the Referee considered six aggravating factors: 9.22(b) Dishonest or selfish motive; 9.22(c) A pattern of misconduct; 9.22(d) Multiple offenses; 9.22(f) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process; 9.22(i) Substantial experience in the practice of law; 9.22(j) Indifference to making restitution. (ARR 12-13). In mitigation, the Referee considered the following mitigating factors: 9.32(a) Absence of a prior disciplinary record; 9.32(g) Character and reputation; 9.32(k) Imposition of other penalties or sanctions. (ARR 18).

The case involved Respondent accepting and concealing more than $640,000 in cash delivered to him throughout a period of time in packets, wrapped in clear plastic, from his long time friend and drug dealer, and hiding the same in a safe deposit box in a bank in the building where his office was located, and then transferring these packets to a floor safe in his partner's home specifically built for the purpose of concealing the money. (ARR 13).

Respondent alleged during the final hearing that while he hid these large sums of money over a long period of time (over ten years) for his close friend, disbarment was not appropriate in that he did not know the money he

was concealing for his long time friend and drug dealer was drug money. (TR 189; see also TR 177, 179, 180, 186). Instead, Respondent alleged that he thought he was merely assisting his friend in hiding money from a girlfriend. (TR 180,181). Respondent, through counsel, placed his lack of knowledge as to the nature of the proceeds in issue and offered his ignorance as mitigation. (TR 28, 31, 226, 229, 230, 231). The Referee, after considering all of the testimony and evidence presented, found that Respondent's story was simply not credible and considered Respondent's knowledge and credibility as an issue in determining the discipline recommended. (ARR 13-15). Specifically, the Referee found that Respondent knew that he was helping to conceal drug money from a major drug ring. (ARR 13). It is that finding that is appealed by Respondent. This recommendation, however, was clearly appropriate given the following: a Referee's findings and recommendations are presumed correct unless found to be otherwise; disbarment is the appropriate sanction in this case; the Referee did not go behind the conviction solely by virtue of the fact that he considered the testimony of witnesses and the evidence offered; even assuming arguendo that the Referee went behind the conviction, this would be harmless error.

SUMMARY OF THE ARGUMENT

The Report of Referee is complete, accurate and correct and justifies a recommendation of disbarment. First, when a Referee's findings are supported by competent, substantial evidence in the record, they must be upheld. Second, there is a presumption of disbarment for a Respondent who is convicted of a felony which must be upheld unless the same is rebutted. Third, the Referee did not go "behind the conviction" as is alleged by Respondent. The Referee merely considered, as he is allowed to, the testimony of the witnesses and the evidence before him, the fact that Respondent pled guilty to a federal felony, the mitigating and aggravating factors, the Standards for Imposing Lawyer Sanctions, and the case law. All of the enumerated considerations are appropriate for a Referee to consider in reaching a disciplinary sanction and do not amount to going "behind a conviction." Additionally, Respondent himself invited such testimony and placed his lack of knowledge at issue.

Finally, even assuming arguendo that the Referee improperly went behind Respondent's conviction, this would be harmless error and not grounds for reversing the recommendation of disbarment. The discipline recommended by the Referee, therefore, is reasonable, appropriate, and follows the precedent set by this Court. Respondent should be disbarred.

DISBARMENT IS THE APPROPRIATE SANCTION FOR A LAWYER WHO PLEADS GUILTY TO A FEDERAL FELONY AND DOES NOT REBUT THE PRESUMPTION OF DISBARMENT

The Referee recommended disbarment after considering the fact that Respondent pled guilty to a federal felony, the aggravating factors present, the Standards for Imposing Lawyer Sanctions, the case law, and the mitigation offered by the Respondent. That recommendation is appropriate and must be upheld.

This Court has stated that it will not second guess a Referee's recommended discipline if it has a reasonable basis in law and in the Standards for Imposing Lawyer Discipline. The Florida Bar v. Feinberg, 760 So.2d 933 (Fla. 2000); The Florida Bar v. Sweeney, 730 So.2d 1269 (Fla. 1998), The Florida Bar v. Lecznar, 690 So.2d 1284 (Fla. 1997). In fact, a Referee's recommendation on discipline is afforded a presumption of correctness unless the recommendation is clearly erroneous or not supported by the evidence. The Florida Bar v. Lipman, 497 So. 2d 1165, 1168 (Fla. 1986).

This Court has also long held that a felony conviction creates a rebuttable presumption of disbarment. The Florida Bar v. Grief, 701 So.2d 555, 556 (Fla. 1997). While disbarment is the presumed sanction for this type of violation, it is not automatic. The Florida Bar v. Jahn, 509 So.2d 285

(Fla. 1987). An analysis must be made of the severity of the felony and whether the mitigation/aggravation outweighs the severity of the felony. The Referee in the instant case engaged in such an analysis and took great care in reaching his determination to recommend disbarment.

The evidence as determined by the Referee indicated that Respondent, who pled guilty to a federal felony, was not an innocent pawn as he alleged. (ARR 13). In fact, the Referee specifically made findings about Respondent's involvement and knowledge of the criminal activity and in support of his findings specifically stated:

> …it insults credulity to suggest that Respondent, a well-to-do lawyer and highly sophisticated real estate investor, would believe that the cash which Taylor frequently delivered to him in $10,000 packets wrapped in clear plastic, which he surreptitiously transferred to a safe deposit box in a bank in the building where his office was located, and subsequently transferred to a floor safe specially built for that purpose in his partner's home, was ordinary income from legitimate businesses. (ARR 13).

The Referee was able to reach this conclusion after hearing the testimony of DEA Special Agent Jon DeLena, and after hearing the testimony of Respondent himself. To suggest that a Referee is not allowed to assess the credibility of witnesses and to rely on logic in reaching a disciplinary recommendation is ludicrous.

Furthermore, not only did the Referee reach his proper recommendation of disbarment based on the testimony of the witnesses in the case, but also after considering the truthfulness of Respondent's own testimony. As such, he stated that the "Respondent was untruthful during the disciplinary process." (ARR 14). The Referee was entitled to consider this factor in reaching his disciplinary recommendation as to why disbarment, and not a lesser sanction, was appropriate.

Additionally, disbarment was the appropriate recommendation not only given the nature of the offense but also given that the Referee found a number of aggravating factors present: 9.22(b) Dishonest or selfish motive; 9.22(c) A pattern of misconduct; 9.22(d) Multiple offenses; 9.22(f) Submission of false evidence, false statements, or other deceptive practices during the disciplinary process; 9.22(i) Substantial experience in the practice of law; 9.22(j) Indifference to making restitution. (ARR 12-13). In mitigation, the Referee considered the following mitigating factors: 9.32(a) Absence of a prior disciplinary record; 9.32(g) Character and reputation; 9.32(k) Imposition of other penalties or sanctions. (ARR 18). When balancing both, the Referee concluded that the aggravating factors outweighed the mitigating factors and that the presumption of disbarment had not been rebutted.

Finally, the case law is clear that disbarment is appropriate. *See* The Florida Bar v. Bustamante, 662 So.2d 687 (Fla. 1995). In Bustamante, the Respondent pled guilty to one count of federal felony of wire fraud. The Court held that pleading guilty to a federal felony warranted disbarment. *Id*. at 690. Bustamante alleged that because of his good character, his previously unblemished forty-year legal career, his age of sixty-five years, his national reputation in the black community, and the extreme pressures he was undergoing while he was being prosecuted, a suspension rather than disbarment was appropriate. *Id*. at 689. The Court rejected this argument and found that "…under the circumstances in this case, we find that Bustamante has not overcome the presumption that disbarment is the appropriate discipline for a felony conviction." *Id*. at 690.

In the instant case, Respondent's mitigation is not nearly as compelling as that of Bustamante to overcome the presumption of disbarment. In fact, Respondent has more aggravating factors present.

Likewise, in The Florida Bar v. Horne, 527 So.2d 816 (Fla. 1988), the Court held that an attorney who is convicted of a federal felony warrants disbarment. Horne at 818. *See also* The Florida Bar v. Dougherty, 769 So.2d 1027 (Fla. 2000) (Five year disbarment for federal felony convictions); The Florida Bar v. Lechtner, 666 So.2d 892 (Fla. 1996) (Ten

year disbarment for attorney convicted of several felonies); The Florida Bar v. Hosner, 536 So.2d 188 (Fla. 1988)(ten year disbarment); The Florida Bar v. Haimowitz, 512 So.2d 200 (Fla. 1987); The Florida Bar v. Weinsoff, 498 So.2d 942 (Fla. 1986); The Florida Bar v. Nedick, 603 So.2d 502 (Fla. 1992) (disbarment appropriate despite respondent's cooperation with authorities).

A case very similar to the instant one where the Court disbarred a lawyer for participating in illegal drug activities is The Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1989). In Eisenberg, Eisenberg, acting in his capacity as an attorney, participated in a conspiracy to conceal the proceeds from the illegal importation of marijuana. *Id*. at 354. Eisenberg cooperated extensively with the authorities. The Referee recommended disbarment and Eisenberg appealed arguing that disbarment is too severe since he had cooperated extensively with the authorities and the fact that he had been rehabilitated. *Id*. at 354. The Court still recommended disbarment.

THE REFEREE DID NOT GO BEHIND RESPONDENT'S CONVICTION

Respondent argues that the Referee's findings should be overturned because the Referee went behind Respondent's conviction in making his findings. It is The Florida Bar's position that the Referee was entitled to consider the testimony of the witnesses and the evidence he did in reaching a

determination as to whether disbarment or a lighter sanction, as argued by the Respondent, was appropriate. In fact, it is The Florida Bar's position that Respondent in fact opened the door for the Referee to consider the very testimony and documents he now objects to him having considered.

Respondent relies on the fact that the Referee considered the testimony of DEA Special Agent, Jon DeLena, and relied on several documents which were part of the underlying criminal case, as well as the statements of the sentencing judge in arguing that the Referee went outside the appropriate areas in reaching his recommendation. This statement is simply misguided if one looks at the record.

A Referee is allowed to consider any evidence he deems appropriate in reaching a recommendation. *See* The Florida Bar v. Jasperson, 625 So. 2d 459 (Fla. 1993). This is no different when the disciplinary action stems from a criminal case against the Respondent. While it is true that the Court has held that a Referee is not allowed to go behind a conviction, *See* The Florida Bar v. Kandekore, 766 So. 2d 1004 (Fla. 2000); The Florida Bar v. Vernell, 374 So. 2d 473 (Fla. 1979), and in fact The Florida Bar stated the same to the Referee in these proceedings (TR 42, 43), a Referee is not precluded from considering any evidence he/she deems appropriate in determining the discipline. For example, in The Florida Bar v. Diamond, 548 So. 2d 1107

(Fla. 1989), the Referee was allowed to consider the testimony of the judge in the criminal case in reaching his recommendation. Likewise, in The Florida Bar v. Jahn, 509 So. 2d 285 (Fla. 1987), The Florida Bar was allowed to present testimony from two women involved in the incidents leading to Jahn's convictions. The fact that such testimony is considered does not in and of itself mean that a Referee is going behind a conviction.

In the instant case, it was appropriate for the Referee to consider the testimony of DEA Special Agent Jon DeLena. In fact, this testimony was invited by the Respondent and necessary given that Respondent placed his lack of knowledge as to where the money he hid came from into issue by asserting that he had no knowledge that the same was drug proceeds.

In his opening comments to the Court, Respondent's counsel argued as follows:

> The focus of this case should be upon the conviction. It's rather interesting, and certainly you hit the nail on the head in one of our first hearings in this case, and that is the thing that was important to you was what knowledge did my client have that the money that he was holding and that he knew he was holding – and he's got no problem admitting when he gets up here to testify – that he was holding cash for Mr. Taylor.
> But the crucial fact is, is that he did not know it was the fruit of illegality and that it was the fruit of drug sales. Didn't know that, Your Honor. In fact, the U.S. government, in open court, state that he didn't know that. (TR 28)

Respondent continues to place his lack of knowledge as an issue when specifically questioned by the Court as follows:

> The Court: Well, basically, you're reiterating the fact that I said at one point that it's very important, it's a crucial issue, as to whether Mr. Cohen knew that the money was the fruit of illegal activity.
>
> Mr. Tynan: It's an important fact. (TR 29)

The proceedings continued, and Respondent's counsel states as follows:

> Now, you've raised a question that addresses, really, the severity of the activity. ***That's a legitimate inquiry. I don't have a problem with that, your Honor***. And what we're going to present to you today, through my client, is that there was a long-term friendship with Mr. Taylor. They trusted each other. And that my client did not know. (emphasis added). (TR 31)

Respondent cannot now object to the Referee considering testimony which rebutted that offered by Respondent and for which he voluntarily and willingly opened the door.

As to the documents now Respondent complains were considered by the Referee, again the Respondent opened the door for their introduction. Counsel stated to the Court:

> Now, Your Honor may not have the benefit of the full transcript of the sentencing.
> The Court: I have the full one.
> Mr. Nurik: The reason is because…we managed to get a transcript in two hours. And here is the transcript. (TR 33)

In fact, the Bar attempted to object to the introduction of this transcript not having ever received a copy of the same, but the same was introduced into evidence. (TR 33-34).

Counsel for Respondent also introduced into evidence a stipulated section of facts which he read into the record from the sentencing transcript (TR 38-41). By doing so, Respondent's counsel introduced documents and facts into evidence which he now seeks to complain about. The Respondent cannot have it both ways - willingly introducing documents from the underlying criminal case and now seeking to object to the same because they were considered by the Referee.

Once Respondent placed his lack of knowledge in issue as a basis for why he should receive something less than disbarment, The Florida Bar had no choice but to place contradictory testimony in evidence and the Referee was allowed to consider the same in reaching his conclusion.

Finally, it should be noted that the Referee specifically denied that he was going behind the conviction (TR 42) and agreed that Respondent should "…not be allowed to do so." (TR 43). Specifically, the Referee stated:

> This is a slam dunk. He has been convicted. And he is guilty of the crime he pled to. What I'm looking at is the issue of the degree of his involvement. I'm not certainly finding that what he pled to alone is sufficient for disbarment. It isn't. The law says it's perfectly adequate. And the burden, as you pointed out, is in their court to prove otherwise. So I understand that. He's

> looking at disbarment right now, unless his defense counsel can do something more. But I think as part of the overall package I'm going to look at are things that are harmful to him, as well as things that are beneficial, simply so I can decide the appropriateness of disbarment for the matter of which he's pled. And if it should turn out that there was a lot of willful ignorance about where this money came from, that's to his detriment, and it helps the bar's case. (TR 44-45)

EVEN ASSUMING ARGUENDO THAT THE REFEREE WENT BEHIND THE CONVICTION IT WAS HARMLESS ERROR

Respondent argues that it was reversible error for the Referee to consider the documents he did involving the criminal case, the comments by Judge Marra, and the testimony of Agent DeLena. Even assuming arguendo that the consideration of these enumerated items was considered going behind Respondent's conviction, the same is harmless error.

The instant case is very similar to The Florida Bar v. Onett, 504 So. 2d 388 (Fla. 1987). In Onett the Court ruled that the admission into evidence of a federal indictment containing counts and allegations which were not proven at the federal trial was not harmful error. *Id*. at 390. The Court upheld Onett's disbarment, despite the fact that the federal indictment was admitted into evidence, on the basis that the trier-of-fact normally has access to such charges anyway even though they are not evidence of guilt. *Id*. at 390.

Here, like in Onett, *supra*, the fact that the Referee may have considered documents that were not in evidence in assessing Respondent's knowledge of where the money he hid came from is harmless error.

Respondent relies on The Florida Bar v. Vernell, 374 So.2d 473 (Fla. 1979) for the proposition that the Referee in the instant case went behind Respondent's conviction, yet Vernell is distinguishable. In Vernell, the Referee attempted to decide whether or not Vernell was actually guilty of the tax offenses for which he was charged. In the instant case, the Referee did not attempt to determine whether Respondent was actually guilty of the offense with which he was charged, but merely attempted to assess Respondent's credibility as to the fact that he allegedly had no knowledge of where the money he was hiding came from. The Referee in the instant case accepted Respondent's guilt, but in determining the appropriate sanction considered Respondent's knowledge and intent, something he is entitled to do pursuant to the Standards and the case law.

CONCLUSION

A Referee's findings should not be disturbed unless they are clearly erroneous. His findings are not. Only after carefully considering all of the documentary evidence, the testimony offered, and the arguments made did he make his findings. Those findings are supported and should not be

disturbed. Respondent pled guilty to a federal felony. Respondent should be disbarred.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that true and correct copies of the foregoing Answer Brief have been furnished by regular U.S. mail to Daniel S. Mandel, Counsel for Respondent, at Mandel, Weisman, Brodie, Griffin & Heimberg, P.A., 2101 NW Corporate Boulevard, Suite 300, Boca Raton, Florida 33431; and to Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300, on this _____ day of September, 2004.

ADRIA E. QUINTELA

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

Undersigned counsel hereby certifies that the brief of the Florida Bar is submitted in 14 point, proportionately spaced, Times New Roman font, and that the computer disk filed with this brief has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

ADRIA E. QUINTELA

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