IN THE SUPREME COURT OF FLORIDA
CASE NO. SC 03-2041
Fla. Bar File No. 2004-50,550 (17J)

THE FLORIDA BAR,

Complainant,

-Vs-

STEVEN EDWARD COHEN,

Respondent.
_____/

RESPONDENT'S INITIAL BRIEF
IN SUPPORT OF PETITION FOR REVIEW

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STATEMENT OF THE CASE AND THE FACTS

This case involves two sets of factual determinations. The correct choice between them is the fundamental legal issue before this Court. A federal district judge, the Honorable Kenneth A. Marra, determined one set of facts when Respondent, Steven Cohen, accepted responsibility and pleaded guilty to the one-count conspiracy to structure funds with which he was charged. The Florida Bar presented the other set of facts later to the referee when going behind the conviction and underlying facts established in federal court. As a legal matter, this Court must decide which factual record properly serves as the predicate for discipline. Accordingly, both sets of facts must be compared and scrutinized to understand this case and to determine upon what basis discipline should be predicated.

The Guilty Plea in Federal Court

As came to light during the federal prosecution, the funds to be structured were the proceeds of a large marijuana distribution racket headed by Roger Taylor, who was arrested and charged with trafficking, among other offenses. Roger Taylor was also a long-standing friend of Steven Cohen and, along with others, a fellow investor in commercial real estate. Before the referee, the testimony was uniform that Mr. Taylor also was known to have legitimate, cash-intensive business dealing with fireworks and automated teller machine, in addition to the legitimate commercial real estate ventures. (Tr. 127-28, 137, 159). No evidence and no judge, whether the

federal district judge or the referee, remotely implicated Respondent Steven Cohen in participating in any trafficking or distribution of marijuana.

Rather, it is uncontested that over a course of approximately ten years, Mr. Taylor prevailed upon Steven Cohen to accept and hold cash for him that was first deposited in a safe deposit box and later in a home safe. As the cash accumulated, it amounted to approximately $640,000 that Steven Cohen was holding by the time the federal prosecutors arrested and charged Mr. Taylor for distribution of marijuana, thereby making public Mr. Taylor's true occupation. The U.S. Attorney's office stipulated in federal court that the relevant value of the funds was "approximately $640,000 and as such, it is more than $500,000 but not more than $800,000." (Plea Agreement, **&** 4a).

When charged with a single count in federal court of conspiring to structure funds, Steven Cohen showed respect for himself and for the profession by admitting guilt and entering into a plea agreement for this federal felony, knowing full well that it would also result in discipline from The Florida Bar. In addition to agreeing to an immediate return of all funds in his possession or control, this plea agreement potentially subjected Steven Cohen to a maximum of five years' imprisonment followed by three years' supervised release plus a fine of up to $250,000. (Plea Agreement, **&** 5). No prediction of the sentence in the plea agreement was binding upon the federal court, nor could Steven Cohen withdraw his plea merely because the

court rejected any joint recommendations of the parties. (Id., & 9). Steven Cohen also waived all rights of appeal, short of an upward departure or illegal sentence. (Id. at 10).

Once determined to plea, Steven Cohen also notified The Florida Bar on his own initiative and accepted an immediate suspension of his license before any judgment and sentence was entered by the federal court. As agreed with the U.S. Attorney's Office, Steven Cohen also turned over the approximately $640,000 in funds of the conspiracy. Although these funds accumulated over a period of approximately ten years, which accumulation was an overt act in furtherance of the charged conspiracy, at no time in that decade was the object of the conspiracy ever fulfilled by deposit of any funds. At no time did the federal government charge Steven Cohen with actually structuring funds, let alone any greater crime or additional counts. At no time did Steven Cohen claim any ownership interest in the funds, nor did the federal government ever seek forfeiture based upon any of the myriad bases available if lawful grounds exist.

The federal district judge overseeing the case against Steven Cohen was the Honorable Kenneth A. Marra, who previously sat in the criminal division of the same Fifteenth Judicial Circuit Court of the State of Florida where the referee also sits. With this experience and vantage point -- and with guilt conceded by Steven Cohen -- the only issue before Judge Marra was the appropriate sentence for the conspiracy

charged. Without any additional counts or greater crimes at issue against Steven Cohen, the appropriate sentence depended largely upon proof of Steven Cohen's knowledge, or lack of knowledge as it turns out, of the source of the funds.

Resolution of this issue by Judge Marra was necessary because both the U.S. Government and Steven Cohen objected to statements in the Presentence Investigation Report ("PSI") prepared by a U.S. Probation Officer, which is not of record here,[1] suggesting that Steven Cohen knew that the source of the funds was from marijuana sales and that Steven Cohen knew this in part because he may have personally used marijuana provided by Mr. Taylor. However, the Assistant U.S. Attorney, Mr. Roger Powell, who had been investigating the case for over a year-and-a-half and prosecuting it against Steven Cohen, felt that there was no basis for imputing such knowledge. In this regard, he told the Judge Marra at sentencing that he had no evidence that Steven Cohen knew the source of the funds, stating categorically:

[1]Nor could a federal Presentencing Investigation Report ("PSI") be made part of the record solely by the parties or any state judge. Federal Rule of Criminal Procedure 32(b) expressly forbids even the parties to a federal criminal case from disclosing the PSI without an order from a federal judge. No such order is of record here, and the referee appears to have been unaware of the need for one.

> It was over a year-and-a-half investigation, and, personally, I spoke to every witness in this case, and I can assure the Court that there was no witness, among over 60, in which they reported to me that they had a conversation with Mr. Cohen that the monies involved in any -- in either a daily transaction or a deposit transaction to the safe deposit box involved drug proceeds. Period. End of story.
>
> So, with that in mind, that, point blank, takes care of the issue, I believe, with regard to the illegal nature of the proceeds.

(Sentencing Tr. at 17:17 - 18: 3) (Tr. at 100).

This statement by the lead federal prosecutor was not lightly made. The plea agreement specifically advised that "[t]he Office of the United States Attorney for the Southern District of Florida reserves the right to inform the court and the probation office of all facts pertinent to the sentencing process, **including all relevant information concerning the offenses committed, whether charged or not**, as well as concerning the defendant and the defendant's background." (Plea Agreement, **&** 8) (emphasis supplied).

In further evaluating the appropriate criminal sentence, Judge Marra had the benefit of several, notable character witnesses whose testimony was preserved for the record in the sentencing transcript. For example, Ralph Joseph Phillips, Jr., a Captain of the City of Delray Police Department testified to his good works with kids in National Little League, especially kids with emotional problems. Wayne Cole, the Staff Assistant for the Deputy Secretary of Corrections in the State of Pennsylvania, likewise testified as sentencing to Steven Cohen's profound family attachments, friendship, and character. Attorney William Weisman testified to the pro bono legal

work performed by Steven Cohen, and his nephew, Larry Cohen, explained how Steven Cohen had been a surrogate father to him even while Steven Cohen was raising his own family.

After hearing such testimony, Judge Marra accepted the proffer of the Assistant U.S. Attorney and accepted the plea agreement and the recommended sentence -- thereby effectively rejecting the contradictory statements in the PSI to the effect that Steven Cohen knew the source of the funds either directly or through his personal use of drugs provided by the drug dealer, Mr. Taylor. Judge Marra stated: "I will adopt the findings of the pre-sentence investigation report except as to any findings relating to the Defendant's knowledge of the illegal nature of the proceeds. And I'll strike any references to his recreational drug use as well." (Tr. 24). Thus, as a fundamental part of the sentencing hearing, Judge Marra accepted the factual determinations of the plea agreement. Accordingly, despite being a first-time offender, Steven Cohen was sentenced under the applicable guidelines to four months of incarceration followed by four months of home detention and two years of supervised release. He was also fined $20,000.

The Disciplinary Hearing

When Steven Cohen had served his time in prison, he went before the referee to receive appropriate discipline from The Florida Bar, expecting to participate in a hearing about aggravation and mitigation since the facts underlying the felony conviction were already admitted and adjudicated. This expectation was set by the Order of Referee as follows: "The need for evidentiary hearings on the issue of guilt is obviated by the Respondent's admission that he has pled guilty to, and been convicted of, a felony, and this constitutions violations of Rules 4-8-4(a), (b) & (d) of the Rules Regulating the Florida Bar." (01/30/04 Order of Referee, at 1). The timing was difficult because Steven Cohen had been incarcerated and was not able to participate freely in the preparation for the hearing before the referee. (Mot. to Continue). Even more pointedly, when the hearing was to begin, his eighty-five year-old mother was extremely ill with cancer and hospitalized. (Id.) Despite an unopposed motion to continue, however, the referee commenced the hearing. (Tr. 11).

Prior to the start of the hearing, the only information that the referee had before him was from a partial sentencing transcript and the Complaint of The Florida Bar with the Judgment and Sentence of the federal district court attached. (Tr. 11). Although the referee had ordered both The Florida Bar and Steven Cohen to produce a copy of the federal Presentence Investigation Report ("PSI"), the record does not reflect that any federal district judge had entered the order necessary to allow either

the federal government or Steven Cohen to disclose the PSI pursuant to the restrictions of Federal Rule of Criminal Procedure 32(b).[2]

According to the referee, the point of the hearing was to produce findings of fact about "what he [Steven Cohen] knew and when did he know it and what did he do..." (Tr. 13). Before opening statements, however, the referee stated that he had already concluded, "It's obvious that he [Steven Cohen] was more than just somebody who was serving as an escrow agent here. And the obvious knowledge is there." (Tr. 12.) The referee elaborated: "The simple fact is that I'm inferring a great deal of knowledge and involvement on his [Steven Cohen's] part in any event." (Tr. 15).

Moments later, the referee ordered[3] an agent of the U.S. Drug Enforcement Agency, Jon DeLena, to give testimony because "it will simply fill in some blanks, but not really change the court's impression. It's not as though I think he was simply somebody innocently on the periphery here. It's obvious he was involved and knew what was going on." (Tr. 15). The referee professed, "[m]y interest is in knowing essentially what Mr. Cohen knew and did." (Tr. 19). In the referee's view: "What I'm looking at is the issue of the degree of his involvement. **I'm not certainly finding**

[2] Because it is cited in the Report of the Referee and the Amended Report of the Referee, the Plea Agreement itself was apparently made part of the record sometime later.

[3] This order was later memorialized as the "Privacy Act Order" entered June 1, 2004.

that what he pled to alone is sufficient for disbarment. It isn't." (Tr. 44) (Emphasis supplied).

Although Judge Marra had clearly and necessarily determined the very issue of Steven Cohen's knowledge of the source of the funds as part of the judgment and sentence, The Florida Bar encouraged this preconceived inquiry, going behind the adjudicated facts of the conviction in federal court. As the Bar Counsel defined this approach: "We have the **unique scenario** in this case of going a **step further** and introducing into evidence to the court what Mr. Cohen's knowledge [sic] of where the proceeds in question came from." (Tr. 25) (Emphasis supplied).

In the very next breath, however, the Bar Counsel confirmed that while it was seeking to prove knowledge by Steven Cohen, it was simultaneously relying upon the conviction adjudicated in federal court as the basis for appropriate discipline:

> [I]t is the bar's position, regardless of that, he's been convicted of a felony. Whether or not he knew the proceeds in question were illegally obtained or they were drug money or he was hiding money for a client... the fact remains, he committed a crime. And having committed **that crime**, he should be sanctioned appropriately.

(Tr. 25) (Emphasis supplied). That crime, the one-count conspiracy to structure funds, was the same crime that the referee had indicated, standing alone, would not justify disbarment. (Tr. 44).

With the stage set in this fashion, The Florida Bar proceeded to elicit the comments of the lone DEA agent, Jon DeLena, as the sole evidence for contradicting

the findings inherent in the federal conviction, as proffered in the plea agreement and by the Assistant U.S. Attorney, Mr. Powell. The agent contradicted the already proven amount of $640,000 in proceeds, reciting the hearsay that "[a]ccording to Taylor it was at one time over a million dollars." (Tr. 63) The agent also recited the mere belief, expressed by the arch co-conspirator and marijuana kingpin, Mr. Taylor, that Steven Cohen had knowledge: "he, in fact, stated to me -- Taylor did -- that Cohen knew that it was money that he had derived from drug proceeds." (Tr. 63). Notably, at no time in the record did the agent state that Mr. Taylor actually told Steven Cohen the source of the funds. In hearsay fashion, the agent was just relaying a belief of Mr. Taylor.

The agent again purported to quote the out-of-court statements of Mr. Taylor, suggesting that Steven Cohen even used Mr. Taylor's marijuana personally, "as Mr. Taylor told me, he provided a lot of marijuana to Mr. Cohen, for his own personal use." (Tr. 64-65). The agent had no corroboration aside from this report from the drug dealer himself while the dealer was in federal custody.

In response, Steven Cohen took the stand. Without guilt being a disputed issue, there were no witnesses listed by Steven Cohen to give testimony that would go behind the facts of the conviction, as The Florida Bar had done. Rather, Steven Cohen confirmed the essential details of the federal conviction. He met Mr. Taylor when he moved here to go to law school. (Tr. 152). He admitted that Mr. Taylor first entrusted

money to him as long ago as 1993 or 1994. (Tr. 151). Mr. Taylor presented it to him as "fireworks money" in July or August of that year. (Tr. 152). He confirmed that he had asked Mr. Taylor the source of the money, and that Mr. Taylor indicated it was "the fireworks." (Tr. 177). Steven Cohen took Mr. Taylor at his word. (Id.). The rationale for holding the money was to keep a girlfriend of Mr. Taylor unaware. (Tr. 181).

Steven Cohen did not deny that these events unfolded over a period of ten years. (Tr. 154). He also stated that Mr. Taylor removed some of the money "rarely" maybe "once every other year." (Tr. 154). He also admitted to moving the funds from a safe deposit box to a home safe to reduce monthly fees and because it was "too big for the safe deposit box I had." (Tr. 182, 200). Steven Cohen also made the statement that he did not know the status of the prosecutions other people holding money on Mr. Taylor's behalf. (Tr. 198).

Steven Cohen also admitted to the referee that he was never asked to structure the funds by actually depositing them, but that he would have done it if asked because "we did discuss it. And that's the conspiracy." (Tr. 198). Equally tellingly, there was no testimony -- not even hearsay from the DEA agent -- that Steven Cohen had ever used or received any of the money for his own use or received any other benefit. (See Tr. 155, 162, 171, 175).

Other testimony confirmed that of Steven Cohen. The agent confirmed that Mr. Taylor had a legitimate fireworks and ATM businesses, as well as real estate ventures. (Tr. 94-95). Other witnesses called by Steven Cohen at trial confirmed the same, legitimate businesses. (Tr. 127-28, 137). None of the other witnesses called by Steven Cohen knew that Mr. Taylor was not a drug dealer before his arrest, nor did any know or observe personal use of marijuana by Steven Cohen. Quite the contrary, Steven Cohen, age 49 at the time, testified that he was a virtual health nut because both his brother and his grandfather had died in their early fifties. (Tr. 165, 167).

He further explained that when a DEA agent contacted him, he had also just learned of Mr. Taylor's arrest and detention. (Tr. 193). Steven Cohen hired a lawyer on his own behalf, and followed the instructions of his attorney in negotiating the handover of the funds in a manner that avoided concerns of an admission. (Tr. 187, 193). At no point does the record suggest that Steven Cohen ever denied that he held the funds in question; rather, he communicated constantly with the benefit of legal representation. (Tr. 187, 193).

Following this testimony, the Bar Counsel closed by focusing heavily on the "knowledge issue." She argued to the referee "Mr. Cohen knew that he was holding drug proceeds for his friend, a known marijuana dealer" and that "Mr. Cohen must have known or I'm sorry to say he was incredibly stupid if he did not know." (Tr. 205). She further argued, despite the categorical denial by the Assistant U.S. Attorney

in federal court about the absence of testimony from about 60 witnesses, that "no one in this scheme could have believed this was legal money." (Tr. 207). Counsel for Steven Cohen then closed, and was required to answer continuing comments of the referee such as "I can't overlook the fact that [he] was in possession... of $640,000 of drug money.... And for a year and a half, he kept onto it. And I understand that on advice of counsel it was a bargaining chip." (Tr. 231).

The Referee's Report & Amended Report

The Referee issued a Report of Referee expressly relying upon R. Regulating Fla. Bar 37.2(b) as "conclusive proof of guilt of that criminal offense". (Report, at 3 & 11). At the same time, the Report also relied upon the statements of the DEA agent to find all four of the same violations that were alleged by The Florida Bar in the Complaint:

R. Regulating Fla. Bar 3-4.3 (unlawful act)

R. Regulating Fla. Bar 4-8.4(a) (violation of rules of conduct)

R. Regulating Fla. Bar 4-8.4(b) (commission of criminal act adversely affecting the lawyer's honesty, trustworthiness, or fitness)

R. Regulating Fla. Bar 4-8.4(d) (conduct prejudicial to administration of justice)

(Report, at 11).

The referee later issued an Amended Report, specifically adding a violation of R. Regulating Fla. Bar 4-8.1(a) (making a false statement of material fact in a disciplinary matter) not previously charged by The Florida Bar. (Am. Report, at 11). Despite having stated the crime to which Steven Cohen pleaded guilty would not "alone" justify disbarment, see Tr. at 44, the referee proceeded to recommend in both the original Report and the Amended Report a 5-year disbarment, citing the statements of the only witness for The Florida Bar, the DEA agent, in order to go behind the conviction.

In so doing, the Amended Report found that four points justified the following six aggravating factors:

9.22(b) dishonest or selfish motive

9.22(c) pattern of misconduct

9.22(d) multiple offenses

9.22(f) submission of false evidence

9.22(i) substantial experience in the practice of law

9.22(j) indifference to making restitution.

(Am. Report, at 12-13).

As the first of the four points, the Amended Report specifically mischaracterized the federal crime as one of "concealment" of funds. (Am. Report, at 4) ("Personally received and concealed"); (Am. Report, at 13) ("helping to conceal

drug money"). This characterization is contrary to the actual crime of structuring funds, which is actually the revelation of funds by depositing them in a structured way.

As a second point, the referee concluded that Steven Cohen was untruthful because he knew the funds were the "fruit of drug dealing." (Am. Report, at 14). This conclusion is an outright rejection of the absence of knowledge by Steven Cohen that had been adjudicated by Judge Marra during sentencing in federal court. Although noting that Judge Marra had adopted the findings of the presentence investigation report "except as to any finding relating to the Defendant's knowledge of the illegal nature of the proceeds," the referee instead found knowledge. (Am. Report, at 10, 14). This contrary finding was based upon a presentence investigation report that was never in evidence before the referee and also based upon the hearsay of DeLena, and of the drug dealer, Taylor, who said "Respondent knew." (Am. Report, at 14). Nowhere in the record is there evidence that Taylor never indicated to DeLena that he had ever "told" Respondent Steven Cohen. To the contrary, the Assistant U.S. Attorney proffered to the federal court that no witness had ever admitted to telling Steven Cohen of the sources of the funds. (Sentencing Tr. at 17:17 - 18: 3) (Tr. at 100).

Likewise, the Amended Report referred to "millions" of dollars laundered from "flower shops" and continues to repeat "a million dollars". (Am. Report, at 5, 6, 10,

and 15). This conclusion is also in direct contradiction to the facts of the federal conviction, which was based upon a stipulated amount in federal court of more than $500,000 but less than $800,000. (Plea Agreement, **&**4a). The referee relied on both of the foregoing conclusions, contrary to the federal court, to justify his third point of "refusal to acknowledge the wrongful nature of his conduct." (Am. Report, at 17).

Fourth, the Amended Report referred to an "unwillingness" to turn over funds. However, the only witness of The Florida Bar, DEA Agent Jon DeLena, did not testify to the "unwillingness" of Steven Cohen. The only evidence in record is to the contrary: the total willingness of Steven Cohen, subject only to the advice of counsel due to the legal consequence of admissions. (Am. Report, at 8, 17-18). The referee dismissed this advice of legal counsel as something that a "truly remorseful defendant" should ignore. (Am. Rep. at 18).

Throughout these points, the referee also claimed that the sentencing Judge had a "great distaste for, and hesitation to go along with, the plea bargain" and that the sentencing Judge "very reluctantly went along with the very favorable plea bargain." (Am. Report, at 8, 9). In contrast, the evidence of record is, according to the Judge Marra himself, that he has a policy of accepting plea agreements but scrutinized them for "some reason brought out in the facts or in the evidence to cause me to be concerned...." (Sentencing Tr. at 51). Then Judge Marra expressly stated: **"In this**

case, I don't find any reason to deviate from that policy." (Id.) (Emphasis supplied).

Lastly, the Amended Report found that the mitigating factors applied of (1) no prior disciplinary record under 9.32(a); and (2) very good character in evidence under 9.32(g). But without any contradictory evidence, the referee rejected as evidence of the mitigating factor of other penalties and sanctions under 9.32(k), the prison sentence, the home incarceration, the supervised release, the $20,000 fine, and the repeated statements over time of Steven Cohen about destructive and lasting effects upon his life and his family. Instead, the refereed deemed them all inadequate to serve as a "constant and lasting reason for remorse and regret" (Am. Report, at 18-19). All this for a man whose life of half a century was previously un-blemished and who uttered profound regret even before the federal sentencing: "I stand here today completely and utterly destroyed, and I'm very sorry, Your Honor." (Sentencing Tr. at 50). No evidence exists in the record that Steven Cohen's remorse has been anything but profound and lasting, as he again stated before the referee:

> Q: Do you have remorse for what's occurred here?
> A: Obviously, I feel terrible.
> Q: Why?
> A: Why? Because I've spent a whole lifetime building up the position, both economically, emotionally....
>
> And I let everyone down, my family, again, the kids I coach, the guys I know in town, the charities I worked for, the other lawyers. It was a completely destructive incident.

(Tr. 169-170).

On this record, the Amended Report recommended disbarment for five years and the assessment of the costs of The Florida Bar. This appeal ensues only as to the recommendation of disbarment and the findings of the referee upon which that recommendation was predicated.

ISSUE ON APPEAL

Can The Florida Bar properly go behind a federal conviction upon which it relies for a presumption of guilt by using hearsay statements on the beliefs of a co-conspirator to establish a different and contrary crime for the purpose of seeking disbarment that the referee stated was not justified on the basis of the conviction alone?

STANDARD OF REVIEW

Whether The Florida Bar could "go behind" the facts of the federal conviction it relied upon to establish guilt for purposes of imposing professional discipline is a question of law that Respondent submits this Court should review *de novo*, akin to a matter resolved by summary judgment, see The Florida Bar v. Cosnow, 797 So.2d 1255, 1258 (Fla. 2001), because "[a]n administrative determination of questions of law is not binding upon a reviewing court, see The Florida Bar v. Rose, 187 So. 2d 329, 331 (Fla. 1966). The sufficiency of the record before the referee for contradicting the findings of the federal sentencing judge and the proffer of the federal prosecutor is reviewed for competent and substantial evidence. See The Florida Bar v. Rotstein, 835 So. 2d 241, 245 (Fla. 2004).

Review of discipline to be imposed is broader in scope because the determination of appropriate discipline is the "ultimate responsibility" of this Court, as well as a necessary one if the disciplinary recommendation is "clearly off the mark." The Florida Bar v. Vining, 707 So. 2d 670, 673 (Fla. 1998).

SUMMARY OF ARGUMENT

After Steven Cohen faced his dishonor, pleaded guilty in federal court to a one-count information of conspiracy to structure funds, and served his time in federal prison, The Florida Bar was not correct in presenting -- nor was the Referee correct in accepting -- statements that went behind the federal conviction upon which The Florida Bar relied to establish guilt for disciplinary purposes. The principle is well established that one cannot go behind the fact of a conviction for any purpose when that conviction is the basis of a disciplinary proceeding. Any contrary rule would create incongruities that would diminish the courts, the conduct of all counsel, and the role of plea agreements in our system of justice. Equally important, any contrary rule would deter attorneys who would otherwise be willing to admit their guilt from doing so for fear that discipline could later to be imposed upon any conceivable re-writing of the facts underlying the plea, even if the result were incongruous.

Such an incongruous result occurred here. Although Respondent, Steve Cohen, fully admitted his guilt, and was sentenced and imprisoned for participating in an un-consummated conspiracy to structure funds, and although he continues to this very day to accept fully the consequences of the first-ever stain upon his personal and professional reputation, The Florida Bar and the referee recommended discipline predicated upon a totally different crime. In fact, the referee stated that if discipline

were imposed based upon the facts of the conviction alone, then the recommended disbarment would not be warranted.

That the referee recommended disbarment anyway shows the great prejudice from going behind a conviction here and the incongruities that resulted. Where the federal sentencing judge, the Honorable Kenneth A. Marra, had expressly rejected any finding that Steven Cohen knew that the funds to be structured were drug proceeds, the referee found to the contrary. Where Judge Marra struck any finding at sentencing of personal use of drugs by Steven Cohen, the referee concluded to the contrary. Where, after interviewing sixty witnesses over a year-and-a-half, the federal prosecutor proffered that he could only charge a single conspiracy to structure funds, the referee found Steven Cohen guilty of a plan to conceal funds, which was neither charged in federal court nor an element of structuring. In fact, structuring funds is the very opposite of concealment because it is designed to reveal funds by depositing them in a way that simply avoids special reporting.

From these contrary findings, the referee found not only that Steven Cohen had committed a wrong that was contrary to the facts of the federal conviction, but then the referee submitted an Amended Report finding that Steven Cohen had necessarily made false statements in the disciplinary process -- precisely because Steven Cohen had testified exactly consistent with what he had admitted, and been convicted of, in federal court. The referee's conclusion was based upon the hearsay statements of a

lone DEA agent to impeach the federal conviction and the proffer of the Assistant U.S. Attorney. It was also based upon reference to a Presentence Investigation Report that was never in evidence, and properly so because it could not have been disclosed without the order of a federal judge.

Consequently, the referee's recommendation of a five-year disbarment is based upon an insufficient record that resulted in findings that are totally incongruous with the facts of the conviction upon which The Florida Bar relied. Steven Cohen submits that he should be disciplined in accord with the facts of the conviction upon which The Florida Bar relied to establish guilt.

Based upon these principles and circumstances, Respondent, Steven Cohen, asks that his petition for review of the recommended discipline be granted to the extent that he be disciplined only in conformity with the facts of the admitted crime and that his voluntary admission of guilt, his acceptance of other sanctions, and his clear remorse and acceptance of responsibility be granted due weight. Accordingly Respondent suggests that the appropriate discipline under the facts and circumstances of this case be a suspension from the practice of law, subject to the requirements of reinstatement set forth in rules 3-7.2(h)(1) & 3-7.10, *inter alia*, of the Rules Regulating the Florida Bar.

ARGUMENT

ISSUE

Can The Florida Bar properly go behind a federal conviction upon which it relies for a presumption of guilt by using hearsay statements on the beliefs of a co-conspirator to establish a different and contrary crime for the purpose of seeking disbarment that the referee stated was not justified on the basis of the conviction alone?

Humbly, and with great remorse, Respondent, Steven Cohen, submits willingly to the discipline of this Court. When he pleaded guilty in federal court to the one-count information filed against him for conspiracy to structure funds, he knew equally well that he was agreeing to appropriate discipline from The Florida Bar. Steven Cohen has been, and remains, fully prepared to accept that discipline. What he asks now of this Court is that such discipline be meted out in accord with the conviction upon which The Florida Bar relied in establishing guilt, not a set of factual findings that go behind the conviction and re-write both the crime and the conduct adjudicated by the federal sentencing judge. Unfortunately, because The Florida Bar and the referee went behind that conviction, contrary to the settled law and without even a sound evidentiary basis that might warrant an exception to that settled law, it is necessary for this Court to intervene. Steven Cohen asks this Court to reaffirm here, and for future disciplinary cases, the principle that neither party to a disciplinary proceeding can go behind a conviction that is the predicate for discipline. He further

asks this Court to impose a suspension consonant with the settled facts of the federal conviction.

A. The referee's findings violated the prohibition against "going behind a conviction" when that conviction is relied upon as the basis for professional discipline.

It has been stated time and again by this Court that a referee "is not empowered to 'go behind the convictions.'" The Florida Bar v. Vernell, 374 So. 2d 473, 475 (Fla. 1979). See The Florida Bar v. Kandekore, 766 So. 2d 1004, 1007 (Fla. 2000). This Court has phrased this rule even-handedly, applying to both The Florida Bar and the offending lawyer: "It was not appropriate nor proper to receive evidence bearing on guilt or innocence of Respondent of the original criminal charge." The Florida Bar v. Horne, 527 So. 2d 816, 817 (Fla. 1988). From Horne, in particular, the import of this rule is that "the allegations included in the charges attached to the Complaint are proven facts." Id.

Underlying this principle is the command of the Rules Regulating the Florida Bar that a felony conviction introduced into a disciplinary proceeding is "conclusive proof of the criminal offense(s) charged for purposes of these rules." R. Regulating Fla. Bar 3-7.2(b). Applying this rule and the related prohibition against "going behind a conviction" in Kandekore, this Court held that it was impermissible to challenge the validity of another state's felony conviction in a disciplinary proceeding. Kandekore,

766 So. 2d at 1007. Likewise in Horne, this Court essentially held that discipline flowing from the conclusively established facts of a conviction should be affirmed without consideration of any evidence besides that in aggravation or mitigation, which is separate and apart from the facts of the conviction. See Horne, 527 So. 2d 816.

The disciplinary proceeding under review here at first appeared to progress in accordance with these well established principles. Initially, the Order of Referee provided as follows: "The need for evidentiary hearings on the issue of guilt is obviated by the Respondent's admission that he has pled guilty to, and been convicted of, a felony, and this constitutions violations of Rules 4-8-4(a), (b) & (d) of the Rules Regulating the Florida Bar." (01/30/04 Order of Referee, at 1). That order reflected the foregoing law, which is why it was neither incumbent upon Respondent to list numerous fact witnesses concerning the conviction, nor appropriate for The Florida Bar to call an agent of the DEA to re-characterize those adjudicated facts.

However, at the start of the hearing itself, the referee indicated that he already had additional findings in mind concerning the knowledge of Steven Cohen about the source of the funds, despite Judge Marra having adjudicated the same issue. Before opening statements, the referee had concluded, "it's obvious that he [Steven Cohen] was more than just somebody who was serving as an escrow agent here. And the obvious knowledge is there." (Tr. 12.) The referee elaborated: "The simple fact is

that **I'm inferring a great deal of knowledge and involvement** on his [Steven Cohen's] part in any event." (Tr. 15) (Emphasis supplied).

From this point, the counsel for The Florida Bar encouraged this preconceived notion and sought to go behind the adjudicated facts of the conviction in federal court. As the Bar Counsel defined this approach: "We have the **unique scenario** in this case of going a **step further** and introducing into evidence to the court what Mr. Cohen's knowledge [sic] of where the proceeds in question came from." (Tr. 25) (Emphasis supplied).

In the very next breath, however, the Bar Counsel confirmed that while it was seeking to prove knowledge by Steven Cohen, it was simultaneously relying upon the conviction adjudicated in federal court as the basis for appropriate discipline:

> [I]t is the bar's position, regardless of that, he's been convicted of a felony. Whether or not he knew the proceeds in question were illegally obtained or they were drug money or he was hiding money for a client... the fact remains, he committed a crime. And having committed **that crime**, he should be sanctioned appropriately.

(Tr. 25) (Emphasis supplied). That crime, the one-count conspiracy to structure funds, was the same crime that the referee had indicated, standing alone, would not justify disbarment. (Tr. 44).

In going behind the facts of the conviction, the referee relied upon numerous factual predicates that went beyond, and were in fact contrary to, the facts of the conviction. For example, the referee characterized the conspiracy reflected in the Plea

Agreement as one in which "the Respondent had personally received and concealed" currency. (Am. Report, at 4). Reference to "concealment," however, is not to be found in either the Plea Agreement or the Information; nor is it an element of the offense of structuring. Structuring actually contemplates taking money out of concealment and putting it into the stream of commerce by depositing with a federally insured institution in a way calculated to avoid additional federal reporting requirements.[4]

Likewise, the Amended Report accepts the hearsay of the DEA agent, Jon DeLena, of Mr. Taylor's statement of mere belief "that Respondent was very much aware that this was drug money." (Am. Report, at 5). However, nowhere in the record is Mr. Taylor is reported to have actually told Steven Cohen that it was drug money. To the contrary, the Assistant U.S. Attorney proffered to the federal district judge, "that there was no witness, among over 60, in which they reported to me that they had a conversation with Mr. Cohen that the monies involved in any -- in either a daily

[4] To establish a federal conspiracy conviction, there must be (1) an agreement existed among two or more persons; (2) that the defendant knew of the general purpose of the agreement; and (3) that the defendant knowingly and voluntarily participated in the agreement. U.S. v. High, 117 F.3d 464, 468 (11th Cir. 1997). Structuring is a violation of 31 U.S.C. sec. 5324(a)(3), and is established by the following elements: (1) the intent (2) to evade the reporting requirements of 31 U.S.C. sec. 5313(a). See U.S. v. Ward, 808 F. Supp. 803, 812 (S.D. Ga. 1992).

transaction or a deposit transaction to the safe deposit box involved drug proceeds. Period. End of story." (Tr. at 100; Sentencing Tr. at 17-18).

The Amended Report also states that the drug dealer, Mr. Taylor, operated "flower shops," through which Mr. Taylor laundered "millions of dollars of cash." (Am. Report, at 4-5). Contrary to the amount of funds established in federal court -- which was more than $500,000 but less that $800,000 -- the referee alludes to "the transfer of as much as a million dollars in cash." (Am. Report at 6). This million-dollar reference is repeated. (Am. Report, at 10, 15). But there is no evidence in the record of any flower shops, nor is there of laundering millions.

Also in contradictory fashion, the Amended Report, on the one hand, states that "the crime to which the Respondent pled was one which the Government probably could not have proven" and then immediately characterizes the federal sentence as one "greatly reduced from what the apparently provable facts could have yielded, especially if Respondent had been charged with all the criminal acts...." (Cf. Am. Report, at 6 with Am. Report, at 7). All of which surmise about "provability" is also directly contrary to the proffer of the Asst. U.S. Attorney to the federal district judge during sentencing, which was the only probative evidence in the entire record on this point. (Sentencing Tr. at 17:17 - 18: 3) (Tr. at 100).

The Amended Report also concludes that Steven Cohen's "unwillingness to turn it [the funds] over in the first instance obviously was a very effective bargaining chip,

which helped him greatly in the criminal proceeding, but it should not be favorably viewed by this Court in this disciplinary proceeding." (Am. Report, at 8). However, there is no evidence at all in the record that Steven Cohen was unwilling to turn over the funds in the first instance. Rather, the uncontradicted evidence is that Steven Cohen obeyed advice of counsel concerning the admission inherent in such production. (Tr. 187). It demeans lawyers everywhere for the referee or The Florida Bar to suggest that the retaining of counsel and the heeding of legal advice in the face of a broad investigation into drug trafficking is somehow improper or against the interests of justice.

The Amended Report continues to state that the sentencing Judge indicated his "great distaste for, and hesitation to go along with, the plea bargain." (Am. Report at 8). It further suggests that "the federal Judge at sentencing very reluctantly went along with the very favorable plea bargain, in no small part because he had great difficulty in acceding to the government's recommendation that he ignore statements in the presentence investigation report which flatly stated that Respondent knew that the money he was concealing for Taylor was drug money." (Am. Report, at 9). However, the federal Judge stated just the opposite, expressing no concern or reluctance, according to the record of the sentencing:

> It's been my approach to sentencing to essentially honor and respect the agreement of the parties when they come to a plea agreement. It is my view in most cases -- and there are reasons and times when a deviation from this policy is warranted, but it is my view in most cases that the

> Government understands its case,.... I shouldn't interfere with that negotiation **unless there is some reason brought out in the facts or in the evidence to cause me to be concerned** about the agreement that's been reached and deviate from the parties' agreement. **In this case, I don't find any reason to deviate from that policy.**

(Sentencing Tr. at 51) (Emphasis supplied).

Consequently, the referee's findings resulted in a series of incongruities because of the contrasted with the adjudication of the same facts by Judge Marra in federal court. It should be kempt in mind that Judge Marra's conclusions were in turn predicated upon the plea agreement, and most importantly, the proffer of the Assistant U.S. Attorney who had investigated Steven Cohen and others, including interviewing 60 witnesses, over a year-and-a-half. Since the burden of proof at federal sentencing hearings is a preponderance of the evidence,[5] if Judge Marra could not find reason to doubt the facts presented to him, it is the height of incongruity that a referee who faces the much higher burden of proof of clear and convincing evidence[6] could re-examine only a portion of the same in formation to find the contrary.

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[5] "The government bears the burden of proving the applicability of guidelines that enhance a defendant's offense level. Similarly, when a defendant challenges a factual basis of his sentence, the government has the burden of establishing the disputed fact by a preponderance of the evidence. U.S. v. Polar, 369 F.3d 1248, 1255 (11th Cir. 2004).

[6] The Florida Bar v. Varner, 780 So. 2d 1, 4 n.3 (Fla. 2001).

Not only do such findings by the referee violate the longstanding prohibition against "going behind the conviction" in a disciplinary proceeding, but also they diminish the dignity of the federal courts, the federal prosecutor, and the role of plea agreements in the system of justice. This Court should not embrace such a departure from the established principles that guide the use of convictions as evidence of guilt in disciplinary proceedings. In rejecting such a departure, this Court should also reject the discipline recommended based upon such a questionable foundation.

B. In going behind the conviction, the referee's findings were predicated on hearsay of the supposition of a co-conspirator that was not competent or sufficiently probative to impeach the findings of a federal judge, the proffer of the federal prosecutor, and a federal plea agreement.

Even if there are some circumstances which warrant an exception to the prohibition against "going behind" the adjudicated facts of a conviction, they are not present here. Although the referee makes surmise about the weight of certain evidence in the federal Presentencing Investigation Report ("PSI"), it was not in evidence. Nor could it have been without an order from a federal judge to authorize such disclosure pursuant to rule 32(b) of the Federal Rules of Criminal Procedure, but no such order is in the record. That leaves only (a) the testimony of the DEA agent, Jon DeLena, who was called by The Florida Bar largely to give hearsay evidence on guilt, and (b) such documents as the federal sentencing transcript and the plea

agreement that are equally available to this Court for interpretation and review as they were to the referee.

The most significant issue for the referee and The Florida Bar was Steven Cohen's knowledge of the source of the funds. Judge Marra had considered this very issue during the federal sentencing and concluded: "I will adopt the findings of the pre-sentence investigation report except as to any findings relating to the Defendant's knowledge of the illegal nature of the proceeds. And I'll strike any references to his recreational drug use as well." (Tr. 24). However, the referee began the proceedings before him with his mind already made up to the contrary. He stated, "It's obvious that he [Steven Cohen] was more than just somebody who was serving as an escrow agent here. And the obvious knowledge is there." (Tr. 12.) The referee elaborated: "The simple fact is that I'm inferring a great deal of knowledge and involvement on his [Steven Cohen's] part in any event." (Tr. 15).

Moments later, the referee ordered[7] an agent of the U.S. Drug Enforcement Agency, Jon DeLena, to give testimony because "it will simply fill in some blanks, but not really change the court's impression. It's not as though I think he was simply somebody innocently on the periphery here. It's obvious he was involved and knew what was going on." (Tr. 15). The testimony from this DEA agent is the sum total

[7] This order was later memorialized as the "Privacy Act Order" entered June 1, 2004.

of the grounds that the referee had to impugn the findings of Judge Marra, as well as the plea agreement and the proffer of the Assistant U.S. Attorney that Judge Marra reviewed without concern. (Sentencing Tr., at 51).

On the predominant issue of Steven Cohen's knowledge, the DEA Agent offered only Mr. Taylor's hearsay statement of mere belief "that Respondent was very much aware that this was drug money." (Am. Report, at 5). Nowhere in the record is Mr. Taylor is reported to have actually told Steven Cohen that it was drug money. To the contrary, the Assistant U.S. Attorney proffered to the federal district judge, "that there was no witness, among over 60, in which they reported to me that they had a conversation with Mr. Cohen that the monies involved in any -- in either a daily transaction or a deposit transaction to the safe deposit box involved drug proceeds. Period. End of story." (Tr. at 100; Sentencing Tr. at 17-18). Steven Cohen also adamantly denied being told.

Despite the relaxed evidentiary standards of disciplinary proceedings, no case located by the undersigned holds that another's mere belief is competent to prove anything. The Courts have routinely rejected mere supposition or belief about what someone knew --let alone a hearsay statement to that effect -- because it is incompetent to prove anything. "The purpose of the personal knowledge requirement is ... to ensure that there is an admissible evidentiary basis for the case rather than mere supposition or belief." Pawlik v. Barnett Bank of Columbia County, 528 So.2d

965, 966 (Fla. 1st DCA 1988). The thin evidentiary chain here should be of particular concern to this Court where the only source of such suppositions is himself a co-conspirator with every incentive to appease the federal prosecutors for his own benefit. See, e.g., Bourjaily v. United States, 483 U.S. 171, 181 (1987) (In determining the admissibility of coconspirator statements to guard against the bias of a co-conspirator's self- interest in exoneration or mitigation, the court should consider both the coconspirator's hearsay statement and independent outside evidence).While Respondent, Steven Cohen, is not asking this Court to unduly formalize the nature of the evidence that may be considered by a referee, it is only fair and reasonable -- not to mention well-supported in the legal precedent -- that the hearsay suppositions of a person not be accepted as competent proof of anything, even in the most relaxed evidentiary context. If Mr. Taylor's statement had any weight, it would have been very simple for him to tell the DEA agent that he, Mr. Taylor, had actually told Steven Cohen about the source of the funds. But he did not. And against the indirect supposition offered by the DEA Agent, the Assistant U.S. Attorney investigating the case proffered to the federal judge that none of sixty witnesses could testify that anyone had told Steven Cohen the source of the funds. (Sentencing Tr. at 17:17 - 18: 3) (Tr. at 100). When such "evidence" is counterpoised -- the DEA agent's hearsay suppositions against the direct proffer of a federal prosecutor investigating a case -- no precedent supports upholding the former, mere supposition, over the latter.

However, such is the foundation for the referee's most incongruous finding: that Steven Cohen had knowledge of the source of the funds, despite Judge Marra convicting him otherwise.

Even if the referee may go behind the federal conviction in limited circumstances, the dubious record here does not support such a result. Therefore, based upon the content of the record itself, as well as based upon the legal prohibition against going behind the adjudicated facts of a conviction, Respondent, Steven Cohen, submits that the referee erred and that the recommendation of disbarment is correspondingly unsupported.

C. Under facts of the federal conviction and Steven Cohen's circumstances, a sanction of suspension is just, not disbarment.

The referee, whose findings are challenged here, stated unequivocally that the facts of the conviction alone do not warrant disbarment. In his words, "I'm not certainly finding that what he pled to alone is sufficient for disbarment. It isn't." (Tr. 44). The only basis for the recommended disbarment was the exercise of "going behind the conviction" that was engaged in by The Florida Bar and embraced by the referee. In the absence of such an un-fettered, and ultimately incongruous, re-examination of the facts of the federal conviction, there would be no factual basis for the recommended discipline. To the contrary, the case law bears out the referee's conclusion that something less than disbarment is the appropriate sanction for the facts underlying the conviction. Thus, to the extent that this Court upholds the even-handed

application of the prohibition against "going behind the conviction" or, alternatively, to the extent that this Court finds the record before the referee insufficient to impeach the adjudicated facts of a federal sentencing, Steven Cohen respectfully submits that the appropriate discipline is a suspension.

The relevant precedent shows that far more egregious conduct than conspiring to deposit funds in a bank at some point in the future in a manner that avoids additional federal reporting warrants a suspension, rather than disbarment. Thus, in Vining, for example, where the respondent had injured a client by failing to diligently collect monies owed and was also found guilty of repeated offenses of "dishonest, fraudulent, and deceitful conduct," including before a judge, this Court found a three-year suspension appropriate. Vining, 707 So. 2d at 672-73. In The Florida Bar v. Kleinfeld, 648 So. 2d 698 (Fla. 1995), this Court reviewed findings of three violations, including prejudice to the client through failure to appear at scheduled proceedings and the "extraordinarily serious" offense of making a false statement to a tribunal. Id. at 699-700. Even without evidence of mitigation, this Court found it appropriate to suspend the respondent.

If this Court is not persuaded that such a suspension of Steven Cohen is sound on its face, the conclusion of this Court that The Florida Bar and the referee over-reached the facts of the federal conviction, or did so without competent evidence to impeach the facts of the federal conviction, also means that most of the aggravating

factors relied upon by the referee were unwarranted. Without the incongruous conclusion that Steven Cohen knew the source of the funds or that Steven Cohen used recreational drugs -- conclusions contrary to those of Judge Marra -- there would be no knowing concealment, see Am. Report at 13. There would also have been no untruth during the disciplinary process, see Am. Report at 14.[8]

Among mitigating factors in Respondent's favor are the absence of any record of disciplinary activity and good behavior subsequent to the incident, see The Florida Bar v. Papy, 358 So. 2d 4 (Fla. 1978), and the absence of any party injured by Respondent's actions, see The Florida Bar v. Whitlock, 426 So. 2d 955 (Fla. 1982). It is equally apparent that the record is devoid of any evidence of a dishonest or selfish motive in committing the offense. See Fla. Stds. Imposing Law. Sancs. 9.32(b). At no time is there evidence that Steven Cohen used any of the money or gained any benefit from assisting Mr. Taylor. However, these latter two factors were not even addressed in the Amended Report of the Referee. The record also shows that the

[8] Although the referee suggests that the statement of Respondent's counsel during the federal sentencing to the effect that others pleaded guilty to holding Mr. Taylor's drug money with specific knowledge should be held against Steven Cohen, see Am. Report at 14-15, a counsel's statement simply does not support a conclusion that Respondent himself knew these details. Moreover, there is no evidence that, upon his recent release from the federal prison at the time, Steven Cohen was cognizant of the details of such cases. Nor is such testimony material in any way to the imposition of discipline for Respondent's admission that, regardless of others, he in fact held money in furtherance of a conspiracy to structure funds.

referee made no findings of other factors in evidence: cooperative attitude, no injury to clients, interim rehabilitation, sympathy of the sentencing judge, and a dedication over time to public service. In The Florida Bar v. Arnold, 767 So. 2d 438 (Fla. 2000), for example, such mitigating factors were found to warrant a 60-day suspension in the face of a felony conviction for affirmatively engaging in monetary transactions in property knowingly derived from specified unlawful activity. Here, Steven Cohen's adjudicated conduct is far less.

It is axiomatic that disbarment is the most severe sanction. R. Regulating Fla. Bar 3-5.1(f); The Florida Bar v. Clement, 662 So. 2d 690, 699 (Fla. 1995). "Lawyers are disbarred only in cases where they commit extreme violations involving moral turpitude, corruption, defalcations, theft, larceny or other serious or reprehensible offenses. Disbarment is an extreme penalty and should only be imposed in those rare cases where rehabilitation is highly improbable." The Florida Bar v. Davis, 361 So.2d 159, 162 (Fla. 1978) (citing In re LaMotte, 341 So. 2d 513 (Fla. 1977)). Disbarment "occupies the same rung of the ladder in these proceedings as the death penalty in criminal proceedings." The Florida Bar v. Summers, 728 So.2d 739, 742 (Fla.1999) (quoting The Florida Bar v. Hirsch, 342 So.2d 970, 971 (Fla.1977)).

What constitutes an appropriate sanction is one that serves the three purposes recognized by this Court of (a) fairness to society; (b) fairness to the attorney; and (c) deterrence of similar misconduct. See Clement, 662 So. 2d at 699. Applying this

balancing test here, a suspension amply fulfills all purposes. It is fair to society that a lawyer be convicted who has been fully investigated by the U.S. Attorney's office and found blameless of any conduct more egregious than a single, un-fulfilled conspiracy to which he voluntarily pleaded guilty. He has already paid his debt to society after accepting incarceration, a home detention, supervised release, a substantial fine, and suspension from his chosen profession of over twenty years. Second, it is fair to the attorney that he be held responsible for the conduct which he has voluntarily admitted and been convicted. But it is not fair to discipline him for contrary findings predicated on the re-examination of that conviction at a disciplinary proceeding that supposedly was not going to address issues of guilt.

Third, given such a myriad of sanctions and the stigma and burdens attached to each, deterrence of similar conduct by others is assured. No one could be enticed by such consequences. Equally importantly, the precedential value of this case would be sending a signal that attorneys who accept responsibility for their crimes, especially felonies, will be fairly dealt with in a manner consonant to the facts they have accepted and owned-up to, not in some incongruous and unexpected manner reminiscent of a star chamber. No more salutary policy could be furthered.

For all of these reasons, Respondent, Steven Cohen, urges that the proper course of action for this Court is to exercise its ultimate responsibility for attorney discipline by imposing a suspension. That result is most consistent with the legal precedent, the

conclusive nature of a felony conviction, and the fairest balance under the established principles of attorney discipline. Steven Cohen submits himself to this Court's judgment of appropriate discipline accordingly.

CONCLUSION

Based upon the foregoing reasons and legal authority, Respondent, Steven Edward Cohen, asks that his petition for review of the recommended discipline be granted to the extent that he is disciplined only in conformity with the facts of his conviction. Simply put, if guilt is not an issue because The Florida Bar has chosen to rely upon a conviction, then neither The Florida Bar nor a respondent, should be allowed to embellish or impeach the material facts that necessarily underlie that conviction. Such a result comports with existing prohibition against "going behind a conviction" in the course of the disciplinary process, and it preserves a measure of balance between protecting the public adequately and yet treating members of the profession fairly -- principles of concern both for this case and for future cases. Such a result also avoids the incongruities that inhere in pitting the factual findings of a federal court against the contrary findings of a referee -- made all the more incongruous here by the higher standard of proof that obtains in a disciplinary proceeding compared to a federal sentencing proceeding.

Accordingly Respondent suggests that the appropriate discipline under the facts and circumstances of this case be a suspension from the practice of law, subject to the requirements of reinstatement set forth in rules 3-7.2(h)(1) & 3-7.10, *inter alia,* of the Rules Regulating the Florida Bar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing was mailed this 20th day of August, 2004, to:

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CERTIFICATION OF TYPESIZE

Undersigned counsel certifies that this brief employs proportionately spaced Times New Roman type in fourteen (14) points which typesize meets or exceeds the legibility standards set by Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

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