IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

RICHARD PHILLIP GREENE,

Respondent.
_____/

Supreme Court Case No. SC04-1595

The Florida Bar File No. 2003-50,230(17H)

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 Report of Referee will be designated as RR ____ (indicating the referenced page number). The transcript of the Final Hearing held on January 28, 2005, will be designated as TT ____, (indicating the referenced page number). The Appendix attached to this brief will be designated as A ___ (indicating the referenced page number).The Florida Bar will be refereed to as "the Bar." Richard Phillip Greene will be referred to as "respondent".

STATEMENT OF THE CASE AND FACTS

In the interest of accuracy, and to ensure the record is complete, The Florida Bar offers the following supplement to respondent's statement of the case and facts.

Respondent did plead guilty to 1 count of securities fraud (A 15). However, the count to which respondent pled guilty also incorporated the factual predicate for all of the other charges the United States Attorney decided not to pursue in return for respondent's guilty plea (A 15). Count V of the superseding indictment, the count to which respondent pled guilty, realleged and incorporated paragraphs 1 through 13 and 16 through 52 of superseding indictment (A 13). The predicate acts included the formation of a conspiracy, securities fraud, mail fraud, and the use of respondent's trust account to commit the fraud (A 1-3, 5-10). The referee, after hearing all of the testimony presented and reviewing the pertinent documents, found respondent pled guilty to his participation in a criminal conspiracy to commit securities fraud and mail fraud and respondent used his trust account in the scheme (RR 2, 3).

SUMMARY OF THE ARGUMENT

Respondent in this case pled guilty to his participation in a conspiracy to commit securities fraud, mail fraud, and the use of his trust account in furtherance of the fraud. Respondent was placed on felony suspension after he pled guilty. After the Bar filed its complaint, respondent filed a motion to dismiss the trust account violation alleged by the Bar in Count I and all of Count II of the Bar's complaint. Respondent based his argument upon the Bar's necessity to obtain a probable cause finding prior to the filing of a formal complaint. The referee denied respondent's motion to dismiss because she found the complaint filed by the Bar followed the entry of an order of felony suspension and the allegations in the complaint were the factual predicate for Count V of the superseding indictment. This Court has held a referee can consider, and find the respondent guilty of, the predicate acts of a respondent when the respondent has pled guilty to 1 count of a multiple count indictment. Prior to respondent filing his motion to dismiss, the Bar had filed a motion for summary judgment because a felony conviction upon trial or plea shall be conclusive proof of guilt of the criminal offenses charged for the purposes of the Rules Regulating The Florida Bar. The referee in this case properly considered the predicate acts contained in the superseding indictment as conclusive proof respondent was guilty of the charges and held there were no genuine issues of material fact so the Bar was entitled to judgment as a matter of law. The only issue left for the referee to determine at the final hearing was the appropriate sanction.

This Court has held a bar disciplinary action must serve three purposes: the judgment must be fair to society, it must be fair to the attorney, and it must sufficiently deter other attorneys from similar misconduct. Furthermore, the discipline must have a reasonable basis in existing case law or The Florida Standards for Imposing Lawyer Sanctions. The recommendation by the referee in this case adheres to the purposes of lawyer discipline because it is fair to society, it is fair to respondent, and would deter other attorneys from engaging in similar conduct. Moreover, existing case law dictates an attorney who is convicted of a felony be disbarred. Respondent can overcome the presumption of disbarment by presenting extenuating mitigating circumstances, but this respondent did not present the requisite mitigation needed to overcome the presumption of disbarment. Given respondent's conduct, the discipline given in similar cases, and The Florida Standards for Imposing Lawyer Sanctions, the referee in this case properly recommended disbarment.

ARGUMENT

I. THE REFEREE DID NOT ERR IN DENYING RESPONDENT'S MOTION TO DISMISS.

A trial court's decision on a motion to dismiss is reviewed on appeal using the *de novo* standard of review. *Siegle v. Progressive Consumers Insurance Company*, 819 So.2d 732 Fla. (Fla. 2002); *Visor v. Buhl*, 760 So.2d 274 (Fla. 4th DCA 2000). When determining the merits of a motion to dismiss, the trial court's consideration is limited to the 4 corners of the complaint, the allegations of which must be accepted as true and considered in the light most favorable to the nonmoving party. *Bell v. Indian River Memorial Hospital*, 778 So.2d 1030 (Fla. 4th DCA 2001). The referee in this case considered the allegations in the Bar's complaint in the light most favorable to the Bar and determined the Bar had a valid cause of action against respondent. The referee held the complaint filed by the Bar followed an entry of an order of felony suspension and the allegations in the Bar's complaint were the factual predicate for Count V of the superseding indictment against respondent.

In his Motion to Dismiss, respondent asked the referee to dismiss a trust account violation alleged by the Bar in Count I and all of Count II of the Bar's complaint. Respondent based his argument upon the Bar's necessity to obtain a probable cause finding prior to the filing of a formal complaint. R. Regulating Fla. Bar 3-3.2(b); *The Florida Bar v. G.B.T.*, 399 So.2d 357 (Fla. 1981). Additionally, respondent stated that

the filing of a complaint based upon a felony conviction is an exception to the probable cause rule. R. Regulating Fla. Bar 3-7.2(i)(2).

A judgment of guilt includes those cases in which the trial court in the criminal proceeding enters an order adjudicating the respondent guilty of the offenses charged. R. Regulating Fla. Bar 3-7.2(a)(1). A judgment of guilt of a member of The Florida Bar by a court of competent jurisdiction upon trial of or plea to any crime or offense that is a felony under the laws of this state…shall be conclusive proof of guilt of the criminal offenses charged for the purposes of these rules. R. Regulating Fla. Bar 3-7.2(b). A judgment of guilt, where the offense is a felony under applicable law, shall constitute conclusive proof of probable cause and The Florida Bar may file a complaint with the Supreme Court of Florida, or proceed under rule 3-7.9, without there first having been a separate finding of probable cause. R. Regulating Fla. Bar 3-7.2(i)(2). In this case, respondent pled guilty to committing securities and mail fraud and using his trust account in furtherance of the fraud. Respondent contends he only pled guilty to Count V of the superseding indictment, therefore, he should not be held accountable for any of the other conduct outlined in the factual predicate of the superseding indictment. However, the count of the superseding indictment to which respondent pled guilty realleged and incorporated the factual predicate for all of the acts respondent was alleged to have committed. The factual predicate included the allegations that respondent committed mail fraud and used his trust account while committing the securities fraud to which he pled guilty.

In *The Florida Bar v. Wolis*, 783 So.2d 1057 (Fla. 2001), an attorney was named a defendant in a 64 count federal indictment following an investigation by the Securities and Exchange Commission ("SEC") of his employer. The indictment alleged, among other things, multiple securities law violations as well as perjury, false statement, and obstruction of justice charges relating to the SEC investigation. The attorney pled guilty to Count 64 of the superseding indictment, which was a felony obstruction of justice charge. Count 64 of the superseding indictment explicitly realleged and incorporated multiple previous paragraphs of the indictment. After the referee considered the charge for which the attorney pled guilty and the factual predicate for the charge, the referee found the attorney guilty. The referee found included in the predicate acts for Count 64 were the attorney's actions in assisting and filing false reports to the SEC and his responsibility for the administrative operations of the company for which he not only prepared the narrative portions of the company's quarterly and annual reports, but also signed the annual reports filed with the SEC. The referee also found the attorney lied under oath during the SEC investigation. The referee recommended the attorney be disbarred. This Court held the attorney's guilty plea to Count 64 provided the necessary competent substantial evidence to support the referee's findings of fact.

Respondent in this case, like the attorney in *Wolis*, pled guilty to 1 count of a multiple count indictment. However, the predicate acts were included in the count to which respondent pled guilty. Therefore, the Bar, pursuant to the rules cited above, was able to file its complaint without a finding of probable cause on the trust accounting

violation alleged in Count I and all of Count II. Given this Court's holding in *Wolis*, respondent pled guilty to all of the predicate acts cited in the superseding indictment. The superseding indictment stated respondent committed securities fraud, mail fraud, and used his trust account in committing the fraud. The Bar alleged in its complaint that respondent pled guilty to securities fraud, mail fraud, and failed to provide the Bar with the original or duplicate deposit slips for his trust account. The Bar requested respondent's trust accounting records because he pled guilty to using his trust account to commit securities fraud. Since the allegations in the Bar's complaint are based upon respondent's judgment of guilt, the Bar did not need a probable cause finding. *See* R. Regulating Fla. Bar 3-3.2(b). The referee's determination to deny respondent's motion to dismiss in this case was proper because she determined the Bar had a valid cause of action against respondent after considering the allegations in the Bar's complaint in the light most favorable to the Bar.

II. THE REFEREE DID NOT ERR IN GRANTING THE FLORIDA BAR'S MOTION FOR SUMMARY JUDGMENT.

The standard of review for the entry of summary judgment is *de novo*. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla. 2000); *Orlando v. FEI Hollywood, Inc.*, 898 So.2d 167 (Fla. 4th DCA 2005). Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to a judgment as

a matter of law. *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So.2d 126 (Fla. 2000); *Holl v. Talcott*, 191 So.2d 40 (Fla. 1966). A felony conviction upon trial or plea shall be conclusive proof of guilt of the criminal offenses charged for the purposes of the Rules Regulating The Florida Bar. *See* R. Regulating Fla. Bar 3-7.2(b). In the case at bar, respondent pled guilty to securities fraud, mail fraud, and using his trust account in furtherance of the fraud, thus, the referee held there were no genuine issues of material fact so the Bar was entitled to judgment as a matter of law.

Again, this Court held in *Wolis* that the referee could consider the predicate acts contained in the charge to which the attorney pled guilty. This respondent pled guilty to a charge of securities fraud. However, the factual predicate for the charge of securities fraud realleged and incorporated multiple previous paragraphs of the indictment. The predicate acts contained in the superseding indictment stated respondent took part in a conspiracy to commit securities fraud and mail fraud and he used his trust account in order to commit the fraud. Given this Court's holding in *Wolis*, the referee properly considered the predicate acts contained in the superseding indictment as conclusive proof respondent was guilty of the charges and held there were no genuine issues of material fact, therefore, the Bar was entitled to judgment as a matter of law.

III. DISBARMENT IS THE APPROPRIATE SANCTION FOR AN ATTORNEY CONVICTED OF A FELONY INVOLVING A CONSPIRACY TO COMMIT SECURITIES AND MAIL FRAUD.

While a referee's findings of fact should be upheld unless clearly erroneous, this Court is not bound by the referee's recommendations in determining the appropriate level of discipline. *The Florida Bar v. Vannier*, 498 So.2d 896 (Fla. 1986); *The Florida Bar v. Rue*, 643 So.2d 1080 (Fla. 1994). Furthermore, this Court has stated the review of the discipline recommendation does not receive the same deference as the guilt recommendation because this Court has the ultimate authority to determine the appropriate sanction. *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997); *The Florida Bar v. Wilson*, 643 So.2d 1063 (Fla. 1994). In *The Florida Bar v. Pahules*, 233 So.2d 130 (Fla. 1970), this Court held three purposes must be held in mind when deciding the appropriate sanction for an attorney's misconduct: 1) the judgment must be fair to society; 2) the judgment must be fair to the attorney; and 3) the judgment must be severe enough to deter others attorneys from similar conduct. This Court has further stated a referee's recommended discipline must have a reasonable basis in existing case law or the standards for imposing lawyer sanctions. *The Florida Bar v. Sweeney*, 730 So.2d 1269 (Fla. 1998); *The Florida Bar v. Lecznar*, 690 So.2d 1284 (Fla. 1997). In the instant case, existing case law and the Florida Standards for Imposing Lawyer Sanctions support the referee's recommendation of disbarment as the appropriate discipline, while conforming to the purposes of lawyer discipline.

A. THE REFEREE'S RECOMMENDATION OF DISBARMENT AS THE APPROPRIATE SANCTION FOR RESPONDENT'S FELONY CONVICTION INVOLVING SECURITIES AND MAIL FRAUD IS SUPPORTED BY EXISTING CASE LAW.

This Court has held disbarment is the appropriate discipline when an attorney is convicted of a felony. *The Florida Bar v. Wolis*, 783 So.2d 1057 (Fla. 2001); *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997); *The Florida Bar v. Bustamante*, 662 So.2d 687 (Fla. 1995); *The Florida Bar v. Isis*, 552 So.2d 912 (Fla. 1989). Moreover, this Court has disbarred attorneys convicted of a felony involving criminal fraudulent conduct. *See The Florida Bar v. Dougherty*, 769 So.2d 1027 (Fla. 2000); *The Florida Bar v. Grief*, 701 So.2d 555 (Fla. 1997); *The Florida Bar v. Bustamante*, 662 So.2d 687 (Fla. 1995); *The Florida Bar v. Isis*, 552 So.2d 912 (Fla. 1989). In *The Florida Bar v. Wolis*, 783 So.2d 1057 (Fla. 2001), an attorney was named a defendant in a 64 count federal indictment following an investigation by the Securities and Exchange Commission ("SEC") of his employer. The attorney pled guilty to Count 64 of the superseding indictment, which was a felony obstruction of justice charge. Count 64 of the superseding indictment explicitly realleged and incorporated multiple previous paragraphs of the indictment. The referee found the attorney guilty of the charge to which he pled guilty and the acts contained in the factual predicate after the referee considered the predicate acts contained in the indictment. The referee recommended the attorney be disbarred. This Court held the attorney's guilty plea to Count 64 provided the necessary competent substantial evidence to support the referee's findings of fact and disbarment was the appropriate sanction.

This Court in *The Florida Bar v. Bustamante*, 662 So.2d 687 (Fla. 1995), held disbarment was the appropriate sanction for the attorney's conviction of 1 count of federal felony wire fraud. The attorney in *Bustamante* was participating in a scheme to defraud an insurance company and to obtain money from the insurance company by means of false and fraudulent pretenses, representations, and promises. The referee recommended the attorney be disbarred. Furthermore, the referee found various aggravating factors and only 2 mitigating factors. The attorney in *Bustamante* appealed the referee's recommendation because he claimed the referee did not properly apply the aggravating factors and failed to consider any mitigating factors. The attorney contended a suspension was more appropriate than disbarment. This Court held the referee's findings regarding aggravation were supported by competent, substantial evidence and the referee did consider the appropriate mitigating factors. This Court approved the referee's recommendation of disbarment as the attorney had not overcome the presumption disbarment is the appropriate discipline for a felony conviction.

The attorney in *The Florida Bar v. Cohen*, 583 So.2d 313 (Fla. 1991), was convicted of felony arson in Maine. The attorney had been indicted for the arson of his home, which allowed him to collect between $32,000 and $40,000 in insurance proceeds. The conviction was the result of the attorney's *Alford* plea.[1] The referee recommended

[1] A plea containing a protestation of innocence when a defendant intelligently concludes that his interests require the entry of a guilty plea. *North Carolina v. Alford*, 400 U.S. 25, 37 (1970).

the attorney be suspended for 12 months and thereafter until his successful passage of the Florida and Ethics portions of The Florida Bar Examination. The Bar appealed the referee's recommendation because arson and the collection of the insurance proceeds is a serious offense, which merits disbarment. This Court held that a conviction of felony arson, which allows an attorney to collect insurance proceeds, is a serious offense warranting disbarment notwithstanding the attorney's assertion the conviction was based upon an *Alford* plea.

In *The Florida Bar v. Pavlick*, 504 So.2d 1231 (Fla. 1987), an attorney had been indicted in Michigan for conspiracy to import marijuana, conspiracy to possess with intent to distribute, and distribution of marijuana. He entered into an *Alford* plea to a charge of accessory after the fact to a misprision of a felony.[2] The attorney always protested his innocence and disputed the underlying facts of the crime even after his plea hearing. The referee stated he accepted the attorney's testimony that he entered into an *Alford* plea rather than go to trial because of his family. The referee considered the results of a polygraph to which the attorney submitted and the results supported the attorney's version of the events. The referee found the attorney had no prior convictions, he was an exemplary family man, and he participated in community activities. The referee recommended the attorney be suspended for 2 years. This Court approved the referee's recommendation because the referee properly considered in mitigation the

[2]A person commits a misprison when they heard or knew through a secondary source a crime had been committed and failed to report it, having a duty to do so.

circumstances surrounding the attorney's *Alford* plea when determining the appropriate sanction.

Respondent asserts in his brief that his felony conviction for securities fraud, which contained a factual predicate including mail fraud and the use of his trust account in furtherance of the fraud, warrants a 2-year suspension instead of disbarment. This Court stated in *The Florida Bar v. Budnitz*, 690 So.2d 1239 (Fla. 1997), quoting *The Florida Bar v. Graham*, 605 So.2d 53 (Fla. 1992), "Dishonesty and lack of candor cannot be tolerated by a profession that relies on the truthfulness of its members." Fraud by its very definition is dishonesty,[3] which this Court stated cannot be tolerated.

This respondent's conduct is similar to the conduct of the attorneys in *Wolis*, *Bustamante*, and *Cohen*. The attorney in *Wolis* pled guilty to a federal felony obstruction of justice charge, but the factual predicate for the obstruction of justice charge included filing false reports with the SEC and lying under oath to the SEC. In this case, respondent pled guilty to securities fraud, but the factual predicate to the charge included mail fraud and the use of his trust account in order to commit the fraud. Both the respondent in *Wolis* and this respondent pled guilty to a single count of a multiple count indictment. Both indictments outlined fraudulent acts committed by the respondents. This Court in *Wolis* agreed with the Bar that the referee's finding of fact and aggravation

[3]Fraud is the intentional perversion of truth for the purpose of inducing another in reliance upon it to part with some valuable thing belonging to him or to surrender a legal right. Fraud is synonymous with bad faith and dishonesty. Black's Law Dictionary 660 (6th ed. 1990).

were supported by the record and disbarment was the appropriate sanction for the attorney's conviction of a felony involving dishonesty. Since the record supports the referee's findings of fact and her consideration of the applicable mitigating and aggravating factors in this case, and the felony for which respondent was convicted is one involving dishonesty, this Court should approve the referee's recommendation of disbarment.

This respondent and the attorney in *Bustamante* both pled guilty to 1 count of fraud in federal court. The attorney in *Bustamante* claimed, and this respondent claims, the referee failed to consider mitigating factors, which would overcome the presumption of disbarment as the appropriate discipline for a felony conviction. This Court in *Bustamante* held all of the mitigating factors set forth by the attorney were presented to the referee. In this case, respondent provided the testimony of various character witnesses along with his own testimony thereby setting forth the mitigating he wanted the referee to consider. In *Bustamante*, this Court found the referee did consider the mitigating factors applicable to the attorney's case and the referee actually found 2 mitigating factors applicable. The referee in this case found the presence of 1 mitigating factor after considering the testimony and record before her. Respondent in this case, as the attorney in *Bustamante*, failed to overcome the presumption disbarment is the appropriate discipline for a felony conviction. Given the similarities between this case and *Bustamante*, this Court should approve the referee's recommendation of disbarment.

The attorney's plea in *Cohen* is different from this respondent's plea in that the attorney in *Cohen* entered into an *Alford* plea and this respondent did not. This respondent protested his innocence at his final hearing, but did not protest his innocence before the court that convicted him. Even though the attorney in *Cohen* entered into an *Alford* plea, the referee still recommended disbarment because the mitigation offered by the attorney was not enough to overcome the presumption of disbarment. This Court held a conviction for felony arson, which allowed an attorney to collect insurance proceeds, is a serious offense which warranted disbarment notwithstanding the facts considered in mitigation. Although the attorney in *Cohen* pled guilty to felony arson, his conviction involved fraud because he collected insurance proceeds from a fire he purposely started at his house. The case at bar and *Cohen* are similar in nature because they both involve fraud and warrant the imposition of the same discipline, which is disbarment.

Again, the attorney in *Pavlick* entered into an *Alford* plea, which this respondent did not. Additionally, the attorney in *Pavlick* pled guilty to a charge of accessory after the fact to a misprison of a felony where this respondent pled guilty to a conspiracy to commit securities and mail fraud. A misprison is essentially knowing of a crime through a secondary source and failing to report the crime. This respondent pled guilty to actively participating in a fraudulent securities scheme. Therefore, this respondent's conviction is of a more serious nature than the conviction in *Pavlick*. The referee in *Pavlick* considered the mitigating circumstances surrounding the attorney's *Alford* plea and

recommended a 2-year suspension. This Court approved the referee's recommendation because the referee properly considered in mitigation the circumstances surrounding the attorney's *Alford* plea. In this case, respondent did not enter into an *Alford* plea and his crime was of a more serious nature. Consequently, this respondent deserves a more stringent sanction, which would be disbarment.

Respondent cites to *The Florida Bar v. Diamond*, 548 So.2d 1107 (Fla. 1989), in support of his recommendation of a 2-year suspension. However, *Diamond* is distinguishable from this case. The attorney in *Diamond* was convicted by a federal court jury of 6 counts of mail and wire fraud. The attorney in *Diamond* actually went to trial and did not plead guilty to the charges against him. In addition, the judge presiding over the attorney's criminal trial testified at the disciplinary final hearing. The judge stated that notwithstanding the verdict, he never saw the attorney as an active participant in an act of fraud. In *Diamond*, this Court held a referee may consider the relative culpability of the accused when determining the appropriate sanction. No one from the government or the judiciary that worked on this respondent's case testified on his behalf as to the level of his involvement in the fraudulent scheme. None of the other participants in the fraudulent scheme testified as to this respondent's limited involvement in the scheme. The only person claiming this respondent had minimal involvement in the fraudulent scheme is the respondent himself. This respondent's mitigation is not similar to the mitigation presented in *Diamond*. Therefore, the discipline in this case should be more severe than the

discipline in *Diamond*. Since the attorney in *Diamond* was suspended for 3 years, this respondent should be disbarred.

B. THE REFEREE DID NOT FIND SUFFICIENT MITIGATION TO OVERCOME THE PRESUMPTION DISBARMENT IS THE APPROPRIATE SANCTION FOR RESPONDENT'S FELONY CONVICTION.

A referee's findings of fact should be upheld unless clearly erroneous or lacking in evidentiary support. *The Florida Bar v. Forrester*, 656 So.2d 1273 (Fla. 1995), quoting *The Florida Bar v. Marable*, 645 So.2d 438 (Fla. 1994). This standard applies in reviewing a referee's finding of mitigation and aggravation. *The Florida Bar v. Arcia*, 848 So.2d 296 (Fla. 2003). Because the referee is in the better position to evaluate the demeanor and credibility of the witnesses, the referee's findings of fact should be upheld if they are supported by competent, substantial evidence. *The Florida Bar v. Forrester*, 656 So.2d 1273 (Fla. 1995), quoting *The Florida Bar v. Marable*, 645 So.2d 438 (Fla. 1994). On review, this Court neither reweighs the evidence in the record nor substitutes its judgment for that of the referee so long as there is competent, substantial evidence in the record to support the referee's findings. *Id*. The party contending the referee's findings of fact and conclusions as to guilt are erroneous carries the burden of demonstrating there is no record evidence to support those findings or that the evidence in the record clearly contradicts the conclusions. *The Florida Bar v. Feinberg*, 760 So.2d 933 (Fla. 2000), quoting *The Florida Bar v. Sweeney*, 730 So.2d 1269, 1271 (Fla. 1998).

The Florida Standards for Imposing Lawyer Sanctions 5.1 deals with the proper sanctions for an attorney involved in the commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation. Here, respondent pled guilty to entering into a conspiracy to commit securities fraud, mail fraud, and using his trust account to engage in the fraud. Moreover, Standard 5.11 suggests disbarment is the appropriate discipline when a lawyer is convicted of a felony under applicable law or a lawyer engages in serious criminal conduct, a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft. Thus, disbarment is presumed to be the appropriate discipline when an attorney is convicted of a felony and the respondent bears the burden of overcoming the presumption. In this case, the referee did not find sufficient mitigation for the respondent to overcome the presumption disbarment was the appropriate sanction for respondent’s conviction in a securities and mail fraud scheme.

When considering the discipline delineated in The Florida Standards for Imposing Lawyer Sanctions, any applicable mitigating or aggravating factor must be considered. The referee in the instant case found in mitigation the evidence of good character and reputation. In aggravation, the referee found prior discipline and respondent’s substantial experience in the practice of law. The mitigating factor in this case does not overcome

the presumption of disbarment as the appropriate discipline. Respondent asserts in his brief he clearly and convincingly established the following mitigating factors:

1. Absence of dishonest or selfish motive;
2. Cooperation with The Florida Bar;
3. Compelling evidence of good character and reputation;
4. Interim rehabilitation;
5. Imposition of other penalties; and
6. A true sense of remorse.

However, respondent failed to demonstrate there is competent, substantial evidence to support each of the 5 additional mitigating factors he claims the referee should have considered. In his brief, respondent relies on the character testimony provided by his witnesses at the final hearing. Respondent's character witnesses were friends of the respondent, an attorney that has shared office space with respondent, and respondent's long time secretary. They all testified to the fact that despite respondent's felony conviction for fraud he was honest and trustworthy. The witnesses stated respondent was a competent lawyer and he should not be disbarred.

Respondent claims an absence of a dishonest or selfish motive. However, respondent provided no evidence to show his motives were honest and unselfish. The very nature of the conspiracy for which respondent was convicted was to make a company appear attractive so the participants in the scheme could sell their stock at a higher price than it was actually worth. The stock purchasers believed they were

purchasing stock in a successful company. In reality, the company was not very profitable. The participants in the fraudulent scheme would make a profit selling their stock, but the stock purchasers would lose money. While there was no evidence respondent owned stock he could sell, he was being paid for his services in order to complete the fraudulent scheme. Respondent was going to be paid between $7,500 and $10,000 for his services (TT 108). Therefore, respondent's motives were not honest or unselfish because he was going to profit from the scheme.

Respondent asserted in his brief he cooperated with the Bar and the referee should have found cooperation as a mitigating factor. Respondent in this case admitted he did not provide the Bar with the deposit slips requested. Rule Regulating The Florida Bar 5-1.2(b)(2) requires an attorney to maintain original or duplicate deposit slips and a cash receipts book with specific client information. Respondent did produce various records, which contained deposit information in them. However, respondent did not provide the necessary deposit slips. On August 28, 2002, the Bar requested respondent's trust account records for the previous 6 years (A 20). Rule Regulating The Florida Bar 5-1.2(d) requires an attorney to retain trust account records for 6 years. Respondent refused to comply with the Bar's request and originally only provided his trust account records for January and February 2001 (A 22-24). Respondent had to retrieve some of the records for that 2 month period from the bank (A 24). Obviously, respondent did not maintain the minimum trust accounting records as required by the rules and he did not provide the Bar with the trust accounting records requested. In the end, respondent did provide the Bar with trust

account records from January 1999 through June 2003 (A 26). However, those records did not encompass the entire period for which Bar Counsel originally requested respondent's trust account records and they did not include the required deposit slips or some form of deposit record. Hence, respondent did not cooperate with the Bar.

Respondent claims interim rehabilitation is an applicable mitigating factor in this case. Respondent received a sentence of 5 years probation, 6 months home detention, 250 hours of community service, and a fine of $10,000. Respondent has paid his fine and completed his term of home detention. However, respondent is still on probation and will be for a number of years and has not completed his community service requirement. Since respondent has not completed his sentence, he has not been rehabilitated. Respondent must still make monthly reports to his probation officer and obtain permission before he can travel. Thus, respondent's assertion interim rehabilitation applies to this case is misplaced.

Respondent claims the referee should have considered in mitigation the imposition of other penalties. Respondent did testify to the sentence he received for pleading guilty to his participation in a conspiracy to commit securities and mail fraud. The terms of his criminal sentence were discussed above. However, respondent failed to demonstrate how the imposition of his criminal sanction should mitigate the appropriate sanction in this disciplinary case. The referee did not find, and respondent did not prove, that respondent's criminal sanction mitigated the applicable disciplinary sanction in this case,

which is disbarment. Consequently, the referee in this case was proper in not finding in mitigation the imposition of other penalties.

Respondent stated the referee erred in not finding a true sense of remorse as a mitigating factor. Remorse is a mitigating factor the referee can consider. Respondent and his character witnesses testified to respondent's remorse. However, the referee was in the best position to evaluate the demeanor and credibility of the witnesses and she did not find remorse as an applicable mitigating factor. The only evidence respondent presented to the referee in support of remorse was testimony and it seems she did not find the testimony compelling enough to find remorse as a mitigating factor. Thus, the referee did not err in failing to find remorse as a mitigating factor.

The referee did find in mitigation respondent's good character and reputation. However, the single mitigating factor found by the referee in this case does not overcome the presumption disbarment is the appropriate discipline for respondent's felony conviction. Moreover, the referee found prior discipline and respondent's substantial experience in the practice of law as aggravating factors. Mitigating factors may justify a reduction in the degree of discipline to be imposed. Alternatively, aggravating factors may justify an increase in the degree of discipline to be imposed. An attorney convicted of a felony needs to demonstrate the existence of extenuating mitigating circumstances in order to overcome the presumption disbarment is the appropriate discipline. *See The Florida Bar v. Bustamante*, 662 So.2d 687 (Fla. 1995); *The Florida Bar v. Diamond*, 548 So.2d 1107 (Fla. 1989). The referee in this case heard all of the testimony and was in the best

position to determine which mitigating and aggravating factors applied to respondent's case. The referee only found respondent's good character and reputation as mitigation. On the other hand, the referee did find prior discipline and respondent's substantial experience in the practice of law in aggravation. The single mitigating factor coupled with the 2 aggravating factors found by the referee in this case do not warrant a deviation from the recommended discipline for an attorney convicted of a felony outlined in The Florida Standards for Imposing Lawyer Sanctions or existing case law, which is disbarment. Respondent did not demonstrate there was a lack of record evidence to support the referee's findings or that the evidence in the record clearly contradicts the referee's conclusions thereby warranting this Court to substitute its judgment for that of the referee. As a result, this Court should approve the referee's recommendation of disbarment in this case.

CONCLUSION

This Court should approve the referee's report in this case and respondent should be disbarred because the referee's recommendation as to discipline is consistent with existing case law and The Florida Standards for Imposing Lawyer Sanctions and respondent failed to overcome the presumption disbarment is the appropriate sanction for an attorney convicted of a felony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY true and correct copies of The Florida Bar's Answer Brief have been furnished by regular U.S. mail to Kevin P. Tynan, counsel for respondent, 8142 North University Drive, Tamarac, Florida 33321, and to Staff Counsel, 651 E. Jefferson Street, Tallahassee, FL 32399-2300 on this 3rd day of June, 2005.

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ERIC MONTEL TURNER

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

Undersigned counsel hereby certifies The Florida Bar's Answer Brief is submitted in 14 point, proportionately spaced, Times New Roman font, and the computer file has been scanned and found to be free of viruses by Norton Anti-Virus for Windows.

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ERIC MONTEL TURNER