IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

THE FLORIDA BAR,

Complainant,

v.

ROBERT ANDREW SMOLEY,

Respondent.
_____/

Supreme Court Case No. SC11-837

The Florida bar File No. 2011-51,199(17C) FFC

REPORT OF REFEREE

I. SUMMARY OF PROCEEDINGS

The undersigned was duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline.

The matter arises from the Respondent, Robert Smoley's, guilty plea in the United States District Court of the Northern District of California to violations for Drug Conspiracy pursuant to 21 U.S.C. § 846 and Conspiracy to Launder Monetary Instruments pursuant to 18 U.S.C. § 1956(h). Judgment was entered on March 3, 2011, and the Respondent was sentenced to forty (40) months imprisonment with the recommendation that the Respondent participate in the United States Bureau of Prisons RDAP (Residential Drug Abuse Program). The sentence is below the Federal Guidelines.

The Florida Bar filed a Notice of Determination of Guilt following the Respondent's felony convictions in the United States District Court of the Northern District of California. On May 3, 2011, the Supreme Court of Florida suspended the Respondent from the practice of law and referred the matter to the Chief Judge of the Eleventh Judicial Circuit for the appointment of a referee. Undersigned was appointed by order of the Chief Judge on May 10, 2011.

The Respondent submitted a waiver of the time requirements set forth in R. Regulating Fla. Bar 3-7.2. By order dated July 31, 2011, the Supreme Court extended the time for the referee's report to be filed until December 6, 2011. By order dated November 30, 2011, the Supreme Court extended the time for the referee's report to be filed until January 6, 2012. By order of the Court, the time for the referee's report was extended to be filed until February 6, 2012.

The matter proceeded to final hearing on November 8, 2011. Bar exhibits one through eight were admitted into evidence without objection. The Respondent had begun serving his sentence at the time of the hearing thus he did not appear in person. The Respondent's video deposition was admitted into evidence without objection. The Respondent called Richard Sharpstein who represented Mr. Smoley in federal court and Dr. John Eustace who conducted an evaluation of Mr. Smoley for purposes of the disciplinary proceedings. Dr. Eustace's curriculum vitae was admitted without objection and a Federal Bureau of Prisons' print-out showing the

Respondent's target release date from incarceration was also admitted without objection.

During the course of these proceedings, Ronna Friedman Young, Bar Counsel, represented The Florida Bar and Richard Baron represented the Respondent. The pleadings and all other papers filed in this cause which are forwarded to the Supreme Court of Florida with this report constitute the entire record.

II. FINDINGS OF FACT

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. The Respondent's Professional History.

The evidence presented to the undersigned Referee in this matter established the Respondent's professional history as follows:

1976-1982	Elected Commissioner, Vice-Mayor and 1st elected Mayor in the history of North Bay Village, Florida. Mr. Smoley was elected to the first office of Mayor on the same day he sat for the Florida Bar
1976-1977	Certified Legal Intern with the Miami-Dade County Office of the Public Defender.
1977	Graduated Nova Southeastern University Law School.
1978	Admitted to Florida Bar on June 16, 1978, and entered private practice.

1978-1980	Served as Special Bar Counsel for The Florida Bar.
1980	Appointed City Attorney for the Hialeah Water & Sewer Board overseeing a budget of $50 million dollars.
1980	Appointed Assistant City Attorney of Sweetwater.
1980-1985	Served as Special Counsel to the United States Senate Judiciary Committee.
1982	Sworn in as member of the Federal Trial Bar.
1985	Sworn in by Chief Justice Earl Warren to practice before the U.S. Supreme Court.
1986-1990	Co-founder of Peninsula Development Group developing over $100 million dollars of residential real estate in Florida, Colorado and California.
1988-1990	Co-founder of Cellular Concepts, awarded the first nationwide AT&T cellular distributorship.
1990-1995	Co-founder of Telecompanions, a nationwide telephonic dating service in America and infrastructure provider for the personal sections of every national newspaper.
1994-1999	Co-founded The Beariffic Bear Factory.
1999-2005	Co-founded Worldwide Web Enterprises, an Internet credit card processing and fulfillment house for the online pharmaceutics industry.
2001-2003	Appointed chairman of the Center for Responsible Telemedicine, a nationwide non-profit organization chartered to promote the attributes of employing the emerging Internet technologies into medicine.
2001-2007	Co-founded United Mail Pharmacy Services, a brick and mortar neighborhood pharmacy specializing in mail order distribution and compounding.
2004-2007	Co-founded Model Search America, a nationwide talent search company.
2004-2007	Co-founded the Icom Group, an Internet marketing and telecommunications company specializing in the development, marketing and sale of nutraceuticals (non-pharmaceuticals).
2006-2009	Co-founded Amerigroup Holdings, a telemedicine company.

C. Narrative Summary Of Case.

In *United States of America v. Robert Smoley*, case number 10CR00619-001, Robert Smoley was charged with one felony count of Drug Conspiracy in violation of 21 U.S. Code, Section 846 and one felony count of Conspiracy to Launder Monetary Instruments in violation of 18 U.S. Code, Section 1956. The charges were filed in the United States District Court of the Northern District of California. (Bar exhibit 1). Mr. Smoley pled guilty and was adjudicated guilty of both counts on March 3, 2011. (Bar exhibit 7). He was sentenced to forty (40) months imprisonment to be followed by three (3) years probation. (Bar exhibit 7). Pursuant to Rule 3-7.2(b) of the Rules Regulating The Florida Bar, the judgment stands as "conclusive proof of guilt of the criminal offense(s) charged for the purposes of these rules."

During the change of plea hearing on November 4, 2010, (Bar exhibit 2), the federal district judge considered the plea agreement signed by the Respondent, the Respondent's counsel Richard Sharpstein, and the Assistant U.S. attorney. (Bar exhibit 3). Mr. Smoley admitted he was responsible for the distribution of over seven million units of controlled substances through the use of various internet pharmacy businesses. (Bar exhibit 3, p. 4). He further admitted that he knew the drugs were distributed or dispensed without valid prescriptions, without any legitimate medical purpose and outside the scope of professional medical

practice. (Bar exhibit 3, p. 4).

Mr. Smoley also admitted that he and his co-conspirators deposited over forty-eight (48) million dollars in gross revenue from the internet pharmacy operations (Bar exhibit 3, p. 6), and that he opened a number of accounts at financial institutions in the United States through which he transferred money gained from the criminal conduct in an effort to conceal the profits from law enforcement. (Bar exhibit 3, p. 6).

During the change of plea hearing, as well as the signed plea agreement, Mr. Smoley repeatedly stated he was pleading guilty because he was guilty and acknowledged the veracity of the allegations against him. (Bar exhibit 2, p. 17, 34, 38). During the extensive plea colloquy, defense counsel for the Respondent represented that Mr. Smoley had been a "practicing lawyer. Of course he won't be and hasn't been. He resigned from The Florida Bar." (Bar exhibit 2, p. 7). In Smoley's Sentencing Memorandum, paragraph 13, it was represented that Smoley would "be a convicted felon for the rest of his life and lose his license to practice law in Florida." As previously stated, Mr. Smoley was sentenced to forty months incarceration to be followed by three years probation, a sentence below the applicable Federal Sentencing Guidelines.

Richard Sharpstein, defense counsel for the Respondent in the criminal case, testified on behalf of the Respondent in the bar proceedings. Mr. Sharpstein

testified that when he began working on the case, the Respondent was being investigated for trafficking in a diet pill commonly known as Fen-phen. (Transcript excerpt p. 9). Although Fen-phen was the only substance involved in the government undercover sting operation, it was not the only controlled substance that the Respondent distributed. (Transcript excerpt p. 20). In addition to Fen-phen, the Respondent distributed Valium, Xanax, and Ativan. (Transcript excerpt p. 20). Mr. Sharpstein also indicated that Mr. Smoley used an alias when buying drugs from persons he thought were wholesale suppliers. (Transcript excerpt p. 21). Mr. Smoley admitted to the use of an alias in his plea agreement, (Bar exhibit 3, p. 4), and sworn deposition testimony. (Transcript excerpt p. 49).

Mr. Sharpstein stated that the amount alleged to have been generated during the criminal conduct was disputed in federal court but ultimately agreed to because it was not in Mr. Smoley's best interest to litigate "extraneous issues in the agreement" and risk a favorable plea agreement. (Transcript p. 13, 18, 19). According to the sentencing memorandum, the forty month sentence envisioned by the plea agreement was six months below the low end of the sentencing guideline calculation. (Bar exhibit 4, page 4).

Mr. Sharpstein explained that Mr. Smoley's failure to file a number of income tax returns was also disputed in federal court. Mr. Smoley was in negotiations with the government and was being audited during the time the tax

returns were due. Smoley had consulted with tax attorneys who advised him not to file the tax returns. (Transcript excerpt p. 21, 26). As part of the plea agreement, Mr. Smoley ultimately filed federal income tax returns for the years 2000 through 2009. (Transcript excerpt p. 21– p. 22).

Mr. Smoley similarly maintained he had not acted inappropriately in failing to file the tax returns because he was being audited at the time and was subject to a criminal investigation. (Deposition p. 47-8). As a result, he had consulted with tax attorneys who advised him not to file the returns. (Deposition p. 61). The tax returns were ultimately signed and filed. (Deposition p. 49).

Mr. Smoley also maintained he could not attest to the validity of the government's assertion that the criminal conduct had generated over forty-eight (48) million dollars in gross revenue. (Deposition p. 50-2). In response to questioning whether he had thus entered the guilty plea believing he had committed illegal acts, Mr. Smoley explained that although he had acknowledged some misconduct, which he maintained was not to the degree asserted by the government, he had accepted the plea in order to avoid the risk of obtaining a greater jail sentence if he chose to go to trial. (Deposition p. 55-06). As an attorney, he had often counseled clients faced with similar circumstances. (Deposition p. 57-8).

Dr. John Eustace testified on behalf of the Respondent. Mr. Smoley first

met Dr. Eustace on or about May 27, 2011, after being referred by counsel. Dr. Eustace conducted an evaluation of Mr. Smoley and determined that he was suffering from alcoholism. As is the case with those suffering from alcoholism, Dr. Eustace testified that Mr. Smoley had impaired judgment and a false sense of reality which contributed to his misconduct.

Mr. Smoley testified that he began drinking from an early age and detailed what appears to have been a contentious and debilitating childhood in spite of being surrounded by material wealth. (Deposition pages 10-16, 37). His drinking increased with age culminating in an intervention by his family and friends approximately a year and a half before the date of his deposition testimony. (Deposition p. 37-8). At the time of the deposition, Mr. Smoley had recently received a purple chip in recognition of nine months of sobriety. (Deposition p. 39). He explained that he began attending Alcoholics Anonymous immediately and had two sponsors. (Deposition p. 39). He had signed up with FLA and attended every meeting. (Deposition p. 39).

When asked to describe the remorse he felt for his conduct, Mr. Smoley explained that it was "actually stupidity, I mean, on a biblical term … a colossal misjudgment." (Deposition p. 42). He expressed dismay over the fact he had worked hard to achieve an elevated degree of success and had compromised everything he achieved as a result of a "colossal misjudgment." (Deposition page

2-3). He noted the separation from his eight-year-old son and the disappointment of his family and friends as a result of his prosecution and impending incarceration. (Deposition 42-4).

III. RECOMMENDATIONS AS TO GUILT

I recommend that the Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

Rule 3-4.3 The commission by a lawyer of any act that is unlawful or contrary to honesty and justice, whether the act is committed in the course of the attorney's relations as an attorney or otherwise, whether committed within or outside the state of Florida, and whether or not the act is a felony or misdemeanor, may constitute a cause for discipline.

Rule 4-8.4(b) A lawyer shall not: (b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects;

Rule 4-8.4(c) A lawyer shall not: (c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation…

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

Standard 5.11(a) of the Florida Standards for Imposing Lawyer Sanctions provides: "Disbarment is appropriate when: (a) a lawyer is convicted of a felony under applicable law." Also, Standard 5.11(c) provides: "Disbarment is appropriate when: (c) a lawyer engages in the sale, distribution or importation of controlled substances."

V. LEGAL ANALYSIS

Disbarment is the presumptively appropriate sanction for an attorney's felony conviction:

> Disbarment is the presumed sanction when an attorney has been convicted of a felony. [Case citations omitted]; Fla. Stds. Imposing Law. Sancs. 5.11(a) (absent aggravating or mitigating circumstances, disbarment is appropriate when a lawyer is convicted of a felony). Pursuant to Standard 5.11(a), a single felony conviction can result in disbarment.
>
> *The Florida Bar v. Irish*, 48 So. 3d 767, 774 -775 (Fla. 2010).

Commission of a felony is fundamentally inconsistent with the fitness to practice of law. "Disbarment of an attorney convicted of a serious felony offense cannot be interpreted as unfair to him. Illegal behavior involving moral turpitude demonstrates intentional disregard for the very laws an attorney is bound to uphold." *The Florida Bar v. Liberman,* 43 So.3d 36, 39 (Fla. 2010).

Substantial mitigation may nonetheless be presented to overcome the presumption. *The Florida Bar v. DelPino,* 955 So. 2d 556 (Fla. 2007). The burden

is on the attorney to establish grounds warranting disregard for the presumption of disbarment. *The Florida Bar v. Liberman*, 43 So. 3d 36 (Fla. 2010). The Florida Supreme Court has recognized the monstrous effects of an addiction and at times allowed an attorney's addiction to overcome the presumption in favor of disbarment thus allowing for a temporary suspension and eventual return to the practice of law after rehabilitation. [1]

In ruling that evidence of the attorney's addiction was sufficient to overcome the presumption in favor of disbarment, the Court in *Del Pino* indicated that it was "mindful of those cases in which a respondent's drug addiction caused or contributed to the felonious conduct and resulted in suspension instead of disbarment." *The Florida Bar v. Del Pino*, 955 So. 2d at 563. The issue in the present case is thus whether the evidence of the Respondent's alcoholism is

[1] *See also Fla. Bar v. Hochman*, 815 So.2d 624 (Fla. 2002) (suspending attorney for three years, effective, nunc pro tunc, on the date of his felony suspension after pled to felony grand theft where mitigating evidence included drug and alcohol addiction); *Fla. Bar v. Marcus*, 616 So.2d 975 (Fla.1993) (attorney suspended for three years after conviction of felony for misappropriating client funds where cocaine addiction was directly and causally linked to misconduct); *Fla. Bar v. Corbin*, 540 So.2d 105 (Fla.1989) (suspension for three years for conviction for attempted sexual activity with child twelve years of age or older, but less than eighteen, who was in familial or custodial authority where substantial mitigation included voluntary completion of residential alcohol treatment program); *Fla. Bar v. Jahn*, 509 So.2d 285 (Fla.1987) (suspending attorney for three years after he was found guilty of delivery of cocaine to a minor and possession of cocaine where drug addiction was one of several mitigating factors); *Fla. Bar v. Rosen*, 495 So.2d 180 (Fla.1986) (suspending an attorney for three years after conviction for knowingly and intentionally possessing cocaine with the intent to distribute); *see also Fla. Bar v. Clark*, 582 So.2d 620 (Fla.1991) (suspending attorney for three years after felony conviction on federal drug charges where substantial mitigating factors included the fact that the attorney was operating a law partnership with his father, who suffered from a drinking problem, and was attempting to carry his fathers caseload as well as his own).

sufficient to overcome the presumption in favor of disbarment because the evidence has established that his alcoholism contributed or is causally connected to his criminal activity.

In advancing his position that it should, Mr. Smoley first seeks to diminish the extent of his criminal conduct by asserting that the plea agreement he signed and his oral pronouncements under oath during the plea colloquy in federal court were not an accurate portrayal of his involvement in criminal activity. He maintains he made the statements in order to secure a plea which avoided exposure to the possibility of a much longer term of incarceration. (Deposition p. 50-1). Criminal defendants engage in this type of balance of competing considerations on a daily basis when faced with criminal prosecution and the exposure to incarceration with its resulting loss of liberty and family. Mr. Smoley's position is thus unfortunately not novel.

The issue arises however in that weighing the criminal conduct against the grounds advanced in mitigation to determine the propriety of an attorney's disbarment, the trier of fact is entitled to rely upon the Respondent's sworn statements which are made in open court in return for a more favorable outcome in criminal court. To do otherwise would allow vague conjectures after the fact to undermine a sworn statement made before a federal judge during a plea agreement without a forum in which to contest the validity of the defendant's assertions.

Having received the benefit from these admissions in a federal criminal sentencing, Mr. Smoley cannot now turn around and attempt to refute these admissions by stating that he essentially made misrepresentations under oath in order to obtain the more advantageous plea but should now not be held responsible for those statements.

Moreover Mr. Smoley maintains that he was innocent of any formulated criminal design when embarking on these series of transactions. (Deposition p. 42). He maintains that he researched the issue thoroughly (Deposition p. 31-4, 43) and felt his conduct was legal although "looking back, it's – it was gray." (Deposition p. 43). Unfortunately, not only Mr. Smoley's acknowledgement that he now realizes that entering into the "business" venture was "gray", but his acknowledgment that he used an alias when attempting to purchase drugs from persons he thought were wholesale suppliers, (Transcript excert p. 21; Bar exhibit 3, p. 4; Deposition p. 49), refute his assertion that he was ignorant of the fact that his behavior could constitute criminal conduct. Mr. Smoley also had an extensive and successful business career. Not only was Mr. Smoley a practicing attorney for thirty years, he was a successful businessman who had developed a number of ventures in pharmaceutical and internet enterprises as well as other novel business ventures.

Having determined that Mr. Smoley thus conducted himself in a manner

consistent with the crimes for which he entered a plea and was convicted in federal court, examination must accordingly follow as to whether Mr. Smoley's tragic abuse of alcohol nevertheless warrants suspension rather than disbarment from the Florida Bar. During his testimony, Mr. Smoley was asked to describe the remorse he felt as a result of his conviction, impending incarceration and possible disbarment. (Deposition p. 42). Mr. Smoley articulated a somewhat bewildered assessment as to how he could have acted with such "colossal misjudgment" (Deposition p. 43) given all he had achieved during his thirty years as a practicing member of the Florida Bar.

Such bewilderment is certainly understandable. Having what appeared to have been extraordinary business, as well as legal achievements, Mr. Smoley had also attained political success and recognition in his community. At the time of the prosecution, he was enjoying the benefits of what appears to have been a happy second long-term marriage which produced Mr. Smoley's third child, a boy who was eight years old at the time. To what degree alcoholism contributed to Mr. Smoley's ultimate demise and involvment in criminal activity is difficult to ascertain however.

Mr. Smoley testified that he began drinking at sixteen in response to a particularly painful experience and reaction to his stepmother's actions during his sixteenth birthday. (Deposition p. 37). This incident was apparently the

culmination of a series of events at the hands of his father's family which contributed greatly to a painful and debilitating childhood. (Depostion pages 10-16, 31). He explained that he drank in order to deal with the pain of his childhood following a highly contested dissolution of marriage. (Deposition p. 37).

Mr. Smoley explained that his drinking increased as time went on, in particular while involved in politics: "And when I got in politics, you know, drinking is like part of politics, you know. Everybody goes out and has a – you know, drinks before the meeting, drinks after meeting, drinks this social event, that social event." (Deposition p. 37-8). Mr. Smoley testified that his drinking then increased while in his thirties: "I know I just drank way, way too much. Out of hand." (Deposition p. 38).

The drinking persisted until approximately one year before the date of the deposition testimony when a family friend who is a physician intervened and forced Mr. Smoley to attend a behavioral health center in Broward County. (Deposition p. 38). As previously noted, Mr. Smoley began attending Alcoholics Anonymous, joined FLA and was at the time of the testimony of his deposition, sober for nine months. (Deposition p. 38-40). He indicated he was also planning to attend a rehabilitation program while incarcerated. (Deposition p. 40).

It is hard to ascertain to what degree Mr. Smoley alcoholism caused or contributed to his criminal conduct. It is plausible to conjecture, given the nature

of an addiction, that the alcoholism must have played a part in Mr. Smoley's demise. Certainly Dr. Eustace's testimony sought to establish that alcoholism was a major contributing factor to the misconduct. However Dr. Eustice met Mr. Smoley in preparation for the case and did not testify regarding Mr. Smoley's conduct with any specificity.

Moreover when asked to explain his involvement in the criminal conduct, Mr. Smoley did not attribute alcohol as a reason for his misconduct. He failed to mention his addiction at all when contemplating his predicament. He repeatedly indicated that the conduct was not to the extent portrayed by the plea negogiations and what criminal conduct had existed was the product of stupidity and misjudgment, not alcohol us or an addiction.

There can be no disagreement regarding this factor given the fact that Mr. Smoley seemed to possess, by all external means of measurement, all that would seem to be required for a fulfilled, happy life: health; the love and respect of his family and friends; children; a stable marriage of seventeen years; personal and professional achievement; and material means. To what extent Mr. Smoley was willing to compromise these achievements as a result of his own character flaws as opposed to his alcoholism is however left unanswered.

The evidence suggests that Mr. Smoley may have been an alcoholic during most of his life given the fact that he began drinking at the age of sixteen yet there

is no evidence his addiction contributed to or caused his criminal conduct. There was no testimony introduced as to whether the use of alcohol had escalated at any point making it more and more difficult for Mr. Smoley to exercise the judgment that would have been required to avoid his present predicament. Neither the family friend who facilitated the intervention nor anyone else who was familiar with Mr. Smoley's business dealings and conduct during the time in question offered to establish the extent to which his addiction propelled his criminal conduct.

The government's investigation of Mr. Smoley's conduct took place during the lapse of a number of years. Yet Mr. Smoley indicated that his alcohol use escalated finally warranting intervention by his family friend approximately one year before the deposition, well into the criminal investigation and well into the time that negogiations were already occurring with the government to resolve the issue.

Thus although Mr. Smoley expressed appreciation for his friend's intervention and his sobriety should be recognized for the accomplishment it represents, it is difficult to discern to what degree it established a direct and casual link to the conduct giving rise to his criminal conviction and tragic ultimate downfall. Without such a connection, disbarment remains the appropriate remedy and there is a failure to overcome the presumption for disbarment. *Contrast, The*

Florida Bar v. Rosen, 495 So. 2d 180 (Fla. 1986) [Rosen was convicted on federal felony charges of knowingly and intentionally possessing cocaine with intent to distribute. The Court described the facts of the case as "illustrating yet another tragedy related to cocaine abuse" and imposed a 3 year suspension.]; The *Florida Bar v. Marcus,* 616 So. 2d 975 (Fla. 1993) [Marcus was suspended for 3 years after conviction of a felony count for misappropriation where cocaine addiction was directly and casually linked to misconduct and Marcus made full restitution before the matter came before a grievance committee]. To rule otherwise would render *any* evidence of an addiction sufficient grounds to overcome the presumption in favor of disbarment for a felony conviction. Given the seriousness of a felony conviction when examining an attorney's qualification for continued membership in the Florida Bar, the referee does not read the Supreme Court's decisions in this manner. *See, Fla. Bar v. Cohen,* 908 So.2d 405 (Fla. 2005); *Fla. Bar v. Cueto,* 834 So.2d 152 (Fla. 2002); *The Florida Bar v. Grief,* 701 So. 2d 555 (Fla. 1997); *The Florida Bar v. Bustamante,* 662 S0. 2d 687 (Fla. 1995); *The Florida Bar v. Insua,* 609 So. 2d 1313 (Fla. 1992); *The Florida Bar v. Marks,* 492 So. 2d 1327 (Fla. 1986); *The Florida Bar v. Hecker,* 475 So. 2d 1240 (Fla. 1985).[2]

It has already been noted that Mr. Smoley's sentence was six months below

[2] The referee notes that although the failure to pay taxes has been held to support disbarment, this factor is not considered as grounds warranting disbarment in this case given the Respondent's assertion that he did not do so on advise on counsel. *The Florida Bar v. Behm,* 41 So.3d 136 (Fla. 2010).

the lower range of the sentencing guideline. Although not granted substantial weight, it is noted that representations were made in federal court that Mr. Smoley had, or would be resigning from the Florida Bar and that his felony convictions warranted the loss of his license thus prohibiting his ability to practice law. Having made these representations in federal court while attempting to negotiate a more favorable sentencing outcome renders Mr. Smoley's assertions rather disingenuous in this forum.

Three precepts should be applied in determining discipline. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and, at the same time, not depriving the public of the services of a qualified attorney due to undue harshness in imposing a penalty. Second, the judgment must be fair to the respondent—sufficient to sanction a breach of ethics and, at the same time, encourage rehabilitation. Third, the judgment must be severe enough to deter others who might be prone to become involved in like violations. T*he Florida Bar v. Adorno,* 60 So. 3d 1016, 1031 (Fla. 2011); *the Florida Bar v. Pahules,* 233 So. 2d 130, 132 (Fla. 1970). I find that disbarment in this case meets these precepts.

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. Disbarment effective, nunc pro tunc, June 2, 2011 (the effective date of respondent's suspension).

B. Additionally, respondent shall pay the bar's reasonable costs in the disciplinary proceedings.

VII. PERSONAL HISTORY, PAST DISCIPLINARY RECORD AND AGGRAVATING AND MITIGATING FACTORS

Prior to recommending discipline pursuant to Rule 3-7.6(m) (1) (D), I considered the following personal history of Respondent, to wit:

A. Respondent is 60 years old. He was admitted to The Florida Bar on June 16, 1978.

B. Respondent received a grievance committee admonishment on March 4, 1996 for violation of Rules Regulating the Florida Bar 3-4.3 and 4-8.4(c). As shown by bar exhibit 8, the prior disciplinary proceeding concerned respondent's plea of nolo contendere to one misdemeanor count of Removing Property Subject to Lien Beyond County Limits. Pursuant to Standard 9.22 of the Florida Standards for Imposing Lawyer Sanctions, a finding of minor misconduct shall not be considered in aggravation after 7 or more years in which no

disciplinary sanction has been imposed. Accordingly, while I note this prior discipline, I am not considering it in aggravation.

C. In aggravation, I find Standard **9.22(b)** dishonest or selfish motive. The Respondent was ordered to forfeit his interest in over 48 million dollars representing the gross deposits from the drug conspiracy as shown by bar exhibit 7, page 7. He used an alias, Ryan Sherman, during negotiations with persons he thought were wholesale suppliers of drugs.

D. In aggravation I find Standard **9.22(c)** a pattern of misconduct. The Respondent's conduct was not a single act nor did the conduct occur over a short period of time. Through Mr. Smoley's various internet businesses, he was responsible for the distribution of over 7 million units of controlled substances that were distributed without valid prescriptions and without any legitimate medical purpose using a number of websites in connection with his businesses. In the process of conducting his businesses, he deposited approximately $48,359,345.67 in gross revenue into accounts located throughout the U.S. and moved money among those accounts in order to conceal his profits from his illegal drug trafficking).

E. In aggravation, I find Standard **9.22(d)** multiple offenses. Mr. Smoley as convicted of drug conspiracy and money laundering which would violate multiple Rules Regulating The Florida Bar including 3-4.3, 4-8.4(b) and 4-8.4(c).

F. In aggravation, I find Standard **9.22(i)** substantial experience in the practice of law. Mr. Smoley was admitted to the bar in 1978.

G. In mitigation, I do not find absence of a prior disciplinary record. Respondent has a record, because of his prior misdemeanor and admonishment. I do not find full and free disclosure to disciplinary board or cooperative attitude toward proceedings because Mr. Smoley testified in his deposition that he had no prior disciplinary record and was never charged with a dishonest act. (Deposition p. 41). Given his prior nolo contendere plea and grievance committee admonishment as shown by bar exhibit 8, this testimony was not true. Given that no independent character witnesses appeared to testify to respondent's character or reputation, I do not find good character or reputation in mitigation. Given Dr. Eustace's testimony and the deposition testimony of the Respondent, I find in mitigation that Mr. Smoley does have an alcohol problem. However, I give this factor little weight because Mr. Smoley did not testify that alcohol caused him to commit the felonies in question or that he was under the influence of alcohol during the period of time he distributed controlled substances and engaged in money laundering. I also do not find that Mr. Smoley is remorseful for his actions. His testimony establishes that he attempts disputes the validity of his own sworn statements in federal court and diminishes his involvement in criminal conduct. An individual cannot claim remorse for something that he claims he did not do.

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Fee-rule 3-7.6(q) (1) (I):	$	1,250.00
Investigative Costs (Paid to U.S. Dist. Ct.)	$	27.50
Court Reporters' Fees:		
October 17, 2011	$	110.00
November 8, 2011-Final Hearing	$	160.00
Bar Counsel Travel Costs:		
October 17, 2011	$	71.20
November 8, 2011-Final Hearing	$	44.29
TOTAL ITEMIZED COSTS:	**$**	**1,662.99**

It is recommended that such costs be charged to the Respondent and that interest at the statutory rate shall accrue and that should such cost judgment not be satisfied within thirty days of said judgment becoming final, the Respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

Dated this 6th day of February, 2012.

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ROSA C. FIGAROLA, Referee

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Report of Referee has been mailed to **The Honorable Thomas D. Hall**, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a copy sent in word format by electronic mail to ***e-file@flcourts.org***; and that copies were furnished by regular U.S. Mail to **Richard Baron**, Respondent's counsel, at Richard Baron & Associates, 501 Northeast 1st Avenue, Suite 201, Miami, Florida 333132; **Kenneth Lawrence Marvin**, Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300; and **Ronna Friedman Young**, Bar Counsel, The Florida Bar, Ft. Lauderdale Branch Office, Lake Shore Plaza II, 1300 Concord Terrace, Suite 130, Sunrise, Florida 33323 on this 6th day of February, 2012

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ROSA C. FIGAROLA, Referee