IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

vs.

STEVEN L. SOMMERS

Respondent.

Case No: 67,890, 67,926, 68,641

RESPONDENT'S INITIAL BRIEF

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STATEMENT OF THE CASE

This is a case of original jurisdiction pursuant to Article V Section 15 of the Constitution of the State of Florida.

The instant proceedings are the result of three complaints filed in the Supreme Court alleging 12 counts of misconduct by Respondent. All three complaints were assigned to the Honorable Frances Jamieson, Circuit Judge, for hearing. Final hearing on all three cases was held on May 9, 1986.

Prior to and during hearing, Respondent and The Bar stipulated to virtually all facts alleged and Respondent acknowledged guilt in 10 of the 12 counts alleged by The Bar. On those ten counts, the parties entered into a stipulation as to the disciplinary rules violated and, if appropriate, the amount of restitution Respondent would make to the respective complainant.

On June 20, 1985, the Referee filed a separate report for each of the three complaints brought by The Florida Bar. In case 67,890, (one of the cases Respondent contested) she recommended a private reprimand and six months probation. In cases 67,926 and 68,641, the Referee recommended suspension from the practice of law for six months and thereafter until rehabilitation is proved and that Respondent further receive chemical abuse counseling. The Referee did not specify whether the two six month suspensions were consecutive or concurrent.

In her reports, the Referee found the Respondent guilty of all counts alleged by The Bar except count V (Strickland) of the

complaint filed in case 68,641.

Respondent does not appeal the Referee's findings of fact. He does appeal the discipline recommended by the Referee and asks that this court reject the Referee's recommended discipline and substitute therefore a suspension for 45 days with three years probation.

Throughout this brief, Appellant shall be referred to as either Respondent or Mr. Sommers. Appellee shall be referred to as Complainant or The Bar.

STATEMENT OF FACTS

Between Respondent's answers to The Bar's complaints and requests for admission and the statements made to the court during final hearing, the parties have stipulated to virtually all the facts alleged in The Bar's complaints. To facilitate the court's consideration of this case, the facts of each count is listed below.

Case number 67,890 (Miner). In November, 1982, Irene Miner retained Respondent to handle an age discrimination matter on her behalf. She paid him $900.00 in fees and $60.00 for the cost of filing the action. Respondent filed the suit in the appropriate United States District Court. In January, 1984, defendant's motion for summary judgment was granted. Respondent and Mrs. Miner agreed that an appeal would be filed for a fee of

$750.00.

Respondent filed Ms. Miner's appeal and on August 15, 1984, the Eleventh Circuit Court of Appeals affirmed the District Court's decision.

In approximately September, 1984, Ms. Miner requested the return of various documents delivered to Respondent to assist him in the preparation of her case. Despite several demands from Ms. Miner extending through February, 1985, Respondent did not return any of her documents to her.

Ms. Miner never paid any portion of the $750.00 fee charged for the filing of her appeal.

At final hearing, Respondent argued that the facts of this case did not warrant a finding that he violated DR 9-102 (B) (3) (return of trust property) as alleged by The Bar.

The Referee found the Respondent guilty of the aforementioned disciplinary rule and recommended that he be privately reprimanded and that he be placed on probation for a period of six months.

Case number 67,926.

Count I (Nicholson) In March, 1983, Barry Nicholson retained Respondent to represent him in a labor dispute and paid Respondent a $1,000.00 initial retainer fee. Respondent filed suit on Mr. Nicholson's behalf and initially prosecuted the case in a responsible manner.

In approximately March 1, 1985, having heard nothing from Respondent for a lengthy period of time, Mr. Nicholson began

telephoning and writing Respondent on a frequent basis demanding a status report on his case and the return of certain documents in Respondent's files. Respondent failed to return any of Mr. Nicholson's communications.

Mr. Nicholson's case was still pending in the appropriate court as of the date of final hearing.

The parties stipulated that Mr. Nicholson was entitled to a $500.00 refund of unearned fees.

Count II (Chestnut)

In July, 1984, Respondent was retained by Jeffrey Chestnut to represent him in a proceeding to dissolve his marriage. Mr. Chestnut paid Respondent $400.00 as an advance fee for his services. Other than a meeting with Mr. Chestnut in July, 1985 and gathering information from him pertinent to a financial affidavit, Respondent took no action on Mr. Chestnut's behalf.

Subsequent to being retained by Mr. Chestnut, Respondent moved his law office without notice to his client. Thereafter, Mr. Chestnut attempted to contact Respondent at his old location without success.

Mr. Chestnut's cause of action was not prejudiced by Respondent's neglect. The parties stipulated that he was entitled to a $400.00 refund.

The parties stipulated that Respondent violated various disciplinary rules in this count. However, the Referee listed Disciplinary Rule 7-101 (A) (3) on page 1 of her report relative

this count through typographical error. It should read DR 7-101 (A) (2). In fact, the parties stipulated that Disciplinary Rule 7-101 (A) (3) was not violated.

Count III (Snowe)

In March, 1984, Respondent was retained by Ms. Sandra H. Snowe to represent her in an employment discrimination action against the United States Navy. Upon retaining Respondent, Ms. Snowe paid him a $1,000.00 fee and $150.00 for filing costs. In October, 1984, Respondent filed suit in the appropriate United States District Court. However, Respondent never perfected service of process on the appropriate defendant. On May 6, 1985, Ms. Snowe's case was dismissed without prejudice. However, the time for filing suit has elapsed.

Ms. Snowe had no contact with Respondent subsequent to December 19, 1984 despite her writing letters to Respondent in February, March and April, 1985.

Before the Referee, Respondent stipulated that Ms. Snowe was entitled to Restitution in the amount of $1,000.00.

Case number 68,641.

Count I (Farnham)

In June, 1983, Richard L. Farnham retained Respondent to represent him in an employment dispute with Boeing Services International. Respondent originally filed the case in State court. However, upon defendant's motion, it was removed to United States District Court. On February 17, 1984, that court sent the case back to State court where it was delayed by matters

outside of Respondent's control.

In February and March, 1985, upon defendant's motions, two of the counts of the complaint were dismissed resulting in Respondent's filing an amended complaint in April, 1985. Thereafter, Respondent failed to move the case along and to communicate adequately with his client despite telephone calls and letters that he received from Mr. Farnham.

Mr. Farnham's case has not been prejudiced. The parties stipulated that no refund of fees is warranted.

Count II (Oh)

In January, 1984, Young Hwan Oh, retained Respondent to handle an immigration matter for Mr. Oh. Respondent received $350.00 of a $500.00 fee.

Respondent filed the initial paperwork to obtain the relief sought by Mr. Oh. However, he did not follow up on his application and after June, 1984, Ms. Oh lost contact with Respondent. In July, 1985, Ms. Oh retained other counsel for an additional fee of $800.00 and the relief that she sought was obtained.

Counsel for the parties have stipulated that Ms. Oh is entitled to a $200.00 refund of unearned fees.

Count III (Prothero)

In October, 1983, Sue C. Prothero retained Respondent to handle a wrongful termination of employment case. She paid him an initial retainer of $1,000.00.

After filing a complaint on behalf of Ms. Prothero, in

November, 1984, Respondent attended a preliminary hearing on her behalf. Subsequently, in approximately December of that year Respondent filed an amended complaint. Thereafter, Ms. Prothero received no communications from Respondent despite several attempts to do so.

The parties have stipulated that Ms. Prothero is entitled to a refund of $500.00.

Count IV (Meier)

Respondent was retained by Paul Meier in January, 184 to represent him in a cause of action against Pan American Airways. He paid Respondent an initial retainer of 1,000.00.

After filing suit in the appropriate state court, Respondent successfully resisted defendant's motions to dismiss. In January, 1985, Respondent attended depositions taken by both parties in the action. Thereafter, Mr. Meier's attempts to contact his lawyer were unsuccessful.

In September, 1985, the presiding Judge filed sua sponte a motion to dismiss for failure to prosecute. The court withdrew the motion when it learned that depositions had been taken in January, 1985 in furtherance of Mr. Meier's cause of action.

Mr. Meier has obtained new counsel and his cause of action has not been prejudiced by Respondent's failure to communicate.

The parties have stipulated that Mr. Mier is not entitled to any refund of the fees paid to Respondent.

Count V (Strickland)

The Referee found Respondent not guilty of the charges

filed by The Florida Bar in this count.

In late June, 1985, Respondent was consulted by Cynthia Strickland regarding a sexual discrimination case that she was contemplating. She paid him a $30.00 consultation fee.

Subsequent to their initial conference, Ms. Strickland delivered her file to Respondent for review and to determine if Mr. Sommers would represent her in her case. At the time that the file was delivered to Respondent, the 90 day period in which Ms. Strickland had to file suit had begun to run.

Respondent kept Ms. Strickland's file for approximately 30 days. However, he did not return her numerous telephone calls relative the return of her file. Ms. Strickland was ultimately able to retain her file from Respondent's secretary prior to the expiration of the 90 day suit.

Count VI (Williams)

Respondent represented Earnest Williams in numerous law suits in both State and Federal court. In one of the suits, the case was taken to trial and the presiding magistrate found for the defendant. Mr. Williams then paid $400.00 to Respondent to appeal the magistrate's decision. Respondent did not file the appeal and lost contact with his client after January, 1985. Mr. Williams subsequently obtained new counsel to represent him on appeal. The parties stipulated that the $400.00 paid for the appeal should be refunded.

Count VII (Gunter)

In April, 1984, Jerry Gunter retained Respondent to

represent him in a discrimination case against Coca-Cola Company. Mr. Gunter had previously filed his case personally on January 12, 1984 in United States District Court. Respondent received a fee of $700.00 to prosecute Mr. Gunter's cause of action.

In May, 1984, Mr. Gunter received an order dismissing his case without prejudice. Respondent had not filed a notice of appearance between the time he was retained in April, 1984 and the dismissal order. When he contacted Respondent relative the dismissal, Mr. Gunter was told that Respondent could refile the case since it was dismissed without prejudice. Thereafter, however, Respondent did not file a new suit and Mr. Gunter's cause of action is now barred.

The parties stipulate that Mr. Gunter is entitled to a refund of $700.00.

Count VIII (Branson)

In August, 1984, Daniel L. Branson retained Respondent to represent him in an employment dispute with the United States Postal Service. He paid Respondent $1,000.00 as an initial fee. On August 22, 1984, Respondent filed a complaint in the United States District Court. On February 11, 1985, the court directed plaintiff to show cause why the action should not be dismissed without prejudice for failure to perfect service of process. Respondent responded to the Show Cause Order on February 26, 1985. Approximately one month later, defendant filed a motion to dismiss for improper service of process. Respondent did not respond to that motion. Thereafter, Respondent did no further

work on the case resulting in dismissal of Mr. Branson's cause of action.

Because the appropriate filing deadlines have passed, Mr. Branson's cause of action is now barred.

The parties have stipulated that Mr. Branson is entitled to a refund of he entire $1,000.00 that he paid to Respondent.

Other than Respondent, the only witnesses that testified at final hearing in the disciplinary case were three individuals that Respondent called to present evidence in mitigation of discipline.

The first witness to testify was Dr. George Von Hilsheimer, a licensed psychologist with a Ph.D. in that field. Dr. Von Hilsheimer has been treating behavioral disorders, including persons involved in substance abuse, since 1957. He testified that Mr. Sommers first came to him on June 5, 1985. Dr. Von Hilsheimer diagnosed Mr. Sommers as suffering from severe depression with substance abuse causing complications (TR 28). At that time, Dr. Von Hilsheimer did not feel that the substance abuse was Mr. Sommers' primary problem. After approximately one month of treatment Mr. Sommers broke off the relationship and did not reappear until October, 1985 (TR 31).

Dr. Von Hilsheimer testified that he felt that Respondent's chemical dependency was an attempt at self-treatment (TR 31) and initially he did not feel like any institutional drug treatment was necessary. When Mr. Sommers reappeared in October, however, Dr. Von Hilsheimer referred Respondent to an expert on substance

abuse who determined that Respondent's condition was approaching a "terminal stage" (TR 34). Subsequently, in January, 1986, Respondent entered Brookwood Rehabilitation Center for six weeks in-house treatment. Upon Respondent's discharge in February, Dr. Von Hilsheimer has been seeing Respondent on a weekly basis.

Dr. Von Hilsheimer testified that Respondent would be able to handle a law practice and that his prognosis for recovery is good (TR 36-37). Dr. Von Hilsheimer based his prognosis on his 85% success rate over a 30 year period (TR 38).

During cross examination, Dr. Von Hilsheimer testified that Respondent has always appeared for his appointments and that Dr. Von Hilsheimer had no questions about his judgment or his ability to follow through on decisions (TR 41). He also testified that after 12 or 13 weeks of treatment (respondent was past that point at the time of final hearing) that the success rate for people such as Respondent was up to 70% (TR 44).

Respondent's second witness was Judith L. Leeper, a counselor at the Brookwood Recovery Center. She was Respondent's counselor while Respondent was residing in Brookwood. She testified that Respondent's initial diagnosis was chemical dependency and that it had progressed to the chronic stage (TR 50). She testified that Respondent participated in educational sessions and that, after a time, came to completely accept the fact that he was addicted to drugs. Ultimately, Respondent wholeheartedly accepted the AA and NA precepts and became an enthusiastic participant in those programs (TR 52-53).

After Respondent's discharge on February 26, 1986, he continued with the Brookwood after care program and weekly AA or NA meetings.

Ms. Leeper testified that she would have no problem referring clients to Respondent for representation.

Respondent's final witness was Samuel A. Bradshaw, Jr. Mr. Bradshaw testified that he had known Respondent for only three or four months and that he met him through the Brookwood after care program. Mr. Bradshaw is the facilitator (moderator) for Mr. Sommers' after care group and that through their weekly meetings, Mr. Bradshaw had observed Respondent's wholeharted participation in the program.

Mr. Bradshaw testified that several weeks prior to final hearing he had retained Mr. Sommers to represent Mr. Bradshaw in a modification action brought by Mr. Bradshaw's ex-wife. Respondent had attended final hearing on the matter and obtained a decision favorable to his client. Mr. Bradshaw testified that he was very pleased with Respondent's services, that Respondent dealt with his case in a competent and professional manner and that he would have no reservations about referring others to Respondent for legal help (TR 64).

Finally, Respondent testified on his own behalf. He was admitted to The Florida Bar on May 31, 1977 after graduating with honors from The University of Florida Law School in December, 1976. While at law school, Respondent was a member of the Law Review and had two works published by the University of Florida

Law Review.

Respondent initially worked for the National Labor Relations Board in Tampa, Florida. In February, 1981 he left the NLRB to work for a law firm in Memphis, Tennessee. In October, 1981, Respondent left Memphis and moved to Orlando to enter the private practice of law.

In August, 1984, the office sharing arrangement that he had with two other lawyers broke up and he became in-house counsel for the Hotel Employees and Restaurant Employees International Union in Orlando, Florida. From that date until final hearing, he was the sole in-house counsel for that union. His employment agreement allows him to take private clients.

Respondent testified that while residing at Brookwood he was allowed to leave to attend a previously scheduled arbitration hearing for a union employee. The matter was satisfactorily resolved.

Respondent also testified that he had never had any disciplinary problems with The Florida Bar prior to this series of cases (TR 71). He explained that he had always prided himself on his professionalism and that it was not until August, 1984 that his professionalism began to diminish. He attributed this degredation of his practice to his beginning to use drugs on a "recreational" basis in April, 1984. By August, that use exceeded a recreational basis and began to affect his ability to reason and his judgment. He testified that it "led to an obvious lack of representation of my clients and diligence in my

practice" (TR 72).

Respondent testified that alcohol was not a factor in his dependency at all.

Respondent's use of drugs initially affected him only to the extent that he would put off his clients' matters until the last minute (TR 73). Up until early 1985, Respondent testified that he would go into his office on a daily business and take care of matters at the last minute. However, after that point in time, his practice "just feel into disarray" (TR 73).

Although initially Respondent answered correspondence from the Bar, in approximately March, 1985, he ceased opening correspondence from The Florida Bar because he "knew that it was bad" news (TR 76).

Respondent first sought help from Dr. Von Hilsheimer in June, 1985 and saw him for about a month. In August, 1985, Respondent ceased the use of drugs and for approximately three weeks was able to do so. However, his abstinance ceased and in October he returned to Dr. Von Hilsheimer's care.

Respondent testified that other than the Miner count, he waived probable cause on all matters brought by The Florida Bar. He appeared before the grievance committee at one point in time and voluntarily admitted to the committee the nature of his problems (TR 77-78). On January 13, 1986, four days before he checked into Brookwood recovery center, Respondent ceased the use of drugs and has abstained from its use since that date. He was discharged on February 26, 1986 and incurred a bill of $9,416.00

for his treatment (TR 80).

Respondent testified that he is attending NA on at least a weekly basis plus he is attending weekly meetings in Brookwood's after care treatment program. He is also seeing Dr. Von Hilsheimer or one of his associates weekly (TR 81).

Respondent acknowledged to the Judge that his problems with The Bar are completely his fault and that he is responsible for his problems (TR 82). He acknowledge the propriety of these disciplinary proceedings and understands that discipline is appropriate. As he put it,

> The Bar entrusted me and held me out to the public as a competent practicing attorney, and somehow I have got to earn that trust back. Thats what I have to do. It should not be given to me; I have to earn it back. (TR 82)

Respondent has embraced the 12 steps of treatment of the AA and NA program and acknowledges that one of those steps is making amends to those that he has wronged. Respondent testified that his financial status at the time of the final hearing was "quite negative" (TR 83), and that he may have to declare bankruptcy (TR 84). He testified that if he resorts to bankruptcy that none of his obligations to his clients will be discharged. He then stipulated to those clients to whom restitution would be appropriate.

Respondent testified that he is no longer involved in the "so called drug scene" and those friends with whom he had associated during his use of drugs. He testified that he is

currently opening his mail and answering his phones and that his housekeeping and personal habits have changed for the better (TR 87-88). He further testified that he now understands that during the period that all of his grievances arose, rather than trying to deal with his problems, he was trying to avoid them (TR 88).

Respondent has managed to maintain his part-time job as in-house counsel with the union. The controlling personnel at the union are aware of his problems and are very supportive of his efforts to combat his dependency. Not only have they failed to voice any dissatisfaction with his performance, they have been very pleased with his services (TR 89).

SUMMARY OF ARGUMENT

Respondent is a young, bright lawyer who practiced law without problems from May, 1977 until approximately April, 1984. From them until early summer 1985 his practice deteriorated to, as he now knows, drug dependency.

Respondent initially failed to work with The Florida Bar in its investigation. In fact, he did not appear at the probable cause hearing held on the first complaint brought against him. However, in late summer 1985, he grabbed hold of his life and recognized his errors. Thereafter, he waived probable cause hearings on the remaining 11 counts against him and appeared before the grievance committee and candidly apprised them of the nature of his problem.

At final hearing before the Referee, Respondent admitted guilt to 10 of The Bar's 12 charges and stipulated to the disciplinary rules violated in each of those 10 counts. He also stipulated to the amount of restitution owed to those clients entitled to a refund. Respondent's admissions and stipulations obviated the necessity of The Florida Bar putting on evidence. Respondent did testify on his own behalf as to mitigation and he also presented three witnesses to testify as to his rehabilitation from drugs.

The Referee absolved the Respondent of guilt on one of the two counts which Respondent contested. She recommended a private reprimand on the other contested count.

Despite Respondent's prior clean record, his cooperation

with The Bar, his admission of misconduct and his obvious repentence, Bar Counsel asked for a one year suspension from the practice of law with reinstatement to be predicated upon proof of rehabilitation--a factor adding another 6 to 12 months to Respondent's penalty.

Respondent argues to this court that a six month suspension is unduly harsh in light of The Bar's acceptance of consent judgments for public reprimands and probation for exactly the same offenses in, this court's orders for similar transgressions, the fact that six months suspensions have been handed out by this court only for far more serious offenses or where there has been repeated misconduct extending over a long period of time, and particularly, in light of Respondent's acceptance and treatment of his drug dependency problem and his prior clean record.

The Bar's position in this case is contrary to the philosophy expressed by this court by The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985) wherein this court rejected The Bar's recommendation of a suspension of 3 months and 1 day and imposed, instead, a public reprimand. In that opinion, the court rejected The Bar's contention that alcoholism should not be considered in mitigation of discipline. Respondent argues that The Bar is being unfair in his case just as it was in Headley. Once again, The Bar is seeking an unrealistically stearn discipline and is arguing that a chemical dependency treatment program should not be considered a material mitigating factor.

In other words, despite this court's firm pronouncement in

Headley, The Florida Bar is still unwilling to work with its members that have chemical dependency problems.

Respondent asks this court to substitute for the referee's recommended discipline a suspension from the practice of law for 45 days with automatic reinstatement to be followed by probation for three years similar to that imposed in the Headley case.

ARGUMENT

SUSPENSION FROM THE PRACTICE OF LAW FOR 45 DAYS WITH AUTOMATICE REINSTATEMENT AND PROBATION FOR THREE YEARS WITH QUARTERLY CASE LOAD REPORTS, MANDATORY WEEKLY NA OR AA ATTENDANCE AND RESTITUTION TO CLIENTS IS THE APPROPRIATE DISCIPLINE TO BE ENTERED FOR RESPONDENT'S NEGLECT OF HIS CLIENT'S CASES.

Respondent comes before this court fully aware that his misconduct warrants stern discipline. He has been found guilty, in essence, of 11 counts of neglect covering a one year period. He realizes that a reprimand is not in order and accepts the fact that he will be suspended from the practice of law.

Respondent asserts that the Referee's recommendation of six months suspension is unduly harsh in light of Respondent's (1) prior unblemished record; (2) cooperation with The Bar and admission of guilt; (3) his treatment for the drug dependency that lead to his misconduct; (4) his remorse and repentence; and (5) the fact that all of his transgressions were basically neglect and occurred within a 12 month period.

Respondent asks this court to set aside the Referee's recommended discipline and to substitute a 45 day suspension with automatic reinstatement followed by probation for three years. Conditions of probation could include quarterly case load reports, total abstinance from drugs and mandatory weekly attendance at Alcoholics Anonymous (AA) or Narcotics Anonymous (NA) meetings. Finally, whether it is a condition of probation or not, Respondent intends to make restitution to those clients to whom a refund of

fees is appropriate.

Adopting Respondent's suggested penalties will fulfill the three purposes of discipine as enunciated in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) at page 132. There this court said

> In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

An examination of Respondent's proposed discipline shows that it meets all three criteria mentioned above. First and primary in disciplinary proceedings, is the protection of the public. Respondent asserts to this court that stringent probation would provide this court with the guarantees that it needs to ensure the public that Respondent shall not neglect his client's legal matters in the future. While Respondent practiced law without problems for seven years, he recognizes that his lapses during a one year period leaves him with the burden of showing that he can once again be trusted with his client's affairs.

Dr. Von Hilsheimer, Ms. Leeper and Mr. Bradshaw have all

testified that they would have no reluctance in referring clients to Respondent. While their testimony is persuasive, there is no empirical data on which such a recommendation can be supported. Three years probation with quarterly case load reports, mandatory NA or AA counseling and complete abstinance from drugs will give this court the data that it needs to certify Respondent as a fit and able practitioner. Should Respondent violate his probation, he recognizes that stern sanctions would be appropriate.

In imposing discipline, this court should keep in mind that Respondent's transgressions all involved a failure to attend to his clients' affairs and did not involve any dishonesty or improper motive. Despite the plethora of discipline rules listed, Respondent's offense can be fairly summarized as neglect.

Also significant is the fact that Respondent's misconduct occurred within a relatively tight period and was directly attributable to his drug dependency problem. The underlying basis of Respondent's misconduct has now been determined and treated. There is no evidence before this court that his transgressions shall be repeated in the future.

To suspend Respondent for six months as the Referee recommends, or for one year as The Bar demands, falls squarely within the category of a discipline involving "undue harshness"- a situation to be avoided according to Pahules. Furthermore, when the six months to one year period that reinstatement takes is added to the discipline, Respondent has been removed from the practice of law for such a long period of time that he will be

forced to completely start over again as a lawyer. Such a penalty is too harsh for neglect.

Respondent is no threat to the public. A short suspension followed by a three year supervision period will guarantee the public the dedicated service it is entitled to receive.

The second Pahules factor is the fairness of the penalty to the accused lawyer. The discipline imposed should be "sufficient to punish ... and at the same time encourage reformation and rehabilitation". Pahules, supra.

This court started in The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982) on page 1081 that:

> In those cases where alcoholism is the underlying cause of professional misconduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline.

The same philosophy should be extended to those lawyers dependent on drugs.

Despite the Larkin decision in 1982, in 1985 The Florida Bar was once again arguing that chemical dependency should not be a mitigating factor in imposing discipline. In The Florida Bar v. Headley, 475 So.2d 1213 (Fla. 1985) this court rejected The Florida Bar's demand that a lawyer whose misconduct was a result of alcoholism should be suspended for three months and one day. Rather than any suspension, this court imposed a public reprimand and probation.

Respondent asks this court to give him the same chance for

rehabilitation that it gave to Mr. Headley. He has acknowledged his dependency on drugs, has spent six weeks in a treatment center for his dependency and, since February, 1986, has engaged in treatment at least three times a week including complete participation in the NA program. To suspend Respondent for six months as recommended by the Referee is unduly harsh and emphasizes retribution rather than rehabilitation.

In considering the fairness of the recommended discipline to the Respondent, this court should also keep in mind that the Bar has an obligation to its members at large who are dependent on drugs. Although The Bar in the case at hand is emphasizing an unsympathetic, punitive sanction, its official news organ is reporting just the opposite. In the February 1, 1986 edition of The Florida Bar News (Exhibit A in the appendix) the headlines announced that the Board of Governors approved the Articles of Incorporation of a corporation named Florida Lawyers Assistance, Inc.

FLA, Inc. is to be the first corporation in the country whose sole purpose is to help lawyers overcome drug and alcohol problems. A board member is quoted in the Bar News as saying the purpose of the corporation is to help lawyers "clean up their act before they get in trouble with the grievance committee". Obviously, Respondent is already in trouble with the grievance committee and the corporation being formed by The Florida Bar can help him only in the manner in which it is helping Mr. Headley, i.e., serving as a probation officer. But, arguing in

Respondent's case that lawyers with drug dependency problems who have already engaged in unethical conduct will receive a harsh penalty despite their subsequent rehabilitation is contrary to the philosophy expressed by the Board in their announcement of the formation of FLA, Inc. In other words, it does a lawyer no good to "come in out of the cold". In the case at hand, the Bar is arguing that it doesn't do any good to cooperate with The Bar, to go before the grievance committee and be candid with your problem, and to seek expensive rehabilitation. The Florida Bar will treat you harshly whether you do it or not.

Respondent demands that The Florida Bar take a consistent posture on lawyers with chemical dependency problems. That posture should be assisting and encouraging lawyers to undergo treatment and rehabilitation.

Finally, this court must consider the deterrent effect of any discipline imposed. Suspension from practice for 45 days, with the attendant publicity and the required mailing of a copy of the order to all clients is not a slap on the wrist. Respondent will lose salary and face and will have to experience the opprobrium of his peers. Such an experience will be a deterrent to many lawyers standing by itself. When the suspension is coupled with a three year probation, however, it extends the penalty imposed against Respondent to one of long standing duration.

Lest the Bar argue that Respondent is getting off lightly, consider the fact that he has had virtually no practice for over one year and has had to expend considerable sums (over $9,000.00)

on his rehabilitation program. The financial penalties resulting from his misconduct are substantial and should deter other lawyers who contemplate similar conduct.

The Florida Bar may argue that long term suspension is necessary to deter other lawyers. However, such a philosophy did not bother them when they recommened a public reprimand in the case of The Florida Bar v. Long, 486 So.2d 591 (Fla. 1986). There, Respondent received a public reprimand for nine counts of misconduct involving neglect, excessive fees, and various trust accounting provisions. Mr. Long and The Bar acknowledged that his misconduct was the result of a serious alcohol problem and, in addition to the public reprimand, agreed to three years probation with verification of his continued voluntary acohol rehabilitation.

Respondent recognizes a material difference between his case and Long in that restitution was made to all of Mr. Long's clients and, apparently, there was no prejudice. It is in light of those factors that Respondent acknowledges that a public reprimand is not appropriate and he understands that a suspension is appropriate. A copy of the Long order and the Referee's Report and Consent Judgment are attached to this brief as Respondent's Exhibit "B".

Consistent with Long is The Florida Bar v. Ehrlich, 485 So.2d 417 (Fla. 1986). There, Mr. Ehrlich received a public reprimand and two years probation requiring monthly urinalysis during the first year and bi-monthly urinalysis the second year. Failure to

submit to the urinalysis or a finding that he is engaged in alcohol or drug abuse will form a basis for the termination of probation. While the court's order does not specifically note that Mr. Ehrlich had a drug dependency problem, the urinalysis leads one to that conclusion. Mr. Ehrlich was also required to make restitution to three clients for sums totalling almost $1,500.00.

Respondent cannot explain to this court why Long and Ehrlich received public reprimands by consent from The Florida Bar and Respondent's similar situation warrants a six month suspension.

Another recent case that is inconsistent with The Bar's posture in the case at bar is The Florida Bar v. Garcia, 485 So.2d 1254. There, the Referee found the Respondent guilty of six counts of misconduct involving improper fees, neglect, improper withdrawal and trust accounting violations. The Bar argued that a 60 day suspension was necessary to adequately deter others. This court rejected The Bar's position and ordered a public reprimand with two years probation.

Respondent recognizes that while his misconduct is similar, it is in fact somewhat more egregious than Mr. Garcia's. However, a 45 day suspension and three years probation is a materially harsher discipline than a public reprimand.

Respondent argues that a six month suspension should be reserved for cases involving more serious misconduct or a pattern of misconduct extending over several years. For example, in The Florida Bar v. Gillin, 484 So.2d 1218 (Fla. 1986) an attorney

received a six month suspension for stealing from his law firm. Similarly, in The Florida Bar v. Dancu, 490 So.2d (Fla. 1986), a lawyer received a six month suspension or misappropriation of trust funds.

Respondent argues to this court that his misconduct, involving primarily neglect, even without mitigating factors does not warrant a six month suspension. But when this court considers the various mitigating factors mentioned above, it becomes apparent that a suspension of short duration not involving proof of rehabilitation is appropriate. Respondent recognizes his wrong-doing. He is well on the road to rehabilitation. He has suffered both physically and mentally for his misconduct and is contrite and remorseful. He made the following statement to the Referee at final hearing

> I'd only like to say to the court, to your Honor, Mr. Root, to The Bar, it's been a very difficult two, three years of my life. I want to apologize to the court and to The Bar, to my clients. Part of the NA, AA program is to admit and to try to rectify the problems that you caused while you were incapacitated, and I hope to be able to do that as much as I can and I will strive to do that.
>
> I have hurt my clients; I have hurt the public image of The Bar; and I want to apologize and do everything I can to try and rectify that. And I hope to attempt to earn the court and the Bar's trust back again. (TR 126).

To suspend Respondent for a long period of time is nothing more than emphasizing the punitive nature of disciplinary proceedings and to deny rehabilitation. Respondent asks for one

more chance. To suspend him for a year to two years (when one considers the normal duration of reinstatement proceedings) is denying him the opportunity to pull his life together.

CONCLUSION

Respondent asks this court to enter an order of discipline consisting of 45 days suspension with automatic reinstatement and three years probation including quarterly case load reports, mandatory weekly NA attendance and abstinance from drugs and to reject the Referee's three recommendations of discipline consisting of a private reprimand in case 67,890, a six month suspension in 67,926 and a six month suspension in case 68,641.

RESPECTFULLY SUBMITTED this 3rd day of September, 1986.

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CERTIFICATE OF SERVICE

I **HEREBY CERTIFY** that the original and seven copies of the foregoing Brief and Appendix has been hand delivered to the Supreme Court and that a copy was mailed to JOHN B. ROOT, JR., Bar Counsel, The Florida Bar, 605 E. Robinson Street, Suite 610, Orlando, Florida 32801 on this 3rd day of September, 1986.

JOHN A. WEISS