IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

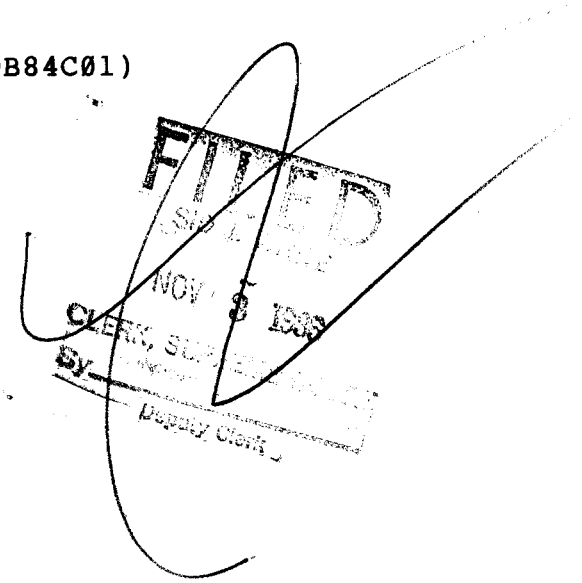
v

MICHAEL J. JAHN,

Respondent.
_____/

CASE NO: 68,279

(TFB #09B84C01)



RESPONDENT'S ANSWER BRIEF

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SYMBOLS & REFERENCES

Respondent will refer to the Appellant in these proceedings as Complainant or The Bar. Appellee shall be referred to as Respondent.

References to the transcript of final hearing will be designated by the abbreviation TR followed by the appropriate page number. References to the Referee's report shall be designated by the symbol RR followed by the appropriate page number.

STATEMENT OF THE CASE

Respondent accepts the Bar's statement of the case with the following modifications.

This is a case of original jurisdiction before this court pursuant to Article V, Section 15 of The Florida Constitution.

On page two of the Bar's brief it is mistakenly stated that subsequent to the Referee's order in favor of Respondent's Motion in Limine, the Bar filed an amended complaint. In fact, the Bar filed an amended complaint after the Referee granted Respondent's Motion to Strike the original complaint.

The grounds for Respondent's motion to strike were that the Bar's complaint contained such inflammatory and immaterial allegations that the only alternative available to the Referee was striking the complaint in its entirety.

Subsequent to the Bar's filing its amended complaint, Respondent filed a Motion in Limine which was denied by the Referee.

STATEMENT OF THE FACTS

While Respondent has no quarrel with the accuracy of the Bar's statement of facts, he feels that the facts involved in this case need to be more thoroughly addressed.

A. Respondent's Criminal Convictions.

On May 24, 1984, Respondent was charged in a two count information with possession of cocaine and possession of paraphernalia for events that happened on the night of February 3, 1984. On July 20, 1984, a second information was filed charging Respondent with three counts of criminal conduct including delivery of cocaine to a minor, possession of cocaine and child abuse for conduct that took place on June 21, 1984.

No other criminal charges have ever been filed against Respondent.

Respondent ultimately pleaded no contest to possession of cocaine on the first information filed and delivery of cocaine to a minor on the second. He was adjudicated guilty in May, 1985 and on June 12, 1985 he was automatically suspended from the practice of law pursuant to Rule 11.07 of the Integration Rule of The Florida Bar. On June 17, 1985, he was sentenced to four and one-half years concurrent sentences on each count, the maximum sentence available to the judge under the guidelines.

B. The Referee's Report.

After observing that the case at bar "is a difficult, troublesome case involving a drug-impaired professional" (RR 1)

the Honorable William A. Norris, Jr. made extensive findings of fact in a seven page report. Judge Norris, who is eminently familiar with disciplinary proceedings, recommended three years suspension as the appropriate discipline. In so doing, he rejected the testimony of the Bar's only two witness as being unworthy of belief.

In The [redacted] incident, (the case involving the delivery of cocaine to a minor), the Referee made the following finding:

> I find that to the extent [redacted]s testimony conflicts with Respondent's testimony and the testimony of Julia Harden Mitchell (TR 63-130) whose testimony I find to be especially believable, [redacted]s version of the incident is highly unreliable and worthy of little weight. Thus, I find, based on my personal observations of the appearance and demeanor of the witnesses, that:
>
> (1) The cocaine was in the original possession of [redacted] not the Respondent; and
>
> (2) [redacted] was a willing participant in the injection of cocaine into her body; and
>
> (3) No force was used (RR 3).

The Referee found that [redacted]'s testimony regarding the events that occurred on the night of February 3, 1984, (the possession conviction) and the two weeks prior to that date, could be characterized as "extremely difficult to believe" (RR 3). He further found that:

To the extent that her testimony conflicts

> with Respondent's testimony and the testimony of the other witnesses I elect to rely on and believe the other witnesses. [redacted]'s testimony does not have "the ring of truth." It simply does not smell right. Thus, I find, based on my personal observations of the appearance and demeanor of the witnesses that:
>
> (1) [redacted] was a willing participant in the injection of cocaine into her body; and
>
> (2) No force was used (RR 3).

Judge Norris then considered Respondent's background, his dependency on cocaine, the consequences of his dependency, his rehabilitation and his remorse for his acts. After consideration of all the witnesses' testimony, Judge Norris made the following findings of fact:

> With regard to Respondent's testimony, I find him to be extremely candid and forthcoming in discussing his addiction and in accepting ultimate responsibility for his conduct. He is indeed remorseful. This candor is, for example, a refreshing contrast to the attitude exhibited by a Respondent in a recent case also heard by the undersigned. See The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985).
>
> Based on the testimony of the above witnesses, I make the following findings:
>
> (1) At all times material to The Bar's complaint, Respondent was addicted to cocaine;
>
> (2) That Respondent's acts underlying the criminal conduct for which he was convicted were caused by and directly attributable to his cocaine addiction;
>
> (3) That from August 1984 through

> the date of the hearing Respondent has lived a drug and alcohol free life;
>
> (4) That Respondent is medically classified as a recovering addict;
>
> (5) That the treatment plan and recovery prognosis for individuals addicted to alcohol and individuals addicted to cocaine is identical;
>
> (6) That Respondent's addiction involved neither the practice of law nor his clients. (RR 5)

In Section V of his report, the able and experienced Referee extensively discussed his reasons for the discipline that he recommended in this case. After observing that there was no "rational distinction between alcohol addiction and cocaine addiction" (RR 6) and that members of The Bar who are recovering alcoholics should be treated in the same manner as those recovering from cocaine addiction, the Referee made the following statements:

> Are those of our profession (such as the Respondent) who have succumbed to the lure and temptation of a so-called "safe" recreational drug, so unworthy of compassion and understanding, is their addiction so reprehensible, that our profession is justified in casting them from our midst with the stigma of the ultimate penalty--disbarment? I think not!
>
> With respect to this case, there is no competent evidence before me that Respondent's cocaine addiction adversely impacted any of his clients or that his drug involvement was for pecuniary gain. There is, of course, ample evidence that his

> cocaine - induced conduct reflected adversely on the public image of The Bar and on the Respondent individually. For his drug-induced conduct he has paid a very high price. He and his family have been the subject of extensive media attention. He is a twice convicted felon, he has been incarcerated in the state prison system, and he has been suspended from the practice of his profession. I believe that he has been punished enough. (RR 6)

C. The [redacted] [redacted] Incident.

Respondent pleaded no contest to the charge of delivery of cocaine to a minor. The gravamen for the charge was Respondent's injection of [redacted] [redacted] with cocaine - an act Respondent admitted doing (TR 292). The injection took place in the employees bathroom in an Eckerds Drug Store.

At the time of the incident described above, [redacted] was 15. The Referee found that Respondent should have known that she was under the age of 18. He did have doubt, however, whether it was apparent that she was merely 15 years old (RR 3).

Despite her minority, Ms. [redacted] had already started drinking alcoholic beverages to the point of intoxication and illness (TR 30), she smoked marijuana (TR 33) and she had seen other people do cocaine (TR 14). Her boyfriend in June 1984, at some point subsequent to the incident involving Respondent, checked himself into a drug rehabilitation center (TR 28). In June 1984, having completed the eighth grade, [redacted] [redacted] had already been suspended from middle school for smoking cigarettes

(TR 26) and had made virtually all D's the school year prior to that summer. The subsequent school year she dropped out of school.

Mrs. Julia Harden Marshall (Respondent's girlfriend in 1984 and now married and residing in Wyoming) testified that she and Respondent were driving together when they met Ms. [redacted] on June 21, 1984. Mrs. Marshall and Respondent both testified that Ms. [redacted] was hitchhiking along a highway on an afternoon when it was about to rain (TR 184, 285). Ms. [redacted] testified that she was on her way to visit her boyfriend and was wearing short shorts, a half-shirt and no bra. She denied hitchhiking.

After Ms. [redacted] got into the car, Respondent asked her if she would like to stop at T.G.I.Friday's, the restaurant and bar to which Respondent and Mrs. Marshall were going. Ms. [redacted] willingly and enthusiastically ("I wanted a drink") went into Friday's with the couple (TR 30).

Ms. [redacted] testified before the Referee that Respondent and his girlfriend knew her age prior to entering Friday's. However, during cross-examination, she acknowledged that during deposition on August 24, 1984 she testified that she could not remember whether she had told Respondent her age (TR 29, 30). Respondent and Mrs. Marshall were consistent in their testimony that Respondent asked Ms. [redacted]s age and she acknowledged that she was 19 years old (TR 186, 286). All the parties agreed, however, that when the bartender asked Ms. Stepp for identification proving her age, that she did not tell him that

she was not old enough to be served alcohol.

Respondent testified that shortly after their drinks were served, he learned that Ms. [redacted] possessed some cocaine (TR 287). He immediately suggested that the three of them leave the bar. Although Ms. [redacted] intimated to the referee that she reluctantly left with Respondent and his girlfriend, she never refused to leave with them. Nor did she make any attempt to continue to her boyfriend's house, which was only a five minute walk away (TR 31-33).

The three of them drove to an Eckerd's drugstore and Respondent and Ms. [redacted] went inside to buy syringes. Once inside the store, all parties agree that Ms. [redacted] was asked by Respondent to go back outside to the car to get his wallet. After searching the car, Ms. [redacted] returned inside the store and told Respondent that she could not find it. He then went outside, leaving her alone in the store for approximately ten minutes (TR 39). Although there were employees and customers in the store, and although Ms. [redacted] was unattended, at no point did she ask any individual for assistance or in any way indicate that she was in any distress (TR 39).

Upon returning to the store, Respondent bought the syringes and he and Ms. [redacted] went into the employees' bathroom in the back of the store (TR 40). While in the bathroom, Respondent injected himself and [redacted] with cocaine (TR 291, 292).

While Respondent and Ms. [redacted] were in the bathroom, an

individual (whom they later learned was a policeman) knocked on the door and asked if everything was alright. Respondent advised the individual knocking that he was feeling ill. Ms. [redacted] did not indicate her presence in the bathroom (TR 43). She also acknowledged that she could have yelled while in the bathroom, that Respondent never physically or verbally threatened her, and yet she did not call for help (TR 43, 44).

Ms. [redacted] testified that she did not know the source of the cocaine, that Respondent injected her against her will and that at some point in time Respondent rubbed her body with cocaine (TR 17-19). Respondent denied all three statements and particularly denied rubbing cocaine on Ms. [redacted]'s body with the statement that at that point in time he was more interested "in putting cocaine in my arm than rubbing it on people's bodies" (TR 292).

Ms. [redacted] also testified that while she was in the bathroom, and while Respondent was filling syringes prior to giving the injections, the door to the bathroom "was unattended" (TR 41).

Some time after the individual knocked on the door, Ms. [redacted] left the bathroom and immediately saw a policeman. When he asked her if there were any drugs in the bathroom, she said no (TR 45). It was not until she was told that she was going to Juvenile Court and was read her Miranda rights that she admitted that there were drugs in the bathroom (TR 45).

Ms. [redacted] testified to the Referee that later on that

night she gave a taped statement to police officers. She acknowledged to the Referee that she did not make any mention about being rubbed with cocaine during the taped statement (TR 46). She also told the Referee that she did mention during the taped statement that she had had a drink in Friday's earlier that day. However, on cross-examination, she acknowledged that during deposition she had answered under oath that she had not told the police about either the cocaine rubbing or the drink at Friday's (TR 46).

Ms. [redacted] acknowledged to the Referee that she did not see fit to tell her entire story until after the Assistant State Attorney prosecuting the case told her about Respondent's being in trouble with "some girl in a hotel" (TR 48).

When asked why she lied to the police officers, Ms. [redacted] testified that she was "scared I was going to get in trouble" and "I thought that my mom was going to beat me when I got home" (TR 20). She acknowledged that when her parents arrived at Eckerds, her "stepfather got mad, and my mom was standing there looking like she was freaking out" (TR 21).

D. The [redacted] Incident.

Although the events of the night of February 3, 1984 only resulted in a conviction of possession of cocaine (in the second count of that information he was charged with possession of paraphernalia), The Florida Bar presented testimony from Respondent's date on that night, [redacted], under the guise of background information relating to the charge. Ms. [redacted]

although no such charges were ever brought, alleged that Respondent injected her with cocaine against her will. The Referee rejected Ms. [redacted] testimony after finding it "extremely difficult to believe" and observing that [redacted]'s testimony does not have `the ring of truth'" (RR 3). The Referee further observed that:

> To the extent that her testimony conflicts with Respondent's testimony and the testimony of the other witnesses, I elect to rely on and believe the other witnesses (RR 3).

The Referee then specifically found, based on his "personal observations of the appearance and demeanor of the witnesses" that Ms. [redacted] was a willing participant in the injection of cocaine into her body and that no force was used on her (RR 3).

At the time that Respondent met Ms. [redacted] in February, 1984, she was 19 years old, a high school drop-out and a pool shark who spent virtually every free night frequenting bars and pool halls (TR 91). Ms. [redacted] had a pool-related nickname, "Florida Slim", and in 1983 won $1,500.00 playing pool. She even owned a $500.00 cue (TR 91).

Ms. [redacted] according to her own testimony, had at least "tried" marijuana prior to meeting Michael Jahn, had experimented with other drugs, and had admittedly at least come close to trying cocaine on a prior occasion (TR 92-94).

On February 3, 1984, Ms. [redacted] was on her third date

with Respondent. They had met in Daytona two weeks previously and, according to Respondent, had purchased cocaine and used it on the night they met. While Ms. [redacted] acknowledges a suspicious transaction with a known cocaine dealer on their first date (TR 106-109), she denies that she used cocaine that or any other night.

One week later, Ms. [redacted] drove to Orlando and met Respondent at a Holiday Inn near his home. She testified that she spent the night in the hotel but denied spending the night with Respondent (TR 115). She did, however, acknowledge that she called her parents while at the hotel and falsely told them that she was spending the night with Respondent's parents in Winter Park (TR 115). Prior to calling her parents, Ms. [redacted] and Respondent had spent the evening in Orlando wining and dining, an evening which included an expensive meal and a ride in a horse-drawn carriage.

Respondent and Ms. [redacted] made plans to meet at the same Holiday Inn the following weekend.

The Saturday of the next weekend, February 3, 1984, Ms. [redacted] met Respondent in the parking lot of the same Holiday Inn at which she had stayed the previous weekend. She left her bags in her car (TR 278) and went with Respondent in his car to a family reunion in Kissimmee. On the way to the reunion, Respondent bought her a new pair of cowboy boots (TR 118) and later in the day Respondent and Ms. [redacted] took her young cousins and nephews to a go-cart race track (TR 69).

Ms. [redacted] testified that after leaving the reunion in Kissimmee, she had been told by Michael that they were to spend the night at Disney World. This was supposedly true despite the fact that she had left her car and luggage at the Holiday Inn in Orlando. Respondent asserts that it was their plan all along to return to that same Holiday Inn.

Ms. [redacted] testified that upon returning to the Holiday Inn after being unable to find any rooms near Disney World, the hotel clerk told her there was but one room available in the hotel but that another room would be available later that night (TR 70). Respondent denies that any such conversation took place and hotel records support his position (TR 230).

Upon entering the motel room, the couple drank champagne and Ms. [redacted] admits that she allowed Respondent to insert some cocaine into the back of her hand (TR 73). She then testified that the rest of the evening was spent with Respondent forcibly injecting her with cocaine against her will.

Very late that night or early the next morning, Ms. [redacted] left the motel room, according to her testimony having to forcibly extricate herself, and went downstairs and asked the clerk to call an ambulance (TR 81). When the ambulance arrived, it was accompanied by police officials despite the fact that they were not summoned. Ms. [redacted] refused to cooperate with the police officers when they questioned her (TR 85, 232).

After Ms. [redacted] was examined at the hospital, her sister anonymously called police officials to report a sexual

battery (TR 233). Subsequent to that telephone call, Ms. [redacted] gave a detailed statement to law enforcement authorities.

While speaking to police, Ms. [redacted] told police officers that she was engaged in an undercover investigation and that is why she was in Respondent's presence. She even told investigating officers that she was working with a Detective Galle of the Holly Hills Police Department (TR 120).

Respondent's description of his relationship with Ms. [redacted] is far different than her testimony indicates. He testified that she introduced him to a cocaine dealer (Squirrel) on the night they met (TR 264). Even Ms. [redacted] admitted she knew Squirrel and suspected he was a cocaine dealer (TR 105). She further admitted seeing Respondent hand Squirrel some money while the three of them were sitting in front of a dive (TR 107). After the cocaine was purchased, Respondent testified he and Ms. [redacted] purchased syringes and used up the entire $400.00 worth of cocaine purchased that night (TR 264-266).

The next weekend, on their second date, Respondent agreed that they spent an evening in Orlando but he testified that they spent the entire night together and that they made love (TR 272).

On their third date, the weekend of February 3rd, Respondent testified that it was the couple's intention all along to spend the night together in the same motel they had stayed in the week before.

Respondent called as a rebuttal witness, Steven D.

Milbrath. Mr. Milbrath represented the Holiday Inn that Ms. [redacted] had sued in a civil action for the events that occurred on February 3, 1984. Mr. Milbrath, who did not know Respondent prior to the law suit, testified that his investigation revealed that the Holiday Inn was only 75% filled on the night in question (TR 230) and that there were no reports of any commotion or disturbances in the hotel despite Ms. [redacted]s assertion that she had to fight off Respondent while she tried to escape from the room (TR 231). Mr. Milbrath also testified that Ms. [redacted] refused to allow the desk clerk to call the police when he summoned an ambulance (TR 231). While awaiting the ambulance, Ms. [redacted] told the hotel security guard that she was an undercover police operative (TR 233).

Ms. [redacted]'s suit against Holiday Inn was settled for nuisance value ($3,200.00) after her deposition. Mr. Milbrath said [redacted]'s lawyer settled because they felt she had no credibility after asserting that she was stringing Respondent along in an attempt to nail him for drug violations (TR 228, 234).

E. <u>Respondent's Chemical Dependency.</u>

Respondent admitted his guilt on the two felony convictions (TR 259). He did describe to the Referee, as mitigation, the events that led to his misconduct. In essence, Respondent's misconduct was a result of cocaine dependency and the lifestyle, and the association of people within that lifestyle, that accompanies cocaine dependency.

Michael Jahn was admitted to The Florida Bar in March 1978 and until the events that led to the case at bar, practiced law without problem.

Respondent testified that he first began using cocaine on a limited recreational basis in early 1980 while he was living in Miami (TR 293). About 18 months later, after he had moved to Orlando, Respondent began injecting cocaine (TR 293). He testified that his use of cocaine increased rapidly and, although he did not realize it, his dependency began affecting his personality. Until 1984, he absolutely refused to accept the fact that he was dependent on cocaine. Although, at his parents insistence, he checked himself into Brookwood, a rehabilitation center in Orlando in March 1983, his problem continued unabated. In fact, while at Brookwood, he injected cocaine (TR 294-297). He now realizes Brookwood's treatment was a failure because he was not then ready to admit his dependency problems (TR 297).

Despite his addiction to cocaine, Respondent never let it interfere with his law practice, never accepted cocaine as fees, and there is no evidence before the court whatsoever that his dependency affected his professionalism in any manner (RR 5,6).

After his second arrest, Respondent entered the Pine Grove Rehabilitation Treatment Center in Mississippi and spent over four months in that program. He testified that he has not taken any alcohol or cocaine since August 10, 1984 (TR 315) and that he has remained extremely active in the NA and AA programs

both before and during his incarceration (TR 324, 325).

Respondent's reformation is evident by the fact that he was largely responsible for Mrs. Marshall checking herself into a drug rehabilitation program for five weeks in October 1984 (TR 193).

Respondent testified that his compulsion for cocaine was such that he never kept it around. If he bought it he went through the entire quantity immediately (TR 267, 284). Cocaine was so important to him that he used it to the exclusion of even sexual activities (TR 268). He testified that even though he was five minutes away from his apartment on the day that he met [redacted], his compulsion was such that as soon as he was in possession of cocaine, he was going to find "a semi-secluded spot" and inject cocaine immediately (TR 291).

Respondent acknowledges his culpability for his misconduct. As he put it:

> I'm in the situation I'm in and I'm here today solely because of my actions, and its my responsibility (TR 289).

On June 12, 1985, Respondent was adjudicated guilty and was sentenced to two four and one half year concurrent sentences for his two felony convictions. He was also automatically suspended from The Florida Bar on that date for a period of at last three years.

While incarcerated, and despite the fact that he was considered a minimum risk, through some bureaucratic mistake he was transferred to Brooksville Correctional Institute--a maximum

security institution. While there, an inmate informed Respondent's father that Respondent's life was in danger if he stayed at that institution (TR 252).

At the time of the final hearing in this cause, Respondent testified that his release date was set for December, 1987.

The Referee in these proceedings emphasized that he based his recommended discipline in large part on the testimony of Dr. Doyle Preston Sith, the physician in charge of Pine Grove Recovery Center, a drug rehabilitation center in Hattiesburg, Mississippi. Dr. Smith's practice is limited to addictionology and he has treated over a thousand people for chemical dependency over the last five years alone (TR 133-134).

Dr. Smith first saw Respondent at Pine Grove on August 13, 1984 and diagnosed him as being a cocaine addict (TR 137). Dr. Smith and his staff treated Respondent at Pine Grove through December, 1984 (TR 139).

Initially, Respondent only superficially acknowledged his dependency. Dr. Smith testified that such "intellectual" acceptance is "classic" (TR 141). He also testified that it is not unusual for an addict to go through more than one center (TR 138).

The treatment program at Pine Grove emphasizes "nonchemical coping skills" and utilizes AA and NA programs as a mainstay of their program (TR 142). Dr. Smith pointed out that the treatment of the alcoholic and the cocaine addict involves

the same principles (TR 137).

Extended care of the advanced addict is important because the dependency creates a chemical imbalance in the brain which alters the jugment and feelings of the individual. In the non-dependent person, judgment and feeling return to normal after the effect of the chemical wears off. In the addict, however, the chemical imbalance in the brain is such that judgment and feeling are abnormal even after the drug wears off (TR 143-144).

When Respondent checked into Pine Grove, he was at the point described in the preceding paragraph (TR 144).

Eventually, Respondent's superficial acceptance of his dependency changed to a "gut-level" acceptance. He then completely embraced the NA and AA concept and began "leading the pack going to the meetings" (TR 147).

Dr. Smith testified it takes 11 to 18 months for an individual to return to normal (TR 148).

Dr. Smith considers Respondent a "recovering addict" with an 85% chance of no relapse (TR 148, 149). Dr. Smith has expressed a willingness to hire Respondent as a counselor at Pine Grove should he desire such employment (TR 152).

Judge Norris asked Dr. Smith if he would allow Respondent, should he be a physician, to operate on Dr. Smith at present. Dr. Smith said he would "prefer" Respondent because Dr. Smith knows Respondent is not dependent on drugs (TR 165, 166).

Dr. Smith testified that he does not believe Respondent is now any threat to he public (TR 153). In response to the

Referee's inquiry as to whether Respondent is "worth salvaging", Dr. Smith said:

> If he was worth getting that degree in the first place, I mean to practice, or to practice in a profession, he's worth salvaging to get back into that profession (TR 168).

Respondent also called four witnesses to testify as to his recovery. The first of these, John Robert McCann, is a neighbor who has known Respondent about five years. Mr. McCann testified that Respondent worked for McCann's company as a laborer after Respondent returned from Pine Grove in December 1984 and until his trial. Respondent was a reliable worker (TR 174).

Mr. McCann also testified that during the aforementioned period he observed that Respondent was now "noticeably different than prior to his treatment" (TR 175). Before, Respondent's behavior had been "quite erratic and a little bizarre", that he would not maintain eye contact or sit still and that he had screaming arguments with his parents (TR 176).

During conversations in the winter of 1984-85 with Mr. McCann, Respondent admitted his addiction and assumed responsibility for all his problems (TR 175).

George D. Dugan, III, a Ft. Pierce lawyer also testified in mitigation. He and Respondent became close friends in law school in 1974 and have maintained their relationship. Mr. Dugan testified that Respondent did not use cocaine in law

school (TR 207).

About one year prior to Respondent's arrest, Mr. Dugan became aware of Respondent's addiction. Eventually, Respondent's behavior jeopardized their friendship when, during a visit to Dugan, Respondent elected to use cocaine with an individual, over Dugan's objections, rather than remain with Dugan (TR 208-210).

Upon Respondent's return from Pine Grove, the difference in Respondent was like "day and night" (TR 213).

Mr. Dugan does not believe Respondent is using cocaine any more (TR 214).

Respondent's sister, Valerie A. Jahn, a Miami lawyer, related that her brother changed after he moved to Orlando from a person she was proud to be with to an "obnoxious" and "very abrasive" individual (TR 218). She eventually realized he was using cocaine and disassociated herself from him.

After Respondent returned from Pine Grove, he acknowledged his past addiction (TR 224) and completely abstained from drugs and alcohol. Ms. Jahn testified that Respondent even left one of her parties because there was too much alcohol present (TR 223).

Respondent, compared to two years ago, has done "a hundred percent turnaround. He's fun to be around again" (TR 224).

Finally, Respondent's father, an Orlando lawyer testified. He described in detail the gradual change in Respondent's demeanor and conduct after he moved to Orlando (TR

238-240). He discussed Respondent's unsuccessful stay at Brookwood rehabilitation center in March 1983 and Respondent's negative attitude towards treatment (TR 241-242).

Mr. Jahn testified that Respondent was a different person when he returned from Pine Grove, that he has wholeheartedly embraced NA and AA (TR 249) and that Respondent has completely abstained from drugs despite their being readily available to inmates such as Respondent (TR 251).

As a result of Respondent's problems, Mr. Jahn testified that not only Respondent, but Mr. and Mrs. Jahn have become active in the Kairos prison ministry and that there has been a spiritual renewal in the Jahn household (TR 247).

Mr. Jahn testified that the cost of Respondent's stay at Pine Grove alone was over $10,000.00 (TR 245) and that Mr. and Mrs. Jahn's financial assistance to Respondent has put Mr. Jahn's retirement "ten years down the road" (TR 246). But, Mr. Jahn also testified that:

> When he came back [from Pine Grove] there was a difference, and it's maintained.
>
> And even though he's been in jail, you know, I'm proud of him (TR 246).

SUMMARY OF ARGUMENT

Respondent has been suspended from membership in good standing in The Florida Bar since June 12, 1985. He cannot be readmitted until at least three years from that date, and not before his civil rights are restored. Prior to reinstatement, he must prove rehabilitation pursuant to Rule 11.11 of Article XI of the Integration Rule of The Florida Bar.

A. The Discipline to be Imposed:

Respondent readily admits his guilt and acknowledges that he is guilty of the crimes to which he pleaded. He further acknowledges that he used very poor judgment in his dealings with both Ms. [redacted] and Ms. [redacted] He does not excuse his misconduct, but explains it as being the result of severe cocaine dependency. Respondent has sought assistance for his dependency including four months successful treatment in an institution specializing in such treatment and he has participated wholeheartedly in the NA program since his treatment ended in December 1984. Respondent has not used any alcohol or illicit drugs since August 10, 1984.

Respondent's conduct changed dramatically as he became dependent upon cocaine. Upon rehabilitation, his deviation from his normal conduct has been eliminated and he is once again the individual that was admitted to The Florida Bar in 1978.

Numerous witnesses, including the physician that treated him while at the rehabilitation clinic, have attested to the change in Respondent's demeanor since his return from

treatment.

The purpose of disciplinary proceedings is not to seek retribution but to ensure the protection of the public. Respondent asserts that the three year suspension recommended by the Referee in these disciplinary proceedings, when coupled with his having to prove rehabilitation before reinstatement in appropriate proceedings, ensures protection of the public.

Disbarment is inappropriate in the case at bar because of the numerous mitigating factors that are present including (1) the misconduct was the result of the chemical dependency; (2) Respondent's prior unblemished record; (3) the misconduct occurred completely outside the practice of law; (4) Respondent never attempted to profit from the illegal use of drugs; and (5) Respondent's rehabilitation from the chemical dependency that led to the misconduct.

B. The Referee's Findings of Fact.

A Referee's finding of fact cannot be overturned unless they are supported by no competent evidence.

The Referee, after specifically noting that his findings are based on the demeanor and appearance of the witnesses appearing before him, and after noting inconsistencies in their own testimony as well as with other witnesses' testimony, found that the testimony of the Bar's two witnesses was not worthy of belief.

ARGUMENT

POINT I

THE THREE YEAR SUSPENSION RECOMMENDED BY THE REFEREE, WHEN VIEWED IN LIGHT OF THE SUBSTANTIAL MITIGATION PRESENT IN THIS CASE, IS THE APPROPRIATE DISCIPLINE TO BE IMPOSED.

Respondent argues that this case is governed by this Court's recent decision styled The Florida Bar v. Rosen, opinion number 67,442 (October 9, 1986), a case involving virtually identical facts.

In Rosen, as in the case at bar, the Referee rejected the Bar's request for disbarment for acts resulting in a felony conviction. Just as was true in Rosen, Respondent's case illustrates "yet another tragedy related to cocaine abuse". Id., p.2.

Both cases involve lawyers who had unblemished records prior to their addiction to cocaine and who, while able to keep their misconduct isolated from their professional practice, were unable to exercise such care for themselves and who ended up withdrawing "into the nightmarish nether-world of cocaine addiction" until finally convicted of a felony. Id., p.2.

Both lawyers since their arrest have overcome their addiction and no longer use illegal drugs. Both appear capable of rehabilitation and of being an asset to the Bar if reinstated.

If there is a distinction between the two cases, it is that Rosen's conduct was all the more reprehenisble because he engaged in drug trafficking, an activity that involves illegal

conduct for pecuniary gain. No such activity is present in the instant case.

The two primary factors this Court considered in mitigation of Rosen's discipline are equally applicable to Michael Jahn's situation.

First, the referee in both cases found, in similar language, that the misconduct was attributable to their addiction. (RR 4, Rosen, p.2)

Second, "and most crucially", both referees found that the respective respondent had overcome his addiction and no longer engaged in illegal drug use.

In the case at bar, Respondent spent four months in a rehabilitation center and has been a diligent attendee at AA and NA meetings since his release in December, 1984. The witnesses buttress Respondent's testimony that he has led a drug-free life since August 10, 1984 and the Bar presented absolutely no evidence to the contrary.

Respondent is not arguing that his addiction excuses or in a defense to his misconduct. He admits his guilt. He does argue, however, that the mitigation present in his case mitigates the discipline to be imposed. The referee agreed. Now, in the Rosen case, this court has agreed with Respondent, too.

In Rosen, this court expanded to drug addiction its past position as to alcoholism that:

> a loss of control due to addiction may properly be considered as a mitigating circumstance in order to reach a just conclusion as to the discipline to be

properly imposed.

However, the Rosen Court implies that before a Respondent can avail himself of this mitigation, he must affirmatively show that he has overcome his addiction and no longer engages in the use of illegal drugs.

Respondent meets both prongs of the Rosen test. The Referee found that (1) Respondent's misconduct was the result of drug addiction and (2) that he is medically classified as a recovering addict and has lived a drug and alcohol free life since August 1984.

By adopting the discipline recommended by the referee below, this court will be adhering to the three purposes of discipline as listed in The Florida Bar v. Pahules, 233 So.2d 130 (Fla. 1970) at 132. Those three purposes are (1) protection of the public, (2) a discipline that is fair to the Respondent, i.e., encouraging reformation and rehabilitation while simultaneously punishing him, and (3) severe enough to deter other lawyers.

As has become customary in disciplinary proceedings, The Florida Bar in the instant case quickly skirts over the first two purposes and asks this court to focus entirely on punishment. Such a position is contrary to this court's ruling in The Florida Bar v. Pincus, 300 So.2d 16 (Fla. 1974), where this court said the Bar's requested discipline was improper because it

> Focuses upon retribution rather than the goal of effective discipline which is primarily to protect the public from

> incompetent and unethical practitioners and only secondarily to punish the offender and to act as a deterrent to others.

Respondent argues to the court that the three year suspension recommended by the Referee in these disciplinary proceedings will sufficiently protect the public, will be fair to Respondent in that it will encourage reformation and rehabilitation and, because it is the ultimate discipine short of disbarment, will deter others from similar misconduct in the future. Respondent's position is consistent with this court's prior holdings.

Suspending Respondent from the practice of law for three years effective June 12, 1985 and continuing until Respondent has had his civil rights restored and proves rehabilitation pursuant to Rule 11.11 of the Integration Rule of The Florida Bar will not only accomplish the goals announced in Pahules, but it will encourage other lawyers to seek rehabilitation for chemical dependency. Affirming the referee's recommendation here, when coupled with Rosen, is a clear declaration that lawyers guilty of misconduct stemming from chemical dependency have an incentive to seek treatment. That incentive is mitigation of discipline.

In recommending a three year suspension, the Referee noted numerous mitigating factors, including:

1. That at all times material to the Bar's complaint, Respondent was addicted to cocaine;

2. That Respondent's acts underlying the criminal conduct for which he was convicted were caused by and directly attributable to his cocaine addiction;

3. That from August 1984 through the date of the hearing Respondent has lived a drug and alcohol free life;

4. That Respondent is medically classified as a recovering addict;

5. That the treatment plan and recovery prognosis for individuals addicted to alcohol and individuals addicted to cocaine is identical;

6. That Respondent's addiction involved neither the practice of law nor his clients.

Other mitigating factors not listed by the Referee were Respondent's clean disciplinary record, his acknowledgment and remorse for his past wrongful acts and his improper actions were never designed to give him financial profit.

Judge Norris' recommendation is consistent with caselaw handed down by this court prior to final hearing. Obviously, the Referee did not have access to Rosen, supra, but as argued earlier, that case supports the Referee's decision. That case most similar to Respondent's is The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla. 1985). Although Carbonaro was found guilty of conspiracy to distribute drugs, the Supreme Court suspended him for three years, retroactive to his 11.07 felony suspension. In suspending, rather than disbarring Carbonaro, the court considered numerous mitigating factors, among which were the fact that his crimes were unrelated to his practice, did not involve the violation of a client's trust, personal hardship and his demonstrated potential for rehabilitation. All of those factors

exist in Respondent's case also.

The Florida Bar draws upon cases that are materially more egregious than Respondent's in its arguments that he should be disbarred. The foremost of those cases is The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985). Hecker was found guilty of conspiracy to traffic in 1000 pounds of marijuana. In disbarring Hecker, this court noted that he deliberately set out to engage in illegal drug activities for pecuniary gain.

There is no comparison between Respondent's conduct and that of an individual trafficking in 1000 pounds of marijuana in an attempt to profit off his illegal activities.

The second case cited by The Florida Bar as support for disbarment, The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983) also involves misconduct more egregious than that at hand. In Wilson, the lawyer was disbarred after it was found that:

> He pressured a client who was incarcerated in the Clay County Jail to make arrangements to have delivered to him one and one-half pounds of cocaine (e.s.).

Clearly, unlike Carbonaro, Wilson's misconduct directly involved the practice of law.

Even in Wilson, however, this court acknowledged on page 3 of its opinion that

> If substantial and convincing evidence of mitigating circumstances had been presented, the complexion of the case may very well have been different. But no evidence in mitigation has been proffered by Respondent.

Respondent has presented numerous factors in mitigation

in his case.

The other cases cited by The Florida Bar are also inappropriate to the case at hand. The Florida Bar v. Beasley, 351 So.2d 959 (Fla. 1977) involved a lawyer's delivery of marijuana to his client. In The Florida Bar v. Linn, 461 So.2d 101 (Fla. 1984) the lawyer conspired to distribute large quantities of cocaine for pecuniary gain and, in a second count, was found guilty of conduct involving moral turpitude and dishonesty. In The Florida Bar v. Ludwig, 465 So.2d 528 (Fla. 1985), the Respondent was disbarred after being found guilty of five felony counts of delivery of a controlled substance and one count of grand theft. In The Florida Bar v. Wentworth, 469 So.2d 127 (Fla. 1985), the Respondent was disbarred for being involved in large scale marijuana smuggling. The same was true in The Florida Bar v. Kline, 475 So.2d 1237 (Fla. 1985). Kline was disbarred after being convicted of possessing in excess of 2000 pounds of marijuana. Clearly, Mr. Kline was engaged in drug dealing for pecuniary gain.

None of the Bar's cases contain the mitigating factors present in the instant case. Nor do any of them involve the two mitigating factors that are present in Rosen, i.e., addiction and treatment.

The Bar's argument that Respondent's addiction and treatment was improperly considered by the Referee is directly contrary to this Court's holding in Rosen (a case not available to Bar Counsel at the time the initial brief in this cause was

written).

Even had Rosen not been decided, however, the Bar's argument that the referee should not have considered mitigation is off the mark. Respondent has never argued that he should not be sternly disciplined. He argues that his addiction and treatment mitigate the discipline to be imposed and reduces the sanction from the ultimate penalty, disbarment, to the most severe penalty short of that, i.e., a three year suspension.

If Judge Norris' recommendation is adopted, Respondent still must prove rehabilitation in reinstatement proceedings before he resumes practice.

As was true with Mr. Rosen, in the instant case this Court should

> reject the recommendation of The Florida Bar that he be disbarred, since such a punishment appears not only too harsh in the circumstances, but may well deprive the legal community of Mr. Rosen's participation as an attorney in the future, should he be found rehabilitated and reinstated after the suspension period. (Rosen, supra, p.3.)

POINT II

THE REFEREE'S FINDINGS OF FACT ARE SUPPORTED BY COMPETENT EVIDENCE AND SHOULD NOT BE DISTURBED (ADDRESSING COMPLAINANTS POINT III).

The sole issue before the Referee was the appropriate discipline to be imposed for Respondent's two felony convictions. Respondent's adjudication of guilt was "conclusive proof of the guilt of the offense charged." Rule 11.07 (4) of Article XI of the Integration Rule of The Florida Bar. Respondent has never denied that he is guilty of possessing cocaine on the night of February 3, 1984 and that he delivered cocaine to [redacted] in June, 1984.

Under the guise of explaining the circumstances of the convictions, however, The Florida Bar brought in [redacted] and [redacted] who then leveled various allegations of improper activity that were not even charged by the State Attorney's office. Particularly scandalous were the allegations made by Respondent's ex-lover, [redacted]

The Referee, although he allowed the Florida Bar to bring in extraneous evidence, emphatically rejected the testimony of the Bar's witnesses. His finding of fact must be upheld unless they are "clearly erroneous or without support in the evidence". Rule 11.06 (9)(A) of Article XI of the Integration Rule of The Florida Bar. It is the Referee's job to resolve conflicts and evidence, The Florida Bar v. Hoffer, 383 So.2d 639

(Fla. 1980), and his findings must be upheld unless there is no evidentiary support in the record for them. Obviously, there is substantial, in fact overwhelming evidence, to support the Referee's decision. The Referee specifically stated that he made his findings based in part on the appearance and demeanor of the witnesses sitting before him. Obviously, he is in the best position to consider and decide the conflicting stories that were before him.

After considering that both the Bar's witnesses at various points in time lied to the police, after considering the inconsistencies that were apparent in their testimony even before hearing Respondent's witnesses' testimony, and finally, after listening to Respondent, the Referee chose not to believe the incredible allegations lodged by Ms. [redacted] and Ms. [redacted]

In addition to the Bar's witnesses' testimony being contradicted by Respondent's testimony, the Referee noted that disinterested witnesses called by Respondent, specifically Julia Harden Mitchell, whose testimony he found to be "especially believable" and lawyer Steven Milbrath, showed beyond doubt that Ms. [redacted] and Ms. [redacted] were not being candid with the court.

The referee found that Ms. [redacted]'s version of the incident involved in delivery charge "is highly unreliable and worthy of little weight" (RR 3). He further found that Ms. [redacted]'s testimony regarding her relationship with Respondent was "extremely difficult to believe" and did not have "the ring of truth to it". This court is not now in the position to reverse

the Referee's explicit findings in this case.

The Florida Bar argues that the Referee's findings are inconsistent with the facts because Respondent could not be guilty of the crime for which he was convicted, i.e., delivery of cocaine to a minor, if in fact the minor had the cocaine in her possession prior to the event as found by the Referee. Just as Respondent is prohibited by the Integration Rule from attacking his conviction so should The Florida Bar be prohibited from attacking it. Respondent admitted that he injected [redacted] with cocaine. The delivery was the injection. In a technical sense, when [redacted] supplied Respondent with cocaine, she relinquished control over it. He then delivered it to her in the form of an injection.

In addition to the Referee's emphatically finding the Bar's witnesses untruthful, the Referee found the Respondent's testimony to be particularly credible. On page 4 of his report, the Referee found

> With regard to Respondent's testimony I find him to be extremely candid and forthcoming in discussing his addiction and in accepting ultimate responsibility for his conduct. He is indeed remorseful. His candor is, for example, a refreshing contrast to the attitude exhibited by a Respondent in a recent case also heard by the undersigned. See The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985).

In Price, the referee recommended disbarment of a lawyer acquitted of drug importation. Clearly, the referee does not have a predisposition towards respondents. His rulings are

based on the facts before him -- just as they should be.

This Court has consistently ruled that the referee's findings will not be disturbed unless they are not supported in the record. In the case at bar, there is ample support for his findings, and they should be upheld.

CONCLUSION

The Referee's recommendation of a three year suspension retroactive to June 12, 1985, the date on which Respondent was suspended for three years pursuant to a felony conviction, is the appropriate discipline to be imposed in light of the numerous mitigating circumstances involved in this case. In imposing the three year suspension, the maximum discipline allowed short of disbarment, the Supreme Court is severely punishing Respondent while at the same time encouraging others with drug dependency problems to seek rehabilitation.

The Referee's findings of fact are amply supported by the evidence and should not be overturned by this court.

RESPECTFULLY submitted this 31st day of October, 1986.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing brief was mailed to Jan K. Wichrowski, Bar Counsel, The Florida Bar, 605 E. Robinson Street, Suite 610, Orlando, Florida 32801, on this 31st day of October, 1986.

JOHN A. WEISS