IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v.

MICHAEL J. JAHN,

Respondent.
_____/

Case No. 68,279
(TFB 09B84C01)

COMPLAINANT'S INITIAL BRIEF

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Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar:

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SYMBOLS AND REFERENCES

In this Brief the complainant, The Florida Bar, will be referred to as "the Bar", while the respondent in this action, Mr. Michael J. Jahn, will be referred to as "the respondent".

The following symbols will be used: "R" for the record of the transcript of March 24, 1986. "Ref" for the report of the referee of July 28, 1986.

STATEMENT OF THE CASE AND FACTS

In May, 1984, respondent was charged in a two count Information in the Ninth Judicial Circuit Court of Orange County, Florida, Case No. CR-84-2909, The Florida Bar Exhibit 6. Count One of the Information charged him with possession of cocaine, a controlled substance, in violation of Florida Statute 893.13-(1)(e), a third degree felony stemming from his February, 1984, injections of the drug on himself and a nineteen year old female who reported this to law enforcement authorities, R-63-90. In July, 1984, respondent was further charged in a three count Information in the Ninth Judicial Circuit Court of Orange County, Florida, Case No. CR-84-3393. In Count One, respondent was charged with delivery of cocaine, a controlled substance, to a minor in violation of Florida Statute 893.13(1)(c)(1), a first degree felony, The Florida Bar Exhibit 57. The delivery of cocaine to a minor charge stems from respondent activities on June 21, 1984, in which respondent injected cocaine into a fifteen year old girl in a drugstore bathroom, R-6-25.

In May, 1985, Respondent was adjudicated guilty, upon pleas of nolo contendre, of delivery of cocaine to a minor, a first

degree felony, and possession of cocaine, a third degree felony, The Florida Bar Exhibit 4. On June 17, 1985, respondent was sentenced to the Florida Department of Corrections for a term of four and one half years in each case to run concurrently, The Florida Bar Exhibit 5. Respondent was suspended from The Florida Bar for three years effective June 12, 1985, pursuant to Article XI, Rule 11.07(2) of the Integration Rule of The Florida Bar by Order of this Court dated July 24, 1985 in Case No. 67,317.

On February 5, 1986, the Bar filed a Complaint alleging the above conduct against the respondent. On February 11, 1986, this Court appointed The Honorable William Norris as referee in this case. Pursuant to the referee's order in favor of respondent's Motion in Limine, the Bar filed an amended complaint. On March 6, 1986, Mr. John A. Weiss, counsel for respondent, filed an Answer to the Amended Complaint. Final hearing was held on April 24, 1986, in the chambers of the referee in Bartow, Florida, upon a waiver of venue from both parties. The Bar presented the testimony of Ms. [redacted], Ms. [redacted], and by deposition, Dr. Shashi B. Gore, M.D. The respondent presented the testimony of Dr. Doyle Preston Smith, M.D., Mr. John R. McCann, Ms. Julia A. Marshall, Mr. George D. Dugan, III., Ms. Valerie A. Jahn, Mr. Steven D. Milbrath, Mr. George N. Jahn, and the respondent. This

testimony was concluded on the evening of April 24, 1986. On April 28, 1986, the Bar filed a motion to allow rebuttal testimony. After several subsequent pleadings including a written proffer of rebuttal testimony, and respondent's response thereto, the referee declined to allow the Bar to present rebuttal testimony.

The referee then filed his report with this Court on July 28, 1986. The referee noted that while certain facts regarding the criminal charges were in dispute, the respondent did not deny his ultimate guilt, Ref- Section I, pg. 2. Regarding Case No. CR-84-3393 involving the minor, [redacted] in which respondent pled guilty to delivery of cocaine to a minor, the referee rejected Ms. [redacted]'s testimony. The referee found, contrary to Ms. [redacted]'s testimony, that the minor had been in original possession of the cocaine and that no force was used to inject cocaine into the girl. The referee noted that it should have been apparent to the respondent that [redacted] was under the age of eighteen at the time of the incident, Ref- Section I, pg. 3; R-55. Regarding Case No. CR-84-2909, the referee also rejected the testimony of Ms. [redacted], who was nineteen years old at the time, regarding her alleged contact with respondent. Although Ms. [redacted] testified that respondent had enticed her

into a motel room, injected her with cocaine, and continued to inject her with cocaine and blood throughout the night, R-76-78; the referee found that Ms. [redacted] was a willing participant in the injection of cocaine and that no force was used, Ref- Section I, pg. 3-4.

The referee made a specific finding that the respondent had been addicted to cocaine at the time of these felonies and that he was now rehabilitated and remorseful. The referee specifically noted that respondent's acts underlying the criminal conduct for which he was convicted were caused by and directly attributable to his cocaine addiction, Ref- Section I, pg. 4. Based on this finding of facts, the referee recommended that respondent be found guilty of The Florida Bar Integration Rule, Article XI, Rule 11.02(3)(a) for engaging in conduct contrary to honesty, justice and good morals, and 11.02(3)(b) for engaging in felonious criminal conduct, as well as Disciplinary Rule 1-102(A)(3) of the Code of Professional Responsibility of The Florida Bar for engaging in illegal conduct involving moral turpitude. The referee recommended that respondent be found not guilty of violating Disciplinary Rule 1-102(A)(4) for engaging in conduct involving fraud, misrepresentation, dishonesty, or deceit, and Disciplinary Rule 1-102(A)(6) for other misconduct reflecting

adversely on his fitness to practice law, Ref- Section IV, page 5. The referee then recommended that respondent be suspended for three years to run concurrently with his prior felony suspension, Ref- Section V, page 6. The referee specifically noted that respondent's cocaine addiction was responsible for his actions and that compassion and understanding (Ref- Section V, Pg. 6) were called for since in the referee's view this was offered by the Bar and this Court to attorneys recovering from alcoholism. The referee also noted respondent's rehabilitation, his remorse, and the fact that his felonies did not involve his clients or his law practice. The referee further noted there was ample evidence that respondent's felonious conduct reflected adversely on the public image of the Bar and that the subject had received extensive media attention, Ref- Section V, pg. 5-6.

At the Board of Governors' meeting which ended on September 19, 1986, the Board of Governors of The Florida Bar voted to petition for review in this case regarding the referee's findings of fact as to the circumstances of the felonies and recommendations of not guilty as to certain Disciplinary Rules of The Florida Bar's Code of Professional Responsibility as well as the recommended discipline.

SUMMARY OF ARGUMENT

This case involves a disciplinary proceeding of a first degree felony involving the delivery of cocaine to a minor, a fifteen year old female, and a conviction of a third degree felony involving a separate instance of possession of cocaine.

The referee in this case recommended that the respondent be suspended from The Florida Bar for a period concurrent with his prior automatic felony suspension. In making this recommendation, the referee placed great weight on the testimony of a physician who testified to respondent's rehabilitation from his addiction to cocaine, which had occurred entirely subsequent to respondent's commission of the felonious acts, Ref-Section II, pg. 4. The referee also chose to find the testimony of two young females concerning the respondent's actions in committing the felonies to be without credibility and instead adopted respondent's version of the facts.

In doing so, however, the referee's findings were contrary to the facts of the felony convictions. In one case, the referee's findings that the minor female had been in possession

of the cocaine rather than the respondent, (Ref-Section I, pg. 3), is actually so contrary to the facts of this felony that such facts could not have upheld this conviction. Further, the referee recommended that the respondent be found not guilty of Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar, Rule 1-102(A)(4) for engaging in conduct involving fraud, misrepresentation, dishonesty, or deceit, and Disciplinary Rule 1-102(A)(6) for misconduct reflecting adversely on his fitness to practice law. The referee did find respondent in violation of other rules which were charged, Ref-Section II, pg. 5. It is the position of The Florida Bar that the above findings of facts and recommendations of not guilty as to certain Disciplinary Rules are contrary to the record and clearly erroneous.

It is further the position of The Florida Bar that the referee erred in placing great weight in the testimony concerning respondent's rehabilitation from the use of cocaine as a mitigating factor in recommending a suspension rather than disbarment. The fact that respondent was convicted of two separate felonies is in itself so serious that disbarment is called for. If use of an illegal drug to excess during the commission of crimes were allowed to mitigate such serious breaches of ethical conduct, the purposes of discipline of an attorney would be seriously neglected.

ARGUMENT

POINT I

AN ATTORNEY SHOULD BE DISBARRED WHERE HE HAS BEEN CONVICTED OF TWO FELONIES INVOLVING ILLEGAL DRUGS, ONE OF WHICH IS A FELONY OF THE FIRST DEGREE INVOLVING A MINOR.

It is well settled that the purposes of attorney discipline are protection of the public, administration of justice, and the protection of the legal profession through the discipline of members through the Bar. In The Florida Bar v. Lord, 433 So.2d 983 (Fla. 1983), this Court further addressed the goals of discipline, noting:

> Discipline for unethical conduct by a member of The Florida Bar must serve three purposes: First, the judgment 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 and 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 other who might be prone or tempted to become involved in like violations, at 986.

In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984), this Court noted another important purpose, that of protecting a

favorable image of the legal profession by imposing visible and effective discipline for serious violations, at 1341.

Felony convictions necessarily involve that close scrutiny be given to the goal of the protection of the public. This is particularly true in the case at hand where respondent admits that his impulses were made uncontrollable by reason of his cocaine addiction. Respondent's own witness testified that respondent's impulses can never be cured but only controlled, R-157. Thus, the public is threatened by respondent's addiction in and of itself, which calls for close scrutiny and particularly so where his status as a member of The Florida Bar is not severed by disbarment.

Since each discipline case involves a different fact pattern and circumstances, individual consideration is necessary to carry out the above purposes. It is apparent that felony violations are among the most serious violations of ethics which can be committed by an attorney. An attorney is expected to uphold the laws of the state and any breach thereof reflects poorly upon the reputation of the Bar.

This Court has not failed to note the seriousness of felony drug violations in the past regarding the goals of discipline. In The Florida Bar v. Hecker, 475 So.2d 1240 (Fla. 1985), this Court noted that attempting to act as a drug procurer warranted disbarment:

> The Bar also argues that the recommended suspension is inadequate given the gravity of respondent's misconduct. In the Bar's view respondent should be disbarred. We agree. Respondent's conduct in attempting to act as a drug procurer is wholly inconsistent with his professional obligation as a member of the Bar. We appreciate that disbarment is the severest sanction available to us and should not be imposed where a less severe punishment would accomplish the desired purpose. The Florida Bar v. Moore, 194 So.2d 264 (Fla. 1966). We appreciate also that respondent has served his prison sentence, suffered other personal misfortunes, and appears to be genuinely remorseful. Nevertheless, respondent deliberately set out to engage in illegal drug activity for pecuniary gain. Illegal drug activities are a major blight on our society-nationally, statewide, and locally. Necessarily, members of the Bar are brought into contact with the illegal activity because of their professional obligations to offer legal assistance to clients accused of wrongdoing. Members of the Bar should be on notice that participation in such activities beyond professional obligations will be dealt with severely. The conduct of respondent warrants disbarment. The legal profession cannot tolerate such conduct., at 1243.

The above statements of the Court are directly on point in this case. In Hecker, the respondent's criminal conviction was lesser than respondent's in the present case, being only one second degree felony for criminal conspiracy to traffic in one thousand pounds of cannabis rather than the first degree felony

of delivery of cocaine to a minor as in this case. Certainly the legislature of the State of Florida adjudged delivery of cocaine to a minor to be more serious than criminal trafficking when it classified delivery to a minor as a first degree felony. The reasoning is clear. The threat to youngsters from adults that would lead them to participate in the use of illegal drugs is obvious. When those drugs are administered by adults in a dangerous manner such as injection, see Ref-Section I, pg. 3 and R-16-20, the offense becomes all the more reprehensible.

The fact that respondent's conviction involved not just one but two separate felony convictions involving two separate sets of circumstances further demonstrates the seriousness of this case. Respondent's second felony conviction in Case No. CR-84--2909 involved a third degree felony involving possession of cocaine under an entirely different set of circumstances and at a different time than the delivery of cocaine to a minor. This case also involved a young female. In The Florida Bar v. Wilson, 425 So.2d 2 (Fla. 1983), this Court did not hesitate to disbar a respondent convicted of two felonies involving illicit drugs. Although Wilson involved an attorney-client relationship where an attempt was made to traffic in cocaine, neither of the convictions involved a first degree felony as in this case. Although

the referee recommended suspension, the Court noted that a three year suspension would not meet that criteria required of attorney discipline. This Court noted in Wilson that disbarment after a conviction of two felonies is certainly not unfair to an attorney and that mere suspension would not be just to the public where the attorney involved in illegal conduct involving moral turpitude had violated his oath and flagrantly breached the confidence reposed in him as an officer of the court.

> A suspension, with continued membership in the bar, albeit without the privilege of practicing, is susceptible of being viewed by the public as a slap on the wrist when the gravity of the offense calls out for a more severe discipline., Wilson at pg. 3.

The Court further noted that disbarment would insure that respondent could only be admitted again upon full compliance with the rules of the Bar and that disbarment was called for.

> Finally, if the discipline does not measure up to the gravity of the offense, the whole discipline process becomes a sham to the attorneys regulated by it. Disbarment as a result of the conviction of felonies is a message loud and clear to the members of The Florida Bar that this Court will not countenance or permit the conduct for which respondent was convicted. In our view, a suspension does not have the deterrent affect of disbarment., Wilson at pg. 4.

Further, this case involves a high degree of awareness by the public, relevant to the fourth factor to be considered in

attorney discipline. The referee noted that this case generated a large amount of publicity and that there was ample evidence that respondent's conduct reflected adversely on the public image of the Bar, Ref- Section V, pg. 6.

Certainly, the public does not trust an attorney who has been convicted of widely publicized felonies. The fact of this public awareness coupled with the seriousness of respondent's misconduct and the fact that he would be treated more kindly by the Bar because he used illegal drugs while committing the crimes would undeniably erode the public confidence in the Bar's efforts to maintain integrity.

Prior case law supports disbarment as the appropriate discipline in this case. In The Florida Bar v. Beasley, 351 So.2d 959 (Fla. 1977) this Court held that respondent must be disbarred after being convicted of delivery of marijuana to a client. In The Florida Bar v. Linn, 461 So.2d 101 (Fla. 1984) an attorney was disbarred for soliciting to traffic in cocaine and neglect of a real estate matter. In The Florida Bar v. Ludwig, 465 So.2d 528 (Fla. 1985) this Court disbarred the respondent for conviction of one count of grand theft and five counts of delivery of a controlled substance. In The Florida Bar v. Wentworth, 469 So.2d 127

(Fla. 1985) this Court held that the respondent should be disbarred where he was convicted of federal marijuana smuggling and had prior felony suspensions. In The Florida Bar v. Kline, 475 So.2d 1237 (Fla. 1985), this Court disbarred the respondent for possession of cannabis in the second degree.

Anything less than disbarment in the present case would be inconsistent with the principles and the goals of The Florida Bar and be viewed with disdain by a public which refuses to tolerate both illegal drug conduct and attorneys who refuse to abide by the ethical standards required of them.

ARGUMENT

POINT II

THE REFEREE'S FINDING THAT RESPONDENT'S ADDICTION TO COCAINE IS MITIGATION OF HIS FELONIOUS CONDUCT IS ERRONEOUS AND UNJUSTIFIED.

In his report, the referee states at several points that respondent's addiction to cocaine should be considered as a mitigating factor to his conduct. In Section Two, number (2), at pg. four of his report, the referee states: "That respondent's acts underlying the criminal conduct for which he was convicted were caused by and directly attributable to his cocaine addiction." Although the referee states in Section III, pg. 5 "The findings of fact involving [redacted] and [redacted] and concerning respondent's addiction to cocaine are not defenses to respondent's criminal conduct." The referee later states that he takes the addiction to cocaine into consideration as a mitigating factor:

> The Bar, as sanctioned by the Supreme Court, has addressed the alcohol-impaired professional but what of the cocaine-impaired professional? Is there a rational distinction between alcohol addiction and cocaine addiction other than the obvious one that the use and possession of one drug is legal and the other illegal? I think not!

> Can we in today's enlightened times recognize the recovering alcoholic and, after treatment and rehabilitation, permit him to remain in, or return to, the Bar, and not offer the same compassionate understanding to those of our brothers and sisters who suffer from, and recovering from, cocaine addiction? I think not!
>
> Where cocaine was once thought to be a "safe" drug of choice, today the media is replete with stories with detailing the emerging horrors of cocaine addiction. Are those of our profession (such as the respondent) who has succumbed to the lure and temptation of 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!, Ref- Section V, pg. 6.

The referee makes several assumptions here which are simply not supported by either case law or the facts.

First of all, the referee assumes that even alcoholism would be considered a mitigating factor to such serious criminal convictions as a first degree felony and a third degree felony as in this case. The seriousness of respondent's misconduct must be examined before any plea for mitigation can be considered, much less applied. Respondent admits that his guilt is uncontested in his felony convictions involving two entirely separate circumstances, Ref- Section II, pg. 2. A review of the record clearly shows that respondent's conduct falls far from the professional standards expected of a practicing attorney and warrants the strongest sanction available, disbarment. There can

be no mitigation for a conviction of a first degree felony involving the delivery of a cocaine to a minor as well as a separate conviction for possession of cocaine. This Court has not hesitated to disbar attorneys for reprehensible felonious conduct involving drugs, The Florida Bar v. Hecker, supra. To allow an attorney to claim that his use of an illegal drug is a very defense to his actions with the illegal drug which resulted in a felony conviction of the first degree is ludicrous. If the Court allowed such claims as cocaine addiction to be a mitigating factor to felony convictions, this would be a message to all members of The Florida Bar that if they desire to commit a felony they should consider using drugs while doing so as mitigation. A comparison to the criminal law standards, while not controlling, is persuasive here. It is well settled in criminal law that voluntary intoxication does not excuse the commission of a unlawful act or alleviate the consequences, Cochran v. State, 65 Florida 91, 16 So. 187 (Fla. 1913); Cruz v. State, 143 Florida 263, 196 So 590 (Fla. 1940). Further, as the respondent himself has stated under oath, his cocaine use was not a daily uncontrollable habit, but he was a binge user, with frequent periods of otherwise normality, R-323.

Further, this Court has never allowed even alcoholism to mitigate serious conduct such as this. In The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984) this Court noted, in a case where the respondent claimed alcoholism was the cause of his neglect of a client's case and mishandling of trust funds, that deterrence to other members of the Bar and a favorable public image would not allow such mitigation: "Alcoholism explains the violations, it does not justify them", at 1341. This Court has never held that alcoholism would mitigate a felony conviction and it is stretching the realm of this Court's imagination to suggest that use of an illegal drug should be considered as mitigation to a first degree felony particularly where an attorney is involved.

The referee further errs in placing great weight on the testimony of Dr. Doyle Smith, a physician who testified extensively on respondent's behalf regarding the respondent's rehabilitation as effected by the clinic of which Dr. Smith is the director. The referee states:

> The most important testimony in the area was given by Dr. Doyle Preston Smith (TR 132-169), Director of Pine Grove Recovery Center, and an expert in the field of treatment and rehabilitation of impaired professionals. In evaluating my findings and subsequent recommendations I urge the Court to read Dr. Smith's testimony in its entirety., Ref- Section III, pg. 4.

The referee goes on to note the degree of respondent's recovery from his addiction. While favorable, the facts of respondent's recovery and rehabilitation as testified to by Dr. Smith, Mr. Dugan, Mr. Milbrath, Mr. McCann, Ms. Marshall, and respondent's father and sister are not relevant to this disciplinary proceeding. See The Florida Bar v. Routh, 414 So.2d 1023 (Fla. 1982), where the respondent pled guilty to three felonies and offered evidence of his rehabilitation which took place subsequent to the misconduct on which the disciplinary proceeding was based. This Court in refusing to allow such evidence of rehabilitation noted that while subsequent rehabilitation would be relevant to a reinstatement proceeding, it had no relevance to any of the material issues of fact in the disciplinary proceeding.

It must be noted the respondent's addiction in itself involves an admission that his two felony convictions were not isolated instances of violations of the law of this state. Respondent admits that he purchased cocaine frequently throughout this period of his addiction for his own use, R-324, in violation of laws in this state.

It is imperative that members of our profession be called upon to take responsibility for their misconduct. Although respondent would argue that his misconduct was the result of his uncontrollable actions, the Bar would respond that every attorney at the moment he commits a serious ethical violation, suffers from equally bad judgment. Addiction is merely another reason.

ARGUMENT

POINT III

CERTAIN FINDINGS OF FACT AS STATED BY THE REFEREE REGARDING THE CIRCUMSTANCES OF THE FELONY CONVICTIONS AND THE RECOMMENDATIONS OF NOT GUILTY AS TO CERTAIN DISCIPLINARY RULES OF THE CODE OF PROFESSIONAL RESPONSIBILITY OF THE FLORIDA BAR ARE CLEARLY ERRONEOUS AND WITHOUT SUPPORT IN THE RECORD.

It is well settled that the referee's findings of facts will be upheld unless they are clearly erroneous or without support in the evidence, The Florida Bar Integration Rules, Article XI, Rule 11.06(9)(a), The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). It is the position of The Florida Bar that the referee's findings of facts in this case do not have the requisite support in the record and are therefore erroneous. In this case, the respondent did not deny that he had been convicted of two separate felonies. In fact, respondent is precluded from denying that the two felony convictions are irrevocable proof of his commission of the felonious acts, The Integration Rule of The Florida Bar, Article XI, Rule 11.07(4), "If a determination or judgment of guilt of a felony is entered against a member of The Florida Bar and becomes final without appeal or by affirmance on appeal, such judgment shall be conclusive proof of the guilt of the offense charged."

However, respondent, by his attempts to controvert the facts regarding the circumstances of the felony convictions attempts to do just that. Taking the two convictions separately, the first degree felony involving delivery of cocaine to a minor, Ms. [redacted] will be examined first. Section 893.13(1)(c)(1) of the Florida Statutes provides:

> (c) Except as authorized by this chapter, it is unlawful for any person over the age of eighteen years to deliver any controlled substance to a person under the age of eighteen years. Any person who violates this provision with respect to:
>
> 1. A controlled substance named or described in Section 893.03(1)(a), (1)(b), (2)(a), or (2)(b) is guilty of a felony of the first degree, punishable as provided as provided in Section 775.082, Section 775.083, or Section 775.084.

Section 893.02 of the Florida Statutes provides:

> (4) Deliver or "delivery" means the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship.

Possession has been defined as existing where one has physical possession of a controlled substance and knowledge of such physical possession, Lewis v. State, 320 So.2d 823 (Fla.App 1975). However, the respondent, and the referee, in accepting the respondent's view, would state that in actuality Ms. [redacted], the fifteen year old, was in possession of the cocaine when she met

the respondent and that the respondent injected her with her own cocaine. See the testimony of the respondent, R-287-293, his former girlfriend, Ms. Julia Harden Marshall, R-183-193, and the referee's report at Section One, page 3: "Thus, I find, based on my personal observation of the appearance and demeanor of the witnesses, that: (1) The cocaine was in the original possession of [redacted], not the respondent; ....". If Ms. [redacted] was in the original possession of the cocaine, it follows quite logically that respondent could not be guilty of delivery of the same substance to her. As Ms. [redacted] and the Judgment (The Florida Bar Exhibit 4) in this case, Case No. CR-84-3393, indicate respondent, did, in violation of Florida Statute 893.13(1)(c)(1) unlawfully deliver cocaine, a controlled substance, to Ms. [redacted] a minor. The Judgment makes no indication that this delivery was only by injection since there can be no delivery of a substance to a person who is already in possession of it. See State v. Cristodero, 426 So.2d 977 (Fla.App 4 Dist. 1982); Garces v. State, 485 So.2d 847 (Fla.App. 3 Dist. 1986). As Ms. [redacted] testified, she had never used cocaine before, R-14; the respondent was in possession of the cocaine, and respondent injected her against her will with the substance in the public bathroom of a drugstore, R-17-20. To allow the facts of the situation to be twisted to show that Ms. [redacted] was in the possession of the

substance would defy the Integration Rule, 11.07(4) as well as the bounds of acceptable logic.

In the other felony conviction, the third degree felony, possession of cocaine, the referee chose not to believe the testimony of Ms. [redacted] who was nineteen years old at the time where she claimed that respondent engaged in immoral, reprehensible, and shocking behavior in injecting her with cocaine. Although the referee questioned what motive, if any, Ms. [redacted] would have for being untruthful about the incident, at R-331-333, the referee in his final report totally rejects Ms. [redacted]s entire testimony with the single statement, "It simply doesn't smell right."

The referee refused to allow the admission of the sworn police reports in these public cases into evidence although they are part of public criminal files, R-56. These reports each support the testimony of both girls. Further, the fact remains that neither of these girls were charged with crimes which is wholly contradictory with the referee's findings.

It is a fact that Ms. [redacted] and Ms. [redacted] testified to very similar circumstances regarding the respondent's actions in

setting them up to be injected with cocaine. Further, respondent used his status as an attorney to his advantage to manipulate others into complying with his illegal motives, see the testimony of Ms. [redacted] (R-11-12) and respondent himself (R-287, 322-323) regarding his use of his Florida Bar membership card to gain credibility in purchasing alcohol for a minor and purchasing syringes for use in injecting the cocaine (R-322) as well as his boasting of his status as an attorney, R-89.

It is further a fact that information was received by the State Attorney from Ms. Kim Marie Bailey and Ms. Pamela Giannuzz as noted by the plea agreement in evidence as Florida Bar Exhibit 2, regarding yet other crimes. This is admissible pursuant to The Florida Bar v. Stillman, 401 So.2d 1306, 1307 (Fla. 1981). Further, the testimony of Dr. Shashi B. Gore, in evidence by deposition, as Florida Bar Exhibit 7, further supports Ms. [redacted]s testimony that she was injected numerous times by the respondent with cocaine and other substances which left her in a state of acute distress. There is no testimony other than that of the respondent in controversion of Ms. [redacted]'s statement of the facts. Indeed, as Ms. [redacted] testified, she cooperated with law enforcement authorities leading to the respondent's arrest for possession of cocaine in this matter, R-79-80, 81, 85-86. This

would hardly support any contention that this was a mutually voluntary "coke party". The facts of this arrest, the persuasive evidence of the similarity of the evidence in these cases and the uncontroverted fact of respondent's convictions conclusively point to the fact that Ms. [redacted] and Ms. [redacted] were not willing participants in respondent's cocaine usage through injection.

The next issue on which the referee erred regarding his finding of the facts concerns his finding that respondent be found not guilty of violating Rule 1-102(A)(4) for engaging in conduct involving fraud, misrepresentation, dishonesty, or deceit and Rule 1-102(A)(6) for other misconduct reflecting adversely on his fitness to practice law, at Section Four of his report, page 5. Although the referee finds the respondent in violation of the Integration Rule of The Florida Bar, Rule 11.02(3)(a) for engaging in conduct contrary to honesty, justice, and good morals, and Rule 11.02(2)(b) for engaging in felonious conduct as well as the Disciplinary Rule of the Code of Professional Responsibility of The Florida Bar, Rule 1-102(A)(3) for engaging in illegal conduct involving moral turpitude, the referee makes no statements as to why this conduct would also not be in violation of Rule 1-102(A)(4) for dishonesty and the very general rule, 1-102(A)(6) for reflecting adversely on his fitness to practice

law. In fact the referee himself states at Section Five page 6, "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." Thus the referee appears to state that respondent is in violation of the rule as exactly as it is worded yet fails to find the respondent in violation of the rule itself. There are no similar cases involving felonies where this Court has stated that felonious conduct does not reflect adversely on an attorney in violation of Disciplinary Rule 1-102(A)(6). In fact, the following cases all involving felonies involving drugs all cite 1-102(A)(6) to be in violation; The Florida Bar v. Linn, 461 So.2d 101 (Fla. 1984); The Florida Bar v. Carbonaro, 464 So.2d 549 (Fla. 1985); The Florida Bar v. Ludwig, 465 So.2d 528 (Fla. 1985); The Florida Bar v. Price, 478 So.2d 812 (Fla. 1985); and The Florida v. Anderson, 482 So.2d 1 (Fla. 1986). The latter two cases also cite violations of 1-102(A)(4) for conduct involving dishonesty. Without dwelling on the point unnecessarily, if the girls' version of respondent's conduct involving the felonies is accepted, this would be deceit in violation of this rule.

CONCLUSION

WHEREFORE, The Board of Governors of The Florida Bar respectfully prays that this Honorable Court will review the Referee's Report and recommendations; find the referee's findings of fact to be in error regarding the circumstances of the two felony convictions and the findings of not guilty as to certain Disciplinary Rules of the Code of Professional Responsibility of The Florida Bar, and disbar the repsondent for a period of at least three years and further order the respondent to pay costs in these proceedings currently totalling $ 1320.35.

Respectfully submitted,

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Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Complainant's Initial Brief has been furnished by ordinary U.S. mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing was mailed by ordinary U.S. mail to John A. Weiss, Counsel for Respondent, Post Office Box 1167, Tallahassee, Florida, 32301; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, this 6th day of October, 1986.

Jan Wichrowski

JAN K. WICHROWSKI
Bar Counsel