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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

v

CASE NUMBER: 72,505

ALAN K. MARCUS,

Respondent.
_____/

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

As indicated by The Florida Bar in its brief, the Respondent will refer to The Florida Bar as such, as the Bar or as Petitioner. Respondent will be referred to as such or by his name.

The referee reports will be designated RR I for his May 2, 1989 report, RR II for his July 23, 1990 report (filed on January 17, 1992) and RR III will refer to the referee's amended report dated February 18, 1992.

References to the transcripts of hearings before the referee will be limited to the two evidentiary hearings before him an February 10, 1989 and June 6, 1990. References to pages in the former will be indicated by the symbol TR I and to the latter as TR II.

STATEMENT OF THE CASE AND OF THE FACTS

In its statement of the case, Bar Counsel thoroughly sets forth the procedural events of this case. Respondent would point out, however, that The Florida Bar mistakenly states on page five of its brief that Respondent was adjudicated guilty of a felony on August 24, 1990. In fact, he was indicted on that date. Respondent was adjudicated guilty on July 22, 1991.

Respondent's felony conviction was for exactly the same offenses for which disciplinary proceedings were brought against him. On October 23, 1991, he was sentenced to six months house arrest, $40,000.00 fine and three years probation.

On November 21, 1991, Respondent was automatically suspended pursuant to his felony conviction. That suspension was effective December 23, 1991.

The facts relating to Respondent's misconduct are fairly straight forward.

Respondent was admitted to the Bar in 1978 and until his felony suspension had no disciplinary sanctions imposed upon him. TR 11 128, 145. In late October 1985, after becoming addicted to cocaine, Respondent suddenly started engaging in a course of conduct that was entirely inconsistent with his past career. As set forth in the referee's May 2, 1989 report, there were five instances in which Respondent mishandled funds belonging to his clients or to the firm. That misconduct ended on June 6, 1986. RR I 3-8. In essence, Respondent overstated to his clients the settlement value of four insurance cases resulting in his obtaining

$39,000.00 in surplus insurance proceeds. The fifth case involved his doing work for a client and failing to remit to his law firm approximately $4,921.16 in fees.

The referee specifically found that

> There was a direct and causal link between the Respondents (sic) misconduct and hie narcotic addition to cocaine. RR III 2.

On August 27, 1986, three weeks after his misconduct was discovered, Respondent made full restitution as to all funds taken. RR I 3-8, RR III 2.

The referee accepted the agreement on February 10, 1989 between The Florida Bar and Respondent that an eighteen month suspension was the appropriate discipline for his offense. After this case was remanded by this Court to the referee far additional evidence in mitigation, the referee reaffirmed his recommended eighteen month suspension but reduced Respondent's probation to three years. RR III 2.

In deciding to accept the eighteen month suepension recommended by The Florida Bar, the referee relied on the testimony of two physicians who are experts in the treatment of addictions and on the testimony of the monitor assigned to Respondent by Florida Lawyers Assistance, Inc. (FLA). After remand, on June 6, 1990 the referee heardthe additional testimony of eleven character witnesses, Respondent's FLA monitor (again) and Respondent himself. Among the witnesses testifying for Respondent were his wife, three lawyers, numerous individuals from Narcotics Anonymous (NA), some of whom have become clients, and other individuals who attested to

the uncharacteristic behavior that Respondent engaged in during the period from the fall of 1985 through the summer of 1986.

The evidence before the referee was overwhelming that Respondent has not engaged in the consumption of alcohol or illicit drugs since December 5, 1986. TR II 144. Since his first FLA meeting on December 4, 1986 and his admission into a cocaine rehabilitation program at Coral Reef Hospital on December 7, 1986, Respondent has been a model of recovery. He currently attends three or four NA or FLA meetings per week.

The referee specifically found the following factors to be mitigation in this case:

(1) As previously established, there was a direct and causal link between the Respondents misconduct and his narcotic addiction to cocaine.

(2) Respondent has established a repore (sic) and strong affiliation with Narcotics Anonymous Program over the last three years and continues this affiliation on a bi-weekly basis.

(3) Respondent has successfully fulfilled a two year contract with the Florida Lawyers Assistance Corporation and voluntarily continues to report to his assigned monitor to date.

(4) Respondent has shown an active and helpful role in the recover (sic) of other suffering addicts.

(5) Respondent adequately and responsibly performs as an attorney in the community today.

(6) Respondent has made full restitution to the harmed parties.

SUMMARY OF ARGUMENT

Respondent's misconduct was the direct result of the impairment of his judgment due to cocaine addiction. After seven years of a blemish-free practice Respondent began acting contrary to his normal character. Ultimately, he engaged in five instances of improper unethical behavior between October 24, 1985 and June 6, 1986. Since then, his behavior has been exemplary.

The witnesses that testified on Respondent's behalf told the referee that during the period from the fall of 1985 through August 1986, Respondent's behavior was bizarre. He changed from a loving and caring father to an individual who disregarded all his values. He even brought his mistress home with a suggestion that Respondent, his wife and his mistress all live together. He suddenly started engaging in prolonged absences from work, he became unreliable in his appearances for social events and he became a generally despicable person.

In August 1986, his misconduct was discovered and he was fired from his firm. He immediately made full restitution of all funds taken.

After unsuccessfully trying to self-treat his dependency for several months in the fall of 1986 (during which time he continued to consume alcohol), Respondent entered FLA in a recovery program on December 4, 1986. Three days later he entered the Coral Reef Hospital treatment program. Since December 5, 1986, he has completely abstained from all drugs and alcohol.

Respondent's recovery has been an example to all who observed

him. He has sponsored numerous individuals, has given of himself to the NA organization and has even conducted meetings in jails. He is once again the loving father and highly valued friend that he was before his one year period of aberrational behavior.

In cases such as this, where there is a direct causal relationship between the misconduct and impairment due to addiction, this Court has given Respondents the benefit of the doubt. The Florida Bar v Sommers, 508 So.2d 341 (Fla. 1987), The Florida Bar v Jahn, 509 So.2d 285 (Fla. 1987) and The Florida Bar v Rosen, 495 So.2d 180 (Fla. 1986). Respondent deserves the same consideration.

The mitigating circumstances in this case justify The Florida Bar's agreement on February 10, 1989 (over three years ago) that an eighteen month suspension was appropriate. At that time, Respondent had 27 months of sobriety, i.e., interim rehabilitation, behind him. As of the date of this brief, Respondent has over five and one half years of demonstrated sobriety. For the five years between his entry into a treatment center and his automatic suspension from practice in December 1991, Respondent practiced law in a commendable manner and without any harm to his clients. Respondent's interim rehabilitation, his prompt restitution, his absence of a prior disciplinary record, his full and free cooperation with The Florida Bar and his obvious remorse and desire to make amends all point towards the propriety of an eighteen month suspension from the practice of law nunc pro tunc December 23, 1991, followed by three years probation.

ARGUMENT

THE EIGHTEEN MONTH SUSPENSION AGREED TO BY THE FLORIDA BAR AND RECOMMENDED BY THE REFEREE IS TEE APPROPRIATE DISCIPLINE FOR RESPONDENT'S MISCONDUCT AND SUBSEQUENT FELONY CONVICTION FOR THAT MISCONDUCT IN LIGHT OF THE SUBSTANTIAL MITIGATION PRESENT AND BECAUSE HIS MISCONDUCT WAS DIRECTLY ATTRIBUTABLE TO HIS COCAINE DEPENDENCY, WHICH OCCURRED IN A NARROW TIME FRAME FROM OCTOBER 1985 THROUGH JUNE 1986 AND WHICH IS EXTREMELY UNLIKELY TO REOCCUR.

In late 1985 and early 1986, after seven years of a exemplary practice, Respondent engaged in a course of conduct that was completely inconsistent with his earlier life and with the life that he has lived in the six years since then. His aberrational behavior was unquestionably caused by his impairment due to cocaine addiction. In the six years since his last act of misconduct in early June, 1986, and most particularly since he became "clean" on December 4, 1986, Respondent's conduct has been beyond reproach.

Rather than being able to put his misconduct behind him, as he thought he had done when he agreed on February 10, 1989 with The Florida Bar that an eighteen month suspension would be the appropriate discipline for his misconduct, Respondent has been in disciplinary limbo for the three and one half years since that date. Approximately eighteen months after his February 10, 1989 agreement, Respondent was indicted for nine counts of misconduct which exactly track the disciplinary charges brought against him. On July 22, 1991, Respondent pled to one count resulting in his being sentenced on October 23, 1991 to six months house arrest, a $40,000.00 fine and three years probation. Two months later Respondent was automatically suspended from the practice of law

pursuant to his felony suspension.

Despite Respondent's attempt to resolve these disciplinary proceedings in February 1989, as a result of the complaint filed by The Florida Bar on May 31, 1988, his disciplinary proceedings are still pending. Respondent humbly suggests that the original eighteen month suspension agreed upon by the parties to this action, is certainly appropriate now even if it was not the fit discipline to be imposed when this Court remanded this case on November 13, 1989. Respondent now has a demonstrated track record of sobriety lasting five and one half years. His drug dependence was the cause of his misconduct and, now that that problem has been identified and is under control, there is no need to enter a suspension longer than eighteen months.

The three purposes of discipline are to protect the public from unethical conduct, to impose a discipline that is fair to the accused lawyer in that it punishes a breach of ethics while at the same time encouraging reformation and rehabilitation, and deterrence. The Florida Bar v Pahules, 233 So.2d 130, 132 (Fla. 1970). Respondent submits that an eighteen month suspension will accomplish all three goals.

Respondent is not a lawyer that should be removed from practice to protect the public. From the time of his last act of misconduct in June 1986 until his suspension over five years later, he conducted his practice in an exemplary manner without any harm to his clientele. Respondent's misconduct was directly attributable to his addiction. Once the cause of his misconduct

was identified and treated danger to the public was no longer a concern. In essence, Respondent's misconduct was a relatively brief aberration in an otherwise sterling career.

Were it not for his addiction, Respondent submits that there would be absalutely no concern about the welfare of Respondent's clientele. He urges this Court to look at the seven years of his practice before his addiction and the six years afterwards and to consider those periods reflective of Alan Marcus' practice. When his years of exemplary practice are emphasized, rather than his less than one year of aberrational conduct, no conclusion can be reached but that the public has been well-served by Respondent. The testimony of his witnesses makes that abundantly clear.

At the February 10, 1989 hearing, three witnesses testified on Respondent's behalf. The first of these was Dr. Jules Trop, one of the pioneers in the field of addictionology and currently one of the foremost experts in that field. In 1989, Dr. Trop, a physician, was the medical director of the New Life Addiction Program at North Miami Medical Center. Dr. Trop testified that there is "no question" that Mr. Marcus "suffered from the disease of chemical dependency." TR I 26. He further testified that

> Had [Mr. Marcus] not been the victim of the disease of addiction, [his misconduct] simply would not have happened. TR I 27.

Dr. Trop noted that Mr. Marcus had "excellent family support...." and that his recovery was of "very high quality...." TR I 28. Respondent's prognosis for recovery from his addiction is "excellent". TR I 28.

It must be pointed out that Dr. Trop's diagnosis has been borne out by the three and one half years of sobriety since his testimony.

Dr. Trop in February 1989 had treated approximately 250 lawyers and over 500 physicians during the preceding four or five years. TR I 32. He pointed out that while under the influence of drugs, individuals do things that are inconsistent with their normal personality. Specifically, Dr. Trop said

> The drug works on the brain biochemically. Common sense, good judgment, moral values, et cetera, et cetera, disappear under the influence of the drug and people do things that they would not normally do;.... TR 1 32.
>
> In essence, an addict's faculties are impaired. TR I 33.

Respondent's treating physician, Richard Tysan, also testified during the February 1989 hearing. Dr. Tyaon is the medical director of the CareUnit of Coral Springs and the Inner Phase Recovery Program in Boca Raton and Miami Lakes. Dr. Tyson first treated Respondent when he entered the five day inpatient program at Dr. Tyson's facility on December 7, 1986. TR I 34, 38. That treatment was followed by an intensive outpatient program for both Respondent and his wife over the next year. TR I 35.

Dr. Tyson agreed with Dr. Trop's assessment that

> Cocaine and all other mood altering substances used in excess cause people to violate their basic moral and ethical framework. TR I 37.

Dr. Tyson also testified that

> At this time, knowing him and seeing him in the recovery, in the state without the chemicals, my opinion is that he behaved in

> that manner only because of chemical use. It's clear, given the responsibility that he's taken the amount of work he has done in terms of giving away what he's got now to the newcomers, that he's an individual with a real high ethical and moral system. TR I 38.

There can be no doubt that Respondent's conduct was markedly altered during that period beginning in late 1985 and lasting through the summer of 1986. The testimony of his wife, Lori Marcus, is compelling in that regard. Ms. Marcus testified for Respondent at the June 6, 1990 hearing. Her testimony paints a picture of a lawyer who was (and is, once again) a wonderful husband and an adoring father to his two children. He got along with other people and, in fact, other people with children gravitated towards him. TR II 27, 28.

Things changed in the summer of 1985. TR II 29. At that time Ms. Marcus noted for the first time that they were having marital problems. She testified that

> As time went on, he became more self-centered, arrogant, impatient. He became less and less dependable, more flamboyant, less patient with the children, less patient with me.
>
> ...
>
> Our marriage was deteriorating rapidly. There was no communication. TR II 29, 30.

Ms. Marcus did not realize that her husband had a drug problem until Respondent was "bottoming" in June or July 1986. TR II 30. Prior to that time, in approximately February, Respondent began engaging in extremely bizarre behavior. For example, he would bring files home, would set all of his papers on the kitchen table and then would sit there from early in the evening until three

o'clock in the morning. Ms. Marcus later found out that what he was doing during that entire period was taking cocaine. TR II 31. The most extreme example of Respondent's incredibly bizarre behavior was Mr. Marcus' extramarital affair. In June 1986 Ms. Marcus suspected Respondent was having an affair after she started getting large American Express bills. Although Mr. Marcus initially denied his infidelity, eventually he brought his mistress home and wanted the three of them to live together in the same household. TR II 32. As Ms. Marcus testified, "this was not the man 1 had married". TR II 33.

By August 1986, "things had gotten very, very bad." Respondent would disappear for several days at a time and he had absolutely no relationship with his children at all. TR II 33.

Finally, Respondent started trying to get his life together. In September he abstained from cocaine but he continued using alcohol. In November 1986, he had a relapse which resulted in his checking into the Coral Reef hospital for drug treatment in December 1986. TR II 34, 35.

Respondent's treatment at Coral Reef was a five day inpatient program followed by an intensive one year outpatient program. That program initially required bath Mr. and Ms. Marcus going to meetings four nights a week for three hours pew night. TR II 36, 37. In addition to that, Respondent went to numerous NA meetings.

Ms. Marcus characterized Respondent's recovery as "a miracle". TR II 38. He has been "clean" since December 5, 1986 and Ms. Marcus is once again enthusiastic about their marriage. She

testified that

> His recovery has been the most wonderful experiences of our lives. He is the person he used to be. He is caring, he is honest, he is the most wonderful father out of everyone 1 know. He helps people. He is sensitive. TR II 39.

Ms. Marcus' testimony is confirmed by one of her best friends, Linda Gest. The Gest family and the Marcus family had been good friends for approximately eleven and one half years prior to the June 1990 hearing. Ms. Gest said that prior to Mr. Marcus' addiction

> He used to get my husband in a lot of trouble, because he was a very good father and a very good husband. I used to go home and say 'why didn't you do that', or 'why didn't you do that'.
>
> So I would say that he was an excellent father and an excellent husband. TR II 122, 123.

When asked to describe Mr. Marcus' behavior while he was using drugs, Ms. Gest testified

> Mr. Marcus is a very meticulous man. During the six months [he was dependent], he was not. He would not appear timely. Lori and I and the children would wait for him and he wouldn't show. He was not dependable during this time.
>
> He was arrogant. I am sorry to say it, but he was rather repulsive.
>
> There were times when we would be with him socially, where my husband and I would discuss later that we would chose not to go out with him again socially. TR II 123.

When asked how Mr. Marcus was acting in June 1990, Ms. Gest replied

> He is getting my husband in trouble again.

> He is considerate. He is there. He is dependable. He is back the way he used to be. TR II 124.

From a professional sense, lawyer Jeffrey Kramer paralleled the testimony of Ms. Marcus and Ms. Gest. Mr. Kramer testified that before Mr. Marcus' drug problems began

> He was sharp, he was right on top of things. He never let anything slide. TR II 110.

Socially, Mr. Kramer testified that prior to his problems Respondent was a "great guy, one of my best friends." TR II 108. Once he went on drugs, Mr. Marcus "was a different person. He was unreliable." TR II 109. Mr. Kramer testified that he atopped socializing with Mr. and Mrs. Marcus because Respondent was never around. Mr. Marcus was "high strung and nervous. He was inattentive." TR II 109.

Now, Mr. Kramer says that the old Alan Marcus has returned.

> We are doing all the things that we used to do. We recently worked on a couple of personal injury cases together. He carried the day, for the most part.
>
> Socially, we are doing the same things that we were doing before. We get together at least a couple of times a month with the kids. We go out socially with Alan and Lori just like we did before. TR II 111.

When asked if Mr. Marcus had ever expressed remorse Mr. Kramer answered:

> Many, many times. We have had heart to heart discussions. He virtually put himself to the point of tears, baring his soul and regretting that he ever got involved with this problem and for the things that happened. TR II 111.

While an addict is never completely recovered, Alan Marcus is beyond the point of there being a valid concern about his relapse. In February, 1989, both Dr. Trop and Dr. Tyson testified that Respondent's recovery was excellent. Their optimism was borne out in June, 1990 by Respondent's FLA monitor, his NA sponsor, and by three other individuals who are in NA with him. Among those witnesses were: Michael Gibson, a businessman; Sheldon Zilbert, a lawyer who is Respondent's monitor with FLA; Nancy Cliff, a lawyer in FLA with Respondent; Louise Poteat, a facilitator of two after care programs and a fellow NA attendee; and Ron Molina, a CPA who attends NA meetings with Respondent. Mr. Gibson and Mr. Molina both retained Respondent as their lawyer in child custody battles knowing full well that he was a recovering addict. Both were well satisfied with his services. Mr. Zilbert has referred ten or fifteen cases to Respondent while he was in recovery and was pleased with Respondent's representation. Nancy Cliff co-counseled several cases with Respondent and found his work habits to be exemplary.

All witnesses gave Respondent very high marks for his recovery program. Mr. Zilbert testified that Respondent had done "remarkably well in his recovery", and that Respondent's representation of Mr. Zilbert's referrals was a "credit to the profession". Mr. Zilbert considered Respondent's chances of a relapse to be "preposterous". TR II 59, 61, 63.

Mr. Zilbert went on to state that after working with numerous other professionals over many years, he thought in June 1990 that

> Alan has long ago reached that point in recovery where he can now say he is recovering as well as any recovering person I know. TR 11 68.

Nancy Cliff is a lawyer who met Respondent in FLA. She has handled overflow litigation for Respondent and, while working with him, found him to be "a very responsible attorney" and "very competent". TR II 84. She is sure that he is not using alcohol or drugs. TR II 88.

Ron Molina, a CPA, knows Respondent from NA. He retained Respondent to represent him in a child custody fight.

Perhaps the person who best knows Respondent, other than Mr. Zilbert and Lori Marcus, is Respondent's NA sponsor, Michael Gibson. Mr. Gibson, a partner in a wholesale seafood operation, first met Respondent in December 1986. He testified that in June 1990, Mr. Marcus was still attending three or four NA meetings a week. He attested to Respondent's working the steps and his recovery in general. Mr. Gibson testified that Respondent "is doing great'' in his recovery and that Respondent's attitude is "upbeat". TR II 15.

The most important aspect of Mr. Gibson's testimony, however, is that he had sufficient trust in Respondent to not only allow him to represent the seafood business but to handle a personal custody case regarding Mr. Gibson's child. TR II 15. After a suit that lasted many years, because Mr. Gibson's ex-spouse had taken his child out of the state, Respondent got custody for Mr. Gibson. TR II 16.

Two other witnesses testified as to Respondent's ability as a lawyer during his recovery, Donald W. Vander Linde, a general contractor and Leslie Adler, a CPA. Both testified as to Respondent's superb ability. TR 11, 146-149, 163-169.

By far and away the most important testimony before the referee was that of Respondent himself. On June 6, 1990, after the case was remanded by this Court, Respondent spoke extensively about his recovery program. On December 7, 1988, Respondent checked into the Coral Reef Hospital for a five day in-patient treatment program. That was followed up by one and one half years of after care. Initially, Respondent's outpatient program was four days a week plus his normal NA and FLA meetings. On a quarterly basis, the after care program tapered down to three meetings per week, two meetings per week and finally one night a week. The program included counseling for Respondent as well as his brothers, his parents and his wife. TR II 131-133.

Respondent is very active in Narcotics Anonymous (NA) and The Florida Lawyers Assistance (FLA) program.

Initially, rather than doing the standard recommended regimen of 90 meetings in 90 days, Respondent did approximately 180 meetings in his first 90 days of treatment. TR 11 135. He now averages between three and four meetings per week. Never fewer than three weekly meetings. TR II 136.

Respondent has taken meetings into hospitals and other institutions, including the North Dade jail and the stockade in that county. TR II 136. He sponsors five people in NA and he runs

some of the NA meetings (including such tasks as opening the doors, making coffee, putting out literature and cleaning up after the meetings). TR II 137, 142.

Respondent is also one of the "trusted servants", people that collect money to pay for the rooms that are rented, coffee and literature. TR II 142, 143.

Respondent is also active in the FLA program. Initially, he signed a contract with that organization and his monitor, Sheldon Zilbert, has attested to his dedication to that organization.

Respondent testified that his "clean date" is December 5, 1986 and that he has not used any drugs or alcohol since then. TR II 144.

Respondent has no prior disciplinary history with The Florida Bar. TR II 145.

Under Pahules, this Court's first responsibility is to guarantee the public's protection from a lawyer. The testimony of the witnesses before the referee indicated that Respondent's misconduct was an aberration, and that since his recovery began in December 1986, he has conducted himself consistent with the highest standards of our profession. A track record in excess of five years, during which members of the public retained Respondent to represent them and fellow lawyers reviewed his work, including referrals, prove that Respondent is no threat to the public's welfare.

When, in a case such as this, misconduct occurs in a narrow period of time and the causes of which are clearly identified and

treated, the concern about future misconduct is diminished. We know why Respondent suddenly started acting irrationally. The cause for that irrational behavior was identified and treated. He now has a long track record showing that the possibility of relapse is "preposterous".

The second element under Pahules in determining a discipline is one that is fair to the lawyer in that it is sufficient to punish a breach of the ethics while encouraging reformation and rehabilitation. Any suspension longer than eighteen months is simply unfair to Alan Marcus. It will not encourage rehabilitation at all. Perhaps, more importantly, is that a longer suspension will discourage reformation and rehabilitation by other addicted lawyers.

On February 10, 1989, recognizing that discipline was appropriate, and after over three years of almost religious dedication to NA and FLA and complete sobriety, Mr. Marcus admitted his guilt and agreed at final hearing to an eighteen month suspension. Now, three and one half years later, that case is still hanging in limbo. In the meantime, four years after the fact, Respondent was indicted on August 24, 1990 for the same conduct involved in the disciplinary proceedings. That indictment resulted in a conviction on July 22, 1991 and a felony suspension from this Court effective December 23, 1991. Now, in July 1992, over six years after the misconduct occurred and three and one half years after an accord with the Bar was reached, we are still arguing discipline to this Court. At some point in time,

disciplinary proceedings must end.

Respondent's recovery from his addiction is an example that other lawyers should be encouraged to follow. It is imperative that this Court show the lawyers that in our state where addiction is a problem in their life, seeking help is the best thing a lawyer can do. That policy was emphasized in The Florida Bar v Jahn, 509 So.2d 285, 287 (Fla. 1987). There, the Court stated that

> An attorney with a chemical dependency problem, whether the drug of his choice is legal such as alcohol, or illegal such as cocaine, should be encouraged to seek treatment to rid himself of the dependency. We have held in prior Bar disciplinary cases that an addicted attorney who has demonstrated positive efforts to free himself of his drug dependency should have that fact recognized by the referee and this Court when considering the appropriate discipline to be imposed.

This Court must give dependent lawyers some encouragement. Some hope. Even lawyers who have engaged in serious misconduct should be able to look at Alan Marcus and see that prompt restitution coupled with an iron-clad recovery program will enable them to rehabilitate their lives. Not have it destroyed.

While dependency certainly does not abrogate the need for discipline, the sanctions that are applied should not be so harsh as to make dependent lawyers think that restitution and rehabilitation are meaningless. Addicted lawyers must have a light at the end of their tunnel of addiction.

Suspending Alan Marcus for eighteen months, nunc pro tunc December 23, 1991, is imposing exactly the sort of sanction that the Court referred to in Jahn. If ever there were a case where a

lawyer's misconduct was the result of chemical dependency, it is this one. In thirteen years of practicing law, only in a very narrow time span were there any problems. Those problems were alleviated when the recovery from the dependency began. The sanction meted out to Mr. Marcus should be consistent with the policy this Court espoused in Jahn. That case had ample precedent in The Florida Bar v Larkin, 420 So.2d 1080 (Fla. 1982); The Florida Bar v Rosen, 495 So.2d 180 (Fla. 1986) and The Florida Bar v Sommers, 508 So.2d 341 (Fla. 1987).

An eighteen month suspension in the case at Bar will certainly meet the third goal of Pahules; deterrence.

A one and one half year suspension is a long enough absence from practice that its severe adverse financial consequences will deter any lawyer from similar misconduct, (and in the case at Bar a $40,000.00 fine was coupled with Respondent's criminal sanction). Proof of rehabilitation will be required before any lawyer so disciplined will be reinstated; that, too, is deterrence.

More importantly, however, eighteen months is consistent with past decisions. For example, in Rosen, this Court suspended a lawyer for three years after his federal felony conviction of possessing cocaine with the intent to distribute. Similarly, in Jahn, the lawyer was suspended for three years after being convicted of two crimes involving delivery of cocaine to a minor and possession of cocaine. The offenses by Messrs. Rosen and Jahn were far more serious than the case at Bar. They were distributing cocaine, an offense not involved in the case at Bar. Both lawyers

would have been disbarred but for their dependency. Mr. Marcus' actions are not as serious as theirs and, accordingly, his discipline should be reduced.

A case with facts more similar to Respondent's is that of The Florida Bar v Tunsil, 503 So.2d 1230 (Fla. 1986). Mr. Tunsil received a one year suspension followed by two years probation after it was found that he misappropriated approximately $10,500.00 that he held in trust for a guardianship. (There was also a minor additional charge relating to a bounced check.) After acknowledging Respondent's cooperation with the Bar, his remorse, and the effects of his alcoholism, all circumstances considered as mitigation, this Court suspended Mr. Tunsil for only one year. This was true despite the fact that the restitution was only made in accordance with a plea agreement in criminal charges brought against Respondent.

Respondent's case is very similar to that of Mr. Tunsil. Rather than being addicted to alcohol, Respondent was addicted to cocaine. However, he had a demonstrated recovery program, his remorse was apparent in his testimony, he cooperated with the Bar and he made restitution. Unlike Mr. Tunsil, however, Respondent immediately made restitution (within three weeks of a complaint being filed with The Florida Bar) and it was not the result of a plea agreement. An even more important distinction between Tunsil and the case at Bar, however, is the length of time that Respondent's interim rehabilitation has been documented. The Bar's complaint was filed on May 31, 1988, over four years ago, and the

misconduct at issue occurred over six years ago.

The time that these proceedings has been pending is certainly a mitigating circumstance calling for a reduced sanction. For example, in The Florida Bar v Kaufman, 347 So.2d 430 (Fla. 1977) this Court stated that one of its considerations in discipline was the fact that charges had been filed more than three years before oral argument in front of the Supreme Court. The Court observed that

> During that time respondent has had time to evaluate his conduct and has experienced personal and professional detriment.

Similarly, Respondent has had over four years to evaluate his conduct and experience personal and professional detriment.

It has been a fundamental precept of this Court's policy and discipline for many, many years that "disciplinary proceedings should be handled with dispatch." The Florida Bar v Oxford, 127 So.2d 107 (Fla. 1960). In The Florida Bar v Randolph, 238 So.2d 635 (Fla. 1970) the Supreme Court adopted a referees discipline in a case that had been pending for seven years after observing on page 638 that

> inordinate delays are indeed unfair and even unjust to the one accused.

The Court also observed on page 639 that the suffering of a lawyer because of unjust delay can supplant more formal discipline.

While the delay in the case at Bar cannot be attributable to The Florida Bar, a referee's improper delay can reduce discipline. The Florida Bar v Guard, 453 So.2d 392 (Fla. 1984). There, a referee's seventeen month delay in issuing his report resulted in

a 30 day suspension being imposed instead of one year.

This Court has specifically noted in the Florida Standards for Imposing Lawyer Sanctions under Standard 9.32, that there are numerous mitigating factors that shall be taken into consideration in any discipline. Among the factors that apply to the case in hand are:

(a) Absence of a prior disciplinary record;

(d) Timely good-faith effort to make restitution....

(e) Full and free disclosure to disciplinary board or cooperative attitude....

(g) Character or reputation;

(h) Physical or mental disability or impairment;

(i) Unreasonable delay in disciplinary proceedings;

(j) Interim rehabilitation;

(k) Imposition of other penalties or sanctions;

(1) Remorse.

Most of the mitigating factors listed under Standard 9.32 are present in the case at Bar. The most important ones, however, are Respondent's interim rehabilitation and his prompt restitution. The fact that he has no prior disciplinary history and that he cooperated wholeheartedly with The Florida Bar in these proceedings are also worthy of substantial consideration.

When considering deterrence, this Court should also note that Standard 9.32(k), relating to imposition of other penalties, is an appropriate consideration in the case at Bar. Respondent pled guilty to one count of the nine counts brought against him. While the sentencing judge did not feel that incarceration was necessary,

Respondent was given six months house arrest, three years probation and a $40,000.00 fine was levied. Respondent submits that such a fine is a clear deterrence to other lawyers and when it is coupled with his eighteen month suspension, it is a heavy sanction indeed.

It is time to put an end to Respondent's disciplinary proceedings. Additional remand as suggested by the Bar is unnecessary. In February 1989 The Florida Bar thought an eighteen month suspension was appropriate. Respondent's conviction for the same acts for which the eighteen months was recommended in no way changes the gravity of his offense. It in no way enhances the lack of risk that he poses to the public's welfare. After eighteen months, and after his civil rights are restored, Respondent will still have to prove rehabilitation in reinstatement proceedings. At that time, if Respondent meets his burden of proving rehabilitation, this Court will be able to reinstate him without any concern for the publics welfare.

An eighteen month suspension will be a fair discipline to Respondent while at the same time it will announce to other dependent lawyers that seeking treatment for an addiction will be a favorable element that will be considered if they have engaged in misconduct. Finally, eighteen months is a long enough suspension, particularly when coupled with the criminal penalties imposed here, that no lawyer that looks at Alan Marcus' case will think that he got off easy.

CONCLUSION

The Florida Bar's original agreement made in February 1989 that Respondent should be suspended for eighteen months is even more valid in July 1992 than it was then. In the almost three years that elapsed from that agreement until Respondent was automatically suspended as a result of his felony conviction, he proved beyond a shadow of a doubt that he could be trusted to conduct the practice of law in an exemplary fashion.

This Court should adopt the referee's recommended discipline and suspend Respondent for eighteen months nunc pro tunc December 23, 1991, and thereafter until he proves rehabilitation in reinstatement proceedings. Upon reinstatement, Respondent should be placed on probation for three years.

Respectfully submitted,

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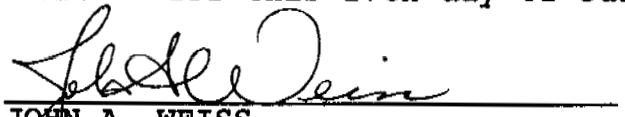
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer Brief was mailed to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300 and to Arlene K. Sankel, Bar Counsel, The Florida Bar, Suite M-100, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida 33131 this 27th day of July, 1992.



JOHN A. WEISS