

IN THE SUPREME COURT OF FLORIDA

SUPREME COURT CASE NO. 72,505

THE FLORIDA BAR,

Complainant

-v-

ALAN K. MARCUS,

Respondent.

RESPONDENT'S BRIEF ON DISCIPLINE

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INTRODUCTION

The Florida Bar was the Complainant and will be referred to as the Bar. Alan K. Marcus was the Respondent and will be referred to as Mr. Marcus.

The symbol "T." will refer to the transcript of the proceedings held February 10, 1989, before the Referee, the symbol "ROR" will refer to the Report of Referee.

STATEMENT OF THE CASE AND OF THE FACTS

The Bar filed a public complaint against Mr. Marcus on May, 31, 1988, alleging four counts of misappropriation of client funds. At final hearing the complaint was amended to include additional similar matters (T.4-5; 14-15).

Mr. Marcus answered. He admitted making restitution. As affirmative defenses, he set forth that at all pertinent times he was under the influence of cocaine. He also set forth that he **had** rehabilitated himself. On December 8, 1986, he voluntarily entered the Coral Reef Hospital Dependency Unit on an in-patient basis for one week. On December 13, 1986, he voluntarily commenced a one year out-patient program **with** the Coral Reef Hospital Dependency Unit. He successfully completed the program. On December 13, 1986, he also voluntarily commenced attending a program sponsored by the Florida Lawyers' Assistance, Inc. **This** program meets every Monday. He attends regularly, missing only several meetings. Additionally, he entered into a contract with Florida Lawyers' Assistance, Inc. and had abided by its terms. A copy of the contract was attached to the Answer. He also voluntarily attends meetings of Narcotics Anonymous, at least four times a week, and has done so for the past year and a half. He also sponsored people in the program. He also voluntarily visits hospitals and institutions and shares his

experiences with addicts in them. He also set forth that discipline would serve no useful purpose since he had fully rehabilitated himself and no one was harmed.

The final hearing was held on February 10, 1989. The parties announced that they had reached settlement. They agreed to an eighteen month suspension, lifetime probation for substance abuse, participation in the Florida Lawyers' Assistance, Inc. program, and a five year trust account probation (T.21). Mr. Marcus would enter an unconditional guilty plea and admit to the facts set forth in the complaint (T.21). It was pointed out that restitution had been made after the initial complaint but very early in the proceedings (T.21).

The Referee noted that Mr. Marcus was on his way to straightening out his difficulty and thus he had no objection to suspension with some type of supervision in the future, **as** opposed to disbarment (T.22). It was quite reasonable to the Referee (T.22).

In mitigation, Mr. Marcus presented three witnesses. Other witnesses were called and told not to come since the matter had been settled (T.24).

Doctor Jules Trop testified. He is a physician and specializes in the field of addiction, addictionology is what it is called (T.20). He is the medical director of the New Life Addiction Program at North Miami Medical Center (T.20). He is

the past medical director at South Miami Hospital Addiction Treatment Program and Mount Sinai Addiction Treatment Program (T.20). He founded and directed that program (T.20).

There is no question from the Mr. Marcus' history both of the onset of drug use, the progress of drug use, the treatment for drug use, and the subsequent recovery from drug use or drug addiction, that he suffered from the disease of chemical dependency (T.26).

The disease of chemical dependency is a compulsion to use drugs or alcohol in the face of negative consequences (T.26). The negative consequences are the things that addicts do to themselves, to their loved ones, to their work, to their environment, to everything around them (T.26). Mr. Marcus suffered the consequences (T.26). He committed the acts he was charged with (T.26). He went into treatment and made a good recovery (T.26). Mr. Marcus is a perfect example of a person who became addicted (T.26). Addiction is not a voluntary act (T.26). Addiction is a disease recognized by all medical associations (T.26).

In his opinion, Mr. Marcus would not have committed the acts for which he pled guilty had he not been the victim of the disease of addiction (T.27). These things simply would not have happened but for his being the victim of the disease of addiction (T.27).

The disease of addiction is neither a moral failing, a lack of will power, or a psychiatric disorder (T.27). It is a primary disease of compulsion (T.27). It is a chronic, progressive, relapsing, and, if untreated, fatal disease (T.27).

Mr. Marcus has been in recovery for over two years (T.27). It is a good quality recovery (T.28). He is doing all of the things that he needs to do in terms of after-care recovery, meetings, Alcoholics Anonymous, Narcotics Anonymous, and Lawyers' Assistance Program meetings (T.28). He is doing what he needs to do (T.28). Also, he has excellent family support (T.28).

Mr. Marcus' recovery is a very high quality recovery (T.28). His prognosis is excellent (T.28).

On cross-examination, Dr. Trop testified that his understanding was that Mr. Marcus did not spend the money involved at all (T.29).

Dr. Trop has treated probably two hundred and fifty attorneys and over five hundred physicians in the last four or five years (T.32). In the great majority of cases, these professionals have committed acts, either illegal acts, certain immoral acts, certain acts that are very painful to themselves and others, under the influence of the drug (T.32).

The drug works on the brain biochemically (T.32). Common sense, good judgment, moral values, disappear under the influence of the drug and people do things that they would not normally

do; sometimes violent acts (T.32). The tie in between the disease of addiction and the acts that addicts commit **as** a result of addiction is that they are working as impaired people, people with impaired faculties (T.32-33). The money that was involved here was not used to further Mr. Marcus' addiction (T.33). He took the money because of his impairment resulting from his addiction (T.33).

Dr. Richard Tyson testified. He is a physician and his practice consists of addiction medicine and treatment (T.34). He is the medical director of Care Unit of Coral Springs and of the Interphase Recovery Program, Boca Raton and Miami Lakes (T.34).

Mr. Marcus came to see him as a patient in 1986 (T.34). He had the disease of addiction for which he began his treatment (T.34). When Mr. Marcus came to him he was somewhat gaunt, physically (T.34). He was anxious, very fearful, and he wanted a change (T.34). He recognized that he had a problem (T.34).

The Respondent first went in as an inpatient (T.34), for five days (T.34). He continued on an intensive outpatient program which lasted approximately one year (T.34-35).

The inpatient treatment consisted initially of an assessment and evaluation (T.35). The detoxification process was begun (T.35). A physical examination was given (T.35). There was group therapy on a regular basis (T.35). There was blood testing,

urine testing, and an electrocardiogram given (T.35). Basically, physical evaluations were performed and a psychosocial evaluation was performed, which means he was evaluated in terms of his emotional and psychological status (T.35).

The outpatient therapy was a continuation of the bonding process, a stage of recovery that he needed to go through, dealing with emotional issues and feelings (T.35). That process was built around group therapy which was begun in the hospital and was continued on a decreasing frequency (T.35).

Mr. Marcus took positive steps for his rehabilitation (T.35-36).

Dr. Tyson has been seeing Mr. Marcus periodically for over a year since he completed outpatient therapy (T.36). Mr. Marcus has progressed really well (T.36). He has really **grasped** the elements that are necessary for recovery: humility, the ability to give to others, to provide service for people coming into the program (T.36). He **had** done that by solidly embracing Narcotics Anonymous, which has been and will continue to be an essential part of his continued recovery (T.36).

When he was in the active phase of his addiction, about a six month period, he demonstrated, as would any patient under the influence of cocaine, behavioral changes that looked very much like mental illness (T.36). Cocaine causes paranoia (T.36). It causes real inaccuracy in reality perception (T.36-37).

Cocaine and all other mood altering substances used in excess cause people to violate their basic moral and ethical framework (T.37). Patients, including Mr. Marcus, look like they have major personality disorders including antisocial personality disorder, which is one associated with violation of the law (T.37). Cocaine patients also have the trait of grandiosity (T.37). Again, that is a distortion of reality (T.37). The family damage and personal social contact that occurs when people get involved with chemicals, which they also include as a part of their description of the disease, is enormous (T.37). Those things were all present when he came (T.37).

In his opinion there was a causal relationship between Mr. Marcus' active addiction and his actions as set forth in the Complaint (T.37). Knowing Mr. Marcus and seeing him in recovery, in a state without the chemicals, his opinion is that Mr. Marcus behaved in the manner he did only because of the chemical use (T.38). It is clear, given the responsibility he has taken and the amount of work he had done in terms of giving away what he now has to the newcomers, that Mr. Marcus is an individual with a real high ethical and moral value system (T.38).

Sheldon Zilbert testified. He is an attorney (T.47). He serves on the Florida Lawyers' Assistance Corporation Hotline (T.47). He serves as one of the members of the corporation itself (T.47). Florida Lawyers' Assistance Corporation is an independent

corporation set up by The Florida Bar to help impaired attorneys that are struggling with addiction, whether the addiction be alcohol, cocaine, tranquilizers, valium, or barbiturates (T.47). Addiction is addiction (T.47). The Florida Bar has recognized that the need to help attorneys exists, that there are many attorneys that have no place to turn, because they are professionals (T.47-48). They are ashamed to let their peers know that they are in difficulty (T.48). They have no place to go (T.48). The Florida Bar has taken an enlightened position and established this corporation separate and apart from itself so that some degree of confidentiality may be maintained (T.48). An attorney that has a problem or a partner who recognizes that one of his partners has a problem has a place to go and to seek assistance (T.48).

He has known Mr. Marcus' family for over thirty years (T.48). He came to know Mr. Marcus better in December, 1986 (T.48). He is Mr. Marcus' monitor at Florida Lawyers' Assistance Corporation (T.48). Charles Hagen, the Executive Director of Florida Lawyers' Assistance Corporation, called him about Mr. Marcus and asked him to go out make contact with Mr. Marcus and assess the situation (T.48-49). He met Mr. Marcus at a Florida Lawyers' Assistance Corporation recovery meeting (T.49).

Mr. Marcus' recovery has been an absolute inspiration to him personally (T.49). He has reports that he has been filing

with Florida Lawyers' Assistance Corporation since he was appointed as Mr. Marcus' monitor (T.49).

Mr. Marcus entered into a formal contract with the Florida Lawyers' Assistance Corporation whereby he agreed to abide by certain conditions: to report to Mr. Zilbert, to report to Florida Lawyers' Assistance Corporation, to pay the costs of supervision, to go to certain meetings, to abstain from the use of drugs, and to maintain contact with certain people so that they can be sure that there is a system whereby he is not only being monitored but that he also has a place to reach out to and to seek help beyond the formality of dealing with a physician (T.49-50). He has been meeting with Mr. Marcus and filing reports on him for over two years (T.50). He meets with Mr. Marcus on a personal basis a minimum of four times a week (T.50). He himself is a recovered addict and alcoholic and has gone through the same process that Mr. Marcus faced at the hearing (T.50).

At the inception of the program, Mr. Marcus was clearly frightened (T.50). He felt horribly ashamed (T.50). His guilt was overwhelming him (T.50). Mr. Zilbert was able and fortunate enough to share with him that he had experienced the same guilt, the same shame, the same overwhelming feelings of failure (T.50). Mr. Zilbert thought that he was a genetically defective human being until he also found out that he had a disease (T.50). He realized that he was not a bad person, that he just was a

sick person attempting to get better one day at a time (T.50).

He has been meeting with Mr. Marcus a minimum of four times a week (T.50). They have personal contact (T.50). The pressure that Mr. Marcus has been experiencing stemming from the uncertainty about the outcome of the disciplinary proceedings has been overwhelming (T.50). There are times when he has spoken to Mr. Marcus where he (Mr. Zilbert) has been reduced to tears watching him work his program (T.50-51). When he says work a program, those are terms of art (T.51). He is refering to Mr. Marcus being honest with him about how he was feeling, discussing how he was feeling, discussing his clients with him, asking advice (T.51). Mr. Marcus has been a joy to his life (T.51). He does not know why God chose to place Mr. Marcus in his life, but he cannot state the gratitude that he has for knowing Mr. Marcus and watching the progress that he has made (T.51).

His reports indicate, one after another, that Mr. Marcus' attitude consistently gave him the highest ratings: cooperative, honest, open (T.51). He attended meetings regularly (T.51). He grasped the tools of recovery (T.51). He learned how to be open about his problems (T.51). He assumed the full responsibility of his program (T.51). He was willing and gained much insight (T.51). His home life also improved (T. 51). He observed Mr. Marcus at meetings and professionally (T.51). Mr. Marcus shared, honestly and candidly (T.51). He coped with his

personal and professional life more than adequately (T.51). He served as an inspiration to Mr. Zilbert (T.51). His attitude was positive despite the burden and the pressure that he was facing from his disciplinary proceedings (T.51-52).

Respondent's composite Exhibit 1, Mr. Marcus' contract with Florida Lawyers' Assistance Corporation, Respondent's composite Exhibit 2, Mr. Zilbert's monitoring reports, and Respondent's Exhibit 3, the report prepared by Mr. Hagen and Mr. Zilbert, were admitted (T.53-54).

Mr. Marcus' prognosis is excellent (T.54).

The Referee stated that he was going to accept the agreement (T.54). Bar counsel was to prepare the proposed Report of Referee (T.23). The Referee told Bar counsel to include in the findings of fact the opinions of the doctors about the causal relationship between Mr. Marcus' addiction and his conduct (T.54). That was not done (ROR 10-11).

The Referee entered his Report recommending that Mr. Marcus be found guilty of the factual allegations as charged and recommended an eighteen month suspension as discipline with life time probation for substance abuse to be regulated by Florida Lawyers' Assistance, Inc., and a five year trust account probation (ROR 8-10).

On June 14, 1989, this Court directed the parties to file briefs as to the Referee's recommended discipline.

SUMMARY OF THE ARGUMENT

Mr. Marcus was an impaired attorney suffering from the disease of addiction. He would not have committed the acts complained of except for his disease. There was a direct causal relationship.

Mr. Marcus did not use the funds involved either to further his addiction or for any other reason. He made full restitution. He voluntarily sought assistance for his addiction and rehabilitated himself. He is remorseful about his actions and his recovery is of very high quality. He has no prior disciplinary history.

These factors and case law precedent and disciplinary standards mandate the approval and acceptance of the consent judgment and recommended discipline by this Court.

POINT ON REVIEW

THE REFEREE'S RECOMMENDED DISCIPLINE OF AN EIGHTEEN MONTH SUSPENSION IS WARRANTED BECAUSE MR. MARCUS'S ADDICTION DISEASE CAUSED HIS CONDUCT, HE HAS REHABILITATED HIMSELF, HE IS REMORSEFUL, HIS ATTITUDE IS EXCELLENT, HIS CHARACTER AND REPUTATION ARE EXCELLENT, HE HAS MADE RESTITUTION, AND HE HAS NO PRIOR DISCIPLINARY RECORD.

ARGUMENT

THE REFEREE'S RECOMMENDED DISCIPLINE OF AN EIGHTEEN MONTH SUSPENSION IS WARRANTED **BECAUSE** MR. MARCUS'S ADDICTION DISEASE CAUSED HIS CONDUCT, HE HAS REHABILITATED HIMSELF, HE IS REMORSEFUL, HIS ATTITUDE IS EXCELLENT, HIS CHARACTER AND REPUTATION ARE EXCELLENT, HE HAS MADE RESTITUTION, AND HE HAS NO PRIOR DISCIPLINARY RECORD.

This Court is committed to the principle 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....." (The Florida Bar v. Jahn, 509 So.2d 285, 287 (Fla. 1987))

In The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987), the attorney was guilty of numerous counts of client neglect and of failure to maintain records of funds and accounting therefore. The referee recommended a six month conditional suspension, a private reprimand, and six month's probation. The attorney's misconduct was related to an unspecified substance-abuse condition. The attorney voluntarily entered a chemical dependency treatment facility and completed a six week treatment program. The referee also recommended that the attorney be required to comply with all of the conditions or requirements of the "Aftercare" program of continuing treatment

and rehabilitation and that he avail himself of the services of The Florida Bar's Substance-Abuse Assistance Program.

On review, this Court reduced the discipline to a ninety day suspension and probation for three years.

"The evidence in this case, showing numerous counts of client neglect, depicts a practitioner who allowed his law practice to deteriorate rapidly into a state of disarray and disorder. If there were not the debilitating effect of chemical dependency or some other cause as an explanation, the level of client neglect shown would call into serious question a person's fitness for the practice of law. The principal concerns of the bar and this Court are to protect the public, to warn other members of the profession about the consequences of similar misconduct, to impose an appropriate punishment on the errant lawyer, and to allow for and 'encourage reformation and rehabilitation.' The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970)

In view of the totality of the circumstances, we find the appropriate discipline in this case to be a suspension for ninety days and probation for three years...As condition of probation Sommers must make restitution to clients as agreed and approved by the referee within a reasonable time but no later than the termination of his probation. As a further condition Sommers must participate in The Florida Bar's program of supervised recovery for drug-impaired lawyers. Failure to comply with the rehabilitation program may result in summary suspension from the practice of law. In addition, Sommers' probation will include as a condition the oversight of his legal practice by the disciplinary staff of The Florida Bar. Sommers shall be required to file quarterly reports setting forth the status of all cases and legal business he is handling on behalf of clients in accordance with the procedures established for the regulation of attorney probation within the bar." (508 So.2d at 343)

In The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1984), the attorney was indicted by Federal Grand Jury for conspiring

to receive, to transport in interstate commerce, and to sell stolen securities. He was found not guilty by reason of insanity.

Prior to trial he had been found to be incompetent to stand trial and entered Shands hospital for evaluation and treatment. He was released after five weeks but continued a course of out-patient treatment consisting of drug and clinical therapy. His condition was dramatically stabilized under this regimen.

After acquittal, the Bar filed a complaint against him. The attorney did not deny the nature or the occurrence of the events underlying the criminal charges in the Bar complaint. He answered that the conduct giving rise to the complaint was "not intentional or willful, but occurred during a time when he was mentally incompetent and not responsible for his acts."

At the hearing, the lawyer presented several character witnesses who testified to his earlier competence in the practice of law, his sudden, marked deterioration in personal and professional behavior around the time of the criminal conspiracy, and his subsequent return to his normal high standard of conduct. The referee found that the attorney was clearly mentally ill at the time of the infractions but that he could appreciate the nature of his acts. The referee recommended that the attorney be found guilty on all counts and that the attorney be suspended from the practice of law for six months, with automatic reinstatement, and probation of three years. This Court reduced

th discipline to a suspension for ninety days, and probation as long as the attorney remained active in the practice of law holding that: "...the referee correctly considered respondent's mental illness in mitigation of his wrongful actions...." (453 So.2d at 797)

Thus, in language equally applicable to this case, this Court held that:

"...While we recognize the gravity of respondent's misconduct, we consider in mitigation his severely limited ability to control his activity. We cannot see how greater deterrence or protection of the public will be achieved by a lengthy suspension of one who, until this episode, had an unblemished record and who has now, with the help of ongoing medical assistance, returned to his former level of conduct and practice... ." (Id.)

The Florida Bar v. Tunsil, 503 So.2d 1230 (Fla. 1986), the attorney appropriated for his own use approximately \$10,500 which he had been holding in trust for a guardianship. Also, a check issued to a subpoenaed witness was dishonored for insufficient funds.

This Court took into account that:

"...respondent has repaid the misappropriated funds and made good on the 'bounced' check. Nor do we ignore the respondent's cooperation with the Bar, his remorse, and the effect of his alcoholism. While we agree with the referee that these circumstances constitute mitigating factors, we must determine to what extent we can permit mitigation to offset the sanctions to be imposed for respondent's misconduct. The theft of a clients' funds is one of the most serious offenses a lawyer can commit. Such misconduct, absent sufficient mitigating factors, compels the extreme sanction of disbarment for several reasons." (503 So.2d

at 1230-1231)

The Court ordered a one year suspension in light of the seriousness of the misconduct in misappropriating funds, the attorney's failure to comply with trust accounting procedures, and his prior disciplinary history (a private reprimand for neglecting a legal matter). This Court also ordered passage of the professional ethics portion of the Bar examination and a two year probationary period with the condition, among others, that the attorney immediately submit to evaluation for alcohol abuse and to treatment if the evaluation indicated the need.

In The Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982), the attorney failed to appear for the continuation of his clients' trial without the prior permission of the trial judge, and neglected legal matters for clients. The attorney suffered from alcohol abuse and had for some length of time. The referee recommended a suspension for three years and that his reinstatement be conditioned upon proof that he received professional treatment for his alcohol abuse which resulted in his having full control of the problem, that he no longer presented a risk to the public as a practicing attorney, that he was fit and able to practice law, and that he had made full restitution of the fees paid by the two clients whose legal business he neglected. He had earlier been publicly reprimanded for similar misconduct. This Court reduced the suspension to

ninety one days and until such time as the attorney established rehabilitation. This Court held that: "...It is clear from the facts of this case, as perceptively found by the referee, that Mr. Larkin's professional misconduct stems totally from the effects of alcohol abuse." 420 So.2d at 1081. This Court noted that:

"Business and professional groups, including The Florida Bar have only recently openly acknowledged and addressed the problem of the alcoholic businessman and professional. This problem must be directly confronted; a practicing attorney who is an alcoholic can be a substantial danger to the public and the judicial system as a whole... If alcoholism is dealt with properly, not only will an attorney's clients and the public be protected, but the attorney may be able to be restored as a fully contributing member of the legal profession. This Court has responsibility to assure that the public is fully protected from attorney misconduct. In those cases where alcoholism is the underline cause of professional misconduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline." (Id.)

In The Florida Bar v. Marshall, 531 So.2d 336 (Fla. 1988), the attorney had practiced law for many years, was reasonably competent and was respected in his home community. He was an alcoholic but had been able to control his use of alcohol and function as a lawyer without major detriment to his practice. In later years he was less able to manage his alcoholism and became progressively less competent to handle his obligations. He began assisting an elderly client in the management of her financial affairs. He permitted the client to deliver to him

various checks for substantial amounts. They were out of proportion to the value of any professional services rendered to her and the attorney treated the transfers of money as gifts. They amounted to \$19,000. Shortly thereafter, a guardian was appointed for the client and the attorney made full restitution to the guardian.

The referee held that the acceptance of the money was improper and that the attorney knew or should have known that the client's money should be safe guarded and used for her benefit. The attorney failed to recognize his impropriety at first, because his judgment was impaired by alcoholism, but upon later reflection and analysis he understood it. He rendered an accounting to the Court and repaid the money to the guardian. He also realized that he needed to seek assistance and treatment to overcome his alcoholism. The attorney informed The Florida Bar of his actions. An audit of his accounts showed that the attorney had failed in several respects to follow the rules and mandated procedures governing trust account administration. The attorney had undergone treatment for his recovery and rehabilitation from alcoholism and had a strong and sincere intention to overcome his illness. He had continued to participate in the program of recovery prescribed for him by Florida Lawyers' Assistance. The referee found that the attorney's misconduct was due to alcohol and the resulting excessive use

of alcohol over a long period of time which affected his reason and judgment.

The referee recommended that the attorney be suspended for eighteen months and that he be placed on probation during the eighteen month suspension. The recommended terms of probation were that he complete his contract with Florida Lawyers' Assistance and that he comply with the other prescribed and recommended courses of recovery and treatment set forth in the referee's report. This Court approved the referee's report and adopted it as its judgment.

In The Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988), the attorney misused client funds without intent, and knowingly played a role in a usurious loan transaction between two of his clients. The referee recommended a one year suspension and a two year supervised probation period to run concurrently to the suspension, during which the attorney was required to participate in the Florida Lawyers' Assistance, Inc. The referee took into consideration that the attorney had no prior disciplinary history, and had had no complaints filed in the three years since the acts of misconduct were brought to light. As to mitigation, the referee noted:

"Respondent's violations were extensive, however, these violations were without intent but were attributable to emotional instability resulting from marital difficulties, and the concomitant use of drugs and alcohol. Although possibly not forthright initially, he cooperated with the Bar's investigation

of the charges and acknowledged his guilt.

The Respondent has suffered the consequences of adverse newspaper publicity and the stigma resulting therefrom. He has faced up to his illness, and pursued rehabilitation, including close monitoring by a fellow attorney. He was instrumental in organizing an AA-type of support group for attorneys in Sarasota and surrounding areas. His rehabilitation has shown steady progress and his prognosis is good.

Respondent has made restitution in one and [is] taking steps to make restitution in the others.' (519 So.2d at 608)

This Court held that the appropriate discipline was a suspension for two years in addition to the period of probation recommended by the referee:

"In the instant case, the referee found the violations were without intent, occurred during a one and half year period of emotional instability, and were due in part to drug and alcohol addiction. This Court in the past has recognized loss of control due to drug or alcohol addiction as a mitigating circumstance. The Florida Bar v. Rosen...; The Florida Bar v. Larkin... The referee also found respondent 'has made steady progress' toward rehabilitation and has maintained his law practice without complaint since the last violation almost three years ago. The 'extreme sanction of disbarment is to be imposed only "in those rare cases where rehabilitation is highly improbable." ' Rosen...." (Id.)

In The Florida Bar v. Thompson, 500 So.2d 1335 (Fla. 1986), the attorney pled guilty to possession of cocaine, possession of a controlled substance, disorderly intoxication, and leaving the scene of an accident. The Court adjudicated him guilty of disorderly intoxication and sentenced him to a \$500 fine and six months probation. Adjudication was withheld on the other

three charges. The referee recommended that the attorney receive a ninety one day suspension and thereafter until **he** proves his rehabilitation, that the attorney be placed on probation for two years, and as a condition of probation that the attorney obtain a drug evaluation and in the event that the evaluation recommended treatment that he undergo the treatment consistent with the evaluation and recommendation, and, further, that if the evaluation recommended screening that the attorney undergo any screening that was recommended. This Court approved the discipline:

"...While we agree that 'the discipline should be fair to both the public and the attorney, with an object of correcting "the wayward tendency in the accused lawyer while offering to him a fair and reasonable opportunity for rehabilitation," ' The Florida Bar v. McKenzie, 319 So.2d 9, 11 (Fla. 1975), quoting State ex rel. The Florida Bar v. Ruskin, 126 So.2d 142, 144 (Fla. 1961), we find the ninety-one day suspension and accompanying proof of rehabilitation in this case proper." (500 So.2d at 1336)

See also, The Florida Bar v. Jahn, 509 So.2d 341 (Fla. 1987); and The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986).

Florida Standards for Imposing Lawyer Sanctions, Standard 9.32, list mitigating factors. The factors present in this case are:

1. Absence of a prior disciplinary record.
2. Personal or emotional problems.
3. Timely good faith effort to make restitution or to rectify consequences.

4. Character or reputation.
5. Physical or mental disability or impairment.
6. Interim rehabilitation.
7. Remorse.

The decisions of the Court, the mitigation factors, and the evidence all necessitate that the Referee's recommended discipline be approved.

Doctor Jules Trop testified. He is a physician and specializes in the field of addiction, addictionology is what it is called (T.20). He is the medical director of the New Life Addiction Program at North Miami Medical Center (T.20). He is the past medical director at South Miami Hospital Addiction Treatment Program and Mount Sinai Addiction Treatment Program (T.20). He founded and directed that program (T.20).

There is no question from Mr. Marcus' history of the onset of drug use, the progress of drug **use**, the treatment for drug use, and the subsequent recovery from drug use or drug addiction, that he suffered from the disease of chemical dependency (T.26).

The disease of chemical dependency is a compulsion to use drugs or alcohol in the face of negative consequences (T.26). The negative consequences are the things that addicts do to themselves, to their loved ones, to their work, to their environment, to everything around them (T.26). Mr. Marcus suffered the consequences (T.26). He committed the acts he was

charged with (T.26). He went into treatment and made a good recovery (T.26). Mr. Marcus is a perfect example of a person who became addicted (T.26). Addiction is not a voluntary act (T.26). Addiction is a disease recognized by all medical associations (T.26).

In his opinion, Mr. Marcus would not have committed the acts for which he pled guilty had he not been the victim of the disease of addiction (T.27). These things simply would not have happened but for his being the victim of the disease of addiction (T.27).

The disease of addiction is neither a moral failing, a lack of will power, or a psychiatric disorder (T.27). It is a primary disease of compulsion (T.27). It is a chronic, progressive, relapsing, and, if untreated, fatal disease (T.27).

Mr. Marcus has been in recovery for over two years (T.27). It is a good quality recovery (T.28). He is doing all of the things that he needs to do in terms of after-care recovery, meetings, Alcoholics Anonymous, Narcotics Anonymous, and Lawyers' Assistance Program meetings (T.28). He is doing what he needs to do (T.28). Also, he has excellent family support (T.28).

Mr. Marcus' recovery is a very high quality recovery (T.28). His prognosis is excellent (T.28).

On cross-examination, Dr. Trop testified that his understanding was that Mr. Marcus did not spend the money involved

involved at all (T.29).

Dr. Trop has treated probably two hundred and fifty attorneys and over five hundred physicians in the last four or five years (T.32). In the great majority of cases, these professionals have committed acts, either illegal acts, certain immoral acts, certain acts that are very painful to themselves and others, under the influence of the drug (T.32).

The drug works on the brain biochemically (T.32). Common sense, good judgment, moral values, disappear under the influence of the drug and people do things that they would not normally do; sometimes violent acts (T.32). The tie in between the disease of addiction and the acts that addicts commit as a result of addiction is that they are working as impaired people, people with impaired faculties (T.32-33). The money that was involved here was not used to further Mr. Marcus' addiction (T.33). He took the money because of his impairment resulting from his addiction (T.33).

Dr. Richard Tyson testified. He is a physician and his practice consists of addiction medicine and treatment (T.34). He is the medical director of Care Unit of Coral Springs and of the Interphase Recovery Program, Boca Raton and Miami Lakes (T.34).

Mr. Marcus came to see him as a patient in 1986 (T.34). He had the disease of addiction for which he began his treatment

(T.34). When Mr. Marcus came to him he was somewhat gaunt, physically (T.34). He was anxious, very fearful, and he wanted a change (T.34). He recognized that he had a problem (T.34).

The Respondent first went in as an inpatient (T.34), for five days (T.34). He continued on an intensive outpatient program which lasted approximately one year (T.34-35).

The inpatient treatment consisted initially of an assessment and evaluation (T.35). The detoxification process was begun (T.35). A physical examination was given (T.35). There was group therapy on a regular basis (T.35). There was blood testing, urine testing, and an electrocardiogram given (T.35). Basically, physical evaluations were performed and a psychosocial evaluation was performed, which means he was evaluated in terms of his emotional and psychological status (T.35).

The outpatient therapy was a continuation of the bonding process, a stage of recovery that he needed to go through, dealing with emotional issues and feelings (T.35). That process was built around group therapy which was begun in the hospital and was continued on a decreasing frequency (T.35).

Mr. Marcus took positive steps for his rehabilitation (T.35-36).

Dr. Tyson has been seeing Mr. Marcus periodically for over a year since he completed outpatient therapy (T.36). Mr. Marcus has progressed really well (T.36). He has really grasped the

elements that are necessary for recovery: humility, the ability to give to others, to provide service for people coming into the program (T.36). He had done that by solidly embracing Narcotics Anonymous, which has been and will continue to be an essential part of his continued recovery (T.36).

When he was in the active phase of his addiction, about a six month period, he demonstrated, as would any patient under the influence of cocaine, behavioral changes that looked very much like mental illness (T.36). Cocaine causes paranoia (T.36). It causes real inaccuracy in reality perception (T.36-37). Cocaine and all other mood altering substances used in excess cause people to violate their basic moral and ethical framework (T.37). Patients, including Mr. Marcus, look like they have major personality disorders including antisocial personality disorder, which is one associated with violation of the law (T.37). Cocaine patients also have the trait of grandiosity (T.37). Again, that is a distortion of reality (T.37). The family damage and personal social contact that occurs when people get involved with chemicals, which they also include as a part of their description of the disease, is enormous (T.37). Those things were all present when he came (T.37).

In his opinion there was a causal relationship between Mr. Marcus' active addiction and his actions as set forth in the Complaint (T.37). Knowing Mr. Marcus and seeing him in recovery,

in a state without the chemicals, his opinion is that Mr. Marcus behaved in the manner he did only because of the chemical use (T.38). It is clear, given the responsibility he has taken and the amount of work he had done in terms of giving away what he now has to the newcomers, that Mr. Marcus is an individual with a real high ethical and moral value system (T.38).

Sheldon Zilbert testified. He is an attorney (T.47). He serves on the Florida Lawyers' Assistance Corporation Hotline (T.47). He serves as one of the members of the corporation itself (T.47). Florida Lawyers' Assistance Corporation is an independent corporation set up by The Florida Bar to help impaired attorneys that are struggling with addiction, whether the addiction be alcohol, cocaine, tranquilizers, valium, or barbiturates (T.47). Addiction is addiction (T.47). The Florida Bar has recognized that the need to help attorneys exists, that there are many attorneys that have no place to turn, because they are professionals (T.47-48). They are ashamed to let their peers know that they are in difficulty (T.48). They have no place to go (T.48). The Florida Bar has taken an enlightened position and established this corporation separate and apart from itself so that some degree of confidentiality may be maintained (T.48). An attorney that has a problem or a partner who recognizes that one of his partners has a problem has a place to go and to seek assistance (T.48).

He has known Mr. Marcus' family for over thirty years (T.48). He came to know Mr. Marcus better in December, 1986 (T.48). He is Mr. Marcus' monitor at Florida Lawyers' Assistance Corporation (T.48). Charles Hagen, the Executive Director of Florida Lawyers' Assistance Corporation, called him about Mr. Maracus and asked him to go out make contact with Mr. Marcus and assess the situation (T.48-49). He met Mr. Marcus at a Florida Lawyers' Assistance Corporation recovery meeting (T.49).

Mr. Marcus' recovery has been an absolute inspiration to him personally (T.49). He has reports that he has been filing with Florida Lawyers' Assistance Corporation since he was appointed as Mr. Marcus' monitor (T.49).

Mr. Marcus entered into a formal contract with the Florida Lawyers' Assistance Corporation whereby he agreed to abide by certain conditions: to report to Mr. Zilbert, to report to Florida Lawyers' Assistance Corporation, to pay the costs of supervision, to go to certain meetings, to abstain from the use of drugs, and to maintain contact with certain people so that they can be sure that there is a system whereby he is not only being monitored but that he also has a place to reach out to and to seek help beyond the formality of dealing with a physician (T.49-50). He has been meeting with Mr. Marcus and filing reports on him for over two years (T.50). He meets with Mr. Marcus on a personal basis a minimum of four times a week (T.50). He

himself is a recovered addict and alcoholic and has gone through the same process that Mr. Marcus faced at the hearing (T.50).

At the inception of the program, Mr. Marcus was clearly frightened (T.50). He felt horribly ashamed (T.50). His guilt was overwhelming him (T.50). Mr. Zilbert was able and fortunate enough to share with him that he had experienced the same guilt, the same shame, the same overwhelming feelings of failure (T.50). Mr. Zilbert thought that he was a genetically defective human being until he also found out that he had a disease (T.50). He realized that he was not a bad person, that he just was a sick person attempting to get better one day at a time (T.50).

He has been meeting with Mr. Marcus a minimum of four times a week (T.50). They have personal contact (T.50). The pressure that Mr. Marcus has been experiencing stemming from the uncertainty about the outcome of the disciplinary proceedings has been overwhelming (T.50). There are times when he has spoken to Mr. Marcus where he (Mr. Zilbert) has been reduced to tears watching him work his program (T.50-51). When he says work a program, those are terms of art (T.51). He is referring to Mr. Marcus being honest with him about how he was feeling, discussing how he was feeling, discussing his clients with him, asking advice (T.51). Mr. Marcus has been a joy to his life (T.51). He does not know why God chose to place Mr. Marcus in his life, but he cannot state the gratitude that he has for knowing Mr. Marcus

and watching the progress that he has made (T.51).

His reports indicate, one after another, that Mr. Marcus' attitude consistently **gave** him the highest ratings: cooperative, honest, open (T.51). He attended meetings regularly (T.51). He grasped the tools of recovery (T.51). He learned how to be open about his problems (T.51). He assumed the full responsibility of his program (T.51). He **was** willing **and** gained much insight (T.51). His home life also improved (T. 51). He observed Mr. Marcus at meetings and professionally (T.51). Mr. Marcus shared, honestly and candidly (T.51). He coped with his personal and professional life more than adequately (T.51). He served as an inspiration to Mr. Zilbert (T.51). His attitude was positive despite the burden and the pressure that he **was** facing from his disciplinary proceedings (T.51-52).

Respondent's composite Exhibit 1, Mr. Marcus' contract with Florida Lawyers' Assistance Corporation, Respondent's composite Exhibit 2, Mr. Zilbert's monitoring reports, and Respondent's Exhibit 3, the report prepared by Mr. Hagen and Mr. Zilbert, were admitted (T.53-54).

Mr. Marcus' prognosis is excellent (T.54).

The cases cited by the Bar at p.p. 9 and 11 of its Brief are distinguishable in that they did not involve an impaired attorney who suffered from the disease of addiction, the attorneys had not been rehabilitated, there was no mitigation as compelling

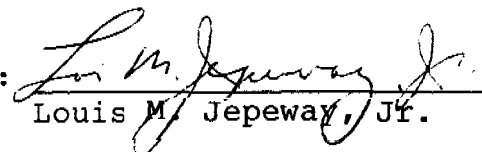
as that involved in this case, and in several instances
restitution had not been made.

This Court must approve the consent judgment and recommended
discipline.

CONCLUSION

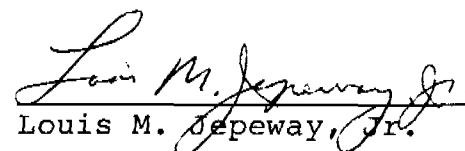
This Court must approve the consent judgment and recommended discipline.

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By: 
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Respondent's Brief on Discipline was mailed to WARREN J. STAMM, Bar Counsel, The Florida Bar, Suite 211, Rivergate Plaza, Miami, Florida 33131, JOHN F. HARKNESS, JR., Executive Director, The Florida Bar, Tallahassee, Florida 32399-2300 and JOHN T. BERRY, Staff Counsel, The Florida Bar, Tallahassee, Florida 32399-2300 this 17th day of August, 1989.

By: 
Louis M. Jepeway, Jr.