

IN THE SUPREME COURT OF FLORIDA

**FILED**  
AUG 5 1985  
CLERK SUPREME COURT  
By \_\_\_\_\_  
Deputy Clerk

THE FLORIDA BAR,  
Complainant,

Supreme Court Case  
No. 72,505

v.

ALAN K. MARCUS,  
Respondent.

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On Petition to Review

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Initial Brief of Complainant

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### SYMBOLS AND REFERENCES

In this Brief, The Florida Bar will be referred to as either "The Florida Bar" or "The Bar". Alan K. Marcus will be referred to as "Respondent" or "Marcus". Other witnesses will be referred to by their respective surnames for clarity.

Abbreviations utilized in this Brief are as follows: "TR" will refer to the transcript of proceedings held February 10, 1989. "EX" will refer to exhibits submitted at the Grievance Committee hearing held February 25, 1988. "ROR" will refer to the Report of Referee dated May 2, 1989.

STATEMENT OF THE CASE

This disciplinary proceeding commenced on **May 31, 1988** with the filing of a public complaint by The Florida Bar against Respondent .

On **June 6, 1988**, the Supreme Court assigned a Referee to hear this matter.

Final hearing was held on **February 10, 1989**. In arguing discipline at the **final** hearing, **The** Florida Bar indicated to the Court that the agreed upon eighteen month suspension, probationary period for substance abuse and five year trust account probation was based on the unconditional and complete guilty plea of Respondent on **all facts and charges** as set out in the original complaint before the Court and the **subsequent** matter which was incorporated and considered. (TR 21)

Although there was substantial testimony offered with respect to rehabilitation, there were no representations or stipulations made as to reinstatement.

The Referee issued his **Report of Referee** on **May 2, 1989** wherein he approved the unconditional consent judgment for discipline and recommended an eighteen month suspension and probation for both substance abuse and trust accounting violations.

By order dated **June 14, 1989**, the Supreme Court directed the parties to file simultaneous briefs as to the Referee's recommended discipline.

### STATEMENT OF THE FACTS

The Florida **Bar** filed a four count complaint against Respondent alleging systematic and intentional misappropriation by Respondent of client funds to his own use. At final hearing the complaint **was** amended to include additional matters also involving the intentional misappropriation of funds. (TR 4-5, 14-15)

Respondent alleges that **the** cause of his actions was substance abuse of cocaine. (TR 7-8) Respondent also stipulated to all of the facts and **charges** as set out in the Bar's complaint and sought only to argue mitigating factors with respect to the imposition of discipline. (TR 8-10)

The negotiation and acceptance of the resulting Consent Judgment For Discipline was effectuated by **the presence** of Stuart Grossman, Designated Reviewer for the Eleventh Circuit Grievance Committee D, who after review of the facts and negotiations between the parties approved **the** discipline as proffered to the Referee. (TR 17-19, 20) In mitigation, Respondent presented the testimony of Dr. Jules Tropp, Dr. Richard Tyson and Sheldon Zilbert who testified as to the procedures implemented by Florida Lawyers Assistance, Inc., Respondent's involvement in the program and his progress made.

After considering the testimony, evidence and argument of the parties, the Referee found Respondent guilty of the factual allegations as charged **and** violation of Rule 11.02(3) (A) (commission by a lawyer of any act contrary to honesty, justice, or good

morals) of the Integration Rule of The Florida Bar and Disciplinary Rules 1-102(A) (4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) and 1-102(A) (6) (a lawyer shall not engage in conduct that adversely reflects on his fitness to practice law) of the Code of Professional Responsibility and imposed an eighteen month suspension as discipline. (See attached Exhibit A).



### SUMMARY OF THE ARGUMENT

Pursuant to Rule 3-7.6(a)(2), Rules of Discipline, the discipline imposed by the Referee at Bar is subject to review by the Supreme Court and additional **discipline in excess of** that recommended may be imposed.

The case at Bar is not unique in that Respondent, Marcus, was addicted to cocaine, misappropriated client funds and converted them to his personal account. These actions fit the pattern of an attorney with a **substaiice** abuse problem, but for one factor: the misappropriated funds were not used to further his addiction. For mitigation purposes, this made restitution that much easier.

Respondent has no prior disciplinary history and the actions complained of, although systematic and continuous, were contemporaneous with his addictive **phase**. Additionally, Respondent did voluntarily seek assistance for his addiction **and** as evidenced from the testimony elicited in mitigation, is remorseful about his actions and is moving toward recovery.

These factors, taken together **arid** read in conjunction with existing disciplinary standards **and** case law precedent, warrant the tendering and acceptance of the Consent Judgment **arid** recommended discipline subject to review by the Supreme Court.

POINTS ON APPEAL

POINT I

WHEIHER THE REFEREE'S RECOMMENDATION FOR AN  
EIGHTEEN MONIH SUSPENSION IS WARRANTED AS  
A MINIMUM DISCIPLINE AND WHETHER THE FACTORS  
CONSIDERED WARRANT SUCH DISCIPLINE  
SUBJECT TO REVIEW BY THE SUPREME COURT.

## ARGUMENT

### I

ALTHOUGH THE REFEREE'S RECOMMENDATION FOR AN EIGHTEEN MONTH SUSPENSION IS WARRANTED AS A MINIMUM DISCIPLINE, THE FACTORS CONSIDERED BY THE REFEREE WARRANT SUCH DISCIPLINE SUBJECT TO REVIEW BY THE SUPREME COURT,

A Referee's findings of fact enjoys the same presumption of correctness as the judgment of the trier of fact in a civil proceeding. Rule 3-7.5 (k)(1), Rules of Discipline. The Supreme Court is not bound by the Referee's recommendation for discipline, The Florida Bar v. Weaver, 356 So.2d 797 (Fla. 1978). All Referee reports recommending public reprimand, suspension, disbarment or resignation are reviewed by the Supreme Court, even in the absence of the filing of a Petition for Review by a party. Rule 3-7.6(a)(2) Rules of Discipline.

The instant action that was before the Referee was generic in course, but not in effect.

The addiction to cocaine and other substance abuses are unfortunately affecting a number of attorneys as well as other professionals. The reasons for the addiction vary, but the results are often the demise of a successful legal career. As such, although attorneys facing disciplinary proceedings quite often do so after a legal matter was neglected or client funds misappropriated, each case must be considered individually and mitigating factors viewed in a light taking into consideration where the attorney has been, what effect did his substance abuse

have on others and how is he working to correct the problem.

In the **case** at Bar, two main factors **and** questions arose with respect to Respondent's guilt or innocence **and** what effect his substance abuse had on his actions/inactions. Because Respondent pled unconditionally guilty to all counts and all matters, the issue of guilt or innocence is moot.

Respondent maintained prior to and at trial that he systematically misappropriated client funds because of his addiction to cocaine; yet he did not use any of the misappropriated **funds** to support this addiction; he just accumulated the monies in his personal account. Perhaps this **made** his ability to make restitution of **all** monies that much easier.

In determining mitigation,' a number of factors must be considered, some of which are **as** follows:

- A. **Absence** of a prior disciplinary record.
- B. Personal or emotional problem.
- C. Timely good faith effort to make restitution or to rectify consequences of misconduct.
- D. Character or reputation.
- E. Physical or mental disability or impairment.
- F. Remorse.

It is these factors that the Referee considered in accepting the Consent Judgment **as** offered. It has been widely held that

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'Mitigation has been defined as circumstances, considerations or factors that **may** justify a reduction in a degree of discipline to be **imposed**. Florida **Standards for** Imposing Lawyer Sanctions, Standard 9.32.

prior history should be considered when determining appropriate punishment for misconduct. The Florida Bar v. Schupack, 523 So.2d 1129 (Fla. 1988). Respondent **Marcus** had no prior disciplinary history with the Bar.

Respondent argued at Referee level that **the case of The Florida Bar v. Musleh, 453 So.2d 794 (Fla. 1983)** controls and closely parallels the case sub judice. In Musleh, Respondent was indicted by a Federal Grand Jury **for** Conspiracy to Receive and to Transport and sell Stolen Securities in interstate commerce. He was acquitted because of insanity. The Bar then **proceeded** against him in a **disciplinary** proceeding. The Referee considered **Mr. Musleh's** mental illness in mitigation of his **acts**. He **also** recommended automatic reinstatement at the end of the six-month period.

The Supreme Court held that **it was** proper to consider the mental illness in mitigation. The Court went on to say that:

"In weighing the proper discipline to be assessed on the facts of **this** case, we **are** mindful of the three purposes of Bar discipline--punishment of the offender, deterrence of those who might be tempted to emulate the wrongdoer, and protection of the public... **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 on-going medical assistance, returned **to** his former level of conduct and practice. **We**, therefore, suspend Respondent from the practice **of** law for ninety days.. **We** further impose probation for as long as Respondent remains active in the practice of law..." *Id.*, at 797

In order to support the **finding** by the Referee at Bar, **one** must parallel substance abuse and addiction to that of mental

illness. Testimony was elicited at trial of the effect of addiction on one's mental thinking process and how the addiction becomes a disease. (TR 27-28, 32, **36-37, 39**)

Nevertheless, it is the underlying offense of misappropriation of funds that must be considered. In the **case** of The Florida Bar v. Tunsil, **503** So.2d 1230, (Fla. 1987), the Court found that theft of clients' funds is one of the most serious offenses a lawyer could commit and such misconduct, absent sufficient mitigation, compels the extreme sanction of disbarment. The Court went on to **say**,

"In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be among those at the very top of the **list**."

However, this does not mean to say that **these** factors are routinely sufficient to lessen an otherwise appropriate discipline in misappropriation cases. See The Florida Bar v. Roth, 471 So.2d **29** (Fla. 1985) (lawyer who misappropriated funds suspended for three years); The Florida Bar v. Morris, 415 So.2d 1274 (Fla. 1982) (lawyer who **used** trust funds for personal purposes suspended for two years).

It should be noted that the discipline sought by The Florida Bar at the inception of the proceeding sub judice was disbarment. (TR 3) It is only after a consideration of the factors presented in mitigation that a consent judgment was negotiated. The Court at Bar, as did the Court in Tunsil, considered the repayment of the misappropriated funds, the cooperation **with** the bar and the

Respondent's remorse and substance abuse as mitigating factors sufficient to warrant a lesser discipline.

The position of the Bar in initially seeking disbarment was reconsidered upon the tendering of the Unconditional Guilty Plea by Respondent, Marcus. In the **case** of The Florida Bar v. Anderson, 395 So.2d 551 (Fla. 1981), the Court imposed a two year suspension and found that because of the stipulation and plea of guilty entered into by Respondent, the Referee was unable to hear personally from Respondent and therefore the Referee could only conclude that Respondent knew what **she** was doing and committed the acts over a substantial period of time.

In the case of The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987), the Court held that evidence showing numerous counts of client neglect by the attorney who voluntarily entered a chemical dependency treatment facility and completed the treatment program, warrants a ninety day suspension and probation for three years.

As previously stated, although there were multiple counts of neglect and misappropriation by Respondent, Marcus, the activity stemmed from a specific period of time and course of conduct.

The Sommers Court went on to state that the principal concern of the Bar and Supreme Court in attorney disciplinary cases is to protect the public, warn other members of the **profession** of the consequences of similar misconduct, impose appropriate punishment on the errant lawyer **and** to allow for and

encourage reformation and rehabilitation. (citing The Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1975)).

In the The Florida Bar v. Roman, 526 So.2d 60 (Fla. 1988), the Court held that the attorney's theft of client funds, effectuated through fraud on the Court, warrants disbarment regardless of mitigating factors. The Referee recommended a three year suspension from the practice of law, but the Court rejected this discipline and imposed disbarment. In Roman, the fraud was perpetrated on the Court by submitting a false affidavit and sworn statements whereas Respondent, Marcus misrepresented to the client the value of the true settlement.

Disbarment was also imposed in the case of The Florida Bar v. Altman, 465 So.2d 514 (Fla. 1985) wherein the Court held that:

"...engaging in illegal conduct involving moral turpitude, conduct involving dishonesty, fraud, deceit, or misrepresentation, conduct which adversely reflects upon fitness to practice law, and conduct prejudicing or damaging a client in the course of the professional relationship, failing to maintain complete records of clients' funds, and applying clients' money to a purpose other than that for which it was intended, warrants disbarment."

Not as severe a discipline, but no less egregious an act, the Referee in the case of The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987) held that with respect to the recommended discipline, Jahn's felonious conduct was the direct result of his cocaine addiction. As with Marcus, the Referee found that Jahn's **practice of** law was not effected and that he was classified as a recovering addict. The **Court** went on to say:

"The Referee, in a thoughtful and cogent report, concluded that Jahn's lack of prior disciplinary history, the fact that no clients were injured, that Jahn's



misconduct was directly related to his drug addiction and Jahn's exemplary efforts to rid himself of his chemical dependency should be considered as mitigating the discipline to be imposed."

"Based upon these facts, we find the referee's recommendation to be entirely reasonable and will serve the purposes of Bar discipline set forth in The Florida Bar v. Larkin, 447 So.2d 1340 (Fla. 1984)."


"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." See The Florida Bar v. Knowles, 500, So.2d 140 (Fla. 1986); The Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986).

In the case of The Florida Bar v. Corrales, 505 So.2d 1327 (Fla. 1987), the Respondent attorney submitted a Conditional Guilty Plea and Consent Judgment. The Referee accepted the plea and imposed a ninety day suspension. The Court upheld this discipline finding that possession and use of illegal drugs warranted a ninety day suspension, two year term of probation with a special condition requiring periodic drug evaluation and payment of disciplinary costs. This was followed by the Court in The Florida Bar v. Holtsinger, 505 So.2d 1329 (Fla. 1987).

As such, the mitigating factors presented by Respondent Marcus, when viewed together with the underlying violations, support the finding by the Referee of the eighteen month suspension but do not preclude the imposition of further discipline by the Supreme Court.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the discipline imposed is warranted subject to review by the Supreme Court.

  
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the above and foregoing Complainant's Initial Brief on Petition for Review was sent Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927 and that a true and correct copy was mailed to Louis M. Jepeway, Jr., Attorney for Respondent, 19 West Flagler Street, Suite 407, Miami, Florida 33130 by Certified Mail Return Receipt Requested (#P 110 986 143) and to Sheldon Zilbert, Attorney for Respondent, 200 Biscayne Boulevard, Suite 3120, Miami, Florida 33131 by Certified Mail Return Receipt Requested (#P 110 986 144) on this 2nd day of August, 1989.

  
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