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IN THE SUPREME COURT OF FLORIDA

CLERK, SUPREME COURT

By \_\_\_\_\_  
Chief Deputy Clerk

THE FLORIDA BAR

Petitioner,

vs .

ALAN K. MARCUS,

Respondent.

Supreme Court Case  
No. 72,505

REPLY BRIEF OF THE FLORIDA BAR

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ARGUMENT

**ALTHOUGH ADDICTION MAY BE CONSIDERED  
AS A MITIGATING FACTOR, IT DOES NOT  
EXCUSE THE SERIOUS MISCONDUCT OF MIS-  
APPROPRIATION WHICH WARRANTS THE SANCTION  
OF DISBARMENT**

This Honorable Court has previously stated that the misuse of client funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment for such an offense. The Florida Bar v. Shanzer, **572 So. 2d 1382** (Fla. 1991). This Court has also stated that it would not be reluctant to impose disbarment upon an attorney who had engaged in the misuse of client funds. The Florida Bar v. Breed, **378 So. 2d 783** (Fla. 1979).

While it is true that there are **cases** in which mitigating factors resulted in a suspension as opposed to disbarment, it is also true that this Court has disbarred attorneys who have misappropriated client funds despite the presence of mitigating evidence.

In The Florida Bar v. Golub, **550 So. 2d 455** (Fla. 1989) the Respondent admitted to misappropriating approximately \$23,000 from an estate for which he was both the attorney and the personal **representative**. The money had been stolen over an extended period of time and restitution had not been made. Respondent argued that his alcoholism mitigated his actions. In rejecting the Referee's recommendation of a three **year** suspension and ordering instead a disbarment, this Court stated:

In this **case**, we agree with The Florida Bar. While alcoholism explains the respondent's conduct, it does not excuse it. **As**

we stated in The Florida Bar v. Tunsil, 503 So. 2d 1230, 1231 (Fla. 1986), "[i]n 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." Although we may consider such factors as alcoholism and cooperation in mitigation, we must also determine the extent and weight of such mitigating circumstances when balanced against the seriousness of the misconduct. Golub, at 456.

In the matter of The Florida Bar v. Shuminer, 567 So. 2d 4330 (Fla. 1990) disbarment was again determined to be the appropriate sanction for the misappropriation of client funds despite testimony indicating that Respondent suffered from long standing drug and alcohol dependency. Although **various** factors were found in mitigation, including the absence of prior discipline, addiction, timely and good faith efforts at restitution, cooperation, successful rehabilitation for over one year, and other factors, this court found that the Respondent "...failed to establish that his addictions rose to a sufficient level of impairment to outweigh the seriousness of his offenses." **Id.** at 432. In reaching the foregoing decision, this Court found that the Respondent continued to work effectively during the period in question and had used the stolen money not to finance his addiction, but to purchase a luxury automobile.

A similar finding was made in The Florida Bar v. Knowles, 500 So. 2d 140 (Fla. 1986). In this case the Respondent had misappropriated, over a period of approximately 4 years, close to \$200,000 of client funds. He eventually plead no contest to eight counts of grand theft. An adjudication of guilt was withheld. **At** the time the matter was considered by this Court, the Respondent

had been alcohol free for approximately three years.

After considering the matter, this Court determined that the seriousness of the misconduct warranted disbarment. Although recognizing Respondent's addiction as a mitigating factor, the court did not find it sufficient under those particular facts to warrant a lesser discipline. The thefts occurred over a period of some four **years** during which time Respondent continued to work and his income was undiminished. Recognizing Respondent's unblemished prior record, his recovery from his addiction, and his prompt restitution to his client, this Court allowed the three year disbarment to run concurrent, *nun pro tunc*, with the date of his suspension some three years earlier.

The foregoing cases stand for the proposition that while addiction and recovery are mitigating factors, they are not **excuses** for the very serious misconduct of misappropriation of client funds. While the Respondent is to be commended for his seemingly successful efforts at rehabilitation, that does not mean that disbarment is not the appropriate sanction for the type of misconduct in which he engaged.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that an original and seven copies of The Florida Bar's Reply Brief were sent via Airborne Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399 and copies were mailed to Jack A. Weiss, Esquire, Attorney for Respondent, P. O. BOX 1167, Tallahassee, Florida 32302; John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399 this 18 day of September, 1992.

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