IN THE SUPREME COURT OF FLORIDA
(Before a Referee)

The Florida Bar,

Complainant,

vs.

James A. Helinger, Jr.,

Respondent.
_____________________________/

CASE NO. 79,370

FILED
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# RESPONDENT'S ANSWER BRIEF

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## SYMBOLS AND REFERENCES

In this Brief, the Complainant, The Florida Bar, will be referred to as "Complainant", "The Florida Bar" or "The Bar". The Respondent will be referred to as "Respondent". "RR" will refer to the Report of Referee dated October 12, 1992.

## STATEMENT OF THE FACTS AND THE CASE

The Florida Bar filed its Complaint in this Case. The Respondent filed his Answer admitting the misconduct charge but alleging mitigating circumstances. The matter was heard before the Referee who rendered his Report, which recommended a 90-day suspension and probation for an extended period of time. The Bar filed its Petition for review of the Referee's Report on the basis that the length of the suspension was insufficient in light of the seriousness of the offense.

The Florida Bar's Complaint in this case arises out of a series of obscene and threatening telephone calls made over a period of almost five (5) years by the Respondent to a woman in Tallahassee, Florida. All of said calls were made from telephones in Tallahassee where the victim resided. Respondent was apprehended by law enforcement authorities in Tallahassee, charged with making obscene telephone calls, a second degree misdemeanor. He pled guilty to six (6) counts of making said calls, contrary to Section 365.16(1)(d)/26.012 FLA.STAT., was found guilty and sentenced to thirty (30) days in jail, of which he served thirteen (13) days, and six (6) months probation, together with a fine and costs.

In his Answer, the Respondent admitted the misconduct alleged, the resulting criminal charges and his conviction. In addition, he alleged facts which he believed constituted mitigating

circumstances which should be considered by the Referee in determining the sanction or sanctions to be recommended to this Court.

On Page 2 of the Bar's Brief, the Bar states "... the Final Hearing held August 5, 1992 was used for presentation of evidence relating to aggravating and mitigating factors." This statement is accurate. Evidence was offered relative to aggravating and mitigating factors. Based upon the evidence the Referee found many mitigating factors. In its Brief, both in its Statement of Facts and of The Case and in its Argument, the Bar focused solely upon the aggravating factors and almost completely ignored the mitigating factors as found by the Referee.

The facts of this case are best set out in the Findings of Fact by the Referee (Pages 1-6 of Referee's Report, and the facts set out by the Referee in Pages 8, 9 and 10 of his Report). For the convenience of the Court, these facts are as follows:

> "1. In June 1986, Respondent began making obscene telephone calls to a lady in Tallahassee, which telephone calls continued intermittently until April 1991, when Respondent was apprehended by the Tallahassee Police Department. All of said phone calls originated in Tallahassee and occurred on Fridays, Saturdays and Sundays on weekends when Florida State University had a home football game. The Complaint here was the result of said telephone calls.
>
> 2. Respondent was a substantial booster of the

Florida State University football team and rarely, if ever, missed a home football game. He and other boosters had condominium units in a condominium complex in the vicinity of the Florida State University stadium. From the time of Respondent's arrival in Tallahassee on Friday, before a football game, through all of Saturday and even a portion of Sunday, there were continuous parties in which alcohol was served and consumed and at which Respondent became intoxicated. It was on these occasions that he made the obscene telephone calls for which he was arrested.

2a. The testimony of the victim at the Final Hearing, together with her written statement given to the State Attorney's office of Leon County, gives some indication of the devastating effect of this lengthy period of intentional and systematic harassment by Respondent. The victim, Ms. N , testified that during the first telephone call, Respondent advised that he was in possession of nude photographs and that he would show these photographs to her boss unless she went out with him on a date and had sex with him. Although she knew that there were not such photographs in existence, Ms. N testified, she felt compelled to reveal the contents of the telephone call to her boss. This experience was both humiliating and embarrassing to her. There was also testimony by Ms. N concerning the

distress and terror which she experienced as a result of receiving threatening and obscene calls from a stranger whose identity and motive were unknown to her. By his own admission, Respondent placed these telephone calls in Tallahassee in order to avoid detection.

The facts set forth above are either undisputed or unrefuted. Respondent plead guilty to criminal conduct on May of 1991 and was subsequently sentenced to thirty (30) days in jail, six months probation, together with a fine and costs. The bulk of evidence presented to this Court was presented by Respondent in an effort to mitigate the discipline to be imposed in this matter.

3. Almost immediately after his arrest, Respondent determined that he needed professional help in relation to making obscene telephone calls. He decided to enter Golden Valley Health Center, Golden Valley, Minnesota, an institution specializing in diagnosing and treating sexual psychiatric disorders. He was admitted to said Center on May 15, 1991, and was discharged on June 14, 1991. At the time of his discharge, he was diagnosed as having:

a. Adjustment disorder with emotional features.

b. Alcoholism.

c. Mixed chemical abuse, cocaine.

d. Psychological Disorder, NOS.

e. Narcissistic and dependency personality traits.

The Discharge Plan recommended by Golden Valley consisted of:

a. Securing the services of a therapist.

b. Attending chemical dependency treatment in Florida.

c. Seeking help from various support groups in Florida including Recovering Lawyers Alcoholic Anonymous Group.

3a. At the time of the Final Hearing, Respondent was approximately 45 years of age. He acknowledged placing obscene telephone calls since the age of 11. Since the age of 11, Respondent made calls on and off through the years until his prior arrest for the same type of misconduct in 1978. Although the conduct ceased for a time after that arrest, he began again and placed calls not only to Ms. N , but to other individuals, chosen either at random or out of the newspaper.

4. During the course of Respondent's treatment at Golden Valley, he was told, for the first time, that he was an alcoholic and a cocaine addict and, when he was so told, he came to believe it.

5. Informationaly it should be noted that in connection with the arrest in 1978, Respondent entered a plea to six counts of placing harassing telephone calls. The amended information indicates that Respondent was charged with placing harassing telephone calls to a woman and offering to exchange a piece of lost jewelry

for sexual favors. Respondent admitted proposing such an exchange. In connection with the 1979 plea agreement, Respondent was placed on probation for a period of 3 years. While on probation, Respondent consulted with and was treated by a psychologist, Dr. Sidney Merin. Dr. Merin did not diagnose Respondent's problems as being related to the consumption of alcohol or drugs. According to his own testimony, Respondent complied with the probationary conditions set forth in the plea, including the requirement that he continue counseling. Although he may have complied with probationary conditions, unfortunately, it has been proven that by 1986 he began making the telephone calls to Ms. N .

5. After leaving Golden Valley Health Center, Respondent went to Parkside Lodge of Florida for treatment of his alcoholism and cocaine addiction where he remained for one (1) week, after which he was discharged. He then sought the services of the Florida Lawyers Assistance Program, Inc., a program operated with the cooperation of the Florida Bar to serve as support for lawyers with alcohol and/or chemical addictions and to monitor their progress. As a part of this program, he joined Alcoholics Anonymous and he has attended meetings of Alcoholics Anonymous and he has attended meetings of Alcoholics Anonymous approximately twice weekly since joining. Under his contract with Florida

Lawyers Assistance Program, he reports monthly to his monitor and has submitted to quarterly random tests for alcohol and controlled substances, all of which tests have proven negative.

6. The testimony in this cause is to the effect that the Respondent has not consumed any alcoholic beverages or controlled substances since his discharge from Golden Valley Health Center and this Referee so finds. It should also be noted that Respondent's testimony indicates that he began using cocaine, an illegal drug, at the age of 34. After he abstained from the use of the drug for approximately three years during that 11 year period (approximately 1984 through 1986), he returned to using the drug again. This cocaine use continued even after Respondent's arrest in the N matter. In fact, upon admission to Golden Valley Health Center, on May 15, 1991, Respondent tested positive for cocaine and cocaine metabolite, the Respondent was obviously addicted to cocaine.

7. Prior to his sentencing in Tallahassee, Respondent conferred with the victim of the obscene telephone calls and as a result thereof, the victim's attitude changed from one of anger to one of compassion and at his sentencing, she testified that she did not believe that the telephone calls were made maliciously, but were the result of a deep-rooted problems for which

the Respondent needed treatment.

8. Subsequent to Respondent's release from Golden Valley, his attitude toward his Wife has changed resulting in a much improve marital relationship in which he enjoys the full support of his wife.

9. Respondent enjoys the full support of his two (2) brothers as well as the pastor of his church.

10. Alcohol and substance addiction to cocaine and Respondent's psychiatric problems are all illnesses which are probably not curable. However, they are controllable in the sense that symptoms of these illnesses will not happen if:

a. Respondent is dedicated to resisting the effects of the illnesses.

b. Respondent seeks professional assistance in controlling the illnesses.

c. Respondent has the support of Alcoholics Anonymous, Florida Lawyers Assistance, Inc. and like organizations, his family and his friends.

11. I further find that Respondent is determined to resist the effects of this illnesses, he is determined to continue cooperating in the programs of Alcoholics Anonymous and Florida Lawyers Assistance, Inc. and to continue securing professional help for his psychiatric problems.

12. As a result of the foregoing, Respondent has

an excellent chance of avoiding exhibiting any symptoms of his illnesses and any repetition of his prior misconduct and thus to be fully rehabilitated."

"In reaching these conclusions, I have carefully considered the various factors set out in Rule 9.22 and 9.32 of the Florida Standards for Imposing Lawyer Sanctions. I find the following aggravating factors: 9.22(c) a pattern of misconduct & 9.22(d) multiple offenses. On the other hand, I find the following mitigating factors: 9.32(a) absence of prior record, 9.22(b) absence of dishonest or selfish motivation and 9.32(e) full and free disclosure to disciplinary board or cooperative attitude toward proceedings. The conduct was caused by Respondent's personal and emotional problems and his addiction to alcohol and cocaine.

After being apprehended, Respondent made a good faith effort to rectify the consequences of the misconduct by, in effect, apologizing to the victim. Again it should be noted that the victim now has testified twice on behalf of the Respondent. Once at the sentencing in Tallahassee and during the course of the hearing before this Court.

Respondent is truly remorseful for his conduct and is determined to rehabilitate himself.

No client nor the administration of justice was injured by Respondent's misconduct.

Further explaining the recommendation above, I do not believe that ninety (90) days suspension will be beneficial in any way to the Respondent. He does not need any suspension to demonstrate to him the gravity of his offense. On the other hand, the ninety (90) days suspension will demonstrate to other members of the Bar and to the public that the Court will not tolerate misconduct such as that engaged in by Respondent. The probation, however, is absolutely necessary to encourage the Respondent in continuing the professional help which he needs and at the same time, keeping him aware of the probably results of any repetition of the misconduct herein involved. Such probation on the one (1) hand will be an encouragement and on the other hand, it will serve as a crutch upon which he can lean, knowing full well that the consequences of future similar conduct will be disastrous.

I have also considered that the Respondent is 48 years old, married with one minor child. Standing in sharp contrast to the conduct in 1978 and 1991 are the array of factual accounts, psychological reports and testimonials that establish a very strong case for mitigation. This record overwhelmingly describes a man who has been an outstanding lawyer for some 20 years, generously gives his time and energy for the betterment of one of the state universities, whose work is highly

regarded by respected citizens and attorneys. All this plainly shows that the events of 1978 and 1991 were aberrations caused largely by an undiagnosed and untreated disease and mental problem which now is under medical control and continuing supervision by capable support organizations. While the Respondents illness and addictions resulted in hospitalization and treatment, it did not otherwise interfere with his work; and nothing in this record shows that the misconduct harmed any client or resulted in prejudice to anyones rights.

Likewise, any longer suspension of the respondent would serve no useful purpose in this case. One of the purposes of a suspension in addition to punishment is to hold the attorney up to public criticism, thereby reinforcing the urgent need to correct the misconduct. Respondent's case has called him into intense scrutiny by the press in Tallahassee as well as the press in his home county."

## SUMMARY OF ARGUMENT

The sole issue before this Court is whether or not the discipline recommended by the Referee is adequate to serve all of the purposes of disciplining lawyers. Admittedly, the Respondent is guilty of a second degree misdemeanor, was tried therefor, and sentenced to thirty (30) days in jail. He has not attempted to justify his conduct or to be excused therefor.

The Referee found that Respondent's misconduct was caused by illnesses - alcoholism, cocaine addiction and a psychiatric problem; he has sought professional help and has cooperated in treatment therefor; has not consumed any alcoholic beverages or controlled substances since June, 1991; has complied with his contract with Florida Lawyers' Assistance, Inc. and followed the precepts of Alcoholics Anonymous, and his conduct has exhibited other mitigating circumstances, all of which reflects that it is unlikely that Respondent will again engage in like misconduct. Based upon these Findings of Fact, the Referee concluded that a ninety (90) day suspension would be adequate to fully discharge all of the purposes of Lawyers' discipline, including deterring other lawyers from engaging in like misconduct, and additional sanctions would serve no useful purpose.

It is Respondent's position that:

13. The Bar has not demonstrated that the Referee's Findings and Conclusions are clearly erroneous or lacking in

evidentiary support and that said Findings and Conclusions should not be upheld on review.

14. Considering the nature of Respondent's misconduct and the mitigating circumstances therefor, all as found by the Referee, the discipline recommended by the Referee comports with the spirit and letter of the purposes of disciplining lawyers as set out in the Case Law applicable to the facts in this case, as well as to the Florida Standards for Imposing Lawyers' Sanctions adopted by the Board of Governors of the Florida Bar.

## ISSUE FOR REVIEW

The Complainant in its brief has stated under the title "ARGUMENT 1", that the issue for review is:

> "THE REFEREE'S RECOMMENDED DISCIPLINE, A 90-DAY SUSPENSION, IS INSUFFICIENT CONSIDERING THE SERIOUS NATURE OF RESPONDENT'S MISCONDUCT."

This is a misstatement of the issues. Complainant has completely ignored the effects which should be given to the mitigating circumstances as found by the Referee. An accurate statement of the issue is:

> WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE, A NINETY-DAY SUSPENSION AND PROBATION FOR AN EXTENDED PERIOD OF TIME, SUBJECT TO THE CONDITIONS SET OUT IN THE REFEREE'S REPORT, IS SUFFICIENT DISCIPLINE CONSIDERING THE NATURE OF RESPONDENT'S MISCONDUCT AND THE MITIGATING FACTORS AS FOUND BY THE REFEREE.

Under "ARGUMENT 1" after stating the Bar's view of the issue for review, there are four subparagraphs designated A, B, C and D.

There is no issue as to Subparagraph A. Admittedly, Respondent's misconduct warrants discipline.

As to Subparagraph B, the Referee's findings reflect that Respondent was an alcoholic and that each act of misconduct here involved occurred while the Respondent was in Tallahassee to attend a home football game of Florida State University and after Respondent had become intoxicated and was the result thereof.

Subparagraph C is a misstatement of the law. The Referee found the Respondent to be an alcoholic, a cocaine addict, and the sufferer of a psychiatric problem for none of which is there a "cure". Cases decided by this Court, cited in this brief, hold that the control of alcoholism and cocaine addiction are mitigating circumstances which should be considered in determining the sanctions to be imposed for misconduct caused by such addiction.

## ISSUE TO BE REVIEWED

WHETHER THE REFEREE'S RECOMMENDED DISCIPLINE, A NINETY-DAY SUSPENSION AND PROBATION FOR AN EXTENDED PERIOD OF TIME, SUBJECT TO THE CONDITIONS SET OUT IN THE REFEREE'S REPORT, IS SUFFICIENT DISCIPLINE CONSIDERING THE NATURE OF RESPONDENT'S MISCONDUCT AND THE MITIGATING FACTORS AS FOUND BY THE REFEREE.

## ARGUMENT

From the outset the Respondent has always recognized that, being guilty of the conduct alleged, this Court would impose some sanctions upon him. The sole purpose of his "defense" was to demonstrate to this Court that under the facts of this case the sanctions imposed should be minimal. This effort was based upon two principles of law which have been adopted and followed by this Court.

It has always been the philosophy of this Court that the purpose of assessing sanctions in lawyer disciplinary matters is to protect the public's interest and to give fair treatment to the accused attorney. State, ex-rel. The Florida Bar v Ruskin, 126 So.2nd 142 (Fla.1961). The discipline should be corrective and the controlling consideration should be the gravity of the charges, the injuries suffered and the character of the accused. Holland v Frournoy, 195 So.2nd 138 (Fla.1940). The penalty assessed should not be made for the purpose of punishment. The Florida Bar v King, 174 So.2nd 398 (Fla.1965). Neither prejudice nor passion should enter into the determination. State, ex-rel. The Florida Bar v Bass, 106 So.2nd 77 (Fla.1958). In The Florida Bar v Pahules, 233

So.2nd 130 (Fla.1970), this Court carefully set out the purpose of discipline as follows:

> "In cases such as these, three purposes must be kept in mind in reaching our conclusions. First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become encouraged in like violation."

Pahules, supra, was cited with approval and quoted in The Florida Bar v Saphirstein, 376 So.2nd 7, (Fla.1979), The Florida Bar v Harper, 518 So.2nd 262, (Fla.1988) and numerous other cases.

In 1982 this Court, in the case of The Florida Bar v Larkin, 420 So.2nd 1080 (Fla.1982), squarely confronted the problems involved arising out of attorney alcoholism. In this case the Court stated:

> "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 well. Too often, attorneys will recognize that a colleague suffers from alcohol abuse but will ignore the problem because they do not want to hurt the individual or his or her family. This attitude can have disastrous results both for the public and the individual attorney. If alcoholism is dealt with properly, not only will the attorney's clients and the public be protected, but the attorney may be able to be restored as a fully competent member of the legal profession. This Court has the

> <u>responsibility of assuring that the public is fully protected from attorney's misconduct. In those cases where alcoholism is the underlying cause of the professional man's conduct and the individual attorney is willing to cooperate in seeking alcoholism rehabilitation, we should take these circumstances into account in determining the appropriate discipline</u>."

<u>Larkin</u>, supra, was followed by <u>The Florida Bar v Headley</u>, 475 So.2nd 1213 (Fla.1985). In this case the Court fully recognized that where the misconduct was caused by alcoholism and the attorney is willing to cooperate in seeking rehabilitation, the Court should take these matters into consideration as mitigating circumstances. In this case the Court stated that:

> ".... First and foremost among the mitigating circumstances is the fact that there have been no instances of bad conduct by Respondent as a practicing attorney. He has not been cited for contempt of court, nor has he adversely affected the rights or neglected the interest of a client. Also, Respondent now acknowledges that he is an alcoholic and has been actively engaged in Alcoholics Anonymous in an attempt to put his life back together.
>
> "The Bar contends that we should not consider alcoholism as a mitigating circumstance since it occurred after the wrongful conduct. See <u>State ex-rel. v Hogsten</u>, 127 So.2nd 668 (Fla.1961)(Alcoholism or illness is not relevant for consideration as mitigating circumstances when it occurs after the wrongful event). However, we accept the Referee's finding that Mr. Headley's failure to pay Bar dues was a direct result of his being an alcoholic. This finding was based upon the testimony of a member of the Florida Bar, a reformed alcoholic, who has had daily contact with Respondent since August 14, 1984. The Referee correctly characterized this witness as an expert in the area of alcoholic attorneys and placed great weight upon his testimony.

> "We do not feel as though the discipline recommended by the Complainant is best suited in this case. As we noted in The Florida Bar v Larkin, 420 So.2nd 1080 (Fla.1982), in those cases where alcoholism is the underlying 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. Further, a major shortcoming of the Complainant's recommended discipline is that it fails to offer the Respondent an opportunity of successful rehabilitation through the Special Committee of The Florida Bar on alcohol abuse...."

The law above-cited has been well established by this Court and this Court has not deviated therefrom. The disagreements between the Bar on the one hand and the Referee and the attorney for the Respondent on the other arises not because of a disagreement as to the facts of this case but from the differences of opinion as to the relative importance of some of the facts. Thus, many of the facts which Respondent will emphasize in this brief are completely ignored by the Bar in its brief. There is no real controversy as to the facts - the importance of many of the facts are in dispute.

The law is clear that in Bar disciplinary proceedings:

> "The party seeking review has the burden of showing that the Referee's findings are "clearly erroneous or lacking in evidentiary support." The Florida Bar v Wagner, 212 So.2nd 770, 772. (Fla.1968). Unless this burden is met, a Referee's findings will be upheld on review. The Florida Bar v McClure, 575 So.2nd 176 (Fla.1991)". See also The Florida Bar v Neu, 597 So.2nd 266 (Fla.1992)."

The Referee in his Report found, among other things, that:

1. Beginning in June, 1986, the Respondent began making obscene telephone calls to a lady in Tallahassee, which calls continued intermittently until April, 1991. All of the said phone calls originated in Tallahassee and occurred on Fridays, Saturdays and Sundays, on weekends when Florida State University had a home football game. (RR.1) The Respondent was a substantial booster of the Florida State University football team and rarely, if ever, missed a home football game. From the time of Respondent's arrival in Tallahassee on Friday, before football, through all of Saturday and even a portion of Sunday, there were continuous parties in which alcohol was consumed and at which Respondent became intoxicated. It was on these occasions that Respondent made the obscene telephone calls for which he was arrested. (RR.2) The conduct of making the telephone calls was caused by Respondent's personal and emotional problems and his addiction to alcohol and cocaine. (RR.8)

2. Almost immediately after his arrest, Respondent determined that he needed professional help in relation to making obscene telephone calls. He entered Golden Valley Health Center, an institution specializing in diagnosing and treating sexual and psychiatric disorders, on May 15, 1991 and was discharged on June 14, 1991.

3. During the course of Respondent's treatment at Golden Valley Health Center, he was told for the first time that he was an alcoholic and cocaine addict, and when he was so told, he believed it.

4. After leaving Golden Valley Health Center, Respondent went to Parkside Lodge of Florida, for treatment of his alcohol and cocaine addiction, where he remained for one week.

5. He then sought the services of The Florida Lawyers Assistance Program, Inc., a program operated with the cooperation of The Florida Bar to serve as support for the lawyers with an alcoholic and/or controlled substance addiction, and to monitor their progress.

6. As a part of the program of The Florida Lawyers Assistance Program, Inc., Respondent joined Alcoholics Anonymous and has attended meetings approximately twice weekly, reporting monthly to his monitor. He has submitted to quarterly, random tests for alcohol and controlled substances, all of which have proved negative.

7. Respondent was an alcoholic, a cocaine addict, and suffered from a psychiatric problem.

8. Alcoholism, cocaine addiction and psychiatric problems are all illnesses which are probably not curable.

9. These illnesses are all controllable in the sense that symptoms of these illnesses will not occur if:

a. Respondent is dedicated to resisting the effects of the illnesses, and he is.

b. Respondent seeks professional assistance in controlling the illnesses, and he is.

c. Respondent has the support of Alcoholics Anonymous, Florida Lawyers Assistance, Inc. and like organizations, his

family, and his friends, and he is.

d. Respondent is determined to resist the effects of these illnesses, to continue cooperating in the programs of Alcoholics Anonymous and Florida Lawyers Assistance, Inc. and securing professional help for his psychiatric problems, and he is.

10. Respondent has not consumed any alcoholic beverages or controlled substances since his discharge from Golden Valley Health Center (6/14/91).

11. Respondent has an excellent chance of avoiding exhibiting any symptoms of his illnesses and any repetition of his prior misconduct and thus to become fully rehabilitated.

12. No client nor the administration of justice was injured by Respondent's misconduct.

13. Respondent is truly remorseful and is determined to rehabilitate himself.

14. After being apprehended, Respondent made a good faith effort to rectify the consequences of his misconduct by apologizing to the victim who has since testified twice on behalf of the Respondent, once at the sentencing at Tallahassee, and once during the course of the Hearing before the Referee.

The Complainant, in its brief, makes much of the fact that in 1978 the Respondent was arrested and charged with placing obscene and harassing telephone calls to a woman. Respondent entered into a plea agreement in 1979 and was placed on probation for three (3) years with the requirement that he continue counselling. Although

the conduct apparently ceased for a time after his 1978 arrest, by 1986 he began making the telephone calls herein involved. In this connection, the Complainant fails to point out the findings by the Referee that, "Respondent consulted with and was treated by a psychologist, Dr. Sidney Merin. Dr. Merin did not diagnose Respondent's problems as being related to the consumption of alcohol or drugs." This Finding of Fact is not disputed by the Complainant and it should be taken as true. Respondent did not know the contributing causes of his misconduct and therefore did not avoid these pitfalls.

The Complainant states on Page 3 of his brief:

> "Respondent proclaimed his recovery from addiction to alcohol and cocaine. However, no expert witness testified in support of this position."

Complainant offered in evidence as the Bar's Exhibit 2, records from Golden Valley Health Center. Included in said documents was a discharge summary executed by Stephen Barton, M.D. This document was offered in evidence by the Bar for some purpose and the only logical purpose could be that the contents thereof were material to this case. On Page 3 of said discharge summary, it is stated:

> "The diagnostic impression is that:
>
> 1. Adjustment disorder with mixed emotional features.
>
> 2. Psychosexual Disorder, NOS.
>
> 3. Alcohol and cocaine dependency.
>
> 4. Narcisstic independent personality traits - rule out mixed personality disorder."

Further, the testimony of the Respondent, his wife, all of his brothers, as well as the witnesses connected with the Florida Lawyers Assistance, Inc. and Alcoholics Anonymous certainly establish that Respondent was an alcoholic. The Referee's Findings of Fact in this regard is surely supported by the evidence.

On Page 9 of the Bar's brief, it is stated:

> "The record is void of expert testimony which would establish a causal connection between Respondent's alcoholism and cocaine use and the criminal conduct."

The Respondent submits that the criminal conduct occurred only on those occasions when he was in Tallahassee, attending FSU football games, and partying through an entire weekend where he became intoxicated. Every call he made to the lady involved was done on these occasions when he was drunk. There could be no clearer proof of a causal connection.

Respondent submits that the Bar has not carried its burden of showing that the Referee's findings are clearly erroneous or lacking in evidentiary support.

On Page 14 of the Bar's brief, it is stated:

> "Also consistent with the Golden Valley Health evaluation is an attempt by the Respondent <u>to excuse his conduct by blaming it variously on his family history, his alcoholism and his abuse of an illegal drug</u>."

The Respondent has not attempted to excuse his conduct for any reason - it was inexcusable. In the trial of this case, he merely attempted to demonstrate the cause of the misconduct and the steps that he had taken to rehabilitate himself. It was not and is not

the position of the Respondent that he should not be disciplined; however, it was and is his position that the sanctions to be imposed should be measured by the nature and gravity of the misconduct weighed in the light of the mitigating circumstances, so as to achieve a result compatible with the philosophy of this Court as heretofore set out. This Court, in the leading case of <u>The Florida Bar v Tunsil</u>, 503 So.2nd 1230 (Fla.1986) stated:

> "We are not unmindful 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."
>
> " ... "
> " ... "
> " ... "
>
> "...We cannot, however, agree with the Referee's recommendation of a mere three-month suspension with automatic reinstatement. The mitigating factors simply can neither erase the grievous nature of Respondent's misconduct in stealing clients' funds, nor diminish it to the extent of warranting the same punishment which has been meted out for must less serious offenses."

Respondent's misconduct was inexcusable. It had a devastating effect upon the victim. It constituted a crime but in the scale of crimes, the conduct constituted only a second degree misdemeanor. In the criminal case, the trial judge sentenced

Respondent to thirty (30) days in jail. In the scale of attorney misconduct, ranging from stealing from clients, or deceiving the Court on down to simple neglect, Respondent's misconduct rates really low. Without the mitigating factors, the sanctions would probably have been no more than a relatively short suspension. The Referee took this into consideration and concluded ninety (90) days' suspension was adequate.

On Page 15 of the Complainant's Brief, it is stated:

> "Pursuant to Standard 5.12 of the Florida Standards for Imposing Lawyer Sanctions, 'Suspension is appropriate when a lawyer knowingly engages in criminal conduct not included within Standard 5.11 and that seriously reflect on the lawyer's fitness to practice.'"

A second degree misdemeanor is not criminal conduct included in Standard 5.11. Standard 5.12 is qualified by Standard 5.1 which reads:

> "Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, or in all cases with conduct involving dishonesty, fraud, deceit or misrepresentation."

The qualifications set out in Standard 5.1 and the factors set out in Standard 3.0 are completely ignored in the Complainant's

Brief. The consolidation of Standards 3.0, 5.1 and 5.12 would read as follows:

> "After considering the following factors:
>
> (a) The duty violated;
>
> (b) The lawyer's mental state;
>
> (c) The potential or actual injury caused by the lawyer's misconduct; and
>
> (d) The existence of aggravating or mitigating factors and absent mitigating factors, suspension is appropriate when a lawyer knowingly engages in criminal conduct which is not included within Standard 5.11 and it seriously adversely reflects on the lawyer's fitness to practice."

Further, in the Bar's Brief, it is stated:

> "None of the disciplinary cases reviewed that have been previously decided by this Court is directly on point."

This statement is indeed accurate. There are no previously decided cases by this Court supporting a three-year suspension for Respondent's misconduct where there are similar mitigating circumstances.

The Referee stated Respondent's position more eloquently than can his counsel, in the following words:

> "I have also considered that Respondent is 48 years old, married with one minor child. Standing in sharp contrast to the conduct in 1978 and 1991 are the array of factual accounts, psychological reports and testimonials that establish a very strong case for mitigation. This record overwhelmingly describes a man who has been an outstanding lawyer for some 20 years, generously gives his

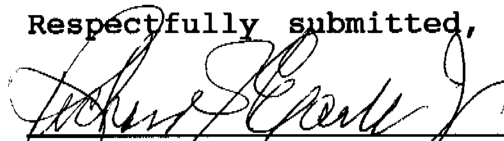
> time and energy for the betterment of one of the state universities, whose work is highly regarded by respected citizens and attorneys. All this plainly shows that the events of 1978 and 1991 were aberrations caused largely by an undiagnosed and untreated disease and mental problem which now is under medical control and continuing supervision by capable support organizations. While the Respondent's illness and addictions resulted in hospitalization and treatment, it did not otherwise interfere with his work; and nothing in this record shows that the misconduct harmed any client or resulted in prejudice to anyone's rights."

Respondent adopts these views of the Referee and submits that the Referee's Report should be affirmed.

## CONCLUSION

In conclusion, Respondent submits that the conduct of which he was guilty was a second degree misdemeanor, wholly and unconnected to the practice of law, in which no client was injured in any way. The cause of such conduct was alcoholism, cocaine addiction and a psychiatric problem. Respondent sought professional help for these illnesses and will continue securing the same. As a result, he has an excellent chance of avoiding the symptoms of said illnesses in the future. Under these circumstances and in view of the numerous mitigating factors found by the Referee, a suspension of more than 90 days would serve no useful purpose and would be punitive, contrary to the philosophy of this Court.

Respectfully submitted,



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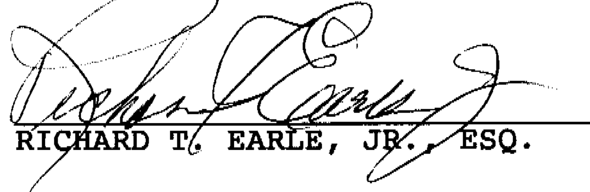
## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief was served on SUSAN V. BLOEMENDALL, Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Florida 33607, by regular U.S. Mail this 3rd day of February, 1993.



RICHARD T. EARLE, JR., ESQ.