IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant.

v.

EVAN ROBERT WOLFE,

Respondent.

_____/

CASE NO.: 94,226

RESPONDENT'S ANSWER BRIEF

RICHARD B. MARX
Attorney for Respondent
66 West Flagler Street
Second Floor
Miami, Florida 33130
(305) 579-9060
Fax (305) 377-0503
Florida Bar No.: 051075

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE

TABLE OF OTHER AUTHORITIES

PAGE

SYMBOLS AND REFERENCES

In this brief, the complainant, The Florida Bar, shall be referred to as "The Florida Bar" or the "bar".

The transcript of the final hearing held on April 5, 1999, shall be referred to as "T" followed by the cited page number (T-___).

The Report of Referee dated April 26, 1999, will be referred to as "ROR" followed by the reference page number(s) (ROR-_____).

The bar's Initial Brief will be referred to as "IB" followed by the reference page number(s) (IB-_____).

STATEMENT OF THE CASE

On March 10, 1998, The Florida Bar filed a Petition for Emergency Suspension (hereinafter referred to as the "Prior Action") against respondent, pursuant to rule 3-5.2 of the Rules Regulating The Florida Bar. The Petition was supplemented on March 11, 1998. The Petition alleged that respondent committed in person solicitation of the victims of the tornadoes that struck Osceola County, Florida in February, 1998 by approaching victims and discussing being retained by them to represent them in conducting negotiations with insurance companies, in violation of rule 4-7.4(a). On March 17, 1998, Respondent filed a Motion in Opposition to Petition for Emergency Suspension. On March 26, 1998 this court entered its order, "restraining and enjoining Respondent from soliciting, entering into an agreement for, charging, or collecting a fee for professional employment from a prospective client with whom he has no family or prior professional relationship, in person or otherwise, in regard to the tornado that struck Osceola County, Florida in February, 1998." The order found that the injunction was adequate to protect the public and appointed the Honorable E. Randolph Bentley as referee. A final hearing was held on April 14, 1998, and

after considering all the pleadings, the referee recommended that the proceeding be dismissed as being moot, and issued his report on May 4, 1998. Said report was approved by this court on June 11, 1998.

On November 2, 1998, the Bar filed the instant action which is a three count complaint based on the same facts raised in the Prior Action. On November 12, 1998, The Honorable Joel H. Brown was appointed Referee. On March 29, 1999 Respondent entered into a Stipulation as to Facts and Rule Violations with the bar wherein he stipulated to every fact and rule violation contained in the bar's complaint. On April 5, 1999, a final hearing was held before the Referee only as to the issue of discipline. On April 26, 1999 the referee issued his report. Pursuant to the Stipulation entered into between the parties on March 29, 1999, the Referee recommended that Respondent be found guilty as to all counts of the complaint. As to discipline, the Referee recommended that Respondent be suspended from the practice of law for a period of ninety (90) days with automatic reinstatement at the end of the period of suspension as provided in rule 3-5.1(e). Further, upon reinstatement, the Referee recommended a period of probation of five (5) years. In arriving at the appropriate discipline for the Respondent, the Referee considered all aggravating and mitigating factors as set forth in the Florida Standards for Imposing Lawyer Sanctions.

On June 3, 1999 the Bar served its Petition for Review of the Referee's Report. The bar originally sought disbarment as the appropriate discipline but now takes the position that given Respondent's admitted severe, long-term substance abuse problem, a three year suspension requiring proof of rehabilitation is warranted. Further, the Bar contends that Rule 3-5.1(c) provides that the probation period may not be for more than three years unless it is for an indefinite period determined by conditions stated in the order, and that given the nature of Respondent's drug abuse and personal problems a three-year period of probation following reinstatement would be most appropriate to achieve the goals of discipline.

The referee conducted a thorough analysis of what should be appropriate discipline and gave proper weight to all of the mitigating and aggravating factors as set forth in the Florida Standards for Imposing Lawyer Sanctions, and arrived at the correct discipline of a ninety (90) day suspension. As to the period of probation, Respondent agrees with the Bar that a three-year period of probation following reinstatement is most appropriate.

STATEMENT OF THE FACTS

There were no disputed issues of facts in the instant action. The parties entered into a Stipulation as to Facts and Rules Violations on March 29, 1999. Accordingly, the final hearing before the Referee held on April 5, 1999 dealt only with the issue of appropriate discipline. Respondent stands by the Stipulation of March 29, 1999. However, in its Statement of Facts, the Bar indicates that, "respondent also entered into an oral agreement with a Hispanic client to pay him a fee for every Hispanic client he referred...in exchange for ... translation services. The client referred his parents to the respondent for representation unrelated to the Central Florida tornadoes and the respondent neglected their legal matter. They found it difficult to contact the respondent and their insurance company never received any communication from him." (IB-8) (Emphasis added). There is no indication in the Stipulation of Facts, nor in the Referee's Report about respondent representing the parents of a Hispanic client on a matter "unrelated to the Central Florida tornadoes". Additionally, respondent was not charged in the complaint with neglecting any matter "unrelated to the Central Florida tornadoes" regarding the parents of a Hispanic client. Accordingly, this

paragraph should be stricken or disregarded by this court because it is not grounded on the stipulated facts, nor on the Referee's Report.

SUMMARY OF THE ARGUMENT

The bar argues for the proposition that solicitation is suspension which requires proof of rehabilitation and it relies on the dissenting opinion of the The Florida Bar v. Weinstein, 624 So.2d 261 (Fla. 1993). The bar is asking for this court to disregard mitigating factors of the Florida Standards for Imposing Lawyer Sanctions. This case as well as the other cases relied upon by the bar, are inapplicable to the issues raised in the case and do not offer any guidance in arriving at a proper discipline in this case. The actions of The Florida Bar in the prosecution of the instant case are less than virtuous and at worst border on prosecutorial misconduct. There has been a blatant effort by the prosecution to create an atmosphere solely designed to prejudice the trier of fact against the Defendant and to prevent him from having a fair hearing. From the outset, this prosecution had a well-crafted plan to load the case with as much prejudicial information as possible, having nothing to do with the issues. The Bar has gone to great length to produce all of the blood and gore it could for no legitimate purpose. The Bar has even gone as far as referring to Respondent as a looter during the final hearing for discipline. (T-13). Despite the fact that Respondent entered into a very detailed Stipulation of Facts and Rules Violation, admitting virtually all of the facts of the complaint, the bar took it upon itself to parade witnesses, produce evidence,

including photographs, not to resolve any issues regarding the appropriate discipline to apply, but rather to inflame the trier of fact.

The bar initially sought the discipline of disbarment at the ouset of the case. It now seeks a long-term suspension. This is an apparent attempt to set a new standard for recovery from drug abuse by attempting to take the position that a long-term suspension is warranted so as to assure the Respondent's recovery. Not only is that argument legally unsound, it does not ring true as to recovery from substance abuse. There was ample evidence presented to establish that the Respondent is well on his way to recovery and obviously the referee in fashioning a ninety- (90) day suspension accepted that argument.

The referee considered and gave the proper weight to all of the mitigating and aggravating factors. Although this court has the ultimate authority to determine appropriate discipline, the referee is guided by the Standards for Imposing Lawyer Sanctions, which constitute a model that sets forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions on an individual basis. These standards are designed to promote: (1) consideration of all factors relevant to imposing the appropriate level of sanctions in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer

discipline; and (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among jurisdictions. The referee has meticulously followed this procedure.

THE NINETY-DAY SUSPENSION RECOMMENDED BY THE REFEREE IS FAIR AND JUST, AND BASED UPON THE SOUND APPLICATION OF THE FLORIDA STANDARDS FOR IMPOSING LAWYER SANCTIONS

The bar takes the position that the ninety-day suspension recommended by the referee is too lenient in light of the seriousness of the offense and that the severity of the respondent's problems require that he be suspended for an extended period of time, requiring him to prove rehabilitation prior to reinstatement.

The bar offers to the case of The Florida Bar v. Weinstein, 624 So.2d 261 (Fla. 1993) for the proposition that in person solicitation merits disbarment.[1] The bar, in its argument before the referee stated that this case "is on all fours" with the instant case. That statement is absolutely not accurate. Weinstein is not on all fours with this case. In Weinstein, the attorney solicited business from a stranger while hospitalized after a motorcycle accident with serious head injuries. Further, the attorney lied to a

[1] Although the bar argues in its Initial Brief that the appropriate discipline here should be suspension requiring proof of rehabilitation (more than ninety-one days) at trial it argued for disbarment. (See T-10,11).

nurse at the hospital and told her he was the patient's lawyer, and lied to the patient's brother by telling him that he had been sent by the police at the scene of the accident. He also mailed solicitation letters to the families of Dowe and Fluke that contained false statements. Although the referee ordered a ninety-day suspension, this court ruled instead that Weinstein be disbarred. The crucial point upon which this court relied upon as an aggravating factor in ordering disbarment, which the bar has apparently glossed over, is the fact that Weinstein lied under oath regarding the truth of the claims he made in his written solicitations to Dowe and Fluke.

This court further asserted in its ruling that, "false testimony in the judicial process deserves the harshest penalty". Id. at 262, *citing* The Florida Bar vs. Rightmyer, 616 So.2d 953, 955 (Fla. 1993), see also Fla. Stds. For Imposing Law.Sancs. §§ 6.11, 9.22(a)-(d), (f), (i). The referee considered the bar's assertions at trial that Wolfe lied and stated in his report that "a statement of defense containing certain misstatements of fact was filed on the respondent's behalf by his attorney in response to the Notice of Probable Cause Vote...The response was not sworn to and the Court notes that the respondent did not testify under oath at a grievance committee hearing nor did the grievance committee require an evidentiary hearing. At the final hearing, the respondent admitted the allegations contained in the bar's Complaint and

entered into a stipulation of facts on March 29, 1999". (ROR-11). Therefore, the referee found that this was not an aggravating factor.

The bar emphasizes that while Weinstein engaged in a single incident of solicitation, Wolfe engaged in multiple acts of solicitation and therefore his actions where much more serious than Weinstein's. However, the bar seems to ignore the referee's findings that all of Wolfe's offenses, "were part of the same scheme and took place over a short period of time". (ROR-10). Accordingly, this was not considered to be an aggravating factor. Finally, and most importantly, the Weinstein case does not deal with the issue of drug addiction as a mitigating factor. This case does not provide any guidance in analyzing the issue of appropriate discipline in the case at bar and in no way supports the bar's position concerning appropriate discipline.

The bar cites The Florida Bar v. Stafford, 542 So.2d 1321 (Fla. 1989) for the proposition that the appropriate sanction for solicitation is a suspension which requires proof of rehabilitation. In that case the attorney received a six-month suspension for solicitation of professional business. He asked persons or organizations to solicit professional business for him, including police officers. This case did not deal with drug addiction as a mitigating factor. The bar ignores this critical distinction and chooses instead to cite as authority the dissent in Stafford for the proposition that mitigating

factors should be completely removed from Standards for Imposing Lawyer Sanctions when determining the appropriate level of discipline in solicitation cases and that we should "rid our ranks of this type of lawyer". (I.B.-14, 15, 16, 17). Fortunately, this was a dissenting opinion and not the court's ruling.

The bar alleges that Wolfe did not voluntarily cease his solicitation until he was caught, and that the bar would never have learned of his activities had he not solicited the friend of an appellate court judge. (I.B.-15). The bar here has totally ignored the referee's findings that, "...the respondent has attempted to cooperate by entering into a stipulation of facts...and at the final hearing he admitted his wrongdoing and expressed remorse". (ROR-12). The Referee considered this in mitigation. (ROR-12). Thus, throughout its brief, the bar appears to be challenging the referee's findings, and not just his recommended discipline. The bar has utterly failed to demonstrate that these findings are without support in the record or clearly erroneous.[2]

The bar has cited a several cases that deal with solicitation and order suspensions of varying lengths, all of which require proof of rehabilitation before reinstatement. None of these cases delt with drug addiction. It fails,

---

[2] A referee's findings of fact are presumed to be correct and are not subject to review absent a clear showing that the facts are without support in the record or are clearly erroneous. *See* The Florida Bar v. Carson, 24 Fla.L.Weekly S229 (Fla. May 20, 1999).

however, to analyze the mitigating factors in each of those cases, and refuses to consider the mitigating factors in the case at bar or to acknowledge the referee's findings and analysis of said mitigating factors.

The bar's brief, as well as the evidence it presented at trial make clear its intent to create as much prejudicial information as possible against the respondent. Despite the parties' stipulation as to the facts of the case and the rules violation, the bar has seen fit to produce all the blood and gore it could. There was no legitimate purpose for bringing in pictures of the devastation of the Orlando area tornadoes when those facts have been stipulated. The bar argued that it was introducing said evidence for the purpose of showing the vulnerability of the victims, but this was a fact that was not in dispute. The respondent stipulated to the fact that there was great destruction, that the tornadoes damaged a number of homes, and killed and injured a large number people. Respondent's counsel at trial also stipulated that the victims were in fact vulnerable. (T56). However, the bar proceeded with its scheme to paint the respondent in the worst possible light despite their stipulation. The bar even went as far as referring to the respondent during the trial as a ***looter***. (T13). The word looter has extremely negative connotations, especially for people who have been through a natural disaster such as hurricane Andrew. To loot is defined as to plunder and sack during war. MERRIAM

WEBSTER'S COLLEGIATE DICTIONARY 688 (10TH ed.1995). Without minimizing respondent's conduct, his actions do not come anywhere near "plundering and sacking". The use of this term by bar counsel at trial did nothing to resolve the issue of discipline, but rather was an attempt to create prejudice against the respondent. The bar has transcended all bounds of decency and fair play in its zeal to disbar and/or secure a long term suspension for Wolfe. In the prosecution of disciplinary complaints should not the bar be expected to proceed with in a fair manner? The bar's conduct in the case at bar could not have been what this court envisioned when it established the Rules Regulating The Florida Bar. *See* Rule 1.2.

Even though the bar initially sought disbarment at the final hearing (T-11), it now takes the position that a long-term suspension is appropriate. This is an apparent attempt to set a new standard for recovery from drug and alcohol abuse by attempting to take the position that a long-term suspension is warranted so as to insure the respondent's recovery. Not only is that argument legally unsound, it does not ring true as to recovery from substance abuse. There was ample evidence presented at trial to establish the fact that respondent is well on his way to recovery and obviously that argument was accepted by the referee in fashioning a ninety- (90) day suspension and was part of his findings. (ROR-8).

The bar acknowledges in its Initial Brief, even though it hints that it was not voluntary, that respondent's addiction to cocaine and his efforts at rehabilitation constitute a mitigating factor. (IB-20). The referee made a finding that respondent's addiction and efforts at rehabilitation were in fact a mitigating factor. (ROR-13). The bar refers to the testimony of Myer Cohen, Executive Director of Florida Lawyers Assistance, Inc., for the proposition that three years is the time usually required to determine with a high degree of accuracy whether a particular lawyer will be successful in maintaining sobriety because it normally takes three years for the recovering addict to internalize what has been learned. (IB-20,21). This testimony has been taken out of context and misconstrued by the bar.

Mr. Cohen did not testify as, nor was he qualified as an expert on the issue of mental health. Mr. Cohen testified as the representative of Florida Lawyers Assistance, Inc., (FLA), how that organization operates, and the compliance of respondent with his rehabilitation contract with that organization. There were no questions asked of Mr. Cohen regarding his training, education, and background in the area of mental health that would qualify him to give an opinion as to the discharge summary of respondent from COPAC, and the admission summary sheet that found an Axis II diagnosis of anti-social personality disorder. (T115-116). Accordingly, his

testimony, with respect to personality disorders is of little or no value and can not be given the same weight as that of an expert in the field of mental health and addictionology in order to draw the conclusion that respondent needs a minimum suspension of three years. Mr. Cohen's testimony as to the "stressors" that could lead to a relapse is just his personal opinion. Mr. Cohen's testimony should only be meaningful as to the operation of FLA and the fact that respondent has been in compliance with his FLA Rehabilitation Contract. If we follow the bar's reasoning to its logical conclusion, then anybody who is under an FLA rehabilitation contract and receives a disciplinary suspension, no matter what the offense is, would have to be suspended for the duration of his/her FLA contract, which is normally three years. This is certainly could not be the intent of the Rules Regulating The Florida Bar nor the intent of the Florida Standards for Imposing Lawyer Sanctions, envisioned for the imposition of appropriate levels of sanctions based on a case by case basis.

The testimony of Evan J. Zimmer, M.D., an expert witness, board certified in both psychiatry and addictionology, with substantial experience with individuals who suffer from cocaine usage (T-35) was that, "Long term use of cocaine is in my clinical opinion usually most globally responsible for a person's aberrant, maladaptive, illegal behavior during the period of usage."

(T-40). As to issues of personality disorders Dr. Zimmer testified that, "...anyone who really understands the disease of addiction and really understands what a personality disorder is recognizes that that type of diagnosis is best made when a person has had a chance at ongoing abstinence and sobriety of a duration of six months to a year before that kind of testing would have any kind of validity." (T-43-44). Further, Dr. Zimmer stated that, "The impaired behaviors will incur [sic] while intoxicated and while not intoxicated until a person is in recovery." (T-47). The bar's concern appears to be that respondent will slip back into his old addictive behavior if he is not suspended for three years and they seem to rely on Mr. Cohen's testimony for this proposition. (IB-21). The referee specifically addressed this question with Dr. Zimmer and asked him, "At what point does the addiction to cocaine cease being an influence on somebody's rational behavior as to whether to do the kinds of acts that Mr. Wolfe is accused of?" Dr. Zimmer responded that, "To not do it? That's relatively rapid. That's probably within a matter of probably days to weeks...After cessation of the use of the drugs and entering a recovery program" (T-48). Thus, the bar's argument that the suspension has to be for three years is erroneous and not supported in the record.

FLA's organization of support groups for lawyers is based upon the principles of Alcoholics Anonymous (AA). See discussion regarding FLA's

Rehabilitation Contract *infra*. The long history of AA provides a great deal of hope for those individuals suffering from addiction. In the preface to the book of Alcoholics Anonymous under the "Doctor's Opinion", which was written by a physician, it provides that:

> Men and women drink essentially because they like the effect produced by alcohol. The sensation is so elusive that, while they admit it is injurious, they cannot after a time differentiate the true from the false. To them, their alcoholic life seems the only normal one. They are restless, irritable and discontented, unless they can again experience the sense of ease and comfort which comes at once by taking a few drinks...After they have succumbed to the desire again, as so many do, and the phenomenon of craving develops, they pass through the well-known stages of a spree, emerging remorseful, with a firm resolution not to drink again. This is repeated over and over, and unless this person can experience an entire psychic change there is very little hope of his recovery.
> On the other hand--and strange as this may seem to those who do not understand—once a psychic change has occurred, the very same person who seemed doomed, who had so many problems he despaired of ever solving them, suddenly finds himself easily able to control his desire...the only effort necessary being that required to follow a few simple rules.[3]

The program of AA is the cornerstone of all other twelve step recovery programs, and they apply virtually the same principles. Thus, alcoholics and drug addicts are one and the same as to the effect of the substance on the individual.

[3] Alcoholics Anonymous, xxvii (3rd ed. 1998).

David Vittoria a therapist at the Transitions Recovery Program testified that Wolfe spent thirty-three (33) days there and was transferred to a more intensive treatment facility in Mississippi (COPAC) which specializes in treating professionals with addiction problems. Mr. Vitorria has had follow up with Wolfe and testified that, "...he was doing very well in treatment, that he was following recommendations that COPAC was giving him, and moving forward in his treatment and definitely getting a better education about his disease of addiction." (T-91,92).

The bar also acknowledges that while respondent's use of cocaine may have clouded his judgment, it did not appear to have diminished his ability to operate his law practice. (IB-22,23). The bar asserted that respondent produced no evidence that his law practice as a sole practitioner suffered from his cocaine abuse, and that he handled a sizeable case load (some 200-400 persons after hurricane Andrew) for a nonimpaired sole practitioner. (IB-22). This number is not really as impressive as the bar would like it to be given the type of practice respondent had. Respondent's practice involved helping clients process insurance claims, he was not actually litigating each and every one of these "200-400" post hurricane Andrew claims. This was a function that could be handled by an insurance adjuster. The bar has also raised the issue of respondent driving his personal vehicle with signs posted

on it to generate business in the Miami area and in the Orlando area as well. (IB-12,13). This issue was not addressed in the parties' Stipulation of Facts and Rules Violation, even though the bar cites to it in their brief as if it was, it was not set forth in the bar's Complaint, and it was not mentioned in the Report of Referee. This is an issue of fact and therefore has no bearing on the issue of discipline since all the issues of fact have been stipulated to by the parties. Accordingly, it should be stricken and/or disregarded by this court. In any event, this argument does not hold water in light of Mr. Vitorria's testimony. Mr. Vitorria testified that he has, "treated lawyers who have been able to practice law under the influence of cocaine, many professionals, as a matter of fact, whose insight and judgment have been impaired significantly while still being able to do their job; as a matter of fact, sometimes doing their job very well". Q. "But the judgment was impaired?" A. "Significantly, most of the time, sure".(T-91). Additionally, when Mr. Vitorria was questioned regarding whether drug addiction was cured he answered as follows:

Q. ...Addiction is not cured. Correct?

A. Correct.

Q. But it's arrested?

A. Correct.

Q. And by arrested, does that not mean that when a person does what they're supposed to do for their treatment, that the condition of addiction is arrested, is stopped?

A. Yes, that is true.

Q. And that in the case of Mr. Wolfe, if Mr. Wolfe is doing the things that Transitions told him to do, that COPAC told him to do, and that his recovery tells him to do, then the chances are he's not going to relapse. Would that be true.

A. Yes. (T-98).

For an objective observer who has no knowledge regarding addiction and the recovery process, the bar's argument might lead to the conclusion that respondent's actions were purely motivated by greed. The fact of the matter is that the respondent went to the Orlando area driven by the compulsion to use drugs and the need to generate the funds necessary to purchase the drugs. See Doctor's Opinion regarding compulsion *infra.* The use of the signs on his truck is another example of the insanity of the disease of addiction and his behavior. Would a normal person drive around with such a sign on his personal vehicle? Hardly. It clearly shows that his thinking was impaired by

drugs and not that he was a bad person. This compulsion is the same concept as the "phenomenon of craving" referred to in the "Doctor's Opinion". *See* footnote 2. The uncontroverted expert testimony of Dr. Zimmer and Mr. Vitorria clearly established that respondent's misconduct was the direct result of his addiction to cocaine. More importantly, this was a specific finding made by the referee. The referee stated in his report that, "The Court accepts the testimony and finds the experts were credible in their testimony that long-term use of and addiction to cocaine causes emotional problems and impairs the judgment [of] the person who is actively addicted". (*See* ROR-12). Furthermore, the referee specifically found that, "...the addiction affected [respondent's] judgment and that mitigation is warranted in that he was suffering from personal and emotional problems stemming from the ***addiction which further impaired his judgment with regard to the misconduct***". (ROR-13)(Emphasis added). The bar has not challenged this finding and in order to do so it would have to make a clear showing that the facts are without support in the record or are clearly erroneous.[4] Thus, it does not matter how well respondent was operating his practice, he was impaired as a result of his addiction and his misconduct was a direct result of his addiction.

[4] *See* footnote 2 above.

FLA provides monitoring of individuals by placing them under contract. Attorneys suffering from chemical dependency are requested to enter into a Rehabilitation Contract. The contracts are usually of three years duration and require the attorney to follow a structured rehabilitation program appropriate for the individual. All contracts are Alcoholics Anonymous (AA)/Narcotics Anonymous (NA) oriented and require the attorney to attend a specified number of meetings per week, obtain a sponsor, as well as joining a home group, agree to being monitored by another recovering lawyer on a monthly basis, submit to random drug tests and obtain treatment and therapy when necessary. Monitoring reports are filed with FLA each month and constitute a written record of recovery. Monitors are required to grade the lawyer on attitude, compliance with the treatment plan, compliance with monitor plan, functioning in legal setting and functioning in other areas. Lists of meetings attended are submitted for the monitor's examination to further provide the monitor with a picture of the attorney's progress in recovery. W.H. Kilby, Remarks Regarding the Operation of Florida Lawyers Assistance, Inc. 6 (1995)(unpublished). In the event a participant fails to comply with any of the terms of the Rehabilitation Contract, FLA reports such conduct to The Florida Bar. Mr. Wolfe signed a contract with FLA July 6, 1998 for three years and it required him to attend ninety (90) AA or NA

meetings in ninety (90) days to begin upon release from residential treatment. This he did. After that first ninety (90) days, he had to attend at least three AA or NA meetings per week, plus the weekly FLA attorney support group meetings. He also was assigned a monitor to meet with on a monthly basis and supply monthly monitoring reports, which are also provided to The Florida Bar. He also has to submit to random drug tests on a quarterly basis. Since Mr. Wolfe has been under contract with FLA, there have been no negative reports on him and Mr. Cohen testified that he has been very compliant. (T104-106). Further, Mr. Cohen testified that he has been very willing to accept the suggestions given to him and to follow the recommendations of the program. (T-105,106). FLA's rehabilitation contract and system of monitoring provides a means, with highly credible evidence, to document a history of prolonged recovery through the monitor and the FLA staff. *See* W.H. Kilby 6.

The bar's position in this case would reverse years of progress made by court opinions in the area of drug addiction. The bar takes the position that although respondent's addiction explains his misconduct, it does not excuse it. The Florida Bar v. Golub, 550 So.2d 455, 456 (Fla. 1989), (IB at 20). Respondent does not seek to have his misconduct excused, but rather to have it mitigated. A ninety (90) day suspension is not a mild or lenient

punishment. A suspension of any length is simply devastating. Even if you ignore the obvious financial penalty of loss of income, you have horribly damaging publicity, including the requirement to send a copy of the suspension order to all your clients. There's a complete loss of privacy and prestige within the community.[5] Today addiction is generally viewed as a disease and excessive use is widely seen as a mitigating factor in disciplinary proceedings. Given a proper showing of rehabilitation, which the referee found in the case at bar, addiction will be accepted as evidence in mitigation of improper behavior.[6]

This court has recognized that the problem of addiction must be directly confronted. If substance abuse 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 full contributing member of the legal profession. In those case where [substance abuse] is the underlying cause of professional misconduct and the individual attorney is willing to cooperate in seeking rehabilitation, we should take these circumstances into account in determining the appropriate discipline. The Florida Bar v. Larkin, 420 So.2d 1080, 1081 (Fla. 1982).

---

[5] Stephanie B. Goldberg, Drawing the Line: When is an Ex-Coke Addict Fit to Practice Law?, A.B.A.J., Feb. 1990 at 90.

In The Florida Bar v. Sommers, 508 So.2d 341 (Fla. 1987) this court recognized that the principlal concerns of the bar and the Supreme Court in attorney discipline cases are to protect the public, warn other members of the profession about consequences of similar misconduct, impose appropriate punishment on the errant lawyer, and allow for and encourage reformation and rehabilitation. In this case, evidence showing numerous counts of client neglect by attorney who voluntarily enters chemical dependency treatment facility and completes treatment program warranted a ninety (90) day suspension and three years probation with conditions including restitution to clients, participation in the bar's program of supervised recovery for drug-impaired lawyers, and oversight of legal practice by bar disciplinary staff. All of these elements are in place already in the case at bar.

Whether or not a professional duty has been violated depends to a large extent on whether or not the acts of the attorney were voluntary. The drug itself engenders denial. The addicted attorney is therefore unable to make reasonable or sound decisions. Likewise, respondent's misconduct in the instant case was not the result of his greed for money, but rather the involuntary compulsion of his disease to obtain the drug. In such instances,

---

[6] *See* Raymond P. O'Keefe, The Cocaine Addicted Lawyer and the Disciplinary System, St. Thomas Law Review, Vol. 5, 1992 at 220.

the attorney's actions are involuntarily immobilized by the psychological machinations of an obsessive compulsion. Unfortunately, few courts have grasped and explicitly recognized this dynamic phenomenon. While involuntariness is often considered a defense in a criminal proceeding, addiction's impact on a lawyer's mental state is more often considered only as a mitigating factor.[7]

This court recognized the devastating effects of cocaine addiction in The Florida Bar v. Rosen,495 So.2d 180 (Fla. 1986). The attorney was convicted on federal felony charges of knowingly and intentionally possessing cocaine with intent to distribute. The referee recommended a three year suspension, and the bar filed a Petition for Review seeking disbarment instead. This court affirmed the referee's findings of fact that "[t]he respondent's involvement in the crime for which he pleaded guilty was a result of his own addiction to cocaine at the time" and that "respondent's addiction was the prime force behind his felony conviction". Id. at 181. This court stated that "it has in the past, held that a loss of control due to addiction may properly be considered as a mitigating circumstance in order to reach a just conclusion as to the discipline to be properly imposed. Id. *citing* The

[7] *See* O'Keefe at 223.

Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982); The Florida Bar v. Ullensvang, 400 So.2d 969 (Fla. 1981).

Fortunately, disciplinary proceedings and the imposition of appropriate sanctions are not guided by emotions or name calling, but rather by the Florida Standards for Imposing Lawyer Sanctions. These standards provide a format to be used by Bar Counsel, Referees and the Supreme Court whereby they are to consider each of these questions before recommending or imposing appropriate discipline:

(1) What are the professional duties violated by the attorney?

(2) What was the attorney's mental state at the time of the misconduct?

(3) What is the potential or actual injury caused by the attorney's misconduct?

(4) Do any aggravating or mitigating circumstances exist?

The bar is supposed to use these standards to determine recommended discipline to referees and this court and to determine acceptable pleas pursuant to Rule 3-7.9 of the Rules Regulating The Florida Bar. The purpose of lawyer disciplinary proceedings is to protect the public and the administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to discharge their professional duties to clients, the

public, the legal system, and the legal profession properly. *See* Florida Standards for Imposing Lawyer Sanction 1.3.

These standards are designed for use in imposing sanctions after a rule violation has been established. The standards constitute a model, setting forth a comprehensive system for determining sanctions, permitting flexibility and creativity in assigning sanctions in a particular case of lawyer misconduct. They are designed to promote: (1) consideration of all factors relevant to imposing appropriate level of sanctions in an individual case; (2) consideration of the appropriate weight of such factors in light of the stated goals of lawyer discipline; (3) consistency in the imposition of disciplinary sanctions for the same or similar offenses within and among the jurisdictions. Id.

Typically, addicted attorneys who are disciplined by bar associations are most commonly charged with client neglect or conversion of client funds.[8] In the case at bar, respondent's misconduct did not involve client neglect nor conversion of client funds. There were no "victims", no clients were damaged, and there was no issue of restitution involved. In fact the referee in the "prior action" determined that the issues were moot because all contracts had been rescinded and dismissed the Petition for Emergency Suspension.

This is not to minimize respondent's actions because they did create injury to the legal profession and respondent has acknowledged this. However, there were no clients who suffered any direct injuries as a result of respondent's actions.

After misconduct has been established, the standards encourage that aggravating and mitigating circumstances be considered in deciding what sanctions to impose. The standards specifically set out all of the aggravating and mitigating circumstances to be considered in Standard 9.22. The referee in the case at bar painstakingly analyzed each and every aggravating and mitigating factor, applied it to the facts of the instant case and gave it its proper weight. (ROR 10-14). Moreover, he has carefully pondered and weighed all of the considerations set forth in Standard 1.3 before fashioning an appropriate level of sanction. This analysis has been in keeping with the goals for imposing lawyer discipline. Although this court has the ultimate responsibility for determining the appropriate level of discipline to impose (The Florida Bar v. Carricarte, 24 Fla. L. Weekly S171 (Fla. April 8, 1999)), the referee's analysis of the aggravating and mitigating factors constitute findings of fact and accordingly are presumed to be correct and are not subject to review by this court absent a clear showing that the facts are

---

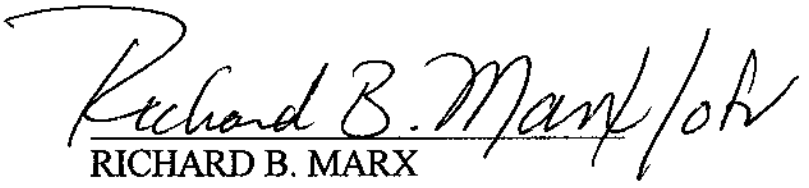
[8] Id.

without support in the record or are clearly erroneous. The Florida Bar v. Carson, 24 Fla. L. Weekly S229 (Fla. May 20, 1999). The bar has not made nor even attempted to make such a showing in its Initial Brief.

CONCLUSION

WHEREFORE, respondent prays that the Report of Referee in the instant case be affirmed, with the exception that the period of probation be reduced to three years.

Respectfully submitted,



RICHARD B. MARX
Attorney for Respondent

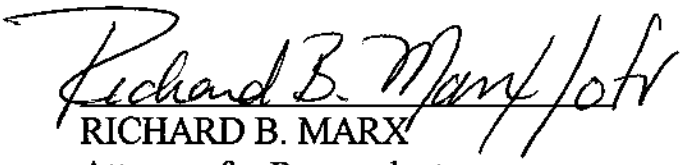
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the Respondent's Answer Brief have been sent by regular U.S. Mail to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to Jan K. Wichrowski, Bar Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314; John Anthony Boggs, Esq., Staff Counsel, The Florida Bar 650 Apalachee Parkway, Tallahassee, Florida 32399-2300, this 24th day of August, 1999.

RICHARD B. MARX
Attorney for Respondent
66 West Flagler Street
Second Floor
Miami, Florida 33130
Tel. (305) 579-9060
Fax (305) 377-0503
FBN 051075

COMPLIANCE WITH RULE 9.210 (A)(2)

The undersigned hereby certifies that the foregoing brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point Times New Roman.



RICHARD B. MARX
Attorney for Respondent