. IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,
Complainant, Case No. 94,226
[TFB Case No. 1998-31,849(09B)]

v.

EVAN ROBERT WOLFE,
Respondent.
_____/

THE FLORIDA BAR'S INITIAL BRIEF

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 253847

AND

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(407) 425-5424
ATTORNEY NO. 381586

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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 in the Appendix ("T-A-").

The Report of Referee dated April 26, 1999, will be referred to as "ROR" followed by the referenced page number(s) of the Appendix, attached. (ROR-A-____)

The bar's exhibits will be referred to as Bar Ex.___, followed by the exhibit number.

The respondent's exhibits will be referred to as Respondent Ex. _____, followed by the exhibit number.

STATEMENT OF THE CASE

On March 10, 1998, the bar served a Petition for Emergency Suspension after it came to the bar's attention that the respondent was soliciting, in person, victims of the recent Orlando area tornados, B-Ex. 8. This court entered its order on March 26, 1998, restraining the respondent from engaging in any further in person solicitation of persons who were victims of the February, 1998, Orlando area tornados and appointing a referee to hear the respondent's evidence that he did not violate the Rules Regulating The Florida Bar and to examine the contracts the respondent entered into to determine if any of them should be voided. After a short hearing on April 14, 1998, the referee made his written recommendation on May 4, 1998, that the matter should be dismissed, without prejudice to the bar filing related disciplinary proceedings, because there were no longer any pending contracts to be examined. This court accepted the referee's recommendation and dismissed the emergency suspension case on June 11, 1998.

The Ninth Judicial Circuit Grievance Committee "B" voted to find probable cause on August 18, 1998. The bar filed its three count complaint on November 2, 1998. The referee was appointed on November 12, 1998. The final hearing was held on April 5, 1999. The referee entered his report on April 26, 1999, adopting the

stipulation as to facts and rule violations entered into by the parties. Pursuant to the stipulation, the referee found the respondent violated the following Rules Regulating The Florida Bar in Count I: 4-7.4(a) for soliciting professional employment from a prospective client with whom the lawyer has no family or prior professional relationship; 4-7.4(b)(1)(A) for sending a written communication to a prospective client concerning a disaster involving the recipient of the communication less than thirty days after the date the disaster occurred; and 4-7.4(b)(1)(F) for sending a communication to a prospective client when the lawyer knows, or reasonably should know, the recipient's physical, emotional, or mental state makes it unlikely the recipient would exercise reasonable judgment in employing a lawyer. He recommended, pursuant to the stipulation, that the respondent be found guilty of violating the following Rules Regulating The Florida Bar with respect to Count II: 4-7.1(b) for making a communication that is likely to create unjustified expectations about the results the lawyer can achieve or that states or implies the lawyer can achieve results by means that violate the Rules of Professional Conduct or other law; 4-7.1(d) for making a communication that contains a testimonial; 4-7.1(p) for failing to submit an ad to the standing committee on advertising either prior to or contemporaneously with the ad's first dissemination; 4-7.2(h) for failing to specify in a written communication whether the client will be liable for expenses in addition

to the fee, liable for expenses regardless of the outcome, and whether the percentage fee will be computed before expenses are deducted; 4-7.2(j) for making statements that are merely self-laudatory or for making statements that describe or characterize the lawyer's services in advertisements or written communications; 4-7.4(b)(1)(D) for making a communication that involves coercion, duress, fraud, overreaching, harassment, intimidation, or undue influence; 4-7.4(b)(1)(E) for making a written communication that contains false, fraudulent, misleading, deceptive, or unfair statements or claims or that is improper under rule 4-7.1; 4-7.4(b)(2)(A) for failing to mark each page of a written communication with the word "advertisement" in red ink; 4-7.4(b)(2)(B) for failing to file a copy of a written communication with the standing committee on advertising either prior to or concurrently with the first dissemination of the communication; 4-7.4(b)(2)(E) for failing to failing to provide with the written communication a written statement of the lawyer's qualifications; 4-7.4(b)(2)(G) for failing to state in the first sentence of a written communication that if the recipient has already retained a lawyer, to disregard the communication; and 4-7.4(b)(2)(J) for failing to disclose in the written communication the source from which the lawyer learned of the recipient's potential need for legal representation where the communication was prompted by a specific occurrence involving or affecting the recipient or a family member. With respect to Count III, the referee

found, pursuant to the parties' stipulation, the respondent violated the following Rules Regulating The Florida Bar: 4-1.5(a) for entering into an agreement for a fee generated by employment that was obtained through advertising or solicitation not in compliance with the Rules Regulating The Florida Bar; 4-1.5(f)(4)(A)(i) for failing to place in the contract the statement that the client has received and read the statement of client's rights; 4-1.5(f)(4)(A)(ii) for failing to place in the contract the statement that the client may cancel the contract by written notification within three business days after the date of execution; 4-1.5(f)(4)(C) for failing to provide the clients with a copy of the Statement of Client's Rights for Contingency Fees. The referee recommended the respondent be suspended from the practice of law for ninety days, with automatic reinstatement, and be placed on a five-year period of probation conditioned on the respondent continuing to participate actively in the program offered by Florida Lawyers Assistance, Inc., and fully abide by all terms of said contract, practicing law only as a member of a firm and not as a sole practitioner and completing ten hours of ethics courses within the next twelve months.

The board considered the referee's report and recommendations at its May, 1999, meeting and voted to seek an appeal of his disciplinary recommendation. The board believed that based on the case law and the respondent's admitted severe, long-

term substance abuse problem, a suspension requiring proof of rehabilitation was warranted. The bar served its Petition for Review on June 3, 1999, seeking a three-year suspension. 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. The bar submits that the nature of the respondent's drug abuse and personal problems indicate that a three-year period of probation following reinstatement would be most appropriate to achieve the goals of discipline.

STATEMENT OF THE FACTS

The following facts are derived from the Stipulation as to Facts and Rule Violations entered into by the parties on March 29, 1999.

In March, 1998, a series of disastrous tornados struck the Central Florida area which damaged a large number of homes and killed or injured a large number of people. Within thirty days of the storms, the respondent traveled from Dade County to Osceola and Seminole counties on two separate occasions where he solicited legal business, in person, from a number of individuals who had experienced damage from the storms. The respondent had no prior personal, professional, or familial relationship with any of the persons from whom he solicited legal business. He provided the individuals with flyers and brochures for the purpose of these individuals distributing same to other persons who had suffered damage from the storms. The respondent did not file his brochures and flyers with the standing committee on advertising either prior to, or contemporaneous with, his first distribution of these advertising materials. The flyers and brochures did not substantially comply with the Rules Regulating The Florida Bar. The respondent also entered into contingency fee contracts with some of the persons he had solicited which did not comply with the Rules Regulating The Florida Bar. All of said

contracts were later voided.

The respondent also entered into an oral agreement with a Hispanic client to pay him a fee for every Hispanic client he referred to the respondent in exchange for the client providing the respondent with translation services. The client referred his parents to the respondent for representation unrelated to the Central Florida tornados 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.

SUMMARY OF THE ARGUMENT

In person solicitation is one of the more serious offenses a lawyer can commit. State ex rel. The Florida Bar v. Dawson, 111 So. 2d 427, 431 (Fla. 1959). Damage is done not only to the persons solicited, but to the image of the profession as a whole. The respondent engaged in a series of such solicitations in Central Florida which required him to travel hundreds of miles from his office in Miami. Within less than thirty days after the disasters, the respondent entered areas that were restricted for the purpose of protecting the victims from exploitation (T-A-61-63, 72). He used a contingency fee contract that was not in compliance with the rules (ROR-A-218), passed out advertising materials that were not incompliance with the rules (ROR-A-214-216), requested people he solicited to pass out these same advertising materials for him (ROR-A-214-216), and agreed to share legal fees with a nonlawyer who referred Spanish speaking clients (ROR-A-216). The respondent knew what he was doing was wrong but believed he would not be caught (T-A-140). The respondent argued that his thirteen years of heavy cocaine use, at the rate of three to six grams per day at the time the misconduct occurred, so impaired his judgment, that he was unable to prevent himself from engaging in conduct he knew to be wrong (T-A-130-132, 139-140, 143-144).

The bar recognizes that the respondent's substance abuse problem is a mitigating factor that does act to diminish a lawyer's culpability in a bar disciplinary case, The Florida Bar v. Graham, 605 So. 2d 53, 56 (Fla. 1992). Therefore, disbarment, which the bar submits would otherwise be appropriate here, should be mitigated to a period of suspension. The issue is whether the respondent should be required to prove rehabilitation prior to being reinstated. The bar submits that the facts of this case require proof of rehabilitation, especially in light of the respondent's admitted long term cocaine abuse as well as the testimony of Myer Cohen of Florida Lawyers Assistance, Inc., that a good estimation of the respondent's probability of being able to remain drug free cannot be reliably determined before the passage of three years of rehabilitation (T-A-109-110). Further, the bar submits that the risk of relapse remains very high without appropriate resolution and rehabilitation of the respondent's other mental health issues (T-A-107, 114-116). Therefore, the severity of the respondent’s problems require that he prove to this court that he is fit to resume the practice of law and will not constitute a danger to the public. The case law supports the imposition of longer term suspensions requiring proof of rehabilitation where the misconduct is serious, even where there is evidence of substance abuse or mental health problems in mitigation. It is noted that the respondent has a prior record of a public reprimand and this also calls for enhanced discipline.

A NINETY-DAY SUSPENSION IS OVERLY LENIENT DISCIPLINE FOR THE PERSONAL SOLICITATION OF DISASTER VICTIMS

A referee's findings of fact are presumed to be correct and are not subject to review by this court absent a clear showing that the facts are without support in the record or are clearly erroneous. The Florida Bar v. Carson, 24 Fla. L. Weekly S229 (Fla. May 20, 1999). A referee's recommendation as to discipline, however, is subject to closer scrutiny by this court because it bears 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).

In The Florida Bar v. Weinstein, 624 So. 2d 261 (Fla. 1993), a lawyer was disbarred after he committed in person solicitation. He gained access to a motorcycle accident victim in the hospital by lying to the nurse on duty that he was the victim's lawyer and by lying to the victim's brother that he had been sent by the police officer at the accident scene. He brought a retainer contract and medical release with him when he solicited the victim, who had suffered a brain injury in the accident. In addition, he mailed solicitation letters to other potential clients that contained false statements. One letter also contained language that could create unjustified expectations about the results he could achieve. In mitigation, the referee considered

Mr. Weinstein's long standing history of kidney disease, his surgery, and his resulting financial problems. In aggravation, he considered Mr. Weinstein's disciplinary history (a private reprimand for trust account record keeping violations). Like the referee in the present case, the referee in Weinstein recommended a ninety-day suspension. This court found that Mr. Weinstein's conduct in soliciting a brain injured patient in the hospital, accompanied by his lying to the nurse and lying under oath regarding the truth of the claims he made in his solicitation letters, warranted disbarment. Mr. Weinstein's in person solicitation, in particular, was "one of the more odious infractions that a lawyer can commit; his conduct brings his profession into disrepute and reduces it to a caricature." Unlike the present case, Mr. Weinstein engaged in only one incident of in person solicitation.

In the case at hand, the respondent engaged in far more than one incident of in person solicitation. In addition, the respondent placed signs on his personal vehicle shortly after tornados hit the Miami area (which was prior to the tornados striking the Orlando area) stating "Storm Damage? Free legal Consultation. Law Offices of Evan Wolfe." (T-A-165). The signs contained both his Miami telephone number and an Orlando telephone number (T-A-165). He then drove his personal vehicle with the signs posted on it around the Miami area, hoping to generate legal business (T-A-

166). After the tornados struck the Orlando area, he drove his personal vehicle to the Orlando area, on two separate occasions, with the signs posted on it (T-A-164-165, 148; Stipulation as to Facts and Rule Violations). Although the respondent did not lie under oath as Mr. Weinstein did, he was not completely candid either. The respondent neglected to mention to the grievance committee that he had placed signs on his vehicle advertising his availability for a free consultation when he asserted, through counsel, that at least some of the tornado victims approached him (B-Ex. 7 p. 5).

In The Florida Bar v. Stafford, 542 So. 2d 1321 (Fla. 1989), a lawyer was suspended for six months, requiring proof of rehabilitation prior to being reinstated, for soliciting personal injury clients through a police officer with whom he would then split the fee earned. Mr. Stafford received some ten or eleven cases as a result of the officer's solicitation efforts. In mitigation, Mr. Stafford had no prior disciplinary history, enjoyed an excellent reputation in the community, freely admitted his wrongdoing, and cooperated with both the bar and law enforcement authorities The referee also found that Mr. Stafford did not appreciate the criminality of his conduct and had been rehabilitated. In aggravation, however, this court found that Mr. Stafford understood that his conduct was unethical at the time he entered into

the agreement with the officer and only ceased the referral/solicitation arrangement when he learned it was a third degree felony. The court further opined that "perhaps no single aspect of the practice of law has received more public criticism than the unethical solicitation of clients." Although the referee recommended a public reprimand and three month period of suspension with automatic reinstatement followed by three years of conditional probation, this court, in analyzing the case law, determined that in general suspensions of varying lengths had been imposed for solicitation. This court's research showed at that time, with the exception of one case, The Florida Bar v. Britton, 181 So. 2d 161 (Fla. 1965), all of the cases resulted in suspensions requiring proof of rehabilitation. One resulted in a two-year suspension. The Florida Bar v. Meserve, 372 So. 2d 1373 (Fla. 1979). Another resulted in an eighteen-month suspension. Dawson, supra. Four resulted in six month suspensions. The Florida Bar v. Perry, 377 So. 2d 712 (Fla. 1979); The Florida Bar v. Curry, 211 So. 2d 169 (Fla. 1968), cert. den. 393 U.S. 981 (1968); The Florida Bar v. Scott, 197 So. 2d 518 (Fla. 1967); and State ex rel. Florida Bar v. Bieley, 120 So. 2d 587 (Fla. 1960). In a dissent, Justices Kogan, Ehrlich and Grimes stated they would have disbarred Mr. Stafford. "It is conduct such as this that truly makes a mockery of our legal system's ethics, and it should not be tolerated by the Bar or by this Court." The dissent went on to state that Mr. Stafford's having voluntarily ceased the improper

activity and his evidence of rehabilitation should not be considered in determining the appropriate discipline and it was necessary to "rid our ranks of this type of lawyer" in order to restore the public's faith in the disciplinary system. Unlike Mr. Stafford, the respondent did not voluntarily cease his solicitation until he was caught. He knew that in person solicitation was unethical but he believed he "could get away with it." (T-A-140). Had the respondent not unwittingly solicited the friend of an appellate court judge (B-Ex. 2 p. 20), the bar would never have learned of the respondent's misconduct because none of the persons he solicited reported it to the bar.

In Scott, supra, the lawyer was, as discussed above, suspended for a period of six months for having solicited legal business through a minister. He met with the minister for the purpose of establishing contact with widows known to the minister whose husbands had been killed in an accident. Mr. Scott wanted the minister to recommend to the widows that they retain Mr. Scott to pursue their wrongful death claims. After the minister spoke to each widow in her home, Mr. Scott, who had followed the minister in his own car, would enter the widow's home and secure her business. He obtained written contingency fee contracts from some of the widows and paid one widow a referral fee. In imposing the long term suspension, this court stated that the "solicitation of business by members of The Bar, all of whom are officers of

the Court, has been and is universally condemned."

In Bieley, supra, the attorney was suspended for six months because he entered into an agreement with an investigator to solicit legal business. In exchange, Mr. Bieley agreed to employ him as the investigator on the cases referred.

In State ex rel. Florida Bar v. Murrell, 74 So. 2d 221 (Fla. 1954), the lawyer was suspended for two years, or one year if he paid his disciplinary costs within ninety days, for soliciting legal business through a nonlawyer between 1946 and 1950. In mitigation, the referee considered Mr. Murrell's long career as an attorney, his poor health, and that he had not engaged in any unethical conduct during the intervening four years. The referee recommended a suspension of six to twelve months. After the lengthy discussion of the importance of integrity and character in members of the legal profession, this court stated:

> [if a lawyer] is so imbued with the competitive spirit [that he or she finds it necessary to solicit business, then he or she should] sell automobiles, real estate, drygoods, groceries, refrigerators and radios, rent a hole in the wall and sell victuals, make the best pies, fry the best chicken and steak, be an outstanding golfer, football player, propagate the best strain of seed corn or breed a stud horse that will outrun any other stud horse in the country and win the Kentucky Derby, any of which and many others may be advertised to the heart's content and will make the owner a fortune, but if he is expert in the administration of

> justice he is governed by cannons that place the emphasis on spiritual consideration, he is the fiduciary of his client, the state and the public, he must be candid with the court, fair and considerate of other lawyers and have a reputation for the highest integrity. When the state admits a lawyer to practice, it places its stamp of approval on him and says he is worthy to be trusted in legal matters. Advertising and deception are not included in his lexicon. At page 226.

In person solicitation is not just a serious disciplinary offense. It is a first degree misdemeanor as well. Fla. Stat. §877.02. As this court stated in Petition of Wolf, 257 So. 2d 547, 548 (Fla. 1972), the "[rule] at every turn places emphasis upon the *protection of the public* and the image and integrity of The Florida Bar as a whole. The license to practice law is a privilege, not a right. . . ." (Emphasis in the original). The purposes of discipline are protecting the public, encouraging rehabilitation in the accused lawyer, and deterring other attorneys from engaging in similar acts of misconduct, The Florida Bar v. Cibula, 725 So. 2d 360, 363, (Fla. 1998), with emphasis on protection of the public from an incompetent, unethical, or irresponsible lawyer. The Florida Bar v. Dancu, 490 So. 2d 40, 41 (Fla. 1986). An additional factor this court has considered in the past is the protection of the profession's image, which is achieved by the imposition of visible and effective disciplinary measures when serious violations occur. The Florida Bar v. Larkin, 447 So. 2d 1340, 1341 (Fla. 1984). The respondent's solicitation was both a crime and an ethical violation of such

a type that reinforces the public's view of lawyers as "sharks" (T-A-141) or "ambulance chasers." (T-A-45). "Lawyers are officers of the Court and members of the third branch of government. That unique and enviable position carries with it commensurate responsibilities. If the public cannot look to lawyers to support the law and not break it, then, pray tell, to whom may they look." Justice Ehrlich's dissenting opinion in The Florida Bar v. Levine, 498 So. 2d 941, 942 (Fla. 1986).

The respondent also entered into improper contingency fee contracts and failed to submit his advertisements to the standing committee on advertising, both less serious offenses. However, when considered in whole with the respondent's solicitation, the bar submits the cumulative nature of the misconduct warrants the imposition of a harsher sanction than the case law concerning fee contract problems and technical advertising violations would indicate. The Florida Bar v. Williams, 604 So. 2d 447 (Fla. 1992).

In The Florida Bar v. Lange, 711 So. 2d 518 (Fla. 1998), a lawyer was suspended for one year for making self-laudatory, misleading advertisements, disclosing a client's confidences, and representing a client where his own interests conflicted with those of the client. With respect to the advertising violation, Mr.

Lange placed an ad in the yellow pages of the telephone directory which contained a statement that he was admitted to practice law in all federal courts and in all state courts when in fact this was not true. He also used the phrase "When the Best is Simply Essential" that was merely self-laudatory. He was advised on two occasions by the standing committee on advertising that the ad failed to comply with the rules, but he refused to make the necessary changes. Although the advertising violation, standing alone, would have warranted a public reprimand, because there were other, more serious acts of misconduct, this court found the suspension to be more appropriate. Likewise, the respondent's case involves other, more serious acts of repeated misconduct.

In The Florida Bar v. Moriber, 314 So. 2d 145 (Fla. 1975), a lawyer was suspended for forty-five days in connection with an improper contingency fee contract he entered into with a client. The terms of the contract provided him with a clearly excessive fee. He was to collect all sums due the client as a result of the client's mother's death for which Mr. Moriber would be paid 33 1/3% of the gross recovery if the matter was settled without a suit being filed and 40% if a suit was instituted. Thereafter, Mr. Moriber proceeded to collect all sums due his client without any problems and collected his 33 1/3% fee. The referee found that the matter

was not one that was appropriate for a contingency fee because it was more akin to the administration of a small estate. The fee he collected was more than he would have been entitled to if he had probated the client's mother's estate. In fact, the matter could have been handled by a nonlawyer because the major asset passed to the client as a matter of law. Mr. Moriber wrote a few letters, made a few telephone calls, and made one trip. He argued, unconvincingly, that he could not be found to have charged an excessive fee in violation of the rules absent a finding of fraud or dishonesty. The only mitigating factor the referee found was the absence of a disciplinary history.

The respondent has made much of his addiction to cocaine and the bar recognizes that such an illness, and the respondent's efforts at rehabilitation, albeit undertaken only after the bar served its complaint on him (T-A-134-135), constitute a mitigating factor. The bar submits, however, that although the respondent's addiction explains his misconduct, it does not excuse it. The Florida Bar v. Golub, 550 So. 2d 455, 456 (Fla. 1989). Impaired attorneys are a serious problem that this court does not take lightly. The Florida Bar v. Liroff, 582 So. 2d 1178, 1180 (Fla. 1991). Although it is important to examine the offense and the mitigating circumstances surrounding it, it is also critical to consider the effect of the misconduct on others and the likelihood that the attorney may engage in further

disciplinary violations. The Florida Bar v. Moxley, 462 So. 2d 814 (Fla. 1985). Here, Myer Cohen, the Executive Director of Florida Lawyers Assistance, Inc., testified that the respondent is currently struggling with family issues, professional issues, financial issues, and personality factors (T-A-107, 115-116) which must be addressed or he will suffer a relapse because the stressors that led to his drug addiction will remain in place (T-A-115). Three years is the time usually required for Mr. Cohen 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 (T-A-110). Therefore, the bar submits that in this particular case, involving long term heavy substance abuse where a number of precipitating factors remain unresolved, a three-year suspension, which would coincide with the respondent's Florida Lawyers Assistance, Inc., recovery contract, is warranted so that Florida Lawyers Assistance, Inc., will be in a better position to determine whether the respondent's rehabilitation from his drug abuse has been successfully completed.

In a case involving long term drug use as a mitigating factor, a lawyer was ordered disbarred by this court despite mitigation arguments similar to the respondent's. In The Florida Bar v. Shuminer, 567 So. 2d 430, (Fla. 1990), Mr.

Shuminer produced evidence that he had been a drug abuser since he was ten years old. He blamed his drug and alcohol addiction for causing him to misappropriate funds from a number of clients over a relatively short period of time. He had voluntarily entered into treatment at COPAC and a Florida Lawyers Assistance, Inc., contract. His treating physician testified that his prognosis for recovery was good. He had fully complied with his treatment program and his Florida Lawyers Assistance, Inc., recovery contract. Two Dade County judges testified as to Mr. Shuminer's good professional reputation and moral character. The referee found in additional mitigation that Mr. Shuminer had no prior disciplinary history, suffered from not only substance abuse problems, but family problems as well, made a timely good faith effort at restitution to the clients he had harmed, cooperated with the bar by entering into an unconditional guilty plea, had only been a practicing lawyer for one year, and showed remorse. In considering the matter, this court determined that disbarment was warranted in spite of the numerous mitigating factors because Mr. Shuminer, despite his claims of being severely impaired, was not so impaired that he was unable to work regularly and effectively, and used most of the money he stole from clients to purchase a luxury automobile rather than to support or conceal his addiction.

Likewise, the respondent produced no evidence that his law practice as a sole

practitioner suffered from his cocaine abuse. In fact, the respondent testified that he represented some 200-400 persons after hurricane Andrew and there is no indication that he neglected those cases due to his drug abuse (T-A-155). The bar submits this is a sizeable case load for a nonimpaired sole practitioner, who has no associates, to handle, let alone one who is using cocaine on a regular basis. Although the respondent's cocaine use may have clouded his judgment, it did not appear to have diminished his ability to operate his law practice.

Suspensions requiring proof of rehabilitation are not uncommon where a lawyer has had a substance abuse problem for which he or she has voluntarily sought treatment. In The Florida Bar v. Marshall, 531 So. 2d 336 (Fla. 1988), a lawyer was suspended for eighteen months despite his "excessive use of alcohol over a long period of time which affected his reason and judgment" and his voluntary entry into a treatment program for his illness. In The Florida Bar v. Hartman, 519 So. 2d 606 (Fla. 1988), a lawyer was suspended for two years despite the fact that his misappropriation of client funds was caused by emotional instability resulting from marital problems and drug and alcohol abuse. Mr. Hartman had entered into a treatment program for his substance abuse and his prognosis for recovery was good. His misconduct also had been covered by the media and his reputation had been

damaged. In The Florida Bar v. Wells, 602 So. 2d 1236 (Fla. 1992), an attorney was suspended for eighteen months, rather than being disbarred, because of mitigating evidence that he suffered from cocaine addiction. A three-year suspension was ordered in The Florida Bar v. Farbstein, 570 So. 2d 933 (Fla. 1990), despite evidence that the lawyer's misappropriation was the direct result of his severe poly-substance abuse for which he had voluntarily sought treatment prior to the institution of the bar proceedings. He had made significant progress in attaining recovery and had made restitution to those harmed.

In further aggravation here, the respondent has a prior disciplinary history. He received a public reprimand pursuant to a conditional guilty plea for consent judgment in 1997 for trust account record keeping violations. See The Florida Bar v. Wolfe, 693 So. 2d 33 (Fla. 1997). The referee also found in aggravation that the respondent had a dishonest or selfish motive in that his solicitation was aimed at obtaining an economic benefit for himself. He engaged in multiple instances of misconduct by soliciting a number of tornado victims. The persons the respondent solicited were particularly vulnerable to exploitation and the respondent had been a member of the bar for fourteen years at the time the misconduct occurred.

Although the referee recommended the respondent be placed on a five-year period of probation following reinstatement, the rules do not appear to provide for such a time period. Probation may be for not less than six months or more than three years, unless for an indefinite period determined by the conditions stated in the order. R. Regulating Fla. Bar 3-5.1(c). The bar submits that in this case, due to the nature of the respondent's drug addiction and personal problems, a three-year period of suspension and, following the respondent's reinstatement, a three-year period of probation, would serve both the respondent's interests and those of the public.

CONCLUSION

WHEREFORE, The Florida Bar prays this Honorable Court will review the referee's findings of fact and recommendation of a ninety-day suspension followed by a five-year period of conditional probation and instead impose suspension of not less than three years followed by a three-year period of probation with the conditions set forth in the Report of Referee and payment of costs now totaling $5,301.12.

Respectfully submitted,

JOHN F. HARKNESS, JR.
Executive Director
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 123390

JOHN ANTHONY BOGGS
Staff Counsel
The Florida Bar
650 Apalachee Parkway
Tallahassee, Florida 32399-2300
(904) 561-5600
ATTORNEY NO. 253847

AND

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(407) 425-5424
ATTORNEY NO. 381586

By: _____
Jan K. Wichrowski
Bar Counsel

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of The Florida Bar's Brief and Appendix have been sent by regular U.S. Mail to Debbie Causseaux, Acting Clerk, The Supreme Court of Florida, Supreme Court Building, 500 S. Duval Street, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to counsel for the respondent, Richard B. Marx, Counsel for Respondent, 66 West Flagler Street, Miami, Florida, 33130; and a copy of the foregoing has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this _____ day of June, 1999.

Respectfully submitted,

_____
Jan K. Wichrowski
Bar Counsel

IN THE SUPREME COURT OF FLORIDA

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APPENDIX TO COMPLAINANT'S INITIAL BRIEF

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(904) 561-5600
ATTORNEY NO. 253847

AND

JAN K. WICHROWSKI
Bar Counsel
The Florida Bar
1200 Edgewater Drive
Orlando, Florida, 32804-6314
(407) 425-5424

ATTORNEY NO. 381586

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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.

Jan K. Wichrowski
Bar Counsel
ATTORNEY NO. 381586