IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,	Case No.	SC01-1298 and SC02-1118
	TFB No.	1998-11,287(13C)
Complainant,		2000-11,485(13C)
		2001-11,428(13C)
vs.		2001-11,655(13C)
		2002-10,208(13C)
JAMES MANUEL HEPTNER		2001-11,791(13C)
Respondent.		

_____/

ANSWER BRIEF OF RESPONDENT,
JAMES MANUEL HEPTNER

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SYMBOLS AND REFERENCES

In the Brief, The Florida Bar, Petitioner, will be referred to as "The Florida Bar" or "The Bar". The Respondent, James Manuel Heptner, will be referred to as "Respondent" or "Heptner". The presiding Referee, the Honorable Peter

Ramsberger, Circuit Court Judge of Pinellas County, shall be referred to as the "Referee".

"TR1" will refer to the transcript of the final hearing before the Referee in Supreme Court Case Nos. SC01-1298 & SC02-1118 held on April 4, 2003. "TR2" will refer to the transcript of the continuation of the final hearing before the Referee in Supreme Court Case Nos. SC01-1298 & SC02-1118 held on August 8, 2003. "TR3" will refer to the transcript of the continuation of the final hearing before the Referee in Supreme Court Case Nos. SC01-1298 & SC02-1118 held on August 7, 2003.

The Report of Referee dated August 26, 2003, will be referred to as "RR".

"TFB Exh." will refer to exhibits presented by The Florida Bar and "R. Exh." Will refer to exhibits presented by the Respondent at the final hearing before the Referee in Supreme Court Case Nos. SC01-1298 & SC02-1118.

"Rule" or "Rules" will refer to the Rules Regulating the Florida Bar. "Standard" or "Standards" will refer to Florida Standards for Imposing Lawyer Sanctions.

STATEMENT OF THE CASE

By Order of this Court dated March 29, 2001, in Florida Bar v. James Manuel Heptner, Supreme Court Case Nos. SC00-920 and SC00-2570, Respondent was suspended from the practice of the law for 60 days, effective 30 days from the date of the Order. (TFB Exh 1). On June 13, 2001, The Florida Bar filed a Petition for Order to Show Cause in SCO1-1298 to determine why Respondent should not be held in contempt and suspended from the practice of law, or disbarred, for practicing law while under an Order of Suspension. That Petition complained Heptner was deficient in complying with that order in; delinquently notifying his clients and the Courts as to the suspension order and providing the Rule 3-5.1 affidavit; removing his sign and changing his answering machine message; dressing like an attorney; being delinquent in CLER requirements; having contact with his client William Walent about the dismissal of his case due to a missed status conference and in the manner in which he had another attorney file a motion to reinstate that case so the client would not be prejudiced. The Bar subsequently amended that Petition to include an allegation Heptner tried to buy a use amount of cocaine from a client drug dealer that law enforcement was using as a confidential informant.

On or about that same time the Bar reopened Case No SC01-1744, TFB 2001–10367 (13C), for additional investigation even though the grievance committee had found no probable cause as to the initial inquiry letter. The Bar subsequently filed a formal complaint in that matter, which Heptner did not contest, and which was assigned to the same Referee as in this case. In that case Heptner acknowledged he had responded to the Bar's initial letter of inquiry untimely as alleged. He attributed that problem primarily to his cocaine use. While that case related to the same time period and problem of impairment as the present case, and could have been brought at the same time, the Bar elected to bring it separately. Nonetheless the Referee had the benefit of presiding over that case and considered the evidence and aggravating and mitigating factors presented to him in both cases to assist him in fashioning an overall comprehensive discipline in the Heptner case(s). Given Heptner's condition and wanting to ensure Heptner's rehabilitation the Court adopted the Referees report in the initial case (SC01-1744) on July 3, 2002 and suspended Heptner for 91 days. That case is not part of this appeal except as it relates to the totality of the circumstances and overall discipline utilized by the Referee in determining his present recommended discipline for Heptner.

During the pendency of both the Amended Petition for Order to Show Cause and that initial case the Bar filed a five count Complaint in this case, Supreme Court Case No. SC02-1118 on May 10, 2002.

On July 18, 2002 the Referee entered an Order consolidating the Florida Bar's Petition for Order to Show Cause (SC01-1298) with the Bar's five count Complaint.

Count V of that Complaint alleged the same facts as the Amendment to the Petition for Order to Show Cause alleged. Heptner filed an Answer to the Complaint admitting the bulk of it. He also filed a Response and Affirmative Defenses to the Petition for Order to Show Cause and the Amendment to it. In those pleadings Heptner essentially admitted to rule violations of Count I – IV of the Complaint but disputed certain factual allegations therein, admitted his criminal conduct as to Count V but denied Nova was a client when he bought drugs from him or that Heptner accepted drugs for legal services, admitted to being dilatory in complying with the Notice and "appearance of attorney" requirements of the Suspension Order but denied he practiced law where the Walent matter was concerned.

Both sides subsequently completed their respective discovery and the consolidated case was scheduled for a final hearing in October, 2002. The Bar then obtained a continuance of that hearing until April, 2003 when the

hearing was commenced. It was then continued until July, 2003 to allow for the testimony of a Bar witness that had failed to appear. In July, 2003, however, the case was again continued until August, 2003, because of the Referee's then inability to preside over the case. The case thereupon went to a concluded final hearing on August 7, and 8, 2003. The Referee then entered his report and recommendation on August 26, 2003. He subsequently amended that report on October 16, 2003, to specifically delete any findings of incompetency or competency violations by Heptner. The Bar then filed a Petition for Review of the Referee's Report on November 3, 2003, without stating their reason.

STATEMENT OF THE FACTS

The Referee indicated that Respondent admitted to Counts I, II, III and IV of the Bar's Complaint, and he found the Bar proved the violations of Count V of the Complaint without any specific factual discussion. (RR-1 and 2) The Referee also went on to adopt the Bar's allegations in the Petition for Order to Show Cause as his own findings without specific discussion. Contrary to the Bar's assertion on pages 4-5 of its brief the Referee did not find Heptner "guilty of contempt for initially violating the terms of an order of suspension and by engaging in the practice of law while suspended".

Respondent did not contest violating Rules, 4-1.3(a) and 4-8.4(g) relative to Counts I and III of the Bars Complaint nor did he contest failing to timely respond to the Bars inquiry relative to Counts II and IV of the Complaint. Consequently neither the Bar nor Respondent put on any evidence relative to these Counts even though there was disagreement over the particular facts giving rise to the rule violations. In fact the Bar strenuously objected when Respondent sought to address the factual allegations of Counts I - IV (TR-2; 222-223). Consequently the Referee did not have to make any findings relative to these Counts but instead accepted the stipulation of the parties as to the Rule violations.

Respondents summary of the facts of those first four Counts are as follows:

Count I - In July 1996 Ms. Vicki Kaster hired respondent to represent her in a dissolution case involving no children, a short term marriage, a marital home in foreclosure, some minor personalty and various marital liabilities. Both Ms. Kaster and her husband agreed to attend mediation without their attorneys in an effort to hold down fees and work out the terms of a marital settlement.

A settlement was reached and Ms. Kaster attended the final hearing with Respondent wherein a Final Judgment of Dissolution of Marriage was entered on March 5, 1997. Ms. Kaster subsequently asked that her name be restored but the divorce court would not revisit the Final Judgment to do that. Ms. Kaster and Respondent subsequently disputed her responsibility to pay for a separate name

change proceeding which Respondent ultimately performed at no charge to her. Ms. Kaster's name change was entered on December 17, 1997, after a short judicially imposed delay, because Ms. Kaster had filed a bankruptcy under her married name during the pendency of the name change. Respondent was untimely in responding to the bars initial inquiry letter in this matter. The Bar subsequently agreed to recommend this case to diversion but instead, four years later, chose to include it in this Complaint.

Count II - On March 22, 2000 James Cabler complained to the Bar that Heptner had not paid Mr. Cabler's mediators bill. The Bar initially issued a letter in this matter finding no probable cause as to any rule violations but subsequently reopened the matter for further inquiry at or about the same time it reopened Count I above. Respondent subsequently met with the grievance committee investigator and complied with all bar discovery in this case.

Count III - Respondent represented client Jose Pizarro in an automobile accident case resulting in a July 30, 1999 settlement of Mr. Pizarro's claim for $9,000 with defendants insurance company, Safeco Property and Casualty Insurance Companies (Safeco). Safeco subsequently claimed to have not received the release signed by Respondent and Pizarro and Heptner was unable to provide them a copy. Respondent advised Safeco he would try to obtain another release. Heptner hired a

private investigator, who testified at the final hearing, to find Pizarro to obtain another release but was unsuccessful in obtaining one.

Safeco did not contest Mr. Pizarro's acceptance of the settlement by virtue of his endorsement on the settlement draft and they acknowledge that Mr. Pizarro's claim is in fact now extinguished by both the settlement and the statute of limitations. Respondent failed to timely respond to the bar inquiry in this matter but did in fact later respond including participating in discovery in this case.

Count IV - On May 30, 2001 the Florida Bar received an Inquiry / Complaint from Edgar F Starr against Respondent. Respondent wrote in response to the inquiry on June 26, 2001, some eleven days late, and also fully cooperated with the Bar investigator. While the Bar found no merit to the underlying Complaint it has cited Respondent for his untimely response.

The parties did, however, present evidence to the Referee as to Count V of the Bar's Complaint and its Order to Show Cause as amended.

Respondent contested that portion of Count V of the Bar's Complaint and the Amended Order to Show Cause which alleged that Respondent had purchased cocaine to use on a regular basis over an eighteen month period from Daniel Nova while he represented Mr. Nova in legal matters. He also contested the allegation that Mr. Nova paid Respondent with cocaine for his legal services. Respondent filed a response to the Amendment questioning the propriety of the Bar raising his

arrest for cocaine solicitation in an Order to Show Cause for violating a suspension order when the issue of his cocaine solicitation was already raised in Count V of the Complaint. Once again Respondent did not contest violating various disciplinary rules in soliciting Nova to purchase cocaine to use from him but did contest both whether Nova was a client at the time of the purchases / solicitations and that he was paid in cocaine for legal services.

The Referee's report did not specifically address these two factual disputes between the parties but stated "As to count V of the Complaint the undersigned finds by clear and convincing evidence that the Florida Bar has proven the violations alleged therein" (RR-2). The Bar had alleged the Rules violated were Rules 3 - 4.4 (criminal misconduct); Rules 4 - 8.4(b) (a lawyer shall not commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects); Rule 4 - 8.4(g) (a lawyer shall not fail to respond, in writing, to any official inquiry by a disciplinary agency, as defined elsewhere in these rules, when such agency is conducting an investigation into the lawyer's conduct; a written response shall be made (1) within 15 days of the date of the initial written investigative inquiry by bar counsel, grievance committee, or board of governors); and Rule 4 - 1.16(a)(1) (a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a

client if the representation will result in violation of the Rules of Professional Conduct).

Nova testified at trial that Respondent did work for him in exchange for cocaine (TR1 120:10-19; 122:17-22), and that Respondent agreed to cover the rest of his girlfriend's fee with cocaine. (TR1-122; 12-18). He also testified Respondent bought cocaine from him many times. (TR1-120; 24-25). Nova later contradicted himself by stating that he did not give Respondent cocaine to handle his girlfriend's divorce (TR1-133;22;134;1-9), that Heptner never did anything in his divorce case (TR1-120;17-19;122;23-24), that he never spoke about fees for a divorce with Heptner (TR1-119;17-25), that the only day he met with Heptner to discuss his divorce case was the day he wore a wire to engage Heptner in illegal conversation (TR1-121;24-25;122;1-3), and that Heptner had "given him so many problems and excuses with his divorce that he proposed Heptner do his girlfriend's (divorce) now." (TR1-122;5-7). Heptner contested that he had ever agreed or been paid to do Nova's divorce until shortly before Nova came to his office in July, 2001, wearing a wire. (TR2-239;1-25).

Nova was a career drug dealer who was hardly led astray by Heptner. Nova testified he got out of prison in January, 2000, for possessing heroin with intent to distribute (TR1-127; 25), when he was caught at the airport with several ounces of heroin. (TR1-128; 1-3). He testified he went back to dealing drugs on a daily basis

as soon as he got out of prison. (TR1-128; 21-25;129;1-5). He testified he could not remember how many transactions he handled on an average weekly basis. (TR1-129; 10-14). He testified while he was arrested again in June, 2001 for drugs that "the police or someone set him up and maybe planted the drugs in his home." (TR1-132; 1-25).

Sergeant Kenneth Mormon of the Tampa Police Department Narcotics Unit testified he knew of Daniel Nova as far back as 1995. (TR1-102; 15-19). Sergeant Mormon testified Mr. Nova was arrested in 1995 on a first degree drug related murder charge (TR1-103;21-25;104;20-22), and that the police seized 140 grams of cocaine at his residence resulting in his June, 2001 arrest. (TR1-106;1-12). He further testified in a two day wiretap of Mr. Nova's phone there were 25 drugs related calls. (TR1-111; 1-17). He also testified Nova had a cooperation Agreement with law enforcement which led to him wearing a wire to Heptner's office to engage him in drug related conversation. (TR1-113; 1-4).

Heptner acknowledged purchasing cocaine from Nova (T2-238; 17-18; 239; 14-18), but denied ever exchanging legal services for cocaine. (TR2-238; 19-21; 239; 9-13; 240; 3-8). He indicated he had represented Nova on a traffic ticket involving a single appearance and that he ultimately agreed to represent him in a divorce as set forth in the July 2001 wiretapped conversation. (TR2-239; 1-25). The Referee observed Nova was a long standing drug dealer and a convicted felon.

(TR1-110; 11-14). The Referee found "I don't believe a word this man says one way or another. He has got zippo credibility with this trier of fact. (TR2-136; 18-24). The Referee had an opportunity to observe Nova's credibility and demeanor and found, "when I listen to all this stuff, Bill, it's just - - am I supposed to pick and choose what I think? And I just got to tell you right up front, I don't, you know, want to pretend like this guy's - - like he's got some credibility after hearing all this kind of stuff. He's just all over the place. Given his history and his flagrant disregard for all kinds of things, notwithstanding just the law, but people he's dealing with, et cetera, et cetera, I'm supposed to attach some credibility in some fashion to this witness? I can't. In good faith, I just can't, so - - I know you don't pick the witnesses. You do the best you can. And you did a good job with what you had, but I'll just tell you right up front. There it is." (TR -139; 1-18).

The parties also presented evidence as to the Bar's Petition for Order to Show Cause wherein the Bar alleged Heptner had not complied with the Court's March 29, 2001, Order of Suspension of sixty days and should therefore either be suspended until he had demonstrated rehabilitation or disbarred.

The Bar alleged that Heptner was deficient in notifying his clients and the Courts as to the suspension order, in timely removing his sign and answering service message, in his dress, in his C.L.E.R. requirements, and in having contact with his client, Walent, relative to a missed hearing and how he handled having another

attorney handle that problem so the clients case would not be prejudiced. Heptner contacted the Bar to obtain any specific directives as to his suspension but was advised there wasn't any (TR2-226 thru 227; all). He conscientiously made an effort to notify all his clients and the Courts of his suspension but was dilatory in the notification process (TR2-229;25;230;1-16). The Bar pointed out that his clients, Ricos and Walent, were not on his notification affidavit but they were made aware of his suspension by either Heptner or his staff.

Heptner's suspension began on a Friday and he removed his sign Monday morning. (TR1-19; 22-24;TR2-227;21-25). He changed his way of dress that same morning when the Bar investigator asked him to do so. (TR2-228). He stopped going in to his office. (TR1-150; 1-11). He stopped answering his phone but forgot to change his answering machine message. (TR2-228; 1 thru 9). He did not return clients calls or speak to them with the exception of William Walent who repeatedly harassed his Wife at home until Heptner was forced to take his call. (TR2-233; 8-25). He suspended his practice, did not take any new cases, and turned his caseload over to other attorneys to avoid practicing law or prejudicing his clients. Anyone stopping by his office to see him was advised he was on a sixty (60) day suspension (TR1-20; 1-4). He admitted to being delinquent in notifying the courts and his clients about his suspension but he did notify them. (TR2-230; 1-16). He became compliant with his CLER requirements.

Heptner learned he had misadvised his covering attorney as to the date and time of Walent's case management conference when he went to the courthouse, not wearing attorney clothes, to determine the time of the hearing.. (TR1-57;25;TR1-74;14-18;TR1-143;8-25;TR1-144;6-12;TR2-228 thru 232;all). He failed to advise the Court of his suspension once he learned of the dismissal of Walent's case and spoke to Walent, albeit incidentally, about the dismissal subsequent to its occurrence. (TR2-231; 19-21). He provided information sufficient to allow Treuhaft to prepare a motion to reinstate Walent's case which he then ran to the courthouse to avoid prejudice to Walent's case. (TR1-45 thru 46; all; TR1-145 thru 146; all; TR2-232; 1-25). He wrote the presiding judge to explain the mix-up and Heptner's deficiencies (TR2-232; 3-6;TR1-65;1-3). The motion that was filed had Heptner's law office signature block but was signed by attorney Treuhaft. (TR1-145 thru 147; all; TR2-232;7-25). Heptner's client, William Walent denied being misled by Heptner and stated he was aware of Heptner's suspension before the case management conference and was satisfied with the outcome of his case. (TR2-204; 1-19; TR3-4; 20-25; TR3-5; 1-11). Nonetheless, the Referee apparently adopted the allegations of the Bar's Petition for Order to Show Cause as to Heptner's violation of the suspension order as to Walent.

The Bar never disputed Heptner's extensive rehabilitation following his arrest. Heptner voluntarily sought residential drug treatment at Health Care Connections on

September 10, 2001. (TR2-245; 1-25). As Tim Sweeney, Recovering Attorneys Program Director of Health Care Connections has previously testified, Mr. Heptner was suffering from his addiction to cocaine and marijuana and was clinically, situationally, depressed (R. Exh-1). Heptner did not recommence practicing law upon his discharge but instead sought and obtained counsel to take over his practice so that his client's interests were fully protected to their satisfaction. He immediately entered and graduated from DACCO's year long drug rehabilitation program. (TR2-246 thru 247; all). Thereafter he entered into an F.L.A. contract and has continued in his rehabilitation. (TR2-248 thru 250; all). He has experienced substantial personal, professional, and financial consequences because of his actions, drug use, his rehabilitation, and the Bar's disciplinary measures. (TR2-250; 10-25).

While the Referee correctly found that Heptner was not diligent in complying with various bar requirements he also implicitly found by the sentence he recommended that Heptner's failure to comply was not willful but instead was the result of his impairment.

SUMMARY OF THE ARGUMENT

The Referee herein considered the totality of the circumstances, including aggravating and mitigating factors, in determining the appropriate discipline for Heptner. While the Court has the ultimate authority to determine the appropriate sanction to be imposed it generally does not second guess the Referee where, as here, his decision is supported by the Standards and case law.

The Bar's recommendation of disbarment is not warranted here since it is typically only imposed in cases of drug trafficking, theft and/or misappropriation, adjudications of certain felonies, perjury or other subversions of the judicial process in the absence of mitigating circumstances.

The Court has historically favored a policy of reformation and rehabilitation over the ultimate sanction of disbarment. Respondents involvement of a drug dealing client in his drug misconduct and his prior disciplinary history, are aggravating factors not automatic disbarment triggers.

While drug impairment does not excuse Heptner's misconduct it does help to explain his mental state particularly when this conduct all took place during a time period when both he and rehabilitation experts state his cocaine use was out of control.

It is significant that Heptner recognized his problem and stopped practicing law to voluntarily commence an extensive and ongoing rehabilitation to include five months of F.L.A. sponsored residential rehabilitation, a year long DACCO aftercare program and that he is continuing rehabilitation under a F.L.A. contract. It is undisputed that he has been verifiably drug free for over two years.

Other than his criminal arrest for trying to buy drugs for his habit his misconduct was primarily neglectful and fortunately did not result in any legal prejudice to his clients or the courts. His criminal charges have been dismissed.

He similarly was neglectful in complying with this Courts previous suspension order as consequence of his impairment. He was dilatory in meeting certain requirements of that Order but sought to comply with it. In addition the Referee found Heptner improperly asked another attorney to take steps to avoid prejudicing a client whose case was dismissed during his suspension. However, the Referee found Heptner's actions were not selfish or profit seeking.

Heptner was previously disciplined 13 years ago (a private reprimand in 1990) and 10 years ago (a public reprimand and 18 months probation in 1994). He was suspended for 60 days in 2001 in a third disciplinary event. This

Referee took Heptner's disciplinary history into account in his present recommended discipline to this Court.

Mr. Heptner is remorseful and of otherwise good character and reputation. He has received substantial punishment and will continue to receive it under the recommended discipline. The reinstatement process will further demonstrate he is reformed and rehabilitated. The Court should therefore affirm the Referees decision in this matter.

VI. THIS COURT SHOULD AFFIRM THE REFEREE'S DETERMINATION THAT DISBARMENT IS NOT WARRANTED FOR A PREVIOUS DRUG DEPENDENT ATTORNEY, OF OTHERWISE GOOD CHARACTER AND REPUTATION, WHO IS REMORSEFUL AND WHO IS MAKING LONG TERM CONTINUOUS EFFORTS TO REHABILITATE THE DRUG PROBLEM WHICH IMPAIRED HIS JUDGMENT AND CAUSED HIM TO BOTH NEGLECT SOME LEGAL MATTERS (WHICH DID NOT SUBSTANTIALY PREJUDICE ANY OF HIS CLIENTS) AND FAIL TO FULLY COMPLY WITH THE COURTS PREVIOUS SUSPENSION ORDER.

The Standards for Imposing Lawyer Sanctions describe the various types of discipline that the Court may impose on an attorney who is guilty of misconduct (Rule 3-5.1). Basically, the degree of punishment in each case depends on the particular factual situation presented by the particular case at hand, i.e. the totality of the circumstances. In imposing a sanction after a finding of lawyer misconduct, a court should consider 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. Florida Standard for Imposing Lawyer Sanctions 3.0.

The Court has also set forth caselaw guidelines in imposing discipline. 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 involved in like violations. Florida Bar v. Cibula, 725 So.2d 360, 363 (Fla.1998), (quoting Florida Bar v. Reed, 644 So.2d 1355, 1357 (Fla. 1994), Florida Bar v. Wasserman, 654 So. 2d 905, 907 (Fla. 1995).

While the Supreme Court has the ultimate power to determine the appropriate sanction, Florida Bar v. Jahn, 509 So. 2d 285, (Fla. 1987), generally speaking it will not second guess the referees recommended discipline as long as it has a reasonable basis in existing case law and the Florida Standards for Imposing Lawyer Sanctions. Florida Bar v. McFall, 2003 WL 22799198, (Fla. 2003); Florida Bar v. Temmer, 753 So. 2d 555, 558 (Fla. 1999); Florida Bar v. Fredericks, 731 So. 2d 1249, 1254 (Fla. 1999); Florida Bar v. Miller, 2003 WL 22250387, (Fla. 2003). The Court has stated in Florida Bar v. Leczner, 690 So. 2d 1284, (Fla. 1997), at 1287 and 1288 that;

> "The referee, as finder of fact in Bar disciplinary proceedings, is in a unique position to assess the credibility of witnesses and appraise the circumstances of surrounding alleged violations. As to discipline, we note that the referee in a Bar proceeding again occupies a favored vantage point for assessing key considerations—such as a respondent's degree of culpability and his or her cooperation, forthrightness, remorse, and rehabilitation. Accordingly, we will not second-guess a referee's recommended discipline as long as that discipline has a reasonable basis in existing caselaw."

Numerous cases also provide, "Therefore the referees disciplinary recommendation is presumptively correct and will be followed unless clearly off the mark." Florida Bar v. Niles, 644 So. 2d at 507; Florida Bar v. Vining, 707 So. 2d 670, 673 , (Fla. 1998); Florida Bar v. Fredericks, 731 So. 2d 1249, 1254 (Fla. 1999).

There is nothing in the record to suggest the Referee in Heptner did not consider both the Standards and case law guidelines in determining his recommended discipline for Heptner. The Referee's report recognized Heptner was remorseful and of good character and that Heptner acknowledged his drug problem had led to the issues before the referee in this Complaint, the Order to Show Cause which was consolidated with this Complaint and the unopposed simultaneously pending initial Complaint which the Bar chose not to consolidate with this one. The Referee in his report recognized Heptner was having personal or emotional problems and was operating under an impairment during those events as corroborated by unrebutted expert testimony. (R. Exh.1;TR1-75 thru 82;all). The Referee found Heptner neglectful, not incompetent, by specifically amending his report on October 16, 2003 to delete any reference to Rule 4-1.1 (Competency) violations in his report. The Referee recognized Heptner had voluntarily undertaken extensive interim rehabilitation sponsored by F.L.A. including a five month residential rehabilitation, an F.L.A. monitoring contract with continued meetings

and counseling and graduating from a year-long extensive DACCO drug rehabilitation program. (TR1-174;1-4). He recognized Heptner had voluntarily stopped practicing law in September of 2001 and had turned his practice over to other attorneys with no resulting prejudice or complaints by his clients. The criminal charges against Heptner were dismissed in recognition of these efforts (TR1-166;1-3). The prejudice to Heptner's clients and the Courts in these matters were, fortunately minimal. The Referee found Heptner did not act selfishly or dishonestly in these matters (RR-4). The referee did not find Heptner failed to cooperate or assist the Bar in the discovery or resolution of these matters despite his untimely response to the Bar's initial investigation letters of them. Heptner was compliant with the Bar investigator (TR1-38;23-25).

Consequently, the Referee imposed a 91 day suspension to be followed by two years probation in April, 2002 in the unconsolidated initial Complaint which was resolved immediately prior to this case. That sentence was imposed to ensure Heptner did not recommence practicing law without demonstrating further rehabilitation through reinstatement. The Referee then scheduled this case for hearing and turned his attention to it.

In this case, after considering the totality of the circumstances, the Referee imposed a two year suspension retroactive to his initial suspension of Heptner to be followed by two years probation under an F.L.A. contract. That is a substantial

punishment depriving Heptner and his family of the benefits and income of his law practice. It is public and embarrassing and serves as a deterrent to others. At the same time it is not unduly harsh, it encourages reformation and rehabilitation and protects the public while not depriving it of a restored qualified attorney.

VII. THE BAR'S CRITICISM OF THE REFEREE RECOMMENDED DISCIPLINE IN NOT RECOMMENDING DISBARMENT IN THIS CASE IS UNWARRANTED BY BOTH THE STANDARDS AND THE CASELAW.

Standard 9.0 provides generally; "After misconduct has been established aggravating and mitigating circumstances may be considered in determining what sanctions to impose."

Those mitigating and aggravating factors are then set forth in Standard 9.1, 9.2, 11.0 and 12.0 all of which were raised before the Referee. While the Bar cited Standard 5.11 (Criminal Acts) for the proposition that Heptner's disbarment is appropriate that standard, in fact, only provides for disbarment absent aggravating or mitigating circumstances. Additionally, Standard 12.0 specifically contemplates the involvement of a client in attorney drug cases and states it is an aggravating factor, not an automatic disbarment. Therefore the Bar's contention that Respondents

participation in drug rehabilitation should not be considered in mitigation where Respondent committed a felony drug offense involving a client is simply contrary to the Standards for Imposing Lawyer Sanctions in drug cases. In fact, Standard 10.3, absent the aggravating factors that are present in the Heptner case, would only require Heptner to be suspended for 90 or 91 days.

The case law is in accord with the Standards. Numerous cases support suspension and rehabilitation, rather than disbarment, for attorneys who use drugs. Therefore the Bar's brief is also incorrect in stating, "The caselaw is in support of disbarment for criminal misconduct involving the purchase or sale of controlled substances." There is not a single reported case in Florida of an attorney being disbarred for personal drug use or purchasing drugs for personal use. The only discipline drug cases where attorneys have been disbarred involve drug trafficking or misappropriation of client funds. (See discussion in III below).

The Court in, Florida Bar v. Pahules, 233 So.2d 130, (Fla. 1970) at 131, when considering the disbarment of an attorney who, like Heptner, had nineteen years of experience and three children to support, said;

> "Disbarment is the extreme measure of discipline and should be resorted to only in cases where the lawyer demonstrates an attitude or course of conduct wholly inconsistent with approved

> professional standards. It must be clear that he is one who should never be at the bar, otherwise suspension is preferable."

Disbarment has long been viewed as the ultimate sanction imposed in cases involving theft, subversion of the judicial process and adjudications of certain felonies such as drug trafficking in the absence of mitigating factors or extenuating circumstances. "Disbarment from practice of law is an extreme penalty and should be imposed only in those cases where rehabilitation is improbable." Florida Bar v. Davis, 379 So.2d 942 (Fla.1980). The Court also stated in Florida Bar v. Dawson, 111 So.2d 427 (Fla. 1959),

> "We have come to regard disbarment as the most severe disciplinary prescription that can be imposed on a lawyer. The cases generally regard a judgment of disbarment as one reserved for the most infamous type of misprision and as justifiable in those instances where the possibility of the lawyer's rehabilitation and restoration to an ethical practice are the least likely.

"To sustain disbarment there must be a showing that the person charged should never be at the Bar. It should never be decried where punishment less severe, such as reprimand, temporary suspension or fine will accomplish the desired purpose." Florida Bar v. Blessing, 440 So.2d 1275 (Fla. 1983).

On the other hand, numerous cases require that the discipline order offer the attorney a fair and reasonable opportunity for rehabilitation and that the discipline assessed against the attorney be corrective in nature. Florida Bar v. Mackenzie, 319 So. 2d 9 (Fla. 1975); Florida Bar v. Thomson, 271 So. 2d 758 (Fla. 1972); Florida Bar v. Ruskin, 126 So. 2d 142 (Fla. 1961); Florida Bar v. Bass, 106 So. 2d 77 (Fla. 1958); Florida Bar v. Murrell, 74 So. 2d 221 (Fla. 1954).

VIII. DISBARMENT IS NOT WARRANTED FOR AN IMPAIRED ATTORNEY WHO AGREED TO REPRESENT A LONG STANDING DRUG DEALER, FROM WHOM HE BOUGHT USE AMOUNTS OF COCAINE, IN A DIVORCE PROCEEDING GIVEN HIS REHABILATION EFFORTS AND THE TOTALITY OF THE CIRCUMSTANCES.

Daniel Nova was a long standing criminal drug dealer who had previously sold cocaine to Heptner for his personal use. (TR2-239;14-17). Heptner subsequently represented Nova in a single traffic ticket hearing for which he was paid. (TR2-239;1-13). Heptner also told Nova he would represent him in a divorce once he was retained to do and ultimately agreed to help Nova with his divorce. (TR2-239;18-23). Subsequent to that general agreement Nova came to Heptner's office, at law

enforcements bidding, wearing a body wire to engage Heptner in conversation about cocaine. (TR1-121;1-3;TR1-124;1-17). There Heptner asked Nova if he had any cocaine for sale.

Heptner concedes the gross impropriety of that conversation and that it shouldn't take place with anyone, much less someone he had agreed to represent and had represented in the past. His contention that his cocaine addiction impaired his judgment is supported by unrebutted expert testimony. (R Exh 1;TR1-75 thru 81;all). He fully cooperated with the Bar in this case, complied with all discovery, stipulated to the bulk of the alleged violations, expressed remorse and voluntarily sought and completed extensive rehabilitation. The criminal charges against him have been dismissed. Heptner vehemently denies Nova's contention that he paid him cocaine for legal services and the Referee found Nova's testimony to the contrary totally lacking any credibility. (TR1-136;18-24;TR1-139;1-1 thru 18).

The following are cases involving attorney's being disciplined for Rule violations where drug dependency/impairment is a case component. Numerous cases identify drug rehabilitation efforts as a substantial mitigator.

Florida Bar v. Temmer, 632 So. 2d 1359 (Fla. 1994) and 753 So. 2d 555 (Fla. 1999), involved an attorney who began a romantic affair with her client in 1990, moved in with him a few months later and started using marijuana and crack cocaine with him. Ten months later he reported her drug use to the bar before reconciling

with her and attempting to withdraw his complaint. Temmer initially categorically denied his allegations but later consented to a finding of probable cause.

Temmer sought assistance from F.L.A. and a mental health counselor who found her problems, unlike Heptner's, were more personality/relationship than drug based. The Court did not find Temmer's initial general denial of the charges to warrant more severe sanctions than if she had not filed such a denial. The Temmer Court then imposed a ninety (90) day suspension with three years probation.

Unlike Heptner, who has remained drug-free since his rehabilitation began in September of 2001, towards the end of her probationary period Temmer was arrested for possession of marijuana, cocaine and valium and stipulated with the Bar to thereby be in violation of several disciplinary rules. Temmer again then voluntarily submitted to F.L.A., a seven day residential treatment program at Health Care Connections and psychiatric evaluations. The Temmer Referee, like the Heptner Referee, found substantial mitigation in that she; (a) had personal or emotional problems (b) provided full and free disclosure to the disciplinary board or a cooperative attitude toward the proceeding (c) had a physical or mental disability or impairment (d) had interim rehabilitation (e) showed remorse.

The Court found in aggravation that because Temmer committed a violation for which she was already on probation her discipline should be more severe. Neither the Bar nor the Referee cited her involvement of a client in her drug

misconduct (her new paramour) as a concern unlike its emphasis in Heptner. Because of Temmer's exhaustive rehabilitation efforts, the Court only suspended her for ninety one (91) days and ordered she complete her monitoring contract with F.L.A.

Similarly Heptner has made exhaustive efforts towards rehabilitation that far surpasses Temmer's efforts. Unlike Temmer he did not commit new drug offenses while on probation for previous drug offenses. Nonetheless, the discipline he received, after the referee considered aggravating as well as mitigating factors, far surpassed Temmers.

In the Florida Bar v. Sommers, 508 So. 2d 341, (1987), the Bar filed three complaints of twelve counts against the attorney for "numerous counts of client neglect" and trust record deficiencies. The referee concluded the problem was related to substance abuse and noted Sommers voluntarily completed a six week residential drug treatment program. The referee recommended a six month conditional suspension. The Court instead ordered a ninety (90) day suspension with concurrent three years probation with F.L.A. conditions citing the "totality of the circumstances" and its policy to "encourage reformation and rehabilitation". Sommers at 343.

Florida Bar v. Hartman, 519 So. 2d 606, (Fla. 1988), involved an attorney who engaged in nine separate incidents of misappropriation of clients money and

assisting a client in arranging a usurious loan thereby exposing his client to a felony. The Court found the Hartman's drug and alcohol addiction and marital and personal problems combined with his F.L.A. treatment warranted a two year suspension followed by two years probation with F.L.A, conditions.

The Florida Bar. v. Wells, 602 So. 2d 1236, (Fla. 1992), is another case where the Court considered its "goal of reformation and rehabilitation" in drug use cases and the totality of the circumstance in fashioning discipline for an impaired attorney with a disciplinary record facing multiple counts of misconduct. Wells involved an attorney with trust account deficiencies who abandoned his law practice resulting in nine separate instances of client neglect as a result of his chemical dependency. The Bar sought disbarment. In light of mitigating factors of personal and emotional problems, absence of dishonest or selfish motive, character, reputation, remorse and participation in rehabilitation the Court instead suspended Wells for 18 months and until he completed the state lawyer's assistance program for substance abuse and demonstrates he is fully rehabilitated. The Court also imposed a probationary period of two years following reinstatement.

The Florida Bar v. Levine, 498 So. 2d 941 (Fla. 1986), involved an attorney who was convicted of misdemeanor personal use of cocaine and received two years criminal probation. The Court gave him a public reprimand.

The Florida Bar v. Kaufman, 531 So. 2d 152, (Fla. 1988), involved an attorney arrested in two separate felony drug arrests within five months of each other. One was for methaqualone possession the other for cocaine possession. The Court imposed a consent judgment of one year retroactive suspension followed by two years probation with F.L.A. conditions.

The Florida Bar v. Thompson, 500 So. 2d 1335 (Fla. 1986), involved an attorney who pled no contest to four charges: possession of cocaine, possession of controlled substance (Darvon), disorderly intoxication and leaving the scene of an accident. He subsequently advised the bar he was arrested for four misdemeanors (although two of the charges were felonies) and his attitude and tone showed lack of remorse or repentance. The Court ordered a ninety one (91) day suspension and a drug evaluation to be followed by any recommended treatment.

The Florida Bar v. Weintraub, 528 So. 2d 367, (Fla. 1988) involved an attorney who pled no contest to delivery of cocaine to his neighbor/paramour while she had two police officers there to monitor the transaction. He served eight (8) months criminal probation, received an F.L.A evaluation and was suspended for ninety (90) days with two years probation with drug conditions.

The Florida Bar v. Holtsinger, 505 So. 2d 1329, (Fla. 1987), involved an attorney who received a ninety (90) day suspension followed by two year probation with drug conditions for his personal use of illegal drugs.

The Florida Bar v. Helinger, 620 So. 2d 993, (Fla. 1993), involved an attorney who made obscene phone calls to a woman in Tallahassee from June 1986 until April 1991 on those weekends Florida State had home football games. The attorney would consume alcohol and cocaine when he was in Tallahassee on those weekends visiting. He was sentenced to thirty (30) days in jail and six months criminal probation. He entered a center for the treatment of sexual psychiatric disorders and for drug abuse and contracted with F.L.A. for their services. The Court suspended Hellinger for two years to be followed by probation.

Attorney misconduct in removing knife from store without paying for it or receiving permission to take it, and in using cocaine and marijuana, warrants suspension from practice of law for 90 days and until time attorney successfully completes state lawyer's assistance program for substance abuse and demonstrates he is fully rehabilitated, and imposition of probationary period of two years following reinstatement. Florida Bar v. Franke, 548 So. 2d 1119 (Fla. 1989).

Florida Bar v. Price, 632 So.2d 69 (Fla. 1994), involved an attorney who regularly showed up at court intoxicated or under the influence of drugs. The Court

reprimanded Price and suspended him for ninety (91) days and to undergo an evaluation and to complete any recommended treatment.

Conviction of possession of cocaine warranted a 18-month suspension from practice of law where attorney cooperated with Bar, readily admitted his wrongdoing and completed treatment program prior to being suspended and continued with alcohol counseling, Florida Bar v. West, 550 So. 2d 462 (Fla. 1989).

Florida Bar v. Liroff, 582 So. 2d 1178 (Fla. 1991). Attorney/Dentist addicted to opiate cough syrup brought before the Court a third time for failing to comply with his F.L.A. contract was suspended for sixty (60) days and ordered once again to complete drug treatment.

Florida Bar v. Blau, 630 So. 2d 1085 (Fla. 1994) Attorney Blau was arrested in 1989 for possession of marijuana and continued to use it after his arrest. He admitted to using cocaine for several years but did not have problems in his law practice. The Court ordered a sixty (60) day suspension to be followed by three years probation with drug conditions.

Florida Bar v. Corrales, 505 So. 2d 1327 (Fla. 1987) involved an attorney who received a ninety (90) day suspension followed by two year probation with drug conditions for his personal use of marijuana.

The case of Florida Bar v. Giordano, 500 So. 2d 1343 (Fla. 1987) involved an attorney who was adjudicated guilty of one count of possession with intent to distribute cocaine and three counts of distribution of marijuana, unlike Heptner, who sought cocaine for his own personal use. Giordano, like Heptner, admitted to his wrongdoing but, unlike Heptner, had sought to distribute drugs and did not seek rehabilitation. The Court imposed a three year nunc pro tunc suspension.

Florida Bar v. Michael E. Sweeting. Assistant State Attorney Michael Sweeting tendered a guilty plea for consent judgment for public reprimand and one year suspension for soliciting his secretary to purchase a small amount of cocaine for him and then encouraging her to lie to investigators about it in three separate wire tapped phone conversations. He unlawfully used the Florida Crime Information Center to identify narcotic agents and did not enter into any rehabilitation. Mr. Heptner, unlike Mr. Sweeting, did not seek to dishonestly impede an investigation.

The Florida Bar v. Jahn, 509 So. 2d 285 (Fla. 1987) involved an attorney who injected himself and two different minor females with cocaine on different occasions ostensibly against their will. Jahn was convicted and sentenced to 41/2 years incarceration. He sought rehabilitation. The Court gave him a three year nunc pro tunc suspension.

The Florida Bar v. Rosen, 495 So. 2d 180 (Fla. 1986) involved an attorney who was suspended nunc pro tunc three years after being adjudicated guilty of federal felony charges of knowingly and intentionally possessing cocaine with intent to distribute as a consequence of his addiction to that drug.

Conviction for accessory after fact to misprision of felony involving importation of marijuana warrants two-year suspension rather than disbarment in view of attorney's testimony denying guilt and indicating that he submitted to Alford plea rather than going to jail because of his family. Florida Bar v. Pavlick, 504 So. 2d 1231 (Fla. 1987).

Helping law partner and client launder money for drug-smuggling scheme warrants 90-day suspension from the practice of law. Florida Bar v. Fertig, 551 So. 2d 1213 (Fla. 1989).

Participation in conspiracy to import 15,000 pounds of marijuana warranted one year suspension from practice of law in light of voluntarily initiated contact with law enforcement agencies and cooperation with those authorities, including risk of life to help further investigation. Florida Bar v. Pettie, 424 So. 2d 734 (Fla. 1982).

The Bar ignores the above more congruent cases in its brief but instead cites three less applicable cases where attorneys were involved in drug trafficking rather than drug use.

The Bar cites Florida Bar v. Beasley, 351 So. 2d 959 (Fla. 1977), in support of its proposition Heptner should be disbarred. In Beasley, unlike in Heptner however, the attorney arranged for trafficking amounts of Quaaludes and marijuana to be delivered to his client resulting in the attorney being criminally sentenced to a year imprisonment. Beasley neither claimed impairment nor sought rehabilitation but apparently sought to sell drugs to his client for money. Beasley was a drug trafficker without any mitigating factors, Heptner is not.

The Bar cites Florida Bar v. Wilson, 425 So. 2d 2 (Fla. 1983), as another case supporting disbarment. Like in Beasley the Respondent in Wilson was found guilty of drug trafficking with a client quite unlike Heptner who sought a use amount of cocaine to feed his addiction. In Wilson, unlike in Heptner, there was no mitigating factors, the attorney was adjudicated guilty of two felonies and did not seek rehabilitation.

Finally, the Bar cites another drug trafficking case, Florida Bar v. Marks, 492 So. 2d 1327, (Fla. 1986), to support its contention Heptner should be disbarred. In Marks the attorney conspired with a client to import large amounts of marijuana by plane into the United States from foreign countries for profit. The Court in Marks

found “Marks deep involvement in a plot to smuggle illegal narcotics into Florida,” and his failure to “demonstrate any mitigating circumstances,” warrant disbarment (at 1328-29). This again is to be contrasted with Heptner who sought a use amount of cocaine from a habitual dealer whom he had only agreed to represent while seeking drugs to satisfy his addiction.

Ironically the Bar also contends, in page 34 of its brief, that Heptner’s drug impairment and subsequent rehabilitation should not be considered in mitigation because (a) he continued to practice effectively (as well as ineffectively) during the period in issue (b) other attorneys had a high regard for Heptner’s abilities and (c) because he was only a binge user. This contention by the Bar was directly rebutted by the treatment centers addictionologist who testified Heptner was chemically dependent and situationally depressed (R. Exh 1;9-14). He also testified that neglect, lack of diligence, and failure to respond is characteristic of chemical dependent attorneys (R. Exh 1;13-15).

Heptner testified his drug use was extensive, that he had lost control, (TR2-250;5-19), and that it effected his ability to practice law. He also testified he would sometimes use drugs during the work week which would impair his abilities the next day. (TR2-224;9-12).

Respondent has never suggested his impairment excuses his conduct but the caselaw supports his contention that impairment and rehabilitation are a considered

factor in the totality of the circumstances in fashioning discipline. He also contends his totality of circumstances differs from the Wolfe, Shuminier, Setien, and Horowitz, cases cited by the Bar and discussed below.

In the Florida Bar v. Wolfe, 759 So. 2d 639, (Fla. 2000), the Bar brought disciplinary proceedings against attorney Wolfe for, among other things, his in person attempt to drum up new business by soliciting clients whose homes and families had been recently injured by tornadoes. Mr. Wolfe, like Heptner, had been disciplined in the three years preceding his case and suffered from a cocaine addiction. The referee considered a number of aggravating and mitigating factors and recommended Wolfe be suspended for 90 days to be followed by 5 years probation.

Wolfe admittedly involved a drug discipline case where the Court increased the referee recommended discipline. In Wolfe the Court disagreed with the referee's recommendation and instead imposed a one year suspension to be followed by three years probation with F.L.A. monitoring. The Court refused to give a more lenient sentence for three reasons. First, it found the nature of Wolfe's planning in achieving the solicitations did not demonstrate the violation was from his impairment. This is different from the Heptner case where the health care professionals have stated his lack of diligence in these matters and in responding to the Bar is characteristic of the impairment he has. Additionally, Wolfe's solicitations and violations were selfish and profit motivated, unlike Heptner who acted dilatorily and sought only to

preserve his client, Walent's, legal rights. Second, Wolfe affirmatively engaged in conduct he knew to be improper (he stated "I thought I could get away with it.") to Heptners problems stemming from his failure to act. Third, similar to Heptner, the Court deals more harshly with cumulative misconduct than isolated incidents. The Court in Wolfe, however, increased a 90 day suspension to a year long suspension. It did not increase a two year suspension with two years probation to a disbarment like the Bar proposes in Heptner.

The Bar also cited the case of Florida Bar v. Shuminier, 567 So. 2d 430, 433 (Fla. 1990), for the proposition that Heptner should be disbarred. Shuminier, unlike Heptner, involved trust misappropriation wherein the Court stated, "In the hierarchy of offenses for which lawyer may be disciplined stealing from a client must be at the very top of the list." Shuminier is therefore inapplicable here. It should also be noted that Shuminier is in marked contrast to another line of cases where drug and alcohol impairment, coupled with remorse and rehabilitation, has mitigated misappropriation from clients and resulted in suspension rather than disbarment. See Florida Bar v. Ruskin, 126 So. 2d 142, (Fla. 1961) and Florida Bar v. Blessing, 440 So.2d 1275 (Fla. 1983).

Florida Bar v. Setien, 530 So. 2d 298 (Fla. 1988), is another case cited in the Bar's brief which is distinguishable from the case at hand. Unlike in Heptner, the

referee recommended disbarment rather than suspension in Setien for a defalcating attorney who did not perform the work his clients retained him to do, did not enter into any type of rehabilitation and who abandoned his law practice without leaving a forwarding address such that the Bar was unable to even locate him for over one year.

In the case of the Florida Bar v. Horowitz, 697 So. 2d 78 (Fla. 1997), the Bar filed three multi-count Complaints, including alleged misappropriation, against the thrice previously disciplined Respondent. The Court subsequently entered a default against Horowitz for his failure to defend on those consolidated Complaints. The referee, unlike in Heptner, found no factors in mitigation and several in aggravation. While Horowitz attributed his misconduct to clinical depression the Court found that assertion was made without expert testimony or outside corroboration. Horowitz failed to present any evidence of rehabilitation and the Court found the information he later presented to be untimely and unpersuasive. Consequently the referee recommended disbarment.

IX. DISBARMENT IS NOT WARRANTED FOR AN IMPAIRED ATTORNEYS FAILURE TO TIMELY AND FULLY COMPLY WITH THE COURT'S PRIOR SUSPENSION ORDER.

This Court entered a March 29, 2001 Order suspending Respondent from practicing law for 60 days (from April 30, 2001 until June 30, 2001). On April 12, 2001 the Bar sent Heptner a letter advising him of the requirement that his clients, opposing attorneys and any Court he appears before be notified (Rule 3-5.1(g) and that he should take steps to eliminate the appearance of being a lawyer in good standing (TFB Exh 3). Heptner then immediately called the Bar for specific directions as to any other specific thing he should do but was advised there wasn't any specific guidelines (TR2-227;1-18).

It is also significant that Heptner was actively and regularly continuing to use cocaine during this time thereby diminishing his lucidity. Heptner's actions were neither intentional nor profit seeking but rather a further illustration of the impairment under which he was operating (TR2-225;1-7).

It is also significant that at the time Heptner received the Order and accompanying letter, and thereafter, he was medically diagnosed as being chemically dependent on cocaine and situationally depressed causing his judgment to be impaired. (R. Exh 1)

The Respondent does not agree, however, and the referee did not find that, "Respondent deliberately violated the terms of his suspension order by continuing to engage in the practice of law" as alleged in the Bar's initial brief.

Standard 8.1 relates to prior discipline orders and provides for disbarment only in the absence of aggravating or mitigating factors.

As discussed previously, the Referee considered both aggravating and mitigating factors in determining Heptner's discipline. The following Florida cases have also addressed situations where attorneys have not fully complied with the terms of their suspension orders. Typically, additional punishment is imposed by the Court rather than disbarment.

Florida Bar v. Golden, 563 So. 2d 81 (Fla. 1990), involved an attorney who was suspended for ninety (90) days on September 22, 1988. Thereafter, he appeared in Court on two different occasions with a client to assist and counsel the client in getting the matter continued. There was a dispute between him and one of the clients whether he told him he was suspended. Golden failed to provide his clients with a copy of his suspension order as required by Rule 3-5.1(h). The bar sought to disbar him. The Court disagreed that his malfeasance should cause disbarment and instead suspended him for one year.

Florida Bar v. Brigman, 322 So. 2d 556 (Fla. 1975), was an attorney that violated the terms of his suspension order in that he (1) failed to remove a sign lettered `E. PAUL BRIGMAN, Attorney at Law' from his office building following his suspension, (2) failed to give notice to his clients of his suspension from the practice of law, and evidence of such action to staff counsel of The Florida Bar, a

violation of Integration Rule 11. 10(6) of the Florida Bar, and (3) failed to discontinue the use of letterhead stationery identifying himself as an attorney-at-law following his suspension. The Court suspended him for one year.

Florida Bar v. Levkoff, 511 So. 2d 556 (Fla. 1987), involved an attorney who performed numerous actions as an attorney over a seven month period in 1984, while suspended for nonpayment of dues. He received a ninety (90) day suspension.

Florida Bar v. Breed, 368 So. 2d 356 (Fla. 1979), involved an attorney who was temporarily suspended on December 22, 1977, whose law office sign was still on his door on August 24, 1978. He also wrote to clients on his letterhead during August, 1978. The Court withheld an adjudication of contempt provided he removed his sign within fifteen (15) days, that he refrain from using his letterhead and that he further abide by the terms of his suspension.

Florida Bar v. Abagis, 327 So. 2d 208 (Fla. 1976), involved an attorney who was suspended for four months on June 4, 1975, who as of December, 1975, had failed to comply with the requirement to notify his clients about his suspension. The Court found him in contempt for noncompliance and suspended him for one year. The Court provided further, however, that if he were to provide the required notice by March 1, 1976, his one year suspension would be reduced to four months.

Florida Bar v. Penn, 421 So. 2d 497 (Fla. 1982), is a curious case stating "as a member of good standing of the bar of the federal district court, practicing before the bankruptcy court in that district while on suspension by the state court does not warrant discipline" and that, "while it is true that admission to practice before a federal court is derivative from membership in a state bar, suspension or disbarment by a state does not result in automatic suspension or disbarment by the federal court without some affirmative action by the federal court."

The Bar's brief discusses three cases, readily distinguishable from the case at hand, to suggest Heptner's failure to timely and fully comply with the Court's suspension Order warrants disbarment.

Florida Bar v. Greene, 589 So. 2d 281 (Fla. 1991), involved an attorney that engaged in the practice of law on four occasions while he was under suspension and who chose to resign from the Bar rather than participate in the disciplinary proceedings against him. This is to be contrasted from Heptner who directed his client, Walent, to another attorney who prepared and signed the pleading thought necessary to preserve the client's rights and who was dilatory in notifying his clients and the Court about his suspension. Additionally, the Court in Greene, unlike in Heptner, found no factors in mitigation.

Florida Bar v. Brown, 635 So. 2d 13 (Fla. 1994), involved an attorney who continued to practice law (in a way not disclosed by the case) after he had resigned

in lieu of discipline. Significantly, in Brown, the attorney refused to accept service of the Order to Show Cause proceeding against him and, unlike in Heptner, neither presented extenuating circumstances nor participated in the discipline process.

Florida Bar v. Ross, 732 So. 2d 1037 (Fla. 1998), involved an attorney who sought to subvert the judicial process for his own financial gain in a pending action to set aside a foreclosure sale by requiring a foreclosure purchaser give him a half interest in the property in exchange for testimony that would reveal that Movant, contrary to Movant's assertion, did in fact receive notice of the foreclosure sale on his property. When the attorney's offer was rebuffed he thereupon turned to Movant and offered to instead remain unavailable to testify in exchange for several thousand dollars.

The referee found this conduct violated Rule 4-8.4(c) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit or misrepresentation) and that he acted with a dishonest and selfish motive and refused to acknowledge the wrongful nature of his conduct. This is to be distinguished from Heptner who did not seek to subvert an active case for financial gain, did not act with a dishonest or selfish motive, and acknowledged the wrongful nature of his conduct.

X. RESPONDENTS PRIOR DISCIPLINE RECORD DOES NOT WARRANT DISBARMENT GIVEN THE TOTALITY OF THE CIRCUMSTANCES.

It is well established that in rendering discipline the Court considers the respondent's previous disciplinary history and increases the discipline where appropriate for cumulative misconduct. The Respondent agrees that cumulative misconduct can be found when the misconduct occurs near in time to the other offenses, regardless of when discipline is imposed. Florida Bar v. Golden, 566 So. 2d 1286, 1287 (Fla. 1990). As this Court recognized in Florida Bar v. Williams, 753 So. 2d 1258 (Fla. 2000), "enhanced discipline is permissible when multiple violations occur or the attorney has a prior history of misconduct." at 1263.

With the exception of the four year old Case No. 1998-11, 287(13C), in which diversion was previously deemed appropriate and which the Bar resurrected for this case, the conduct underlying the remaining pending cases occurred during a limited time period in 2001. It is both the unrebutted expert's and Heptner's position that his failure to timely respond to the Florida Bar inquiries, his lack of diligence and his drug arrest are primarily attributable to his chemical dependency on cocaine.

Similarly the discipline case resolved immediately before this one, (case number SC01-1744, Florida Bar No.: 2001-10, 367-13C), which resulted in a ninety day suspension for failing to timely respond to the Bar's investigation, also took place within this same time period. The Referee clearly fashioned the sanction he

recommends be imposed against Heptner in recognition that his addiction caused a number of issues to spin out of control within the same general time period rather than being a continued and extended series of intentional violations by a recalcitrant attorney who refused to respond to the disciplinary process. The Referee considered that case as a serial part of the overall problem he was adjudicating, not as Heptner's fourth disciplinary event.

The case of Florida Bar v. Wasserman, 654 So.2d 905 (Fla. 1995), involved an attorney who, like Heptner, had three previous disciplinary cases against him, who unlike Heptner, had continued to see and retain clients after being notified of his suspension. Wasserman, like Heptner, had substantial experience in the practice of law, had not caused actual harm to any client, person or Court and appeared remorseful. Wasserman, however, was not suffering from chemical dependency and did not voluntarily shut down his practice like Heptner. Nonetheless the Court in Wasserman took his cumulative misconduct into account and suspended him for sixty days. Similarly the Referee in Heptner took his prior misconduct and the totality of the circumstances into account but suspended him for two years to be followed by two years probation.

In the case of Florida Bar v. Terkoff, 511 So. 2d 556 (Fla. 1987), the respondent attorney, while under suspension from regular Bar membership for

nonpayment of dues engaged in numerous incidents in the practice of law over a seven month period. Terkoff also had prior misconduct. The Court imposed a ninety day suspension.

In the Bern case cited by the Bar, 425 So. 2d 526 (Fla. 1982), the respondent attorney was not disbarred but was instead suspended for one year for multiple offenses even though he had been disciplined three times in the past five years for offenses similar to the ones then considered by the Court.

Contrary to the Bar's assertion there is nothing to suggest that Heptner has failed to respond to lesser forms of discipline.

In 1990 he received a private reprimand, in 1994 a public reprimand and eighteen months probation and he later received a sixty day suspension in 2001. He voluntarily closed his practice after that sixty day suspension in 2001 to enter into drug rehabilitation while facing a number of offenses his addiction created. The Bar then brought two Complaints and a Petition for Order to Show Cause against Heptner for those offenses which all took place during his active cocaine use. The Referee heard the first Complaint where the complainant alleged Heptner did not timely pay his interpreter bill which was later paid. Heptner did not contest this Complaint but freely admitted to his misconduct and impairment. Because Heptner had not timely responded to the Bar's inquiry within 15 days and was undergoing continued drug rehabilitation the same Referee that heard this case suspended him

for 91 days to ensure he was rehabilitated prior to recommencing his practice. Heptner elected not to petition for reinstatement at the conclusion of that suspension to both complete the disciplinary process of the present case and further demonstrate his rehabilitation. The Referee subsequently considered that case in the totality of the circumstances of this one in recommending an appropriate discipline to this Court.

CONCLUSION

The Referee's recommended discipline of Heptner is in accord with the Standards and case law which he applied in considering all applicable aggravating and mitigating factors involved in this case. Disbarment is an extreme sanction and is not warranted here under the totality of the circumstances of this case. Given this policy and the trustee's unique position to assess the witnesses and directly weigh the evidence the Court should affirm the Referee's recommended discipline of two years suspension retroactive to July 16, 2002 to be followed by two years probation under an F.L.A. contract.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Federal Express, Airbill Number 821744162812 to **The Honorable Thomas D. Hall**, Clerk, The Supreme Court of Florida, 500 South Duval Street, Tallahassee, FL 32399-1927; a true and correct copy by hand delivery to **William Lance Thompson**, Assistant Staff Counsel, The Florida Bar, 5521 W. Spruce Street, Suite C-49, Tampa, Florida 33607; by regular U.S. mail to **John Anthony Boggs**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this 29th day of December, 2003.

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____

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CERTIFICATION OF FONT SIZE AND STYLE
CERTIFICATION OF VIRUS SCAN

The Undersigned does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font, and the computer disk filed with this brief has been scanned and found to be free of viruses, by Norton Antivirus for Windows.

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James Manuel Heptner