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.		

_____/

REPLY BRIEF
OF
THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

Respondent has utilized his "Statement of The Facts" to make improper arguments disputing the Referee's factual findings, and to inject purported facts outside the record. Respondent did not file a Petition (or a Cross-Petition) for Review with this Court in order to appeal the Referee's findings of fact. Therefore, the only issue properly before this Court is the appropriate sanction for the Respondent's misconduct. The factual findings of the Referee are not in dispute. While the page limits of a Reply Brief do not permit a thorough response to Respondent's improper arguments, these issues will be briefly addressed.

Respondent is incorrect in stating that the Referee's Report did not address two disputed factual issues. First, Respondent denies that he purchased cocaine from Mr. Nova while representing Mr. Nova in legal matters. Second, Respondent denies that Mr. Nova paid him for legal services by supplying him with cocaine. The Referee resolved these factual issues by adopting the facts contained in the Complaint and Petition for Order To Show Cause. The Report of Referee states: "After considering all of the pleadings and evidence submitted, the facts set forth in the Complaint, and the Petition for Order to Show Cause, as amended, are hereby adopted as the Findings of Fact herein, and are hereby incorporated by reference."

(RR1-2). The Referee found that Respondent admitted to Counts I, II, III, and IV in the Complaint. As to Count V, the Referee found that the Bar proved by clear and convincing evidence, the violations alleged in therein. (RR2). The Complaint includes the following paragraphs which were incorporated by reference into the Report of Referee:

> 99. At Respondent's suggestion, Mr. Nova paid Respondent with cocaine in exchange for legal services in connection with Mr. Nova's divorce proceeding.
>
> 100. Respondent purchased cocaine from Mr. Nova on a regular basis over a period of approximately 18 months during which time Respondent was representing Mr. Nova in legal matters.
>
> 101. At no time during the period he was purchasing cocaine from Mr. Nova, did Respondent withdraw from representing Mr. Nova.

These factual findings are supported by substantial evidence in the record. After hearing all of the testimony, including that of the Respondent, and considering the documentary evidence, the Referee resolved the disputed factual issues in favor of the Bar. The Referee found that Respondent purchased cocaine from a client over a period of approximately 18 months, including during the period he was suspended from the practice of law, and was paid in cocaine for providing legal services.

Respondent further improperly disputes the Referee's finding that he violated the terms of his suspension order by continuing to engage in the practice of law while suspended. The Referee found that the Bar proved, by clear and convincing evidence, the allegations set forth in its Petition for Order to Show Cause, as amended. (RR2). Respondent did not petition this Court to appeal the Referee's findings. The following allegations contained in the Petition for Order to Show Cause were, therefore, adopted as findings of fact by the Referee:

> 18. Respondent has engaged in the practice of law during the period of his suspension by continuing to represent his client, William Walent.
>
> 19. Respondent engaged in the practice of law during the period of his suspension by filing a motion and notice of hearing on behalf of his client, William Walent.
>
> 20. Respondent engaged in the practice of law during the period of his suspension when he falsely stated to his client, William Walent, that he had made an appearance at the Case Management Conference on May 14, 2001; that he had filed motions on behalf of the client; and when he implied that he would continue to represent the client through the final hearing set in August 2001.
>
> 21. Respondent has failed to comply with Rule 3-5.1(g) (regarding notice of suspension) by failing to notify his clients and the Courts where he is listed as attorney of record.

Finally, Respondent incorrectly states in his Answer Brief that the Referee made no factual findings relating to Counts I through IV of the Bar's complaint, but

instead merely accepted the stipulation of the parties as to the Rule violations. Respondent claims he was prevented from putting on evidence at the final hearing relative to Counts I through IV. Respondent then presents his version of the facts relating to Counts I through IV.

The record reflects that Respondent agreed to admit the allegations of Counts I through IV of the Complaint in their entirety with two minor changes.[1] (TR2 260:12-25 to 261:1-8). When the Respondent attempted to address the factual allegations of Counts I through IV at the final hearing, the Bar objected based on Respondent's prior stipulation to these matters. The Referee agreed and limited Respondent's testimony regarding Counts I through IV to mitigation only.

Respondent's summary of the first four Counts includes facts not contained in the record. This Court should reject Respondent's attempt to improperly supplement the record and disregard any reference in Respondent's Statement of Facts which goes beyond the facts as agreed to by the parties and adopted by the Referee.

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[1]The following language was added to Count II: "The Respondent failed or refused to respond to the Bar's May 16th, 2000 letter, although Respondent does not recall receiving said correspondence." In addition, the Bar agreed not to proceed on the alleged violation of Rule 4-1.1 in Count I of the Complaint.

ARGUMENT

I. RESPONDENT'S DISCIPLINARY RECORD REPRESENTS A 10-YEAR HISTORY OF MISCONDUCT AND NOT MERELY AN ONGOING "PROBLEM" ATTRIBUTABLE TO HIS USE OF DRUGS.

Respondent argues that his most recent 91-day suspension should be considered as part of "an overall problem" related to his drug use, and not as Respondent's "fourth disciplinary event." He repeatedly refers to Case No. SC01-1744 as the "unconsolidated Complaint," in an apparent attempt to minimize its impact as prior discipline. According to Respondent, Case No. SC01-1744 should have been consolidated with the other five cases included in the pending proceedings, and should not be considered as separate discipline because it occurred during the same period of time as the misconduct in the instant case.

Respondent incorrectly represents that the Referee recommended a 91-day suspension in Case No. SC01-1744 as part of an "overall disciplinary scheme" which includes the instant proceedings. SC01-1744 was a separate matter, based on facts unrelated to the instant proceedings. At the time the Referee issued his Report in SC01-1744 (on March 28, 2002), he had not yet been appointed as Referee to hear the Bar's Complaint in the current cases. Judge Ramsberger was

appointed Referee in SC02-1118 on June 6, 2002, and had just been appointed Referee in the contempt case (SC01-1298) on March 13, 2002. The cases were consolidated by Order dated July 18, 2002. In recommending a 91-day suspension and two-year probation in SC01-1744, the Referee stated in his Report: "**A longer suspension would have been recommended**, however, prior to this Report, respondent voluntarily sought, and has continued with residential treatment and counseling." Report of Referee, dated March 28, 2002, page 2.

Respondent also argues that, with the exception of the misconduct in Count I, which occurred in 1997, all of the conduct in the instant case occurred during a limited time period in 2001, and was attributable to what Respondent refers to as a chemical dependency on cocaine. Respondent's history of prior discipline dates back to 1990, and involves repeated violations of the same rules in multiple cases. Were it not for the consolidation of cases, Respondent's disciplinary history might be considerably more extensive. Respondent's private reprimand in 1990 resulted from misconduct in **two** separate cases. His public reprimand in 1994 resulted from **three** consolidated cases, and his 60-day suspension in 2001 was imposed for misconduct in **two** separate cases. In addition, the instant proceedings consolidate a five-count Complaint with a contempt case. The five counts of the Complaint are separate matters involving different clients and different factual

situations. Respondent incorrectly claims that Count V of the Complaint alleges the same facts as the Petition for Order to Show Cause. The contempt case relates to Respondent's violation of an order of suspension, while Count V of the Complaint relates to Respondent's criminal misconduct. If these six matters had not been consolidated, Respondent would have even more "disciplinary events" on his record.

II. RESPONDENT'S COCAINE USE WAS NOT "OUT OF CONTROL" AND DOES NOT OUTWEIGH THE SERIOUSNESS OF HIS MISCONDUCT.

Respondent continues to rely on his alleged drug addiction and impairment to excuse his misconduct. Respondent makes several references in his Brief to the "unrebutted" expert testimony that he was operating under an impairment during the period of time he committed the misconduct in this case. The expert testimony presented by Respondent supports the fact that he participated in various rehabilitation programs, but does not support the Respondent's contention that his drug use was "out of control." For example, Respondent cites to the testimony of Timothy Sweeney, the director of Health Care Connections, the treatment center Respondent attended following his arrest in 2001. At the final hearing, Mr. Sweeney testified that Respondent had successfully participated in treatment and had been abstinent from drugs for approximately a year and a half. (TR1 81-82).

Mr. Sweeney provided no testimony at the final hearing to support Respondent's claim that his drug use in any way impaired his ability to practice law. Similarly, Cedric Hernandez, the substance abuse counselor from DACCO (Drug Abuse Comprehensive Coordinating Office), testified regarding Respondent's compliance with the requirements of the DACCO program, and did not address whether Respondent's cocaine use had any impact on his ability to work effectively. (TR1 169-174).

The only other expert testimony cited by Respondent is Mr. Sweeney's testimony in the previous case, No. SC01-1744. (R. Exh. 1). In SC01-1744, Respondent was charged with failing to respond to the Bar, and received a 91-day suspension. At the time Mr. Sweeney testified on February 20, 2002, the Bar had not yet filed its Complaint in the instant case. Mr. Sweeney **only** addressed Respondent's failure to respond to the Bar, and not any of his other misconduct. Mr. Sweeney testified that Respondent's failure to respond in writing to the Bar could be the result of "situational depression" related to chemical dependency. According to Mr. Sweeney one of the common manifestations of "situational depression" is "the not-opening-the mail problem." (R. Exh. 1, 13-16). Mr. Sweeney agreed that none of Respondent's doctors had diagnosed him as suffering from depression. (R. Exh. 1, 19). He was unable to explain how

Respondent managed to never miss a court appointment, had not violated any court orders relating to his clients, and continued to open 40 new cases per month, despite suffering from "not-opening-the-mail syndrome." (R. Exh. 1, 20-21). Mr. Sweeney testified that Respondent identified himself as a "binge user" who "often goes months without using cocaine." (R. Exh. 1, 18).

Respondent has not demonstrated that his cocaine use impaired his ability to practice law effectively. (See Initial Brief, at 33-34). Once Respondent was arrested in August 2001 on charges of Solicitation to Deliver Cocaine, he checked into a drug rehabilitation center and subsequently took advantage of the Pre-Trial Intervention Program to have the criminal charge dismissed. Respondent has demonstrated that he successfully completed various treatment programs. He has not shown, however, that his alleged addiction to cocaine ever significantly impaired his ability to practice law. This Court has required that, before drug abuse may serve as a mitigator, "the addiction must impair the attorney's ability to practice law to such an extent that it outweighs the attorney's misconduct." Florida Bar v. Wolfe, 759 So. 2d 639, 644 (Fla. 2000). Respondent has not established that his periodic use of cocaine rose to a sufficient level of impairment to outweigh the seriousness of his misconduct.

III. DISBARMENT IS THE APPROPRIATE SANCTION FOR RESPONDENT WHO VIOLATED MULTIPLE RULES, ENGAGED IN CRIMINAL MISCONDUCT, PRACTICED LAW WHILE SUSPENDED, AND HAS A HISTORY OF FOUR PRIOR DISCIPLINES.

Respondent cites numerous cases to support a suspension as the appropriate sanction for the personal use of drugs where mitigating factors are present. None of the cases cited by Respondent, however, reflect the totality of circumstances represented in the cases consolidated before this Court. For example, Respondent cites Florida Bar v. Temmer, 632 So. 2d 1359 (Fla. 1994) and 753 So. 2d 555 (Fla. 1999), in support of a suspension. Temmer received a 91-day suspension after her arrest for possession of controlled substances while still on probation following an earlier 90-day suspension for similar misconduct.[2] Temmer did not violate multiple disciplinary rules, neglect client matters in numerous cases, or fail to respond to the Bar in **eight** separate cases. Respondent, unlike Temmer, violated an order of suspension by appearing before a judge on behalf of a client while suspended, failed to notify clients of his suspension, and

[2]Respondent makes much of the fact that Temmer was involved in drug use with a client, however, there are no facts in either opinion to indicate that she continued to represent the individual after becoming personally involved with him. In fact, the former client is not even mentioned in the later case which resulted in a 91-day suspension.

continued to practice law while CLER delinquent. Unlike Respondent, whose record consists of four prior disciplinary proceedings, Temmer had been disciplined only once previously.

While all of the cases cited by Respondent involve an attorney's use of drugs or controlled substances, none of them include all (or even most) of the following factors which are present in the instant case:

- Respondent involved his client in felony misconduct.
- Respondent's disciplinary history includes multiple repeat violations of the same rules.
- Respondent has been disciplined on four prior occasions.
- Respondent violated an order of suspension by engaging in the practice of law, by holding himself out as a lawyer, and by failing to notify his clients of his suspension.
- Respondent repeatedly failed to respond to inquiries from the Bar.
- Despite his claimed addiction, Respondent went months without using cocaine.
- At the time of his alleged addiction, Respondent maintained a thriving solo law practice.

- Respondent's character witnesses testified that they observed no signs of drug use.

Respondent argues that disbarment has only been imposed in cases where an attorney engaged in drug "trafficking" as opposed to the purchase of "use" quantities of drugs. The Bar cited several cases in its Initial Brief in which attorneys were disbarred in cases analogous to the instant case. In Florida Bar v. Beasley, 351 So. 2d 959 (Fla. 1977), this Court disbarred an attorney who made a phone call to put a client in touch with someone who could supply the client with marijuana. In Florida Bar v. Wilson, 425 So. 2d 2 (Fla. 1983), this Court disbarred an attorney who requested a client to supply him with cocaine. Unlike the Respondent, the attorneys in Beasley and Wilson did not commit multiple additional offenses, violate an order of suspension, or repeatedly fail to respond to the Bar. Neither Beasley nor Wilson had a history of prior discipline.

Respondent also cites a number of cases for the proposition that violation of a suspension order does not warrant disbarment. Not only are these cases factually dissimilar to the instant case, they do not reflect the totality of circumstances present here. None of these cases involved attorneys who solicited the delivery of cocaine from a client, violated numerous disciplinary rules, repeatedly failed to respond to the Bar, **and** had a history of four prior disciplines.

Contrary to Respondent's assertion, this Court has frequently disbarred attorneys who have violated an order of discipline. See, e.g., Florida Bar v. Jones, 571 So. 2d 426 (Fla. 1990) (disbarring attorney for continuing to practice law during suspension, failing to comply with rules requiring him to inform clients of his suspended status, and misrepresenting to Court that he had complied with the suspension order); Florida Bar v. Greene, 589 So. 2d 281, 282-83 (Fla. 1991) (disbarring attorney for continuing to practice law while suspended, holding that "[w]e have found disbarment appropriate in other cases in which attorneys have engaged in the practice of law while suspended"); Florida Bar v. Brown, 635 So. 2d 13, 13-14 (Fla. 1994) (holding in contempt and disbarring attorney for violating the terms of his disciplinary resignation by continuing to practice law after disciplinary resignation; holding that "[c]lear violation of any order or disciplinary status that denies an attorney the license to practice law generally is punishable by disbarment, absent strong extenuating factors").

In Florida Bar v. Bauman, 558 So. 2d 994 (Fla. 1990), the referee recommended that the respondent be suspended for three years for practicing law while under a six-month order of suspension. The Bar argued for disbarment, while Bauman argued that disbarment was an extreme penalty which "should only be imposed in those rare cases where rehabilitation is highly improbable." Id.

(quoting Florida Bar v. Davis, 361 So. 2d 159, 161 (Fla. 1978)). This Court agreed with the Bar that disbarment was appropriate, stating: "We can think of no person less likely to be rehabilitated than someone like respondent, who wilfully, deliberately, and continuously, refuses to abide by an order of this Court." 558 So. 2d at 994.

The record in this case shows that Respondent purchased cocaine from his client, Danny Nova, on and off over a period of at least 18 months. Respondent was arrested and charged with Solicitation to Deliver Cocaine, a third degree felony. This case, however, does not represent a one-time drug offense, but rather a pattern of misconduct, as well as a continuing disregard for the authority of this Court and the Rules Regulating The Florida Bar. Respondent cannot rely on his recreational drug use to excuse his numerous ethical violations, or his contempt of this Court's order of suspension. Respondent's misconduct, when considered in light of the totality of the circumstances and the aggravating factors present in this case, warrants disbarment.

Dated this _____ day of_____, 2004.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of this brief have been provided by Airborne Express, Airbill Number 5061987770 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 regular U.S. Mail to **James Manuel Heptner**, 2715 Via Capri, Unit 720, Clearwater, FL 33764-3988; by regular U.S. mail to **John Anthony Boggs**, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, FL 32399-2300, all this _____ day of _____, 2004.

_____
William Lance Thompson
Assistant Staff Counsel

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William Lance Thompson