

SUMMARY OF THE ARGUMENT

The Florida Bar's brief demonstrates a clear misunderstanding of addiction which is the issue before this Court. The Bar tacitly admits that Respondent's position is correct in all respects since it failed to meaningfully respond to Respondent's arguments. The Florida Bar's arguments are based upon misstated testimony and misapplications of law and therefore its conclusions in its brief are erroneous. The Referee's recommendation of disbarment should not be approved by this Court.

RESPONSE AND REBUTTAL TO ARGUMENTS PRESENTED IN ANSWER BRIEF

The trial testimony demonstrated that Respondent was a personable and well liked young man who started off his career as a bright, intelligent, and very competent lawyer who ultimately fell victim to the disease of addiction which ruined his life in every aspect. ARR 12 At the outset, Respondent acknowledges that his misconduct is of the most egregious and heinous type both in substance and in number. Respondent does not ask to be excused for his misconduct, but rather he seeks that the mitigation standard be applied such that he receives a sanction less than disbarment. Therefore, the real question before this Court is not what misconduct occurred but why the misconduct

occurred and that is perhaps best summarized by the Dr. Zimmer's question:

Did Mr. Gross wake up one morning and say, "Well, for the next couple of years, I'm going to behave in a very unmanageable and irresponsible way and just hope I don't get caught because it's more profitable and fun to try to sleaze and scam people and hold my license out to anybody who might want to grab it if they want to take a close look at what I've been doing?" TR2 57-58.

Dr. Zimmer was correct in his answer when he stated:

"I don't think he woke any one morning and said, "Today's the day I'm going to screw up my life". TR2 57-58.

The Bar's Answer Brief misses the point by focusing on what occurred, and not why it occurred which is the issue raised in Respondent's brief and is before this Court. The Bar ignored this issue and instead, dedicated nine pages of its brief to repeating the allegations of misconduct which was stipulated to at trial. This leads to the simple conclusion that either the Bar does not understand addiction or it has ignored Respondent's arguments concerning addiction and argues in a vacuum that it is simply the amount and type of misconduct that justifies disbarment. Such is not the state of the law enunciated by this Court in prior decisions. See: The Florida Bar v. Jahn, 509 So.2d 285, (Fla. 1987); The Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990); The Florida Bar v. Rosen, 495 So.2d 80 (Fla. 1986).

A summary of the Bar's brief in support of the Referee's

recommendation of a 5 year disbarment is that Respondent committed too many serious acts of misconduct and therefore disbarment is the appropriate sanction. The Bar then tries to side step the issue of addiction by its arguments that (1) the Respondent's misconduct was not proximately caused by his addictions; (2) Respondent could not establish the duration of his addiction; (3) Evan Zimmer, M.D. did not approve of Respondent's treatment; (4) The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) supports disbarment and (5) disbarment did not violate the Americans with Disabilities Act. [AB 15-16].

All of the Bar's arguments are flawed and must fail due to the fact that its conclusions are based upon misstatements of the record and a misunderstanding of addiction as mitigation under the case law as demonstrated below.

POINT I

The Number and Severity Of The Incidents Of Misconduct That Resulted From Addiction Does Not Support Disbarment

The Bar requests this Court to view this case in a vacuum. The Bar belabors the argument of the egregiousness and volume of Respondent's misconduct throughout its brief in support of disbarment without addressing the disease of alcoholism and addiction. This is an emotional argument which the Bar must rely on since it can not factually or legally refute Respondent's

position.

In almost every case cited by the Bar the analysis turns on the volume and seriousness of the misconduct, neglecting to advise the Court that those cases failed to consider addiction, rehabilitation and how it applied to mitigation. The present state of the law requires consideration of those facts. The Florida Bar v. Jahn, *supra*; The Florida Bar v. Farbstein, *supra*; The Florida Bar v. Rosen, *supra*. The Bar has totally ignored that almost all of the trial testimony was exclusively concerning the subject of addiction and how addiction impacted and devastated every aspect of Respondent's life.

Respondent understands the difficulty the Court faces where the issue of addiction and rehabilitation is raised in mitigation. Alcoholism and drug addiction is a disease recognized in the medical community. *See American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders*, 4th Ed. 1994. When there is an understanding of mental illness and how it impacts behavior, the number and degree of offenses are irrelevant since the behavior is a direct and proximate result of the addiction. Once the Referee found that the addiction proximately caused the number of egregious offenses, then it does not matter how many or how serious they were since they resulted from the addiction.

POINT II

Respondent Established By Clear And Convincing Evidence That His Misconduct Was Proximately Caused By His Addictions

The Bar's argument that Respondent did not prove by clear and convincing evidence that his misconduct was the direct result of his addiction is contrary to the testimony at trial and the findings in the Referee's Amended Report.

The Bar ignores Dr. Zimmer's testimony completely. Dr Zimmer testified that the Respondent's behavior was typical of people who are actively addicted to a very high level of alcohol and/or drugs, that every violation was a pit stop along the "highway of substance abuse", and that Respondent misconduct was one prolonged catastrophic explosion of chronic behavior. (TR 2 59-61). Dr. Zimmer explained how Respondent's substance abuse proximately caused his misconduct and testified that Respondent lost his ability to discern right from wrong. TR2 97-99. Finally, the following colloquy made Dr. Zimmer's expert opinion clear:

But, Doctor, by the latter part of 2001 based upon Mr. Gross's representation to you and other information you were able to glean, you would state with a reasonable degree of medical certainty that due to substance abuse, his ability to practice law has become substantially impaired. Correct?

A. Yes. TR2 105

Dr. Janice Wilmoth, a psychologist with a doctorate degree in psychology and neuropsychology and is a state and international certified addiction professional, corroborated Dr. Zimmer's testimony by correlating Respondent's misconduct and his addiction. (TR2 132-136). This unchallenged testimony resulted in the Referee's clearly stated finding in his report that, "The Referee can accept Respondent's argument that his misconduct was largely the product of drug and alcohol addiction." ARR at 12. For the Bar to establish that the misconduct was not the result of addiction would require it to rewrite the record.

The Bar had the opportunity to present expert testimony at trial to support its position as to the issue of addiction, but it elected not to do so. Respondent submits that the reason the Bar did not retain an expert is that any expert in addiction would have been in agreement with Respondent's experts that addiction proximately caused Respondent's misconduct.

POINT III

The Fact That The Duration of Respondent's Addiction Is Unknown and Dr. Zimmer's Displeasure With Respondent's Treatment Is Irrelevant

The Bar's argument that Dr. Zimmer and Dr. Wilmoth failed to establish the duration of Respondents substance abuse fails to connect it to anything of significance. This is because it is of no significance. The trial testimony

established that the Respondent suffered from addiction prior to his misconduct and continued through the time he was suspended from the practice of law. Even though Dr. Zimmer and Dr. Wilmoth did not know the time and duration of Respondent's addiction, the uncontradicted testimony of Glen Lurie, Robin Jung, Ari Mendelson, Andrew Custer and Bradley Stark all established that Respondent had a substance abuse problem prior to and during the time of his misconduct. Once it was established that Respondent committed his misconduct while suffering from addiction, it does not matter if Respondent abused alcohol and drugs for 5, 10 or 15 years since the duration of the addiction is not determinative of whether the addiction overcomes the presumption of disbarment. The fact is that the Respondent's misconduct occurred during his disease.

The Bar's argument that Dr. Zimmer was "less than pleased with Respondent's course of treatment" is irrelevant. The fact that Dr. Zimmer would have preferred Respondent go into long term treatment does not add anything to the Bar's position. It is a meaningless argument. Certainly, inpatient treatment is preferable, but absent financial resources, Respondent did the next best thing, he signed a contract with FLA and attended A.A. Apparently, Dr. Zimmer thought that Respondent's condition was so bad and that he was so

incapable of functioning that he believed that Respondent needed long term hospitalization for his disease.¹ Therefore the Bar's argument supports Respondent's position that the mitigation standard should be applied and that Respondent should not be disbarred.

POINT IV

The Bar's Reliance On Shuminer In Support Of Disbarment Is Based Upon Misstatements Of The Record And A Misunderstanding of Addiction As Mitigation

The Bar argues that the holding in The Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) supports the Referee's recommendation of disbarment. In fact and to the contrary, Shuminer supports a long term suspension. In Shuminer, this Court held disbarment was the appropriate sanction when the attorney continued to work, his income did not diminish during the height of his addiction and he used the funds from misconduct to purchase a luxury automobile as opposed to supporting or concealing his addictions. Id. at 432. The reason this Court found Shuminer's addictions failed to rise to a sufficient level of impairment was due to the fact that he was still functioning and the impairment did not disrupt his life. Id. at 432.

¹ It should be noted that Dr. Wilmoth testified that Respondent was no longer a candidate for inpatient treatment since he has been sober for more than a year and no longer meets the criteria for inpatient treatment. TR2 140.

Therefore, consistent with this Court's decisions and the Standard for Imposing Lawyer Sanctions, if the addiction had disrupted the attorney's life such that he could not function, he would have satisfied the elements of the mitigation standard which would overcome the presumption of disbarment. Therefore, when juxtaposed to the instant case, Shuminer cannot possibly be used for the proposition of disbarment as this case is the reverse of Shuminer.

The Bar contends that Respondent failed to provide evidence of mitigation equal to Shuminer since there was no "direct link" between Respondent's misconduct and his substance abuse. (AB at 23) This is completely erroneous and contrary to the Referee's findings and the uncontroverted testimony of Dr. Zimmer and Dr. Wilmoth as already demonstrated above. There is absolutely no basis for the Bar to have made these statements.

The Bar argues that unlike Shuminer, the Respondent was not "in full compliance with his FLA contract" due to the fact that the Respondent did not meet with his monitor on one occasion. TR156-157. However that conclusion flies in the face of testimony at trial, as Mr. Usher testified that while ultimately, it is Respondent's responsibility, he could not have complied due to the fact that he was out of town. (T156-157). What the Bar neglected to tell the Court

is the entire testimony of Ben Usher in which he stated, Respondent not only substantially complied, but he has been more compliant than many other people he monitored by supplying him with more specific information about his meeting attendance, his moods and how he was feeling. (T156-157). The Bar's failure to advise the Court of Mr. Usher's entire testimony is a misstatement of the record and just another failed attempt to try and reconcile the result in Shuminer with this case.

The Bar argues that Respondent was not candid in his representations to Dr. Wilmoth and Dr. Zimmer. Respondent was candid during his testimony at the trial and the record confirms his candor. Respondent was so candid that he admitted his wrongdoing and every aspect of it. The fact that Respondent was not candid with Dr. Zimmer or Dr. Wilmoth further evidences that Respondent was an addict and does not detract from that position. It demonstrates that either the Bar does not understand addiction or it is simply ignoring the uncontradicted testimony at trial. Dr. Zimmer and Dr. Wilmoth's testified that lack of candor is a normal part of the disease of addiction and part of the process that a person goes through on the road to recovery. Dr. Zimmer stated that, two characteristics of the addict and alcoholic are denial of the disease and hiding what they're doing." TR2 at 101. This goes to the very heart

of the reasoning in Shuminer (disbarment proper when attorney did not use money to conceal addiction”). Id. at 432.

The Bar’s quantitative comparison of this case with Shuminer must also fail. The Bar argues that the instant case involved a “substantially greater amount of misappropriation of client funds” than Shuminer (AB at 22).² This same argument was rejected in The Florida Bar v McFall, 863 So.2d 303 (Fla. 2003). In McFall the referee considered the small amount of misappropriated funds as mitigation and this Court rejected that analysis, stating that it does not matter whether the amount involved is large or small it is still misappropriation. This court stated in footnote 4 in the McFall opinion, that “it is irrelevant whether the misappropriation involved a large or small amount of funds, because it is the act of misappropriation that constitutes misconduct. The Rules Regulating The Bar does not condition a rule violation for misappropriation based upon the amounts of funds involved.” Id.

Finally, the argument that Respondent continued to work effectively during the period in question simply states an untruth. The Bar submits a court proceeding in which a judge commended Respondent on his effective representation (AB 23-24) and the testimony of Ari Mendelson, who testified

² Respondent made restitution to all his clients prior to the Bar filing a complaint against him except for Dr. Frederick Herman, who is still owed \$5000 and Tonya Sheets who is owed \$7500.

that Mr. Gross was very successful in winning his cases for his clients.” (AB at 24). These two isolated incidents are hardly indicative of whether Respondent was capable of practicing law. Dr. Zimmer testified that Respondent probably had moments of lucidity in his addiction, but it did not mean he was capable of practicing law. (TR2 110-111). Even the Referee’s contradicts the Bar’s argument, as the Referee stated that Respondent “was a competent and talented attorney *before falling victim to substance abuse*”. ARR at 12. (emphasis added).

Obviously Respondent could not function as an attorney since he failed to appear at a client’s trial, was subject to show cause orders, and could not timely respond to the discovery requests of the Bar in his own case. The fact of the matter is that Respondent did not continue to work effectively as a lawyer and the record is crystal clear on this issue. The evidence presented at trial chronicled the total devastation in Respondent’s personal and professional life brought about as a direct result of his addiction. Dr. Zimmer analogized Respondent’s addiction as a “chemical lobotomy.” TR2 98-99. Attorney Andy Custer testified that Respondent always had to borrow money because he was broke, that his electricity, telephone and cable were turned off and that his car was repossessed. TR3 64-65. Mr. Custer clearly testified that prior to

his suspension and during his initial months in recovery, Respondent could not function as an attorney, could not concentrate, and was unable under his best efforts to move forward. Respondent worked for Mr. Custer shortly after his suspension and was doing tasks completely unrelated to law because he could not function effectively. TR3 66. Ari Mendelson, an attorney testified that he worked Respondent and observed that he was perpetually out of money, was always disorganized, and had the personal appearance of a person who was abusing alcohol and/or drugs. TR1 135. Attorney Bradley Stark, a former law professor used to refer cases and work cases with Respondent. Mr. Stark testified that he noticed a change in Respondent, that things became progressively worse for Respondent as he began to drink and use drugs to excess, and his condition got so bad that there came a time when he no longer trusted Respondent to do legal work and stopped referring cases to him. TR3 117.

In the Shuminer opinion as well as all other cases cited by the Bar in which addiction and rehabilitation did not overcome the presumption of disbarment this Court focused on the fact that the impairment did not diminish the attorney's capacity to function effectively as an attorney. Clearly, Respondent could not function as a human being, no less as an attorney as

evidenced by the Respondent having his utilities turned off and then being evicted from his home, evicted from his office and having his car repossessed.

Another key to determining diminished capacity is whether the attorney's misconduct was "deliberate or knowing".³ Dr. Zimmer's testimony that Respondent had lost his "ability to discern right from wrong" clearly established that Respondent's misconduct was not knowing or deliberate and demonstrated diminished culpability. TR2 99.

The instant case is the reverse of Shuminer, and supports a long term suspension as the appropriate sanction.

POINT V
**The Americans With Disabilities Act Supports A Long Term
Suspension**

The Bar dedicates only one paragraph in its reply brief to this argument. The Bar relies on The Florida Bar v. Clement, 662 So2d 690 (Fla. 1995) for the conclusion that the ADA does not apply because the attorney's condition (bipolar mental condition) did not directly cause the misconduct. As demonstrated by Dr. Zimmer and Dr. Wilmoth's testimony, Respondent's disease was the proximate cause of his misconduct. Therefore the ADA does apply to this case making disbarment a violation of the ADA and requires a long

³ This is the focus of the dissenting opinions in The Florida Bar v. McFall, 2003 WL 22799198 (Fla. 2003), The Florida Bar v. Smith, 866 So.2d 41 (Fla. 2004), and The Florida Bar v Tauler, 775 So.2d 944 (Fla. 2000).

term suspension be imposed.

CONCLUSION

Based upon the foregoing arguments and authority, this Court should reject the Referee's recommendation of disbarment and impose a long-term suspension with any other conditions this Court deems proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing have been sent via U.S. Mail to Thomas D. Hall, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; a true and correct copy of the foregoing was sent via regular U.S. Mail to: William Mulligan, Esq., Bar Counsel, The Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, this ____ day of April 2004.

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COMPLIANCE WITH RULE 9.210(a)(2)

The undersigned hereby certifies that the foregoing Reply Brief complies with Fla.R.App.P. 9.210(a)(2) in that it was prepared using 14 point proportionately spaced Times New Roman font and hereby files a 3.5" computer diskette containing said reply brief, which has been scanned by Norton AntiVirus and found to be free of viruses.

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