

IN THE SUPREME COURT OF FLORIDA

**THE FLORIDA BAR,
SC01-1403, SC01-2737
Complainant.**

Supreme Court Case Nos.

SC02-1592 & SC03-210

v.

LEE HOWARD GROSS,

Respondent.

Florida Bar File Nos.

**1999-71,301(11M), 2000-70,
390(11M), 2001-70,681(11M),
2002-71,060(11M), 2002-70
081(11M) & 2002-70,374(11M)**

_____ /

RESPONDENT'S AMENDED INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, Florida Bar, shall be referred to as AFlorida Bar@ or
Athe Bar@.

The trial transcript will be referred to as ATR1, TR2, TR3@, or TR4 depending on whether reference is made to the first, second, third day of the final hearing or the motion for rehearing, followed by the referenced page number(s). (TR1 at ____). The Amended Report of Referee shall be referred to as (ARR at ____).

ISSUES PRESENTED

1. Did Respondent's addiction rise to a level such that it is sufficient mitigation to overcome the presumption of disbarment for his substantial and egregious acts of misconduct?
2. Should the Amended Report of Referee be disapproved due to the fact it is clearly erroneous as a result of the Referee's failure to make findings of fact and conduct an analysis regarding Respondent's addiction and rehabilitation as mitigation?
3. Does the disbarment of the Respondent violate the Americans with Disabilities Act pursuant to 42 U.S.C. ' 12131 ?
4. Is the Respondent entitled to mitigation that overcomes the presumption of disbarment such that the appropriate discipline is a long term suspension?

STATEMENT OF THE CASE AND FACTS

The Florida Bar filed four complaints against Respondent which were consolidated for the final hearing. The first complaint alleged misappropriation of client funds, trust account violations, and the failure to comply with a subpoena (case number SC01-1403). The second complaint alleged Respondent neglected and failed to communicate with his client (case number SC01-2737). The third complaint alleged that Respondent participated in a mortgage fraud (case number SC02-1592). The fourth complaint alleged that Respondent forged a judge's and client's signature. (case number SC03-210). On May 21, 2002, Respondent was suspended from the practice of law on an emergency basis for misappropriating client funds, committing mortgage fraud and failing to comply with a Florida Bar subpoena.

The final hearing took place May 19, 2003, June 24, 2003 and June 26, 2003. All factual allegations contained in the complaint were admitted by stipulations entered into by the parties. Respondent presented extensive evidence in mitigation based upon his impairment (alcoholism and substance abuse), personal emotional problems, rehabilitation, remorse, good character and good reputation. Eleven witnesses testified for Respondent, and two witnesses

testified for the Bar. The testimony of Respondent-s witnesses was not challenged, impeached and was uncontested. The following is a summary of their testimony:

1. Myer Cohen is the Executive Director of Florida Lawyers Assistance, Inc. (hereinafter AFLA®). FLA is an organization created by The Florida Bar and the Supreme Court in 1986 to help Florida lawyers, law students and judges who may have impairment problems due to alcohol or drug abuse or due to psychological problems. TR1 105. Mr. Cohen testified that Respondent voluntarily entered into a rehabilitation contract with FLA on May 20, 2002. TR1 112. The contract incorporates a rehabilitation program that includes attendance at 12-step meetings, Alcoholics Anonymous (AA) or Narcotics Anonymous (NA), attorney support group meetings, random urinalysis testing and meetings with an attorney/monitor who oversees compliance with the contract terms. TR1 108. Mr. Cohen testified that after reviewing Respondent-s FLA file, Respondent has complied with the contract and has, **AY** come to an understanding of what chemical dependency is and how it has affected his life and his performance and his practice and I think he is taking the steps that are necessary to address it. I don't know how much you can tell after a year, but he certainly has been doing everything that he-s supposed to for that year.® TR1 113-114. Mr. Cohen

testified that 80% to 95% of the attorneys that join FLA enjoy sustained recovery and become not only better lawyers than they were before but better than many lawyers in the general population of lawyers as a whole. TR1 116-117. Mr. Cohen stated that, 88 % of the FLA participants that comply with the contract don't have any problems during the term that they are under contract. TR1 117.

Mr. Cohen testified that Respondent is doing everything that has been asked and required of him, and is well on his way with his recovery.

2. Evan Zimmer, M.D. is a psychiatrist, board certified by the American Board of Psychiatry and Neurology and is an addictionologist. Dr. Zimmer is also the Director of Phoenix Community Mental Health Center and the Director of Psychiatric Services at St. Luke's Addiction Treatment Center in Miami, Florida. Dr. Zimmer evaluated Respondent April 28, 2003 and testified that he diagnosed Respondent as suffering from dysthymia, a chronic mild to moderate depression and chemical dependency, which is now in remission. TR2 42, 63. Dr. Zimmer directly linked Respondent's misconduct that resulted in his bar complaints with the alcohol and drugs he was consuming on a daily basis. TR2 60. Dr. Zimmer analogized Respondent's case of alcohol and drug abuse to a chemical lobotomy and that as result of his alcohol and drug abuse Respondent lost his ability to discern right from wrong. TR2 98-99. Dr. Zimmer recommended inpatient treatment, but concluded that if Respondent attends his AA meetings

regularly, complies with his FLA contract, maintains a monitor and sponsor and continues working the twelve steps, then his chances of staying sober are excellent. TR2 117.

3. Dr. Janice Wilmoth is a psychologist with a doctorate degree in psychology and neuropsychology, and is a State and Internationally certified addiction professional. Dr. Wilmoth has been a clinical and executive director of several treatment facilities and has lectured extensively on the topic of addiction. Dr. Wilmoth is the treating group therapist for Respondent through FLA. Dr. Wilmoth has been working with Respondent in group therapy on a weekly basis since September of 2002 and has diagnosed Respondent as having poly-substance dependence and a depression disorder. TR2 135. Dr. Wilmoth, like Dr. Zimmer, has found a direct correlation between Respondent's alcoholism and drug abuse and his misconduct. TR2 134. Dr. Wilmoth indicated that Respondent is no longer a candidate for inpatient treatment, and concluded that people who remain alcohol and drug free for a year have a 90 percent chance of staying sober.

4. Glen Lurie is a registered architect and personal friend of Respondent for 15 years. Mr. Lurie testified that he would get together with Respondent socially for football games and barbeques. Mr. Lurie had personal knowledge concerning how Respondent's alcohol and drug use began to escalate in 1995-1997. Mr. Lurie testified that Respondent would come over his house at 9:00 a.m. already

drunk and having not been to bed. Mr. Lurie testified that in May 2002, Respondent acknowledged that he had a problem, sought counseling, joined AA and stopped drinking and using drugs. TR3 59-60. Mr. Lurie is convinced of Respondent's recovery and would absolutely trust him in handling his affairs. TR3 60.

5. Andy Custer, Esq. is an attorney, and testified as to how Respondent acted during his alcohol and drug use and that Respondent always had to borrow money because he was broke. Mr. Custer had first hand knowledge that Respondent's electricity, telephone and cable were turned off, and that his car was repossessed. TR 64-65. Mr. Custer, a previous employer of Respondent, testified that prior to his suspension and during his initial months in recovery, Respondent could not function as an attorney. Mr. Custer testified that Respondent could not concentrate and no matter how hard he worked, he was just not there. He was easily distracted. He was not able under his best efforts to move forward. So I consequently had him doing things completely unrelated to law. TR3 66. Mr. Custer testified that he would not hesitate hiring Respondent to work for him if he was the same person he used to be before falling victim to his addictions. TR3 66.

6. Jorge Varela is Respondent's AA sponsor. Mr. Varela has been a member of AA for more than five years and met Respondent in the Coral Room (an AA

meeting room in Coral Gables, Florida). TR1 142. Mr. Varela is helping Respondent work the twelve steps of AA and they are currently working on the ninth step. TR1 144. When Mr. Varela first met Respondent his impression was that Respondent looked like Pigpen, a character out of the Peanuts comic strip, with a cloud over him. AHe looked pretty bad@. TR1 142. Mr. Varela has seen a dramatic change in Respondent since they first met. Respondent Asmiles nowYHe feels a bit more peace and serenity@. TR1 145-146. Mr. Varela testified that Respondent is now working on making amends because he knows that he needs those amends for him to hopefully not drink again.@

7. Benjamin Usher, Esq. is Respondent's FLA Monitor. Mr. Usher is a former Federal Administrative Judge, former attorney with the United States Department of Labor, and former general counsel for the presidential committee on the Occupational Safety and Health Review Commission. TR1 153-154. Mr. Usher is a recovering alcoholic and has 21 years of continuous sobriety. He met Respondent in June of 2002 and became his FLA Monitor. As an FLA Monitor he meets with Respondent at least once a week and has to make sure that Respondent does not use alcohol or drugs, that he attends at least one lawyer support group meeting a week and at least three AA or NA meetings a week and assures that he complies with his FLA contract. Mr. Usher files monthly monitoring reports with FLA. Mr. Usher testified that as Respondent's FLA

Monitor, he remains in contact with him on a steady basis, and, Respondent is in compliance with his FLA Rehabilitation Contract and has been doing more than everything asked of him in his program of recovery. TR1 156.

8. Ari Mendelson, Esq., is an attorney who did work for Respondent in his office. Mr. Mendelson met Respondent in August 1999 and started doing legal work for Respondent such as covering hearings, depositions and performing other lawyerly duties. TR1 129. Mr. Mendelson had a strong suspicion that Respondent was abusing alcohol and drugs when he discovered liquor bottles in Respondent's office. Mr. Mendelson testified that Respondent was perpetually out of money, was always disorganized, and demonstrated the personal appearance of a person who was abusing alcohol and/or drugs. TR1 135.

9. Robin Jung, Esq. is a former law partner of Respondent who is now an attorney with the United States Department of Commerce. Mr. Jung became partners with Respondent in the early 90-s because Respondent was a very good lawyer, confident, aggressive, hard working and a model example of someone who zealously represented his clients. TR1 149. Mr. Jung described Respondent as someone who works hard and plays hard and drank more than most people.

10. Russell Spatz, Esq. is a former Division Chief for the State Attorney's Office, and former law professor at St. Thomas University School of Law and

currently is in private practice. Mr. Spatz has been a member of AA for over 22 years and has seen Respondent at the Coral Room almost every Saturday and has heard Respondent share his testimony. TR3 11. Mr. Spatz testified that Respondent is a serious member of AA, that he values his membership and that he wants to stay sober more than anything else, that he wants to get his life on track and is sincere in his desire. TR3

11. Bradley Stark, Esq. is an attorney in private practice and former professor of Respondent while at the University of Miami School of Law. Mr. Stark is a sole practitioner with a varied practice and has done a great deal of sophisticated criminal cases, as well as securities regulation, and disciplinary work. Mr. Stark remembers Respondent as an excellent student and a top-notch lawyer who he had referred cases to in the past. TR3 114-115, 117. Mr. Stark testified that he noticed a change in Respondent and that things became progressively worse for Respondent as he began to drink and use drugs to excess. Respondent's condition got so bad that there came a time when he no longer referred cases to Respondent. TR3 117. Mr. Stark testified that he has seen Respondent bring the same determination he brought to his cases before his addiction to the process of recovery. TR1 122. Mr. Stark has observed the evolution in Respondent to the point where the most important thing for him now is his sobriety. Mr. Stark testified he watched the evolution of Respondent and that he has seen

Respondent Aspiral down in his life and has now seen him climb back and it is very real.@TR1 124.

After the hearing concluded Florida Bar requested the Referee recommend disbarment and the Respondent requested the Referee recommend a long term suspension.

On August 1, 2003 the Referee issued a report, which found Respondent guilty of the charged violations and recommended a four-year disbarment. Both parties filed motions for rehearing which were heard September 4, 2003. An Amended Report of Referee issued, which changed the recommended discipline from a four-year disbarment to a five-year disbarment *nunc pro tunc* to May 21, 2002, the date of Respondent's emergency suspension.

The Referee's reports make no reference to the testimony presented at the hearing except for one sentence on Page 13 of the Amended Report which mentions the testimony of Dr. Zimmer with respect to his recommendation that Respondent undergo inpatient substance abuse treatment for three months to a year or longer. ARR at 13. The reports fail to mention or analyze any of the testimony of Respondent's witnesses. There are no findings of fact related to Respondent's alcohol and drug abuse or his recovery, other than it states that Respondent's misconduct was largely the product of his alcohol and drug

addiction. ARR at 12. There are no findings as to the complete and total devastation Respondent experienced in his life. The original and amended reports do not even acknowledge that Respondent raised the issue of addiction as a mitigating factor despite the fact that was the primary testimony during three days of trial. It was as if Respondent failed to produce any witnesses or present a defense at his hearing.

SUMMARY OF ARGUMENT

Respondent did not wake up one morning and decide to ruin his career and his life. The three days of testimony dealing almost exclusively with addiction and rehabilitation, which was unchallenged, uncontroverted and unopposed established that Respondent was a suffering alcoholic and drug addict, and that his addiction consumed and destroyed everything of value in his life including his ability to function as an attorney. Respondent lost his income, his home, his car, his office, his business, his license to practice law, and his family. Respondent was destitute and had become financially, spiritually, emotionally and morally bankrupt as a direct and proximate result of his addiction. Respondent's alcoholism and substance abuse addiction rose to a level that he had a diminished capacity at the time he committed substantial and egregious acts of misconduct. Respondent entered the recovery process, which includes but is not limited to his voluntarily joining Alcoholics Anonymous, working a twelve step program, voluntarily signing a contract with Florida Lawyers Assistance, Inc. and participating in group therapy. If addiction and rehabilitation can be a basis for mitigation so as to overcome the presumption of disbarment, then there can be no case more compelling than the instant case.

The Referee's recommendation of disbarment is not supported by clear and

convincing evidence and should be disapproved by this Honorable Court.

Respondent's disbarment violates the Americans with Disabilities Act pursuant to 42 U.S.C. ' 12131.

The appropriate discipline for Respondent is a 3 year suspension.

ARGUMENT

POINT I

RESPONDENT-S ADDICTION AND REHABILITATION CONSTITUTE SUFFICIENT MITIGATION TO OVERCOME THE PRESUMPTION OF DISBARMENT FOR HIS SUBSTANTIAL AND EGREGIOUS MISCONDUCT

A. Understanding the Addict and Addiction

It is virtually impossible to understand the mind of an alcoholic and an addict until one has walked in his shoes. Only then can there be an appreciation for what the alcoholic and addict experiences. The concept of addiction is foreign to most reasonable people although most families have been touched by this disease. The difficulty in understanding and analyzing the concept of addiction is that it is an illogical disease. It is extremely complex to have a logical analysis of an illogical problem. For example, a person who suffers from addiction to drugs and alcohol does not wake up one morning and decide that this is the day I am going to use alcohol or drugs to the point that I may lose my wife, children, financial stability, standing in the community, ruin my health, destroy my relationships and wreck my career. The judge who became intoxicated and passed out in the hall of a hotel half naked during a judicial conference, I am sure did not decide that morning that she was going to take her clothes off in public, humiliate herself in front of her colleagues and bring shame to her reputation and profession.

Recognizing the difficulty in conveying the concept of addiction and the devastation that it brings, the Court may better understand it if it is compared to using tobacco. No rational person would smoke tobacco today given the tremendous amount of information available regarding the health hazards associated with smoking, yet people continue to smoke because they are addicted and cannot stop. The same concept applies to the individual addicted to alcohol and drugs. He or she is driven by a compulsion that puts them on a path of self destruction which defies all logic.

The book of Alcoholics Anonymous in the chapter 11 (*A Vision for You*) describes this struggle as follows:

For most normal folks, drinking means conviviality, companionship and colorful imagination. It means release from care, boredom and worry. It is joyous intimacy with friends and a feeling that life is good. But not so for us in those last days of heavy drinking. The old pleasures were gone. They were but memories. Never could we recapture the great moments of the past. There was an insistent yearning to enjoy life as we once did and a heartbreaking obsession that some new miracle of control would enable us to do it. There was always one more attempt and one more failure.

The less people tolerated us, the more we withdrew from society, from life itself. As we became subjects of King Alcohol, shivering denizens of his mad realm, the chilling vapor that is loneliness settled down. It thickened, ever becoming blacker. Some of us sought out sordid places, hoping to find understanding companionship and approval. Momentarily we did then would come oblivion and the awful awakening to face the hideous Four

Horsemen C Terror, Bewilderment, Frustration, Despair. Unhappy drinkers who read this page will understand!¹

We are in effect asking the justices of this Court to try and walk in Respondent's shoes when judging him. Many times a better understanding comes from personal anecdotes. In his article *In the Solution*, Robert W. Gwin, Jr., writes a vivid description of his struggle with addiction:

It was my professional ambition to become successful and to be respected by my peers. But there was a hole in my soul that no amount of alcohol could fill. My thoughts remind me of Peggy Lee's song, *If That's All There Is?* Constant attempts to fill the hole in my soul with alcohol never seemed to bring real peace and serenity. And, as my addiction progressed, the results were disastrous: loss of family and friends, severe financial problems, being fired as a partner in a respected law firm, and finally the loss of my law license due to willful neglect of my clients' legal problems. The loss of control over my drinking was so complete that alcohol controlled every aspect of my lifestyle. Alcohol became wholly consuming, causing a mental and emotional paralysis. I became unable to make even simple decisions and follow through with appropriate actions.²

This is exactly the plight of the alcoholic and addict which has been proven in this case.

B. Alcoholism and Substance Abuse is a Disease.

¹ Alcoholics Anonymous at 151.

² Robert W. Gwin, Jr., *In the Solution*, 60 Ala.Law.Rev. 140 March 2001.

Alcoholism and chemical dependency are prevalent illnesses in society and the legal community in particular. A higher percentage of attorneys are afflicted with addictive diseases than the general population.³ In a recent study it was pointed out that whereas 8-10% of the general population have substance abuse issues, for lawyers it's 15-18%. One study estimates that 60% of ethical violations resulting in bar discipline proceedings involve substance abuse.⁴ When this issue is viewed on a national basis the numbers are staggering. According to the American Bar Association's (ABA) Commission on Lawyer Assistance Programs, over 56,000 ABA members will have a lifetime alcohol dependency disorder; over 30,000 will have a lifetime drug disorder (other than alcoholism); and over 100,000 will have a lifetime substance abuse disorder.⁵ The National Institutes of Health projects that as of 1995 there were more than 11 million alcoholics and more than 7 million alcohol abusers who were at least 18 years old in the United States.⁶

Addiction is a chronic and progressive illness which if left untreated is fatal.⁷ An individual afflicted by addiction experiences a series of increasingly severe stages of the disease causing problems that affect physical and mental health, employment and

³ Patricia Sue Heil, *Tending the Bar in Texas; Alcoholism as a Mitigating Factor in Attorney Discipline*, 24 St. Mary L. J., 1263, 1993.

⁴ Christine M. Durham, Views from the Bench: *We Are All In This Together*, 16-SEP UTBJ 14, Sept. 2003.

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Interview with Ken Hagreen, *Lawyers and Substance Abuse*, 36-JUN Trial 76, June 2000

⁶ *Id.*

⁷ Heil at 1273

relationships, and causes the impaired person to behave in completely unacceptable ways.⁸

⁸ Id.

The abuse of drugs varies according to levels of involvement as the disease progresses.

Robert H. Coombs, Ph.D., a professor of biobehavioral sciences at the UCLA School of Medicine has developed a 5 prong model of classification for abusers and addicts, which illustrates the progressive nature of the disease of addiction.⁹

⁹ Robert Coombs, Ph.D., *Addiction's Defining Nature*, 64 Tex. B.J. 166, February 2001.

At one end of the continuum is the Abstainer (Type 1) who never uses alcohol. This group makes up about one-third of the general population. The Drinker/User (Type 2) is a social drinker/user. Type 2 Drinker/User constitutes the majority of the population and occasionally uses alcohol and drugs in a social setting and has no trouble restraining or discontinuing their consumption and rarely experience significant personal problems either at home or at work. On the other end of the continuum is the physically but not psychologically dependant addicts (Type 4). This is the frequent user of alcohol and drugs. The body's internal chemistry adapts to the ingestion of substances, inducing physical dependence. When there is an abrupt interruption in use, the body goes into withdrawal symptoms, but after enduring withdrawal, the Type 4 user who is not psychologically dependent, can walk away from chemical dependence and never look back. Finally we have the Physically and Psychologically Dependent Addicts (Type 5) who depend on the drugs=psychoactive effects to cope with life. When unpleasant and disruptive events accelerate, rather than discontinue the drug as Type 4 addicts do, they increase the dosage, switch to other drugs, or try to substitute various substances. Instead of blaming drugs for their spiraling decline, they regard them as the solution to all their problems. Type 5 users continue to medicate their feelings even as their lives deteriorate.¹⁰ Untreated, it eventually becomes debilitating and often fatal; it gets worse, never better.¹¹ The Type 5 addict completely loses control of his life. His

¹⁰ Id.

¹¹ Id.

behavior is driven by the inescapable compulsion to get the next fix. Values that were once a major part of their lives such as family, career, self respect, and reputation become insignificant. The addict's brain changes so that the addict craves the drug of choice and then compulsively seeks that drug.¹² Addiction involves an illogical, irrational, irresponsible, continued, repeated use of a substance as it destroys an individual's life.¹³ The power of an addiction can be gauged by what the addict will forfeit for the drug. Psychologically dependent addicts value drugs above everything else. The drug of choice B alcohol, cocaine, narcotics, or other substances comes before family, personal health, personal finances, and sometimes even food, shelter and freedom from imprisonment. This begs the question, how can an intelligent, reasonable person reach such a point of destructive almost suicidal behavior. The answer is that once the addict becomes dependent physically and psychologically he no longer has a choice and is no longer reasonable. At that point the person has lost his free will. The psychological strength of the addict's habit distorts his formally rational responses to life situations. He loathes himself for his outrageous behaviors, but the bizarre logic of an addictive mind rules out rational decisions.¹⁴ The alcoholic/addict ends up losing his moral compass in a struggle of broken promises and commitments. C. Respondent was an Alcoholic and Addict.

¹² Kent C. Berridge and Terry E. Robinson, *The Mind of an Addicted Brain: Neural Sensitization of Wanting versus Liking*, *Current Directions in Psychological Science* 4(3): 71-76, 1995.

¹³ Harold E. Smith, Douglas Talbot and Martha A. Morrison, *Chemical Abuse and Dependence: An Occupational Hazard for healthy professionals*, 7(3) *Topics in Emergency Medicine*, 69-78, 1985.

¹⁴ Coombs at 171.

Respondent was a Type 5 addict. Dr. Zimmer testified that Respondent fit the profile of an addict who lost control. TR2 44. Dr. Zimmer testified that Respondent's alcohol use increased over time until he was drinking on a daily basis plus bingeing on larger amounts of alcohol in conjunction with use of cocaine, which is not uncommon. TR2 44. According to Dr. Zimmer, Respondent underwent a chemical lobotomy. TR2 98. Based upon the uncontested testimony of Evan Zimmer, M.D., which was corroborated by Dr. Janice Wilmoth, alcohol and drug abuse proximately caused Respondent's acts of misconduct, and but for Respondent's alcohol and drug addiction the actions which are the subject matter of The Florida Bar's complaints would not have taken place. TR2 60, 134. Respondent's ability to distinguish right from wrong had become impaired based upon his addiction. TR2 134

The testimony presented at the final hearing by Dr. Zimmer and Dr. Wilmoth clearly established that the misconduct of the Respondent occurred during the same time period his alcoholism and addiction progressed to the point that it did. Dr. Zimmer testified that, as the disease gets worse the behavior of the person becomes more impulsive, judgment and insight fail more often, and the consequences of their use begins to accumulate, and becomes greater as time goes on such that the individual can not recognize right from wrong. TR2 97-99. Respondent's misconduct was therefore not intentional or willful. He was suffering from an illness that diminished his capacity to know right from wrong. TR2 60, 134. Dr. Zimmer's testimony clearly demonstrated that the violations committed

by Respondent were not individual isolated incidents that should be looked at separately, but rather it was a single catastrophic episode of sustained aberrant behavior. TR 60-61.

D. The Recovering Alcoholic/Addict.

Despite the gloomy picture addiction paints, there is hope. Even though addiction is a disease that has no cure and if left untreated can be fatal, it can be arrested and there is hope for those who come into recovery. The treatment of chemically dependent professionals has proven to be very successful. All properly managed treatment programs, such as Florida Lawyers Assistance, Inc. (FLA), have recovery rates, which are phenomenally higher than those seen in the general population. The reported statistical recovery rate is approximately 80 percent.¹⁵ TR1 116-118.

FLA's treatment and recovery program includes monitoring, random drug testing, treatment and attendance at AA meetings all of which gives the necessary assurances to protect the public trust and confidence placed in attorneys. This system protects the public. FLA's organization of support groups for lawyers, judges and law students is based upon the proven principles of AA. The long history of AA provides a great deal of hope for those individuals suffering from addiction. The program of AA is the cornerstone to all other twelve step recovery programs, and they apply virtually the same principles. Thus alcoholics and drug addicts are one and the same as to the effect of the substance on the individual. In the preface to the book of Alcoholics Anonymous it states in the ADoctor's Opinion@ the following:

¹⁵ Roger A. Goetz at 13.

Men and women drink essentially because they like the effect produced by alcohol. The sensation is so elusive that, while they admit it is injurious, they cannot after a time differentiate the true from the false. To them, their alcoholic life seems the only normal one. They are restless, irritable and discontented, unless they can again experience the sense of ease and comfort which comes at once by taking a few drinks. After they have succumbed to the desire again, as so many do, and the phenomenon of craving develops, they pass through the well-known stages of a spree, emerging remorseful, with a firm resolution not to drink again. This is repeated over and over, and unless this person can experience an entire psychic change there is very little hope of his recovery.

On the other hand, and strange as this may seem to those who do not understand, once a psychic change has occurred, the very same person who seemed doomed, who had so many problems he despaired of ever solving them, suddenly finds himself easily able to control his desire, the only effort necessary being that required to follow a few simple rules.¹⁶

Respondent has embraced recovery as is evidenced by the uncontroverted testimony of Dr. Zimmer, Dr. Wilmoth, Jorge Varela, Bradley Stark, Glen Lurie and Respondent.¹⁷ Respondent has joined Alcoholics Anonymous, continues working a twelve step program of recovery, signed a rehabilitation contract with FLA and regularly attends and participates in group therapy. Mr. Stark personally witnessed Respondent come full circle and testified that he watched the evolution of Respondent to the point where the primary thing to him today is his sobriety, and that he has seen Respondent spiral down in his life and has now seen him climb back and it is very real. @TR1 124.

¹⁶ Alcoholics Anonymous, xxvii (3rd Ed. 1976).

¹⁷ Respondent was clean and sober for just over a year at the time of his hearing. To date, Respondent has

E. Addiction and Disciplinary Proceedings

It has been estimated by FLA that roughly 15 percent of the members of The Florida Bar will develop a problem with alcohol and/or drugs at some time during their career. This translates to almost 10,000 lawyers being at risk of developing an addictive illness. *See, Impaired Attorneys and the Disciplinary System*, 73-DEC FLBJ 14 December 1999. There are two broad and opposing views of addiction. The first is that addiction is a moral failing, which should act as a bar to admission to the legal profession. Its proponents are skeptical about addiction being a true disease and feel that treatment is futile and recovery is an unstable condition. Anderson, McCrackin & Reddy, *Addictive Illness in the Legal Profession: Bar Examiners Dilemma*, *The Professional Lawyer*, pg 16 (May 1996). An alternative view stresses the need for understanding the unique nature of addictive illnesses, especially the features of compulsivity and denial. *Id.* at 16. Once these are understood and accepted, policies and procedures can be developed that work positively for the profession and the public. *Id.* at 16.

The disease of addiction, whether it is alcohol or drugs, is chronic, progressive and undermines the judgment of the individual user. Dependence on alcohol and other mood altering substances brings about personality change and erratic behavior. *Id.* at 18.

Today, addiction is generally viewed as a disease and recovery is widely seen as a mitigating factor in disciplinary proceedings. Given a proper showing of rehabilitation and

remained clean and sober for 1 year and 9 months without relapse.

restitution, addiction will be accepted as evidence of mitigation of improper behavior. Raymond P. O'Keefe, *The Cocaine Addicted Lawyer and the Disciplinary System*, 5 St. Thomas L.Rev. 217, 220 (1992). The empirical evidence is out there which demonstrates the amazing statistics for addicted attorneys and judges who come in from the cold and enter recovery.

F. Respondent's Alcoholism, Addiction and Rehabilitation Warrants Mitigation Overcoming the Presumption of Disbarment.

Addiction and rehabilitation as it relates to mitigation either exists or it doesn't. There is no middle ground. If in fact this Court finds that addiction and the level of addiction along with rehabilitation is significant then mitigation should require a result other than disbarment. This Court through the Florida Standard for Imposing Lawyer Sanctions has clearly established that addiction and subsequent rehabilitation will be considered in mitigation. This Court has recognized the problem of addiction and has looked favorably on a lawyer's efforts at rehabilitation. See Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987); Florida Bar v. Hochman, 815 So.2d 624 (Fla. 2002).

In order for addiction to serve as a mitigating factor, the addiction must have impaired the attorney's ability to practice law to such an extent that it outweighs the attorney's misconduct. Florida Bar v. Shuminer, 567 So.2d 430, 431-432 (Fla. 1990); Florida Bar v. Knowles, 500 So.2d 140 (Fla. 1986). In other words, the attorney must show evidence of his/her lack of culpability due to mental or substance abuse, which

impaired a lawyer's judgment. Florida Bar v. Graham, 605 So.2d 53 (Fla. 1992). Once addiction reaches this level, the number or severity of offenses should not matter. For example, if a person has been declared legally incompetent, that person can not be held responsible for any decisions that person makes. This concept should apply to the addicted attorney who commits numerous or serious acts of misconduct due to the fact that his addiction has rendered him incompetent.

The problem is that there is no bright line rule or guidance as to what evidence needs to be presented to demonstrate addiction that rises to a level such that it rebuts the presumption of disbarment. Respondent presented three days of testimony dealing almost exclusively with addiction. There could not be a more compelling case as to addiction and the devastation that it leaves in its wake than the facts of this case. Respondent suffered the most profound consequences of addiction, short of death.

The Florida Bar consistently cites Florida Bar v. Shuminer, 567 So.2d 430 (Fla. 1990) in addiction mitigation cases for the proposition that impairment will not excuse the offense of misappropriating client funds. In fact, Shuminer does not stand for that proposition at all, but rather the opposite. In Shuminer, the attorney settled claims for clients without their consent, used the funds for his personal endeavors, lied to clients concerning cases being in settlement negotiations, deposited trust funds into his personal account and failed to satisfy a doctor's lien from a settlement. The attorney presented a mitigation defense, was diagnosed with an alcohol and drug abuse problem during the time period the acts of

misconduct occurred, went into treatment, became a member of Alcoholics Anonymous, and complied with an FLA contract. The attorney further had no prior disciplinary complaints, had a repayment plan for victims, cooperated with the Bar, had good reputation and moral character, was sober for a year and showed remorse for his misconduct. Nevertheless, this Court held that disbarment was the appropriate sanction due to the fact that the attorney continued to work and his income did not suffer during the height of his addiction. A[H]e used the funds from misconduct not to support or conceal his addictions, but to purchase a luxury automobile. Id. at 432. He was still functioning and the impairment did not disrupt his life. Therefore this Court ruled that the attorney's addiction failed to rise to a sufficient level of impairment to outweigh the seriousness of his offenses. Id. at 432. Conversely, and 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, his addiction would have diminished his culpability entitling him to mitigation that would overcome the presumption of disbarment. Therefore, when juxtaposed to the instant case, Shuminer cannot possibly be used for the proposition that disbarment is appropriate in this case.

The instant case is the reverse of Shuminer. Unlike the attorney in Shuminer, Respondent lost absolutely everything. Respondent's misconduct was not to further a lavish lifestyle but rather to conceal and further his addiction. Respondent was leading a life which was morally, financially, and spiritually bankrupt. Respondent did not use his

client's money to purchase a new Jaguar, in fact Respondent's car (Toyota Corolla) was repossessed. Respondent was described as perpetually "broke". TR1 135. As Mr. Varela so aptly described Respondent, he was "like Pigpen", walking around in a cloud. TR1 142. If ever there was a situation where addiction totally destroyed an individual it is this one. All that was missing as a result of the addiction was jail or death. Respondent's case as to addiction and its effect on his life was complete and overwhelming. What more disruption could come to one's life after he has lost his home, his car, his utilities, his office, his job, his income, and his loved ones?

In Knowles this Court disbarred an attorney for the misuse of client funds despite his argument that his alcoholism should have mitigated his punishment. This Court found that his alcoholism did not rise to a level of mitigation since Knowles continued to work and did not suffer any loss of income. Respondent's case is distinguishable since he could not function as an attorney (TR3 66) and not only did Respondent lose his income, he lost everything. Therefore, in this case, Shuminer and Knowles support mitigation overcoming the presumption of disbarment.

In Florida Bar v. Shanzer, 572 So.2d 1382 (Fla. 1991) this Court disbarred an attorney for misuse of client funds despite mitigating evidence. Id. at 1383. The Court stated that it recognized that "mental problems as well as alcohol and drug problems may impair judgment so as to diminish culpability." Id. at 1384. In Florida Bar v. Travis, 765 So.2d 689 (Fla. 2000) this Court disbarred an attorney for misuse of client funds. The Court

citing Shanzer again acknowledged the presumption of disbarment could be rebutted to reduce the presumed discipline. Id. at 691. Therefore, both Shanzer and Travis recognize that alcohol and drug problems may impair judgment so as to diminish culpability. In the instant case, Respondent suffered severe impairment such that his culpability was diminished. Respondent's ability to distinguish right from wrong had become impaired due to his addiction. TR2 60, TR2 134. This evidence was not refuted, contradicted or impeached. Thus, in the instant case, Shanzer, Travis, Shuminer and Knowles all support that the presumption of disbarment should be rebutted and that Respondent's punishment be mitigated due to the fact that Respondent's impairment diminished his culpability as evidenced by his losing absolutely everything short of his health and life.

The facts of this case do not justify disbarment in light of substantial mitigation by way of addiction and rehabilitation that was presented. The Referee appears to have based his decision in favor of disbarment as the appropriate sanction due to the number of incidents of misconduct and the severity of the misconduct, without properly addressing the significant mitigation presented. The Referee stated in his Amended Report that, **A**The range of misconduct and number of incidents are simply too broad to permit the suspension recommended by the Respondent.**@**ARR at 13. This reasoning appears to be based on some type of imaginary line that once it is crossed, no amount of mitigation can save the attorney from the extreme penalty of disbarment. The problem with this approach is that no such line of demarcation exists anywhere in the case law, the Rules

Regulating The Florida Bar, or in the Standard for Imposing Lawyer Sanctions. How then can an appropriate discipline be fashioned in the future for similar cases if all that there is to rely on is an imaginary Acut off point@beyond which no attorney will be spared the extreme penalty of disbarment? Should an attorney who has stolen client funds and proved substantial mitigation by way of addiction and rehabilitation, be suspended if he misappropriated \$1,000 of client funds and disbarred if he misappropriated \$100,000.? Where do we draw the line? Should it be drawn at \$50,000, \$75,000 or \$99,000? This Court addressed this issue in Florida Bar v. McFall, 2003, WL 22799198 (Fla. 2003). In McFall the attorney misappropriated escrow funds. The Referee considered the small amount of the misappropriated funds as a mitigating factor. Id. This Court rejected that notion and stated in footnote four of the opinion that:

This Court has reiterated many times that misappropriation is one of the most serious violations an attorney can commit. It is irrelevant whether the misappropriation involved a large or small amount of funds, because it is the act of misappropriation that constitutes the misconduct. The Rules Regulating Florida Bar does not condition a rule violation for misappropriation based on the amount of funds involved. See R. Regulating Fla. Bar 4-1.15, 4-8.4, 5-1.1(a). Accordingly, we disapprove the referee's findings of this mitigating factor. Id.

Following this reasoning, it could be concluded that a Alarge amount of misappropriated funds@cannot be considered as an aggravating factor. Misappropriation of client funds is what it is. It is a violation that carries the presumption of disbarment, but can be rebutted by substantial mitigation as a result of addiction and rehabilitation.

Addiction either exists as mitigation or it does not. Respectfully, this Court should not engage in a numerical analysis of the number of incidents of misconduct or the amount of money misappropriated in order to determine whether mitigation is going to be considered or not, or whether addiction will rise to the level of rebutting the presumption of disbarment. Once the presumption has been overcome, a long-term suspension should be the appropriate discipline.

Respondent is very aware of the recent dissenting opinions in McFall, supra; Florida Bar v. Tauler, 775 So.2d 944 (Fla. 2000), and just recently in Florida Bar v. Smith, 2004 WL 112941 (Fla. 2004) which made it clear that they would disbar all attorneys who engage in deliberate or knowing misappropriation of client funds regardless of mitigation. The dissent's view continues to be that if there is more than an isolated incident of misappropriation of client funds and a lack of strong mitigation, the appropriate sanction is disbarment. Id. at 9. In McFall the dissenting opinion concluded that, mitigation cannot avoid the crucial fact that he intentionally took money for his personal use from funds he held in trust for his client. Id. 5-6. This view fails to consider the disease model of addiction or the fact that the Type 5 addict has no control of his actions and therefore it cannot be concluded that his actions were deliberate, knowing or intentional.

The law must be clear that when the elements of addiction and rehabilitation are present, the penalty has to be something less than disbarment. To hold otherwise would

emasculate the enlightened view this Court has demonstrated in the past. See Florida Bar v. Rosen, 495 So.2d 180 (Fla. 1986); Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990); Florida Bar v. Jahn, 509 So. 2d 285 (Fla. 1987); Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982). This Court's view of addiction has taken us out of the stone age and has substituted the draconian approach to lawyer discipline with a compassionate view which values human life. This view recognizes that an attorney or judge who is in recovery can make a valuable contribution to the legal community, the Bar and society. Therefore, Respondent's addiction and rehabilitation should constitute mitigation overcoming the presumption of disbarment.

POINT II
THE REFEREE'S FAILURE TO MAKE FINDINGS OF FACT AND CONDUCT AN ANALYSIS REGARDING RESPONDENT'S ADDICTION AND REHABILITATION IS CLEARLY ERRONEOUS

The Referee's Amended Report fails to meet the requirements for a report of referee as set forth in Rule 3-7.6(k) of the Rules Regulating The Florida Bar and should be disapproved. Specifically, the Amended Referee's Report lacks findings of fact and law to support the Referee's recommendation of disbarment. The report failed to mention, discuss or analyze any aspect of Respondent's impairment, addiction and rehabilitation which was presented as mitigation to the presumed discipline of disbarment. The report was totally lacking in findings of fact regarding the level of addiction, rehabilitation and its relationship to mitigation.

An examination of the Referee's Amended Report reveals the following: (a) Pages 2-8 recite the factual allegations which were already stipulated to by the parties; (b) Pages 8-11 states that the Respondent is guilty of the violations. The Referee lists all of the rule violations, but does not undertake any analysis; and (c) Pages 11 - 14 barely addresses the issue of discipline. Three days of testimony and almost an entire trial concerning addiction and rehabilitation was reduced to a few paragraphs, which fail to analyze the issue of mitigation.

The Referee's Amended Report does not provide any legal basis to justify the recommended discipline. The Referee prefaces his recommendation by stating:

A recommendation for the appropriate discipline in this case is not an easy task. Both litigants find comfort in the citation and argument of certain of the many decisions of the Florida Supreme Court which have dealt with alcohol and drug addicted lawyers. This case is not exactly like any of them, but more closely resembles some of the fact situations relied on by The Florida Bar. @ ARR 11.

The Referee does not mention or distinguish the cases he refers to and relied upon in his report in support of disbarment. How can this Court review the cases relied upon by the Referee in support of disbarment if it does not know which cases he relied upon ? This alone should be a basis for disapproval of the Amended Referee's Report.

In paragraph C on page 12 the Referee states **A**Y accepts Respondent's argument that his misconduct was largely the product of alcohol and drug addiction. He was a competent

and talented attorney before falling victim to substance abuse. Respondent is remorseful. Respondent signed a contract with Florida Lawyers Assistance, Inc. and engaged in a course of alcohol treatment. ARR 12. The Referee fails to apply these findings to the discipline imposed. Specifically, the Referee failed to analyze why these factors should or should not constitute mitigation.

In Paragraph D on page 12, the Referee recommends disbarment and states that he has balanced aggravating factors, taking into consideration the mitigating factors argued by the Respondent, in light of the case law presented by the parties. (ARR 12). The Referee fails to identify which mitigating and aggravating factors he considered and the specific case law he relied upon. How can the Respondent challenge, or for that matter even understand, the Referee's decision when it is not clear what aggravating or mitigating factors were considered, and whether or not the Referee properly considered such factors as aggravating or mitigating factors. For that matter, how can this Court know if the factors considered were factors that could properly be considered as aggravating or mitigating factors? There is simply no identification of facts or law or any analysis of the facts and law in the report. This court has held that the consideration of mitigating evidence is mandatory at the sanction stage of a disciplinary proceeding and that consideration of this evidence is clearly in accordance with the Florida Standards for Imposing Lawyer Sanctions. Florida Bar v. Eisenberg, 555 So.2d 353 (Fla. 1989). Clearly the Referee did not engage in this type of analysis when he apparently ignored the

testimony of eleven witnesses who provided substantial uncontradicted testimony on the issue of addiction, impairment, personal and emotional problems, character and reputation, rehabilitation, and remorse. It is as if the Respondent did not present any witnesses or a defense at his hearing. This requires the Amended Report of Referee be disapproved.

The Referee's erroneous conclusion is illustrated by the statement that, "The range of misconduct and number of incidents are simply too broad to permit the suspension recommended by the Respondent." ARR 13. This statement is not based on any competent and substantial evidence, and appears to be setting a standard for disbarment which is incapable of measurement and disregards addiction and rehabilitation as mitigation. It is clear that when a Referee determines the appropriate penalty he or she must consider the Respondent's impairment as a result of alcohol and drug abuse. Florida Bar v. Graham, 605 So.2d 53, 56 (Fla. 1992); Florida Bar v. Grigsby, 641 So.2d 1341 (Fla. 1984), Florida Bar v. Larkin, 420 So.2d 1080 (Fla. 1982). The Referee failed to consider the evidence of Respondent's impairment and rehabilitation in making his determination of disbarment. This is evidenced by his statement acknowledging this Court's precedent concerning addiction as mitigating factor, specifically citing Rosen in his Amended Report, and then ignoring this Court's precedent by not applying it to the facts of this case or explaining why Rosen does not apply.

The Referee's lack of analysis and ambivalence regarding Respondent's disbarment is

exemplified in his statement that, ~~A~~If the Supreme Court decides not to adopt the disbarment recommendation because of its prior statements in Davis and Rosen, this referee would have no problem.~~@~~ARR 14. This seems to indicate that the Referee was troubled by this case and did not want to disbar the Respondent.

Next, the Referee in his Amended Report changed the period of disbarment from a 4 year disbarment to a 5 year disbarment without providing any reason, basis or analysis for the increase in the penalty. The Referee then states again that Respondent should be allowed to practice law again upon demonstrating rehabilitation. ARR 14.

At the motion for rehearing, respondent's counsel advised the Referee of the need to make findings of fact and law and requested the Referee to make such findings. The Referee refused and stated that all the facts were in the record, and that the ~~A~~Judges will read the record before they disbar someone-or if they don't all read the record~~C~~I don't know how they operate~~C~~they will at the very least have a series of law clerks who will read the record and tell them what's in the record and your brief will tell them what's in the record, as will your oral argument.~~@~~ TR4 20-22.

It is submitted that if the Referee had taken into account Respondent's impairment and rehabilitation, Respondent would have received sanctions less than disbarment. Respondent's disbarment is inconsistent with this Court's stated purpose of rehabilitation and the fact that Respondent was under a mental disability during the acts of misconduct. Therefore, the Amended Referee's Report should not be approved.

POINT III
**RESPONDENT'S DISBARMENT IS VIOLATIVE OF THE
AMERICANS WITH DISABILITIES ACT**

Respondent's disbarment is a violation of the Americans with Disabilities Act (ADA) 42 U.S.C. ' 12131 (2) which prohibits discrimination against people with disabilities. This Court has recognized that the ADA applies to The Florida Bar. The Florida v. Clement, 662 So.2d 690, 700 (Fla. 1995). Pursuant to the ADA:

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable modifications to rules, policies or practices or the provisions of auxiliary aids and services, meets the essential eligibility requirements for participation in programs or activities provided by a public entity. Id.

Alcohol and Drug abuse are recognized as a legitimate diseases and mental disorders by the American Psychiatric Association, DSM-IV. Pg 175-203, 4th Edition (1996). Likewise, it is a disability under the American With Disabilities Act. 42 U.S.C. ' 12114 (b). In this case Respondent is a qualified individual pursuant to the ADA since he is no longer using drugs or alcohol and he is under contract as part of his participation in FLA, a supervised drug and alcohol program.

This Court has stated that whether the ADA prevents a specific sanction turns on a case by case basis. Clement at 700. In Clement, this Court acknowledged that while the ADA applied to the Bar, it rejected the argument that the ADA prevented a three year suspension of a lawyer who was diagnosed with bi-polar disorder. This Court stated that

although the attorney was a qualified individual his actions were not the result of his disorder, and there were no reasonable modifications that could be made to prevent the repetition of egregious misconduct on the part of the attorney. This Court specifically found that the lawyer had committed misconduct while already under the care of a psychiatrist and had admitted that he could fool his psychiatrist into believing he was under control when in fact he was not under control.

The case at bar is quite distinguishable. The Referee specifically found that Respondent's conduct was largely the result of drug and alcohol addiction and that Respondent could be rehabilitated, unlike the attorney in Clement. Finally, unlike Clement, where the attorney was suspended and could obtain a license in the future, Respondent has been disbarred, which for all purposes means Respondent will not be able to ever law practice again. Disbarment is the career equivalent of a death penalty. The road back from disbarment is an arduous one requiring the individual to apply *de novo* for admission to Florida Bar and to undergo the screening process of the Florida Board of Bar Examiners as set forth in the Bar Admission Rules. The reality is that a disbarred attorney almost never regains his or her license. They must go through the Florida Board of Bar Examiners, which realistically turns a five-year disbarment into a minimum of a 10 year process to regain admission to The Florida Bar.

Therefore the discipline imposed on Respondent is essentially a permanent denial of the ability to practice law again for misconduct that was a proximate result of his

disability for which he can be rehabilitated. Disbarring the Respondent is punishing the sick and disabled, and this exactly what the ADA was meant to prevent.

POINT IV
THE APPROPRIATE DISCIPLINE IS A LONG TERM SUSPENSION

This Court has held time and again that the Amisuse of client's funds is one of the most serious offenses a lawyer can commit and that disbarment is presumed to be the appropriate punishment." Florida Bar v. Shanzer, 572 So.2d 1382, 1383 (Fla. 1991). The knowing and intentional misappropriation of a client's funds or property is a serious offense. In the hierarchy of offenses for which lawyers may be disciplined, stealing from a client must be at the top of the list. Florida Bar v. Tunsil, 503 So.2d 1230, 1231 (Fla. 1986). This is the case even when no client has been injured. Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979). Accordingly, disbarment is the presumptive sentence. Shanzer. Nevertheless, it does not mean disbarment is the automatic sanction. McShirley, 573 So.2d at 808-809. Each case is to be determined on a case-by-case basis.

This Court has imposed the less severe sanction of suspension in light of significant mitigating factors such as addiction and rehabilitation. Florida Bar v. Benchimol, 681 So.2d 663 (Fla. 1996). Also See: Farbstein (misappropriated client funds, substance abuse was the direct and proximate cause of misconduct; the attorney had sought voluntary treatment in AA, despite the presumption of disbarment, the mitigating factors supported suspension over disbarment); Florida Bar v. O'Malley

,534 So.2d 1159 (Fla. 1988), (violation of trust account rules, testified falsely under oath, engaged in illegal conduct and committed acts of dishonesty three-year suspension was appropriate due to the mitigating factors of alcohol abuse, the stress of divorce, restitution to victim and remorse); Larkin (failing to appear at a continuation of trial, neglecting to carry out legal matters, failing to carry out contract for services, suspension was the proper sanction when misconduct was due to impairment caused by alcohol); Rosen (attorney convicted of federal drug trafficking statute suspended instead of disbarred due to crime being committed as a result of his addiction to cocaine). In Benchimol this Court stated:

An attorney with a chemical dependency problem, whether alcohol or drugs should be encouraged to seek treatment, to rid himself of the dependency. We have held in prior bar disciplinary cases that an addicted attorney who had demonstrated positive efforts to free himself of his drug dependency should have that fact recognized by the Referee and this Court when considering appropriate discipline to be imposed. Citing Jahn, at 287.

Even when an attorney misappropriates client funds, substance abuse may be a mitigating factor the court may use to impose a sanction less than disbarment. Florida Bar v. Farbstein, 570 So.2d 933 (Fla. 1990). In fact, this Court has stated:

This court has held that loss of control due to addiction may properly be

considered as a mitigating circumstance in order to reach a just conclusion as to the discipline to be properly imposed.@ ... ADisbarment is an extremely harsh sanction and is to be imposed only in those rare cases where rehabilitation is improbable. Florida Bar v. Rosen, 495 So.2d 80 (Fla. 1986).

The Florida Standards for Imposing Lawyer Sanctions state the purpose of lawyer discipline proceedings. Specifically, the purpose of lawyer discipline proceedings are to protect the public and administration of justice from lawyers who have not discharged, will not discharge, or are unlikely to properly discharge their professional duties to clients, the public, the legal system, and the legal profession. See Florida Standards for Imposing Lawyer Sanctions 1.1. The purposes of attorney discipline are three fold. First, to be fair to society, both in 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 the undue harshness of the penalty imposed. Next, it must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Finally, it must be severe enough to deter others who might be prone or tempted to become involved in like violations. Florida Bar v. McShirley, 573 So.2d 807, 808 (Fla. 1991); Florida Bar v. Pahules, 233 So.2d 130, 132 (Fla. 1970); Florida Bar v. Fitzgerald, 541 So.2d 602 (Fla. 1989); Florida Bar v. Hartman, 519 So.2d 606 (Fla. 1988).

Applying the standards for imposing discipline in the instant case, Respondent should receive a long term suspension.

- A. A long term suspension is fair to society, both in 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 the undue harshness of the penalty imposed.

If Respondent is suspended in excess of 91 days, he is not reinstated and admitted to practice immediately thereafter. The Respondent must first carry a burden and prove that he is rehabilitated pursuant to Rule 3-7.10 of the Rules Regulating The Florida Bar. This assures that the public will be protected. This will assure that the Respondent is again fit to practice law as his character and fitness as well as whether or not he is rehabilitated. These factors will be scrutinized by The Florida Bar as well as a Referee, and eventually by this Court.

At the same time it provides the public a qualified lawyer if rehabilitated. The testimony of Bradley Stark, Ari Mendelson, and Robin Jung all support that the Respondent was an excellent attorney prior to his becoming a victim of alcohol and drug addiction. This was also a finding of the Referee. Finally as stated above, those lawyers who are recovering alcoholics and addicts tend to be better than the general population of lawyers. Therefore a 3 year suspension would satisfy this prong of the standards imposing lawyer discipline.

- B. A long term suspension is fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage

reformation and rehabilitation.

The fact that a long-term suspension may be imposed rather than disbarment should not leave the Court or the public with the impression that an attorney has not been sufficiently punished. A suspension of any length is simply devastating and is hardly a slap on the wrist. Aside from the obvious financial penalty due to loss of income, the attorney faces horribly damaging publicity and humiliation which includes the requirement of sending a copy of the order of suspension to each of his/her clients, as well as counsel and judges learning of the suspension. There is a complete loss of privacy and prestige within the community. Stephanie Goldberg, *Drawing the Line; When is an Ex-Coke Addict Fit to Practice Law?*, A.B.A. Journal 49 (February 1990).

At the same time, it allows for the Respondent to become rehabilitated. The Physician's Recovery Network (PRN) rallies around its doctors when they are addicts and alcoholics. The PRN immediately intervenes and gets the doctor into treatment and rehabilitates them until the PRN deems that they are able to safely practice medicine again. The PRN does not immediately seek to forfeit the doctor's license. However, when it is a lawyer, rather than help him, The Bar seeks to execute him professionally. If we abandon our fallen brethren by disbarring them who will stand up for them? How many lives of lawyers and

judges that could have been saved will be forever destroyed? All those recovering lawyers and judges that are a success today, that have overcome their addiction and have become leaders in the legal community, the Bar and have made valuable contributions to the law and society would never have had that opportunity had we embraced a draconian perspective on addiction. Someone needs to step up and speak up for those addicted lawyers and judges among us and give them the opportunity to come in from the cold and embrace recovery. Martin Niemöller, a Protestant pastor in Nazis Germany and one of the pillars of the moral resistance to the Nazis, who has been widely quoted for his statement about moral failure in the face of the Holocaust, wrote:

First they came for the Communist, but I was not a Communist, so I said nothing. Then they came for the Social Democrats, but I was not a Social Democrat, so I did nothing. Then they came for the trade unionists, but I was not a trade unionist. And then they came for the Jews, but I was not a Jew, so I did little. Then when they came for me, there was no one left to stand up for me.

As attorneys it is our duty to stand up for those who can not stand up for themselves which include the down trodden and those who have been afflicted with illness. The only way to help these afflicted attorneys is to recognize that when addiction rises to such a level that the lawyer is afflicted with illness over which he has no control, that it constitutes mitigation which overcomes the presumption of disbarment.

- C. A long term suspension is severe enough to deter others who might be prone or tempted to become involved in like violations.

A long term suspension will deter other lawyers from in similar types of misconduct. This Court has made it very clear that an attorney who engages in serious misconduct, whether it be misappropriation of funds or committing criminal acts he/she will be disbarred absent substantial mitigation. A long term suspension will not change this position, but rather allow mitigation only in those rare circumstances for addiction when the addiction rises to such a level that the attorney's capacity is diminished, and he becomes totally devastated mentally, emotionally, and financially. It is incomprehensible to think that an attorney would voluntarily choose to experience the impending doom that an addict experiences. Finally, as stated above, a long term suspension is hardly a slap on the wrist and carries serious consequences, not to mention the accompanying stigma that comes with such a suspension.

Therefore, a long term suspension is the appropriate punishment for Respondent along with any other conditions this Honorable Court deems just and proper.

CONCLUSION

Based upon the foregoing arguments and authority, this Court should reject the Referee's Amended Report and Recommendation of disbarment and impose

a long term suspension.

Respectfully submitted,

RICHARD B. MARX
Attorney for Respondent

REQUEST FOR ORAL ARGUMENT

Respondent requests oral argument before the Court and submits that the Court's decision making process will be enhanced by hearing oral argument.

COMPLIANCE WITH RULE 9.210(a) (2)

The undersigned hereby certifies that the foregoing Amended Initial 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 brief, which has been scanned and found to be free of viruses.

RICHARD B. MARX
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FBN 051075

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing brief have been sent by Federal Express, overnight delivery 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 and regular U.S. Mail to: William Mulligan, Esq., Assistant Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, Florida 33131, and to The Honorable Paul Siegel, Referee, 175 NW 1st Avenue, Miami, Florida 33128 this ____ day of February, 2004.

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