IN THE SUPREME COURT OF FLORIDA

IN RE: PETITION FOR REINSTATEMENT OF ALAN R. HOCHMAN,	**Supreme Court Case No. SC03-707**
Petitioner.	**The Florida Bar File No. 2003-71,336(11B-MRE)**

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INITIAL BRIEF OF THE FLORIDA BAR

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INTRODUCTION

For the purpose of this brief, The Florida Bar will be referred to as "The Florida Bar", "the Bar" or "Florida Bar". Alan R. Hochman will be referred to as "petitioner", "Alan Hochman", "Mr. Hochman" or “Hochman”.

Abbreviations utilized in this brief are as follows:

C.S.F. – The Florida Bar’s Clients’ Security Fund

TR - for the transcript of the final hearing held on July 9, 2004 and July 16, 2004.

F.L.A. - Florida Lawyers’ Assistance, Inc.

App. - is used to represent the Appendix attached to this brief.

App.1 - Judge Ward’s Order dated December 15, 2003.

App.2 - Excerpts of Petitioner’s deposition taken December 2, 2003.

I HEREBY CERTIFY that this brief is typed in Times New Roman, 14 Point type.

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RANDI KLAYMAN LAZARUS
Bar Counsel

STATEMENT OF THE CASE AND OF THE FACTS

On April 17, 2003, Alan Hochman filed his petition for reinstatement with The Florida Supreme Court. Hochman was initially suspended for three (3) years by order dated March 12, 1998, after admitting that as a result of a significant problem with drug addiction he had misappropriated clients' funds. The consent judgment executed by Hochman on November 21, 1997, provided for the following:

1. Ongoing participation in an appropriate directed rehabilitation program.
2. A reasonable plan for restitution to be made to the affected clients. The specific terms of the restitution plan will be made upon the Respondent securing any and all appropriate sources of income.
3. Respondent agrees to make restitution under the supervision of a member of The Florida Bar in good standing. This monitor shall be in place for five (5) years or until restitution is completed to the affected parties. Respondent shall submit to Staff Counsel the name of the monitor for approval.

Hochman was criminally charged with two felony grand theft charges and on October 7, 1999, he pled no contest to those charges. The charges resulted from thefts from two of the victims of the original thefts. On January 11, 2000, The Florida Bar filed its notice of judgment of guilt requesting a three (3) year suspension based on the felony judgments. A referee recommended that the imposition of the suspension run consecutive to the existing three (3) year suspension. On April 4, 2002, this Court issued an opinion in which it upheld the

referee=s ruling and modified the term of the suspension to run retroactively to the date Hochman agreed to cease practicing law, to wit July 28, 1997.

On July 25, 2003, the Honorable Diane Ward was appointed referee to rule in regard to the Petition for Reinstatement[1]. The Florida Bar filed its Motion to Dismiss on October 1, 2003, arguing that all restitution had not been paid as required by the consent judgment as petitioner owed the C.S.F. at least $175,369.29 for sums paid to victims and at least $106,067.49 to clients from whom he had misappropriated funds. On October 30, 2003, the referee denied the Bar=s motion to dismiss and set the final hearing for November 17, 2003. On November 10, 2003, the Bar filed its only Motion to Continue the Final Hearing. The final hearing was reset for December 12, 2003.

On December 4, 2003, The Florida Bar filed its Motion to Strike Petitioner=s Witness list and argued that petitioner had responded to the Bar=s interrogatories on June 20, 2003 with the names of two witnesses and a notation that the list could be supplemented. A supplemental list containing eleven (11) witnesses was provided on December 3, 2003, nine (9) days before the final hearing making meaningful discovery impossible. There were character witnesses and witnesses attesting to Hochman=s alleged rehabilitation from his drug addiction. The Bar argued that

[1] During the pendency of the petition many motions and responses were filed by both parties. Only those items relevant to the issues raised have been referenced.

during Hochman=s deposition on December 2, 2003, he admitted that he became addicted to Vicodin in the end of 2001 and beginning of 2002, leading to hospitalization in March 2002 and that he tested positive in a urinalysis test for methadone in June of 2002 through his contract with F.L.A. Petitioner testified that the test results were in error leading the Bar to contact F.L.A. F.L.A. advised that in September of 2003 Hochman had revoked The Bar=s ability to obtain information from F.L.A. The Bar argued that Hochman should not be permitted to present witnesses in regard to his rehabilitation from drug addiction in light of his refusal to release information to The Florida Bar concerning his involvement with F.L.A., particularly in light of Hochman=s sworn testimony of recent drug abuse. On December 15, 2003, Judge Ward issued an order which precluded Hochman from introducing any evidence or testimony related to his substance abuse addiction and/or rehabilitation unless he waived his privilege of confidentiality regarding records and testimony related to his addiction and treatment. (App. 1). The referee denied petitioner=s Motion for Rehearing of the order.

On January 5, 2004, the Bar filed its Motion for a Finding of Petitioner=s Unfitness to Resume the Practice of Law, supplemented on January 8, 2004. In that motion the Bar argued that:

1. Hochman had admitted to drug addiction relapse in January of 2002, after being prescribed the narcotic Vicodin for a shoulder injury and became addicted to Vicodin.

2. Hochman admitted to illegally purchasing prescriptions for Oxycontin from at least one individual.
3. Hochman admitted to being admitted for in-patient drug addiction treatment from January 21, 2002 until March 1, 2002.
4. Hochman admitted that in June or July of 2002, after release from the treatment facility, he tested positive for Methadone in a urine test through his continuing affiliation with Florida Lawyer=s Assistance.

The Bar posited that in light of the referee=s ruling that Hochman could not present any evidence of rehabilitation unless he released information to the Bar, which he steadfastly refused to do, it would be impossible for him to establish that he was fit to resume the practice of law.

The Bar served a Motion for Summary Judgment on February 2, 2004. Grounds similar to the Bar=s Motion for a Finding of Unfitness were argued. On April 21, 2004, the referee denied the Bar=s Motion for Summary Judgment and Motion for Finding Petitioner Unfit to Resume the Practice of Law.

The final hearing began on July 9, 2004. The petitioner=s case was to be presented first as it was his burden to prove reinstatement. One of the Bar=s witnesses, attorney Dennis Koltun, was taken out of turn and testified first. Mr. Koltun has been a member of the Florida Bar since 1973. (TR 26-27). He has known Alan Hochman as a friend, neighbor and someone who he rented office space for at least twenty (20) years. (TR 28). On June 22, 1995, Hochman

borrowed $25,000 from Mr. Koltun, which was memorialized in a promissory note whose terms provided for payment in full within thirty (30) days. On September 28, 1995, Hochman wrote Koltun a letter explaining that he needed the money since he was being extorted by a client. Koltun later learned that Hochman did not need the money because he was being extorted, but rather because he had taken money from a client whom he needed to reimburse. (TR 28-32). Hochman paid back between $12,000 and $13,000 several years later with no explanation. (TR 32). Mr. Hochman assured Koltun that even if he was to declare bankruptcy Koltun would be paid back. In 1998 Hochman listed Koltun as a creditor on his bankruptcy petition. Since 1998 neither Hochman or anyone on his behalf has contacted Koltun about repaying the remaining debt. (TR 33).

Koltun testified that over the years he had spoken to Hochman=s former legal secretary, Dee, another lawyer named Levi Gardner and other persons who had dealings with Mr. Hochman. Mr. Koltun commiserated with Mr. Gardner about being unknowingly duped by Hochman and what could be done to recoup monies. (TR 34-42). According to Koltun, Hochman does not have an unimpeachable character and moral standing in the community since he lied to Koltun and others and as an officer of the Court he is held to the highest standard in the world. (TR 46).

Petitioner presented attorney Francisco Cerezo as his first witness. He has been a lawyer with Steel, Hector & Davis since January of 2002. He met Alan Hochman sometime in 2002. Hochman assists him as a paralegal. (TR 60). He testified that Alan Hochman is very hard working and works long hours, and he is very pleased with the high quality of the work. (TR 62). He described him as Aa paralegal on steroids.@ (TR 63). He has a nice demeanor with support staff. (TR 64). Hochman has not displayed any ill will or malice toward The Florida Bar. Hochman has demonstrated remorse. (TR 66). He testified that Hochman has a strong character and would make a fine lawyer. (TR 68).

The petitioner=s second witness was Arthur Garel. He met Alan Hochman in 1994 and then again in 1997. (TR 70-71). Garel is a compulsive gambler who has not gambled in ten (10) years. The gambling led to drugs and alcohol. (TR 71). Garel resigned from The Florida Bar in 1995. He stole approximately half a million dollars from his trust account, which he has paid back. He had spent a year in the Dade County Jail, followed by five (5) years of probation. After reapplying, the Board of Bar Examiners has not recommended his readmission. An appeal was pending in this Court. (TR 80-81). Garel had weekly contact with Hochman. (TR 72). Hochman has shown remorse by being apologetic to his family and by trying to make payments. (TR 74-75). Although Hochman has not expressed ill will

toward The Florida Bar Ahe is not a happy camper@. He has acceptance since he screwed up and is paying the price. (TR 75-76). Hochman discusses his work with Garel regularly. Hochman deals with addicts and alcoholics that the firm gets involved with pro bono. Hochman takes the clients to court and contacts them and makes sure that they are doing the right thing. (TR 77, 82). Garel assumes that Hochman would be alone with these clients since he did not think Joe Klock would accompany them. (TR 82). Garel thinks that Hochman=s moral character is excellent at the present time. (TR 78). Hochman is dying to get his wife back. He has a great relationship with his children. He has been a good friend. (TR 79). Tom Headley, a member of The Florida Bar since 1969, testified on behalf of Alan Hochman. His is an alcoholic in recovery, being sober for twenty (20) years with no relapses. (TR 85). Headley met Hochman in 1997. They are friends, but do not socialize. (TR 87). Headley represented Hochman on a couple of legal matters. Hochman never paid him for these legal services. (TR 88). In 1997 Hochman was depressed and discouraged. (TR 89). In 1998 and 1999 Hochman was not earning money and had hundreds of thousands of dollars in debt. Hochman only blamed himself. (TR 90). He would not say that Hochman has ill will toward the Bar. Hochman is not happy about the Bar=s position but they have a right to it. (TR 91).

The petitioner then presented Michael Nguyen, who obtained his doctorate in clinical psychology in August of 2002. He will sit for the National Licensure Exam in clinical psychology. (TR 96-97). He treats the staff at Steel, Hector & Davis. Joe Klock brought him into the firm. He mainly focuses on the mail room staff. They are adolescent boys who have completed a program through the juvenile justice system who have adjustment problems. He is paid $40,000 a year by Steel, Hector & Davis and not by the courts or government. (TR 98-101, 112-113). Alan Hochman contacted him for counseling with marital problems in 2003. Hochman has adjustment issues with no clinical diagnosis. (TR 102-103). Hochman exhibited guilt about the separation of his family, being an alcoholic and misappropriating money from his clients. (TR 105-106). Over the Bar=s objection, Dr. Nguyen testified that Hochman had not appeared unresponsive, incoherent or having an inappropriate affect. (TR 111).

Alan Hochman appeared next. He was admitted to The Florida Bar in 1975. He obtained an AV rating, tried approximately seventy-five (75) trials, sat on the board of two (2) insurance companies, was the managing partner of his firm and employed six (6) lawyers. He loved practicing law and did his best. His income was multiple six figures every year until the last two (2) years before his suspension. (TR 120-122). He was married in 1975. His daughter is a third year

medical student. His son is going into his fourth year of college. (TR 122). He was a heavy social drinker in the 1980's and started to drink in the 1990's during the week. He started taking sedatives to sleep and then became a regular user. He began having a problem with substances other than alcohol beginning in about July of 1995. He spent over a million dollars on his addiction. It was over a hundred thousand dollars a year the last two years that he was spending on drugs. (TR 123-125). Prior to his suspension he was a half a million dollars in debt between banks and friends. (TR 123). His brain told him he did not have a problem until he realized that he had taken client monies. He was living in a blackout the last four (4) or five (5) months and did not remember what he had done or said. Then he remembered he had stolen client monies. He went to friends and to rehab and went to the Bar and told them. No one had filed a complaint and no complainant had complained to him prior to him bringing his actions to the attention of The Florida Bar. Most of his clients knew he took the money. He did not ask and told them after he took it. He asked some if he could take it. It was mostly money that had lingered in his trust account to pay medical liens. Asking to take their money was a violation, but there were some clients that he did not ask. The Bar approved a letter he sent to clients advising them what had happened. He wrote that he along

with the Bar would try to resolve the problem by getting them paid back. (TR 125-128).

Hochman testified that he took his client Dora Brown=s money in the spring of 1997 and started paying her back in June of 1997. He had written her to tell her he was in rehab. She got upset and he knew he was going to be in trouble whether he reported himself to the Bar or not. (TR 166-168).

Hochman also testified that he recalled one of his clients, Tammy Mendez who was pregnant at the time of a car accident. She lost the baby and her husband. He took $43,000 from his trust account paid to Mendez for property damage. In his bankruptcy petition he reaffirmed that debt. He did not know if he paid more than $700 to her since the monies are paid to the Bar and the Bar pays the clients. He testified that sometimes his restitution payments were made by his monitor and other times they were made by the Bar. (TR 171-173). Mr. Hochman ultimately agreed that he had not paid Mendez directly. (TR 174).

According to Hochman, the terms of his suspension were that he make reasonable attempts at restitution. The Bar would suggest a plan after he signed the agreement and come to a figure per month for the first five (5) years. He anticipated the suspension would exceed thirty-six (36) months, but the intent was that he get reinstated so he could pay the clients back more aggressively. By

permitting him to enter into a payment plan the Bar was foregoing seeking a contempt action for failure to pay restitution within the term of the suspension. He stated that at the time the Bar was doing everything they could to help him get back. The other conditions were that he continue to be involved in a rehabilitation program. In the agreement he admitted that he had stolen trust funds. Hochman and the Bar agreed to him making restitution payments of $400 per month for the first five (5) years effective in November of 1998 and the renewal was anticipated to be in December of 2003. (TR 130-131, 165). The $400 per month figure was reached since Hochman=s monitor had written letters to The Florida Bar in October and November of 1998 stating that Hochman had physical problems and that his income was reduced. In a December 1998 letter from the Bar to Hochman=s monitor it did not provide that the $400 per month payment would continue for sixty (60) months or for any time period. (TR 161-163). Hochman testified that he spoke with the Bar and discussed where he worked and how much he earned. He stated that he paid more than $400 per month. According to his records and the Bar=s records he paid $60,000 in the first three (3) years. (TR 164-165).

In November of 1997 and for the following ten (10) months, he worked for the YMCA of Greater Miami and earned $5,000 per month. (TR 132-133). He was a messenger for two or three weeks. In 1998 Gary Glasser hired him as a paralegal

earning $200 per week and within a month or two earning $50,000 a year. (TR 134).

While working for Glasser, Hochman=s clients Flatte, Kay and Pickett called him and told him that the Bar was asking them to go to the police to prosecute him. He had not had any direct contact with these clients previously, other than responding to their claims to the C.S.F. (TR 135-136). A police officer contacted him and his F.L.A. monitor, and told him that the Bar had sent him over there to file on all the clients involved in his taking of trust funds. He surrendered himself for arrest in August or October of 1999. He was charged with two felony counts of grand theft, second degree felonies, for the money stolen from two clients. He plead to two (2) years of community control and several years of probation and a certain amount of restitution. (TR 136-139). He paid Pickett the entire $10,000 owed. The Bar paid the other victim $50,000 and he paid approximately $13,000. He paid Richard Marx $25,000 to represent him in the criminal matter and $18,000 for his representation in Bar matters. He still owes him $20,000. (TR 139-141, 443-444).

Hochman testified that he is responsible for what happened to him. He believed that the Bar attorney, Elena Evans, who negotiated the consent judgment with him had an understanding of what happened. He believed that after she went on maternity leave clients who realized their money was gone were enraged and

contacted the undersigned. According to Hochman, the clients and the undersigned had a sense of outrage. He did not agree with what happened, but he accepted it. He was hoping he would not be prosecuted. (TR 178-179). Hochman is very unhappy and disappointed about what happened because Evans told him there would be no participation by the Bar in a prosecution and they wanted him to be reinstated as quickly as possible so that the clients could be paid back, although none of that was referenced in the consent judgment. (TR 180,183). Although he harbors no ill will, he believed that in the 2000 proceeding the undersigned could have requested that the Referee=s punishment run nunc pro tunc. He did not want to be suspended for another three years and at the same time recognizes that it is a miracle that he was not disbarred. He would be grateful if it was 10 years. He is one of the luckiest people on the face of the earth to even have a chance to practice law. He never expected it and still does not. (TR 181).

Subsequent to Glasser, Hochman was employed as a paralegal for eight months at a salary of $800 per week by Wolpe & Liebowitz. (TR 141). He went back to work for Glasser for another year and averaged $50,000 a year. (TR 142). He was then employed by Scott Sandler as a paralegal for six months at a salary of $800 per week. (TR 142). He became federally certified to repair air conditioners. He

worked for a company for a couple of months and started his own company in November of 2001 for a couple of months and then got ill. (TR 143).

Hochman began working as a paralegal for Steel, Hector & Davis on March 15, 2002 at a salary of $63,000 a year, which increased to $90,000 a year plus a potential bonus of $15,000 three months later. He discusses how to try cases with lawyers, prepares pleadings and does research. He goes to motions in chambers where no parties are present. He works with kids and anybody that the firm has contact with who have substance abuse problems. He assists them finding places to be treated and in their after care. In the prior month he billed 200 pro bono hours for that purpose. (TR 143-145).

In February of 1998 Hochman filed for bankruptcy. It was discharged around August of 1998. He had run up credit card bills of approximately $300,000 prior to his suspension. A second mortgage on his home was foreclosing. Bankruptcy stayed the foreclosure temporarily. Hochman paid the bankruptcy trustee $12,000. The client debt was reaffirmed and the credit cards and some other creditors were discharged. Hochman testified that he was obligated to list every creditor and had the right to reaffirm at any time. If he had not listed Koltun and Gardner he would have committed bankruptcy fraud. The only thing he has done to reaffirm his debt to them is say that he would pay them when he is reinstated. He felt it was a moral

obligation and he would pay it when he could. (TR 145-149, 442). The two and one half million dollars that was discharged in bankruptcy included three mortgages on the house and the house was taken out of bankruptcy and sold. That liquidated about $600,000. His wife=s car was sold and that liquidated another $70,000. He also included potential debt of the law firm, including the clients. Technically a million dollars was discharged. (TR 461).

Grossman & Roth loaned him $200,000 to keep his family afloat. They paid $16,000 toward his Hazelden Rehabilitation and $21,000 to his wife. They were paid in full by cases that he had assigned to them in 1996. (TR 149, 444-446). Hochman received a $100,000 inheritance. $50,000 was obtained by the trustee and the other $50,000 went to Grossman & Roth. (TR 149-150, 446). Hochman testified to having three disability policies. One policy paid $400 per month, one paid $1,000 a month and the third paid $5,000 a month. All three policies were ultimately settled based on his inability to practice trial law. One carrier settled for $15,000, one for between $30,000 and $40,000 and the third for $375,000. He obtained about $170,000 from the last policy. The money went to pay creditors and some to clients. Hochman testified that he used the money to buy a home. He hoped to obtain a second mortgage to pay off his clients, but could not do so because of his arrest. (TR 150-152, 206).

Hochman's wife asked him to leave in March of 2002. He rented an apartment for six months but could not afford it. He now sleeps on the sofa in his wife›s townhouse. Since he has worked for Steel, Hector & Davis all of his paychecks are directly deposited into his wife=s account since she is trustworthy and frugal. He did not want to have that money at his disposal. He made that decision because he was released from rehab from a 45 day stay on March 1, 2002. Right now there are a lot of reasons he continues to turn his salary over to his wife. He is now completely responsible. He gets paid $6,000 a month. His wife gives him a check on a weekly basis. He pays out of pocket expenses. His wife is a physical therapist and supports herself. His money is used for the children=s tuition and living expenses. (TR 152-156, 175, 177). He performs the highest level he can at work. He loves the job and works between 60 and 70 hours per week. The firm is very involved with people with overwhelming personal problems. He goes to peoples= homes, brings them food and takes them places. He is a thief who gives money to buy food for people. He has been told by Steel, Hector & Davis that they would hire him if he became an attorney. They would raise his salary 50 % and want him to use most of that raise to pay the clients back. (TR 156-159).

An April 15, 2003, letter from The Florida Bar to Hochman=s monitor was introduced as Petitioner=s Exhibit 1. (TR 185). Hochman testified that the letter

provided that he had to pay $400 a month for sixty (60) months equalling $24,000. (TR 188). He stated that he has paid $60,000 and offered to renew the contract at much higher payments. (TR 189). The Bar would not negotiate with him until after these proceedings were over. (TR 192). He made four (4) payments of $500 per month starting in February of 2004. (TR 191).

Joe Klock, Jr. testified on behalf of Alan Hochman. He has been a member of The Florida Bar since 1973 and was managing partner of Steel, Hector & Davis since 1979, overseeing 200 attorneys. (TR 237-238). He met Hochman between 1974 and 1975 and again while Hochman was a patient at South Miami Hospital. (TR 238-239). The firm offered Hochman a job as a paralegal. Hochman helps in every phase of a case, helps him analyze cases, sits in on client interviews, drafts pleadings, drafts briefs and discusses strategy. (TR 240-241). Klock is the Chairman of the Board of Bay Point Schools where a large number of the children have substance abuse problems. He testified to the following:

> ASo Alan is very, very useful in working with the clients because he can relate to them and also help them identify different kind of problems they have and then he helps just with the normal stuff.@ (TR 242).

Hochman assists him on 60 % of his cases. He has never missed a deadline and his work is excellent. Klock communicates with him ten (10) to fifteen (15) times a day. (TR 247).

Klock testified that Hochman devotes far too much of his financial resources to his family. He thinks Hochman=s adult children are perfectly capable of getting school loans. He will deprive himself so he can divert funds to his wife and children. (TR 249). The only thing of value that Hochman has is a leased Cadillac. (TR 250). If reinstated, Hochman would be hired as an attorney and earn around $300,000 a year. He feels he is ready to practice law based on his high standard of competence. (TR 252, 254).

The Bar questioned Klock about Hochman=s Supplement to Memorandum in Opposition to the Florida Bar=s Motion to Dismiss which he signed. Klock testified that Hochman thought it was too strong and should be tempered down. Klock explained to Hochman that he thought it was important Ato call a spade a spade.@ (TR 255- 256). The Bar asked the referee to reconsider a previous ruling, to be discussed later, in regard to the introduction of that document as Mr. Hochman had reviewed it and permitted its introduction. The referee did not change the ruling. (TR 207-209, 222, 261).

The Florida Bar presented an opening statement. Among other things the Bar stated it would introduce admissions establishing that beginning December of 2001, Hochman was again taking drugs, entered a rehab program and tested positive for Methadone. Hochman=s counsel objected and argued that she had

purposely stayed away from that area and the Bar would be opening it up. The Bar argued that the door had not been closed as to the Bar, but only as to Hochman based on the referee=s order dated December 15, 2003. (TR 196; App.1). The referee questioned its relevance and concluded that an incomplete picture would be presented. The referee precluded the introduction of the evidence, but permitted a subsequent proffer. (TR 202-203, 205; App. 2).

The Florida Bar introduced admissions made by Hochman in his deposition taken by the Bar on December 2, 2003. Mr. Hochman admitted that he had made his last restitution payment in 2001. (TR 205). Other admissions identified Karen Castillo and Sharon Lyn as employees of Steel, Hector & Davis. (TR 206-207). The Bar attempted to introduce documents filed in these proceedings by Hochman=s attorneys to establish ill will and malice toward the Bar. The Bar argued that Mr. Hochman had adopted these statements. (TR 207-209). The referee would not permit their introduction. (TR 222). The Bar introduced the affidavit of Alan R. Hochman in opposition to the Florida Bar=s Motion for Summary Judgment. (TR 225).

The Bar attempted to introduce a stipulation entered into by Hochman=s attorney Richard Marx in the felony conviction proceeding which stated that a Detective Alvarez initiated the investigation of Hochman based on a police report

filed by Pickett and that The Florida Bar permitted the Detective to review their files at his request and pursuant to Rule 3-7.1(n) of the Rules Regulating The Florida Bar. The Bar argued that the testimony was relevant since Hochman=s testimony concerning the Bar=s contacting his clients to cause a criminal prosecution was in contradiction to the stipulation entered into on his behalf. The referee refused to permit the Bar to introduce the stipulation. (TR 135-136, 228-232).

The Bar introduced letters written on behalf of Hochman by Marcelle Poirier, his monitor, dated October 26, 1998, with attachments and November 10, 1998 outlining Mr. Hochman=s various problems, why he could only pay $400 a month, and solidifying that agreement. (TR 232, 235-236).

Carlos Ruga, the Miami Branch Auditor was presented as the Bar=s witness. He has been an employee of The Florida Bar for twenty (20) years and performs audits of trust accounts for cause and anything to do with financial matters, works on all reinstatements, has testified between 200 and 300 times. He is a certified public accountant. (TR 261-264). In regard to Alan Hochman, and before Mr. Ruga was deposed he reviewed documents relating to his bankruptcy and a letter from The Florida Bar listing all monies paid and not paid. (Petitioner's Exh. 1). He also created documents and exhibits regarding the monies. After his deposition, Ruga

reviewed some bank records that he had. (TR 265). The Bar sought to introduce an exhibit that had been provided in discovery. The exhibit listed the client=s name, the amount owed, the amount paid by Mr. Hochman, the amount paid by the C.S.F. and the balance due to clients that had not been paid anything. (TR 266). Petitioner=s counsel said that she was surprised by Ruga=s testimony and that he must have drafted the chart after his deposition of April 27, 2004. Counsel stated that it was the first time she had seen the chart and had not reviewed it with her client and that was inaccurate. (TR 267-269,354-355). At the April 27, 2004 deposition of Mr. Ruga, petitioner=s counsel stated that she had the charts in question. (TR 355). The chart, and three others were attached and provided to petitioner with the Bar=s discovery responses, first on December 23, 2003 and again on April 21, 2004. (TR 271, 281, 354). Mr. Ruga had referred to these charts in his deposition. (TR 355). The referee permitted petitioner=s counsel to again take Mr. Ruga=s deposition as to old opinions formed and misunderstood by petitioner=s counsel. (TR 287-288).

Levi Gardner, a member of The Florida Bar for the past twenty (20) years testified on behalf of the Bar. (TR 295). He worked with Hochman from May of 1991 until March of 1994 and then from May of 1995 until March of 1996. Hochman would receive work from several insurance carriers and hand Gardner cases to

work the files up. The billing would go through Hochman=s office. Gardner received a percentage for the work that he billed with rent deducted. (TR 296-297). Hochman never paid him in full for any particular month. Hochman had been paid by the clients. Gardner left in 1994 with Hochman owing him $38,000. (TR 298). In May of 1995 Gardner returned to Hochman because his employer=s business failed and he hoped to protect his debt. (TR 299). Hochman gave no real explanation for not paying Gardner. Hochman never disagreed about monies due to Gardner. (TR 300). During the second affiliation Hochman gave Gardner at least two bad checks. Gardner is owed $48,000 for the work he performed and has not been paid. He is aware that Hochman discharged his debt to him in bankruptcy. (TR 301-302).

He ran into Hochman once before the bankruptcy and once after. The encounters were a year apart and heated with foul language used by both. The first meeting was in the summer of 1997. Hochman blamed Gardner for his predicament of having troubles with one of the insurance carriers. Hochman has never expressed any remorse to him. (TR 303-304). During the second encounter Gardner was aware of Hochman=s problems with The Florida Bar. Hochman blamed Gardner. (TR 305). Gardner wrote a letter in June of 2003 after seeing a notice in The Bar News that Hochman was petitioning for reinstatement. (TR 305-

307). Gardner did not lend Hochman money, like a commercial entity or friend. Rather, Gardner worked hard for his money, tried a lot of cases and took time away from his kids. (TR 307). He was looking for Hochman to do the right thing. (TR 308). What is most shocking and reprehensible is Hochman=s absence of embarrassment and blaming him. He expected Hochman to call him and acknowledge his error and apologize, but instead he got accusations and blame. (TR 314-315).

The final hearing resumed on July 16, 2004, after Mr. Ruga's second deposition. Petitioner=s counsel moved to limit Ruga=s testimony. The Bar advised the referee that the Bar had relied on Mr. Hochman=s monitor=s May 14, 2003 letter which had agreed with the Bar=s April 2003 letter which set forth all payments made and all money owed. (TR 357). On the first day of the final hearing, July 9, 2004, Mr. Hochman=s attorney advised the referee that those figures were inaccurate. (TR 268). The referee was advised that as a result of Hochman=s position of inaccuracy, taken for the first time, the underlying documentation used to form the basis for the April 16, 2003 letter was reviewed by Mr. Ruga resulting in two modifications of payments made, in Hochman=s favor. (TR 356-359, 361, 395, petitioner's Exh. 1). The Bar and the referee agreed to provide additional time to

the petitioner if they needed it in regard to Mr. Ruga=s analysis. (TR 369-370). Petitioner chose to proceed. (TR 372).

Mr. Ruga=s testimony continued. He described a chart he had prepared which was introduced as the Bar=s Exhibit 11A. It contained the name of the client, the amount that is owed to the client, the amount paid by Mr. Hochman, amount paid by the C.S.F. and the balance due. (TR 376). The original amount taken by Mr. Hochman was $321,056.87. Hochman has paid back $47,870.09. The Florida Bar, through its C.S.F. has paid $182,767.35. Clients are owed $98,167.49. Hochman currently owes $280,934.84, without any interest. (TR 378). Mr. Ruga relied on Hochman=s monitor=s representation that the Bar=s April 16, 2003 compilation and analysis of funds was correct. (TR 396). The April 16, 2003 letter was formed from the claims to the C.S.F. information from the monitor and Mr. Hochman=s letters that he wrote the clients and The Florida Bar. He has seen those records. (TR 409). He reviewed a restitution package which contained checks and information which caused two changes in the computations.

Mr. Ruga=s next chart, introduced as The Bar=s Exhibit 12A presented an analysis of payments made by Hochman chronologically. It showed two payments in 1997, several payments in 1998 and 1999 and some in 2000. After the December 1998 agreement for Hochman to pay $400 per month to the present, he paid

$26,769.21. Of that payment, $19,923.98 was paid as restitution to the two victims, Pickett and Allen, who pressed criminal charges. Mr. Hochman paid $6,845.12 to the remaining victims. (TR 379-380). Before January of 1999, Hochman paid $20,800. The initial complainant, Dora Brown, was paid $20,300. (TR 380). The bulk of the monies, $43,123.98, was paid to three individuals, Pickett, Allen and Brown, leaving $4,746 to the remaining victims. (TR 417). Hochman pays what he is forced to pay. Ruga also testified that if everybody had filed a criminal complaint, Hochman probably would have paid everybody. (TR 418). Of the sixteen (16) clients Hochman took money from eight (8) have been paid and eight (8) are still due monies. (TR 420).

An analysis was performed by Mr. Ruga of two accounts in the name of Alan Hochman and his wife Barbara Hochman from the period of December 14, 1999 to October 14, 2003. (TR 381). $758,224.96 was deposited into those accounts. (TR 383).

Mr. Ruga reviewed a third account at Citibank handled by Mr. Hochman for the period of November 6, 2002 until July 6, 2003. Nine (9) times checks were dishonored due to insufficient funds and the account had twenty-three (23) overdrafts. (TR 383-384). The first check dated January 21, 2003, in the amount of $2,800 was written to Williamson Cadillac. It created an overdraft of $2,846.59.

The check was presented again on January 28, 2003 and returned for non-sufficient funds. The balance was negative $2,846.59. The accounting department at Williamson Cadillac advised that Hochman had made a payment on April 24, 2003 which was returned for insufficient funds. (TR 384-386). Other checks to Hochman=s co-workers, Castillo and Lyn were also returned. (TR 387).

Another account handled by Hochman and reviewed by Mr. Ruga revealed that from April 19, 2002 to January 3, 2003, it had overdrafts fifty-four (54) times and the bank charged Hochman $1,315. (TR 388). Hochman wrote all of the checks. (TR 393). Mr. Ruga concluded that Mr. Hochman is totally fiscally irresponsible based on the fact that he is writing bad checks, having constant overdrafts and paying large bank charges on the only two accounts he handled. (TR 388-389). Fiscal irresponsibility is the way he handles the accounts that he had, as opposed to the accounts handled by his wife. (TR 392). Mr. Ruga=s testimony is based on facts and records and are not opinions. His opinions are only as to the handling of accounts. (TR 397). On cross examination Ruga testified that Hochman should have been disbarred or resigned after stealing these monies from his clients. (TR 413). Mr. Ruga does not think that Hochman should be reinstated because he has not paid his clients all of the money owed and he is totally irresponsible with his accounts. (TR 415).

Hochman testified in rebuttal. He met Gardner in the Dade County Courthouse in May or June of 1997 and was obnoxious and high. (TR 428).

Hochman testified that he paid the Allens $24,700, as opposed to $8,435.98. (TR 430). He also testified that he paid Brown $37,000, as opposed to $23,200. (TR 431). Hochman testified that the Bar=s record keeping was accurate after he started the payment plan in December of 1998. (TR 432). Hochman said that he sent a letter to Ms. Nam of the Bar dated November 10, 2000, outlining all of the payments before 1998. That explains why the Bar did not list $45,000 in payments. (TR 432-434). Lee was owed $12,500, and not $23,500 and according to Hochman the Bar overpaid him. (TR 437). Hochman said that he paid Jacobson $1,500, although the Bar is listed as paying Jacobson $1,500. The figures concerning the thefts and payments to Mccloy, McLish, Mendez, Naranjo, Messler, Weber, Flatte-Hendel and to Perez were correct. (TR 438- 439). Hochman testified that the Bar=s figure of $47,370.09 as to payments made by him was $15,000 understated. Hochman agreed with his lawyer that a figure of $94,770.09 was in the ballpark. (TR 440). Hochman testified that even with that figure he still owes over $200,000. (TR 463).

Hochman did not know whether the figure of $758,224.92 that the Bar presented as being deposited into his accounts was accurate. (TR 440). He paid an

IRS income tax lien in 1999 in the vicinity of $10,000 and $8,700 to the I.R.S. in 1997. (TR 441). In November of 1997 he paid $13,000 as withholding tax. Income tax paid in 1998 was $8,400 and withholding tax was $12,800, totalling $53,000. (TR 442). He paid the bankruptcy trustee attorney $10,000. (TR 443). He has paid City National Bank $13,000 and owes them $3,000. He paid for his children=s educational expenses. (TR 448).

In regard to the nine (9) dishonored checks, Hochman said it was because he thought he would get a check from his wife and did not. Each person was paid before they knew that the check would not clear. He said it was an inappropriate way to handle his accounts. He picks up money on Sundays instead of waiting until Wednesday. (TR 449).

Hochman explained the dishonored checks to Williamson. He was qualified for a lease requiring $1,200 down. He was told two (2) days later that he did not qualify and needed to put $3,800 down. He got a $1,400 advance on his salary and gave Shawn of Williamson a $2,400 post dated check to hold for four weeks. Shawn deposited it in a week because his boss was upset. It bounced twice. It ultimately got paid. Shawn said he spoke with someone at the Bar and explained to them that it was not Hochman=s fault. Shawn felt so badly about the checks that he told Hochman he did not have to pay the money owed. (TR 450-452).

Hochman said he spoke to the Bar on a weekly basis because they wanted to make sure that they were appropriately disputing amounts of C.S.F. claims if there was a dispute. The Bar did not request a modification of the payment plan since Hochman was paying more than agreed. (TR 453-454). Hochman said he should have walked in paying a lot more than he did. (TR 454). He tried to be a parent to his kids and a husband and try to get them back what he took from them. He tried to split it down the middle between the clients and the kids. (TR 454-455).

The referee issued her report on August 3, 2004 recommending reinstatement

with the following conditions:

1) Restitution

a) A neutral accountant shall be appointed to review the records of the Petitioner=s Trust Account, bank accounts, and any relevant documents in the possession of The Florida Bar to determine the names of each person owed restitution based on the Petitioner=s misconduct, the exact amount of restitution, the amount that has already been paid and by whom, and when the payments were made. Within sixty days of receiving this accounting, the Petitioner shall prepare a payment plan and submit it to The Florida Bar for their approval. If the parties cannot agree on an amount and terms, then the matter shall be set for a restitution hearing before the referee.

b) The Petitioner=s payment plan shall also include full restitution to attorney Levy Gardner and Dennis Colton.

c) All payments shall be made by the Petitioner to a member of Florida Bar who shall act as a monitor for the duration of the restitution, accepting payments checks from the Petitioner which will be forwarded to The Florida Bar. The monitor shall maintain a record of all checks received and payments forwarded. No payments shall be made directly to the victims by the Petitioner. The Florida Bar will make all payments, and maintain an accounting of all checks received by the Petitioner and payments made to victims.

d) The Petitioner shall have no authority to write checks on any business/operating checking account or trust account until full restitution has been made.

2) Rehabilitation

The Petitioner shall not consume any alcohol, controlled substances or any unprescribed medications. Until full restitution has been made, he shall:

a) submit to weekly urinalysis testing, and the findings shall be forwarded to The Florida Bar;

b) maintain a Sobrietor at his residence which shall be monitored by the Monitored Services Bureau, 15801 State Road #9, Miami, Florida 33169, telephone (786) 263-4899. The Sobrietor is a remote alcohol testing system which enables reliable automatic and unsupervised remote breath test administration at the Petitioner=s own home. The Petitioner shall submit to random alcohol testing no less than five times per week. The results of these tests shall be forwarded to The Florida Bar.

The Florida Bar filed its petition for review on September 30, 2004. This brief follows.

SUMMARY OF ARGUMENT

In this appeal The Florida Bar is requesting that this Honorable Court reject the referee's recommendation that Alan Hochman be reinstated to the practice of law with various conditions, including having a "sobrietor" device in his home. This Court may review the factual basis for the referee's recommendation by conducting an independent review of the record. The Florida Bar re Wolfe, 767 So.2d 1174 (Fla. 2000). The evidence established that petitioner has not presented any evidence to establish that he is no longer a drug addict, that he remains owing at least $200,000, not including interest, of the $321,056.87 he misappropriated,

harbours ill will toward The Florida Bar, has had client contact and does not have unimpeachable character.

Moreover, the referee wrongly excluded the petitioner's own testimony in his deposition taken in these proceedings which showed he became drug addicted and engaged in criminal conduct by purchasing prescriptions for drugs.

ARGUMENT

I. THE REFEREE IMPROPERLY EXCLUDED EVIDENCE OF PETITIONER'S DRUG USE AND CRIMINAL CONDUCT DURING THE SUSPENSION.

The Florida Bar attempted to introduce in these proceedings petitioner's sworn deposition testimony of December 2, 2003. The referee prohibited the introduction of the following proferred testimony. (Attached as App. 2, TR 205).

1. Petitioner became addicted to Vicodin, prescribed by a physician and Oxycontin in December of 2001 and January of 2002.
2. Petitioner entered South Miami Hospital rehab on January 21, 2002 where he remained until March 1, 2002.
3. Petitioner would purchase prescriptions of Oxycontin from friends and people he knew.
4. Petitioner would either give his friends the money to fill the prescription or obtains pills from friends at no cost.
5. Petitioner tested positive for Methadone in June or July of 2002.

The referee maintained that her order of December 9, 2003, which prohibited the petitioner from introducing any evidence of substance abuse rehabilitation – unless he permitted the Bar access to his F.L.A. records – also applied to The Florida Bar. The following colloquy between the referee and Bar Counsel explains.

> MS. LAZARUS: To show, Your Honor, that the petition for reinstatement cannot be granted and, in fact, Mr. Hochman is a danger to the public because he has engaged in the illegal use of drugs during the period of time that he was suspended, and he started out by being a drug addict. That is all evidence that is extremely relevant in this proceeding. (TR 197).
>
> * * *
>
> We are here on a petition for reinstatement. Mr. Hochman has stopped us from getting information as to whether he is clean and sober or whether he's still a drug addict. He has precluded us from

doing that. That shouldn't prevent me and it shouldn't permit them – because I am introducing evidence concerning it. I haven't closed off avenues to him. I don't have to prove my case. I should be permitted to put it in, Your Honor. (TR 198).

THE REFEREE: The petitioner has the burden of proof in this matter. If they have not introduced any evidence of substance abuse or rehabilitation it's not because they didn't want to. It's because of my order dated December 9, 2003. The reason for me entering that order was because the Bar has filed a motion to strike the witness list because the petitioner had listed a number of witnesses who presumably, and based on proffer, would testify as to rehabilitation. The Bar argued that if they were not permitted to go into any of the information from F.L.A., it would give an incorrect and incomplete picture and would be precluded from cross-examining.

* * *

And thus, the trier of fact would not have a full and complete picture of whether or not he was rehabilitated insofar as substance abuse. For you to go into it now, it would create the exact same problem. You would be giving me an incomplete or selective view of his rehabilitation from substance abuse. (TR 198-199).

* * *

MS. LAZARUS: Respectfully, Your Honor, I think that it was Mr. Hochman's obligation to open himself up on a petition for reinstatement and when he hasn't done that, he has caused a penalty, so to speak, to himself. The Florida Bar should not be prevented from introducing evidence to Your Honor showing that there's a suspended lawyer out there who had a drug habit who wants to be reinstated to the Bar and I think that it's very important that you have that evidence. It really has nothing to do with the order in regard to Mr. Hochman. That is really a separate matter and that has to do with him not wanting to reveal himself to the Court and to the Bar. Now, for me not to be presenting this information to you, I thing that's an issue that potentially can cause great public harm if I'm not giving you evidence that shows that he could be out there and be a danger to the public. (TR 200-201).

* * *

> THE REFEREE: If the burden of proof is on Mr. Hochman to show rehabilitation, then why are you presuming a burden to show a lack of rehabilitation?
>
> MS. LAZARUS: I am not assuming a burden, Your Honor, but I have grounds upon which to object to his reinstatement. (TR 201).

Petitioner misappropriated approximately $321,056.87 (TR 378). He was suspended for three years, as opposed to being disbarred after admitting he was a drug addict. The consent judgment provided for his ongoing participation in an appropriate directed rehabilitation program.[2] Once the Bar discovered petitioner's recent illegal drug usage, instead of cooperating with the Bar, petitioner specifically revoked the Bar's ability to investigate further. The referee's December 3, 2003 decision was the correct remedy. As the petitioner should not have been permitted to use evidence concerning rehabilitation as a sword and a shield the referee ordered the following.

> Ordered that petitioner shall be precluded from introducing any evidence or testimony related to his substance abuse addiction and/or rehabilitation unless he waives his privilege of confidentiality regarding records and testimony related to his addiction and treatment. (App. 1)

At the final hearing, the referee ruled that she would be given a selective view if the Bar's evidence was admitted. The referee was correct in that conclusion. It

[2] Although the referee's December 9, 2003 referenced that petitioner held a privilege of confidentiality that conclusion was not correct. As the consent judgment provided for petitioner's ongoing participation in a rehabilitation program that information was not confidential. Rule 3-7.1(j) of The Rules Regulating The Florida Bar. In light of petitioner's "revocation" and refusal to permit F.L.A. to release information and the fact that it is petitioner's burden to establish rehabilitation the Bar did not and ought not challenge petitioner's stance.

was, however, the petitioner's actions in wanting to hide information from the Bar, and the referee, which created a selective view. The referee was wrong to penalize the Bar for the petitioner's steadfast obfuscation. Instead, the referee should have been concerned with what Alan Hochman is hiding.

In The Florida Bar v. Lopez, 545 So.2d 835 (Fla. 1989), the Bar attempted to introduce testimony from a prosecutor in the underlying criminal matter which gave rise to that petitioner's suspension. The referee ruled that pre-suspension evidence was irrelevant to the reinstatement. This Court noted that the proffered evidence "strongly suggested that claims of rehabilitation should be closely examined." The Court held that the referee erred. Here, the proffered evidence included the fact that petitioner again became addicted to drugs, illegally purchased it off the streets, entered an in-patient treatment facility, and tested positive for Methadone after his release from in-patient treatment. Surely, the foregoing "strongly suggested that claims of rehabilitation should be closely examined."

Moreover, the public policy effect of the referee's ruling cannot be ignored. The petitioner was able to obtain a lesser penalty for his misconduct as a result of availing himself of a rehabilitation program – to wit, F.L.A. This referee recommended petitioner's reinstatement despite the fact that the petitioner did not introduce a shred of evidence that he had made rehabilitative efforts from his drug

addition and was not currently a drug user. The effect of that action is to make the efforts of affected attorneys who have worked hard to rehabilitate themselves and prove that they are worthy of returning to the great privilege of practicing law, meaningless.

VI. PETITIONER HAS NOT ACTED WITH UNIMPEACHABLE CHARACTER DURING THE PENDENCY OF THE SUSPENSION.

In order to successfully apply for reinstatement to The Florida Bar, a petitioner must demonstrate various requisite elements. The Florida Bar In Re Timson, 301 So.2d 448 (Fla. 1974); The Florida Bar in Re Whitlock, 511 So.2d 524 (Fla. 1987). In fact, this Court has recognized, with the addition of Rule 3-7.10(f)(3)(g) that it is not enough to show that an individual is doing those things that should be done throughout life. More is required. Furthermore, all aspects of a petitioner's character may be examined to determine fitness to resume the practice of law. The Florida Bar v. Grusmark, 662 So.2d 1235 (Fla. 1995). To determine whether a suspended attorney should be reinstated, the Supreme Court may review the factual basis by conducting an independent review of the record. The Florida Bar ex rel. Wolfe, 767 So.2d 1174 (Fla. 2000). Here, the referee gave short shrift to the Bar's objections, to be more fully set forth below. Rather than recommending that the petition be denied, the referee fashioned conditions which reflect her acknowledgment that petitioner is unfit to resume the practice of law. Additionally, the referee simply ignored evidence submitted.

A. Evidence that the petitioner is no longer a substance abuser

On November 21, 1997, Alan Hochman executed a consent judgment in which he admitted that as a result of a significant problem with drug addiction, clients' funds were misappropriated. There was no evidence presented, either expert or lay, to establish that Alan Hochman is no longer a drug addict. On the contrary, the petitioner took great pains in his refusal to permit the Bar's access to his records with F.L.A. In fact, it is the proffered testimony, which the referee refused to admit that established that at the very least the petitioner had one, if not two, drug relapses which returned him to an in-patient treatment facility.

The referee's report is devoid of any mention of the petitioner's sobriety but for the caption "rehabilitation" above the conditions imposed. Those conditions however, speak louder than words. The referee stated:

> The Petitioner shall not consume any alcohol, controlled substances or any unprescribed medications. Until full restitution has been made, he shall:
>
> a. submit to weekly urinalysis testing, and the findings shall be forwarded to The Florida Bar.
>
> b. Maintain a Sobrietor at his residence which shall be monitored by the Monitored Services Bureau, 15801 State Road #9, Miami, Florida 33169, telephone (786)263-4899. The Sobrietor is a remote alcohol testing system which enables reliable automatic and unsupervised remote breath test administration at the Petitioner's own home. The Petitioner shall submit to random alcohol testing no less that five times per week. The results of these tests shall be forwarded to The Florida Bar.
>
> (ROR)

It is a terribly sobering thought to consider that in order for the public to be secure from this petitioner's predisposition to abuse drugs and steal from his clients he must have his urine analyzed and a breath testing machine housed in his residence. The conditions are more akin to those of a convicted felon than a reinstated member of this noble profession. It is as if the referee, through the imposed conditions, is giving the petitioner the opportunity to prove that he is rehabilitated.

B. <u>Strict Compliance with the Consent Judgment's Requirement of Making Restitution.</u>

Alan Hochman agreed to make restitution to the victims of his thefts, which totaled $321,056.87. (TR 378). In what appears to be an effort to facilitate the payment of restitution the Bar agreed that Hochman could pay back funds according to a payment plan and with the assistance of a monitor. Nearly seven years later and according to an analysis by the Bar's auditor, petitioner has repaid $47,876.09, without interest.[3]

[3] At the final hearing, despite the fact that on May 14, 2003 Hochman and his monitor had agreed to the Bar'sApril16, 2003 compilation of all monies stolen, paid by the Client's Security Fund, paid by Hochman and still owed to victims, Hochman claimed to have paid an additional $45,000 in restitution. Hochman explained that the April 16, 2003 letter did not include payments made before the payment plan began in December 1998. (Petitioner' s Exh. 1). That is why, even though the letter requested corrections, none were necessary. Rather, petitioner states that his November 10, 2000 letter to the Bar referenced the earlier payments. (Petitioner's Exh. 2). A close examination of the April 16, 2003 letter reflects it did include pre-payments, such as the 1997 payments to Dora Brown in the amount of $20,000. Also, the Bar's April 16, 2003 schedule set forth only those payments by Hochman for which the Bar received proof, not simply petitioner's statements in a letter that Hochman made payments. The Bar stands by its compilations. Moreover, as early as December of 2003 the Bar had provided charts in discovery to be relied on by the Bar's auditor to the petitioner setting forth those amounts, as agreed to by Hochman. Even if Hochman's new position is accepted he admitted to owing over $200,000. (TR 463).

From the year 2000 until 2004, except for some small payments made, Hochman paid nothing to the victims. Hochman has never made any payments to The Florida Bar's Clients' Security Fund. Most shockingly, from December 14, 1999 until October 14, 2003, $758,224.96 was deposited in Hochman's personal bank accounts. (TR 383). At the time that Hochman filed his petition for reinstatement he was earning $104,000 a year. Another factor that is telling is that the bulk of payments were made to three victims. One was Dora Brown, the initial complainant who threatened to take Hochman to the Bar and to the police. The other two were the victims upon which Hochman was prosecuted for grand theft. (TR 417). It is abundantly clear that this petitioner made only those payments which would potentially save him from a worse fate. Like the respondent in The Florida Bar v. Nunn, 596 So.2d 105 (Fla. 1992), Hochman was motivated by the proceedings, and not by the client's well being.

It is apparent from Hochman's testimony that restitution to clients was not his priority.[4] In fact he testified that he was trying to be "a parent to his kids and a husband." (TR 454). At first blush, this statement appears commendable. Mr. Hochman, however, chose to fund his children's graduate school tuition and housing when much of the population, who has not misappropriated in excess of

[4] Hochman testified that the terms of his suspension are that he make "reasonable attempts at restitution." (TR 130). The consent judgment only provides for the payment of restitution.

$300,000, utilize student loans to fund their education. (TR 448). Moreover, Mr. Hochman's testimony that he tried to split monies down the middle between "his clients and his kids" is not even true. (TR 454-455). The clients have been paid $47,870.09 according to the Bar's auditor. (TR 396). Three quarters of a million dollars was deposited into Hochman's accounts over three years. The victims' share was clearly not split down the middle. Sadly, Mr. Hochman's client/victim Tammy Mendez, whose husband and baby were killed in a car accident, did not receive a cent of the $43,000 that he took from her or the "split" he testified to. (TR 171-173).

As a further excuse for his failure to make restitution to his clients and The Florida Bar, petitioner testified about the huge legal fees he paid. (TR 443-444). This argument is much like the one made by the killer who murders his parents and wants sympathy because he is now an orphan. Even with the introduction of this testimony it is obvious that Mr. Hochman has failed to take responsibility for his actions. If he chose to use his wealth – $758,224.96 in deposits in three years -- for other payments, it was his choice to do so. To do so, however, translates into a failure to make restitution.

In The Florida Bar In Re: Paul H. Hessler, 493 So.2d 1029 (Fla. 1986) that petitioner plead guilty to one count of second degree grand theft for

misappropriating $80,000 from the estate of one of his clients. Hessler initially did not make restitution as the heirs could not be located. The referee recommended reinstatement and permitted a payment plan. The referee added in excess of $22,000 as an interest payment. This Court rejected the referee's finding and stated:

> We have not made it a practice to permit restitution on an installment plan and see no reason to commence that practice here. If a suspended lawyer wants to enjoy the privilege of practicing law after having been convicted of thievery, he should settle the debt created by his dishonest acts in full before readmission.
>
> Hessler, at 1030

In Hessler, that petitioner was felony suspended. Here, Hochman agreed to make restitution and failed to do so. According to Hessler, without even a condition requiring restitution, this Court would not permit reinstatement without complete restitution.

In The Florida Bar v. Grusmark, 662 So.2d 1235 (Fla. 1995), the referee recommended reinstatement even though Grusmark owed the C.S.F. $3,900, conditioning it upon Grusmark declaring personal bankruptcy and reimbursing the C.S.F. $200 per month. When the Court issued its opinion the C.S.F. had been paid in full and Grusmark had declared bankruptcy. It was noted that the disciplinary history, in good part, was directly connected to Grusmark's financial difficulties and lavish lifestyle. The matter, sub judice is far more egregious than Hessler or

Grusmark. Hochman's debt to the clients and the Bar remains at $280,934.84, without interest (TR 378). He has been earning a steady salary, has had three quarters of a million dollars deposited into his accounts, has discharged over a million dollars of personal debt and remains tremendously indebted for his delfacations. The Grusmark, supra, opinion did not contemplate the situation Hochman has placed himself in.

As with the lack of evidence concerning rehabilitation from drug abuse, the referee imposed conditions concerning restitution, rather than recommending denial of the petition as a result of petitioner's failure to comply with a condition of the discipline. These conditions do not serve to eliminate the requirement of substantial compliance.

C. Fiscal Irresponsibility

The Bar's auditor testified in regard to a personal bank account handled by Hochman from November 6, 2002 until July 6, 2003. (TR 383-384). Hochman filed his petition for reinstatement on April 17, 2003. Nine checks were dishonored due to insufficient funds and the account had 23 overdrafts. Hochman gave Williamson Cadillac a $2,800 check to lease a Cadillac on January 21, 2003. That same check was returned twice and then on April 24, 2003 – subsequent to the filing of the petition for reinstatement – Hochman issued yet another bad check

to the Cadillac dealer. (TR 384-386). The petitioner testified that it was the dealer's fault since the salesman agreed to hold the check for "four weeks" and because he didn't qualify for the lease. (TR 450-452). It is simply hard to believe that any business establishment would agree to hold a check for four weeks.

Mr. Ruga also testified in regard to the remaining checks written to Hochman's co-workers, a landlord, a shoe repair facility and a travel agency. Hochman again justified his bad check writing by explaining that his wife gave him an allowance which he had anticipated receiving at the time he wrote bad chcks. He said that he paid the co-workers before they knew the checks did not clear. (TR 449). Hochman did not explain why this pattern continued from January of 2003 until July of 2003, subsequent to the filing of his petition for reinstatement.

Another account handled by Hochman from April 19, 2002 to January 3, 2003 had 54 overdrafts. Hochman was charged $1,315 in bank charges. (TR 388).

Mr. Ruga concluded, based on his twenty years experience as an auditor with The Florida Bar, that Mr. Hochman is totally fiscally irresponsible based on writing bad checks, having constant overdrafts and paying large bank charges on only two accounts that he handled. (TR 389-390).

In The Florida Bar v. Lopez, 545 So.2d 835 (Fla. 1989), petitioner claimed that he had an agreement with the bank's president to approve overdrafts. This Court held:

> Petitioner's basic position, which the referee apparently accepted, is that the overdraft agreement and petitioner's testimony that he immediately made the checks good is an adequate explanation and that the returned checks were the responsibility of the bank. We disagree. The burden of showing fitness to resume the practice of law was on petitioner. Routinely writing bad checks, even if eventually made good, burdens the recipients and is fundamentally dishonest. It brings disrepute on the writer and the profession. It is inconsistent with fitness to practice law.
>
> (emphasis supplied)
> Lopez, at 837.

Instead of finding another basis to recommend rejection of petitioner's reinstatement the referee imposed the following condition:

> d) The Petitioner shall have no authority to write checks on any business/operating checking account or trust account until full restitution has been made.

In so doing the referee has memorialized her agreement that the petitioner is financially irresponsible by the imposition of a condition, rather than rejection of the petition.

The combination of Hochman's current mishandling of his financial matters, after his enormous misuse of clients' funds, coupled with making excuses for his actions establishes his lack of trustworthiness. So much so that the referee has

completely prohibited him from writing checks in the practice of law. The referee has therefore found that "Hochman has failed to demonstrate that he has progressed in his understanding of professional responsibility, that he may now be reposed with the publics' trust." The Florida Bar, Petition of Samuel Rubin for Reinstatement, 323 So.2d 257 (Fla. 1975).

> Every attorney should be eligible and worthy to accept and hold trust funds. The public should feel secure in leaving money or other property with any member of the Bar.
>
> (Emphasis supplied)
> The Florida Bar Re: Gail A. Roberts, 721 So.2d 283 (Fla. 1998)

D. Lack of Malice and Ill Will Toward Those Who by Duty Were Compelled to Bring Disciplinary Proceeding

In The Florida Bar v. Vernell, 520 So.2d 564 (Fla. 1988), this Court held that disagreement with a legal holding in and of itself, is not evidence of malice. In this case, Alan Hochman, did not simply express disagreement but rather displayed a level of contempt closer to righteous indignation. Much of Hochman's wrath, emanated from his stated position that his victims were contacted by the Bar and encouraged to contact the police, that the Bar was the movant behind the criminal prosecutions resulting in his felony pleas and that the Bar's vendetta continued when the Bar sought his felony suspension. During his testimony before the referee Hochman asserted "that he disagreed and was unhappy but understood."

(TR 180-182). Mr. Hochman's testimony, however, is belied by his affidavit submitted in opposition to the Bar's Motion for Summary Judgment. In it he says, among other things:

> 4. Despite The Florida Bar's agreement and approval of these conditions, they have thwarted my every attempt at re-instatement.
>
> 5. The Florida Bar attempted to delay my re-instatement for an additional three (3) years, however, the Florida Supreme Court found this maneuver to be in violation of the Agreement and in violation of the prohibition as to double jeopardy and stated that since I had only been suspended for three (3) years, I was entitled to pursue my petition for re-instatement since July 28, 2000.
>
> * * *
>
> 8. The Florida Bar has blocked my ability to present substantial and relevant evidence regarding my rehabilitation by obtaining a ruling precluding the introduction of this evidence.
>
> * * *
>
> Additionally, I have paid $35,000.00 in legal fees and owe an additional $15,000.00 in fees incurred for the most part due to the many roadblocks erected by the Bar to block my reinstatement.
>
> While employed in this capacity, Randi Lazarus began calling my prior clients and told them I was being criminally prosecuted for the money I had taken (a statement which was false) and encouraged them to contact the police and to file charges against me. Ms. Lazarus told my clients that by filing charges, this was the only way they would be reimbursed. This too was false as I had already signed an agreement with the Bar which included restitution and had already notified my clients, admitting to my conduct.[5]
>
> 22.Despite the assurances from The Florida Bar that I was not going to be criminally prosecuted, that they were going to give me a second chance in light of my self-reporting, full cooperation, three (3) year suspension, and agreement to pay restitution, The Florida Bar

[5] The Bar attempted to introduce a stipulation entered into on Hochman's behalf in the proceeding before Judge Dean in 2000. In it, Hochman agreed that the criminal investigation was initiated by William Pickett's complaint to the police and that Detective Joe Alvarez contacted the Bar and requested that he review all files in regard to thefts by Hochman. The referee would not permit its introduction. (TR 228-232).

> took definitive steps to encourage that charges be filed, including contacting my clients and providing the Bar file to the police.

In Petition of Joseph L. Wolf, 257 So.2d 547 (Fla. 1972), that petitioner described the proceeding causing his suspension as a miscarriage of justice. This Court held that as a result Wolf had failed to comply with the factor of lack of malice and ill feeling toward these compelled to prosecute him.

Here, Hochman's malice and ill will are evidenced by his writing words in which he lambasts the Bar for "thwarting him, blocking him, maneuvering, creating roadblocks, and being the cause of his criminal charges."

E. Client Contact During the Suspension

A suspended lawyer is prohibited from direct client contact. Joseph Klock, Hochman's employer at Steel, Hector & Davis testified as follows.

> "So Alan is very, very useful in working with the clients because he can relate to them and also help them identify different kind of problems they have and then he helps just with the normal stuff." (TR 242).

Klock did not testify to his presence during any of those contacts. In fact, petitioner's witness Arthur Garel testified that petitioner takes the clients to court and makes sure that they are doing the right thing and that Joe Klock would not be present. (TR 77, 82). Whether these clients are viewed as "pro bono" is irrelevant

to the analysis. Client contact of this nature is prohibited. Rule 3-6.1(e) of the Rules Regulating The Florida Bar.

F. Evidence of Impeachable Character

Dennis Koltun and Levi Gardner testified in opposition to petitioner's reinstatement. Hochman and Koltun were friends for many years. (TR 28). In 1995 Hochman borrowed $25,000 from Koltun. Despite a promissory note requiring complete payment within 30 days, Hochman paid back between $12,000 and $13,000. Hochman assured Koltun that even if he was to declare bankruptcy Koltun would be repaid. In 1998, Koltun received notice of Hochman's bankruptcy. (TR 32). To date, Hochman has never contacted Koltun to either apologize, explain or make any repayment. (TR 33). Koltun maintained that Hochman is not of good character and morals, since he is a liar who does not show remorse. As an officer of the court Hochman should be held to the highest standards. (TR 46).

Levi Gardner worked for Hochman for years. Despite the fact that Hochman was paid on cases, he did not pay Gardner all that was due to him. He owes him $48,000. To add insult to injury, in two encounters Hochman was accusatory and blamed Gardner for his troubles. Gardner's earnings were also discharged in Hochman's bankruptcy. Hochman has never expressed remorse. (TR 299-305).

What was most shocking to Gardner is Hochman's absence of embarrassment and blaming him. He found that reprehensible. (TR 314-315).

Rather, than finding petitioner's conduct in regard to his belligerence toward Gardner and failure to keep his word to Koltun - together with his lack of communication and remorse toward both - to be yet another ground to oppose the reinstatement the referee required that petitioner repay Koltun and Gardner. Although this "remedy" would ultimately solve the problem it ignores petitioner's conduct.

> [f]inding a lack of good moral character is not restricted to acts reflecting moral turpitude, but, rather, includes "acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness and respect for the rights of others and for the laws of the state and nation." Anything less would not protect the public interest sufficiently.
>
> The Florida Bar v. Jahn, 559 So.2d 1089, 1090 (Fla. 1990).

The essence of the rehabilitation testimony presented on behalf of the petitioner establishes that he is currently a good employee who has made some efforts at restitution despite all of the money he has spent to support his adult children and in his attempts to win his wife back. That evidence does not sufficiently carry the heavy burden of establishing rehabilitation. The Florida Bar v. Timson, 301 So.2d 448, 449 (Fla. 1975).

Alan Hochman should not be reinstated.

CONCLUSION

Based upon the foregoing reasons and citations of authority, The Florida Bar respectfully submits that the referee=s report recommending petitioner's reinstatement should be rejected.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of The Florida Bar=s Initial Brief was forwarded Via Federal Express airbill #809685808659 to **Thomas D. Hall**, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399-1927, and a true and correct copy was mailed to Leslie Rothenberg, Attorney for Petitioner, Steel, Hector & Davis, 200 So. Biscayne Boulevard, Suite 4000, Miami, Florida 33131, on this 30th day of November, 2004.

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Bar Counsel

APPENDIX

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