IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

CASE NO. SC04-1019

v.

TFB Case No. 2004-31,883(19B)(CFC)

MARC B. COHEN,

Respondent.

_____________________________/

RESPONDENT'S ANSWER BRIEF

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SYMBOLS AND REFERENCES

The following abbreviations and symbols are used in this brief:

I.B.	=	The Florida Bar's Initial Brief.
RR.	=	Report of Referee, attached as an appendix to the Initial Brief.
Resp. Exh.	=	Respondent's Exhibit from final hearing.
T.	=	Transcript of final hearing before Referee on January 21, 2005.

STATEMENT OF THE CASE AND FACTS

On June 21, 2004, The Florida Bar filed its Notice of Determination or Judgment of Guilt based on Respondent's no contest plea to possession of a felony amount of marijuana as well as five misdemeanors, including driving under the influence, possession of drug paraphernalia, fleeing and eluding officers, resisting arrest without violence and reckless driving arising from Respondent's arrest on August 11, 2002. Respondent timely filed his Petition to Stay Felony Suspension and Motion to Appoint Referee on June 29, 2004. On September 10, 2004, this Court referred Respondent's Petition to a Referee to submit "a report and recommendation to the Court as to whether Respondent should be suspended."

A final hearing was held on January 21, 2004. Respondent offered the testimony of five judges, the Honorable Scott M. Kenney, the Honorable Henry J. Andringa, the Honorable Peter M. Evans, the Honorable William L. Roby and the Honorable David C. Morgan; the assistant director of Florida Lawyers Assistance, Incorporated, Judith Rushlow; Respondent's treating psychologist, Nadir Baksh, M.S.W., Psy.D.; Respondent's Alcoholics Anonymous ("A.A.") sponsor, Bernard Krause; a lawyer in Respondent's law firm, Julie Oldehoff; and two of Respondent's major law firm clients, Shahid H. Shaikh, Vice President of First National Bank & Trust in Stuart, Florida, and Lilli Senesac, Credit Manager for Scripps Treasure Coast Publishing. Respondent also introduced exhibits consisting

of letters from clients and other lawyers in Respondent's legal community attesting to his professional reputation. (Resp. Exh. E, Resp. Comp. Exh. F and G). The Bar called the arresting officer to elicit details regarding Respondent's arrest and introduced a copy of the arrest report, as well as an independent substance abuse evaluation.

The Referee made detailed factual findings which are set forth in his Report of Referee. The Referee considered the gravity of Respondent's offenses, as described by Florida Trooper Phillip Spaziente. (RR. A2). In addition, the Referee noted the sentence imposed for the criminal charges recognizing that "Respondent was offered the alternative of being adjudicated on the felony charge and receiving no jail time or having adjudication withheld with the imposition of imprisonment." (RR. A2). Rather than losing his civil rights, Respondent accepted the thirty day term of imprisonment which began on July 1, 2004, followed by consecutive terms of one year drug offender probation and two years of probation. (RR. A2). In addition to the jail term and probation, "Respondent was also required to perform 150 hours of community service, pay approximately $1,500 in fines and court costs and relinquish his driver's license for six months." (RR. A2).

The Referee found that Respondent immediately sought treatment following his arrest. Specifically, the Referee noted, "[t]hree days after the arrest, Respondent sought help from Florida Lawyers Assistance, Incorporated ("F.L.A.,

Inc.") and began treatment with a psychologist, Dr. Nadir Baksh, to address his underlying personal issues." (RR. A2, citing T. 47, 58). The Referee considered Dr. Baksh's findings that "Respondent was in crisis, confronted with marital problems and the suicide attempt by his daughter." (RR. A2). The Referee accepted Dr. Baksh's diagnosis that Respondent suffered "from untreated obsessive compulsive disorder that was spiraling out of control, with depressive features and dependency issues." (RR. A2, citing T. 48). At the time of the final hearing, Respondent had "attended eighty-nine one hour counseling sessions with Dr. Baksh" and "F.L.A., Inc. ha[d] monitored the progress of his therapy sessions with Dr. Baksh." (RR. A2, citing T. 51, 64).

David Lloyd Merrill, Esquire, further corroborated Respondent's progress in addressing his personal crisis. While Respondent had experienced an "extremely difficult personal crisis at the time of his arrest," Mr. Merrill witnessed an "extraordinary change" in which Respondent became "a happier, positive and more solid person." (RR. A4; Resp. Exh. F-1).

The Referee determined that Respondent had affirmatively proven his rehabilitation. (RR. A6). Respondent executed his F.L.A., Inc. contract on September 9, 2002, and has been continuously monitored since that date. (RR. A2). While Respondent initially tested positive for marijuana in his first drug screen taken shortly after his arrest, the Referee found, "Respondent has tested

negative in all categories during his random monthly drug tests." (RR. A2, citing T. 62). The Referee heard the testimony of Judith Rushlow, Assistant Director of F.L.A., Inc. and reviewed her May 25, 2004 letter regarding Respondent's progress. The Referee highlighted Ms. Rushlow's statement in her May 25, 2004 letter that, "[a]s a result of his willingness to follow a recovery program, and his consistent compliance with the terms of his rehabilitation contract with FLA, we believe his prognosis for long-term sobriety is excellent." (RR. A2; Resp. Exh. 3). Ms. Rushlow further testified at the final hearing that Respondent was "'extremely compliant' and that he had done an 'excellent job in rehabilitation.'" (RR. A2, citing T. 62, 64).

Beside Respondent's participation in F.L.A., Inc., Respondent has embraced the Alcoholics Anonymous program, attending two times a week. (T. 122). Respondent's A.A. sponsor, Mr. Bernard Krause, testified regarding his consistent participation in and his commitment to working the program. (RR. A3, citing T. 71-76). At The Florida Bar's request, Respondent submitted to an independent evaluation with Martha E. Brown, M.D. (T. 114-115). Dr. Brown also found Respondent's prognosis to be good. (RR. A3). The Referee determined that Respondent's current treatment program was sufficient to ensure his continued sobriety. (RR. A3).

Julie Oldehoff, Esquire, testified regarding Respondent's law practice, his work ethic and his abstinence from the practice of law during the month of his incarceration. The Referee found that "Ms. Oldehoff had met Respondent when she worked as a part-time associate attorney with Respondent's former firm for six to seven years." (RR. A3, citing T. 78-79). The Referee noted Respondent's devotion to his practice by commenting that although "Ms. Oldehoff worked from 6 pm to 10 pm while raising her children," she had "regular interaction with Respondent who consistently worked until the late evening hours." (RR. A3, citing T. 78). After Respondent and Ms. Oldehoff left their former firm, Respondent repeatedly offered Ms. Oldehoff to become "of counsel" to his firm once her children were older. (RR. A3, citing T. 80-81). Ms. Oldehoff accepted Respondent's offer and "planned her first day of work to coincide with the first day of Respondent's jail sentence." (RR. A3, citing T. 82-83). The Referee found that Ms. Oldehoff's assistance permitted him to completely refrain from the practice of law throughout July 2004. (RR. A3). Respondent's law office organized his schedule to permit Ms. Oldehoff to cover hearings for Respondent's busy law practice, which consisted of approximately one thousand active case files. (T. 83-85).

The Referee also considered the candid manner in which Respondent discussed his arrest and treatment with his major clients, recognizing that

Respondent's disclosure could justify their termination of his representation. (RR. A4). The Referee referenced the testimony of Shahid H. Shaikh, Vice President of the First National Bank & Trust Company of the Treasure Coast in Stuart, Florida. Mr. Shaikh's corporation was a major and long-standing client of Respondent's law firm. Respondent had represented First National Bank & Trust for ten years and, at the time of the hearing, handled five hundred active files for the company. (T. 93, 98). The Referee noted Mr. Shaikh's testimony that "Respondent called within a week of his arrest to answer any questions posed by the bank" and that "Mr. Shaikh stated that they found Respondent very forthcoming and opined that his work performance is excellent." (RR. A4, citing T. 95-97). Similarly, the President of First National, Mr. Sam Beller, also referenced the forthcoming manner in which Respondent disclosed his arrest and commented on the progress that he had observed. The Referee referenced Mr. Beller's May 7, 2004 letter, in which Mr. Beller stated:

> Over the last 20 months, those of us at the bank who deal with Respondent on a regular basis have experienced first-hand Respondent becoming the person that he was at the commencement of our relationship. The progress that he has made over the past 20 months has repeatedly proven to us that the right decision was made in maintaining our professional relationship with him.

(RR. A4; Resp. Exh. G-1).

Like Mr. Beller and Mr. Shaikh, Ms. Lilli Senesac, the Credit and Collections Manager for Scripps Treasure Coast Publishing Company, confirmed Respondent's willingness to openly discuss his problems with a major client. The Referee found that Ms. Senesac "testified consistently with her letter dated May 12, 2004 in which she stated, '[a]t the time of Respondent's arrest, the company decided to continue our professional relationship with Respondent and have found that Respondent has proven his commitment to regaining his mental health.'" (RR. A4, citing T. 104-105; Resp. Exh. G-2).

The Referee also made extensive findings concerning Respondent's superior reputation among judges before whom Respondent has appeared. The Referee summarized the judges' testimony as follows:

> Respondent represented that twenty-nine judges throughout the State were willing to testify live or by affidavit as to Respondent's character and professional fitness. (T. 44). Due to the cumulative nature of the evidence, Respondent was asked to limit his presentation to five judicial witnesses. (T. 43). Pursuant to subpoena, five circuit and county court judges testified concerning Respondent's superior reputation for legal ability and professional ethics. The Honorable Scott M. Kenney, a circuit court judge in the Nineteenth Judicial Circuit since 1986 testified that Respondent has appeared before him between fifty to one hundred times. (T. 11). In Judge Kenney's opinion, Respondent's reputation for professional ability is excellent and his ethical behavior is always above reproach. (T. 12). Judge Kenney further stated that Respondent had an "absolutely excellent" reputation among other judges in the circuit. (T. 13). The Honorable Henry J. Andringa, a Pinellas county court judge since 1988, stated that he had been struck by Respondent's professionalism and civility and that Respondent has become the "benchmark for collection

> attorneys" who appear before him. (T. 19-20). The Honorable Peter M. Evans, a Palm Beach County judge since 1989, who has served on the faculty of the Florida Judicial College for approximately ten years, testified that Respondent had appeared before him on a regular basis for the past ten years. (T. 24). Judge Evans testified that Respondent was an outstanding lawyer, one of the finest attorneys that he has ever had in his courtroom and opined that he would "make a fine county court judge." (T. 25, 28). In Judge Evans' opinion, Respondent "has the knowledge and demeanor and professionalism that exemplify the best in our profession that I have seen." (T. 29). The Honorable William L. Roby, Chief Judge of the Nineteenth Circuit, had known Respondent as opposing counsel before he took the bench and as an attorney who has appeared before him. As opposing counsel, Judge Roby found that Respondent was a tenacious and ethical trial attorney. (T. 32). As a judge, he has determined that Respondent is clearly in the top ten percent of commercial litigators. (T. 32). The Honorable David C. Morgan, a former chief assistant state attorney and currently a county court judge since 1996 has also had the opportunity to observe Respondent in court. (T. 36). Judge Morgan testified that he is consistently prepared and always a gentlemen. (T. 39). Judge Morgan remarked that Respondent is what is right about The Florida Bar. (T. 39).

(RR. A4-A5).

Respondent introduced several letters from lawyers addressed to the sentencing judge in Respondent's criminal case regarding Respondent's reputation and character. (RR. A5; Resp. Exh. E and Comp. Exh. F). The Referee made the following observations:

> Most notably, attorneys who have acted as opposing counsel have consistently described Respondent as cordial and professional while still vigorously defending his clients. Other attorneys have expressed admiration for the manner in which he has handled cases routinely referred to him or his willingness to introduce young

> lawyers to the legal community and assist his colleagues with novel legal issues.

(RR. A5).

Respondent discussed his personal life crisis in the months before his arrest. Respondent testified that in February 2002, Respondent's marriage had deteriorated to the extent that he and his wife discussed ending their marriage. (T. 109). Shortly thereafter, Respondent received a call from his teenage daughter's high school stating that they had sent her to a mental hospital after discovering cuts and scratches on her arm. (T. 109). Respondent explained that while he had devoted himself to his law practice, he blamed himself for neglecting his family. (T. 110). Respondent was "devastated" and his alcohol and marijuana abuse escalated. (T. 109). Respondent testified that he was in "terrible" condition and living in a "self-created hell." (T. 118-119).

Respondent was so impaired that he did not remember all of the details of his August 2002 arrest. (T. 129, 132, 133). Respondent testified, "I am so ashamed. I can't begin to tell you." (T. 116). Two days after his arrest, he sought treatment from Dr. Baksh for the first time. (T. 111). Respondent explained that Dr. Baksh was a "major reason" for his successful recovery because he would not have been able to do it on his own. Respondent testified, ". . . and I think this is

true for anyone, until you understand the nature and the context of the problem you are experiencing, you have no idea how to address it yourself." (T. 117).

Respondent indicated that he would agree to any condition in order to prove his total devotion to sobriety. For example, Respondent offered to sign a lifetime contract with F.L.A., Inc., explaining that he wanted the "world to be assured it wouldn't happen again." (T. 118-119). Respondent testified that his current sober condition is a "universe away" from where he had been. (T. 119). Respondent stated that he was "absolutely willing to speak [to the public] and spread the word" concerning his personal experiences regarding his mental health issues, his drug and alcohol abuse and the effects of his actions on others. (T. 126). Respondent testified, "I don't mind letting the whole world know that one day at a time it will never ever happen again." (T. 116).

Based on the evidence presented at the final hearing, the Referee found ten mitigating factors, including absence of a prior disciplinary record, absence of a dishonest or selfish motive, personal or emotional problems, timely good faith effort to rectify consequences of misconduct, cooperative attitude toward proceedings, character or reputation, physical or mental disability or impairment, interim rehabilitation, imposition of other penalties or sanctions, and remorse. (RR. A6-A7). The Referee found no aggravating factors. (RR. A7). The Referee recommended this Court not impose any additional suspension, but instead place

Respondent on three years of probation, during which time Respondent be required to remain compliant with his F.L.A., Inc. contract, completely abstain from alcohol, submit to alcohol and other controlled substance testing, and "be required to make [twelve] speaking engagements per year of probation with regard to his mental health, substance abuse and criminal acts and his efforts to rehabilitate himself." (RR. A8).

STANDARD OF REVIEW

The burden is on "the party seeking review to demonstrate that a report of referee sought to be reviewed is erroneous, unlawful or unjustified." R. Regulating Fla. Bar 3-7.5(c)(5). Because the Referee is in a better position to evaluate the demeanor and credibility of the witnesses, the Court "neither re-weighs the evidence in the record nor substitutes its judgment for that of the Referee so long as there is competent substantial evidence in the record to support the Referee's findings." Florida Bar v. Marable, 645 So. 2d 438, 442 (Fla. 1994). The Referee's recommended sanction should be upheld if it has a "reasonable basis in existing case law." Florida Bar v. Wohl, 842 So. 2d 811, 815 (Fla. 2003)(*citations omitted*).

SUMMARY OF THE ARGUMENT

Almost three years ago, Respondent suffered from an undiagnosed obsessive compulsive disorder and was dependent on alcohol and marijuana. Respondent protected his law practice while his family life was destroyed. His marriage was ending and his teenage daughter had attempted to commit suicide. Respondent's drug abuse culminated on the night of his arrest. Three days later, Respondent contacted F.L.A., Inc. and began the arduous task of rehabilitation. The Bar does not dispute Respondent's rehabilitation and does not seek a rehabilitative suspension.

The Referee recognized that the Standards for Imposing Lawyer Sanctions "promote flexibility and creativity to assign sanctions" for each unique situation and found extraordinary mitigating circumstances. The Referee noted Respondent's incarceration effectively suspended him for thirty days and found that no further suspension was warranted, recommending three years of probation with monitoring by F.L.A., Inc. The Bar recognizes Respondent should be given credit for the time he could not practice during his jail term and concedes Respondent is not a danger to his clients. The Referee's recommendation that Respondent be required to make thirty-six speaking engagements, discussing his criminal charges, his substance abuse and his mental health issues is a meaningful

deterrent to others.   The Bar's request to impose an additional sixty day suspension is solely punitive and does not serve the interests of lawyer discipline.

ARGUMENT

I. <u>The Referee's recommended sanction is supported by the Standards for Imposing Lawyer Sanctions, case law and the purposes of discipline</u>.

Since Respondent's convictions served as conclusive proof of guilt pursuant to Rule Regulating the Florida Bar 3-7.2(b), the Referee's sole duty was to evaluate the evidence presented to reach the appropriate sanction. The Referee heard the testimony of Judges Scott M. Kenney, Peter M. Evans, Henry J. Andringa, William L. Roby and David C. Morgan, two of Respondent's major clients, Respondent's treating psychologist, the assistant director of F.L.A., Inc., Respondent's A.A. sponsor, another lawyer in his firm and the arresting officer. In reaching his conclusions, the Referee noted that Respondent's jail time effectively suspended Respondent since he was precluded from practicing law, even though a suspension was not formally imposed. (RR. A7). The Referee recommended to this Court that no additional suspension was warranted. (RR. A7).

The Referee recommended a three year term of probation with the following special conditions:

> . . .Respondent shall remain in compliance with his F.L.A. contract for the full term of his probation. Second, Respondent shall completely abstain from alcohol and shall be tested for alcohol as well as any other controlled substance not otherwise prescribed. Third, in addition to the community service previously ordered as a condition of his

> criminal sentence, Respondent shall be required to make 12 speaking engagements per year of probation with regard to his mental health, substance abuse and criminal acts and his efforts to rehabilitate himself.

(RR. A7-A8).

The Florida Bar does not dispute the Referee's finding that Respondent has affirmatively established rehabilitation from his substance abuse and therefore, concedes that rehabilitative suspension is not warranted. (I.B. 11). Given the exemplary reputation as described by the judges before whom Respondent practices, combined with the testimony from his major corporate clients regarding Respondent's progress and excellent work product, the Bar cannot show that he is a danger to the public. Instead, the Bar's sole basis for requesting the Court to impose a ninety day suspension, with credit for the thirty days of incarceration, is to punish Respondent. However, all of the facts and circumstances, as found by the Referee, demonstrate that Respondent has been sufficiently punished.

In the past two years and ten months since his arrest, Respondent has honorably worked to rectify his past mistakes. Two days after his arrest, Respondent sought mental health counseling to address his previously undiagnosed obsessive compulsive personality disorder as well as to address substantial family problems pertaining to his divorce and the hospitalization and attempted suicide of his teenage daughter. (T. 49, 116-117). Three days after his arrest, he met with

F.L.A., Inc. (T. 58). Respondent diligently pursued treatment with a substance abuse counselor, met with his F.L.A., Inc. monitor, and at the final hearing had passed forty monthly random drug screens. (T. 112, 120). Respondent candidly disclosed his misconduct and his efforts to seek treatment to his clients, knowing they might have chosen to terminate their relationship. (T. 95, 106; Resp. Comp. Exh. G). Respondent contacted the judges before whom he regularly practiced to answer any questions or concerns they had about him. Respondent was limited to calling five judicial character witnesses and all five judges testified to Respondent's superior reputation. (RR. A4-A5). To protect his bar license, Respondent accepted the criminal trial judge's offer of a thirty day jail sentence, on the condition that his adjudication would be withheld on the felony possession of marijuana charge rather than the alternative of an adjudication of guilt on the felony offense with no jail time. (RR. A2). A further suspension would devastate Respondent's law practice. (T. 125). After considering the totality of the circumstances, it is respectfully submitted that the Bar's requested sanction is unnecessarily punitive.

This Court has recognized that the "debilitating effects of substance abuse" can mitigate sanctions for lawyer misconduct that would otherwise seriously question a lawyer's "fitness to practice law." See Florida Bar v. Sommers, 508 So. 2d 341 (Fla. 1987); Florida Bar v. Wells, 602 So. 2d 1236 (Fla. 1992). The

attorneys in Sommers and Wells essentially abandoned their practices, committing numerous ethical violations causing injuries to their clients, and neglected to adhere to the trust accounting rules. In addition, the attorney in Wells was arrested for driving under the influence and subsequently arrested for possession of cocaine and the attorney in Sommers suffered from "unspecified substance abuse." Wells at 1236; Sommers at 342. In both cases, the sanctions were greatly mitigated due to the existence of substance abuse.

Consideration of an attorney's illegal substance abuse as a mitigating circumstance clearly promotes the Court's stated objective of "encouraging reformation and rehabilitation." Wells at 1239; Sommers at 343. Similarly, Respondent's diagnosis of obsessive compulsive disorder combined with his dependence on marijuana and alcohol mitigates Respondent's criminal law violations. In this case, the criminal charges are not accompanied by other misconduct directly related to the practice of law. Respondent struggled to maintain his superior reputation in the legal community while at the same time, his personal family life deteriorated to the extent that he blamed himself for his daughter's attempted suicide. The Bar seeks an additional suspension asserting that his conduct did not just involve personal substance abuse but also included driving under the influence, reckless driving, fleeing and eluding, and resisting officers without violence. (I.B. 5, 13-14). While Respondent acknowledges that

his criminal misconduct justifies a disciplinary sanction, his terrible judgment was directly related to his severe chemical dependency and further impaired by his extremely troubling personal circumstances.

The Referee's recommended sanction strikes the appropriate balance between protecting the public, imposing punishment, deterring other lawyers and encouraging reformation and rehabilitation. The Referee carefully examined the Standards for Imposing Lawyer Sanctions for drug cases, the disposition of similar offenses and the purposes of discipline as set forth in Florida Bar v. Lord, 433 So. 2d 983 (Fla. 1983). The bases supporting the Referee's recommended sanction are discussed below.

A. The Standards for Imposing Lawyer Sanctions support the recommended sanction.

As the Referee noted, the Standards were constructed to "permit 'flexibility and creativity in assigning sanctions in particular cases of lawyer misconduct.'" (RR. A8; quoting Fla. Stds. Imposing Law. Sancs. 1.3). While the Standards provide a guideline for the appropriate sanction, the sanction is not fixed. Rather, the Court has discretion to increase or decrease the presumptive sanction depending on the facts presented. In order to promote "flexibility and creativity," the Standards encourage the Referee to examine all of the circumstances surrounding the misconduct. See Fla. Stds. Imposing Law. Sancs. 3.0. Similarly,

The Florida Bar's publication commenting on Standard 10 recognizes that the sanction for felony personal drug use should depend on the application of mitigating and aggravating circumstances. In pertinent part, The Florida Bar's commentary states, "[a] lawyer engaging in misdemeanor or felonious conduct, involving controlled substances, will be suspended from the practice of law. The length of the suspension may be influenced by mitigating and/or aggravating factors." The Florida Bar, Florida's Standards for Imposing Lawyer Sanctions, Nov. 2000 at 52-53.

The Referee considered Standard 10.3 and the extraordinary mitigating circumstances and the absence of any aggravating factors in rendering its recommendation. The Bar agrees Respondent is rehabilitated and does not seek a rehabilitative suspension. In addition, the Bar does not suggest that the mitigating factors are unsupported by the record and never argued to the Referee that mitigating circumstances were irrelevant. Indeed, there is ample evidence warranting the finding of each mitigating factor. The Referee found the following mitigating factors:

> 1. Absence of a Prior Disciplinary Record. Fla. Stds. Imposing Law. Sancs. 9.32(a). Respondent was admitted in April 1978 and has practiced for over twenty-six years without any disciplinary history.

2. Absence of Dishonest or Selfish Motive. Fla. Stds. Imposing Law. Sancs. 9.32(b). Respondent's disciplinary proceeding concerns Respondent's criminal conduct and does not relate to the practice of law.

3. Personal or Emotional Problems. Fla. Stds. Imposing Law. Sancs. 9.32(c). Respondent's personal life was in turmoil due to marital discord and the attempted suicide of his daughter, which exacerbated his dependence on controlled substances and alcohol.

4. Timely good faith effort to rectify consequences of misconduct. Fla. Stds. Imposing Law. Sancs. 9.32(d). Respondent constructively examined and confronted not only his chemical dependency issues, but also his underlying personal issues. Respondent contacted F.L.A., Inc. within three days of his arrest and he followed all of F.L.A., Inc.'s recommendations without complaint. Further, Respondent immediately began treatment with a counselor to address his personal and familial relationships that were in crisis.

5. Cooperative attitude toward proceedings. Fla. Stds. Imposing Law. Sancs. 9.32(e). Respondent's testimony, demeanor, rehabilitation efforts and candor to the judges before whom he regularly appears establish his cooperative attitude toward these proceedings.

6. Character or Reputation. Fla. Stds. Imposing Law. Sancs. 9.32(g). The testimony of judges and documentary evidence from other lawyers in the community convincingly establish Respondent's superior reputation for legal ability and professionalism.

7. Physical or Mental Disability or Impairment. Fla. Stds. Imposing Law. Sancs. 9.32(h). At the time of his arrest, Respondent's untreated obsessive-compulsive disorder combined with alcohol and drug use affected his judgment. While not excusing the criminal conduct, these impairments should be considered in assessing his behavior.

> 8. Interim rehabilitation. Fla. Stds. Imposing Law. Sancs. 9.32(j). Respondent has proven his rehabilitation through the testimony of the representatives from Florida Lawyers Assistance, Inc. and through his treating psychologist . His sobriety has been confirmed through monthly random urine screens for the past twenty-seven months.
> 9. Imposition of other Penalties or Sanctions. Fla. Stds. Imposing Law. Sancs. 9.32(k). At the time of Respondent's plea, Respondent was offered the choice between an adjudication of his felony possession of drug charge without jail time or a withhold of adjudication with a thirty-day jail sentence. In order to preserve his civil rights, Respondent accepted the jail term. Respondent's jail sentence also effectively suspended his ability to practice law for thirty days.
> 10. Remorse. Fla. Stds. Imposing Law. Sancs. 9.32(l). Respondent has demonstrated remorse through his testimony, the testimony of his witnesses and his conduct in seeking treatment to rectify his dependency and mental health issues.

(RR. A6-A7).

Rather than contesting the applicability of the mitigating factors, the Bar urges the Court to simply ignore the mitigating circumstances and automatically impose a ninety day suspension, with credit for Respondent's thirty day jail sentence. By urging the Court to disregard the mitigating circumstances, the Bar advocates abandoning the Court's well-established policy purposes specifically set forth in Standard 1.3 and even its own published policy recognizing the application of mitigating and aggravating circumstances in felony drug use cases.

The Bar argues that Standard 10.3 requires, as an absolute minimum, a ninety day suspension any time there is a determination of guilt and asserts that the Referee and the Court are precluded from considering mitigating circumstances. (I.B. 10-11). Pursuant to the Bar's logic, mitigating circumstances should not be applied to Respondent's case because he pled to possessing a felony amount of marijuana. On the other hand, according to the same analysis, mitigating circumstances would be applicable for a lawyer who possessed a felony amount of marijuana but entered a pre-trial diversionary program (such as drug court), or achieved the dismissal of charges on grounds unrelated to the merits of the case (such as an exclusionary remedy, speedy trial violation, discovery violation or unavailability of a witness).

A conviction (via a determination of guilt or an adjudication) does not change the underlying misconduct. It merely provides the Bar with a convenient method of proving the disciplinary violation since it serves as conclusive proof of guilt. See R. Regulating Fla. Bar 3-7.2(b). A dismissal (either as a remedy for a constitutional violation or the successful completion of a diversionary program) does not preclude The Florida Bar from investigating and seeking the imposition of discipline for the criminal conduct. As the Bar notes in its Initial Brief, a lawyer's felonious conduct is not excused or even mitigated by the dismissal of criminal charges. (I.B. 12)(citing Florida Bar v. Garland, 651 So. 2d 1182, 1183 (Fla.

1995)). It is inequitable and nonsensical to permit the consideration of mitigating circumstances for felony conduct in which a conviction or determination of guilt is not obtained, but prohibit a Referee from considering mitigating circumstances when a lawyer pleads to the offense.

In addition, the distinction between felony drug possession and misdemeanor drug possession can be artificial if both involve personal use. Adopting the Bar's suggested analysis, this Court could not consider mitigating circumstances if a lawyer is convicted of possessing more than twenty grams of marijuana for his personal use. However, if this same lawyer had negotiated a plea to the reduced misdemeanor charge of possessing twenty grams or less of marijuana, then mitigating circumstances would become suddenly relevant. The disparity of treatment is unjustified since both situations concern the same illegal substance and the same underlying misconduct. Regardless of the outcome of the criminal matter, the Court should carefully examine the lawyer's conduct and evaluate all of the circumstances in order to assign the appropriate sanction.

The Referee did not find any aggravating factors. Without referencing a pertinent aggravating factor, the Bar appears to argue that the circumstances of his criminal offenses justify the aggravation of the sanction. Respondent does not attempt to diminish the gravity of his action or deflect responsibility. Rather,

Respondent demonstrated remorse and shame regarding his conduct during the final hearing. (T. 116-119). Nonetheless, a few facts require clarification.

First, the Bar repeatedly states in its Initial Brief that Respondent "caused a serious accident involving injuries" when the record does not support its assertion. (I.B. 5, 8). The Bar used Respondent's convictions as "conclusive proof of guilt" pursuant to Rule 3-7.2(b). However, Respondent did not plead to any crime involving injuries. Respondent's driving under the influence charge only pertained to property damage. See Notice of Determination of Guilt, attachment 1 of 32, "Judgment." In addition, the Bar did not offer the testimony of anyone involved in the accident to indicate that they had been injured by Respondent. Although the other drivers went to the emergency room and were released the same day, there is no showing that they were injured. (T. 133). Respondent deeply regretted causing the car accident. (T. 116, 132). However, it is not appropriate to further aggravate the circumstances with assertions not supported by the record.

Second, the Bar cites to Respondent's interactions with the arresting officer to argue the egregiousness of this case. The Bar references Respondent's driving, his failure to react to the police sirens and his inability to follow the police officer's commands. The Trooper testified that Respondent was "extremely intoxicated," that he was not listening to his commands and was requesting the Trooper to drive him home. (T. 146-147). The Trooper's testimony was consistent with the

conduct of a very impaired person, rather than an individual who was intentionally disrespectful or violent toward law enforcement.

The Referee took great care to consider and evaluate all of the circumstances. While the presumptive sanction pursuant to Standard 10.3 is a ninety day suspension since Respondent proved rehabilitation, the Referee appropriately determined the totality of the circumstances warranted a reduced sanction. The Referee's recommended sanction adheres to the Standards for Imposing Lawyer Sanctions and should be accepted.

B. The Referee's recommended sanction has a reasonable basis in existing case law.

The Referee considered that Respondent has already been effectively suspended for thirty days when he was incarcerated. Respondent and Ms. Oldehoff testified that she covered Respondent's cases during his thirty day jail term. When Respondent was released seven days early, Respondent voluntarily refrained from the practice of law for the remaining thirty days. The Bar agrees that Respondent should be given credit for the thirty days he spent in jail but urges this Court to impose an additional sixty day suspension. (I.B. 2, 15).

The Bar asserts Respondent's criminal conduct warrants a harsher sanction. The Bar's argument does not consider that the "debilitating effects of substance abuse" causes poor judgment leading to a wide range of misconduct, including

criminal law violations. See Florida Bar v. Wells, 602 So. 2d 1236 (Fla. 1992). While criminal conduct seriously questions a lawyer's fitness to practice law, substance abuse mitigates the severity of the sanction. Florida Bar v. Dubbeld, 594 So. 2d 735, 737 (Fla. 1992)(citing Florida Bar v. Hartman, 519 So. 2d 606 (Fla. 1988); Florida Bar v. Larkin, 420 So. 2d 1080 (Fla. 1982)). As such, The Florida Bar's reliance on Florida Bar v. Weintraub, 528 So. 2d 367 (Fla. 1988) and Florida Bar v. Temmer, 632 So. 2d 1359 (Fla. 1994) is misplaced because neither case is mitigated by a finding that the attorneys suffered from drug abuse or addiction. Moreover, Weintraub and Temmer are further distinguishable because neither contain the extraordinary mitigating circumstances present in this case.

The clearest distinction between Weintraub and the present case is Mr. Weintraub's conviction for delivery of cocaine. Weintraub at 368. Mr. Weintraub not only possessed cocaine, but also delivered cocaine to his neighbor with whom he had been "romantically involved." Id. Further, there was no indication that Mr. Weintraub was in the throes of drug addiction or alcohol abuse, suffered from a mental illness or experienced severe family problems. Rather the referee in Weintraub described his use as "recreational." Id. While Mr. Weintraub had contacted F.L.A., Inc., he had only done so "as part of his negotiations with the Bar with regard to [the] disciplinary proceeding." Id. The Weintraub referee rejected the attorney's request for a private reprimand noting that he had not taken any

steps to disengage in the illegal drug activity until after he was apprehended and finding that a public reprimand would not be an effective deterrent. Id. at 369.

Since Mr. Weintraub's life was free from personal trauma, addiction and mental health issues, the referee reasonably determined that he had sufficient clarity to stop using illegal drugs and refrain from delivering them to his girlfriend prior to his arrest. In contrast to Weintraub, Respondent's life was in turmoil before his arrest. Respondent's treating psychologist, Dr. Baksh, testified that he suffered from a previously undiagnosed obsessive compulsive disorder and the increasing abuse of alcohol and marijuana. (T. 48-50). Respondent was caught in a vicious cycle in which his drug and alcohol abuse harmed his family life and in return, his deteriorating personal life exacerbated his substance abuse. Respondent described this time period as a "self-created hell" and explained he would never have been unable to recover on his own. (T. 117, 119). In describing his problems with his family and his substance abuse, Respondent testified, "And I couldn't change it at that point in time, and I just hated myself for it." (T. 110). Respondent did not contact F.L.A., Inc. or his therapist as a term of his negotiations with the Bar like the attorney in Weintraub. Rather, he sought help because he was at rock bottom following his arrest and desperately needed assistance. (T. 47). Respondent explained, "until you understand the nature of the problem you're experiencing, you have no idea how to address it yourself." (T. 117).

Unlike the attorney in Weintraub, a "recreational" user who was not addicted, Respondent's struggle to obtain and maintain sobriety was a demanding accomplishment. While Respondent's condition had to severely decline before reaching out for help, Respondent ultimately demonstrated his full commitment to his recovery by attending eighty-nine therapy sessions, weekly meetings with his F.L.A., Inc. monitor, his bi-weekly meetings with his A.A. group and his forty negative monthly drug screens. (T. 51, 112, 120, 122). As opposed to Mr. Weintraub who sought only a private reprimand, the Referee's recommended sanction includes an effective deterrent to others, requiring him to make thirty-six public speaking appearances describing his criminal, mental health and substance abuse problems.

Similar to Weintraub, Florida Bar v. Temmer also addresses use of an illegal substance by an attorney who was not suffering from chemical dependency and who also involved others in her drug use. Temmer at 1360. Ms. Temmer's use of crack cocaine revolved around a boyfriend, who had formerly been her client in a criminal matter. Id. at 1359. Notwithstanding Ms. Temmer's problems with her "relationships" and "personality" as found by her therapist, Ms. Temmer used illegal drugs with a former client. Id. at 1360. There is no suggestion that Respondent ever involved a client in his illegal drug use. Although Respondent's family life was severely harmed by his substance abuse, Respondent sustained his

law practice, protected his clients and maintained his reputation in the legal community.

Moreover, other substantial mitigating factors are present in this case that were not found in either Weintraub or Temmer. For example, Respondent has a superior reputation for ethics in the legal community. Judge Scott Kenney testified that his "ethical behavior is always above reproach" and that is reputation among other judges in the Nineteenth circuit is "absolutely excellent." (T. 12-13). Judge Henry Andringa averred that Respondent has become "the benchmark for collection attorneys." (T. 19-20). Judge Peter Evans testified that he has the "knowledge and demeanor and professionalism that exemplify the best in our profession that I have seen." (T. 29). Judge William Roby testified that he is "clearly in the top ten percent of commercial litigators." (T. 32). Judge David Morgan stated that Respondent is "consistently prepared and always a gentleman." (T. 39). Although Respondent's reputation does not excuse his criminal conduct, Respondent's tremendous efforts in his previously unblemished twenty-five year career justify consideration.

In addition to his reputation, Respondent compellingly demonstrated remorse through his testimony and his willingness to substantiate his good intentions. Respondent offered to submit to a lifetime contract with F.L.A., Inc. and conveyed his eagerness to reach out to others by sharing his experiences. A

lawyer of Respondent's stature is a perfect candidate for a mitigated sanction requiring outreach into the legal community.

Since the Bar does not dispute the Referee's finding of rehabilitation, its citations to Florida Bar v. Thompson, 500 So. 2d 1335 (Fla. 1987), Florida Bar v. Finklestein, 522 So. 2d 372 (Fla. 1988) and Florida Bar v. Schram, 355 So. 2d 788 (Fla. 1978) are not pertinent. In each of these cases, the attorney had not yet demonstrated rehabilitation from illegal drug use. Thompson at 1336 ("We find proof of rehabilitation wise under the circumstances of this case. . .") ; Finklestein at 372-73 (attorney did not assert rehabilitation but rather offered to agree to a one year suspension following the filing of the notice of determination of guilt); Schram at 788 (noting that the Board of Governors voted to modify the consent agreement to emphasize he would not be readmitted until he proved rehabilitation). Because of the need to prove rehabilitation, the recommended sanctions in each of these cases were necessarily greater than ninety days and do not provide helpful guidance.

Public reprimands have been imposed for criminal conduct similar to the law violations in the present case. For instance, in Florida Bar v. Fields, 520 So. 2d 272 (Fla. 1988), an attorney was convicted of battery and of driving under the influence involving an accident. In addition to the criminal charges, Mr. Fields also failed to comply with trust accounting rules and improperly charged

delinquent clients a usurious rate of interest. Fields at 272-73. Moreover, Mr. Fields had been previously reprimanded for the same conduct involving the illegal interest rate. Id. There is no indication that Mr. Fields suffered from substance abuse nor were any other mitigating factors addressed.

In Florida Bar v. Allen, 518 So. 2d 916 (Fla. 1988), an attorney received a public reprimand following two separate convictions of driving under the influence and an incarceration after he appeared in court intoxicated. While substance abuse issues may be implicit in the fact pattern, there is no discussion of rehabilitation or mitigating circumstances. Indeed, the case is aggravated by the attorney's failure to seek help after his first arrest.

The Court imposed a public reprimand in Florida Bar v. Dubbeld, 594 So. 2d 735 (Fla. 1992), after giving the responding attorney several prior chances to seek treatment for his substance abuse. Mr. Dubbeld was first admonished after he engaged in a verbal altercation with a police officer. Id. at 736. The second admonishment followed a domestic violence conviction in which he battered his wife and a disorderly intoxication conviction. Id. Mr. Dubbeld was ordered to execute and comply with the terms of an F.L.A., Inc. contract as a condition of his second admonishment. Id. at 737. Mr. Dubbeld did not complete his contract. Id. Instead, Mr. Dubbeld was subsequently convicted of driving under the influence involving a traffic accident. Id. at 736. Mr. Dubbeld was also found to have left

an "obscene or at least patently offensive" message on a woman's answering machine. Id. Although the Court recognized that "[a]lcohol abuse and seeking treatment for such affliction can be mitigating circumstances in attorney discipline," the Court was "troubled by his failure to complete his [F.L.A., Inc.] contract and to comply with conditions of his second admonishment." Id. at 737.

Notwithstanding Respondent's felony charge of possession of marijuana, his conduct is less egregious than the circumstances in Dubbeld. As opposed to Dubbeld, when Respondent was offered the assistance to reform, he zealously pursued his recovery. In the two years and ten months since his arrest, Respondent has completely abstained from drugs and alcohol. The assistant director of F.L.A., Inc. testified that Respondent was "extremely compliant" and had "done an excellent job in rehabilitation." (T. 62, 64).

The Bar argues that Respondent's felony plea to possession of over twenty grams of marijuana sufficiently distinguishes his case from Fields, Allen and Dubbeld. While Respondent concedes that none of those cases involve a felony charge, it is respectfully submitted that a misdemeanor charge for possession of marijuana weighing less than twenty grams is not substantially different from a felony charge of marijuana weighing over twenty grams when both charges concern personal use. In this case, there is no suggestion that Respondent was delivering or selling marijuana to others. The Court has imposed a public

reprimand for a misdemeanor marijuana charge even when it was accompanied by other lawyer misconduct. In Florida Bar v. Pascoe, 526 So. 2d 912 (Fla. 1988), the attorney possessed marijuana while sharing a marijuana cigarette at a party, failed to timely file a criminal appeal, published an improper advertisement and improperly criticized a federal court action. The Court found that there was no indication of substance abuse and imposed a public reprimand followed by three years of probation. Id. at 914.

The Referee in the present matter noted the absence of case law directly on point and so appropriately considered consent judgments that have been approved by the Court. (RR. A11- A13). Prior to discussing the consent judgments, the Referee cited to the Preface of the Standards for Imposing Lawyer Sanctions, which states, "The Bar will use these standards to. . . determine acceptable pleas under Rule 3-7.9 [pertaining to consent judgments]." (RR. A11). Accordingly, the Referee reasonably determined that the sanctions set forth in the consent judgments provide persuasive authority in assigning an appropriate sanction.

The Referee first considered Florida Bar v. Gaines, SCO3-790, in which the Bar agreed to a sixty day suspension for conduct involving heroin and marijuana use. (RR. A12). While the criminal charges were dismissed following a motion to suppress, the consent agreement indicated that the attorney had "shot up" heroin and then had shown his girlfriend how to heat up and mix the heroin for her usage.

(RR. A12). The drugs were discovered after his girlfriend overdosed and the police responded to his apartment. (RR. A12). The responding attorney had established rehabilitation and had no prior disciplinary record but did not have the substantial mitigating circumstances present in this case, including character or reputation evidence, mental disability and personal problems. (RR. A12).

Florida Bar v. McLennon, Case No. SC04-521, concerned an attorney who had been convicted of possession of misdemeanor marijuana and driving under the influence with a blood alcohol level of .416. A year and a half after his first arrest, the attorney was again arrested for driving under the influence, involving an automobile accident. The Bar agreed to a thirty day suspension followed by probation, with a special condition of an automatic ninety-one day suspension if the attorney violated the terms of his probation. As in Dubbeld and Allen, Mr. McLennon did not diligently pursue his rehabilitation after the first arrest and yet the Bar agreed to a sanction less than ninety days.

The Referee's recommendation that no further suspension is warranted is supported by the case law. First, Thompson, Finklestein and Schram are inapplicable because the responding attorneys still needed to establish rehabilitation and therefore the suspensions necessarily exceeded ninety days. Second, the Temmer and Weintraub decisions imposing a ninety day suspension are distinguishable since Ms. Temmer and Mr. Weintraub involved others in their

drug use, were not suffering from chemical dependency and both lacked the other substantial mitigating factors present in this case. Third, Allen and Dubbeld both received public reprimands even though they both caused accidents while driving impaired, were arrested on more than one occasion and failed to diligently pursue rehabilitation after their first arrest. Fourth, the Court has approved a sixty day suspension in cases involving felony drug use that endangered another and a thirty day suspension when the attorney failed to seek adequate treatment after his first driving under the influence and possession of marijuana arrest and as a result, was again arrested after causing an accident while driving impaired. Gaines; McLennon. Fifth, the Referee's recognition that Respondent was effectively suspended for thirty days is supported by prior cases and is not contested by the Bar. (I.B. 2, 15; RR. A10; Florida Bar v. Winkles, 668 So.2d 604 (Fla. 1996)(approving consent judgment in Case No. 84-764, in which an attorney was given credit for time he voluntarily suspended himself from the practice of law.))

In the absence of any case directly on point, the Referee's recommended sanction constituted a careful comparison of the relevant cases and a reasonable analysis of all of the circumstances. Respondent respectfully requests this Court to approve the recommended sanction.

C. The Referee's recommended sanction meets the purposes of lawyer discipline.

The Referee referenced and utilized the purposes of attorney discipline in constructing his recommended sanction. (RR. A10-A11)(citing Florida Bar v. Spear, 887 So. 2d 1242 (Fla. 2004); Florida Bar v. Lord, 433 So. 2d 983, 986 (Fla. 1983). The three purposes of lawyer discipline are as follows:

> First, the judgment must be fair to society, both in terms of protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of undue harshness in imposing penalty. Second, the judgment must be fair to the respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Third, the judgment must be severe enough to deter others who might be prone or tempted to become involved in like violations.

Lord at 986 (*emphasis omitted*).

The Bar does not contest the Referee's finding that Respondent is not a danger to the public or that he is a "qualified and able lawyer." (RR. A10). Indeed, even the criminal judge who sentenced Respondent recognized Respondent's abilities and ordered him to complete one hundred and fifty hours of pro bono work as a condition of his probation. (T. 134). Imposing an additional suspension would unfairly "[deny] the public of a qualified lawyer." Lord at 986. Two of Respondent's major long-term corporate clients offered testimony and statements on his behalf, expressing their admiration of his work product and his candid disclosures regarding his conduct, his condition and his treatment. (T. 93-

97, 104-105; Resp. Exh. G-1). Each of his clients testified that they are more than satisfied with their decision to retain his services after his arrest. (T. 95-97, 104-105). Respondent testified that at any time, he has between five hundred to one thousand active collection files and that a further suspension would devastate his practice. (T. 123, 125).

The Bar primarily argues that an additional suspension is necessary to punish Respondent and deter others. Although the Bar properly submits that criminal charges are not dispositive of disciplinary sanctions, a referee may consider the "imposition of other penalties or sanctions." Fla. Stds. Imposing Law. Sanc. 9.32(k). Despite the absence of any prior criminal record, Respondent was offered the choice of being adjudicated of a felony or being sentenced to thirty days in jail. (RR. A2). Respondent preserved his civil rights and chose the jail term. (RR. A2). The Referee appropriately considered the jail time as a part of Respondent's punishment when evaluating the sanction.

Moreover, the Bar overlooks the effectiveness of the recommended sanction in "encouraging reformation and rehabilitation" and deterring similarly situated lawyers. In this case, the Referee noted Respondent's superior reputation in the community and recognized that he was respected by judges, opposing counsel, young lawyers and his corporate clients. (RR. A4-A6). As such, the community is very likely to listen to his experiences, identify with him and learn by his example.

The Referee properly tailored a creative sanction unique to Respondent's circumstance. See Fla. Stds. Imposing Law Sancs. 1.3.

Specifically, the Referee recommended a condition of probation requiring Respondent to make thirty-six public appearances "with regard to his mental health, substance abuse and criminal acts and his efforts to rehabilitate himself." (RR. A8). While many would object to sharing such intensely personal failings and crises with strangers, Respondent enthusiastically offered to reach out to others. (T. 125). The Referee astutely realized that this sanction encourages others to seek help before causing irreparable harm and also consistently reminds Respondent of his mistakes that happened almost three years ago. Given the nature of Respondent's misconduct which had a clear nexus with substance abuse and mental health problems, his public appearances will be a much more effective deterrent than an additional suspension. The Referee's recommended sanction satisfies the purposes of lawyer discipline and should be upheld.

CONCLUSION

Respondent respectfully requests the Court to accept the Referee's recommendation that no further suspension is warranted and place Respondent on probation for three years with the conditions that he remain in compliance with his F.L.A., Inc. contract, that he submit to random alcohol and drug testing and that he be required to make twelve public speaking appearances per year of probation discussing his substance abuse, mental health and criminal acts and his efforts to rehabilitate himself.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the foregoing Respondent's Reply Brief has been furnished by FedEx overnight delivery and electronic submission via e-file@flcourts.org to the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1926 and true and correct copies have been furnished by U. S. Mail to Sheila Marie Tuma, Assistant Staff Counsel, The Florida Bar, 1200 Edgewater Drive, Orlando, Florida 32804-6314 and Staff Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 this 30th day of June, 2005.

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GWENDOLYN H. HINKLE, ESQUIRE

CERTIFICATION OF FONT SIZE AND STYLE

The undersigned counsel does hereby certify that this brief is submitted in 14 point proportionally spaced Times New Roman font.

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GWENDOLYN H. HINKLE, ESQUIRE