**IN THE SUPREME COURT OF FLORIDA**

**THE FLORIDA BAR,**

**Complainant,**

**v.**

**NOAH DANIEL LIBERMAN**

**Respondent,**
**_____/**

**SUPREME COURT CASE**
**No.: SC06-1874**

**THE FLORIDA BAR FILE No.:**

**2007 -70,245 (11N)**

---

# RESPONDENT'S SECOND AMENDED INITIAL BRIEF ON APPEAL

---

RICHARD BARON, ESQ.
TFB #178675
RICHARD BARON & ASSOCIATES
201 N.E. 1ST AVENUE
SUITE 201
MIAMI, FLORIDA 33132

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

Cases

## SYMBOLS AND REFERENCES

For the purpose of this the Respondent's Initial Brief on Appeal:

**References to parties and witnesses:**

The Florida Bar will be referred to as the "Florida Bar" or the "Bar".

Noah Daniel Liberman will be referred to as either "Respondent" or by name.

The Referee, the Honorable Catherine Pooler, a County Court Judge in Miami, Florida will be referred to as "Judge Pooler" or the "Referee".

Other persons will be referred to by their respective surnames.

**Transcript and Document references:**

References to the Initial Report of Referee will be set forth as "ROR" and page number.

References to the transcript of the hearing of January 10, 2008 on the Supplemental Report of Referee will be set forth as "HSROR" and page number.

References to the Supplemental Report of Referee will be set forth as "SROR" and page number.

References to the exhibits introduced at trial will be set forth as "TFB Ex.#" and its letter designation.

**Appendix**

The Respondent's Appendix contains all documents and transcripts and is sequentially numbered and shall be referred to as "R.App." and page number. All document references shall contain the Respondent's Appendix page number after the other relevant reference or citation.

## STATEMENT OF THE CASE AND OF THE FACTS

Noah Liberman was a young attorney who was primarily, if not exclusively, involved in civil litigation. He also had a secret; he was a severely addicted drug addict. For years prior to his arrest, drugs controlled his life. The use of the drugs led to he and his friends pooling their funds to purchase the drugs in greater quantity for a volume discount and then the drugs being distributed among his friends. After a period of time, he sold drugs to a person he believed to be a friend and was subsequently convicted for trafficking of the drug "ecstasy".

The Respondent entered into a plea agreement with the Office of the State Attorney and pled guilty. On or about March 30, 2006, the Respondent was adjudicated guilty of one felony count of Phenethylamine/Ecstasy/Trafficking of 10 Grams or more but less than 200 Grams. Since that time he cooperated with authorities, served a short sentence in county jail over weekends only, served six months on community control. His probation was early terminated due to exemplary conduct on April 2, 2008.

On September 22, 2007 the Florida Bar filed a Complaint that charged the Respondent with the sole misconduct of Trafficking of 10 Grams or more but less than 200 Grams of Phenethylamine/Ecstasy. The Complaint did not allege, and the Respondent was not put on notice, of any other misconduct and no other misconduct was addressed at any stage of the proceedings through discovery or

otherwise by the Florida Bar or undersigned counsel.

Over the ensuing year the Florida Bar conducted an extensive investigation into the facts and circumstances of Respondent Noah Liberman's life and the circumstances of the conviction. After consultation between the Florida Bar's trial counsel, the Florida Bar's Chief Discipline Counsel and the Florida Bar Board of Governors,[1] the Florida Bar approved, and the Respondent executed, the Unconditional Guilty Plea And Consent Judgment For Discipline, Petition For Approval Of Unconditional Guilty Plea And Consent Judgment For Discipline, (R.App. page 12-16) filed and docketed with the Clerk of this Court on October 1, 2007.

In response to the submitted Consent Judgment to the Complaint as written, on December 21, 2007 this Honorable Court responded as follows:

> "Upon consideration of the referee's report and the Unconditional Guilty Plea and Consent Judgment for Discipline filed in the above-styled cause, the case is remanded back to the referee for further proceedings. The referee is to provide a supplemental report that contains factual findings elaborating on Respondent's underlying criminal activities and disciplinary misconduct. The referee should explain why she found trafficking in illegal drugs to be "minor misconduct," and she should provide an analysis as to how a three-

1 At the January 10, 2008 hearing Mr. Mulligan stated: " I would support Mr. Barons information regarding mitigation because we looked at this case extensively already and we've gone through the case law in these types of cases as well as looking at all of the mitigation that was involved here and made our decision based on that. You know, we went through all of the necessary checks and balances in our own office so it's not like I'm the one acting off the cuff in making a decision." (HSROR page 10- R.App. page 30).

> year suspension, rather than disbarment, is an appropriate discipline for a felony conviction of illegal drug trafficking. The referee is allowed to and including February 19, 2008, in which to submit a supplemental report consistent with this order."

As is explained in more detail below, Judge Pooler found this order to be "tersely worded" (HSROR page 3- R.App. page 23) and apparently interpreted this instruction as her marching orders to disbar the Respondent regardless of the position of the Florida Bar or the evidence presented.

Judge Pooler scheduled a hearing to supplement the record which was held on January 10, 2008. As Judge Pooler did not notify the parties that the Consent Judgment was rejected under Rule 3-7.9, the parties appeared at the hearing to present evidence to support the Consent Judgment; as that was the only remaining issue before the Referee.

When the hearing commenced, Judge Pooler announced: "So what I'm doing is I'm going to void the stipulations at this point and start *ab initio*. I understood it was to be a mitigation hearing from the get go when this case first came to me, so we'll start, we'll take all the testimony that we can today." (HSROR page 3 - R.App. page 23). [2]

Neither prior to, nor at the hearing, did Judge Pooler notify the parties that

---

2 Even at the hearing itself, Judge Pooler did not notify the parties that the Consent Judgment was rejected under Rule 3-7.9. It is further unclear what "stipulations" Judge Pooler was referring to.

the Consent Judgment was rejected under Rule 3-7.9. The parties appeared at the hearing to present evidence to support the Consent Judgment and to offer evidence why "a three-year suspension, rather than disbarment, is an appropriate discipline for a felony conviction of illegal drug trafficking" as that was the only issue before the Referee. Both counsel for the Respondent as well as the Florida Bar viewed the scheduled hearing only as one to "supplement" the record, as requested in this Court's December 21, 2007 order, and not a trial.

At the hearing Judge Pooler was presented evidence from the Respondent, his prosecutor in his criminal case, his family, employers, members of the community and an addiction expert. All present, including counsel for the Florida Bar, offered evidence to support the Consent Judgment and recommended that the Respondent be suspended, as detailed in the Consent Judgment, as the overwhelming and unrebutted testimony established that this case was about a young man with a serious drug addiction who was well into recovery and was not about a "drug trafficker" as the term is commonly perceived. Importantly, the only evidence that was submitted to Judge Pooler at the January 10, 2008 hearing was mitigating evidence about the Respondent's addiction and recovery to support the Consent Judgment.

The following witnesses testified at the evidentiary hearing and their testimony is summarized as follows:

NOAH DANIEL LIBERMAN

The Respondent Noah Liberman testified that he started using drugs at age 14 and the drug use took its expected path of progression from marijuana and alcohol to LSD to cocaine and finally crystal methamphetamine ("crystal meth"). The Respondent was using crystal meth for four (4) months straight and multiple times a day at the time of his arrest. At the time of the events that led to his arrest he was totally impaired and heavily addicted. As to the Trafficking aspect of the charges, the Respondent testified that he was the one who would purchase the drugs for himself and his friends as a type of buyers cooperative to get the benefits of volume discount on the drugs. The Respondent testified that the Respondent was not dealing drugs in the typically accepted sense for profit. As to the volume of the drugs recovered at the time of his arrest, the Respondent testified that the amount of the drugs was dictated by the requests made by the confidential informants working with police. It was the police, through the confidential informants, who requested the amount of drugs that pushed this case into a trafficking volume and, but for the requests of the confidential informant and the Respondent's seriously impaired condition, the Respondent would not have had a trafficking amount of drugs in his possession at the time of the arrest. The Respondent took responsibility for actions, did not fight the criminal charges and pled guilty to the charges. The Respondent is very remorseful for his actions and has sought treatment for his addiction and is successful in recovery for the last three years and nine months. The Respondent participated in Outpatient Treatment, continues with AA/NA/FLA meetings, has a sponsor and has devoted substantial time to community service. There were no questions or testimony about misconduct not charged in the Complaint other than the Respondent's admission to addicted drug use during college and law school and that the drugs "came from" New York. (HSROR page 15-46 - R.App. page 35-66)

CHRISTI SHEROUSE, ESQ.

The affidavit of Ms. Sherouse was presented to the Referee and filed of record. The affidavit states in material part that in 2006 Ms. Sherouse met the Respondent through a mutual friend, Lisa Lehner, Esq., who advised her that she had worked with the Respondent when he was an attorney. Ms. Lehner advised Ms. Sherouse that although the Respondent had gone through some difficulty in the past, that if Ms. Sherouse was willing to give him a chance, he would do an excellent job. At his interview, the Respondent impressed Ms. Sherouse with his candor. He was upfront about his criminal issues and past

drug addiction. He discussed both areas openly. The Respondent began working for Ms. Sherouse and the firm on November 6, 2006. Ms. Sherouse affirmed that the Respondent is intelligent, knowledgeable, diligent, responsible and hard working. Ms. Sherouse also got to know the Respondent outside of the office as he had become involved in the Camillus House Young Leaders ("CHYL"), a charitable organization of which Ms. Sherouse is currently the Chair. Ms. Sherouse stated that the Respondent is now in charge of the CHYL tutoring group, which brings tutors to Camillus House to assist with GED preparation and other educational needs. Notably, since the Respondent was put in charge, CHYL had its first member successfully pass the exam and receive his GED. Ms. Sherouse stated that she is aware of the Respondent's past and that it does not appear that he is the same man today. Ms. Sherouse opined that the Respondent has learned from his mistakes and that in her opinion he will never repeat the unfortunate acts of his past. (HSROR page 47 - R.App. page 67).

MICHAEL J. MARRERO, ESQ.

Mr. Marrero has been a friend of the Respondent since high school and testified that the Respondent is a good person and was aware of his drug use but not the extent. Mr. Marrero testified that the Respondent always had money available to him and had no financial motive to sell drugs. Mr. Marrero further testified that there is a marked difference in the present Respondent and the Respondent of 4 years past. (HSROR page 47-54 - R.App. page 64-74).

LISA LEHNER, ESQ.

Ms. Lehner was a former prosecutor and a practicing attorney and "Of Counsel" at the firm at which the Respondent was employed as an attorney at the time of the arrest. Ms. Lehner testified that the Respondent was an excellent young attorney and showed great promise and who could get along and share interests with everyone regardless of who they were. Ms. Lehner had no idea the Respondent had drug problem and was shocked when she found out. Ms. Lehner testified that the Respondent's addiction did not affect clients of the firm. Ms. Lehner further stated that the Respondent is a changed person and is of the opinion that these acts could never happen again. She also opined that it would be unfortunate if the Respondent, at this young age, was not given a second chance and that the legal community would benefit from his eventual return. Ms. Lehner also testified that she would hire the

Respondent if, or when, his license is reinstated. (HSROR page 54-68 - R.App. page 74-88)

ANDRÉS RIVERO, ESQ.

Mr. Rivero testified that he is a former employer of the Respondent and a former Federal Prosecutor. Mr. Rivero testified that he had a good working relationship and friendship with the Respondent and that the Respondent was very good young attorney. Mr. Rivero stated that his firm does complicated litigation and not every attorney has the mind to handle the complexities, but that the Respondent is very smart and analytical and could do the work. Mr. Rivero stated that he did not know the Respondent was using drugs and that the drug use did not affect clients. After the Respondent's arrest, the Respondent apologized to Mr. Rivero and showed remorse for his actions and how if may have affected Mr. Rivero and the firm. After the events, the Respondent kept in touch with Mr. Rivero and they still have a friendship. Mr. Rivero testified that there has been a marked change in the Respondent since the events and that he has seen a growth and maturity in the Respondent as a result of the events. Mr. Rivero testified that he believes that the Respondent deserves a second chance, does not believe that this could ever happen again and would hire the Respondent again, if or when, he is re-licensed. (HSROR page 68-81 - R.App. page 88-101).

JOHN EUSTACE, M.D.

Dr. Eustace is a renowned and experienced addiction expert. Dr. Eustace testified as to the impairing effects of Ecstasy and methamphetamine abuse which without exception causes seriously impaired judgment and a false sense of reality. Dr. Eustace testified as to the Respondent's drug use history and diagnosed the Respondent as a severely addicted methamphetamine dependant. Dr. Eustace opined that the Respondent would not have sold drugs if he was not seriously impaired and addicted, and that but for the impairment and addiction, the arrest in its current form would not have occurred. Dr. Eustace further testified that it is common and typical of drug addicts/users to pool money and share drugs, and that that is not what they consider a "trafficker" in the addiction treatment medical community. Dr. Eustace testified as to the Respondent's recovery and introduced the documents from Florida Lawyer's Assistance, Inc., ("FLA") verifying that the Respondent has complied with all of the requirements of FLA and has tested negative for drugs at all times. Dr. Eustace testified that the Respondent's prognosis is excellent, currently has 3 years 9 months of sobriety, is in full remission and

with the current support systems in place, Dr. Eustace opined within reasonable medical certainty that the Respondent will not use drugs again and will never repeat these acts. (HSROR page 81-103 - R.App. page 101-123).

EDWARD ALAN MARTINEZ. ESQ.

Mr. Martinez is now a private attorney and was the Assistant State attorney that prosecuted the Respondent in Miami-Dade Circuit Court and handled the case for the State Attorney from the time of arrest until the Respondent's plea. Mr. Martinez was deposed and his deposition was read into the record. Mr. Martinez testified that the Respondent was fully cooperative but because he was such a severe drug addict that he could not be used as an informant. Mr. Martinez further stated:

A. " It didn't seem to us like he was a street trafficker. He accepted responsibility. He went into rehab immediately. He was drug tested routinely and was always negative."

Q. So he wasn't your typical drug dealer who was in this for a profit, who was corrupting the system, who was corrupting people, who was -- who had an access to drugs all around the County and could get whatever he wanted. He was a very limited guy, wasn't he?

A. Correct. Correct.

Q. It was basically limited to people, to his friends and friends of his friends.

A. Right. And it was limited also to drugs that it appeared to us that he used, which is another thing we look at. A drug dealer is in it for profit. Whatever will make them money is what they make. They may not necessarily use Crystal Meth, but they'll sell it. They may not necessarily use Ecstasy, but they'll sell it. When Mr. Liberman was arrested there was evidence that pretty much anything that he sold, there was also residue on personal items that showed that he actually used the drug himself, which is another indication that they're just doing it to fuel their own drug habit.

Q. And you're comfortable that that was the case with Mr. Liberman?

A. Yes.

Q. Did you make the final recommendation as to his sentence?

A. Yes, I did.

Q. And again, it was a very unusual sentence, wasn't it, for a drug trafficker?

A. Absolutely. Absolutely. It was a lesser sentence than probably even if he had cooperated. We worked out a situation where Mr. Liberman did cooperate anyway by providing substantial assistance in the form of donations for fighting crime, to help with the Coral Gables Police Department to refund their expenses on his case and any other case that they do for narcotics. (HSROR page 103-111 - R.App. page 123-131).

RONALD LOWY, ESQ.

Mr. Lowy is the Respondent's FLA Monitor as well as a former employer. Mr. Lowy testified that the Respondent is fully compliant with FLA contract and goes to more meetings than required and is an active participant. As to the Respondent's compliance Mr. Lowy stated that the Respondent would do things that the Respondent did not agree with because he was told to do them and that the Respondent was unique because he would voice his opinion and then do it anyway. Mr. Lowy testified that as an employee the Respondent was very hard working, very bright, and helped make new law with some of his research, writing and creative legal arguments. Mr. Lowy testified that he would definitely rehire the Respondent. Mr. Lowy further opined that the Respondent will never do something like this again and should be given a second chance because he would make an excellent attorney and would benefit the legal community. (HSROR page 113-122 - R.App. page 133-142).

GUELSY HERRERA

Ms. Herrera is a Corrections Senior Officer in Miami-Dade County Florida. Ms. Herrera supervised the Respondent for his first 6 months of community control when the Respondent went to jail on weekends. Tellingly, Ms. Herrera testified that in her 12 years of experience the Respondent was the first client that ever took responsibility for his acts and told Ms. Herrera that he made a mistake and just wanted to do what he could do to make it right. Ms. Herrera further testified that the Respondent was a model probationer, always where he was supposed to be, always checked in, paid all fines/fees on time and did community service. The Respondent was tested numerous times for drug use with all tests negative. Interestingly, the Respondent would ask for additional tests. Ms. Herrera testified that she does not believe that the Respondent will ever use drugs again or be in trouble again. Ms. Herrera also stated that she would hire the Respondent as her attorney if he got his license back. (HSROR page 124-136 - R.App. page 144-156).

JANE GROSS

Ms. Gross is the Respondent's mother and testified that the Respondent was always a good child and that due to the financial circumstances of the family had no financial incentive to sell drugs. She testified that she suspected that something was different about the Respondent in the time preceding the arrest but thought it was work and life stress. Ms. Gross was unaware that it

was drug addiction. She stated that she feels guilty for not recognizing the problem. Ms. Gross testified that the Respondent is now a different person and doesn't think that the Respondent will ever use drugs again. (HSROR page 138-145 - R.App. page 158-165).

The above summaries represent the entirety of the evidence presented at the hearing on January 10, 2008. There was no evidence presented, questions asked, or testimony received about misconduct not charged in the Complaint other than the Respondent's admission to addicted drug use during college and law school and that the drugs "came from" New York. (HSROR page 44 - R.App. page 64)

In a surprise to the Florida Bar, undersigned counsel and the Respondent, on February 25, 2008, Judge Pooler issued her Supplemental Report recommending that this Court accept the Consent Judgment but nonetheless recommended that the Respondent be disbarred. [3]

However, and critically, Judge Pooler based this recommendation on findings of fact about misconduct that was not charged in the Florida Bar's Complaint and was not even addressed at the January 10, 2008 hearing or, for that matter, at any other time in these proceedings. Further, the Respondent was never charged with, or put on notice about, the misconduct on which the Referee, in major part, based her findings. Being uncharged and unnoticed; the misconduct was not subject to discovery and the Respondent was not given the opportunity to

3 This, of course, makes no sense as the Consent Judgment must be rejected to impose a more serious penalty under Rule 3-7.9 as discussed more fully below.

admit, deny or offer an explanation or defense.

In response to the above testimony to supplement and support the Referee's initial Report and Recommendation of October 1, 2007, the Referee, in her Supplemental Report, made the findings of fact about fourteen separate acts of misconduct that were not charged in the Complaint and were not litigated. (R.App. page 206-208). Further, of the fifteen enumerated acts of misconduct that the Referee made a finding of fact that the Respondent committed, only one (Trafficking in M.D.M.A.) was named in the Complaint. There was no notice even hinted to the Respondent that he would be called upon to defend the other fourteen alleged acts of misconduct.

The Respondent was therefore ambushed by the Referee who conducted her own ex-parte investigation into what she perceived to be damning facts outside of the pleadings and after the hearing was concluded. By any definition, this is a violation of due process of law. The fundamental unfairness of this is highlighted by the fact that the Referee made a finding of fact that the Respondent possessed 33.5 grams of GHB and went on to explain to the Court that GHB is the "date rape" drug clearly inferring that the Respondent is a rapist in addition to being a drug trafficker. There was no GHB found in the Respondent's apartment as would have been established by evidence had the Respondent been put on notice and the alleged misconduct properly litigated.

This appeal follows.

## SUMMARY OF ARGUMENT

After extensive investigation by the Florida Bar into the facts and circumstances of the misconduct, and with concurrence by the Florida Bar's trial counsel, Chief Discipline Counsel and Board of Governors, the Florida Bar and the Respondent submitted the Consent Judgment to the Referee. The Referee accepted the Consent Judgment under Rule 3-7.9 and filed a Report of Referee on October 1, 2007 endorsing the Consent Judgment.

In an apparent attempt to follow what the Referee perceived to be the will of this Court, the Referee again accepted the Consent Judgment but incongruously abruptly reversed herself and nonetheless recommended disbarment after the January 10, 2008 hearing. This inexplicable result came after a hearing where nothing but overwhelming and unrebutted mitigating testimony was presented supporting the recommendation by the Florida Bar that the Consent Judgment be approved. To come to this conclusion the Referee was forced to violate Rule 3-7.9 and go outside the charging document and consider evidence of misconduct not introduced, not charged and not noticed. This Honorable Court has steadfastly prohibited such due process violations.

For these reasons, the Respondent requests that this Honorable Court strike the Supplemental Report of Referee and approve the Consent Judgment for the reasons explained more fully below.

## ARGUMENT

**I. THE REFEREE VIOLATED THE DUE PROCESS RIGHTS OF THE RESPONDENT BY: (A) FAILING TO NOTIFY THE PARTIES THAT SHE WAS REJECTING THE CONSENT JUDGMENT UNDER RULE 3-7.9 A REASONABLE TIME BEFORE THE HEARING, (B) FAILING TO NOTIFY THE PARTIES THAT THE JANUARY 10, 2008 HEARING WAS GOING TO BE ANYTHING OTHER THAN A HEARING TO SUPPLEMENT AND SUPPORT THE PREVIOUSLY SUBMITTED CONSENT JUDGMENT, (C) CONSIDERING EVIDENCE NOT INTRODUCED BY THE FLORIDA BAR, (D) CONSIDERING EVIDENCE NOT PROVIDED TO THE RESPONDENT AT OR PRIOR TO THE HEARING, (E) CONSIDERING EVIDENCE THAT WAS WHOLLY UNRELIABLE AND INADMISSIBLE, AND (F) CONSIDERING EVIDENCE OF UNCHARGED MISCONDUCT. THE REFEREE THEREFORE VIOLATED THE DUE PROCESS RIGHTS OF THE RESPONDENT REQUIRING THAT THE SUPPLEMENTAL REPORT AND RECOMMENDATION BE EITHER STRICKEN OR DISREGARDED IN ITS ENTIRETY.**

In response to the Order of this Court referring the matter back to Judge Pooler for a supplemental analysis, the parties were noticed that that there would be a hearing on January 10, 2008.

As the parties were not advised that the Consent Judgment was rejected by the Referee as required under Rule 3-7.9, both Counsel for the Respondent as well as the Florida Bar were under the impression that the January 10, 2008 hearing was scheduled to present mitigation evidence to supplement and support the previously submitted Consent Judgment.

However, at the outset of the hearing the Referee stated:

> The Court: "And this case originally had stipulated , went up to the Supreme Court, and they returned it with a tersely worded document which told me to hold hearings on it. So what I'm doing is I'm going to void the stipulations at this point and start *ab initio*." (HSROR page 3 - R.App. page 23).

Counsel for the Respondent shortly later stated his understanding that this was a supplemental hearing and not a trial by stating:

> Mr. Baron: "So we're (here) today, Judge to supplement the record" (HSROR page 9 - R.App. page 29).

Counsel for the Florida Bar confirmed this position by stating:

> Mr. Mulligan: " I am not here today to engage in a trial. I told Mr. Baron that beforehand. The Bar is not opposing a three year suspension. We've obviously agree to it and that's –the Supreme Court has not changed our mind on that. I agree with Mr. Baron that the reason we're here is just to give some more information" (HSROR page 9-10 - R.App. page 29-30).

With the position of the parties being stated on the record, Counsel for the Florida Bar attempted to abide by the Referee's "*ab initio*" announcement and proceed with a *de facto* trial and stated as follows:

> Mr. Mulligan: "other than that Your Honor, I would just like to note, like I said, that the Florida Bar still supports the original agreement and intends, you know – is not changing its mind today, and would just like to turn it over to Mr. Baron to allow him to place – we'll, I will just do it at this time, if you would like, just place into evidence the basically, his conviction for trafficking, which is dated I believe April 28th of 2006. Let me just confirm that, give me a

second—I'm sorry, March 30th of 2006, for one felony count of trafficking of 10 grams or less – or more—of less than 200 grams, I'm sorry.

The Court Reporter: Less than how many, Sir?

Mr. Mulligan: But less than 200 grams. More than 10 but less than 200. So that would be the only exhibit the Florida Bar would place into evidence.

Mr. Mulligan: So I'll rest at this time." (HSROR page 13-14 - R.App. page 33-34).

As such, the Florida Bar placed one document exhibit into evidence which was the March 30, 2006 order and judgment of conviction.

In response the Referee stated:

The Court: "Does anyone have a copy of the arrest affidavit or the arrest warrant?

Mr. Mulligan: I think I have it, Your Honor, I have the State Attorney's file here.

The Court: the old A-form? This is as illegible as they always were. Okay. I'm just going to take this in also and make it a composite just so the record is complete if there's a question later." (HSROR page 14 - R.App. page 34) [4]

4 The undersigned did not object to this as it was equally unclear during the hearing what the motives of Judge Pooler were at the time regarding the State Attorney's file. Nonetheless, it is suggested that the error was fundamental and that the failure to object is excused. To be considered fundamental "the error must reach down into the validity of the trial itself to the extent that a verdict of guilty could not have been obtained without the assistance of the alleged error." *Brown v. State,* 124 So.2d 481, 484 (Fla.1960)); *J.B. v. State,* 705 So.2d 1376, 1378 (Fla.1998) ("An error is fundamental when it goes to the foundation of the case or the merits of the cause of action and is equivalent to a denial of due process."). Here, virtually

Whether the Referee was referring to taking the documents into her chambers for review or was taking the documents into evidence was not stated by the Referee and is not clear on the record. It is also unclear what the Referee meant by the statement: "just so the record is complete if there's a question later."

What is clear is that the State Attorney's file that the Referee requested and "took in" was not marked and enumerated as evidence, was not introduced by the Florida Bar as evidence and was not listed or provided to the Respondent before the hearing in discovery. More incredibly, the State Attorney's file was not even provided to the Respondent at the hearing. The contents of the State Attorney's file were never identified and the Respondent's Counsel to this day does not know what it contained. However, based on the experience of undersigned counsel, it must have contained various documents including the arrest affidavit, search warrant and affidavit, inventory, police reports, supplemental police reports etc.

What is also clear is that none of the contents of the State Attorney's file that the Referee "took in", were admissible under even the most relaxed rules of

---

all of the Referee's findings of fact "could not have been obtained without the assistance of the alleged error."

evidence. [5]

It only became clear to the Parties later, upon reading the Supplemental Report, that the Referee closely inspected the State Attorney's file and viewed whatever was contained in the file as proof positive of numerous acts of uncharged misconduct and made numerous findings of fact based solely thereon.

The Supplemental Report of Referee confirms the oral representations of the Referee by stating: "At the hearing the Referee rescinded the ratification of the agreement between the Florida Bar and the Respondent, and held a hearing *ab initio*, as though no agreement had been reached between the parties." (SROR page 3 - R.App. page 204). The parties were never advised that the January 10, 2008 hearing was to be a trial / final hearing and were not remotely aware, as became apparent only after the issuance of the Supplemental Report, that uncharged

---

5 The Respondent acknowledges that because "bar disciplinary proceedings are quasi-judicial rather than civil or criminal, the referee is not bound by technical rules of evidence." *Florida Bar v. Rendina,* 583 So.2d 314, 315 (Fla.1991). Nonetheless, the admissibility of evidence in discipline cases is governed by the abuse of discretion standard. *See Florida Bar v. Hollander,* 607 So.2d 412 (Fla.1992). This Honorable Court in *Canakaris v. Canakaris,* 382 So.2d 1197, 1203 (Fla.1980) defined a judicial "abuse of discretion" as judicial action that is arbitrary, fanciful, or unreasonable. (see discussion in *Allstate Floridian Ins. Co. v. Ronco Inventions, LLC***,** 890 So.2d 300, (Fla. 2nd DCA 2004)). Here it is suggested that the actions of the Referee were arbitrary and unreasonable and that the ex-parte review of documents that were never provided to the Respondent, or even identified, was an unprecedented abuse of discretion. Also, here, unlike *The Florida Bar v. Centurion*, 801 So.2d 858 (Fla. 2000) the documents should be deemed inadmissible as the documents contained statements of witnesses that the Respondent could not be reasonably expected to subpoena as he was unaware of who authored the statements contained in the documents.

misconduct derived from materials that the Florida Bar never sought to introduce, and were never provided to the Respondent, needed to be addressed.

Needless to say, if that was the course the Referee intended to follow, the parties should have been notified before the hearing and not at the hearing. *The Florida Bar v. Vernell*, 721 So.2d 705 (Fla. 1998); *The Florida Bar v. Batista*, 846 So.2d 479 (Fla. 2003). [6]

The testimony of the hearing is detailed above in the statement of facts. Notwithstanding the fact that there were no charges of misconduct brought in the Florida Bar's Complaint, based solely and exclusively on the State Attorney's file "taken in", the Referee made findings of fact about the following fourteen acts of uncharged misconduct which were, the Respondent can only assume, referenced in or otherwise contained in the State Attorney's file:

> (1) On February 16, 2004, Respondent sold 1 gram of methamphetamine in a hand-to-hand sale to a confidential informant (CI) who was working with the Coral Gables Police Department in conjunction with the Miami Beach Police department and the Drug Enforcement Administration (DEA). (R.App. page 206).

---

6 Interestingly, the Referee in her Supplemental Report, while explaining why she never found the misconduct to be "minor", footnoted the following: "As a new rule violation cannot be considered without adequate notice and attorneys must be given reasonable notice of the charges they face before the referee's hearing on those charges, *a priori*, this Court could not find that the Respondent violated a Rule not charged in the Complaint. See *In re Ruffalo*, 390 U.S. 544 (1968); see also *Florida Bar v. Price*, 478 So. 2d 812 (Fla. 1985). " (SROR page 4). The Referee was therefore aware of the minimum due process requirements of the hearing but nonetheless did not follow them.

(2) On February 24, 2004 the Respondent sold two grams of methamphetamine and 2 M.D.M.A. Ecstasy pills to the same CI in a hand-to-hand transaction. (R.App. page 206).

(3) On March 9, 2004 the Respondent sold 1 gram of Methamphetamine to the same CI in a hand-to-hand sale. (R.App. page 206).

(4) On April 5, 2004 the Respondent sold 2 grams of Methamphetamine to the same CI in a hand-to-hand sale. (R.App. page 206).

The following items were recovered in the Respondent's home:

(5) 10.9 grams of marijuana. (R.App. page 207).

(6) 3.3 grams of Crystal Methamphetamine. (R.App. page 207).

(7) 1.2 grams of cocaine. (R.App. page 207).

(8) 33.5 grams of GHB (date rape drug). (R.App. page 207).

(9) Drug residue, pipes and lighters. (R.App. page 207).

(10) Money Laundering. (R.App. page 207).

(11) Possession of Marijuana. (R.App. page 207).

(12) Possession of drug paraphernalia. (R.App. page 208).

(13) Possession of Ketermine. (R.App. page 208).

(14) Importing drugs from New York. (R.App. page 208).

Not one act of the above fourteen acts of alleged misconduct was charged in the Complaint and the Respondent was not put on notice that any of this misconduct would be litigated at the January 10, 2008 hearing. No discovery was conducted on above fourteen acts of alleged misconduct and the Respondent was not given an opportunity to admit, deny, refute or otherwise explain these alleged acts. Had the Respondent been noticed that this alleged misconduct was subject to a finding of fact or aggravating factor, the Respondent would have presented both fact evidence and expert testimony.

In point of fact, of the fifteen alleged acts of misconduct that were included in the Referee's findings of fact on which she based her disbarment recommendation, only one was charged in the Complaint, namely (15) "Trafficking in M.D.M.A. (Ecstasy)".

An attorney is entitled to due process in disciplinary proceedings, *The Florida Bar v. Carricarte* 733 So.2d 975 (Fla.,1999), *See Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985), and this Court has scrupulously enforced the due process rights of attorneys charged with violations of the Rules Regulating the Florida Bar. *In re Ruffalo*, 390 U.S. 544 (1968); *Florida Bar v. Price*, 478 So. 2d 812 (Fla. 1985).

Minimal due process requires reasonable notice and an opportunity to be heard. *The Florida Bar v. Committee* 916 So.2d 741 (Fla. 2005).

As to the notice requirement, the attorney must be given reasonable notice before the hearing to know the nature of the proceeding and to know what charges he or she faces before proceedings commence. *The Florida Bar v. Baker*, 810 So.2d 876 (Fla. 2002), *The Florida Bar v. Vernell*, 721 So.2d 705 (Fla. 1998); *The Florida Bar v. Daniel* 626 So.2d 178, (Fla.1993). Here the Respondent was never given notice prior to the hearing that the hearing was going to be a trial "*ab initio*".

As to the discipline imposed, due process requires that the attorney be permitted to "explain the circumstances of the alleged offense and to offer

testimony in mitigation of any penalty to be imposed." *Florida Bar v. Cruz,* 490 So.2d 48, 49 (Fla.1986); *see also Florida Bar v. Fussell,* 179 So.2d 852, 854 (Fla.1965). Here there were fourteen "offenses" which were contained in the Referee's findings of fact on which the Respondent was given no notice or opportunity to be heard whatsoever.

A similar, but far less egregious, example of the instant due process violation is found in *The Florida Bar v. Batista,* 846 So.2d 479 (Fla. 2003). In *Batista* this Court found as follows:

> "We agree with Batista that a new rule violation cannot be considered without adequate notice. Attorneys must be given reasonable notice of the charges they face before the referee's hearing on those charges. *See In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968); *see* also *Florida Bar v. Price*, 478 So.2d 812 (Fla.1985) (rejecting, based on due process concerns, a referee's finding that attorney committed perjury during disciplinary proceedings because the conduct was not charged); *Florida Bar v. Vernell*, 721 So.2d at 705 (Fla.1998) (similar); *Florida Bar v. Stillman,* 401 So.2d 1306 (Fla.1981) (similar). A rule violation cannot be prosecuted during the same trial unless it is within the allegations of the Bar's complaint. *See Florida Bar v. Fredericks,* 731 So.2d 1249 (Fla.1999); *Florida Bar v. Vernell,* 721 So.2d at 706. Here, the witness-contact allegations were clearly not within the allegations set forth in the Bar's complaint. Therefore, the referee properly refused to consider them as a new rule violation. The referee, however, did consider the conduct, made findings of fact in reference to it, and specifically stated that it "hurt [Batista's] cause." Thus, in essence, it appears that the referee considered the conduct as an aggravating circumstance. 846 So.2d 479 * 484

In addition to the notice and opportunity to be heard violation, here the Referee specifically made findings of fact about allegations of misconduct that

were clearly not within the allegations in the Complaint. Not only did the Referee not refuse to consider them, as required under *Batista*, the Referee based her recommendation for disbarment almost exclusively on them. [7]

Further, as stated, the contents of the State Attorney's file were never made known to the Respondent.

As such, the Referee violated the due process rights of the Respondent by: (a) failing to notify the parties that she was rejecting the Consent Judgment under Rule 3-7.9 a reasonable time before the hearing; (b) failing to notify the parties that the January 10, 2008 hearing was going to be anything other than a hearing to supplement and support the previously submitted Consent Judgment; (c) considering evidence not introduced by the Florida Bar; (d) considering evidence never provided to the Respondent at or prior to the hearing; (e) considering evidence that was wholly unreliable and inadmissible; and (f) considering evidence of uncharged misconduct.

As it would be impossible to try to give the appropriate weight to the few proper findings that are inextricably intertwined with the many improper findings, the only fundamentally fair result would be to strike the Supplemental Report or disregard it in its entirety.

---

7 As opposed to *The Florida Bar v. Rotstein*, 835 So.2d 24, (Fla. 2002) where this Court found no due process violation where the referee's report did not cite to, or rely upon, improperly admitted testimony.

## II. THE SUPPLEMENTAL REPORT AND RECOMMENDATION OF THE REFEREE IS INCORRECT AS IT IS INCONSISTENT WITH THE TRANSCRIPT AND IS INCONGRUOUS AS IT RECOMMENDS THAT THE CONSENT JUDGMENT BE ACCEPTED BUT THAT THE RESPONDENT NONETHELESS BE DISBARRED.

A second glaring defect in the Supplemental Report are the several references contained in it wherein the Referee recommends that the Consent Judgment be accepted, but nonetheless that the Respondent be disbarred. The references and text in the Supplemental Report are as follows:

> (SROR page 8 - R.App. page 209): "For the reasons stated herein, the undersigned Referee recommends that the Consent Judgment be accepted and that the following disciplinary measures be accepted."
>
> (SROR page 13 - R.App. page 214) "For the forgoing reasons the undersigned Referee recommends that the Supreme Court accept the consent judgment as previously submitted in its entirety, and disbar the Respondent from the further practice of law."

Obviously, and unfortunately, the Referee did not understand Rule 3-7.9 or the nature of the Consent Judgment and its purpose in these proceedings. Rule 3-7.9 states:

> Rules Regulating the Florida Bar, Rules of Discipline, Rule 3-7.9
>
> (b) After Filing of Formal Complaint. If a respondent states a desire to plead guilty to a formal complaint that has been filed, staff counsel shall consult established board guidelines for discipline and confer with the designated reviewer. If staff counsel or the designated reviewer rejects the proposed consent judgment, the plea shall not be filed with the referee. If staff counsel and the designated reviewer approve the proposed consent judgment, the respondent shall be advised that staff counsel and the designated reviewer will recommend approval of the respondent's

> written plea and the consent judgment shall be filed with the referee. If the referee accepts the consent judgment, the referee shall enter a report and file same with the court as provided elsewhere in these rules. If the referee rejects the consent judgment, the matter shall proceed as provided in this chapter.

As such, the Referee can reject the Consent Judgment outright and the matter will then proceed to trial on the Complaint or the Referee can accept it and forward it to this Court as she did on October 1, 2007.

What cannot logically happen, and Rule 3-7.9 makes crystal clear**,** is what happened here. Here the Referee in the Supplemental Report stated:

> "At the hearing the Referee rescinded the ratification of the agreement between the Florida Bar and the Respondent, and held a hearing *ab initio*, as though no agreement had been reached between the parties. The Referee took testimony and evidence, heard argument and reached her own conclusion as to the appropriate discipline to be imposed for the case at hand." (SROR page 3-4 - R.App. page 204-205).

This statement by the Referee in the Supplemental Report that the Referee "rescinded the ratification of the agreement between the Florida Bar and the Respondent" (SROR page 3-4- R.App. page 204-205), is incorrect and is belied by the transcript of the hearing. When the hearing commenced, Judge Pooler announced: "So what I'm doing is I'm going to void the stipulations at this point and start *ab initio.* I understood it was to be a mitigation hearing from the get go when this case first came to me, so we'll start, we'll take all the testimony that we can today." (HSROR page 3- R.App. page 23). At no time were the parties advised

that the Referee was rescinding her prior acceptance of the Consent Judgment as required under Rule 3-7.9.

As previously discussed, if this statement was in fact a rejection of the Consent Judgment under Rule 3-7.9 (which is unclear at best), then minimal due process required that the parties be notified that the Consent Judgment was rejected before the hearing.

To further confuse matters, after the hearing, as contained in the Supplemental Report, the Referee apparently accepted the Consent Judgment and recommended that this Court accept the Consent Judgment "in its entirety" (SROR page 13 - R.App. page 214) but somehow change the agreed terms as to discipline.

This, of course, is incongruous and violates Rule 3-7.9 and it is therefore suggested that this is an additional ground to strike the Supplemental Report or disregard it in its entirety.

## III. THE REFEREE ERRED IN FINDING AGGRAVATING FACTORS UNDER 9.22(b), 9.22 (d) AND 9.22(g).

It is suggested that the Referee again erred in finding aggravating factors in 9.22(b) Dishonest or selfish motive, 9.22(d) Multiple Offenses and 9.22(g) Refusal to Acknowledge Wrongful Nature of Conduct.

### 9.22(b) Dishonest or selfish motive

After an in depth review of decisions by this Court it is apparent that there has never been a case where sanctions arising from drug use or addiction included the aggravating factor of dishonest or selfish motive. All of the cases where dishonest or selfish motive were found in aggravation are where the attorney deceived or defrauded some third party for financial gain. See discussion in *The Florida Bar v. Varner*, 780 So.2d 1 (Fla. 2001)(deception alone insufficient to establish dishonest or selfish motive); *The Florida Bar v. Brownstein,* 953 So.2d 502 (Fla. 2007)(using trust funds then lying about it sufficient to establish dishonest or selfish motive); *The Florida Bar v. Maurice,* 955 So.2d 535 (Fla. 2007)(fact that complaining party did not pay any money to Maurice and did not lose any during the course of Maurice's representation insufficient to establish dishonest or selfish motive); *The Florida Bar v. Greene* 926 So.2d 1195 (Fla. 2006)(paid substantially for undertaking fraudulent actions sufficient to establish dishonest or selfish motive); *The Florida Bar v. Bustamante,* 662 So.2d 687 (Fla. 1995)(fraudulently obtaining funds through a series of

misrepresentations sufficient to establish dishonest or selfish motive). In *The Florida Bar v. Smith*, 650 So.2d 980 (Fla.1995), this Court endorsed a finding by a Referee that differentiated between dishonest acts and dishonest and selfish motives and found that Smith did not have a dishonest or selfish motive even though he engaged in tax evasion and caused false statement to be made to Federal Election Commission.

In sum, there are ninety two opinions issued by this Court where a reference to a dishonest or selfish motive was included in the opinion and not one involves discipline arising from drug use or drug addiction. In contrast, in the six cases involving addiction footnoted below and discussed in *The Florida Bar v. Del Pino, 955 So.2d 556 (Fla. 2007)*, none of the cases discuss dishonest or selfish motive.

This case is not about a selfish motive, it is about drug addiction. The evidence presented at the January 10, 2008 evidentiary hearing overwhelmingly established that the Respondent did not engage in these acts for financial gain but, on the contrary, did so to feel that he was part of the group and to acquire drugs to fuel his own addiction. As this Court stated in *Florida Bar v. Rosen*, 495 So.2d 180 (Fla. 1986).

> "[t]he respondent's involvement in the crime for which he pleaded guilty was a result of his own addiction to cocaine at the time," and that "respondent's addiction was the prime force behind his felony conviction." As a witness speaking on Rosen's behalf testified, "[his] problems, I am certain, [were] directly attached to the cocaine problem he had; it is a disease. I think ... he was someone who had it very very

badly." 495 So.2d 180 * 181

Here too the Respondent had it very, very badly and it was his addiction that was the prime force behind his felony conviction. As such, it is suggested that the Referee erred in finding an aggravating factor under 9.22(b) Dishonest or selfish motive.

**9.22(d) Multiple Offenses**

In making a finding of fact that the Respondent engaged in multiple offenses the referee stated: "The arrest affidavit, search warrant and subsequent charging document filed against Respondent reveal four separate and distinct sales of illegal substances made to a CI over a period of six weeks." (SROR p. 10 – R.App. p. 211).

It can only be assumed that the "arrest affidavit, search warrant and subsequent charging document" referred to by the Referee in making this finding were contained in the State Attorney's file previously discussed at length. Here the Respondent was convicted of one offense and the Complaint of the Florida Bar charged one offense, namely trafficking in ecstasy. No other acts of misconduct were charged or litigated. As such, for all of the reasons discussed in Section I above, the Referee erred in making this finding of fact that the Respondent committed multiple offenses.

**9.22(g) Refusal to Acknowledge Wrongful Nature of Conduct.**

The Referee's finding that the Respondent failed to acknowledge the wrongful nature of his conduct is, simply put, mind boggling. The Respondent pled guilty to the criminal charges then entered an unconditional plea of guilt to the Florida Bar's Complaint as written. The Respondent did not dispute the Florida Bar's charges at any stage of the proceeding and only sought to present evidence of his addiction in mitigation. At the January 10, 2007 hearing the evidence was unrebutted, overwhelming and even endorsed by the Florida Bar that the Respondent was not a "drug trafficker" as the term is commonly understood but a severely addicted drug addict. All witness, including Dr. John Eustace and the former prosecutor who prosecuted this case, agreed that they not consider the Respondent a drug trafficker. As such, the Respondent believes, and it is necessary to his recovery and rehabilitation to believe, that his actions were the result of his addiction and not the result of his intent to traffic drugs.

What the Respondent was attempting to explain to the Referee was that the only reason that he was convicted of trafficking was that the quantity of the ecstasy pills he had at the time of his arrest was predetermined by the confidential informants who requested he acquire them. Of course, the confidential informants, acting in concert with the police, requested he obtain a trafficking amount to make a more serious case. The Respondent stated that but for the actions of the

confidential informants he would not have been convicted of trafficking and that he was an addict and not a trafficker.

This is a far cry from failing to acknowledge his guilt or the wrongful nature of his conduct.

The Referee again misunderstood the nature of the proceedings and the nature of the Respondent's testimony. In *The Florida Bar v. Kandekore* 766 So.2d 1004, 1005 (Fla. 2000), this Court held that "where the underlying criminal charges constitute felony charges, determinations or judgments of guilt shall ... constitute conclusive proof of the criminal offense(s) charged". Here the Respondent unconditionally pled guilty to the Complaint so his violation of the rule was never in question. This Court in *Kandekore* went on to state: "[D]ue process requires that the attorney be permitted to explain the circumstances of the alleged offense and to offer testimony in mitigation of any penalty to be imposed."); *Pavlick*, 504 So.2d at 1234 ("Due process ... requires that the accused lawyer shall be given full opportunity to explain the circumstances and otherwise offer testimony in excuse or in mitigation of the penalty.)" 766 So.2d 1004 * 1006. This Court further stated that Kandelore could have, and should have, done so. *Id*. at 1005.

Here the Respondent was simply explaining the circumstances of his addiction and the reason for the trafficking quantity as he could and should have

done. The Referee was authorized to reject the explanation and not mitigate, but the Referee was not authorized to somehow twist the explanation into a denial that he did anything wrong and bootstrap it into an aggravating factor. As such, it is suggested that the Referee erred in finding an aggravating factor under 9.22(g) - Refusal to Acknowledge Wrongful Nature of Conduct.

## IV. LEGAL ANALYSIS AS TO WHY THE CONSENT JUDGMENT SHOULD BE APPROVED AS PREVIOUSLY SUBMITTED. THE REFEREE IMPROPERLY FAILED TO CONSIDER AND/OR IMPROPERLY OVERRULED THE RECOMMENDATION OF THE FLORIDA BAR AND THE OVERWHELMING WEIGHT OF THE EVIDENCE THAT THE CONSENT JUDGMENT BE ACCEPTED AND THAT THE RESPONDENT BE SUSPENDED AND NOT DISBARRED.

### a. THE FACTS PRESENTED ESTABLISH THAT THE MISCONDUCT WAS UNRELATED TO THE PRACTICE OF LAW AND ENTIRELY THE RESULT OF THE RESPONDENT'S ADDICTION; THEREFORE A LENGTHY SUSPENSION IS APPROPRIATE.

The Respondent acknowledges that when an attorney has been convicted of a felony, disbarment is the presumptively correct discipline. *Fla. Std. Imposing Law. Sancs.* 5.11. The burden is upon the attorney to prove that something less than disbarment is warranted by the circumstances. However, when substantial mitigation is presented, a suspension is nonetheless appropriate on a felony conviction. *The Florida Bar v. Del Pino* 955 So.2d 556 (Fla. 2007) [8] (Referee's

8 This Court in *Del Pino* stated: "We are also mindful of those cases in which a respondent's drug addiction caused or contributed to the felonious conduct and resulted in suspension instead of disbarment. *See Fla. Bar v. Hochman,* 815 So.2d 624 (Fla.2002) (suspending attorney for three years, effective, nunc pro tunc, on the date of his felony suspension after he pled no contest to felony grand theft where mitigating evidence included drug and alcohol addiction); *Fla. Bar v. Marcus,* 616 So.2d 975 (Fla.1993) (suspending attorney for three years after conviction of felony for misappropriating client funds where attorney's cocaine addiction was directly and causally linked to misconduct); *Fla. Bar v. Corbin,* 540 So.2d 105 (Fla.1989) (suspending attorney for three years; while acting as a circuit judge, the attorney was convicted of attempted sexual activity with a child twelve years of age or older, but less than eighteen years of age, with whom he stood in a position of familial or custodial authority; substantial mitigation included voluntarily entering and completing a residential alcohol treatment program); *Fla.*

recommendation of disbarment overruled and three-year suspension from practice of law was appropriate sanction for attorney's misconduct of participating in fraudulent transfer of condominium, which transfer led to conviction for mail fraud, and preparing and signing false and fraudulent application for extension of time to file and pay her federal income taxes, which led to her conviction for tax evasion).

Importantly, in *The Florida Bar v. Baker,* 810 So.2d 876 (Fla. 2002) this Honorable Court held that although lawyers may be disciplined for conduct that is not related to the practice of law, misconduct not connected with the practice of law is to be evaluated differently and may warrant less severe sanctions than misconduct committed in the course of the practice of law. *See Florida Bar v. Corbin,* 540 So.2d 105, 107 (Fla.1989) (finding mitigation where an attorney's "misconduct did not involve the practice of law nor actual breach of a professional responsibility to litigants or clients."). Here, the misconduct was entirely unrelated to the practice of law and the misconduct did not directly or indirectly involve

---

*Bar v. Jahn,* 509 So.2d 285 (Fla.1987) (suspending attorney for three years after he was found guilty of delivery of cocaine to a minor and possession of cocaine where the attorney's drug addiction was one of several mitigating factors); *Fla. Bar v. Rosen,* 495 So.2d 180 (Fla.1986) (suspending an attorney for three years after he was convicted of knowingly and intentionally possessing cocaine with the intent to distribute); *see also Fla. Bar v. Clark,* 582 So.2d 620 (Fla.1991) (suspending attorney for three years after felony conviction on federal drug charges where substantial mitigating factors included the fact that the attorney was operating a law partnership with his father, who suffered from a drinking problem, and was attempting to carry his fathers caseload as well as his own)." 955 So.2d 556 * 563.

clients.

As addressed very recently in *Del Pino,* it is respectfully suggested that the misconduct herein, when viewed in conjunction with the evidence of addiction and other mitigating factors, and further examined in light of Supreme Court precedent, suggests a lengthy suspension is the appropriate sanction.

The first Supreme Court case that involves this types of addiction *versus* criminal acts is found in *Florida Bar v. Rosen,* 495 So.2d 180 (Fla. 1986). In *Rosen* the Bar sought disbarment for a drug-addicted attorney who was adjudicated guilty of federal felony charges of knowingly and intentionally possessing cocaine with intent to distribute. The referee found that "[t]he respondent's involvement in the crime for which he pleaded guilty was a result of his own addiction to cocaine at the time," and that "respondent's addiction was the prime force behind his felony conviction." As a witness speaking on Rosen's behalf testified, "[his] problems, I am certain, [were] directly attached to the cocaine problem he had; it is a disease. I think ⋯ he was someone who had it very very badly." The Supreme Court described his addiction as follows "Rosen's productivity as a member of society precipitously plummeted as he became increasingly addicted to free-base cocaine. To his credit, he quietly wound up his law practice towards the end of 1981, when he no longer felt able to adequately protect the best interests of his clients. Unfortunately, however, he had by then lost the ability to exercise such care for

himself, and continued to withdraw into the nightmarish nether-world of cocaine addiction until he finally became involved in drug trafficking in 1982." The Supreme Court held that a loss of control due to addiction may properly be considered as a mitigating circumstance in order to reach a just conclusion as to the discipline to be properly imposed and cited *The Florida Bar v. Larkin,* 420 So.2d 1080 (Fla.1982); *The Florida Bar v. Ullensvang*, 400 So.2d 969 (Fla.1981). Rosen was given a three year suspension. [9]

Here, Noah Liberman also slid into that living hell of addiction and, as was testified to by Dr. Eustace, it was the addiction that entirely caused the actions that led to his arrest.

A second relevant case is *Florida Bar v. Jahn,* 509 So.2d 285 (Fla.1987). In May 1985 Jahn pled *nolo contendere* and was adjudicated guilty of delivery of cocaine to a minor, a first-degree felony, and possession of cocaine, a third-degree felony. The convictions were based on two separate incidents one of which occurred in May 1984 and which involved Jahn's injecting himself and a nineteen-year-old female with cocaine. In June 1985, Jahn was sentenced to a four-and-one half year term of incarceration in each case to run concurrently. Jahn was suspended from the practice of law for three years. The Florida Bar sought

9 This Court recently upheld the rationale in *Rosen* to permit impairment due to drugs as a mitigating factor. See *Florida Bar v Bloom* SC06-1025 decided 12/13/2007.

disbarment. This Court rejected the argument of the Bar and concluded that Jahn's lack of prior disciplinary history, the fact that no clients were injured, that Jahn's misconduct was directly related to his drug addiction and Jahn's exemplary efforts to rid himself of his chemical dependency should be considered as mitigating the discipline to be imposed.

Here too no clients were injured and Noah Liberman’s actions were directly related to his drug addiction. He further also has made exemplary efforts to rid himself of his chemical dependency.

Another relevant case is *The Florida Bar v. Marcus,* 616 So.2d 975 (Fla. 1993). In *Marcus* the Bar sought disbarment for the misappropriation of client funds, disbarment was not ordered by the Supreme Court because there was a finding that "there was a direct and causal link between the Respondent’s misconduct and his narcotic addiction to cocaine." The referee heard testimony from doctors, family members, friends, and lawyers about the change that took place in Marcus' personality, conduct, and behavior during the six-month period of his addiction. Although Marcus was able to continue practicing law, he did realize that his condition was deteriorating rapidly, recognized his need for treatment, and promptly obtained treatment. Although Marcus was found to have misappropriated client funds, a usual death sentence with the Bar, he was nonetheless suspended due to the addiction impairment. Because of the addiction and impairment, Marcus

was suspended for three years.

Again, here no clients were injured and Noah's actions were directly related to his drug addiction like Marcus. However, and critically, in the eyes of the Florida Bar and this Court, the misappropriation of client funds is more severe misconduct than drug trafficking.

The last and more recent case is *The Florida Bar v. Heptner,* 887 So.2d 1036 (Fla. 2004). In *Heptner,* Heptner was already suspended for numerous violations of the rules when through an undercover narcotics trafficking investigation and telephone wiretap, Heptner had been recorded soliciting the delivery of cocaine from a client in two phone conversations. The conversations took place in May 2001, while Heptner was suspended. Further, Heptner had purchased cocaine from the client on a regular basis over an eighteen-month period and, at Heptner's suggestion, the client had also provided Heptner with cocaine in exchange for legal services. During Heptner's suspension from the practice of law, he continued to provide legal advice to the client regarding his dissolution of marriage case. In 2001, the client wore an audio recording device during a meeting in Heptner's office. During that meeting, Heptner again solicited the delivery of cocaine from the client. Heptner was arrested and charged with a violation of section 893.13(1)(a), Florida Statutes (2000), solicitation to deliver cocaine, a third-degree felony.

The Supreme Court disbarred Heptner but in doing do noted that the referee found that “Heptner had personal or emotional problems and a “physical or mental disability or impairment,” but the referee did not identify Heptner as a drug addict. Further, although the referee stated that Heptner should receive two years of probation to ensure that he successfully completes his substance abuse treatment and counseling, the referee did not make any findings that specifically indicate Heptner's use of drugs was due to an addiction rather than merely a recreational activity. The referee also did not make a specific finding that Heptner's illegal drug use was the cause of his misconduct.” The Court went to cite additional reason for disbarment, specifically that (1) Heptner involved his client in his felony misconduct; (2) Heptner violated an order of suspension by engaging in the practice of law, by holding himself out as a lawyer, and by failing to notify his clients of his suspension; (3) Heptner has been disciplined on four prior occasions; and (4) Heptner committed multiple rule violations.

Here the facts compare very favorably when weighed against *Heptner*. Specifically, (1) Noah’s use of drugs was due to an addiction rather than merely a recreational activity; (2) Noah’s illegal drug use was the cause of his misconduct; (3) Noah did not involve a client in his felony misconduct; (4) there was no violation of a suspension order; (5) no prior discipline, and (6) no multiple violations.

Respondent Noah Liberman admits that he had engaged in unethical and illegal activity that warrants a substantial disciplinary sanction. However, the Supreme Court decisions discussed herein indicate that suspension is the appropriate sanction where the attorney disciplined had no financial motive for the misconduct and the misconduct was entirely related to addiction. Here, the Respondent engaged in misconduct in an addicted and impaired series of acts.

Mr. Liberman was wrong, admitted he was wrong, was incarcerated for his acts, cooperated with authorities and now with the Florida Bar. The undersigned would respectfully urge that this Honorable Court focus on impairment and supplement the previously submitted consent judgment with a recommendation that the Respondent be suspended for a period of three years.

### b. THE MITIGATING FACTORS FAR OUTWEIGH THE AGGRAVATING FACTORS.

#### i. Aggravating Factors

Under the Florida Standards for Imposing Lawyer Sanctions, on the Complaint and the evidence presented, the following factors are the only factors that can be found in aggravation.

9.22(c) pattern of misconduct;

#### ii. Mitigating Factors

The Florida Bar argued in it closing argument to this Referee that the Florida

Bar's opinion on this case changed and the discipline sought reduced from disbarment to suspension when it became apparent to the Florida Bar that this was a case about addiction and not about drug trafficking. [10] The evidence supports the Florida Bar's position. Evidence was presented to the Referee by Dr. John Eustace, a well known and respected expert on addiction, who evaluated the Respondent and opined that the Respondent was suffering from a severe addiction at the time the conduct began and throughout the course of the misconduct. Due to the addiction, the Respondent's impaired thinking created the sincere, though impaired, belief that he was simply buying bulk quantities of the drugs at a better price for he and his friends. Further, the Respondent has been involved in treatment for his addiction and has actively been involved with FLA.

From a review of the Supreme Court cases that follow it is apparent that the Court, in fashioning a suitable punishment, looks both to the act and the intent. Here,

---

10 At the January 10, 2008 hearing, Mr. Mulligan, counsel for the Florida Bar in this matter, informed the Referee that he was aware of, and believed in, the presumption of disbarment for felony cases and has been involved in many cases where there was a felony and even with substantial mitigation, still argued for disbarment. However, in this case, Mr. Mulligan stated that the Bar found there to be an overwhelming amount of mitigation such that it overcame the presumption. The Bar found it particularly persuasive that the state prosecutor in Mr. Liberman's case did not find Mr. Liberman to be a drug "trafficker" in the traditional sense and Dr. Eustace's testimony that Mr. Liberman was a meth dependant and that these acts were a direct result of his addiction. The Florida Bar was further persuaded by the evidence that the Respondent's addiction is in remission with an extremely low chance of relapse based on his clean time of 3 years 9 months and the support system he has in place.

the acts on their face are egregious, but when the acts are examined in conjunction with the Respondent's addiction and impaired thinking, the acts are substantially mitigated.

The Respondent has fully cooperated in the criminal investigation, and in this proceeding has only argued mitigation and has not sought to evade a finding of guilt on the factual allegations.

It is respectfully suggested that under the Standards for Imposing Lawyer Sanctions, and in particular Standard 9.32, the following factors are present in this case:

**9.32(a) - absence of a prior disciplinary record**

The evidence is undisputed that the Respondent has no prior disciplinary record. Therefore, Standard 9.32(a) is applicable and should mitigate in the Respondent's favor.

**9.32(b) - absence of a dishonest or selfish motive;**

The evidence is undisputed that the actions are not related to dishonesty, but to addiction. There was no selfish motive and the Respondent did not engage in the acts for financial gain. Therefore, Standard 9.32(b) is applicable and should mitigate in the Respondent's favor.

**9.32(d) - timely good faith effort to rectify consequences of misconduct**;

The evidence is undisputed that the Respondent cooperated with authorities and assisted in the police investigation. Once confronted with the reality of his impaired

thinking, the Respondent made every effort possible to rectify the consequences of his misconduct. Therefore, Standard 9.32(d) is applicable and should mitigate in the Respondent's favor.

**9.32(e) - full and free disclosure to disciplinary board and cooperative attitude towards proceeding;**

The Respondent has accepted that he made a serious mistake in judgment, recognized the nature and extent of his addiction and accepted responsibility for his acts. The Respondent has only presented evidence as to mitigation. Therefore, Standard 9.32(e) is applicable and should mitigate in the Respondent's favor.

**9.32(f) – inexperience in the practice of law;**

The Respondent was admitted to the Florida Bar on October 7, 2002 and at the time of his arrest was a member of the Florida Bar Young Lawyers Division. Therefore, Standard 9.32(f) is applicable and should mitigate in the Respondent's favor.

**9.32(g) - otherwise good reputation and character**;

The evidence presented through witnesses established that the Respondent is of otherwise good character and reputation. Therefore, Standard 9.32(g) is applicable and should mitigate in the Respondent's favor.

**9.32(g) - mental impairment (addiction)**

The evidence is undisputed that the Respondent suffered from a serious addiction that caused mental impairment. The evidence presented by Dr. Eustace and

the Respondent clearly establish this mitigating factor. Therefore, Standard 9.32(b) is applicable and should mitigate in the Respondent's favor.

**9.32(j) - interim rehabilitation**;

The evidence establishes that the Respondent voluntarily entered into addiction treatment and counseling and has also sought addiction counseling from Florida Lawyers Assistance, Inc., ("F.L.A."). Therefore, Standard 9.32(j) is applicable and should mitigate in the Respondent's favor.

**9.32(k) - imposition of other penalties and sanctions;**

The Respondent was charged and entered into a plea agreement for the misconduct, was fined, incarcerated and placed on extended probation. Therefore, Standard 9.32(k) is applicable and should mitigate in the Respondent's favor.

**9.32(1) - remorse.**

The evidence supported that the Respondent is genuinely and sincerely remorseful. Therefore, Standard 9.32(l) is applicable and should mitigate in the Respondent's favor.

**11.1 Additional factors not enumerated**

Additionally, under Standards for Imposing Lawyer Sanctions 11.1, the Respondent is entitled to the Mitigating Factor (in addition to those enumerated in 9.32) of ongoing supervision under FLA.

## V. THE BEST EVIDENCE THAT THE RESPONDENT SHOULD NOT BE DISBARRED WAS HIS ADMISSIONS TO THE REFEREE OF UNKNOWN, UNCHARGED, AND UNDISCOVERABLE PRIOR ACTS WHICH EVIDENCES HIS PROGRESS IN TREATMENT AND REHABILITATION.

A complete moral inventory and complete candor about one's addiction are the hallmarks of recovery. [11]

Here, the Referee took the Respondent's complete candor about his drug use in college and law school and used it as an aggravating factor in her rationalization to recommend disbarment.

Far from being evidence that Noah Liberman can never be rehabilitated, it is the best evidence that both he can and that he is well on his way. If the Respondent was the drug trafficker, rapist and dishonest schemer that he is portrayed to be by

---

11 The 12 Steps of Narcotics Anonymous which the Respondent has been religiously following are: *1.* We admitted we were powerless over drugs - that our lives had become unmanageable. *2.* Came to believe that a Power greater than ourselves could restore us to sanity. *3.* Made a decision to turn our will and our lives over to the care of God as we understood Him. *4.* Made a searching and fearless moral inventory of ourselves. *5.* Admitted to God, to ourselves and to another human being the exact nature of our wrongs. *6.* Were entirely ready to have God remove all these defects of character. *7.* Humbly asked Him to remove our shortcomings. *8.* Made a list of all persons we had harmed, and became willing to make amends to them all. *9.* Made direct amends to such people wherever possible, except when to do so would injure them or others. *10.* Continued to take personal inventory and when we were wrong promptly admitted it. *11.* Sought through prayer and meditation to improve our conscious contact with God as we understood Him, praying only for knowledge of His will for us and the power to carry that out. *12.* Having had a spiritual awakening as the result of these steps, we tried to carry this message to other addicts and to practice these principles in all our affairs.

Referee in the Supplemental Report, the last thing that he would done during his testimony is admitted to uncharged acts that were unknown to anyone in this world other than him.

This testimony was forthrightness in its purest form and it is fundamentally unfair that it was twisted into an aggravating factor. Before this Court is a man who is well on the road to recovery and who should be reinstated to the Florida Bar if, and when, his treatment has progressed to the point where his rehabilitation is sufficiently documented after a long term suspension to satisfy this Honorable Court that he is fit to be reinstated to the Florida Bar.

## CONCLUSION

In *The Florida Bar v. Hochman***,** 815 So.2d 624, (Fla. 2002) this Honorable Court stated:

> "Finally, we stress that misconduct such as Hochman's (i.e., misappropriation of client trust funds and felony determinations of guilt) typically results in disbarment. We stress too that Hochman most likely would have been disbarred (or possibly suspended for two consecutive, instead of concurrent, three-year terms) had he not from the very beginning voluntarily come forward, entered into a guilty plea and consent judgment for discipline, and doggedly pursued meaningful rehabilitation. Hochman's experience, and this opinion, should serve as an important reminder to all attorneys that voluntarily taking responsibility and meaningful action to correct their own misconduct will be favorably recognized and considered by this Court in determining appropriate discipline."

Here too the Respondent Noah Daniel Liberman entered into a guilty plea and consent judgment for discipline, and doggedly pursued meaningful rehabilitation.

For the foregoing reasons it is respectfully suggested that the Referee erred on several levels that should result in the Supplemental Report of Referee being stricken or disregarded in its entirety.

From the foregoing legal analysis it is respectfully requested that this Honorable Court approve the Consent Judgment submitted with the original Report of Referee filed on October 1, 2007.

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that this original of this pleading was served by U.S. mail upon the Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399 and a true and correct copy was mailed to William Mulligan, Esq., Bar Counsel, The Florida Bar, 444 Brickell Avenue, Suite M-100, Miami, FL 33131 and The Honorable Catherine M. Pooler, Dade County Courthouse, 73 West Flagler Street, Room 612, Miami, FL 33128, Kenneth Marvin, Esq., Chief Discipline Counsel, The Florida Bar, 651 East Jefferson Street, Tallahassee, Florida 32399-2300 and to John F. Harkness, Jr. Executive Director, The Florida Bar, 651 East Jefferson Street Tallahassee, Florida 32399 on April 8, 2008.

Respectfully submitted,

Richard Baron, Esq.
Fla. Bar # 178675
Richard Baron & Associates
501 Northeast 1st Avenue, Suite 201
Miami, Fl 33132
Tel.: 305-577-4626
Fax.: 305-577-4630

## CERTIFICATE OF TYPE, SIZE AND STYLE AND ANTI-VIRUS SCAN

I HEREBY CERTIFY that the brief of Respondent does not exceed 50 pages excluding the table of contents and table of citations and is submitted in 14 point Times New Roman font and the emailed file in which this brief is submitted has been scanned to free of viruses, by Norton Anti Virus for Windows.

_____
Richard Baron, Esq.
Attorney for Respondent