IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR

Complainant,

vs.

PHILLIP DAVID IRISH,
Respondent.

_________________________/

Supreme Court Case No: SC08-1375, SC08-1552, SCO8-2398, SC08-1891

RESPONDENT, PHILLIP DAVID IRISH'S INITIAL BRIEF

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SYMBOLS AND REFERENCES

In this brief, the complainant, Florida Bar, shall be referred to as "Florida Bar" or "the Bar".

The trial transcript will be referred to as "TR" followed by the referenced page number(s). (TR. __).

The Report of Referee shall be referred to as (ROR- ___).

ISSUES PRESENTED

1. Did the Referee erroneously conclude that it was necessary for the Respondent to prove that he was addicted to steroids in order to overcome the presumption of disbarment ?

2. Did Respondent establish by clear and convincing evidence mitigating factors that overcomes the presumption of disbarment and requires a discipline of a long term suspension ?

PRELIMINARY STATEMENT

The Florida Bar filed a Notice of Determination of Guilt and 3 complaints against Respondent which were consolidated for the final hearing. The Notice of Determination of Guilt (Case Number SC08-1891) alleged that Respondent was convicted of 1 count of trafficking in gamma butyrolactone (a/k/a GHB); 2 counts of possession of a controlled substance without a prescription; 1 count of possession of cocaine and 2 counts of possession, sale and/or delivery of a steroid. *See State of Florida v. Philip Irish,* Case No. 05019059CF10A, 17th Judicial Circuit, Broward County, Florida. Respondent was sentenced to 30 months incarceration which he is currently serving. Upon the filing of the Notice of Determination of Guilt, this Court issued an Order October 8, 2008 suspending Respondent from the practice of law pursuant to Rule 3-7.2(f) of the Rules Regulating the Florida Bar.

The first complaint (Case Number SC08-1375) alleged the following:

1. Pierre Smith paid Respondent $1000 to vacate a judgment that was entered against him. Respondent neglected the case which resulted in Smith's bank account being garnished. Smith attempted to contact Respondent but Respondent did not communicate with him. Smith filed a bar complaint against Respondent. The Bar requested

Respondent to reply to the complaint but Respondent did not respond.

2. Lionel Forbes paid Respondent $1,000 to represent him in an immigration matter. Forbes attempted to contact Respondent on several occasions but Respondent did not communicate with him. Forbes filed a bar complaint against Respondent. The Bar requested Respondent to reply to the complaint but Respondent did not respond.

The second complaint (Case Number: SC08-1552) alleged that Aleksander Mogulyan paid Respondent $900 to defend him in a lawsuit. Respondent failed to file any pleadings and failed to appear for the hearing on plaintiff's motion for summary judgment. This resulted in final judgment being entered against Mogulyan for damages. Mogulyan filed a Bar complaint against Respondent. The Bar requested Respondent to reply to the complaint but Respondent did not respond.

The third complaint (Case Number SC08-2398) alleged the following:

1. Benjamin Rodriguez retained Respondent to represent him in 5 lawsuits. In June 2007, Respondent vacated his office and abandoned the cases. Respondent missed scheduled deadlines, court hearings and a deposition. Rodriguez tried to contact Respondent on several occasions but Respondent did not communicate with him.

2. Michael S. Mallor retained Respondent to litigate a civil matter but Respondent did not file any pleadings and neglected the case. Mallor tried to contact Respondent on several occasions but Respondent did not communicate with him.

3. Matthew Ermovick paid Respondent $1,000 to represent him in a civil matter. Respondent never took any action to litigate the matter.

The final hearing occurred May 6, 2009 before, the Honorable Jack H. Cook, Circuit Court Judge for the 15th Judicial Circuit in Palm Beach County, Florida. All factual allegations contained in the notice of determination of guilt and the complaints were admitted by Respondent in a stipulation that was entered into by the parties. The Florida Bar presented no witnesses but offered into evidence Respondent's certified conviction.

Respondent presented extensive evidence of mitigation. Specifically Respondent alleged the following mitigating factors in support of a sanction other than disbarment: (1) impairment from substance abuse; (2) personal emotional problems; (3) rehabilitation; (4) remorse; (5) good character and reputation; (6) lack of a prior disciplinary record; (7) lack of experience in the practice of law and (8) other penalties and sanctions imposed. In support of Respondent's mitigation case the following exhibits were admitted into

evidence:

Respondent's Exhibit 1: Curriculum Vitae of Richard M. Seely, MD

Respondent's Exhibit 2: Oasis Rehabilitation Treatment Center Rehabilitation Records for Respondent.

Respondent's Exhibit 3: Medical Records resulting from infection caused in Respondent's arm by intravenous use of cocaine.

Respondent's Exhibit 4: Broward County Jail Certificate indicating Respondent completed a Substance Abuse Program

Respondent's Exhibit 5: Article from the Sun Sentinel newspaper reporting Respondent's Arrest

The following 4 witnesses testified on behalf of Respondent:

1. Richard B. Seely, M.D., a medical doctor licensed in the State of Florida, Board certified psychiatrist and an addiction medicine specialist. (TR. 13). Dr. Seely maintains a private practice in Weston, Florida and is affiliated with Transitions, a drug and alcohol rehabilitation facility in North Miami, Florida. He teaches the Addictions and Impaired Professionals courses at Nova University School of Osteopathic Medicine. Dr. Seely is the regional representative for the Physicians Recovery Network and has assessed and treated thousands of health care professionals for substance abuse. (Tr. 14). He has also assessed and treated over 600 members of the

legal profession and has performed evaluations for the Florida Bar, the Florida Board of Bar Examiners and Florida Lawyers Assistance, Inc. (Tr. 14). Dr. Seely performed a 3 hour telephonic substance abuse evaluation of Respondent. (Tr.15). Dr. Seely rendered the following expert opinions: (a) Respondent was suffering from a chemical dependency and addiction to GHB and cocaine during his acts of misconduct; (b) all of the Respondent's criminal conduct and unethical behavior was a direct result of his addiction to GHB and cocaine (Tr. 20). and (c) Respondent's addiction to GHB and cocaine is in remission and Respondent is on the road to recovery and rehabilitation and his chances of staying clean and sober are very good. (Tr. 24-25 & 27).

2. Sandra Daniella Cordero. Respondent's ex-girlfriend. (Tr. 97). She is completing her Pre-Med degree at Florida Atlantic University where she is an honor student. (Tr. 97). Ms. Cordero is pursuing a professional career in nursing.(Tr. 97). She testified that when she first met Respondent in 2005 he was a respectable, decent and honest church going man. (Tr. 97-98). He was professional and hardworking. (Tr. 98) She also testified that Respondent lost all of those attributes by 2006 as a result of his addiction to GHB and

cocaine, and that as a result of his addiction he was dishonest, unmotivated, anti-social and dysfunctional. (Tr. 98 &100).

3. David Irish is Respondent's father, a reverend for more than 40 years and a Lieutenant Colonel in the Army Reserve for the North Carolina National Guard. (Tr. 112). He watched the evolution of Respondent and has seen him spiral down in his life and climb back up. (Tr. 113-118). Rev. Irish testified as to Respondent's behavior prior to his addiction, his behavior during his addiction and his behavior after rehabilitation. Rev. Irish testified about how he got his son back from addiction and that Respondent is again happy, ambitious and in good spirit and has a good attitude. (Tr. 118).

4. Respondent's testimony concerned his childhood, educational background, employment history, history of drug addiction, and rehabilitation.

None of the witnesses' testimony was impeached.

At the conclusion of the hearing the Florida Bar requested the Referee recommend disbarment and Respondent requested the Referee recommend a long term suspension.

The Referee issued a report of referee May 15, 2009 which found Respondent guilty of all of the charged violations and recommended

disbarment *nunc pro tunc* to October 8, 2008 (the date Respondent was suspended.) (ROR-26).

Respondent timely filed a petition for review pursuant to Rule 3-7.7 of the Rules Regulating the Florida Bar.

SUMMARY OF ARGUMENT

The evidence presented at trial established clearly and convincingly that Respondent was a suffering from an addiction to GHB and cocaine and that his addiction consumed and destroyed everything of in his life. Respondent lost his income, his home, his car, his office, his business, his license to practice law, his family and his liberty. Respondent was destitute and had become financially, emotionally and morally bankrupt as a direct result of his addiction. Respondent's substance abuse addiction rose to a level such that he had diminished capacity and that but for the addiction the misconduct would not have occurred. Respondent has interim rehabilitation as demonstrated by voluntarily attending Alcoholics and Narcotics Anonymous meetings, working a twelve step program, voluntarily completing a substance abuse program while incarcerated and reading the literature of Alcoholics and Narcotics Anonymous. Respondent's addiction to GHB and cocaine and his interim rehabilitation combined with other mitigating factors overcomes the presumption of disbarment.

The Referee's recommendation of disbarment is erroneously based upon the belief that it was necessary for Respondent to prove that he was addicted to steroids to overcome the presumption of disbarment. The report

of Referee should be disapproved and a long term suspension should be imposed.

STATEMENT OF FACTS

Respondent had a good, clean and moral upbringing. (Tr. 113). He was a young man of good moral character and fiber. He was intelligent, ambitious and gracious and was on his way to becoming a successful lawyer. He fell prey to the disease of addiction which resulted in his incarceration and suspension from practicing law. Despite his circumstances and serious consequences, he has recovered from his addiction and is attempting to salvage his professional career.

Growing up Respondent was obedient, respectful and never gave his family any trouble. (Tr. 113). He was always happy with an "enthusiastic spirit". (Tr. 113). He was kind and gracious to everyone and as result he was very well liked by all who met him. (Tr. 113). He cared for others and was very giving. (Tr.113). He was ambitious and worked extremely hard at everything he did. (Tr.113).

Respondent was a smart and conscientious student from grade school through higher education. (Tr. 114). He excelled in high school and was a member of the National Honor Society. (Tr. 114). He was active in sports, band and other school organizations. (Tr. 114). He was also church going and was involved in church activities such as attending Sunday school, youth group and Bible study. (Tr. 113-114).

Upon graduating from high school, Respondent attended the University of North Carolina in Charlotte. (Tr. 114). While attending undergraduate school he worked many hours on weekends and still maintained excellent grades. (Tr. 114). He was a member of the National Honor Society and eventually graduated *cum laude* in 3 years. (Tr. 58).

Respondent moved to South Florida after graduating from college so that he could attend law school at the Shepard Broad Law Center at Novasoutheearn University. (Tr. 114). During his first year in law school Respondent received a disabilities fellowship grant for his good grades. (Tr. 60). He ended up graduating in the top 1/3 of his class. During the same period, Respondent obtained a master's degree in business administration from Nova University. (Tr. 114). He obtained both his JD and his MBA at the same time. (Tr. 114). Respondent passed the Florida Bar examination upon graduating from law school and was admitted to the Florida Bar shortly thereafter. (Tr. 61).

Upon being admitted to the Florida Bar Respondent was employed by the law firm of Behar, Gutt & Glazer in Aventura, Florida. (Tr. 61). He subsequently became an associate with the law firm of Elder, Reporello & Lewis, in Miami, Florida. (Tr. 62).

Respondent did not use drugs during grade school or high school. (Tr. 18). His introduction to drugs occurred as a result of his desire to become physically fit. (Tr. 18) While in college Respondent began to work out in a gym where he was first time introduced to Gamma-Hydroxybutyric (a/k/a as GHB) and experimented with growth hormones. (Tr. 18) At that time GHB was a legal health supplement that was available in health food stores. (Tr. 18). GHB eventually was made illegal in the United States in or about 1998. He used GHB strictly as a nutritional supplement to assist with body-building and was taking it in small doses. (Tr. 18). He was unaware that GHB had an intoxicating effect if ingested in greater quantities.

GHB does exactly what alcohol does, but without the adverse side effects such as hangovers. GHB, like alcohol, relaxes you and takes away one's daily tension and anxiety without any bad after effect. It is as addictive as alcohol and other depressants such as Valium, Xanax, and other similar medications. (Tr. 18-20)

Respondent learned of GHB's intoxicating side effects in 2000 while working out at a gym. (Tr. 58). He was given GHB as a substitute for alcohol by friends who advised him that it was better for him than alcohol since it would not damage his liver. During this period Respondent used

GHB rarely since it interfered with his ability to study in law school and later to practice law. (Tr. 58).

In 2005 Respondent became unemployed after the firm he worked for disbanded. (Tr. 62). As a result he became distraught and began using GHB more frequently and eventually on a daily basis. (Tr. 63). He also spent a considerable amount of time at the gym and began using steroids regularly in order to feel better. (Tr. 108). This was the same reason he was using GHB. (Tr. 108) He also experimented with snorting cocaine since it enabled him to stay awake from the effects of GHB. (Tr. 65) It is common for an addict to use GHB and cocaine, a relaxant and stimulant at the same time since it enables one to stay awake in order to use more GHB. (Tr. 20-21)

By this time, Respondent had become completely addicted to GHB. Respondent would order a 1 liter bottle through the internet from a foreign country where GHB was legal. (Tr. 104). A liter lasted him a month and is a common quantity purchased by those who frequently use GHB. (Tr. 34) In November of 2005, Respondent ordered a liter of GHB through the internet for his own use. (Tr. 76). Law enforcement officers intercepted the package and arrested him at his home. (Tr. 76). A search of his home revealed that he also possessed cocaine and steroids for which he was also arrested. (Tr.

34 & 76). He posted bond and remained out of jail while his case was pending until March 2008. (Tr. 83)

All of the drugs found in Respondent's possession were solely for his own personal use. (Tr. 41) Respondent was charged with trafficking in GHB solely as a result of the quantity that he purchased. One liter of GHB is the quantity that converts a charge of possession of GHB to trafficking in GHB. (Tr.34)

As a result of being arrested Respondent was embarrassed and humiliated. (Tr.71&91) The arrest was published in a local Fort Lauderdale and Miami newspaper. (Tr. 70-71). Respondent felt completely demoralized and became increasingly depressed and despondent. (Tr. 70-71) As a result he increased his usage of GHB and cocaine. He also began drinking alcohol.

By the beginning of 2006 Respondent increased his use of GHB and started injecting cocaine into his veins. (Tr. 98-99) During this time Respondent carried around a plastic bottle filled with GHB and a vial of cocaine. (Tr. 99) He would drink the GHB and inject the cocaine and pass out with empty cocaine bags and blood filled syringes surrounding him. (Tr. 100) He became very anti-social and all he did was stay home and use drugs.

(Tr. 100). During this time he seldom went into the office, did not practice law, and did not attend to his clients. (Tr. 100)

Respondent visited local rehab centers at the urging of his girlfriend and his family, however he did not admit himself. (Tr. 100). At one point in 2006 his family intervened and sent him to Oasis Treatment Center in California for a month where he became clean and sober. (Tr. 48 &115). He stayed clean and sober for an additional month and half but relapsed when he found out that the State was demanding jail time for his drug crimes.

By 2007 Respondent ceased functioning as a human being. He could not practice law and therefore he was unable to generate any income. He did not own a car and he was unable to make mortgage payments which resulted in the loss of his condominium. He was unable to pay his credit card debts, his school loans, his electric bill and his telephone bill. His parents paid his electric bill and phone bill. (Tr. 78-83). His parents also paid for his food by giving him Winn Dixie gift cards because they feared that if they gave him money for food he would spend it on drugs. (Tr. 133).

At this point Mr. Irish's entire life was spent using drugs. (Tr. 100). He lost his friends, his girl friend, familial relationships and business relationships. (Tr. 80-81)

Respondent was arrested in March 2008 for throwing a rock through his ex-girlfriend's window. (Tr. 84). Even though he was not prosecuted for any crime, the arrest caused his bond to be revoked. (Tr. 83). Respondent has been incarcerated until this day.

Incarceration has had a miraculous effect upon Respondent. (Tr. 118). Since his incarceration he regularly attends AA and NA meetings and reads the literature from Narcotics Anonymous and Alcoholics Anonymous, the Bible and other spiritual and recovery related literature. (Tr. 81 & 92). He also completed a 30 day substance abuse program while in the Broward County Jail. (Tr. 88-89). He regularly attends religious services and takes part in Bible study. (Tr. 24).

Rev. Irish frequently speaks with Respondent and has visited him in prison. (Tr. 118) Rev. Irish testified that Respondent is once again a happy, and an ambitious individual with an enthusiastic spirit and a great attitude. Rev. Irish believes that he has his son back from the ravages of addiction. (Tr. 118) Respondent testified that upon his release from prison he will join FLA, help others take part in some type of prison ministry and be active with inmates by taking AA/NA meetings to the prisons. (Tr. 84 &91-92).

ARGUMENT

POINT I

THE REFEREE ERRONEOUSLY CONCLUDED THAT IT WAS NECESSARY FOR RESPONDENT TO PROVE THAT HE WAS ADDICTED TO STEROIDS IN ORDER TO OVERCOME THE PRESUMPTION OF DISBARMENT

The Referee's wrongfully recommended the discipline of disbarment due to his erroneous belief that it was necessary for Respondent to prove that he was addicted to steroids in order to overcome the presumption of disbarment. The Referee's recommendation of disbarment is contrary to the clear and convincing evidence that was presented at final hearing. The evidence clearly demonstrated that Respondent was addicted to GHB and cocaine which directly caused all of his misconduct. The Referee failed to understand that it is not necessary to prove addiction to a substance or a criminal event once it is established that he is suffering from addiction to various substances.

Respondent was driven by a compulsion that put him on a path of self destruction. Respondent's drug use came before family, personal health, personal finances, and sometimes even food, shelter and freedom from imprisonment. His use of drugs distorted his logic and reason such that he was unable to make rational decisions. Had the Referee understood the depths of Respondent's addiction to GHB and cocaine and the law as it relates to addiction in disciplinary proceedings, he could not have found that

Respondent failed to overcome the presumption of disbarment because he was not addicted to steroids. Instead he erroneously concluded that it was necessary for Respondent to be addicted to steroids to overcome the presumption of disbarment.

1. Addiction as it Relates to Disciplinary Proceedings

Addiction is generally viewed as a disease and as a result recovery from addiction is accepted as a mitigating factor in disciplinary proceedings. The Supreme Court of Florida has held that addiction and subsequent rehabilitation will be considered as a mitigating circumstance in determining the appropriate sanction to be imposed. *Florida Bar v. Jahn,* 509 So. 2d 285 (Fla. 1987)*, The Florida Bar v. Rosen,* 495 So.2d 180, 181 (Fla. 1986). The Supreme Court has recognized the problem of addiction and has looked favorably on a lawyer's efforts at rehabilitation. *Id.; The Florida Bar v. Hochman,* 815 So.2d 624 (Fla. 2002).

However there is no bright line rule or guidance as to the evidence needed to be presented in order to demonstrate that the addiction rises to a level such that it rebuts the presumption of disbarment. This is a compelling case concerning addiction and the devastation that it leaves in its wake. Respondent suffered the most profound consequences due to his addiction that one could suffer short of death.

The Supreme Court has imposed the less severe sanction of suspension in cases, similar to this case. In the *Florida Bar v. Rosen*, supra a lawyer was convicted of drug trafficking and was suspended for 3 years. His sanction was mitigated from disbarment to suspension based upon his addiction and his rehabilitation. The Court held:

> … that loss of control due to addiction may properly be considered as a mitigating circumstance in order to reach a just conclusion as to the discipline to be properly imposed." ... "Disbarment is an extremely harsh sanction and is to be imposed only in those rare cases where rehabilitation is improbable.

The Court reiterated its position concerning addiction as a mitigating factor in *The Florida Bar v. Bloom*, 972 So.2d 172, (Fla. 2007). In that case the Court citing *Rosen,* held that "loss of control due to addiction may properly be considered as a mitigating circumstance in order to reach a just conclusion as to the discipline to be properly imposed."

2. There was clear and convincing evidence that demonstrated that Respondent was an addict.

It was undisputed that Respondent was a drug addict. (ROR-24). Dr. Richard Seely testified that Respondent fit the profile of an addict who had lost control of himself. Dr. Seely and Respondent both testified that his drug use increased over time until he was using on a daily basis with the amount he used increasing almost daily. Respondent was using GHB together with intravenous cocaine. (Tr. 98-100).

If there is any question concerning how impaired the Respondent was during the height of his addiction, one only need to look at his behavior and decision making during that time. For example, Respondent was using cocaine intravenously, which is in and of itself very dangerous. During his intravenous use of cocaine he ruptured a vein in his arm and it became infected. As a result Respondent had to go the emergency room and have surgery on his arm in order to cure the infection. Less than 2 weeks later Respondent resumed the intravenous use of cocaine in the same arm. (Tr. 67-68). Respondent did not care or consider the consequences of his acts. The only thing that is important to the addict is that he or she gets high. The undisputed testimony of Dr. Seely, Respondent and his girlfriend, Ms. Cordero clearly established Respondent had reached this point in his life as a result of his addiction. (Tr. 98-100).

The Referee's conclusion that Respondent did not overcome the presumption of disbarment because he is not addicted to steroids is error since such a fact is completely irrelevant. (ROR 19-20 & 24). It does not matter whether or not Respondent was addicted to steroids so long as he was addicted to some drug that impaired his ability to function and was the cause of his illegal conduct. You are either an addict or not. What you are addicted to is irrelevant.

The Referee's conclusion that the presumption is not rebutted based upon the failure to prove an addiction to steroids totally misses the point. It does not matter if Respondent was addicted to steroids. Simply put, the issues are (1) was Respondent an addict and (2) whether the misconduct was caused by the addiction. In other words the irrational, illogical (and criminal) act of possessing and taking steroids, knowing the terrible effect it has upon a person, is the same as Respondent's other irrational and illogical acts, (i.e. client neglect, missing court dates, failing to communicate with clients, etc.). All of these acts were caused as a result of the Respondent's addiction. Respondent's illegal possession of steroids is actually no different than any other crime he committed as long as it was proximately caused by his addiction which in this case it was.

If the Referee could not initially recognize that all of Respondent's misconduct was the result of his addiction, he should have subsequently reached that conclusion as a result of the clear and convincing, undisputed and unimpeached testimony of Dr. Seely. Dr. Seely's testified that the type of misconduct does not change the reason as to why the misconduct occurred. Specifically he testified:

> … I think part of that overall picture is the overwhelming portion of his addiction and compromise of his ability to navigate reality at that point in his life was due to the GHB and also the cocaine. There were certainly -- we talked about his use

> and abuse of steroids and some of the substances I think that he mentioned, that's somewhere mentioned in the charges, but at that -- it doesn't change the picture. The picture is that of -- that's commonly seen of a good person of good moral fiber that falls sway to addiction and, in the course of their addiction, neglects clients, breaks the law, ends up of having consequences and now is on the road to recovery. This is a gentleman that didn't have, you know, prior arrests. He is someone that has made a complete turnaround in his life and shows substantial evidence of rehabilitation, regardless of what the details are of the six charges.. (Tr. 32).

Any reasonable person having heard the evidence presented at final hearing would have determined that Respondent had been a cauldron of addiction and his entire being was replete with instances of inappropriate, irrational and illogical behavior as a result of addiction. It would not be reasonable to conclude that Respondent's possession and use of steroids was anything other than one of those instances that occurred as result of his addiction. The Referee agreed with Dr. Seely and found considerable evidence that the misconduct was related to addiction. (ROR-24). The flaw in the Referee's finding is that he accepted the Bar's (red herring argument) that he had to be addicted to steroids in order for mitigation to be established. It would be wholly irrational and illogical to find that all of the misconduct occurred due to the Respondent's addiction but then find that he cannot overcome the presumption of disbarment because he was not addicted to steroids.

3. <u>Respondent's Misconduct Was Directly Caused by His Addiction</u>

Respondent's misconduct can be summarized as follows: (1) felony convictions; (2) client neglect; (3) failure to communicate with clients and

(4) failure to respond to the Florida Bar's lawful requests during a disciplinary proceeding.

Dr. Seely specifically testified that when Respondent's addiction escalated, it became disastrous to his law practice just as the many other addicted professionals he had occasion to assess over the years. (Tr. 19). Missing deadlines, not filing cases, failure to file pleadings and failing to communicate with clients is typical for lawyers who become addicted to drugs as was Respondent. (Tr. 19). According to Dr. Seely there was nothing else in Respondent's character that would have caused him to exhibit this behavior and neglect. (Tr. 21). The addiction diminished his mental capacity such that he did not know right from wrong. (Tr. 95).

The testimony presented at the final hearing by Respondent and his witnesses clearly established that Respondent's misconduct occurred during the time period when he was addicted to GHB and cocaine. Dr. Seely's expert opinion was that Respondent's drug abuse proximately caused his criminal acts and client neglect, and that but for Respondent's drug addiction the misconduct would not have occurred.

In fact the Referee made the specific finding that "Respondent presented considerable evidence of addiction to GHB and cocaine and directly related his misconduct to his drug addiction in order to overcome

the presumption of disbarment." (ROR-24).

4. Respondent Demonstrated Interim Rehabilitation.

The Referee erroneously found that Respondent failed to demonstrate interim rehabilitation. (ROR-21). This finding is completely contrary to all of the undisputed and unimpeached evidence presented at final hearing. It is difficult to understand how the Referee came to this conclusion based upon the clear and convincing evidence presented that demonstrated interim rehabilitation.

Dr. Seely unequivocally testified that Respondent was becoming rehabilitated and that he was on the road to recovery from his addiction. (Tr. 32). The Referee was without a sufficient basis to discount Dr. Seely's testimony. (ROR. 21-22). Dr. Seely's credentials and substantial experience in the field of addiction enabled him to make evaluations of professionals who have suffered from the disease of addiction. His professional and expert opinions concerning one's fitness to practice their profession have consistently been requested and accepted by the Physician's Recovery Network, The Florida Bar and the Florida Board of Bar Examiners. (Tr. 14). The Referee's failure to accept Dr. Seely's opinion based upon the fact that he did not speak with Respondent's treating professionals or review the records from his treatment program while in jail is clearly erroneous. Dr.

Seely interviewed Respondent by telephone due to the fact that he was incarcerated in Hardee County, Florida, almost 200 miles from Dr. Seely's office. Dr. Seely testified that while a phone interview may not be the best method for evaluating a client, it is certainly a sufficient method and one that he has become accustomed to using. (Tr. 28-29) Dr. Seely testified that even over the telephone he can fairly and accurately assess a person's mental status and the veracity of what they're saying. (Tr. 29)

Dr. Seely's evaluation was corroborated by the testimony of Rev. Irish. As Respondent's father, Rev. Irish knew more about his son than almost anyone. Rev. Irish testified that his son is the same as he was prior to becoming addicted to drugs and appears to be rehabilitated. (Tr. 118).

Dr. Seely's opinion was also corroborated by the Certificate issued to Respondent by the Broward County Jail for successfully completing its substance abuse program. Obviously if Respondent did not demonstrate any efforts toward recovery and rehabilitation he would not have received the certificate. Finally Respondent testified at final hearing he had been attending AA and NA meetings while in prison and had been reading the literature of Alcoholics and Narcotics Anonymous. (Tr. 87-89)

There is nothing more that Respondent could have provided to demonstrate his interim rehabilitation. On the other hand, The Bar offered

absolutely no evidence to support that Respondent was not rehabilitated. Therefore Respondent should have found that Respondent has interim rehabilitation.

5. Respondent Has Presented Clear and convincing evidence of Addiction and Rehabilitation As Mitigation to Overcome the Presumption of Disbarment.

In order for addiction to be considered as a mitigating factor, the addiction must have impaired the attorney's ability to practice law to such an extent that it outweighs the attorney's misconduct. *The Florida Bar v. Martinez-Genova,* 959 So.2d 241 (Fla. 2007); *Florida Bar v. Shuminer*, 567 So.2d 430, 431-432 (Fla. 1990); *Florida Bar v. Knowles,* 500 So.2d 140 (Fla. 1986).

In *Shuminer,* supra the attorney settled claims for clients without their consent, used the funds for his personal endeavors, lied to clients concerning cases being in settlement negotiations, deposited trust funds into his personal account and failed to satisfy a doctor's lien from a settlement. The attorney was diagnosed with an alcohol and drug abuse problem during the time period the acts of misconduct occurred, went into treatment, became a member of Alcoholics Anonymous, and complied with an FLA contract. The attorney had no prior disciplinary complaints, had a repayment plan for victims, cooperated with the Bar, had a good reputation and moral character,

was sober for a year and showed remorse for his misconduct. Nevertheless, this Court held that disbarment was the appropriate sanction due to the fact that the attorney continued to work and his income did not suffer during the height of his addiction. "[H]e used the funds from misconduct not to support or conceal his addictions, but to purchase a luxury automobile". Id. at 432. He was still functioning and the impairment did not disrupt his life. Therefore this Court ruled that the attorney's addiction failed to rise to a sufficient level of impairment to outweigh the seriousness of his offenses. Id. at 432. Conversely, and consistent with this Court's decisions and the Standard for Imposing Lawyer Sanctions, if the addiction had disrupted the attorney's life such that he or she could not function, the addiction would have diminished culpability entitling him or her to mitigation sufficient to overcome the presumption of disbarment. That is exactly what occurred in the case at bar.

The instant case is the reverse of *Shuminer*. Unlike *Shuminer,* Respondent lost absolutely everything. Respondent's misconduct did not further a lavish lifestyle. The misconduct was to conceal and further his addiction. Respondent was leading a life which was morally, financially, and spiritually bankrupt. He did not use his client's money to purchase a luxury car, pay his personal bills, or to buy any material items. The money received

from his clients was used solely to purchase drugs. He was destitute and had lost everything including his liberty. His addiction and its effect upon his life were complete and overwhelming. What more disruption could come to one's life after he has lost home, his office, his job, his income, and his loved ones and ends up in prison?

In the instant case, Respondent suffered severe impairment such that his culpability was diminished. But for the impairment the misconduct would not have occurred. This evidence was not refuted, contradicted or impeached.

Respondent has proven all of the elements of addiction and rehabilitation by clear and convincing evidence so that he has rebutted the presumption of disbarment. The case law is clear that when the elements of addiction and rehabilitation are present, the penalty has to be something less than disbarment. To hold otherwise would emasculate the enlightened view the Supreme Court has demonstrated in the past. See *Florida Bar v. Rosen*, 495 So.2d 180 (Fla. 1986*); Florida Bar v. Farbstein*, 570 So.2d 933 (Fla. 1990); *Florida Bar v. Jahn,* 509 So. 2d 285 (Fla. 1987); *Florida Bar v. Larkin,* 420 So.2d 1080 (Fla. 1982).

POINT II

RESPONDENT HAS ESTABLISHED MITIGATING FACTORS BY CLEAR AND CONVINCING EVIDENCE THAT REBUT THE PRESUMPTION OF DISBARMENT

When determining the appropriate sanction to impose upon a lawyer who has been convicted of a felony the process starts with Standard 5.1 and 5.11 of the Florida Standards for Imposing Lawyer Sanctions. These standards state in pertinent part:

> **5.1 FAILURE TO MAINTAIN PERSONAL INTEGRITY**
>
> Absent aggravating or mitigating circumstances, and upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving commission of a criminal act that reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer in other respects, or in cases with conduct involving dishonesty, fraud, deceit, or misrepresentation:
>
> **5.11** Disbarment is appropriate when:
>
> **(a)** lawyer is convicted of a felony under applicable law; or
> …
> **(c)** a lawyer engages in the sale, distribution or importation of controlled substances;

Based upon these standards the Florida Supreme Court has held that disbarment is the presumed sanction for a lawyer convicted of a felony. *The Florida Bar v, Del Pino,* 995 So.2d 456 (Fla. 2007); The *Florida Bar v. Bustamante***,** 662 So.2d 687 (Fla. 1995); *The Florida Bar v. Cohen,* 908 S0.2d 405 (Fla. 2005). However, disbarment is not automatic and the

presumption may be rebutted. *The Florida Bar v. Jahn,* 509 So.2d 285 (Fla. 1987); *The Florida Bar v. Marcus,* 616 So.2d 975 (Fla. 1993). In *Marcus,* the Supreme Court held that an attorney who is convicted of a crime is not automatically disbarred. Instead the Court views each case on a case by case basis and the merits presented. *Id.* at 977. In *The Florida Bar v. Greene,* 926 So.2d 1195 (Fla. 2006) the Court held that while the Standards provide that disbarment is the presumptive sanction for a lawyer convicted of a felony the presumption is subject to aggravating and mitigating circumstances.

The Florida Standards for Imposing Lawyer Sanctions list the mitigating and aggravating circumstances in Standards 9.22 (Aggravating Circumstances) and 9.23. (Mitigating Circumstances). The Referee found that the following aggravating factors were proven by clear and convincing evidence: (1) Respondent had a dishonest or selfish motive;(2) a pattern of misconduct; (3) multiple offenses; and (4) bad faith obstruction of the disciplinary proceeding by intentionally failing to comply with rules or orders of the disciplinary agency.

The Referee also found that the following mitigating factors were proven by clear and convincing evidence: (1) absence of a prior disciplinary record; (2)inexperience in the practice of law; (3) physical or mental

disability or impairment and (4) the imposition of other penalties or sanctions.

A. The Referee erroneously found that Respondent's failure to respond to the Bar's request for an explanation to the Bar complaint was an aggravating factor.

The Referee erroneously considered as an aggravating factor that Respondent engaged in the bad faith obstruction of disciplinary proceedings by failing to respond to the Bar's request for a response to the bar complaints filed against him. *See Florida Standard for Imposing Lawyer Discipline 9.22(e).* This finding flies in the face of the evidence presented at final hearing. Respondent was at the height of his addiction at the time the Bar requested him to respond to the bar complaints. It was at this time that Respondent could not function as a human being no less a lawyer. Respondent's entire time was spent on his couch using drugs and not tending to his personal affairs. Chances are that he did not even know of the Bar's requests since it was probably in the stacks of unopened mail sitting in his office. It was not that Respondent did not want to respond, he simply was not capable of responding. In fact, the failure to respond to the Bar's request is typical behavior of someone suffering from addiction. The drug is in control.

This issue was completely misunderstood by the Referee. "Bad faith" requires a conscious and intentional act. Respondent was simply not capable of having the intent to delay disciplinary proceedings. This is especially the case when the chances are that Respondent did not even know the existence of the disciplinary proceedings. Therefore this should not be considered an aggravating factor.

B. The Referee failed to consider several mitigating factors which were proven by clear and convincing evidence.

1. **Full and free disclosure to disciplinary board or cooperative attitude toward proceedings**. *See Florida Standard for Imposing Lawyer Discipline 9.32(e).* Aside from Respondent admitting his wrongdoing in his answers to the Bar's complaints, he also entered into a joint stipulation admitting all of the misconduct. Clearly this supports the mitigating factor, that Respondent made full and free disclosure of his wrongdoing and is evidence of his cooperation.

2. **Interim rehabilitation.** *See Florida Standard for Imposing Lawyer Discipline 9.32(j)-* The Referee should have considered Respondent's interim rehabilitation as a mitigating factor when determining the appropriate sanction to impose. This is based upon the clear and convincing and undisputed evidence that was presented during the final hearing which was more fully stated

above. Respondent has clearly demonstrated interim rehabilitation by clear and convincing evidence and as such it should be considered as a mitigating factor.

3. Analysis of Aggravating and Mitigating Factors

Dr. Seely's testified that Respondent's misconduct was a direct and proximate result of his addiction to GHB and cocaine. (Tr. 20) Dr. Seely rendered his opinion to a reasonable degree of medical certainty. His opinion was unrefuted and unchallenged and was accepted by the Referee (ROR-24). The Bar was on notice and knew that Respondent's main argument against disbarment was mitigation due to impairment. The Bar had the opportunity to present expert testimony at final hearing to support its position concerning the issues of addiction, causation and rehabilitation but elected not to do so.

Respondent was a personable and well liked young man who started off his career as a bright, intelligent, and very competent lawyer who fell victim to the disease of addiction which ruined his life. Respondent acknowledged the severity of his misconduct and has shown remorse. Respondent did not seek to be excused for his misconduct, but rather seeks that his sanction be mitigated so that he receives a sanction less than disbarment.

The fact that there are a number of instances of misconduct and that clients have been injured cannot be addressed in a vacuum as the Referee has done. Instead it must be addressed together with the disease of addiction. When there is an understanding of the disease and how it impacts behavior, the number and degree of offenses become less relevant due to the fact that the lawyer but for the disease of addiction the misconduct would not have occurred.

The Referee erroneously relied upon several cases provided to him by the Bar to support the recommendation of disbarment. None of those cases apply to this case. (ROR 23-26). In almost all of the cases relied upon by the Referee in support of the sanction of disbarment the lawyer was not an addict. *See The Florida Bar v. Heptner,* 887 So.2d 1035 (Fla. 2004); *Florida Bar v. Wilson II,* 643 So.2d 1063 (Fla. 1994); *Florida Bar v. Insua,* 609 So.2d 1313; and *Florida Bar v. Palmer,* 588 So.2d 234 (Fla. 1992). In *Heptner,* the lawyer was not a drug addict, had 4 prior disciplinary actions, had substantial experience in the practice of law and was convicted of the sale of cocaine. In *Wilson II,* the lawyer was not a drug addict, refused to acknowledge his wrongdoing, and his misconduct was motivated by greed and not addiction. In *Insua and Palmer,* the lawyers were not addicts and they engaged in drug related crimes for profit.

This case is distinguishable from all of those cases since Respondent was an addict without a prior disciplinary history, had little experience in the practice of the law, acknowledged his wrongdoing, and accepted the money from his clients in order to purchase drugs for his use and not for profit or greed. (Tr. 102-104)

Once the lawyer is determined to be an addict the analysis used to determine what discipline should be imposed changes. The Referee's analysis in determining what sanction to impose ignored the fact that Respondent was an addict and based his recommendations as if he was a normal and functioning human being. Therefore the recommendation of disbarment is clearly flawed.

This case is remarkably similar to *The Florida Bar v. Jahn,* 509 So.2d 285 (Fla. 198) and *The Florida Bar v. Rosen,* 495 So.2d 180 (Fla. 1986). In *Jahn,* the Supreme Court held that an attorney's felony convictions which were based upon illicit drug use warranted a 3 year suspension rather than disbarment when the misconduct was directly related to drug addiction. In the instant case there is more than ample evidence to support the position that drug addiction was the proximate cause of all of the Respondent's misconduct. Respondent in this case bears a close resemblance to Rosen. Respondent graduated *cum laude* from the University of North Carolina with

a major in business economics and obtained his Jurist Doctorate and a business degree while in law school at the Nova South Eastern School of Law. During the same he did *pro bono* work for the Legal Aid Society for Broward County. It is evident that when not under the influence of drugs Respondent was an exceptionally motivated and bright young man with a promising future just as *Rosen.* Respondent, who is, now, only 30 years old, has the potential like Rosen to be a very good and professional attorney.

Other cases that are similar to this case and support a sanction less than disbarment are *The Florida Bar v. Marcus, 616* So.2d 975 (Fla. 1992)(lawyer who pled guilty and was convicted of a federal felony and who misappropriated client funds warranted a 3 year suspension followed by three-year probation period, rather than presumptive sanction of disbarment, in light of mitigating factors of cocaine addiction, successful rehabilitation, lengthy delay in resolving the matter, previous consent judgment, early restitution), *The Florida Bar v. Hochman, 815* So.2d 624 (Fla. 2002)(attorney who pled no contest to felony theft of client funds warranted 3 year suspension instead of disbarment where attorney committed the felony theft as a result of drug addiction and entered into a drug treatment program) and *The Florida Bar v. Weintraub, 528* So.2d 367 (Fla. 1988) (an attorney's illegal possession and delivery of controlled substance warranted

a 90 day suspension from practice of law and two-year term of probation when the attorney sought rehabilitation and delivery of the cocaine was not for profit.) and *The Florida Bar v. De La Torre,* 994 So.2d 1032 (Fla. 2008)(18 month suspension followed by 3 years of probation was appropriate sanction for attorney who pled no contest to felony battery on a police officer and felony possession of cocaine when the attorney had no prior disciplinary record, had been experiencing personal and emotional problems at or around time of his misconduct, there was evidence of his good character and reputation, he demonstrated interim rehabilitation and he had completed all of the terms of his criminal sentencing.

The facts of this case do not justify disbarment due to Respondent's substantial mitigation due to his addiction and rehabilitation combined with the other mitigating factors that were proven by clear and convincing evidence.

The Referee did rely upon two cases in which the lawyer was an addict and disbarment was determined to be the proper sanction. *Florida Bar v. Martinez-Genova,* 959 So.2d 241 (Fla. 2007); *The Florida Bar v. Valentine-Miller,* 974 So.2d 333 (Fla. 2008). These cases are distinguishable from this case. This Court held that *Martinez-Genova*'s disbarment was appropriate even though she was addicted to cocaine.

Martinez-Genova misappropriated trust funds and was arrested for possession of cocaine. In reaching its conclusion the Court applied the *Shuminer* analysis and determined that *Martinez-Genova*'s addiction did not rise to a level for mitigation since she still functioned as a lawyer as evidenced by her passing the bar examination and handling complex litigation while using cocaine. In this case Respondent could not function as a human being no less a lawyer. As a result of his addiction to drugs, Respondent was unable to communicate with his client's or opposing counsel, he could not do legal research, he could not draft or file legal pleadings, he could not try any cases, he could not argue motions, he could not manage personal or firm affairs and in the end he could not even make it to the office. In fact in the end Respondent had stacks of unopened mail. Clearly he was not functioning as an attorney or making a living as an attorney during his addiction. This is what distinguishes this case from *Martinez-Genova*.

Valentine-Miller suffered from severe personal problems and an addiction to alcohol and drugs which affected her ability to represent clients and manage her office. She eventually entered into a rehabilitation program for 6 months after Bar proceedings were brought against her for stealing money from her trust account. This Court, noting that that even when trust

funds are stolen, the presumption of disbarment can be rebutted in some instances and a lesser sanction may be imposed. *Id* at 338. However the Court disbarred *Valentine-Miller* and held that her addictions and personal problems did not rise to a level that rebutted the presumption of disbarment. *Valentine-Miller* is distinguishable from this case due to the fact that she was still able to function as an attorney. Specifically, she was able to settle cases and earn money; something Respondent was not capable of doing. *Valentine-Miller* also knew right from wrong when she refused to give her client's their share of the settlement funds.

The Referee's reliance upon the dicta in that case (that *Valentine-Miller* should have recognized her spiral downward and that she should of sought help) demonstrates the flawed reasoning and lack of understanding as to the extent of Respondent's addiction. Respondent could not stop using drugs irrespective of his downward spiral. The Referee should have recognized this, based upon his finding that there were failed attempts at rehabilitation prior to his being incarcerated. (ROR-22). Unlike *Valentine-Miller,* Respondent did not wait until Bar proceedings were commenced in order to try and obtain help. He tried to get help by going to several rehabilitation centers before Bar proceedings began. On each occasion he failed to obtain help due to the severity of addiction which prevented each

attempt at recovery.

The purpose of attorney discipline is three fold. First, to be fair to society, both in protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of the undue harshness of the penalty imposed. Next, it must be fair to the Respondent, being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation. Finally, it must be severe enough to deter others who might be prone or tempted to become involved in like violations. *Florida Bar v. McShirley*, 573 So.2d 807, 808 (Fla. 1991); *Florida Bar v. Pahules*, 233 So.2d 130, 132 (Fla. 1970).

A long term suspension satisfies the purpose of imposing discipline.

A. A long term suspension is fair to society, both in protecting the public from unethical conduct and at the same time not denying the public the services of a qualified lawyer as a result of the undue harshness of the penalty imposed.

If Respondent is suspended for more than 91 days, he cannot be reinstated immediately thereafter. The Respondent must first prove that he is rehabilitated pursuant to Rule 3-7.10 of the Rules Regulating The Florida Bar. This assures that the public will be protected by requiring that the Respondent is fit to practice law and has been rehabilitated. These factors will be scrutinized by The Florida Bar, a Referee, and eventually by this Court. This completely alleviates the Referee's speculative concerns as to

whether the Respondent can remain sober. (ROR-22).

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

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

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

A long term suspension will deter other lawyers from similar types of misconduct. This Court has made it very clear that an attorney who engages in serious misconduct, such as committing criminal acts will be disbarred absent substantial mitigation. A long term suspension will not change this

position, but rather allow mitigation only in those rare circumstances of addiction where the addiction rises to such a level that the attorney's capacity is diminished, and he or she becomes totally devastated mentally, emotionally, and financially.

CONCLUSION

In this case Respondent has proven by clear and convincing evidence that (1) he was addicted to drugs, (2) as a direct and proximate cause his of his addiction he could not function as an attorney; (3) all of the misconduct occurred as a direct and proximate result of his addiction and (4) Respondent has interim rehabilitation. When the elements of addiction and rehabilitation are present the penalty has to be something less than disbarment. See *Florida Bar v. Rosen*, 495 So.2d 180 (Fla. 1986); *Florida Bar v. Farbstein*, 570 So.2d 933 (Fla. 1990); *Florida Bar v. Jahn,* 509 So. 2d 285 (Fla. 1987); *Florida Bar v. Larkin,* 420 So.2d 1080 (Fla. 1982). Therefore, this Court should reject the Referee's Report and Recommendation of disbarment and impose a long term suspension.

Respectfully submitted,

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RICHARD B. MARX
FBN 051075

REQUEST FOR ORAL ARGUMENT

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

COMPLIANCE WITH RULE 9.210(a) (2)

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

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RICHARD B. MARX
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing brief have been sent by Federal Express, overnight delivery to Thomas D. Hall, Clerk, The Supreme Court of Florida, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927; and a true and correct copy of the foregoing was sent and regular U.S. Mail to The Honorable Jack H. Cook, Referee, Palm Beach County Courthouse, 205 North Dixie Highway, West Palm Beach, FL 33401 and to Juan Carlos Arias, Esq., Staff counsel, The Florida Bar on __________, 2009.

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RICHARD B. MARX
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