IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

Supreme Court Case
No. 66, 146

The Florida Bar File No.
MRE85001

THE FLORIDA BAR	)
	)
	)
In Re: ALAN SILVERSTEIN,	)
Petition for Reinstatement.	)
	)

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BRIEF OF RESPONDENT

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TOPICAL INDEX

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Although the Statement of the Case and Facts of The Florida Bar generally accurately states the information herein set forth, the Respondent deems it necessary to supplement and correct factual information that is both relevant to the issues before this Court and which was taken into consideration by the Referee in his recommendation of reinstateement.

The Bar in its brief has stated that the Respondent's arrest and subsequent felony conviction arose out of the sale of cocaine to "undercover police" or other such similar language. That representation although incorporated into the Bar's argument and not specifically set forth in its Statement of Facts, nevertheless, carries the connotation that it is a fact -- a fact to be considered by this Court and one which was or should have been considered by the Referee.

This is an inaccurate and distorted statement of the real facts surrounding the Respondent's arrest. The sale of cocaine by the Respondent was between himself and a friend of himself and his wife, the friend being a fellow "user" of cocaine.

At the time of the Respondent's reinstatement proceedings he had been employed as a law clerk/paralegal by the law firm of Schwartz, Steinhardt, Weiss & Weinstein, formerly known as Schwartz, Klein, Steinhardt, Weiss & Weinstein, for almost three years, and is still so employed.

Although the information is contained both in the Bar Investigation Report and other exhibits, the Respondent would point out the following:

1) Respected members of the Bar, by way of letters, spoke of the Respondent's past reputation as a competent and ethical attorney.

2) Prior to his arrest, the Respondent had been a practicing attorney in Florida for 16 years, without any prior disciplinary record.

3) The Miami Beach Bar Association located in the community where the Respondent practiced for many years advised the Bar in an unsolicited response to the notice of his reinstatement proceedings published in the Miami Review, that it had no objection to Mr. Silverstein's reinstatement.

4) The Honorable Richard Fuller, judge of the Circuit Court for the Eleventh Judicial Circuit, in response to an inquiry from the Bar, stated that he unreservedly supported the Respondent's reinstatement.

5) The Respondent's employers for the past three years, practicing and respected members of the Bar, both endorsed his reinstatement and advised the referee that the Respondent's level of legal work for the past three years was outstanding and scholarly and that he had diligently applied himself during that period.

6) No judgment had been entered against the Respondent as the result of any transaction or incident occuring subse-

quent to his arrest and suspension, nor had he been involved in any type of immoral or unlawfull activity. *

ARGUMENT

POINT I

WHETHER PUBLIC POLICY SHOULD BE CONSIDERED A BAR TO THE REINSTATEMENT OF A SUSPENDED ATTORNEY WHEN THE GROUNDS FOR THE ORIGINAL SUSPENSION WAS THE ATTORNEY'S CRIMINAL CONVICTION FOR SALE AND DELIVERY OF COCAINE, A CONTROLLED SUBSTANCE.

Rule 11.07(2)(4) of the Florida Integration Rule provides in part that an attorney adjudicated guilty of a felony shall automatically be suspended as a member of The Florida Bar, such suspension to continue for a period of three (3) years and thereafter until restoration of civil rights and reinstatement to the Bar pursuant to the Rules relating thereto.

Rule 11.11 of the Integration Rule establishes the procedure for reinstatement of a suspended attorney. Sub-section (5) provides that:

> "The matter to be decided shall be the fitness of the petitioner to resume the practice of law."

Sub-section (9) provides in part that:

> "If the petitioner is found fit to resume the practice of law, the judgment shall reinstate him in the Florida Bar." (Emphasis supplied)

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* "TT" will indicate reference to Transcript of Testimony

The Respondent was adjudicated guilty of a felony in February, 1980, and accordingly suspended from the Florida Bar in March, 1980. In 1983, the probationary period imposed upon the Respondent as a result of his felony conviction was terminated and the Respondent's civil rights were restored in June, 1984. He subsequently filed his petition for reinstatement with the Florida Bar in October, 1984. At the time of the Respondent's hearing before the Referee, in April, 1985, the Respondent had been suspended from the Florida Bar in excess of five (5) years by reason of his felony conviction and by the time of his reinstatement as the result of these proceedings, if such be the case, he will have been suspended six (6) years or more.

It is obvious from the foregoing recitation of dates and events that the Respondent has satisfied each and every provision of the Integration Rule set forth above as a predicate to seeking reinstatement. It is additionally abundantly clear from the record that the Respondent has in the past five and one-half years rehabilitated himself with respected law abiding members of the community, has earned the praise and respect of his present employers who are members of the Florida Bar, as well as his past employers and his former probation officer, drug addiction counselers and members of the judicial system. In short, the Respondent has demonstrated at every turn that he has overcome and put behind him that isolated event in his life that lead to his suspension. He has accepted full blame for

his past drug addiction and felony conviction and has not evidenced any bitterness or vengeance toward society because of it. Indeed, he has expressed the deep sorrow and remorse that he has experienced as a result of the shame and embarrassment caused to his fellow attorneys and the Florida Bar.

The Bar did not oppose the Respondent's reinstatement nor has it petitioned this Court to review the Referee's report recommending reinstatement because it questions the Respondent's rehabilitation during the past five and one-half years. Rather, to use the language of the Bar at page two of its brief:

> ". . . the main contention of the Board of Governors of The Florida Bar and the reason for [its] Petition for Review "is predicated upon the ground that Mr. Silverstein's suspension as of now for some five and a half (5-1/2) years is not long enough; that Mr. Silverstein's suspension should continue for an additional indefinite period of time to foster . . . the concept of discipline and the protection of the public, as well as the image of The Florida Bar. . . ." (Bar's brief, page 1)

The Bar so argues not because the Respondent was convicted of a felony, but more specifically because he was convicted of a felony relating to activities involving <u>controlled substances</u>. The Bar, therefore, wishes to classify a felony conviction involving controlled substances apart from other felonies. In view of the present language of the Integration Rules set forth above regarding felony convictions, suspensions and reinstatement, it would appear that the Bar desires to modify or in some fashion amend those specific provisions so as to declare that

notwithstanding anything to the contrary, an attorney convicted of a felon involving a controlled substance shall be automatically suspended from the Bar for a period in excess of that now in effect, or for that matter, indefinitely. What minimum specific period of suspension is endorsed or suggested by the Bar is unclear. It would seem likely to assume that it supports a minimum of five or six years inasmuch as the Bar objects to the Respondent's five and one-half years on the basis that it is of insufficient duration.

It may well be that this Court could in an appropriate fashion accomplish the measures advocated by the Bar if it weredeemed necessary and appropriate, but certainly not in this case. The Respondent respectfully submits that his Petition for Reinstatement should be judged by the existing provisions of the Integration Rule at the time of his petition as well as the judicial construction of those Rules by this Court. FLORIDA BAR v. KIMBALL, 425 So.2d 531, 533 (1983). It is only from that perspective that any meaningful response to the Bar's petition for review can be presented. Otherwise, the Respondent's answer brief and argument must become hopelessly lost in a discussion involving future public policy of the Bar and perhaps this Court. Such is not an appropriate subject for his speculation.

Viewed within the context of the present Integration Rule, the Bar would seem to be arguing in substance that the Referee's report is either erroneous, unlawful or unjustified

because the Respondent's suspension resulted from a felony conviction involving a controlled substance and his suspension accordingly is not long enough-rehabilitated or not. The foregoing criteria for review is provided in Rule 11.09(3)(e) of the Integration Rule as is the Bar's burden of proof as the party seeking review.

With regard to the review criteria above, the Bar has not suggested that the referee's report is unlawful. Nor does the Bar appear to contend that the Referee's report was erroneous in the sense that it was predicated upon an erroneous application of the law to the facts before the referee or an erroneous finding of fact. Rather, the Bar's argument more appropriately seems to fall within the third area of review supra - that is that the referee's report and recommendation of reinstatement was unjustified. Unjustified because termination of the Respondent's suspension and resulting reinstatement after only five and one-half years is too lenient for an attorney convicted of a felony involving a controlled substance.

The Respondent respectfully submits that the foregoing argument of the Bar incorrectly confuses punishment with rehabilitation in the setting of re-instatement proceedings and further, that the Bar has not sustained its burden in demonstrating that the Referee's report was unjustified or for that matter erroneous, if in fact, the Bar has so intended to argue notwithstanding the analysis above. The Respondent takes this position for the reasons below:

1. The Respondent does not in any way make light of the Bar's concern with the proliferation of drug use (and dependency) among its members and of the numerous felony convictions against attorneys involving controlled substance. Indeed, the Respondent an an admitted former addict is only too well aware of the devastation that is attendant to drug abuse, both professionally and personally. It is a problem that pervades every strata of our society, including attorneys. And certainly, the conviction of an attorney for a felony involving a controlled substance adversely reflects on the Bar. But so too does the conviction of any felony.

As has been observed by this Court before in determining what measures will adequately discipline an attorney it is appropriate, inter alia, to examine the gravity and nature of the offense. e.g., BAR v. WILSON, 425 So.2d (Fla. 1983); BAR v. CARBONARO, 464 So.2d 549 (Fla. 1985) infra; BAR v. FUSSELL, 179 So.2d 852 (Fla. 1965) infra. In the Respondent's statement of facts, supra, it was pointed out that the sale to which he pled guilty and for which he was convicted involved the delivery of cocaine to a friend, not undercover police as was recited in several instances in the Bar's brief. The Respondent does not in any manner mean to suggest that that distinction diminishes the seriousness of his offense. He has expressed in most graphic terms the disgust and contempt that he felt for himself both as an individual and as a member of the Bar by reason of his conviction. (T. 55, 56). Neverthe-

less, the distinction is significant in measuring and weighing any circumstances in mitigation of the severity of Mr. Silverstein's conduct.

As found by the Referee and not disputed by any party to these proceedings, the Respondent was a cocaine addict at the time of his offense. As an addict and drug abuser, his circle of friends and acquaintances increasingly became other addicts, drug users and drug abusers. As difficult as it may be for one not an addict or drug user to understand, in that drug subculture because of the unpredictable availability of controlled substances, in this case cocaine, friends and acquaintances will frequently turn to each other to procure them. Today, the same person who solicits a friend to find cocaine may the next week be called upon to perform the same service. Sooner or later every drug addict or drug abuser will procure drugs not only for himself but for his friends and within that context will be guilty of "selling" a controlled substance.

It was precisely under the foregoing circumstances that the Respondent sold the cocaine leading to his arrest and conviction. Phyllis Warren was a friend of the Respondent and his wife. She and the Respondent worked for the same company. They frequently used cocaine in each other's company, socialized in the drug culture, shared cocaine and procured cocaine for each other when a ready supply was not available from his or her own source.

In the latter part of 1979, Warren and the Respondent's

wife had an argument and thereafter they did not see her for several weeks. Soon Warren began calling the Silversteins several times a day, leaving messages on their answering machine and notes on their front door, apologizing for her argument with Mrs. Silverstein and seeking to make amends. At first Warren's overtures were ignored. The Respondent was again attempting to control his cocaine addiction and the absence of anyone from his life who was a drug user could only help. But eventually, Warren and Silverstein's wife reconciled their differences and it was at that time that Warren solicited the Silversteins' help in procuring cocaine. Unbeknownst to the Respondent, the previous frantic phone calls and notes and finally the solicitation for cocaine itself was inspired by law enforcement officials who had earlier arrested Warren, discovering a small amount of cocaine in her possession. Telling police that she had received the cocaine from the Respondent, the police employed her services to arrange for the incident that lead to the Respondent's arrest.

These then were the fact surrounding the Respondent's arrest and conviction. They reveal a man who had become seriously addicted to cocaine and whose quality of life, as is true of all addicts, became measured in terms of having continuous access to the drug. As noted earlier, the Respondent does not suggest that the foregoing circumstances surrounding his arrest minimize the seriousness of his offense nor justify it. Those circumstances, however, are relevant when one must

weigh the Respondent's professional punishment and discipline. This latter conclusion is amply demonstrated by the cases earlier cited and discussed below.

The Bar has cited several cases to underscore the involvement of Florida attorneys with the "drug trade" and those cases do indeed demonstrate that some attorneys in Florida have become involved in the "business" of drug trafficking. But, by the same token, the overwhelming majority of those cases are factually dissimilar in circumstance from that of the Respondent's offense other than the common denominator of drugs. For example, in BAR v. LEVENSTEIN, 446 So.2d 1021 (Fla. 1984), Levenstein was convicted for transporting large sums of money gained by a drug smuggling conspiracy of his clients. In BAR v. TRAVELSTEAD, 435 So.2d 832 (Fla. 1983), the subject attorney was charged with conspiracy to import large quantities of marijuana and fled this state's jurisdiction to avoid prosecution. BAR v. RYAN, 394 So.2d 996 (Fla. 1981), involved an attorney who converted Twenty Thousand ($20,000) Dollars of a client's money, was indicted for conspiracy to possess with intent to sell One Hundred (100) pounds of marijuana and subsequently disappeared, presumably to avoid prosecution. The attorney in BAR v. WILSON, supra, pressured a client who was in jail to make arrangements to have delivered to him One and a Half (1-1/2) pounds of cocaine. He continued to deny his guilt after conviction during Bar disciplinary proceedings, and had been an attorney all of six months. Again, the Respondent does

not suggest that his felony was not a serious breach of conduct and good moral character expected of an attorney. To the contrary, he has sincerely said and acted otherwise. Still, even the most critical eye must perceive a difference between the motivation, and wilful and flagrant character of the participants in the cases above, and the circumstances surrounding the Respondent's arrest. His involvement in the "sale" of cocaine was directly related to his drug addiction and its insidious corruption of the values by which he has lived the better part of his life. Nor did the Respondent's sale involve the odious character of trafficking in a controlled substance as a business for profit as is evident in several of the cases cited by the Bar. His sale was to accommodate a friend within the context of his addiction. It is obvious from the Referee's comments and report that he was in agreement with the foregoing characterization.

It is readily apparent that substantial mitigating circumstances surrounded the Respondent's conviction. As noted above, this Court has already observed that such matters are a legitimate area of inquiry in determining the appropriate disciplinary measures to be taken against an errant attorney. Thus, even in BAR v. WILSON, supra, an extreme case involving an attorney of only six months who pressured and solicited his client in jail to arrange the delivery of one and one-half pounds of cocaine, Justice Ehrlich speaking for this Court, stated:

> "If substantial and convincing evidence of mitigating circumstances had been presented the complexion of the case may very well have been different. But no evidence in mitigation has been proferred by respondent." Id. at page 3 (Emphasis supplied)

And, in BAR v. CARBONARO, supra, a recent case dealing with an attorney guilty of a felony involving "large quantities" of cocaine, a majority of this Court approved the referee's recommendation that Carbonaro be suspended rather than disbarred as urged by the Bar:

> "based upon the evidence and the referee's findings of mitigating circumstances and the respondent's potential for rehabilitation. . . ." Id. at page 551 (Emphasis supplied)

BAR v. FUSSELL, supra, represents yet another case where this Court observed that it is appropriate for an attorney:

> ". . . to explain the circumstances of the offense and otherwise mitigate the disciplinary penalty." (Emphasis supplied) Id. at page 854

Although traditionally, mitigating circumstances are of importance in determining the punishment to be imposed upon an attorney within the framework of disciplinary proceedings, such factors are undeniably also of significance in evaluating whether or not an attorney has indeed rehabilitated himself as a condition precedent to his reinstatement. It is obvious from the language of the Referee's comments in the record and his report that he did in fact weigh the circumstances surrounding the Respondent's conviction in determining that the Respondent should be reinstated to the Bar. (TT. 126-132). In other words, the Referee concluded, based upon the evidence before

him, and considering the nature of the Respondent's offense with its attendant circumstances of addiction, that he had lived and conducted himself during his suspension commensurate with what is required to fairly demonstrate rehabilitation and satisfaction of the criteria for reinstatement. In In Re: PETITION OF DAWSON, 131 So.2d 472 (Fla. 1961), involving a petition for reinstatement, this Court observed:

> "The essential elements will, of course, vary with the particular case, depending primarily upon the requirements of the disciplinary order, as well as upon the nature of the offense which resulted in a disciplinary action. (Emphasis supplied)

Id. at page 474. The Court thereafter enumerated the elements to be considered as a guide in the deliberation of reinstatement. Those elements are essentially the same as set forth by the Bar in its brief citing In Re: PETITION OF TINSON, 301 So.2d 448, 449 (Fla. 1974).

The offense for which the Respondent was suspended involved a conviction of a felony. In looking at the circumstances and nature of the Respondent's offense, DAWSON, supra, it is difficult to imagine what more would be necessary to indicate that he has proven himself worthy of the privilege of again practicing law. The facts below unequivocally demonstrate that he has in every way possible removed himself from the drug element that lead to his felony conviction; that he has sincerely and convincingly reunited himself with the values, ethics and morals expected of a member of the Bar; that his character

since his suspension has been unimpeachable and his repentance and desire to be an exemplary member of the Bar genuine; that both past and present, he has enjoyed the reputation for being a competent, able and ethical attorney. Indeed, it was because of this exemplary conduct subsequent to his felony conviction that the Respondent's probation was terminated well in advance of its expiration date. The Miami Beach Bar Association in a totally unsolicited letter to the Bar stated that it had no objection to Mr. Silverstein's reinstatement. The Honorable Richard Fuller, the Respondent's sentencing judge, who now presides in the Civil Division of the Eleventh Judicial Circuit, in response to an inquiry by the Bar, stated:

> "I feel that this case is the exception and my faith in this man warrants my continued, unreserved endorsement of his return to membership in the Bar." (Emphasis supplied)

It is axiomatic that although in disciplinary proceedings the ultimate judgment is with this Court, by the same token:

> ". . . the initial fact finding responsibility is imposed upon the referee. His findings of fact should be accorded substantial weight. They should not be overturned unless clearly erroneous or lacking in evidentiary support."

Id. at 772 citing STATE ex rel FLORIDA BAR v. BASS, 106 So.2d 77 (Fla. 1958).

The areas to which a referee's fact finding is directed necessarily depends upon the nature of the proceedings before him. Thus, for example, when disciplinary proceedings have been commenced against an attorney, the refeee is charged with

making a factual determination regarding the existence of the commssion of the offense or violation charged. On the other hand, in reinstatement proceedings, an attorney's guilt of the conduct or offense which led to his former discipline and/or suspension has already been determined. The fact finding role of the referee in this latter instance, is, of necessity, therefore directed to those areas involving rehabilitation subsequent to discipline, which includes but is not limited to, attitude, conduct and life-style. As observed earlier, the issue to be decided is the attorney's fitness to resume the practice of law.

The Respondent respectfully submits that the evidence submitted to the Referee by way of testimony, letters, recommendations and the Florida Bar investigator's report itself, furnished a substantial and competent basis upon which to predicate the Referee's positive findings of fact and recommendation for the Respondent's reinstatement.

Based upon the entire record, his findings can neither be called clearly erroneous or lacking in evidentiary support. He had the opportunity to see and hear the witnesses who testified before him and weight their demeanor, veracity and motives. He had before him an almost microscopic examination of the Respondent, spanning his drug addiction treatment and probation commencing in 1980 through the Bar investigator's report in 1985. During five and one-half years, the Respondent has been scrutinized by drug addiction counsellors, probation officers,

employers, circuit court judges, referees and the Bar's own investigator. The evidence compiled from these sources furnished an overwhelming factual basis for the Referee's findings of fact and recommendation for reinstatement.

It was earlier observed in this brief that the Bar takes little if any meaningful issue with the Respondent's rehabilitation or the Referee's findings in connection therewith. The Bar rather frames its objection to the Respondent's reinstatement on the basis of public policy - a public policy which would in general bar attorneys from reinstatement subsequent to a suspension for a felony conviction involving a controlled substance and which would more specifically, bar the Respondent from reinstatement until more time has elapsed.

By assuming such a posture in this reinstatement proceeding, the Bar is apparently essentially arguing and directing its attention to the punishment or discipline the Respondent should receive as a result of his felony conviction rather than to the issue of his rehabilitation and conduct subsequent to his suspension. However, the Respondent's punishment has already been established under the Integration Rule, i.e., suspension from the Bar for three (3) years without leave to apply for admission until restoration of his civil rights and then readmission being conditioned upon the Respondent's demonstration that he has been rehabilitated and fit to resume the practice of law.

If the Bar perceives that additional punishment should

befall an attorney specifically guilty of a felony involving controlled substances such that his suspension and reinstatement should continue long after the period now provided for under the rule, then that is a matter which as noted earlier, may be accomplished in futuro under the rules or possibly by this Court's prospective announcement. It is respectfully submitted, however, that it is quite another matter for The Florida Bar to take the position five and one-half years after the Respondent's suspension within the context of this reinstatement proceeding, that as a matter of public policy, the Respondent has not or cannot, because of the duration of his suspension, demonstrate his rehabilitation and satisfaction of the requirements necessary for reinstatement, because he was convicted of a controlled substance felony. To take such a position under the circumstances of this case would be as stated in BAR v. RANDOLF, 238 So.2d. 636, 639 (Fla. 1970), quoted with approval in BAR v. PAPY, 358 So.2d 4, 6 (Fla. 1978), the equivalent of the Respondent being:

> ". . .left roaming in the fields of Limbo what Dante called the praiseless and the blameless dead." (Citation omitted)

As observed in CARBONARO, supra, one of the criteria in determining the discipline to be imposed upon an attorney is

> ". . . that the judgment must be fair to to the respondent being sufficient to punish a breach of ethics and at the same time encourage reformation and rehabilitation." (Emphasis supplied)

Id. at 551. The Respondent respectfully submits that this is

precisely what his suspension has accomplished.

The Bar emphasizes that the Respondent's reinstatement hearing was held two months short of one year after restoration of his civil rights. It is difficult to understand the significance of that observation. Obviously had the Respondent not conducted himself during his probation in an exemplary manner, his probation might well still be in effect rather than having been earlier terminated, with the result that his civil rights would not have yet been restored and he would procedurally be unable to apply for reinstatement. However, such is not the case. If the Bar is suggesting that the Respondent's rehabilitation and positive conduct during his suspension should only be considered as having commenced from the restoration of his civil rights and is therefore of limited duration and value, it must be submitted that such a position is without legal precedent either under the Integration Rule or this Court's decisions. It is abundantly clear from a reading of the cases involving attorney discipline or reinstatement that it is the total period of suspension that is relevant both in terms of punishment as well as in terms of rehabilitation.

The Respondent must also respectfully disagree with the Bar's concern that his suspension has not been long enough to foster and protect the image and integrity of the Bar. Putting aside that such an argument in these reinstatement proceedings again directs itself to punishment rather than rehabilitation, the Respondent submits that the duration of his punishment,

i.e., suspension, has neither been short or of little consequence in admonishing attorneys and advising the public that the Bar and this Court will deal firmly in such matters. As pointed out elsewhere, supra, if the Respondent is reinstated in the course of these present proceedings, he will have been suspended from the Bar and the practice of law for a minimum of six years. Such a period of time is longer than the length of time hundreds if not thousands of Florida attorneys have been members of the Bar. It is inconceivable to believe that members of the Bar do not understand the significance and consequence of being denied the ability to earn one's livelihood for six years in the only manner known to him; it is inapposite to human experience to seriously believe that members of the Bar do not understand the banishment, isolation, shame, embarrassment, stigma, loss of self-esteem and even scorn resulting from a suspension from the Bar for six years. True, there will always be those who are unimpressed by a six-year suspension from the Bar either because they perceive such a period of time as insufficient or, on the other side of the spectrum, because the possibility of severe discipline will never be a hinderance to their aberrant behavior. But in evaluating the deterring effect of a suspension such as the Respondent's encompassing at the minimum a period of six years, one must look to the vast majority of attorneys who lie between the two foregoing extremes. To them the message is obviously clear.

Nor can the public within its own common sense fail to appreciate the significance of a suspension from the Bar for so long a period of time. Certainly for those members of the public who are aware or care, the ordeal of six years suspension can hardly be viewed as a slap on the wrist or in any way indicative of a too lenient attitude on the part of the Bar or of this Court.

One last point should be made. It would seem implicit in this Court's CARBONARO, supra, opinion that at least as of that date, the Court still finds it appropriate and relevent to examine and treat each Bar proceeding on a case by case basis, weighing the circumstances surrounding the offense and giving due consideration to substantial and convincing mitigating factors, WILSON, supra -- even if the offense involves a controlled substance felony. Carbonaro came before this Court in the posture of disciplinary proceedings affirmatively instituted by the Bar. The Respondent's case comes before the Court as a petition for reinstatement. Should a more restricted approach apply here than in Carbonaro?

POINT II

WHETHER A PETITIONING ATTORNEY'S FINANCIAL INSTABILITY, AS REFLECTED BY OUTSTANDING LIENS AND JUDGMENTS, SHOULD BE CONSIDERED A NEGATIVE FACTOR IN DETERMINING HIS REINSTATEMENT

With regard to the Bar's position concerning the Respondent's "financial instability", it should be first observed

that none of his judgments or liens, as acknowledged by the Bar, are related to his law practice. His judgments do not relate to nor are they associated with the improper handling of clients' money, conversion of trust account funds, failure to promptly and accurately account to a client, nor for that matter accepting and retaining a fee without rendering the service for which he was employed. By the same token, the Respondent's suspension did not arise out of that type of conduct clearly contemplated by Florida Integration Rule 11.11(9), which provides in part that judgment reinstating an attorney may be conditioned:

> ". . . upon the making of partial or complete restitution to parties harmed by the petitioner's misconduct which led to the suspension or resignation. . . ."

Thus by way of comparison, IN THE MATTER OF HODGES, 229 So.2d 257, cited by the Bar, which involved the reinstatement proceedings of an attorney who had been disbarred, the referee recommended reinstatement conditioned upon:

> ". . . regarding payment by petitioner of several outstanding debts arising from the disbarment proceedings." Id. at 257.

The Board of Governors opposed Mr. Hodges' reinstatement because ". . . he [shirked] the moral obligation which arose from the incident leading to his disbarment." It should be noted that this Court approved Mr. Hodges' reinstatement subject to the referee's condition, finding that the:

> ". . . record as a whole . . ."

warranted such a result.

It is indeed true that the Respondent is a judgment debtor. It is additionally true that he neither has the means nor ability to do more than he has at the present time to satisfy those judgments or arrange for their payment. (T.53-55).

Presently, and for some time the Respondent has paid Internal Revenue $184.00 per month towards his income and tax arrears and although there is still an indebtedness outstanding, the Respondent has managed to significantly reduce his outstanding balance.

The Respondent's net take home pay is $333.00 per week. (T.54). After deducting from that amount his IRS payment of $184.00 per month, the Respondent's effective weekly take home pay is approximately $280.00. It is obvious that after making allowances for reasonable living expenses, the Respondent is simply financially unable to pay or make payments on the balance of his judgments.

This is not a case where one is indebted and although having the ability to pay his debts refuses to do so or otherwise secretes his assets to avoid collection. No one, including the Bar, suggests that the Respondent either has the assets or the ability to pay more towards his judgments than he is presently doing. The Bar's position therefore, would essentially leave the Respondent in the impossible position of denying him reinstatement until he "comes to grips" (T.124) with his judgments when it is conceded by all that he hasn't had the ability to do so during the past five and one-half

years of his suspension and absent a radical change in his earning capacity, will have little if any potential to do so in the future.

The latter foregoing observations were aptly discussed by this Court many years ago in PETITION OF STALNAKER, 9 So.2d 100 (Fla. 1942). Stalnaker had been suspended from the Bar in connection with certain funds owing to a client, his reinstatement considered upon repayment of same. He eventually settled the indebtedness for approximately 1/10th the amount of the judgment. In response to Stalnaker's petition for reinstatement, a circuit court commission argued that the settlement was inadequate.

The trial judge who sat as a referee and recommended reinstatement cited and quoted numerous cases relevant to the issue of restitution, an example of which appears below, to wit:

> "We do not attach very much importance, as a rule, to the matter of restitution, because that may depend more upon financial ability or other favoring circumstances than repentance or reformation. A thoroughly bad man may make restitution, if he is able, in order to rehabilitate himself and regain his position in the community; and a thoroughly good man may be unable to make any restitution at all. Repayment of the money wrongfully withheld is eminently proper, and especially so if done from a good motive, but it does not absolve the crime, or, in itself, prove that the offender is inherently a better man." Id. at 102

With regard to the judge's recommendation of reinstatement and the authorities he cited in support thereof, particularly

with regard to restitution in STALNAKER, supra, this Court said:

> "It was Judge Sandler's views that restitution meant the payment according to the extent of one's financial ability to pay. This rule is sanctioned by the weight of authority.
>
> "[1,2] If we hold that restitution must precede reinstatement, then a strong probability exists that the petitioner's suspension is permanent, which was not intended, and he is thereby forever precluded from resuming the practice of law; if restitution precedes reinstatement, then we withhold the usual reward given to a fellow citizen for exemplary living; although the citizen may possess a contrite conscience and diligently strive to atone for the error of the past, but for the lack of money with which to make restitution he is branded as morally unfit to practice law; the doors of the temple of justice under such a ruling is forever closed to him. Such a rule is not only harsh or severe but unworkable. The more reasonable and just rule, which is sustained by the weight of authority, is to the effect that restitution in full need not necessarily precede reinstatement; that restitution means payment to the extent of one's ability to pay, honestly and fairly made. The latter rule was applied to the facts in controversy by Judge Sandler and we hereby hold that his conclusion is correct." Id at 104.

The foregoing comments of this Court express and summarizes far more eloquently and poignantly the Respondent's response to the Bar's objection regarding his reinstatement. Surplusage aside, to follow the Bar's path to its logical conclusion would ban the Respondent from the practice of law for years, perhaps a lifetime, declaring him morally or otherwise unfit to practice because he has no money to pay his judgments. On the one hand the Bar presses for the Respondent's financial stability and on the other seeks to deny him the ability to do so.

The Referee conditioned the Respondent's reinstatement upon his forfeiture to attack or attempt to set aside any of his judgments or to eliminate them in bankruptcy. Implicit in the Referee's recommendation was his recognition of the principles announced by this Court in STALNAKER, supra. The Referee took notice that the Respondent had reasonably done as best he could to deal with his judgments, that are in the aggregate far beyond his reach at the present time; and that to delay his reinstatement until he is able to pay, settle or otherwise make arrangements to pay them was unnecessary, unrealistic and a burden disproportionate to the circumstances. The Referee no doubt believed, that in time as the Respondent's fortunes changed for the better as the result of his reinstatement, that he would within the limitation of his expenses and income be in a position to resolve some if not all of his judgments and that he would do so.

One can hardly argue that the condition imposed by the Referee is of little consequence. Bankruptcy has been resorted to by our citizenry as a last resort measure to relieve themselves of financial indebtedness and instability, including no doubt, many fine, ethical and morally fit attorneys. Indeed, as this Court considers the Respondent's petition for reinstatement, it would hardly be presumptuous to contemplate how many attorneys in this State, who are considered fit to practice law, are burdened with debts and judgments arising from improvident investments, inability to repay borrowed funds or

from circumstances not planned, devised or schemed.

The Respondent respectfully submits, that this Court should be guided by the balanced doctrine approved in STALNAKER, supra. The Respondent having demonstrated his rehabilitation during the past five and one-half years should not be denied the opportunity to resume the practice of law by reason of his lack of money to accommodate all of his judgments. Had he promised his creditors more than he has done, it would have been a promise financially impossible to fulfill, and to that extent would have subjected him to as much criticism as has otherwise been voiced. He has made payments within the limitations of his purse. No judgment has been entered against him as the result of of any conduct or transaction during the five and one-half years of his suspension. To require more of the Respondent at this time or at any time in the immediate future is for all practical purposes a sentence of suspension beyond the good of reasonable rehabilitation and the reasonable means to that end.

POINT III

WHETHER IN APPLYING A CASE BY CASE STANDARD, PETITIONING ATTORNEY ALAN SILVERSTEIN SHOULD BE REQUIRED TO TAKE THE BAR EXAMINATION

The Respondent respectfully disagrees with the Bar's position, that as a condition to reinstatement, he should be required to take the Florida Bar Examination.

The testimony presented before the Referee with regard to the Respondent's employment during the last three years as well as his familiarity with Florida law established the following uncontroverted facts:

For the past three years the Respondent has been employed as a paralegal/legal assistant/research clerk with the law firm of Schwartz, Steinhardt, Weiss & Weinstein, formerly known as Schwartz, Klein, Steinhardt, Weiss & Weinstein. Mr. Klein, who was one of the senior partners of the Schwartz, Klein law firm and for whom Mr. Silverstein worked prior to Mr. Klein's separation from Mr. Schwartz is a board certified civil litigation attorney, a former member of the Board of Governors of The Florida Academy of Trial Lawyers, a former member of the Board of Ethics Committee of The Dade County Bar Association and Florida Bar and a former chairman of one of the Grievance Committees of the Eleventh Judicial Circuit. He has been admitted to the practice of law in Florida since 1963. (T.7)

Mr. Schwartz, for whom the Respondent also worked during his association with Mr. Klein and for whom the Respondent still works, has been a practicing attorney for 22 years (T.18), is certified in the civil practice of law, a member of The Florida Academy of Trial Lawyers and formerly served on the Board of Directors of The Florida Academy of Trial Lawyers. (T.19)

Based upon their foregoing qualifications, it is clearly evident that both Mr. Schwartz and Mr. Klein are able and

competent attorneys who have earned the professional esteem of their peers. It is similarly true that with their level of competence andd expertise, they have more than an adequate and reliable foundation to evaluate and judge the competency of an attorney such as the Respondent, who has worked directly under them on a daily basis as a legal assistant for two years in the case of Mr. Klein and three years in the case of Mr. Schwartz.

Both Mr. Klein and Mr. Schwartz described the Respondent's work and ability as follows:

MR. KLEIN:

> ". . . his services were outstanding. . . . Alan performed just outstandingly for us and beyond all of my expectations." (T.10) I can't think I can say enough of what Alan has done in the two years that he has been with us." (T.11)

MR. SCHWARTZ:

> ". . . he would come in at night, he would come in on weekends, on Saturdays; and if we'd be working Sunday, and there was no expectation of more pay for it, it was just him putting all of his time and effort to rehabilitate himself. . . ."
> "I have found Alan to be applying himself fully. If he gets back in the Bar, we will hire him as an associate in our law firm." (T. 21, 22)

Additionally, the Respondent testified that in the past three years he has read every advance sheet and Florida Law Weekly and has helped research numerous briefs and legal memorandums. (T.57, 58). Letters from members of the Bar who have known the Respondent in the past and which are part of the record (T.56, 57, composite Exhibit D-6), indicate his past reputation to be that of a competent attorney.

The foregoing testimony and evidence unquestioned and uncontroverted by the Bar at the Respondent's reinstatement hearing, demonstrates by competent, substantial and convincing evidence that the Respondent is as abreast of the law in Florida as would any other competent Florida attorney. It is difficult to imagine who would be in a better position to judge the Respondent ability and competence than two such long standing members of the Bar as Mr. Schwartz and Mr. Klein - attorneys, who without equivocation have corroborated the Respondent's dedication, ability and competence.

It is somewhat difficult to understand the Bar's statement that the Respondent's employment as a legal assistant for three years does:

> ". . . not sufficiently test his competency to practice law."

Admittedly, if the Respondent was by profession a paralegal and not an attorney he would certainly not be qualified to practice law. However, this is a case which involves a man who was an attorney for sixteen years prior to his arrest and enjoyed a reputation as a competent attorney, which brings us to another aspect of the Bar's concern with the Respondent's competency.

The Bar asserts that since the Respondent was a drug addict and obviously incompetent in 1979, the "possible" period of the incompetency which may result from such a condition "could" extend far before that date. Such an observation or concern

although understandable in a general sense, is, under the circumstances speculation which the Respondent's present level of competency beguiles. Indeed, during the last half of 1979, the Respondent's drug usage had developed into addiction and interfered with his ability to practice law. And, it might be fair to surmise that a period of time immediately prior to mid 1979, the Respondent's competency was impaired because his cocaine usage was then rapidly progressing into addiction. But there is certainly no evidence to indicate that the Respondent's prior cocaine usage compromised his ability and competency for the better part of his sixteen years as a member of the Bar. Had the Respondent drug usage so effected his competency it is highly unlikely that he would have ever again been able to resurrect his ability to its present level. It is certainly evident from the record that whatever temporary lapse in proficiency may have resulted from the Respondent's addiction has been more than rectified by his conscientious and diligent work and research for the past three years.

The cases cited by the Bar in support of its argument are factually totally dissimilar from the Respondent's situation and offer no sound basis to require him to take the Florida Bar Examination.

THE FLORIDA BAR In Re: WARREN, 408 So.2d 223 (Fla. 1981) referred to in the Bar's brief at page 7, makes no mention of Mr. Warren having to take the Florida exam and was obviously inadvertently cited by the Bar for that proposition. Indeed,

as noted below, Warren actually held otherwise. THE FLORIDA BAR v. DAVIS, 397 So.2d 690 (Fla. 1981), no doubt intended to be cited rather than WARREN, supra, did involve an attorney who was ordered to take the Bar exam notwithstanding that he had been employed during his disbarment as a paralegal. However, under the facts of DAVIS, supra, it is understandable why this Court felt such a requirement necessary. Davis had been disbarred in 1964. The Court's opinion is dated 1981. During that time Mr. Davis had been employed as a paralegal in Alabama. Davis, therefore, had had no exposure to Florida law for almost sixteen years and clearly would have been hard pressed to demonstrate that he was competent to practice law in Florida without completing the Bar exam.

THE FLORIDA BAR v. BARKET, 424 So.2d 752 (Fla. 1982), cited at page 7 of the Bar's brief, involved an attorney suspended from the Bar for approximately six years, who, during that period had had some minimal contact with attorneys and had witnessed a few trials. He had only occasionly read advance sheets and during his suspension was primarily engaged in the business of a home improvement contractor.

The factual dissimilarity between DAVIS and BARKET, supra, with the Respondent is compelling. RASHER, WARREN, supra and THE FLORIDA BAR In Re: EFRONSON, 403 So.2d 1305 (Fla. 1980), represent cases factually similar to the Respondent's and for that reason are meaningful and compelling authority for not requiring him to take the Florida Bar Exam. As a matter of

fact, this Court referred to both of those cases in BARKET, supra, to demonstrate by comparison why Barket should be required to take the bar exam and in the process of doing so, indicated what type of a situation would not warrant or necessitate completion of the exam. Thus Warren who had been suspended (as related by the Court in BARKET, supra):

> ". . . maintained a high degree of proficiency by working as a paralegal." Id. at 752

In EFRONSON, supra, Mr. Efronson had been suspended from the Bar for what appears to be several years because of a Federal felony conviction. The testimony and evidence presented at his reinstatement hearing indicated that Efronson:

> ". . . had maintained a large law library and read the advance sheets as well as session laws. An attorney testified, that, from his personal observations [Efronson] has kept up on developments in the law. . . ." Id. at 1305

This Court's comments in BARKETT, supra, are more relevant and informative with regard to the issue at hand, to wit:

> "The purpose of a Bar examination is to test one's minimal competency to practice law. Because each petitioner is different whether it is proper to require a successful passing of a Bar exam must be decided on a case by case basis." Id. at 752, 753

It is respectfully submitted that the Respondent's many years as an attorney prior to his suspension and his past reputation for competency as an attorney, as well as his last three years spent as a legal assistant, reading, analyzing and digesting the law, observed and supervised daily by respected

and competent attorneys who unreservedly characterize his skill and ability as "outstanding" and "scholarly", who is deemed competent enough to be offered employment as an attorney should he be reinstated, has proven to the excess that he exceeds by far the "minimal" competency referred to in BARKETT, supra.

The Referee did not condition the Respondent's reinstatement upon completion of the Bar exam. Although he did not expressly provide that the Respondent's reinstatement not to be so conditioned, in light of the Referee's comments at the conclusion of the hearing (T. 126-132), it would be nothing short of rank speculation to conclude that such an omission was anything but that - an omission. Indeed, by the Referee specifically conditioning the Respondent's reinstatement upon matters relating to his judgments, it is clear that he felt no necessity to make provision for anything other than what he in fact entered as a condition. It is clear that the Referee did not in any way question the Respondent's ability and competency to practice law and in that regard the record overwhelmingly supports his determination.

CONCLUSION

Respondent respectfully submits that the Referee's report recommending his reinstatement should be approved by the Court. The Referee's report was predicated upon competent, substantial evidence and it has not been demonstrated by the Bar to be either unlawful, erroneous or unjustified. In addition, the

Respondent has clearly demonstrated his genuine sorrow and remorse for his offenses, not only against society as a whole, but the embarrassment to the Bar and his fellow attorneys. What more could he do?

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing instrument was served by mail this 1 day of October, 1985, upon:

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