

IN THE SUPREME COURT OF FLORIDA

PAUL H. HESSLER,

Petitioner,

vs.

Supreme Court #66,884
TFB NO. HRE85001

THE FLORIDA BAR,

Respondent.

FILED
SEP 10 1980
FEB 10 1980
CLERK, SUPREME COURT
By _____
Chief Deputy Clerk

PETITIONER'S BRIEF

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SUMMARY OF THE ARGUMENT

Petitioner seeks an immediate removal of his suspension from the practice of law with full reinstatement as in accordance with the Referee's recommendation in this matter.

This argument is simply that the Petitioner has met all criteria for reinstatement under the Florida Bar Integration Rule 11.11 in that:

1. He has strictly complied with the disciplinary order;
2. He has shown clear evidence of unimpeachable character and moral standing in the community with no contrary evidence presented;
3. He demonstrates clear evidence of good reputation for professional ability through his full-time teaching of business law and continuing efforts in the field of law;
4. He is ethically and morally equipped to resume a position of honor and trust as a member of the Bar with the Referee finding that Petitioner is probably a more secure risk to the public than many attorneys who never had anything happen to them.

Further, the Referee noted that Petitioner has done everything in practically a role-model type of case of demonstrating what is necessary to show that he has a fitness and qualification to return to practice.

The only lingering issue that this Court must resolve is whether reinstatement must be predicated upon Petitioner's making

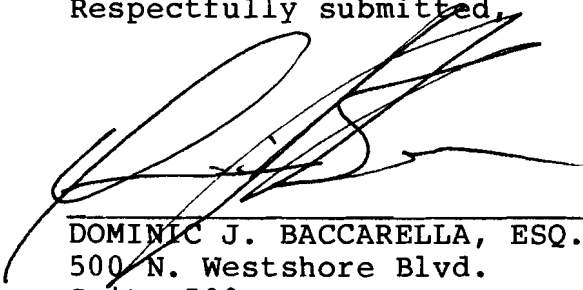
full restitution where the heirs who should rightfully receive such monies are unavailable and cannot be found. The Bar maintains that Petitioner should not be reinstated without first making full restitution, but to whom? Petitioner maintains that this is tantamount to additional retribution against Petitioner.

Alternatively, if this Court deems it appropriate under these unusual circumstances, Petitioner has willingly offered to make restitution but on an installment basis based upon Petitioner's ability following his reinstatement. Petitioner has included a schedule to begin repayment which was also considered and approved by the Referee (who included it in his Report if it was felt by this Court to be necessary). This Court has consistently held that restitution meant "payment to the extent of one's ability to pay, honestly and fairly made." Petition of Stalnaker, 9 So.2d 100 (Fla. 1942). In the words of the Referee, "If a wealthy man could afford to do it, he could buy his way back in." Report and Recommendation of Referee, p. 4.

Clearly, Petitioner has already suffered full retribution by society through incarceration and loss of rights. Further, he has fully demonstrated his remorse, his strong community and personal support and above all, his moral and ethical standing to resume a rightful position as a member of the Florida Bar.

The decision of this Court should follow the recommendation of the Referee by fully reinstating Mr. Hessler to the practice of law immediately.

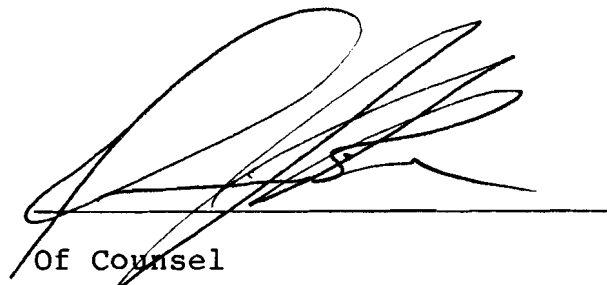
Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail, to Honorable Circuit Judge, Thomas M. Gallen, Referee, Room 327, Manatee County Courthouse, P. O. Box 1000, Bradenton, Fla. 33506 and John T. Berry, Staff Counsel, The Florida Bar, Tallahassee, Fla. 32301-8226 and David R. Ristoff, Esq., Assistant Staff Counsel, The Florida Bar, Suite C-49, Tampa Airport Marriott Hotel, Tampa, Fla. 33607 on this the 5 day of March, 1986.



Of Counsel

STATEMENT OF THE FACTS

In late 1979, the Petitioner, an attorney and a member of the Florida Bar, misused monies from the estate of one of his clients. An audit by the Florida Bar revealed that petitioner's accounts were substantially in compliance except for the estate account in question. The shortage in the estate account was noted and resulted in an indefinite temporary suspension from the practice of law in the State of Florida on February 21, 1980. No further action was taken by the Bar.

Petitioner was charged on February 26, 1980 with Grand Theft in the Second Degree by the Hillsborough County State Attorney's Office. Petitioner pled guilty to one count of Grand Theft on September 30, 1980, and was informed by the Judge that he would grant probation only if petitioner could make full restitution because the estate heirs otherwise opposed probation. Unable to repay, petitioner was sentenced to the maximum allowed, 5 years, as an "example". Petitioner was paroled on August 3, 1982 with full civil rights restored on December 16, 1983.

A claim by the estate was filed with Respondent, The Florida Bar, to its Client Security Fund but the claim was denied.

Petitioner has led an exemplary life since being restored to society, presently teaching as a full-time Assistant Professor of Business Law at the University of South Florida. Unfortunately, Petitioner has been unable to make full restitution to the injured clients to date.

Since petitioner's instituting this Petition for Reinstatement in April, 1985, and despite a diligent search

effort on the part of Respondent and Petitioner, neither heir of the estate in question has been located.

Finally, it should be noted that no evidence or testimony was offered at the hearing on the petition here presented against the petitioner while strong community and personal support was demonstrated.

STATEMENT OF THE CASE

This Court did grant a Petition for Temporary Suspension of the Petitioner on February 21, 1980 (Case No. 58,575). Said suspension has remained in effect to date and petitioner has fully complied therewith as per the Referee's Report in this matter. Having had his civil rights restored in December, 1983 and restored his life to stability, the petitioner instituted this Petition for Reinstatement on April 17, 1985. On November 22, 1985, the Referee rendered his opinion favoring the immediate reinstatement of the petitioner and noted that the petitioner had been an exemplary citizen. The Referee further noted that the heirs to the estate monies in question were unable to be found. The Referee then recommended that if this Court deems it necessary under these circumstances that Petitioner should make restitution, that Petitioner be allowed to do so on an installment basis. The Board of Governors of the Florida Bar now disagrees with the decision of the Referee and demands that full restitution be required prior to readmission.

ISSUE

WHETHER THE REFEREE ERRED BY TAKING COGNIZANCE
OF THE FACTS AS PRESENTED AND FINDING THAT
FULL RESTITUTION PRIOR TO READMISSION WOULD
BE TANTAMOUNT TO ADDITIONAL RETRIBUTION BY
THE FLORIDA BAR AND THEREBY RECOMMENDING
THAT PETITIONER SHOULD BE REINSTATED TO THE
FLORIDA BAR IMMEDIATELY WITHOUT CONSIDERATION
OF SAID RESTITUTION UNDER THE CIRCUMSTANCES.

A R G U M E N T

WHETHER THE REFEREE ERRED BY TAKING COZNIZANCE OF THE FACTS AS PRESENTED AND FINDING THAT FULL RESTITUTION PRIOR TO READMISSION WOULD BE TANTAMOUNT TO ADDITIONAL RETRIBUTION BY THE FLORIDA BAR AND THEREBY RECOMMENDING THAT PETITIONER SHOULD BE REINSTATED TO THE FLORIDA BAR IMMEDIATELY WITHOUT CONSIDERATION OF SAID RESTITUTION UNDER THE CIRCUMSTANCES.

At the outset, it must be noted that restitution has been considered at the judicial phases of Petitioner's case.

Initially, the trial judge stated that restitution with probation would be an acceptable alternative to incarceration to his Court and the heirs of the estate but, in lieu of Petitioner's inability to repay, he was sentenced as an "example" to the maximum allowable sentence.

In the instant case, the Florida Bar has opposed the removal of its temporary suspension from Petitioner until full restitution can be made despite everyone's inability to locate the parties to whom restitution should rightfully be made.

The basic question to be answered is the meaningfulness of restitution in the instant case. Restitution is to be made only to a defendant whose money or property has been taken from him and it is not meant to be available to third parties. CJS 77, pg. 322. And, yet, here we have no rightful claimant to the funds which the Bar seeks to have restored. CJS goes on to note:

"Restitution is not of mere right but is ex gratia, resting in the exercise of a sound discretion, and the court will not

order it where the justice of the case does not call for it."

Ibid p. 322.

Does the justice of this case call for restitution or, rather, is it only further retribution against Petitioner?

Respondent has noted The Florida Bar. v. Blalock, 325 So.2d 401 (Fla. 1976), as its primary basis to require full restitution prior to reinstatement of Petitioner. The Blalock case was an action for disbarment brought by Respondent rather than a Petition for Reinstatement. In Blalock this Court suspended Mr. Blalock and made it a "condition" of eligibility for reinstatement that full restitution of client's funds be made. No such condition was placed on Petitioner prior to this petition.

In denying reinstatement in The Florida Bar v. Pahules, 382 So.2d 650 (Fla. 1980) this Court did so not merely on failure to make full restitution but more significantly on Mr. Pahules' failure to complete probation and have his civil rights restored. As an aside, the Court stated that Pahules would have a right to repetition upon showing of completion of probation, restoration of rights and "restitution or a satisfactory arrangement therefore." Pahules, supra, at 651, (emphasis added)

As stated in Petition of Stalnaker, 9 So.2d 100 (Fla. 1942), "restitution" meant "payment to the extent of one's ability to pay, honestly and fairly made." After reviewing all the facts in the instant case, the Referee determined that Petitioner was unable to make repayment and "the repayment of the money alone will not demonstrate fitness or qualifications. If a wealthy

man could afford to do it, he could buy his way back in."

Report and Recommendation of Referee at page 4.

In discussing the purpose of reinstatement, this Court has stated that the purpose is not to retry for the misconduct. In re Hurtenbach, 27 So2.d 348 (Fla. 1946). Yet, it appears apparent that the Bar through the Board of Governors seeks here to retry the Petitioner and add additional retribution upon him.

The Referee in this matter stated that the Petitioner, "...has paid his retribution to society as his deterrant and it certainly may follow that he has paid sufficient penalty to deter anyone else. He (Petitioner) has done everything in practically a role-model type of case of demonstrating what is necessary to show that he has a fitness and qualification to return to practice." Report, supra, at page 3.

In In re Dawson, 131 So.2d 472 (Fla. 1961) the Court stated "In the ultimate, we will look to the evidence in each case to ascertain whether it supports a conclusion that the errant lawyer has so conducted himself personally and in the life of his community to justify a conclusion that he has repented of his misdoings, that the disciplinary order has impressed him with the vital importance of ethical conduct in the practice of law, and that he is morally equipped to resume a position of honor and trust among the ethical practitioners of the Bar." Dawson, supra, at 474.

Clearly, the Referee fully examined the facts in rendering his conclusion when he stated, "It is the opinion of this Referee that Petitioner is probably a more secure risk to the public

than many attorneys who never had anything happen to them."

Report, supra, at page 3.

On Petitions for Reinstatement, this Court has consistently held that exemplary life and being held in high regard in the community is of utmost importance. In re Dodd, 152 So.2d 462 (Fla. 1963); Phillips v. The Florida Bar, 257 So.2d 2 (Fla. 1972); In re Branch, 53 So.2d 317 (Fla. 1951) and that these elements set down in Dawson, supra, were primary aspects to be reviewed, The Florida Bar v. Timson, 301 So.2d 448 (Fla. 1974). No evidence has been presented to refute Petitioner's exemplary life and position in the community.

The exemplary nature of Petitioner's conduct is also uncontroverted by Respondent. Respondent has pointed to Stalnaker, supra, Ibid as being in conflict with their steadfast position regarding full restitution prior to reinstatement as the only acceptable arrangement. It has been consistently held by this Court that although restitution is important, there are exceptional circumstances where reinstatement should be allowed in the absence of restitution. Stalnaker, supra, Ibid., Dawson, supra, Ibid.

The Petitioner has offered, despite the unavailability of the legitimate beneficiaries, to make full restitution under a satisfactory repayment schedule based upon the concepts laid down in Stalnaker, supra, Ibid. and has even included a repayment schedule for the Court's consideration if deemed appropriate under the circumstances (those circumstances being that there is no person to whom payment can presently be paid).

Satisfactory arrangements for restitution have been considered and approved by this Court where the situation warranted. The Florida Bar: Petition of Pahules, 382 So.2d 650 (Fla. 1980); In the Matter of Delves, 203 So.2d 168 (Fla. 1967); In re Lathero, 26 So.2d 667 (Fla. 1946); In re Burton, 241 So.2d 389 (Fla. 1980). This is consistent with the position of the Referee in the current petition in that he recommended that Petitioner be reinstated and should this Court require restitution, that he be allowed under a repayment schedule that was included. The Board of Governors of the Florida Bar now opposes even this approach to restitution despite the reasonableness under the circumstances. Delves, supra, at page 169.

In the case at bar, the Petitioner has no one to whom restitution should rightfully be made but has in no way refused to make such restitution if this Court determines it to be appropriate under the circumstances. Petitioner has offered a reasonable repayment schedule for such restitution which has been included with the Referee's Report and Recommendation. Justice has already been served upon Petitioner and public confidence is apparent. To require full and complete restitution as a pre-condition to Petitioner's reinstatement is clearly an attempt to retry him and add new retribution.

CONCLUSION

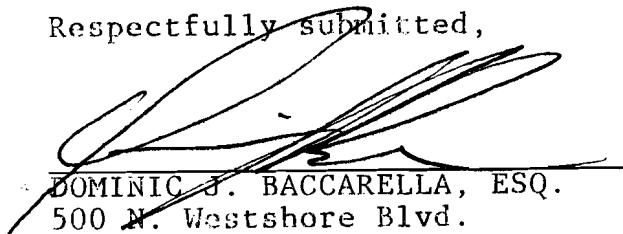
The Report and Recommendation of Referee considered all the pertinent facts surrounding the case of the Petitioner and took note of the retribution by society and Petitioner's fulfillment of the basic requirements of The Florida Bar Integration Rule 11.11:

1. Strict compliance with the disciplinary order;
2. Clear evidence of his unimpeachable character and moral standing in the community;
3. Clear evidence of a good reputation for professional ability;
4. Ethically and morally equipped to resume a position of honor and trust as a member of the Bar.

As the Referee is in the best position to consider all the facts on a first hand basis, it is clear that his recommendation for immediate reinstatement of Mr. Hessler to the practice of law, thus lifting the indefinite suspension, is the appropriate course of action.

Therefore, the decision of this Court should follow the recommendation of the Referee in this matter by lifting the suspension and fully reinstating Mr. Hessler to the practice of law immediately.

Respectfully submitted,



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Of Counsel