IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Case No. 68,246

RE: William E. Whitlock III

Petition for Reinstatement
_____/

ANSWER BRIEF

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SYMBOLS AND REFERENCES

In this Answer Brief, the Petitioner, Mr. William E. Whitlock III, will be referred to as "Mr. Whitlock"; and The Florida Bar will be referred to as "The Bar".

The following symbols will be used: R for the record of the final hearing of May 22, 1986; and REF for the Referee's Report.

STATEMENT OF THE CASE

The Bar adopts petitioner's Statement of the Case, adding only that the Board of Governors of The Florida Bar voted that they concurred in the referee's recommendation that Mr. Whitlock's reinstatement be denied in this case on July 17, 1986.

STATEMENT OF THE FACTS

A concise statement of the facts regarding this Petition for Reinstatement follows. Mr. Whitlock is currently suspended pursuant to two disciplinary actions, The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982) and The Florida Bar v. Whitlock, 484 So.2d 1244 (Fla. 1986).

In the former case, Mr. Whitlock was suspended for three years and thereafter until rehabilitation was proven for three counts of mishandling client's trust funds. The referee found evidence of irregularities in the trust account, including a shortage in Mr. Whitlock's trust account of approximately $20,000.00, checks returned for insufficient funds and checks drawn from the trust account for improper purposes, although the shortages were promptly reimbursed.

In Mr. Whitlock's most recent suspension, he was suspended for one year concurrent with his prior suspension and ordered to pass the ethics portion of the bar examination prior to reinstatement for failing to advise a buyer of a second mortgage on

certain property in a real estate transaction which Mr. Whitlock handled. Mr. Whitlock had been a cosigner on the second mortgage, and was thus aware of the lien on the property. Part of Mr. Whitlock's conditional plea agreement included his execution of a promissory note for the approximate $32,000.00 loss of the buyer. This note remained unpaid at the final hearing on Mr. Whitlock's Petition for Reinstatement, R-155-157.

At this final hearing, Mr. Whitlock presented ten witnesses on his behalf including his wife and himself. The referee concluded from such testimony that the petitioner was held in good regard by his friends and acquaintances and that there was no evidence of malice, and that he had made efforts to keep his legal knowledge up to date and expressed repentance for his prior actions, REF- 6. However, the referee concluded that tremendous financial irresponsibility continued to be demonstrated by Mr. Whitlock in view of his unpaid judgments and debts, totalling over $300,000.00, and the fact that Mr. Whitlock had made no effort to voluntarily contact his creditors and display his professed intent of repayment, prevented his reinstatement at the current time. The referee specifically noted that respondent possessed both a securities license and real estate license, yet

had not obtained employment in any endeavors which would allow him to demonstrate financial responsibility, REF- 4.

SUMMARY OF ARGUMENT

The referee in this case held a lengthy hearing, heard the case presented by Mr. Whitlock and The Florida Bar, and presented a carefully considered report of his findings to this Court, recommending that Mr. Whitlock's Petition for Reinstatement be denied, with leave to reapply at a later date.

It is well settled that the findings of a referee are presumed to be correct and will not be overturned absent a clear showing that the referee's findings are clearly erroneous and without support in the evidence. This standard applies specifically to petitions for reinstatement as well as discipline proceedings in general.

The petitioner has not yet met his heavy burden of demonstrating the referee's findings in this case to be clearly erroneous or without support. The referee's report is supported by the record in each and every respect.

The referee was correct in concluding that the tremendous financial irresponsibility continued to be evidenced by Mr. Whitlock prevents a sufficient demonstration of rehabilitation to allow him the privilege of practicing law.

ARGUMENT

POINT ONE

RESPONDENT CANNOT ATTACK THE REFEREE'S FINDINGS ON REVIEW IF THEY ARE NOT CLEARLY ERRONEOUS AND ARE SUPPORTED BY THE EVIDENCE.

A referee's findings of fact have a presumption of correctness that will not be overturned absent a showing that the referee's findings are clearly erroneous or without support in the evidence. The Florida Bar Integration Rule, Article XI, Rule 11.06(9)(a) further establishes that a referee's findings shall have the same presumption or correctness as the judgment of the trier of fact in a civil proceeding.

In The Florida Bar v. Fields, 482 So.2d 1354 (Fla. 1986) this Court recently reiterated this presumption, citing The Florida Bar v. Hoffer, 383 So.2d 639 (Fla. 1980) and The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978). In Hirsch, the Court upheld the referee's finding of fact, noting that such a determination was the referee's responsibility and would not be overturned unless it was clearly erroneous or without support in the evidence.

> "We have carefully reviewed the evidence and find that the reports of both referees are supported by competent and substantial evidence which clearly and convincingly

> shows that Hirsch has violated the Code of Professional Responsibility on the respects charged. We approve the findings of fact and conclusions filed by the referees", at 857.

This standard does not differ in petitions for reinstatement. In The Florida Bar In Re Charles K. Inglis, 471 So.2d 38 (Fla. 1985), this Court noted:

> This court's review of referee's reports in reinstatement proceedings governed by the same rules and procedures as are reports submitted in other disciplinary proceedings. The Florida Bar Integration Rule, Article XI, Rule 11.11(8). On review of the report of a referee in either type of proceeding, "the burden shall be on the party seeking review to demonstrate that a report of the referee sought to be reviewed is erroneous, unlawful, or unjustified." Id, Article XI, Rule 11.09(3)(e). A referee's findings of fact "shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." Id, Article XI, Rule 11.06(9)(a). Thus, we must accept the referee's findings of fact unless they are not supported by competent, substantial evidence in the record. With regard to legal conclusions and recommendations of a referee, this court's scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment, at 40-41.

While the scope of review is broadened, this does not affect the presumption of correctness of the referee's findings of facts.

ARGUMENT

POINT TWO

THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATIONS ARE SUPPORTED BY CLEAR AND CONVINCING EVIDENCE ON THE RECORD.

Petitioner contends that the referee's finding of fact are clearly erroneous or lacking in evidentiary support in several areas.

Petitioner states that the referee's findings that no payments were tendered to Mr. Kykendall, the complainant to The Florida Bar in the case which was the basis for the petitioner's most recent suspension, is erroneous. However, Mr. Kykendall testified at the final hearing that he was caused a loss of approximately $32,000.00 for payment of a second mortgage which Mr. Whitlock had failed to disclose to him. Although Mr. Whitlock signed a promissory note for the debt, no payments were ever made and Mr. Kykendall was forced to retain legal counsel who obtained a judgment against Mr. Whitlock for over $32,000.00. Mr. Kykendall has not received any payments at all in this judgment. Although Mr. Whitlock offered a payment plan to Mr. Kykendall, this plan was rejected, R-155-162. At any rate, it is undisputed

that Mr. Whitlock has a judgment against him for $35,887.50 which resulted from the facts behind his most recent discipline, The Florida Bar v. Whitlock, 484 So.2d 1244 (Fla. 1986), and he has failed to make even a token payment on this large judgment. This fact was confirmed by the petitioner himself at final hearing, R-100-102. Clearly, there is indeed substantial evidence in support of the referee's statement, "It appears that no payments towards restitution have been tendered to Mr. Donald Kykendall, who testified at the referee hearing concerning the circumstances which led to the judgment for $35,887.50, which was the basis for the petitioner's most recent discipline, R-155-163.", REF- 4.

Petitioner also disputes the referee's finding regarding the past due child support petitioner owes to his former wife. Petitioner argues that this is a clearly erroneous finding because the referee referenced an $8,000.00 unpaid arrearage. However, Mr. Whitlock himself stated at final hearing that he was held in contempt for failure to pay his child support arrearages, R-122-123, and that the amount of arrearage was approximately $8,000.00, R-95. Thus, based on petitioner's own sworn testimony, there is a clear and convincing basis for the referee's finding that the respondent was held in contempt for failure to pay child support previously ordered by the court.

Petitioner next disputes the referee's finding of fact that the large number of unpaid financial judgments against Mr. Whitlock indicate financial irresponsibility.

On Mr. Whitlock's Petition for Reinstatement filed with this court on January 30, 1986, Section 7, petitioner lists eight creditors to whom he owes a grand total of $220,641.27.

Final hearing revealed other debts which were undisclosed on Mr. Whitlock's Petition for Reinstatement. These debts included the approximate $8,000.00 owed in past due child support; approximately $32,000.00 owed to Mr. Patrick Tittle in repayment of a loan which Mr. Tittle, as cosigner for Whitlock, was forced to pay when Mr. Whitlock defaulted (R-141-142) a 1981 $1602.73 payment by the Clients' Security Fund of The Florida Bar to Mr. Daniel McCullen resulting from Mr. Whitlock's acceptance from Mr. McCullen of a sum into his trust account for payment of Mr. McCullen's property taxes and subsequent failure to pay same, R-139-140, and approximately $38,000.00 to Mr. Robert McCain for repayment of a loan and settlement litigation (although Mr. Whitlock disputes the amount of the loan), R-133-136.

Yet another debt not listed by Mr. Whitlock on his petition is the costs assessed against him by this Court in his most recent disciplinary action, The Florida bar v. Whitlock, supra, in which Mr. Whitlock was ordered to pay $700.98. Mr. Whitlock admitted at final hearing that he had not made any payments on this debt either, R-126.

Thus, Mr. Whitlock owes approximately $300,000.00 to various debtors, $78,000.00 of which was not listed on his Petition for Reinstatement, and has not paid even nominal amounts to any of these creditors or even initiated contact with any of his creditors.

Certainly this would not indicate an individual who is responsible in his financial dealings.

Although petitioner apparently would support the view that this incredible amount of debt has no adverse reflection on his character since he doesn't have sufficient income to make payments, The Florida Bar would not support this view. Such blatant disregard of debts demonstrates a degree of financial irresponsibility especially dangerous in one who is requesting to be allowed the privilege of practicing law. The fact that petitioner

failed to even make nominal contact with his creditors to at least advise them of his willingness and intent to repay them professed at final hearing, is further detrimental to his character and was noted in the referee's report, REF- 4.

Petitioner states in support of his inability to pay these debts that "Petitioner has been unable to retire any of the obligations against him because he has had to devote all of his efforts to support his family", p.25 of Petitioner's Initial Brief. However, the fact that petitioner is employed by his present wife, who bought her lawn care business, WEW Companies, Inc., from respondent's father, R-92, would indicate otherwise. Further, Mr. Whitlock testified under oath that his wife, his employer, is the one responsible for payment of the rent and household expenses due to his poor credit rating, R-143.

As the referee noted, respondent possesses both a securities license and a real estate license, yet he professes to a limited income which prohibits him from becoming financially responsible, REF- 4. Mr. Whitlock made no showing at final hearing that he has actively pursued more financially rewarding employment.

Thus, there appears to be an ample basis for the referee's conclusion that respondent has not demonstrated himself to be financially responsible.

ARGUMENT

POINT III

THIS PETITION FOR REINSTATEMENT SHOULD BE DENIED WHERE THE PETITIONER HAS DEMONSTRATED FINANCIAL IRRESPONSIBILITY AND HAS A PRIOR RECORD OF TRUST ACCOUNT MISHANDLING.

It is well settled that the petitioner bears a heavy burden of proving that he is fit to resume the privilege of practicing law. In The Florida Bar v. Dawson, 131 So.2d 472 (Fla. 1961), this Court noted that the proof required to prove a petitioner's fitness may vary depending on the nature of their previous misconduct.

> We begin with the requirement that the burden is on the petitioner to establish that he is entitled to resume the privilege of practicing law without restrictions. 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 the disciplinary actions, at 474.

In Mr. Whitlock's first disciplinary action, The Florida Bar v. Whitlock, 426 So.2d 955 (Fla. 1982), petitioner was suspended for three years, requiring proof of rehabilitation. When Mr. Whitlock was found guilty of three counts of trust account mishandling, the referee recommended disbarment. The Court,

noting Mr. Whitlock's cooperation and that no economic loss was caused except to Mr. Whitlock, ordered a three year suspension with readmission "only upon proper proof of rehabilitation", at 958.

In the 1986 case, The Florida Bar v. Whitlock, supra, the Court found respondent guilty pursuant to a conditional plea agreement which included Mr. Whitlock's agreement to repay Mr. Kykendall for the losses he suffered as a result of Mr. Whitlock's unethical conduct as well as the costs of the proceeding. Although no date for repayments were specified, Mr. Whitlock was ordered to pass the ethics portion of the Florida Bar exam prior to reinstatement. It is not contested that Mr. Whitlock has done the latter. However, the fact that he has failed to make even the slightest payments on this debt should certainly carry a greater weight on his fitness to resume the practice of law, pursuant to Dawson, given the nature of his two disciplines of suspension.

The Florida Bar in Re Inglis, supra, stated the six standard criteria for reinstatement to active membership in the Bar including: 1) Strict compliance with the previous disciplinary order, 2) Good moral character, 3) Demonstration of professional

ability, 4) Lack of malice toward those involved in bringing about the previous disciplinary proceeding, 5) A strong sense of repetance for the prior misconduct and a genuine intention of proper conduct in the future, and 6) Compliance with any conditions imposed as restitution.

However, Inglis further specified that the above list does not prohibit further considerations of a petitioner's character:

> This list is not all inclusive, it is proper to consider all aspects of the individual with a view to determining the applicant's present fitness to resume the practice of law. The criteria can be summed up as being embodied in two components: 1) Good moral character, personal integrity, and general fitness for a position of trust and confidence, and 2) Professional competence and ability., at 39.

In The Florida Bar in Re Silverstein, 484 So.2d 5 (Fla. 1986), the petitioner was allowed reinstatement despite several judgments against him for various debts. However, two important distinguishing factors in Silverstein include the fact that Mr. Silverstein's suspension was based upon a felony conviction rather than trust account mishandling and the Court's specific finding that the petitioner was honestly attempting to meet his financial obligations, at 5. Pursuant to Dawson and Inglis, supra, greater evidence is required of Mr. Whitlock's financial responsibility due to the basis of his suspensions.

In The Florida Bar In Re Ragano, 403 So.2d 401 (Fla. 1981), the court allowed the reinstatement of Mr. Ragano, who was suspended for a felony conviction regarding his personal income taxes having no relationship to any attorney-client relationships. Noting that Mr. Ragano had outstanding judgments against him, the Court specifically found that the petitioner had no ability to generate income except in the practice of law. This significantly differs from the case at hand, where respondent possesses both a securities and a real estate license.

Noting that Mr. Ragano also had a history of checking account mishandling during his suspension, the Court specifically noted that steps had been taken to repay the amounts owed and there was a reasonable explanation for the problems which had ceased. This is further distinguishable from the case at hand where respondent's financial problems continue.

In The Florida Bar v. Rubin, 323 So.2d 257 (Fla. 1975), the petitioner was denied reinstatement where he had been suspended for six months. This Court noted that it was entirely proper to consider evidence of prior disciplinary proceedings for the purpose of comparing prior and current conduct. Where, as in the case at hand, there was evidence of unsatisfied liens and

judgments, at least one of which were not reported in petitioner's financial statement, the Court stated:

> An attorney once removed or suspended must demonstrate rehabilitation, and the burden of doing so requires more than recitations of intent and contrition. Unsatisfied judgments, and a failure to acknowledge judgment liens in a personal financial statement filed for the purpose of demonstrating reinstatement, are antithetical to an affirmative showing of rehabilitation.", at 258.

It is undisputed that Mr. Whitlock demonstrated several of the necessary elements required for rehabilitation, including refraining from the practice of law during his suspension, payment of costs in the 1982 case, and passing the ethics portion of the bar exam.

Evidence was presented by one former client and several friends and acquaintances that Mr. Whitlock is held in good regard and bears no malice to those involved in his previous disciplinary proceedings. However, as the referee noted, such expressions are not sufficient to overcome the degree of financial irresponsibility continued to be demonstrated by the petitioner. As The Florida Bar v. Dawson, supra, and The Florida Bar v. Inglis, supra, dictate, great weight must be assigned to the consideration of areas of a petitioner's character which played a part in the disciplinary actions. The practice of law is a

privilege, not a right, The Florida Bar v. Wolf, 257 So.2d 547 (Fla. 1972), and petitioner's demonstrated financial irresponsibility requires that this petition be denied until more of a showing of such responsibility is demonstrated. Financial irresponsibility is demonstrated not merely by the fact that he has insufficient funds to repay the tremendous debts, but by his lack of apparent concern in failing to contact or, as the referee noted, at least strive to use his apparent abilities to earn sufficient funds, REF- 4. As respondent himself testified, R-143, his poor credit rating prevents him from even obtaining an apartment in his own name. The petitioner's lack of rehabilitation in the area of financial responsibility is obvious. Further, as the referee pointed out, there is no presumption in this day and age that the resumption of the practice of law is any guarantee that Mr. Whitlock will be able to repay his debts and become financially responsible, REF- 4.

CONCLUSION

WHEREFORE, The Board of Governors of The Florida Bar respectfully prays that This Honorable Court will approve the referee's findings of fact and recommendation that the Petition for Reinstatement be denied with leave to apply again at a future date and pay costs in these proceedings currently totalling $643.20.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and Seven (7) copies of the foregoing Answer Brief has been furnished by ordinary U.S. mail to the Supreme Court of Florida, The Supreme Court Building, Tallahassee, Florida, 32301; a copy of the foregoing was mailed by ordinary U.S. mail to John A. Weiss, Attorney for Respondent, at Post Office Box 1167, Tallahassee, Florida, 32301; and a copy has been furnished by ordinary U.S. mail to Staff Counsel, The Florida Bar, Tallahassee, Florida, 32301, on this 25th day of August, 1986.

Jan K. Wichrowski
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