IN THE SUPREME COURT OF FLORIDA

PETITION FOR REINSTATEMENT
OF RICHARD J. ALFIERI.

THE FLORIDA BAR,

Appellant,

CASE NO.: 68,885

v.

RICHARD J. ALFIERI,

Petitioner-Appellee.
_____/

ANSWER BRIEF OF PETITIONER

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INTRODUCTION

References to the transcript of the December 18, 1986, reinstatement hearing before the Hon. Robert M. Gross will be shown as (Tr. page no.). At that hearing, Petitioner Richard J. Alfieri offered a composite exhibit indexed by sixteen categories of items. These documents will be referred to as (Ex. A-index no.). Petitioner also offered a composite exhibit of two letters from the United States Probation Office which will be referred to as (Ex. B). Judge Gross found all of the above exhibits relevant and admissible as evidence. (Tr. 100, 140). The Florida Bar offered no exhibits.

Effective January 1, 1987, The Florida Bar Integration Rule and the Code of Professional Responsibility were superseded by the Rules Regulating The Florida Bar. The Florida Bar Rules Regulating The Florida Bar, 494 So.2d 977 (Fla. 1986). Disciplinary cases pending as of that date are to be processed under the latter rules. Id. However, where a case has proceeded through the filing of the referee's report under Article XI of the Integration Rule, this Court has expressed a preference for citations to that rule. The Florida Bar v. Reid, 12 F.L.W. 137 n.1 (Fla. March

19, 1987). The referee's report in the case sub judice, however, is dated January 13, 1987. This answer brief will therefore cite to both the "old" and "new" rules and note substantive differences between them, if any.

STATEMENT OF THE CASE AND OF THE FACTS

The statement of the case provided by The Florida Bar, while essentially accurate in its facts, is remiss in not presenting all of the evidence adduced before the referee. It is also remiss in not explaining why the Bar never seriously argued against reinstatement at that hearing, nor requested conditions upon reinstatement, particularly as the Bar is represented by the same counsel in this proceeding as at that hearing. A complete statement of facts is therefore required.

On August 26, 1982, a federal grand jury in the Southern District of Florida indicted (Ex. A-3) Petitioner Richard J. Alfieri on one count of conspiracy to defraud the United States, 18 U.S.C. § 371, and five counts of failing to file currency transaction reports, 31 U.S.C. §§ 1081, 1082 and 1059.

(This is a total of six counts. The Bar erroneously states ten counts.)

The gist of the charges was "money laundering" during 1980 and 1981 whereby Petitioner allegedly took advantage of his daughter's position as a bank teller to convert some cash of clients into cashier's checks without filing the required currency reports with the Internal Revenue Service.

Pursuant to a plea agreement with the United States (Ex. A-3), Petitioner entered guilty pleas to the conspiracy count and one currency count. The United States agreed to recommend maximum concurrent sentences of up to five years imprisonment. On September 27, 1982, the Hon. Norman C. Roettger, Jr. accepted the pleas and sentenced Petitioner to four years imprisonment and a fine of one hundred thousand dollars. (Ex. A-3).

On September 15, 1982, this Court ordered Petitioner suspended from The Florida Bar (Ex. A-5) and on March 10, 1983, granted his petition for leave to resign. (Ex. A-2).

Petitioner was incarcerated in federal correctional facilities for a period of some

thirty-two months, followed by a period of supervised parole. (Ex. A-3; Tr. 98-99). He was discharged from federal supervision on May 13, 1986, (Ex. A-15), and his civil rights were restored, upon the recommendation of his federal parole officer. (Ex. A-13, 14).

On June 9, 1986, Petitioner Alfieri filed a Petition for Reinstatement to The Florida Bar. (Ex. A-3). The petition was timely, as it was filed more than three years after acceptance of resignation while disciplinary action was pending. Fla. Bar Integr. Rule, art. XI, Rule 11.08(6) [R. Reg. Fla. Bar 3-7.9(m)]. On June 16, 1986, this Court designated the Hon. Robert M. Gross, a judge of the County Court of Palm Beach County, as referee to hear the petition. (Ex. A-2).

At the outset of that hearing, Petitioner offered forty-five affidavits, including ten from Florida attorneys, which attested to his good moral character and professional competency. (Ex. A-8; Tr. 5). The Bar stipulated to their admissibility. (Tr. 6, 100).

The Bar also set the tone of the hearing at the outset. Bar counsel stated that he had had the "full cooperation" of Petitioner; that the petition was "totally in accordance with the requirements of The

Integration Rule;" and that the Bar had conducted an "exhaustive investigation" of Petitioner. (Tr. 9). Bar counsel then appeared to concede that the Bar's own investigation supported readmission:

> [Mr. Barnovitz]: And as a predicate to the readmission, when the petitioner is finished, the Bar will recite those few findings as a result of its investigation that I've just referred to.

(Tr. 12).

Petitioner then presented the testimony of twelve persons, including himself, each testifying that Petitioner met the readmission criteria set out in Petition of Wolf, 257 So.2d 547 (Fla. 1972).

Lawrence J. Miano, a Fort Lauderdale attorney, testified that he had known Petitioner since 1972 and that they had performed legal work together prior to Petitioner's resignation. He noted that Petitioner "has always conducted himself with professionalism and that expertise that you really don't find in many attorneys," (Tr. 14), and that he had an "A-1" reputation. (Tr. 16). Milano testified that he had employed Petitioner as a law clerk since the latter's release (Tr. 21); that he was a person of good moral character (Tr. 18); and that Petitioner showed remorse

for participating in the illegal currency transactions. (Tr. 19). On cross-examination, Bar counsel brought out that Petitioner had maintained his legal skills through employment in the prison law library. (Tr. 24). Milano concluded that, "I can say that the quality and caliber of his work now and then is substantially the same." (Tr. 24).

Charles A. Edwards, an insurance agent, testified that he had frequently consulted Petitioner on estate planning matters prior to Petitioner's resignation. He stated that Petitioner's moral standing in the community was "excellent" (Tr. 29), and that, in discussions with Petitioner since his release, he found that Petitioner bore no ill will toward anyone and had a positive outlook for the future. (Tr. 30-31).

Michael Gozansky, M.D. testified that he had been Petitioner's physician since 1975. (Tr. 33). In a letter addressed to this Court (Ex. A-7), Dr. Gozansky stated that from "late 1979 through late 1981 [the period of the currency transactions] Mr. Alfieri exhibited signs of marked depression with anxiety reaction." In 1982, Petitioner exhibited "marked depression and anxiety caused by multiple personal,

financial, and legal problems." (Ex. A-7). However, a post-incarceration examination in 1986 showed excellent physical and mental health. (Ex. A-7; Tr. 34-35). Dr. Gozansky concluded that,

> I found that he certainly emotionally was like a new person. He was -- he had total control of himself, there were no signs of anxiety or depression going on, and I felt he was in much better mental health.
>
> * * *
>
> I feel that he'll be able to carry out his duties normally.

(Tr. 35-36).

Les Paul Sternberg, a Fort Lauderdale attorney, testified that Petitioner had an "excellent" professional standing, particularly in estate planning and tax matters. (Tr. 39). He stated that Alfieri was remorseful and that he was "absolutely" rehabilitated. (Tr. 41).

Kenneth M. Manfredi, a former client of Petitioner since 1972, testified to Petitioner's excellent legal reputation, his pro bono community activities, and that since Petitioner's release he showed remorse and "wants to renew himself." (Tr. 52). He concluded that he would

not hesitate to consult Petitioner upon reinstatement. (Tr. 53).

Rory J. McMahon, United States Probation officer, testified that Petitioner's "attitude and his adjustment while under supervision was excellent." (Tr. 55). "[B]asically his attitude was one that he made a mistake, and he bore no animosity toward anybody that was involved." (Tr. 56).

Steven Greene testified that he had been incarcerated with Petitioner at Maxwell Air Force Base in 1983; that Petitioner ran the prison law library and assisted inmates in their research; and that Petitioner was extremely remorseful for his mistake and bore no animosity toward anyone. (Tr. 60-66).

Salvatore Defilice, a Fort Lauderdale attorney, testified that he had employed Petitioner as a law clerk, particularly for tax and estate matters. He stated that Petitioner willingly performed pro bono work, was of excellent character and "fully accepted the consequences" of his prior wrongdoing. (Tr. 67-70).

Jean A. Alfieri testified that she was the former wife of Petitioner and had been divorced after twenty-five years of marriage. She stated that she was

still good friends with Petitioner and that she and their two children had maintained a close relationship with him while he was incarcerated. (Tr. 71-73). Mrs. Alfieri testified that the divorce had been caused by Petitioner's "mental problems" -- guilt, nervousness and depression -- prior to incarceration. (Tr. 73-74). She concluded that she "very definitely" had forgiven Petitioner for involving their adult daughter in unlawful activity. (Tr. 75).

The daughter, Elaine Weeks, testified that she had pleaded guilty to a misdemeanor and received a sentence of six weekends and probation. (Tr. 81-82). She stated that she loved her father very much (Tr. 77) and that the family unit, despite the divorce, remained strong. (Tr. 79). She found her father to be "very remorseful" and stated that she shared in this remorse. (Tr. 77). She concluded that Petitioner would be "a very fine attorney" if readmitted." (Tr. 79).

Petitioner's son, Paul R. Alfieri, testified that he considered his father as a "role model" and that this paternal influence caused himself to attain membership in The Florida Bar in 1985. (Tr. 88, 92). He agreed with other family members that a sustaining

family relationship existed (Tr. 89) and that his father was a "completely different person" in terms of physical and emotional health since his release. (Tr. 90-91). He stated that his father had served four attorneys and himself as a legal assistant since release (Tr. 91), and that he hoped to form a father-son law partnership if reinstatement were granted. (Tr. 93). He further stated that his father realized his mistake, was remorseful and bore no ill feelings. (Tr. 91-92).

The most important witness was, of course, Petitioner himself. His testimony regarding his criminal fine and his status with the bar of New York will be detailed in the arguments on those points. Alfieri's testimony fully met all the criteria of Petition of Wolf, supra.

Petitioner stated that he was fifty-two years of age (Tr. 118) and that before the currency transactions he had "lived a very normal and straightforward life for almost seventeen years as an attorney." (Tr. 102). However, he was also a "sole, lonely practitioner" (Tr. 120), and that at the time of his crime he was in a state of physical and mental strain which might be

analogized to menopause. (Tr. 136). He stated that, "I just totally lost sight of what was right or wrong" (Tr. 102) and engaged in "a reckless disregard for obeying the law," (Tr. 104), "going headlong into oblivion." (Tr. 118).

Petitioner's current attitude is likely best reflected by his statement that, "I'm almost thankful that it happened as I look back. And thankful that it happened as soon as it happened, so as to prevent any further deterioration and further wrongful conduct." (Tr. 118). "They say prison is bad. And I would agree, and I certainly wouldn't recommend it for anyone, but you can get some real benefits out of it, and I know I did. . . . In fact, I feel that I probably am in better mental and physical condition now than I've ever been even when I was much younger." (Tr. 117-118).

Petitioner testified that he had no ill feelings toward anyone involved in his prosecution (Tr. 114), and that he had the greatest respect for Judge Roettger, the sentencing judge. (Tr. 111).

Petitioner stated that while he was in prison he had served as the prison law clerk and kept abreast of the law. (Tr. 110). Immediately upon release he sought

out positions as a legal assistant (Tr. 110) and kept current in his fields of taxation and business and estate planning. (Tr. 120).

Petitioner's intention upon reinstatement is to form a close working relationship with his son and other attorneys, as he recognizes the emotional risks of solo practice, (Tr. 120), with a full realization of the privilege that Bar membership is:

> [M]y practice and my professional conduct was always -- I cherished it, and guarded it. And yet at this period of my life and just this few weeks or month, month and a half, I threw everything out the window.
>
> I didn't get up one morning and say I was going to do it, but my conduct did it.
>
> It speaks for itself.

(Tr. 108). The record in this case likewise speaks for itself and on that record the referee found as fact that Petitioner has accepted the consequences of his wrongdoing, is sincerely repentant and is currently qualified to engage in the practice of law.

One can only conclude that at that hearing, the Bar implicitly concurred in such findings, as it offered little or nothing in opposition to them:

Mr. Barnovitz: Your Honor, at this time, I would merely report to you that, and I've discussed this with Mr. Titone, that as a result of the exhaustive investigation conducted by the Bar, the only things of less than positive result that the Bar -- that developed in the Bar's report was Judge Roettger, who when questioned as to his recommendation on reinstatement chose not to make a recommendation, but merely informed the Bar that he had, in fact, imposed a heavier sentence than ordinary on Mr. Alfieri because of his perception of the nature of the crime and the involvement of the daughter.

Mr. Alfieri voluntarily submitted copies of his income tax returns for the past five years that raised numerous questions. They were audited by the C.P.A. auditor, staff auditor of the Florida Bar, and while there were certain issues that were raised that need correcting, the Bar's auditor is satisfied with the result of the Bar's audit.

We have brought to your attention the situation with the New York State Bar Association, the fact that it was The Florida Bar, it was me, who informed New York State of the felony conviction and of The Florida Bar resignation by Mr. Alfieri, which in turn prompted New York State to initiate its own version of seeking a felony suspension, the equivalent to our felony suspension, which would then form a predicate for New York State to pursue or not any other discipline, formal disciplinary proceeding that they regarded as appropriate under the circumstances.

Those would be the only items that I would point out to the Court.

* * *

(Tr. 141-142).

Nevertheless, the Bar now opposes the reinstatement of Petitioner.

STANDARD OF REVIEW

As stated by this Court:

> The referee's findings of fact are presumed correct and will not be disregarded unless clearly erroneous or lacking support in evidence. The Florida Bar v. McCain, 361 So.2d 700 (Fla. 1978); The Florida Bar v. Hirsch, 359 So.2d 856 (Fla. 1978).

The Florida Bar v. Baron, 392 So.2d 1318, 1320 (Fla. 1981). This Court, of course, is the final arbiter of whether such facts establish Petitioner's fitness to resume practice in terms of integrity and professional competency, with due emphasis upon the protection of the public and the image and integrity of The Florida Bar as a whole. See, Petition of Wolf, supra 257 So.2d at 548.

SUMMARY OF THE ARGUMENT

This Court should not "revisit" its opinion in The Florida Bar v. Alfieri, 427 So.2d 662 (Fla. 1983). It is the "law of the case" and a final decision. Further,

the Bar's argument that the Alfieri case represents poor policy is now moot due to rule changes.

Petitioner does not disagree that the nature of a disciplined attorney's wrongdoing is relevant to reinstatement. However, the critical questions are that attorney's rehabilitation and fitness to practice law. Petitioner has met his burden on those issues. The referee's findings should not be disturbed.

Petitioner's status with the bar of New York is collateral to his proceeding, particularly since Petitioner practiced law in Florida, not New York, from 1970 to 1982. This Court is the best judge of his qualifications. Further, Petitioner's New York status was the result of innocent mistake by Petitioner as he had requested his attorney to notify New York of his conviction. The bar of New York was in fact notified of the conviction by the federal probation office and apparently failed to take action through oversight. All actions, or inactions, of Petitioner regarding his New York status were reasonable in the circumstances, as the referee apparently found in recommending reinstatement.

Requiring full and immediate payment of Petitioner's fine to the United States would only be a punitive measure, unrelated to rehabilitation or fitness to practice law. Since the United States, through a consent order, has agreed to partial payment or installments, Petitioner should be required to comply strictly with the order of the United States District Court for the Southern District of Florida.

ARGUMENT

I. THIS COURT SHOULD NOT "REVISIT" ITS DECISION IN THE FLORIDA BAR V. ALFIERI, 427 SO.2D 662 (FLA. 1983).

Petitioner takes up the Bar's last argument first because it goes to the very nature of this proceeding. In essence, the Bar seeks to rewrite The Integration Rule and seek a disbarment nunc pro tunc.

The Bar never addresses the fact that this Court's prior Alfieri opinion in "the law of the case." See generally, 3 Fla. Jur. 2d Appellate Review § 414 (1978, supp. 1987). If this Court is to "revisit" Alfieri it must likewise revisit well-established principles of appellate finality.

The Bar also falls into hyperbole in calling Alfieri the "death knell of disbarments." As the Bar must recognize, the Alfieri opinion has never been cited by any court; nor will it ever by cited by a Florida court, as the rules have changed since 1983.

The unanimous Alfieri opinion states:

> An attorney whose petition for leave to resign is granted may apply for readmission after three years. Fla. Bar Integr. Rule, art. XI, rule 11.08(6). Similarly, a disbarred attorney may apply for readmission after three years. Id. at rule 11.10(5). Disbarment, therefore, would be no greater in effect than the punishment which Alfieri has agreed to accept by filing his petition. We see no reason to prolong these proceedings, and we grant Richard J. Alfieri's petition to resign, effective with the filing of this opinion.

428 So.2d at 663.

Under current rules, a readmission application may be submitted by a disbarred attorney after five years. R. Reg. Fla. Bar 3-7.9(a). See, The Florida Bar Rules Regulating The Florida Bar, supra 494 So.2d at 978. A readmission application may be submitted by an attorney who has resigned in connection with a disciplinary action after three years. R. Reg. Fla. Bar 3-7.9(m). The specific rationale of Alfieri therefore no longer

exists. However, the Alfieri opinion remains the law of this case and should not be revisited.

II. WHILE THE NATURE OF A DISCIPLINED ATTORNEY'S PRIOR WRONGDOING IS RELEVANT TO HIS REHABILITATION, THE CRITICAL INQUIRY ON A PETITION FOR REINSTATEMENT IS REHABILITATION ITSELF.

Petitioner fully agrees that, "The first aspect to be considered is the nature of the offense which resulted in the disciplinary action." Petition of Wolf, supra 257 So.2d at 549. The nature of the offense sets the context for the proceeding and aids in identifying the particular problem which the attorney must prove he has overcome -- be it avarice, personal malice, sexuality, or substance abuse.

However, the purpose of a reinstatement proceeding is not to retry the petitioner for his offense. Petition of Stalnaker, 9 So.2d 100 (Fla. 1942). As this Court emphasized in Petition of Wolf, supra:

> Article XI, Rule 11-11(5) specifically provides that 'the matter to be investigated and decided shall be the fitness of the petitioner to resume the practice of law.'

257 So.2d at 548. [The current rule states, "The matter to decide shall be the fitness of the petitioner to

resume the practice of law." R. Reg. Fla. Bar 3-7.9(g).] See also, Petition of Stalnaker, supra.

The Bar, however, argues that Petitioner's crime of defrauding the United States is so "heinous" as to warrant permanent exclusion from The Florida Bar. The essence of this argument is that, despite the fact of Petitioner's proven rehabilitation and his current fitness to practice law, reinstatement should nevertheless be denied. There is absolutely no authority for that proposition in The Integration Rule nor in the decisions of this Court.

The brief of the Bar (pp. 7-8) cites eleven cases where attorneys were disbarred for felony convictions. It is worth noting that in each of those cases this Court adopted the recommendation of the fact-finder, indicating that significant weight is given to the recommendation of the referee. In the case sub judice, the referee has recommended reinstatement.

In its selection of cases the Bar has also blinded itself from the fact that this Court has reinstated attorneys who had been suspended or disbarred following felony convictions. In each such case, reinstatement was ordered because rehabilitation and fitness had been

proved. See, Petition of Koester, 217 So.2d 115 (Fla. 1969) (conviction for income tax evasion); Petition of McGregor, 122 So.2d 7 (Fla. 1960) (conviction for making false and fraudulent claims against the United States); Petition of Branch, 53 So.2d 317 (Fla. 1951) (conviction for unspecified felony); Petition of Pine, 41 So.2d 546 (Fla. 1949) (conviction for Mann Act prostitution felony).

Finally, the Bar argues against reinstatement because the sentencing judge gave Petitioner a harsher sentence than the ordinary defendant. It is difficult to discern how that may have harmed Petitioner's rehabilitation. In fact, Petitioner's own testimony demonstrates how he benefited from his incarceration. (Tr. 117-118). However, to keep the facts straight, Petitioner would point out that Judge Roettger did not give Petitioner the maximum sentence of five years under the plea agreement, but imposed a sentence of four years.

The Bar seems to desire a rule requiring eternal disbarment of any attorney convicted of a felony. The Bar, of course, is free to follow proper procedures in proposing such a rule. This case, however, is not the

forum for such a proposal. The questions here are rehabilitation and fitness and those facts have been proven by Petitioner Richard J. Alfieri.

III. PETITIONER'S STATUS WITH THE BAR OF THE STATE OF NEW YORK SHOULD NOT BE A FACTOR IN THIS PROCEEDING, PARTICULARLY SINCE SUCH STATUS AROSE FROM INNOCENT MISTAKE.

The Bar suggests that this reinstatement proceeding should be abated pending a resolution of Petitioner's status in the State of New York. The undersigned suggests that this is but another example of the Bar's punitive attitude toward Petitioner and an obfuscation of the true issues of rehabilitation and fitness.

First, this Court is the best judge of Petitioner's rehabilitation and fitness. Petitioner has not practiced law in the State of New York since 1970. (Tr. 132). It is respectfully suggested that New York will follow, rather than lead, Florida.

Second, even an adverse decision in New York should have no effect on this proceeding. The pertinent rule provides:

3-4.6. Discipline by foreign or federal jurisdictions

> A final adjudication in a disciplinary proceeding by a court or other authorized disciplinary agency of another jurisdiction, state or federal, that an attorney licensed to practice in that jurisdiction is guilty of misconduct justifying disciplinary action shall be considered as conclusive proof of such misconduct in a disciplinary proceeding under this rule.

R. Reg. Fla. Bar 3-4.6. Petitioner's misconduct (a felony conviction) is freely admitted. The question here is rehabilitation.

The Bar argues, however, that there has been further misconduct here, i.e., a fraud perpetrated on the Bar of New York by Petitioner. The facts surrounding this issue are fully developed in the record before this Court -- facts heard by the referee who obviously resolved the issue in favor of Petitioner by recommending reinstatement.

The record facts show that on the day after Petitioner's plea agreement was filed in federal court, and some three weeks prior to a formal adjudication of guilt, Petitioner specifically requested his attorney to notify the Bar of New York of the felony conviction. That letter reads in full as follows:

Richard J. Alfieri
2717 N.E. 33rd Street
Fort Lauderdale, Florida 33306

September 3, 1982

Robert J. O'toole, Esq.
208 S.E. 6th Street
Fort Lauderdale, Florida 33301

Dear Mr. O'Toole

I believe there is a requirement of notification to the various Bar associations of the felony conviction. Since I am not certain of the procedure, please send what notice is required to the Florida, New York and Federal Bars. In my present state of mine, you are far better able to answer any questions they may have.

Probation Officer, Richard Miklic told me at our first meeting, that his office would be contacting them in the process of preparing my pre-sentence investigation.

I will look into the notification requirements and procedure for the Florida Real Estate Commission.

Thank you for your continuing support.

Yours sincerely,

Richard J. Alfieri

(Ex. A-12).

Attorney O'Toole apparently did not carry out Petitioner's instructions. However, the New York Bar

was in fact notified of the conviction during Petitioner's presentence investigation. On September 7, 1982, federal probation officer Richard Micklic contacted his counterpart in New York, who responded that he in turn had contacted Mrs. Greene of the New York Bar Grievance Committee. (Tr. 129). This correspondence was in evidence before the referee. (Ex. B). Petitioner testified that:

> In my mind, at that time, relying on the letter that I had given to Mr. O'Toole and relying on the information that Mr. Micklic, my probation officer, had told me, and stating that he had actual correspondence behind what he was saying, in my mind, the various bar associations had been contacted.

(Tr. 129).

The Bar apparently finds Petitioner's belief to be unreasonable, as Petitioner apparently should have suspected something was amiss when he received no notification of a New York disciplinary proceeding. However, Petitioner's actions were influenced by his experience with the Florida Real Estate Commission, by whom he was also licensed.

As indicated in the O'Toole letter, Petitioner personally advised the real estate commission of his conviction prior to incarceration. That commission did

nothing. Following his release, Petitioner received a routine renewal application from the commission and again advised them of his conviction. Only then did the commission begin disciplinary proceedings, resulting in a sixty-day license suspension and reinstatement in good standing. (Tr. 128-134; Ex. A-10). As explained by Petitioner under oath:

> Q. So that because the Florida Real Estate Board took no action, despite your actual notification to them --
>
> A. Absolutely.
>
> Q. -- You felt that the same thing had happened in New York State?
>
> A. Yes. Because when I then got into contact with the Florida Real Estate Commission Legal Department, they sat down and said, we don't know how this happened, but things like this do happen, so now let's sit down as if we were back then and talk about it and see what we are going to do with it.
>
> Q. Did that trigger, sir, an impulse that you should have pursued The New York State Bar situation in the same fashion?
>
> A. Well, again, the answer to that is yes, and the answer -- but the answer continues by saying, I did contact them. They have been contacted.
>
> Here are letters stating that they have been contacted.

Now I asked them for a letter of good standing or whatever standing I have, and they come back with a letter of good standing.

Q. And the certificate of good standing that you received from the appellate division second department in New York State indicated to you that notwithstanding a felony conviction and a resignation from The Florida Bar, in the eyes of The New York State Bar, this constituted no basis for any action concerning your license to practice law?

A. Well, with all due respect, I did not look at it from that point of view.

I viewed this in the same way that I viewed the Florida Real Estate Commission's actions, that they were going to sit back until somebody literally forced them to do something.

And not knowingly or willingly or intentionally, I merely -- what happened, as soon as I found out that they were insisting that they had not been informed, I prepared the most complete documentation for them and federal expressed it up to them immediately.

Q. Well --

A. And this was even before they entered the notice of motion, because they used my documentation to refer to in their notice of motion for act of suspension, or order for suspension.

(Tr. 133-135).

One thing should be made very clear. Petitioner never practiced law under his New York license after his conviction. [In fact he has not practiced in New York since 1970 and has no intention of returning (Tr. 132, 138).] Only because New York failed to act after notice of conviction from the probation office did Petitioner remain in good standing in that state. As part of the requirements for his Florida petition for reinstatement, Petitioner requested and received notice of his good-standing status in New York. It would be preposterous to suggest that his submission of that certificate of good standing with his petition was intended to "hoodwink" or deceive the referee and the referee obviously understood the chain of events and put no blame on Petitioner for them.

IV. THE RECOMMENDATION OF THE REFEREE SHOULD BE CLARIFIED TO REQUIRE THAT PETITIONER'S FINE TO THE UNITED STATES BE PAID IN STRICT COMPLIANCE WITH ALL ORDERS OF THE UNITED STATES DISTRICT COURT.

The report of the referee states:

> 2. Petitioner's reinstatement should be conditional upon the payment of the fine imposed by the Court in the case of United States of America vs.

Richard J. Alfieri, Southern District of Florida, Case Number 82-6070-CR.

The Bar has seized upon this language to argue that Petitioner should be required to pay his full one hundred thousand dollar fine as a precondition to reinstatement. It is highly unlikely that that was the intention of the referee, as the referee inquired about (Tr. 94) and was advised about a federal court order specifying the terms of payment. (Tr. 96). That federal order was in evidence and states in pertinent part:

> 7. As an alternative for settlement, and without prejudice to the provisions of paragraphs #1 through #6, above, defendant shall have the right to submit to plaintiff within sixty (60) days of the entry of this Order, a proposal for settlement of his entire obligation upon payment of a cash amount less than the total sum of $100,000.00, most specifically, payment of $48,000 in cash within one year of the entry of this Order, plus payment of $2,400 in cash six months from the date of entry of this Order and $2,400 in cash one year from the date of entry of this Order; any such proposal will involve application and interpretation of the provisions of 18 U.S.C. § 3565(g) and the legislative commentary thereon to be found in H. REP. NO. 98-906, 98th Cong., 2d Sess. 10 (1984), and the acceptance of any such proposal shall therefore be in the sole discretion of the plaintiff, acting through its undersigned United States Attorney who shall advise the defendant of his decision thereon in

writing within sixty (60) days following receipt of any such proposal.

(Ex. A-9).

It is very curious that the Bar wishes to require the United States to receive more than the United States desires to accept. Since a fine is penal in nature, rather than being in the nature of restitution, the Bar's motivation must be punitive. But this Court has said, "In adjudicating the question of rehabilitation, punitive considerations are only incidental and do not control." Petition of Stoller, 36 So.2d 443, 444 (Fla. 1948).

The Bar is quite aware that the sole reason for nonpayment is that payment plans for fines are a recent development in federal law which is currently under review in Washington. Petitioner testified under oath that, "I have placed funds aside to make the payments, either way they tell me to make the payments." (Tr. 97). "I would have already started any payment plan that they wanted me to, except that they literally told me to hold up. . . ." (Tr. 122).

Having so sworn, Petitioner would certainly be subject to discipline (including disbarment) for failing to honor his oath.

The Bar also appears to believe that a payment plan may subject Petitioner to some extended supervision by the federal government and that this would be unseemly. The answer to this is a question: "What's wrong with supervision?" Many disciplined Florida attorneys function under the supervision of this Court and the supervision of trust account auditors, psychiatrists and substance abuse programs. That the United States District Court may take a keen interest in Petitioner's finances during the repayment period should be regarded as a benefit, not a detriment.

CONCLUSION

The findings and recommendations of the referee should be adopted with the clarification that Petitioner pay his fine to the United States in strict compliance with all orders of the United States District Court for the Southern District of Florida.

Respectfully submitted,

JOSEPH J. TITONE, ESQUIRE
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Answer Brief of Petitioner have been furnished by United States mail to DAVID M. BARNOVITZ, ESQ., The Florida Bar, Galleria Professional Bldg., Suite 602, 915 Middle River Drive, Fort Lauderdale, Florida 33304; JOHN F. HARKNESS, JR., ESQ., The Florida Bar, Tallahassee, Florida 32301-8226; and JOHN T. BERRY,

ESQ., The Florida Bar, Tallahassee, Florida 32301-8226, this 11 day of May, 1987.

JOSEPH J. TITONE, ESQUIRE
Counsel for Petition