IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

In Re:

LEWIS M. WILLIAMS

(Petition for Reinstatement)
_____/

Supreme Court
Case No. 69,589

On Petition for Review of
the Referee's Report in a
Reinstatement Proceeding.

ANSWER BRIEF OF THE FLORIDA BAR

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INTRODUCTION

In this brief, The Florida Bar will be referred to as either "THE FLORIDA BAR", or "THE BAR". LEWIS M. WILLIAMS will be referred to as the "Petitioner" or "WILLIAMS"; the Petition for Reinstatement filed by Petitioner will be referred to as "Petition for Reinstatement" or "reinstatement petition". Witnesses will be referred to by their respective surnames for clarity.

Abbreviations utilized in this brief are as follows:

"TR-I" refers to the transcript of proceedings of the final hearing before the referee held July 6, 1987. The transcript is incorporated in two volumes, pages of which are consecutively numbered.

"TR-II" refers to the transcript of proceedings of the final hearing before the referee held July 7, 1987 which is incorporated in one volume.

"EX" refers to Bar Exhibit introduced into evidence at the final hearing.

"PET EX" refers to Petitioner's Exhibit introduced into evidence at the final hearing

"RR" refers to the Report of Referee

STATEMENT OF THE CASE AND FACTS

Petitioner was suspended from the practice of law on February 13, 1979 (TR-I at 67) based upon his conviction of felonies involving the possession and sale of a controlled substance (cocaine), conspiracy to commit a felony (sales of cocaine) and carrying a concealed firearm (TR-I at 76, RR at 5). Petitioner was sentenced to serve a ten-year term of incarceration (TR-I at 76).

Petitioner's conviction was affirmed on appeal in November 1979 (TR-I at 80). In February 1980, Petitioner began serving his prison sentence (TR-I at 76). In March 1982 Petitioner was transferred to a work release center (TR-I at 77). Petitioner was placed on parole in November 1982 and was released from parole in April 1985 (TR-I at 77). In May 1985, Petitioner's civil rights were restored, with the exception of owning or possessing a firearm (TR-I at 78).

This reinstatement proceeding commenced on November 5, 1986 with the filing of a Petition for Reinstatement. Upon receipt of the reinstatement petition, The Florida Bar undertook an extensive investigation concerning Petitioner's activities subsequent to his suspension in order to formulate a position concerning Petitioner's character and fitness to resume the practice of law.

On November 26, 1987 the Supreme Court assigned a referee to hear this matter and present findings of fact and recommendations to the Supreme Court of Florida.

The final hearing before the referee was held on July 6 and 7, 1987.

At the final hearing Petitioner as well as fifteen character witnesses testified in support of reinstatement. Petitioner's character witnesses included: ADLER, an insurance agent who was a former client of Petitioner to whom Petitioner had referred insurance business and from whom Petitioner received referrals for legal work (TR-I at 166-167, 174); MAYNARD, a bondsman with whom Petitioner has had professional contact on behalf of clients (TR-I at 38); colleagues with whom Petitioner has had or currently has business arrangements (e.g., employers or attorneys with whom Petitioner has shared referrals), THOMSON (TR-I at 30-32); REYNOLDS (TR-I at 54); CLARKE (TR-I at 90,91); DROESE (TR-I at 128); FERRER (TR-I at 135); BARONE (TR-I at 182); and former clients (MOLINA, BULLOUGH, HARRIS).

The Florida Bar opposed Petitioner's reinstatement. In opposing Petitioner's reinstatement, The Florida Bar presented witness testimony to establish that Petitioner did not and does not enjoy a good reputation for truthfulness, veracity and integrity (DOUGLAS WILLIAMS; TR-II at 18). In addition, The Florida Bar presented witness testimony and evidence to prove that Petitioner does not have unempeachable character and is unfit to resume the practice of law. Such evidence established:

a. That Petitioner was involved or associated with drug trafficking as evidenced by the factual basis of the felony conviction as well as admissions Petitioner made to a witness (WAKSMAN, TR-II at

94-96; McDANIEL, TR-II at 72-73);

b. That subsequent to his conviction and suspension Petitioner continued his association with persons involved in drug smuggling (McDaniel, TR-II at 45-46);

c. That Petitioner attempted to contact a confidential informant in his criminal case knowing that access had been denied by the trial court (McDANIEL, TR-II at 60, 64; WAKSMAN, TR-II at 98);

d. That Petitioner sought to conduct postverdict interrogation of jurors in his criminal case without ensuring that required notice was given (WILLIAMS, TR-I at 246);

e. That subsequent to his conviction and suspension Petitioner solicited the bribery of a police officer who was a witness in his criminal case (McDANIEL, TR II at 65, 66);

f. That Petitioner's trust account reflected activity subsequent to his suspension (EX 2; WILLIAMS, TR-II at 29-35);

g. That Petitioner failed to comply with the technical requirements of closing his practice; to wit, furnishing a copy of his suspension order to all clients and furnishing The Florida Bar with an affidavit listing the names and addresses of all clients who were so notified (WILLIAMS, TR-I at 74; TR-II at 23);

h. That Petitioner was not candid with The Florida Bar in his response to Bar discovery in this reinstatement proceeding in that he failed to disclose his ownership interest in a duplex as of January 1, 1979 and failed to disclose that he continued to make mortgage payments, pay the taxes, collect the rent and maintain the property notwithstanding the transfer of title to the property to his son on January 2, 1979 (WILLIAMS, TR-I at 201, 229-230);

i. That Petitioner manifested a lack of candor in his testimony before the referee, as evidenced by his denial of involvement in securing legal counsel and paying legal fees for a person convicted of murder (WILLIAMS, TR-II at 192; TR-I at 244, 245; McDaniel, TR-II at 52);

j. That Petitioner manifested a lack of candor in his

testimony before the referee concerning the issuance of a check from his trust account which he attempted to argue was drawn from his personal account (EX 3; WILLIAMS, TR-II at 204, 208-210);

k. That subsequent to his suspension Petitioner attempted to intimidate or threaten an investigator in response to the investigator's demand for payment of his fees (McDANIEL, TR-II at 85, 86, 140-142). Petitioner later threatened or attempted to intimidate this investigator who was subpoenaed to testify before the referee and was in a position to present damaging testimony concerning Petitioner's activities (McDaniel, TR-II at 131-133).

After considering the testimony and evidence presented at the final hearing, the Referee issued a report dated December 11, 1987 recommending that the Petition for Reinstatement be denied and that Petitioner be required to pay all costs of the reinstatement proceeding.

The Report of Referee was considered and approved by the Board of Governors at its meeting held January 13-16, 1988.

Petitioner seeks review of the Referee's findings of fact as well as the recommendation that Petitioner's reinstatement be denied and that the investigative costs be charged to Petitioner.

The Florida Bar recommends approval of the Report of Referee pursuant to which The Florida Bar seeks an order denying Petitioner's reinstatement and requiring Petitioner to pay the costs of this proceeding, including the investigative costs incurred by The Florida Bar.

SUMMARY OF ARGUMENT

As a finder of fact, a referee weighs the evidence and credibility of witnesses. A referee's findings are presumed correct and will be upheld unless clearly errous and lacking in evidentiary support.

In the instant case the referee carefully considered the evidence and issued a report with specific citations to the record in support of the findings. Petitioner has failed to establish that the referee's findings lack evidentiary support.

The issue in a reinstatement proceeding is the petitioner's character and fitness to resume the practice of law. Not only has Petitioner in the instant case failed to meet his burden of establishing unimpeachable character and fitness but through the testimony and evidence presented in opposition to reinstatement The Florida Bar clearly and convincingly established Petitioner's unfitness.

The Rules of Discipline do not prohibit the inclusion of Bar investigative costs as a cost of proceeding. Reinstatement proceedings, by their nature, require an investigation involving a petitioner's character and his activities subsequent to his suspension. The costs of such investigation should be assessed against the petitioner.

ARGUMENT

I. THE REFEREE'S FINDINGS OF FACT AND RECOMMENDATION THAT PETITIONER BE DENIED REINSTATEMENT IS SUPPORTED BY THE EVIDENCE.

The Supreme Court has held that the license to practice law is a privilege, not a right; a petitioner in a reinstatement proceeding has the heavy burden of proving his fitness in terms of integrity as well as professional competency. Petition of Wolf, 257 So.2d 547, 549 (Fla. 1972). Further, the argument of a petitioner that he should be reinstated because he has "paid his debt" and has suffered sufficient punishment has been specifically rejected by the Court. Id at 548, 550.

Although a wide range of factors may be considered in determining whether an attorney should be permitted to resume the practice of law, The Florida Bar in re Rubin, 323 So.2d 257 (Fla.1975), the basic elements which should be considered include the nature of the offense which resulted in the disciplinary action, evidence of unimpeachable character and moral standing, and strict compliance with the specific conditions of the disciplinary order. Wolf at 549. Moreover, the Supreme Court has held that demonstrating rehabilitation requires more than "recitations of intent and contrition." Rubin at 258.

It is the Bar's position that the testimony of Petitioner and his character witnesses does not establish unimpeachable character and fitness to resume the

practice of law. Moreover, although The Florida Bar does not have the burden of proof in reinstatement proceedings, the evidence presented by The Florida Bar demonstrates, clearly and convincingly, that Petitioner does not have unimpeachable character, that he failed to strictly comply with his suspension order and that he displayed a lack of candor in this proceeding in both his response to discovery submitted to The Florida Bar and in his testimony before the referee at the final hearing. Accordingly, the referee's recommendation to deny reinstatement is fully warranted.

This Court has held that a referee's findings of fact are presumed correct unless clearly erroneous or lacking in evidentiary support. The Florida Bar v. Neely, 502 So.2d 1237, 1238 (Fla. 1987). Although the arguments presented by Petitioner in his Initial Brief reflect disagreement with the referee's findings, Petitioner fails to demonstrate that the referee's findings are without support in the record or are clearly erroneous. In fact, in the report the referee cites to specific pages in the record which support each factual finding. (See Neely at 1238 wherein this Court noted the referee's specific citations to the record. After reviewing the report and the record in that case, the Court concluded that substantial competent evidence supported the referee's findings).

Further, Petitioner's argument that the Referee "overlooked" the testimony of Petitioner's witnesses ignores the fact that the Referee's report specifically includes a

summary of the nature of their testimony. RR at 5. Accordingly, it is apparent that the Referee did not "overlook" the testimony but, rather, did not find Petitioner's witnesses' testimony either persuasive or a sufficient basis upon which to base a recommendation for reinstatement.

The testimony of Petitioner's character witnesses reflects only the public side of Petitioner's character; to wit: the way Petitioner wants to be perceived by the public. In support of reinstatement, Petitioner recruited a motley of persons to testify on his behalf before the referee: an insurance agent, a bondsman; colleagues with whom he has had or currently has business arrangements (i.e., employers or attorneys with whom he has shared referrals); and former clients. The nature of the relationship Petitioner had with these witnesses required Petitioner to act in an exemplary manner. The witnesses contact with Petitioner is expected to have been favorable and their testimony, therefore, reflects an obvious bias.

The response to Petitioner's felony conviction by the character witnesses who knew Petitioner at the time of the criminal proceedings may be generally described as "shock" or "disbelief." (REYNOLDS, TR-I at 49; DROESE, TR-I at 124). Involvement in drug trafficking is, understandably, inconsistent with the witnesses' perception of Petitioner's reputation for integrity which was characterized by one witness as "absolutely perfect" (ADLER, TR-I at 168). This

response of "shock" or "disbelief" is significant because it demonstrates the Bar's position that Petitioner's character witnesses are familiar with Petitioner only in terms of his public persona.

Even after his conviction, Petitioner attempted to perpetuate a public persona of integrity. Petitioner's efforts in this regard are reflected in the explanations Petitioner gave to his character witnesses concerning his involvement in criminal activity, some of which were given shortly before the final hearing in this proceeding: Petitioner told one witness that he wasn't guilty (ADLER, TR-I at 173) and another witness that he had been "enticed" to protect a woman (REYNOLDS, TR-I at 52, 53) and gave several witnesses the clear impression that he was a victim of circumstance (i.e., in the wrong place at the wrong time) (REYNOLDS, TR-I at 53; CLARK, TR-I at 100; DROESE, TR-I at 131; Bullough, TR-I at 155) RR at 5. It is apparent, therefore, that Petitioner attempted to explain his actions to many of his witnesses in terms which would be easily digestible, to-wit: a man who out of loyalty to his mistress sought to protect her in collecting a debt and unwittingly became involved in a drug transaction.

The testimony and evidence presented by The Florida Bar, however, unmasked Petitioner's public persona to reveal a private side of his character which is absolutely consistent with the character of Petitioner as a criminal defendant who was found guilty by a jury and sentenced to a

ten-year term of incarceration for felonies involving drugs.

The factual basis of Petitioner's criminal conviction, as recalled by WAKSMAN, the prosecutor in the criminal proceedings, evidences Petitioner's private nature and is in direct conflict with the portrayal of circumstances Petitioner furnished to his character witnesses:

> He was convicted of delivering, selling, or offering to sell two kilos of cocaine to two undercover Miami detectives.
>
> He had two cans. That would be the types of cans you might buy tomato juice or grapefruit juice in, about a foot high and maybe four or five inches in diameter, in his briefcase which I believe contained some of his legal files.
>
> There were no paper wrappings, just aluminum cans, factory sealed.
>
> He delivered them with a female codefendant to two Miami detectives.
>
> He talked up the deal, which was the phrase the detectives used. He said, "This is good stuff."
>
> One of them had to take a regular can opener and open up the can. Inside was a sealed plastic package, in each can, that had a kilo of cocaine.
>
> The price -- I remember the detectives brought $100,000.00 to the hotel room. I think the price was $46,000.00 or $48,000.00 a kilo.
>
> They even made a joke, "We have a couple of thousand dollars left over, can you give us some ounces."
>
> The testimony was that his response was, "I only deal in kilos."
>
> They tested it. When they did the preliminary field test, it was positive.
>
> Somebody said the magic words and the rest of the detectives in the next room came out and arrested everybody.

> Mr. Williams had two guns concealed upon his person. . . .
>
> I remember when the arresting officers came in, I think he went into either a bathroom or a closet.
>
> They went in there to apprehend him and there was a gun on a shelf, which he acknowledged putting there.
>
> Then when they were patting him down, either he called to their attention or they found another handgun secreted on his person somewhere.

(WAKSMAN, TR-II at 94-96)

The unsavory private side of Petitioner's character is further supported by the testimony of Bar witness, McDANIEL. McDANIEL is a private investigator who was hired by Petitioner to perform investigative services subsequent to Petitioner's felony conviction and his suspension from the practice of law. In this capacity, McDANIEL occupied the unique position as Petitioner's confidante through which he obtained confidential information involving Petitioner from Petitioner as well as other sources.

McDANIEL met petitioner during or about September 1979, subsequent to Petitioner's felony conviction and suspension from the practice of law. At that time, Petitioner was "assisting" ISIDRO RODRIQUEZ ("RODRIGUEZ") who was incarcerated at the Dade County Jail awaiting trial for murder. The assistance Petitioner provided RODRIGUEZ involved obtaining legal counsel for him (WILLIAMS, Tr-I at 237) and in obtaining information in connection with an

investigation involving his case which was being handled by McDANIEL (McDANIEL, Tr-I at 41).

McDANIEL's testimony is particularly significant in revealing the private side of Petitioner's character in the context of Petitioner's association with or involvement in the drug smuggling industry. According to McDANIEL, "there was, no doubt that Mr. Williams was involved very heavily in the trafficking of drugs." (McDANIEL, TR-II at 72).

> When I first met Mr. Williams, it was through Ysidro [sic] Rodriguez. Ysidro [sic] told us that we could trust Lewis, that he had connections with Poppo who was legally known as Alberto Dominguez and a host of other aliases.

McDANIEL, TR-II at 41.

Poppo is RODRIGUEZ's codefendant and a fugitive from justice (McDANIEL, Tr-II at 44, 45). He "ran an organized enterprise for smuggling activities" (McDANIEL, Tr-II at 42). Poppo was also known as "the baker" because he owned bakeries in Broward, Miami and Palm Beach which were used to manufacture bread filled with cocaine which was transported around the city (McDANIEL, Tr-II at 45).

McDANIEL's testimony establishes that Petitioner knew Poppo "very well". In fact Petitioner was introduced to McDANIEL as a connecting link ("go-between") with Poppo as a source of both information and funds from Poppo for investigative and legal fees in connection with RODRIGUEZ's case. (McDANIEL, Tr-II at 45-47).

> As the relationship continued, we got to know Mr. Williams personally and he routinely stated that he was in touch with Poppo regularly, and they are trying to come up with investigative funds.

> He [Petitioner] was receiving attorney fees from Poppo that were paid to the Law Firm of Pollack & Casuso, or whatever names they go by, and it continued on.
>
> So his [Petitioner's] admissions were to me that he [Petitioner] was connected with Poppo, that he [Petitioner] knew Poppo's whereabouts. He (Petitioner) brought to me information with regard to some of the officers that were involved in corruption in the Miami Police area that were involved with his case as well as Ysidro Rodriguez's case.
>
> Some of the leads he provided, we followed up on and we exchanged information with him [Petitioner]. (Emphasis added)

(McDANIEL, Tr-II at 46)

McDANIEL's testimony concerning Petitioner's relationship with Poppo is significant because it clearly demonstrates that even after his felony conviction and suspension from the practice of law, Petitioner maintained an association with and acted as an intermediary for persons involved in drug smuggling.

Moreover, McDANIEL's testimony concerning the nature and purpose for which he was retained in connection with investigating matters involving Petitioner's case further corroborates the private, unethical, side of Petitioner's character.

McDANIEL and Petitioner were in frequent communication with each other during the investigation involving RODRIGUEZ's case (McDANIEL, Tr. at 52). In November 1979, while RODRIGUEZ's investigation was pending and after Petitioner's conviction had been affirmed on appeal (WILLIAMS, Tr-II at 241), Petitioner retained McDANIEL to

investigate matters on behalf of himself and his codefendent, NURIA IZQUIERDO ("NURIA") (McDANIEL, Tr. at 53, 170).[1] Pursuant to this investigation McDANIEL was directed to locate and interview the jurors to determine if they had been prejudiced or dominated by any particular juror as well as to locate and interview the confidential informant (McDANIEL, Tr-II at 60; WILLIAMS, Tr-I at 241).

The trial court, however, had previously denied Petitioner's motion to disclose the confidential informant (WAKSMAN, Tr-II at 98) and access to the informant was, therefore, prohibited. McDANIEL first learned of the Court's ruling prohibiting access to the confidential informant from GEORGE LOPEZ, a police officer who was the controlling agent/officer for the informant and who was also present during Petitioner's arrest and was a witness in Petitioner's case (McDANIEL, Tr-II at 64).

> He [Lopez] told me that the Judge had ordered that the informant's identity not be stated, there he was not to testify and he was in fear of his safety, and that he would hold me responsible if something happened with regard to his safety.

(McDANIEL, Tr-II at 64).

Further, Petitioner's directive to McDANIEL to conduct postverdict interviews of jurors was improper. Disciplinary

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1/JESUS AMATO, NURIA IZQUIERDO and Petitioner were codefendants, tried separately. NURIA and Petitioner were convicted (McDANIEL, TR-II at 55). AMATO owned the cocaine and made the deal (WILLIAMS TR-II at 243). AMATO was acquitted (McDANIEL, TR-II at 55).

Rule 7-108(D) of the Code of Professional Responsibility (in effect during the 1979-1980 period in question) and Ethical Cannon 7-29 to which the Rule refers provides:

> After dismissal of the jury in a case with which he is connected, a lawyer shall not communicate with or cause another to communicate with any juror regarding the trial except to determine whether the verdict may be subject to legal challenge, in which event he shall scrupulously follow the procedure described and provided for in EC 7-29 hereof.

(Disciplinary Rule 7-108(D) of the Code of Professional Responsibility)

* * *

> Subject to any limitations imposed by law it is a lawyer's right, after the jury as been discharged, to interview the jurors solely to determine whether their verdict is subject to any legal challenge provided he has reason to believe that ground for such challenge may exist, and further provided that prior to any such interview made by him or under his direction, he shall file in the cause, and deliver a copy to the trial judge and opposing counsel, a notice of intention to interview such juror or jurors setting forth in such notice the name of each such juror. The scope of the interview should be restricted and caution should be used to avoid embarrassment to any juror and to avoid influencing his action in any subsequent jury service.

[Ethical Cannon 7-29 (emphasis added)]

Petitioner has admitted that he directed McDANIEL to interview the jurors without ensuring that proper notice of intention to interview was filed (WILLIAMS, Tr-II at 246).

Petitioner's instructions to McDANIEL are particularly suspect when considering the testimony of his character witnesses who testified that Petitioner's knowledge of law and procedure was excellent (REYNOLDS, TR-I at 45; CLARKE, TR-I at 92; DROESE, TR-I at 123). In fact one of Petiti-

oner's character witnesses stated that Petitioner had a "tremendous knowledge of civil and criminal procedure. I think he could probably recite the rule books verbatim" (FELIU, Tr-I at 16). Thus, the question arises as to how an attorney with such a thorough comprehension of law and procedure could be unaware of the rules pertaining to postverdict interrogation of jurors.

The Bar maintains that Petitioner was fully aware of the rules governing postverdict juror interrogation as well as the impropriety in contacting a confidential informant in violation of the court's directive. Petitioner, however, chose to ignore these rules and accomplish indirectly, through McDANIEL, what he could not do directly. The Bar does not accept, nor is there any evidence in the record to support, Petitioner's suggestion that his actions in this regard were the result of "emotional unrest." On the contrary, Petitioner's actions reflect a calculated effort to circumvent the rules; such conduct is consistent with the private side of Petitioner's character, known only to a witness such as McDANIEL who was privy to this side of Petitioner's character.

Another example of the private, unethical, side of Petitioner's character is reflected in Petitioner's directive to McDANIEL to "feel out" the police officer and witness GEORGE LOPEZ (McDANIEL, Tr-II at 65, 66). In this manner, Petitioner attempted to utilize McDANIEL as an intermediary to solicit a bribe.

At a later point in his relationship with McDANIEL, Petitioner attempted to intimidate McDANIEL through the use of threats. Prior to surrendering to begin his prison sentence, Petitioner lead McDANIEL to believe that McDANIEL's bill for investigative services would be paid from referral fees which were being collected on his behalf by Gloria, a courthouse clerk (McDANIEL, Tr-II at 852-53). After repeated attempts to collect his bill from Petitioner had failed, McDANIEL directed his attorney to send Petitioner a demand letter. McDANIEL's attorney sent Petitioner a demand letter dated October 29, 1982. In response to this letter, Petitioner left a threatening telephone message with McDANIEL's telephone answering service, inquiring "how is your health?" (McDANIEL, TR-II at 85, 86, 140-142).

Another more recent example of Petitioner's use of threats or subtle intimidation occurred in June 1987, prior to the final hearing in this matter. Shortly after receiving a subpoena to attend the final hearing, McDANIEL received in the mail various documents, including a corporate document and a copy of his occupational license, with his street address, and on at least one document his suite number, circled (McDANIEL, TR-II at 131). McDANIEL operates his business through a post office box and does not publish a business street address (McDANIEL, TR-II at 132, 133). McDANIEL characterized the communication he received as a threat: it "is an indication that somebody knows exactly which office suite I have, which is very protected."

(McDANIEL, TR-II at 132). Based upon his knowledge of Petitioner, McDANIEL attributes this threatening communication to have been directed to him by Petitioner (McDANIEL, TR-II at 131, 132).

Both the 1987 communication and the 1982 verbal threat McDANIEL received from Petitioner are consistent with the private, unethical, side of Petitioner's character. In April 1986, several months before filing his petition for reinstatement, Petitioner settled the lawsuit that McDANIEL had filed against him to collect his fees. (WILLIAMS, TR-I 233, 235). The Bar suggests that after settling this civil matter with McDANIEL and satisfying the judgment, Petitioner did not anticipate that the Bar would inquire further concerning this debt and he did not, therefore, expect McDANIEL to appear as a witness in these proceedings. When he learned that McDANIEL had been subpoenaed to appear, and understandably concerned with the nature of McDANIEL's testimony, Petitioner let McDANIEL know in terms which were absolutely clear to McDANIEL that he could be located.

McDANIEL's comments concerning Petitioner's character best summarize the private side of Petitioner:

> He lacks morality, he lacks -- he exhibits no professional respect or any professionalism that would be deserving of respect.
> To me, he is what justice is not about.

(McDANIEL, TR-II at 137)

Further, in commenting as to his opinion as to Petitioner's reputation for truth and veracity, McDANIEL stated

"my firsthand experience is that he is a liar" (McDANIEL, TR-II at 137).

Petitioner's representations to the referee at the final hearing, as well as his lack of candor with The Florida Bar in his response to discovery, are consistent with McDANIEL's comments concerning Petitioner's character and reputation for truth and veracity as demonstrated by the following:

(a) Who's Poppo?

When Petitioner was asked by his attorney at the final hearing about his relationship with Poppo, Petitioner gave the impression that he had little, if any, recollection of "Poppo".

> I don't know who he [McDANIEL] is talking about but I think the name coincided to a former client. Just a second. If somebody could help me out on who that guy was -- it's the same guy. I represented him some six or eight months prior thereto on a firearm possession and a small possession of cocaine. There was a jury trial with Wilkie Ferguson.
>
> Alberto Dominguez -- that sounds like the same guy.
>
> [Petitioner's counsel]: Did you know an individual named Poppo?
>
> [Petitioner]: I think that's just a Latin name for father, a courtesy name. I am sure I heard the name before, but you hear it every day in the Latin community.

(WILLIAMS, TR-II at 192)

McDANIEL's correspondence to Petitioner dated September 12, 1979 (PET EX 6) corroborates McDANIEL's testimony and reflects that Petitioner was involved in assisting

McDANIEL's investigation in RODRIGUEZ's case. Page 3 of McDANIEL's letter to Petitioner (PET EX 6) refers to Poppo in a manner which substantiates Petitioner's familiarity with Poppo.[2] In fact, McDANIEL suggests the scheduling of a meeting with Poppo in Petitioner's office. Accordingly, it is apparent that Petitioner lacked candor in his testimony before the referee concerning his knowledge of or involvement with Poppo.

(b) Obtaining counsel for RODRIGUEZ and payment of RODRIGUEZ's legal fees.

Although at final hearing Petitioner admitted that he was trying to find a lawyer for RODRIGUEZ (WILLIAMS, TR-II at 238, 239), Petitioner denied any knowledge as to how RODRIGUEZ came to be represented by PAUL POLLACK's office.

> [Petitioner]: . . . I offered it to Mr. Barone and he wouldn't take it. I offered it to Judge Stedman and he wouldn't take it.
>
> It finally ended up in Paul Pollack's office. Paul Pollack has a very busy law firm. He has several ex-prosecutors working for him. They ended up with the case somehow. (emphasis added)

(TR-II at 238)

* * *

> [Bar Counsel]: When you indicated that Mr. Rodriguez had asked you about an attorney, did you recommend an attorney to him?
>
> [Petitioner]: I recommended two or three lawyers. It never jelled.
>
> [Bar Counsel]: Who did you recommend?

2/Both "Poppa" and "Poppo" refer to the same person, Alberto Dominguez, and are used interchangeably.

[Petitioner]: Mr. Barone, for one. He wouldn't take the case.

Eventually, somehow he got around to Pollack's office.

[Bar Counsel] How did he get to Mr. Pollack's office?

[Petitioner]: I don't know.

[Bar Counsel]: Did you recommend Louis Casuso?

[Petitioner]: No.

[Bar Counsel]: Did you recommend Mr. Pollack?

[Petitioner]: No.

(Tr-I at 244, 245)

* * *

[Bar Counsel]: You are saying Mr. Rodriguez got to Mr. Pollack on his own?

[Petitioner]: I don't know how he got to him. he may have been appointed as a special public defender . . . .

(TR-I at 245)

Petitioner's denial of involvement in recommending and/or securing PAUL POLLACK's firm as counsel for RODRIGUEZ is refuted by McDANIEL in his detailed testimony concerning his visit to PAUL POLLACK's office which, McDANIEL claims, was arranged by Petitioner (McDANIEL, Tr-II at 49, 51).

Moreover, in response to inquiry by Bar Counsel, Petitioner initially denied both paying POLLACK any fees as well as handling <u>any money on RODRIGUEZ's behalf</u> (WILLIAMS, TR-II at 245, emphasis added). However this position is contradicted by Petitioner's subsequent testimony that "somebody", he couldn't remember who, gave him $1,000.00

cash for RODRIGUEZ's legal fees (WILLIAMS, TR-II at 191) which was given to Carling Stedman, one of the attorneys Petitioner had contacted, as a deposit. (WILLIAMS, TR-II at 191).

> [Petitioner's Counsel]: How much was the deposit?
>
> [Petitioner]: One thousand dollars.
>
> [Petitioner's Counsel]: How did he [Carling Stedman] get that one thousand dollars?
>
> [Petitioner]: I gave it to him
>
> [Petitioner's Counsel]: Where did you get the one thousand dollars?
>
> [Petitioner]: That was the same one thousand dollars that had been floating around for about a week, trying to find a lawyer. I believe his wife gave it to me.

(TR-II at 191)

Petitioner's lack of candor in this regard is further substantiated by the testimony of McDANIEL wherein McDANIEL describes, in detail, a meeting, attended by himself, Paul POLLACK, Petitioner and NURIA where, in Petitioner's presence, Pollack received SIX THOUSAND THREE HUNDRED DOLLARS ($6,300.00) for legal fees for representing RODRIGUEZ (McDANIEL, Tr-II at 52).

Further, in his response to a Bar Interrogatory requesting the address of any real property in which Petitioner owned, or subsequently acquired, an interest in since January 1979, Petitioner failed to include a duplex (rental property) which he owned on January 1, 1979. Petitioner transferred title to the property to his son on January 2, 1979. (TR-I at 229; Interrogatory No. 5).

Was Petitioner's omission merely an oversight? Apparently not. An intentional omission is suggested by the fact that Petitioner continued to pay the taxes, collect the rent and maintain the property (WILLIAMS, TR-I at 201, 229-230) and yet he failed to include these payments as monthly obligations (expenses) in response to another Bar Interrogatory (Interrogatory No. 13).

Certainly in reinstatement proceedings where character, truth and veracity is the issue, it is reasonable to expect a petitioner to be most candid and forthright in responding to discovery so as to avoid the possible conclusion that a truthful answer might lead to disclosure of a fact which the Petitioner preferred to be kept hidden. For example, in this case Petitioner's response might have been an attempt to avoid disclosure of the fact that he owned or is involved with property which has been the subject of numerous Housing Code violations (WILLIAMS, TR-I at 231-232).

In addition, The Florida Bar established at the final hearing that Petitioner failed to strictly comply with the suspension order. In his testimony in this proceeding Petitioner attempted to give the impression that he had scrupulously complied with his suspension order and ceased practicing law in May 1979, upon receipt of the Court order denying his petition for clarification pursuant to which he was suspended effective February 1979. (WILLIAMS, TR-II at 73, TR-II at 23).

Rule 11.10(7), Integration Rule of The Florida Bar which

was in effect at the time Petitioner was suspended, required:

> Upon service on the respondent of an order of disbarment, suspension, resignation for cause, temporary suspension, or placement on the inactive list, the respondent shall, unless this requirement is waived or modified in the court's order, forthwith furnish a copy of the order to all of his clients with matters pending in the respondent's practice, and within 30 days after service of the order, the respondent shall furnish staff counsel of The Florida Bar with a sworn affidavit listing the names and addresses of all clients who have furnished copies of the order.

Petitioner admits that he failed to strictly adhere to these requirements (WILLIAMS, TR-I at 74; TR-II at 23). Petitioner's excuse is "nobody said to do that." (WILLIAMS, TR-I at 23). Yet, as a member of The Florida Bar, Petitioner is charged with "notice and held to know the provisions of the Integration Rules and the standards of ethical and professional conduct" prescribed by the Supreme Court. Rule 11.01 (1), Integration Rule of The Florida Bar.

Not only did Petitioner fail to adhere to the technicalities of closing his practice as required by the Integration Rule, but Petitioner permitted his trust account to remain open and active subsequent to his suspension (Bar EX 2; TR. at 29-35). In fact Petitioner's trust account was closed on May 23, 1980 (EX 2), subsequent to Petitioner's incarceration in February 1980 (WILLIAMS, TR-I at 75).

The Florida Bar was able to obtain from the bank a copy of one of the checks issued by Petitioner from his trust account subsequent to his suspension. This check was issued

on January 15, 1980 and made payable to a physician in connection with a client matter (EX 3; TR-II at 34). Petitioner admitted that at the time the check was issued, he was suspended (WILLIAMS, TR-II at 35)

When asked by his counsel, Petitioner first attempted to explain that the check was written on his personal account (TR-II at 204). During cross-examination, Petitioner was confronted with his bank statement and account number. He was evasive in his response and was not forthright in admitting that the check, was in fact, drawn on his trust account. TR-II at 207, 208.

> [Bar Counsel]: Is that check drawn on your escrow account?
>
> [Petitioner]: I don't know.
>
> [Bar Counsel]: Comparing the number and the amount reflected on the statement.
>
> [Petitioner]: It appear to be the same number.
>
> [Bar Counsel]: Your Check No. 599 did not reflect escrow account on it, did it?
>
> [Petitioner]: It does not.
>
> [Bar Counsel]: But it was in fact an escrow account, is that correct?
>
> [Petitioner]: According to that record, it is. But if you are asking me if I have personal knowledge, I don't know.
>
> * * * *
>
> [Bar Counsel]: Mr. Williams, did you not give the Bar this check and reflect that it was a check on your escrow account?
>
> [Petitioner]: I did, but I could be mistaken. I thought that was my escrow account check.
>
> [Bar Counsel]: Is this check from the same account

-- the check which you presented to The Florida Bar, a blank check No. 776 drawn on the Riverside Bank with this account number here, which you identified as an escrow account check, the same account as Bar Exhibit No. 3?

[Petitioner]: It appears to be similar, Judge, although I didn't identify it as escrow.

[Bar Counsel]: Let me show you the letter which you sent to The Florida Bar (handing). Do you not refer to an escrow account in that letter?

[Petitioner]: Yes, I did.

[Bar Counsel]: What bank is referred to in that letter?

[Petitioner]: Riverside Bank.

[Bar Counsel]: I ask you one more time, Mr. Williams, is Bar Exhibit No. 3 a copy of a check drawn on your escrow account?

[Petitioner]: I don't know.

[Bar Counsel]: Will you look at the number on that check and look at the statement upon which the check appears to have been ---

[Petitioner]: I have looked at them, all three.

[Bar Counsel]: Is there a similarity in the number?

[Petitioner]: Yes, there is.

[Bar Counsel]: Is it the same number?

[Petitioner]: Yes it is.

[Bar Counsel]: Is that account your escrow account?

[Petitioner]: I think it is. I'm not positive.

WILLIAMS, TR-II at 208-210

The Florida Bar maintains that evidence of activity in an attorney's trust account subsequent to his suspension is prima facia proof of a failure to comply with the

disciplinary order and rebuts Petitioner's sworn testimony that upon receipt of the Court order in May 1979, he "immediately, within ten minutes" "shut down" his law practice (WILLIAMS, Tr-II at 23). Regardless of the extent of the activity, practicing law while under suspension is clearly in direct violation of the suspension order.

Such conduct is not, as Petitioner argues, a minor transgression and Respondent's failure to be forthright in his testimony in this regard is but another instance of Respondent's lack of candor in this proceeding.

It is apparent from the referee's report that the referee carefully considered all the testimony and evidence presented and in recommending the denial of the petition, the referee was persuaded by the evidence presented by The Florida Bar in opposition to reinstatement. As a fact finder for the Supreme Court, a referee judges the credibility of the witnesses and resolves any conflicts in the evidence. The Florida Bar v. Stalnaker, 485 So.2d 815, 816 (Fla. 1986).

A Petitioner's right to reinstatement is not determined by the number of witnesses he recuits to testify on his behalf. A Petitioner must meet his burden of establishing fitness to resume the practice of law which specifically includes evidence of unimpeachable character. There is no case law cited by Petitioner which would support the reinstatement of an attorney of either questionable character or one who manifests a lack of candor in his

testimony before the referee.

The cases cited by Petitioner as authority for reinstatement are distinguishable from the case sub judice. In The Florida Bar in re Whitlock, 506 So.2d 400 (Fla. 1987), the Supreme Court found that the petitioner's evidence of unimpeachable character was completely unrebutted and that the findings of the referee were not supported in the record.

In The Florida Bar in re Inglis, 471 So.2d 38 (Fla. 1985) there was no factual matter in dispute. The Supreme Court found that the referee's conclusion that Petitioner was morally unfit was improperly based upon a finding that Petitioner, acting as a broker, had a legal or fiduciary duty to disclose to his co-owners of property his intent to sell his investment at a profit. Moreover, the Court found that Petitioner's conviction of the offense of culpable negligence as the result of a shooting accident occurring fifteen years prior did not involve specific criminal intent or moral turpitude and should not preclude a finding of good character. Thus in Ingles both the date of the occurrence of the criminal offense as well as the nature of the criminal offense (i.e., an accidental shooting) was considered by the Court in rejecting consideration of remote criminally negligent conduct as evidence of unfitness. This is clearly not the situation in the instant case where Petitioner's offense involves drug trafficking and does not involve negligent conduct, criminal or otherwise.

Moreover, unlike the instant case, in both Whitlock and Inglis, the referees found that the petitioners had compiled with prior disciplinary orders.

The Florida Bar in re: Ragano, 403 So.2d 401 (Fla. 1981) is distinguishable from the instant case in that in Ragano the referee found that the petitioner had been rehabilitated, and that he had complied with the suspension order. The Referee also considered the nature of the criminal offense (tax evasion) and the fact that The Florida Bar did not produce any witness who testified contrary to the conclusions of Petitioner's witnesses. These factors are not present in the case sub judice.

It is the Bar's position that the testimony and evidence presented in opposition to reinstement clearly and convincingly established Petitioner's lack of fitness. Such evidence is neither minor in nature nor is it limited to the time period during or shortly after Petitioner's suspension (e.g., Petitioner's lack of candor in his response to discovery and his testimony before the referee occurred in 1987 during the course of this reinstatement proceeding).

It is the function of a referee, as a fact finder, to determine whether the evidence presented by a Petitioner warrants a recommendation for reinstatement. The referee in the case sub judice has carefully weighed the evidence and as indicated by the recommendation to deny reinstatement has concluded that Petitioner is not fit to resume the practice of law.

II. THE RULES OF DISCIPLINE DO NOT PROHIBIT TAXATION OF BAR INVESTIGATIVE COSTS AGAINST PETITIONER

Rule 3-7.5(k)(1), Rules of Discipline provides, in pertinent part, that a referee's report shall include:

> A statement of costs of the proceedings and recommendations as to the manner in which costs should be taxed. The costs shall include court reporter's fees, copy costs, witness fees and traveling expenses, and reasonable traveling and out-of-pocket expenses of the referee and bar counsel, if any. . . . (emphasis added)

Although the aforementioned Rule requires the inclusion of the specific costs listed therein, there is no language of limitation, such as "the costs shall only include" or "shall be limited to". Accordingly, a referee has the authority to consider Bar investigative costs as a cost of the proceeding and to recommend that these costs be taxed against Petitioner.

Further, the amount of investigative time and resulting costs in a reinstatement proceeding is reflective of the difference in nature between reinstatement and disciplinary proceedings: a disciplinary proceeding is narrow in focus, based upon a complaint upon which probable cause has been found; a reinstatement proceeding, however, is much broader in focus and require extensive investigation into Petitioner's character, background and activities.

In the instant case Petitioner's activities beginning in 1979 (the date of his suspension) were investigated. Recovery of these investigative costs from Petitioner, as an attorney whose felonious conduct necessitated this

proceeding and investigation, is fully justified. Disallowance of these costs places an unfair burden on The Florida Bar members in good standing whose dues are used to support investigations of this nature.

Moreover, the nature or quantity of the information obtained through a Bar investigation is not a proper basis to object to payment of the costs and does not support a conclusion that the investigation itself was unwarranted. Notwithstanding this position, Petitioner's argument that the investigation in the instant case was "futile" or did not "turn up" witnesses ignores the fact that it was through such investigation that information was obtained which suggests that Petitioner was less than candid in his response to Bar discovery. For example, the investigation revealed that Petitioner had an interest in property as of January 1, 1979 and continued to pay taxes, the mortgage and other expenses subsequent to his transfer of title to the property to his son. This information was not disclosed in Petitioner's Answers to the Bar's Interrogatories (TR-I at 229, 230, 232). Through investigation The Florida Bar further learned that this property was the subject of housing code violations (TR-I at 231, 232).

Accordingly, as a general principle in reinstatement proceedings, The Florida Bar should be entitled to reimbursement of its investigative costs. Further, the Rules of Discipline do not prohibit a referee from considering the Bar's investigative costs as a cost of

proceeding and recommending the taxation of these costs against the Petitioner.

CONCLUSION

The Referee's findings and recommendation are fully supported by the record in this case. The Florida Bar recommends that the Supreme Court approve the Report of Referee and enter an order denying reinstatement and assessing all costs, including the Bar's investigative costs, against Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original of the Answer Brief of The Florida Bar was mailed by Federal Express to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32301, and that a true and correct copy was mailed by Federal Express to John A. Weiss, Attorney for Respondent, 101 N. Gadsden Street, Tallahassee, FL 32302 this 2nd day of April, 1988.

Patricia S. Etkin

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