IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR
Re: RUSSELL T. SICKMEN
Petition for Reinstatement

Case No. 70,047

PETITIONER'S ANSWER BRIEF

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INTRODUCTION

The appellee in these proceedings, RUSSELL T. SICKMEN, shall be referred to as the petitioner in this brief. The appellant, THE FLORIDA BAR, shall be referred to as such or as the Bar.

References to the transcript of final hearing shall be referred to by the designation TR followed by the appropriate page number. There were seven depositions entered into evidence. References to those depositions shall be designated by the use of the abbreviation Depo/ followed by the deponent's name.

STATEMENT OF THE CASE AND FACTS

Petitioner accepts the Bar's statement of the case as written.

Petitioner has no disagreement with the statement of facts in the Bar's brief. However, Petitioner believes a more thorough discussion of the record is necessary to adequately apprise this court of the circumstances surrounding this case.

Petitioner has been a member of the New York Bar since 1974. Throughout his career, he practiced law in that state. In 1975, Petitioner was admitted to The Florida Bar.

On September 15, 1983, an information was filed against Petitioner in the United States District Court for the Southern District of New York charging him with conspiracy to commit mail fraud in 1978 and early 1979. In Federal Court such a crime is a felony. Under the laws of the states of Florida and New York, conspiracy to commit mail fraud is a misdemeanor. Petitioner was convicted of the crime charged on November 13, 1983.

Petitioner was sentenced to thirty days incarceration and 450 hours community service to be performed during his three years of probation. Petioner was also required to pay restitution to an insurance company in the amount of $14,750.00. That restitution was paid in 1984.

Petitioner was discharged from probation in May 1987. (TR 7).

On November 13, 1984, this court suspended Petitioner pursuant to the felony conviction suspension rule effective December 13, 1983. Subsequent to that order, the Bar brought disciplinary proceedings against Petitioner. Final hearing was held on December 12, 1985 before this court's referee. The referee recommended that Petitioner be suspended from the practice of law in Florida for a period of 3 years, effective December 1983, and thereafter until he proves rehabilitation and passes the Bar's ethics exam.

The Florida Bar did not appeal the referee's recommendation that Petitioner be suspended for three years.

This court adopted the referee's recommendations in an opinion reported at **The Florida Bar v. Sickmen**, 491 So.2d 274 (Fla. 1986).

On February 12, 1987, Petitioner filed his petition for reinstatement in this court. Final hearing was held in Tallahassee, Florida on June 4, 1987. On July 20, 1987, a copy of the referee's report recommending reinstatement was served on the Florida Bar. On September 17, 1987, seven months after the petition for reinstatement was filed, The Florida Bar served its petition for review.

At final hearing, Petitioner submitted in evidence the depositions of seven witnesses attesting to his good character,

professional ability and rehabilitation. Petitioner also testified in his own behalf.

The Florida Bar presented no witnesses at final hearing.

The first witnesses to testify on the Petitioner's behalf was Harry Organek, a New York lawyer practicing since 1974.

Mr. Organek has known the Petitioner for over five years and has had contact with him two to four times a month since his suspension. Mr. Organek testified that he maintained a social contact with the Petitioner but, at times, they

> would discuss legal matters, but only in terms of what the recent case law was. He was interested in keeping up with the changes in the law.

When asked about the Petitioner's reputation for legal ability in the legal community prior to his suspension, Mr. Organek replied:

> His reputation was of an attorney who was highly competent and who took a great personal interest in each particular case that he handled.

Mr. Organek also testified that both prior to and after his conviction, Petitioner had a good reputation for truth and veracity.

After opining that Petitioner would never repeat the conduct which lead to his conviction and suspension, Mr. Organek stated the basis for his belief as follows:

> Because he is a person of good reputation for truth and veracity. I believe that he is an honest individual, and the incident involving the conviction that he had, I think was an aberration and something that occurred many, many years ago.

> He has said to me, many times, that he realizes it was a very stupid thing that he did and that it was a mistake, and it was something he would absolutely never do again. He recognizes that practicing in his profession demands a high degree of ethical conduct. He plans on maintaining such a degree in the future. (Depo/Organek 11).

Mr. Organek testified that he would have no reluctance to refer clients or to entrust Petitioner with escrow funds should he be reinstated.

The second witness to testify through deposition on Petitioner's behalf was David Grey, a lawyer practicing in New York since 1964.

Mr. Grey has known petitioner for twelve years in a strictly professional capacity. He testifed that Petitioner had an "excellent" reputation for legal ability prior to his conviction and that his reputation in both the legal community and the general community for truth, veracity and moral character was also "excellent". (Depo/Grey 5)

Mr. Grey further indicated that the Petitioner had never evinced any animosity towards The Florida Bar for suspending him and that he would have no reluctance to refer friends, relatives or clients to the Petitioner for the handling of their legal matters or to entrust Petitioner with escrow funds.

A third New York lawyer, Peter Kolbrener, also testified on Petitioner's behalf.

Mr. Kolbrener has been a lawyer for twenty six years. He testified that he first met Petitioner when he was a law clerk. Mr. Kolbrener became reacquainted with the Petitioner approximately six years ago when Petitioner asked Mr. Kolbrener to do some trial work for him.

Mr. Kolbrener testified that Petitioner "did very good work" in the law office. However, when asked if he knew how many trials Petitioner had handled, Mr. Kolbrener answered , "I don't know" (Depo/Kolbrener 9). Later, despite his early assertion that he did not even know if the Petitioner had done any trial work, Mr. Kolbrener opined that Petitioner should associate trial counsel with any of his cases that were to go before the jury (Depo/Kolbrener 18, 19).

Mr. Kolbrener also testified as to the manner in which Petitioner wound down his New York practice. He testified that most of the Petitioner's cases went to him and that the requirements of New York law requiring the transfer of cases was followed (Depo/Kolbrener 14).

Petitioner continued to receive fees for work done on Kolbrener's cases prior to Petitioner's suspension. However, all such fees were expressly approved by a Judge before they were paid.

Mr. Kolbrener said that he would have no reluctance to refer clients to the Petitioner and that he thought it was "positively crazy" to think that the Petitioner would ever take any funds out of trust.

The fourth witnesses to testify for thePetitioner was Rosalyn Kushner, a speech language pathologist and audiologist. Mrs. Kushner is the wife of the Rabbi of Petitioner's temple. She is also the director of management and planning for Families Organized for Community Understanding of Strokes (FOCUS).

FOCUS is a peer support group that is run by volunteers who are professionals.

When Petitioner was sentenced to 450 hours community service, he volunteered to work for FOCUS. Ms. Kushner, who had known Petitioner about three or four years at that time, recommended to the Board of Trustees of FOCUS that he be allowed to do his community service for the organization. Ms. Kushner testified that, when recommending Petitioner's employment to the Board, she had "no doubt at all" that Petitioner was a person of integrity and would fulfill his obligations in a forthright manner. (Depo/Kushner 7)

Ms. Kushner testified that Petitioner worked for FOCUS for approximatley 2 1/2 years. She further testifed that although Petitioner only had to put in 450 hours for FOCUS,

> He put in well over 500 hours and continued to show interest in the group long after it was really necessary, as far as his hours are concerned. (Depo/Kushner 7)

Ms. Kushner charactarized Petitioner's attitude towards FOCUS as "devoted" and observed that "he really threw himself into his work for FOCUS."

She further pointed out that

> He was concerned about the individual people and, as I said, he followed up even after he was no longer really involved in the organization. (Depo/Kushner 9)

When asked about Petitioner's reputation in the community for truth, veracity and integrity, Ms. Kushner stated that subsequent to his conviction "he has regained the trust of the people" (Depo/Kushner 11).

Ms. Kushner's husband, Rabbi Paul Kushner, was the fifth person to testify for Petitioner. Rabbi Kushner has known Petitioner for seven or eight years and has a "congregant relationship" with him. Rabbi Kushner testified that Petitioner is a very active member of the temple's Men's Club and is moderately active in the congregation. He testified that Petitioner has a "very, very close relationship" with his family, including taking care of a brother who has serious mental problems (Depo/Kushner 4, 5).

Rabbi Kushner testified that even before Petitioner's conviction he was very contrite and absoultely acknowledged his wrong doing (Depo/Rabbi Kushner 6). Rabbi Kushner further observed that before Petitioner's conviction, he was very highly regarded by the temple's congregation. Although the conviction negatively affected his reputation, Kushner testified that Petitioner, has once again regained the trust that he lost as a result of his misconduct (Depo/Rabbi Kushner 7).

When asked if he considered the Petitioner a person of good character and good moral standing, the following dialogue took place:

> A. Yes, I would say so, unhesitatingly.
>
> Q. Notwithstanding his felony conviction?
>
> A. Right, I think he has made a mistake. He has admitted it, he has atoned for it, and I think he may have emerged a stronger person for it.
>
> Q. Do you think it wil happen again?
>
> A. I strongly doubt it.
>
> Q. Why not?
>
> A. I think he has learned what happens when one yields to negetative temptation. I think that the reputation he has and his family status in the community means more to him then any possible gain from another unfortunate involvment. (Depo/Rabbi Kushner, 7 and 8)

Rabbi Kushner testified that he would have no reluctance to refer clients or to entrust Petitioner with escrow funds should he be reinstated.

Kenneth Paul Greenfield, a retailer and former client of Petitioner's also testified. Mr. Greenfield, who has known Petitioner since 1960, has been represented by him on many occasions, including closings on both houses and businesses, general real estate advice and on liability claims. Mr. Greenfield testified that Petitioner, while representing him, was "totally honest and forthright" and Mr. Greenfield was completely satisfied with Petitioner's services.

Mr. Greenfield also related that he has referred relatives and other persons to Petitioner for representation and has never heard any dissatisfaction from any of them. He further observed that Petitioner was highly regarded by the community for truth and veracity and that Mr. Greenfield "definitely" thinks the Petitioner is a man of integrity and honesty.

Mr. Greenfield related that Petitioner "totally" accepted blame for his wrongdoings and is sorry for his misconduct. (Depo/Greenfield 6). When asked if Petitioner was proud to be a lawyer, Mr. Greenfield answered:

> Well, let's put it this way. Russ becoming a lawyer was probably the biggest, most important thing he has ever done in his whole life. (Depo/Greenfield 7).

When asked if he thought Petitioner would be an honest lawyer if reinstated, Mr. Greenfield said

> I think you couldn't ask for a more honest, upright individual who definitely - there would be no hesitation on his honesty or ever making this type of mistake again.(Depo/Greenfield 7, 8)

Mr. Greenfield also testified that he would hire Petitioner as his lawyer, would refer others to him, and would entrust him with escrow funds. He further testified that Petitioner had never indicated to him any malice or animosity towards the Bar for his suspension.

Petitioner's final deposition witness was Dr. Andrew Schildhaus, a psychologist. Dr. Schildhaus first met Petitioner about six years ago when Dr. Schildhaus began working with some of Petitioner's clients. Dr. Schildhaus testified that Petitioner's reputation for legal ability was "excellent" and that those patients of Dr. Schildhaus who were being represented by Petitioner were pleased with his work product.

Dr. Schildhaus testified that he believes Petitioner to be an honest individual and one who is devoted to his family. He observed that Petitioner has accepted responsibility for his conviction and has never tried to equivocate about his wrongdoings. He has indicated remorse and sorrow.

Petitioner also testified in his own behalf at final hearing. He told the referee that he is 40 years old, has been married nineteen years, and that he had two children aged twelve and eight. He was admitted to the New York Bar in 1974 and to the Florida Bar in 1975.

Other than the events that led to his conviction and suspension, Petitioner has never been charged with any crime or ethical impropriety.

Petitioner did not lose his civil rights as a result of his conviction because his crime was a misdemeanor under the laws of New York. Petitioner last practiced law in New York on March 1, 1984 - the date on which his suspension in that state began.

He has not practiced law in Florida since his conviction and his Florida suspension has been effective since December 14, 1983.

Although Petitioner has been suspended pursuant to New York's interim suspension law since March 1, 1984, a formal order of discipline was not handed down until April, 1987. New York at that point in time decreed that Petitioner should be disbarred for his criminal conviction. At the time of final hearing, the order of disbarment was pending on rehearing.

The New York order of disbarment was for the same offense for which Petitioner received a three year suspension in Florida.

Petitioner testified that his offenses involved (1) his failure to advise a client that Petitioner was lending money to an individual that was purchasing the house belonging to the client; (2) his failure to disclose to an insuance company that a client of the Petitioner's falsely claimed during deposition that he lived in a house that burned down; and, (3) his submitting a proof of claim for additional living expenses to an insurance company in which it was stated that Petitioner's client lived in the house. The false claims for additional living expenses totalled $2,000.00. (TR11-17)

In September 1982, Petitioner and his client learned that a co-owner of the house had hired somebody to burn the house down.

There was no allegation that Petitioner in any way knew about the arson of the house or that he benefited from the burning of the building.

In New York, suspended lawyers are not allowed to clerk or in any way associate themselves with the practice of law. Accordingly, Petitioner's employment since his suspension has been sparse.

Petitioner testified that when he was working as a lawyer, he spent about seventy hours a week on his practice. Petitioner testifed that his devotion to his practice did not seem unusual because he had worked throughout high school, college and law school (TR 22, 23).

Petitioner confirmed Mrs. Kushner's testimony about his work for FOCUS. Petitioner was required to spend 450 hours working for FOCUS at the rate of 150 hours per year. In fact, however, Petitioner completed his requirement in approximately one year (TR24). Petitioner testified that he recorded over 500 hours working for FOCUS, and after he ceased recording his hours, he put in atleast 100 hours more. (TR24)

Petitioner has also been active in his temple's Men's Club. He has curtailed various other social work because he was constantly meeting people who knew he was a lawyer and who would seek legal advice from him, both informally and formally. He testified that each time that occurred, he had to relate that he was a suspended lawyer and it was an awkward situation (TR 25, 26).

Prior to his suspension, Respondent had incorporated and very actively worked for the Burn Alumni Supportive Association of Nassau County. This organization was a support group for the families of victims of severely burned individuals.

Petitioner was also active in two similar groups; Cancer Care and ORT. Cancer Care Volunteers assisted families of individuals suffering from cancer. ORT dealt with autistic children and those with learning disabilites.

Petitioner is not only the primary means of support for his wife and two children, but he must assist in the support of his thirty four year old brother, Robert, who is totally disabled due to psychiatric problems.

On Petitioner's petition for reinstatement, he listed substantial income for his period of suspension. Petitoner testified that those sums were all legal fees earned prior to his suspension of March 1, 1984. He testified that he transfered approximately 300 files to other attorneys on that date and that the income he received during his suspension was for work prior to the suspension. (TR31-33).

All sums that Petitioner received for legal work had to be approved by a New York Judge before they were disbursed to him (TR33).

Petitioner further testified that 90% or more of the income that he was going to receive for work done prior to his suspension had already been disbursed to him.

Petitioner candidly described to the referee while testifiying his unethical conduct. He stated that:

> The disciplinary proceeding is based upon two distinct periods or acts of unethical practice;
>
> First was not disclosing to the estate and the beneficiaries that I was making a loan to the purchasers of their property; secondly some fourteen or fifteen months later or about eighteen eighteen months later, representing Mr. Cohen in a deposition where he in fact lied about occupying a house and not correcting, first of all, not directing him to testify truthfully; number two, not stopping him from testifying falsely; three, not correcting the record; four, not notifying my adversary, who was also a member of the Bar, officer of the court; and five, permitting the fraud to be perpetrated by submitting the deposition and proof of loss forms (TR 36, 37).

Petitioner testified that he allowed his client to testify falsely in 1976 because of his "very close relationship" with the client and because of "very poor judgment on my part". (TR37)

The disciplinary penalties levied upon Petitioner have been "tremendously embarrasing" and will soon cause great financial difficulty. They also have been very emotionally draining on everyone involved, including his immediate family, his parents and his in-laws (TR37,38).

When asked whose fault the situation in which he finds himself, Petitioner replied "It's my fault. It is no one else's fault." (TR38)

Petitioner acknowledged the propriety of his being disciplined and feels that The Florida Bar treated him fairly in his disciplinary proceedings (TR39).

Petitioner was never charged with the arson of the building which was involved in the false insurance claim (TR40).

Petitioner testified that during the three to four years prior to his suspension, he always had approximately two to three hundred open cases, the majority of which were personal injury matters (TR40). He also handled real estate transactions, commercial litigation and commercial transactions not in litigation (TR40).

Petitioner testifed that he has taken nearly one hundred cases to the point where a jury was picked, and about twenty to twenty five of those cases went to a verdict (TR 41).

During his suspension, Petitioner has maintained his membership in all professional associations, with the obvious exceptions of the New York Bar and The Florida Bar, so that he could continue receiving educational periodicals from all of the organizations (TR42).

During his suspension, Petitioner has continued to subscribe to The Florida Bar Journal and the Bar News (TR42).

Petitioner took and passed the multi state ethics examination (TR43).

During his suspension, Petitioner took a four day trial practice seminar in 1985 (TR44).

Petitioner indicated to the referee during the final hearing that should he be reinstated in Florida he intended to take numerous CLE courses to refresh his knowledge of Florida law (TR44,45).

When asked if he ever wanted to again practice law, Petitioner initially replied "very much", and then elaborated:

> I very much enjoyed practicing law for a period of in excess of ten years. Obviously I enjoyed it. I was working fourteen to sixteen hours a day. I miss it very much. I want to do it because it is something I feel I have to do and want to do in order to gain some, possibly all of what I lost in reputation and professionalism. ... I need to do it because financially I need to do something at this point because monetarily things are drying up and my family has to have support. I am the only one that is going to support my family. (TR 45).

When asked what Petitioner could tell the referee to assure him that Petitioner's misconduct would not reoccur, he answered:

> It could not happen again. We are talking about something I have gone through which I can not describe more than I have already described it. It is a destruction of a career, almost a destruction of a family, obviously a financial destruction of what I though I had built up. There is no chance of this or anything similar taking place again if I was to be reinstated. (TR 47).

During cross examination, the Petitioner acknowledged to Bar Counsel that he intended to relocate to the state of Florida if reinstated and that he had actually never represented any body before a court in this state (TR48). Petitioner indicated that he hopes to associate with an existing firm in Palm Beach County should he be reinstated in Florida (TR60).

SUMMARY OF ARGUMENT

The referee appointed to preside over these proceedings found that Petitioner met his burden of proving his fitness to resume the practice of law. The referee's findings are based on substantial evidence and are not erroneous. In fact, The Florida Bar presented no witnesses and no evidence to rebutt Petitioner's evidence.

The fact that in April, 1987, the New York Bar disbarred Petitioner for the same offense for which he was suspended in Florida effective December 13, 1983, has no bearing on these reinstatement proceedings. The New York disbarment is for exactly the same offense for which Petitioner received a three year suspension from this court. Reinstatement proceedings are not an opportunity for the Board of Govenors of The Florida Bar to try to impose more severe disciplinary sanctions. The sole issue before the referee in reinstatement proceedings is Petitioner's fitness to practice law - not the propriety of the three years suspension previously handed down by the Supreme Court of Florida.

Petitioner has proved his fitness to practice law and the referee's recommendation that he be reinstated should be adopted by this court forthwith.

ARGUMENT

POINT I.

THE REFEREE'S FINDING THAT THE PETITIONER MET THE BURDEN OF PROVING HIS FITNESS TO RESUME THE PRACTICE OF LAW IS BASED NOT ONLY ON SUBTANTIAL EVIDENCE BUT IS BASED ON THE UNREBUTTED TESTIMONY GIVEN BY THE PETITIONER AND HIS WITNESSES, AND, THEREFORE, THE REFEREE'S REPORT AND RECOMMENDATION SHOULD BE ADOPTED BY THIS COURT.

The sole issue before the court in reinstatement proceedings is "the fitness of the Petitioner to resume the practice of law". Rule 3-7.9 (g), Rules of Discipline. Its purpose is not to re-try the Petitioner for his past misconduct. **Petition of Stalnaker,** 9 So. 2d 100 (Fla. 1942).

The referee appointed by this court to hear Petitioner's reinstatement proceedings, after noting the six factors set forth in **The Florida Bar: In re: Timson,** 301 So. 2nd 448, 449 (Fla. 1974), stated in paragraph four of section II of his report that:

> From the evidence presented the undersigned finds the Petitioner has met his burden and demonstrated his fitness to resume the practice of law. While the state of New York has dealt more severely with the Petitioner then the state of Florida, I find that the Petitioner has complied with all of the requirments placed upon him by the Supreme Court of Florida, and has not only proved his rehabilitation but met every standard set forth in the case of **(Timson, Supra)**, as more particularly set forth above.

A referee's findings of fact will be upheld "unless clearly erroneous or lacking in evidentiary support." **The Florida Bar v. Wagner,** 212 So. 2d 70 (Fla. 1968) at 72.

Not only are the referee's findings of facts based on the greater weight of the evidence presented, but there is no evidence to the contrary. The evidence presented shows that the Petitioner strictly complied with the disciplinary order, that he was possessed of unimpeachable character, that he had a good reputation for professional ability, that he lacked malice and ill feelings towards those involved in bringing disciplinary proceedings against him and that he possessed a sense of repentence and a desire to conduct his practice in an exempliary fashion in the future. Clearly, the requirements of **Timson** have been met.

The only negative evidence before the Court was Petitioner's disbarment in New York. As argued in Point II of this brief, that disbarment should have no bearing on Petitioner's reinstatement.

The Bar argues that Petitioner's 1987 disbarment for exactly the same offense for which he was suspended in Florida in 1983, "**ipso facto** precludes a finding" that Petitioner has a good reputation. The fallacy in the Bar's argument is that the inquiry in reinstatement cases is what the Petitioner has done with his life since his discipline. The New York disbarment in no way affects Petitioner's rehabilitation process - it merely punishes him for misconduct that occurred in late 1978 and early 1979.

Petitioner presented seven witnesses at final hearing that attested to his good character and his sterling reputation. They all testified that the Petitioner had learned his lesson, was a trustworthy individual, and all asserted that they would refer clients to him and entrust him with escrow funds.

The primary thrust of the Bar's argument against immediate reinstatement is their disagreement with the referee's recommendation that Petitioner be reinstated without taking the entire bar exam. Rule 3-7.9 does give this court the option of requiring passage of the bar exam for suspensions lasting over three years. However, the referee recommended Petitioner's reinstatement without the bar exam. Inherent within that recommendation was his finding that Petitioner possesses the confidence and legal ability to practice law in Florida without the additional burden, both financial and time wise, of taking the entire bar exam.

(The primary reason for Petitioner's suspension lasting "more than three years," is the duration of these proceedings. Despite the fact that the referee's report recommending reinstatment was dated July 16, 1987, the Bar's initial brief in this cause, although timely filed, was not delivered to the court until exactly three months after that date.)

The evidence before the court shows that there is no need for the Petitioner to take the Bar exam.

Petitioner's offense, which occurred in 1978 and early 1979, did not involve any lack of professional ability. His offense did, however, involve a lack of a grasp of ethics. That shortcoming that has been, in part, cured by Petitioner's passage of the multi-state professional responsibility exam on November 14, 1986.

Where Petitioner's offense did not involve any lack of professional competency, the need for imposing the Florida Bar Exam is less urgent. This is particularly true in light of the fact that starting in 1988, all Florida lawyers will have to average taking at least ten hours per year of CLE courses.

Petitioner would have no objection to this court imposing a requirement of more than ten hours per year CLE attendance should the court desire to require it as a condition of probation during the first three years of his reinstatement to practice.

The Florida Bar points to the testimony of one lawyer, Peter Kolbrener as the basis for asking this court to require the Petitioner to pass the two parts of the Florida Bar exam that he has not already taken. Mr. Kolbrener, a pure trial lawyer, during cross examination, insinuated that Petitioner was not qualified to take a case to trial. (TR 18, 19). However, early in his testimony, Mr. Kolbrener testified that he did not even know if Petitioner had ever even taken a case to trial (TR 9).

In fact, Petitioner has taken more than 100 cases to trial in New York. Of those cases, twenty to twenty five of them were tried to the point of a verdict by the jury.

Mr. Kolbrener was associated by Petitioner to handle cases because Petitoner's case load had risen to the point where he no longer had the time to take the cases to lengthy trial. That is the sole reason that Mr. Kolbrener was associated.

Even Mr. Kolbrener admitted that Petitioner was a good "inside lawyer" (TR 9). He expressed no reluctance to refer clients to Petitioner.

The other two lawyers testifying on Petitioner's behalf, Harry Organek and David Grey were enthusiastic in their praise of Petitioner's legal ability.

Andrew Schildhaus, the clinical psychologist that worked with many of Petitioner's personal injury clients also praised his reputation in the legal community and pointed out that all of the patients that Dr. Schildhaus had from Petitioner's practice were pleased with his performance.

Finally, Kenneth Paul Greenfield, a former client and good friend of the Petitioner's, testified about the good job the Petitioner did on Mr. Greenfield's cases.

Petitioner has presented overwhelming evidence of superlative legal skills and sterling legal ability. When the testimony in front of the referee is considered in light of the fact that Petitioner's ethical offense did not involve any lack

of professional competence, there is no need to require the entire bar exam.

This court has , in the past, reinstated to practice numerous lawyers that have been suspended for long periods of time without requiring the bar exam. For example, in **The Florida Bar v Ragano,** 403 So. 2nd 401 (Fla. 1981) and **The Florida Bar v Berman,** 372 So. 2nd 95 (Fla. 1979) this court reinstated without the necessity of taking the bar exam two lawyers who had been suspended for eight years. In **The Florida Bar v. Silverstein,** 484 So. 2d 5 (Fla. 1986), no exam was required of a lawyer away from practice for at least six years due to a felony conviction. The Bar points to **The Florida Bar v. Barkett,** 424 So. 2nd 751 (Fla. 1982) as support for their argument that Petitioner should be required to pass the bar exam. However, Mr. Barkett was out of practice for over six years - twice as long as Petitioner.

Requiring Petitioner to take and pass the entire bar exam will probably delay his reinstatement until at least October 1988 - one year from now and five years after Petitioner's suspension began. The bar exam is given in Florida only in February and July. In light of the fact that the Bar's reply brief is not due in this court until the end of November, it is highly unlikely that Petitioner will learn if this court is going to require him to take the bar exam in time to sign up and study for the February bar exam.

In other words, the first time Petitioner will be able to take the bar exam is July, 1988. The grades for that exam will not be posted until October.

Requiring the bar exam of the Petitioner will extend his three year suspension to five years.

The protection of the public is paramount in disciplinary proceedings. However, any fears about Petitioner's professional competency can be allayed by placing him on probation and by requiring him to take CLE courses during that probation.

POINT II

THE FACT THAT THE NEW YORK BAR DISBARRED PETITIONER IN APRIL, 1987, FOR THE SAME OFFENSE FOR WHICH PETITIONER WAS SUSPENDED IN FLORIDA EFFECTIVE DECEMBER 1983, AND WHICH INVOLVED MISCONDUCT THAT OCCURRED IN 1978 AND EARLY 1979 IS IRRELEVANT TO THESE PROCEEDINGS AND SHOULD BE DISREGARDED IN DETERMINING PETITIONER'S FITNESS TO RESUME THE PRACTICE OF LAW.

Although Petitioner was suspended by the New York Bar on March 1, 1984 for his November 13, 1983, conviction, it was not until April 1987 that it entered a formal order of discipline. At that time, New York disbarred Petitioner for his conviction.

Petitioner's disbarment in New York is pending on re-hearing.

The Board of Governors of The Florida Bar, despite the fact that the Florida Supreme Court adopted an unappealed referee report recommending a three year suspension **nunc pro tunc**

December 13, 1983, is now arguing to this court that New York's disbarment should preclude Petitioner's reinstatement. A result which will effectively disbar him in Florida, too.

It is obvious what happened. The Board of Governors of the Florida Bar is afraid that the New York Bar has "one-upped" Florida by disbarring Petitioner.

It is too late for the Board to argue that Petitioner should be disbarred. That argument should have been made in 1985 by appealing the referee's report recommending a three year suspension. By not appealing the referee's recommendation, the Board of Governors is now estopped from arguing that Petitioner should not be reinstated.

As stated earlier in this brief, the matter to be decided in reinstatement proceedings is the fitness of the Petitioner to resume practice. Rule 3-7.9 (g), Rules of Discipline. The discipline meted out by a foreign court for exactly the same offense is irrelevant in determining Petitioner's rehabiliation.

In essence, The Florida Bar is now arguing that because New York disbarred Petitioner, Florida should too. That argument was specifically rebutted by this court in **The Florida Bar v Wilkes,** 179 So. 2nd 193 (Fla. 1965). In that case, The Florida Supreme court held that a finding of professional misconduct by another Bar is binding in this state only as to proof of guilt. The state of Florida, however, is to hold a **de novo** hearing as to the sanction to be imposed.

However, **Wilkes** and similar cases are inappalicable to the case at hand. New York's disciplining of Petitioner has no bearing on the matter before the court, i.e., his fitness to resume the practice of law.

It does not matter at this point in time what discipline New York imposes for Petitioner's misconduct. In 1985 the Florida Bar argued to the referee that the Petitioner should be disbarred. The referee rejected the Bar's argument. The Florida Bar did not appeal the referee's decision and this court imposed a three year suspension. That disciplinary sanction is the final sanction to be meted out in this matter.

Petitioner has been severely punished for his wrongful acts of nine years ago. Although his offenses were deemed a felony in Federal Court, under the laws of Florida and New York they were misdemeanors. For his crime, he has been subjected to the longest suspension possible in this state, i.e., three years.

He has now petitioned for reinstatement, has met the burden imposed upon him, and it is time for him to resume the practice of law.

"Punitive considerations are only incidental" in reinstatement proceedings. **In re: Stoller ,** 36 So. 2nd 443 (Fla. 1948). The Supreme Court then observed that:

> To rehabilitate means to restore to one's former rank, privilege or status, to clear the character or reputation of stain, to retrieve forfeited trust and confidence. Forgiveness and pardon are as much a part of our scheme of things as prosecution and punishment but the approach to it should be by democratic process.

Petitioner's conduct since his suspension has been exemplary. He has shown penance for the acts for which he was disbarred. He realizes that the practice of law is a highly respectable profession. His conduct since his suspension reveals an attitude in accord with the highest traditions of our profession.

Petitioner should be given another chance to practice law.

CONCLUSION

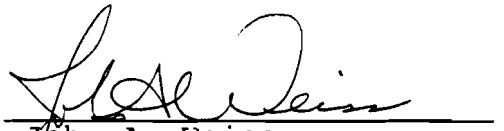
The referee's findings that the Petitioner should be reinstated to practice are not clearly erroneous or lacking in evidentiary support. In fact, Petitioner's evidence overwhelmingly showed his rehabilitation and the bar was unable to rebutt any of his testimony.

Petitioner possessed a reputation for good legal ability, was disciplined for acts not bearing on his professional competence, and can be required, if the court feels it necessary, to take additional CLE courses if there is any doubt as to his knowledge of Florida law and procedure.

The fact that New York disbarred Petitioner five months after Petitioner's three year suspension in Florida ended, when the disbarment is for exactly the same offense as Petitioner's Florida suspension, should have no effect whatsoever on Petitioner's reinstatement.

Petitioner should be reinstated immediately without the requirement of a bar exam.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief has been mailed to James N. Watson, Jr., Bar Counsel, The Florida Bar, 600 Apalachee Parkway, Tallahassee, Florida 32301 on this 5th day of November, 1987.

John A. Weiss