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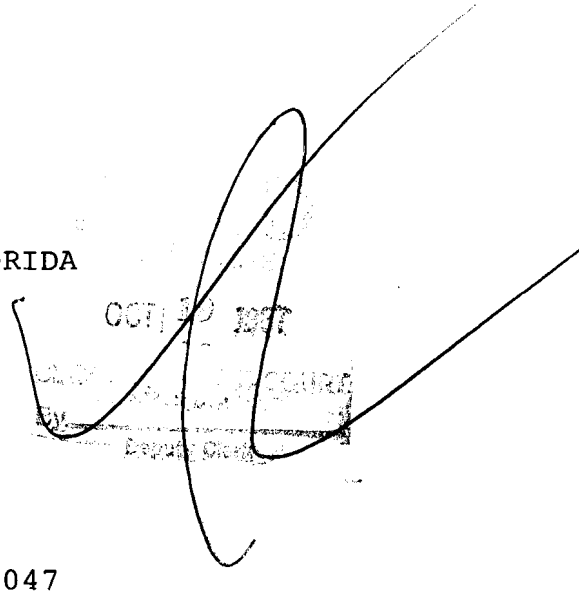
IN THE SUPREME COURT OF FLORIDA



THE FLORIDA BAR,

Complainant,

vs.

RUSSELL T. SICKMEN,

Respondent.
_____/

Case No. 70,047

TFB File No. 8721623(NRE)(02)
(formerly NRE87001)

INITIAL BRIEF OF COMPLAINANT

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Executive Director

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STATEMENT OF THE CASE

On February 12, 1987, Respondent filed a petition for reinstatement which was approved by the referee in his report dated July 16, 1987. The petition for reinstatement followed Respondent's three (3) year suspension from the practice of law in Florida for his conviction of the federal felony of conspiracy to commit mail fraud.

The Board of Governors of The Florida Bar, at its meeting which terminated on September 5, 1987, voted to petition this Court for review of those portions of the referee's report relating to the recommendation of reinstatement and the attendant conditions for said reinstatement. This cause is predicated upon the aforementioned petition for review.

STATEMENT OF FACTS

On September 15, 1983, an information was filed against Respondent in the United States District Court for the Southern District of New York charging conspiracy to commit mail fraud, a felony in violation of Title 18, United States Code, Section 371. On that date, Respondent entered a plea of guilty to the information. Respondent was convicted of the felony in the United States District Court on November 14, 1983.

Based upon the felony conviction, the Florida Bar filed a formal complaint against Respondent in the Supreme Court of Florida on April 30, 1985. The complaint charged that Respondent violated Rules 1-102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation) and 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law) of the Code of Professional Responsibility of The Florida Bar.

A formal hearing on this matter was held on December 12, 1985, before a duly appointed referee. Based on evidence presented at the hearing, Respondent was found guilty of the charged disciplinary violations. The referee recommended that Respondent be suspended from the practice of law in Florida for a period of three (3) years, nunc pro tunc, December 1983, and thereafter

until proof of his rehabilitation was provided as set forth in article XI, Rule 11.10(4) of the Integration Rule of The Florida Bar. The referee also recommended that Respondent be required to pass the ethics portion of The Florida Bar Examination prior to his reinstatement. In The Florida Bar v. Sickmen, 491 So.2d 274 (Fla. 1986), the Supreme Court of Florida adopted the referee's recommendations.

On April 20, 1987, after Respondent's petition for reinstatement was filed but before it was acted on by the referee, the appellate division of the Supreme Court of New York, Second Judicial Department, disbarred Respondent from the practice of law in the State of New York.

SUMMARY OF ARGUMENT

At issue here is the propriety of reinstating to the practice of law in Florida a suspended attorney who has been disbarred by another state for the same misconduct. Granting Respondent's petition for reinstatement would, under the circumstances of this case, flaunt the requirements imposed by this Court on attorneys seeking to return to active membership in The Florida Bar. Additionally, reinstatement would adversely affect the interests of both The Florida Bar and the citizens of this state.

To be eligible for reinstatement, a petitioning attorney has the burden of demonstrating good moral character and professional competence. Respondent's disbarment by New York's highest court, coupled with conflicting testimony as to his professional ability, preclude a finding that either of these requirements has been met.

A primary consideration in attorney disciplinary proceedings is the welfare of the public and of the legal community. Neither of these interests would be well-served by allowing Respondent to practice law in Florida when he is forbidden to do so in another state. To the contrary, reinstatement here would irreparably harm the image of those members of The Florida Bar who adhere to the high standards of fidelity and trust expected of all attorneys.

ARGUMENT

ISSUE I

RESPONDENT HAS NOT MET THE REQUIREMENTS IMPOSED ON ATTORNEYS SEEKING TO RETURN TO ACTIVE MEMBERSHIP IN THE FLORIDA BAR.

This Court has imposed a rigorous set of criteria on attorneys seeking to return to active membership in The Florida Bar. The criteria include: (1) strict compliance with the previous disciplinary order; (2) good moral character; (3) demonstrable professional ability; (4) lack of malice toward those involved in bringing about the previous disciplinary proceedings; (5) a strong sense of repentance for the prior misconduct and a genuine intention of proper conduct in the future; and (6) compliance with any conditions imposed, such as restitution. The Florida Bar In re Timson, 301 So.2d 448, 449 (Fla. 1974); In re Dawson, 131 So.2d 472, 474 (Fla. 1961).

The Court has further stated that the six elements set forth in Timson, supra, in essence, require a petitioning attorney to demonstrate: (1) good moral character, personal integrity, and general fitness for a position of trust and confidence, and (2) professional competence and ability. The Florida Bar in re Inglis, 471 So.2d 38, 39 (Fla. 1985).

The petition for reinstatement considered by the Court in Inglis arose from an order of suspension entered against Inglis in 1964 for failure to disclose his interests in various real estate transactions and for felonious assault. Addressing the question of how a suspended attorney in reinstatement proceedings can make the requisite showing of professional ability, the Court said, "When the period of suspension is only a few months to a few years in duration, continued professional ability can be shown by competent testimony showing a reputation for professional ability." Id at 41. Though petitioner in Inglis had been ordered suspended for only eighteen months, he remained out of the practice of law for twenty years. This prolonged absence compelled the Inglis court additionally to require successful completion of the Florida Bar Examination before granting the petition for reinstatement.

In Petition of Wolf, 257 So.2d 547-48 (Fla. 1972), cited in Timson, supra, this Court noted that "the Integration Rule at every turn places emphasis upon the protection of the public and the image and integrity of The Florida Bar as a whole." (Emphasis in original). This pronouncement by the Court signifies its recognition of its responsibility to the public and the legal community.

The order of disbarment entered against Respondent by the Supreme Court of New York militates strongly against a finding that Respondent has met either of these requirements. The referee therefore erred in not giving due weight to Respondent's disbarment in New York when considering his petition for reinstatement.

In the instant case, Respondent was suspended from The Florida Bar for three years. According to Inglis, the professional ability required before a suspended attorney can be reinstated is evidenced by "reputation." Here, the disbarment order entered against Respondent in New York ipso facto precludes a finding that such a "reputation" exists. The order also negates any showing that Respondent is of "good moral character" and fit "for a position of trust and confidence," additional criteria for reinstatement under Inglis, Timson, and Dawson.

Before the referee who heard the evidence in support of Respondent's petition for reinstatement, the depositions of several people including former clients and attorneys who had worked with Respondent were entered to support the contention that Respondent had a good reputation for legal ability.

Of the witnesses called on Respondent's behalf, three were practicing attorneys. David Grey stated in his deposition that he

specialized in workmen's compensation matters and had represented several of Respondent's clients through referrals (Petitioner's Composite Exhibit #1, Deposition of David Grey at 4). Mr. Grey testified that he was in charge of the referral matters only and there was not an actual co-counsel relationship with Respondent. Mr. Grey went on to say that he is consulted by 500 to 750 other lawyers for his specialty (Petitioner's Composite Exhibit #1, Deposition of David Grey at 10). Other than through these referrals, Mr. Grey had no extensive involvement with Respondent in his legal work but believed that Respondent had an excellent reputation for legal ability.

Another witness, Harry Organek, also testified that Respondent had a reputation as a highly competent attorney prior to his suspension (Petitioner's Composite Exhibit #1, Deposition of Harry Organek at 9). Mr. Organek participated in handling several cases from Respondent in conjunction with another attorney, Peter Kolbrener. It was through Mr. Kolbrener that Mr. Organek met Respondent. Mr. Organek describes Mr. Kolbrener as a "very well known and very respected practitioner" in their area (Petitioner's Composite Exhibit #1, Deposition of Harry Organek at 9).

Mr. Peter Kolbrener was a member of the law firm where Respondent clerked during law school and did referral trial work

for Respondent for about two-and-a-half years prior to Respondent being suspended. Respondent and Mr. Kolbrener even had a joint letterhead showing their association. After Respondent's suspension, Mr. Kolbrener received several hundred referral cases from Respondent to complete.

Mr. Kolbrener stated in his deposition that he felt that Respondent was competent to handle the preliminary aspects of a legal proceeding, but that he would not allow Respondent to carry a case through to trial. (Petitioner's Composite Exhibit #1, Deposition of Peter Kolbrener at 19).

These conflicting recommendations regarding Respondent's reputation for legal ability are insufficient for a finding of demonstrable professional ability so as to meet this criterion for reinstatement.

Under the current Rules of Discipline, Rule 3-5.1(e), a suspension of more than 90 days shall require proof of rehabilitation and may require passage of all or part of the Bar examination. Rule 3-7.9(k) also provides that where a suspension has continued for longer than 3 years, a judgment for reinstatement may be conditional upon proof of competency, including passage of the full Bar examination.

In this matter, Respondent has been suspended for more than three years and the testimony of his witnesses does not present an adequate showing of proof of his professional competence and ability.

In view of Respondent's lengthy absence from the practice of any law, especially having never practiced in Florida, and the disbarment order from New York, the referee erred in not conditioning any right to reinstatement upon passage of the complete Bar examination. The Florida Bar v. Barket, 424 So.2d 751 (Fla. 1982).

ISSUE II

GRANTING RESPONDENT'S PETITION FOR REINSTATEMENT WOULD NOT BE IN THE BEST INTERESTS OF EITHER THE MEMBERS OF THE FLORIDA BAR OR THE PEOPLE THEY SERVE.

In The Florida Bar v. Wilkes, 179 So.2d 193 (Fla. 1965), this Court was called upon to determine the effect Florida should give a judgment of disbarment entered in another state. The respondent in Wilkes had been a member of The Florida Bar since 1950. He was also a member of the New York Bar until his disbarment in 1960. In 1963, the Florida Bar filed a complaint against respondent in the Supreme Court of Florida pursuant to Rule 11.02(6) of the Integration Rule of The Florida Bar. Proceeding on the theory that the New York judgment was binding in Florida, not only as to proof of guilt, but also as to the discipline awarded, the referee recommended that respondent be either disbarred or suspended from the practice of law in Florida until the New York disbarment was vacated. The referee's wholesale adoption of the punishment imposed by the New York court was rejected by the Wilkes court because such adoption amounted to "an abdication of the responsibility imposed on this court to determine for itself, in proceedings conducted by it, or under its direction, the fitness of those permitted to practice in this state." Id at 196-97. The Court therefore remanded the cause to the referee for an independent appraisal of respondent's fitness to practice in

Florida. The Court made it clear, however, "that to hold that Florida is not obligated to recognize and enforce the New York judgment does not mean that it cannot do so if it elects." Id at 196. Thus, Wilkes stands for the proposition that the appropriate discipline to be imposed on an attorney in Florida when a discipline order has been entered against him in another jurisdiction is to determined on a case by case basis.

While in Wilkes, the issue of the effect of a disbarment in another jurisdiction dealt with an initial disciplinary action in Florida, the problem is the same as in the instant matter . . . "the knotty problem of allowing one who has been disbarred elsewhere to practice here (Florida)." Wilkes, p. 200.

In the instant matter, Respondent was the subject of disciplinary proceedings based upon his conviction of a federal felony. This particular conviction was also the basis for disciplinary proceedings in Respondent's resident state, New York. The disciplinary proceedings in New York subsequently resulted in disbarment of Respondent prior to his petition for reinstatement being heard.

The purpose of the disciplinary proceedings here, as in all cases involving attorney misconduct, is to protect the public from those who have failed to uphold the standards of fidelity and trust

inherent in the profession. The Florida Bar v. Hogsten, 127 So.2d 668, 670 (Fla. 1961). It therefore follows, as this Court has noted on several occasions, that determinations as to appropriate discipline must be guided primarily by the welfare of the public and of the legal community. The Florida Bar v. Beaver, 259 So.2d 143, 144 (Fla. 1972). It is clear that the interests of both would be ill-served by allowing Respondent to represent clients in Florida when he is forbidden to do so in another state.

In State v. Fishkind, 107 So.2d 131 (Fla. 1958), this Court discussed the great weight the general public affords disciplinary proceedings: "As members of this profession we realize that our standing is often measured in the layman's mind by the manner in which we discipline that small minority of our brethren who break the rules of fidelity and trust required by our calling." Id at 133. Reinstating Respondent to The Florida Bar when the Bar of a sister state has deemed him unfit to remain a member would therefore irreparably harm the reputation of the profession in this state.

Respondent has described the personal impact the criminal and disciplinary proceedings have had on not only his life but that of his family. He also has stated that he has no other plans or options to support his family in the event his readmission is denied.

This Court has held that if the concept and protection of the public, as well as the image of The Florida Bar, are to have any meaning at all, cases involving reinstatement of suspended lawyers must be viewed in the cold light of objectivity and without regard to personal sympathy. Petition of Wolf, 257 So.2d 547, 550(Fla. 1972).

In the instant matter, Respondent's discipline was based upon certain criminal activity. Subsequent to the Florida discipline and prior to seeking reinstatement, Respondent was disbarred by his resident jurisdiction, New York. Respondent now not only seeks reinstatement with the weight of a long-term suspension from Florida but has also brought with him the stigma of having been disbarred. If the public image of the Florida Bar is a legitimate criterion for readmission, the presence of an attorney who has been disbarred in another jurisdiction cannot be justified or permitted.

This Court has often noted that "the practice of law is a privilege which places special burdens upon those choosing to pursue this honorable profession. Law, being 'a jealous mistress' makes extraordinary demands upon members of the bar." Fishkind at 132-33. While the standards are high and the responsibilities great, the vast majority of attorneys have unblemished records. The people of Florida expect and indeed deserve to be protected from those attorneys whose conduct falls below the standards

imposed by the Bar of this state or the bars of other states. In order to preserve the trust vested in this Court to perform this task, Respondent's petition for reinstatement in the instant case should therefore be denied.

CONCLUSION

It is apparent that the Referee erred in recommending reinstatement in light of Respondent's disbarment in New York. At the very least, reinstatement should have been contingent on Respondent's passage of the Bar examination as proof of Respondent's legal ability.

As set forth herein, Respondent's petition for reinstatement should be denied until such time as the New York disbarment has been reviewed and reversed or until such time as Respondent can demonstrate his ability by passage of the full Bar examination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by hand delivery to JOHN A. WEISS, ESQUIRE, Counsel for Respondent, at his office address of 101 North Gadsden Street, Tallahassee, Florida 32302, this 16th day of October 1987.

JAMES N. WATSON, JR.