

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Supreme Court
Case No. 71,948

In Re: PETER M. LOPEZ
_____ /

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

ANSWER BRIEF OF PETER M. LOPEZ

B.K. ROBERTS, ESQ.
ROBERT R. McDONALD, ESQ.

ROBERTS, BAGGETT, LaFACE
& RICHARD
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(904)222-6891

and

HAL P. DEKLE, ESQ.
412 Madison Street
Suite 808
Tampa, Florida 33602
(813)223-2300

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PRELIMINARY STATEMENT

For purposes of convenience and to aid the Court in reviewing this brief, the following designations will be used:

Peter M. Lopez, the Petitioner for Reinstatement, will be referred to as "Lopez."

Designations to the transcript of the first reinstatement hearing held May 16, 1988 shall be "(T1-page number)".

Designations to the transcript of the second reinstatement hearing held May 31, 1988, shall be "(T2-page number)".

Designations to the transcript of the third reinstatement hearing held July 11, 1988 shall be "(T3-page number)".

References to the report of Alfonso C. Sepe, Referee, dated July 26, 1988 shall be "(Referee's Report--page number)".

STATEMENT OF THE CASE AND FACTS

The reinstatement hearing consisted of three hearings before the Honorable Alfonso C. Sepe, the hearings being held May 16, May 31, and July 11, 1988. The first hearing was continued to allow the resolution of income tax questions. Both parties rested their respective cases at the conclusion of the second hearing. The third hearing was held due to a motion filed by the Florida Bar to reopen the case to consider a question of The Florida Bar concerning a bank account of the business owned by Lopez.

Lopez in general agrees with the Statement of the Case and Facts as submitted by The Florida Bar. However, Lopez feels The Florida Bar is painting only one-half of the factual picture, as it recites the dark clouds raised by The Florida Bar but does not recite therein the valid explanations given by Lopez and accepted by the Referee. Rather than completely reciting the Case and Facts, Lopez herein states only areas of disagreement and clarification.

In particular, with reference to the question of the filing of federal income tax returns for Canary Investments, Inc., (a C Corporation), the Florida Bar does not set forth in its Statement of Facts the underlying reasons for the delay in filing the tax returns, which reasons the Referee felt justified the delay in filing the tax returns. As part of his case in chief, Lopez called as a witness Carlos Salcinas, who is the C.P.A. who ultimately prepared the income tax returns for Canary Investments, Inc. Salcinas was hired as the C.P.A. to prepare the returns because Canary Investments, Inc. had experienced problems with the prior C.P.A. (T1-66), who lost records necessary for the filing of the returns (T1-74). The Florida Bar's witness who testified concerning the income tax return question, Carlos Ruga, himself stated that the former accountant of Canary Investments, Inc. had lost the files (T1-161), and stated that more information than was available (at the first hearing) was in fact needed to properly file a tax return (T1-158). Lopez was in contact with the I.R.S., and extensions were granted for the

filing of the tax returns (T1-93, 74). At the conclusion of the May, 16, 1988 hearing, the Referee continued the hearing to allow Lopez and The Florida Bar to further investigate the filing of the income tax returns for Canary Investments, Inc. and for Canary Investments, Inc. to file the tax returns.

A second hearing was held May 31, 1988, being a continuation of the first hearing. At the second hearing evidence was submitted that all of the income tax returns for Canary Investments, Inc. were properly filed, and although Canary Investments, Inc. had taxable income of \$5,751 for fiscal year-end August 1, 1983, and \$4,665 for fiscal year-end August 31, 1984 (T2-6), there was nothing illegal in what was done, the taxable income for 1983 and 1984 were eliminated by losses for subsequent tax years (T2-9), and the taxes were correctly prepared (T2-10). Further, at the second hearing The Florida Bar cross examined Lopez as to the reasons why the tax returns for Canary Investments, Inc. were not timely filed, and Lopez provided valid explanations for the untimely filing of the income tax returns, those reasons being because the general health of Lopez was poor (T1-52,53), tax records were lost (T2-15), the C.P.A. replacing the first C.P.A. refused to work on the returns without adequate payment (T1-70, 71) although Lopez was always pushing him to file the returns (T1-72), that Lopez had correspondences directed to and received from the I.R.S. concerning the tax returns for 1983 and 1984 (T2-16) and the C.P.A. filed for extensions for the other tax years (T1-74), the C.P.A. knowing of the extensions, which were valid grounds to withhold filing (T1-73).

At the second hearing, The Florida Bar cross examined Lopez and raised an issue of an apparent omission from the Petition for Reinstatement filed by Lopez, the omission being a 1980 arrest for extortion. Lopez was never charged (T2-24, 29), as there was no adequate basis for the criminal complaint. Again, Lopez offered valid reasons why the 1980 arrest for extortion was not included in paragraph 10 of the Petition for Reinstatement, being that Lopez felt matters prior to his suspension were not required to

be reported and Lopez believed the issue was sufficiently covered elsewhere in the Petition for Reinstatement (T2-29, 39), and the matter being the basis for the lawsuit referenced in the Petition for Reinstatement (Lopez v. Orlando Martinez). The Referee accepted the explanation given by Lopez, and found the matter was sufficiently included in the Petition for Reinstatement.

At the conclusion of the second hearing the Referee announced from the bench that he was going to recommend, in the face of unanimous opposition by The Florida Bar, the reinstatement of Lopez (T2-49). Thereafter, The Florida Bar reopened the matter, and a third hearing was held to consider the bank account of Peter M. Lopez & Associates, as set forth in the Statement of Facts of the brief of The Florida Bar. Again, however, all questionable activities were explained to the satisfaction of the Referee. Lopez had a valid overdraft agreement with the president of the bank (T3-23), immediately covered any checks returned (T3-38), never issued a check without prior approval (T3-61), and always covered his overdrafts (T3-29). The Referee found no wrongdoing and recommended reinstatement.

SUMMARY OF ARGUMENT

I.

Lopez has demonstrated that he has unimpeachable character as required by the relevant case law. The failure to file tax returns for the tax years 1983 through 1987 for Canary Investments, Inc., a Florida corporation, were totally justified and adequately explained. Everything Lopez did with regard to this issue was legal. Similarly, the issues raised by The Florida Bar concerning the bank account of Peter M. Lopez & Associates were adequately explained and justified. In addition, Lopez presented a number of witnesses who testified to the honesty, trustworthiness and character of Lopez, presented evidence of a good reputation for professional ability, that Lopez holds no malice nor ill feeling towards any of those involved in his prior disciplinary proceedings, and demonstrated the repentance of Lopez and the desire of Lopez to conduct his practice of law in an exemplary fashion in the future. The Florida Bar could not produce any unbiased member of the public to testify as to the character of Lopez, the witnesses of The Florida Bar being the Assistant United States Attorney who prosecuted Lopez which resulted in the 3 year suspension of Lopez in 1983, and the special investigator in that same federal criminal trial. However, these two witnesses had no contact with Lopez since 1983 and thus their opinions as to the character of Lopez were not supported by a factual basis.

II.

The failure of Lopez to include in paragraph 10 of his Petition for Reinstatement the fact that in 1980 he was arrested for extortion does not demonstrate any flaws in the character of Lopez nor does it demonstrate a pattern of Lopez intentionally withholding information to avoid any detrimental consequences. Lopez was not charged with extortion (or any other crime) relating to the 1980 arrest, there being no sufficient basis for the complaint against Lopez. The 1969 issue between Lopez and the Florida Board of

Bar Examiners was not a matter where Lopez intentionally fraudulently withheld information from The Florida Board of Bar Examiners, the decision of Lopez to not include in paragraph 10 of the Petition for Reinstatement the 1980 arrest of extortion does not demonstrate he was willfully withholding information from The Florida Bar, and both taken together do not show any pattern of wrongdoing. Lopez adequately explained the reasons for his decision not to include the 1980 extortion arrest in paragraph 10 of the Petition for Reinstatement, Lopez adequately included or referenced the arrest in other portions of the Petition for Reinstatement (including the reference to Lopez v. Orlando Martinez), and Lopez had no intent of hiding information from The Florida Bar, as so found by the Referee.

III.

The Referee allowed into evidence the proffered testimony of Florida Bar witnesses concerning the facts resulting in the 1983 Federal conviction and subsequent suspension from The Florida Bar. However, even if the Referee had not considered such information, such would have been harmless error as Lopez has adequately demonstrated that since his 1983 suspension to the present he has rehabilitated his character and has reached and maintained that high plateau of character which all members of the Bar must have. The Referee properly considered all relevant information in making his determination that Lopez has rehabilitated his character and satisfies the high level of character required.

IV.

There was no error in the Referee sustaining objections to the opinion testimony offered by Florida Bar witnesses Bondi and Johnson. Both witnesses Bondi and Johnson testified that they had no contact with Lopez since 1983, the date of conviction and sentencing in the Federal criminal case, and therefore these two witnesses had no knowledge as to the current state of the character of Lopez. If it was error for the

Referee to fail to admit the proffered testimony of the witnesses of The Florida Bar as to their opinion of the character of Lopez, such error was harmless error in the face of the witnesses who testified on behalf of Lopez, each and every one testifying as to the high state of character of Lopez, and also in view of the fact that The Florida Bar presented no witnesses, other than Bondi and Johnson, to refute the testimony of the high state of character of Lopez.

ARGUMENT

L.

PETITIONER HAS DEMONSTRATED HIS UNIMPEACHABLE CHARACTER.

The elements for reinstatement as an attorney in good standing to The Florida Bar have been clearly delineated in a number of cases, and stipulated to by counsel for The Florida Bar and for Lopez at the hearing below, those elements being:

- A. Strict compliance with the disciplinary orders suspending Lopez;
- B. Evidence of the unimpeachable character of Lopez;
- C. Evidence of a good reputation for the professional ability of Lopez;
- D. Evidence of lack of malice and ill feeling towards those involved in the disciplinary proceedings and the underlying criminal actions resulting in the automatic suspension of Lopez;
- E. Personal assurances by Lopez of a sense of repentance and a desire to conduct the practice of law in an exemplary fashion in the future; and
- F. Restitution of all money.

See The Florida Bar Re: Whitlock, 511 So.2d 524 (Fla. 1987); In Re: Timson, 301 So.2d 448 (Fla. 1974). The Florida Bar stipulated that Lopez strictly complied with the disciplinary orders suspending Lopez and has made full payment of all money due (T1-13, 22-23). Lopez put on evidence of the other elements, and The Florida Bar contends Lopez did not prove his unimpeachable character.

As properly stated by The Florida Bar in their initial brief, the findings of the fact as determined by the Referee are presumed to be correct and must be accepted unless not supported by the record or unless the findings are clearly erroneous. Furthermore, as recognized by this Court in In Re: Inglis, 471 So. 2d 38, 40 (Fla. 1985), citing then Integration Rule 11.11(18),

"the burden shall be on the party seeking review [The Florida Bar] to demonstrate that a report of a referee sought to be

reviewed is erroneous, unlawful, or unjustified. A referee's findings of fact shall enjoy the same presumption of correctness as the judgment of the trier of fact in a civil proceeding." Thus, we must accept the referee's findings of fact unless they are not supported by competent, substantial evidence in the record.

(Citations omitted). The existing Rules Regulating The Florida Bar Rule 3-7.6(c)(5) contain similar language placing the burden on review on The Florida Bar to show error. See also The Florida Bar v. Hooper, 509 So. 2d 289, 290 (Fla. 1987), wherein this Court stated "this Court's review of a referee's findings of fact is not in the nature of a trial de novo in which the Court must be satisfied that the evidence is clear and convincing. The responsibility for finding facts and resolving conflicts in the evidence is placed with the Referee."

The Referee determined as a matter of fact that Lopez demonstrated rehabilitation and recommended reinstatement, which the Florida Bar opposes. Thus, The Florida Bar bears the burden to demonstrate that the findings of fact, as made by the Referee, were clearly erroneous and totally unsupported by the record. The Florida Bar seeks to establish this by stating that the Referee failed to give appropriate consideration to certain matters raised in the three hearings held before the Referee. However, the record clearly reflects that the Referee considered all relevant information submitted by Lopez and by The Florida Bar in finding as a factual matter that Lopez strictly complied with all disciplinary orders of The Supreme Court (including obtaining a high passing score on the ethics test), demonstrated his unimpeachable character, demonstrated by clear, convincing and uncontradicted evidence his good reputation and professional ability and his lack of malice and ill feeling towards those involved in bringing the disciplinary proceedings against him, demonstrated his repentance and contriteness as well as his deep desire to conduct his practice of law in an exemplary fashion in the future, and has demonstrated his compliance with all prerequisites for reinstatement (Referee's Report-2).

A. The Canary Investments, Inc. Tax Return Matter

The Florida Bar attempts to raise as an issue the late filing of tax returns for a Florida corporation known as Canary Investments, Inc. It is uncontroverted that the tax returns for Canary Investments, Inc. for the tax years 1983, 1984, 1985, 1986, and 1987 were not filed until 1988, and The Florida Bar is of the position that this in and of itself illustrates that Lopez is not fit to be an attorney. However, valid reasons were given by Lopez, others, and even The Florida Bar's accountant witnesses for the delay in filing. The testimony of the existing C.P.A. for Canary Investments, Inc., Carlos Salcinas, that of Lopez, that of The Florida Bar's own witness, Carlos Ruga, and the Petitioner's exhibits admitted into evidence by the Referee clearly shows that Lopez acted with due diligence in trying to solve the tax return problems of Canary Investments, Inc.

As can be gleaned from Petitioner's Exhibits, in November, 1983, Canary Investments, Inc. requested an extension of time to file the 1983 tax returns. Thereafter, in May, 1984, Canary Investments, Inc. forwarded a letter to the I.R.S. informing the I.R.S. that certain documents were lost, to which the I.R.S. responded by letter of June, 1984 acknowledging Canary Investments, Inc.'s request for information. Thereafter in December, 1985 the I.R.S. forwarded to Canary Investments, Inc. a notice setting up an appointment with Canary Investments, Inc. to review the tax situation, to which by letter dated January 9, 1986 Lopez responded requesting a postponement of the appointment due to his illness and confirming that Canary Investments, Inc. had taxable losses. Lopez testified that he went to the I.R.S. and was in touch with the tax officials of the U.S. government (T2-16-17). As was recognized at the reinstatement hearing, the I.R.S. has not brought any actions against Lopez, presumably being satisfied with the actions taken by Lopez with regard to the tax matters. In addition to the evidence that Lopez was in contact with the I.R.S., the reasons for the delay in filing the tax returns were clearly enumerated. Prior to employment of the current C.P.A., Salcinas, another

C.P.A., Rubin Mastrapa, was employed for preparation of the tax returns for Canary Investments, Inc. However, Mastrapa had lost the records needed to prepare the tax returns (T2-16), which fact was confirmed by Salcinas (T1-66), and even by The Florida Bar's witness, Carlos Ruga (T1-161). The Florida Bar's witness, Ruga, testified the tax returns could not be filed with the information then available (T1-158). Additionally, during this time period Lopez was ill with a very serious life threatening infection which did not allow Lopez to engage in a profession (T1-52, 53). Notwithstanding, Lopez continued his efforts to file the returns which fact was confirmed by Salcinas when Salcinas testified that Lopez was always pushing him to have the tax returns prepared (T1-72). Additionally, Salcinas refused to work on the returns as Lopez had fallen too far behind in payments due Salcinas for work completed and Salcinas was not willing to continue working without an adequate financial arrangement (T1-72). While the lack of funds to pay a C.P.A. may not normally be a valid reason for not filing the returns, when viewed with the other valid reasons for the delay (extensions with the I.R.S. and lost records), lack of funds to pay the C.P.A. is a valid reason given the testimony of Salcinas wherein he stated, in response to a question of The Florida Bar, that a layman could not prepare the tax returns for Canary Investments, Inc. (T1-83). Finally, Salcinas was aware of the extensions granted for the 1983 and 1984 returns and therefore he was able to continue and wait before preparing those returns (T1-73), and for the other years Salcinas himself filed for extensions (T1-74).

The Florida Bar alleges that the tax returns for Canary Investments, Inc. were only filed to appease the Referee for purposes of the reinstatement proceedings. This is an outright misstatement of the record to which Lopez objects. The record clearly illustrates the efforts of Lopez in trying to have the tax returns filed long before these reinstatement proceedings were instituted, much less long before the hearing in this matter. Petitioner's Exhibit 1 includes letters from Carlos Salcinas to Rubin Mastrapa

requesting the information which Mastrapa had lost, the letters being dated May, 1986. The assertion from The Florida Bar also flies directly in the face of the testimony of Salcinas, whereby he stated Lopez was always pressing Salcinas to file the returns (T1-72), and the testimony of Lopez on cross-examination by The Florida Bar: "Q: Did you file these tax returns for the sole purpose of this Petition for Reinstatement? A: No, sir. I have been trying to file since a couple of years ago." (T2-18). This Court should not consider The Florida Bar's inference based on its unsupported misstatement of the record.

The Florida Bar also implies that Lopez' defense as to the delay in the filing of the income tax returns is that there were no taxes owed. It is true that this point was raised, not only by Lopez through the testimony of Salcinas (T1-71-72, 76), but also by The Florida Bar's own witness, Carlos Ruga, who stated there was nothing illegal as to what was done, (T2-10), and that when Canary Investments, Inc. filed its taxes for 1985 which showed a huge loss, Canary Investments, Inc. would have recouped the taxes for 1983 and 1984, years when there were small taxable income (T2-9). This was not the reason for the delay, however, as the evidence clearly shows.

All of the above was submitted to the Referee for his consideration while sitting as the trier of fact in this matter. The Referee properly reviewed any conflicting evidence (little, if any, evidence presented by The Florida Bar conflicted with evidence presented by Lopez, and in fact the evidence of The Florida Bar corroborated the evidence of Lopez), and was in the position to judge the demeanor of the witnesses as they were so testifying. It is obvious from the transcript that the Referee gave appropriate consideration to the testimony and evidence presented concerning the tax matter and resolved as a matter of fact the actions of Lopez did not impeach his character. As stated by the Referee, there was nothing illegal about Lopez' actions, and "there is not even a hint of fraud or criminality, Federal of State, in the story of his taxes." (T2-47)

The Florida Bar has failed to show that the findings of fact, as so found by the Referee, are clearly erroneous or without support in the record.

B. The Peter M. Lopez & Associates Bank Account Matter.

The Florida Bar raises a minor point in its Initial Brief concerning a possible continued listing in the yellow pages under the listings for attorneys. Any such listing was without the knowledge of Lopez, and Lopez was never called as an attorney during the time of his suspension (T1-99). Lopez never took any affirmative action to solicit business or to list his name to get clients, and when suspended sent a letter to each of his clients informing them of his suspension as required (T1-99). The first time Lopez ever heard about the possibility that his name was listed in the yellow pages under the "attorneys" section was at the hearing of May 16, 1988 (T1-99). The testimony of Lopez clearly establishes that he did not solicit legal business nor hold himself out to be an attorney during his period of suspension nor knowingly have his name listed in the yellow pages.

The Florida Bar raises as a major contention the fact that during the period of his suspension, Lopez issued certain checks on the bank account of Peter M. Lopez & Associates with the Ocean Bank of Miami, some of which were returned for insufficient funds. The Florida Bar entered into evidence Florida Bar Exhibit 1, being copies of the bank statements for the account for Peter M. Lopez & Associates and a compilation of 48 checks initially returned by the Bank for insufficient funds. It must be stressed that all checks in question were immediately paid by either the Bank or by Lopez when they were initially returned for insufficient funds, as after Lopez found out that a check was returned he would call the party and pay them cash or have the bank cover the check (T3-38, 47).

Lopez had a long-term relationship with the president of the Ocean Bank of Miami, Jorge Perez, which spanned over 15 years and still continues (T3-22, 38). In fact, Mr.

Perez handled the accounts of Lopez for many years and the Bank considers Lopez as an excellent person with an excellent character (T3-23, 27). Thus, because of the very good banking relationship enjoyed by the Ocean Bank of Miami with Lopez, the Ocean Bank of Miami and in particular Perez, the President thereof, had an agreement with Lopez for overdraft protection whereby if Lopez contacted Perez and stated that Lopez needed certain checks covered for a number of days which would overdraw the account, Perez would authorize the overdrafts (T3-23-24, 29), which were always covered by Lopez (T3-9). In fact, it is common practice for banks to provide overdraft services to their customers (T3-27), and the Ocean Bank of Miami, on the day of the third hearing, had 1,400 accounts with negative balances, constituting between \$6 to 7 million dollars of overdrafts (T3-26). Ocean Bank of Miami continues to provide overdraft coverage for its customers, such as Lopez, and the Bank charges \$20.00 per overdraft and earns between \$20,000 and \$27,000 per day on overdraft charges (T3-25). Thus, it is clear that providing overdraft services is a common practice. The account of Lopez was handled by Perez, the President of the Bank, with whom Lopez had the overdraft agreement. (T3-57).

It is admitted that some checks issued on the Peter M. Lopez & Associates account were initially returned for insufficient funds. All checks were immediately paid, and at no time did Lopez issue a check with the intent that the check be returned or to have the payee lose any money or be defrauded out of any money, because Lopez knew the checks would be paid due to his agreement with Perez (T3-39, 46, 55). There is conflicting testimony from Perez as to why certain of the checks were returned for insufficient funds, and it could be inferred from the testimony of Perez that some of the checks were returned for insufficient funds because the overdrafts went too high. However, Lopez and Perez both testified that Lopez would telephone Perez for permission to issue an overdraft check. Perez stated that he never personally refused to pay an overdraft (T3-30, 31), and Lopez testified that he would not send out a check which would overdraw the

account until he received permission for the overdraft from Perez (T3-62). A reasonable construction of the testimony of Perez, where he states the Bank would not honor an overdraft if it got too high, was that the Bank would not give Lopez permission to issue an overdraft check if the overdraft balance was too high. This conflict in the testimony was resolved by the Referee sitting as a trier of fact, who determined by the Referee that no action of Lopez cast a shadow on his character. Contrary to what The Florida Bar asserts in its brief, the Referee did give weight to the testimony of the witnesses that in fact certain checks were returned for insufficient funds, but also gave weight to the fact that when the checks were returned for insufficient funds they were immediately paid either by the Ocean Bank of Miami or from other funds by Lopez, that Lopez never issued a check with the intent to defraud any payee, that the overdraft agreement was based on a good banking relationship of 15 years, that Lopez always covered his overdrafts, that Lopez would not issue a check without prior approval from the president of the Ocean Bank of Miami, and that the president of the Ocean Bank of Miami did not refuse to pay any of the overdrafts of Lopez.

II.

THE PETITIONER DID NOT INTENTIONALLY OMIT ANY RELEVANT INFORMATION FROM THE PETITION FOR REINSTATEMENT, AND ALL RELEVANT INFORMATION WAS SUBMITTED TO THE FLORIDA BAR EITHER THROUGH THE PETITION FOR REINSTATEMENT OR TO THE INVESTIGATOR OF THE FLORIDA BAR.

The second argument of The Florida Bar is based on paragraph 10 of the Petition for Reinstatement submitted by Lopez, wherein Lopez states that he has not been arrested or convicted for any matter (other than the federal conviction resulting in his three year suspension in 1983) other than an arrest and conviction for an invalid auto inspection sticker in 1981, although Lopez was arrested on the charge of extortion in 1980. The Florida Bar argues Lopez therefore intentionally withheld relevant information from The Florida Bar.

Prior to answering the allegations of The Florida Bar, it is important to note that in footnote 2 of the initial brief of The Florida Bar (p. 17 thereof), The Florida Bar refers to an investigative report and states such investigative report was admitted into evidence. This is a clear misstatement of the Record on Appeal, as the referenced report was never admitted nor even proffered for admission into evidence by The Florida Bar. Lopez strenuously objects to any reference to the report and to footnote 2 and the contents thereof.

The Florida Bar goes to great lengths to attempt to tie together some sort of pattern of improper conduct with the failure of Lopez to include in paragraph 10 of the Petition for Reinstatement his 1980 arrest for extortion (for which he was not charged, there being no valid basis for the complaint against Lopez) to a problem Lopez had with his initial admission to The Florida Bar, and cites to this Court Lopez v. The Florida Board of Bar Examiners, 231 So. 2d 819 (Fla. 1969). However, The Florida Bar's efforts fall woefully short as there is no finding of any fraud by Lopez either in Lopez v. The Florida Board of Bar Examiners or in the instant proceeding.

Lopez v. The Florida Board of Bar Examiners concerned the initial application of Lopez to become a member of The Florida Bar. In his original application, Lopez failed to include certain information, necessitating the filing of an amended application which contained the information. The Florida Board of Bar Examiners contested the admission of Lopez to The Florida Bar based on his original omissions, but this Court ruled that Lopez should be admitted to The Florida Bar. In determining that Lopez should be admitted to The Florida Bar, this Court stated that it could

find nothing in the information withheld that would have justified the denial of the application, had the facts been submitted forthrightly and fully in the first place, as they were in an amended application. It seems clear that the applicant could have had no fraudulent design in withholding information that could have had little, if any, damaging effect on his application.

* * * *

The applicant has given reasonable explanation of the other matters cited by the Board, and after reviewing the entire record, it is our opinion that the applicant's long, diligent, and determined efforts to obtain permission to practice his profession in this country should be recognized as some indication of his stability.

231 So.2d at 820-821. This Court recognized that Lopez erred in failing to list all pertinent information on his initial application for admission, but determined that Lopez did not do so fraudulently and met all of the requirements for admission to The Florida Bar, which necessarily included questions of character.

The Florida Bar now contends that because Lopez omitted in one portion of his Petition for Reinstatement an arrest which occurred a year before his suspension (an arrest for which Lopez was not charged (T2-24)), Lopez willfully withheld information from The Florida Bar reflecting on his honesty and which requires the presumption of the intent of Lopez to avoid a troublesome area. The record is clear Lopez was not attempting to withhold any information. Lopez volunteered the information concerning the 1980 arrest to The Florida Bar investigator, Gordon Sither (T2-24), which certainly does not evidence intent of Lopez to withhold information, and Lopez believed it was

sufficiently addressed in the Petition for Reinstatement (T2-39, 40).

The Florida Bar represents that the Referee found absurd Lopez' reason for not including the 1980 extortion arrest in paragraph 10 (T2-28). However, contrary to the implication of The Florida Bar in its Initial Brief, the Referee's comment was not directed to the reason Lopez gave for his decision not to include in paragraph 10 of the Petition the arrest for extortion. What the Referee found to be absurd was a discussion concerning why a 1981 arrest and conviction for an invalid automobile sticker was included in paragraph 10 but not the 1980 arrest for alleged extortion. The exchange was as follows:

Referee: Paragraph 10 [of the Petition for Reinstatement] says: "Other than the arrest--" which is the U.S. District arrest, you, the petitioner, has not been arrested or prosecuted for any crime, felony or misdemeanor other than the automobile sticker in 1981."

Witness: Your Honor, I construe that to be not part of the record that the Bar--

Referee: Neither was the automobile sticker.

Witness: Well, the automobile sticker was 1981.

Referee: Do you think The Florida Bar cares about the automobile sticker and not about the extortion?

Witness: Your Honor, let me tell you that they do.

Referee: No, they don't, not as between the two. That's absurd.

Witness: They want to know exactly what you have done.

(T2-27-28). Thus it is clear that the Referee was not saying that Lopez' reasons for not including the arrest for extortion in paragraph 10 of the Petition as being absurd, but was stating something completely different was absurd, contrary to that implied by The Florida Bar in its brief.

Lopez did adequately explain why the 1980 arrest for extortion was not included in paragraph 10 of the Petition. Lopez was not charged, there being no basis for the

complaint against him, Lopez' concern was from 1981 forward (T2-29), and the matter was referenced in other portions of the Petition for Reinstatement as it stemmed out of those facts giving rise to the original suspension in 1981 (T2-39-40, 42), and was the basis for Lopez v. Orlando Martinez which was referenced in the Petition for Reinstatement. Lopez provided the information to the investigator for The Florida Bar (T2-24), and did not intentionally withhold any information from The Florida Bar (T2-38). The Referee considered all of these matters and determined as a matter of fact Lopez was not hiding the 1980 arrest for extortion from The Florida Bar, stating "taken in the context of another document filed in the entire petition, indicates that he [Lopez] was not hiding it, that the Bar knows it, the Judge knows it, the Board of Governors knows it..." (T2-47).

Therefore, the actions of Lopez regarding this issue show no fraud or misrepresentation by Lopez and the Referee found Lopez demonstrated his high degree of character.

III.

THE CONSIDERATION GIVEN BY THE REFEREE TO THE UNDERLYING OFFENSES WAS PROPER.

The Florida Bar alleges that the Referee committed error because he failed to consider the nature and the facts of the underlying offenses resulting in the suspensions of Lopez in 1981 and 1983. However, The Florida Bar's assertions are again misplaced. The Florida Bar called no witnesses to testify concerning the 1981 suspension. For the 1983 suspension, The Florida Bar called as a witness Robert Bondi, Assistant United States Attorney who prosecuted Lopez resulting in the automatic three year suspension of Lopez in 1983 (T1-118), and also called William Johnson, the Immigration and Naturalization special investigator who aided in Lopez' prosecution (T1-137). When Bondi and Johnson were called as witnesses by The Florida Bar, trial counsel for Lopez objected to the testimony. After initial discussion, the Referee allowed the testimony of Bondi to be presented as a proffer in view of the objection of trial counsel for Lopez. Although the Referee initially stated he would not allow Bondi to testify because The Florida Bar had already disposed of the issue to which Bondi was going to testify (the facts and circumstances underlying the federal conviction of Lopez resulting in the automatic three year suspension in 1983), the Referee allowed the proffer of the testimony and ultimately admitted the testimony of Bondi and Johnson as it related to a recitation of the facts and circumstances of the criminal conviction. As the Referee stated "I have been thinking now about the recitation of facts surrounding the circumstances leading up to the investigation of Mr. Lopez by the Federal Government and the indictment and conviction. I have decided that I am going to allow those facts in, as recited. But I am going to exclude from evidence Mr. Bondi's opinion and not permit that." (T1-146-147). (The exclusion of Bondi's opinion is addressed in Argument IV). It is true that the referee stated that the testimony of Johnson and Bondi would give life to the charging document (which point The Florida Bar some how tries to construe as the trial judge in effect

saying he is not admitting the testimony of the underlying facts and circumstances), but that was the reason the testimony was proffered in the first place.

Before the testimony of Bondi, argument was made before the Referee as to whether or not the Referee was required to consider the nature of the underlying offenses resulting in suspension, The Florida Bar citing to the Referee Petition of Wolf, 257 So. 2d. 547 (Fla. 1972) and Petition of Rubin, 323 Sd. 2d. 257 (Fla. 1975). Whether or not these cases require a Referee to consider the underlying facts resulting in the prior disciplinary action (a point which is not conceded, as upon a close reading of the cases it is clear that this Court held that a Referee may consider such information, but the cases do not say that a Referee is required to consider such information), the Judge allowed the proffer and ultimately accepted the testimony of the witnesses as to the facts surrounding the conviction of Lopez.

If we assume that the Referee did not allow the proffered testimony to be admitted, such refusal is not error in this instance. As stated by The Florida Bar, the reinstatement proceeding is designed to examine a petitioner's conduct during the period of suspension to assure rehabilitation. The Referee recognized that a showing of rehabilitation is necessary (T1-145). The necessary showing of the moral character was demonstrated by Lopez as so found as a matter of fact by the Referee. The moral standard required of any member of The Florida Bar, whether it is a petitioner for reinstatement or a member in good standing, is a minimum plateau which must be maintained. Because the Referee found as a matter of fact that Lopez has attained and maintained that minimum plateau of high moral character, it is not necessary to demonstrate that Lopez was well below the plateau at the time of his suspension. Additionally, the evidence proffered through Bondi, does not contain evidence of additional wrongdoing, as the proffered testimony only shows Lopez may have committed additional identical errors but does not show different acts which were illegal. Thus, the

proffered testimony would not add to the existing record as to the circumstances of the criminal conviction. Lopez was convicted of his wrongdoings, suspended from The Florida Bar, and has paid his dues and shown rehabilitation. It was stipulated by The Florida Bar that Lopez had fully complied with the terms and conditions of reinstatement as set forth in the Order suspending Lopez from the practice of law (T1-22), and Lopez even obtained a score of 90 on the ethics exam, required to be taken pursuant to the suspension order.

If we assume that the Referee did not allow the proffered testimony of Bondi and Johnson, the Referee's reasons therefore were sound. As initially stated by the Referee, if the underlying offense was so egregious as stated by The Florida Bar counsel The Florida Bar could have sought disbarment of Lopez and this Court could have disbarred Lopez. As stated by the Referee, "where the Florida Bar had the discretion to ask for disbarment and chose to make a judgment that the facts did not justify a disbarment and that's the only conclusion that anyone can reach, that the Florida Bar knowingly decided not to recommend disbarment because it felt the facts weren't serious enough--that's the conclusion, since they didn't disbar him. They suspended him only, which was an invitation to return to the Bar. The facts of the original felony--if I hold that these facts for which he was prosecuted in the U.S. District Court were too serious and, therefore, nullifies his Petition for Reinstatement, then in effect, I am disbarring him,..." (T1-108-109).

After reviewing the testimony and demeanor of the witnesses as they testified, including the testimony concerning the factual circumstances of the criminal conviction, the Referee found as a matter of fact that Lopez did show rehabilitation of his character and that Lopez has reached and maintained the minimum plateau required of lawyers.

IV.

WHETHER THE REFEREE SHOULD HAVE CONSIDERED THE TESTIMONY OF THE FLORIDA BAR WITNESSES AS MEMBERS OF THE PUBLIC.

The Referee excluded opinion evidence offered by two witnesses called by The Florida Bar, Robert J. Bondi, Assistant United States Attorney who prosecuted Lopez which resulted in the automatic suspension in 1983, and William Johnson, an Immigration and Naturalization Services investigator who assisted Mr. Bondi in the prosecution of Lopez. The evidence excluded was the opinion of Bondi and Johnson as to the character of Lopez (the Referee allowed proffered testimony of Bondi and Johnson as to the facts and circumstances surrounding the 1983 suspension of Lopez (T1-147), as discussed in Argument III above). The Florida Bar argues that because this was an open proceeding, anybody was allowed to walk in and give an opinion as to whether or not Lopez should be allowed to practice law. It is true the reinstatement proceeding is open (with publications in the local newspaper, etc.); however, the reinstatement proceeding is also governed by certain rules of evidence, and one of the basic rules of evidence is a person cannot give an opinion about something of which he has no knowledge. The testimony is clear that Bondi "had absolutely no contact with Mr. Lopez at all since his conviction and sentencing in 1983," (T1-127) and Johnson could not base his opinion on any post suspension conduct other than the listing (inadvertent) of Lopez in the yellow pages under "attorney" (a point discussed in Argument I.B. above). Thus, because neither Bondi nor Johnson had any factual basis to give an opinion of the present character of Lopez based on matters they knew subsequent to his 1983 suspension, the Court properly determined that they could not give an opinion as to his current character.

If this Court determines it was error for the Referee to not allow the opinion of Bondi and/or Johnson, such error was certainly not harmful. Lopez produced witnesses who all testified favorably to the character of Lopez (T1-29; T1-49; T1-56, 57; T1-59;

T1-62), and no persons were called by The Florida Bar to refute the character of Lopez other than Bondi and Johnson, whose opinions were formed from activities which occurred prior to 1983 and were not based on facts or observations made subsequent to the suspension of Lopez.

The record is clear that Lopez has demonstrated his high degree of character. If there were any conflicts of evidence as to the character of Lopez, the trier of fact resolved them in favor of Lopez when the Referee recommended Lopez be reinstated to the Florida Bar. The Referee did not commit error in sustaining objections to the opinion testimony of Bondi and Johnson, and even if the Referee did commit error in sustaining the objection, such was harmless.

CONCLUSIONS

Lopez satisfactorily met the burden of proving that he has satisfied each and every criteria required of a person seeking reinstatement to The Florida Bar as enumerated in the Rules Regulating The Florida Bar and the case law handed down by this Court. The trier fact weighed all of the evidence, including allegations made by The Florida Bar concerning income tax matters with regard to Canary Investments, Inc., the bank account of Peter M. Lopez & Associates, and the contents of the Petition for Reinstatement. The Referee considered the underlying facts resulting in the criminal conviction and subsequent three year automatic suspension from The Florida Bar, and considered the witnesses and evidence presented before him in making his determination. The Referee, after hearing the testimony, viewing the demeanor of the witnesses and admitting exhibits into evidence, found as a matter of fact that the character of Lopez was unimpeachable, Lopez having rehabilitated his character from the dark days from the early 1980s, that Lopez had no fraudulent design in any of the issues raised by The Florida Bar, and found as a matter of fact Lopez satisfied the requirements for reinstatement to The Florida Bar as an attorney in good standing. The Florida Bar did not meet the burden of demonstrating to this Court that the Referee's findings were not supported by the record or that the Referee was clearly erroneous, as the record clearly supports the recommendations and findings of fact made by the Referee. Similarly, the Referee considered all relevant information in making his determination of the fitness of Lopez and this Court should affirm the decision of the Referee and order that Lopez be reinstated after payment of reasonable costs associated with his Petition for Reinstatement.

RESPECTFULLY SUBMITTED this 14th day of October, 1988.

**B.K. ROBERTS, ESQUIRE
ROBERT R. McDONALD, ESQUIRE**

**ROBERTS, BAGGETT, LaFACE
& RICHARD**
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(904)222-6891

and

HAL P. DEKLE, ESQ.
412 Madison Street
Suite 808
Tampa, Florida 33602
(813)223-2300

By: 

ROBERT R. McDONALD, ESQUIRE

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Petition has been furnished by U.S. Mail to Louis Thaler, Esquire, Bar Counsel for The Florida Bar, Suite 211, Rivergate Plaza, 444 Brickell Avenue, Miami, Florida, 33131; John F. Harkness, Jr., Executive Director, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32301-8226; John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32301-8226; and Hal P. Dekle, Esquire, 412 Madison Street, Suite 808, Tampa, Florida, 33602 this 16th day of October, 1988.



ROBERT R. McDONALD

RRM/LopezBrief