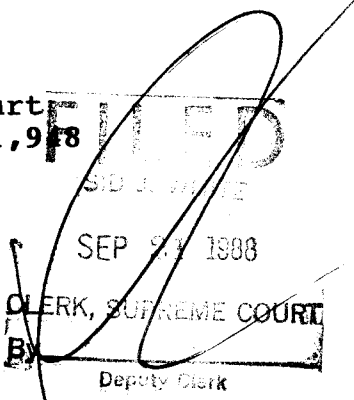
10-15

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,)

In Re: PETER M. LOPEZ)
(Petition for Reinstatement)

Supreme Court
Case No. 71,9[illegible]8



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

INITIAL BRIEF OF THE FLORIDA BAR

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INTRODUCTION

THE FLORIDA BAR, Respondent in the lower proceedings, will be referred to as "The Florida Bar."

PETER M. LOPEZ, Petitioner in the lower proceedings, will be referred to as "Petitioner."

THE BOARD OF GOVERNORS OF THE FLORIDA BAR will be referred to as the "Board of Governors."

The following symbols will be used in this brief:

"T1" - Transcript of the Reinstatement Hearing I held on May 16, 1988.

"T2" - Transcript of Reinstatement Hearing II held on May 31, 1988.

"T3" - Transcript of Reinstatement Hearing III held on July 11, 1988.

"RR" - Report of Referee dated July 26, 1988.

"PR" - Petition for Reinstatement dated February 19, 1988.

STATEMENT OF CASE AND FACTS

On November 25, 1981, Petitioner was suspended from the practice of law for one year for urging parties/witnesses to testify falsely under oath. The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981).

On April 21, 1983, as a result of a 22-count felony indictment filed against Petitioner in the United States District Court for the Southern District of Florida, Case No. 81-513 CR-WMH, Petitioner was found guilty of all 22 felony counts alleging that Petitioner did willfully and knowingly make and cause to be made false, fictitious statements as to material facts to the Immigration and Naturalization Service. On September 20, 1983, Petitioner was automatically suspended from The Florida Bar pursuant to Rule 11.07 of the Integration Rule of The Florida Bar (1983). The Florida Bar v. Lopez, Supreme Court Case No. 63,714 (Fla. 1983).

It is relevant for purposes of this appeal to direct the Court's attention to Lopez v. Florida Board of Bar Examiners, 231 So.2d 819 (Fla. 1969) for reasons which will become apparent in the brief. In Lopez v. Florida Board of Bar Examiners, the instant Petitioner experienced problems in initial admittance to The Florida Bar.

On February 19, 1988, by and through counsel B.K. Roberts and Hal P. Dekle, Petitioner filed a Petition for Reinstatement and a $500.00 cost deposit pursuant to Rule 3-7.9 of the Rules Regulating The Florida Bar (effective January 1, 1987).

Thereafter, The Florida Bar initiated an investigation into the allegations of the Petition for Reinstatement as well as Petitioner's fitness to resume the practice of law.

On April 11, 1988, the Honorable Alfonso C. Sepe, Referee, set a Reinstatement Hearing for May 16, 1988. At the Reinstatement Hearing on May 16, 1988, Petitioner introduced the testimony of several witnesses favorable to reinstatement (T1). However, upon examination of Petitioner as to federal income tax returns filed personally and in the name of "Canary Investments, Inc," a Florida corporation in which Petitioner and his wife were sole directors and shareholders, certain problems were uncovered. For the fiscal years 1983 to 1987, Petitioner did not file tax returns for Canary Investments because of alleged problems in compiling necessary records (T1.160-161). Petitioner further alleged that there was an overall loss for those years (T1.76, 78). Staff Auditor Carlos Ruga testified that during that period of non-filing, Canary Investments bought and sold property and collected rents (T1.154). The Referee adjourned the May 16, 1988 hearing until Petitioner filed the tax returns or was able to rectify the tax return situation (T1.161-162).

At the second hearing on May 31, 1988, Petitioner introduced tax returns which indicated an overall loss for the years 1983 through 1987. However, in two of the five years, Canary Investments earned income which would have subjected the corporation to taxation if the returns were filed pursuant to federal and state law (T2.6).

Further, at the second hearing of May 31, 1988, Petitioner was examined as to the contents of the Petition for Reinstatement. Petitioner was found to have failed to list an arrest for extortion in 1980 (T2.21-32). Although the arrest pre-dated the suspensions involved herein, the relevance of this point will become apparent during the argument at Point II. At the conclusion of the second hearing, the Referee recommended that Petitioner be reinstated (T2.53-54).

Just after the May 31, 1988 hearing, through admitted fault on the part of The Florida Bar Staff Investigator and Bar Counsel, Staff Auditor Carlos Ruga came to review certain bank records belonging to "Peter M. Lopez & Associates," the business entity which Petitioner maintained during his suspension (T3.5). Although these records were furnished to Staff Investigator Gordon Sither a few days before the May 16, 1988 hearing, they were not reviewed or brought to the attention of Staff Auditor Carlos Ruga until after the conclusion of the second hearing on May 31, 1988 (T3.6).

On June 7, 1988, before the Referee issued his Report of Referee, The Florida Bar filed a Motion to Allow Further Evidence in Reinstatement Proceeding. The Referee set a third hearing for July 11, 1988 at which time the Motion was granted (T3.11).

At the third and final hearing on July 11, 1988, The Florida Bar presented the testimony of Staff Auditor Carlos Ruga, who had reviewed the bank records for Peter M. Lopez & Associates for an account maintained at Ocean Bank of Miami.

The period examined was 1984 to 1988. This period was narrowed to January 1986 to January 1988, for purposes of the hearing. During the period January 1986 to January 1988, Petitioner issued and signed 444 checks on the Peter M. Lopez & Associates account at Ocean Bank. Of the 444 checks, 199 created overdrafts to the account and 48 of those overdrafts were checks returned for non-sufficient funds. The relevance of this problem will become apparent at Point I.

After the hearing of July 11, 1988, the Referee issued a Report of Referee dated July 26, 1988, recommending the reinstatement of Petitioner (RR.4).

Since the mailing date of the Report of Referee was not timely for the Board of Governors meeting on July 27-29, 1988, the Report of Refere was considered by the Executive Committee of The Florida Bar. The Executive Committee directed the filing of a Petition for Review and this appeal.

SUMMARY OF ARGUMENT

I

Petitioner has not acted with unimpeachable conduct, as is required by the case law governing reinstatement proceedings, in light of two factual situations brought to the attention of the Referee by The Florida Bar. The first factual situation involves Petitioner's failure to file federal and state corporate tax returns for the years 1983 through 1987 for Canary Investments, Inc., a Florida Corporation involved in various real estate transactions during that period, where Petitioner and his wife were sole officers and shareholders of the corporation. The second factual situation involves Petitioner's operation of the "Peter M. Lopez & Associates" bank account during the period of suspension. During the period January 1986 to January 1988, Petitioner issued and signed 444 checks on the Peter M. Lopez & Associates bank account. Of these 444 checks, 199 created overdrafts to the account and 48 were returned for insufficient funds.

II

In light of Petitioner's past problem in initial admittance to The Florida Bar, said problem arising out of the Florida Board of Bar Examiners' contention that Petitioner failed to reveal certain information on his bar application in 1969, Petitioner's omission of certain information on his Petition for Reinstatement should be considered to adversely reflect on the Petition for Reinstatement. Although Petitioner set forth an arrest in 1981 for an automobile inspection sticker violation,

he failed to mention an arrest in 1980 for extortion. Both the arrest for extortion in 1980 and the arrest for the automobile inspection sticker violation pre-dated any period of suspension. Petitioner's failure to list the extortion arrest, where he set forth an automobile inspection sticker violation arrest, points to the conclusion that the extortion arrest was not set forth to avoid a potentially troublesome area of inquiry.

III

The Referee failed to consider the nature of the underlying offenses giving rise to suspension and accordingly acted contrary to clear case law indicating that such a consideration should be undertaken in a reinstatement proceeding. The comparison of the prior misconduct to the conduct during the period of suspension is necessary and relevant to a proper determination of a Petitioner's fitness to resume the practice of law.

IV

The Referee's exclusion of the opinion evidence offered by two of The Florida Bar's witnesses was clearly erroneous. Reinstatement hearings are public proceedings where members of The Florida Bar and members of the public are given the opportunity to express opinions as to a petitioner's fitness to resume the practice of law. Motivation and relevance of such opinions should be considered when assigning weight to the opinions and should not be a basis to totally exclude the opinions.

I.

PETITIONER HAS NOT ACTED WITH UNIMPEACHABLE CHARACTER DURING THE PENDENCY OF SUSPENSION IN LIGHT OF:

A. THE CANARY INVESTMENT TAX RETURN MATTER.
B. THE PETER M. LOPEZ & ASSOCIATES BANK ACCOUNT MATTER.

In order to successfully apply for reinstatement to The Florida Bar, a petitioner must demonstrate various requisite elements. The Florida Bar In Re Timson, 301 So.2d 448 (Fla. 1974); The Florida Bar In Re Whitlock, 511 So.2d 524 (Fla. 1987). Among the elements, and of main contention by The Florida Bar that said element has not been satisfactorily demonstrated, is the requirement that Petitioner prove by clear and convincing evidence that he has acted with "unimpeachable character" during the period of suspension. Timson, at 449. Two specific instances of less than unimpeachable character were demonstrated to the Referee and were erroneously not given appropriate consideration as the Referee found that "the unimpeachable character of Petitioner, Peter M. Lopez, has been clearly and satisfactorily demonstrated by evidence presented before this Referee" (RR.2).

The necessary conclusion must be that, in not giving these factors, which are hereafter described, the appropriate consideration, the Referee's findings and recommendations are clearly erroneous and without support in the record. This Court's review of referees' reports in attorney reinstatement proceedings is governed by the same rules and procedures as are reports submitted in other disciplinary proceedings. The Florida Bar In Re Inglis, 471 So.2d 38 (Fla. 1985). A referee's findings of

fact must be accepted unless they are not supported by competent, substantial evidence in the record. Inglis, at 40. Further, with regard to legal conclusions and recommendations of a referee, the scope of review is broader as it is ultimately the Court's responsibility to enter an appropriate judgment. Inglis, at 41.

A. THE CANARY INVESTMENT TAX RETURN MATTER.

On or about September 23, 1975, Petitioner incorporated Canary Investment, Inc., a Florida corporation in which Petitioner and his wife are sole officers and shareholders. Petitioner has admitted that it was his responsibility to file income tax returns for Canary Investments (T1.87, T2.13-14). During the period 1980 to 1986, Canary Investments was involved in several real estate transactions, including the construction and sale of four houses (T1.71, 154), and the sale of ten-unit rental apartments (T1.78). At the time of the first reinstatement hearing on May 16, 1988, the only corporate tax return produced to The Florida Bar was for the fiscal tax year 1982, which was filed on August 31, 1982 (T1.154). In fact, at the time of the first reinstatemet hearing on May 16, 1988, Petitioner had not filed corporate tax returns for Canary Investments for the fiscal years 1983, 1984, 1985, 1986, and 1987 (T2.5).

Throughout the proceedings, Petitioner offered various excuses for his failure to file tax returns. As Petitioner stated,

> First of all, I didn't have any money, sir. Secondly, I had no records. Canary Investment had no records. They had been lost by Mr. Mastrapa.
>
> (T2.17).

In addition to Petitioner's excuses that he "didn't have any money" (T2.17) and that he changed accountants and the records were lost or misplaced (T1.160-161, T2.15-17), Petitioner attempted to excuse his failure to file by indicating that extensions were requested (T1.87) and there were losses for those years anyway (T1.76,78). Based upon the evidence, the Referee continued the first reinstatement hearing on May 16, 1988, until the tax matter was resolved (T1.161-162).

At the second reinstatement hearing on May 31, 1988, the Petitioner produced copies of the filed corporate returns for fiscal tax years 1983 to 1987. The Florida Bar's position is that the excuse concerning having no money to pay taxes is no excuse for a member of The Florida Bar who has been twice suspended, convicted of 22 felony counts, and applying for reinstatement to The Florida Bar under a standard of proving unimpeachable character. By definition, "unimpeachable character" is character that cannot be questioned. This is not the case as there are substantial questions surrounding any person or entity's failure to file tax returns. Having no money to pay taxes is simply not a reason not to file tax returns.

The excuse about changing accountants and losing records also does not hold up to scrutiny. Petitioner admitted, as shareholder and officer of the corporation which he ran, that he was responsible for the filing of the tax returns (T1.87, T2.13-14). Blaming others for failures in accomplishing legal responsibilities must weigh heavily against a finding of unimpeachable character.

The excuse about filing extensions is also without merit. The extensions dealt with certain tax years and not others. There were no extensions for the State of Florida Intangible Tax returns. Further, the contention that corresponding with the Internal Revenue Service in 1983 and 1984 (T2.17) was a meritorious excuse for not filing for those tax years and tax years 1985, 1986 and 1987, is simply not valid. Further, the contention that the Internal Revenue Service or someone at the Internal Revenue Service was patiently waiting, also tests belief (T2.17).

The plain fact that tax returns for the corporation were not filed for the fiscal years 1983 through 1987 and continuing thereafter through the time of the second reinstatement hearing on May 31, 1988, is a factor which alone can defeat a clear and convincing finding of unimpeachable character. These tax returns were only filed to appease the Referee for purposes of these proceedings. There was an obvious ability to file the returns because the returns were filed in the 15 days between the first reinstatement hearing of May 16, 1988 and the second reinstatement of May 31, 1988. Such conduct is nothing but suspicious, questionable and a far cry from "unimpeachable." Petitioner has not defeated the presumption that, but for these reinstatement proceedings, the tax returns would not have been filed. This is because Petitioner has irrelevantly argued that there were losses for those years anyway (T1.76-78).

Accordingly, the Petitioner's contention that there were losses for those years anyway is no excuse. The federal and

state laws requiring the filing of tax returns do not excuse said filings because there are alleged losses. A lay person may not know this, but a lawyer, albeit suspended and particularly because he is suspended and applying for reinstatement, must know this. In fact, although there was an overall loss for all the years, which does not cause Petitioner to be presently liable for any taxes, the tax return for the fiscal year ending August 31, 1983, indicates a net income of $5,751.00 (T2.6) and the tax return for the fiscal year ending August 31, 1984, indicates a net income of $4,665.00 (T2.6). If Petitioner had filed timely, he would have been liable to pay both federal taxes (T2.7) as well as State of Florida Intangible Taxes. We are also not talking about simple taxable transactions. For example, the tax return for fiscal year 1985, which was not filed until May 31, 1988, the day of the second reinstatement hearing, indicates a loss in the amount of $68,259.00 (T2.7).

Petitioner made his own rules and did not file, until his failure to file became an issue before the Referee. That issue was erroneously not considered by the Referee. The Referee concluded that since the Internal Revenue Service was not investigating or prosecuting Petitioner, he would not consider the merits of the tax matter (T1.152-153, T2.12). This was not and is not The Florida Bar's point, which is, that the very fact the tax returns were not filed when they should and could have been filed, reflects adversely on the Petition for Reinstatement (T2.10).

B. THE PETER M. LOPEZ & ASSOCIATES BANK ACCOUNT MATTER.

During the period of suspension, Petitioner maintained a bank account at Ocean Bank of Miami in the name of "Peter M. Lopez & Associates." Although not a point of main contention, Petitioner has admitted that there were not nor ever were any associates in Peter M. Lopez & Associates, although he did expect to have associates (T2.21). Further, through alleged inadvertence, a listing for Peter M. Lopez & Associates under the attorney section of the Southern Bell Yellow Pages, was maintained during the period of suspension (T1.99). Petitioner described Peter M. Lopez & Associates as a business name (T2.21).

A review of the bank account records of the Peter M. Lopez & Associates account for the period January 1986 to January 27, 1988 (T3.12), indicated that of the 444 checks issued on that account (T3.19), 199 of the checks created overdrafts to the account (T3.19) and 48 were returned for insufficient funds (T3.20). All of the 444 checks were signed by Petitioner (T3.41). The evidence further indicated that Petitioner knowingly wrote these checks with insufficient and even negative balances (T3.28, 33, 60).

Petitioner defended with the testimony of Jorge Perez, (T3.21), President of Ocean Bank, who alleged that Petitioner had a verbal overdraft agreement with the bank (T3.23). This same witness also testified that on occasions, the verbal overdraft agreement failed and checks were returned (T3.32). The following exchange between bar counsel ("Q") and Mr. Perez

("A") demonstrates that this verbal overdraft arrangement was sufficiently flawed to put Petitioner on notice that said arrangement was simply not working:

> Q: In 1986 and 1987, there is testimony that there were 444 checks that came into this account. One hundred and ninety-nine were overdrafts and forty-eight were insufficient funds.
>
> A: Forty-eight were returned.
>
> Q: Yes. Do you think that is a little unusual or more than a clerical mistake, as you represented in your affidavit?
>
> A: Well, Mr. Lopez, when I got the arrangement -- when he drew all these checks, it was not unusual. We paid most of the checks.
>
> Q: But you returned forty-eight of them to the payees, didn't you?
>
> A: Maybe at that time, the overdraft got too high and then we returned those checks.
>
> Q: So there were some instances where the bank refused to pay beyond the overdraft?
>
> A: Yes. The overdraft goes so high and then usually, we refuse after that.
>
> Q: Would it surprise you that in September of 1987, every check presented to the account was returned insufficient funds.
>
> A: I don't remember.
>
> Q: In September of 1987, there were no deposits to that account, although there were -- I believe there were about ten items that were returned for insufficient funds.
>
> (T3.31-33)

* * *

> Q: Mr. Perez, were you out of the country or out of town the <u>entire month of September, 1987</u>? (emphasis added)
>
> (T3.58)

A: I don't remember.

(T3.58)

Further, in one of the more egregious instances, Petitioner wrote two rent checks to Mosta Corporation, Petitioner's landlord (T3.41), which were returned for insufficient funds. Thereafter, Petitioner was contacted by an attorney for the landlord (Joseph Colletti). The matter was "settled" by Petitioner issuing a check to the landlord's attorney for two months rent plus attorney's fees. Petitioner's "settlement" check, in the amount of $6,070.80, was then returned for insufficient funds (T3.41-45).

The obvious impropriety is demonstrated by the record which includes a summary of the 48 dishonored checks prepared by Staff Auditor Carlos Ruga and considered by the Referee. These checks ranged in amounts from $43.96 to $9,000.00. We are not dealing with a businessman who has had troubled times and receives favors from a long-time acquaintance who happens to be president of a bank. We are dealing with an attorney, now applying for reinstatement, who has had 48 check returns in a recent 24-month period. The Referee apparently reasoned that Petitioner should have corrected the overdraft/insufficient funds situation after the first check was returned (T3.50-53). Further, the Referee appreciated the effect to the public in the event the bank did not pay or Petitioner was unable to cover the overdrafts (T3.56). Apparently, however, the Referee failed to give sufficient weight to these conclusions.

This is the gist of The Florida Bar's argument. Not only was the situation not corrected after the first check was dishonored,

but members of the public received these dishonored checks from a suspended member of The Florida Bar. The Florida Bar has no evidence to contradict and accordingly does not contest that all checks were eventually paid by Petitioner (T3.8).

II

THE PETITIONER'S OMISSION OF RELEVANT INFORMATION FROM THE PETITION FOR REINSTATEMENT SHOULD REFLECT ADVERSELY ON THE PETITION FOR REINSTATEMENT.

This second point on appeal must be prefaced by a description of Petitioner's past problems on his initial application to The Florida Bar. Lopez v. Florida Board of Bar Examiners, 231 So.2d 819 (Fla. 1969), involved a review of the Florida Board of Bar Examiner's rejection of the instant Petitioner's initial application to The Florida Bar.

The Florida Board of Bar Examiners,

> found that the applicant Lopez was unfit to practice law because in his answers to questions propounded on his application for admission he failed to reveal certain information, that, in the opinion of the Board, was relevant to the question of his fitness to practice law in this state.
>
> Id., at 820.

The Florida Board of Bar Examiners further found that the instant Petitioner had,

> falsely and fraudulently withheld that he had been involved in several civil suits; that he had resided in Miami, Florida, during a part of the period 1950-1958; that he had been summoned to appear before the immigration authorities for over-staying his visa in this country; that he had falsely claimed United States citizenship in order to join the Florida National Guard; and that he had served as a research aide while studying for the Bar.
>
> Id., at 820.

The Supreme Court of Florida ordered the admission of the instant Petitioner at that time stating that,

> the habit of concealment and equivocation that is so natural for a person of applicant's political learning when living under a communist regime will undoubtedly

be dissipated eventually when applicant becomes fully acclimated to life in this democracy[1].

Id., at 821.

Further, the Supreme Court stated,

> it is true that much of the evidence creates some suspicion about his ethical responsibility, but it must be remembered that as he enters the practice of law he will be bound by, and required to adhere strictly to, the canons of ethics relating to the legal profession, and should he falter, The Florida Bar, under the rules of this court, possesses adequate machinery to bring him to accountability.

Id., at 821.

With regard to the instant Petition for Reinstatement, Petitioner, at Paragraph 10 of said Petition, stated:

> Other than the arrest which led to his conviction in the United States District Court, Southern District of Florida, resulting in his suspension from the Florida Bar by Order of this Court in 1983, the judge, prosecutor and witnesses of which are listed in paragraph 4 above, Petitioner has not been arrested or prosecuted for any crime, either felony or misdemeanor, except for failure to have a valid automobile inspection sticker, the conviction date being August 4, 1981.

(PR.3).

Petitioner failed to mention that he was arrested in 1980 for extortion.[2] The relevance of not mentioning an arrest for

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[1]It is historically noteworthy that Petitioner at most may have lived only a few months under the communist regime in Cuba. Fidel Castro came to power on January 1, 1959, the same year Petitioner emmigrated to the United States. Lopez v. Florida Board of Bar Examiners, 231 So.2d 819, 820 (Fla. 1969).

[2]The details of the arrest are set forth in the Report of Investigation of Gordon Sither, which was admitted in evidence before the Referee. Briefly, Petitioner had been arrested based on an affidavit from a Miami accountant, which set forth that (Footnote Continued)

extortion in 1980 while mentioning an arrest for failure to have a valid automobile inspection sticker on August 4, 1981, where both arrests occurred before any period of suspension,[3] was made clear to the Referee at the second reinstatement hearing on May 31, 1988 (See T2.21-32).

The Referee found Petitioner's response to the questions by bar counsel "absurd" (T2.28). Furthermore, the Referee, despite having notice of Lopez v. Florida Board of Bar Examiners, 231 So.2d 819 (Fla. 1969) (T2.35) wherein Petitioner suffered a similar "lapse," did not conclude that this behavior adversely reflected on Petitioner fitness to resume the practice of law.

Petitioner's responses were absurd. In response to the Referee's question:

> Well, that's a good question. Why did you single out the sticker and leave out the extortion? That's the question
>
> (T2.25).

Petitioner stated:

> In answer to your question, I see that I did not put it in, but I construed my petition to be my arrest record or any kind of a record subsequent to my suspension, but not before my suspension . . .
> (T2.25).

(Footnote Continued)
Petitioner had hired a gunman to threaten the accountant to withdraw his complaint against Petitioner lodged with The Florida Bar.

[3]The Supreme Court Order in The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981) (urging parties and/or witnesses to testify falsely under oath) was dated November 25, 1981, and rehearing was denied February 15, 1982. The Supreme Court Order in The Florida Bar v. Lopez, Supreme Court Case No. 63,714 (Fla. 1983) (conviction of 22 felony counts) was dated September 20, 1983.

Bar counsel will point out that both the extortion arrest (March 14, 1980) and automobile sticker arrest (August 4, 1981) were prior to Petitioner's initial suspension (November 11, 1986). See The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981).

In further explanation of the omission, Petitioner stated:

> My answer is that if it isn't there, it isn't, but I didn't mean to hide anything because I have nothing to hide. I know the Florida Bar. I knew they were going to investigate me up to the point up to where I live. There was no question. I believe that I attached -- I don't know if --
>
> (T2.38).

It is unfortunately noteworthy that history has repeated itself. Petitioner has made his own rules again. Just as Petitioner failed to set forth certain troublesome items in his initial application to The Florida Bar, Petitioner has, in the instant proceeding, failed to set forth an arrest for extortion. Logic, relevance and the nature of this proceeding dictate that the arrest for extortion should have been disclosed without the need for The Florida Bar to uncover the incident through staff investigation. The point is not what The Florida Bar knew, but rather Petitioner's honesty as reflected in the information set forth in (or omitted from) his Petition for Reinstatement to The Florida Bar. The omission of relevant information presumes intent to avoid a troublesome area (again) which puts into serious question this Petitioner's fitness to resume the practice of law.

III

THE NATURE OF THE UNDERLYING OFFENSES SHOULD BE CONSIDERED BY THE REFEREE AND THE SUPREME COURT OF FLORIDA IN REINSTATEMENT CASES.

Petitioner was before the Referee based upon two distinct underlying offenses which led to his suspension from The Florida Bar. The underlying offense which led to Petitioner's initial suspension involved Petitioner's urging of parties and/or witnesses to testify falsely under oath in a civil matter. Petitioner was suspended for a period of one year effective November 11, 1981. The Florida Bar v. Lopez, 406 So.2d 1100 (Fla. 1981). This suspension occurred after proceedings before a referee.

The second underlying offense which led to the subsequent suspension involved Petitioner's conviction of 22 felony counts of knowingly making false and fictitious statements to the Immigration and Naturalization Service. The Florida Bar v. Lopez, Supreme Court Case No. 63,714 (Fla. 1983). This subsequent suspension was pursuant to Rule 11.07 of the Integration Rule of The Florida Bar (1983), the automatic suspension rule for a felony conviction which was in effect at that time.

Both suspensions required proof of rehabilitation since they were for periods of more than 90 days, a fact which the Referee apparently did not take into consideration. Because of the proximity of suspension dates, the suspensions ran concurrently and then consecutively. Petitioner was never granted reinstatement after either suspension.

Regardless, the Referee failed to take into consideration the underlying offenses which led to Petitioner's suspension and incorrectly assumed that the such evidence was not admissible

because The Florida Bar could have and should have sought the disbarment of Petitioner (T1.107-114).

Accordingly, the Referee ignored the clear case law cited by bar counsel (T1.106-107), which indicates that the underlying offenses must be considered. Petition of Wolf, 257 So.2d 547 (Fla. 1972); Petition of Rubin, 323 So.2d 257 (Fla. 1975).

In Wolf, supra, the petitioner therein asserted that the Referee improperly considered the petitioner's past disciplinary record, including the nature of the offense that led to his disbarment. The Supreme Court held,

> This assertion is without merit for the Referee may properly consider the prior disciplinary record of one seeking to be reinstated to The Florida Bar, including the number, similarity and gravity of his offense.
>
> Wolf, supra, at 548.

Similarly, in Rubin, the petitioner therein argued

> that evidence of prior disciplinary action should not be considered in a reinstatement proceeding because it should have been considered (whether it was or not), and would have been a factor in the disciplinary proceeding which generated the suspension.
>
> Rubin, supra, at 258.

The Supreme Court held,

> We disagree. It is proper for the Referee to accept evidence of prior disciplinary proceedings, among other things, for the prupose of comparing prior and current conduct and the Referee report in this case indicates that evidence of prior misconduct was considered for that express purpose.
>
> Rubin, supra, at 258.

The Referee in the instant case refused to accept evidence of Petitioner's prior misconduct for any purpose. Such refusal was

clearly erroneous and contrary to the clear decisions in Wolf, supra, and Rubin, supra, both cases having been cited to the Referee (T1.106-107).

The reinstatement proceeding is designed to examine a Petitioner's conduct during the period of suspension. In order to make such an examination, the Referee must consider the factors leading to the suspension. There is no point of reference to make a determination as to how "good or bad" Petitioner has been during the period of suspension, if the Referee does not consider how "good or bad" Petitioner was during the period of time leading up to the suspension.

In simplest terms, a case by case analysis dictates that an examination of a petitioner's conduct during suspension should be compared to the egregiousness of his actions which lead to his suspension. Especially if, as The Florida Bar contends in Points I and II, the Petitioner has not been so "good." Especially, since the standard is "unimpeachable character." Especially, since the underlying misconduct was egregious.

This case is a perfect example of why the underlying offenses cannot be ignored. In the initial suspension, Petitioner urged parties and/or witnesses to testify falsely under oath, which is, perhaps, one of the most egregious acts an officer of the court can commit. The second suspension involved a conviction on 22 felony counts of making false and fictitious statements to the Immigration and Naturalization Service.

With regard to the felony conviction, Assistant United States Attorney, Robert J. Bondi, who criminally prosecuted Petitioner,

set forth a version of the criminal facts for the Referee (T1.119-125). Mr. Bondi characterized the 22 felony counts as the "cream of the crop" (T1.122), as there were "many, many more" (T1.124) cases which were not prosecuted.

It is unclear from the record in what manner the Referee treated this version of the criminal facts. At different points, the Referee indicated he would not consider the underlying facts (T1.107,113), at another point, the Referee indicated he would consider Mr. Bondi's testimony as a proffer (T1.106), at another point the Referee indicated he would "allow those facts in, as recited" (T1.147), but, "just to give a little life to the old charging document, the indictment in this case" (T1.147). In the latter situation, the Referee made it clear that "that's the only reason I will let it in" (T1.147). The Florida Bar contends the case law indicates there were more reasons to allow the version of facts into evidence than to "give a little life to the old charging document." The Referee properly should have compared the prior misconduct with Petitioner's impeachable conduct during the period of suspension. If the Referee had acted pursuant to the case law, he should have found that Petitioner's conduct was clearly not (unimpeachable).

IV

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

The Referee improperly excluded the opinion evidence offered by two of The Florida Bar's witnesses and in fact, did not consider the testimony of one of the witnesses. Assistant United States Attorney Robert J. Bondi (T1.117), who criminally prosecuted Petitioner's conviction of 22 felony counts, was allowed to set forth a version of the underlying facts leading to the felony conviction and express his opinion as to Petitioner's fitness to resume to practice law. Thereafter, the Referee excluded the opinion testimony from consideration and only considered Mr. Bondi's version of the facts "just to give a little life to the old charging document, the indictment in this case" (T1.147). Further, Immigration and Naturalization Services Special Agent William Johnson (T1.135) was not even allowed to express his opinion as to the Petitioner's fitness to resume the practice of law (T1.147).

Although these opinions were based upon knowledge of Petitioner's activities at the time of his misconduct and not based on knowledge of Petitioner during the period of suspension, they were not irrelevant if, as argued at Point III, the nature of the underlying offense is properly considered. Petition of Wolf, 257 So.2d 547 (Fla. 1972); Petition of Rubin, 323 So.2d 257 (Fla. 1975).

The Referee did not consider that a reinstatement hearing is a public proceeding where anyone's opinion should be considered (T1.113) and given appropriate weight. Robert J. Bondi spoke as a

member of the public and as member of The Florida Bar (T1.127) and not as a representative of the United States Attorney's Office (T1.118-119). Special Agent William Johnson spoke as a member of the public and not merely as a representative of the Immigration and Naturalization Service (T1.133).

Reinstatement proceeding were designed to allow anyone to voice an opinion. Advertisements are run in local publications advising the public to come forward. Regardless, the Referee decided that the opinion evidence of Robert J. Bondi and William Johnson were not to be considered as evidence (T1.147). Further, the record reflects that the Referee, improperly, gave little or no weight to the underlying misconduct which these two witnesses were greatly familiar with. To totally ignore the opinions of members of the public who do come forward to testify is clearly erroneous.

CONCLUSION

The record in this case reflects that Petitioner makes and abides by his own set of rules even if these rules are not the ones everyone else must follow. From the very beginning of Petitioner's relationship with the Florida Board of Bar Examiners, through Petitioner's two suspensions and through the period of suspension to the time of the instant proceedings, it is evident that Petitioner has not changed his ways.

When applying to The Florida Bar, Petitioner failed to mention certain information in his bar application. Lopez v. Florida Board of Bar Examiners, 231 So.2d 819 (Fla. 1969). When parties/witnesses in a civil matter were going to testify truthfully, Petitioner urged them to testify falsely and if they did testify falsely, then, he would get them "off the hook." The Florida Bar v. Lopez, 406 So.2d 1100, 1101 (Fla. 1981). When clients came to Petitioner to solve their immigration problems, in 22 known and proven criminal instances, Petitioner falsified documents and submitted the documents to the Immigration and Naturalization Service (T1.119-125). The Florida Bar v. Lopez, Supreme Court Case No. 63,714 (Fla. 1983).

During the period of Petitioner's suspension, he engaged in various real estate transactions under the corporate name "Canary Investments, Inc.," and when it came time to file corporate tax returns, Petitioner failed to file for some very questionable reasons. When the Referee in these proceedings held up Petitioner's reinstatement, the tax returns for the past five years, were

filed in a two-week period. Further, in operating a business known as "Peter M. Lopez and Associates," Petitioner, during the two-year period from January 1986 to January 1988, issued and signed 444 checks on the business account. Of the 444 checks, 199 created overdrafts to the account and 48 were returned to the payees for insufficient funds. Finally, history repeated itself when the time came for Petitioner to file a Petition for Reinstatement. Under the faulty reasoning that The Florida Bar was going to find the information anyway, Petitioner failed to set forth an arrest for extortion in the Petition for Reinstatement, although he did set forth an arrest for an invalid automobile inspection sticker, where both arrests, the former not set forth and the latter fully described, occurred prior to any period of suspension.

The Florida Bar's position is that these proceedings, in which the burden of proving unimpeachable character and fitness to resume the practice of law by clear and convincing evidence is upon the Petititioner, have demonstrated that Petitioner's conduct during the period of suspension has been questionable and impeachable. Accordingly, The Florida requests that the Petition for Reinstatement be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven copies of the foregoing Initial Brief of The Florida Bar has been sent to Sid J. White, Clerk, Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida 32399, by Federal Express (AB# 6126612225) and a true and correct copy was mailed to Petitioner's attorneys: Hal P. Dekle, Esq., 14740 Lake Magdalena Circle, Tampa, Florida 33613, by Federal Express (AB# 6126612240); B.K. Roberts, Esq., 101 East College Avenue, Post Office Drawer 1838, Tallahassee, Florida 32302, by Federal Express (AB# 6126612214), on this 20th day of September, 1988.

Patricia S. Etheridge for

LOUIS THALER
Bar Counsel