

IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

IN RE:

MICHAEL J. JAHN
(Petition for Reinstatement).

Case No. 72,182
[TFB Case No. 88-31,150 (CRE)
(09B) 1

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INITIAL BRIEF OF THE FLORIDA BAR

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

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SYMBOLS AND REFERENCES

The Florida Bar, Respondent in lower proceedings, will be referred to as "The Florida Bar".

Michael J. Jahn, Petitioner in the lower proceedings, will be referred to as "Petitioner".

The following symbols will be used in this brief:

T- Transcript of Reinstatement hearing held on February 20, 1989.

RR- Report of Referee dated May 4, 1989.

STATEMENT OF THE CASE AND FACTS

On June 12, 1985, the Supreme Court of Florida suspended Petitioner from the practice of law pursuant to his two felony convictions for delivery of cocaine to a minor and possession of cocaine. The Florida Bar filed a Complaint seeking further discipline. Pursuant to the Referee's recommendations, this Court then suspended the Petitioner from the practice of law for three years effective June 12, 1985, The Florida Bar v. Jahn, 509 So.2d 285 (Fla. 1987).

On March 31, 1988, Petitioner filed a Petition for Leave to File Early Petition for Reinstatement, along with his early Petition for Reinstatement. The Florida Bar opposed this in its Response, citing Rules of Discipline, Rule 3-7.9(e), since respondent had not yet completed payment of the costs assessed against him in the prior discipline proceedings. On May 12, 1988, this Court granted Petitioner's leave to file the early Petition for Reinstatement, but stated that the matter would not be referred to a referee until costs were paid. On October 18, 1988, Petitioner filed a notice indicating that costs were paid in full and the Court assigned the case to the referee on October 21, 1988.

Final Hearing was held on February 20, 1989. Petitioner presented six witnesses, including himself. Mr. Roger Smith,

correctional officer at Lake Correctional Institution, testified that he had known the Petitioner since 1985 when he was an inmate at the facility and that Petitioner had demonstrated rehabilitation from drug use since his conviction, T-10-19. Mr. Murray Epstein, an attorney from south Florida, testified that he had known the Petitioner since 1970 and that he had demonstrated rehabilitation from drug use since his conviction. Mr. Epstein also testified that he and Petitioner discussed legal cases since his suspension and Petitioner appeared legally knowledgeable, T-28. Petitioner's father, Mr. George Jahn, also testified of Petitioner's rehabilitation subsequent to the 1985 conviction, T-34-49. He stated that he had occasionally discussed his law practice with Petitioner and Petitioner appeared to express legal knowledge in those conversations, T-46. He also testified that he had attempted to help his son find employment through his friends at title insurance companies, but that he had been unsuccessful due to Petitioner's felony conviction, T-49-50. Petitioner testified regarding his rehabilitation from cocaine dependency and his job history since his suspension, T-50-97, 104.

In 1987, Petitioner obtained employment as a trust officer at NCNB, a Miami branch of a major Florida bank, by misrepresenting himself as a member of The Florida Bar in good standing without any criminal history. He lied on his resume,

his employment application and under oath on a polygraph exam, TFB Ex. 1. He also lied during some ten interviews with NCNB, T-62. Petitioner's misrepresentation was discovered and he was terminated within a few days of his employment, T-61-63.

Petitioner also testified that he went through bankruptcy due to lawsuits brought against him by the three young females who alleged that he had forcibly injected them with cocaine against their will and sought damages therefore, T-95.

Petitioner has not worked in the legal area since his suspension but did attend two or three Continuing Legal Education courses, T-87-88. He did some legal research, about 5-7 hours a month, while employed by Florida Ranchlands, T-94.

The Florida Bar presented one witness, a staff investigator, who described his investigation of Petitioner's Petition for Reinstatement and how he learned of the NCNB incident, T-99.

The Referee ordered Petitioner to submit to a urinalysis drug test, without prior warning, after the hearing and Petitioner successfully passed this test. On May 4, 1989, the Referee filed his report recommending that Petitioner be readmitted to The Florida Bar immediately, without taking The Florida Bar exam, and be placed on probation for three years with

periodic drug screening and participate in any programs recommended by Florida Lawyers Assistance, Inc., RR-5-6.

The Florida Bar's Board of Governors determined that the Bar should petition for review of the Referee's recommendation of reinstatement at their May, 1989, meeting.

SUMMARY OF ARGUMENT

Petitioner has the burden of proving his rehabilitation from the factors which caused him to become addicted to cocaine and to be convicted of the first degree felony of delivery of cocaine to a minor, by injection, and the third degree felony of possession of cocaine in relation to another young female. There is evidence that Petitioner has sought treatment for his drug use and that he now leads a drug free lifestyle. However, Petitioner's actions during his period of suspension have cast doubt about his moral integrity which appear even more deeply rooted than his cocaine addiction. It is well settled that a petitioner for reinstatement to The Florida Bar must demonstrate evidence of an unimpeachable character in order to prove his fitness to practice law. By lying during his suspension, in representing himself as a member in good standing of The Florida Bar who had no criminal history in order to obtain employment as a trust officer in a bank, and continuing this fraud in ten interviews, many resumes, and even a polygraph exam, Petitioner has utterly and completely failed to demonstrate the required moral standards for reinstatement.

Further, Petitioner admittedly declared bankruptcy during his suspension with the main purpose of avoiding restitution to the young women with whom, it was criminally charged, he forcibly

injected with cocaine. Petitioner should not be reinstated to
The Florida Bar.

ARGUMENT

POINT I

**PETITIONER HAS FAILED TO DEMONSTRATE
THE UNIMPEACHABLE CHARACTER REQUIRED
DURING HIS SUSPENSION AND HIS PETITION
FOR REINSTATEMENT SHOULD BE DENIED.**

A petitioner for reinstatement must demonstrate certain behavior in order to demonstrate his rehabilitation and fitness to practice law. The elements of this behavior are outlined in The Florida Bar v. Timson, 301 So.2d 448 (Fla. 1987):

1. Strict compliance with the disciplinary order
2. Evidence of unimpeachable character
3. Clear evidence of a good reputation for professional ability
4. Evidence of lack of malice and ill feeling toward those involved in bringing the disciplinary proceedings
5. Personal assurances of sense of repentance and desire to conduct practice in exemplary fashion in the future
6. Restitution of funds

at 449.

Also, In Re: Dawson, 131 So.2d 472 (Fla. 1961) and In Re: Whitlock, 511 So.2d 524 (Fla. 1987).

It is the position of The Florida Bar that Petitioner clearly failed to prove the second element, evidence of unimpeachable character. As acknowledged by the Referee in his report, RR-4, Petitioner obtained employment as a trust administrator with NCNB in Miami in October, 1987. He did so by

completely and knowingly lying about his criminal history, saying he had none, and representing himself as a member in good standing of The Florida Bar, **T-58-63, 91**. He lied by omitting this information and changing dates of employment to conceal his prison term on his resume which he sent to NCNB and many other potential employers, **T-96**. He also deliberately and completely lied on the NCNB employment application, about ten NCNB job interviews, and under oath on a pre-employment polygraph, **T-62**. Although he was directly questioned regarding his criminal history on the polygraph exam, he successfully passed the test by controlling his physical responses, **T-63**. He acknowledged that his only motive for these misrepresentations was personal gain, RR-4.

This action reflects very poorly on an individual who seeks to demonstrate his rehabilitation from a first degree felony conviction and his fitness to practice law. Petitioner's prior discipline, egregious as it was since it involved injecting a minor female with cocaine in the restroom of an Eckerd's drugstore, was attributed to his addiction to cocaine. Drug and alcohol addictions are recognized as diseases in these enlightened times and thus afforded some sympathy. By this action, however, Petitioner has subjected his moral integrity to question. Lying and misrepresenting facts are recognized as character traits which do not deserve sympathy or belong in the

practice of law. Further, he lied to obtain employment in the field of administering trust money, where a trustee's honesty and integrity are intrinsic to his position. He obtained this job by misrepresenting himself as a member in good standing of The Florida Bar who did not desire to remain in private practice, T-91.

This Court has not hesitated to impose significant discipline on attorneys who engage in similar fraud and misrepresentation; The Florida Bar v. Johnson, 439 So.2d 216 (Fla. 1983); The Florida Bar v. Beneke, 464 So.2d 548 (Fla. 1985). In The Florida Bar v. Nuckolls, 521 So.2d 1120 (Fla. 1988), this Court suspended a respondent for 90 days where he fraudulently obtained 100% financing by misrepresenting the purchase price of condominium units, stating:

We cannot characterize as "bad judgment" a deliberate attempt to penetrate a fraud on lenders who, based on respondent's misrepresentations, thought they were making an 80% loan.

at 1121.

The referee in the case at hand is thus overly lenient in characterizing the NCNB fraud as "not the real" Michael Jahn, RR-5.

The Florida Bar does not contest the Referee's findings of fact, recognizing that these are afforded great weight as long as

they are supported by competent, substantial evidence in the record, In Re: Inglis, 471 So.2d 38, 40 (Fla. 1985). Further, Petitioner stipulated to the facts of the NCNB incident. However, the recommendations of the referee regarding the ultimate disposition of the case are recognized as being subject to a broader scope of review since it is ultimately the Court's responsibility to enter an appropriate judgment, Inglis at 41.

Further, Petitioner's bankruptcy must be noted. He admitted that he undertook a personal bankruptcy with the primary purpose of avoiding the lawsuits brought by three young women against him for his alleged conduct in forcibly injecting them with cocaine, T-95. This demonstrates a failure to provide restitution to those harmed as a result of his previous misconduct, yet another requirement for reinstatement.

Public interest is yet another factor against Petitioner's reinstatement. As the Referee noted, a petition was submitted by 28 members of the Bar from the Orlando area, RR-2, which urged the Referee to carefully consider the reinstatement to assure that the Petitioner would not repeat the behavior which resulted in his felony suspension and reflected so poorly upon the Bar as a whole. It must be remembered that Petitioner's criminal investigation involving injecting several young women, one a minor, with cocaine against their will in motel rooms, resulted

in substantial publicity at the time, making the public well aware that Petitioner was a member of The Florida Bar. Petitioner has already complained about the hostile feelings towards his reinstatement, T-64-65, 67. The Referee acknowledged the great interest shown in the reinstatement by the media, T-64-67, Petitioners Ex. 6. The duty of protecting the public and the image of The Florida Bar would not be served by allowing this Petitioner to be reinstated given his demonstrated lack of rehabilitation. Since respondent lied about his criminal history and Bar status while suspended, one must greatly question whether he would be truthful in the future regarding his background if reinstated.

In Re: Alfieri, 529 So.2d 1116 (Fla. 1988) addressed a similar situation to the case at hand. This Court refused to allow reinstatement where the petitioner had been allowed to resign despite serious criminal convictions and had subsequently failed to provide notice thereof to the New York Bar of which he was also a member. Although the referee found that the petitioner had demonstrated rehabilitation and recommended reinstatement, this Court denied it, stating:

The Bar argues that this failure to comply with the regulatory rules of that jurisdiction casts doubt on petitioner to resume the practice of law in Florida. We agree., at 1117.

This Court has not hesitated to deny reinstatement where petitioners fail to prove rehabilitation, In Re: Doyle, 241 So.2d 689 (Fla. 1970); In Re: Pahules, 382 So.2d 650 (Fla. 1980).

It is acknowledged that Petitioner presented evidence of his rehabilitation from his drug addiction. Petitioner, however, summed up his own professional reputation for professional ability at final hearing, where he stated, "I liked being a lawyer. I don't think I did much if a job with it in the last couple of years.", T-83. None of the attorneys who testified were able to state that they had directly worked with Petitioner so as to be able to judge his professional competence. Along this line, Petitioner has not had any direct employment in the legal field while suspended which would afford him the opportunity to keep abreast of the law nor has he demonstrated enough significant self education to make the passage of the Bar exam unnecessary, as recommended by the Referee, RR-3.

This Court, In Re: Stoller, 36 So.2d 443 (Fla. 1948), stated, "Reinstatement is more a matter of grace than of right and is dependant upon rehabilitation and whether or not the disciplinary sanctions have been adequate.", at 444. Thus, it is immaterial that the suspension period has passed if Petitioner has not demonstrated a rehabilitation of his character.

In Re: Wolf, 257 So.2d 547 (Fla. 1972), this Court denied reinstatement to a petitioner disbarred after felony convictions stating that he was not entitled to reinstatement despite the lapse in time, noting that the license to practice law is a privilege, not a right, and the importance of the Court's duty of the protection of the public and the image and integrity of The Florida Bar, at 548. In denying reinstatement, the Court stated it understood the sympathy felt for a petitioner in these circumstances, which is clearly demonstrated throughout the referee's report at hand. Nevertheless, the Court in Wolf held that the service of a suspension period is not considered sufficient punishment unless the Petitioner has demonstrated rehabilitation. Petitioner has not, and therefore his Petition for Reinstatement should be denied.

CONCLUSION

Respondent has failed to demonstrate the rehabilitation necessary to be allowed to be reinstated as a member of The Florida Bar. His misrepresentation of himself as a member of The Florida Bar in good standing without a criminal felony record in order to gain more lucrative employment casts grave light upon his character and completely fails to show the unimpeachable character required for reinstatement. His bankruptcy, designed to avoid restitution through the lawsuits by the young females which were brought as a result of his felonious conduct in forcibly injecting them with cocaine, is clearly reflective of the lack of integrity required in these proceedings.

Accordingly, The Florida Bar requests that the Petition for Reinstatement be denied and The Florida Bar's costs in responding to his Petition, currently totalling \$1,205.89, be assessed against the Petitioner.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the original and seven (7) copies of the foregoing Initial Brief of The Florida Bar has been furnished by regular U.S. Mail to the Supreme Court of Florida, Supreme Court Building, Tallahassee, Florida, 32399-1927; a copy of the foregoing has been furnished by regular U.S. Mail to John A. Weiss, Counsel for Petitioner, at Post Office Box 1167, Tallahassee, Florida, 32301; and a copy has been furnished by regular U.S. Mail to Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida, 32399-2300, this 27th day of June, 1989.

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