IN THE SUPREME COURT OF FLORIDA

PETITION FOR REINSTATEMENT
OF KEITH A. SELDIN,

Petitioner-Appellee,

THE FLORIDA BAR,

Respondent-Appellant.
_____/

Supreme Court Case No. 75,212

The Florida Bar File No.
90-50,791 (15E-FRE)

INITIAL BRIEF OF THE FLORIDA BAR

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STATEMENT OF THE CASE AND OF THE FACTS

Petitioner, representing a decedent's estate, paid a $10,000.00 real estate commission to his fiancé in connection with the sale by the estate of a parcel of commercial real estate. While petitioner agreed that the payment to his fiancé (a sales person, not a broker) constituted a violation of statute and an attempt to exclude one or perhaps two (2) brokers from a commission, he steadfastly insisted that his fiancé was the procuring cause of the sale. The referee found that respondent's fiancé was not the procuring cause. This court, in an extensive review of the record, agreed with the referee. The $10,000.00 payment constituted an outright misappropriation.

As a result of respondent's misappropriation and a myriad of other offenses referenced in its decision, the court ordered that respondent be suspended for a period of two (2) years and imposed various conditions related to the reinstatement process. The Florida Bar v. Seldin, 526 So.2d 41 (Fla. 1988).

Upon this reinstatement proceeding, there were no issues raised concerning petitioner's adherence to and compliance with the specific conditions of the court's order. Petitioner paid the bar's costs, took and passed the ethics portion of the bar examination and made restitution to the estate.

At the final hearing, the parties agreed regarding petitioner's burden of proof, viz., that the criteria set forth in Petition of Wolf, 257 So.2d 547 (Fla. 1972) would govern the proceeding (8).* Petitioner

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* All page references are to transcript of final hearing.

testified to a lack of malice and ill-feeling toward those who by duty were compelled to bring about the disciplinary proceeding (91). Both petitioner and two (2) witnesses called by him testified concerning his professional ability thereby establishing clear evidence of a good reputation for professional ability (26, 27, 81, 82, 100 and 101).

Petitioner produced only one (1) witness regarding evidence of unimpeachable character and moral standing in the community. This witness, William Fleck, an attorney, testified as follows:

> Q. Do you know his reputation for honesty in the community?
> A. It is pretty good (28).

Upon cross examination, Mr. Fleck testified:

> Q. Regarding your last question and answer with regard to Mr. Seldin's reputation in the community, what do you base that on?
> A. Upon my experience with him and upon the fact that I never heard of any bad reports about him from other lawyers with whom I dealt with, with whom have dealt with him.
> Q. Well, did you discuss Mr. Seldin with these other attorneys that you made reference to?
> A. About the time when he had his problems with the bar, I guess two years ago, it came as a surprise to a number of us in the courthouse, and at that time, some comments were made about the fact that we had the opinion that he was an honest individual and throughout he would continue to be once he saw his way through this problem.
>
> Q. Who was that discussed with?
> A. Scott Kramer for one, Pat O'Hara, those two names immediately come to my mind.
>
> Q. Anyone else?
> A. Not that I can think of right away (28, 29).

The following transpired concerning petitioner's attempt to address the criterion set forth in Wolf, supra, defined as "personal assurances supported by corroborating evidence, revealing a sense of repentance, as well as a desire and intention of the petitioner, to conduct himself in an exemplary fashion in the future."

In his petition for reinstatement, petitioner recited, as follows:

> Although the Petitioner has never felt morally guilty of the violations, Petitioner both as lawyer and citizen bears no ill-will... (Petition for reinstatement, page 5, paragraph 2).

When questioned concerning his statement that he never felt morally guilty of the violations established in the bar proceeding, petitioner testified:

> Q. Mr. Seldin, have you felt morally guilty of the violations?
> A. I have, to this date, when this situation arose, did not feel I was morally wrong, I was legally wrong and have proven that I was legally wrong.
> Did I have ill will and a guilty mind to do it, no, to this day, I believe that, and am I sorry that it happened, yes, and if I had to do it over again, would I do it, no, but I did not intend for what happened to have happened, and I did not intend for it to appear the way it happened, but it happened, and I was found to be wrong, and I accept that (104).

When asked whether or not he ever explained to the witnesses who testified on his behalf exactly what acts of misconduct he was found to have committed, petitioner was unable to recall. He testified:

> Q. My question to you is: Did you ever express that yourself to them, that I, Keith Seldin, misappropriated funds, and I agree with the Court that that is what I did - -
> A. I do not recall (103).

Four (4) of the witnesses presented by petitioner testified that petitioner was remorseful. Bruce Cohen, a corporate officer and former client testified that petitioner expressed remorse but was unable to recount what, if anything, petitioner had explained to him regarding the facts underlying petitioner's suspension. His comprehension of the underlying facts was, at best, garbled (39-41).

Joel Cronin, M.D., a Florida attorney and physician likewise testified regarding remorse. He explained that petitioner showed little remorse at the outset but gradually became more remorseful (44). He never had any discussion with petitioner regarding the facts underlying petitioner's suspension. He testified:

> Q. And if I understand you correctly from that point to today where you are sitting testifying, you never discussed with Mr. Seldin the facts underlying the incident which led to his suspension?
> A. That is correct. I sort of stayed away from it, to be honest with you (53).

Edward Esposito, a semi-retired refractor company owner and former client of petitioner testified that petitioner was very remorseful (62, 63). Like the other witnesses, however, Mr. Esposito had no discussion with or explanation from petitioner regarding what conduct petitioner considered to constitute wrongful conduct. Mr. Esposito testified:

> Q. The remorse that he expressed to you --
> A. Yes.
>
> Q. -- what did he say?
> A. He said that he was proven wrong in this case, and that after the facts were laid out, he realized that he was wrong, he was sorry he did it and wouldn't have done it had he known it was wrong. That it was a silly thing to do after he found out he was wrong, and he said that he lost his career, and that he was in bad shape, words to that effect --
>
> Q. Did he explain to you at any time what it was that he found out as a result of the Bar proceedings that led him to believe that his conduct was wrong?
> A. No (64).

In his petition for reinstatement, petitioner did not, in listing extant civil actions, make reference to the fact that there was an outstanding litigation entitled Jupiter Cove Plaza, Ltd., etc., plaintiff v. Keith Seldin, P.A. The complaint in that action was admitted into evidence as joint composite exhibit 1 in evidence (89).

The bar argued that petitioner failed to comply with Rule 3-7.10(n)(2)n by failing to reveal the referenced civil action and all particulars relating thereto. Petitioner insisted that the rule explicitly provided for reporting only when the applicant for reinstatement is either a party plaintiff or defendant; in that the defendant in the subject action is a professional association, there was no need for petitioner to list the proceeding nor reveal particulars relating thereto. Petitioner testified as follows:

> Q. Is there anything in that litigation that is evidenced by the Joint Composite Exhibit Number One, is there anything in that litigation as pertains to Keith Seldin, P.A. that does not concern your actions?
> A. It concerns actions of a corporation with another partnership in entering into a lease agreement, in exercising an option to a lease agreement -- .
>
> Q. Who were the officers, directors and stockholders of Keith Seldin, P.A.?
> A. Keith Seldin.
>
> Q. From the beginning?
> A. Yes.
>
> Q. So that for that corporation to have done anything at all, for that corporation to have acted in any way or fashion from the day it was born through the present time, it would require some act on your part, sir?
> A. It would require an act on my part as president of the corporation.
>
> Q. Yet, you did not regard that corporation as your alter ego?
> A. It is not my alter ego, it's a corporation (108, 109).

The referee found that petitioner had fully complied in establishing the requisite criteria for reinstatement and filed a report recommending that petitioner be reinstated.

The Board of Governors of The Florida Bar, at its October, 1990 meeting directed bar counsel to petition for review seeking an order denying reinstatement to petitioner.

SUMMARY OF ARGUMENT

Although every factor relating to a petitioner's character and fitness is relevant upon a reinstatement application, this court propounded six (6) basic elements to guide it in its deliberations. Petition of Wolf, 257 So.2d 547 (Fla. 1972).

In the bar's view, the issue upon this appeal focuses upon the degree to which a petitioner must establish such elements. It is the bar's position that petitioner failed to produce evidence of unimpeachable character and moral standing in the community and failed to establish personal assurances supported by corroborating evidence, revealing a sense of repentance, as well as a desire and intention to conduct himself in an exemplary fashion in the future; two (2) of the six (6) basic elements as enunciated in Wolf, supra.

It is respectfully submitted that if the cavalier approach employed by the petitioner to the establishment of the two (2) above referenced basic elements is deemed sufficient, then the reinstatement process, rather than an in-depth appraisal of an errant attorney's fitness again to stand beside his brethren at the bar, becomes a pro forma, automatic process rendering the distinction between automatic and reinstatement suspensions cloudy if not meaningless. Petitioner misappropriated client funds. He should be held to the highest level of proof regarding establishment of the requisite character, moral standing and repentance demonstrating total rehabilitation.

ARGUMENT

I. PETITIONER'S BAR CONVICTION FOR THEFT OF CLIENT FUNDS AND OTHER VIOLATIONS SHOULD MANDATE CLEAR AND CONVINCING PROOF ON HIS PART OF THE SIX BASIC GUIDELINE ELEMENTS AS ENUNCIATED IN PETITION OF WOLF.

It is respectfully submitted that consideration of petitioner's application for reinstatement should and must start with an examination of the circumstances leading to his suspension. Indeed, it was the fact of petitioner's misappropriation of client's funds which formed the starting point of the court's deliberations in Petition of Wolf, 257 So.2d 547 (Fla. 1972). In The Florida Bar Re: Peter M. Lopez, 545 So.2d 835 (Fla. 1989) the court stated:

> It is proper for the referee to consider a petitioner's past disciplinary record, including the nature of the offense(s) which led to his suspension or disbarment. The Fla. Bar Re: Rubin, 323 So.2d 257 (Fla. 1975); Petition of Wolf, 257 So.2d 547 (Fla. 1972).

Petitioner stands before the court convicted of a host of offenses including theft of $10,000.00 of client's funds. It is the bar's view that petitioner, in order to attain reinstatement, must establish by clear and convincing evidence the six (6) basic reinstatement guideline elements enunciated in Wolf, supra. It is respectfully submitted that petitioner failed to establish evidence of unimpeachable character and moral standing in the community and remorse. Each of these elements will be treated, in turn.

A. **EVIDENCE OF UNIMPEACHABLE CHARACTER AND MORAL STANDING IN THE COMMUNITY:**

Only one witness was called by petitioner to address the issue of petitioner's unimpeachable character and moral standing in the community. William Fleck, an attorney, was asked:

> Q. Do you know his reputation for honesty in the community?
> A. It is pretty good (28).

Upon cross examination, Mr. Fleck testified:

> Q. Regarding your last question and answer with regard to Mr. Seldin's reputation in the community, what do you base that on?
> A. Upon my experience with him and upon the fact that I never heard of any bad reports about him from other lawyers with whom I dealt with, with whom have dealt with him.
> Q. Well, did you discuss Mr. Seldin with these other attorneys that you made reference to?
> A. About the time when he had his problems with the bar, I guess two years ago, it came as a surprise to a number of us in the courthouse, and at that time, some comments were made about the fact that we had the opinion that he was an honest individual and throughout he would continue to be once he saw his way through this problem.
>
> Q. Who was that discussed with?
> A. Scott Kramer for one, Pat O'Hara, those two names immediately come to my mind.
>
> Q. Anyone else?
> A. Not that I can think of right away (28, 29).

Thus, the only evidence of unimpeachable character and moral standing in the community was based upon a discussion by and among three attorneys which discussion took place at least two years prior to the reinstatement hearing. Petitioner adduced no evidence to demonstrate that any of the three attorneys was knowledgeable of the circumstances giving rise to petitioner's suspension. Nothing was produced to show that the attorneys with whom Mr. Fleck had his two year old discussion had ever dealt with petitioner and if so, in what capacity.

It is respectfully submitted that the foregoing does not, by application of any yardstick, constitute a basis upon which a finding of substance can be predicated establishing unimpeachable character and moral standing in the community. The distillate of what petitioner produced is an opinion rendered by one attorney who participated in two cases in which petitioner was involved dating back between two and four and one-half years prior to petitioner's suspension, and casual conversation had by such attorney with two other lawyers whose relationship, dealings and/or connections to petitioner are entirely unknown. In the bar's view, the quality and paucity of evidence introduced regarding petitioner's unimpeachable character and moral standing in the community is even less compelling than that criticized by the court in Wolf, supra, where the court rejected the evidence as lacking substance. In Wolf, the petitioner produced numerous "prominent people in the community", including three judges, representatives of the Naval Reserve and other organizations of military veterans, two lawyers, and two former clients (Id. at page 549). In determining that the cumulative weight of the testimony elicited from such parade of witnesses was inadequate to establish unimpeachable character and moral standing in the community, the court commented upon the lack of specifics and the fact that there was no evidence to demonstrate that the witnesses were aware of the facts underlying petitioner's difficulties with the bar. The evidence appears far more sparse in the case under consideration.

B. **PERSONAL ASSURANCES SUPPORTED BY CORROBORATING EVIDENCE, REVEALING A SENSE OF REPENTANCE, AS WELL AS A DESIRE AND INTENTION OF THE PETITIONER, TO CONDUCT HIMSELF IN AN EXEMPLARY FASHION IN THE FUTURE:**

In his petition for reinstatement petitioner recites, as follows:

> Although the Petitioner has never felt morally guilty of the violations, Petitioner both as lawyer and citizen bears no ill will... (Petition for Reinstatement, page 5, paragraph q.)

When questioned concerning his statement that he has never felt morally guilty of the violations established in the bar proceeding, petitioner testified:

> Q. Mr. Seldin, have you felt morally guilty of the violations?
> A. I have, to this date, when this situation arose, did not feel I was morally wrong, I was legally wrong and have proven that I was legally wrong.
> Did I have ill will and a guilty mind to do it, no, to this day, I believe that, and am I sorry that it happened, yes, and if I had to do it over again, would I do it, no, but I did not intend for what happened to have happened, and I did not intend for it to appear the way it happened, but it happened, and I was found to be wrong, and I accept that (104).

It would appear that while petitioner feels remorseful regarding his bar difficulties, in general, he does not and has not repented for the misconduct specifically found to have occurred by the referee and specifically affirmed by the court in its May 12, 1988 disciplinary order.

When asked whether or not he ever explained to the witnesses who testified on his behalf exactly what acts of misconduct he was found to have committed, petitioner was unable to recall. He testified:

> Q. My question to you is: Did you ever express that yourself to them, that I, Keith Seldin, misappropriated funds, and I agree with the Court that that is what I did - -
> A. I do not recall (103).

Four (4) of the witnesses presented by petitioner testified that petitioner was remorseful. Bruce Cohen, a corporate officer and former client testified that petitioner expressed remorse but was unable to recount what, if anything, petitioner had explained to him regarding the facts underlying petitioner's suspension. His comprehension of the underlying facts was, at best, garbled (39-41).

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> Q. And if I understand you correctly from that point to today where you are sitting testifying, you never discussed with Mr. Seldin the facts underlying the incident which led to his suspension?
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> Q. The remorse that he expressed to you --
> A. Yes.
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> Q. -- what did he say?
> A. He said that he was proven wrong in this case, and that after the facts were laid out, he realized that he was wrong, he was sorry he did it and wouldn't have done it had he known it was wrong. That it was a silly thing to do after he found out he was wrong, and he said that he lost his career, and that he was in bad shape, words to that effect --

Q. Did he explain to you at any time what it was that he found out as a result of the Bar proceedings that led him to believe that his conduct was wrong?
A. No (64).

The distillate of the foregoing is that petitioner has to this date not repented for his actions and though expressing remorse to four (4) individuals, never explained to the individuals what it was that he was remorseful about. In Petition of Rubin, 323 So.2d 257 (Fla. 1975) the court stated that mere recitations of intent and contrition are insufficient to support a petition for reinstatement. The definition of "repent" as appears in Webster's New World Dictionary, Second College Edition (1986) is "to feel sorry or self-reproachful for what one has done or failed to do." It is difficult to understand how one can be repentant or remorseful when, at the same time, one does not face up to his acts or omissions. It is similarly difficult to comprehend how there can be corroboration of repentance or remorse when the corroborators have absolutely no idea for which sins the repenter is being penitent.

Rule 3-7.10(n)(2)n, Rules of Discipline, provides that a petition for reinstatement must include a statement showing the particulars of every civil action wherein the petitioner is either a party plaintiff or defendant. Petitioner did not reveal in his application for reinstatement a civil litigation venued in Circuit Court, Palm Beach County entitled Jupiter Cove Plaza, Ltd., etc., plaintiff against Keith Seldin, P.A., defendant (case number CL-89-998 AE). The complaint in that action was admitted into evidence as joint composite exhibit 1 in evidence (89).

The bar contends that petitioner has failed to comply with Rule 3-7.10(n)(2)n by failing to reveal the referenced civil action and all particulars relating thereto. Petitioner's explanation is that the defendant is his "P.A." not him as an individual. Petitioner's rationalization simply doesn't comport to the reality that his P.A. has no identity of its own vis a vis acts or omissions. It is not so much the lack of reporting the case that raises concern as was petitioner's insistence that the actions of the P.A. were somehow separate and apart from petitioner's accountability. He testified as follows:

> Q. Is there anything in that litigation that is evidenced by the Joint Composite Exhibit Number One, is there anything in that litigation as pertains to Keith Seldin, P.A. that does not concern your actions?
> A. It concerns actions of a corporation with another partnership in entering into a lease agreement, in exercising an option to a lease agreement -- (108).

When pressed, however, petitioner had to concede that only his own actions or omissions could possibly give rise to a litigation against the P.A. He testified:

> Q. Who were the officers, directors and stockholders of Keith Seldin, P.A.?
> A. Keith Seldin.
>
> Q. From the beginning?
> A. Yes.
>
> Q. So that for that corporation to have done anything at all, for that corporation to have acted in any way or fashion from the day it was born through the present time, it would require some act on your part, sir?
> A. It would require an act on my part as president of the corporation.
>
> Q. Yet, you did not regard that corporation as your alter ego?
> A. It is not my alter ego, it's a corporation (109).

Such rationalization by petitioner is not consistent with the mindset of an attorney striving to establish high ethical standards - standards that should have led him to conclude that he must report any and all actions stemming from or relating to his conduct rather than to seek ways of excluding such information.

Petitioner, relying on what he perceives to be authority established in The Florida Bar, In re: Louis Vernell, Jr., 520 So.2d 565 (Fla. 1988), urges that an attorney seeking reinstatement need not establish corroborated repentance as required by Wolf, supra. Petitioner's reliance on Vernell is misplaced. In The Florida Bar v. Vernell, 502 So.2d 1228 (Fla. 1987), the referee, having found respondent guilty of certain violations, recommended that respondent receive a public reprimand. The court disregarded the referee's recommended sanction, directing, instead, that respondent receive a ninety-one (91) day suspension. Upon his reinstatement hearing, the following colloquy took place between bar counsel and respondent's counsel:

> Q. Do you think the Supreme Court's decision was fair?
>
> MS. GROSSMAN: Now I have to object. I can understand wanting to know whether or not he --
>
> THE REFEREE: Do you all write those questions down there? Is that something the Bar tells you to ask?
>
> MS. GROSSMAN: There is some case law on that, if he has any animosity toward the Court system of the Florida Bar.
>
> THE REFEREE: If you phrase it that way --
>
> MS. GROSSMAN: The Supreme Court is a little bit way out.
>
> I will be glad to answer it. I am mad about the one day. I think they were wrong in overruling the Judge and that one extra day, I think, was wrong.

In its brief upon its appeal from the referee's report recommending reinstatement in Vernell, the bar attributed counsel's remarks to the respondent and urged that such remarks evinced malice toward the court. It was this setting that precipitated the court's remarks, as follows:

> The Bar argues that Vernell has demonstrated malice and ill feelings towards those involved in bringing about the disciplinary proceedings. The Bar rests this allegation on statements made by Vernell at the reinstatement hearing that he believed that this Court's decision to suspend him for 91 days was legally incorrect. Disagreement with a legal holding, in and of itself, is not evidence of malice.

In the bar's view, Vernell hardly equates with the case at bar. Here, petitioner was found guilty of misappropriation, or, what this court repeatedly terms "one of the most serious offenses an attorney can commit." The Florida Bar v. Breed, 378 So.2d 783 (Fla. 1979); The Florida Bar v. Newman, 513 So.2d 656 (Fla. 1987); and The Florida Bar v. Schiller, 537 So.2d 992 (Fla. 1989). Unlike Vernell, petitioner is not merely decrying the fact that the sanction imposed was too stringent, but rather that petitioner was not morally guilty of the underlying offense of misappropriation. This transcends a quarrel with a sanction; it constitutes an inability to recognize and appreciate the scope and extent of one of the most serious offenses an attorney can commit.

CONCLUSION

From the outset of this disciplinary process, petitioner has maintained an unwavering denial regarding his theft of client funds. The evidence of the misappropriation was found by the referee and this court to be clear and convincing. In the bar's view, the establishment of petitioner's theft was beyond a reasonable doubt. Yet, petitioner stands before this court maintaining that he has "never felt morally guilty." It is most respectfully submitted that were petitioner an applicant before the Board of Bar Examiners, his admission would be resoundingly denied. In the bar's view, reinstatement of an applicant suspended due to commission of one of the most serious acts that an attorney can commit should require that the applicant establish his rehabilitation through the most compelling evidence. A surface approach should not be countenanced.

In skating upon the pond of reinstatement petitioner's figures of character, moral standing and repentance are not merely jagged or asymmetrical. There is no impression on the ice, at all.

All of which is respectfully submitted.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief has been furnished to Nicholas R. Friedman, Esquire, attorney for respondent, 21st Floor, New World Tower, 100 N. Biscayne Blvd., Miami, FL 33132-2306 by regular mail on this 11th day of December, 1990.

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