IN THE SUPREME COURT OF FLORIDA

PETITION FOR REINSTATEMENT
OF J. CHARLES SHORES, JR.,

Petitioner - Appellant,

THE FLORIDA BAR,

Respondent - Appellee.

_____/

Supreme Court Case No. 75,749

The Florida Bar File
No. 90-51,218(17A)(FRE)

ANSWER BRIEF OF APPELLEE, THE FLORIDA BAR

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PRELIMINARY STATEMENT

The Florida Bar, Respondent/ Appellee, will be referred to as "the bar" or "The Florida Bar"; J. Charles Shores, Jr., Petitioner/Appellant, will be referred to as "appellant". The symbol "TR1" will be used to designate the transcript of the hearing before the referee on October 19, 1990. The symbol "TR2" will be used to designate the transcript of the final hearing before the referee on December 20, 1990. The symbol "RR" will be used to designate the Report of Referee.

STATEMENT OF THE CASE AND FACTS

On December 30, 1986 this court approved appellant's consent judgment, ordered a public reprimand and placed appellant on probation for a period of two years with a number of conditions pertaining to his alcoholism. Among other things, appellant was required to refrain from the use of alcohol and to comply with the terms of a contract between appellant and Florida Lawyers Assistance, Inc. (FLA, Inc.). [Supreme Court of Florida opinion dated December 30, 1986, The Florida Bar v. J. Charles Shores, Jr., Case No. 68,451].

By order of this court dated August 28, 1987, [The Florida Bar v. J. Charles Shores, Jr., Case No. 70,516] appellant was suspended from the practice of law for his failure to comply with the court's December 30, 1986 opinion and appellant's consent judgment dated February 17, 1986.

On March 13, 1989, appellant entered into a new alcohol rehabilitation contract with FLA, Inc. which terminates on March 13, 1992. [TR1, p.20] It is undisputed that appellant has complied with the terms of his most recent contract with FLA, Inc. [TR1, p.6-7].

On or about March 23, 1990, appellant filed a Petition for Reinstatement pursuant to Rule 3-7.10, Rules of Discipline. The referee first heard this matter on October 19, 1990. A continuance was had until December 20, 1990 to allow the parties to obtain additional information regarding claims made by the Internal Revenue Service [IRS] against appellant. [RR, p.1]. The report of referee recommending that appellant's petition be denied was served on December 27, 1990. Appellant's initial petition for review was filed on February 23, 1991; appellant subsequently filed a notice

of supplemental authority and argument which was returned by the court because it did not comply with Rule 9.210(g), Fla. R. App. P.

At its March, 1991 meeting, the Board of Governors of The Florida Bar determined not to petition this matter for review. The Florida Bar filed a motion for enlargement of time to respond to appellant's petition, whereupon appellant withdrew his prior brief and submitted a new initial brief.

SUMMARY OF ARGUMENT

In a reinstatement proceeding, the petitioner bears the burden of proof, and it is proper to consider all aspects of the individual to determine present fitness for the practice of law. Although appellant has apparently recovered from his alcohol abuse, he has failed to meet his burden of proving his overall fitness to return to the legal profession at this time predicated upon his practice of law while suspended; his failure to attempt to resolve or define his IRS obligations after being given two months to do so; his failure to make restitution to his former clients until after he learned restitution is a prerequisite to reinstatement; his failure to mention his child support as a financial obligation on his petition for reinstatement; and a number of other actions which when taken together cast grave doubts on his fitness.

The bar is also concerned about appellant's legal abilities predicated upon his submission of misleading arguments in his brief which are unsupported by any evidence in the record and which are raised for the first time on appeal. Appellant's argument that the referee erred in assessing costs against him is totally specious and illustrates appellant's failure to research that argument at all. If appellant's research on his own case is so substandard, one can only speculate as to the quality of service he would render to clients if granted reinstatement.

ARGUMENT

I. APPELLANT HAS FAILED TO MEET THE HEAVY BURDEN OF PROOF IMPOSED UPON A PETITIONER FOR REINSTATEMENT

As recently stated by this court in The Florida Bar re Michael Joseph Jahn, 559 So.2d 1089, 1090 (Fla. 1990):

> A petitioner seeking reinstatement bears the heavy burden of establishing rehabilitation, and one element to be considered in regard to reinstatement is the petitioner's character.

Because reinstatement is more a matter of grace than of right and is dependent upon rehabilitation, appellant's recovery from alcohol abuse is but one element to be considered. Jahn at 1090.

In a reinstatement proceeding,

> it is proper to consider all aspects of the individual with a view to determining the applicant's present fitness to resume the practice of law. The criteria can be summed up as being embodied in two components: (1) good moral character, personal integrity, and general fitness for a position of trust and confidence and (2) professional competence and ability.

The Florida Bar In Re Charles K. Inglis, 471 So.2d 38, 39 (Fla. 1985). A lack of good moral character includes

> acts and conduct which would cause a reasonable man to have substantial doubts about an individual's honesty, fairness and respect for the rights of others and for the laws of the state and nation.

Florida Board of Bar Examiners. Re: G.W.L., 364 So.2d 454, 458 (Fla. 1978).

The bar does not dispute respondent's sobriety and concedes that appellant had a good professional reputation prior to his problems with alcohol abuse. However, appellant's sobriety is but one element to be considered. The referee specifically found that appellant had failed to

bear his burden of demonstrating his fitness to return to the practice of law. [RR, p.4]. The referee's recommendation that appellant's petition be denied was predicated upon appellant's conduct during his suspension which casts grave doubts on his ability and fitness to assume the requisite legal responsibilities [RR, p.4]

The referee's findings of fact and recommendations come to the court with a presumption of correctness and should be upheld unless clearly erroneous or without support in the record. The Florida Bar v. Vannier, 498 So.2d 896 (Fla. 1986).

A. Appellant's practice of law while suspended.

Perhaps the most egregious conduct committed by appellant during his suspension was a handwritten letter sent to a judge. The letter was a notice of appearance as counsel of record in which appellant requested a continuance; attached a business card indicating that he was a practicing attorney; and stated that he wished to represent the plaintiff. [TR2, Fla. Bar Composite Exhibit No.6]. The handwritten letter by appellant was dated December 13, 1988, more than one year after he had been suspended from the practice of law. Appellant's inability to acknowledge the wrongful nature of his conduct is apparent from the record.

> Q. Let me ask you this, Mr. Shores; You stated in here that you had never committed a fraud upon any court. Did you not misrepresent yourself to Judge Little?
> A. No, I don't think that was a misrepresentation.
>
> Q. You don't think that the fact that you were suspended and you were representing yourself to be an attorney is a misrepresentation?
> A. I don't think the magnitude of this has any consequence at all, because otherwise, I wouldn't have gotten into it.

Q. Well, just answer my question. Do you not think that is a fraud upon the Court?
A. No.

Q. You don't think that Judge Goldstein or any judge would like to know that he has an attorney that is suspended from the practice of law appearing in front of him?
A. All right. If it was a private client, it would be different.

Q. Did anywhere in the Supreme Court Order say that you were suspended from the practice of law except for your ability to represent your family members? Did it give that exception?
A. (Witness shaking head.)
THE REFEREE: You have to speak your answer Mr. Shores.
MR. SHORES: No.

[TR2, p.31-32]

While admitting that he wrote the letter, appellant appears to believe that because he was trying to assist a family member rather than a "private client" his actions were somehow justified. That sort of rationalization is nothing short of frightening and falls far short of excusing a blatant misrepresentation to a court of law.

B. The failure to file tax returns and resolve IRS debts.

Shortly before what was to be the final hearing on appellant's petition for reinstatement on October 19, 1990, the bar received information which caused the bar to believe appellant had outstanding obligations to the Internal Revenue Service (IRS). Bar counsel admitted additional information was needed [TR1, p.11]. The IRS problem was discussed as follows:

THE COURT: Supposing this IRS thing turns out to be nothing?
MS. AMIDON: What do you mean by nothing? I don't consider a $44,000 tax lien nothing.
THE COURT: It may not be and it may not be criminal. As you said, it may be criminal. I don't know. Just as likely it may not be.
Supposing it turns out not to be criminal and it's not even valid through some bankruptcy law or something or

> whatever? I never did understand that.
>
> THE WITNESS: May I comment on this or comment off the record?
>
> It may give you something to work towards.
>
> THE COURT: Well, I'm not going to do the investigating. I just want to hear what comes up next time my question is there; if it turns out to be unfounded or ill-founded or whatever, what would your recommendation be?
>
> [TR1, p. 48-49]

Thus, it was abundantly clear to appellant at the October hearing that further investigation into the IRS matter was required and that the referee was not going to do it. Thereafter, the referee continued the hearing to allow the parties to obtain additional information regarding IRS claims against appellant. [RR, p.1]

However, in his brief, appellant states he "had no notice or knowledge of any alleged lien prior to his hearing ... " [Initial brief, p.17.] Appellant again states he did not know about any lien prior to the December 20, 1990 hearing on page 18 of his brief. The bar respectfully submits that appellant's argument is a misrepresentation to this court.

At the subsequent hearing on December 20, 1990, some two months later, a certified copy of a notice of federal tax lien against appellant in the sum of $44,001.74 was entered into evidence as bar Exhibit No. 4. Also entered into evidence as bar Exhibit No. 5 is a letter dated October 30, 1990 from the IRS to The Florida Bar indicating appellant's tax liabilities in the amounts of $78,193.81 and $44,013.74 plus accruals. Both of these exhibits were entered into evidence without any objection by appellant [TR2, p.21-22] despite his claim in his brief that they were entered "over objection". [Appellant's initial brief, p. 20]. Although appellant expressed his disagreement with the

contents of the documents, he offered no evidence to refute them. Indeed, appellant offered no evidence whatsoever to demonstrate that he even attempted to obtain additional information concerning his possible obligations to the IRS. Although the referee indicated he would give appellant until the end of the year to provide him with documentation that the IRS problem had been resolved, respondent failed to do so.

> THE REFEREE: I would like to see all of these things taken care of in some manner.
>
> I'll tell you what I'll do. If you can get this tax business straightened out before the year is up, I'll entertain your motion then, but I'm going to want some documentation from the tax people, and it is your responsibility to get it, showing that this thing has been satisfied in some way. Because to start you off in the practice of law owing, with a tax lien on you for over a hundred thousand dollars that they are not going to settle is going to leave too many temptations open as far as I'm concerned.
>
> These exhibits go to you. Okay.
>
> That is going to be my recommendation.
>
> MS. AMIDON: Your Honor, would you like me to draft a proposed referee report?
>
> THE REFEREE: Yes. Extend it for a year, or I will entertain his petition sooner if he can satisfy or settle something with this IRS matter.
>
> MR. EGAN: Can you get that satisfied?
>
> MR. SHORES: Yes. I talked to the lady last Friday. She left me and said ---
>
> THE REFEREE: If you do it in two weeks, I'll entertain it in two weeks. I don't care. Get that thing settled. If you can get it settled, get it settled.
>
> MS. AMIDON: Your Honor, I must advise you, the Bar rules provide that once a petition is denied, that it is one year.
>
> THE REFEREE: I can't entertain it sooner?
>
> MS. AMIDON: Unless we hold it, you know, we can wait --- I think you said if he finished it or got this straight by the end of the year; is that correct?
>
> [TR2, p.68-69]

Despite having received an additional two months to investigate his IRS status, appellant offered no evidence at the final hearing that he had done anything to investigate or resolve the issue. However, in his brief, appellant attempts to argue issues which were not even mentioned

at either hearing and attempts to mislead the court. Whether the tax liens are exonerated by a bankruptcy, by the running of the statute of limitations or by some other means is not an issue before the court. What is an issue is appellant's failure to raise these issues at the hearing.

> That an appellate court may not consider matters outside the record is so elemental that there is no excuse for any attorney to attempt to bring such matters before the court.

Altchiler v. State, 442 So.2d 349, 350 (Fla. App. 1 Dist. 1983).

Although appellant testified in a deposition that he had not filed tax returns since 1985, the referee, after being presented with the October 30, 1990 letter from the IRS, found that appellant has not filed an income tax return since 1982 except for an extension to file a 1989 return after filing his petition for reinstatement. [RR, p. 3-4]. Once again, appellant failed to mention any reasons for his failure to file tax returns at the hearing or to present any evidence on the issue. Rather, his first attempt to explain his failure to file tax returns since 1982 is in his brief. Even assuming, arguendo, that appellant's reasons are valid, they are unsupported by any competent evidence and cannot be raised for the first time on appeal.

Appellant also argues in his brief that he "should not be denied his right to reinstatement for exercising his right under the law to contest the amount of an alleged tax liability." [Appellant's brief, p.21]. However, he failed to offer any evidence at his hearing that he was even investigating, much less contesting the alleged tax liabilities.

C. Additional illustrations of appellant's failure to meet his burden of proof of his overall fitness to practice law.

While presenting some arguments at the hearing and even more in his brief, appellant failed to present any evidence to support those arguments. The lack of any evidence on the IRS matters has been discussed. When confronted with the graduate school application on which he failed to mention that he had been suspended from the practice of law, he argued loudly that his suspended status was of no concern to the school. The record, however, is ominously devoid of any evidence to support that argument.

While the bar does not care how many times a lawyer has been married, the bar does care if a lawyer testifies under oath that he has been married twice when in fact he has been married three times [TR2, p.36-37]. If an attorney "forgets" how many wives he has had, one cannot help speculating on what else he may "forget".

Appellant made no attempt to make restitution to his former clients until he learned it was a prerequisite to his petition for reinstatement [TR2, p.16]. It is respectfully submitted that appellant's payment to his former clients was not made out of a sense of remorse or an attitude of contrition but rather only because his failure to do so would act as a bar to his reinstatement.

Finally, appellant failed to mention his obligation to pay child support in his petition for reinstatement. [TR2, p.17-18]. Although he argued that his ex-wife was not concerned about the arrearages in child support [TR2, p.18-19], he failed to offer any evidence to support that argument either in the form of testimony or an affidavit from his ex-

wife. As stated by this court in The Florida Bar. Petition of Samuel Rubin For Reinstatement, 323 So.2d 257, 258 (Fla. 1975):

> Because of a lawyer's interaction with the public, a wide range of factors may be considered in determining whether an individual shall be allowed to enter or resume this profession. An attorney once removed or suspended must demonstrate rehabilitation, and the burden of doing so requires more than recitations of intent and contrition. Unsatisfied judgments, and a failure to acknowledge judgment liens in a personal financial statement filed for the purpose of demonstrating reinstatement, are antithetical to an affirmative showing of rehabilitation.

II. Appellant's Argument That The Referee Erred In Assessing Costs Against Him Is Specious and Legally Incorrect.

The bar is troubled by appellant's argument concerning the assessment of investigative costs against him. Appellant boldly cites cases for the proposition that investigative costs were improperly assessed. Unfortunately, appellant apparently failed to read the current Rules Regulating The Florida Bar. That appellant failed to research this issue beyond finding cases to support his argument is of grave concern. If appellant is so careless in his research for his own case, in which he has a strong personal interest, one cannot help speculating on the quality of research he would conduct on behalf of a client.

Even cursory research such as reading the current rules would have revealed that the rules had changed. As this court is well aware, Rule 3-7.6(k)(5) provides that "costs of the proceeding shall include investigative costs ... ". The rule was amended by this court to include investigative costs in The Florida Bar. In re Amendment To Rules Regulating The Florida Bar, Rule 3-7.5(k)(1) Cost of Proceedings, 542

So.2d 982 (Fla. 1989), and subsequently renumbered in The Florida Bar Re Amendments To The Rules Regulating The Florida Bar (Grievance Procedures And Confidentiality), 558 So.2d 1008 (Fla. 1990). That appellant did not so much as bother to read the current rules is apparent from his reliance on the old rule number.

Appellant's specious and legally incorrect argument casts doubt on his abilities. As was the case in The Florida Bar v. Katz, 491 So.2d 1101 (Fla. 1986), appellant's "arguments" in his brief, including his presentation of new and misleading arguments unsupported by any evidence in the record and raised for the first time on appeal, are perhaps even more illuminating than the testimony before the referee.

CONCLUSION

Appellant clearly failed to bear his burden of proving his overall fitness to return to the practice of law at this time. Although appellant has apparently overcome his alcohol abuse, he has demonstrated an indifference or inability to determine the status of his obligations to the IRS; he submitted a notice of appearance as counsel of record more than a year after he was suspended; he failed to make restitution until learning he had to do so before any petition for reinstatement would be considered; and failed to list his child support arrearages on his list of financial obligations in his petition for reinstatement. Unfortunately, appellant appears to believe that his recovery from alcohol abuse and the length of his suspension are the sole factors to be considered.

Appellant submitted new and misleading arguments in his brief which were not raised at either hearing and which are unsupported by any evidence in the record. In his brief, appellant claims error by the referee for admitting certain documents into evidence even though appellant failed to object at the time they were entered into evidence. Finally, appellant presented a specious and legally incorrect argument concerning costs assessed against him, thereby casting doubt on his legal abilities.

For the foregoing reasons, The Florida Bar respectfully requests that the referee's recommendations be accepted and appellant's petition for reinstatement be denied.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing answer brief has been furnished to J. Charles Shores, Jr., Petitioner, at 4101 Leona St., Tampa, FL 33629, by Certified Mail # P247 960 733, return receipt requested, on this 23rd day of April, 1991.

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