IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

SHELDON J. SANDERS,

Respondent.
_____/

Case No. 75,815

TFB File No. 90-00931-02

ANSWER BRIEF

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PRELIMINARY STATEMENT

Sheldon J. Sanders, Respondent, will be referred to as "Respondent." Thomas H. Bateman, III, Referee, will be referred to as "Referee." The symbol (TR-___) will be used to designate the transcript of the final hearing on June 26, 1990. The symbol (R-___) will be used to designate the referee's report submitted on October 12, 1990. The symbol (B-___) will be used to designate the Respondent's initial brief submitted on January 9, 1991. All of the Rules of Discipline, of the Rules Regulating Florida Bar, that are referred to in this brief are rules that were in effect prior to the March 17, 1990 amendments.

STATEMENT OF THE CASE

On or about October 30, 1979, Respondent was convicted in New York of conspiracy in the third degree and two felony counts of bribery in the second degree.

Consequently, on or about May 5, 1980, Respondent was disbarred from the practice of law in the state of New York as a result of his 1979 convictions.

On October 5, 1989, nine years after his disbarment, Respondent notified The Florida Bar that he had been convicted and disbarred in the state of New York. Pursuant to this notice, The Florida Bar filed a Notice of Determination of Guilt with the Florida Supreme Court on December 29, 1989. The Respondent duly filed a Motion to Modify. In a court order dated Febrary 27, 1990, the Florida Supreme Court suspended the Respondent from the practice of law in the state of Florida pursuant to Rule 3-7.2 of the Rules of Discipline, Rules Regulating The Florida Bar. Subsequently, Respondent filed a Petition for Reinstatement on April 4, 1990.

On or about May 9, 1990, the Florida Supreme Court appointed Thomas H. Bateman, III, as referee to conduct reinstatement proceedings according to Rule 3-7.9(e),

Rules of Discipline. Pursuant to notice a hearing was held on June 26, 1990.

On October 12, 1990, the Referee filed a report in which he recommended that Respondent be denied readmission to practice law in the State of Florida until such time as the State of New York readmits Respondent, and further, that Respondent be required to retake the Florida Bar Exam.

On November 2, 1990, Respondent filed a Petition for Review.

SUMMARY OF ARGUMENT

The Referee, pursuant to the powers vested in him by this court, correctly determined that Respondent's Petition for Reinstatement be denied. Respondent has not established that he has the general fitness to be placed in a position of trust and confidence that is necessary for reinstatement since he is still disbarred in New York.

Should the court determine that Respondent's Petition for Reinstatement be granted, The Florida Bar asserts that an attorney who has been suspended for over ten years and who has never practiced law in the state of Florida should be required to retake the Florida Bar Examination as a condition for reinstatement.

ISSUE I

THE REFEREE HAS THE AUTHORITY TO RECOMMEND THAT RESPONDENT BE DENIED REINSTATEMENT

The duties of a referee in reinstatement proceedings are clearly defined in the Rules of Discipline. Rule 3-7.9(i) of the Rules of Discipline states:

> "The referee to whom a petition for reinstatement has been referred by the chief justice shall proceed to a prompt hearing, at the conclusion of which the referee shall make and file with the Supreme Court of Florida a report which shall include the findings of fact and a recommendation as to whether or not the petitioner is qualified to resume the practice of law."

It is through these Rules of Discipline that a referee is granted the necessary powers to perform his task. The Respondent's repeated assertion that the referee's authority is statutorily created is erroneous. (B-4), (B-7).

Further, the Respondent's assertion that the referee was not authorized to make a recommendation is also in error. The plain language of Rule 3-7.9(i) explicitly states that the referee must hear, try, and determine matters presented to him as a referee and thereafter to submit his findings of fact and recommendations to the Florida Supreme Court. These duties are also clarified in the order of the court appointing the referee. The burden is on the party seeking review of the referee's report to establish that the report is erroneous,

unlawful, or unjustified. The Florida Bar In Re Inglis, 471 So. 2d 38 (Fla. 1985). The Florida Supreme Court has stated that in reinstatement proceedings, a referee could properly consider a petitioner's past disciplinary record, including the nature of the offenses which led to his suspension or disbarment. The Florida Bar In Re Lopez, 545 So. 2d 835 (Fla. 1989).

In the case at hand, the referee did precisely what he was required to do. He heard the uncontroverted evidence that was presented to him, namely, that Respondent was disbarred in New York and that he had not been reinstated there, and based on this evidence and caselaw, the referee recommended that Respondent be denied reinstatement to the practice of law in Florida. (R-9, 36). The referee made a recommendation as he was required to do under the Rules of Discipline and the court order which appointed him.

Based upon the clear language of the Rules of Discipline, the referee acted well within the scope of authority granted to him by the rules and the order of this court appointing him as referee.

ISSUE II

RESPONDENT HAS NOT MET ALL OF THE CRITERIA FOR REINSTATEMENT

The criteria used to evaluate whether a disbarred or suspended attorney is fit to resume the practice of law has been set forth in The Florida Bar In Re Inglis, 471 So. 2d 38 (Fla. 1985) and The Florida Bar In Re Sickmen, 523 So. 2d 154 (Fla. 1988). In Sickmen, the court stated:

> "The petitioner must show: (1) full compliance with conditions imposed in the previous disciplinary judgment; (2) unimpeachable character; (3) a reputation for professional ability; (4) lack of malice toward those responsible for the previous disciplinary action; (5) a repentant attitude concerning the earlier wrongdoing and a strong resolution to adhere to principles of correct conduct; and (6) restitutions to persons harmed by the earlier misconduct."

523 So. 2d at 155. The court has clearly noted that this list is not all-inclusive. In Re Inglis, 471 So. 2d 38, 39 (Fla. 1985). The Inglis court summed up the criteria into two components: "(1) good moral character, personal integrity, and general fitness for a position of trust and confidence and (2) professional competence and ability." Id.

It is clear from the record that the referee's finding of competence only related to Respondent's professional competence (however, it should be noted that this finding of professional competence was also

conditioned upon the Respondent's successful completion of the Bar examination as a prerequisite to his reinstatement). See (R-8, 9).

The Florida Bar agrees with the referee's conclusion that, until Respondent is readmitted in New York, Respondent has not proven that he is fit to resume the practice of law. See (R-8). Since the Respondent is still disbarred in New York and has repeatedly been denied readmission, Respondent has not established his "good moral character, personal integrity, and general fitness for a position of trust and confidence." Respondent was found guilty of bribery and conspiracy to commit bribery in New York. (B-2). The crimes Respondent was convicted of were clear and conscious violations of the obligations of an officer of the court. Until such time as New York will place its confidence in Respondent by reinstating him as a practicing attorney, The Florida Bar agrees with the referee that we should follow suit with New York and deny his Petition for Reinstatement.

ISSUE III

AN ATTORNEY WHO WAS SUSPENDED IN FLORIDA BASED UPON HIS DISBARMENT IN A FOREIGN JURISDICTION SHOULD NOT BE REINSTATED IN FLORIDA UNTIL THE FOREIGN JURISDICTION READMITS HIM

The Florida Bar agrees with the referee's recommendation that Respondent's reinstatement be denied since he is disbarred in New York. This recommendation is explicitly supported by Justice Ehrlich in The Florida Bar In Re Sickmen, 523 So. 2d 154, 156 (Fla. 1988) Ehrlich, J., concurring specially). Justice Ehrlich stated:

> "If New York had instituted its disciplinary proceedings first and had disbarred Mr. Sickmen, there is no doubt in my mind that this Court would have imposed the same discipline, and would not readmit him to The Florida Bar unless and until the State of New York had done likewise."

Id. Because Respondent cites Sickmen in support of his argument that he should be reinstated, a comparison of the similarities and differences between it and the case at hand is necessary. (R-9).

In Sickmen, the petitioner was also a suspended attorney who was seeking reinstatement. Similarly, the petitioner was convicted in New York of a felony and as a result, was later disbarred. Id. at 155. Based on his felony conviction, the petitioner was suspended in Florida for three years. Id.

The underlying facts between Sickmen and the case at hand are almost indentical. Respondent was also convicted of a felony in New York, and consequently, he was later disbarred. (R-3). However, the important distinction between the two cases is the timing between the New York Bar's disciplinary action and ours. In Sickmen, it was not until after his Florida suspension, that the petitioner was disbarred by New York. 523 So. 2d 154, 155 (Fla. 1988). Because the petitioner was not disbarred by New York until almost three years after his felony conviction, his New York disbarment occurred right before his petition for reinstatement in Florida. It was a result of this later disbarment that The Florida Bar appealed the petitioner's reinstatement. This court concluded that the petitioner's suspension had been a final adjudication on the misconduct in question, and therefore, any further discipline based on the same misconduct was unjustified. Id. Because this allowed an attorney to practice law in Florida who was disbarred in a foreign jurisdiction, Justice Erhlich wrote his own opinion in which he stressed that this court would not have readmitted the petitioner had the New York disbarment occurred prior to the Florida suspension. Sickmen, 523 So. 2d 154, 156 (Fla. 1988) (Ehrlich, J., concurring specially).

The case at hand is the exact situation that Justice Erhlich described in his concurrence. Respondent was

disbarred in New York prior to his Florida suspension. (R-3). Respondent's suspension had not been a final adjudication on the misconduct in question, but rather a standard suspension based upon the Notice of Determination of Guilt filed by The Florida Bar according to Rule 3-7.2(e), of the Rules of Discipline. The Florida Bar is not asking this court to discipline Respondent twice for the same misconduct, as was the case in Sickmen, but instead deny his Petition for Reinstatement to the practice of law in Florida. Therefore, Sickmen does not support Respondent's argument, but rather supports The Florida Bar's position that the Petition for Reinstatement should be denied. Moreover, it would be a travesty for this state to permit an attorney to practice law here while he is disbarred in a foreign jurisdiction.

Respondent also argues that he has been suspended for a period of ten (10) years and that this exceeded the three-year limitation. (B-9). However, under Rule 3-7.2(h) of the Rules of Discipline, Respondent's suspension was clearly authorized by the Rules Regulating The Florida Bar. The record demonstrates that the court was extremely lenient in its suspension order because it could have started his suspension date from the date of the court order, rather than nunc pro tunc to May 5, 1980. (R-1).

The Florida Bar agrees with the referee that, given the facts of this case, Respondent should not be reinstated since he is disbarred in New York.

ISSUE IV

A SUSPENDED OR DISBARRED ATTORNEY WHO HAS NOT BEEN REINSTATED FOR A PERIOD OF TEN YEARS SHOULD BE REQUIRED TO TAKE THE BAR EXAM AS A CONDITION FOR REINSTATEMENT

The referee correctly recommended that should Respondent be reinstated, it should be conditioned upon his successful completion of the Florida Bar Examination (excluding the ethics portion of the exam, since Respondent successfully took this part in 1987). (R-12). Respondent was admitted in 1977 to the practice of law in Florida and suspended nunc pro tunc to 1980 following his New York felony conviction. Consequently, Respondent has been suspended for a period of ten (10) years. (R-6). Prior to his suspension, Respondent never practiced law in the state of Florida. (TR-59). Based on these uncontroverted facts, Respondent should be required to successfully complete the bar exam.

This recommendation is supported by the Rules of Discipline of the Florida Bar and by caselaw. Rule 3-7.9(k) of the Rules of Dicipline states:

> "...if suspenison of petitioner has continued for more than three (3) years, the reinstatement may be conditioned upon the furnishing of such proof of competency as may be required by the judgment in the discretion of the Supreme Court of Florida, which proof may include certification by the Florida Board of Bar Examiners of the successful completion of an examination for admission to The

Florida Bar susequent to the date of the suspension."

The Florida Supreme Court has expressed that in determining whether it is appropriate for reinstatement to be conditioned upon successful completion of the bar examination, the determination must be decided on a case by case basis. The Florida Bar In Re Barket, 424 So. 2d 751 (Fla. 1982). In Barket, the court concluded that the petitioner needed to retake the bar exam where he had been out of the practice of law for over six (6) years, even though he had some continual contact with the law. Id. at 752. The court stated: "When a referee determines that one's legal competency to return to the practice of law after a long suspension is not proved, it is proper to require, by testing, a demonstration of that competence." Id.

In a later case, the Court appeared to narrow the reasoning it used in Barket, by stating: "if the suspension period exceeds three years, MacPherson shall be required to successfully complete The Florida Bar Examination." The Florida Bar v. MacPherson, 534 So. 2d 1156 (Fla. 1988) (emphasis added).

In the case at hand, where the Respondent has never practiced law in Florida and has been suspended from the practice of law in Florida for over ten (10) years, the referee properly recommended that Respondent's

reinstatement be conditioned upon his successful completion of The Florida Bar Examination.

Respondent misconstrued The Florida Bar's position on this issue. Respondent alleges that The Florida Bar is only asking that the Respondent be required to attend the three-day course that is available for new attorneys, rather than retake the Bar exam. (B-15). This is an erroneous interpretation of the final hearing that was held on June 26, 1990. In support of his allegation, Respondent cites a portion of the final hearing. (B-15, 16). However, this portion of the hearing is taken out of context. The Bar's counsel was merely pointing out to the referee the options that were available to him in making his recommendation. (TR-64). Moreover, Respondent has failed to meet the burden of proof that he must overcome in support of his contention that The Florida Bar's counsel "supported and concurred" with his petition. See (B-4). Respondent shows no record cites, nor any mention in the referee report, of The Florida Bar's counsel supporting or concurring with his position.

The Florida Bar's position is that if this court should determine that the Respondent should be readmitted to the practice of law in Florida, The Florida Bar agrees with the referee's recommendation that Respondent be required to pass the Bar exam.

CONCLUSION

The referee correctly determined that Respondent should be denied reinstatement to resume the practice of law in Florida. The Florida Bar asks this court to accept the referee's recommendation and deny the Respondent's Petition for Reinstatement.

Should this court conclude that Respondent's Petition for Reinstatement be granted, The Florida Bar asks that his reinstatement be conditioned upon his successful completion of the entire Florida Bar Examination.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief regarding TFB File No. 90-00931-02 has been forwarded by certified mail# P 981-962-320, return receipt requested, to SHELDON J. SANDERS, Respondent, at his record bar address of Post Office Box 346, Long Beach, New York 11561-0346, on this 29th of January 1991.

JAMES N. WATSON, JR.
Bar Counsel