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SID J. WHITE
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CLERK, SUPREME COURT
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IN THE SUPREME COURT OF FLORIDA

THE FLORIDA BAR,

Complainant,

vs.

SHELDON J. SANDERS,

Respondent.

______________________/

Case No. 75815

TFB File No. 90 00932-02

INITIAL BRIEF

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PRELIMINARY STATEMENT

The Florida Bar, Complainant, will be referred to as "The Bar" or "The Florida Bar". Sheldon J. Sanders, Respondent, will be referred to as "Respondent". The symbol "TR" will be used to designate the transcript of the final hearing held on June 26, 1990.

STATEMENT OF THE CASE AND OF THE FACTS

On December 28, 1989 The Florida Bar filed a Notice of Determination of Guilt. The Respondent duly filed a Motion to Modify. The Florida Supreme Court filed an Order dated February 27, 1990 that suspended the Respondent from the practice of law nunc pro tunc to May 5, 1980. A Petition for Reinstatement was filed on or about April 4, 1990.

Pursuant to Notice, a hearing was held before the Honorable Thomas H. Bateman, III circuit Judge/Referee 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.

The Respondent filed a Petition for Review on November 2, 1990.

This Brief is in support of Respondents Petition to Review.

SUMMARY OF ARGUMENT

The Referee exceeded his statutory authority.

Reinstatement to The Florida Bar should not be conditioned upon reinstatement in New York.

Respondent has complied with all of the criteria for reinstatement.

Respondent should not be required to retake the Florida Bar Exam.

ARGUMENT

The decision of Thomas H. Bateman, III, Judge/Referee should be reversed and the Petitioner should be reinstated to membership in the Florida Bar.

ISSUE I

THE REFEREE EXCEEDED HIS STATUTORY AUTHORITY

A hearing on this matter was held on June 26, 1990 before Thomas H. Bateman, III, who acted on that day as a referee.

The hearing was attended by James Watson, Esq. on behalf of the Florida Bar. Mr. Watson, acting on behalf of the Florida Bar, did not object to the position and contentions of your Petitioner. In fact, the record will indicate that Mr. Watson supported and concurred with my Petition.

Judge/Referee Bateman's decision of October 12, 1990 denied my application for readmission for membership in the Florida Bar.

It is respectfully submitted that Judge/Referee Bateman not only erred in his decision, but exceeded the authority bestowed upon him pursuant to Section 3-7.9(g).

Section 3-7.9(g) is as follows:

> Determination of fitness by referee hearing. The referee to which the petition for reinstatement is referred shall conduct the hearing as a trial, in the same manner, to the extent practical, as proceedings are conducted under the rule concerning trials. The matter to decide shall be the fitness of the petitioner to resume the practice of law (Emphasis supplied.)
>
> (i) Prompt hearing; report. 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.... (Emphasis supplied.)

This Honorable Court is requested to note the portion of Judge/Referee Bateman's decision wherein he states,

> Given the Florida Supreme Court Nunc Pro Tunc suspension order; however, Petitioner has been effectively disbarred for over ten years. (Emphasis supplied.)

Judge Bateman clearly followed the guidelines as promulgated by this Court in The Florida Bar In Re Inglis, 471 So.2d 38, 39 (Fla. 1985).

The Supreme Court of Florida advises that the elements to take into account when considering a petition for reinstatement are: (1) Strict 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 the principles of correct conduct; and (6) Restitution to persons harmed by the earlier misconduct. The Florida Bar In Re Sickmen, 523 So.2d 154 (Fla. 1988) and cases cited therein. The criteria was summed up in The Florida Bar In Re Inglis, 471 So.2d 38,39 (Fla. 1985),

> 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.

He further states in Point IV of his decision,

> I find that Petitioner has a reputation of good character and a good professional reputation. I believe he has rehabilitated himself and that he has shown a sincere intent to avoid wrongdoing.

Your Honors, Judge/Referee Bateman ruled that I am fit to resume the practice of law. (Emphasis supplied.)

He then denied my application.

Your Honors, it is respectfully submitted that Judge/Referee Bateman exceeded his authority in the reasoning he applied to conclude that my petition should be denied.

Judge/Referee Bateman apparently denied my application based upon the concurring opinion of Judge Ehrlich in matter of Sickmen-The Florida Bar In Re Sickmen, 523 So.2d 154 (Fla. 1988). At this point, Judge/Referee Bateman deviated

from his statutory authority as set forth in Section 3-7.9(g).

> The matter to decide shall be the fitness of the Petitioner to resume the practice of law...

Section 3-7.9(i)

> ....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....(Emphasis supplied.)

This Court has held in In Re Inglis, 471 So.2d 38, (Fla. 1985)

> ....with regard to legal conclusions and recommendations of a Referee, this Court's scope of review is somewhat broader as it is ultimately our responsibility to enter an appropriate judgment. (Emphasis supplied.)

In other words, this Court reemphasized that the Referee is a trier of the facts and this Honorable Court is a trier of the law.

ISSUE II

REINSTATEMENT TO THE FLORIDA BAR SHOULD NOT BE CONDITIONED UPON REINSTATEMENT IN NEW YORK

This Court held that Sickmen should be reinstated since his disbarment in New York was based upon the same misconduct as the Florida suspension, not further or separate misconduct.

This Court further ruled,

> ....the fact that another jurisdiction imposed a more severe sanction for the same misconduct does not justify our placing any greater burden on the Petitioner than those already imposed.

In the original Order of Suspension of Sickmen on December 13, 1983, Judge Ehrlich dissented and voted for disbarment. In the Order of April 7, 1988, Judge Ehrlich concurred with the Court's opinion to reinstate Sickmen. Judge Ehrlich could have dissented but however chose instead to concur.

This Court's attention is respectfully referred to the similarities and differences between Sickmen's case and mine.

Sickmen was formally disbarred in New York subsequent to his suspension in Florida. It is interesting to note that this Court could have disbarred Sickmen for his felony conviction but chose merely to suspend him for three years. (Judge Ehrlich dissented and chose disbarment.)

As a matter of law, however, Sickmen was not disbarred in New York subsequent to his suspension in Florida. Section 90 subdivision 4A of the Judiciary Law of New York State:

> Any person being an attorney and counselor-at-law who shall be convicted of a felony, as defined in paragraph E of this subdivision, shall upon such conviction cease to be an attorney and counselor-at-law, or to be competent to practice law as such.

Subdivision e,

> For purposes of this subdivision, the term felony shall mean any criminal offense classified as a felony under the laws of this state, or any criminal offense committed in any other state, district, or territory of the United States and classified as a felony therein, which if committed within this state, would constitute a felony in this state.

Therefore, Sickmen ceased to be an attorney in New York prior to his suspension by the State of Florida.

I, however, was suspended by this Court Nunc Pro Tunc for ten years. This suspension exceeded the three-year limitation pursuant to Rule 3.5.1(e) and the last sentence of that paragraph states,

> No suspension shall be ordered for a specific period of time in excess of three years.

Even Judge Bateman agreed that this suspension had the effect of disbarment.

I respectfully inform this Court that the State of Florida also punished me for the same misconduct as the State of New York and not a new, further, or different misconduct.

As in Sickmen, the Referee found that I have established my rehabilitation and that I have met the criteria set forth in past cases and I have demonstrated my fitness to resume the practice of law. I hope Your Honors will agree that the record supports the Referee's finding. As a matter of time

reference, therefore, New York and Florida punished me simultaneously.

On February 27, 1990, this Court suspended me Nunc Pro Tunc to May 5, 1980 upon the condition that I successfully complete the readmission process under Rule 3-7.9 of the rules regulating the Florida Bar.

This Court did not place any other restrictions upon my reinstatement. This Court could have ordered in its Suspension Order that I can only be reinstated to the Florida Bar upon the condition that I'm reinstated to the Bar in the State of New York. Again, this Honorable Court set NO conditions upon my reinstatement except that I comply with Rule 3-7.9. (It is interesting to note that Judge Ehrlich concurred in this Order.) See TR June 26, 1990, page 6, line 22,

> THE COURT: One is strict compliance with any disciplinary orders that have been entered. And I -- I'm going to assume that's New York as well as -- or some foreign bar as well as The Florida Bar. Is that true?
> MR. WATSON: It's just the Florida suspension, Your Honor.
> THE COURT: Just the Florida suspension.
> MR. WATSON: Right. And that order relates only to that he prove his right to readmission.
> THE COURT: All right.

See TR June 26, 1990, page 7, line 12,

> MR. WATSON: It wasn't required. The order of suspension was the order of determination of guilt, and the only condition that was placed in that order was that he prove his fitness to be readmitted. (Emphasis supplied.)

ISSUE III

THE RESPONDENT HAS COMPLIED WITH ALL OF THE CRITERIA FOR REINSTATEMENT

I have met the criteria for reinstatement as stated in the majority opinion and in the concurring opinion in the Sickmen and Inglis cases. I have now done all that the Order of Suspension required as a prerequisite to my reinstatement to the practice of law in this state.

Your Honors, it is well settled and axiomatic that the law does not deal in trivialities. It is known as a Deminimis rule. Your Honors, I submit that it does not make any difference that New York disbarred me before Florida suspended me, or vice versa. As stated before, my punishment was effective the same day.

It is again respectfully submitted that Your Honors were aware of my disbarment when you promulgated your Order dated the 27th day of February 2990, since your Order was based upon a Notice of Determination of Guilt which clearly set forth all of the facts of my case. Your Honors were also aware that Sickmen had to be automatically disbarred in New York upon his felony conviction.

It is submitted that Judge/Referee Bateman abandoned

his role as Referee and became a Judge. He used a portion of a concurring opinion by Judge Ehrlich to deny my petition for reinstatement. He exceeded his authority pursuant to Rule 3-7.9(g)(i) in that he resorted to conjecture as to what this Court might do or might not do under a given set of facts. He further ignored the fact that Judge Ehrlich did not dissent in the Sickmen opinion, but in fact concurred.

He exceeded his authority in that Rules 3-7.9(g)(i) only give him power to determine my fitness to practice law. In fact, he found that I was fit to practice law again. His authority is strictly limited to be a finder of the facts. Legal conclusions are the responsibility of this Honorable Court (In Re Inglis, 471 So.2d 38).

As in Sickmen, the Referee found that I have established my rehabilitation and that I have met the criteria set forth in past cases and I have demonstrated my fitness to resume the practice of law. I hope Your Honors will agree that the record supports the Referee's finding.

ISSUE IV

RESPONDENT SHOULD NOT BE REQUIRED TO RETAKE THE FLORIDA BAR EXAM RESPONDENT IS QUALIFIED TO PRACTICE LAW IN THE STATE OF FLORIDA

Your Honors, Judge/Referee Bateman stated on page 8 of his decision,

> I find that Petitioner has a reputation of good character and a good professional reputation. I believe he has rehabilitated himself and that he has shown a sincere intent to avoid wrongdoing.

Your Honors, it is correct that I have not practiced law for ten years. It is respectfully submitted that this does not in and of itself mean that I am not qualified to practice law now. Your Honors, there is a huge difference between having knowledge and using that knowledge. I state humbly to this Court that I have the knowledge to practice law in the State of Florida.

Would Your Honors consider a nonpracticing law professor as unqualified because he does not practice law? Would Your Honors consider a judge unqualified because he does not actively practice law?

Your Honors, I am a highly experienced title closer and do over five closings per day. In fact, on one given day I did eleven closings. I am called upon by major title companies to handle their most difficult closings. I respectfully urge you to refer to the letters of major title companies and from lawyers attesting to my legal competence and further to Judge/Referee Bateman's finding that I am legally competent. I am totally familiar with trusts,

estates, real estate, bankruptcy, matrimonial and litigation in general.

I have taken thirty hours of continuing legal education. I read the New York Law Journal and the Florida Bar Journal on a regular basis.

Judge/Referee Bateman recommended that I retake the Florida Bar exam <u>solely</u> upon the fact that I have not been an attorney for ten years.

Your Honors, Florida is unique in that it has two classes of attorneys -- active and inactive.

The active lawyer pays $140 per year dues and takes thirty hours of continuing legal education every three years. The inactive lawyer is not permitted to practice in Florida. He need not take the thirty hours of continuing legal education and pays only $120 per year in dues.

Let us examine the following hypothetical, but possible, set of facts.

John Doe is a carpet salesman who passed the Florida Bar in 1977. (The year in which I passed the Bar.) He has <u>never</u> practiced law in any form, shape or manner in any jurisdiction. He now decides, in 1990, to begin the practice of law. He pays an additional $20 and listens to thirty hours of tapes. He is now worthy and well qualified under Florida law to be a full-time active lawyer. Your Honors, is he?

Your Honors, I was primarily a litigator and negotiator for eighteen years. I was counsel to the New York State Teachers Association, New York State Society of Orthopedic Surgeons, and the Nassau Suffolk Physicians Guild. As such, I negotiated well over one thousand hours of labor negotiations and never had a strike. Your Honors, I could and can still prepare Temporary Restraining Notices by the hour.

Your Honors, no lawyer or judge knows all of the law all of the time (except for one hour after taking the Bar exam).

Your Honors, I know the questions are difficult and the answers are easy. I know how to think and I know how and where to find the law. Your Honors, I submit that a negotiator and trial lawyer is a talent unto itself. Your Honors, I have that talent. If I am given the privilege of being readmitted to the Florida Bar, I assure you that I will only practice that which I know.

Your Honors, please take note that at my Hearing James Watson, Esq. specifically stated that the Florida Bar did not require that I retake the Bar exam. They only required me to attend a three-day course for new lawyers. See TR June 26, 1990, page 8, line 5,

> MR. WATSON: He doesn't have to wait. There were no other conditions like I referred to. Usually the conditions that we're looking for to be met in the orders are like where the

> respondent is required to pass the ethics portion of the Bar exam, complete so many hours of CLE, restitution and whatever. There were no additional conditions placed on his suspension by the Court -- (Emphasis supplied.)

See TR, page 64, line 10,

> MR. WATSON: Before I do that, Your Honor, one other option which is available, which we have begun recommending on reinstatement petitions, is that the Bar has an intensive course for new attorneys which --

Your Honors, I was suspended on February 27th, 1990 Nunc Pro Tunc to May 5, 1980. I hereby ask that the beginning of my suspension be deemed February 27, 1990. Your Honors' attention is respectfully directed to Section 3-7.9(k).

Your Honors, this section states in part that a reinstatement may be conditioned upon certification by the Florida Board of Bar Examiners.

Your Honors, it is submitted that the word may is discretionary and not mandatory. If the statute was intended to be mandatory, the word "must" would have been substituted instead of the word "may".

This section also refers to post-hearing procedures. The second is entitled "Judgment". It is solely in this Court's discretion, and I humbly ask that you use that discretion and allow my readmission without retaking the Florida Bar exam.

Your Honors, I submit that the sole question before you is, "Is Sheldon J. Sanders qualified to be a lawyer, and if so, what kind of lawyer would he be if he were readmitted to practice in the State of Florida?"

Your Honors, I refer you to the age old Indian expression, "Walk a mile in my moccasins." Your Honors, I have been submitted to the depth of degradation and survived. I had my head shaved bald and was placed in a maximum security jail.

Your Honors, I can truly understand a client's problems and concerns, just as an orthopedist who has had a bad back knows the meaning of pain. I know what it's like to be a client. Your Honors, I assure you that I will be an understanding, as well as a competent, lawyer.

Your Honors, reversal of a Referee's decision is not new, unique or novel to this Court. This Court overruled the Florida Bar in In Re Sickmen and overruled the Referee in In Re Inglis.

I'm sure that Your Honors are questioning why I have not been readmitted in New York. Judge/Referee Bateman asked me the same question. In the absence of an opinion by the Appellate Division of the State of New York, it is a question that cannot be answered. I also cannot answer why the New York State Grievance Committee will not answer

my questions as to whether or not their counsel acted with their knowledge and consent. There is a lot I cannot answer. I can, however, assure you that I will be a very good, understanding, knowledgeable lawyer.

Your Honors, I repeat, Judge/Referee Bateman found me to be of good moral character, professional integrity and general fitness for a position of trust and confidence, and that I have professional competence and ability.

Your Honors, I ask you to grant my petition for readmission because I earned it -- the hard way. I beg to have my dignity restored after thirteen long years of a living hell.

CONCLUSION

The decision of Judge/Referee Bateman dated October 12, 1990 should be reversed, and that the Respondent, Sheldon J. Sanders, be permitted to resume the practice of law in the State of Florida without retaking the Florida Bar exam.

Respectfully submitted,

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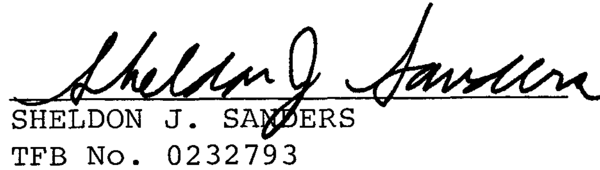
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief regarding TFB File No. 9000932-02 has been forwarded by Federal Express air bill # 9870367581 to JAMES N. WATSON, ESQ., Bar Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399, on this 9th day of January 1991.



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