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IN THE SUPREME COURT OF FLORIDA

DAVID BALDWIN WEBSTER,

Petitioner,

v.

THE FLORIDA BAR,

Respondent.

_____/

CASE NO. 79,979
TFB NO. 92-11,771(HRE)(13E)

ANSWER BRIEF

OF

THE FLORIDA BAR

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SYMBOLS AND REFERENCES

The following symbols and references are used in this brief:

TR. - Transcript of the final hearing held on April 29 and 30, 1993.

R.R. - Report of Referee issued in this matter.

TFB Ex. - Exhibits of The Florida Bar submitted into evidence at the final hearing.

Pet. Ex. - Exhibits of Petitioner submitted into evidence at the final hearing.

IB - Petitioner's Amended Initial Brief.

Appdx. - Appendix to the Answer Brief of The Florida Bar.

STATEMENT OF THE FACTS AND CASE

The Florida Bar makes the following additions and corrections to the statement of the facts and case in Petitioner's Initial Brief:

Although the Supreme Court Order in Case No. 73,302 temporarily suspending Petitioner from the practice of law was dated November 18, 1988, the Order stated that Petitioner was to accept no new clients from that date and to "cease representing clients thirty (30) days after issuance of said Order pursuant to Rule 3-5.1(g) of the Rules Regulating The Florida Bar." Therefore, the suspension was effective thirty (30) days from November 18, 1988. Further, the eighteen (18) month suspension term in the subsequent Consent Judgment in Case No. 74,503 was to run concurrent with the temporary suspension term and the Report of Referee so states that, "Respondent shall be disciplined by an eighteen (18) month suspension to run concurrent with the temporary suspension ordered in Case No. 73,302 (effective date December 18, 1988)." (Pet. Ex. 8).

Petitioner asserts, in his Statement of the Case and Facts, that "Petitioner's suspension expired on June 17, 1990." This is not a correct statement under the Rules Regulating The Florida Bar. Petitioner's suspension and this Court's Order of suspension never "expired." If this were true, Petitioner would presumably have been automatically authorized to practice in the State of Florida after June 17, 1990. This was, and is, certainly not true. According to Rule 3-5.1(e) of the Rules Regulating The Florida Bar, "upon expiration of the suspension period and the satisfaction of

all conditions accompanying the suspension, the respondent shall become eligible to all of the privileges of members in The Florida Bar." (emphasis added). The expiration of the suspension period is not the equivalent of the expiration of the suspension. Since Petitioner's suspension never expired, his execution of the Motion for Admission to Micronesia was not executed four days after the expiration of the suspension, as asserted on page 3 of Petitioner's Initial Brief.

Petitioner asserts that he "had not received notice from the District of Columbia Bar that he, in fact, was not in good standing." The burden was on Petitioner, pursuant to The Rules Regulating The District of Columbia Bar, to promptly inform the Washington, D.C. Bar of both the temporary suspension in 1988 and the subsequent eighteen (18) month suspension in 1990. (TFB Ex. #20, p. 2). Petitioner's failure to notify the District of Columbia Bar of his 1988 and 1990 suspensions enabled him to remain in good standing with the District of Columbia, even though he admittedly had not practiced there since approximately 1969. The District of Columbia Bar was not notified of Petitioner's Florida suspension until September of 1992 when The Florida Bar contacted the Washington, D.C. Bar in connection with the Bar's reinstatement investigation. (TFB Ex. #20, p. 2). Additionally, although Petitioner did inform William Stinnett, the United States Department of the Interior law enforcement coordinator in Palau, of his "earlier drug problem", he did not inform Mr. Stinnett, or anyone else with the Department of the Interior, of his suspensions

in Florida. (Pet. Ex. #11). Petitioner also did not inform the Supreme Court of Palau of his suspensions in Florida. (Pet. Ex. #14).

Petitioner claims, in the Initial Brief, that he "believed that the probationary period would begin when he returned to the practice of law in Florida". In the Recommendation section of the Report of Referee in this reinstatement matter, the Referee found as follows:

> "Petitioner chose not to abide by the conditions of probation. He failed to follow the recommendations of the F.L.A. as he agreed he would. Though Petitioner disclosed his cocaine problem and voluntarily sought treatment, he made the determination that the recommendations of F.L.A. were unreasonable and not to be adhered to. Though Petitioner may no longer have a substance abuse problem, he was the person on probation and should not have made the decision to ignore the conditions of probation approved by the Florida Supreme Court. Petitioner left the United States and did not again attempt to comply with the recommendations of F.L.A. until he returned to the United States in the Fall of 1992 and filed his Petition for Reinstatement. Petitioner did not attempt to meet the requirements of six (6) hours of C.L.E. credit in estate and trust accounting during the probationary period as required, but waited until after his application for reinstatement was filed. Petitioner did not pay costs of the disciplinary proceedings until the eve of the evidentiary hearing and after unsuccessfully attempting to have those costs discharged in bankruptcy.
>
> It is clear that Petitioner did not abide by the conditions of his probation in a manner consistent with a person who is attempting to gain reinstatement to the Bar." (R.R., Section III. Appdx. #1).

The Referee was in a position to judge the credibility of Petitioner's testimony on this issue and found that Petitioner "chose not to abide by the conditions of probation." The Referee also found the following in Section III regarding Petitioner's

actions in Micronesia and Palau:

> "Also troubling is Petitioner's conduct regarding his application for admission to practice before the courts of Micronesia and Palau and his failure to notify the Washington, D.C. Bar of his Florida disciplinary proceeding. Though Petitioner may not have made an actual misrepresentation on those applications, it is clear he played fast and loose with the facts by failing to disclose The Florida Bar disciplinary proceedings and subsequent suspension. Failing to notify the Washington, D.C. Bar of the Florida suspension helped facilitate the good standing certificate received by Petitioner in 1990 and used to assist his admission to the courts of Micronesia and Palau.
>
> Petitioner's failure to disclose these things, along with his failure to abide by the Consent Judgment, cast doubts on his claim of rehabilitation." (R.R. Section III. Appdx #1.)

SUMMARY OF ARGUMENT

The evidence presented during the reinstatement proceeding showed, and the Referee properly found, that Petitioner intentionally failed to fulfill any of the terms of the two (2) year probation imposed by this Court's disciplinary order. The Referee considered Petitioner's testimony that he unintentionally violated the probation terms in the suspension order and/or that the violations were de minimis. The Referee rejected Petitioner's position in the Report of Referee.

The evidence further showed, and the Referee properly found, that Petitioner executed and filed a Motion for Admission in Micronesia and a sworn affidavit in support of his admission to Palau and failed to disclose his Florida suspension in either document or in any other manner. Petitioner also did not disclose his Florida suspensions to the Department of the Interior, his employer in Palau. Petitioner further failed to notify the Washington, D.C. Bar of his 1988 and 1990 Florida suspensions and attached a certificate of good standing from Washington, D.C. in support of his admission to both Micronesia and Palau.

According to the precedent established by this Court, the Referee's recommendation that the Petition for Reinstatement be denied must be upheld. Petitioner's failure to comply with the requirements of this Court's suspension Order by ignoring or choosing not to fulfill the conditions of probation during the term of probation, shows that he failed to strictly comply with this Court's disciplinary order. Petitioner's misleading, deceitful,

and improper conduct relative to his Motion for Admission to practice in Micronesia and affidavit in support of his application to practice in Palau, his failure or refusal to inform the Micronesian Attorney General and officials of the United States Department of the Interior of his Florida suspension, and his failure or refusal to notify the Washington, D.C. Bar of the Florida suspensions show his lack of unimpeachable character. The evidence presented by Petitioner was not sufficient to overcome the evidence of a lack of fitness and rehabilitation presented by The Florida Bar.

ARGUMENT

I. PETITIONER FAILED TO MEET HIS BURDEN TO ESTABLISH BY CLEAR EVIDENCE THAT HE IS FIT TO PRACTICE LAW IN THE STATE OF FLORIDA.

Pursuant to the precedent established by this Court, the Referee's findings of fact are presumed correct and will be upheld unless they are clearly erroneous and without support in the record. The Florida Bar v. Della Donna, 583 So.2d 307 (Fla. 1989). Rule 3-7.10(g), Rules Regulating The Florida Bar states that the matter to be decided in a reinstatement proceeding is the "fitness of the petitioner to resume the practice of law."

According to this Court's opinion in In re Timson, 301 So.2d 448 (Fla. 1974), the criteria to guide the Referee in determining fitness include the following: 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.

This Court has provided further guidance in determining whether a Petitioner has met the heavy burden of showing fitness to resume the practice of law. In In re: Jahn, 559 So.2d 1089, (Fla. 1990), Jahn failed to disclose his felony convictions, his imprisonment and his suspension from The Florida Bar when he applied for a position as a trust officer for NCNB and further intentionally failed to disclose his past history in numerous interviews with NCNB personnel. NCNB hired Jahn but, after

receiving an anonymous tip about his background, fired him immediately. There was no finding in Jahn that the attorney failed to strictly comply with the terms of the suspension order, and the Referee found that Jahn had his drug addiction under control. The Referee recommended that Jahn be reinstated to the practice of law. This Court denied the petition for reinstatement and stated as follows:

> Jahn's lying, primarily for personal pecuniary gain, casts so much doubt on his character and his fitness to practice law that we must agree with the bar that the referee erred in recommending reinstatement at this time. Therefore, we deny the petition. Jahn @ 1090.

In denying the reinstatement in Jahn, this Court provided additional guidance in determining whether a reinstatement petition should be granted:

> "Reinstatement is more a matter of grace than of right and is dependent upon rehabilitation." In re Stoller, 160 Fla. 769, 770, 36 So.2d 443, 444 (1948). 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. In re Timson, 301 So.2d 448 (Fla. 1974); In re Dawson, 131 So.2d 472 (Fla. 1961). In this respect reinstatement is analogous to initial admission to the bar where we have held that an applicant's demonstration of good moral character is necessary to protect the public. Florida Board of Bar Examiners re G.W.L., 364 So.2d 454 (Fla. 1978). Finding a lack of good moral character is not restricted to acts reflecting moral turpitude, but, rather, 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." Id. at 458. Anything less would not protect the public interest sufficiently. Jahn @ 1090.

As this Court stated in Jahn, Petitioner has the heavy burden of establishing rehabilitation and particularly in establishing unimpeachable character. Petitioner's misconduct related to his

filing of a deceitful and misleading motion for admission to practice in Micronesia and a deceitful, misleading and improper affidavit in support of his admission to practice in Palau, his failure to inform the courts and authorities in both Micronesia and Palau of his Florida suspension, and his failure to notify the Washington, D.C. Bar of his Florida suspension are "acts and conduct which would cause a reasonable man to have substantial doubts about (Petitioner's) honesty, fairness and respect for the rights of others and for the laws of the state and the nation." (Id. @ 1090).

Petitioner's misconduct in Micronesia and Palau alone is sufficient to require that this Court uphold the Referee's denial of the petition. Petitioner's failure to disclose his Florida suspension to Washington, D.C., wherein prompt disclosure would have resulted in his suspension in that jurisdiction, facilitated his employment as a prosecuting attorney in both Micronesia and Palau. The fact that Petitioner intentionally failed and refused to disclose his suspension in Florida to facilitate his employment as a prosecutor is even more egregious. A prosecutor holds a position of trust and honor in the community in which he or she serves and, by obtaining employment under these circumstances, Petitioner violated that trust and honor.

Petitioner claims, in his Initial Brief, that he advised the Washington, D.C. Bar of his Florida suspension in October or November 1992, and that there was no testimony that his failure to notify the D.C. Bar of the suspension was ill-motivated or

intentional. However, the circumstances surrounding Petitioner's failure to comply with the Washington, D.C. Bar rules by failing to promptly notify that jurisdiction of his Florida suspension show that Petitioner had a motive to intentionally fail to notify the Washington, D.C. Bar of his Florida suspension. Both Palau and Micronesia required a certificate of good standing from another jurisdiction in order for an applicant to be admitted to practice. Palau, in fact, required a certificate of good standing from each jurisdiction in which Petitioner practiced. (Pet. Ex. #17, Rule 2(a)). Pursuant to the rules regulating the District of Columbia Bar, timely notification by Petitioner of his suspensions in Florida in 1988 and 1990 would have resulted in Petitioner's reciprocal suspension in Washington, D.C. (TFB Ex. #20). Therefore, Petitioner's timely reporting of his Florida suspension to D.C. would have prevented him from using the certificate of good standing in Washington, D.C. to support his admission in Micronesia and Palau.

Based on the circumstances described above, Petitioner had a motive to intentionally fail or refuse to promptly notify the Washington, D.C. Bar of his Florida suspension and to draft his Motion for Admission in Micronesia and affidavit in support of his admission to Palau in a misleading and deceitful way to make it appear that he had not been subject to discipline in any jurisdiction. Petitioner's assertion that he was a member in good standing in Washington, D.C. was based upon his failure or refusal to disclose his Florida suspension to the Washington, D.C. Bar.

Petitioner argues that he has now paid the disciplinary costs and completed the CLER hours mandated by this Court's Order of Suspension.

The evidence shows that Petitioner attempted to discharge the disciplinary costs in bankruptcy and did not pay the outstanding disciplinary costs until the first day of the final hearing on the reinstatement matter. The Referee found, in his report, that "Petitioner did not pay costs of the disciplinary proceedings until the eve of the evidentiary hearing and after unsuccessfully attempting to have those costs discharged in bankruptcy." (R.R., Section III. Appdx. #1). Therefore, although the costs were due as of the date of the order and judgment in this case on May 24, 1990, the costs were not actually paid until the eve of the final hearing on April 29, 1993. (TR. p. 4 - 6). By now claiming that the costs have been paid, Petitioner is apparently receding from his previous position that the costs were discharged in bankruptcy and not owed to The Florida Bar. Moreover, Petitioner agreed, in the Consent Judgment, to pay the reasonable costs of The Florida Bar and did not challenge the cost statements submitted by the Bar to the Referee and this Court. Further, Petitioner testified at the reinstatement hearing that he had savings in the amount of $10,000.00 - $12,000.00 when he returned to the United States in September 1992. (TR. p. 463.)

Petitioner failed or refused to complete the Continuing Legal Education (CLER) hours required by the conditions of probation adopted in this Court's Order of Suspension until after he returned

to the United States in late 1992, although the suspension Order required completion of said CLER hours during the two (2) year term of the probation, commencing on February 21, 1990. (TFB Ex. #11. TR. p. 435). Petitioner acknowledged, in his testimony at the reinstatement final hearing, that he had the means and ability to complete the trust and ethics CLER during the term of the probation, but chose not to do so, even though he knew he could have written and obtained the tapes. (TR. pp. 435 - 436). Petitioner testified at the final hearing that he returned to the United States on various occasions after February 21, 1990. (TR. pp. 370 - 371, 395 - 396). Petitioner could have obtained the required CLER tapes on those occasions as well. The Referee found, in his report, that, "Petitioner did not attempt to meet the requirements of six (6) hours of C.L.E. credit in estate and trust accounting during the probationary period as required, but waited until after his application for reinstatement was filed." (R.R. Section III, Appdx. #1.)

Petitioner failed or refused to comply with the terms of the suspension order which required, during the probation period, "an evaluation by Florida Lawyer's Assistance, Inc., (F.L.A., Inc.) and any treatment or after care recommended by F.L.A." (TFB Ex. #11). Petitioner admits that he failed to comply with this requirement. (TR. p. 443). The record shows that Petitioner met with a representative of F.L.A., Inc. in February 1990, but failed to sign a contract with, or follow the recommendations of, F.L.A., Inc. at <u>any</u> time. Petitioner contends that he only agreed to follow

"reasonable" recommendations by F.L.A., Inc., and he chose not to further communicate with F.L.A., Inc. (TR. p. 443). The issue in determining Petitioner's fitness to practice and rehabilitation for reinstatement purposes in the instant case is not only whether Petitioner has overcome his addiction to cocaine, but whether Petitioner failed or refused to comply with the terms of this Court's Order which adopted the Report of Referee and Consent Judgment and required Petitioner to submit to an "evaluation by Florida Lawyer's Assistance, Inc. (F.L.A., Inc.,) and any treatment or after care recommended by F.L.A., Inc." during the two (2) year term of probation which commenced on February 21, 1990. Petitioner's failure or refusal to comply with this requirement reflects adversely on his rehabilitation and fitness to practice.

The Referee found that Petitioner was not entitled to make his own determination of the reasonableness of the F.L.A., Inc. recommendations and that the suspension Order required him to obtain an evaluation and follow "any treatment or after care recommended." (R.R. Section II). The Referee further found, in his report, that Petitioner, "for all practical purposes, refused to follow the recommendation of F.L.A." and, "(a)s of the date of the evidentiary hearing, Petitioner has not complied with the recommendations of F.L.A." (RR., Section III. Appdx. #1).

Petitioner's failure or refusal to comply with the probation terms required under this Court's Order of Suspension, his improper conduct in Palau and Micronesia, and his failure to notify the Washington, D.C. Bar of his Florida suspension show that he is

unfit to practice law in the State of Florida. As this Court has stated, "(r)einstatement is more a matter of grace than of right and is dependent on rehabilitation." (In re: Jahn, 559 So.2d 1089, 1090 (Fla. 1990). The Referee correctly found that Petitioner has not been rehabilitated, is not fit to practice, and should be denied reinstatement to the practice of law in the State of Florida.

II. THE REFEREE'S RECOMMENDATION THAT THE PETITION FOR REINSTATEMENT BE DENIED IS FULLY SUPPORTED BY THE RECORD WHICH IS CLEARLY SUFFICIENT TO SUPPORT A DENIAL OF THE REINSTATEMENT.

In his Initial Brief, Petitioner argues, for the first time, that the probation was contrary to The Rules Regulating The Florida Bar because it required the probation term to be "for a period of two years from the date of the Report of Referee." (TFB Ex. #11). Petitioner claims that the Referee can make only recommendations as to disciplinary measures to be applied and cannot impose discipline, therefore, the probation term cannot commence as of the date of the Report of Referee. This argument, at most, would cause the two (2) year period of probation to begin on the date of this Court's Order of suspension. However, there is nothing in The Rules Regulating The Florida Bar which would prohibit the period of probation imposed by the Referee. Additionally, Petitioner participated in the negotiations which led to the Consent Judgment and executed the document freely and voluntarily. For Petitioner to now claim that the Consent Judgment approved and signed by him is contrary to The Rules Regulating The Florida Bar is disingenuous at best.

Petitioner further claims that the inclusion of semi-annual audits in the terms of probation show that the probation could not logically begin until Petitioner was reinstated. Petitioner also claims that the Consent Judgment was a poorly drafted, ambiguous, confusing and contradictory document and that Petitioner believed that his probation would not begin until he was reinstated. (IB p. 13).

As stated previously, the Consent Judgment and Referee's Report were negotiated, and the Consent Judgment was freely and voluntarily approved and executed by Petitioner. Petitioner was admitted to The Florida Bar on November 10, 1969, and was fully capable of understanding the documents. Petitioner admitted at the final hearing that he did not complete the terms of probation relative to CLER within two (2) years of the Referee's Report and that, "I was in technical violation of that Order, and it read -- it clearly says two years from the date of the report of referee, and the order clearly says two years from the date of this order and I did not do that, and it was not intentional." (emphasis added) (TR. p. 435). Petitioner admitted at the final hearing that the language was clear on its face but claimed that he intended to comply with the Order when he returned to practice. (TR. p. 441 - 442). At no time during the final hearing did Petitioner claim that he failed or refused to complete the conditions of probation because the terms were "confusing", "ambiguous", or "contradictory".

Petitioner further testified at the final hearing that it was his intention to immediately petition for reinstatement. (TR. p. 441 - 443). However, Petitioner later accepted employment in Micronesia, voluntarily left the State of Florida, and did not apply for reinstatement until June 1992. The terms of the Consent Judgment, Referee's Report, and this Court's Order unambiguously required the completion of the required conditions of probation during the two (2) year period of probation beginning on February

21, 1990. It is apparent that since no trust account audits could be conducted in the absence of a trust account, that condition of probation would be rendered moot unless and until Petitioner was reinstated to the practice of law in the State of Florida.

The Referee rejected Petitioner's argument at the final hearing that the failure to complete the conditions of probation were unintentional and/or de minimis violations of the Suspension Order. The Referee found, in his Recommendation, Section III, that:

> "Petitioner, as part of his Consent Judgement, was placed on probation and agreed to follow conditions of probation. Unfortunately, Petitioner chose not to abide by the conditions of probation. He failed to follow the recommendations of the F.L.A. as he agreed he would. Though Petitioner disclosed his cocaine problem and voluntarily sought treatment, he made the determination that the recommendations of F.L.A. were unreasonable and not to be adhered to. Though Petitioner may no longer have a substance abuse problem, he was the person on probation and should not have made the decision to ignore the conditions of probation approved by the Florida Supreme Court. Petitioner left the United States and did not again attempt to comply with the recommendations of F.L.A. until he returned to the United States in the Fall of 1992 and filed his Petition for Reinstatement. Petitioner did not attempt to meet the requirements of six (6) hours of C.L.E. credit in estate and trust accounting during the probationary period as required, but waited until after his application for reinstatement was filed. Petitioner did not pay costs of the disciplinary proceedings until the eve of the evidentiary hearing and after unsuccessfully attempting to have those costs discharged in bankruptcy.
>
> It is clear that Petitioner did not abide by the conditions of his probation in a manner consistent with a person who is attempting to gain reinstatement to the Bar." (emphasis added) (R.R., Section III. Appdx. #1).

Petitioner also claims, in his Initial Brief, that his actions in Micronesia and Palau, and his failure to notify the Washington,

D.C. Bar of his Florida suspension were "harmless". (IB p. 15).

On or about June 21, 1990, Petitioner prepared, executed, and filed with the Supreme Court of Micronesia, a Motion for Admission in support of his application for temporary admission to the Federated States of Micronesia Bar. (TFB Ex. #1, Appdx. Ex. #2). In paragraph 3 of the Motion, Petitioner asserts, "The undersigned is a member of The Washington, D.C. Bar, The Florida Bar, The District of Columbia Court of Appeals, The Fifth Circuit Court of Appeals, The Eleventh Circuit Court of Appeals and The Court of Custom and Patent Appeals." Petitioner failed to reveal that he was suspended in the State of Florida. Petitioner attached a certificate of good standing in Washington, D.C. to the motion. Petitioner failed to promptly inform the Washington, D.C. Bar of his Florida suspension, therefore, he remained in good standing until the Washington, D.C. Bar learned of Petitioner's continuing Florida suspension in late September 1992. After the Washington, D.C. Bar advised the District of Columbia Court of Appeals of Petitioner's ongoing Florida suspension, an Order suspending Petitioner in the District of Columbia was promptly issued on November 16, 1992. (TFB Ex. #14).

In paragraph 6 of the Motion for Admission to Micronesia, Petitioner asserts: "(t)he undersigned is not under an order of suspension or disbarment from any authority." As was previously noted, Petitioner was suspended in Florida beginning in December 1988 and remains suspended as of the date of this brief. Additionally, as was previously discussed, Petitioner would have

been promptly suspended in Washington, D.C. had he timely notified that jurisdiction of this Court's suspension orders dated November 18, 1988, and May 24, 1990. Petitioner's failure to notify the Washington, D.C. Bar of his suspension allowed him to claim to be a member in good standing in Washington, D.C. and to attach a certificate of good standing.

Petitioner testified at the reinstatement final hearing that he failed to advise the Attorney General for Micronesia, William Mann, of his Florida suspension during his interview for the position of Assistant Attorney General for Micronesia. Petitioner testified that, "I didn't tell the Attorney General. He didn't ask, and I did not tell him that I was under suspension here, which I was at that time." (TR. p. 336). This conduct was deceitful and misled the Micronesian authorities and the Supreme Court of Micronesia.

Regarding the Motion for Admission in Micronesia, Petitioner claims that, "it is clear that Petitioner truthfully indicated on his Micronesia application that he was not under a suspension order from any authority." (IB p. 15). In making this assertion, Petitioner erroneously relies on Rule 3-5.1(e), Rules Regulating The Florida Bar to support his position. Rule 3-5.1(e) in its entirety is as follows:

> (e) **Suspension.** The respondent may be suspended from the practice of law for a definite period of time or an indefinite period thereafter to be determined by the conditions imposed by the judgment. During such suspension, the respondent shall continue to be a member of The Florida Bar but without the privilege of practicing, and, upon the expiration of the suspension period and the satisfaction of all conditions

> accompanying the suspension, the respondent shall become eligible to all of the privileges of member of The Florida Bar. A suspension of 90 days or less shall not require proof of rehabilitation or passage of the Florida bar examination. A suspension of more than 90 days shall require proof of rehabilitation and may require passage of all or part of the Florida bar examination. No suspension shall be ordered for a specific period of time in excess of 3 years.

As can be clearly seen by the plain wording of the rule, a suspended attorney continues to be a member of The Florida Bar, "but without the privilege of practicing and, upon the expiration of the suspension period and the satisfaction of all conditions accompanying the suspension, the respondent shall become eligible to all of the privileges of members in The Florida Bar." (emphasis added). The rule does not state that the suspension Order expires, only the suspension period. In a case such as this wherein the suspension is 91 days or over, the suspension remains in effect, unless and until the suspended attorney files a Petition for Reinstatement, shows rehabilitation and fitness to practice, and is reinstated by Order of this Court. During the entire period from December 1988 until the present, Petitioner has remained continuously suspended and remains ineligible to practice law in the State of Florida. Petitioner acknowledged his awareness of this fact in his testimony before the Referee in the reinstatement final hearing. (TR. p. 450 - 454).

Petitioner's sworn affidavit to the Supreme Court of Palau in support of his admission in 1991 was likewise misleading, deceptive and improper. (Pet. Ex. #13 and 14. Appdx. #3). Petitioner was admitted in Palau under Rule 3 of the Palau Rules of Admission.

The rule provides, in pertinent part that, "(a)ny attorney who is a salaried employee of . . . the Trust Territory Government may practice law in Palau without complying with Rule 2(d) of these rules for a period of four (4) years, so long as the attorney is acting within the scope of his or her employment and maintains membership in good standing in the bar of any state, territory, or possession of the United States." (emphasis added) (Pet. Ex. #17).

Petitioner was exempted only from complying with Rule 2(d), which requires the taking and passing of the Palau Bar exam. Petitioner was not exempted from complying with Rules 2(a), (b), (c) of the Rules of Admission.

Petitioner failed to comply with the requirement of Rule 2(a) of the Palau Rules of Admission which states:

> "Rule 2. Any person who is not admitted to practice law pursuant to Rule 1, shall be certified for admission to practice before the courts of the Republic of Palau if he or she satisfies the following requirements:
>
> (a) Must be able to demonstrate proof of good moral character in the form of certificate of good standing, issued within 30 days of the application for admission, from the bar of the jurisdiction(s) in which he or she practiced law prior to coming to Palau, said certificate to contain a statement that the applicant has not been the subject of original or reciprocal disciplinary proceedings in that jurisdiction, nor is the applicant currently under investigation in that jurisdiction for alleged violations of the canons of ethics of rules of admission. (Pet. Ex. #17).

The Palau rule clearly required Petitioner to provide certificates of good standing, within thirty (30) days of the application for admission, from the bar of the jurisdiction(s) in which he practiced prior to coming to Palau and a statement that Petitioner had not been the subject of original or reciprocal

disciplinary proceedings in that jurisdiction. Petitioner attached a certificate of good standing from Washington, D.C. only, even though he had continuously practiced in Florida from 1969 to 1988 (TR. p. 296). Petitioner's failure and refusal to inform the Palau Supreme Court that he was suspended in the jurisdiction in which he had practiced continuously for nearly twenty (20) years was a violation of the Palau Rules of Admission.

After learning of Petitioner's suspension in Florida and his violation of the Palau Rules of Admission, the Palau Supreme Court issued an Order disbarring Petitioner from practice in Palau on November 13, 1992. The Palau Supreme Court found that, "(b)y failing to divulge to the Supreme Court of Palau The Florida Bar suspension, Respondent misrepresented and concealed a material fact in his application for admission to practice law in this jurisdiction." (Pet. Ex. #14. Appdx. #4.) Additionally, by failing or refusing to inform the Washington, D.C. Bar of his suspension in Florida in violation of the Washington, D.C. rules, Petitioner was able to attach the certificate of good standing from Washington, D.C. to his sworn affidavit even though he had been suspended in Florida since 1988 and had not practiced in Washington, D.C. since 1969. (TR. p. 296).

Petitioner was employed in Palau under contract with the United States Department of the Interior. The evidence showed that Petitioner failed or refused to reveal his Florida suspension to anyone in the United States Department of the Interior either during the period in which he was interviewed for employment or

after he was employed.

The Assistant Secretary for Territorial and International Affairs, United States Department of the Interior during the relevant time periods was Stella Guerra. Ms. Guerra personally interviewed Petitioner and authorized his employment. Petitioner did not inform Ms. Guerra of his Florida suspension during the personal interview or at any other time, and she would not have authorized the employment of Petitioner as Interim Special Prosecutor in Palau if she had known of Petitioner's suspension from The Florida Bar. (Pet. Ex. #11. Affidavit of Stella Guerra, Appdx. #5.)

William Stinnett, Law Enforcement Coordinator for the Office of Territorial and International Affairs for the United States Department of the Interior, interviewed Petitioner and recommended him for the position of Interim Special Prosecutor in Palau. Petitioner failed or refused to inform Mr. Stinnett of his suspension from The Florida Bar. Mr. Stinnett would not have recommended Petitioner for employment had he known of Petitioner's suspension from The Florida Bar. (Pet. Ex. #11. Affidavit of William Stinnett, Appdx. #5).

Victor Hobson, Director of the Trust Territory of the Pacific Islands, Palau Office, administered by the United States Department of the Interior, was Petitioner's immediate supervisor. Petitioner failed or refused to advise Mr. Hobson or any official of the Trust Territory of the Pacific Islands, Palau Office, of his suspension in Florida. Mr. Hobson terminated Petitioner's contract as

Interim Special Prosecutor in Palau on September 25, 1992. (Pet. Ex. #11. Affidavit of Victor Hobson, Appdx. #5.)

Petitioner's failure or refusal to inform any officials of the Department of the Interior, his employer in Palau, of his suspension from The Florida Bar shows his lack of unimpeachable character.

Petitioner claims that his failure to notify the Washington, D.C. Bar of his Florida suspension was unintentional and was not ill motivated. The Referee found as follows on this issue:

> "Failing to notify the Washington, D.C. Bar of the Florida suspension helped facilitate the good standing certificate received by Petitioner in 1990 and used to assist his admission to the courts of Micronesia and Palau." (R.R., Section III. Appdx. #1.)

The Referee found that Petitioner used his good standing in Washington, D.C. to assist his admission in the courts of Micronesia and Palau, and his claim that he did not know that the Washington, D.C. Bar rules required his prompt notification to Washington, D.C. of his Florida suspension is an insufficient justification for his conduct.

In the Conclusion of his Initial Brief, Petitioner states that he has been suspended for nearly five and one-half years for trust account violations. Petitioner voluntarily left the country for two years and did not apply for reinstatement until June 1992, over three and one-half (3 1/2) years after his initial temporary suspension in December 1988. Additionally, the Referee, in his report, states that:

> ". . . due to Petitioner's own actions since his suspension, he has not established his rehabilitation by

clear and convincing evidence." (R.R., Section III. Appdx. #1.)

In the case of In re: Jahn, 559 So.2d 1089 (Fla. 1990), this Court stated as follows:

> "Jahn points out that he has been suspended for more than four years. Practicing law, however, is a privilege, not a right. Petition of Wold, 257 So.2d 547 (Fla. 1972). The mere passage of time is not evidence of rehabilitation." (Jahn @ 1090).

The mere passage of five and one-half years since Petitioner's initial temporary suspension is completely irrelevant to the Court's consideration of this matter. Petitioner's actions in failing to comply with the conditions of probation in the suspension Order, his misconduct regarding both his Motion for Admission to Micronesia and his sworn affidavit in support of his admission to Palau, his failure or refusal to inform the Micronesian Attorney General and officials of the United States Department of the Interior of his Florida suspension, and his failure to promptly notify the Washington, D.C. Bar of his Florida suspension in order to facilitate his admission to Micronesia and Palau clearly mandates that this Court uphold the Referee's denial of reinstatement.

CONCLUSION

The Referee properly recommended a denial of the Petition for Reinstatement and should be upheld. The record fully supports the recommendation in that Petitioner failed to comply with this Court's disciplinary order requiring the fulfillment of conditions of probation. Further, Petitioner prepared and filed a Motion for Admission to practice in Micronesia which was misleading and deceptive, and failed to inform the Micronesian Attorney General of his Florida suspension. Additionally, Petitioner filed a misleading and deceptive affidavit in support of his admission to practice in Palau, and failed to comply with the Rules of Admission to Palau by failing to reveal his suspension in Florida which resulted in his disbarment from practicing in Palau. Petitioner also failed or refused to reveal his suspension from The Florida Bar to any officials within the United States Department of the Interior, his employer in Palau. Finally, Petitioner failed or refused to promptly notify the Washington, D.C. Bar of his suspension and used his certificate of good standing in Washington, D.C. to facilitate his admission to practice law in Micronesia and Palau.

Based on the foregoing and the record in this cause, this Court must uphold the Referee's recommendation that the Petition for Reinstatement be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief of The Florida Bar has been furnished to Scott K. Tozian, Counsel for Respondent, 109 N. Brush Street, Suite 150, Tampa, FL 33602 and to John T. Berry, Staff Counsel, The Florida Bar, 650 Apalachee Parkway, Tallahassee, Florida 32399-2300 by regular U.S. Mail this 8th day of June, 1994.

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APPENDIX

INDEX TO APPENDIX TO THE ANSWER BRIEF OF THE FLORIDA BAR